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

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IN RE PLAINS RESOURCES INC. :
SHAREHOLDERS LITIGATION : C.A. No. 071-N
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MEMORANDUM OPINION AND ORDER

Submitted: January 18, 2005
Decided: February 4, 2005

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LAMB, Vice Chancellor.

I.

Before the court is the fee application following the settlement of this matter. In connection with the settlement, the plaintiffs' counsel claim credit for the entire $67 million of benefit conferred to the shareholders, as well as the supplemental disclosure, and apply for attorneys' fees and expenses in the amount of $3,250,000. The defendants challenge the causation between the litigation and the first $56 million of benefit, and argue for a minimal or incidental causation relating to the second $11 million of benefit. A hearing was held January 18, 2005.

For the reasons set forth below, the plaintiffs' application for attorneys' fees and expenses is granted in the amount of $1,100,000, inclusive of expenses.

II.

In late summer 2003, David Capobianco, Vice President of Vulcan Energy, discussed with James C. Flores, Chairman of the Board of Plains Resources, Inc.,[1] and John T. Raymond, President and Chief Executive Officer of Plains, the potential acquisition of Plains. On November 19, 2003, Plains announced that Vulcan proposed to acquire Plains for $14.25 per share (the "Initial Offer"). The merger terms provide that, if successful, Flores and Raymond would together receive an 11% interest in Vulcan.

[1] Plains is a Delaware corporation in the mid-stream energy sector, with its chief asset being an ownership interest in Plains All American Pipeline ("PAA").

Shortly thereafter, five suits were filed as putative class actions on behalf of the Plains public shareholders, alleging, *inter alia*, that the Plains directors breached their fiduciary duties by favoring the interests of Flores and Raymond to the detriment of the other members of the class. The cases were later consolidated into this litigation.

In response to the Initial Offer, Plains established a Special Committee, which was composed of directors William M. Hitchcock and William C. O'Malley,[2] to assess the offer. The six-member board, including Flores, resolved not to approve any transaction involving Vulcan or any third party without a "prior favorable recommendation by the special committee." On January 21, 2004, the Special Committee rejected Vulcan's offer as financially inadequate, but expressed an interest in further negotiation. On January 23, the plaintiffs' counsel and their financial advisor presented their analysis of the Initial Offer by telephone to the Special Committee, and later, at the request of the Special Committee, delivered a written report.

Negotiations ensued. On February 9, 2004, Vulcan proposed to increase its offer to $16.75 (the "Revised Offer"). On February 18, the Special Committee's investment banker, Petrie Parkman & Co., issued a fairness opinion. The Special Committee recommended that the full board of directors approve the merger

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[2] Hitchcock and O'Malley are purportedly the only two independent directors on the Plains board. However, although O'Malley did not have an ownership interest or directorship in PAA, he had a business and/or personal relationship with Flores and Raymond. Schulman Decl. ¶ 24.

agreement and recommend it to the shareholders of Plains. The full board, with Flores not participating, followed that recommendation.

Shortly after the merger agreement was signed, a third party ("Leucadia" or the "Pershing Group") submitted an offer to acquire Plains for a combination of cash and non-cash with an alleged value of $17.60 per share. The Special Committee rejected this offer the day after it was submitted. After learning of the competing bid, the plaintiffs filed their first amended consolidated class action complaint, alleging that the defendants breached their fiduciary duties by failing to adequately explore the offer. Leucadia later revised its offer on two occasions, both with alleged values of no less than $18. The Special Committee rejected both offers.[3]

On June 23, 2004, Plains filed its definitive proxy statement with the Securities and Exchange Commission and disseminated it to shareholders. The statement revealed for the first time that one of the two members of the Special Committee, Hitchcock, resolved to vote his own shares against the merger because, according to the proxy statement, he believed the price had become inadequate due to changing market conditions. The proxy statement also revealed that Petrie Parkman issued another fairness opinion in June.

[3] The plaintiffs later conceded that the Special Committee exercised sound business judgment in rejecting the competing offer because the value of the non-cash items in the offer was uncertain.

The plaintiffs filed their second amended complaint, alleging, *inter alia*, that the proxy statement contained material misrepresentations and omissions.[4] The plaintiffs also moved for expedited proceedings, including the expedited depositions of four witnesses. On July 9, 2004, the plaintiffs filed their motion for a preliminary injunction, opening brief and affidavits.

