SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

Index No.: 600780/08

IN RE BEAR STEARNS LITIGATION

DECISION
and ORDER

----------X

KORNREICH, SHIRLEY WERNER, J.:

These consolidated class actions arise from the events of March 2008 through May 2008 surrounding the sudden collapse of the Bear Stearns Companies, Inc. (Bear Stearns) and the resulting federally-assisted merger with JPMorgan Chase & Co. (JPMorgan), a stock-for-stock deal with an implied value of $10 per share. Plaintiffs are Bear Stearns shareholders who claimed they suffered injuries arising from the merger. They sought damages from Bear Stearns' directors (Director Defendants)[1] for breach of fiduciary duty and JPMorgan for its alleged tortious conduct surrounding the merger. In a decision dated December 4, 2008, the Hon. Herman Cahn (retired) granted defendants Bear Stearns' and JPMorgan's motions for summary judgment, dismissing the action in its entirety (December Decision). At oral argument on the December Decision, Justice Cahn indicated that plaintiffs' motion for attorneys' fees would be considered upon a renewed application pending the resolution of the summary judgment motions. Plaintiffs' counsel now move for a renewed application of attorneys' fees arising from their claim that their filing of a series of class actions between March 17 and March 20, 2008 was a substantial factor causing the defendants to increase the final merger consideration from $2 to

[1]The Bear Stearns directors named in this action were defendants Henry S. Bieson, Carl D. Glickman, Michael Goldstein, Donald J. Harrington, Frank T. Nickell, Paul A. Novelly, Frederic V. Salerno, Vincent Tese, Wesley S. Williams, Jr., James E. Cayne, Alan D. Schwartz and Alan Greenberg.

$10. Defendants oppose the grant of attorneys' fees.

I. Background

A. Events of March 13 through March 21, 2008 - The Initial Merger Agreement of $2 Per Share

Although familiarity with the facts of this case is presumed,[2] recitation of the facts is warranted here. On the evening of Thursday, March 13, 2008, Bear Stearns' Board of Directors (Board) held a special meeting where its senior management and financial and legal advisors discussed the bank's liquidity crisis and the possibility that, without sufficient funding, it would not be able to open for business on Friday. *In the Matter of Bear Stearns Litig.*, 21 Misc 3d 447, 451 (Sup Ct, New York County 2008). At this meeting, the Board learned that Bear Stearns was having trouble with liquidity because: its customers were withdrawing billions of dollars from their accounts; its financial counterparties ceased conducting any further business with the company, including the refusal to roll over their repurchase agreements; and of its obligations arising under certain margin calls. *Id.* Immediately thereafter, representatives of JPMorgan met throughout the night with officials from the Treasury Department, the New York Federal Reserve (NY Fed), and the Federal Reserve Board. *Id.* The parties eventually came to an agreement to create a temporary Fed-backed loan facility (Loan Facility) pursuant to which, for a period of up to 28 days, JPMorgan would provide fully-secured funding to Bear Stearns, supported by a back-to-back loan facility that allowed JPMorgan to borrow funds on a non-recourse basis from the NY Fed via its discount window. *Id.*

The Loan Facility was approved by the Board following an 8:00 a.m. meeting on Friday March 14th. *Id.* Bear Stearns subsequently issued a press release proclaiming the creation of the

[2]A full reading of the facts can be found in Justice Cahn's December 4, 2008 decision *In the Matter of Bear Stearns Litig.*, 21 Misc. 3d 447 (Sup Ct, New York County 2008).

Loan Facility. *Id.* Around 12:00 p.m., Bear Stearns' senior management convened a public investor conference to discuss the Loan Facility and to announce its retention of Lazard Freres & Co., LLC (Lazard) to seek alternative transactions. *Id.*

