

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HELABA INVEST )  
KAPITALANLAGEGESELLSCHAFT )  
mbH, on behalf of itself and all others )  
similarly situated, )

Plaintiff, )

v. )

C.A. No. 2683-VCL

FREDERICK H. FIALKOW, STEVEN )  
FIALKOW, BERNARD LEVINE, IRA )  
GREIFER, ROBERT C. PORDY, )  
HAROLD SCHULMAN, and NATIONAL )  
HOME HEALTH CARE CORP., )

Defendants. )

**MEMORANDUM OPINION AND ORDER**

**Submitted: March 12, 2008**

**Decided: April 11, 2008**

Seth D. Rigrotsky, Esquire, Brian D. Long, Esquire, RIGRODSKY & LONG, P.A., Wilmington, Delaware; Joseph F. Rice, Esquire, Ann K. Ritter, Esquire, Vincent I. Parrett, Esquire, Badge Humphries, Esquire, MOTLEY RICE LLC, Mount Pleasant, South Carolina; Deborah Sturman, Esquire, STURMAN LLC, New York, New York, *Attorneys for the Plaintiff.*

Kurt M. Heyman, Esquire, Patricia L. Enerio, Esquire, PROCTOR HEYMAN LLP, Wilmington, Delaware; Gary J. Mennitt, Esquire, DECHERT LLP, New York, New York, *Attorneys for Defendants Frederick H. Fialkow, Steven Fialkow, Bernard Levine, and National Home Health Care Corp.*

Gregory V. Varallo, Esquire, John D. Hendershot, Esquire, Geoffrey G. Grivner, Esquire, Meghan M. Dougherty, Esquire, Rudy Koch, Esquire, RICHARDS LAYTON & FINGER, Wilmington, Delaware, Stephen G. Rinehart, Esquire, TROUTMAN SANDERS LLP, New York, New York, *Attorneys for Defendants Ira Greifer, Robert C. Porody, and Harold Schulman.*

LAMB, Vice Chancellor.

At a hearing held on March 13, 2008, this court approved the settlement of this action as fair and reasonable, but withheld decision on the award of attorneys' fees. This opinion considers the \$1,500,000 fee application. The attorneys contend that they are entitled to this fee because they secured a \$3,760,000 benefit to the stockholders and a substantial therapeutic benefit through several purportedly material disclosures. For the reasons set forth below, the application for attorneys' fees and expenses is granted in the amount of \$500,000, plus expenses.

## I.

On November 28, 2006, National Home Health Care Corporation ("NHHC")<sup>1</sup> and Angelo, Gordon & Co. entered into a merger agreement providing for Angelo Gordon to purchase NHHC at \$11.35 or \$11.50 per share, depending on whether NHHC met certain performance benchmarks. In response to this announcement, on January 9, 2007, Premier Home Health Care Services, Inc. ("Premier") made a competing proposal to purchase all of the NHHC common stock for \$12 per share, contingent on securing financing and due diligence. Despite the superior price, a special committee of independent directors designated by the NHHC board rejected Premier's offer, as did the full board. NHHC based

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<sup>1</sup> NHHC is a Delaware corporation with its principal executive offices in Scarsdale, New York. The company provides home health care and staffing services. Long Tr. Aff. Ex. 1. The other defendants, all former directors of NHHC, are Frederick H. Fialkow, Steven Fialkow, Bernard Levine, Ira Greifer, Robert C. Porady, and Harold Schulman.

this decision on the significant uncertainties arising from the contingencies in Premier's proposal.

On January 19, 2007, Helaba Invest Kapitalanlagegesellschaft mbH filed a class action complaint alleging fiduciary misconduct in connection with the Angelo Gordon merger agreement.<sup>2</sup> Specifically, the complaint seeks a declaratory judgment that the NHHC directors violated their fiduciary duties by, among other things, agreeing to strong deal protection devices that, the complaint alleges, improperly precluded superior third party proposals.<sup>3</sup>

NHHC filed its preliminary proxy statement in connection with the Angelo Gordon merger on January 30, 2007, leading to the filing of an amended complaint on March 16, 2007, asserting numerous disclosure claims.<sup>4</sup> In fact, the amended complaint purports to challenge the disclosures in the preliminary proxy on 45 separate bases.

