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Brining v. Donovan, et al.

Suffolk County Superior Court Action No. 1684CV03422-BLS1

Decision and Order Regarding Plaintiff's Post-Verdict Motion for an Award of Attorneys' Fees (Docket Entry No. 80), and Plaintiff's Post-Verdict Motion on Cancellation of Shares, Certain Shareholders Should Not Recover, Rescissory Damages, and Other Remedies (Docket Entry No. 82):

This is a derivative action filed by plaintiff Jennifer Brining ("Ms. Brining") against defendant John J. Donovan ("Mr. Donovan") based on Mr. Donovan's claimed breach of fiduciary duty, fraud, and unjust enrichment in his capacity as the managing director of Sendlater, Inc. ("SIL"), a Vermont corporation.¹ Ms. Brining is a shareholder of SIL, a now defunct internet start-up. She alleges that Mr. Donovan effectively "loot[ed] the funds" of SIL for his own personal benefit over an approximately three-year period beginning in 2014. Mr. Donovan has denied the allegations against him, and he has asserted, as an affirmative defense, the right to set off against any damage award against him certain unpaid expenses that he purportedly incurred on behalf of SIL.

The Court conducted a jury-waived trial of Ms. Brining's claims and Mr. Donovan's affirmative defense over a three-day period in October and early November 2019. Closing arguments took place on December 20, 2019. Ten days later, the Court issued its verdict on special questions (the "Trial Verdict"). The Court found in favor of Ms. Brining on her claims against Mr. Donovan for breach of fiduciary duty, fraud, and unjust enrichment, and awarded damages across all claims in the total amount of \$1,571,770.00, excluding interest and costs. The Court simultaneously rejected Mr. Donovan's affirmative defense.

Following the issuance of the Court's Trial Verdict, Ms. Brining filed two additional motions. Ms. Brining's first motion (the "Motion for Fees") seeks a further court order directing that her attorneys' fees and expenses incurred in this action be paid by SIL pursuant to G.L. c. 156D, § 7.46 ("On termination of the derivative proceeding the court may ... order the corporation to pay the plaintiff's reasonable expenses, including counsel fees, incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation...."), or, alternatively, paid from a common fund funded by any recovery obtained from Mr. Donovan. See *Crowley v. Communications for Hospitals, Inc.*, 30 Mass. App. Ct. 751, 767 (1991) ("[B]ecause we now provide relief

¹ Ms. Brining's Amended Verified Complaint ("Amended Complaint") against Mr. Donovan also included a claim under G.L. c. 93A. She withdrew that claim at trial, however, in acknowledgement of the fact that "intra-enterprise" disputes are not subject to Chapter 93A liability. See, e.g., *Selmark Assocs., Inc. v. Ehrlich*, 467 Mass. 525, 550 (2014) ("'Inter-enterprise' disputes, including those stemming from an employment relationship or between or among fellow shareholders, are essentially private in nature, and thus not considered 'commercial transactions' within the meaning of c. 93A.").

in the fashion of a derivative action -- a fund of money created for the benefit of all the stockholders in the company -- an award of attorneys' fees to the plaintiff out of that fund is appropriate.”). The total fees requested by Ms. Brining through the end of 2019 come to \$688,979.50, and the expenses total \$29,132.29. Ms. Brining's Motion for Fees is supported by an affidavit from her legal counsel, Michael C. Gilleran, Esq., as well as contemporaneous time and expense records and invoices.

Ms. Brining's second motion (the “Cancellation Motion”) asks the Court to exercise its equitable powers to cancel (or effectively cancel) certain SIL shares owned by Mr. Donovan, his business entity (*i.e.*, Securenet), his wife (*i.e.*, Linda Donovan), and two late investors in SIL (*i.e.*, Navin Fabiani and Will Graylin) on the ground that they “acquiesced in or supported Mr. Donovan's [fraudulent] conduct.” Cancellation Motion at 2. Ms. Brining's Cancellation Motion also asks the Court to order that any damage recovery in this action be distributed among SIL's shareholders on a “rescissory” basis (*i.e.*, based, *pro rata*, upon dollars actually invested), as opposed to a shareholding basis (*i.e.*, based upon the percentage of shares owned). Ms. Brining makes this further request on the ground that Mr. Donovan and the other aforementioned investors purportedly obtained their shares, in whole or in part, through Mr. Donovan's fraud and “should not in any way share in any recovery here.” *Id.* at 9.

