IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Franklin Balance Sheet Investment Fund and Franklin Microcap Value Fund, Oppenheimer Investment Partnership LP and Oppenheimer Close International Ltd., Wynnefield Partners Smallcap Value LP I, Wynnefield Partners Smallcap Value LP, Wynnefield Smallcap Value Off-Shore Fund LPD and Channell Partnership II, LP, Individually, derivatively and on behalf of a Class of similarly situated stockholders,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 888-VCP
Thomas G. Crowley, Jr., Molly M. Crowley, Phillip E. Bowles, Gary L. Depolo, Earl T. Kivett, William A. Pennella, Leland S. Prussia, Cameron W. Wolfe, Jr.,	)	
Defendants,	)	
v.	)	
Crowley Maritime Corporation,	)	
Nominal Derivative Defendant.	)	

MEMORANDUM OPINION

Submitted: May 30, 2007
Decided: August 30, 2007

R. Bruce McNew, Esquire, TAYLOR & McNEW, LLP, Wilmington, Delaware, *Attorneys for Plaintiff*

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PARSONS, Vice Chancellor.

Plaintiffs brought this action derivatively and directly, as a class action, against the directors of Crowley Maritime Corporation ("Crowley" or the "Company") for breach of fiduciary duties and waste in connection with split-dollar life insurance policies obtained for the controlling stockholder, officer, and director. Pursuant to a settlement approved by the Court on April 27, 2007, Defendants successfully took the Company private by completing a tender offer for its common stock followed by a short form merger. The action currently is before the Court on the application of Plaintiffs' counsel for an award of their attorney's fees and out-of-pocket expenses in prosecuting this litigation.

Claiming a percentage of an alleged benefit to the class of minority stockholders of $37.25 million, Plaintiffs' counsel seek attorney's fees of $6 million. By agreement of the parties, any attorney's fees and expenses approved by the Court will be paid by the Company, which one or more Defendants now wholly own. Defendants oppose Plaintiffs' counsel's fee application as seeking a windfall and as being based on the erroneous premise that this litigation was the sole cause of the benefit realized by the class as a result of the tender offer. According to Defendants, this is a "shared credit" case and the counsel fees therefore must be based on *quantum meruit*, rather than a percentage of any perceived "common fund." Using that analytical framework, Defendants urge the Court to limit the award of attorney's fees to $650,000.

For the reasons stated in this Memorandum Opinion, I conclude that, although the question is not free from doubt, Plaintiffs' counsel has made a sufficient showing that the litigation was a cause, and probably the primary one, of the sizeable benefit realized by the class from the tender offer made pursuant to the settlement agreement. Therefore, I

hold that Plaintiffs' counsel is entitled to recover their fees based on a percentage of the benefit conferred. I do not agree, however, with Plaintiffs' counsel's claim that this litigation constitutes the sole and direct cause of the entire premium paid in the tender offer. Because Plaintiffs' counsel instigated the action to recover $23,500,000 in damages to at least the Company, if not the class, as well, and did not seek to force the sale of the Company or similar relief, I find it most equitable to award attorney's fees by attributing different percentage rates to two separate portions of the benefit paid to Plaintiffs. Specifically, I award attorney's fees of 15% of the amount alleged in Plaintiffs' Complaint, or $23,500,000, yielding $3,525,000. Additionally, I award attorney's fees of 5% of the remaining benefit paid to Plaintiffs, or $13,744,620, yielding $687,231. Accordingly, I award fees to Plaintiffs' counsel in the total amount of $4,212,231. In addition, the expenses recoverable are $7,227.26, as opposed to the $17,227.26 requested by Plaintiffs' counsel.

I. BACKGROUND[1]

A. Facts

1. Parties

Before selling their holdings in connection with the settlement of this case, Plaintiffs and the shareholders they represent collectively owned approximately 30% of

[1] Unless otherwise stated, the information in this section is taken from my earlier memorandum opinion, *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 Del. Ch. LEXIS 188 (Oct. 19, 2006), the pleadings, or from the settlement agreement dated March 19, 2007.

the common stock of the Company.[2] Thomas B. Crowley, Jr. ("Mr. Crowley") and members of his family (the "Crowley Family"), collectively, owned virtually all of the remainder of the common stock.

Crowley is a Delaware corporation with its principal executive office in Oakland, California. It provides diversified transportation services in domestic and international markets by means of four operating lines of business: Liner Services, Logistics, Marine Services, and Petroleum Services. Defendant Mr. Crowley is Chairman, President, and Chief Executive Officer of the Company and has been a director since 1994. Before settling the underlying dispute, Mr. Crowley beneficially owned and controlled approximately 65% of the voting stock of the Company.

2. Plaintiffs' claims

In their Amended Class Action and Derivative Complaint (the "Complaint"), Plaintiffs alleged that on April 6, 1992, the Company and Mr. Crowley entered into the first of three split-dollar life insurance agreements (the "1992 Agreement"). The 1992 Agreement relates to five life insurance policies with a total face value amount of $50 million on the life of the survivor of Mr. Crowley's father, Thomas B. Crowley, or his step-mother, Molly Crowley. Under the terms of the 1992 Agreement, Mr. Crowley owned the underlying policies and the Company was obligated to pay the premiums on

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[2] Plaintiffs are Franklin Balance Sheet Investment Fund, Franklin Microcap Value Fund, P. Oppenheimer Investment Partnership LP, Oppenheimer Close International Ltd., Wynnefield Partners Smallcap Value LP I, Wynnefield Partners Smallcap Value LP, Wynnefield Smallcap Value Off-Shore Fund Ltd., Channell Partnership II, LP, and John H. Norberg, Jr. The named Plaintiffs owned in excess of 10% of the stock of Crowley.

them. On July 20, 1998, the Company and Mr. Crowley entered into a second split-dollar life insurance agreement related to six life insurance polices with a total face amount of $50 million on the life of Molly Crowley. The Company and Mr. Crowley entered into a third life insurance agreement on November 24, 1998, covering policies having a total face amount of $40 million (collectively with the July 1998 Agreement, the "1998 Agreements"). Similar to the 1992 Agreement, Mr. Crowley was the sole owner of the policies covered by the 1998 Agreements; the policies were pledged to the Company to secure Mr. Crowley's obligation to repay the Company for the premiums, upon termination of the 1998 Agreements or payment of a death benefit.

