COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
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Re: *Eugene M. Julian v. Eastern States Construction Service, Inc., et al.*, Civil Action No. 1892-VCP

Dear Counsel:

Presently before the Court is Plaintiff's Application for Attorneys' Fee Award ("Application") in connection with his successful prosecution of a derivative claim challenging the Benchmark Bonuses. For the reasons stated in this letter opinion, I grant Plaintiff's Application.

I. BACKGROUND

In a Memorandum Opinion entered on July 8, 2008, I held that the Individual Defendants had to return to Benchmark Builders, Inc. ("Benchmark") certain payments

they received, referred to as the Benchmark Bonuses. As a result, Benchmark recovered a total of $1,687,151.49. I further required the Individual Defendants to "reimburse Gene [Plaintiff Eugene M. Julian] for his reasonable attorneys' fees and costs incurred in the prosecution of the Benchmark Bonuses claim."[1] On September 10, 2008, Gene filed his Application for a total of $131,635 in attorneys' fees.[2] The request includes two separate components: (1) $31,635 from the Individual Defendants for Gene's actual attorneys' fees pursuant to a reduced fee arrangement with his attorneys; and (2) $100,000 from Benchmark, which received the benefit of the derivative award, to compensate Gene's counsel, Morris James LLP, for the contingent aspect of their efforts in conferring a corporate benefit on Benchmark. The Individual Defendants, Richard J. Julian, Francis R. Julian, and Steven Bomberger, have paid the $31,635 to Gene and do not dispute that aspect of the Application. Defendants do object, however, to the request for an additional payment of $100,000, which they characterize as an unauthorized and unwarranted "success fee." I turn, therefore, to the parties' contentions as to Gene's request for an award of $100,000 in attorneys' fees to Morris James.

II. ANALYSIS

Gene relies on the "corporate benefit" doctrine to support an award of additional fees here. He contends that doctrine "allows a litigant to recover fees and expenses from

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1 *Julian v. Eastern States Constr. Serv., Inc.*, 2008 WL 2673300, at *20 (Del. Ch. July 8, 2008).

2 The Application does not request reimbursement for any costs.

a corporation where the litigation has conferred some significant and valuable benefit upon the corporation."[3] Defendants deny the applicability of the corporate benefit doctrine in cases like this one where the plaintiff's action resulted in a monetary benefit. They base their argument on the Supreme Court's statement in *Korn* that "the 'corporate benefit' doctrine[] allows a litigant to recover fees and expenses from a corporation where the litigation has conferred some other (non-monetary) valuable benefit upon the corporate enterprise or its shareholders."[4] When read in context, however, that statement does not support Defendants' position. The immediately preceding sentence in *Korn* describes the "common fund" exception to the general rule that litigants ordinarily must pay the costs of their own representation as "enabl[ing] 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 created."[5] I do not read the *Korn* decision as precluding a derivative plaintiff, such as Gene, who succeeds in conferring a monetary benefit on the

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[3] Application ¶ 9 (citing *Korn v. New Castle Cty.*, 922 A.2d 409, 412 (Del. 2007); *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006); *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 357 (Del. Ch. 1999), *aff'd*, 755 A.2d 388 (Del. 2000)).

[4] *Korn*, 922 A.2d at 412.

[5] *Id*.

corporation from recovering his reasonable attorneys' fees and expenses in obtaining that benefit.[6]

To recover attorneys' fees, the petitioning plaintiff must demonstrate that: (a) the action was meritorious when filed; (b) the action benefited the corporation; and (c) the benefit was causally related to the action.[7] There is no serious dispute that all of those preconditions exist in this case. Rather, the controversy centers on the appropriate amount of the fee award.

The amount of attorneys' fees awarded lies within the sound discretion of the court and must be reasonable.[8] In determining the size of an award, the courts assign the greatest weight to the benefit achieved in the litigation.[9] When the benefit is quantifiable, such as where the plaintiff's litigation secured a significant financial benefit for the corporation "that they probably could not have achieved otherwise," courts typically apply a "percentage of the benefit" approach.[10] The fee award also should avoid

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6 *See Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011, 1015 (Del. 2007) (corporate benefit doctrine supported award of attorneys' fees where litigant conferred a common monetary benefit upon an ascertainable shareholder class); *Carlson v. Hallinan*, 925 A.2d 506, 546-47 (Del. Ch. 2006).

