3·26·03
5108

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NCS HEALTHCARE, INC.	)	
SHAREHOLDERS LITIGATION.	)	Consolidated Civil Action No. 19786

BRIEF OF KEVIN B. SHAW AND JON H. OUTCALT IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

MORRIS, JAMES, HITCHENS & WILILAMS LLP

Edward M. McNally (I.D. No. 614)
Michael A. Weidinger (I.D. No. 3330)
Elizabeth A. Brown (I.D. No. 3713)
222 Delaware Avenue, 10th Floor
P.O. Box 2306
Wilmington, Delaware 19899
(302) 888-6800
Attorneys for Defendants Kevin B. Shaw and Jon H. Outcalt

OF COUNSEL:

James R. Bright
Timothy G. Warner
Spieth, Bell McCurdy & Newell Co., L.P.A.
2000 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115
(216) 696-4700

March 26, 2003

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

INTRODUCTION

In addition to being the Chairman of the Board of Directors of NCS and the President and Chief Executive Officer of NCS and a Director respectively, these responding defendants, Jon H. Outcalt and Kevin B. Shaw, at all pertinent times, owned approximately 20% of NCS's equity. (Plaintiffs' Brief In Support Of Application For Attorneys' Fees and Expenses at p. 2). Given their significant role in the history of NCS, these defendants believe that plaintiff's fee application must be viewed in light of all the facts that led to the application. It is worth remembering that NCS Healthcare, Inc. ("NCS") labored on the brink of bankruptcy for almost two years. Through the diligent efforts of NCS's Board, its Independent Committee, and its advisors, NCS was able to fight off bankruptcy proposals from Omnicare, Inc. ("Omnicare") and others and ultimately to bring Genesis Health Ventures, Inc. ("Genesis") to the table and obtain a deal providing $1.60 to NCS's shareholders.[1] Plaintiffs did not contribute to this effort.

Once the deal with Genesis was executed, Omnicare filed suit simultaneously with plaintiffs. From the beginning, Omnicare took the lead in the litigation. During this phase, this Court questioned the slow pace by which plaintiffs and Omnicare were pursuing the litigation, specifically questioning why a preliminary injunction motion had not been submitted at an earlier stage of the

[1] In footnote 46, on page 39 of its November 22, 2002 Memorandum Opinion and Order, this Court stated: "The overall quality of testimony given by the NCS directors is among the strongest this court has ever seen. All four NCS directors were deposed, and each deposition makes manifest the care and attention given to this project by every member of the board."

litigation. (October 8, 2002, Teleconference Transcript at pp. 14, 19 and 23). Plaintiffs admittedly provided little assistance at this stage of the litigation.

At the same time, while litigation ensued, NCS was successful in getting Omnicare to come to the table with an "irrevocable" offer to purchase NCS for $3.50 a share. This came about because of the efforts of NCS's Board, Independent Committee and advisors and Omnicare. Plaintiffs' counsel did not participate in these negotiations.

Well into the litigation, Omnicare was dismissed as a plaintiff. At this point, plaintiffs' counsel were forced to the fore. Omnicare, however, even after being dismissed, maintained the reigns of the litigation, drafting important documents and actively participating in the discovery process. (Plaintiffs' Brief in Support of Application for Attorneys' Fees and Expenses at p. 13); (Bemporad Aff. at ¶¶12, 13, 17, 20, 21, 26 and n. 6). While it is indisputable that plaintiffs' counsel successfully argued and won a preliminary injunction against the Genesis deal, those arguments were made based upon briefs drafted by Omnicare's attorneys. (Bemporad Aff. at ¶¶20, 21, 26 and n. 6). Likewise, the preliminary injunction only opened the door for the possibility of an Omnicare deal at $3.50 a share, the preliminary injunction itself did not create the common fund.

After the preliminary injunction was granted, NCS worked diligently to complete a transaction. In other words, market forces took over. Through the significant efforts of NCS and others, a deal was finally struck whereby Omnicare purchased NCS for $5.50 a share. Plaintiffs' counsel had no meaningful participation in these proceedings. (Bemporad Aff. at ¶27).

