

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

STEPHEN P. LAMB
VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: May 30, 2006
Decided: June 21, 2006

Norman M. Monhait, Esquire
Rosenthal, Monhait & Goddess
Suite 1401, Mellon Bank Center
P.O. Box 1070
Wilmington, DE 19899

Jon E. Abramczyk, Esquire
Morris, Nichols, Arshat & Tunnell
1201 Market Street
P.O. Box 1347
Wilmington, DE 19899

Gregory P. Williams, Esquire
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899

Grover C. Brown, Esquire
Gordon, Fournaris & Mammarella
1220 North Market Street, Suite 700
P.O. Box 1355
Wilmington, DE 19899

***RE: Murray Augenbaum, on behalf of himself and a class of all others similarly situated, v. Peter A. Forman, Mitchell I. Quain, Niles H. Cohen, Dewain K. Cross, Richard D. Forman, James A. Mitarotonda, Stanley Morton, Jim Rosenthal, Reginald Van Lee, Barington Companies Equity Partners, L.P., Vector Capital Corporation, Ranger Holdco, Inc., Ranger Mergerco, Inc., and Register.com, Inc.
C.A. No. 1569-N***

Dear Counsel:

This case arises from a merger between Register.com, a provider of global domain registration and Internet services, and Vector Capital Corporation, a financial buyer, that was attacked in a complaint and an amended complaint filed in 2005. The parties eventually entered into a stipulation of settlement, and, at a

settlement hearing held on May 30, 2006, the court approved the terms of that proposal. What remains to be decided is the plaintiff's application for an allowance of attorneys' fees and expenses. The plaintiff has applied for an award in the aggregate amount of \$450,000. The defendants have agreed to pay an award up to that amount but oppose the size of the request and suggest that an award of \$75,000 is fair and adequate.

The facts of the case are relatively simple. In June 2005, Barington Companies Equity Partners, L.P., an investment fund controlled by James A. Mitarotonda, a Register.com director, approached the rest of the Register.com board with an offer to buy the company through a Barington subsidiary, RCM. Register.com reacted by forming a special committee consisting of all directors other than Mitarotondo and engaging Credit Suisse First Boston ("CSFB") to conduct a sale. The committee also engaged experienced counsel. After a brief review, the committee determined that the RCM proposal was inadequate.

CSFB conducted a full auction type process, contacting 23 potential buyers. Of those, Vector emerged as the leading contender outside of Barington/RCM. Vector's highest offer of \$8.10 was rejected because of the conditions attached to that price. After further negotiation, Register.com signed a deal with Vector at a firm \$7.81 per share, a price that was 11 cents more than RCM's best and final

offer. In response, Barington announced that it would engage in a proxy contest to unseat the Register.com board.

The initial stockholder suit was filed nine days later, on August 17, 2005, alleging breaches of fiduciary duty. On September 15, 2005, Barington announced that it had agreed to vote in favor of the transaction, and withdrew its nomination of directors for the annual meeting. In addition, Barington agreed to provide up to \$20 million to fund a portion of the transaction in exchange for an equity investment in Vector's merger entity and two seats on that entity's board, and also received the right to be reimbursed for up to \$220,000 in expenses. Register.com also disclosed on the same day that it had agreed to reimburse RCM \$500,000 for its own expenses.

The plaintiff filed an amended complaint, alleging breaches of fiduciary duty and disclosure violations. During discovery, however, the plaintiff became convinced that the merger price was fair, and negotiated a settlement to correct what the plaintiff believed were materially misleading disclosures. A settlement mandating additional disclosures was reached on October 6, 2005, pursuant to which a supplement was issued to Register.com's SEC filings on October 18, 2005. The Memorandum of Understanding, finalizing the parties' agreement, was

signed on October 21, 2005. The MOU contained a provision for the plaintiff's attorneys' fees.

At issue is the amount of the fee award. The court's resolution of this dispute is driven by the *Sugarland* factors, as they are applied to this case.¹ First, and most important among those factors, is the benefit achieved by the litigation. The defendants argue strenuously that the supplemental disclosures provided only a modest benefit to the class and "did nothing more than provide shareholders with a slightly more detailed picture of the events leading up to the Merger."² The plaintiff, of course, disagrees.

