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

RICHARD J. KORN and ANDREW DAL NOGARE, Plaintiffs, v. NEW CASTLE COUNTY, a political subdivision of the State of Delaware, CHRISTOPHER A. COONS, as County Executive, and DAVID W. SINGLETON, as Chief Administrative Officer, and PAUL G. CLARK, as President of New Castle County Council, and JOSEPH REDA, ROBERT S. WEINER, WILLIAM J. TANSEY, PENROSE HOLLINS, KAREN H. VENEZKY, PATTY W. POWELL, GEORGE SMILEY, JOHN J. CARTIER, TIMOTHY P. SHELDON, JEA P. STREET, DAVID TACKETT, and JAMES W. BELL, as Members of New Castle County Council, Defendants.	)	Civil Action No. 767-CC

MEMORANDUM OPINION

Date Submitted: July 19, 2007
Date Decided: October 3, 2007

Ronald G. Poliquin, of YOUNG, MALMBERG & HOWARD, P.A., Dover, Delaware; Gary F. Traynor, Paul A. Fioravanti, Jr., and J. Clayton Athey, of PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware, Attorneys for Plaintiffs.

Gregg E. Wilson, Carol J. Dulin, and Laura T. Hay, of NEW CASTLE COUNTY LAW DEPARTMENT, New Castle, Delaware, Attorneys for Defendants.

CHANDLER, Chancellor

In 279 B.C., Pyrrhus of Epirus ostensibly defeated the Roman army at Asculum, but in the process lost a devastating number of his own troops. Another such victory, he exclaimed, and I shall be ruined.[1] In a similarly Pyrrhic victory, the taxpayers of New Castle County have won the "substantial and quantifiable monetary benefit"[2] of a refund of an unauthorized light-tax surplus accumulated by the County, but will now face a significant increase in their tax rate in order to pay for it. The attorneys who led this charge now seek fees and expenses in the amount of $184,990. For the reasons stated in this Opinion, I grant their motion, but not to the full extent sought.

I. BACKGROUND AND PROCEDURAL HISTORY

This litigation began almost three years ago and implicated numerous issues not presently relevant.[3] To briefly summarize, the dispute began when two of New Castle County's taxpayers brought suit to challenge the legality of the County's financial reserves and to enjoin the County's proposed bond issuance. The County voluntarily withdrew the bond proposal. Shortly thereafter, this Court found the financial reserves were in violation of the County Code but declined to

[1] 1 PLUTARCH, *Pyrrhus*, *in* PLUTARCH'S LIVES 538–45 (John Dryden, trans., Random House, Inc. 2001) (75 A.C.).
[2] *Korn v. New Castle County*, 922 A.2d 409, 413 (Del. 2007).
[3] A detailed review of the background of the dispute is found in this Court's September 27, 2005 Opinion. *Korn v. New Castle County*, C.A. No. 767-N, 2005 WL 2266590 (Del. Ch. Sept. 27, 2005).

permanently enjoin the bond issuance.[4] The County passed remedial legislation designed to reform the 2005 budget to comply with the Court's Order, and the plaintiffs were granted leave to amend their complaint to challenge the legality of that remedial legislation and to challenge a surplus of funds accrued from the County's light tax. The County quickly thereafter modified its 2006 budget to spend the light-tax surplus and thereby mooted the issue. This Court granted summary judgment in favor of the County with respect to plaintiffs' challenge to the remedial legislation.[5] In that same decision, each party was ordered to bear its own costs and attorneys' fees.[6]

In early 2006, this Court considered plaintiffs' motion for reargument on the issue of costs and fees. Plaintiffs' counsel sought costs and fees in the amount of $500,000, citing the benefits of canceling the bond issuance and the expenditure of the light-tax surplus as reasons justifying the application of a pseudo-corporate benefit doctrine. Because "conjecture that reducing taxes or canceling bond issuances in favor of spending down reserves has worked a calculable economic benefit to taxpayers requires speculation too profound to support an exception to the American rule on fees," this Court denied the application.[7]

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[4] *Korn v. New Castle County*, C.A. No. 767-N, 2005 WL 396341 (Del. Ch. Feb. 10, 2005).
[5] *Korn v. New Castle County*, C.A. No. 767-N, 2005 WL 2266590 (Del. Ch. Sept. 27, 2005).
[6] *Id.* at *15.
[7] *Korn v. New Castle County*, C.A. No. 767-N, 2006 WL 588041 (Del. Ch. Mar. 2, 2006).

