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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES' ANSWERING BRIEF

OF COUNSEL:

Lee D. Rudy
Grant D. Goodhart III
KESSLER TOPAZ
MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

Patrick C. Lynch
LYNCH & PINE
1 Park Row, 5th Floor
Providence, Rhode Island 02903
(401) 680-0921

PRICKETT, JONES & ELLIOTT, P.A.
Michael Hanrahan (#941)
Elizabeth M. McGeever (#2057)
Kevin H. Davenport (#5327)
1310 King Street
Wilmington, Delaware 19801
(302) 888-6500

Attorneys for Plaintiff-Below Appellee City of Providence

OF COUNSEL:

John Vielandi
David MacIsaac
LABATON SUCHAROW LLP
140 Broadway
New York, New York 10005
(212) 907-0700

LABATON SUCHAROW LLP
Ned Weinberger (#5256)
Derrick Farrell (#5747)
Mark Richardson (#6575)
Thomas Curry (#5877)
300 Delaware Avenue, Suite 1340
Wilmington, Delaware 19801
(302) 573-2540

Attorneys for Plaintiff-Below Appellee Plumbers and Steamfitters Local 60 Pension Trust

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NATURE OF THE PROCEEDINGS

Appellant-Defendants-Below[1] ("Defendants") appeal a 38-page oral opinion of the Court of Chancery (the "Opinion") granting a discretionary fee award to Appellee-Plaintiffs-Below ("Plaintiffs").[2] This litigation caused the removal of a poison pill shareholder rights plan (the "Rights Plan"), including a draconian "acting-in-concert" provision (the "AIC"), and contributed to the successful acquisition of Versum by Merck K GaA ("Merck"). The Versum stockholders received $1.17 billion more in merger consideration than the stock-for-stock merger (the "Entegris Merger") of Versum with Entegris, Inc. ("Entegris") that the Rights Plan sought to protect. The Court of Chancery awarded a reasonable fee of $12 million, representing approximately 1% of the benefit.

Defendants Abandon Primary Arguments Below. Because Defendants have abandoned the primary arguments made in their brief below and at oral argument,[3] the Court of Chancery's findings that the Versum Board's removal of the

[1] Appellants are Versum Materials, Inc. ("Versum" or the "Company") and its former directors, who have no financial interest in this appeal.

[2] *In re Versum Materials, Inc. S'holder Litig.*, Del. Ch. Cons. C.A. No. 2019-0206-JTL (July 16, 2020) Transcript at 45-84 (the "Opinion").

[3] Defendants' Answering Brief ("DAB") (A236-302) at 1-3, 38-44; July 16, 2020 Transcript at 25-34.

AIC and Rights Plan were corporate benefits and that the litigation had a causal connection to those benefits must be affirmed.[4]

Meritorious Claims. The Court of Chancery found Plaintiffs' *Unocal*[5] claims challenging the AIC and Rights Plan were "undoubtedly" meritorious when filed and found it "disappointing" that Defendants contested the issue.[6] On appeal, Defendants do not challenge that ruling. Instead, they make an entirely new argument that is precluded because it was not fairly raised below.[7]

Defendants now contend that Plaintiffs had to prove facts establishing a "reasonable likelihood of ultimate success" on their claims.[8] Defendants, however, have conceded here and below[9] that the meritorious when filed standard only requires that "at the same time" the complaint was filed, the plaintiff had "knowledge of provable facts which hold out some reasonable likelihood of ultimate success."[10] Plaintiffs' complaints, when filed, alleged facts, which, if ultimately proven, would

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[4] *Cal-Maine Foods, Inc. v. Pyles*, 858 A.2d 927, 928 (Del. 2004).

[5] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

[6] Opinion at 58-62.

[7] Del. Sup. Ct. R. 8.

[8] Appellants' Corrected Opening Brief ("DOB") 2-3, 6, 23-24.

[9] *Id.* at 23-24; DAB 29 (A272).

[10] *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 879 (Del. 1980) (emphasis added).

provide "some reasonable hope" of success on their claims.[11] The Court of Chancery cited numerous provable facts which were more than sufficient to permit some reasonable hope for success.

Defendants seek to add a preliminary injunction "reasonable probability of success" test to the standard that has governed mootness fees under Delaware law for over 50 years. Defendants' proposed test ignores the full language of that standard and would require Plaintiffs to meet two different and inconsistent standards for a motion to dismiss and a motion for a preliminary injunction. Defendants agreed to remove the Rights Plan in exchange for Plaintiffs withdrawing their preliminary injunction motion. Now Defendants claim Plaintiffs must prove the substantive reasonable probability element of the withdrawn motion. This would require the same discovery and force the Court of Chancery to decide the same issue that was mooted when Defendants terminated the Rights Plan.