The Crowley board claimed to have approved the 1992 Agreement and the 1998 Agreements in furtherance of their belief that maintaining the closely held nature of the Company was in the best interests of the Company's stockholders and would maximize long-term stockholder value. Sometime in 2002 or 2003, however, the Company ceased making premium payments under both the 1992 and 1998 Agreements because the board was concerned that such payments might violate § 402 of the then newly enacted Sarbanes-Oxley Act. Accordingly, in its April 19, 2004, proxy statement, the Company stated that Mr. Crowley had been solely responsible for paying the premiums on the insurance provided by the 1992 Agreement since the enactment of Sarbanes-Oxley in July 2002.

On December 23, 2003, the Company and Mr. Crowley entered into an agreement that terminated and settled the parties' obligations under the 1992 Agreement. Pursuant to that agreement, Mr. Crowley repaid the Company $7.5 million, which represented the

total amount of premiums paid by the Company under the 1992 Agreement, but did not include any interest. In return, the Company agreed to pay Mr. Crowley for the taxes and interest payable by him on the financing he arranged to repay the $7.5 million to the Company. The life insurance policies underlying the 1992 Agreement continued in effect, but the Company paid the premiums from the cash surrender value of those policies.[3]

In their Complaint, Plaintiffs asked this Court to award damages to the Company and the class in an amount equal to the premiums paid by the Company on the split-dollar life insurance policies, the interest forgiven to the Crowley Family on all amounts owed to the Company from 1992 to the date this litigation settled, and the cost and expenses incurred by the Company in creating, implementing, pursuing, and defending the policies.[4]

The parties disagree over the total amount of damages Plaintiffs claimed in their Complaint. Plaintiffs contend they sought approximately $23.5 million, while Defendants assert that the maximum total liability would have been no more than $11 to $12 million.[5] Because the record at the preliminary stage at which this case settled is quite sparse, it is difficult to determine precisely the total amount of damages Plaintiffs

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[3] Similarly, by the end of 2003, the Company had "suspended" payments under the two 1998 Agreements, and allowed the current premiums to be paid out of the cash surrender values of the underlying policies. Compl. ¶¶ 95(b), (c).

[4] Compl., Prayer for Relief, ¶ F.

[5] Defs.' Br. in Opp. to Pls.' App. for Atty's Fees ("DAB") at 17 n.7.

actually sought. Having carefully considered the parties' divergent arguments on this issue, however, I am convinced Plaintiffs' estimate more closely comports with the allegations in the Complaint.

Plaintiffs' damages claim includes several components. The first two relate to the 1992 Agreement. In the settlement agreement the Company entered into with Mr. Crowley on December 23, 2003, the parties agreed that from September 1992 until December 2003, the Company spent approximately $7.5 million under the 1992 Agreement. Mr. Crowley borrowed that amount and paid it back to the Company pursuant to the 2003 settlement agreement, but the Company agreed to pay Mr. Crowley an amount equal to his expenses on the $7.5 million loan until he collects on the policies. For the 1992 Agreement, Plaintiffs claim as damages: (1) interest on the $7.5 million the Company paid over time between 1992 and 2003;[6] and (2) reimbursement for the interest it paid on Mr. Crowley's $7.5 million loan from December 2003 until the time of the Settlement. Assuming the Company paid its $7.5 million contribution on the 1992 Agreement in 11 equal installments from 1992 to 2003, I calculate the interest on those payments as of the end of 2003 to be approximately $2.9 million. Defendants' estimate of damages did not include anything for this aspect of Plaintiffs' claim. As to the interest on the $7.5 million Crowley borrowed at the end of 2003, the parties agree that the annual interest at 6.5% is $487,500. Thus, as Defendants acknowledge,[7] the total interest

[6] Plaintiffs sought simple interest of 6.5% based on the average interest Crowley paid on its long term debt. Compl. ¶ 101.

[7] DAB at 17 n.7.

cost to the Company to the date of settlement for this component of damages would be $1.6 million.

The remaining components of Plaintiffs' damages claim relate to the 1998 Agreements. Both sides have accepted an estimate of $1.8 million for the annual premiums on the insurance policies covered by the 1998 Agreements. Up until 2003 or so, the Company paid those premiums on Mr. Crowley's behalf. Thereafter, the current premiums were paid from the cash surrender values of the policies. Because the cash surrender value is a cap on Mr. Crowley's obligation to repay the Company for its expenditures under the 1998 Agreements, the Company has suffered an annual erosion and invasion of its collateral since 2003 of $1.8 million. Thus, for each year from 1998 to the time of the Settlement at the end of April 2007, the Company effectively has "paid" $1.8 million, for a total of approximately $15 million. Although Defendants suggest this number should be only $9 million, their argument is unpersuasive because it fails to include any damages for the period from 2003 to the time of the Settlement. Lastly, Plaintiffs seek simple interest at the rate of 6.5% on each of the annual payments of $1.8 million under the 1998 Agreements, or $117,000 for each year such a payment remained outstanding. Defendants do not dispute that figure, but argue that it would yield a total interest amount of somewhere between $400,000 and $1,400,000 for the entire relevant period. I find that estimate woefully short. Indeed, for the $1.8 million the Company paid in 1998 *alone*, without regard to all the later payments of $1.8 million it made, the interest through April 2007 would be over $1 million.

For these reasons, I reject Defendants' contention that the "maximum total liability" under the challenged insurance agreements would have been no more than $11 to $12 million. Instead, I accept as reasonable and fully supported by the Complaint, Plaintiffs' contention that the damages could have been as high as $23.5 million.

B. Procedural History

Plaintiffs filed this action on November 30, 2004. The original complaint asserted derivative and direct claims for, among other things, breach of fiduciary duty, entrenchment, and self-dealing arising out of the 1992 and 1998 Agreements.

Defendants moved to dismiss the complaint, and the parties briefed that motion. Pursuant to the Court's direction at the conclusion of argument, Defendants filed a supplemental brief on standing on October 24, 2005. On December 27, 2005, Plaintiffs, in lieu of responding to Defendants' supplemental brief, sought leave to amend their complaint, which Defendants opposed. On October 19, 2006, I granted Plaintiffs leave to file their amended complaint, but ordered Plaintiffs to reimburse Defendants $10,000 for the unnecessary attorney's fees and costs they incurred due to Plaintiffs' apparent misreading of Court of Chancery Rule 15(aaa).