However, despite the creation of the Loan Facility and subsequent public disclosures, the run on Bear Stearns continued. *Id.* at 552. On Friday, March 14th, Bear Stearns' stock price plummeted, closing down 47%. *Id.* That afternoon, Fitch, Moody's and Standard & Poors significantly downgraded Bear Stearns' short-term and long-term credit ratings two to four notches, stating that additional downgrades were possible. *Id.* That evening, the NY Fed informed Bear Stearns that the Loan Facility would not be available for the opening of business on Monday morning, March 17th. *Id.* Treasury Secretary Henry Paulson subsequently informed Bear Stearns CEO James D. Schwartz that the company needed to complete a stabilizing transaction over the weekend. *Id.* As a result, Bear Stearns decided it could not open for business on Monday without a different source of funding. *Id.* Its funding requirements at this time were in the $60 billion to $100 billion range. *Id.* As such, Bear Stearns determined that its only options were to complete a "stabilizing" transaction over the weekend or file for bankruptcy. *Id.*

As of Saturday March 15, 2008, the only parties who had expressed an interest in completing a "stabilizing" transaction (i.e., a merger) on such an accelerated basis were JPMorgan and non-party private equity firm J.C. Flowers. *Id.* at 453. Members of Bear Stearns and JPMorgan met to discuss the possibility of a merger. *Id.* J.C. Flowers offered Bear Stearns $3 billion in exchange for a 90% equity interest, a proposal which necessitated the creation of a $20 billion credit facility. *Id.* This plan failed to materialize, because J.C. Flowers could not find funding. *Id.* That evening, JPMorgan considered executing a stock-for-stock transaction

where Bear Sterns' shareholders would receive JPMorgan stock with an implied value between $8 and $12 per share. *Id.* Bear Stearns expressed interest at this price level. *Id.* Aided by support from the NY Fed and Treasury, all three parties continued their discussions and due diligence into the morning of Sunday, March 16, 2008. *Id.* That afternoon, JPMorgan indicated to Lazard that it could not proceed without some portion of financial aid from the NY Fed. *Id.* These negotiations led to the NY Fed agreeing to provide $30 billion of non-recourse funding secured by a pool of Bear Stearns collateral, primarily composed of mortgage backed securities. *Id.* The Federal Reserve stated that government backing/intervention was predicated upon the belief that the collapse of Bear Stearns would lead to "unpredictable but likely severe consequences for market functioning and the broader economy...[with]...the risk of systemic damage to the financial system." *Id.*

During the afternoon of Sunday, March 16th, JPMorgan changed its position indicating it was now interested in a stock-for-stock transaction at an implied value of $4 per share of Bear Stearns' stock. *Id.* The offer was subsequently reduced to $2 per share. *Id.* Bear Stearns objected to the $2 price, but JPMorgan refused to increase the deal price, which Bear Stearns management believed to be, in part, at the urging of the government.[3] *Id.* The Board was informed that without an immediate deal, Bear Stearns would have to file for bankruptcy, its shareholders would receive close to nothing, and the holders of the company's $70 billion of unsecured debt would incur heavy losses. *Id.* Lazard then issued a fairness opinion, executed by its Deputy Chairman Larry Parr, stating that the "Exchange Ratio [of $2 per share] is fair, from a financial point of view, to the holders of the Company Common Stock." *Id.* at 453-454.

---

[3]In fact, several members of the Board testified that the government would not permit a deal to take place at a price higher than $2 per share. See James Cayne EBT at 74-76; Michael Goldstein EBT at 101-103; Vincent Tese EBT at 101-104.

On Sunday, March 16, 2008, the Board duly approved a share-for-share merger at an implied price of $2 per share, derived from a fixed exchange ratio of 0.05473 shares of JPMorgan common stock for each share of Bear Stearns common stock (Initial Merger Agreement). *Id.* at 454. In addition, JPMorgan immediately guaranteed certain Bear Stearns obligations and the NY Fed provided up to $30 billion of supplemental funding. *Id.* The Initial Merger Agreement also provided JPMorgan with the option to purchase 19.9% of Bear Stearns common stock at $2 per share and Bear Stearns' headquarters, located on Madison Avenue, New York, New York, for $1.1 billion.

