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

IN RE AXA FINANCIAL, INC. SHAREHOLDERS LITIGATION	))	Consolidated C.A. No. 18268

MEMORANDUM OPINION

Submitted: March 20,2002
Decided: May 16,2002

Corrected: May 22, 2002

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LAMB, Vice Chancellor

INTRODUCTION

This consolidated litigation was filed in response to the proposed acquisition of the publicly owned shares of AXA Financial, Inc. ("Financial" or the "Company"), a Delaware corporation, by AXA Group ("AXA"), the owner of approximately 60% of the Financial's 433 million outstanding shares of common stock. This action was brought as a class action on behalf of all Company shareholders (except defendants and their affiliates) against AXA, the Company and its directors, seeking injunctive and other relief on the. grounds that the proposed transaction was unfair to Financial's minority shareholders in a number of respects, including price.

The consideration initially proposed for the acquisition of the 173 million shares of Company common stock held by the public consisted of $32.10 in cash and 0.271 of an AXA American Depositary Share ("ADS") per Company common share. After a period of negotiation, the parties to the litigation reached a settlement agreement increasing the deal consideration to $35.75 in cash and 0.295 of an ADS. The increase in the cash portion of the deal alone was worth more than $631 million to the Company public stockholders. Following further discovery, that agreement was incorporated into the November 2, 2001 Stipulation of Settlement now before the Court for approval. After notice to the class, a hearing was held to consider the settlement proposal on March 20, 2002.

Three class members (G. Clinton Kelley, Clarence D. Hicks and Jack B. Gehring) have raised objections to the proposed settlement. The objectors question that size of the application for fees and expenses made by plaintiffs' counsel ($3 million) and disclosures relating to it in the Notice of Pendency of Class Action ("Notice"). One (Kelley) also objects to the scope of the release contemplated by the settlement because he states that he wishes to be free to proceed with an action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law relating to the transaction that is the subject of the litigation. For the reasons discussed below, the court overrules the objections. Moreover, the court concludes that the settlement proposed is fair, reasonable and adequate and in the best interests of the class; for these reasons it should be approved in the form submitted. Finally, I conclude that the plaintiffs' application for an award of attorneys' fees and costs, to be paid entirely by AXA, is reasonable and appropriate and should be approved.

II. BACKGROUND

Financial was a life insurance, annuity and asset management company. Its financial advisory and insurance services were conducted through various wholly owned subsidiaries, including The Equitable Life Assurance Society. The Company conducted asset management and investment banking services through various subsidiaries, including its 70% owned subsidiary, Donaldson, Lufkin & Jenrette ("DLJ") until it sold its interest in DLJ in 2000.

From time to time, AXA considered acquiring the public minority. interest in Financial. In response to the suggestion in the spring of 2000 that such a transaction might be proposed, Financial created a Special Committee comprised of the five of independent, disinterested members of its board of directors. In early July of that year, the Special Committee was told that AXA would not make an offer at that time. Nevertheless, the Special Committee continued in existence and retained Simpson, Thatcher & Bartlett and Wasserstein Perella to act as its legal and financial advisers, respectively, in contemplation that such an offer might be made at a later date. Shortly thereafter, AXA agreed to sell DLJ and determined to use the proceeds of that sale to fund the cash portion of an offer to acquire the public minority interest in the Company. Its initial proposal was announced August 30, 2000.

A series of 14 complaints were filed in this court challenging the proposal, charging that the price offered was inadequate and unfair.[1] These complaints were later consolidated for all purposes. Plaintiffs' counsel retained an expert financial adviser, Roger W. Miller, a former managing director of Salomon Brothers Inc, and worked with him to develop an appropriate valuation for Financial's minority shares. According to his affidavit filed in connection with the settlement, Miller's initial view was that AXA would need to increase the amount offered by 5 % to 10 % per Financial share in order to make it fair.[2]

AXA thereafter undertook simultaneous negotiations with the Special Committee and plaintiffs' counsel. During this period, the market value of the ADS fell from $79 on August 29, 2000 to $65.13 on October 16, 2000, a decline of 17.5 % . According to Miller, this decline was due to a general decline in stock prices in the financial services sector and to a decline in the exchange rate of the Euro for the U.S. dollar.