7 *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1167 (Del. 1989).

8 *Franklin Balance Inv. Fund v. Crowley*, 2007 WL 2495018, at *8 (Del. Ch. Aug. 30, 2007).

9 *Id*. (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 150 (Del. 1980)).

10 *Id.* at *8, 10.

windfalls while encouraging "future meritorious lawsuits" by compensating the plaintiffs' attorneys for their lost opportunity cost (typically their hourly rate), the risks of litigation, and a premium.[11] In determining an award of fees, Delaware courts have applied a flexible, multi-factor approach first articulated in *Sugarland*.[12] The relevant factors include: (1) the benefit achieved in the action; (2) the difficulty of the litigation and time and efforts of counsel; (3) the contingent nature of the undertaking; (4) the quality of the work performed; and (5) the standing and ability of counsel.[13] These same principles apply in this case, even though it involves a closely-held corporation with only a handful of stockholders.[14]

In my post-trial Opinion awarding almost $1.7 million to Benchmark based on the unlawful Benchmark Bonuses, I held that the Individual Defendants should reimburse Gene for his reasonable attorneys' fees incurred in obtaining that result. Because Gene had a reduced fee arrangement with his attorneys, Morris James, he effectively prosecuted this action on a partially contingent basis. Consequently, although the evidence shows that Morris James spent 433.6 hours litigating the Benchmark Bonuses, Gene paid only $31,635.70 for that work. That represents a blended hourly rate of

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11 *Id*. at *12; *Seinfeld v. Coker*, 847 A.2d 330, 333-34 (Del. Ch. 2000).

12 *Seinfeld*, 847 A.2d at 337.

13 *Sugarland*, 420 A.2d at 150.

14 *See Carlson v. Hallinan*, 925 A.2d 506, 546-48 (Del. Ch. 2006).

approximately $73. Not surprisingly, the Individual Defendants paid that amount without objection. The question is whether Morris James should receive anything more for their efforts and, in particular, the additional $100,000 fee they seek.

The public policy of Delaware includes "provid[ing] an incentive to stockholders to bring a derivative suit to enforce the rights of the corporation as a whole under circumstances in which filing suit to enforce only their individual rights would be prohibitively costly or otherwise impracticable, thereby leaving unchallenged actionable wrongs against the corporation."[15] Awarding the full amount of attorneys' fees sought here would foster that policy. Conversely, limiting the award to the reduced fee actually paid by Gene not only would undermine that policy, but also would benefit the corporate wrongdoers. Therefore, I find that Morris James is entitled to recover a reasonable amount of attorneys' fees to compensate them for the contingent aspect of their representation of Gene.

The amount Gene actually paid, according to Defendants, reflects the "reasonable amount of fees he incurred in prosecuting the Benchmark Bonus claim."[16] Defendants further argue that the requested success fee would not serve the purposes of the fee shifting authorized by either the common fund or corporate benefit doctrines. One of those purposes is "to prevent persons who obtain the benefit of a lawsuit without

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15 *Id.* at 547-48.

16 Defs.' Resp. to Pl.'s Application for Att'ys Fee Award ¶ 6.

contributing to its cost [from being] unjustly enriched at the successful litigant's expense."[17] Yet, Defendants assert that no individual or class, other than Gene, received an ascertainable benefit from the Benchmark Bonus claim.

To support their argument, Defendants repeatedly cite to this Court's decision in *Carlson v. Hallinan*. They note, for example, that in *Carlson* the plaintiffs only recovered their reasonable attorneys' fees as to time spent prosecuting their derivative claims.[18] Like the claim supporting the award of fees in *Carlson*, however, the Benchmark Bonus claim also was derivative in nature, and I determined that Gene was entitled to recover the reasonable attorneys' fees he incurred pursuing it. Thus, *Carlson* does not support limiting the fee award to the minimal amount Defendants would recognize.

