

Chancery Grants Full \$18M 'Mootness' Fee To Politan Counsel

By Tom Zanki

Law360 (November 17, 2023, 9:14 PM EST) -- A Delaware judge on Friday granted an activist fund's legal team its full request for a nearly \$18 million "mootness" fee as reimbursement for legal expenses, ruling that its closely watched suit challenging medical technology company Masimo Corp.'s allegedly harmful control arrangements produced changes that benefited shareholders.

Vice Chancellor Nathan A. Cook's ruling stems from an October 2022 lawsuit filed in Delaware Chancery Court by Politan Capital Management LP that sought to invalidate Masimo's adoption of bylaw amendments and a "poison pill" after Politan acquired a nearly 9% stake in the company. Masimo later revoked various bylaw amendments targeted by the hedge fund, rendering moot much of Politan's complaint.

"I don't think it would be an exaggeration to say that Politan blew this case out of the water in terms of achieving pretty much all of the very substantial corporate benefits that it set out to achieve by filing this litigation," Vice Chancellor Cook said while delivering his ruling during a late Friday afternoon conference call.

The vice chancellor's decision followed approximately three-hour oral arguments held earlier on Friday. Politan's counsel sought \$17.75 million to cover attorney fees, arguing that they incurred vast costs before Masimo in February rolled back control changes that prompted Politan to later voluntarily dismiss its claims.

"Zero question, they would never have done that had we not sued them," said Schulte Roth & Zabel LLP partner Michael Swartz, representing Politan during oral arguments.

Five other firms have committed hours to representing Politan at various stages of the litigation, according to court filings: Morris Nichols Arsht & Tunnell LLP, Cadwalader Wickersham & Taft LLP, Young Conaway Stargatt & Taylor LLP, BLA Schwartz PC and Ashby & Geddes PA.

Masimo lawyers argued that Politan's fee request was "staggering" and had no reasonable comparison to other corporate law disputes. Politan's request was also excessive, Masimo's counsel argued, because the company revoked its contested bylaws to defuse a high-profile proxy contest underway in early 2023 rather than because of Politan's suit.

Counsel for Masimo argued that Politan's team should receive no fees, or at most \$3.5 million, which represented the company's estimate of what remained after removing fees Politan spent on claims that

it later abandoned and other items that should not be compensated for, according to their legal briefs.

"This was really a self-interested litigation designed to benefit Politan and not the stockholders at large," Hueston Hennigan LLP partner John Hueston said, representing Masimo in oral arguments Friday.

Vice Chancellor Cook disagreed. He determined that Politan's suit opened the path for Masimo shareholders to control the company's board of directors and removed costly provisions that would have compensated Masimo CEO Joe Kiani in the event of a change in control.

"This court recognizes the obvious fundamental benefit of preserving stockholders' right to vote and elect directors of their choosing — even if litigation to enforce that right ends up benefiting the plaintiff," Vice Chancellor Cook said.

Politan's suit was widely followed, given the novelty of issues raised, a point the vice chancellor made while delivering his ruling. Swartz, while arguing for Politan, also said the stakes were huge. He said many in the hedge fund industry feared that other companies would follow Masimo's corporate governance changes if they were allowed to stand.

"Part of the reason we fought so hard was it had implications for the entire industry," Swartz told the Delaware court. "My phone was ringing off the hook by other hedge fund counsel saying, 'You guys have to win this because we're out of business if the Delaware Chancery Court somehow upholds these bylaws.'"

Politan's original complaint alleged Masimo's board made restrictive policy changes in September 2022, shortly after Politan's founder — activist investor Quentin Koffey — met with Kiani and expressed an interest in getting a seat on Masimo's board.

One of the bylaw amendments that Politan's original complaint called "particularly egregious" would have required any investment fund seeking to nominate a board candidate to disclose the identity and investment holdings of its limited partners.

Masimo at the time said its changes aimed to improve transparency regarding the track records of activist investors seeking to shake up the company. Irvine, Calif.-based Masimo produces patient-monitoring technologies for hospitals.

Complicating matters was an employment agreement involving Kiani, which allowed the CEO to claim restricted stock units amounting to 5% of the company and additional cash payouts if a third of Masimo's five directors were replaced in a board vote scheduled for June. Politan's brief estimated the value of Kiani's payout at \$445 million.

But Masimo in February rolled back bylaw amendments targeted by Politan's complaint, plus Kiani waived rights contained in his employment agreement that would have been triggered in the event of a change in control to Masimo's board in the June election.

Vice Chancellor Cook then declined to schedule an early trial. He cited Masimo's commitment not to invoke contested bylaw changes while Politan's activist campaign was underway.

Politan later nominated former Johnson & Johnson executive Michelle Brennan and its own Koffey to serve on Masimo's board, both of whom were elected at Masimo's shareholder meeting in June. Vice

Chancellor Cook said Masimo shareholders benefited from being able to vote on a boardroom challenge without triggering a large payment to Kiani, among other things.

"The ability of stockholders to freely exercise their franchise rights without the threat of an approximately half billion-dollar payment unquestionably has substantial value," the vice chancellor said.

Counsel for Masimo and Politan did not immediately respond to requests for comment late Friday.

Politan is represented in its suit against Masimo by Schulte Roth & Zabel LLP, Cadwalader Wickersham & Taft LLP, Morris Nichols Arsht & Tunnell LLP and Young Conaway Stargatt & Taylor LLP.

Masimo is represented in the suit by Abrams & Bayliss LLP, Quinn Emanuel Urquhart & Sullivan LLP and Hueston Hennigan LLP.

The case is Politan Capital Management LP et al. v. Kiani et al., case number 2022-0948, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery and Leslie Pappas. Editing by Linda Voorhis.