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[1] An additional action was filed in the Supreme Court of the State of New York, New York County. That action has been stayed by the parties pending the entry of a final judgment in this action.

[2] Miller Aff. at ¶12.

On October 17, 2000, plaintiffs' counsel met with representatives of AXA and negotiated an agreement in principle to settle the litigation on terms including an increase in both the cash and stock portions of the payment. AXA and the Special Committee also met on that day and reached agreement on the same financial terms. In his affidavit, Miller describes the settlement terms as follows:

> 14. On October 17, 2000, I was informed that AXA Group was prepared to increase its offer to $35.75 in cash plus 0.295 of an ADS per AXA Financial share in response to the negotiations between AXA Group and plaintiffs' counsel and between AXA Group and AXA Financial's Special Committee (the "Final Acquisition Proposal"). Based upon the closing price of an ADS of $65.13, on October 16, 2000, the day before the announcement of the Final Acquisition Proposal, the Proposal had a value of $54.96, consisting of $35.75 of cash and $19.21 of an ADS (0.295 x $65.13). This represented an increase of $1.46, or 2.7 % , over the $53.50 contained in the Initial Acquisition Proposal; and premia of 25.3 % and 38.7 % , respectively, over the 30day and 90-day average prices of AXA Financial common stock.
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> 15. Due to the ADS price decline referred to above, the Final Acquisition Proposal, while only a modest premium of 2.7% over the Initial Acquisition Proposal, was actually a larger increase in both the cash and stock portions of the consideration. The cash portion was in fact improved by 11.4% and the stock portion by 8.4%. Hence, AXA Financial's public minority stockholders would not only receive more cash, but also have a larger participation in the future prospects of the AXA Group. The Final Acquisition Proposal was above the minimum level that I considered fair to AXA Financial's public minority stockholders in my analysis.

On October 17, 2000, Wasserstein Perella presented its fairness opinion to the Special Committee, which then recommended acceptance of the Final Acquisition Proposal to the full Financial board of directors.

Negotiations over the payment of counsel fees and expenses ensued, culminating in a Memorandum of Understanding ("MOU") on December 7, 2000 in which AXA agreed to pay, in addition to the consideration to be paid to the class, fees and expenses of plaintiffs' counsel up to $3 million. The MOU contains an acknowledgment that AXA took into account the existence and prosecution of the litigation and the desirability of reaching a settlement of the claims asserted therein when it decided to increase the consideration offered in the transaction. Thereafter, the parties engaged in confirmatory discovery that eventually led to the Stipulation of Settlement now before the court.

III. THE OBJECTIONS

The Objectors raise several issues. Hicks objects that the Notice fails to inform class members about the nature of the claims asserted in the litigation (i.e. "failure to make financial disclosure, fraud, auditor malpractice") and, thus, does not allow a stockholder to make an informed judgment about the adequacy of the settlement. He and Kelley both object that the Notice does not reveal the total value of the Settlement or the number of shares of Financial common stock belonging to members of the class. Without that information, "a shareholder cannot make an informed decision on the amount and fairness of the proposed attorney fees." Kelley also complains that the Notice fails to inform stockholders of the source of the fee payment and how much of the $3 million is for expenses. .

Gehring's objection is limited to the amount of the fee request, which, in his opinion, should be cut from $3,000,000 to $3,000. In his submission, he observes that it would take over a month for the court or the attorneys to count $3 million in $1 bills and asks: "Is their love of money that much greater than the love of justice? The $3,000 award is correct."

Finally, Kelley objects to the scope of the proposed release in light of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. The proposed Settlement would release all claims by all members of the class, under federal or state law "relating to the Proposed Transaction, the Revised Transaction, the discussions and negotiations pertaining thereto, the actions of the Special Committee, the tender offer and subsequent merger and any public filings or statements" made in connection therewith.

