WILLIAM B. CHANDLER III
CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: October 26, 2005
Decided: January 4, 2006
Revised: January 5, 2006

Norman M. Monhait
Rosenthal Monhait Gross & Goddess, P.A.
P.O. Box 1070
Wilmington, DE 19899-1070

Daniel F. Raider (Via E-Mail)
818 Laurelwood Drive
San Mateo, CA 94403

Alan J. Stone
Megan E. Ward
Morris, Nichols, Arsht & Tunnell
P.O. Box 1347
Wilmington, DE 19899-1347

Re: *Daniel F. Raider v. Charles T. Sunderland, et al.*
Civil Action No. 19357 NC

Dear Counsel:

On November 2, 2005, this Court entered an Order and Final Judgment that reserved $240,000 of class counsel's fee allowance in an escrow account, pending further order of this Court. The issue requiring resolution was a request from plaintiff for an allowance, or bonus payment, to be paid out of class counsel's fee. Plaintiff requests a bonus payment of $240,000, while class counsel urges a plaintiff's award of only $90,000. After careful consideration, class counsel are hereby awarded $197,600 of the escrowed amount and Mr. Raider is hereby awarded $42,400 of the escrowed amount.

Class representatives are sometimes given additional compensation for shouldering the extra burden in class action litigation, both in Delaware[1] and in

[1] *See Deutsch v. Cogan*, Del. Ch., C.A. No. 8808 (Hartnett, V.C., Nov. 4, 1993) (ORDER); *In re Brooke Group Ltd. Litig.*, Del. Ch., C.A. No. 11838 (Chandler, V.C., May 26, 1992) ($10,000 payment to one plaintiff); *Sternberg v. O'Neil*, Del. Ch., C.A. No. 8592 (Chandler, V.C., June 26,

federal jurisdictions.[2] Such awards are often justified by two factors: a significant amount of time, effort and expertise expended by the class representative, and a significant benefit to the class.[3] Underlying such justifications is the concern that plaintiffs will allow class counsel to settle for an amount less than the expected return, simply because the lead plaintiff will alone bear certain costs of continued litigation while receiving a disproportionately smaller pro-rata share of the marginal benefit. Compensating the lead plaintiff for efforts expended is not only a rescissory measure returning certain lead plaintiffs to their position before the case was initiated,[4] but an incentive to proceed with costly litigation (especially costly for an actively participating plaintiff) with uncertain outcomes.

1991) ($65,000 payment to one plaintiff); *Shanghai Power Co. v. Delaware Trust Co.*, Del. Ch., C.A. No. 3888, (Brown, V.C., Feb. 15, 1980) ($95,000 award to one class representative); *In re United Coasts Corp. S'holders Litig.*, Del. Ch., C.A. No. 13014, (Jacobs, V.C., Sept. 13, 1996); *In re Intek Global Corp. S'holder Litig.*, Del. Ch., Consol. C.A. No. 17207 (Strine, V.C., Apr. 24, 2000) (payments ranging from $5,000 to $10,000 to four named plaintiffs); *In re Commercial Assets Inc. S'holder Litig.*, Del. Ch., C.A. No. 17402 (Strine, V.C., Aug. 3, 2000) ($5,000 to one plaintiff).

[2] *See Sheppard v. Consol. Edison Co. of New York, Inc.*, 2002 WL 2003206, at *6 (E.D.N.Y. 2002) (granting incentive awards ranging from approximately $8,000 to $30,000 to six named plaintiffs); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding named plaintiffs $303,000 each, noting that "[c]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." (*quoting In re S. Ohio Corr. Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997))). *But see* 15 U.S.C.A. § 78u-4 (a)(4) ("Recovery by plaintiffs. The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.")

[3] *See In re Intek Global Corp. S'holder Litig.*, Del. Ch., Consol. C.A. No. 17207 (granting bonus payments to four named plaintiffs who brought unique and proprietary information to plaintiffs' counsel which was incorporated into plaintiffs' complaint and led to an extremely successful result); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 700 F. Supp. 208, 210 (S.D.N.Y. 1988) (awarding $20,085 to lead plaintiff who provided consultative services and had "important role" in the case). I note that a third factor in certain federal jurisdictions—that the class representative's actions protect the interests of the class—is too easily satisfied to be informative. Additionally, the fourth factor—that the class representative assume substantial direct and indirect financial risk—is germane primarily to employment discrimination cases, where whistleblower employees risk retaliation. *See Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991). This final factor would rarely be applicable to cases in the Court of Chancery, where lead plaintiffs generally do not risk similar retaliation.

[4] *See Milkman v. Am. Travellers Life Ins. Co.*, 2002 WL 778272, at *31 (Pa. Com. Pl. 2002).