On November 7, 2006, Defendants moved to dismiss the amended complaint. Beginning in December 2006, however, the parties engaged in arms-length negotiations in an attempt to settle Plaintiffs' claims, and deferred briefing on Defendants' motion. Plaintiffs agreed to consider liquidating their minority position in the Company by selling their shares for cash, as long as the price offered was substantially higher than the "pink sheet" bid price for the shares (at that time approximately $1,800 per share). Making a

tender offer gave Defendants the opportunity to settle the pending litigation while taking the Company private. Following extended negotiations, Plaintiffs indicated they would favorably consider an offer of $2,990 for any and all shares, with closing conditioned on at least 95% of the shares affiliated with Mr. Crowley being tendered as well as a majority of the unaffiliated shares. The parties entered into a settlement agreement (the "Settlement" or "Settlement Agreement") that called for Defendants to make a tender offer along those lines (the "Tender Offer") and further provided that the Company would be responsible for paying Plaintiffs' attorney's fees and expenses as directed by this Court.

After notice to the class and other Crowley shareholders, the Court held a settlement hearing on April 27, 2007, and approved the Settlement.[8] Pursuant to the resulting Final Judgment, I reserved decision on attorney's fees and costs pending briefing and argument by the parties. I heard argument on Plaintiffs' application for fees and costs on May 30, 2007.

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[8] As of May 8, 2007, over 98% of the outstanding shares had been tendered for $2,990 per share as part of the Tender Offer. Crowley Schedule 13E-3, Amendment No. 7 (May 8, 2007). Two stockholders of Crowley objected to the Settlement. One argued that the Settlement forced the minority shareholders to sell out at a price that "significantly undervalues the shares." Letter to Court from Leonard Rosenthal, Ph.D., dated April 9, 2007. Dr. Rosenthal argued that the Crowley stock was worth between $4,851 and $5,826 per share. The other objecting stockholder contended that the Settlement was unfair to them and others like them who had owned Crowley stock at the time of the alleged wrongdoing, but sold it before the settlement was announced. Letter to Court from James F. & Carter P. Thacher, dated April 26, 2007. The Court considered both objections at the settlement hearing, but concluded that neither one had merit.

C. The Parties' Contentions

Plaintiffs submit that to determine reasonable attorney's fees this Court should apply a "percentage of benefit conferred" approach as found in *Sugarland Industries, Inc. v. Thomas*.[9] Plaintiffs assert that the underlying litigation was the sole and direct cause of the Settlement Agreement, and that it resulted in a $37.25 million benefit to the Plaintiff class. On that basis, Plaintiffs argue that the *Sugarland* standard supports an award of attorney's fees of $6 million (or approximately 16% of the claimed benefit). Plaintiffs also request $17,227.26 in out-of-pocket expenses they incurred in this litigation.

Defendants object to Plaintiffs' request as excessive and make two main arguments against it. First, they contend that Plaintiffs' attorney's fees cannot properly be calculated as a percentage of the benefit conferred because this litigation was not the sole cause of the Company's decision to go private. While Defendants agree that some portion of the price paid in the Tender Offer is attributable to the litigation, they argue that, because there were multiple causes for the Tender Offer, the amount attributable to the litigation cannot be determined. Thus, Defendants assert that the only appropriate way to decide on a reasonable attorney's fee in this situation is on a *quantum meruit* basis. Under such a calculation, Defendants argue, Plaintiffs should receive no more than $650,000 in attorney's fees.[10]

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[9] 420 A.2d 142 (Del. 1980).

[10] DAB at 14-15. Defendants arrive at this number by assuming a reasonable hourly fee for Plaintiffs' counsel of $500 per hour for their litigation efforts and a premium of $200 per hour for taking the case on contingency. Multiplying this $700 per hour rate by the 1,047.25 hours Plaintiffs assert their counsel worked

Second, and alternatively, Defendants maintain that even if this Court decides to calculate Plaintiffs' attorney's fees under the *Sugarland* standard, the fee should be well below the $6 million Plaintiffs request. Defendants argue that the Complaint asserts claims worth only about $12 million, at best, not the $23.5 million Plaintiffs allege,[11] and certainly not the $37.25 million upon which Plaintiffs have based their fee application. Citing various factors they consider relevant to a *Sugarland* analysis, Defendants argue that the Court should not award Plaintiffs any more than $800,000 in attorney's fees, based on a percentage of the benefit conferred approach.[12]

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yields $733,250. Defendants contend that this number should be discounted to $650,000 or less because Plaintiffs' counsel should not be compensated for the time they spent seeking to avoid the application of Rule 15(aaa).

11 Pls.' Op. Br. ("POB") at 3.

12 DAB at 15-19.

Defendants also contest $10,000 of Plaintiffs' request for $17,227.26 in out-of-pocket expenses because Plaintiffs incurred the challenged costs in the nature of a sanction in connection with their motion for leave to amend.[13] In ruling on that motion, the Court ordered Plaintiffs to pay Defendants the sum of $10,000 to reimburse Defendants, in part, for the fees and costs they incurred as a result of Plaintiffs' motion. Defendants argue that allowing Plaintiffs to recover that $10,000 payment would be tantamount to reversing this Court's prior order.

II. ANALYSIS

A. Application for Attorney's Fees

The standards for awarding attorney's fees are well established,[14] beginning with what is commonly known as the American Rule.[15] Under the American Rule, prevailing litigants are normally responsible for paying their own attorney's fees. There are, however, two general exceptions to this rule: fee-shifting statutes and equitable doctrines.[16] Two equitable exceptions are the "common fund" and the "corporate benefit" doctrines.[17] "Under the common fund doctrine, a litigant who confers a common monetary benefit upon an ascertainable class is entitled to an allowance for fees and

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[13] DAB at 3 n.1.

[14] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1043 (Del. 1996).

[15] *Walsh v. Hotel Corp. of Am.*, 231 A.2d 458, 462 (Del. 1967); *Maurer v. Int'l Re-Ins. Corp.*, 95 A.2d 827, 830 (Del. Ch. 1953).

[16] *Goodrich*, 681 A.2d at 1044.

[17] *Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990).

expenses to be paid from the fund or property which his efforts have created."[18] Under the corporate benefit doctrine, a litigant who confers significant and substantial benefit to a class, albeit not a tangible monetary one, is entitled to an allowance of fees and expenses.[19] If this Court grants attorney's fees under one of these exceptions, the amount of the award lies within the Court's sound discretion.[20] Because none of the parties to this action argues for use of a corporate benefit analysis, I turn to a discussion of the common fund doctrine.