The additional $100,000 Morris James seeks is reasonable in the circumstances of this case.[19] As a percentage of the benefit achieved, that amount plus the amount

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17 *Korn*, 922 A.2d at 412 (citing *Dover Historical Soc'y*, 402 A.2d at 1090).

18 Defendants also contend that Gene's challenge to the Benchmark Bonuses stemmed from a vindictive motive of damaging his brothers and Bomberger. That argument is neither persuasive nor supported by the evidence. Moreover, even if Gene challenged the Benchmark Bonuses because he believed they were intended to, and did, deprive him of the proper value of his shares, that would not detract from the fact that the Bonuses also represent a breach of fiduciary duty and a wrong committed against Benchmark.

19 My analysis focuses primarily on the first and third *Sugarland* factors, the benefit achieved in the action and the partially contingent nature of the undertaking. Gene's counsel acknowledge that the issues presented by the Benchmark Bonuses claim "were not complex or unique for an attorney familiar with Delaware

reimbursed directly to Gene, a total of $131,635, is less than 6.1 percent of the $1,687,151 recovered. This court frequently has approved applications for fees that far exceed that percentage of the recovery based on the creation of a common fund or monetary corporate benefit.[20]

The additional $100,000 requested also is reasonable in terms of the time spent by counsel and the imputed hourly rate for that work. Morris James avers that it devoted 433.6 hours to the Benchmark Bonuses claim, and Defendants have not questioned that number. Because the parties vigorously litigated that claim throughout extensive pretrial proceedings and trial, the time spent on it appears reasonable. Considering the total amount requested of $131,635, the hourly rate on a blended rate basis for the senior partner and associate of Morris James involved would be $304. That hourly rate is below the blended rates awarded by this court in other litigation and well below the standard

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corporate law." Aff. of Edward M. McNally in Support of Pl.'s Application ¶ 10. Still, there is no dispute about the quality of the work performed or the standing and ability of Plaintiff's counsel. Accordingly, I find that the relatively low percentage of the recovery sought in the Application adequately compensates for the fairly straightforward nature of the claim involved.

[20] *See, e.g.*, *Baupost Ltd. P'ship 1983 A-1 v. Providential Corp.*, 1993 WL 401866, at *3 (Del. Ch. Sept. 3, 1993) (upholding award of 13.04 percent of a settlement award in a derivative lawsuit as "well within the range of fee awards made by this court"); *Seinfeld*, 847 A.2d at 339 (finding attorneys' fee award of 10 percent of fund reasonable in a derivative lawsuit); i*d.* at 337 n.31 (listing three cases awarding fees of 23.5 percent, 25 percent, and 33 percent of their respective funds); *Thorpe v. CERBCO, Inc.*, 1997 WL 67833, at *6 (Del. Ch. Feb. 6, 1997) (awarding attorneys' fees of 33 percent of common fund in a derivative lawsuit).

rate of $550 per hour charged by Gene's lead counsel.[21] Based on these facts, I conclude that an award of $131,635 is appropriate and represents a reasonable attorneys' fee for prosecution of the Benchmark Bonuses claim.

The fact that Morris James, on Gene's behalf, seeks payment from Benchmark, rather than the Individual Defendants, reinforces my finding of reasonableness. As a minority stockholder of Benchmark, Gene will share in at least some of the burden of any award to Morris James. Furthermore, given the Individual Defendants' culpability, there is nothing inequitable about having them, as the collective owners of a majority of the Benchmark stock, bear more of the resulting cost.[22]

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[21] Because the benefit achieved in this case went to a closely-held corporation with only about five stockholders, including Plaintiff and the three Individual Defendants, no premium above standard rates is warranted despite the partially contingent nature of the claim. Morris James' request for $100,000 or just over 6 percent of the benefit achieved tacitly acknowledges this circumstance.

[22] The only other stockholder of Benchmark, Frank T. Fortunato, owns a small minority of the shares. Because he benefited from the monetary award to Benchmark, it is not unreasonable to require Fortunato to contribute something (albeit only indirectly through Benchmark) to reimburse the attendant fees.

III. CONCLUSION

For the foregoing reasons, I grant Plaintiff's Application for Attorneys' Fees and order Benchmark to pay $100,000 to Morris James LLP as compensation for its services on the Benchmark Bonuses claim.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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