Bear Stearns opened for business on Monday morning, March 17, 2008. *Id.* During the course of the week, to keep Bear Stearns afloat, JPMorgan loaned it an additional $13.4 billion and the NY Fed loaned it approximately $30 billion each day. *Id.* Nonetheless, confidence in Bear Stearns continued to wane and the run on the bank continued. *Id.* Bear Stearns customers withdrew funds, and its counterparties were unwilling to provide secured financing. *Id.*

On Tuesday, March 18, 2008, JPMorgan contacted Bear Stearns legal representatives to discuss revising the Initial Merger Agreement. *Id.* JPMorgan had concerns over its commitment to guaranty Bear Stearns' obligations while the market remained skeptical of Bear Stearns' potential viability and the merger going through. *Id.* at 454-455. On Friday, March 21, 2008, to increase certainty that the deal would close, JPMorgan proposed that Bear Stearns issue it enough shares to give JPMorgan control over two-thirds of Bear Stearns' common stock. *Id.* Bear Stearns rejected this proposal, stating that it would require a considerable increase in the merger consideration if any further alterations were to take place. *Id.*

B. March 22, 2008 Special Meeting of Bear Stearns Board of Directors

The minutes from a special meeting of Bear Stearns' board of directors at 9:34 a.m. on

Saturday, March 22, 2008 (March 22nd Board Meeting) provides the following pertinent events surrounding Bear Stearns continued negotiations with JPMorgan. During negotiations, Bear Stearns retained the following four law firms as counsel: Skadden Arps; Sullivan & Cromwell; Cadwalader Wickersham & Taft; and Richards, Layton & Finger. Members from each firm participated in this meeting and all subsequent Board meetings referenced herein. The meeting commenced with Mr. Schwartz informing the Board that JPMorgan had concerns about its liability under the guaranty if Bear Stearns' shareholders did not approve the merger. Affirmation of Marc Wolinsky, Exhibit 17 at 2. Specifically, JPMorgan indicated that due to the additional funding provided to Bear Stearns over the course of the previous week, the NY Fed wanted JPMorgan to guaranty all of the money it had loaned Bear Stearns that week. *Id.* Consequently, JPMorgan communicated that it would not continue funding Bear Stearns absent some guaranty that the merger would close. *Id.* In light of these developments, Mr. Schwartz stated Bear Stearns was preparing for the possibility of a bankruptcy filing. *Id.*

The Board then began to discuss JPMorgan's most recent proposal, which was for Bear Stearns to issue enough new shares so JPMorgan would control a majority of all outstanding voting shares. *Id.* To complete the transaction in such a fashion, JPMorgan was seeking to rely on a New York Stock Exchange (NYSE) exception that would allow Bear Stearns to issue more than 20% of its stock without shareholder approval. *Id.*

The Board and its legal team discussed the scrutiny that this new deal might face under Delaware law. Specifically, the parties were concerned over the possibility that "if [Bear Stearns sold JPMorgan] shares of [Bear Stearns] which carr[ied] a majority of the voting power of [Bear Stearns'] common stock on a pro forma basis there would likely be litigation challenging *that transaction*." (emphasis added). *Id.* at 3. Predicated on a Delaware Supreme Court case entitled

Omnicare, Inc. v NCS Healthcare, Inc., 818 A2d 914 (Del 2003) (Omnicare), Bear Stearns was advised by counsel that it should not give JPMorgan the control it was seeking since the deal would likely not survive a challenge in the Delaware courts. Wolinsky Affirmation, Exhibit 17 at 3. The minutes of this meeting reflect no discussion regarding any current litigation pending at the time against Bear Stearns arising from the Initial Merger Agreement.

C. March 23, 2008 9:00 a.m. Special Meeting of Bear Stearns Board of Directors

The following morning, the Board held another special meeting to discuss the ongoing developments regarding its possible merger with JPMorgan. At this meeting, Mr. Schwartz indicated that JPMorgan's lawyers were advised that the issuance to it of 51% of Bear Stearns' stock, giving JPMorgan control over any shareholder vote, would likely not survive a future challenge in state court. Wolinsky Affirmation, Exhibit 18 at 2; see also Vincent Tese EBT at 176-177; Michael Goldstein EBT at 159-160. The NY Fed, Federal Reserve Board and Treasury Department were kept abreast of these developments and were specifically "told that to withstand a legal challenge in the Delaware courts [Bear Stearns] needs consideration in order to increase the certainty of the transaction and that if [Bear Stearns] gives too much to ensure deal certainty for [JPMorgan] it actually could reduce the certainty." Wolinsky Affirmation, Exhibit 18 at 2. The Board was advised by counsel that "a sale of stock to [JPMorgan] representing the majority of [Bear Stearns] outstanding shares would likely result in a shareholder seeking an injunction to stop the transaction with an expedited decision by the court." *Id.* at 3.