1. Is there a common fund?

The principle underlying the common fund doctrine is that "where a litigant has conferred a common *monetary benefit* upon an identifiable class of stockholders, all of the stockholders should contribute to the costs of achieving that benefit."[21] The issue here, as it relates to a common fund, is whether Plaintiffs' counsel, through the underlying litigation, conferred a monetary benefit on the Plaintiff class upon which attorney's fees can be based.[22]

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[18] *Id.*

[19] *Id.*

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

[21] *United Vanguard Fund, Inc. v. Takecare, Inc.*, 727 A.2d 844, 850 (Del. Ch. 1998) (emphasis added).

[22] As mentioned above, the claims in this case were both derivative and direct class claims. Defendants agreed as part of the Settlement to pay whatever fees and expenses the Court awards. Thus, a determination of those fees will not diminish the benefit to the class. The purported monetary benefit to the class stemmed from the amount by which the Tender Offer price ($2,990) exceeded the unaffected

Defendants argue, among other things, that "neither the settlement of the litigation, nor the premium incorporated in the offer price, created a "common fund" from which attorney's fees [can] be paid."[23] Consequently, according to Defendants, an appropriate fee can only be determined on a *quantum meruit* basis.[24] The Delaware courts have refused to apply such a formalistic approach.[25] Furthermore, the primary alleged wrongdoer, Mr. Crowley, now controls the Company and therefore will bear the burden of any fee award this Court makes. I therefore conclude that this aspect of Defendants' argument is without merit.

Defendants further suggest that this case does not involve a common fund because, in their view, it is not possible to determine a monetary benefit attributable to the litigation. In response, Plaintiffs argue that this Court has "long recognized in an unbroken line of precedent that where litigation results in an increase in a price to be paid for . . . either shares or a corporate asset, a common fund is created."[26] Plaintiffs contend that the common fund in this case is the premium reflected in the Tender Offer made by Mr. Crowley, and that the Company and Mr. Crowley agreed to pay Plaintiffs' attorney's

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"pink sheet" price of $1,800. The members of the class who tendered their shares received the full amount of that benefit.

[23] DAB at 9.

[24] DAB at 10 n.5.

[25] *See In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 357-58 (Del. Ch. 1999).

[26] *See* Pls.' Reply Br. ("PRB") at 6 (citing *Sugarland* and *First Interstate*).

fees in connection with the Settlement, because it allowed them to complete the Tender Offer more quickly and easily.[27]

Defendants elevate form over substance with their suggestion that no actual common fund was created, and that Plaintiffs therefore are relegated to having their attorney's fees determined on a *quantum meruit* basis. While no formal fund may have been created, Plaintiffs' litigation unquestionably resulted in a significant monetary benefit to the Plaintiff class. I consider the premium paid by Mr. Crowley's merger vehicle in the Tender Offer to constitute a monetary benefit conferred on Plaintiffs that resulted at least in part from the litigation. Thus, I conclude that Plaintiffs' request for attorney's fees should be analyzed under the common fund exception to the American Rule.

2. Do Plaintiffs qualify for attorney's fees and expenses under the common fund doctrine?

To qualify for fees and expenses under the common fund doctrine, the applicant "must show that (1) the action was meritorious at the time it was filed; (2) an ascertainable class received a substantial benefit; and (3) a causal connection existed

[27] PRB at 6-7. In this regard, I find persuasive Plaintiffs' argument that had Defendants not agreed to pay the attorney's fees on behalf of Plaintiffs, the Tender Offer would have been delayed while this Court determined the fee and then deducted, pro rata, from each payment made to shareholders the amount of the fees and expenses awarded. As Plaintiffs correctly observe, this not only would have created administrative difficulties, but also would have made "drafting the tender offer materials extremely difficult because it is necessary to describe in those materials the possible consequences of various fee award[s]." *Id.* at 7.

between the action and the benefit."[28] In this case, Defendants do not seriously dispute the existence of the first two requirements. Moreover, the general findings I made in approving the Settlement probably preclude Defendants from disputing either of those elements. Therefore, the real dispute concerns whether a causal connection existed between the litigation and the claimed benefit.

When determining the existence and adequacy of a causal connection, the benefit "need not be directly and entirely attributable to the underlying litigation."[29] Still, the litigation must achieve the benefit; the fact that a benefit occurred after the commencement of the litigation does not necessarily mean that a causal connection exists. Once the first two common fund requirements are satisfied, however, the burden shifts to the defendants to demonstrate that the lawsuit in no way caused the benefit. To rebut the presumption of a causal connection, defendants "must show that the benefit is attributable to other causes."[30]

In this case, Defendants argue that "although the [tender] offer was made *in part* to settle the litigation, it is indisputable that a number of other specific factors also motivated the offer."[31] Defendants claim that making the Tender Offer was motivated as much by the Crowley Family's long-standing goal of taking the Company private, as it

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28 *Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *5 (Del. Ch. Nov. 27, 1990).

29 *Id.* at *6.

30 *Id.*

31 DAB at 10.

was by the pending lawsuit.[32] The Purchase Offer also details some of the specific advantages the Crowley Family sought by taking the Company private.[33] Defendants contend that, because the Crowley Family's allegedly long-standing goal of privatization constitutes a legitimate cause contributing to the Tender Offer, the calculation of a reasonable attorney's fee must be based on *quantum meruit*, not a percentage of any claimed benefit.[34]

Plaintiffs argue that the litigation solely and directly achieved the benefit because: "[1] No other person or party undertook any action which could be claimed or found to have caused the benefit; . . . [2] The acquisition of the minority share[s] was solely a result of this settlement; [and] [3] The price at which the acquisition occurred was solely and directly the result of negotiations between the parties conducted by Plaintiffs' counsel."[35] Further, Plaintiffs contend that the Tender Offer materials do not state that the Company had a long-standing goal of privatization; rather, they simply describe

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32 DAB at 1.

33 DAB Ex. B at 20. Specifically, as a private company, Crowley will not incur the managerial burdens and continuing significant audit, legal, and personnel costs and fees necessary to maintain itself as a public reporting company or be exposed to as much legal risk, including securities law compliance burdens.

34 *See* DAB at 8 (citing *Dunkin' Donuts* for the proposition that if two or more factors confer the benefit, it should be deemed "unquantifiable" and the calculation of attorney's fees limited to a *quantum meruit* analysis).

