

JESSE SMALL

Plaintiff,

v.

MONTY J. BENNETT, et al.

Defendants.

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IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

CASE NO.: 24-C-16-006020

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FINDINGS, DECISION AND ORDER

Plaintiff’s pending Motion for an award of attorneys’ fees and costs (Docket 23) invokes the “corporate benefit rule” to apply for an award of fees and expenses incurred before his shareholder derivative complaint was mooted by Defendants’ actions which satisfied Plaintiff’s demands for relief. Plaintiff Small claims that his “actions succeeded in securing the reduction of an exorbitant and unconscionable termination fee” that had been agreed by Defendants in the event of a change of control of Defendant Ashford Hospitality Prime, Inc. (Plaintiff’s Opening Brief for Application of an Award of Attorneys’ Fees and Expenses at pp. 1-2, Docket 23). The Application is opposed by Defendants (23/1), and is the subject of Plaintiff’s Reply (23/2), with Plaintiff’s Further Submission (23/3), and Defendants’ Response to that further submission (23/4). The Parties’ arguments were heard on October 25, 2017. Upon consideration of the Complaint, the parties’ Motion papers and arguments, with applicable rules and case authorities, the Court makes the following findings and determinations.

Facts related to “corporate benefit” claim

1. In November 2013, Ashford Hospitality Prime Inc. (sometimes “AHP” or “Company”) became a publicly traded corporation. AHP is a Dallas-based real estate investment trust investing in upscale hotels. AHP is externally managed by Ashford Inc. and its subsidiary, Ashford LLC

(collectively “Ashford Inc.” or “Advisor”). On November 19, 2013, AHP entered into an Advisory Agreement with Ashford LLC. Employees of the Advisor perform the operations of AHP which has no employees; Ashford Inc. controls the business of AHP and performs management functions.

2. On June 10, 2015, AHP and the Advisor entered into their Third Amended Advisory Agreement. As amended, the Advisory Agreement provided for calculation of a termination fee, “grossly above market rates,” payable by AHP to the Advisor upon a Change of Control of AHP and if either AHP or the Advisor elected to terminate the Advisory Agreement (e.g., Complaint ¶62).

3. On and after September 1, 2015, AHP stockholder “Sessa” criticized the termination fee as “impossible to calculate, highly variable, and potentially disproportionate.” (Complaint ¶75).

4. On February 3, 2016, AHP and Ashford Inc. were among the named defendants in the Complaint of Sessa Capital (Master), L.P. (“Sessa”) filed in this Maryland Court, Case No. 24-C-16-000557. Sessa, holding 8.2% of AHP stock, challenged the Third Amended Advisory Agreement and explained: if AHP shareholders were to replace Company Directors unapproved by the incumbent Directors (also named as Defendants), “Ashford could terminate the Third Amended Advisory Agreement, imposing an onerous termination fee on the Company . . . equal to approximately half of its current equity value (. . . the “Proxy Penalty”).”

5. On February 25, 2016, AHP sued Sessa in federal court in Texas (3:16-cv-00527-N, N.D.Tex) and in a second suit in state court later removed to the federal court. Both parties sought injunctive relief focusing on the AHP Board’s disapproval of Sessa’s nominees to the Board to stand for election in a contested proxy fight. The consequent matter of calculating the termination fee upon the potential trigger was noted in AHP’s Proxy filed on April 12, 2016, and in Ashford Inc.’s prayer for injunctive relief filed (in Texas state court) on April 27, 2016.

6. On March 14, 2016, the Maryland Complaint by Sessa was dismissed on the parties' stipulation while the Texas cases were proceeding. In the Texas litigation, Sessa formally counterclaimed to allege AHP Board members had breached their fiduciary duties, especially for including the "Proxy Penalty" in the Third Amended Advisory Agreement (June 2015) and for failing to approve Sessa candidates for a proxy battle (annual meeting on June 10, 2016). (Those claims were dismissed, as of February 10, 2017, when Sessa could not overcome the Maryland Business Judgment Rule presumption).

7. AHP Board Minutes dated April 6, 2016, noted in pertinent part that "potential Company value enhancement initiatives" included "establishment of a termination fee committee to explore negotiating a reduction in termination fee."

8. A Company press release dated April 8, 2016, announced the close of its strategic review process that had commenced on or about August 28, 2015. (Complaint ¶¶76-77).