Mr. Schwartz also indicated that JPMorgan's CEO, James Dimon, asked Bear Stearns to make a counteroffer. *Id.* at 2. With the understanding that the counteroffer had not been discussed with the Board, Mr. Schwartz proposed that for a new exchange ratio of $10 to $12 per share, Bear Stearns would change the current option JPMorgan had to purchase 19.9% of Bear

Stearns common stock to an option which was immediately exercisable. *Id.* This counteroffer was rejected. *Id.* The Board also discussed the possibility of having to file for bankruptcy if a deal with JPMorgan could not be finalized. *Id.* The minutes of this meeting, once again, provide no discussion of any lawsuits which were currently pending against the company.

C. March 23, 2008 3:24 p.m. Special Meeting of Bear Stearns Board of Directors

The March 23 afternoon meeting commenced with Mr. Schwartz telling the Board that the government had been updated regarding the fact that JPMorgan was seeking to alter the merger. Wolinsky Affirmation, Exhibit 19 at 2. The government was told that any changes made to the deal must be compliant with Delaware law. *Id.* The government also was told that Bear Stearns would continue to work with JPMorgan to accommodate its concerns, but if an agreement could not be reached, foreign regulators might have to be told that a bankruptcy filing was imminent. *Id.*

Mr. Schwartz then updated the Board on Mr. Dimon's concerns about certainty that the deal would close and JPMorgan's desire to own 50% of the vote. *Id.* Mr. Dimon had been advised that executing the deal in this manner "was not certain because of the possibility that the Delaware courts would overturn the issuance and sale of the shares...[and]...consideration was necessary to increase certainty under Delaware law." *Id.* James Cayne EBT at 121-125; Goldstein EBT at 167-168; Tese EBT at 183-185. Mr. Schwartz further indicated that he discussed with Mr. Dimon the fact that an exchange ratio of $12 per share made sense based upon where JPMorgan's stock was trading. Wolinsky Affirmation, Exhibit 19 at 2. Mr. Dimon was amenable to an increased exchange ratio if Bear Stearns would issue a lot of stock up front. *Id.* Mr. Dimon further was advised that any issuance of Bear Stearns stock needed to be below 40% to be compliant under Delaware law. *Id.* He had indicated that JPMorgan's board had

approved an exchange ratio of $8 per share, but in light of these developments, he would go back and ask his board for an exchange ratio of $10 per share. *Id*; Cayne EBT at 126-129; Goldstein EBT at 170-174; Tese EBT at 186-188. JPMorgan also indicated it would enhance the guaranty and assume $1 billion worth of Bear Stearns losses. *Id.* As a result, Mr. Schwartz told Mr. Dimon that Bear Stearns would be able to open in Asia the following morning. *Id.*

Further discussion was then held regarding the specifics and technicalities of this new proposal including JPMorgan's desire to purchase 39.5% of Bear Stearns outstanding shares of common stock. *Id.* at 2-3. In sum, in exchange for giving JPMorgan greater assurance that it would own enough shares to ensure passage of the merger, Bear Stearns avoided bankruptcy, enhanced the viability of its weakened business and gained four to five times more value for its shareholders. *Id.* at 3; Tese EBT at 194-195. Mr. Tese testified that both sides and the government understood that changes needed to be made to the Initial Merger Agreement because "the marketplace [did not] accept[] it." Tese EBT at 194-195. These changes needed to be "hasty" and in place by Monday morning, so Bear Stearns could avoid bankruptcy. *Id.* As compared to the Initial Merger Agreement, Mr. Tese felt that these changes were more favorable to Bear Stearns, its shareholders and JPMorgan. *Id.* During negotiations, Mr. Schwartz made it clear to the Board that "the biggest issue would be the risk that a court would enjoin the issuance or voting of the shares [JPMorgan] was asking for." Wolinsky Affirmation, Exhibit 19 at 3; Goldstein EBT at 180-181 ("I am sure one of the issues [discussed] was whether this [new proposal] would be approved in a Delaware court if it was challenged"). On this point, the Board was advised by counsel that "Delaware courts have not overruled similar deal protection mechanisms where companies received less extra consideration than [Bear Stearns] would receive here. [The Board] is entitled to exercise its business judgment with its obligations of

