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Re: *Sample v. Gumbiner*
C.A. No. 8833-VCN
Date Submitted: March 25, 2014

Dear Counsel:

This action arose out of the acquisition of The Hallwood Group Incorporated (the "Company") by Defendant Hallwood Financial Limited. The remaining issue from the settlement hearing is the fee to be awarded to Plaintiff's attorney for the supplemental disclosures. The Defendants concede that a fee of perhaps $100,000 is warranted, but they do dispute Plaintiff's entitlement to the fee of $400,000 which he seeks.

The major area of disagreement involves the banker's book which was provided to the Company's shareholders. The parties' debate about the cause of the release of the banker's book can be traced back to a failure to communicate. From the Plaintiff's perspective, his counsel suggested release and, without further comment on behalf of the Company, the release occurred. From the Company's perspective, it always intended to release the banker's book and its release was delayed by reasons beyond the Company's control. Thus, when the settlement agreement was negotiated, the Company did not realize that the Plaintiff believed that he was entitled to credit, while the Plaintiff had a plausible basis to believe that he was deserving of credit. In addition, even if the Plaintiff was not the cause in fact, he argues that the Defendants have contractually agreed that he should receive credit for its disclosure.[1]

In seeking to determine an appropriate attorneys' fee for shareholder litigation, the Court is called upon to balance several factors, including the time and effort spent by Plaintiff's counsel, the relative complexities of the litigation,

[1] The Defendants also assert that disclosure of the banker's book is not significant because its substance had previously been fairly summarized and disclosed by the Defendants to the shareholders. First, not all pertinent information was otherwise disclosed. Second, the collection and presentation of the Company's financial information provides convenience, and thus benefit, to the shareholders.

the standing and ability of counsel, the contingent nature of the litigation, the stage when the litigation ended, whether the Plaintiff can rightly claim all credit for the benefit, and the size of the benefit.[2]

The Court's attention is usually focused upon the most important of these factors, the benefit achieved. In this instance, the major question is whether the Plaintiff can rightly claim credit for disclosure of the banker's book. The other factors can be addressed quickly. Plaintiff's counsel devoted approximately 220 hours to this litigation before achieving settlement, and roughly half of that time may fairly be allocated to disclosure-related efforts. There were several issues to be addressed in the course of this litigation, which took some time, but the complexity of this litigation was typical for cases of this nature. There was very little, if any, litigation expressly regarding disclosure. The standing and ability of Plaintiff's counsel cannot be questioned. The fee arrangement was contingent. This case was far from trial when it settled.[3]

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[2] *In re PAETEC Hldg. Corp. S'holders Litig.*, 2013 WL 1110811, at *7 (Del Ch. Mar. 19, 2013); *see also Sugarland Indus. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980).

[3] Plaintiff's counsel was awarded other fees from the common fund recovery. The parties agreed that the attorneys' fees for the supplemental disclosures and the common fund recovery would be assessed separately. That decision may have been made with the intent to focus the inquiry on

As part of the settlement process, the parties sought to identify (and to agree upon) the benefits for which Plaintiff could take credit.[4] If doing so clearly was the objective, they unfortunately were not successful. According to the Stipulation of Settlement (the "Stipulation"), at paragraph 23(b):

> The Parties acknowledge that the Company revised the Preliminary Proxy to include, among other things, supplemental disclosures pursuant to alterations suggested by Plaintiff (which supplemental disclosures are set out in a blackline, dated January 15, 2014, sent to Plaintiff's counsel) (the "Supplemental Disclosures").

Among changes to the Preliminary Proxy were "alterations suggested by the Plaintiff." In December 2013, Plaintiff's counsel had conveyed his "belief" that the banker's book should be disclosed. He did not propose text that would be the basis for disclosure of the banker's book. Counsel for Defendants, on January 15, 2014, transmitted to Plaintiff's counsel a redline version of the Proxy Statement[5] that, at page 19, reported that the analysis report by Southern Securities (*i.e.*, the

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each of the two discrete components, but fee awards may be more accurate if based on the overall context of the attorneys' efforts.

[4] Thus, allocation of credit for obtaining the supplemental disclosures here is not the same as in, for example, *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417-19 (Del. 2010), where, in the context of a mootness fee award, the Court had to start with the rebuttal presumption that benefits achieved during the litigation were solely caused by the plaintiff.

