IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PAINEWEBBER R & D PARTNERS II, L.P.,

Plaintiff,

v.

CENTOCOR, INC. and CENTOCOR DEVELOPMENT CORPORATION III, INC.,

Defendants and Crossclaimants,

and

CENTOCOR PARTNERS III, L.P.,

Nominal and Crossclaim Defendant,

CENTOCOR, INC. and CENTOCOR DEVELOPMENT CORPORATION III,

Third-Party Plaintiffs,

v.

PAINEWEBBER GROUP, INC.
PAINEWEBBER INCORPORATED
PAINEWEBBER DEVELOPMENT CORPORATION,

Third-Party Defendants.

CA # 1405NC

Submitted: October 12, 1999
Decided: January 31, 2000

MEMORANDUM OPINION

Ann M. Caldwell of Caldwell & Associates LLC, Bala Cynwyd, Pennsylvania; Douglas R. MacGray of The Bear Law Firm, Bear, Delaware. Attorneys for Objector John E. Abdo.

Vernon R. Proctor, Kurt M. Heyman and John H. Newcomer, Jr. of The Bayard Firm, Wilmington, Delaware. Attorneys for Objector Pharmaceutical Partners II, L.P.

STEELE, V.C.

I. Issue Presented

After the parties reached settlement in this case, attorneys for objectors to the settlement filed a petition seeking attorney's fees. Two law firms jointly represent Objector John E. Abdo ("Abdo's Attorneys"); a third law firm represents Objector Pharmaceutical Partners II, L.P. ("PPII's Attorneys"). Abdo's Attorneys and PPII's Attorneys (collectively "the petitioners") jointly ask this court to award fees and expenses in the amount of $900,000 plus interest. Abdo's efforts resulted in no more than an arguable therapeutic benefit to the class, were unsuccessful on the merits, caused extra expense to the parties and delayed receipt of a real monetary benefit to the class. While PPII's efforts directly resulted in a real monetary benefit to the class, PPII's attorneys did not take this case on a contingency basis. Based upon the multifactor analysis customarily used to determine fees on a quantum *meruit* basis, I award fees totaling $650,000. Since the petitioners did not supply the Court initially with information sufficient to allow a meaningful determination of how the joint fees should be fairly divided, the total can be divided between them in a manner consistent with the findings in this Opinion.

II. Background

Defendant Centocor, Inc. ("Centocor") is a biotechnology company incorporated in Pennsylvania. As part of its business, Centocor develops and sells

pharmaceutical drugs. In 1992 and 1993, Centocor allegedly "gave away," without consideration, marketing rights to a drug called CentoRx. The marketing rights to CentoRx belonged to a Delaware limited partnership in which Abdo and PPII invested (the "Limited Partnership").[1] The Limited Partnership was comprised of separate classes. PPII was the largest single investor in what was labeled "Class A;" Abdo likewise invested in Class A.

In 1995, another investor in the Limited Partnership brought this derivative class action seeking damages for breach of contract and fiduciary duties, and declaratory relief giving the Limited Partnership a right to future profits and revenue generated by CentoRx. The facts underlying this action are complicated, and fortunately do not need to be repeated here in detail.[2] For present purposes, it is important to know that the parties did settle, but both Abdo and PPII objected to the methodology used to calculate the terms of the settlement and to the adequacy of the class representative. Abdo had earlier filed his own separate action because he believed the class representative did not effectively respond to his concerns, failed to name certain defendants and failed to pursue certain claims because of

[1] Centocor, whose wholly-owned subsidiary, Centocor Development Corporation served as general partner of the Limited Partnership, entered into an agreement with Eli Lilly & Co. ("Lilly") that, *inter alia*, permitted Lilly to exercise an option to acquire the marketing rights to CentoRx for no additional consideration if a separate drug developed by Centocor (which rights were owned by a separate limited partnership) failed to gain FDA approval. The FDA did not approve that drug and Lilly exercised its option to acquire the marketing rights for CentoRx.

[2] If so inclined, for much greater factual detail, see ***PaineWebber R & D Partners II, L.P. v. Centocor, Inc***, Del. Ch., C.A. No. 14405, Steele, V.C. (March 15, 1999).