9. AHP Board Minutes dated April 12, 2016, described in pertinent part "a discussion regarding shareholder outreach regarding the proxy contest"

10. Small's demand letter dated April 14, 2016 (Exhibit A to Complaint) challenged "AHP's Board's actions in connection with the Advisory Agreement with Ashford LLC, along with the Board's actions in response to Sessa's proxy contest, [as constituting] breaches of the Board's fiduciary duties." Small acknowledged that Sessa had taken "aim at AHP's Advisory Agreement with its 'external' advisor Ashford LLC" Small reviewed the Third Amended Advisory Agreement especially to complain of the "size of the termination fee . . . as a tremendous hurdle" to the Company's just concluded strategic review. Small's principal demand was that the "Board must seek to renegotiate the termination fee with Ashford LLC," while also seeking Board approval of Sessa's Board nominees so as not to trigger the termination fee. Small's letter

acknowledged that AHP would be obliged to investigate his claims, then respond with a determination whether to prosecute potential claims.

11. Small's letters, subsequent to his initial demand, included his May 9, 2016 request for AHP's response in advance of the annual meeting scheduled for June 10, 2016. (Exhibit to Complaint). AHP acknowledged Small's successive letters and reported on the status of Board consideration, review by outside counsel, and ongoing investigation (e.g., letters of April 19, June 22, September 15, October 25, 2016, Exhibits to Complaint). Small's letters dated September 9, 2016 and October 17, 2016 reported that he considered his Demand as having been refused.

12. On May 20, 2016, U.S. District Judge David C. Godbey (N.D.Tex.) granted AHP's motion for preliminary injunction and denied Sessa's motion; Maryland's Business Judgment Rule was applied to reject Sessa's challenge of AHP Board disapproval of Sessa Nominees to stand for election in a contested proxy fight.

13. In May and June 2016, stockholders meeting with AHP Independent Directors expressed, in pertinent part, that "the termination fee payable under the Existing Advisory Agreement is high." (SEC Schedule 14A, Definitive Proxy Statement, April 28, 2017, at p. 54).

14. On June 1, 2016, Company Independent Directors reported that they "wished to begin negotiations with the advisor's independent directors to amend certain provisions of the Existing Advisory Agreement [including] a reduced termination fee, elimination of the incumbent board turnover trigger for a change of control" (Definitive Proxy Statement, April 28, 2017, at pp. 54-55).

15. Small's letter dated June 15, 2016 (Exhibit to Complaint) described his demand as requiring "renegotiation of the termination fee owing to the advisor . . . in light of the Weisman Group's recent offer to purchase AHP."

16. On June 7, 2016, the Weisman Group, an investment firm and 5.2% stockholder of the Company, had made an unsolicited takeover offer. (Complaint ¶¶81). Throughout June and July 2016, exchanges between the AHP Board and the Weisman Group included attention to the calculation, import, and impact of the termination fee. (Complaint ¶¶82-87).

17. In July 2016, Company Independent Directors and Advisor Independent Directors identified issues for discussion by special committees then being formed; such issues included reduction of the termination fee. (Definitive Proxy Statement at pp. 55-56).

18. Beginning in late September 2016, draft revisions of the Existing Advisory Agreement were circulated between the AHP Special Committee and the Advisor Special Committee. During succeeding months, discussions and drafts of the Amended Advisory Agreement were undertaken “with particular focus on the termination fee.” (Definitive Proxy Statement at pp. 56-57).

19. By letter dated October 25, 2016, AHP responded to Small’s correspondence, specifically cited the Board’s compliance with the instruction of *Shenker v. Laureate Educ., Inc.*, 411 Md. 317 (2009), reported on the Board’s investigation of matters raised by Small, informed of the engagement of outside counsel to investigate and report at the Board’s December 6, 2016 meeting, and referred to the nature and circumstances of the Sessa claims and litigation.

20. On November 16, 2016, Small filed a shareholder derivative Complaint in this case, naming the same AHP, Advisor, and director defendants as in Sessa’s earlier Maryland Complaint, complaining of fiduciary breaches and focusing on the “unconscionable” termination fee upon change of control redefined by the Third Amended Advisory Agreement. The Complaint noted, *inter alia*, that an August 28, 2015 announcement of a strategic review by AHP independent directors, to explore alternative corporate strategies, was followed by Sessa’s September 1, 2015 letter to AHP’s Board, criticizing the termination fee. (Complaint ¶¶75-76).

21. Material issues unresolved between the AHP Special Committee and Advisor Special Committee as of early December 2016 included the amount of the termination fee. (Definitive Proxy Statement at pp. 57-58). Negotiations continued in December 2016 and January 2017.

