IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE EMERSON RADIO SHAREHOLDER DERIVATIVE LITIGATION	)))	CONSOLIDATED C.A. No. 3392-VCL

MEMORANDUM OPINION

Date Submitted: January 18, 2011
Date Decided: March 28, 2011

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LASTER, Vice Chancellor.

The complaints in this consolidated derivative action challenged a variety of related-party transactions that nominal defendant Emerson Radio Corporation ("Emerson") allegedly engaged in at the behest of its controlling stockholder, The Grande Holdings Limited ("Grande"). After significant litigation activity, the parties negotiated a settlement, which I approved on January 18, 2011. The parties joined issue over an appropriate attorneys' fee award, with the plaintiffs seeking $1.5 million and the defendants proposing something less without specifying an amount. Although tempted to treat the fee petition as unopposed in light of the defendants' unhelpful failure to take a position, I have an independent duty to determine a fair award. I award $875,000, inclusive of expenses.

I. FACTUAL BACKGROUND

Grande is a Hong Kong-based holding company controlled by the Ho Family Trust. Christopher Ho is the sole beneficiary of the Ho Family Trust and controls Grande through the Trust. In 2005, Grande acquired a 37% stake in Emerson, a manufacturer of consumer electronics products. Grande continued to accumulate shares and achieved hard control in August 2006 with just over 50% ownership. Grande subsequently increased its stake to nearly 60%. Grande also owns major stakes in other companies that operate in the electronics industry, including Capetronic Display Ltd., Lafe Technology Ltd., and Sansui Electronics Co., Ltd.

As it accumulated shares, Grande gained representation on the Emerson board and in the executive suite. In December 2005, an associate of Ho's joined the Emerson

board. In March 2006, another associate of Ho's took over as Emerson's CEO. In July 2006, Ho became Chairman of Emerson's board.

Approximately one year after Grande acquired majority control, Emerson's Audit Committee began receiving reports that Emerson was engaging in related-party transactions with Grande and its affiliates. Many of the transactions involved loans to other Grande operating subsidiaries on terms that appeared to be advantageous to the subsidiaries and disadvantageous to Emerson.

Upon learning of the transactions, the Audit Committee engaged the law firm of Pinnisi & Anderson, LLP ("Pinnisi") to investigate. Pinnisi prepared an initial written report which concluded preliminarily that irregular transactions had occurred. In October 2007, the Audit Committee recommended that Emerson implement a list of financial controls and corporate governance enhancements. In November 2007, the board adopted the Audit Committee's recommendations.

In December 2007, a stockholder plaintiff filed a derivative action on behalf of Emerson. The complaint challenged the related-party transactions and alleged that Ho and his associates were treating Emerson like a wholly owned subsidiary rather than a public company.

On April 4, 2008, Pinnisi submitted its final written report, which detailed many problematic related-party transactions. The report concluded that Ho and Emerson senior management ignored Emerson's internal controls and caused Emerson to engage in the related-party transactions without proper authorization or documentation. The report

found that the transactions exposed Emerson to great risk, caused Emerson to suffer significant losses, and conferred disproportionate benefits on Grande and its affiliates.

As a result of the investigation, the Audit Committee succeeded in having Emerson account for outstanding amounts owed to Emerson from the related-party transactions. Emerson calculated the amount due as $929,772.69. An Audit Committee member disagreed, asserting that the number was higher. Pinnisi suggested the outstanding amounts ran in the range of $1.5 to $2 million. Grande and its affiliates repaid $929,772.69, but no more.

In May 2008, another Emerson stockholder filed a derivative action challenging the related-party transactions. It was consolidated with the first action, and discovery ensued. The defendants produced hundreds of thousands of pages of documents. The plaintiffs obtained discovery from third parties, including electronic files from Emerson's public accountant. The plaintiffs pursued and prevailed on two motions to compel and a request for clarification. The plaintiffs deposed eleven fact witnesses at locations in Hong Kong and the United States. The witnesses included the lead attorney who conducted the Pinnisi investigation and authored the reports, the members of the Audit Committee who supervised the investigation, the individual defendants, and Emerson's CFO.

In October 2010, the parties agreed in principle to a settlement pursuant to which Grande would pay $3,000,000 to Emerson and Emerson would adopt enhanced corporate governance procedures for related-party transactions. I approved the settlement but reserved decision on the amount of an appropriate fee award. Because Emerson will pay

the fee, the amount awarded will reduce dollar-for-dollar the size of the monetary benefit conferred on Emerson.

II. LEGAL ANALYSIS

When a plaintiff pursues a cause of action relating to the internal affairs of a Delaware corporation and generates benefits for the corporation or its stockholders, Delaware law calls for the plaintiff to receive an award of attorneys' fees and expenses determined based on the factors set forth in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980). "[T]he amount of an attorneys' fee award is within the discretion of the court." *In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005). In determining an appropriate award, a court applying Delaware law should consider:

> (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.