On February 9, 2007, Premier submitted another proposal, again offering \$12 per NHHC share, and including a financing commitment letter. Thereafter,

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<sup>2</sup> The plaintiff held stock in NHHC at all relevant times.

<sup>3</sup> The plaintiff also alleged that the proposed transaction favored F. Fialkow and Levine, two directors that controlled 49.4% of the outstanding NHHC stock. The plaintiff challenged the voting agreements entered into by these directors because they "reflect[ed] an abdication of their fiduciary duties to [NHHC's] minority, public stockholders." Compl. ¶ 31. The plaintiff further alleges that Angelo Gordon impermissibly procured F. Fialkow's and Levine's votes by entering into lucrative agreements that ensured their continued involvement in the surviving entity. *Id.* ¶¶ 32, 33.

<sup>4</sup> The complaint filed on March 16 is the operative complaint for purposes of this opinion.

NHHC and Premier entered into a confidentiality agreement and NHHC provided the necessary due diligence information. After some further discussions, the special committee rejected Premier's revised proposal due to the "continued inclusion of a due diligence condition in the financing commitment letter accompanying [it]."<sup>5</sup>

On April 10, 2007, NHHC filed a revised preliminary proxy statement that included supplemental disclosures addressing three of the allegations in the amended complaint. Perhaps most significantly, NHHC disclosed the financial projections used by its financial advisor, Houlihan Lokey Howard & Zukin, in its fairness opinion. NHHC also provided additional information on its decision not to pursue a bid from a prospective acquirer,<sup>6</sup> as well as the precise dollar amount of Houlihan Lokey's fee.<sup>7</sup>

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<sup>5</sup> Defs.' Br. 6. On April 2, 2007, NHHC and Angelo Gordon entered into an amendment to the merger agreement eliminating a \$1.25 million expense reimbursement termination fee. This effectively reduced the break-up fee NHHC would have to pay Angelo Gordon from \$3.055 million to \$2.03 million.

<sup>6</sup> The April 10, 2007 preliminary proxy included the following sentence: "Since Firm C's pricing proposal had been based upon an EBITDA multiple of 5x (which was lower than the 6x multiple that Firm D's pricing proposal relied upon) and taking into account the reasons for Firm D abandoning its interest in a transaction, it was determined that it would not be fruitful to reinitiate discussions with Firm C." Long Tr. Aff. Ex. 13 at 20.

<sup>7</sup> The March 19 preliminary proxy stated: "NHHC is obligated to pay Houlihan Lokey a customary fee for its services, no portion of which is contingent upon the successful completion of the merger." *Id.* at Ex. 12 at 35. The April 10, preliminary proxy stated: "NHHC is obligated to pay Houlihan Lokey \$305,000 for its services, no portion of which is contingent upon the successful completion of the merger." *Id.* at Ex. 13 at 36.

On April 18, 2007, Premier made a third proposal, offering the same \$12 per share, but omitting the due diligence condition from the financing commitment letter. This led to the special committee's recommendation that the Premier proposal was superior.<sup>8</sup> Angelo Gordon and NHHC then began negotiations to amend the merger agreement and, on May 9, 2007, Angelo Gordon raised its price to \$12.50 per share.<sup>9</sup> In response, Premier submitted a final proposal to acquire NHHC at \$12.75 per share, but Angelo Gordon exercised its right under the revised merger agreement to match this proposal, and no other bids were submitted thereafter.

Although the transaction was scheduled to close on September 10, 2007, Angelo Gordon did not receive timely regulatory approval. As will be discussed further below, Angelo Gordon agreed to increase the third quarter dividend by \$0.10 in exchange for extending the closing until November 21.

Separately, on October 18, 2007, the plaintiff, NHHC, the individual defendants, and Angelo Gordon entered into an agreement settling the plaintiff's lawsuit in exchange for an additional \$0.10 per share settlement payment. The

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<sup>8</sup> This court heard the plaintiff's motion for a preliminary injunction on April 23, 2007, and, leading up to that hearing, the plaintiff's counsel engaged in discovery in support of its motion for a preliminary injunction against the consummation of the merger agreement. This discovery included eight depositions. Dfs.' Br. 8. This court denied the motion, but granted the plaintiff leave to submit additional disclosure allegations. The plaintiff never raised any further disclosure claims.