Abdo's perception that the class representative had a conflict of interest. PPII joined the action late as an objector, a fellow pleader for limited discovery into the basis for the terms of the settlement and as a skeptic about the calculations used for the allocation of the monetary payments to the class to which it belonged. Plainly put, PPII tagged along with Abdo on the request for limited discovery on issues related to the settlement and on the adequacy of the class representative claim and Abdo went along for the mathematical ride with PPII on the economic terms of the settlement.

On March 15, 1999, this Court approved the settlement and found the class representative to be adequate despite the initial objection, Notably, that ruling did not find that objection to be frivolous and, therefore, the objectors' claim, albeit ultimately unsuccessful, could fairly be characterized as colorable.[3]

Petitioners, on the other hand, contend that their mathematical miscalculation claim was not only colorable, but directly produced a total of approximately $11.8 million in added value for the Class A unitholders. Breaking that sum down, petitioners claim to be responsible for $690,431.25 in additional monies paid to the Class A unitholders because the petitioners insisted upon the correction of a mathematical error that resulted from reliance on the wrong

[3] The objectors' interests at stake in this action were more than nominal – each Class A unit of the limited partnership cost $100,000. Therefore, even the individual investor, Abdo, had invested substantial sums.

partnership agreement. They uncovered a second miscalculation in the computation of trailing royalties payable to the Class A unitholders.[4] The settling parties corrected this error and Centocor made an additional $502,707 compensatory payment to the Class A unitholders.

That second recalculation not only resulted in the payment of the just-mentioned delinquent trailing royalties but, petitioners contend, will also yield an additional benefit to the Class A unitholders of at least $10,615,808 *over time*, on a net present value basis. Finally, they argue that Abdo's claims filed against the employees of an affiliate of the class representative greatly motivated the class representative to seek a fair and prompt settlement. Petitioners contend that the Class A unitholders would not have received these substantive benefits had the petitioners not been actively involved stirring up controversy even if the resolution of the controversy so stirred did not directly benefit the class.

III. Analysis

Heightened judicial scrutiny applies to the approval of fee applications in class action settlements because "[o]nce a fee petition is tiled and the attorney becomes a claimant against the fund created for the benefit of the class, fiduciary responsibility for the class shifts from the attorney to the trial court and the trial court has the duty to award fees 'with moderation' and a 'jealous regard' for the

[4] The trailing royalties were based on the percentage ownership of each class under the Limited

rights of class members."' The standard used to award attorney's fees for a class representative is equally applicable to requests for fees made by an objector to a class settlement.'

"An attorney fee is not a pot of nectar available to any attorney who represents any shareholder."[7] To demonstrate that they deserve fees of any amount, petitioners must convince me that: (1) the suit was meritorious when filed; (2) the action produced a benefit to the corporation or class; and (3) the resulting benefit to the class or corporation was causally related to the suit.[8]

Abdo's action and the objection to the adequacy of the class representative may have been colorable claims, but that alone does not mean those claims contributed to the creation of any benefit conferred. The original Abdo action filed after the class representative's complaint was nothing more than a copycat pleading. Further, I find that the objection to the class representative achieved absolutely nothing of tangible value for the Class A unitholders. Perhaps one could argue that a slight therapeutic benefit resulted from that objection because

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Partnership agreement.

[5] Deborah A. Klar, *Attorney's Fees in Securities Class Actions: Present Developments Under the Common Fund Doctrine*, 417 P.L.I./Lit. 153, 156 (Oct.-Nov. 1991), *cited in* **DONALD J. WOLFE, JR.&MICHAEL** A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF **CHANCERY** § **9-5(b),** at 676 (1998).

'See, e.g., ***Rosen*** v. ***Smith,*** Del. Ch., C.A. No. 7863, 1985 WL 21143, *2, Hartnett, V.C. (Sept. ***23, 1985).***

[7] ***In re Resorts Int'l Shareholders Litig.,*** Del. Ch., C.A. Nos. 9470, 9605 (consolidated), mem. op. at 4, Hartnett, V.C. (Oct. 11, 1990).