Id. at *3 (citing *Sugarland*, 420 A.2d at 149-50). "[T]his court has traditionally placed greatest weight upon the benefits achieved by the litigation." *In re Anderson Clayton S'holders Litig.*, 1988 WL 97480, at *3 (Del. Ch. Sept. 19, 1988) (Allen, C.). The time and effort expended by counsel is considered as a cross-check to guard against windfalls, particularly in therapeutic benefit cases. *See Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*, 986 A.2d 370, 396 (Del. Ch. 2010).

1. The Monetary Benefits Conferred

"In determining the size of an award, the courts assign the greatest weight to the benefit achieved in the litigation. 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." *Julian v. E. States Constr. Serv., Inc.*, 2009 WL 154432, at *2 (Del. Ch. Jan. 14, 2009) (footnotes and internal quotation marks omitted).[1]

"[T]his Court has a history of properly awarding lower percentages of the benefit where cases have settled well before trial." *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *13 (Del. Ch. Aug. 30, 2007). When a case settles early, this Court tends to award 10-15% of the monetary benefit conferred.[2] For example, in *In*

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[1] This decision does not discuss or consider fee awards where the benefit conferred consisted of a plaintiff claiming partial credit for increasing the consideration provided in an underlying transaction. Those scenarios present unique issues involving causation, quantification, and agency costs that render inapposite comparisons with true common fund and monetary benefit cases. *See generally Brinckerhoff*, 986 A.2d at 374, 384-87 (discussing issues presented); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 605-06, 617-23, 640-42 (Del. Ch. 2005) (same).

[2] *See, e.g.*, *Julian*, 2009 WL 154432 (awarding total of 8% when little time and effort were invested before settlement); *Korn v. New Castle Cty.*, 2007 WL 2981939 (Del. Ch. Oct. 3, 2007) (awarding 10% when "there was limited discovery, no briefing, and no oral argument . . . ."); *Seinfeld v. Coker*, 847 A.2d 330 (Del. Ch. 2000) (awarding 10% when case settled after limited document discovery and no motion practice); *Coleman*, 750 A.2d 1202 (awarding 10% where counsel did not take a single deposition or file or defend a pre-trial motion); *In re Josephson Int'l, Inc.*, 1988 WL 112909 (Del. Ch. Oct. 19, 1988) (awarding 18% when case settled after ten days of document discovery); *Schreiber v. Hadson Petroleum Corp.*, 1986 WL 12169 (Del. Ch. Oct. 29, 1986) (awarding 16% when case settled "[s]hortly after suit was filed").

re The Coleman Co. Shareholders Litigation, 750 A.2d 1202 (Del. Ch. 1999), "[p]laintiffs' counsel did not take a single deposition; nor did they file or defend a single pre-trial motion." *Id.* at 1212. Their efforts consisted only of reviewing documents and conducting "investigations and evaluations of the facts and law relating to the matter set forth" in the complaint. *Id.* (internal quotation marks omitted). Chancellor Chandler awarded 10% of the settlement fund. *Id.* at 1212-13.

When a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically including multiple depositions and some level of motion practice, fee awards range from 15-25% of the monetary benefits conferred.[3] A study of recent Delaware fee awards finds that the average amount of fees awarded when derivative and class actions settle for both monetary and therapeutic consideration is approximately 23% of the monetary benefit conferred; the median is 25%. *See* Richard A. Rosen, David C. McBride & Danielle Gibbs, *Settlement Agreements in Commercial Disputes: Negotiating, Drafting and Enforcement*, § 27.10, at 27-100 (2010).

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[3] *See, e.g.*, *In re Cablevision/Rainbow Media Gp. Tracking Stock Litig.*, 2009 WL 1514925 (Del. Ch. May 22, 2009) (awarding 22.5% where plaintiffs' counsel devoted nearly 5,000 hours to the case); Pl.'s Supplemental Mem. of Law in Supp. of the Proposed Settlement and Application for Att'ys' Fees and Expenses at 6, *Cablevision/Rainbow Media*, C.A. No. 19819-VCN (Del. Ch. July 23, 2008) (describing counsel's efforts as including the taking of depositions and review of hundreds of thousands of documents); *Gelobter v. Bressler*, 1991 WL 236226 (Del. Ch. Nov. 6, 1991) (awarding 16.67% where counsel pursued extensive discovery, including seventeen depositions); *Stepak v. Ross*, 1985 WL 21137 (Del. Ch. Sept. 5, 1985) (awarding 20% where plaintiff took extensive discovery).