During this time, the defendants' counsel contacted the plaintiffs' counsel to inquire into the possibility of a settlement. In response, the plaintiffs' counsel insisted that any settlement must include a substantial increase in the consideration to be paid to the Plains shareholders as well as satisfactory supplemental disclosures.

On July 11, 2004, Capobianco advised both members of the Special Committee that $17.25 was Vulcan's final offer ("Final Offer"). Hitchcock again rejected the proposal as inadequate, but O'Malley recommended it for board approval.

Before presenting the offer to the full Plains board, Vulcan's counsel contacted the plaintiffs' counsel to discuss a settlement. The plaintiffs' counsel accepted the $17.25 price, but reserved the right to review the approval process and

[4] The misrepresentations and omissions included the reasons for Hitchcock's opposition to the merger, the financial analyses, considerations in Petrie Parkman's June fairness opinion, and the reasons for the board to approach Vulcan and ask the consideration to be increased to $17.50. Schulman Decl. ¶ 37.

the disclosures to the Plains shareholders. The same evening, the Plains board voted to approve the offer.

On July 12, 2004, Vulcan and Plains publicly announced the increase in the merger consideration to $17.25. On July 22, the shareholders approved the deal, with 54.49% of shares voting in favor of the transaction.

On August 9, 2004, the parties signed a memorandum of understanding (the "MOU"). However, the parties were unable to agree in the MOU upon the causation language or the amount of attorneys' fees for the plaintiffs' counsel. Three days later, the parties filed a stipulation of settlement (the "Stipulation") with the court. Again, the attorneys' fees and the causation language were left unresolved.

The court approved the settlement on December 20, 2004, reserving the amount of the fee award for a later hearing, which was held on January 18, 2005.

III.

It is well settled in Delaware that the "common corporate benefit" doctrine provides a basis for awarding attorneys' fees and expenses in corporate litigation.[5] The doctrine provides that where a litigant has conferred a common monetary or therapeutic benefit upon an identifiable class of stockholders, all of the stockholders should contribute to the costs of achieving that benefit.[6] In a situation

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[5] *United Vanguard Fund, Inc. v. TakeCare, Inc.,* 727 A.2d 844, 850 (Del. Ch. 1998) ("*TakeCare II*").

[6] *Weinberger v. UOP, Inc.,* 517 A.2d 653, 656 (Del. Ch. 1986).

where corporate defendants take actions to settle or moot the claims, the plaintiff is entitled to attorneys' fees if: (i) the suit was meritorious when filed; (ii) the action producing the corporate benefit was taken by the defendants before a judicial resolution was achieved; and (iii) the resulting benefit was causally related to the suit.[7] Moreover, in such a situation, the plaintiff is entitled to a rebuttable presumption that a causal connection existed between the litigation and the subsequent benefit conferred on the corporation.[8]

Further, the amount of an attorneys' fee award is within the discretion of the court.[9] In determining the amount of an award of fees in a given case, the court typically considers the factors laid out in *Sugarland Indus. v. Thomas*.[10] The factors are: (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.[11] The last two elements are often considered the most important.[12]

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[7] *United Vanguard Fund, Inc. v. TakeCare, Inc.,* 693 A.2d 1076, 1079 (Del. 1997) ("*TakeCare I*").
[8] *Id.* at 1080.
[9] *Krinsky v. Helfand,* 156 A.2d 90 (Del. 1959).
[10] 420 A.2d 142 (Del. 1980).
[11] *Sugarland Indus.,* 420 A.2d at 149-50.
[12] *In re Anderson Clayton S'holders' Litig.,* 1988 WL 97480, at *1 (Del. Ch. Sept. 19, 1988).

Here, the plaintiffs' counsel suggest that the court should consider the entire $67 million the appropriate measure of the benefit conferred to the shareholders. In support of their petition for the fee award, the plaintiffs' counsel claim a partial credit for the first $56 million of benefit, and a substantial credit for the second $11 million benefit and the supplemental disclosure in the proxy statement. In response, the defendants strenuously contest the causal element. They argue that the litigation played no role in the first $56 million of benefit and only a minimal and incidental role in the second $11 million of benefit. They also argue that the supplemental disclosure can support no more than a $275,000 award of attorneys' fees. The court will address these arguments briefly.