Mr. Donovan opposes both Ms. Brining's Motion for Fees and her Cancellation Motion. As to the former, Mr. Donovan argues that, while “the law does provide a mechanism for such awards after trial, the court should not grant the relief as prayed ... as it is both excessive and unwarranted.” Opposition to Post-Trial Motion for an Award of Attorneys' Fees, dated February 12, 2020 (“Fee Opp.”) at 1. In particular, Mr. Donovan takes issue with the billing rate charged by Ms. Brining's legal counsel (between \$350 and \$491 per hour), which Mr. Donovan describes as excessive because it exceeds the billing rate of his own counsel (\$350 per hour), and the number of hours expended by Ms. Brining's counsel (approximately 1,375), which Mr. Donovan claims impermissibly includes “time ... spent on matters that did not provide a benefit to [SIL].” *Id.* at 2.

As to Ms. Brining's Cancellation Motion, Mr. Donovan asserts that SIL “is still a viable Vermont entity,” and that the claims of SIL's creditors “take priority over potential distributions to shareholders.” Opposition to Post-Trial Motion on Cancellation of Shares, dated February 12, 2020 (“Cancellation Opp.”) at 2. He also argues that the Court should refuse to grant the further equitable relief sought by Ms. Brining because doing otherwise would “adversely affect the rights of persons and entities that are not parties to this action,” and because the relief was not requested in Ms. Brining's complaint or amended complaint. *Id.* at 2-3.

The Court has received and reviewed all of the parties' respective submissions with respect to Ms. Brining's Motion for Fees and her Cancellation Motion. It concludes, within its discretion, that no hearing on the motions is necessary. See Superior Court Rule 9A(c)(2). Accordingly, the Court hereby finds and orders as follows:

- 1. Ms. Brining's Motion for Fees (Docket Entry No. 80):** This motion is **ALLOWED IN PART**. Mr. Donovan acknowledges in his opposition papers that Massachusetts law permits an award of attorney's fees in a corporate breach of fiduciary duty action such as this, and the Court finds that an award of fees is appropriate in the circumstances of this case. Mr. Donovan's misconduct as the managing director of SIL was brazen and pervasive. It included, without limitation: (a) the misappropriation of millions of dollars of SIL funds, spread over hundreds of individual transactions, to pay a wide range of Mr. Donovan's personal expenses, such as the cost of his haircuts, his home real estate taxes, and his Myopia Hunt Club and Netflix membership fees (see, e.g., Trial Exhibit 108); (b) the use of SIL employees and contractors to support and promote Mr. Donovan's other business endeavors and legal activities, including using them to maintain his personal website (professordonovan.com) as well as his Wikipedia page (https://en.wikipedia.org/wiki/John_J._Donovan), and to create informational binders for use in other litigation against Mr. Donovan (see, e.g., Trial Testimony of Ben Coole); and (c) the creation of various fraudulent promissory notes, leases, and invoices that Mr. Donovan used (initially, at least) to justify his set-off defense in this proceeding (see, e.g., Trial Exhibits 40-44). Investigating, understanding, documenting, and ultimately proving Mr. Donovan's extensive wrongdoing at trial presented a formidable task for Ms. Brining. Her efforts have resulted in a more than \$1.5 million damage award against Mr. Donovan, in which certain other SIL stockholders undoubtedly possess a "rightful share." See *Coggins v. New England Patriots Football Club, Inc.*, 406 Mass. 666, 669 (1990) (internal quotation marks and citations omitted). Ms. Brining's success in creating a common damage fund for the benefit of herself and other SIL stockholders (the "SIL Common Fund") entitles her, in the opinion of this Court, to an order directing that her associated reasonable attorneys' fees and costs be paid out of that fund. *Id.* See also *Crowley*, 30 Mass. App. Ct. at 767.