With these facts, plaintiffs' counsel seek fees in the amount of $13.5 million dollars for 3,260 hours of work. This equates to $4,100 per hour, an amount envious of any lawyer and an amount that is clearly unreasonable and disproportionate in comparison with the participation of plaintiffs' counsel in the underlying lawsuit and their involvement in the benefit obtained. While it is conceded that plaintiffs' counsel played a role in obtaining a benefit for NCS shareholders, it is equally clear that, given the multitude of other factors contributing to the creation of the common fund, the benefit actually conferred by plaintiffs' counsel is less than asserted by plaintiffs and may not be quantifiable. One point is clear - plaintiffs counsel's current request would be a windfall and is clearly excessive given the facts of this case.

STATEMENT OF FACTS

Mr. Outcalt and Mr. Shaw adopt the Statement of Facts as set forth in the Memorandum of Defendant Shareholders Boake A. Sells and Richard L. Osborne in Opposition to Plaintiff's Application for Attorneys' Fees and Expenses.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

Plaintiffs seek an award of fees and expenses unprecedented in the annals of Delaware jurisprudence, exceeding reasonableness in relation to the plaintiffs' participation in this litigation. There is no reasonable basis to award plaintiffs 13.5% of the benefit, which results in $13.5 million dollars. Plaintiffs have failed to meet their burden to demonstrate the request is reasonable. *Boyer v. Wilmington Materials, Inc.*, 1999 WL 342326 (Del. Ch. May 17, 1999) (burden on plaintiff to establish reasonableness).[2]

A fee award serves two primary incentives:

> the incentive for shareholders to bring meritorious lawsuits that challenge alleged wrongdoing and the incentive for plaintiffs to litigate such lawsuits efficiently.

Seinfeld v. Coker, 2000 WL 1800214, *2 (Del. Ch. 2000). "But a point exists at which these incentives are produced, and anything above that point is a windfall." *Id.* at *3.

The applicable legal principles are undisputed. Under the "common fund" doctrine, a litigant who confers a common monetary benefit upon an ascertainable class is entitled to an award of attorneys' fees and expenses. That doctrine's underlying rationale is that "all of the stockholders . . . benefited from plaintiffs'

---

[2] Plaintiffs' application for attorney fees is subject to the same heightened judicial scrutiny that applies to the approval of class action settlements. *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039 (Del. Supr. 1996). The Court, therefore, must conduct an independent determination of reasonableness on behalf of the common fund's beneficiaries, before making or approving an attorneys' fees award. *Id.*

action and should have to share in the costs of achieving that benefit." *Weinberger v. UOP, Inc.*, 517 A.2d 653, 656 (Del. Ch. 1986). Ultimately, the applicants are entitled to a fee award based upon the creation of a common fund if they can show that (1) their action was meritorious at the time it was filed; (2) an ascertainable class received a substantial benefit; and (3) a causal connection existed between the action and the benefit. *Chrysler Corp. v. Dann,* 223 A.2d 384, 386-87 (Del. Supr. 1966); *Weinberger*, 517 A.2d at 654. The pertinent factors for determining the amount of a fee award are:

> (1) the results accomplished for the benefit of the shareholders; (2) the efforts of counsel and the time spent in connection with he case; (3) the contingent nature of the fee; (4) the difficulty of the litigation; and (5) the standing and ability of counsel involved.

Seinfeld, 2000 WL 1800214 at *5(*citing Sugarland Indus. v. Thomas*, 420 A.2d 142, 149 (Del Supr. 1980)).

The critical question for the Court in determining the proper fee award in this case involves evaluation of the causal link between the efforts of class counsel and the benefit to the class. In making that determination, the Court must inquire into:

> [the] role ... the litigation play[ed] in bringing about the transaction in the form that was ultimately accomplished[.] ... [W]hat is relevant is the benefit *achieved by the litigation*, not simply a benefit that, *post hoc ergo propter hoc*, is conferred after the litigation commences.

In Re Anderson Clayton Shareholders' Litigation, 1988 WL 97480 at *3 (Del. Ch., Sept. 19, 1988) (emphasis in original).