22. On January 24, 2017, the “final version of the Amended Advisory Agreement was . . . approved by the Company Independent Directors” for the Company Board. (Definitive Proxy Statement at p. 58). The Fourth Amended Advisory Agreement was recommended and approved to address a number of concerns expressed by Company stockholders, especially “reducing the size of the termination fee.” (Definitive Proxy Statement at p. 58).

23. On March 24, 2017, Director Defendants, AHP, and Advisor filed Motions to Dismiss Small’s Complaint. Defendants contested personal jurisdiction and challenged Small’s failure to abide AHP’s investigation and anticipated response to his demands. Substantively, Defendants urged that Small was unable to overcome the presumption of the Business Judgment Rule, while noting that Small had not discussed or described the particular circumstances of contracting the Third Amended Advisory Agreement that reflected any fiduciary breach in June 2015. Small did not respond to the dismissal Motions or take any action in this litigation before entering into a Stipulation of Voluntary Dismissal of his Complaint, (Docket 21, filed July 18, 2017) which was Ordered (Docket 21/1) on July 27, 2017.

24. On June 9, 2017, at the Company’s 2017 annual stockholders meeting, stockholders approved the amended and restated advisory agreement addressing revisions to the calculation of the termination fee and changes to termination fee triggers. Stockholder approval of the Fourth Amended Advisory Agreement, accomplishing reduction of the termination fee and revision of change of control triggers, served to moot the Small Complaint.

Authorities, analysis pertinent to “corporate benefit” claim

25. Small now argues that AHP stockholders realized a substantial, valuable benefit with the Fourth Amended Advisory Agreement’s revised termination fee trigger and calculation provisions; accordingly, Small should be entitled to an allowance for attorneys’ fees and expenses despite the American Rule that litigants generally bear their own fees. See *In re First Interstate Bancorp.*, 756 A.2d 353 (Del. Ch.1999); *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162 (Del. 1966).

26. The standard for a court’s discretionary fees award upon applying the corporate benefit doctrine requires Plaintiff to demonstrate that: (a) his lawsuit was meritorious when filed; (b) the action to benefit the corporation was taken by Defendants before judicial resolution was achieved; and (c) the corporate benefit was causally related to the lawsuit. *Wittman v. Crooke*, 120 Md. App. 369, 379 (1998); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del.1997). “A presumption of causation arises by chronology; that is, where claims against a defendant are mooted while litigation is pending, the actions mooting the claims are presumed to have resulted from the litigation.” *Dexter v. Zais Financial Corp.*, 2016 Md.Cir.Ct. LEXIS 11, *9, citing *In re Riverbed Technology, Inc., Stockholders Litigation*, 2015 Del. Ch. LEXIS 241, 2015 WL 5458041, *7 (Del. Ch. 2015).

27. Whether Small’s claim is to be considered meritorious depends on whether the Complaint might have withstood the Defendants’ Motions to Dismiss. *Wittman*, 120 Md. App at 379. That analysis was deferred by Plaintiff’s counsel on successive postponements to respond to the dismissal motion, then by voluntary dismissal of the Complaint. Small’s ability to withstand judicial analysis of the dismissal Motions might have proved problematic.

28. Small's Complaint did not specify how the AHP Board acted outside of sound business judgment upon committing to the Third Amended Advisory Agreement in June 2015. The Board had authority to contract for the management of its business and was presumed to have made good faith, informed business decisions. Absent Small's response to the dismissal motions, this Court was not advised of contemporaneous facts suggesting that the corporate directors did not act in accordance with the Business Judgment Rule or in some manner sufficient to overcome the presumption. Md. Code Ann. Corps & Ass'ns § 2-405.1; e.g., *Oliveira v. Sugarman*, 451 Md. 208, 221-22 (2017).

29. Nor does Small's Complaint appear to articulate how the AHP Board was afforded adequate opportunity to fulfill its responsibility to investigate his demand in April 2016, that he "afford[ed] the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right." *Oliveira*, 451 Md. at 223, quoting *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711 (1991). Absent Small's response to the dismissal motions, the chronology of events, communications, and circumstances appears to reflect the AHP Board's orderly plan to address Small's demand(s), to investigate the demand, to secure assistance of outside counsel, and to recommend a course of action to the Board.