[5] Affidavit of R. Bruce McNew, Esq. in Supp. of Settlement and Application for an Incentive Award and an Award of Attorney's Fees and Expenses ("McNew Aff."), Ex. B.

"banker's book") would be attached as an exhibit to the Schedule 13E-3 that was being filed at the same time. In the transmittal email, Defendants' counsel referred to "revisions based on your [Plaintiff's counsel's] comments."

A debate that may focus on the difference between "revision" and "alteration" is not particularly helpful. Defendants planned, according to the affidavits of W. Alan Kailer, Esquire, counsel to Hallwood Financial Limited,[6] before Plaintiff's counsel's expression of his belief regarding release of the banker's book, that the banker's book would be provided to the Company's stockholders. These affidavits assert that the Company had intended to provide the banker's book all along, that release of the banker's book was delayed because the financial adviser's business unit had been disbanded, and necessary approval for its public release had not been obtained. Specifically, Defendants rely upon the SEC requirement[7] that the banker's book be provided when a controlling shareholder, such as Defendant Anthony J. Gumbiner with his roughly 65 percent

[6] Affidavit of W. Alan Kailer (Mar. 14, 2014); Second Affidavit of W. Alan Kailer (Mar. 24, 2014).

[7] *See* 17 C.F.R. § 229.1016(c). Evidently, an SEC comment letter, dated December 13, 2013, addressed disclosure of the banker's book.

control of the Company, is orchestrating a going private transaction.[8] As anticipated, a few days after Plaintiff's counsel's email, the SEC recommended that the banker's book should be disclosed.

The Court's attention must be directed to what the parties agreed. They thought that they had memorialized Plaintiff's accomplishments. The documents suggest a role performed by Plaintiff's counsel, but there is a parallel and different story that can be supported both by reference to the settlement documents and to extrinsic evidence. Effectuating the parties' intent, which is the goal of the Court, requires the Court to allocate responsibility based primarily on the documents. Ignoring the factual background, however, cannot be justified.[9]

During discussions leading up to the Stipulation, Plaintiff's counsel had expressed the view that the banker's book should be produced to the

[8] *See In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 450 n.63 (Del. Ch. 2002) ("In certain going private transactions, the SEC requires that the entire investment banker board presentation books be made public as an exhibit.").

[9] Perhaps a trial should be held to resolve this factual question. A formal fact-finding endeavor is frequently necessary to resolve ambiguity in written agreements as part of the effort to ascertain the parties' shared intent. The Court's impression is that no one wants to pursue that option.

shareholders.[10] Defendants did not respond to this suggestion directly, but, with the revisions to the Preliminary Proxy a few weeks later, the banker's book was supplied as an exhibit to an amended Schedule 13E-3 on or about January 15, 2014. The Plaintiff argues that this sequence provides a factual basis for his claim. It certainly is enough to warrant an inference of causation.

Furthermore, Plaintiff claims that his contribution to the disclosure of the banker's book is duly documented. As noted, on January 15, 2004, the Company's attorney had sent Plaintiff's counsel a redline version of the Proxy Statement reflecting his comments. Following mention of the Southwest Securities Report (*i.e.*, the banker's book), the additional text to the Proxy Statement was: "(a copy of which is attached as Exhibit (c)(2) to the Schedule 13E-3 filed in conjunction herewith)."[11] The Plaintiff argues that this confirms his role in revising the disclosures to include the banker's book based "on [his] comments." Moreover, the Stipulation recites the parties' acknowledgement that "supplemental

[10] Email of R. Bruce McNew, Esq., dated Dec. 9, 2013. The Preliminary Proxy was filed on November 14, 2013, and the initial Schedule 13E-3 was filed on November 15, 2013.
[11] McNew Aff., Ex. B at 19. A similar revision, at page 27, reads: "The report Southwest Securities presented to the Special Committee on March 28, 2013, attached as Exhibit (C)(2) to Amendment No. 1 to Schedule 13E-3 filed in conjunction herewith, contained projections that reflected . . . ."

disclosures [were made] pursuant to alterations suggested by Plaintiff." Also, in the Notice to Shareholders, as sent by the Company, at paragraph 25(b), the Company similarly informed its shareholders that it had "revised the Preliminary Proxy to include, among other things, supplemental disclosures pursuant to alterations suggested by Plaintiff[,] which supplemental disclosures are set out in a blackline, dated January 15, 2014, sent to Plaintiff's counsel . . . ."[12]