The problem with plaintiffs' fee application is that it assumes that plaintiffs were responsible for the entire benefit to NCS shareholders and fails to

properly account for the multitude of other factors, many more substantial than the efforts of plaintiffs, which contributed to creation of the fund. Plaintiffs were not solely responsible for obtaining the preliminary injunction which enjoined the Genesis merger, resulting in the possibility of a deal with Omnicare for $3.50 per share ($48,000,000 benefit), and were not substantially responsible, or even minimally responsible, for negotiating Omnicare's transaction which resulted in the shareholders receiving $5.50 per share ($51,000,000 benefit), ultimately creating a fund in the amount of $99,000,000.[3]

II. PLAINTIFFS' FEE DEMAND IS UNREASONABLE GIVEN THE FACTS OF THIS CASE.

A. The Plaintiffs Did Not Take a Lead Role in the Litigation – Phase One Benefit.

In formulating a judgment as to what fee is merited, the court considers both the nature of the benefit created and the quantity and quality of the legal work that produced it. *Robert M. Bass Group, Inc. v. Evans,* 1989 WL 137936, *4 (Del. Ch. 1989). Any award to plaintiffs must take into consideration the work actually performed by the plaintiffs' counsel. Plaintiffs' counsel, however, have not submitted any evidence showing the work they performed, hours expended or hourly rates, other than Mr. Bemporad's conclusory affidavit. The absence of supporting evidence weakens the application for such a sizeable fee. *See, e.g., In*

[3] Plaintiffs claim that the aggregated benefit to the NCS Shareholders of the Omnicare's acquisition of NCS at $5.50 per share was $102,000,000. As set forth in the brief of Boake A. Sells and Richard L. Osborne, however, plaintiffs' calculation overstates the aggregate benefit to NCS shareholders because it fails to take into account certain options which reduces the aggregate benefit from $102,000,000 to $99,000,000. Messrs. Outcalt and Shaw contend that the Court should accept the calculations provided by their co-directors Messers. Sells and Osborne which properly calculates the aggregate benefit.

re McCaw Cellular Communications, Inc., Shareholder Litigation, 1994 WL 594017, *5 (Del. Ch.). *Fox v. Chase Manhattan Corp.*, C.A. No. 8192-85, 1986 WL 673, at *1 (Del. Ch.).

This is especially troublesome where plaintiffs did not take the leading role in prosecuting the case until they were forced to when Omnicare was dismissed from the action. Typically, this Court refuses to award shareholders' attorneys a fee based on a percentage of the common benefit fund where counsel for bidders "occupied the dominant, lead litigation role[]." *Robert M. Bass Group*, 1989 WL 137936, at *3 (concluding that attorneys for shareholders served monitoring role that was "secondary and minimal" to efforts of counsel for bidders); *see also In re Dunkin' Donuts Shareholders Litig.*, 1990 WL 189120 (Del. Ch.), at *7 (refusing to award percentage of common benefit fund to shareholders' attorneys who "occupied only a monitoring, active, role" compared to lead role played by counsel for hostile bidder).

The underlying facts of this case are unique. Many of this Court's reported decisions addressing fee applications acknowledge that the bidder took the dominate role in the litigation. In this case, plaintiffs' counsel took the back seat and assumed only a monitoring role until Omnicare was dismissed. Only then were plaintiffs forced to step up and take the lead. But even then, by plaintiffs' counsel's own admission, Omnicare maintained a significant role, remaining active in discovery and brief writing. (Bemporad at ¶¶12, 13, 17, 20, 21, 26 and n. 6). Reasonableness demands that plaintiffs' fee award be lessened in light of these facts.