loyalty and care to act in the best interests of the company and stockholders." Wolinsky Affirmation, Exhibit 19 at 3. Bear Stearns' counsel agreed that there was a fairly good chance that this new proposal would survive a challenge under Delaware law. *Id.* at 3-4. These minutes reflect no discussion regarding any lawsuits which were currently pending against the company.

At another special meeting that evening at 7:34 p.m., the Board was "advised that an increase in the consideration to $10 a share improved the likelihood the share exchange could survive a court challenge." Goldstein EBT at 189; Tese EBT at 206-207.

D. EBT of JPMorgan CEO James Dimon

With regard to what caused the merger price to change from $2 to $10 per share, Mr. Dimon testified to the following. Even after the parties consented to the Initial Merger Agreement, many issues remained since the transaction was completed "in the middle of the night." James Dimon EBT at 140-141. Due to the speed at which the parties were forced to proceed and the approximate $400 billion of assets contained within Bear Stearns, Mr. Dimon stated that he did not feel secure that his firm really understood the breadth and scope of what had actually transpired. *Id.* at 78-79. He amplified this point:

> Part of the major risks of this was you didn't completely know and it would take a while before you could really get your hands around it so you thought you were in control and secure...
>
> Again, no one had ever done a transaction like that ever in the history that I know of mankind of this complexity. There was no way I could have assumed that we would have gotten everything exactly right.

Id. at 79, 85. Mr. Dimon stated that around Wednesday, March 19, 2008, he wanted the parties to reevaluate what they had done and put a final deal together that would "save Bear Stearns from bankruptcy, save the financial system and hopefully do a good transaction for JPMorgan." *Id.* at 141. At this point, despite the Initial Merger Agreement, there was still enormous risk that Bear

Stearns would have to file for bankruptcy, and Mr. Dimon wanted to restructure the transaction so as to reduce this risk. *Id.* at 141-143.

When asked about what changed for JPMorgan in the second transaction, Mr. Dimon stated:

> We gave the additional guarantees. We guaranteed the Fed the $25 billion. We paid more money. So it cost us more money. We got some better guarantees on the vote, like the board of directors would vote for it. We got a better option on the building. So we got the 39.5 percent.
>
> So we greatly increased the odds of a successful closing and reduced the risk both of a bankruptcy and the risk to JPMorgan after the closing, which was still enormous...[because]...we were going to inherit the business. If the business was gone by the time we inherited it, we would have been in terrible shape.

Id. at 143-145. The goal, according to Mr. Dimon, was to minimize JPMorgan's risk by constructing a transaction that would enhance the chances of keeping what was left of Bear Stearns viable. *Id.* at 146, 150; see also *Id.* at 148 ("we really preferred [Bear Stearns not to] go bankrupt both for the financial system of the United States and maybe the world, and for us as a potential owner of it.").

Mr. Dimon averred that he contacted Mr. Schwartz on either Thursday, March 20 or Friday, March 21, 2008, to resolve these outstanding issues and restructure the transaction. *Id.* at 152-153. Mr. Schwartz indicated that he wanted more consideration and the parties began discussing a deal in the range of $8 to $12 per share. *Id.* The parties discussed some movement that had occurred in JPMorgan's stock and how it might increase the consideration. *Id.* Mr. Dimon suggested that JPMorgan purchase up to 66% of Bear Stearns outstanding shares, but, after his legal team had reviewed this proposal, they did not think it would pass muster under Delaware law. *Id.* at 154,157-158. At this point, Mr. Dimon indicated he wanted to do everything in his power to finalize the deal, but that he was willing to go no higher than $10 per