30. Upon close review of the listed chronology of events and contentions, it is clear that the Special Committees' negotiations (fourth quarter 2016), Board approval (January 2017), and shareholder vote (June 2017) in favor of the Fourth Amended Advisory Agreement, were not causally related to the Small lawsuit—or Small's demand letters preceding and threatening his lawsuit. The process of interested shareholders citing concerns to AHP and Advisor, exchanging demands, proposals, contract drafts, and corporate approvals, was well underway before Small

initiated his copycat demand and litigation. The Complaint of Jesse Small followed a number of events and shareholder challenges already addressing the potential termination fee if triggered by a Company Change of Control defined by the Third Amended Advisory Agreement between AHP and Ashford Inc.

31. The Sessa Complaint filed in this Court on February 3, 2016 (Case No. 24-C-16-000557), provides stark example. The Complaint named Defendants Ashford Inc., Ashford Hospitality Advisors LLC, and Ashford Hospitality Prime, Inc., together with seven AHP Directors. Holding 8.2% of AHP stock, Sessa challenged the actions of the Director Defendants that ‘potentially penalize’ the Company by requiring payment of half the Company’s value to Ashford Inc. if a majority of new Directors were elected. ¶1. Sessa’s Complaint criticized the Third Amended Advisory Agreement for its consequent termination fee, the “Proxy Penalty,” if shareholders replaced Directors unapproved by the incumbent Director Defendants. ¶3. Sessa focused attention on the Advisory Agreement’s calculation and import of the “Proxy Penalty”. E.g., ¶¶26, 30, 31, 35. Count I of the Complaint alleged Defendants’ fiduciary breaches by “Inclusion of Proxy Penalty in Third Amended and Restated Advisory Agreement”. ¶¶49-54.

32. AHP, in turn, sued Sessa in Texas. The preliminary injunction issues necessarily focused on Sessa’s advance of candidates for the Board, and the AHP Board decisions to disapprove those Sessa nominees to stand for election in a contested proxy fight at the upcoming annual meeting (June 10, 2016). Applying Maryland’s Business Judgment Rule to the Board’s decisions, federal Judge Godbey denied Sessa’s challenges that AHP had acted to reject the Sessa candidates in bad faith. That opinion and Order granted AHP’s Motion and did not refer directly to terms in the Advisory Agreement. Nevertheless, the consequence of the termination fee trigger was noted, contemporaneously, in AHP’s Proxy filed April 12, 2016, and in the Advisor’s prayer

for injunctive relief filed in the Texas state court action on April 27, 2016 (see Small's Complaint ¶62).

33. Small's Complaint, filed months later on November 16, 2016, named the same corporate and Director Defendants.¹ Small's Complaint broadly described his unsatisfied demand that Board action be taken against Director Defendants "for breach of fiduciary duty in relation to their negotiation and approval of the termination fee associated with an advisory agreement." (First, unnumbered Paragraph). Plaintiff Small described the June 10, 2015 Third Amended Advisory Agreement and the "unconscionable" Termination Fee upon a change of control redefined by that amended agreement. ¶¶4-5. Plaintiff Small acknowledged that "Sessa urged the Company to renegotiate the Termination Fee with the Advisor," but narrowly characterized Sessa's "escalating exchanges" and "four coordinated lawsuits [as] related to AHP's efforts to prevent Sessa from allowing its nominees to stand for election to the Board." ¶6; *see also* ¶¶75-77. Small focused, instead, on criticism and potential consequence of the June 10, 2015 "Company Change of Control," Termination Fee, and termination provisions of the Third Amended Advisory Agreement." ¶59-63. Plaintiff Small condemned the Defendants' actions to effect the June 2015 amendments as "gross negligence" and "ruinous to AHP" if the Termination Fee had been triggered, all in breach of Defendants' fiduciary duties. ¶¶97-101. Count I of the Complaint alleged the breach of fiduciary duties by Director Defendants, especially by "approving and failing to modify the terms of the . . . unconscionable Advisory Agreement and failing to renegotiate the grossly disproportionate Termination Fee." ¶¶131-138. Small's Complaint clearly followed Sessa's lead to challenge the "Proxy Penalty."

¹ Plaintiff's Complaint added two individual officer Defendants to the seven Directors named by Sessa.

34. Nor was Small's Complaint, as of November 16, 2016, a causal link to the creation and negotiations by the AHP Special Committee with the Advisor Special Committee, extending from June 2016 into January 2017. The fulcrum for that process was the original Sessa demand in September 2015, with its March 2016 Complaint in Maryland and ensuing litigation in Texas while Sessa pushed for a proxy fight before the June 2016 Annual Meeting. The January 24, 2017 AHP Board approval of the Fourth Amended Advisory Agreement (and later stockholder approval), was not causally related to Plaintiff's Complaint or prospect of litigation. The fact of Small's demand, then Complaint and prospect of litigation yielded no corporate benefit.