The reference in the revised Proxy Statement to the banker's book is not a "revision," in the sense of a modification of existing text. It is, as Defendants point out, a new insert. Perhaps more importantly, the proposed textual changes which Plaintiff's counsel sent to the Company's attorneys did not identify inclusion of the banker's book as an additional item for alteration or revision.[13] Thus, the question of whether the settlement documentation supports Plaintiff's claim to having obtained the Company's agreement that he was the cause (or a cause) of disclosure of the banker's book is, at best, ambiguous. One reading is that any changes may fairly be attributed to the Plaintiff. Another reading is that only alterations (*i.e.*, changes in text and not new inserts) would be credited to Plaintiff.

[12] The revised proxy accompanied the Notice.
[13] Tr. of Settlement Hr'g at 37.

On these facts, somewhat greater credit for the disclosure of the banker's book goes to the Company because of the regulatory framework in which it operated and with which there is no reason to assume that it would not comply. Nonetheless, Plaintiff's counsel cannot be denied all (or substantially all) credit for its release because he suggested it, even though the Company's attorneys may already have been considering it, and the Company did not report back to him that its release was planned. Thus, approximately 40 percent is a fair measure of Plaintiff's causative role in release of the banker's book.

With some credit attributable to Plaintiff for the release of the banker's book, the question remains of how significant was the banker's book disclosure. In general, release of the banker's book offers important insights for the shareholders, not only because of its information, but also because of how the information is portrayed. In addition, it affords shareholders a better understanding of one of the principal documents that most likely was reviewed by the board of directors. Nonetheless, much of the information in the banker's book was available through the Company's other, even if not consolidated, disclosures. Thus, the release of the banker's book increased and facilitated the shareholders' understanding of the transaction, but its significance must be kept in context.

The Plaintiff also deserves credit for the disclosure to the Company's shareholders of other less significant additional information. This includes a description of Plaintiff's allegations of conflicts of interest, a fuller reporting of the derivative claims asserted by Plaintiff (and that they were not considered in the valuation effort), clarification of the role of projections in the valuation process, and elaboration upon the majority of the minority vote.

The value, however, of these disclosures is not as great as Plaintiff has characterized them for several reasons. The derivative claims had been disclosed; the additional disclosures provided a slightly enhanced explanation of the nature of the claims and the potential effect on valuation. As for conflicts, the ones addressed by the supplemental disclosures were of materially less significance than conflicts that were disclosed and resulted in significant awards in different circumstances.[14] For example, in this category were disclosures revealing that a

[14] *See, e.g., In re Gen-Probe Inc. S'holders Litig.*, C.A. No. 7495-VCL, at 47-49 (Del. Ch. Apr. 10, 2013) (TRANSCRIPT).

special committee member held less than one percent of the Company shares and the words "and disinterested" were removed from the Proxy Statement. In addition, the information regarding the Southwest Securities analysis was more in the nature of clarification of what information was considered and what information was not considered. As for the majority of the minority language, it accomplished more in the nature of repeating and emphasizing important information, as contrasted with disclosing important information. The point is that the supplemental disclosures, except for the banker's book, collectively provided benefit to the stockholders, but the benefit was not particularly significant.

Quantification of the value of disclosures and the related appropriate attorney's fee is not a precise endeavor. The uncertainty associated with responsibility for the release of the banker's book—the principal "additional" disclosure—further complicates the effort.

When the therapeutic benefit of these disclosures is considered in light of the other *Sugarland* factors as described above, the Court concludes that a fair and reasonable fee, inclusive of expenses, for the efforts of Plaintiff's attorney is in the range of $350,000 to $400,000, if the Plaintiff can fairly claim credit for achieving these benefits through his litigation efforts. Of this amount, $275,000 to $300,000 may reasonably be attributed to disclosure of the banker's book and $75,000 to $100,000 to the balance of Plaintiff's achievements.

As set forth above, Plaintiff is entitled to credit of 40 percent for the banker's book disclosure and full credit for the balance of the disclosures. Thus, the Court awards Plaintiff $202,500 for the fees and expenses of his attorney based on the supplemental disclosures.[15]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: A. Thompson Bayliss, Esquire
Register in Chancery-K

[15] This is an effective hourly rate of $1,840, a rate that may be generous but is within the acceptable range. Expenses were considered in the fee award for the common fund recovery.