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Court Awards Attorneys' Fees and Provides Roadmap for Future Fee Recovery

Awarding $875,000 in attorneys' fees and expenses for an action regarding the internal affairs of a Delaware corporation, Vice Chancellor Laster provided a roadmap of potential recovery in future cases. *In re Emerson Radio Shareholder Derivative Litigation*, C.A. No. 3992-VCL (Mar. 28, 2011).

Background

After obtaining majority control of Emerson Radio Corporation ("Emerson"), The Grande Holdings Limited ("Grande") became the subject of an inspection by the Emerson Audit Committee for transactions that allegedly benefited Grande's subsidiaries at the expense of Emerson. As a byproduct of the audit, the Emerson board adopted a number of recommendations regarding financial controls and corporate governance. Two derivative actions were filed challenging Grande's alleged related-party transactions. After document discovery, depositions, and motion practice, Grande agreed to pay $3,000,000 to Emerson which in turn agreed to implement augmented governance procedures for related-party actions. Plaintiffs sought $1.5 million in fees.

***Sugarland* Factors**

In Delaware, attorneys' fees and expenses are awarded when a suit challenging actions related to the internal affairs of a corporation confers a benefit upon the stockholders. The measure of those fees and expenses falls within the discretion of the Court based upon factors set forth in *Sugarland Industries v. Thomas*:

> (i) the amount of time and effort applied to the case by counsel for the plaintiffs; (ii) the relative complexities of the litigation; (iii) the standing and ability of petitioning counsel; (iv) the contingent nature of the litigation; (v) the stage at which the litigation ended; (vi) whether the plaintiff can rightly receive all the credit for the benefit conferred or only a portion thereof; and (vii) the size of the benefit conferred.

The Court awarded $875,000 in fees based on the following analysis.

Monetary Benefits Conferred

Where the benefit is quantifiable, the Court will generally "apply a 'percentage of the benefit' approach." Where a case settles early and before trial (*e.g.*, initial factual investigation, no depositions, no motions), the Court tends to award 10-15% of the benefit conferred. Where the case settles after some greater involvement (*e.g.*, a number of depositions, motion practice), the Court tends to award 15-25% of the benefits conferred. The Court will award no greater than 33% - an amount reserved for cases that progress much further than discovery and

perhaps go to adjudication.

Here, counsel recovered $3,000,000 for the Plaintiffs by engaging in significant discovery – hundreds of thousands of pages of documents were produced, eleven depositions were taken and two discovery motions were addressed. As a result, the Court deemed this to be in the middle tranche of cases where the award is generally 15-25% of the recovery. The Court started at 25% of the $3,000,000 award (or $750,000).

Non-Monetary Benefit

While the Plaintiffs obtained a number of corporate governance reforms, two facts mitigated the value of those benefits. First, the Audit Committee had already instituted many similar reforms. Second, many of the reforms were required by federal law and stock exchange standards. Estimating that the potential harm the corporate governance measures saved Emerson at $500,000, the Court applied the 25% cap to that amount to arrive at $125,000 for therapeutic benefits.

Time and Effort of Counsel

In considering the potential for a windfall, the Court placed a "cross-check on the reasonableness of a fee award" by considering the amount of hours worked. The Court held that 2,136 billable hours at roughly $410 per hour would "not confer an unwarranted windfall on plaintiffs' counsel."

Relative Complexity of the Litigation

The Court held that this case did not warrant an adjustment – up or down – for complexity.

Contingency Risk

The Court gave weight to the contingency risk endured by Plaintiffs' counsel: "[u]nlike when entrepreneurial plaintiffs' firms routinely file representative actions against mergers, knowing that the defendants' ability to issue supplemental disclosures and the hydraulic pressure of deal closure will combine to create a ready-made settlement opportunity, plaintiffs' counsel here did not get into the case with an obvious and well- marked exit in sight." But for this risk, the Court would have considered an award reduction.

Standing and Ability of Counsel

With well-known practitioners, this factor did not require any adjustment.

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