IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE VERSUM MATERIALS, INC. STOCKHOLDER LITIGATION	)))))	C.A. No. 266,2020 Court Below: Court of Chancery of the State of Delaware Consol. C.A. No. 2019-0206-JTL

APPELLANTS' CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

In an oral ruling, the trial court awarded Plaintiffs' counsel a $12 million fee in a contested-takeover case where Plaintiffs did not create a monetary fund or any other quantifiable benefit. This is not a case involving a sizeable settlement or money judgment, where Delaware courts have long awarded and incentivized counsel for creating a common fund. Rather, Plaintiffs were interlopers: they emerged only after a hostile bidder was already on the scene, and their litigation had no impact on the negotiation process or the ultimate topping bid. Yet, they were awarded a fee as if they created a substantial price increase. If anyone deserves credit for the price increase, it is the board of directors, which managed the contested takeover process and obtained superior value for stockholders from a topping cash bid. Plaintiffs did not play any role in causing that price increase, and their counsel should not be granted a fee award based on the value of the price increase. At most, Plaintiffs' counsel were entitled to a *quantum meruit* award of $686,000 based on their hourly rates.

On January 28, 2019, Versum Materials, Inc. ("Versum" or the "Company") announced an all-stock merger of equals with Entegris, Inc. that was valued at $42.26 per share. On February 27, Merck KGaA, Darmstadt, Germany ("MKDG") made an unsolicited offer to acquire the Company for $48 in cash per share. The next day, in light of the Company's existing merger agreement with

Entegris and in response to both MKDG's acquisition offer and suspicious trading activity, the Versum Board of Directors adopted a shareholder rights plan (the "Rights Plan"). On March 8, Plaintiffs filed a complaint challenging an "acting in concert" provision in the Rights Plan (the "AIC Provision") and, later, filed an amended complaint challenging the Rights Plan in full. Meanwhile, the Board continued to evaluate MKDG's unsolicited offer. After obtaining Entegris's permission to meet with MKDG and after MKDG indicated it would increase its offer, the Board negotiated with MKDG for an increased offer of $53 per share. During these negotiations—in which Plaintiffs played no role and which would have happened even in the absence of litigation—the Board terminated the Rights Plan in order to avoid the distraction of expedited injunction proceedings.

In awarding Plaintiffs a $12 million mootness fee, the Court of Chancery found Plaintiffs were entitled to a percentage of the increase in the per-share price paid by MKDG to acquire Versum ($53) from the consideration that would have been paid in the merger of equals with Entegris (valued at $42.26). This award was the product of multiple errors and a clear abuse of discretion.

First, the court applied the wrong legal standard when evaluating whether the litigation was meritorious when filed. Under *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 879 (Del. 1980), in order to obtain a fee award, Plaintiffs were required to show that their litigation had a "reasonable likelihood of ultimate success." The court committed legal error by failing to hold Plaintiffs to this standard. The court did not mention this standard in its oral ruling or find that Plaintiffs had met it. Instead, the court applied the lower "reasonably conceivable" standard applicable to a motion to dismiss.

Second, the court abused its discretion by finding Plaintiffs were entitled to a percentage of the increase in the acquisition price solely because their litigation caused the Board to amend and ultimately remove the Rights Plan. The court incorrectly presumed that if a lawsuit caused a Board to change corporate policy, the litigation must also have caused the ultimate price increase that the Board obtained in the related transaction. This hindsight theory of causation is not logical, is not supported by the record and is not the law. To the contrary, Plaintiffs failed to satisfy their burden under *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980) to affirmatively show that the litigation created that price increase.

The evidence established that the litigation was a mere distraction and played no role in MDKG's initial $48 bid, made before Plaintiffs filed their first complaint, or the Board's negotiation of an increased $53 proposal. While the litigation caused the Board to amend and remove the Rights Plan earlier than it otherwise would have, neither event played any role in the Board's negotiations with MKDG or MKDG's decision to increase its offer to $53. An uncontroverted declaration from MKDG's Global Head of Mergers & Acquisitions confirmed: "The poison pill did not affect anything MKDG did."

The Versum Board did exactly what Delaware courts have commended over the last several decades, using the tools at its disposal to ensure that stockholders obtained the best possible price in a bidding contest. After the Board instituted the Rights Plan, it continued to analyze the MKDG offer and then engaged with both Entegris and MKDG to obtain the highest consideration for stockholders.

The Court of Chancery abused its discretion by awarding Plaintiffs a percentage of a price increase that was not caused by the litigation. Indeed, Plaintiffs' litigation and the ensuing fee award is just another form of "merger tax" or "litigation tax" that Delaware courts have sought to reign in, most notably in the Court of Chancery's *In re Trulia, Inc. S'holder Litig*., 129 A.3d 884 (Del. Ch. 2016) decision. The Court's decision in this case improperly moves in the opposite direction, giving Plaintiffs' counsel an unwarranted presumption that a lawsuit creates quantifiable economic benefits for shareholders and awarding an outsized mootness fee.

Third, the court abused its discretion by punishing Defendants for opposing Plaintiffs' fee request. The court noted that the $12 million request—amounting to nearly $11,000 per hour billed—was "high." Yet, the court granted it on the basis that Defendants' arguments supposedly were "aggressive" and "unhelpful." According to the Court, Defendants' position that Plaintiffs were entitled to no more than a *quantum meruit*-based fee was a "nonstarter." Yet the law is clear that where, as here, Plaintiffs have not met their burden to show a quantifiable benefit, the appropriate fee is based on *quantum meruit*. The court erred by not only rejecting Defendants' arguments, but also penalizing Defendants for raising them.

SUMMARY OF ARGUMENT

1. The Court Applied The Wrong Legal Standard To The "Meritorious When Filed" Requirement. To obtain a fee award, Plaintiffs were required to show their litigation could "withstand a motion to dismiss on the pleadings" *and* had "some reasonable likelihood of ultimate success." *Baron*, 413 A.2d at 879. The court erred by applying the first criteria, but not the second.

2. The Court Erroneously Awarded Plaintiffs' Counsel A Percentage Of The Increased Merger Consideration Even Though Plaintiffs Did Not Demonstrate A Benefit Caused By Their Litigation. The court premised its award on its findings that Plaintiffs' litigation caused Versum to amend and ultimately remove the Rights Plan. But to receive fees measured as a percentage of a transaction price increase, Plaintiffs must not only show that the litigation caused a corporate action, but also that the corporate action then produced quantifiable shareholder benefits. The record demonstrates that the amendment and removal of the Rights Plan did not cause MKDG to make its initial $48 offer or its improved $53 offer. The former occurred before Plaintiffs filed suit; the latter was a result of the Board's negotiations with MKDG. The Board commenced those negotiations while the Rights Plan was still in place, and Plaintiffs played no role in them whatsoever. Nor did the Board's changes to the Rights Plan increase the likelihood that MKDG's bid would succeed. The outcome of the bidding contest between

MKDG and Entegris was determined solely by the ultimate price offered and Entegris's inability to match MKDG's improved offer, not the litigation.