"[H]igher percentages are warranted when cases progress further or go the distance to a post-trial adjudication." *Brinckerhoff*, 986 A.2d at 396; *see In re Telecorp PCS S'holders Litig.*, C.A. No. 19260-VCS, at 103 (Del. Ch. Aug. 20, 2003) (TRANSCRIPT) ("I could see holding out the full measure of 33 to maybe 35 percent [so] that there's a promise actually if you go to trial, it will be at the highest end of the range.") (quoted in *Brinckerhoff*, 986 A.2d at 396). "Cases in Delaware support a wide range of percentages for attorneys' fees, but thirty-three percent is 'the very top of the range of percentages' that the Court of Chancery will grant." *Korn*, 2007 WL 2981939, at *5 (quoting *Thorpe v. Cerbco*, 1997 WL 67833, at *6 (Del. Ch. Feb. 6, 1997)). In *Thorpe*, "plaintiffs' counsel did very high quality work, and . . . they fought their position with vigor and skill for approximately six years," including trial, appeal, and post-appellate proceedings. 1997 WL 67833, at *6. The Court therefore awarded one-third of the common fund, which the opinion described as "at the very top of the range of percentages that this court grants." *Id.*[4]

Awarding increasing percentages helps offset representative counsel's natural incentive to shirk.

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[4] *See, e.g.*, *Berger v. Pubco Corp.*, 2010 WL 2573881 (Del. Ch. June 23, 2010) (awarding a total fee of 31.5% where "lengthy and thorough litigation by counsel . . . resulted in a final judgment and not a quick settlement"); *Gatz v. Ponsoldt*, 2009 WL 1743760 (Del. Ch. June 12, 2009) (awarding 33% in case litigated extensively, including through an appeal in the Delaware Supreme Court); *Ryan v. Gifford*, 2009 WL 18143 (Del. Ch. Jan. 2, 2009) (awarding 33% of cash amount where plaintiffs' counsel engaged in "meaningful discovery," survived "significant, hard fought motion practice" and incurred nearly $400,000 in expenses); *Tuckman v. Aerosonic Corp.*, 1983 WL 20291 (Del. Ch. Apr. 21, 1983) (awarding 29% where litigated through trial and two appeals).

> The class attorney's egoistic incentive is to maximize his or her fees—awarded by the court if the action succeeds—with a minimized time-and-effort investment. This objective does not align with a both zealous and time-consuming prosecution of the class action, aimed at maximizing the amount of recovery for the class members.[5]

"The plaintiff's financial interest is in his share of the total recovery less what may be awarded to counsel, *simpliciter*; counsel's financial interest is in the amount of the award to him less the time and effort needed to produce it. A relatively small settlement may well produce an allowance bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and an appeal." *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972) (Friendly, C.J.). "When the lawyer gains 40 cents to the client's dollar, the lawyer tends to expend too little effort . . . . [H]e would not put in an extra $600 worth of time to obtain an extra $1,000 for his client, because he would receive only $400 for his effort." *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986) (Easterbrook, J.). Consequently, "plaintiff's attorneys have an incentive to settle prematurely and cheaply when they are compensated on the traditional percentage of the recovery basis." John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 689 (1986). Awarding an

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[5] Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 Yale L. & Pol'y Rev. 69, 71 (2004). For now-classic treatments of this problem, see Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. Legal Stud. 189, 198-202 (1987); Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 Cornell L. Rev. 529, 543-546 (1978); Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 Stan. L. Rev. 1125, 1133-39 (1970).

increasing percentage of the benefit "is at best a rough corrective . . . because it substitutes a small number of discrete increments for what is in fact a continuous process — the reduction in the attorney's expected future costs as the case progresses." Miller, *supra*, at 201. It nevertheless "partially mitigates the attorney-client conflicts." *Id.* at 201-02.

Plaintiffs' counsel obtained a tangible recovery for Emerson in the amount of $3,000,000. They invested significant effort in the case and conducted meaningful adversarial discovery. They obtained a large document production from the defendants, sought and obtained third-party production, took eleven fact depositions, and pursued two discovery motions and a request for clarification. This appears to have constituted the bulk of the fact discovery required for the case. By the same token, when the matter settled, plaintiffs still had some depositions to take, had not yet started expert discovery, and would have to conduct a trial and weather any appeal. In light of the stage at which plaintiffs settled, I regard this as a mid-stage case for which a range of 15-25% is appropriate. I start with an award of 25% or $750,000.

2. The Non-Monetary Benefits

In addition to a monetary recovery, the plaintiffs obtained the following corporate governance reforms:

- Emerson must keep in place its existing Global Finance and Accounting Policy and Procedure Manual, which subjects related-party transactions above a threshold amount to advance review and approval by a majority of the Company's independent directors.

- The dollar threshold for advance review of related-party transactions is reduced to $100,000.

- Management must provide a specified set of minimum information to the independent directors in advance of their review.