A. The Defendants Have Not Rebutted The Presumption Of Causation In The First Increase

In Delaware, the defendants bear the burden of demonstrating that there is no causal connection between the initiation of the lawsuit and any subsequent benefit to the shareholders.[13] This is a heavy burden, not often satisfied by a defendant.[14]

The plaintiffs' counsel suggest that their litigation efforts, in part, caused the increase from $14.25 to $16.75 per share, an increase of approximately

[13] *TakeCare I* at 1080.
[14] *TakeCare II* at 852.

$56 million. As evidence of their efforts, the plaintiffs' counsel rely heavily on the analysis of the initial offer prepared by their financial advisor.

The defendants challenge the plaintiffs' claim on three grounds: (i) Vulcan Energy's $14.25 Initial Offer submitted to the Special Committee is not a plausible data point for calculating any monetary benefit achieved by the litigation; (ii) the Special Committee rejected the Initial Offer without reviewing the plaintiffs' financial analysis; and (iii) the plaintiffs' counsel had no negotiations with Vulcan before it entered into the February 18, 2004 merger agreement with Plains.

The court must first reject the defendants' argument that the Initial Offer should not be the starting point to calculate the monetary benefit. Such a premise, if accepted, would undermine any quantification of monetary benefit in most corporate litigation. Moreover, the plaintiffs' counsel did not claim credit for the rejection of the Initial Offer. Rather, they claim a partial credit for the increase from the Initial Offer to the Revised Offer.

After considering all the facts and circumstances, the court finds that the defendants have failed to overcome the burden of rebutting the causation presumption for the following reasons.

First, the connection between the litigation and the first $56 million aggregate benefit is more than just chronologically related. The defendants cite

several cases where no causal connection existed.[15] For example, in *Josephson*, the plaintiffs' financial advisor issued a fairness opinion on the offer price.[16] The special committee, relying on the opinion of its own investment banker, rejected the offer. When the acquirer returned later with an improved offer, the special committee's investment banker rejected it unilaterally. Only at that point did the plaintiffs' counsel become actively involved in the litigation. The court concluded that the defendants satisfied their burden of rebutting the causal connection because there is no evidence that the special committee and its investment banker were more than marginally influenced by the litigation or the opinions of the plaintiffs' financial advisor in their negotiations with the acquirer.[17]

Here, however, the record shows that prior to the execution of the merger agreement on February 18, 2004, the defendants contacted the plaintiffs' counsel and offered to settle the litigation based on a proposed increase from $14.25 to $16.75 per share.[18] Thus, the court finds that the defendants took into consideration the litigation when they improved the Initial Offer.

[15] *See Anderson Clayton,* 1988 WL 97480, at *3 ("[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."). *See also In re Josephson Int'l, Inc. S'holders Litig.,*1988 WL 112909 (Del. Ch. Oct. 19, 1988) ("The mere pendency of litigation does not indicate a causal connection between plaintiffs' efforts and beneficial changes in the merger terms.").
[16]1988 WL 112909, at *3.
[17] *See id.*
[18] Brualdi Aff. at 2, 3.

Second, the defendants claim that the Special Committee did not rely on the plaintiffs' financial analysis in rejecting the Initial Offer.[19] This claim, however, does not diminish the role of the litigation in the improvement of the offer. It is reasonably expected that the defendants' investment banker, with fuller access to the corporate financial information, would arrive at a more accurate result of Plains's intrinsic value. While the court does not deny that other factors, such as changing market conditions, might have played a larger role in the directors' decision-making process, the court cannot conclude that the role of litigation was nonexistent. The court further finds, however, that causation in connection with the first $56 million is relatively weak because of the limited and passive activities of the plaintiffs' counsel at that time.