The Supreme Court, however, reversed that decision in part.[8] Specifically, the Supreme Court agreed that any benefit from the County's decision to abandon the bond issuance was too speculative to warrant an award of fees, but it went on to find that the County had used the light-tax surplus to reduce the tax rate and that this rate reduction constituted a "substantial and quantifiable monetary benefit."[9] Indeed, the Supreme Court seemingly made two findings: (1) that the benefit conferred upon taxpayers amounted to $540,000, the exact amount of money that had been held in surplus; and (2) that the expenditure of the surplus constituted a benefit to *all* light-tax taxpayers. The County now strenuously contends that the benefit cannot be quantified at $540,000 because it has had to raise tax rates to account for the depletion of the surplus. Further, it asserts, the tax rate reduction was not a benefit to all taxpayers in the county. Unfortunately, the County has either chosen inexplicably to share these latter facts only now on remand (and not before the initial trial court decision or on appeal), where they might have proven persuasive, or it has only now post-appeal begun an in-depth analysis of the issues at hand that has disclosed their significance. In any event, these facts were evidently not of record before the Supreme Court on appeal.

[8] *Korn v. New Castle County*, 922 A.2d 409 (Del. 2007).
[9] *Id.* at 413.

II. LEGAL DOCTRINE ON ATTORNEYS' FEES

A. The American Rule and its Exceptions

Generally, Delaware courts follow the American Rule, under which "prevailing litigants are responsible for the payment of their own attorney's fees."[10] There are, however, limited exceptions to this rule. First, where there is a fee-shifting statute, the successful plaintiff may recover attorneys' fees from the defendant. Second, there are several equitable doctrines that provide limited exceptions to the American Rule.[11] The most important of these equitable exceptions is the "common fund doctrine" and the related "common benefit doctrine."[12] Both are based "on the equitable principle that those who have profited from litigation should share its costs."[13] Under the common benefit exception, a litigant may recover attorneys' fees if (1) the action was meritorious when filed, (2) the litigation conferred a substantial benefit on a clearly defined group, and (3) there exists a causal link between the litigation and the benefit.[14]

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[10] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1043–44 (Del. 1996).

[11] *See Maurer v. Int'l Re-Ins. Corp.*, 95 A.2d 827, 830 (Del. 1953) (discussing the equitable exceptions such as the common fund doctrine, petitions for instruction in administering a trust, interpleader suits, and suits where counsel is appointed by the court to represent a position otherwise not advocated).

[12] The common fund doctrine applies where the litigation results in the creation of a fund over which the court has some level of control. Appropriate attorneys' fees are paid from this fund. The common benefit doctrine is most frequently used in our state in the context of corporate litigation and applies where a shareholder's suit has resulted in a significant, substantial (but non-monetary) benefit to the entire corporation.

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

[14] *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006).

In the context of public interest litigation (like a taxpayer's suit), however, the Supreme Court recently has held that "absent legislative authorization, fee-shifting applications are disfavored[,]" and further noted that "our courts have been cautious about creating and expanding judge-made exceptions to the American Rule absent express and clear legislative guidance."[15] In a clear departure from that course, the Supreme Court has now held that the common benefit exception can apply in the context of a taxpayer's suit and does apply in this case.[16] This holding would appear to put Delaware squarely at odds with a number of other states[17] and with a not insignificant body of academic commentary.[18] Under the

[15] *Id.* at 1091.

[16] *Korn v. New Castle County*, 922 A.2d 409, 412–13 (Del. 2007).

[17] Many other states either prohibit recovery of attorneys' fees in taxpayer suits or provide for recovery by *statutory* fee shifting. *See, e.g.*, ARIZ. REV. STAT. ANN. § 35-213 (allowing recovery of attorney's fees in taxpayer actions); IND. CODE § 36-2-6-13(b) (same); N.Y. STATE FIN. LAW § 123-g (same); OHIO REV. CODE ANN. § 309.13 (same); WIS. STAT. ANN. § 814.04 (same); *Hagge v. Iowa Dept. of Revenue & Fin.*, 539 N.W.2d 148, 152–53 (Iowa 1995) ("It is clear to use that these provisions leave no room for the district court to pay refunds to anyone other than the taxpayer who is rightfully owed the refund."); *Okla. Tax Comm'n v. Ricks*, 885 P.2d 1336, 1341 (Okla. 1994) ("The money to be used for refunds comprises an *unsegregated portion* of the state fisc which was *never before the district court for its direct supervision and control* . . . [and] the absence of *direct and present district court control* over monies subject to the OTC's authority would make inappropriate the allowance of a common-fund counsel award." (footnote omitted)). Moreover, the United States Supreme Court has concluded that the federal courts have no power to award attorneys' fees for public interest litigation in the absence of a fee shifting statute. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269–71 (1975).

