

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION**

PRESENT: HON. JENNIFER G. SCHECTER PART 54

Justice

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ESTHER O'MAHONY, KEN FOLEY,

INDEX NO. 652621/2014

Plaintiffs,

- v -

ORDER

GAVIN WHISTON, THOMAS MCARTHY, KIERON
SLATTERY, MOXY RESTAURANT ASSOCIATES,
INC., DUBCORK INC D/B/A/ SMITHFIELD TAVERN,
SMITHFIELD NYC, SMITHFIELD HALL NYC,

Defendants.

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On February 15, 2023, the court issued a post-trial decision directing plaintiffs to submit a fee application pursuant to BCL § 626(e) because they created a substantial corporate benefit by securing a judgment in excess of \$5 million (Dkts. 1096, 1103; *see Glenn v Hoteltron Sys., Inc.*, 74 NY2d 386, 393 [1989]; *see also Matter of Freeman*, 34 NY2d 1, 9 [1974]). Plaintiffs seek \$2,141,612 in fees and reimbursement of \$185,733.73 in expenses (*see* Dkts. 1105-1109). Defendants filed objections (*see* Dkt. 1112-1121).

The court rejects defendants' argument that a substantial reduction due to work on the direct claims is warranted. The court declines to focus on how plaintiffs nominally labeled some of their claims since this case predominantly concerned derivative claims for breaches of fiduciary duty. The work performed was overwhelmingly focused on those derivative claims. The direct claim for repayment of the loan was, both logically and based on the court's experience in discovery, responsible for a relatively trivial amount of work and only represents a small percentage of the judgment.

The court also rejects defendants' argument about the billing rates charged by plaintiffs' counsel and their complaint that much of the work was performed by Mr. Goldman rather than associates. While this is unremarkable given the size of his practice, his billing rate is below many associates at firms that appear in this court and is certainly not unreasonable.

While the fee request is large even considering the substantial value of the judgment, it cannot be overlooked that defendants' discovery conduct was among the most troubling this court has experienced. The docket and the court's many orders addressing the discovery problems speak for themselves and will not be recounted at length yet again. Suffice it to say that the court understands why the billings in this case were more

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significant than one would otherwise expect. Where, as here, protracted ESI disputes, a document dump and multiple conflicting accountings are just the tip of the iceberg, the amount of time billed by Mr. Goldman is understandable. Plaintiffs will not be penalized for having to deal with the substantial amount of extra work that defendants necessitated to address their litigation conduct.

In the end, plaintiffs performed a tremendous amount of work in a case that took nearly a decade to litigate. In light of the resounding outcome, a substantial fee award is warranted (*see Glenn*, 74 NY2d at 393 ["The basis for an award of attorneys' fees in a shareholders' derivative suit is to reimburse the plaintiff for expenses incurred on the corporation's behalf. Those costs should be paid by the corporation, which has benefited from the plaintiff's efforts and which would have borne the costs had it sued in its own right"]). While the court does not award the full amount that plaintiffs sought--reduction for some excessive billing is warranted and the amount sought is excessive relative to the judgment--the more drastic reductions sought by defendants are unwarranted. Having reviewed the billing records and considering the value of the judgment to the company, the court finds that it would be reasonable for the company to reimburse \$1.8 million to plaintiffs for the fees and expenses incurred in this action.

Defendants' other arguments are unavailing.

Accordingly, it is ORDERED that the Clerk is directed to enter an additional judgment in favor of plaintiffs Esther O'Mahony and Ken Foley and against defendant Dubcork, Inc. in the amount of \$1.8 million.

Plaintiffs shall e-file a proposed judgment to the Clerk consistent with this order.

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DATE: 6/30/2023

JENNIFER G. SCHECTER, JSC