3. <u>The Court Erred By Penalizing Defendants For Raising Good-Faith Arguments In Opposition To The Petition.</u> The court improperly penalized Defendants for arguing that Plaintiffs had not shown the litigation created a quantifiable benefit for shareholders. The court stated that Defendants took "an unreasonable position" and therefore granted Plaintiffs' request in full even though it was "high." The Court's punitive premium based on its disagreement with Defendants' litigation position has no basis in the law and chills counsel from vigorously representing their clients.

STATEMENT OF FACTS

A. Versum Announces A Merger Of Equals With Entegris

On January 28, 2019, Versum announced a merger of equals with Entegris. A387. Under the terms of the parties' merger agreement, Versum stockholders would receive 1.120 shares of Entegris stock for each Versum share they owned. *Id.* Combining the companies' complementary portfolios would create the world's first comprehensive materials solutions provider across the semiconductor manufacturing process. A388. Shareholders and analysts reacted positively, and Versum's stock ended the day at $36.67, approximately 16% above the previous day's close. A555–56.

Subject to limited exceptions, the Merger Agreement prohibited the parties from engaging in discussions with third parties that could lead to a competing proposal. A370. The Versum Board, however, reserved the flexibility to engage in discussions with an unsolicited bidder if the Board determined in good faith, and following consultation with outside advisors, that an acquisition proposal "constitute[d] a Superior Proposal or could reasonably be expected to result in a Superior Proposal." A371.

B. <u>MKDG Makes An Unsolicited $48 Per Share Offer</u>

On February 27, MKDG made an unsolicited all-cash offer to acquire Versum for $48 per share. A403. Versum's stock rose by 19% and closed at $49.13, above the offered $48. A556.

C. <u>In Response To The Unsolicited Offer And Unusual Trading Activity, Versum Adopts A Rights Plan To Prevent A Creeping Takeover</u>

On February 27, the Board met with the Company's financial advisor, Lazard, and legal counsel, Simpson Thacher & Bartlett, to discuss MKDG's proposal. Five of the Board's seven members were outside, independent directors. AA365. Lazard informed the Board of unusual trading activity in the Company's stock leading up to and following MKDG's public announcement of its proposal. A400. This trading activity raised a concern that a third party might be seeking to acquire control without negotiating with the Board and at a price that would not reflect a change of control of the Company. *See id.* Desiring to "maximize its flexibility and optionality in light of potential discussions or negotiations with [MKDG] or Entegris," the Board instructed management, Lazard and Simpson Thacher to prepare a draft shareholder rights plan. *Id.*

On February 28, the Board met and after consideration adopted the limited-duration Rights Plan to "deter the acquisition of actual, de facto or negative control of the Company by any person or group through open market accumulation."

A451. In keeping with the Board's goal of maximizing its flexibility, the Rights Plan could be "amended, redeemed or terminated by the Versum Board of Directors at any time prior to being triggered or its expiration on August 30, 2019." A448.

Pursuant to the Rights Plan, Versum stockholders would be entitled to purchase additional Versum stock at a significant discount if any "Person," became the "Beneficial Owner" of at least 12.5% of Versum common stock. A423. "Beneficial Owner" was defined to include the holder of securities "which are beneficially owned, directly or indirectly, by any other Person with which such Person or any of such Person's Affiliates or Associates is Acting in Concert or has any agreement, arrangement or understanding[.]" *Id.*

The Rights Plan carved out from the definition of Beneficial Ownership, and persons who could be deemed to be Acting in Concert, holdings that were subject to agreements concerning the voting of proxies. Similarly, no holder of securities would be deemed to "Beneficially Own" any securities "tendered pursuant to a tender or exchange offer." *Id.*

After the Board adopted the Rights Plan, Versum's stock price continued to exceed the $48 per share offered by MKDG on every trading day. A588. Accordingly, the market did not view the Rights Plan, or the AIC Provision, as impeding a potential transaction at an increased price. A589.

D. The Board Considers MKDG's Offer And Finds It Is Not A Superior Proposal

On March 1, Versum announced that it had rejected MKDG's $48 offer. A471. After consulting its advisors, the Board concluded that MKDG's proposal was not a Superior Proposal under the Merger Agreement. A463. The Board further decided that it was in the best interests of the Company and its shareholders to refrain from making a determination as to whether MKDG's $48 proposal "could reasonably be expected to result in a 'Superior Proposal.'" *Id.* By deferring this determination, the Board retained flexibility to decide when, and under what circumstances, to engage in discussions with MKDG.

E. Analysts' Reactions To The Board's Rejection Of MKDG's Initial Bid

Analysts continued to support the Entegris merger, seeing significant benefits in a merger of equals with continued upside potential for investors. *See* A454 ("We believe that the long-term benefits of the [Entegris-Versum] merger are clear, with natural synergies on the product roadmaps to drive strong top- and bottom-line growth."). Analysts also predicted that MKDG could increase its bid to the "low/mid-$50s" and that the Rights Plan would not be expected to deter MKDG from continuing to pursue Versum. *See* A481 ("We do not expect [MKDG] to be deterred[.]"); A393 ("Given the hostile nature of [MKDG's] approach to Versum we wouldn't be surprised if [MKDG] had to raise its offer at least once to secure the acquisition.”). No analyst questioned the Board’s decision to adopt the Rights Plan or suggested that the Plan would impede a potential transaction at an increased price.

F. Plumbers And Steamfitters Files Suit Challenging Only The AIC Provision

On March 8, Plaintiff Plumbers and Steamfitters filed a purported class action complaint against the Versum Board for alleged breaches of fiduciary duty in connection with the adoption of the Rights Plan. A46–64. According to Plaintiff, the AIC Provision “chill[ed] stockholders from basic participation in corporate democracy.” A48. Plaintiff only challenged the AIC Provision, not the Rights Plan in its entirety. As the complaint stated: “If the Poison Pill simply prevented the accumulation of shares, either individually or with an actual group, and mirrored the poison pills the Court has declared valid in the past, Plaintiff would have no cause to petition the Court for relief.” *Id.*

G. MKDG Launches A Proxy Contest And The Board Subsequently Amends The Rights Plan

On March 12, while the AIC Provision was still in the Rights Plan, MKDG filed a preliminary proxy statement urging Versum shareholders to vote against the Entegris merger. A491–99. The next day, on March 13, the Versum

Board amended the Rights Plan to remove the AIC Provision. A500–504. Versum announced the amendment after markets closed on March 14. A529–35.[1]

H. City Of Providence Files Suit Challenging The Rights Plan Generally

On March 14, Plaintiff City of Providence filed a class action complaint (the "Complaint") against the Versum Board for alleged breaches of fiduciary duty in negotiating the merger with Entegris and its implementation of the Rights Plan in response to MKDG's unsolicited offer. A102–38. On March 19, the court consolidated the two actions and designated the City of Providence Complaint as operative. A139–44.