B. The Plaintiffs' Counsel Made A Significant Contribution To The Second Increase

Both parties appear to be in agreement that the plaintiffs' counsel deserve a greater credit in the second $11 million of benefit. However, parties dispute the extent of the benefit. The defendants argue that Vulcan did not increase its price in response to the litigation. Instead, they argue that Vulcan had a pre-existing plan

[19] The defendants alleged that the Special Committee considered the financial opinion provided by the plaintiffs "useless" because, among other things, the opinion failed to address the tax structure of Plains, which was a prime driver of the transaction. Def. Answer Br. at 23 (citing Goodier Aff. Ex. A at 29-30; Goodier Aff. Ex. C.). The plaintiffs' counsel argue that their report addressed the tax implication of the transaction. Moreover, the lack of detailed analysis was caused by lack of access to the pertinent information. Pl. Reply Br. at 7.

to increase the price to secure enough shareholder votes to approve the merger.[20] On that basis, the defendants claim that the settlement of the litigation is merely an incidental benefit. In any event, the defendants argue, the plaintiffs' counsel at most played a minimal, incidental role in the merger negotiations by approving a merger price negotiated by Vulcan and O'Malley of the Special Committee. Consequently, the plaintiffs' counsel cannot take credit for changes driven by market conditions.[21]

Based on the documents before the court, the court concludes that the plaintiffs' counsel played a significant role in the $0.50 increase per share for three reasons. First, the "pre-existing plan" only suggested that Vulcan would assess the need, if any, to improve the offer prior to the shareholder vote. While changing market conditions undoubtedly played a large role in Vulcan's decision-making process,[22] the court is not persuaded that it is merely a coincidence that the increase

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[20] Capobianco Decl. Ex. A., Special Committee Meeting Mins. on May 26, 2004 (". . . Capobianco indicated that various individuals at Vulcan had different opinions on whether Vulcan should improve its offer . . . . Vulcan might wait to improve its offer and amend the proxy statement until a couple of days before the annual shareholders meeting."); Capobianco Decl. Ex. B., Capobianco's E-Mail on May 27, 2004 ("[We] plan to put our best and final proposal on the table 2 weeks before the shareholder vote."); Capobianco Decl. Ex. C., Capobianco's E-Mail on June 18, 2004 ("1-2 weeks before the vote, we will assess what we need to do to win the vote, if anything. At that time we will make our final decision.").

[21] *See Mutual Shares Corp. v. Texas Air Corp.*, 1987 WL 18105, at *6 (Del. Ch. Sept. 30, 1987); *See also In re McCaw Cellular Comm., Inc. S'holders Litig.,* 1994 WL 594017, at *3 (Del. Ch. Oct. 18, 1994) ("[P]laintiffs' counsel played no role in negotiating or otherwise influencing the terms of the merger that eventually took its place. Rather, counsel's role was simply to agree that (i) they would not oppose the substituted merger transaction, and (ii) the merger would constitute a satisfactory basis for a settlement of this litigation.").

[22] Plains's stock was traded above $16.75 everyday between February 23 and May 16, 2004. Def. Answering Br. at 11.

occurred only two days after the plaintiffs completed expedited discovery and moved for a preliminary injunction. Rather, it suggests that the defendants' actions were at least partially precipitated by the litigation.

Second, contrary to the defendants' argument that the settlement is merely an incidental benefit of the increase to $17.25 in the Final Offer, the record shows that the defendants' willingness to increase the price to $17.25 was, at least in part, conditioned on the plaintiffs' agreement to settle the case on that basis.[23]

Third, while it is not possible to be certain of the degree to which the plaintiffs' counsel influenced events, it is without doubt that they did more than passively accept the terms presented to them. Before the offer price was raised, the plaintiffs' counsel unambiguously insisted that they would settle the case only in exchange for a substantial increase in monetary benefit to shareholders and satisfactory supplemental disclosures. In responding to the settlement offer, the plaintiffs' counsel further reiterated their position by reserving the right to review the approval process and disclosures to shareholders.

C. The Supplemental Disclosure

The defendants do not dispute the therapeutic benefits of the litigation and the plaintiffs' counsel's entitlement to an award for the supplemental disclosures. Rather, they argue that any award for the supplemental disclosures should not

[23] "Vulcan's willingness to offer this increase was conditioned on the shareholder plaintiffs' agreement that this increase would be viewed as acceptable consideration for the settlement of the shareholder litigation." Schulman Decl. at ¶48. *See also* Tr. at 30.

exceed $275,000. The court awards fees for supplemental disclosures by "juxtapos[ing] the case before it with cases in which attorneys have achieved approximately the same benefits."[24] The defendants note that the average award for therapeutic benefit in this court is $273,856.[25] In response, the plaintiffs' counsel contend that they are entitled to more than this amount because the disclosures were highly material.