[18] *See* Gregory C. Sisk, *A Primer on Awards of Attorney's Fees against the Federal Government*, 25 ARIZ. ST. L.J. 733, 785 (1993) ("When the government is held liable to pay benefits or damages to a group of citizens, a separate fund is rarely created from which a fee could be taken. Instead, the money generally remains in the public treasury until actually paid to each individual beneficiary or claimant."); John P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 887 (1975) ("Still more disconcerting is the danger at the other extreme, that courts will transfer to these situations the modes of thought and action that have

Supreme Court's holding in this case, local governments face a new financial risk because plaintiff's attorneys are now incentivized to bring public interest lawsuits. It is questionable, however, whether there is a need to incentivize public interest litigation because there are other enforcement or accountability measures (the Delaware Attorney General and the election process come immediately to mind). The same is not true in the context of corporate litigation.[19] Nevertheless, this Court is obligated to award fees against the County reasonable in relation to the benefit the Supreme Court found was conferred.

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been developed in stockholders' suits and siphon off to lawyers, through court-imposed but otherwise uncontrolled levies, substantial portions of the public revenues." (footnote omitted)).

[19] The policy concerns implicated by shifting fees in public interest litigation have been clearly expressed by commentators:

> But precisely because the benefit resulted from the client's effort to perform a public service, usually the protection of public revenues, it is the ultimate irony to treat the lawyer as the leading partner in a profitmaking enterprise, in which his profit is drawn from and measured by the publicly owned assets that he was employed to conserve. Nonetheless, some courts have slavishly transferred to taxpayers' suits sharing-of-benefit formulas, admitting them as a factor or even making them decisive in measuring fees. The lawyer who thereby secures a net profit, exceeding the fair value of his time and effort spent, should not be described as a public benefactor, but as a poacher on the public domain.

John P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 887 (1975). The larger question is why the courts, rather than the Legislature, should make such a policy judgment affecting public revenues. That was the concern expressed by the United States Supreme Court in *Alyeska Pipeline*:

> Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some, but not others. But it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former.

421 U.S. 240, 269 (1975).

B. Reasonableness of Fees under the Common Benefit Doctrine

Awards of attorneys' fees under the common benefit doctrine must be reasonable in relation to the benefit conferred.[20] The party seeking attorneys' fees and expenses "bears the burden of establishing the reasonableness of the amount sought."[21] The reasonableness of a fee award is committed to the discretion of the Court of Chancery and there can be no "mandatory methodology or particular mathematical model."[22] Driving this analysis is the dual desire to incentivize the bringing of meritorious lawsuits and to avoid "socially unwholesome windfalls."[23] To assess the reasonableness of proposed fees with these desires in mind, the Court considers the following factors: (1) the benefit created / results achieved by the litigation; (2) the time and effort exerted by counsel; (3) the complexities and difficulties of litigation; (4) the skill of counsel; and (5) the contingent nature of counsel's representation.[24] Moreover, the Court may look at other fee awards to provide a basis for comparison.[25]

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[20] *Korn*, 922 A.2d at 413.
[21] *Boyer v. Wilmington Materials, Inc.*, C.A. No. 12549, 1999 WL 342326, at *1 (Del. Ch. May 17, 1999).
[22] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1050 (Del. 1996).
[23] *Seinfeld v. Coker*, 847 A.2d 330, 333–34 (Del. Ch. 2000).
[24] *See Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980); *see also* 2 EDWARD P. WELCH, ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 327.8.2 (2007-1 supp.).
[25] *See, e.g.*, *Franklin Balance Sheet Inv. Fund v. Crowley*, C.A. No. 888-VCP, 2007 WL 2495018, at *13–14 (Del. Ch. Aug. 30, 2007) (comparing facts with those of other cases).

III. ANALYSIS

The Supreme Court has already found that the common benefit exception applies in this case. First, the claim filed was meritorious.[26] Second, the Supreme Court also specifically found that the litigation "created a substantial and quantifiable monetary benefit to all taxpayers."[27] Third, where (as here) a claim is mooted after a complaint is filed by the actions of a defendant, a rebuttable presumption arises that the lawsuit caused the benefit.[28] The County has made no attempt to rebut this presumption and, therefore, the common benefit exception applies. All that remains for this Court is to decide what constitutes a reasonable fee under the *Sugarland* factors. The County does not contest the skill and ability of counsel or the contingent nature of the representation. Consequently, this Court will review the reasonableness of the fee request by examining the benefit conferred, the time and effort exerted, and the complexities and difficulties of the litigation.