35 POB at 11.

Mr. Crowley's perception of the benefits he would receive from the transaction.[36] Similarly, because Defendants have not, and cannot according to Plaintiffs, produce admissible evidence of any tender offer or Crowley Family plan of privatization unrelated to the Settlement of this litigation, they have failed to prove any causative factors other than the litigation.[37]

Finally, Plaintiffs argue that Defendants, in proposing that fees should be based on a *quantum meruit* standard, rely on an erroneous premise: that an award cannot be made based on the *Sugarland* standard unless the litigation was the *sole* cause of the benefit.[38] Plaintiffs see Defendants as saying that if there are multiple causes for the Tender Offer, then this Court has no choice but to use a *quantum meruit* standard in awarding fees. Defendants make this argument, Plaintiffs observe, despite the fact that their own brief "acknowledges that in *Sugarland* a percentage of the benefit was awarded even when the litigation was 'not the exclusive cause of the benefit.'"[39]

First, I find that, no matter which side bears the burden of proof, Defendants have failed to present sufficient evidence to support a finding that the Crowley Family had a pre-existing goal of going private, independent of the litigation. Defendants did not provide a single affidavit from a member of the Crowley Family or the Company's board

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[36] PRB at 5. I also note that Defendants' Tender Offer materials constitute inadmissible hearsay to the extent they are offered by Defendants, as they apparently are, to prove the truth of the matter asserted in them.

[37] *Id.*

[38] *Id.* at 2.

[39] *Id.*

in support of their claim that such a goal existed.[40] Further, the documentation Defendants rely on provides no support for the idea that the Crowley Family had the goal of privatization "long" before this litigation began. Instead, I find that the Purchase Offer shows only that, at the time the Tender Offer was made and in light of the then-pending litigation, the Crowley Family considered it to their advantage to settle the litigation by taking the Company private.

Second, even assuming arguendo that the Company had a long-standing goal of privatization, that goal alone is insufficient for the Defendants to rebut the presumption that the litigation was a cause of the Settlement. Because the first two common fund doctrine requirements are satisfied here, Defendants bear the burden of demonstrating that the lawsuit in no way caused the benefit. For the reasons stated above, I find that Defendants have failed to meet that burden and that Plaintiffs' litigation is a cause, if not the sole cause, of the Settlement. Thus, Plaintiffs are entitled to receive attorney's fees under the common fund doctrine.[41]

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40 *See Grimes v. Donald*, 2000 Del. LEXIS 188, at *4 (Mar. 21, 2000) (finding it significant that defendants presented no affidavit in opposition to the fee application in which the inference of a causal connection between the suit and the decision to enter into a merger was expressly denied).

41 I also reject as overbroad Defendants' argument that if two or more factors confer the benefit, it should be deemed "unquantifiable" and the determination of attorney's fees limited to a *quantum meruit* analysis. As discussed *infra*, the case law does not support such a bright line rule. Rather, I conclude that similar to *Sugarland*, if two or more factors contribute to the creation of a benefit in a reasonably quantifiable way, then a percentage of the benefit analysis is appropriate.

B. Determination of the Appropriate Amount of Attorney's Fees

As stated above, when a court grants attorney's fees under an exception to the American rule, the amount of the award lies within the sound discretion of this Court.[42] A threshold issue here is whether the Court should apply the percentage of the benefit approach or the *quantum meruit* approach. Further, under whichever approach applies, the Court must determine what constitutes a reasonable award of attorney's fees in this case.

1. Percentage of the benefit vs. *quantum meruit*

In determining the size of an award of attorney's fees, courts assign the greatest weight to the benefit achieved by the litigation.[43] When the benefit achieved is unquantifiable, however, courts often find the *quantum meruit* approach most equitable.[44] Conversely, when the benefit achieved is quantifiable courts typically apply a percentage of the benefit approach.

Defendants strenuously oppose use of a percentage of the benefit analysis in this case. Working under the assumption that the litigation was only partially responsible for the Settlement, Defendants assert that this Court cannot quantify the portion of the benefit

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

[43] *See Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 150 (Del. 1980) (discussing the importance of the benefit achieved in awarding attorney's fees).

[44] *See Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990) ("In cases where the benefit created is not quantifiable, the *quantum meruit* approach is often appropriate.").

attributable to the litigation,[45] and therefore can only award fees based on a *quantum meruit* analysis. In addition, Defendants argue that only the benefit achieved by the litigation is relevant in determining a proper fee.[46] Because the objective of Plaintiffs' Complaint was to recover money Defendants caused the Company to spend on life insurance policies, Defendants contend that Plaintiffs cannot contend that their claims solely and directly caused a going-private buy out of the minority.

Plaintiffs, on the other hand, assert that a percentage based *Sugarland* type analysis is proper here, and that "[t]he benefit conferred upon the class as a result of the settlement in this action was at least $37.25 million."[47] Plaintiffs calculated this sum by taking the difference between the pink sheet bid price of $1,800 per share of Crowley stock before the parties agreed to the Settlement, and the negotiated transaction price of $2,990 per share – a difference of $1,190 – and multiplying it by the number of shares to

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45 DAB at 12-13. Defendants argue, in this regard, that the Crowley Family thought the offer of $2,990 was fair based on annual valuations of the employee stock plans dated June 2006 showing the value per share as ranging from $1,913 to $2,943. They assert that by this metric the premium paid ranged from $47 to $1,077 per share, making it impossible to determine what portion was attributable to the litigation.

46 DAB at 11, citing *In re Maxxam Group*, 1987 Del. Ch. LEXIS 423, at *34 (Apr. 16, 1987) ("Only the benefits '*achieved by the litigation*' are relevant when determining fee awards."); *Eisenberg v. Chicago Milwaukee Corp.*, 1998 Del. Ch. LEXIS 141, at *13 (Oct. 25, 1998) ("To serve as the basis for a fee award, a claimed benefit must have some basic relationship to the grievance which led to the filing of the complaint."); *In re Anderson Clayton S'holder Litig.*, 1998 Del. Ch. LEXIS 127, at *8 (Sept. 19, 1988) ("what is relevant is the benefit *achieved by the litigation*, not simply a benefit that…is conferred after the litigation commences.").

47 POB at 11.

be acquired in the transaction, or 31,289, to yield $37,244,620.[48] Plaintiffs contend that the Settlement not only provided the shareholders "an opportunity to realize a benefit of at least $37.25 million not otherwise available to them,"[49] but also enabled them to receive a favorable price, as shown by the fact that by May 8, 2007, only 532 out of 31,289 shares remained untendered.[50]

Plaintiffs also contend that this Court preclusively determined the value of the Settlement and the amount of damages sought by the Complaint when I entered a final judgment approving the Settlement on April 27, 2007.[51] They assert that at the settlement hearing they outlined, without comment or contradiction from Defendants, that the proper way to calculate the benefit to the class was to use the premium paid in the Tender Offer as described above. Plaintiffs argue that this "Court accepted these facts as accurate [and] entered a final judgment based on them," which extends to the present fee calculation.[52]

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48 *Id.* at 11-12. In November and December 2006, when the financial term of $2,990 per share was negotiated, the bid price for Crowley was $1,800 per share. Affidavit of Standard Investment Chartered ¶ 6.