Kelley's objection states: "This is a consumer class action. To the detriment of consumers who owned shares of stock in the Defendant, it has been alleged that AXA breached its duties to stockholders by not paying a fair price . . . to AXA Financial's public shareholders." Because, he states, the Pennsylvania Consumer Fraud statute insures a minimum recovery of $100 to any individual bringing an action thereunder, the proposed settlement is unfair and inadequate as it relates to Pennsylvania residents who "should be paid at least $100.00, or actual damages, which ever is greater, for each harm as they are entitled to under Pennsylvania law." Kelley's objection does not give an indication that he, or anyone else, has initiated an action under the Pennsylvania law in question.

Kelley appeared at the Settlement Hearing through counsel. His counsel was unable, however, to explain the relationship between the subject matter of this lawsuit and the Pennsylvania consumer fraud statute he cites, other than to state that it was "a possible area of relief that Mr. Kelley would have if he would be permitted to proceed on any claim directly."

IV. DISCUSSION

A. The Objections

1. The Form of Notice

The Objectors make a valid point that the Notice might have (but does not) disclose either the number of shares owned by members of the class or the gross dollar value of the increase in consideration realized, in part, by the settlement. Instead, the Notice advises class members that AXA owned 60% of the Financial. common stock and discloses the specifics of the change in terms resulting from the combined efforts of the Special Committee and the plaintiffs' lawyers, without telling the reader, for example, that the change in the cash portion alone was worth more than $63 1 million to the class.

While the Notice might have been more complete if it had included this information, its absence is not a valid reason to deny the settlement or to require a supplemental disclosure to the class. On the contrary, the Notice itself advises recipients to contact plaintiffs' counsel to obtain additional information and provides their addresses for that purpose. The Notice also expressly advises recipients that it "is not all-inclusive" and that, for further details "members of the Class are referred to the Court files. " In addition, the information in question (i.e., the number of Financial common shares held by members of the class) was easily and readily discernable from other public sources. For these reasons, the omission of this information from the Notice is not material. Moreover, it is likely that inclusion of the omitted information would not have raised questions about the settlement but, instead, tended to assuage concerns about both the *bona fides* and reasonableness of the settlement and the propriety of the fee award.

Hicks's objection that the Notice does not inform the class of "a basis for the settlement" seems to be a complaint that the Notice does not adequately explain the nature of the claims asserted in the litigation. As the Objector asks, was the lawsuit about "the failure to make financial disclosures, fraud, auditor malpractice?" This objection reflects a lack of familiarity with Delaware fiduciary duty law. The Notice does disclose the complaint's central allegation of wrongdoing as follows: "Plaintiffs alleged in the Lawsuit that AXA, with the acquiescence of AXA Financial's Board of Directors, breached its duty to treat AXA Financial's public shareholders with entire fairness in connection with the Proposed Transaction to enable AXA to capture for itself AXA Financial's future potential without paying a fair price to AXA Financial's public shareholders." This disclosure adequately informs the members of the class of the nature of the claim being settled, i.e., one based on an alleged breach of the fiduciary duty to treat the Financial public stockholders with entire fairness in the squeeze-out merger.

The final objection to the form of the Notice-that it does not disclose "how the attorney fees will be paid" -is factually incorrect. At page 10, the Notice states that "Defendant AXA has agreed to pay the amount of fees and expenses the Court awards." Thus, there should have been no concern that the payment of the fee would diminish the amount of the benefit realized by the class.[3]

2. The Scope of the Release

Kelley's objection based on the application of the Pennsylvania consumer fraud statute to the operative facts of this case was not developed factually or legally, either in his written submission or his counsel's oral presentation at the Settlement Hearing. For this reason, there is nothing before the court explaining how the consumer fraud laws of Pennsylvania or any other state could apply to the transaction at issue here. Kelley's counsel was specifically invited to explain the nexus between a consumer fraud law

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[3] Kelley also faults the Notice because it does not break down the amount of expenses to be reimbursed to plaintiffs' counsel out of the $3 million application. This information, too, could easily have been learned by examining the court's docket file or by communicating with plaintiffs' counsel.

and claims arising under Delaware fiduciary duty law governing parent/subsidiary merger, but was unable to provide any useful information.