[26] *Korn v. New Castle County*, 922 A.2d 409, 413 (Del. 2007).
[27] *Id.* As discussed earlier, this appears to be a factual finding that this Court may or may not have made had further fact finding been conducted. This Court is, however, bound by the law of the case doctrine as given in the Supreme Court's mandate. *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 38–39 (Del. 2005) ("[T]he trial court is required to comply with the appellate court's determinations as to all issues expressly or implicitly disposed of in its decision.").
[28] *Korn*, 922 A.2d at 413.

A. Benefit

The Supreme Court identified the benefit here as the "return" of $540,000 to taxpayers and a reduction of "all taxpayers' light tax rate."[29] The County now strenuously insists that this benefit is ephemeral. Specifically, the County argues that the depletion of the reserves reduced the light-tax rates for 33,805 customers, but resulted in an *increase* in the rates of 33,543 others. Moreover, those taxpayers who actually enjoyed the reduced rates will now, the County suggests, be subject to wild rate fluctuations because the "cushion" of the surplus will no longer be available to absorb unexpected pricing changes. Finally, the County points out that the value of the benefit should be discounted by the fact that county taxpayers will no longer earn the 4.52% interest on the value of the surplus funds.

Although late to the game, the County has submitted new facts, information, figures, and an affidavit from its Chief Financial Officer. Based on these submissions and the plaintiffs' counterarguments, there is clearly a dispute at hand over the precise value of the benefit conferred in this case. In fact, it is likely that this Court would have benefited from the opportunity to conduct further fact finding. The Supreme Court, however, has already made the relevant factual determinations in this matter. Consequently, this Court is bound to consider the reasonableness of the fee in light of a $540,000 benefit.

[29] *Id.*

B. Time and Effort

Plaintiffs have submitted only unitemized, general records of timekeeping with their original motion for fees. This Court cannot, therefore, determine exactly how much attorney time actually was expended on the light-tax issue. The County notes that fewer than twenty days passed between the filing of the amended complaint containing the light-tax claim and the County's resolution of the matter. It further notes that there was limited discovery, no briefing, and no oral argument on the light-tax claim. Plaintiffs respond that this Court should consider all of the attorney time, including time spent on their numerous other claims (many—if not most—of which were unsuccessful).

Only *some* of the time spent on other matters will be considered for the purpose of ascertaining the reasonableness of a fee award. Plaintiffs rightly note that some of their other work may ultimately have led to the discovery of the light-tax claim. Nevertheless, the Supreme Court's mandate—on which the plaintiffs so heavily rely—directs this Court to award a fee "reasonable in relation to the benefit conferred."[30] As noted above, the benefit here is limited to a one-time reduction in the light-tax rate for some taxpayers. Although there may be some dispute about

[30] *Id.*

the exact number of taxpayers who benefited,[31] it is undisputed that it was a discrete subset of all of the County's taxpayers. Neither party has suggested that *every* taxpayer in New Castle County must pay a light tax, yet any attorneys' fees awarded in this case will come from all of the County's taxpayers as a whole—not just those individuals who pay the light tax. The common benefit exception to the American Rule is premised on the notion that it would be inequitable for a class to share in the benefit of litigation without also sharing the cost.[32] There is also some degree of inequity in requiring the entire class of county taxpayers to pay the cost of litigation that benefited just a subset of taxpayers.[33]

Neither party has cited any Delaware cases awarding or disallowing attorneys' fees in a taxpayer suit. The Court's own limited research has uncovered only two decisions, both of which deny attorneys' fees, but neither of which involved a tax refund. In *Claus v. Babiarz,*[34] Vice Chancellor Short denied a motion for attorneys' fees where taxpayers successfully enjoined the sale of surplus realty. Though this action may have saved the taxpayers money, the

[31] As noted above, the County argues that the refund benefited only 33,805 taxpayers. The Supreme Court's opinion suggests that the refund benefited all those individuals who pay a light tax.
[32] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996).
[33] *Cf. Boyer v. Wilmington Materials, Inc.*, C.A. No. 12549, 1999 WL 342326, at *3 (Del. Ch. 1999) ("it would not be appropriate to compensate plaintiff and his attorneys from the derivative fund for efforts expended on the individual claims").
[34] 190 A.2d 19 (Del. Ch. 1963).

benefit was not deemed substantial. In *State v. City of Milford*,[35] then-Vice Chancellor Jacobs refused to grant attorneys' fees where suit by the state and private plaintiffs invalidated Milford's proposed annexation of certain property. Although the city and its residents may have benefited from the decision, it was not a substantial benefit. In its decision in this case, the Supreme Court did not cite or distinguish either *Claus* or *Milford*. I can see only one difference between this case and those earlier decisions: here, the County issued a refund. That single distinction, in my opinion, further supports this Court's decision to limit attorneys' fees to the light-tax issue. It also supports my decision to require the attorneys' fees to be paid from the light-tax fund, thereby ensuring that those county residents who benefited from the refund are also required to share their benefit with the attorneys for plaintiffs. Those county residents who did not receive any refund should not be obligated to pay the costs of this litigation.

