COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
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Submitted: November 30, 2005
Decided: December 14, 2005

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RE: In re Instinet Group, Inc. Shareholders Litigation
Consolidated C.A. No. 1289-N

Dear Counsel:

Following the court's approval of the settlement of this matter, counsel for the plaintiffs applied for an allowance of $1,450,000 in fees and $173,031.07 in costs. Acting in accordance with the stipulation of settlement, the defendants (joined by The NASDAQ Stock Market, Inc. ("Nasdaq")) oppose that application. Nevertheless, the defendants agree that Instinet Group, Inc. or Nasdaq, as its successor in interest, will pay the amount ultimately awarded by the court.

The court has considered the written submissions of the parties and the arguments advanced by counsel at the November 30, 2005 hearing. For the reasons that follow, a total of $450,000 in fees and expenses will be awarded to counsel for the plaintiffs.

I.

The plaintiffs filed suit to challenge the proposed acquisition of Instinet, a Delaware corporation, by Nasdaq, in a transaction valued at $5.44 per Instinet share (plus a special dividend), or in excess of $1.8 billion in total. Critically, the complaints alleged that Reuters Group Plc., Instinet's majority stockholder, had material interests in the transaction at odds with the interests of the minority stockholders. The complaints attack the fiduciary out provisions of the transaction, the disclosures made in the merger proxy statement, and certain alleged arrangements between and among Reuters, Nasdaq, and Instinet. In regard to the fiduciary out clause, the plaintiffs complained that, although the deal with Nasdaq was structured as a sale of the company in pieces, the merger agreement only permitted the board of directors to terminate in favor of a "superior transaction" for the company as a whole. This was thought to be of particular importance because an outside bidder had informally proposed to pay a higher price for Instinet's institutional brokerage business than was contemplated by the Nasdaq transaction.

On June 29, 2005, the court granted the plaintiffs' motion for expedited discovery on their amended consolidated complaint and set a hearing on a motion for preliminary injunction for September 13, 2005. Thereafter, the plaintiffs engaged in a voluminous, time consuming, and costly document discovery program, reviewing hundreds of thousands of pages of documents obtained from numerous party and nonparty sources. The plaintiffs then took three depositions, all in New York City and all during the same week in early August. While the depositions were ongoing, the parties began settlement negotiations that resulted in a memorandum of understanding dated August 30, 2005. The parties then prepared and signed the stipulation of settlement on September 9, 2005.

The settlement provided for the payment of $1 million in additional compensation to Instinet's minority stockholders, a 15% reduction in the break up fee payable in the event of a superior transaction (from 3.5% of the total equity value of the deal to approximately 3%), and certain enhanced disclosures in the proxy material. In addition, the plaintiffs claim credit for having deprived Reuters of the opportunity to garner an additional $1.5 million from Nasdaq in the transaction, although this produced no corresponding benefit to the class.

The plaintiffs' attorneys have submitted proof that, collectively, the law firms involved in representing the class spent in excess of 2,600 hours in prosecuting this case, having a nominal value of $885,795.50. In addition, there is proof that those law firms incurred in excess of $173,000 in actual out-of-pocket expenses. Of that amount, $27,750 was paid to a noted law professor who gave advice about the terms of the merger agreement. Nearly $125,000 was paid for photocopying and related services, most of which was spent converting the document production from electronic to paper format.

II.

There is no dispute between the parties that because the litigation resulted in a settlement that was approved as fair, reasonable, and adequate, the plaintiffs' attorneys are entitled to some award of fees and expenses.[1] Moreover, as noted above, the stipulation of settlement obliges Instinet (or Nasdaq) to pay the amount determined by the court to be fair and reasonable. Thus, the only dispute is over the amount that should be awarded.

Applications of this nature are addressed to the sound discretion of the court.[2] In determining the amount to award, this court considers several factors, including: (i) the benefits achieved by the settlement; (ii) the difficulty of the litigation and the efforts of counsel, including the stage of the proceeding at which settlement was reached; (iii) the contingent nature of the undertaking; and (iv) the standing and ability of counsel. Here, the defendants focus their objection on the modesty of the benefits achieved and the early stage at which the settlement was reached. They also argue that the plaintiffs' counsel should not be rewarded for having inefficiently litigated the case.