I. MKDG Launches A Tender Offer And Reaffirms Its Preference To Negotiate Directly With The Board

On March 26, MKDG launched a cash tender offer for all outstanding shares of Versum for $48 per share. A509. MKDG emphasized its "firm and unwavering commitment to acquire Versum" and emphasized that it preferred to engage with the Versum Board directly about its proposal. A513–14. The Versum

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1 On March 12, Plaintiff Plumbers and Steamfitters filed an amended complaint, challenging the poison pill generally as "preclusive, coercive, and unreasonable in relation to the threat posed, if any, to corporate policy and effectiveness." A81.

Board responded that it would review the MKDG tender offer and advise stockholders of its position. A523.

J. MKDG Indicates That It Will Improve Its $48 Offer; The Board Determines That The MKDG Proposal Could Reasonably Be Expected To Result In A Superior Proposal And Commences Negotiations With MKDG.

On March 27, while the Rights Plan was in place, Versum sought and obtained permission from Entegris to engage in discussions with MKDG for a 10-day period, without disclosing non-public information. A541. Seifi Ghasemi, Versum's Board Chairman, then contacted Dr. Stefan Oschmann, MKDG's CEO, to discuss MKDG's proposal. *Id.*

On March 28, Mr. Ghasemi and Dr. Oschmann met, and Dr. Oschmann conveyed the possibility that MKDG would improve its proposal, provided that it would receive certain information to complete its diligence. *Id.* The Board met later that day and, following discussions with its advisors, determined that the MKDG tender offer did not constitute a Superior Proposal. The Board, however, also determined that MKDG's offer could reasonably be expected to result in a Superior Proposal, and accordingly, that the Company should disclose non-public information to MKDG and seek to improve the terms of MKDG's proposal. A542.

On March 29, Versum provided MKDG with access to nonpublic materials, subject to a non-disclosure agreement. *Id.*

K. <u>The Board Eliminates The Rights Plan, Avoiding The Expense And Distraction Of Expedited Discovery And Litigation</u>

On March 31, following negotiations among counsel for Plaintiffs and Defendants, Plaintiffs stipulated with Defendants that they would not seek to enjoin the Entegris merger or make further expedited discovery demands if Versum terminated the Rights Plan. A527.

On April 2, the Board terminated the Rights Plan. A542. As the Company explained in a Form 8-K, the Company believed that Plaintiffs' litigation lacked merit. A530. Nevertheless, the Company decided to resolve Plaintiffs' action to "avoid the expense and distraction of litigating" and "instead focus its efforts on the proposed merger with Entegris." *Id.* The Company also noted that, having launched a tender offer, SEC regulations prevented MKDG from acquiring Versum stock outside of the tender offer, *id.*, which further obviated the need for the Rights Plan. *See* SEC Rule 14e-5, 17 C.F.R. § 240.14e-5.

On April 3, Plaintiffs withdrew their motion for expedited proceedings and request to enjoin the Versum-Entegris merger.

L. <u>The Board's Negotiation With MKDG Causes MKDG To Increase Its Offer To $53, Which The Board Determines To Be A Superior Proposal</u>

Mr. Ghasemi and Dr. Oschmann met on April 3 and again on April 6. A542–43. Dr. Oschmann informed Mr. Ghasemi that MKDG would be willing to increase its offer to $53 per share in cash. A543. Plaintiffs and their counsel played no role in those discussions. Versum informed Entegris of the revised offer from MKDG and, as it had done on several occasions before, urged Entegris to consider revising its offer. *Id.* On April 7, MKDG submitted a proposal to acquire Versum for $53 per share. *Id.* In the evening of April 7, Entegris revised its offer, increasing the merger consideration to a 1.236 share exchange ratio and $5 per share in cash. *Id.* The Board considered the terms of the revised proposals by MKDG and Entegris and after discussions with the Company's advisors, determined that the increased MKDG proposal constituted a Superior Proposal. *Id.*

On April 8, Versum publicly announced the Board's determination. A544. Entegris stated that it did not intend to increase its offer. *Id.*

On April 11, the Versum Board determined that the proposed merger with MKDG was fair and in the best interests of Versum and its shareholders and recommended that Versum shareholders vote in favor of it. *Id.* The following morning, Versum terminated the Entegris Merger Agreement, paid the applicable termination fee, and executed a merger agreement with MKDG. *Id.*

M. Defendants Oppose Plaintiffs' Request For $12 Million In Attorneys' Fees

Over nine months later, on January 28, 2020, Plaintiffs filed an application seeking a mootness fee of $12 million—equal to an hourly rate of nearly

$11,000. Plaintiffs asserted that they were entitled to a percentage of the increased consideration paid by MKDG above the original Entegris merger of equals consideration. Plaintiffs conceded that they played no part in MKDG's original $48 offer—made before they filed suit—and had no role in in negotiating MKDG's subsequent $53 offer. Plaintiffs argued, however, that their litigation "facilitated" MKDG's $53 offer because it "increased the likelihood" the offer would be successful. A215, A223.

Defendants opposed, arguing that, among other things, Plaintiffs were not entitled to a fee award because the litigation was not meritorious and did not confer a benefit on Versum shareholders. Defendants argued that any fee received by Plaintiffs' attorneys should be calculated based on *quantum meruit* and reflect the fees and expenses they actually accrued ($686,029.41).

As part of their Opposition, Defendants filed the declaration of Roman Werth, Global Head of Mergers & Acquisitions at MKDG. Mr. Werth confirmed that "[t]he presence, absence or modification of the poison pill did not influence MKDG's plans or strategies in any way or at any time." A311. MKDG was not surprised or deterred when Versum adopted the Rights Plan following its $48 offer. A310. Accordingly, the Rights Plan did not "have any impact on MKDG's planning or thinking with regard to its acquisition strategies." *Id.* The relevant boards that approved the initial and increased MKDG offers did not even know about the Versum Rights Plan or the changes to the Plan. A317.

MKDG's contemporaneous internal documents also reflect MKDG's understanding that the Rights Plan "[d]oes not preclude any of [MKDG's] contemplated actions or a mutually agreed deal." A311. MKDG "expected all along" that it would have to improve its initial offer price. A313.

Mr. Werth also confirmed that the AIC Provision had no effect on MKDG and did not deter it from pursuing Versum or meeting with significant Versum stockholders. On March 14—before the removal of the AIC provision was announced—MKDG senior management participated in a roadshow with Versum investors to solicit support for its proposal. A316. The investors uniformly told MKDG that it would have to improve its offer price to succeed. *Id.*

In sum, Mr. Werth states:

> The poison pill adopted by Versum had no effect on MKDG's plans, strategies or decision in respect of its pursuit of an acquisition of Versum. The authorization to make and later increase the Versum offer was provided to MKDG by the relevant EMDG boards, who were not made aware of the Versum poison pill or any changes thereto. . . . The poison pill did not affect anything MKDG did.

