

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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Submitted: February 27, 2006
Decided: March 29, 2006

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***RE: In re Triarc Companies, Inc. Shareholders Litigation
C.A. No. 16700***

Dear Counsel:

This letter opinion addresses the pending application for attorneys' fees and expenses incurred in the prosecution of this matter. On October 13, 1998, the plaintiffs filed a class action complaint seeking preliminary and permanent injunctive relief with respect to a proposal to take the corporation private for \$18 per share.¹ Some months later, a special committee of the Triarc board of directors decided not to recommend the going-private transaction at that price level and the going-private transaction was withdrawn.² Thus, on March 10, 1999, the company

¹ Compl. ¶ 13.

² Am. Compl. ¶ 13.

announced the withdrawal of the \$18 per share offer. In that same announcement, the company stated that the board of directors had approved a Dutch auction tender offer in which Triarc would seek the tender of up to an aggregate of 5.5 million shares of the company's common stock at a price not lower than \$16.25 and not higher than \$18.25 per share.³

The plaintiffs amended their complaint on March 26, 1999 to challenge the adequacy of the disclosures contained in Triarc's tender offer materials sent to stockholders. The amended complaint alleged that the defendants breached their fiduciary duty of candor by failing to disclose the material fact that the special committee found the \$18 per share going-private offer to be inadequate.⁴ The amended complaint further alleged that the plaintiffs and the other members of the class would be irreparably harmed unless the tender offer materials were supplemented to disclose all material information.⁵

Shortly thereafter, Triarc supplemented its tender offer materials.⁶ Among other things, Triarc informed the shareholders that the chairman of the special

³ *Id.* at ¶ 15. Under the Dutch auction procedure, each tendering shareholder was directed to state the number of shares tendered and at what price within the specified range. Triarc would then pay the lowest price per share necessary to purchase no more than a total of 5.5 million shares at a price at or above the tender price for each share purchased.

⁴ Am. Compl. ¶ 17.

⁵ *Id.* at ¶ 18.

⁶ J. Decl. in Support of Pl.'s Appl. ¶ 13; Hurwitz Decl. ¶ 13.

committee told the potential purchasers in the going-private transaction that he believed, based upon a preliminary analysis that the special committee received from its investment bankers, that “the special committee would seek an increase in the \$18 per share proposal to a number in the low mid twenties.”⁷ The plaintiffs argue that this corrective disclosure was material to each shareholder’s decision whether to tender shares in the Dutch auction. The Dutch auction closed on April 22, 1999 with Triarc acquiring approximately 3.8 million shares (out of the potential 5.5 million) at \$18.25 per share.

On March 23, 1999, other Triarc shareholders filed a similar class action in the United States District Court for the Southern District of New York alleging that the Dutch auction disclosure materials were materially misleading in violation of Section 14(e) of the Securities and Exchange Act of 1934. To avoid duplication with the federal action, in October 2000, the parties agreed to stay this action in favor of the federal action, without prejudice to the plaintiffs’ right to apply to the court for an award of attorneys’ fees and expenses in connection with the benefits allegedly conferred upon Triarc’s public shareholders from the supplemental disclosure.

⁷ *Id.*

Some years after the dismissal of the federal action, and in response to the court's request for a status report, the plaintiffs moved to dismiss this suit as moot on the basis that the disclosure amendments adequately addressed the plaintiffs' concerns.⁸ The court granted the plaintiffs' motion to dismiss on October 27, 2005, and retained jurisdiction for the purpose of determining the plaintiffs' application for an award of counsel fees and reimbursement of expenses.

Thereafter, the plaintiffs' counsel filed a motion requesting fees in the amount of \$250,000 and reimbursement of expenses in the amount of \$6,225.66.⁹

Both sides have submitted briefs and/or affidavits in connection with that motion. The plaintiffs argue that they are entitled to fees and expenses because their efforts caused Triarc to amend its offer to purchase to disclose the material fact that the special committee found the \$18 per share price in the proposed buyout transaction inadequate. They contend that this was a material disclosure that enabled Triarc shareholders to make an informed decision as to whether to tender their shares and at what price in the Dutch auction.