B. The Plaintiffs Were Not Responsible For Negotiating the Transaction That Resulted in the Benefit Fund – Phase Two Benefit

Although it not disputed that the plaintiff obtained the injunction which permitted Omnicare to bid for the acquisition of NCS, this literal "but for" causation is not enough to support an award of fees under Delaware law. As the Court observed in *In re Anderson Clayton Shareholders' Litigation,* 1988 WL 97480 (Del Ch.), the Court must examine what was actually *"achieved by the litigation"* not simply the benefit that occurred to the shareholders after the litigation commenced. *Id.* at *3. All of the *Sugarland* factors are contingent upon the benefit at issue being *causally related to the efforts of* counsel in pursuing their action. *In re Infinity Broadcasting Corporation Shareholders Litigation,* 802 A.2d 285, 293 (Del. 2002). An award, particularly one as high as plaintiffs seek, is appropriate only where the plaintiff can show that it was a "major substantial cause" of the alleged benefit. *See e.g., In re McCaw Cellular Communications,* 1994 WL 594017, at *5 (Del. Ch. Oct. 18, 1994) ("while the litigation may have caused the benefit in a 'but for' sense, it was not a major, substantial cause" of the merger); *In re Anderson Clayton,* 1988 WL 974840, at *4 (substantially reducing fees where litigation was not the "major, substantial cause of the benefit.").

Similarly, the Court in *In re MAXXAM Group, Inc. Stockholders Litigation*, 1987 WL 10016, at *12 (Del. Ch. Apr. 16, 1987) observed:

> In many, perhaps most, cases it will be clear that the entire benefit is directly and entirely attributable to the litigation. Where, however, an arms-length merger is modified during the course of stockholder litigation challenging it ... or where an interested merger is negotiated by an ostensibly independent board committee, a resulting change in merger terms may in part be

> attributable not to the litigation but to the efforts of the independent board or committee meeting its legal responsibilities. To restate, once plaintiffs have a stated a meritorious class action complaint, and the case is thereafter settled on changed terms beneficial to the class ... plaintiffs' attorneys will typically be entitled to some fee at least if the benefit creates a fund. But, in fixing the amount of such fee, a closer look at the particular role of the litigation may be appropriate.

See also, Id. at *11 (fee substantially reduced where change in market conditions, not litigation resulting in settlement, was principal cause of improved merger terms).

Here, the increase in the merger consideration was a result of the negotiations and bidding process of Omnicare, NCS and Genesis; a process not involving plaintiffs' counsel. In determining a reasonable amount of attorneys fees that should be awarded, the Court must evaluate the amount of the benefit that can be fairly attributed to the *efforts of the plaintiff*. *See Painewebber R&D Partners II, L.P. v. Centocor, Inc.*, 2000 WL 130632, *3 (Del. Ch.).

While the preliminary injunction may have opened the door to the ultimate benefit in the "but for" sense, it was not a major, substantial cause of the Omnicare transaction, such that its entire economic value may be fairly attributed to plaintiffs.[4] Plaintiffs' contribution to the benefit was to obtain an injunction

[4] The benefit claimed by the plaintiff was a result of conditions and negotiation over which it had no control. *See In re MAXXAM*, 1988 WL 10016 at *11 (fee substantially reduced where change in market conditions was principal cause of improved merger terms); *see also Croyden Assoc. v. Tesoro Petroleum Corp.*, 1994 WL 163638 (Del. Ch. April 20, 1994) (refusing to consider for purposes of fee award portion of increase in stock price resulting from stock market activity, not litigation); *In re Dunkin' Donuts*, 1990 WL 189120, at *8 (attorneys fees determined on quantum meruit basis due to attenuated nature of benefit conferred); *United Vanguard Fund Inc. v. Takecare, Inc.*, 727 A.2d 844, 857 (Del.

prohibiting the consummation of the Genesis merger agreement. The preliminary injunction alone was of no immediate benefit to NCS shareholders. Once the Supreme Court Order came down, there was confusion among the parties as to the meaning of the Order and the rationale upon which it was based. The litigation did not cease at this time. Instead, the parties were working toward another interlocutory appeal to the Delaware Supreme Court. (Bemporad at ¶26).

