

Corporate & Financial Weekly Digest

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Second Circuit to Consider Employer's Discretion in Connection with LTIP

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The U.S. Court of Appeals for the Second Circuit is considering the district court's decision in *Fishoff v. Coty Inc.*, which held that the Coty Board's broad discretion under its Long Term Incentive Compensation Plan (LTIP) did not include attributing two different fair market values to its stock for the same day.

Michael Fishoff, the former Chief Financial Officer of Coty Inc., a privately held corporation, was a participant in the company's LTIP. Upon exercise, the LTIP entitles a participant to a cash payment in an amount equal to the difference between the fair market value of Coty shares underlying the participant's options and the exercise price.

On November 30, 2008, when Mr. Fishoff exercised his options, the most recent valuation of Coty's stock, in September 2008, had been \$58 per share.

On December 5, 2008, the Coty Board met and decided that in light of deteriorating market conditions, the next valuation of its options needed to be conducted as soon as possible. An independent investment bank valued the Coty shares at \$31 per share as of November 30, 2008. On December 11, 2008, Coty terminated Mr. Fishoff's employment without cause. Coty took the position that the \$31 value applied to Mr. Fishoff's option shares even though the shares had been valued at \$58 when he exercised. The difference between the \$58 valuation and the \$31 valuation of his 200,000 options was \$7,612,000.

The decision of the district court implies that Coty may have given other plan participants who exercised at the same time as Mr. Fishoff the benefit of the \$58 valuation. Coty argued that the LTIP gives it the discretion to do so.

While the LTIP does grant Coty's Board broad discretion with respect to the LTIP and the valuation of its shares, the district court noted that "[t]he LTIP does not explicitly permit Coty to assign different fair market values that are exercised on the same date."

The district court cautioned that reading such discretion into the LTIP "would create a risk of arbitrary conduct by the Board." The statement by the district court seems to suggest that there are limits to a plan administrator's discretion with regard to LTIPs, even where, as here, the

LTIP does not require uniform treatment of all participants and gives the company board the discretion to value its stock at any time and even to apply such value retroactively.

It will be interesting to see if the Second Circuit will offer any clarification. It could be argued, for example, that an employer who chooses to value its shares more favorably for current employee-participants, as opposed to former (terminated) employee-participants is not being “arbitrary,” but is rather exercising its business judgment. (*Fishoff v. Coty Inc.*, 676 F.Supp.2d 209 (S.D.N.Y. Dec. 16, 2009))

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