Whether disclosure is required under Delaware law turns on the question of materiality. A fact is material if there is a "substantial likelihood that the disclosure of omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available."[26] Materiality is a highly contextual mixed question of law and fact that is difficult to assess in passing upon the terms of a settlement. Oftentimes, the court uses a *quantum meruit* approach to determine the awards for therapeutic benefits, and discounts the fees accordingly if the benefits are meager or the disclosures are only marginally material.[27]

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[24] *In re Golden State Bancorp, Inc. S'holders Litig.,* 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000).

[25] *See La. State Employees' Ret. Sys. v. Citrix Sys., Inc.,* 2001 WL 1131364, at *10 n.57 (Del. Ch. Sept. 19, 2001) (the court surveyed attorneys' fee awards for therapeutic benefits over the few years prior to 2001).

[26] *Rosenblatt v, Getty Oil Co.,* 493 A.2d 929, 944 (Del. 1985) (*citing TSC Indus., Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976)).

[27] *Golden State Bancorp*, 2000 WL 62964, at *3.

The court concludes that the supplemental disclosures were potentially material. Among the facts considered, the court gives particular weight to the following: (i) Hitchcock, one of the two members of the Special Committee, withdrew his support for the merger; and (ii) Petrie Parkman issued another fairness opinion in June 2004, one month before the shareholder vote. Given the unique circumstances that the recommendation of the Special Committee remained in full force after Hitchcock's withdrawal of his support,[28] there would appear to be some substantial likelihood that Plains shareholders would view the detailed reasoning behind Hitchcock's change of mind, as well as the updated financial analysis from the investment banker, as having significant influence on their decision-making process.

The court is not aware of, and neither party refers to, a case in which the court awards two separate fees for the supplemental disclosures and the monetary benefit. Therefore, the court will not ascertain the exact amount of award for the supplemental disclosures, but will consider the disclosures a relevant factor in determining the total fee award based on all the facts and circumstances.

D. The Amount Of The Fee Award

Turning to the other *Sugarland* factors, the court first notes that the plaintiffs' counsel were all retained on a contingent fee basis, and stood to gain nothing unless the litigation was successful. It is consistent with the public policy

[28] The counsel to the Special Committee advised that, in the circumstances, both members of the Committee must oppose the merger in order to change its previous recommendation. Schulman Decl. ¶ 35.

of Delaware to reward this risk-taking in the interests of shareholders. On that basis, the plaintiffs' counsel devoted 966 hours (801 pre-MOU hours) drafting the complaint, engaging in expedited discovery, and taking depositions, and incurred about $88,000 of expenses. Moreover, the plaintiffs' counsel are experienced in practicing before this court and prosecuted this action in a diligent and competent manner. These factors all provide support for a reasonable fee award. On the other hand, the court notes that, while the litigation presented several difficult factual issues, the complexity and novelty of this case were commensurate with those often encountered in corporate litigation before this court.

Balancing all the considerations, and mindful of the relatively weak causation in connection with the first $56 million of benefit on one hand and the therapeutic benefits caused by the material supplemental disclosures on the other, the court finds that an award of $1,100,000, inclusive of expenses, fairly and adequately compensates the plaintiffs' counsel for their efforts. The amount slightly exceeds the sum of 1% of the first $56 million and 4% of the next $11 million plus the amount of expenses claimed ($88,000). Moreover, this award amounts to only 1.6% of the total benefit, a percentage award that is both merited by the circumstances of this litigation and fair and reasonable to the plaintiffs' counsel and the class. As a reality check, this award also translates into a fee of roughly $1,165 per hour for pre-MOU work (crediting post-MOU work at normal

hourly rates). This hourly rate, which represents a 150% premium over the blended rates of plaintiffs' counsel, while generous, is not out of line with fees awarded in the past by this court.

IV.

For the foregoing reasons, an award of attorneys' fees in the amount of $1,100,000, inclusive of expenses, is GRANTED. IT IS SO ORDERED.