"What constitutes a reasonable [attorney's] fee is a question that is committed to the sound discretion of the judge." *Berman v. Linnane*, 434 Mass. 301, 302-303 (2001). Factors to be considered include, among other things, "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, [and] the result obtained...." *Id.* at 303, quoting *Linthicum v. Archambault*, 379 Mass. 381, 388-389 (1979). "No one factor is determinative,

and a factor-by-factor analysis, although helpful, is not required.” *Berman*, 434 Mass. at 303.

The burden of proving the amount of fees to be awarded falls on the party seeking the award. See *Robbins v. Robbins*, 19 Mass. App. Ct. 538, 541 (1985). The requesting party must submit sufficient documentation to enable the court to evaluate the hours spent on particular aspects of the case. See *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 445 Mass. 411, 428 (2005) (“*Twin Fires Inv., LLC*”). The court is not required to review the description of each line of voluminous attorney time records to allow or disallow each item, and may consider the bill as a whole. See *id.* at 431. Where it is necessary to apportion fees between compensable and non-compensable claims, the proponent of the fee award bears the burden of making such an apportionment. See *id.* at 430-431; *Killeen v. Westban Hotel Venture, L.P.*, 69 Mass. App. Ct. 784, 792 (2007). If the proponent’s submission is unclear in this regard, the judge may use his firsthand knowledge of the proceedings to make a reasonable judgment as to the proportion of time spent on the non-compensable portions of the case. See *Twin Fires Inv., LLC*, 445 Mass. at 431 (noting that insufficiently detailed records which make it difficult for court to determine whether particular services are compensable justify disallowance of portion of requested compensation).

The Court has examined Ms. Brining’s Motion for Fees, as well as the attorney affidavit, invoices, and other materials submitted in support. The billing rates charged by Ms. Brining’s counsel (between \$190 and \$285 per hour for paralegals and associates, between \$379 and \$491 per hour for lead counsel, and between \$400 and \$580 per hour for other senior attorneys in minor supporting roles) are commensurate with the rates charged, in this day and age, by other civil litigators in the Boston metropolitan area and otherwise reasonable. Compare, e.g., *Toussaint v. Brigham & Women’s Hosp.*, 2018 WL 4760536, at *2 (Mass. Super. Ct. Aug. 21, 2018) (Roach, J.) (finding attorney’s hourly billing rate of \$550 per hour to be reasonable).

As to the amount of time expended by Ms. Brining’s legal counsel, the supporting materials describe, with reasonable specificity, the time spent and tasks performed in representing Ms. Brining over the life of this proceeding. The total number of professional hours expended in the roughly three years since this case was filed (approximately 1,375) is not, on its face, unreasonable. Mr. Donovan nonetheless complains that the total hours for which Ms. Brining seeks compensation impermissibly include: (a) time spent on her individual claims against Mr. Donovan; and (b) time spent on arguments, motions, and

claims that ultimately were unsuccessful, including the Chapter 93A claim that Mr. Brining withdrew at trial. In her reply memorandum, Ms. Brining concedes Mr. Donovan's first point, and she accordingly has deducted \$4,910.00, representing ten hours of attorney time, from her fee request. Plaintiff's Reply in Support of Her Motion for an Award of Attorneys' Fees, dated February 18, 2020 ("Plaintiff's Reply"), at 1. Ms. Brining has reduced her fee request by an additional \$4,830.00 (again, reflecting approximately ten hours of attorney time) to account for time devoted to her unsuccessful Chapter 93A claim. Thus, Ms. Brining agrees that a total fee reduction of \$9,740.00 is warranted. She otherwise opposes any reduction in her requested fee award, however, asserting that the arguments and motions complained of by Mr. Donovan had merit and were, in some instances, practically, if not technically, successful. *Id.* at 2-3.