After the Genesis merger was enjoined the shareholders could have been left with no transaction at all, on the brink of bankruptcy. Genesis consistently asserted throughout the proceedings that it was not interested in participating in a bidding process and could have walked away at the specter of competitive bidding. Omnicare actually threatened to walk away. During a teleconference with this Court, Omnicare confirmed that it was terminating its tender offer according to its terms. (December 11, 2002 Teleconference Transcript at pp. 20 and 49-50). That grim result, however, did not transpire. Rather, Omnicare and Genesis continued to negotiate with NCS, in large part because of the groundwork already laid by NCS. The negotiations ultimately resulted in a benefit to the shareholders. Plaintiffs, however, were not involved in this negotiation process and cannot claim fees for a benefit that they did not create.

III. THE PROPER AWARD GIVEN THESE FACTS

In Delaware, the *Sugarland* factors provide a court significant leeway in crafting a fee award. Unlike the Federal Courts, Delaware courts are not mandated to apply a percentage analysis to a fee award in a common fund case.

Ch. 1998) (attorney fees award drastically reduced where benefits attributable in part to causes other than successful litigation).

As noted previously, Delaware's courts typically refuse to award shareholders' attorneys a fee based on a percentage of the common benefit fund where counsel for bidders "occupied the dominant, lead litigation role[]." *Robert M. Bass Group. Inc.*, 1989 WL 137936, at *3; *see also In re Dunkin' Donuts.*, 1990 WL 189120, at *7.

Plaintiff argues for its award under a percentage analysis. If this Court is inclined to follow plaintiffs' analysis, in Delaware as "the dollar amount of the benefit increases, the fee award as compared to the benefit achieved has dented to *significantly* decrease." *Fox v. Chase Manhattan Corp.*, 1986 WL 673 (Del. Ch. 1986)(emphasis added.). This logic follows the incentives as set forth in *Seinfeld v. Coker*, 2000 WL 1800214, *2 (Del. Ch. 2000), while making sure that a windfall is not awarded to plaintiffs.

As noted previously, and in line with *Sugarland*, the benefit to the shareholders in this case can be divided into two separate phases. The total benefit represented by phase one was approximately $48 million; the total benefit represented by phase two was approximately $51 million.

1. Phase One.

Phase one consisted of the events which led up to the preliminary injunction. At this phase, Genesis presented an offer of $1.60 a share and, through the hard work of NCS and Omnicare, Omnicare came to the table with an "irrevocable" offer of $3.50 a share. Plaintiffs had no role in these negotiations. Plaintiffs only contribution to this phase was obtaining the preliminary injunction with the assistance of Omnicare, which made the deal a possibility.

Omnicare, however, even after being dismissed, maintained the reigns of the litigation; drafting important documents and actively participating in the discovery process. (Plaintiffs' Brief in Support of Application for Attorneys' Fees and Expenses at p. 13); (Bemporad Aff. at ¶¶12, 13, 17, 20, 21, 26 and n. 6). While it is indisputable that plaintiffs' counsel successfully argued and won a preliminary injunction against the Genesis deal, those arguments were made based upon briefs drafted by Omnicare's attorneys. (Bemporad at ¶¶20, 21, 26 and n. 6). Likewise, the preliminary injunction only opened the door for the possibility of an Omnicare deal at $3.50 a share, the preliminary injunction itself did not fully lead to the creation of the common fund.

In the case of *In re Cendent Corporation Prides Litigation*, 243 F.3d 722 (3d Cir. 2001), the court recognized that in mega-fund recoveries the typical common fund percentage fee awarded is in the range of 3-7%. Defendants submit that given the facts of this case, plaintiffs' phase one fee award should be toward the bottom of the *Cendent* range and perhaps lower than 3%.