[8] ***United Vanguard Fund, Inc. v. Takecare, Inc.,*** Del. Supr., 693 A.2d 1076, 1079 (1997).

the unitholders could presumably rest easier knowing that they had been adequately represented by counsel and a class representative adjudicated free of substantial conflict, who acted competently and aggressively on their behalf. But as I will further explain below, this is more chimera than benefit. The recalculations resulting directly from objectors' efforts are what conferred the only real benefit to the Class A unitholders.

Petitioners claim the recalculations directly produced a total of at least $11.8 million in added value for the Class A unitholders. They do admit, however, that only "$7.7 million is attributable solely to the actions of the [o]bjectors, without regard to the benefit claimed by [the class representative]."[9] Remarkably, petitioners' request for fees is unopposed, therefore, I have no basis to question their assertion that their actions produced a sizable benefit for the Class A unitholders. Likewise, petitioners' efforts directly caused a benefit to the class of at least $7.7 million. Petitioners have met the required test for entitlement. As they have met the required elements, I find that petitioners are entitled to attorney's fees.

Once deciding that counsel are entitled to fees, this Court has no standard method with which to compute the proper amount of those fees or how they should

[9] Objectors' Amend. Pet. for Award of Attorneys' Fees and Expenses, at 25 (emphasis in original). In a separate petition, counsel for the class representative are seeking fees.

be dispersed among counsel. "The adoption of a mandatory methodology or particular mathematical model for determining attorney's fees in common fund cases would be the antithesis of the equitable principles from which the concept of such awards originated.""

Nonetheless, in evaluating a fee request, this Court generally uses a multifactor approach consisting of the following factors:

1. time and effort expended by counsel;' [1]
2. difficulty and complexity of the litigation; [12]
3. counsel's standing and ability;[13]
4. the contingent nature of the fee;[14]
5. stage at which the litigation ended;"
6. the amount of the benefit that can fairly be attributed to the efforts of the requestor of the fees;[16]

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[10] ***Goodrich v. E.F. Hutton Group, Inc.,*** Del. Supr., 681 A.2d 1039, 1046 (1996).
[11] ***Stroud v. Milliken Enters., Inc.,*** Del. Ch., C.A. No. 8969, 1990 WL 113345, Hartnett, V.C. (Aug. 2, 1990).
[12] ***Weinberger*** v. ***U.O.P., Inc.,*** Del. Ch., C.A. No. 5642, Berger, V.C. (Mar. 10, 1987).
[13] ***J.L. Schiffman & Co., Inc., v. Standard Indus., Inc.,*** C.A. No. 11267, 1993 WL 271441, at *4, Allen, C. (July 15, 1993).
[14] ***In re Caremark Int'l Inc. Derivative Litig.,*** Del. Ch., C.A. No. 13670 (consolidated), Allen, C. (Sept. 25, 1996).
[15] ***See, e.g., In re MAXXAM Group, Inc. Stockholders Litig.,*** Del. Ch., C.A. No. 8636, mem. op. at 33-34, Jacobs, V.C. (April 16, 1987) (only four depositions were taken and no pretrial motions were made).
[16] ***See, e.g., MAXXAM Group,*** mem. op. at 15 (change in market conditions and independent actions of board helped create benefit).

7. causation;[17]

8. size of benefit conferred.'[8]

Of those factors, the Courts regularly give the size of the benefit conferred the greatest weight." Accordingly, I will closely examine the size of the benefit conferred in appraising petitioners' request for fees. Just as pivotal in this instance, however, is to what extent the petitioners can be credited with causing the benefit conferred upon the Class A unitholders.

The size of the benefit conferred is substantial. As much as $11.8 million may have been generated for the Class A unitholders as a result of the recalculations. There is no dispute that at least $7.7 million directly resulted from the objectors/petitioners efforts. In either event, petitioners seek approximately 10% of the benefit conferred as attorney's fees.[20] According to my recollection of what transpired, PPII's efforts financed and procured the benefit flowing from the recalculations. There is no indication in the record that Abdo independently

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[17] ***See, e.g., In re Anderson Clayton Shareholders Litig.***, Del. Ch., C.A. No. 8387, ltr. op. at 7, Allen, C. (Sept. 19, 1988). In my mind, this factor overlaps almost completely with the previous factor. Therefore, I will, by implication, treat it when I discuss the amount of the benefit that can fairly be attributed to the efforts of the requestor of the fees.