Contrary to Kelley's bald assertion that "This is a consumer class action, " this case presents a clear example of an action arising out of the fiduciary relationships defined under Delaware law that exist between and among a Delaware corporation and its stockholders and directors. Cases of this sort are true class actions that can and should be certified under Rule 23(b)(l) and (2) of the Court of Chancery Rules.[4] In such cases, it is ordinarily true that, when a settlement occurs, the release obtained and legal principles of issue preclusion will bar members of the class from litigating claims based on the same factual predicate in another forum? Thus, in the absence of a more complete explanation of the nature of the claim available under Pennsylvania law, Kelley's objection that some members of the class might have another, unasserted claim arising out of the same factual predicate does not provide an adequate ground on which to disapprove the settlement.

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[4] *Hynson v. Drummond Coal Co.*, 601 A.2d 570,575 (Del. Ch. 1991).

[5] *Nottingham Partners v. Dana, 564* A.2d 1089, 1105 (Del. 1989); *Matsushita Elec. Indus. Co. v. Epstein, 516* U.S. 367, 369 (1996).

Moreover, "[t]he universal rule is that internal affairs of a corporation, including 'defining the attributes of shares . . . and protecting shareholders, ' are governed **by** the law of the corporation's domicile."[6] Suits such as this that seek to enforce the fiduciary duties of directors and controlling stockholders of Delaware corporations play an integral part in regulating the internal affairs of Delaware corporations. As among the corporation,, its stockholders and those fiduciaries, the resolution of claims relating to the discharge of those duties is governed by Delaware law,[7] not by the consumer protection (or even the corporation laws) of a sister state.

B. Class Certification

An important function of this court in reviewing a proposed settlement is to ascertain whether the action may be maintained as a class action under Rule 23.[8] Here it **is** apparent from a review of the record and undisputed that all of the requirements of Rule 23(a) are satisfied. No objector takes issue with this conclusion. The class consists of many thousands of holders of

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[6] ***Hynson,*** 601 A.2d at 576, quoting ***CTS Corp. v. Dynamics Corp. of America,*** 481 U.S. 69, 94 (1987).

[7] ***CTS Corp.,*** 481 U.S. 69, 94. Of course, the disclosure and anti-fraud provisions of the federal securities laws also govern aspects of the relationship between the corporation and its stockholders.

[8] ***Prezant v. DeAngelis,*** *636* A.2d 915 (Del. 1994).

173 million shares of the Company's common stock and is obviously too numerous to join in a single action. The complaint focuses on the question whether the defendants breached their fiduciary duties owed equally to all members of the class of Financial stockholders. Common questions of law and fact exist and the claims of the plaintiff stockholders are typical of the claims of the class. Finally, the record reflects that the representative parties will fairly and adequately represent the interests of the class. There are no conflicts of interest between plaintiffs and other class members. Further., plaintiffs retained counsel who are both well known to the court and highly experienced in litigation of this type.

It is also appropriate to certify this case under Court of Chancery Rules 23(b)(l) and (2). Generally speaking, actions challenging the exercise of fiduciary duties in corporate transactions are properly certified under those rules.[9]

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[9] *See, Nottingham Partners v. Danna*, 564 A.2d 1089 (Del. 1989); *Hynson*, 601 A.2d at 575-79.

C. The Terms of the Settlement

Voluntary settlement of complex corporate litigation has long been favored by Delaware courts. [10] The job of the court in reviewing a proposed settlement is to ascertain that its terms are fair and reasonable. [11] Without deciding the merits of the case, the court must consider the nature of the claims asserted, the possible defenses and the factual circumstances and then apply its own business judgment to determine whether the proposed settlement is fair. Of particular importance is the balance between the strength of the claims being compromised against the benefits secured for the class by the settlement. [12]

Here, the record supports the conclusion that the simultaneous negotiations between AXA and the Special Committee and AXA and plaintiffs' counsel produced revised terms for the buy-out proposal that provided a fair and adequate basis on which to resolve the claims asserted in the litigation. Importantly, while the complaint does state an entire fairness

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[10] *Nottingham Partners*, 564 A.2d at 1102; *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986); *Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 100 (Del. 1979); *Rome v. Archer*, 197 A.2d 49, 53-54 (Del. 1964).