A317–18.

N. Marketplace Evidence Further Confirms That Plaintiffs' Litigation Provided No Shareholder Benefit

Defendants also submitted the expert report of Dr. Guhan Subramanian. Dr. Subramanian explained that Versum's use of the Rights Plan was consistent with standard negotiating procedures for a Company faced with a competing bid and had no impact on the outcome of the negotiations. A579–81, A587–88. As explained in the Subramanian Report, there is no support for the proposition that removing a rights plan in the midst of negotiation between competing bidders—as Versum did here—would benefit shareholders. *See id.*

Dr. Subramanian also reviewed the marketplace evidence, which showed that the AIC Provision and Rights Plan did not inhibit MKDG, and that Plaintiffs' litigation did not provide any monetary benefit to Versum shareholders. Following the announcement of MKDG's offer and the adoption of the Rights Plan, Versum's stock price never closed below $48, which reflected investor expectations that MKDG was going to improve its offer. A588. Analyst reports also confirmed the market expected an increased offer, even with the Rights Plan and the AIC Provision. *Id.*; *see also supra* pages 11–12.

Additionally, based on the efficient capital market hypothesis, one would expect to see the stock price and trading volume increase if the market deemed the removal of the AIC Provision or the Rights Plan to have materially improved the likelihood of a superior bid or otherwise provided a benefit to shareholders. But there was no such market reaction to either event. When the AIC Provision was removed from the Rights Plan, Versum's stock price went down, analysts said nothing about it and trading volume remained consistent with the average during the period. The subsequent termination of the Rights Plan also caused no meaningful stock price or trading volume increases. A588–90.

Plaintiffs' expert Murray Beach submitted a reply report. Mr. Beach opined that when longer trading windows were used, statistically insignificant increases in Versum's stock price could be observed in the days following the removal of the AIC Provision and termination of the Rights Plan. A633–37. Mr. Beach did *not* opine that these statistically insignificant increases demonstrated the removal of the AIC Provision or the Rights Plan created monetary benefits for stockholders. Rather, Mr. Beach opined only that it could not be concluded from Dr. Subramanian's market study that the amendment and termination of the Rights Plan had no impact. A636–37.

O. The Court of Chancery's Oral Decision

On July 16, 2020, the Court of Chancery heard oral argument and then awarded Plaintiffs' requested $12 million award in full, equal to an hourly rate of $10,667.79. The court found Plaintiffs' litigation was meritorious because it could survive a motion to dismiss, and that Plaintiffs were entitled to an award based on a percentage of the increase in price from the Entegris merger to the MKDG acquisition because (1) the litigation was a cause in the removal of the AIC provision and the Rights Plan; and (2) acting in concert provisions and shareholder rights plans have the potential to inhibit competing bids. The court did not—and could not—cite to any facts showing that the AIC Provision and Rights Plan actually inhibited MKDG's bidding or that the removal of the AIC Provision or the Rights Plan actually caused Versum to negotiate the $53 consideration with MKDG.

In attempting to justify the $12 million award, the court erroneously applied various percentages from its decision in *In re Compellent Technologies, Inc. Shareholder Litigation*, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011), which had no connection to the facts of this case. Ex. B at 75–76. The court also analyzed the statistically insignificant price increases found by Mr. Beach. The court claimed these increases could be used to calculate a "benefit," despite Mr. Beach's admission that no such conclusion should be drawn from the data. *Id.* at 76–77.

Finally, while stating that Plaintiffs' $12 million request with its implied hourly rate of nearly $11,000, was something the court had "paused over," the court failed to apply an appropriate hourly rate because it found that Defendants' arguments in opposition were "really aggressive." Ex. B at 83. The court found Defendants' argument that Plaintiffs were entitled to no more than $686,0291.31 was an "extreme position," and therefore effectively punished Defendants by awarding Plaintiffs $12 million rather than appropriately applying its discretion to curb Plaintiffs' aggressive request. *Id.* at 80.

ARGUMENT

I. THE COURT OF CHANCERY APPLIED THE WRONG LEGAL STANDARD IN EVALUATING WHETHER PLAINTIFFS' CLAIM WAS MERITORIOUS

A. Question Presented.

Whether the Court of Chancery erred by applying an incorrect legal standard in evaluating whether Plaintiffs' litigation was meritorious when filed. *See* A193, A272; *see also* Ex. B at 58, 61.

B. Scope of Review.

The Court reviews *de novo* the legal principles applied in reaching a fee award decision. *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010).

C. Merits of the Argument.

Under the "corporate benefit" doctrine, "a litigant who confers a common monetary benefit upon an ascertainable stockholder class is entitled to an award of counsel fees and expenses for its efforts in creating the benefit." *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997). To obtain a fee award, an applicant must show that: "(1) the suit was meritorious when filed; (2) the action producing benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and (3) the resulting corporate benefit was causally related to the lawsuit." *Id.*

A suit is meritorious only "if it can withstand a motion to dismiss on the pleadings, [and] if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success." *Baron*, 413 A.2d at 879. The court did not apply this standard. Rather, it evaluated only whether Plaintiffs' claims would "survive a motion to dismiss," applying the "reasonably conceivable" standard applicable to whether the Plaintiffs stated a claim. Ex. B at 58–61. The court failed to apply the additional requirement that Plaintiffs show "reasonable likelihood of ultimate success." *Baron*, 413 A.2d at 879. Because the court failed to apply the correct legal standard, the court's decision was an abuse of discretion and reversal is required.

Plaintiffs did not show a "reasonable likelihood of ultimate success." Plaintiffs' initial complaint concerning only the AIC Provision was mooted five days later when that provision was eliminated. *See supra* pages 12–13. Plaintiffs' subsequent general challenge to the garden-variety Rights Plan—which was the subject of the remaining 21 days of active litigation in this matter and upon which Plaintiffs premise much of their argument for fees—was plainly not meritorious.

Under *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), shareholder rights plans are protected by the business judgment rule where (1) the board had reasonable grounds to believe there was a threat to the corporate policy and effectiveness; and (2) the terms of the rights plan are proportional in response to the threat. *Id.* at 955. "The presence of a majority of outside directors, coupled with a showing of reliance on advice by legal and financial advisors, constitute[s] a *prima facie* showing of good faith and reasonable investigation." *Third Point LLC v. Ruprecht*, 2014 WL 1922029, at *17 (Del. Ch. May 2, 2014) (internal quotation marks and citation omitted). Those criteria were satisfied here as the Versum Board was controlled by a majority of outside independent directors, and the Board retained competent and well-known legal and financial advisors in connection with the pill. *See supra* page 9.