35. Nor did Plaintiff Small support his application for attorneys' fees by satisfying the "Sugarland" factors addressed in Delaware cases,² or the instructions of Maryland Rule 2-703. Plaintiff does not quantify the corporate benefit or results achieved in relation to counsel's demand for \$565,000 in fees. Small does not explain whether or how counsel necessarily expended 'substantial effort' to pursue complex litigation, especially as his Complaint appeared to rely, in substantial part, on Sessa's litigation. Small eventually submitted certain time records of counsel, but which did not resolve the vagueness of counsel's demand calculations or the disparity with an apparent record of 680 hours engaged on the matter over a four year period. Post-hearing, on November 14, 2017, Plaintiff Small filed a Further Submission (23/3) in support of his application for an award of attorneys' fees and expenses. Plaintiff made his submission for the purpose of "correct[ing] any misunderstanding that may have arisen during the hearing." Plaintiff included

² Absent controlling Maryland authorities, this Court typically looks on decisions of the Delaware Court of Chancery as persuasive authority in corporate law. See., e.g., *Shenker v. Laureate Education, Inc.*, 411 Md. 317, 338n.14 (2009); *Werbowsky v. Collomb*, 362 Md. 581 (2001). Should there be sufficient benefit to justify an award of attorneys' fees, the amount of any award is informed by the "Sugarland factors," which are: (1) the results achieved by counsel; (2) the amount of time and effort applied to a case by counsel for plaintiff; (3) the relative complexities of the litigation; (4) the skills applied to their resolution by counsel; (5) any contingency factor; and (6) the standing and ability of petitioning counsel. *Dexter v. Zais Fin. Corp.*, 2016 Md. Cir. Ct. LEXIS 11, citing *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).

time records to support his application for attorneys' fees and expenses upon claiming credit for the Fourth Amended Advisory Agreement and reduction of the Termination Fee.³

36. Maryland Rule 2-703 informs this Court's discretion and determination whether a fees award should be made if the findings of the court on the underlying cause permit but do not require an award of attorneys' fees. If the court determines that a permitted award should be made, the court shall apply the standards set out in subsection (f)(3) of the Rule and determine the amount of the award. Md. Rule 2-703(f)(2). The court shall consider, with respect to the claims for which fee-shifting is permissible: (A) the time and labor required; (B) the novelty and difficulty of the questions; (C) the skill required to perform the legal service properly; (D) whether acceptance of the case precluded other employment by the attorney; (E) the customary fee for similar legal services; (F) whether the fee is fixed or contingent; (G) any time limitations imposed by the client or the circumstances; (H) the amount involved and the results obtained; (I) the experience, reputation, and ability of the attorneys; (J) the undesirability of the case; (K) the nature and length of the professional relationship with the client; and (L) awards in similar cases. Md. Rule 2-703(f)(3).

37. Even if this Court had identified a corporate benefit following from Plaintiff's litigation, Plaintiff's application did not support a determination of fees based on the factors set out in Rule 2-703(f)(3). Plaintiff did not specifically address the time and labor required by counsel focusing on termination fee issues, or the novelty or any difficulty of the issues presented, or legal skills required, or customary fees for such legal services, or any contingent fee agreement, or any limiting circumstances, or the experience and ability of counsel. See also, *Boeing Co. v. Spirit Aerosystems, Inc.* 2017 Del. Super. LEXIS 630 (Super. Ct.) Plaintiff does not explain the

³ On November 20, 2017, Defendants attached a transcript of this Court's October 24, 2017 hearing as an Exhibit (29) to support their Response to Plaintiff's Further Submission (23/4).

difference or justify counsel's demand for \$565,000 in fees, in view of counsel's late submission of fees apparently recorded in the amount of \$272,347.61.

ORDER

Upon consideration of the Plaintiff's Motion (23) for an award of attorneys' fees and related expenses, and for the foregoing reasons, it is on this 5th day of February, 2018, hereby

ORDERED that the Plaintiff's Motion (23) is **DENIED**.

As all claims and issues between the parties in this case are now resolved, the Clerk will close the file. Plaintiff will bear all open costs.

Judge Pamela J. White
Judge's Signature Appears on Original Document

Judge Pamela J. White, Part 7
Circuit Court for Baltimore City

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