[18] ***Goodrich v. E.F. Hutton Group, Inc.,*** Del. Supr., 681 A.2d 1039, 1048 (1996); ***In re Golden State Bancorp Inc. Shareholders Litig.***, Del. Ch., C.A. No. 16175, Chandler, C. (Jan. 7, 2000).

[19] ***See, e.g., In re Appraisal of Shell Oil,*** Del. Ch., C.A. No. 8080 (consol.), Hartnett, V.C., 1992 LEXIS 228, *11-*12 (Oct. ***30,*** 1992); ***In re Anderson Clayton Shareholders Litig.,*** Del. Ch., C.A. No. 8387, ltr. op. at 3, 7, Allen, ***C.*** (Sept. 19, 1988); ***In re Dr. Pepper/Seven Up. Cos., Inc. Shareholders Litig,*** Del. Ch., C.A. No. 13109, 1996 WL 74214, at *5, Chandler, V.C. (Feb. 9, 1996, as amended Feb. 27, 1996), *aff'd,* Del. Supr., 683 A.2d 58 (1996).

[20] If the $7.7 million figure is used, the petitioners seek approximately 11% of the benefit as fees. If the $11.8 million amount is used, petitioners seek approximately 8% of the benefit as fees.

advanced the argument for recalculation or would have done so if he had been the sole objector. Since Abdo and PPII petitioned jointly, however, PPII and its counsel seem willing to share the fruits of their labor with Abdo's counsel. Nonetheless, the petitioners' joint tiling creates a dilemma for me, which I will explain.

In contrast to the considerable benefit resulting from the recalculations, I find that the challenge to the adequacy of the class representative failed to benefit the Class A unitholders in any meaningful way. While the initial request for limited discovery into the settlement terms and the objection to the adequacy of the class representative stalled settlement and allowed PPII to jump on board and ultimately object to the calculation of the monetary terms of the settlement, Abdo's initial objection had as much a negative effect as a positive one on the Class A unitholders. Throughout this litigation, the class representative skillfully advanced the cause of the Class A unitholders. When the objection to its adequacy was filed the class representative had to turn its attention to defending its own position as class representative. In so doing, it had to expend resources that would have been better used investigating and correcting or litigating the underlying monetary dispute. This distraction only delayed resolution of the ultimate payment of any real benefit to the detriment of Class A unitholders.

I find that counsels' expended time and effort, as well as the difficulty and complexity of the litigation, cuts in favor of the petitioners. This case was complex and (at the time) seemed interminable. Counsel on all sides spent considerable time preparing and litigating this matter. There remains considerable question, however, whether Abdo's substantive efforts did anything more than mirror the actions of the class representative early on. It generated unnecessary extra effort, even with consolidated discovery, and later distracted the class representative from its efforts to settle for better economic terms.

Petitioners did not submit hourly rates or time expended in support of their joint fee request. I can only assume they did not, hoping, in the absence of an objection to their fee request that the Court would consider the request as a modest 10% contingency slice of an $11 million pie. Because of the fact that I must authorize no more than a fair, adequate and reasonable fee to be paid from the class fund, I asked for hourly rates, time expended and some sense of how otherwise counsel might be paid. To some extent, I found the response startling. Abdo's attorneys informed me that Richard D. Greenfield sought an hourly rate of $495.00. His rate is apparently twice that of almost all admitted attorneys authorized to practice in this action and who seek fees in this petition. I cannot understand that request. Nothing in the record reflects that Greenfield's experience, standing or ability merits on hourly rate of almost $500 per hour. Ann

Caldwell made virtually all the appearances in Court for Abdo and her work appeared to carry the ball for his action. I adjust the fee awarded to reflect those facts.[21] While the time expended as reported seems substantial, the issues on which that time was spent were neither pivotal nor consequential in light of the ultimate result.

Abdo's attorneys did take this case on what appears to be a contingency basis. PPII's attorneys, on the other hand, were paid an hourly rate while working on this case, but now hope to be paid from the class fund rather than by PPII. The fee request has been made jointly, and the planned allocation between counsel has not been disclosed to me. My ignorance of that plan is of no real significance here, except that I must consider the actual fruits of their labor and that all the attorneys seeking fees did not handle this case on a contingent basis with the attendant risk.