The Rights Plan was instituted after Versum had announced a merger of equals with Entegris and in response to MKDG's all-cash offer and reports of unusual trading activity leading up to and following the announcement of the MKDG proposal. *See* A400. The Board thereby had a reasonable belief that MKDG or another party may be trying to gain control of the Company via market acquisitions and undermine shareholder value by "disregard[ing] the Company's business plan and long-term corporate goals" or promoting "an inadequately priced change of control of the Company." *Id.*

It is well-established that a board appropriately exercises its discretion in instituting a pill in response to an unsolicited offer and to prevent a creeping takeover. *See In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 481 (Del. Ch. 2000) ("The pill gives the target board leverage to negotiate with a would-be acquiror so as to improve the offer as well as the breathing room to explore alternatives to and examine the merits of an unsolicited bid.”); *In re Activision Blizzard, Inc. S’holder Litig.*, 124 A.3d 1025, 1053 n.19 (Del. Ch. 2015) (“Delaware case law . . . empowers directors to use defensive measures to limit a party’s ability to assemble a controlling block.”).

Moreover, the Rights Plan was neither preclusive nor coercive, and was proportional in response to the threat posed by MKDG’s offer. The language of the amended Rights Plan was garden variety and the same as other rights plans customarily used and approved by the Court of Chancery. For example, in *Yucaipa American Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310 (Del. Ch. 2010), the court rejected plaintiffs’ challenges to a rights plan with substantially the same language as the one here, finding that “the definition of beneficial ownership in [the Rights Plan] is no different than the language that has been incorporated into countless rights plans since [*Moran v. Household International, Inc.*, 500 A.2d 1346 (Del. 1985)].” *Id.* at 341. The 12.5% trigger threshold in the Rights Plan is also higher than thresholds previously approved of by the Court of Chancery. *See, e.g.*, *Selectica, Inc. v. Versata Enters., Inc.*, 2010 WL 703062, at *25 (Del. Ch. Feb. 26, 2010), *aff’d*, 5 A.3d 586 (Del. 2010) (upholding pill with 4.99% threshold); *Third Point*, 2014 WL 1922029, at *19 (upholding pill with 10% threshold for activist investors).

The court's finding as to the Board's "persistent refusal to engage with" MKDG (Ex. B at 61) is also inconsistent with the record. The Board engaged with MKDG repeatedly while the Rights Plan was in place and then removed it once MKDG said it would increase its offer. *See supra* pages 14–15. The Board's decision to defer a determination as to whether the offer could result in a superior proposal was a prudent negotiating strategy, well within the Board's business judgment, and it ultimately resulted in a $5 per share increase.

Plaintiffs therefore did not have a reasonable likelihood of ultimate success, and the court erred by failing to require that they meet that burden.

II. THE COURT OF CHANCERY ABUSED ITS DISCRETION IN AWARDING PLAINTIFFS' REQUESTED FEES WITHOUT EVIDENCE OF A SUBSTANTIAL BENEFIT CONFERRED

A. Question Presented.

Whether the Court of Chancery erred (i) by adopting a rule that plaintiffs' counsel who challenge merger defenses are entitled to a percentage of the price increase that is ultimately paid by a corporate buyer without showing that the litigation itself created any economic benefit for shareholders and (ii) by punishing Defendants for raising good faith arguments in opposition to Plaintiffs' fee request. *See* A281–94; *see also* Ex. B at 47, 80, 82–83.

B. Scope of Review.

Fee awards are reviewed for an abuse of discretion, and the legal principles applied in reaching an award are reviewed *de novo*. *Brown*, 988 A.2d at 417. An award constitutes an abuse of discretion where it is not supported by the factual record. *See Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 15 A.3d 1225, 1233 (Del. 2011).

C. Merits of the Argument.

1. The Court Erroneously Awarded A Percentage Of The Increased Merger Consideration Even Though Plaintiffs Did Not Demonstrate A Quantifiable Benefit.

If attorneys' fees may be warranted under *TakeCare*, courts consider the *Sugarland* factors to determine the size of any award: (i) the results achieved;

(ii) the time and effort of counsel; (iii) the complexity of the issues; (iv) whether counsel worked on a contingent fee basis; and (v) counsel's standing and ability. *Sugarland*, 420 A.2d at 149. The greatest weight is given to the benefit achieved by the litigation. *Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000).

While Plaintiffs are entitled to a rebuttable presumption under *TakeCare* that the litigation caused a change in corporate policy, there is no presumption under *Sugarland* that the change in corporate policy itself created a quantifiable benefit for shareholders. Rather, Plaintiffs must affirmatively establish that the litigation created a quantifiable benefit. *See In re QVC, Inc. S'holders Litig.*, 1997 WL 67839, at *2 (Del. Ch. Feb. 5, 1997); *see also In re Am. Real Estate Partners*, 1997 WL 770718, at *6 (Del. Ch. Dec. 3, 1997) ("As proponents of the fee application, plaintiffs have the burden of establishing the value of the claimed benefit.").

"[W]hat is relevant is the benefit *achieved by the litigation*, not simply a benefit that, *post hoc ergo procter hoc*, is conferred after the litigation commences." *In re Anderson Clayton S'holders' Litig.*, 1988 WL 97480, at *3 (Del. Ch. Sept. 19, 1988). Where, as "is often the case," plaintiffs do not meet their burden to show a quantifiable benefit achieved by their litigation, any fee award should be based on *quantum meruit*. *QVC*, 1997 WL 67839, at *3; *see also Robert M. Bass Grp., Inc. v. Evans*, 1989 WL 137936, at *4 (Del. Ch. Nov. 16, 1989) (declining to award "a fee expressed as a percentage of the monetary benefit" where plaintiff's contribution to creating a benefit "cannot be quantified").

For example, in *In re First Interstate Bancorp Consolidated Shareholders Litigation*, which, like this case, involved the removal of defensive mechanisms including a poison pill, the court found that the *quantum meruit* approach was appropriate because it was not possible to calculate the amount of any monetary benefit conferred by the litigation itself. 756 A.2d 353, 363 (Del. Ch. 1999), *aff'd sub nom. First Interstate Bancorp v. Williamson*, 755 A.2d 388 (Del. 2000). The court stressed that there were "[m]any factors" that "operated independently of the litigation to influence the outcome and the final price paid." *Id.* at 358 n.2; *see also Chrysler Corp. v. Dann*, 223 A.2d 384, 389–90 (Del. 1966) (affirming *quantum meruit* award where claimed corporate benefit could not be measured in dollars); *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *8 (Del. Ch. Nov. 27, 1990) (applying the *quantum meruit* approach given "the attenuated nature of the benefit conferred" by plaintiffs through litigation).

a. The Evidence Showed Plaintiffs' Litigation Did Not Cause The $53 Per Share Deal With MKDG

In this case, Plaintiffs requested a fee award based on a percentage of the increase in consideration paid by MKDG ($53) compared to the implied value of the merger of equals with Entegris ($42.26). However, the evidence showed that

Plaintiffs' litigation did not create the benefit to shareholders of the $53 per share deal with MKDG. MKDG made its initial $48 offer before Plaintiffs filed suit, and MKDG already had approval from its board to offer up to $50. A309. MKDG ultimately increased its offer to $53 as a result of negotiations with Versum, *in which Plaintiffs and their counsel played no role.* As confirmed in the Werth Declaration, the Rights Plan was "of no relevance to MKDG's acquisition plans or strategies" and "did not affect anything MKDG did." A315, A317.[2] Nor was Versum's decision to negotiate with MKDG and accept its $53 offer caused by the amendment or removal of the Rights Plan.