share. *Id.* at 154. Bear Stearns then proposed that in return for a share exchange of $10, JPMorgan purchase 39.5% of its outstanding shares. *Id.* at 158. Mr. Dimon had to discuss these details with his board as well as the NY Fed. *Id.* Mr. Dimon stated that the NY Fed was concerned about the increased deal price because it would end up assuming more risk and quite possibly lose more money. *Id.* at 158-159. Mr. Dimon was willing to have JPMorgan take a first loss position on the NY Fed's $30 billion. *Id.* at 159. Mr. Dimon stated that he was cognizant of the "moral hazard" which existed by paying Bear Stearns' shareholders more, but felt this was secondary to saving Bear Stearns from bankruptcy. *Id.* at 160. This "moral hazard" arose from the sentiment which existed that "[i]f the government was taking risk, the [Bear Stearns'] shareholder should get nothing." *Id.* at 162. When asked if the NY Fed could "veto" the transaction, Mr. Dimon stated "Well, they didn't have to say [a veto existed] because they had it. The Fed has to approve the deal." *Id.* at 161. Despite these concerns, Mr. Dimon felt at $10 a share, the deal was now a "stronger transaction" and was better for Bear Stearns shareholders. *Id.* at 163-164, 174-175. When asked if the pendency of any shareholder suits which had already been filed after the Initial Merger Agreement impacted his thoughts on whether to increase the deal price from $2 to $10 per share, Mr. Dimon said "No." *Id.* at 197.

E. Amended Merger Agreement

On Monday Morning March 24, 2008, the parties reached agreement on an amended merger agreement (Amended Merger Agreement). *In re Bear Stearns*, 23 Misc 3d at 455. As part of this agreement, the merger consideration was increased to an implied value of approximately $10 per share. *Id.* JPMorgan agreed to guarantee Bear Stearns' current and future borrowings from the NY Fed and in the event the merger was voted down, JPMorgan's obligation to guarantee Bear Stearns' trading obligations would be reduced from one year to 120

days. *Id.* In addition, JPMorgan was allowed to purchase 95 million shares of Bear Stearns' common stock at $10 per share for a 39.5% interest. *Id.* at 455-456. Upon completion of the merger, JPMorgan and the NY Fed also agreed to amend their $30 billion special funding arrangement so that JPMorgan would now assume the first $1 billion of losses accrued on any collateral provided to the NY Fed. *Id.* at 156. All of the Director Defendants were required to resign once the merger became effective. *Id.* On May 29, 2008, a majority of Bear Stearns shareholders voted to approve the Amended Merger Agreement. *Id.*

II. Conclusions of Law

In support of their motion, plaintiffs' counsel initially argued entitlement to attorneys' fees under New York law (CPLR § 909) and the "substantial benefit" doctrine detailed in *In re Cablevision Sys. Corp. S'holders Litig.*, 21 Misc 3d 419 (Sup Ct, Nassau County 2008). In reply, however, plaintiffs contend that the court, instead, should apply Delaware law. Regardless of which state's law applies, each contains a causation requirement. Plaintiffs have failed to meet the requisite causation mandated under either standard.

With regard to attorneys' fees, courts in New York generally adhere to the "American Rule." Thus, fees are considered to be "incidents of litigation," and the prevailing party may not collect from the loser unless authorized by a prior agreement, a statute or a court rule. *In re Cablevision*, 21 Misc 3d at 429 citing *Baker v Health Mgmt. Sys., Inc.*, 98 NY2d 80, 88 (2002). CPLR § 909 provides a statutory exception to the rule in class action litigation. "If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class." *In re Cablevision*, 21 Misc 3d at 429 quoting CPLR 909.