Citing *Dow Jones & Co. v. Shields*, 1992 WL 44907 (Del. Ch. 1992), other parties have argued for a maximum award of 5% of the common fund. It is Messrs. Shaw and Outcalt's position that such an award would constitute a windfall to plaintiffs under these facts.[5]

---

[5] Furthermore, the cases relied upon by the plaintiffs in support of its application for 13.5% of the common fund are distinguishable. For instance, plaintiffs cite to *McMullin v. Beran*, C.A. No. 16493-NC, Noble, V.C [ORDER](Nov. 26, 2002) for the proposition that an award of fees and expenses constituting 30% of the $17.6 million settlement fund was reasonable where the case was successfully appealed after an adverse decision from the Court of Chancery. The fee petition in *McMullin*, which followed a full trial and an appeal to the Supreme Court,

Precedent exists supporting an award below the *Cendent* range. *In re Dunkin' Donuts Shareholders Litigation*, 1990 WL 189120 at *11 (awarding attorneys fees that amounted to less than 1% of benefit where court found that class plaintiffs could only be "partly credited with conferring the benefit achieved."); *Robert M. Bass Group, Inc.*, 1989 WL 137936, at * 5 (awarding class counsel $2,000,000, which amounted to less than .02% of the $700 million benefit).

In the *In re Anderson Clayton Shareholders' Litigation*, 1988 WL 97480 (Del Ch.) case the plaintiffs requested a four million dollar fee, which would have represented slightly less than 5% of the $108,000,000 benefit. *Id.* at *1 and *4. Plaintiffs had logged 2,235 hours in the course of that litigation. The Court, however, awarded plaintiffs only $900,000, an amount that was less than 1% of the benefit as attorney fees and resulted in plaintiffs' counsel receiving slightly over $400 per hour. In so ruling, the Court stated:

> Such a fee will reflect a substantial premium over the regular pay that plaintiffs' attorneys could expect to command on a non-contingency undertaking. That premium is justified by their intense efforts and the role that their efforts played in a course of events that ultimately proved to be highly beneficial. *It reflects as well, however, (1) that it was not their efforts alone that won the June 10 injunction, and (2) that the injunction itself did not produce the large monetary benefit to which they now look.*

Id. at *5 (Emphasis added.) The same analysis applies here. *See In re MAXXAM Group*, 1987 WL 10016, at *12 (award lowered "[g]iven the limited causal relationship between the litigation and the material part of the added value that the

---

involved vastly different facts and circumstances than are involved here. There is no evidence that the 30% of the $17.6 million settlement fund resulted in an hourly fee rate anywhere near the one proposed by the plaintiffs in this case.

class will receive ...."). As stated above, any fee awarded by the Court in this case must be proportional to the benefits that were causally related to the efforts of counsel in pursuing their litigation, and must not be based upon benefits to the shareholders that merely occurred after the litigation was filed, but are unrelated to the actions of plaintiffs' counsel. *In re Infinity Broadcasting,* 802 A.2d at 293. Reasonableness demands that plaintiffs' fee award be lessened in light of the present facts.

2. Phase Two.

The second phase occurred after the preliminary injunction was granted. Again, through negotiation between NCS, Genesis and Omnicare, Omnicare eventually purchased NCS for $5.50 a share. Plaintiffs provided no assistance as to phase two. Phase two resulted in an aggregate benefit to the NCS shareholders of $51 million. Although plaintiffs obtained the preliminary injunction which made further negotiations possible, they did not participate at all in the negotiations that eventually resulted in the Omnicare acquisition. (Bemporad at ¶27). As noted above, Genesis previously refused to participate in competitive bidding and Omnicare threatened to withdraw its offer. (December 11, 2002 Teleconference Transcript at pp. 20 and 49-50). NCS's representatives, not plaintiffs, made the final deal a reality.

Plaintiffs cannot show that they were a "major, substantial cause" or even a minimal cause of the ultimate phase two benefit. *See e.g., In re McCaw Cellular Communications,* 1994 WL 594017, at *5; *In re Anderson Clayton*, 1988 WL 974840, at *4. Accordingly, the Court should substantially reduce plaintiffs'

phase two fees. *See In re McCaw*, 1994 WL 594017 at *4 (substantially reducing fee award where "[c]ounsel's contribution, shorn of extravagance, was to set in motion the process that led to [better merger terms]."); *BTZ v. National Intergroup, Inc.*, 1993 WL 133211 at *3 (holding same). Consideration of the facts of this case should lead to an award below the *Cendent* range. *In re Dunkin' Donuts Shareholders Litigation*, 1990 WL 189120 at *11; *Robert M. Bass Group*, 1989 WL 137936, at * 5; *In re Anderson Clayton*, 1988 WL 97480, *5. At a complete maximum, plaintiffs' counsel should receive no more than 3% of the $51 million phase two benefit.