This reality is confirmed by contemporaneous documents and the sequence of the parties' negotiations. MKDG's March 1, 2019 internal presentation concerning the implementation of the Rights Plan does not mention the AIC Provision and notes the Rights Plan "[d]oes not preclude any of our currently contemplated actions." A311. Further, while the AIC Provision was still in place,

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[2] While the court noted MKDG's presentations to Versum investors denigrating the Rights Plan (Ex. B at 69), there was no evidence that the Rights Plan actually affected MKDG's bidding. Internal MKDG documents also show that this was only part of a public relations campaign. A presentation from February 28 noted that the Rights Plan "[d]oes not preclude any of our currently contemplated actions or a mutually agreed deal." A324. The very next bullet in the presentation states that the Rights Plan "[h]owever, can be used in counter messaging in the media." *Id.*

MKDG met and communicated with shareholders regarding its $48 offer and in opposition to the Entegris merger. A316. MKDG never challenged the AIC Provision or the Rights Plan. The market also treated the Rights Plan as irrelevant to the outcome of the bidding contest, as Versum's stock traded above MKDG's $48 offer price on every day after Versum adopted the Plan. A588.

After instituting the Rights Plan, the Board continued to analyze MKDG's offer. On March 27, six days *before* the Rights Plan was terminated, Versum sought and obtained permission from Entegris to engage in discussions with MKDG. A541. During negotiations the next day (in which Plaintiffs and their counsel had no role), MKDG raised the possibility it would improve its offer from $48 following receipt of information needed to conduct due diligence. *Id.* The Board then determined that the MKDG proposal could reasonably be expected to result in a Superior Proposal and negotiated with MKDG to seek a higher price. A542. All of these negotiations took place while the Rights Plan was still in effect.

While corporations generally leave a rights plan in place until an agreement with the counterparty is reached (so that the counterparty cannot effect a creeping takeover), the Board terminated the Rights Plan during the midst of its negotiations with MKDG, avoiding continued litigation expense and distraction. While the litigation caused Versum to remove the Rights Plan sooner than it otherwise would have, there is no evidence that the timing of the removal impacted the negotiations with MKDG or benefited Versum shareholders—the key issue here.

The Rights Plan worked as intended, leading MKDG to signal that a meaningful price increase was forthcoming, without any assistance from the Plaintiffs or the litigation. The highest bidder then won. This is exactly the outcome several securities analysts had predicted at the outset and, as Dr. Subramanian showed, is the expected outcome in multi-bidder contests. *See supra* pages 11–12; *see also* A594–98.

Empirical evidence further illustrates that the litigation created no quantifiable shareholder benefits. Dr. Subramanian demonstrated that price movements were statistically insignificant in the close-open window following the announcements that Versum amended and then removed the Rights Plan on March 14, and April 2, respectively. In fact, Versum's stock price declined from its closing price on March 14 to the opening on March 15. A576–77. The stock price returns and trading volumes on both days following the announcements were also not statistically significantly different from normal. A589–90; A601–02.

b. The Court Erred By Presuming That Because The Litigation Caused The Amendment And Removal Of The Rights Plan, It Also Achieved A Quantifiable Benefit

Rather than analyzing whether Plaintiffs met their burden of establishing that their litigation efforts actually created a quantifiable benefit, the court erred by awarding Plaintiffs their requested fee on the basis that Plaintiffs were the "sole cause" of the amendment and removal of the Rights Plan. Ex. B at 82. Based on that causative relationship, the court found that an award based on a percentage of the purported "benefit conferred" was appropriate. *Id.* at 83. This was an abuse of discretion because the fact that corporate action was taken in response to litigation does not of itself mean the litigation conferred any benefit, let alone a quantifiable benefit. Rather, Plaintiffs must demonstrate that the corporate action caused by their litigation created quantifiable benefits for shareholders. *See, e.g.*, *First Interstate*, 756 A.2d at 358–59, 363.

Here, there was no factual basis from which the court could conclude that the amendment or removal of the Rights Plan caused the increase in the transaction price from the Entegris merger value to the $53 per share deal the Board negotiated with MKDG. The court observed that MKDG could not have acquired Versum while the Rights Plan was still in place and that the Board could have used the Rights Plan "as a just-say-no defense." Ex. B at 70, 84. However, the court did not, and could not, find that the Rights Plan was actually used as a blocking mechanism. *Id.* at 70. To the contrary, the Rights Plan was used in a reasonable and good-faith manner to increase the Board's negotiating leverage and manage the contested-takeover process for the benefit of shareholders; even after instituting the Rights Plan, the Board continued to analyze the MKDG offer and negotiated with MKDG while the Plan was in effect, which led to its $53 offer. *See supra* pages 14–16. There is no evidence that, absent the litigation, the Board would have refused MKDG's $53 offer or maintained the pill to block MKDG from acquiring the Company at a price higher than Entegris was willing to match.

There also is no factual basis for the court's statement that the MDKG "agreement was higher than it would have been in the case where there had been no lawsuit." Ex. B at 64. That was pure speculation. It is inconsistent with the Werth Declaration and the market study in the Subramanian Report. Indeed, not even Plaintiffs' expert went that far. Mr. Beach opined only that there is "some evidence" that Plaintiffs' litigation "*may* have had a positive effect on the market price of Versum stock." A637 (emphasis added). The court did not cite any evidence to support its conclusion, and there is none in the record.