⁸ On October 17, 2002, the federal court granted summary judgment in favor of the defendants and denied the plaintiffs' motion for class certification on the ground that the plaintiffs were not injured because they had not tendered in the Dutch auction.

⁹ The plaintiffs' counsel are seeking fees for services rendered from October 12, 1998, one day prior to the date that they filed the original complaint, through October 20, 2000, the date that the parties agreed to stay this action.

Under Delaware law, “when the litigation results in benefit to all members of a class, the successful litigant is entitled to an allowance for counsel fees to be paid from the fund or property which his efforts have created.”¹⁰ In a derivative suit, an award of fees to the plaintiffs’ counsel is justified if the action conferred some benefit upon the corporation and “the action, when filed, was meritorious and had a causal connection to the conferred benefit.”¹¹ Here, the court concludes that the plaintiffs have met this standard and that they are entitled to recover from the corporation for a benefit conferred generally on the non-controlling stockholders.¹²

The court finds that the amended complaint was meritorious when filed. “A claim is meritorious within the meaning of the rule if it can withstand a motion to dismiss on the pleadings if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success.”¹³ The plaintiffs have sufficiently alleged a claim for breach of the duty of candor with respect to the Dutch auction disclosure documents. The fact that the Triarc special committee was unwilling to recommend the \$18 per share buyout proposal due to adequacy concerns immediately before the announcement of the Dutch

¹⁰ *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966).

¹¹ *Id.* at 386-87.

¹² *Tandycrafts Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989).

¹³ *Id.* (“It is not necessary that factually there be absolute assurance of ultimate success, but only that there be some reasonable hope.”).

auction tender offer was likely material to the shareholders in deciding whether to tender their shares at a price of not less than \$16.25 and not more than \$18.25 per share. Thus, when Triarc amended its disclosures and rendered this suit moot, a benefit was conferred on Triarc and its shareholders.¹⁴

Nevertheless, the court is not able to conclude that the requested amount of \$250,000 plus expenses is reasonable under the circumstances.¹⁵ The plaintiffs' counsel are only entitled to fees for the preparation of the amended complaint and their litigation efforts undertaken before the release of the corrective disclosures. For example, the plaintiffs' counsel are not entitled to recover attorneys' fees for their work in connection with the original complaint that concerned the later abandoned going-private proposal, as the abandonment of that proposal is not claimed to have been caused by the litigation. Nor are the plaintiffs' counsel entitled to an award of fees or expenses for work performed after the defendants'

¹⁴ *United Vanguard Fund v. Takecare, Inc.*, 693 A.2d 1076, 1080 (Del. 1997) (holding that if after a complaint is filed a defendant takes action that renders the claims asserted in the complaint moot, Delaware law imposes on it the burden of persuasion to show that no causal connection existed between the initiation of the suit and any later benefit to the shareholders). Triarc has not shown the absence of a causal relationship between the amended complaint and the supplemental disclosure.

¹⁵ *Chrysler Corp.*, 223 A.2d at 386 (explaining that the amount of the attorneys' fees is fixed by the sound discretion of this court); *Sugarland Indus. v. Thomas*, 420 A.2d 149-50 (Del. 1980) (holding that in determining the amount of attorneys' fees to award, Delaware courts must consider several factors including the "amount of time and effort applied to a case by counsel for plaintiff, the relative complexities of the litigation, the skills applied to their resolution by counsel, as well as any contingency factor and the standing and ability of petitioning counsel").

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corrective disclosure was made, since that disclosure mooted the claims in the amended complaint. Any work done after that disclosure was devoted to non-meritorious claims.

In the circumstances, weighing the relevant efforts, the benefits thereby obtained, and all other relevant factors, including the contingent nature of the undertaking, the court concludes that an award of \$75,000 of fees and expenses, in total, is fair and reasonable.¹⁶ IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor

¹⁶ J. Decl. in Support of Pl.'s Appl. ¶ 31. The court bases its conclusion on the declaration that the plaintiffs' counsel expended 128.75 hours between March 11, 1999, the date after the initial press release announcing the Dutch auction, and April 8, 1999, the date of the corrective disclosure. The plaintiffs have not sufficiently disclosed what their expenses were for or when they were incurred; therefore, the court does not award the expenses.