<sup>9</sup> The merger agreement also reinstated the \$1.5 million reimbursement provision.

parties formally entered into this agreement on January 3, 2008, in a settlement stipulation.

## II.

In support of their fee application, the plaintiff's counsel argue that they performed a critical role in negotiating not just the \$0.10 settlement payment, but the additional \$0.10 dividend and, most significantly, the increase in the final merger price from \$11.50 to \$12.75. As evidence of their involvement, the plaintiff's counsel rely primarily on the deposition testimony of Dr. Robert Pordy, an NHHC independent board member and special committee member. According to the plaintiff's counsel, Dr. Pordy's testimony "is the most reliable and probative concerning the causative relationship between the efforts of plaintiff's counsel in [this] action and the benefits [this] action achieved for plaintiff and the class."<sup>10</sup>

Focusing on the financial terms of the deal, the plaintiff's counsel contends that a fee of \$1,000,000 is warranted because "in directing its negotiations on behalf of the company's public shareholders, the special committee utilized the suggestions of plaintiff's counsel in achieving increased consideration for its constituents."<sup>11</sup> The plaintiff's counsel seek an additional \$500,000 for allegedly

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<sup>10</sup> Pl.'s Reply 3.

<sup>11</sup> *Id.* at 7.

causing NHHC to make several material disclosures, including the financial projections used by Houlihan Lokey in its fairness opinion.

In response, the defendants argue that the plaintiff's total fee request of \$1.5 million, constituting 26.6% of the monetary benefit received by the NHHC stockholders following Angelo Gordon's initial \$11.50 offer, is unreasonably high. According to them, while the plaintiff's counsel secured the settlement payment, they played only a peripheral role in increasing the merger price and the increased dividend payment, justifying only a fee award of 5% or less of that benefit—roughly \$244,000. With respect to the disclosure claims, the defendants contend that the only material supplemental disclosure was the Houlihan Lokey financial projections and no separate award is appropriate. Alternatively, if this court decides to award a fee based on the disclosures, the defendants assert that the plaintiff's counsel should receive no more than an additional \$100,000.

### **III.**

In this case, there is no dispute that the plaintiff's counsel are entitled to an award of attorneys' fees and expenses. The court is asked only to determine the appropriate amount. Such a finding lies within the sound discretion of the court and is guided by the following well-settled factors:

- (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 benefits conferred.<sup>12</sup>

Significantly, “this court has traditionally placed greatest weight upon the benefits achieved by the litigation . . . . [W]hat is relevant is the benefit *achieved by the litigation*, not simply a benefit that, *post hoc ergo propter hoc*, is conferred after the litigation commences.”<sup>13</sup>

#### IV.

“Under the common fund doctrine, a litigant who confers a common monetary benefit upon an ascertainable class is entitled to an allowance for fees and expenses to be paid from the fund or property which his efforts have created. Alternatively, the corporate benefit doctrine comes into play when a tangible monetary benefit has not been conferred,’ but some other valuable benefit is realized by the corporate enterprise or the stockholders as a group.”<sup>14</sup> In this case, the plaintiff’s counsel argues that it caused three distinct monetary benefits to the class, controlled by the common fund doctrine, and a fourth benefit based on a therapeutic remedy, controlled by the corporate benefit doctrine.

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<sup>12</sup> *In re Plains Resources*, 2005 WL 332811, at \*3 (Del. Ch. 2005) (citing *Sugarland Indus. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980)).

<sup>13</sup> *In re Anderson Clayton S’holders’ Litig.*, 1988 WL 97480, at \*3 (Del. Ch. Sept. 19, 1988) (emphasis in original).

<sup>14</sup> *In re First Interstate Bancorp Consol. S’holder Litig.*, 756 A.2d 353, 357 (Del. Ch. 1999) (quoting *In re Dunkin’ Donuts S’holders Litig.*, 1990 WL 189120, at \*3 (Del. Ch. Nov. 27, 1990) (citations omitted)).

A. Benefits Controlled By The Common Fund Doctrine

The three monetary benefits claimed by the plaintiff's counsel can be divided as follows: (1) the \$0.10 payment to settle the litigation; (2) the \$1.25 increase in the final merger price; and (3) the \$0.10 special dividend. According to the plaintiff's counsel, they are entitled to a fee of \$1,000,000 in exchange for these benefits.