[11] *Nottingham Partners*, 564 A.2d at 1102; *Polk*, 507 A.2d at 536.

[12] *See*, *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279 (Del. 1989).

claim arising out of the squeeze-out merger at issue, the background and procedural history of this matter suggest that plaintiffs would have encountered difficulty with their claim had the matter proceeded to trial. As previously noted, the Company formed a Special Committee consisting of five outside, independent directors. That committee was advised by skillful legal and financial experts and appears to have engaged in arm's length negotiations with AXA that resulted in a substantial increase in the original proposal. As a result, the cash portion of the consideration to be paid in the merger was increased by 11.4 % and the stock portion by 8.4 % . At the conclusion of these negotiations, Wasserstein Perella rendered its fairness opinion, on which the Special Committee relied in recommending the transaction to the full board of directors. Nothing in the record suggests that AXA exercised or sought to exercise any undue or coercive influence in these negotiations.

In the circumstances, there is reason to believe that, had the case been pursued to trial, the initial burden of adducing evidence of unfairness would have fallen on plaintiffs.[13] Given their own financial expert's opinion that the revised terms were fair from a financial point of view to the public

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[13] *Kahn v. Lynch Communications Systems,* 638 A.2d 1110 (Del. 1994).

stockholders, plaintiffs no doubt would have encountered substantial obstacles in meeting that burden. Moreover, if, as it appears, there was a properly functioning Special Committee in place, its approval of the transaction is itself strong evidence of fairness.[14]

Against this assessment of the merits of the action, the court must weigh the substantial benefit achieved in the settlement. In absolute terms, the settlement provided for an increase in the cash portion of the consideration from $32.10 to $35.75, an increase of $3.65 per share, and of the stock portion from 0.2709 to 0.295 ADS per Financial share. Thus, the cash portion of the increase in consideration was alone worth a total of $631 million to the class. Comparing the overall value of the initial proposal with the overall value of the revised transaction on the dates they were announced, the increase in value is less, due to the interim decline in the market value of an ADS. Nevertheless, if one compares the value of the two proposals as of the date the settlement was announced, the increase in value is $5.22 per Financial share ($3.65 cash and $1.57[15] in stock) or a total benefit of

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[14] *See, e.g.. Weinberger v. UOP, Inc.*, 409 **A.2d 701 (Del. 1983).**

[15] **The figure is calculated by multiplying 173 million, the number of shares in the class, by $1.56, the value of 0.024 of an ADS at a market price of $65.13.**

$903 million.[16] Given the significant benefits achieved at least in part by the litigation, the terms of the settlement appear fair and reasonable. Exercising its own business judgment, the court is persuaded that the settlement should be approved and the litigation terminated on that basis.

D. The Fee Application

Plaintiffs' counsel have applied for an award of fees and expenses totaling $3 million. In the Stipulation of Settlement, AXA agrees that it will pay the amount of fees and expenses awarded by the court, up to $3 million, and agrees not to oppose any application for fees and expenses within that framework.

In awarding fees in class action litigation, Delaware courts typically consider a number of factors, including the following: the results achieved in the litigation, the contingent nature of the fee arrangement, the amount of time and effort applied, the complexities of the engagement, the quality of the work performed, and the standing and ability of the lawyers involved.[17] Where, as

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[16] The figure of $250 million that appears earlier in this opinion is taken from the Miller Affidavit and compares the difference in value of the two proposals on the date of their respective announcement. Again, this lower figure results from the fact that the stock portion of the transaction, even though the amount of stock was increased in the settlement, was worth less at the time of the settlement than it had been at the time the initial proposal was announced, due to changing market conditions.