49 *Id*. at 12. Plaintiffs argue that because the "pink sheet" bid price of $1,800 represented a thin market, had stockholders tried to liquidate a large number of shares they would have flooded the market and driven down the price of Plaintiffs' shares of Crowley stock below $1,800.

50 *Id*.

51 PRB at 8.

52 *Id*.

I reject Plaintiffs' suggestion that the general factual determinations this Court made in concluding that the Settlement was fair and reasonable preclude Defendants from litigating, in the context of this fee dispute, the amount of the monetary benefit to the class and the extent to which it resulted from the litigation. The hearing on the Settlement focused on whether the Settlement conferred a substantial benefit on the Plaintiff class sufficient to justify, among other things, the release of claims by the class members. In approving the Settlement, I never attempted to determine the precise amount of the benefit attributable to the Settlement.

I find equally unpersuasive Defendants' claim that the benefit in this case is unquantifiable. The possibility that the Company's decision to settle the action by way of a tender offer may have stemmed, in part, from considerations other than Plaintiffs' claims may support awarding a lower percentage of the benefit than Plaintiffs seek as a fee, but it does not require that I apply a *quantum meruit* analysis. Based on the available evidence, I find that the Settlement of Plaintiffs' claims contributed importantly to the premium paid in the Tender Offer as calculated by Plaintiffs, and that it supports a determination that Plaintiffs deserve some credit for effectively creating a common fund for the benefit of the class of approximately $37.25 million.[53]

I further find that Plaintiffs' litigation efforts enabled the class to obtain a benefit at least somewhat more favorable than could have been achieved through trial or through action taken independently of the litigation. Crowley stock had been thinly traded on the

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[53] *See In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 358-59 (Del. Ch. 1999) (discussing characteristics of common fund cases).

pink sheets. The Company had not paid, and had not stated any intention ever to pay, any dividends on the stock.[54] Further, as minority stockholders, Plaintiffs were not in a position to control dividend policy of the Company and were not in a position to cause a transaction which would have provided them liquidity in their stock. Defendants have failed to rebut Plaintiffs credible showing that as a result of the underlying litigation and through creative negotiations, their counsel secured a settlement for the Plaintiff class that they probably could not have achieved otherwise, representing a significant monetary benefit. At the same time, I recognize that it was the Company's decision to settle the action by making the Tender Offer that led to the $37.25 million benefit – a decision Plaintiffs could neither have planned on nor implemented themselves. I conclude, therefore, that Plaintiffs' litigation is a primary legal cause of the Settlement and ensuing $37.25 million benefit.

The litigation, however, played a more important role in causing some aspects of the total benefit than others. In particular, I find that the record strongly supports the conclusion that the litigation caused most, if not all, of the first $23.5 million of the benefit, based on the damages allegations in the Complaint. Nevertheless, Defendants' desire to take the Company private did play some part in their deciding to pay the premium of $37.25 million. Hence, I consider it reasonable to infer that at least some portion of the Tender Offer premium above $1,800 stems from Defendants' desire to go private and the intrinsic value of the Crowley shares, as opposed to the litigation. Thus, it

[54] Pls.' Br. in Supp. of Prop. Settl. at 8.

is within the bounds of equity and my discretion to determine the fee award in this case based on a percentage of the benefit achieved, and to vary the percentage depending on the extent to which Plaintiffs' counsel and the litigation are responsible for specific aspects of the $37.25 million benefit to the class. That the Company also played a part in creating the Settlement premium, especially to the extent it exceeds the $23.5 million alleged in Plaintiffs' Complaint, is one of the factors relevant to determining the amount of a reasonable attorney's fee award.

Defendants argue that this is a "shared-credit" case and focus much of their discussion on cases where the benefit conferred was unquantifiable. Specifically, Defendants rely on *First Interstate*, *Dunkin' Donuts*, and *Takecare II* for the proposition that when the Court cannot ascertain, with any degree of confidence, even an approximate amount reflecting the value conferred on the class members by the litigation, the Court should employ the *quantum meruit* approach. Because I find the benefit caused by this litigation sufficiently quantifiable to support awarding an attorney's fee based on a percentage of the benefit conferred, Defendants' cases are not apposite.

In *First Interstate*, class plaintiffs brought litigation concerning the merger of Wells Fargo and First Interstate. The litigation was rendered moot, however, when First Interstate's board dropped their opposition to Wells Fargo's hostile proposals and abandoned a proposed "white knight" merger agreement with First Bank Systems. Thereafter, class plaintiffs sought their attorney's fees in connection with those moot claims. The court in *First Interstate* applied the *quantum meruit* approach for several reasons; the fact that multiple factors apparently caused the claimed benefit does not

appear to have been controlling. The court determined that it was not a common fund case because the benefit conferred was unquantifiable and because the Court could not determine the source and amount of the fund claimed to have been created by the plaintiffs' litigation efforts.[55] The Court found it difficult to quantify the "fund" created because many factors, independent of the litigation, influenced the outcome and the litigation itself did not result in an injunction or judgment.[56] The court attributed the difficulty, "in significant part, to the fact that the litigation was played out in the context of a hotly contested battle for control of First Interstate."[57] The court could not isolate the amount of the "fund" because the litigation had no relation to one bidder's exchange offer or to the increase in the market price of the winning bidder's shares during that bidder's exchange offer.[58] The Crowley case does not involve any such complications.

Defendants argue that the court in *Dunkin' Donuts* applied *quantum meruit* because it could not attribute the whole or any part of the claimed benefit to the stockholder litigation.[59] *Dunkin' Donuts* involved a class action for breach of fiduciary duties, challenging defensive measures taken by the Dunkin' Donuts board to thwart takeover proposals. The class plaintiffs failed to obtain preliminary injunctive relief because they had not demonstrated a likelihood of irreparable injury. Approximately one

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[55] *Id.*

[56] *Id.* at 358 n.2.

[57] *Id.*

[58] *Id.* at 359 n.3.

[59] DAB at 10.

month later, Dunkin' Donuts approved an auction whereby Allied-Lyons won the bidding contest. The class plaintiffs monitored the auction process. On these facts, the court found the benefit conferred unquantifiable and applied a *quantum meruit* analysis because (1) "class plaintiffs, at the most, can only be partly credited with conferring the benefit achieved" and (2) "the class plaintiffs occupied only a monitoring, albeit active, role in the present litigation."[60] Plaintiffs here played a much more pivotal role in achieving the benefits to the class.