- All related-party transactions must be reported monthly to the Audit Committee.

- The Board must have at least two independent directors.

- Emerson must have an Audit Committee and a Nomination Committee, even if one or both committees are no longer required for Emerson because it delists, changes its listing, or is listed as a controlled company.

- Nominations for independent directors must be approved by a majority of Emerson's independent directors.

- Emerson must maintain an Internal Auditor.

- Emerson cannot retain as corporate counsel any lawyer who has represented the individual defendants or Grande at any time within the last two years.

Emerson may not alter, amend, or repeal these restrictions for a period of two years. After two years, for an additional period of two-and-a-half years, the restrictions cannot be altered, amended, or repealed without the approval of a majority of the independent directors. The restrictions remain in place if Emerson changes its listing or delists.

It is difficult to price these benefits, and the parties have not provided me with helpful precedents. The plaintiffs were not the sole cause of the reforms: The Audit Committee caused Emerson to implement variants of most of the requirements, then the plaintiffs improved on its work. Many of the reforms duplicate existing requirements of federal law and stock exchange listing standards, although the settlement provides continuing protection in the event Emerson changes its listing or delists. The settlement

likewise ensures that Emerson maintains its Nomination Committee, even though as a controlled company Emerson is not required to have one.

For defendants, therapeutic benefits and supplemental disclosures are cheap and easy gives. There is danger in allowing plaintiffs to claim significant incremental credit for therapeutic benefits when (i) the defendants have paid a fixed amount of tangible consideration and (ii) awarding fees for the therapeutic benefits will increase the plaintiffs' attorneys' share of that consideration. Ideally, plaintiffs' lawyers should be seeking to enlarge the total settlement pie by extracting more tangible consideration from the defendants, not finding ways to argue for a bigger share of the existing pie. In this case, plaintiffs' counsel suggests that the combination of cash plus therapeutics should entitle them to 50% of the tangible consideration, well above the 33% that this Court has regarded as the "very top of the range" that should be reserved for those attorneys who take a case the full distance through trial and appeal.

In an effort to link an award for the therapeutic benefits to a real-world metric, I assume that without the measures in place, Emerson faced some threat of additional related-party transactions comparable to what previously occurred. Those transactions caused harm that the parties have priced at approximately $3.9 million — $929,772.69 recovered by the Audit Committee and $3 million by the litigation. The defendants argued persuasively that their experience with the Audit Committee and this litigation sensitized them to the risks of engaging in related-party transactions with a publicly traded Delaware entity. I put the risk of recurrence at 25% without the measures in place. The corporate governance provisions eliminated that risk and accordingly conferred a

benefit of roughly $1 million (25% x $3.9 million). The Audit Committee and the Pinnisi firm paved the road to reform, so the plaintiffs must share credit with them. I allocate credit equally between the two groups, leaving the plaintiffs with 50% credit for a $1 million benefit, which equates to $500,000. Using the same 25% figure for the litigation stage that I applied to the monetary benefits, the plaintiffs are entitled to an incremental fee award of $125,000 for the therapeutic benefits.

3. The Time and Effort of Counsel

The time and effort expended by counsel serves a cross-check on the reasonableness of a fee award. *See Brinckerhoff*, 986 A.2d at 396. I do not question the effort that the plaintiffs expended. They represent that they invested 2,136 hours in the case, which is a realistic number. An aggregate award of $875,000 works out to an effective hourly rate of $410 per hour. That level of compensation does not confer an unwarranted windfall on plaintiffs' counsel.

4. The Relative Complexity of the Litigation

The fee award in this case does not merit any adjustment for complexity. Although the related-party transactions were somewhat opaque, the plaintiffs had the benefit of the guidance provided by the Pinnisi reports.

5. Contingency Risk

Plaintiffs' counsel pursued this case on a contingent basis. They invested a significant number of hours and incurred expenses of $117,687.14. Unlike when entrepreneurial plaintiffs' firms routinely file representative actions against mergers, knowing that the defendants' ability to issue supplemental disclosures and the hydraulic

pressure of deal closure will combine to create a ready-made settlement opportunity, plaintiffs' counsel here did not get into the case with an obvious and well-marked exit in sight. The defendants litigated vigorously, had strong defenses, and could have forced the plaintiffs to go the distance. Accordingly, in undertaking this representation, plaintiffs' counsel incurred true contingent fee risk. Had they not, I would have considered reducing the award.

6. The Standing and Ability of Counsel

The defendants do not contest the standing and ability of plaintiffs' counsel. The plaintiffs' lawyers who brought this case are well-known practitioners who competently prosecuted the action. This factor does not merit an upward or downward adjustment.

III. CONCLUSION

Plaintiffs' counsel are awarded a fee of $875,000, inclusive of expenses. **IT IS SO ORDERED.**