My decision has not been easily reached. By filing jointly, counsel made it especially difficult for me. As a result of the joint tiling, I cannot differentiate between the amount earned by PPII's attorneys, whose efforts generated the only real benefit in this case but who already received a non-contingent partial fee and therefore incurred no risk of effort expended with no return; and, Abdo's attorneys, who did take the case on a contingency and who despite extensive time expended,

[21] Greenfield purportedly worked 188.5 hours, worth allegedly $93,307.50. Reducing his rate to $200 per hour would justify a claim for $37,700. His application for admissionpro *hac vice,* though enthusiastically endorsed by local counsel, reflects a suspension from practice in Pennsylvania for a period of time related to a conflict in representation in similar litigation.

added nothing of real value to this case. Because PPII funded the effort that resulted in the real benefit to the class, it should be reimbursed for its expenses that it advanced for the class. PPII's attorneys' efforts truly drove the recalculation of the settlement provisions and produced the benefit not only for their client but for the class as a whole. The litigation, but for their objection to the monetary calculations essential to the settlement, could not have ended as well for the class. Under the factors outlined above, except for No. 4, PPII's counsel's efforts arguably deserve an enhancement beyond their hour rate. The fact that they incurred no risk by taking the case on a contingency, however, prevents any "lodestar" form of enhancement.**

On the other hand, Abdo's attorneys earned a more modest fee which reflects the inconsequential result they obtained. Even if their efforts generated a benefit, that benefit in whatever form of therapeutic balm it may have come, was more than offset by the wasteful distractions their objection created and the

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[22] *See* ***Sonet v. Plum Creek Timber Company,*** Del. Ch., C.A. Nos. 16639, 16931, mem. op. at 12 n.5, Jacobs, V.C. (August 10, 1999) (stating "[t]he approach of determining a "lodestar" fee (attorney time multiplied by actual hourly rates) and then increasing that lodestar amount by a multiple, closely resembles the "Lindv Bros." method of fee determination used by some federal courts. That is not the approach followed by our courts, either in "fund" cases or in nonpecuniary benefit cases where the fee is determined on a quantum meruit basis. Sugarland v. Thomas, Del. Supr., 420 A.2d 142 (1980). Nor is that approach consistent with the quantum meruit method of determining a reasonable fee, at least as that method has been applied by this Court. In applying that approach, this Court has customarily utilized counsels' customary hourly rates, not "multiplied" rates, to arrive at a reasonable fee.").

resulting delay in receipt of the enhanced monetary benefit directly resulting from the recalculations.

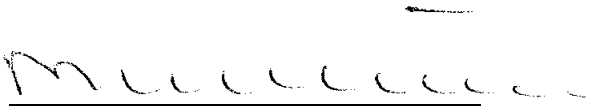
Little information has been provided by the parties on the standing and ability of counsel or the differing nature of counsel's terms for representation. I am not able, especially in the case of foreign counsel, to simply assume that a claim for substantial hourly rate evidences counsel of special competency and extraordinary experience. Therefore, causation and the relative benefit conferred weighed heavily on my conclusion. After forcing counsel to submit details concerning time and effort expended, I had to weigh the credibility of the time allegedly spent against the benefit actually received from the result obtained. Despite the shroud of the joint petition, I can neither conclude that all time expended was wisely spent nor that the class benefited from the effort expended. Considering the multi-factor approach normally used and applying it to the unusual, if not bizarre, nature of this case, I conclude a total fee of $650,000 to be fair, adequate and reasonable and that it should be paid as follows: (1) PPII will be reimbursed for what it advanced for the class through its hourly rate payments to its counsel; (2) its counsel will be paid the balance of its hourly fees owed, but not yet paid; (3) Abdo's counsel will be paid their hourly rate for the time expended as modified above to the extent a balance remains in the $650,000 fund

created by this Order with priority to the time and effort expended by Ann Caldwell.

I am satisfied that on this record that the petitioners and the class who will pay these fees have received equitable treatment.

PPII's counsel will prepare an appropriate order consistent with these findings.

IT IS SO ORDERED.



Vice Chancellor

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