3. Total Fee

Perhaps all this analysis is unnecessary. As the *Seinfeld* case notes, all the Court is mandated to do is to achieve is a reasonable award. This is all that *Sugarland* and *Seinfeld* require. References to total benefit, percentage and loadstar may serve only to distance us from this ultimate goal providing an incentive for plaintiffs to pursue such litigation and to prosecute such cases efficiently. *See Seinfeld*, 2000 WL 1800214 at *2. In this case, adequate incentive may be achieved by merely providing an hourly fee which dwarfs normal hourly rates. For instance, an award of $900 per hour would more than compensate plaintiffs for their efforts. Under this scenario plaintiffs would receive $2,934,000.[6]

[6] In this case, it may not be possible to quantify the amount of the benefit that was the result of the litigation, necessitating a *quantum meruit* analysis. *See United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844 (Del. Ch. 1998) (Court denied fee request based upon percentage of the increase in value of tender offer where court concluded that plaintiff's counsel could claim no credit for the

If a percentage is deemed necessary, these objecting defendants argue that the highest and best award should be 5% of the $48,000,000 (phase one benefit) and 3% of the $51,000,000 (phase two benefit). This produces a maximum total fee of $3,930,000. Based upon the 3,260 hours billed by plaintiffs as stated in their affidavit, this would produce an hourly rate of $1,205, which is more than enough to be an incentive for shareholders to bring meritorious lawsuits and to litigate such lawsuits efficiently. Any additional award would constitute windfall.

---

increased bidding level); *Robert M. Bass Group, Inc. v. Evans*, 1989 WL 137936, *4 (Del. Ch. 1989) (awarding fees based on *quantum meruit* where Court concluded that the contribution of class counsel could not "be measured in monetary terms"); *See In Re Diamond Shamrock Corp.*, 1988 WL 94752 (Del. Ch., September 14, 1988). Given the multitude of factors which contributed to the benefit to shareholders in this case, a *quantum meruit* based award may be appropriate.

CONCLUSION

WHEREFORE, for all of the foregoing reasons and the authorities citied, defendants Outcalt and Shaw respectfully request this Court reduce the attorneys' fees sought by plaintiffs to an award between $2,934,000 and $3,930,000 or lower as the Court deems appropriate.

MORRIS, JAMES, HITCHENS & WILIAMS LLP

Edward M. McNally (I.D. No. 614)
Elizabeth A. Brown (I.D. No. 3713)
222 Delaware Avenue – 10th Floor
P.O. Box 2306
Wilmington, Delaware 19899
(302) 888-6800
Attorneys for Defendants Kevin B. Shaw and John H. Outcalt

OF COUNSEL:

SPIETH, BELL McCURDY & NEWELL CO., L.P.A
James R. Bright
Timothy G. Warner
2000 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115
(216) 696-4700

DATED: March 26, 2003

CERTIFICATE OF SERVICE

I certify that on this 26th day of March, 2002, the foregoing Brief of Kevin B. Shaw and Jon H. Outcalt in Opposition to Plaintiffs' Application for Attorneys' Fees and Expenses by hand delivery to the following:

Donald J. Wolfe, Jr., Esquire
Potter, Anderson & Corroon LLP
Hercules Plaza
1313 N. Market Street
Wilmington, DE 19801

Robert J. Kriner, Jr., Esquire
Chimicles & Tikellis LLP
One Rodney Square
Wilmington, DE 19801

Carmella P. Keener, Esquire
Rosenthal, Monhait, Gross & Goddess
919 N. Market Street, Wuite 1401
Wilmington, DE 19801

David C. McBride, Esquire
Young, Conaway, Stargatt & Taylor
1000 West Street, 17th Floor
Wilmington, DE 19801

Edward P. Welch, Esquire
Skadden, Arps, Slate, Meagher & Flom
One Rodney Square
Wilmington, DE 19801

Elizabeth A. Brown