The "common fund doctrine" permits an award of attorneys' fees from a common fund created by a successful shareholder litigation. *In re Cablevision*, 21 Misc 3d at 432 citing *Seinfeld v Robinson*, 246 AD2d 291, 294 (1st Dept 1998). In addition, even where no favorable judgment has been obtained and no common fund exists, plaintiffs will still be deemed to have obtained a favorable judgment if the action conferred a "substantial benefit" on the class. *Id.* Therefore, in shareholder litigation, plaintiff shareholders may receive an award of counsel fees if they create a substantial benefit on either the corporation or the other shareholders. *Id.* citing *Seinfeld*, 294 AD2d at 295. Where such a benefit is deemed to have occurred, attorneys' fees are awarded to avoid unjust enrichment. *In re Cablevision*, 21 Misc 3d at 433 citing *Seinfeld*, 246 AD2d at 295. However, to recover, plaintiffs must establish that their suit was indeed the proximate cause of the benefit obtained. *In re Cablevision*, 21 Misc 3d at 433 citing *Koppel v Wien*, 743 F2d 129, 135 (2d Cir 1984).

In shareholder class actions under Delaware law, a plaintiff may recover counsel fees for "benefits" tendered outside of the lawsuit by showing: (1) the suit was meritorious when filed, meaning that it was able to withstand a motion to dismiss; (2) the action procuring the benefit was taken by the defendants prior to a judicial resolution of the pending action; and (3) the benefit was causally related to the lawsuit. *Absolute Recovery Hedge Fund, L.P. v Gaylord Container Corp.*, 185 F Supp 2d 381, 386 (SDNY 2002) citing *United Vanguard Fund, Inc. v TakeCare, Inc.*, 693 A2d 1076, 1079 (Del 1997); *United Vanguard Fund, Inc. v TakeCare, Inc.*, 727 A2d 844, 851 (Del Ch 1998); see also *Allied Artists Pictures Corp. v Garon*, 413 A2d 876, 878 (Del 1980).

Here, there is not an iota of evidence in the record to suggest that the shareholder suits filed by plaintiffs after the announcement of the Initial Merger Agreement, had any causal impact

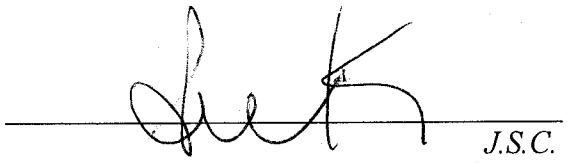
on the negotiations that eventually resulted in the Amended Merger Agreement. With regard to causation, plaintiffs contend that the references made in the testimony and record cited above concerning Delaware litigation were references to the shareholder suits which had already been filed. A reading of the record shows that this simply is not the case. All of the discussion that the parties had regarding Delaware litigation surrounded the potential for future suits that might be filed challenging a merger that resulted from giving JPMorgan control of 50% of the vote. No evidence suggests that the deal was altered due to the suits filed after Bear Stearns initially agreed to a shareholder exchange of $2 per share.

The record goes into great detail of what did cause the deal price to shift from $2 to $10 a share. Despite the presence of the Initial Merger Agreement and the supplemental financing provided by both JPMorgan and The NY Fed, the run on Bear Stearns continued during the week commencing March 17, 2008. Bear Stearns viability was in serious doubt, and JPMorgan was concerned about its commitments; it wanted to restructure the deal in a fashion that would give it less risk and more control. As reflected in both Mr. Dimon's deposition and minutes from the March 22nd Board meeting, JPMorgan was worried about its liability if Bear Stearns shareholders failed to approve the initial merger. It, therefore, wanted enough Bear Stearns stock to assure approval. In this context, the parties discussed the threat of future litigation under Delaware law challenging JPMorgan's control of the shareholder vote. During the pendency of these negotiations, the record is clear that it was the potential for future litigation under Delaware law (that a court would enjoin the issuance of the shares JPMorgan was seeking) which was one of the major factors driving the negotiations. The record is devoid of any evidence concerning the effect, if any, that the class action suits, already filed, had on the negotiations.

The concern over future litigation continued the following day when the Board was advised that in order for any new deal to pass muster and survive a *future* challenge under Delaware law (emphasis added), Bear Stearns would need additional consideration. The parties then began negotiating a deal with an exchange price in the $10 to $12 range. The parties finalized the deal at $10 per share. Many factors clearly contributed to the increase in consideration. Based upon the record, however, the pending shareholder suits were simply not among them. Accordingly, it is

ORDERED that the motion for attorneys' fees is denied.

ENTER



DATE: December 23, 2009
New York, NY

J.S.C.