Having considered all of the information provided and the arguments raised, and giving due regard to the factors set out in *Linthicum, supra*, the Court concludes, in its discretion, that it was reasonable for Ms. Brining's legal counsel to expend 1,355 hours representing her in this derivative action, and that Ms. Brining's recoverable attorneys' fees total \$675,249.50 as a result. See *Berman*, 434 Mass. at 302-303. As Mr. Donovan has not contested the calculation or reasonableness of any of Ms. Brining's requested expenses, the Court awards the full amount sought, which is \$29,132.29. Thus, the total amount of fees and expenses to be paid out of the SIL Common Fund is **\$704,381.79**.²

2. Ms. Brining's Cancellation Motion (Docket Entry No. 82): This motion also is **ALLOWED IN PART** as follows.³

First, Ms. Brining's Cancellation Motion is **ALLOWED** insofar as it seeks to prohibit Mr. Donovan's wholly-owned company, Securenet Holdings, LLC

² In making this award, the Court rejects Mr. Donovan's argument that Ms. Brining's fee request should be disallowed because he was blocked by Ms. Brining from conducting discovery, prior to trial, as to the amount of her claimed fees. Ms. Brining's reply memorandum argues persuasively that the approximate amount of Ms. Brining's accrued attorneys' fees was made known to Mr. Donovan well in advance of trial. See Plaintiff's Reply at 3-5 & Exhibit A.

³ The Court also rejects Mr. Donovan's argument that Ms. Brining's Cancellation Motion must be denied because none of the relief requested in that motion was prayed for in her Amended Complaint. Ms. Brining's Amended Complaint includes two specific prayers for relief seeking an award of damages against Mr. Donovan. Amended Complaint at 19, Prayers 1 and 2. It also includes a general prayer for relief asking the Court to "[a]ward such other and further relief ... as [it] deems just and equitable." *Id.*, Prayer 3. Where, as here, the equitable remedy fashioned by the Court is not "inconsistent with the specific relief prayed for in the bill," then a general prayer for relief is sufficient to support the relief granted. See *Powers, Inc. v. Wayside, Inc. of Falmouth*, 343 Mass. 686, 694 (1962) ("[I]t is well settled that no relief can be given under the general prayer for relief which is inconsistent with the specific relief prayed for in the bill.") (internal quotation marks and citation omitted).

("Securenet"), from sharing in any way in any monies distributed to or from the SIL Common Fund. Mr. Donovan, as a disloyal fiduciary, is not entitled to gain, directly or indirectly, from his own wrongdoing. See, e.g., *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 556 (1997) ("Where a corporate fiduciary obtains a gain or advantage through a violation of his duty of loyalty, a court may properly order restitution of the gain, so as to deny any profit to the wrongdoer and prevent his unjust enrichment."). Prohibiting Mr. Donovan from sharing in the SIL Common Fund through his interest in Securenet will help to ensure that his misconduct does not redound to his own financial benefit. This prohibition also shall apply to any subsequent holder of some or all of Securenet's shares in order to negate any attempt by Mr. Donovan to circumvent the prohibition by transferring Securenet's shares to a third-party.

Second, Ms. Brining's Cancellation Motion is **DENIED** insofar as it seeks an order cancelling Mrs. Donovan's 770,000 shares in SIL. See *Samia v. Central Oil Company of Worcester*, 339 Mass. 101, 116 (1959) (ordering cancellation of certain corporate shares held by defendant who had made wrongful distribution of shares to himself and others). While the circumstances under which Mrs. Donovan acquired her shares are undeniably suspect, this Court was not asked at trial to make, and has not made, a specific finding that her shares were fraudulently obtained. Moreover, Mrs. Donovan was never a party to this action and the Court is not confident that her interests were adequately represented, in all material respects, by her husband, Mr. Donovan. As recognized by the Massachusetts Supreme Judicial Court,

[i]t is a fundamental principle of equitable procedure that a court will not proceed to a final determination, which may affect third persons, without causing them to be made parties to the bill in order that after a hearing, at which they have had their day in court, their claims may be adjudicated.

Lawrence v. Smith, 201 Mass. 214, 215 (1909). See also *Franks v. Markson*, 337 Mass. 278, 283 (1958) (same, quoting *Lawrence*). Because Mrs. Donovan never had her "day in court" with respect to the acquisition of her SIL shares, the Court declines to exercise its equitable power to completely strip her of those shares now.⁴

⁴ The Court simultaneously denies Ms. Brining's request that it cancel Securenet's 800,000 shares in SIL because the Court's previously-announced decision to bar Securenet from sharing in the SIL Common Fund effectively renders that request moot.