[17] *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (1980).

here, the fee is negotiated after the parties have reached an agreement in principle on settlement terms and is paid in addition to the benefit to be realized by the class, this court will also give weight to the agreement reached by the parties in relation to fees. [18]

However one calculates the benefit resulting (at least in part) from the litigation, it is measured in the hundreds of millions of dollars. Even recognizing that the litigation was not the sole reason for this increase, the benefit certainly is supportive of the fee request that plaintiffs' counsel make. Obviously, if the litigation had been the sole cause of such a benefit, the amount of that benefit could justify a fee far higher than $3 million.

The contingent nature of plaintiffs' counsels' fee arrangement also supports the application that is made. Plaintiffs' counsel undertook this assignment with no assurance that they would be paid anything for their work. Where, as here, their efforts result in a substantial benefit to the class, the fee awarded should reflect their willingness to represent the class without promise of payment of any kind.

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[18] Of course, this observation derives from and depends on the court's sense of confidence that the negotiations over the fee agreement were conducted in good faith and had no effect on the other terms of the settlement.

At the same time, while the nature of the transaction at issue certainly called for sophisticated counsel who are skilled in litigating complex corporate cases, there was nothing notably difficult or novel about the assignment. From the record, it seems that the most difficult part of the engagement involved understanding the valuation issues presented (with Miller's help) and functioning effectively to negotiate better terms with AXA. By contrast, the activity related to actually litigating the claim was limited to confirmatory discovery and presentation of the settlement. The amount of time devoted to the matter by all 16 law firms representing the class (a total of 1,140 hours, slightly more than half of which was spent after the MOU was signed) clearly reflects the absence of intense litigation activity.

Weighing these factors leads to the conclusion that an award of fees and expenses of $3 million is justified in this case, particularly by reference to the enormous benefit created, at least in part, by the litigation. No doubt, an award of that size is high when measured by the amount of time spent by plaintiffs' counsel (representing an hourly rate of more than $2,630); nevertheless, this court has recognized in the past that the hourly rate represented by a fee award is a secondary consideration, the first issue being

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In reaching this conclusion, the court has considered and rejected Gehring's objection to the size of the fee and suggestion that $3,000 should be adequate compensation for counsels' efforts. However well intentioned this objection may be, it does not present any valid reason to reject the fee petition or to reduce the amount of the award. One need only consider that the litigation played a part in producing a benefit to the class worth many hundreds of millions of dollars to realize that the objection to the sheer size of the fee award lacks context and persuasive power.

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[19] ***In re Fort Howard Corp. Shareholders Litig.***, Del. Ch., Cons. C. A. No. 9991, tr. at 16-17, Allen, C. (Sept. 29, 1989); ***In re Metro Mobile CTS, Inc. Shareholders Litig.***, Del. Ch., Cons. C.A. No. 12300, mem. op. at 6-7, Berger, V.C. (Aug. 18, 1993).

[20] ***See, e.g. Dagron v. Perelman***, Del. Ch., C.A. No. 15 101, tr. at 49, 5 1,. Chandler, C. (Aug. 29, 1997) (awarding fee equal to approximately $3,500 per hour).

the size of the benefit created.[19] In addition, the implied hourly rate, while high, is not out of line with those in other cases in which plaintiffs' counsel have achieved a significant benefit to the class with only modest litigation efforts.[20] Finally, as noted earlier, the fee was negotiated at arm's length after the terms of the settlement were set and is to be paid in addition to the benefit realized by the class. These facts give the court some added assurance that the fee bears a reasonable relationship to the contribution made by plaintiffs' counsel to the settlement.

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[20] ***See, e.g. Dagron v. Perelman***, Del. Ch., C.A. No. 15 101, tr. at 49, 5 1,. Chandler, C. (Aug. 29, 1997) (awarding fee equal to approximately $3,500 per hour).

V. CONCLUSION

For all the foregoing reasons, the objections are overruled. The consolidated action will be certified as a class action pursuant to Court of Chancery Rules 23(b)(1) and (2), and the proposed settlement approved as fair, reasonable and adequate. In addition, plaintiffs' counsel will be awarded fees and expenses of $3 million to be paid in accordance with the terms of the Stipulation of Settlement. To this effect, the court has today entered an Order and Final Judgment in the form submitted at the Settlement Hearing.

Stephen P. Lamb

Vice Chancellor