Plaintiff bonus awards have their own pitfalls and critics.[5] An overzealous plaintiff could hold-up an optimal settlement in the hopes of achieving a larger settlement and, consequently, a larger bonus payment. Alternatively, a plaintiff's fiduciary obligations to the class could be compromised by the temptation of a quick settlement and a quick bonus payment.[6] With these concerns in mind, I turn to the facts at hand.

A graduate of Harvard University and Stanford Law, Mr. Raider led a varied career as an attorney, accountant, and manager. Since retiring from the practice of law in 1999, he has spent much of his time on personal investments, and is particularly passionate about the interests of minority shareholders. Raider has been a plaintiff or petitioner in two other matters in which his family's total recoveries were $500,000 and $1,000,000, respectively.[7] Raider and his wife's investment in Ash Grove Cement Company is presently valued at more than $500,000 and his family's expected share of the class recovery is approximately $26,400.

The present litigation arose out of Raider's personal initiative and persistence as a minority shareholder of Ash Grove. Raider first communicated with Ash Grove in 2000 to obtain further information regarding the transactions that are the subject of this lawsuit. Upon eventual receipt of that information, Mr. Raider analyzed it and identified errors made by two different financial advisory firms retained by Ash Grove and its controlling shareholders. Raider's efforts continued through the remainder of the litigation, including assuming a leading role in settlement discussions with defendants, providing direction to class counsel and, finally, negotiating class counsel's attorneys fees.

---

[5] *See In the Matter of Cont'l Il. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (denying request for incentive payment to plaintiff, finding that plaintiff had only been deposed for a few hours, and had borne only a "slight risk of being made liable for sanctions, costs, or other fees" had the suit gone "dangerously awry").

[6] *See Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D.N.Y. 1989) ("A class representative is a fiduciary to the class. If class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept sub optimal settlements at the expense of the class members whose interests they are appointed to guard.")

[7] Letter from Daniel F. Raider, dated Dec. 19, 2005. The cases are *In re Best Lock S'holder Litig.*, C.A. No. 16281-NC, and *Raider v. Dover Investments Corp.*, C.A. No. 19357.

In early 2005, Raider rejected a settlement offer worth roughly $11 million in taxable and illiquid stock, despite class counsel's recommendations to accept. In April 2005, Ash Grove offered to settle for $15 million in cash, and Raider accepted. Following acceptance of the settlement, Raider continued to act in the interests of the class by negotiating a reduction of attorney's fees in the amount of $500,000.

While Delaware courts are reluctant to award lead plaintiffs anything other than their out-of-pocket costs and expenses, three factors urge me to allow a bonus payment to Raider. First, Raider spent over 200 hours of his time on this matter over a period of five years continually communicating with class counsel, investigating independently, providing analysis and expertise, reviewing documents, being deposed, negotiating the class settlement (including active direction and instruction to class counsel) and negotiating class counsel's fees. The time and expertise provided by Raider were well beyond that provided by a typical plaintiff. Second, Raider's efforts directly resulted in benefits of approximately $4,500,000, or nearly a third of the final settlement.[8] These direct benefits are in addition to the benefit of the final settlement, whose credit Raider shares with class counsel. Finally, while such efforts might be expected from a large shareholder (that Delaware courts prefer to name as lead plaintiffs), Raider undertook all these actions as a small shareholder—his family stands to benefit only $26,400 from the settlement. For these reasons, Raider has overcome the presumption against awarding a separate payment or bonus.

In determining the size of Raider's award, however, only the amount of effort and expertise will enter into my calculations. I notably ignore the benefit to the class in fixing Raider's bonus payment, lest future plaintiffs will hold up optimal settlements in future negotiations, with the unrealistic hopes of extracting direct benefits for the shareholders from a defendant willing to go to trial in face of such increased demands. While the benefit to the class serves as a threshold question of whether or not the plaintiff receives a bonus payment, to allow the benefit to the class to increase the plaintiff's allowance could drastically alter future plaintiffs' incentives.[9]

[8] Four million dollars in the settlement negotiations and $500,000 in the attorneys' fees reduction.

[9] I note that Raider brought this lawsuit and expended his enormous efforts with little rational expectation for reward other than his relatively small share of the settlement.

Raider spent a total of 205 hours on matters beneficial to the class, including: ninety-three hours of tax and financial analyses, forty-nine hours of settlement efforts, nineteen hours related to class counsel's fees, eighteen hours related to his deposition, and twenty-six hours of travel.[10] Raider was an expert in tax and financial analyses, and the bulk of his time contributed to the case required such expertise. I find that an hourly rate of $200 is suitable, resulting in a $41,000 subtotal. Raider's out-of-pocket expenses amounted to roughly $1,400. Therefore, Raider's allowance will total $42,400. The remaining $197,600 of the escrowed amount will be awarded to class counsel.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:bsr

[10] I specifically exclude the twenty-five hours Raider spent negotiating his plaintiff's allowance and the eighteen hours of unclassified time.