The court cited *In re Cox Radio, Inc. Shareholders Litigation*, 2010 WL 1806616 (Del. Ch. May 6, 2010), and *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012), in justifying its holding that causing the amendment and removal of the Rights Plan is sufficient for an award based on a percentage of the increased transaction price (Ex. B at 82–83), but neither case supports that proposition. In *Americas Mining*, plaintiffs brought a derivative claim on behalf of the company, litigated all the way through trial and obtained a $2 billion judgment. 51 A.3d at 1218. This Court affirmed the Court of Chancery's finding that the entire benefit was due to plaintiffs' litigation, and plaintiffs did not share credit with anyone in conferring a benefit exceeding $2 billion. *Id.* at 1257. There were no questions about whether the plaintiff actually created a corporate benefit or whether the benefit was quantifiable. In *Cox*, the percentage of the benefit award was limited to the increase in consideration that was "fairly attributable to the efforts of Plaintiffs' counsel." 2010 WL 1806616, at *22. In both *Americas Mining* and *Cox*, it was not sufficient for plaintiffs to show their litigation caused the corporation to take certain actions; rather, plaintiffs were also required to show affirmatively that their litigation created quantifiable monetary benefits for shareholders. The court abused its discretion here because the Plaintiffs did not satisfy that burden.

c. The Court Erred By Premising Its Award On Theoretical Benefits That Could Have Been Achieved In Hypothetical Circumstances, Different Than What Actually Occurred

In awarding Plaintiffs $12 million, the Vice Chancellor also relied on his ruling in *Compellent*. In that case, defendants removed or modified five different defensive measures, including a rights plan, a termination fee, information rights provision, superior offer out provision, and a no-shop clause. 2011 WL 6382523, at *17–18. Because no topping bid emerged, the court engaged in a hypothetical exercise, using academic studies to estimate both the potential likelihood that a topping bid could emerge where various deal protections are removed and the potential amount of any such topping increase, if one were to ever emerge. *Id.* at *21–26. The court estimated there was an 8% increase in the chance that a topping bid would emerge and that such a theoretical topping bid could have increased the consideration by 11.37%. *Id.* at *25–26.

To apply *Compellent* here, the court "imagine[d] a hypothetical" where (i) Versum adopted the Rights Plan in connection with announcing the Entegris merger; (ii) the Rights Plan was removed "in the absence of the [MKDG] bid"; and (iii) no actual topping bid emerged. *See* Ex. B at 75. These assumptions led the court to calculate a $40 million benefit from the litigation using the *Compellent* framework. *Id.* at 76. According to the court, applying an attorneys' fee percentage of 10–15% to the $40 million would justify an "award of about $4 to $6 million." *Id.*

Notably, even accepting the court's application of *Compellent*, the hypothetical percentages from that case only highlight that the decision here to award $12 million (two to three times more than estimated) is unjustifiable.

Moreover, the court's assumptions for purposes of its hypothetical are contrary to the facts. MKDG made its first bid of $48 before Versum adopted the Rights Plan, and Versum began negotiating with MKDG while the Rights Plan was still in place. The unrefuted Werth Declaration also demonstrated the Rights Plan had no impact on MKDG's bidding. Accordingly, while in *Compellent*, the court found removal of deal protections could hypothetically result in a benefit to shareholders, the facts here show that the removal of the Rights Plan did not cause Versum's shareholders to receive any benefits. Therefore, the litigation did not create any benefit to shareholders. As in *Dunkin' Donuts* and *First Interstate*, any purported benefit conferred by Plaintiffs' litigation was too "attenuated" and unquantifiable, and any award should therefore have been based on *quantum meruit*.

For similar reasons, the court's discussion of other hypotheticals cannot justify its award. In discussing the AIC Provision, the court noted Mr. Werth's declaration that the provision was of no consequence to MKDG and agreed that the facts showed MKDG met with investors despite the AIC Provision. Ex. B at 65. The court, however, speculated that "Versum could have cited [these meetings] to invoke" the AIC Provision, that MKDG "well could have blundered into a situation where Versum could wield the [AIC] provision against various combinations of stockholders," or that Versum's institutional investors "could well have been affected" by the AIC Provision. *Id.* at 65–66. At most, this speculation suggests that in some hypothetical circumstances, the AIC Provision *could* have had an impact. But there was no finding—and could be no finding based on the record—that the AIC Provision actually impacted the bidding such that its removal could be deemed to provide a quantifiable benefit to shareholders. The court's unsupported speculation on the key issue of causation was an abuse of discretion.

d. The Court Erred By Premising Its Award On Insignificant Stock Price Variations Where There Was No Evidence That Such Variations Reflected Benefits Achieved By Plaintiffs' Litigation

The only evidence the court addressed in justifying its $12 million award came from the parties' competing expert reports on the market's reaction to the announcements that Versum removed the AIC Provision and Rights Plan. In his initial report, Mr. Beach did not opine that the removal of the AIC Provision or Rights Plan impacted Versum's share price. In opposition, Dr. Subramanian noted that Versum's stock price traded above $48 on every day after the Rights Plan (including the AIC) was adopted, showing that the market expected an increased bid notwithstanding Versum's defensive mechanism. Dr. Subramanian also analyzed the close-to-open windows after Versum removed the AIC Provision and the Rights Plan and found that neither action corresponded to any significant change in price. A577–78, A588–90. Dr. Subramanian also noted that there were no statistically significant differences in stock price returns or volumes during the trading days following the announcements. *See id.*

Plaintiffs' expert submitted a reply report (the "Beach Reply") opining that a close-open trading window provides insufficient time for investors to digest new information, and that a one or two-day trading window should instead be used. A633–34. Using these extended trading windows, Beach found minor, and statistically insignificant, changes in price (increases of between $.29 and $.36 per share). A635–36.[3] Mr. Beach did *not* opine that these statistically insignificant price variations showed that the removal of the AIC Provision or termination of the Rights Plan caused any material benefit for shareholders. Rather, Mr. Beach opined only that Dr. Subramanian's analysis had not proven the absence of a benefit and that "there is some evidence that elimination of the AIC and the Rights Plan *may* have had some impact on the price of Versum stock." A636–37 (emphasis added).

The Beach Reply does not suggest that its analysis can be used to quantify such a benefit, even if there was one. In fact, Mr. Beach opined that event

[3] Assuming a 2% standard deviation of daily returns, as Beach did in his Reply, these price movements were not statistically significant at the 5% level. *See*A632; *see also La. Mun. Police Emps.' Ret. Sys. v. Countrywide Fin. Corp.*, 2007 WL 2896540, at *4 n.21 (Del. Ch. Oct. 2, 2007) ("In the field of statistical analysis, a significant effect is generally determined by a ninety-five percent confidence level.").

studies should not be used to quantify any impact on Versum's stock price. A637. Because Plaintiffs have the burden to show a quantifiable benefit, and by Mr. Beach's own characterizations, his analysis does not do so, it cannot support the Court's $12 million award.

The Court of Chancery abused its discretion by relying on the Beach Reply to do exactly what Mr. Beach said it should not do. The court cited the Beach Reply for the proposition that "[f]or the one-day window, there's a total benefit of about $75 million. For the two-day window, there's a total benefit of $142 million." Ex. B at 76. The court then "assume[d] the litigation was the sole cause of the market price changes," and, applying an attorneys' fee percentage of 10–15%, found a fee range of $7.5 million to $22.5 million. *Id.* at 77. However, Mr. Beach did *not* opine—and Plaintiffs did not show—that the variations he observed (or the resulting changes to Versum's market capitalization) were actually caused by the removal of the AIC Provision or termination of the Rights Plan. The court therefore had no basis to make such conclusion.