Defendants advance similar arguments regarding *Takecare II*, and they are equally unpersuasive.[61] In that case, shareholders sought to set aside a letter of intent to accept an offer to purchase a company on the grounds that it prevented a fair auction. The suit became moot after the company accepted a tender offer price higher than the price stated in the letter of intent. In that context, the court found only an "indirect and tangential relationship" between the litigation and the resulting transaction.[62] Further, the court determined that the litigation could take no credit for the pre-lawsuit offer and at most only partial credit for any further increase in the transaction price.[63]

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60 *Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *1456-57 (Del. Ch. Nov. 27, 1990).

61 DAB at 10.

62 *United Vanguard Fund, Inc. v. Takecare, Inc.*, 727 A.2d 844, 857 (Del. Ch. 1998).

63 *Id.*

2. A reasonable award of attorney's fees

Historically, Delaware courts grant attorney's fee awards in shareholder suits to promote efficient litigation of meritorious lawsuits, while avoiding windfalls.[64] Fee awards should encourage future meritorious lawsuits by compensating the plaintiffs' attorneys for their lost opportunity cost (typically their hourly rate), the risks associated with the litigation,[65] and a premium.[66] The fee award, however, can reach a point where it no longer operates as an incentive, and rather morphs into a "socially unwholesome windfall."[67] Therefore, on a case-by-case basis, courts attempt to award attorney's fees in a way that provides the proper incentives, without granting a windfall.

Operating within that framework and having established that this is a percentage of the benefit case, I must now determine a reasonable percentage. Exercising their discretion, Delaware courts consistently have applied a multifactor approach – originally articulated in *Sugarland* – in determining reasonable attorney's fees.[68] The *Sugarland*

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64 *See Seinfeld v. Coker*, 847 A.2d 330, 333-34 (Del. Ch. 2000) (noting the desire to produce two incentives – "the incentive for shareholders to bring meritorious lawsuits that challenge alleged wrongdoing and the incentive for plaintiffs to litigate such lawsuits efficiently," while stating the desire to avoid "socially unwholesome windfalls").

65 *See id.* ("Risk reflects the contingent nature of the work, the financing costs incurred with delaying the attorneys' compensation until the case is concluded, the inability to diversify away particular risks, as well as other contingencies.").

66 *Id.*

67 *Id.* at 334.

68 *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 547 (Del. 1998). *See*, *e.g.*, *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966) (explaining that the amount of attorney's fees is fixed by the sound discretion of this court); *In re*

factors are: (1) the benefit achieved in the action; (2) the contingent nature of the undertaking; (3) the difficulty of the litigation and the efforts of counsel; (4) the quality of the work performed; and (5) the standing and ability of counsel.[69]

As a preliminary matter, before addressing the *Sugarland* factors, I find it appropriate to apply different percentage rates to different portions of the benefit paid to Plaintiffs. In this case, Plaintiffs cannot claim total responsibility for the premium paid in the Tender Offer. While the record shows that Defendants would not have made the Tender Offer but for the pending litigation, Mr. Crowley's motivations for privatizing the Company contributed to his decision to settle the case by way of a Tender Offer. Although I do not find these motivations to be directly causal, I consider Plaintiffs' claim of sole responsibility for the almost $14 million dollar difference between the damages sought in the Complaint and what was paid in the Tender Offer to be exaggerated. It is in this context that I find persuasive Defendants' arguments in that Plaintiffs' litigation only contemplated reimbursement of the Company for insurance premiums. The efforts of Plaintiffs' counsel in the litigation provided the impetus for Mr. Crowley to settle. Those efforts brought Mr. Crowley and Defendants to the negotiating table. Defendants may have had additional reasons unrelated to the litigation for preferring to settle the case by means of a Tender Offer. In any event, Plaintiffs' counsel's representation of the

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Appraisal of Shell Oil Co., 1992 Del. Ch. LEXIS 228, at *12 (Oct. 30, 1992) ("The trial court has considerable discretion in weighing and balancing the various *Sugarland* factors.").

[69] *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980).

minority shareholders of Crowley provided Defendants an opportunity effectively to kill two birds with one stone by simultaneously negotiating a settlement of the litigation and a defensible price for the Tender Offer. This can be seen in Defendants' Purchase Offer, which explicitly trumpets Plaintiffs' role in the negotiation of the Tender Offer price.

While it is clear that Plaintiffs instigated the action leading to the benefit, it is equally clear that they did not plan for the Company to settle the action by taking the Company private. Plaintiffs' counsel deserve some credit for bringing about that fortuitous circumstance and its consummation, but not nearly as much as they do for the settlement of the damages claims in the litigation. As I balance these considerations and others, I conclude that the most equitable and reasonable way to award attorney's fees in this case is by attributing different percentage rates to each of two separate portions of the benefit paid to Plaintiffs.[70] Specifically, I divide the benefit into two portions: (1) the portion of the benefit fairly attributable to the claims alleged in the Complaint, which sought a total of approximately $23,500,000; and (2) the remaining benefit paid to Plaintiffs, $13,744,620 ($37,244,620 - $23,500,000 = $13,744,620).

First, I consider the damages alleged in the Complaint. Plaintiffs and their counsel achieved a significant monetary benefit for the class. It is undisputed that Plaintiffs' counsel took this case on pure contingency and represented their clients well as

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[70] *See Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142, 151 (Del. 1980) (awarding a 5% recovery for a portion of the benefit not exclusively caused by the litigation); *In re NCS Healthcare, Inc. S'holders Litig.*, 2003 Del. Ch. LEXIS 56, at *12 (May 28, 2003) (awarding more than "15% of the first $48 million of the benefit achieved…and 5% of the next $51 million").

experienced practitioners, including primarily Mr. McNew. Although Plaintiffs argue otherwise, I do not find that this case presented particularly novel or complex issues; at least not to the point of tipping the scale in favor of a higher fee. The split-dollar life insurance policies may be complicated, but they represent a single type of corporate asset. Moreover, the 1992 and 1998 Agreements relating to such insurance policies all obligated the Company to take certain actions regarding them for the benefit of the controlling stockholder, Mr. Crowley, and the Crowley Family. Allegations of breach of fiduciary duties and waste based on such self-interested transactions are commonplace in shareholder litigation.