While it is often difficult for a reviewing court, looking at a cold record months later, to ascertain with certainty the materiality of supplemental disclosures, this court is confident that this is not a case where little or no useful information was imparted in the supplemental filing. Instead, the court is satisfied in this case that the supplemental disclosures included useful information about the negotiation process and the changes in the price term of the Vector deal that permitted stockholders to view the final price term and related information from a

¹ *Sugarland Indus. v. Thomas*, 420 A.2d 142, 147-50 (Del. 1980).

² Def.'s Answering Br. 8.

materially different perspective.³ Nonetheless, it is true that the additional disclosures did not reveal fiduciary misconduct or call into question the fundamental fairness of the final deal struck with Vector.

As to the other factors, the defendants point out that the contingent nature of the work stopped when the MOU was agreed upon, after which point the plaintiff's counsel worked another 312.5 hours, three-fifths of the total 504 hours the plaintiff's counsel billed to this matter.⁴ Further, the defendants argue, much of the pre-MOU effort must have been in connection with the original complaint which

³ In its reply brief, the plaintiff's counsel argues that these disclosures were of significant value. First, the disclosures allowed a stockholder deciding whether to support the merger or not to discover through the supplement that Vector at one point submitted a written proposal with a low range above the eventual merger price. This information "permitted a Register shareholder [to understand that the merger price of \$7.81] was below the low end formulated after some assessment of Register." Second, the disclosures allowed stockholders to learn that (a) Vector had not always made Barington approval a condition of its offer and (b) that the net cash condition attached to the rejected \$8.10 offer was only "lumped together with certain open issues." "Thus, shareholders were able to evaluate whether Vector's lowering its offering price from \$8.10 to \$7.81 per share was based on value or mere rationalizations for a lower price, and were better able to consider the Merger price in light of their conclusions." Pl.'s Reply Br. 2-4.

⁴ The plaintiff's counsel argues that the hours expended after the MOU were reasonable because "notwithstanding the signing of the MOU, Plaintiff's counsel continued to view the transaction with some suspicion, particularly because of Barington's change of position for which it was compensated and the apparent sweeping 'under the rug' of facts counsel regarded as material." Pl.'s Reply Br. 6. Second, "the information reviewed during discovery, that was provided after the MOU was signed, was detailed." *Id.* at 7. Third, "as to Vector's claim that too much time was expended after the MOU in finalizing the settlement, Vector ignores the fact that Plaintiff's counsel had to respond and negotiate at times with several different law firms representing the various defendants." *Id.*

should not be cognizable here.⁵ The defendants also challenge the \$8,000 the plaintiff's counsel has claimed in expenses because they have not been itemized to isolate those incurred in pursuit of the disclosure claims from those incurred in pursuit of abandoned claims.⁶

The plaintiff responds that the total number of hours devoted to the matter was reasonable and that the time spent in connection with the original complaint, including discovery into the allegations thereof, proved to be useful in drafting and pursuing the amended complaint after Barington abandoned its threat of a proxy contest. As the plaintiff's reply brief puts it: "[w]ithout the filing and prosecution of the original complaint, the information that was included in the Supplement would never have been discovered."⁷

These and other arguments advanced by the plaintiff in his reply brief lead the court to conclude that the defendants underestimate both the value of the supplement and the effort that was required to achieve a settlement in this case. At

⁵ The plaintiff's counsel's reply brief responds that "Vector is taking a short-sighted approach to litigation and unreasonably seeks to compartmentalize different aspects of a case rather than analyze the case as a whole." *Id.* at 4. The work done on the original complaint fed directly into this work. It would be impossible to separate all of this out.

⁶ The plaintiff's counsel responds, first, that "the time expended (and expenses incurred) in connection with the original complaint is fully compensable." Second, counsel notes that "in any event, Plaintiff submitted in connection with his application that most of the expenses were incurred in connection with the deposition transcripts, copying, and filing fees. All of these expenses were applicable to the case that was resolved" Pl.'s Reply Br. 6 n.2.

⁷ Pl.'s Reply Br. 5.

Augenbaum v. Forman, et al.

C.A. No. 1569-N

June 21, 2006

Page 7

the same time, it remains true that the benefit achieved as a result of the litigation, even viewed as the plaintiff would view it, is both modest and entirely therapeutic in nature. In the circumstances, given the effort devoted to the case, including the filing of two complaints, a motion for preliminary injunction, and the conduct of discovery, the court concludes that an award of \$225,000 is both justified and fairly and adequately compensates the plaintiff's counsel for their fees and expenses in this matter.

Counsel for the plaintiff is asked to submit an order in the appropriate form.

/s/ Stephen P. Lamb
Vice Chancellor