Finally, even assuming that counsel's total hours and fee rates were reasonable, the court's mootness award here represents a 17.5 multiple of the lodestar amount, which is facially excessive and unwarranted. For example, in *In re Abercrombie & Fitch Co. S'holders Derivative Litigation*, 886 A.2d 1271 (Del. 2006), the Supreme Court affirmed the Court of Chancery's decision to reject a fee application, agreed-upon by the parties to a settlement, for a 14.33 multiple of the lodestar, and instead awarded fees at a 2.39 lodestar multiple. *Id.* at 1273, 1275. The Chancellor noted that the 14.33 multiple was "a premium in excess of any premium awarded by this Court (to my knowledge)." *Id.* at 1273. The lodestar method may properly be used as a "backstop check" on a fee application, *id.* at 1274, and it further demonstrates that the court's award here was an abuse of discretion.

e. The Decision Awards A Windfall And Incentivizes Boards To Devote Corporate Resources To Unnecessary And Wasteful Litigation

The Court of Chancery's focus on statistically-insignificant stock price changes raises particular concerns. If other courts adopted the court's reasoning, and based a fee award on insignificant changes that are indistinguishable from noise in a company's stock price, plaintiffs' attorneys would be incentivized to extract some minor change from a publicly traded target company in the context of a takeover fight and then hope that the stock price increased in the next day or two. Such litigation would result in quintessential windfalls and run counter to the court's professed interest in "incentiviz[ing] positive value litigation, meaningful litigation." Ex. B at 72.

Moreover, the Court's ruling disincentivizes boards from avoiding unnecessary litigation by mooting shareholder claims. If plaintiffs' attorneys are awarded fees measured by stock price noise and hypothetical benefits that could have been achieved—rather than actual benefits that were achieved—corporations will be incentivized to fight to the end on shareholder claims to avoid paying windfall awards when their boards later negotiate additional merger consideration from a buyer as a result of factors other than the litigation. Incentivizing corporations to devote time and resources to litigating unnecessary points in parallel with deal negotiations would undermine the very purpose of fee awards and waste corporate resources.

2. The Court Further Erred By Penalizing Defendants For Raising Good Faith Arguments In Opposition To The Fee Petition.

The court also erred by punishing Defendants for making what the court claimed were "aggressive" arguments in opposition to Plaintiffs' free request. The court opined that Defendants' position that any award to Plaintiffs should be based on *quantum meruit*—and therefore pegged to Plaintiffs' accrued fees of $686,029.41—was unreasonable and therefore a justification for granting the full $12 million requested by Plaintiffs. *See* Ex. B at 48 (stating that defendants "ha[ve] taken an unreasonable position on the amount" and that the court will therefore grant Plaintiffs' request even though "all things considered" it "is probably a little high"); *id.* at 80 ("I . . . am influenced by the fact that the defendants' position is just unhelpful and a nonstarter. . . . [Y]ou have [Defendants] taking an extreme position about what the level of compensation ought to be.”)

Defendants’ position was not “extreme.” Plaintiffs’ fee award should be based on *quantum meruit* because Plaintiffs did not show their litigation achieved a quantifiable benefit. Defendants’ opposition was supported by a declaration of the key MKDG executive involved in the transaction, a report by a distinguished professor at Harvard Business and Harvard Law Schools, and applicable Court of Chancery precedent, including the *First Interstate* decision. *See supra* Section II.C.1.

In all events, the court abused its discretion by effectively granting Plaintiffs a punitive award on the basis of its perception of Defendants’ litigation arguments as “aggressive.” The Court of Chancery, as a court of equity, lacks the ability to award punitive damages and only awards sanctions in the case of bad-faith litigation conduct, such as where misrepresentations are made to the court. *See, e.g.*, *Beals v. Wash. Int’l, Inc.*, 386 A.2d 1156, 1160 (Del. Ch. 1978); *In re Rural/Metro Corp. S’holders Litig.*, 2015 WL 1523103 (Del. Ch. Feb. 12, 2015) (Laster, V.C.) (TRANSCRIPT). No such bad faith was or could be found here.

Moreover, because Plaintiffs had the burden of proof, the Court’s (erroneous) belief that Defendants’ position on fee amount was “unhelpful and a nonstarter” cannot justify the court’s adoption of Plaintiffs’ $12 million request. The court was required to consider the facts to determine the appropriate award, including an award falling in between Plaintiffs' request of $12 million and Defendants' response that Plaintiffs were entitled to no more than $686,029.41. The court failed to do so. Instead, it adopted Plaintiffs' request in full, based in part on its unfavorable view of Defendants' arguments. But Plaintiffs' fee petition was not a baseball-style arbitration. The court was required to exercise its independent judgment in reaching its determination as to an appropriate fee award. *See Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 361–62 (Del. 1997) (reversing decision where trial court selected one of two divergent expert valuations rather than exercising discretion to arrive at an independent valuation and noting that the trial court's award "should not spring from an 'all or nothing' mind-set reached at the beginning of the analysis"); *Delaware Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 310–11 (Del. Ch. 2006) ("I cannot shirk my duty to arrive at my own independent determination of value, regardless of whether the competing experts have provided widely divergent estimates of value[.]").

In punishing Defendants for what it perceived as an "aggressive position," the court relied only on *Solomon v. Take-Two Interactive Software, Inc.*, C.A. No. 3604-VCL (Del. Ch. June 18, 2009) (TRANSCRIPT). However, the defendants in *Take-Two* took inconsistent positions before the Court of Chancery by seeking approval of a settlement with releases and, at the same time, arguing "that the very consideration that [defendants had] relied upon to support the settlement is worthless." *Id.* at 63, 64. The court found that the defendants' argument that there was no benefit amounted "to basically a default." *Id.* at 63. Here, by contrast, Defendants did not advance inconsistent positions. Defendants were not seeking approval of a settlement and consistently maintained that Plaintiffs' litigation did not affect the outcome in the merger process, a position fully supported by the record.

If left to stand, the Court of Chancery's ruling will deter counsel from vigorously advocating on behalf of their clients in opposing fee requests. Counsel will be chilled from raising good-faith arguments in opposition to plaintiffs' requests for fear that their clients will be punished with a punitive award for taking an "aggressive" litigation position. To avoid such punishment, defendants will be required to gauge what the court would consider a "reasonable" amount to assert that plaintiffs are entitled to, even if defendants believe in good faith that the litigation created no benefit to shareholders. This imposes a burden on defendants that has no basis under the *Sugarland* factors, and would serve no purpose in "preserv[ing] the wholesome incentives with which [the court is] concerned." *Seinfeld*, 847 A.2d at 337.

CONCLUSION

The Court of Chancery's award should be reversed and remanded and any award entered by the Court of Chancery should be based on *quantum meruit*.

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