Additionally, while the 1,047 hours Plaintiffs' counsel worked on this case do not strike me as disproportionately high, those hours were spent over a period of more than four years. That considered, the fact that Plaintiffs' underlying action never progressed beyond the motion to dismiss stage warrants a reduction in the percentage rate used in calculating fees, as this Court has a history of properly awarding lower percentages of the benefit where cases have settled well before trial.[71] Applying the *Sugarland* factors, in relation to the portion of the benefit attributable to the total damages alleged in the Complaint, $23,500,000, I award Plaintiffs' counsel attorney's fees of 15%, yielding

[71] *See, e.g.*, *In re Coleman Co. S'holders Litig.*, 750 A.2d 1202, 1212 (Nov. 12, 1999) (reducing fees because counsel had only performed confirmatory discovery and had mimicked the bargaining position used by the settling party that preceded them); *Dow Jones & Co. v. Shields*, 1992 WL 44907, at *3 (Del. Ch. Mar. 4, 1992) (awarding fees of $5 million on a benefit of $95 million where the case settled and an independent committee played a significant part in raising the amount paid in the tender offer).

$3,525,000.[72] Not only does this percentage rate conform to the *Sugarland* analysis, but it also properly compensates Plaintiffs' counsel for the excellent benefit they achieved for the class and the risk they assumed without granting a windfall.

Second, I consider the remaining benefit paid to Plaintiffs. I conclude that Plaintiffs' counsel should receive attorney's fees for the additional benefit Plaintiffs received from the litigation and Plaintiffs' counsel's role in negotiating the Settlement. As previously discussed, however, Plaintiffs' counsel were not the sole cause of, nor did they plan for the benefit in excess of the alleged damages that Plaintiffs in fact received due to Defendants use of a Tender Offer to effect the Settlement. In my judgment, when these considerations are taken into account with the *Sugarland* factors, a percentage rate of 5% of the excess benefit achieved is fair and reasonable. Five percent of $13,744,620 yields $687,231 in attorney's fees.

Combined these awards produce a total monetary award of $4,212,231, which represents a reasonable attorney's fee under the circumstances of this case. As a "backstop check," this Court also considers whether a contemplated fee award translates

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[72] Given that this case settled at an early stage, this rate is fair and reasonable when compared to cases that settled at a much later stage. *See Sugarland*, 420 A.2d at 151-52 (awarding 20% of the benefit where Plaintiffs' counsel engaged in two-phase litigation working for over 15,000 hours); *In re Appraisal of Shell Oil Co.*, 1992 WL 321250, at *1170 (Del. Ch. Oct. 30, 1992) (awarding 25% of the benefit where Plaintiffs' counsel litigated a protracted trial with exhaustive pretrial preparation).

Also, there was no guarantee Plaintiffs would have been awarded the full $23,500,000 had their case been fully litigated at trial. The award likely may have been, at most, 75% of that amount. This is one of the factors that caused me to use a 15% rate.

into an exorbitant hourly rate.[73] The award this Court is making does represent a high hourly rate of $4,023, that amply rewards Plaintiffs' counsel for undertaking this litigation on a fully contingent basis. It is not inconsistent or unreasonable, however, when compared with other cases where, as here, litigation has provided especially favorable results for Plaintiffs.[74]

C. Application for Expenses

Under 10 *Del. C.* § 5106, this Court is authorized to "make an order concerning costs in every case as is agreeable to equity." Plaintiffs here request a total reimbursement of $17,227.26, including a request for reimbursement of $10,000 that this Court ordered them to pay Defendants' counsel after Plaintiffs' self-serving misinterpretation of Court of Chancery Rule 15(aaa) caused unnecessary briefing and expense related to their motion for leave to amend their Complaint. Defendants object only to the requested reimbursement of the $10,000 payment. They argue that because this Court required Plaintiffs to pay this fee as a penalty for avoiding the application of Rule 15(aaa), refunding it to them now at Defendants' cost would be the equivalent of

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[73] *See In re Abercrombie & Fitch Co. S'holders Derivative Litig.*, 886 A.2d 1271, 1274 (Del. 2005) ("[U]se of hours invested…was intended as a "backstop check," or as a means to evaluate the propriety of the amount of the award.").

[74] When this fee is compared against historic fees adjusted for inflation, the fee is at the high end of the spectrum, but not unprecedented. Ten years ago, in 1997, this Court awarded a fee that translated into a $3,500 hourly rate. *See In re AXA Fin., Inc.*, 2002 WL 1283674, at *7 n.20 (citing *Dagron v. Perelman,* Del. Ch., C.A. No. 15 101, tr. at 49, 51, Chandler, C. (Aug. 29, 1997)). When adjusted for inflation, that fee would equal $4,542.35 today. (Inflation calculated using the consumer price index calculator at http://data.bls.gov/cgi-bin/cpicalc.pl.).

reversing this Court's prior order.[75] Plaintiffs counter that the issue is not whether Defendants should be required to reimburse expenses related to the Rule 15(aaa) avoidance, "but whether these expenses were properly chargeable to clients by Plaintiffs' counsel."[76] Plaintiffs assert that, because the Court's decision did not "suggest that this expense should be borne solely by counsel and not passed along to counsel's clients," the $10,000 constitutes a proper litigation expense that, pursuant to the Settlement Agreement, Defendants should be required to reimburse.[77]

I disagree with Plaintiffs' characterization of this issue. Although the sanction imposed by the Court did not preclude Plaintiffs' counsel from charging that $10,000 amount to their clients, counsel was in large part responsible for the problem. The fact that Plaintiffs' counsel chose to pay the penalty themselves rather than seek payment by, or reimbursement from, their clients provides no justification for reimbursing those funds to them. I also find unpersuasive Plaintiffs' reliance on the general reference to "expenses" in the Settlement Agreement.[78] If Plaintiffs intended that clause to cover the $10,000 the Court ordered them to pay to Defendants, they should have stated that in the Agreement. Thus, I deny Plaintiffs' counsel's attempt to recoup the $10,000 they paid to

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[75] DAB at 15 n.6.

[76] PRB at 11 n.7.

[77] *Id.*

[78] Stip. and Agreement of Compromise, Settlement and Release, filed Mar. 19, 2007, ¶ 6.

defray Defendants' unnecessary litigation expenses. The Court grants the rest of Plaintiffs' counsel's request for expenses, in a total amount of $7,227.26.

III. CONCLUSION

For the reasons stated, I hold that Plaintiffs' counsel are entitled to receive from Crowley Maritime Corporation a payment of their reasonable attorney's fees in the amount of $4,212,231 and expenses of $7,227.26.

IT IS SO ORDERED.