

\$3.3M Incentive Fee In \$35M Occam Deal Too High, Atty Says

By **Jeff Montgomery**

Law360, New York (August 26, 2016, 5:05 PM ET) -- A class attorney balked Friday at a proposed record-breaking \$3.35 million incentive fee for one shareholder's help in winning a \$35.5 million award in a Delaware Chancery Court challenge to the Occam Networks Inc. merger with Calix Inc., suggesting instead a still-record \$1 million.

During a settlement hearing before Vice Chancellor J. Travis Laster, class attorney David A. Jenkins acknowledged that shareholder Herbert Chen played an outsized role in the five-year litigation effort. The fight ended with a mediated settlement in April, mid-way through a scheduled 10-day trial on challenges to the roughly \$195 million Occam-Calix telecommunications business tie-up in 2010.

Chen, a self-employed investment firm owner, spent more than 6,500 hours working on the case prior to settlement, according to class attorneys and a court affidavit, educating himself in matters of Delaware corporate law and working closely with attorneys. His efforts included important and detailed financial analysis work and examinations of findings in discovery and deposition records, according to a court affidavit.

"Based on that alone, he should get, in my opinion, the largest incentive award granted by a Delaware court, because he had an enormous role," Jenkins said. But he also suggested a lower, \$1 million incentive award, and said it would still be "by a factor of two more than any other award" in a Delaware class case.

Chen's incentive request, Jenkins said, could inappropriately put him in the same fee position as class attorneys. He also noted that the incentive would be in addition to a \$1 million to \$4 million payout the investor is expected to receive from the settlement based on his share holdings.

Attorneys, by comparison, are seeking to split \$9.9 million from the settlement, or about 30 percent, along with \$1.96 million for expenses.

Chen, in a court brief made public late Friday, questioned the motivations of class attorneys and the energy they put into the case at times, as well as their opposition to his fee.

"I find it personally very upsetting that what has been an exceptionally successful and unusual litigation is now marred by indecorous public squabbling over fees, with at least what I consider to be slanderous accusations being hurled at me like firecrackers," Chen said in the brief.

Those named in the suit, filed in 2010, were accused of “utterly failing to get the best price” for Occam and misrepresenting or failing to disclose important facts when seeking approval of the deal. Class attorneys originally called for a corrected per-share price as high as \$14.59, including damages, or nearly double the original total \$7.75 per share paid.

Attorneys for the class estimated the benefit of their efforts at \$2.31 - \$2.67 per share for stockholders.

During one phase of the case, Chen’s work teased out discovery omissions and inaccuracies that led to Wilson Sonsini Goodrich & Rosati PC’s withdrawal from representing Occam in the case. The law firm was soon added as an aiding and abetting defendant and settled separately.

The largest incentive payment in a class case, according to Chen and Jenkins, was a \$450,000 fee extended to investor Peter Brinckerhoff for his work in *In re El Paso Pipeline Partners, L.P. Derivative Litigation*. That case ended in a \$142 million award, still on appeal before Delaware’s Supreme Court.

Vice Chancellor Laster later asked if the incentive fee should come from the proposed \$9.9 million recommended for attorneys’ fees or from the balance of the class award. He cautioned that taking the amount from the class set aside would reduce Chen’s share of the overall award.

“In a case where somebody put effectively multiple years of his life into something, it seems to me there are real risk that it would basically undercompensate him, by reallocating value from his pocket and saying ‘This is compensation for the work you did,’” the vice chancellor said.

Although Vice Chancellor Laster approved the settlement, he reserved judgment on the fee matters and encouraged class attorneys to explore policies for Securities and Exchange Commission whistleblower actions or other qui tam whistleblower award practices.

The settlement, Vice Chancellor Laster said, was “fair, reasonable and adequate.” Because there was a risk that the defendants in the case could win despite class arguments if the trial continued, “this is precisely the situation where a settlement made sense.”

Chen received an undergraduate degree from Brown University with a dual concentration in English Literature and Applied Mathematics and an M.B.A. from The Wharton School with a dual concentration in Finance and Accounting. At one point in his fee affidavit he recalled finding a critical email that led to what he said was a “damning” disclosure failure by Wilson Sonsini.

“While discovery is typically viewed as the sole purview of lawyers, it need not be. Often the legal issues are quite simple, and the analysis of discovery is more like being a reporter or a detective,” Chen said in his affidavit. “What is the story beneath the story? What did they know and when did they know it? These were the issues here.”

The plaintiffs are represented by Robert J. Katzenstein, David A. Jenkins and Kathleen M. Miller of Smith Katzenstein & Jenkins LLP and by Joseph Levi, Michael H. Rosner and Nicholas I. Porritt of Levi & Korsinsky LLP.

The Occam directors and officers are represented by Peter J. Walsh Jr., Arthur L. Dent and Aaron R. Sims Of Potter Anderson & Corroon, by Patrick E. Gibbs of Cooley LLP and by Matthew Rawlinson of Latham & Watkins LLP.

Wilson Sonsini is represented by David E. Ross of Ross Aronstam & Moritz LLP and by Evan R. Chesler, Sandra C. Goldstein and Kevin J. Orsini of Cravath Swaine & Moore LLP.

The case is Herbert Chen, et al. v. Occam Networks Inc., et al., case number 5878, in the Court of Chancery of the State of Delaware.

--Editing by Emily Kokoll.

All Content © 2003-2016, Portfolio Media, Inc.