Finally, because the light-tax issue was resolved so quickly, this Court is justified in reducing the fee percentage.[36] As noted earlier, the County issued a refund within twenty days of the plaintiffs' amended complaint. Such a short amount of time cannot justify the thirty-three percent fee award sought by plaintiffs.

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[35] C.A. No. 1008-K, 1990 WL 29756 (Del. Ch. Feb. 16, 1990).

[36] *See Franklin Balance Sheet Inv. Fund v. Crowley*, C.A. No. 888-VCP, 2007 WL 2495018, at *13 (Del. Ch. Aug. 30, 2007) (noting that the Court of Chancery "has a history of properly awarding lower percentages of the benefit where cases have settled well before trial").

C. Complexities / Difficulties of Litigation

Plaintiffs have offered only casual remarks that this issue proved complex and difficult. In support, they note that they litigated two motions to compel and that the County offered vigorous opposition. Motion practice is a normal part of litigation, however, and plaintiffs have offered no reason why the motions in this case were so complex as to justify an attorneys' fee award of thirty-three percent. Moreover, the fact that the County vigorously opposed plaintiffs' motions is irrelevant; the County's attorneys are under an obligation to do so.[37] If opposition to motions were sufficient to find cases complex and difficult, than this *Sugarland* factor would be meaningless; it would be present in every application for attorneys' fees. Moreover, the County correctly notes that the key elements of the light-tax claim were disclosed publicly before plaintiffs even filed their initial complaint. I conclude that plaintiffs have failed to meet their burden of persuasion.

IV. CONCLUSION

Cases in Delaware support a wide range of percentages for attorneys' fees, but thirty-three percent is "the very top of the range of percentages" that the Court of Chancery will grant.[38] Courts, of course, routinely award lower percentages as

[37] *See* DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2005) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

[38] *Thorpe v. Cerbco*, C.A. No. 11713, 1997 WL 67833, at *6 (Del. Ch. Feb. 6, 1997).

well.[39] Plaintiffs bear the burden of proving the reasonableness of the fee they have requested, and they have failed to meet that burden here.

First, the benefit in this case, as found by the Supreme Court, is fixed at $540,000, but that is a number whose true value remains subject to legitimate debate. That dispute notwithstanding, it is nonetheless clear that the benefit is not universally shared by those individuals now being asked to pay the legal fees associated with obtaining it. Second, the time and effort spent on obtaining this benefit were limited; the County mooted the issue by its own action within twenty days of plaintiffs' amended complaint. Third, plaintiffs have offered no evidence demonstrating why this matter was so nettlesome that attorneys' fees should be awarded at the maximum percentage allowed under Delaware law.

For these reasons, the Court, in the exercise of its discretion, awards attorneys' fees in the amount of ten percent ($54,000) plus court costs in the amount of $4,990, for a total award to plaintiffs' counsel of $58,990. This award is within the range of awards granted previously by this Court and is comparable with awards in other tax refund cases.[40]

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[39] *See, e.g., Baupost Ltd. P'ship 1983 A-1 v. Providential Corp.*, C.A. No. 12978, 1993 WL 401866 (Del. Ch. Sept. 3, 1993) (awarding fees and expenses amounting to about 13% of common fund).

[40] *See* Workshop, *Class Action Attorney Fees: Compensating Lawyers while Protecting Consumers*, 18 GEO. J. LEGAL ETHICS 1243, 1248 (2005) (stating that the average fee award in tax refund cases is thirteen percent).

Like Pyrrhus and his Greek army, the taxpayers of New Castle County won a distinct battle but did so at great cost to themselves. In these unusual circumstances, it would be wholly inequitable to grant a fee award in the amount of thirty-three percent of the common benefit. Considering all of the factors prescribed by Delaware's common law of attorneys' fee awards, I find that a reasonable fee award is $54,000 plus $4,990 in court costs, or a total award of $58,990. The full amount of this award shall be paid to plaintiffs' attorneys by the County using funds from the County's light-tax account.

IT IS SO ORDERED.