As noted, there is no dispute that the plaintiff's counsel secured the \$0.10 settlement payment, equating to a roughly \$260,000 benefit to the class. Indeed, in the stipulation of settlement the defendants state that the "decision to pay an additional \$0.10 per share was a result of the prosecution of [this] action."<sup>15</sup> Therefore, the plaintiff's counsel are entitled to a fee equal to a reasonable percentage of this benefit.<sup>16</sup>

With respect to the increase in the merger price, the plaintiff's counsel are entitled to a share reflective of their important, but limited, role in securing a portion of this benefit.<sup>17</sup> In particular, the plaintiff's counsel did play a role in

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<sup>15</sup> Long Tr. Aff. Ex. 4 § 2.1.

<sup>16</sup> In this case, the fee will not be paid from a common fund itself since the funds have already been paid to the class and the defendants agreed, in the stipulation of settlement, themselves to pay the fee and expenses awarded by the court. Nevertheless, the court will determine this aspect of the fee petition by applying the same principles that guide the court where an actual common fund still exists.

<sup>17</sup> The plaintiff's counsel played no part in securing the initial increase in the merger price from \$11.50 to \$12. This is true because Premier submitted a proposal to acquire NHHC at \$12 before the plaintiff filed its complaint and the record demonstrates that the litigation had no effect on Premier's efforts to solidify its bid. In addition, the plaintiff's counsel's claim that the

securing the final increase from \$12 to \$12.75. On March 23, 2007, the plaintiff's counsel met with the chairman of the special committee and the special committee's legal counsel. This meeting included a telephonic presentation by the plaintiff's counsel's expert outlining the plaintiff's position on an appropriate merger price that properly reflected the fair value of NHHC. Dr. Pordy testified that the March 23rd meeting was helpful and that he considered the plaintiff's views and the views of the plaintiff's expert in the subsequent negotiations with Angelo Gordon and Premier.<sup>18</sup>

In addition, before NHHC's negotiation with Premier after its April 18 proposal "counsel for the plaintiff made written comments available to counsel for the special committee with respect to Premier's proposal which suggested specific items to negotiate and the plaintiff's suggested approach to such items. Plaintiff's views were communicated to the special committee in its negotiations with Premier."<sup>19</sup> The plaintiff's counsel also communicated their support for the revised Angelo Gordon offer at \$12.50 and for Premier's subsequent and final offer at \$12.75.

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reduction in the break-up fee "re-invigorated" the negotiation process is unpersuasive. Angelo Gordon reinstated the higher break-up fee in its \$12.50 proposal and Premier still submitted a higher proposal.

<sup>18</sup> While Dr. Pordy did not attend that meeting, the chairman of the special committee conveyed the plaintiff's position to the entire special committee.

<sup>19</sup> Long Tr. Aff. Ex. 5 ¶ 10.

Thus, the record demonstrates that the plaintiff's counsel played a significant but less than instrumental role in the negotiations from \$12 to \$12.75. The plaintiff's counsel apparently made valuable contributions before the special committee and the full board acted to accept the final merger agreement with Angelo Gordon. At the same time, the court is mindful that the upward movement in the deal price was a result of Premier's persistence in making competing offers, and the actions of the special committee, not specific developments in the litigation. This precludes a fee award in the high range, occasionally approved by this court.

Finally, while the plaintiff's counsel claim to have played a key role in securing the \$0.10 dividend increase, their position is undermined by the record. As mentioned, Angelo Gordon did not get the regulatory approval necessary to close the transaction before the original deadline in the merger agreement. As a result, Angelo Gordon sought an extension in exchange for some minor compensation to the NHHC stockholders, initially offering \$0.075. The special committee managed to negotiate that payment up to \$0.10 per share, without significant input or influence from the plaintiff's counsel. As noted by the defendants, "the entirety of plaintiff's counsel's efforts on this issue consisted of a single email" advising the special committee to negotiate for 12.5 cents. Clearly, the special committee already intended to do this and it independently secured the

\$0.10 payment. In addition, Stephen A. Greene, the senior managing director at Eureka Capital Partners who partnered with Angelo Gordon in the NHHC transaction, testified that Angelo Gordon’s “decision to propose an increased dividend as consideration for the extension had nothing to do with this lawsuit or any communication from plaintiff’s counsel.”<sup>20</sup> Thus, the plaintiff’s counsel should receive only a modest portion of this benefit.