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[1] *In re Chips and Tech., Inc. S'holders Litig.*, 1998 WL 409155, *2 (Del. Ch. June 24, 1998).
[2] *In re Abercrombie & Fitch Co. S'holder Deriv. Litig.*, 2005 WL 2838192,*1 (Del. Oct. 26, 2005).

The benefits achieved by the litigation, although adequate to support the settlement of the claims asserted, are indeed modest. In addition to the payment of an extra $.007 per share, the defendants agreed to a 15% reduction in the break up fee and certain added disclosures in the final proxy statement. The payment amounts to a total of $1 million and justifies some fee. Although the reduction of the break up fee is not immaterial, it does not correlate to the claim asserted in the amended complaint, which attacks the fact that the fiduciary out clause (and the attendant break up fee) limited the definition of a "superior offer" to one for the enterprise as a whole. The added disclosures provide greater detail of several earlier but possibly related transactions between Instinet and Reuters, Reuters and Nasdaq, and Instinet and its CEO. In addition, more detail is given about the amount of the fee paid to Instinet's financial advisor in the transaction. This information is interesting, but it is not clear that its omission was material.

It is also, obviously, true that this modest settlement was reached at an early stage of the litigation. The plaintiffs had only begun to take depositions when settlement discussions began and completed only three depositions before signing the memorandum of understanding. While the court does not penalize plaintiffs' counsel who achieve significant settlements early in litigation, it is also true that those who promptly recognize the inherent weakness of their claims and settle for modest gains should not expect to be rewarded with premium fee awards.

The next consideration is the amount of time and expense incurred by the plaintiffs' counsel in this case. It is apparent that the plaintiffs undertook a massive document program in preparing for the preliminary injunction. As a result, they obtained several hundred thousand pages of production, from numerous sources, and devoted a very large amount of time to the review of these materials. While the *bona fides* of the decision to litigate in this fashion is not in question, it is not unreasonable for the defendants to point out the obvious inefficiencies involved in this case, highlighted by the plaintiffs' decision to pay nearly $125,000 to convert documents produced in a digital format into a paper format. Rather than simply copying the electronic media to permit the plaintiffs' lawyers working on the case to search and review the document production on a computer screen, the plaintiffs spewed the digital production onto paper and, then, copied the paper for review. This approach both added unnecessary expense and greatly increased the number of hours required to search and review the document production. In fact, the time records submitted include a large number of hours, by multiple attorneys, spent reviewing the documents. Thus, the court must disagree with the plaintiffs' counsel's assertion that "this case was a paradigm of efficient litigation,"[3] and give less weight than customary to the number of hours expended by plaintiffs' counsel. Additionally, it would be inappropriate to award the full amount of out-of-pocket expenses, as the very costly decision to "blow back" the digitized document discovery onto paper lacks justification.

Finally, the court notes that the contingent nature of the plaintiffs' counsel's undertaking does not, in this circumstance, justify the premium fee award they seek. The transaction at issue in this litigation was complex and did appear, at first blush, to raise significant issues about the role Reuters and senior Instinet managers played in structuring and negotiating the deal. These questions certainly justified the initial, vigorous pursuit of the claims asserted. Indeed, this court expects that plaintiffs' counsel will always pursue claims vigorously and will devote all of the resources reasonably necessary to prosecute representative claims. Where those efforts bear fruit, the court is apt to reward the plaintiffs' counsel with a fee allowance that takes into account the contingent nature of the undertaking even if the fee amounts to a substantial multiple of a normal hourly rate. Where, however, even a substantial amount of time and expense is spent achieving only a modest result, the contingent nature of the undertaking does not weigh in favor of awarding a premium to the investment of time and effort. On the contrary, where little is accomplished, the fact that the case was undertaken on a contingent fee basis militates in favor of awarding only a modest fee that reflects the value of the benefits achieved. After all, where nothing is achieved, no fee at all is possible.

III.

For the reasons set forth herein, an award of $450,000 in total fees and expenses is GRANTED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor

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[3] Pl.'s Reply Br. at 8.