Third, Ms. Brining's Cancellation Motion is **ALLOWED** insofar as it seeks an order directing that the net proceeds of the SIL Common Fund be distributed among SIL's shareholders (excluding Securenet) on a *pro rata* basis based upon the dollars they actually invested in SIL, as opposed to the number of SIL shares they currently hold. In fashioning remedies involving closely-held corporations, this Court "ha[s] broad powers to determine the appropriate relief to remedy the wrong complained of and to make the [judgment] effective." *Demoulas v. Demoulas*, 428 Mass. 555, 591 (1998) (internal quotation marks and citation omitted). See also *Bodio v. Ellis*, 401 Mass. 1, 10 (1987) ("A court exercising traditional equity powers has power to remedy the wrong complained of and to make the decree effective.") (internal quotation marks and citation omitted). In this case, the Court is persuaded, from all of the evidence, that Mr. Donovan's misconduct as managing director of SIL included manipulating the transfer and/or sale of SIL stock in late 2016 and 2017 to certain investors, including his wife, Linda Donovan, Mr. Graylin, and Mr. Fabiani, so as to unfairly benefit these investors.⁵ Although the precise financial impact of Mr. Donovan's manipulation cannot be discerned from the record, its existence undeniably distorts the relative share percentages of SIL's various investors. For this reason, the Court concludes that distributing the net proceeds of the SIL Common Fund on a *pro rata* basis based upon the dollar amount of each shareholder's investment is a more equitable and more accurate means of compensating all SIL investors (excluding Securenet) for their actual, out-of-pocket losses. See *Brodie v. Jordan*, 447 Mass. 866, 869 (2006) ("Courts have broad equitable powers to fashion remedies for breaches of fiduciary duty in a close corporation ... and their choice of a particular remedy is reviewed for abuse of discretion...."). See also *Lynch v. Patterson*, 701 P.2d 1126, 1130 (Wyo. 1985) ("[C]ourts sometimes permit pro-rata recovery by individual shareholders [in derivative actions] to prevent an award from reverting to the wrongdoers who remain in control of the corporation.").

⁵ For example, the evidence presented at trial establishes that Mr. Fabiani (or his nominee) received at least 57,914 questionable SIL shares through Mrs. Donovan, while Mr. Graylin (or his nominee) received in excess of 570,000 questionable SIL shares in the same manner. See Trial Exhibit 67.

Order

For the foregoing reasons, Plaintiff's Post-Verdict Motion for an Award of Attorneys' Fees (Docket Entry No. 80), and Plaintiff's Post-Verdict Motion on Cancellation of Shares, Certain Shareholders Should Not Recover, Rescissory Damages, and Other Remedies (Docket Entry No. 82) are **ALLOWED IN PART**.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. In addition to the amounts previously awarded, plaintiff Jennifer Brining shall recover reasonable attorney's fees in the amount of **\$675,249.50**, and expenses in the amount of **\$29,132.29**, for a total award of **\$704,381.79**, to be paid **first** out of the common damage fund created for the benefit of Ms. Brining and other Sendlater, Inc. ("SIL") stockholders from any monies or other assets recovered from defendant John J. Donovan (the "SIL Common Fund");
2. Securenet Holdings, LLC ("Securenet"), and any subsequent holder of any SIL shares held by Securenet as of December 30, 2019, are prohibited from sharing in any way in any monies or other assets paid to, or distributed from, the SIL Common Fund;
3. Any monies or other assets distributed from the SIL Common Fund to any SIL shareholder (excluding those referenced in the immediately preceding paragraph) shall be distributed on a *pro rata* basis based upon the dollars each shareholder actually invested in SIL, and not on the number of SIL shares the shareholder currently holds; and
4. No other relief is awarded at this time.

IT IS FURTHER ORDERED THAT final judgment in conformance with this Order and the verdict on Special Questions Following Jury-Waived Trial issued on December 30, 2019, shall enter forthwith.

Brian A. Davis
Associate Justice of the Superior Court

Date: May 29, 2020