B. Corporate Benefit Doctrine

Lastly, the plaintiff’s counsel seek an additional \$500,000 for purportedly causing NHHC to disclose several material facts in connection with the Angelo Gordon merger. Foremost, the plaintiff’s counsel cites the disclosure of the financial projections used by Houlihan Lokey in its fairness opinion. In response, the defendants concede that this was a material disclosure, but contend that NHHC decided to disclose these projections primarily due to this court’s decision in *In re Netsmart Techs., Inc. Shareholders Litigation*.<sup>21</sup> Dr. Porody’s testimony, however, undercuts the defendants’ position. At his deposition Dr. Porody, despite pointed questioning, stated that he did not learn of any Delaware cases during the merger process that were relevant to the current action.<sup>22</sup> From this, the court concludes

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<sup>20</sup> Greene Decl. ¶ 8.

<sup>21</sup> 924 A.2d 171 (Del. Ch. 2007).

<sup>22</sup> Porody Dep. 95-96 (Q. “Do you recall at any point during this process leading to the merger, learning that there were new or recent Delaware decisions that might be relevant to this case? A. No.).

that the plaintiff's disclosure claims affected the defendant's decision to disclose this material.

Similarly, there is nothing in the record to suggest that the plaintiff was not responsible for the defendants' decision to disclose Houlihan Lokey's fee or the additional information regarding a third-party bidder.<sup>23</sup> Instead, the defendants argue that the plaintiff's counsel exerted little effort pursuing these disclosure allegations, focusing on their fiduciary duty claims. For example, the defendants note that the plaintiff never raised the three disclosure issues in the eight depositions it conducted. Notwithstanding these arguments, the record supports a finding that the plaintiff's counsel was responsible for these three disclosures. Moreover, the defendants concede the materiality of the Houlihan Lokey financial projections.

### C. The Appropriate Award

In determining the appropriate amount of attorneys' fees in cases involving both monetary and non-monetary benefits, this court has previously concluded that it would not "ascertain the exact amount of award for the supplemental disclosures, but [would] consider the disclosures a relevant factor in determining the total fee

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<sup>23</sup> The plaintiff's counsel also take credit for the disclosure of certain fee arrangements between S. Fialkow and Robert Heller, Sunrise's Chief Financial Officer, that provide for the payment of future profits in the surviving entity to these individuals. *See Long Tr. Aff. Ex. 7* at 37-38. While the January 19 complaint did discuss these arrangements, it did not include any disclosure claims. In addition, the initial preliminary proxy included these agreements, further undermining the causative effect of the plaintiff's allegations.

award based on all the facts and circumstances.”<sup>24</sup> The court will do the same in this case, which leads back to a consideration of the salient *Sugarland* factors.

No doubt the plaintiff’s counsel worked on a contingent fee basis, which implicates Delaware’s public policy interest in rewarding such “risk-taking in the interests of shareholders.”<sup>25</sup> In this case, the plaintiff’s counsel expended roughly 1,525 hours in drafting the complaints, engaging in discovery, including eight depositions, and incurred \$125,552.73 in expenses.<sup>26</sup> The plaintiff’s counsel prosecuted this action in a competent manner. However, this case did not go to trial, and it did not present particularly complex or novel issues. Most important, the benefit achieved for the class cannot be assigned exclusively or even directly to the litigation. Instead, that benefit was largely the result of a number of other factors, including Premier’s and Angelo Gordon’s aggressive bidding, as well as the efforts of the special committee and its advisors.

## V.

In light of all the above considerations and for the reasons already discussed, this court determines that an award of \$500,000 in fees and a separate award for the plaintiff’s counsel’s expenses is appropriate under the circumstances, and

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<sup>24</sup> *Plains Resources*, 2005 WL 332811, at \*6.

<sup>25</sup> *Id.*

<sup>26</sup> Although the amounts of expenses may seem high, the defendants do not take issue with the plaintiff’s counsel’s itemization.

awards \$625,552.73. This amount appropriately reflects the plaintiff's counsel's role in achieving the relevant benefits received by the NHHC stockholders. The parties shall confer and submit a form of order implementing the foregoing ruling within 10 days. IT IS SO ORDERED.