Causation. Defendants now concede that Plaintiffs' litigation "caused the Board to amend and ultimately remove the Rights Plan."[12] They contend instead that the litigation, including the elimination of the AIC and Rights Plan, had absolutely no causal impact on the success of Merck's offer.[13] While dressed up as

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[11] *Id.*; *Chrysler Corp. v Dann*, 223 A.2d 384, 387 (Del. 1966); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 851 (Del. Ch. 1998).

[12] DOB 3.

[13] *Id.* at 3, 6-7, 30-36.

a lack of benefit argument, Defendants' contention is actually an attempt to shift their burden of proving a total lack of causation by requiring Plaintiffs to prove the litigation caused Merck's offers. Defendants failed to carry their burden of rebutting the presumption that the litigation was a causal contributor to the Versum Board's abandonment of the Entegris Merger and acceptance of Merck's higher offer.[14] They produced no minutes and no affidavits from Versum directors satisfying their burden of showing that the reasons, events and decisions which led to the Board's termination of the Entegris Merger and entry into the Merck Merger were not in any way influenced by the litigation.[15] The Court of Chancery made factual findings supported by the record that there was a causal link between the removal of the AIC and the Rights Plan and the success of Merck's offer, and that the Defendants had failed to satisfy their burden of proving a complete lack of causation between the litigation and their decision to abandon the Entegris Merger and accept the $53 Merck deal.[16]

Reasonable Fee. Defendants have not shown that the Court of Chancery abused its discretion by awarding a fee of approximately 1% of the $1.17 billion price increase. Defendants' challenge to the fee largely relies on their erroneous and

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[14] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1080 (Del. 1997); *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012).

[15] Opinion at 63.

[16] *Id*. at 63-72.

unsupported assumption that there was no causal connection between the removal of the AIC and Rights Plan and the increased price.[17] Defendants failed to present any causation evidence from any witness with actual knowledge of the Versum Board's reasons for terminating the Entegris Merger and accepting Merck's $53 offer. Instead, the Court of Chancery found Defendants' declaration from Merck and expert testimony unconvincing.[18]

The Court of Chancery relied on (i) *Sugarland*[19] and other "shared-credit" precedents, (ii) monitoring fee precedents, (iii) extrapolation of *Compellent*'s[20] determination, based on academic studies, of the effect of eliminating a rights plan on the likelihood of a competing bid, and (iv) the "helpful" tables and analyses Plaintiffs presented.[21] Defendants failed to engage meaningfully with the precedents and concepts governing mootness fees and instead took an unreasonable position that no fee or a minimal fee should be awarded.[22] The Court of Chancery found the fee awarded, though on the higher end of its range of reasonableness, was reasonable in light of the facts and legal precedents. The court's decision was not a punishment

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[17] DOB 3, 6-7, 28-43.

[18] Opinion at 63, 76.

[19] *Sugarland Indus. v. Thomas*, 420 A.2d 142 (Del. 1980).

[20] *In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011).

[21] Opinion at 72-79.

[22] *Id.* at 80.

of Defendants, but reflected Defendants' failure to present relevant evidence and a convincing argument.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery's finding that Plaintiffs' suit was meritorious when filed is supported by the record and should be affirmed. The correct standard only requires complaints to plead provable facts which hold out some reasonable hope of ultimate success. Defendants' argument that Plaintiffs were required to prove a reasonable probability of success was not raised below.

2. Denied. The Court of Chancery's finding that the litigation was a contributory cause of the $1.17 billion increase in merger consideration is supported by the record and should be affirmed. Defendants' argument that Plaintiffs had the burden to prove causation was not raised below and is contrary to Defendants' burden of proving the complete absence of any causal connection.

3. Denied. The Court of Chancery's award of a fee within the range of reasonableness was not an abuse of discretion. Plaintiffs supported their request with facts, precedent and an analysis the court found persuasive. The court's award was based on the record and was not punitive, but rather reflected Defendants' failure to present persuasive evidence and argument.

STATEMENT OF FACTS

The Court of Chancery made 13 pages of factual findings concerning the events leading to the Versum Board's (i) elimination of the AIC and Rights Plan, (ii) repeated reaffirmations of support for the Entegris Merger and opposition to Merck's $48 offer and (iii) ultimate abandonment of the Entegris Merger and acceptance of a $53 offer from Merck.[23] Defendants cannot show that these findings are clearly wrong by ignoring them.

The Court of Chancery examined the terms and implied value of the stock-for-stock Entegris Merger when announced on January 27, 2019, and on February 27, 2019, when Merck announced its fully financed, all-cash $48 per share offer.[24] It analyzed the terms of the Rights Plan adopted on February 28, 2019, including the relatively low 12.5% trigger and the onerous AIC.[25] The Court of Chancery's detailed discussion of the terms and effects of the AIC[26] rejected Defendants' flawed interpretation that the AIC only applied to "wolf-pack" activities and would not affect activities related to proxy contests or a tender offer.[27] Noting that neither expert found evidence of wolf-pack activity, the Court of Chancery

[23] Opinion at 46-58. Some findings are discussed in the Argument section.

[24] *Id.* at 48-49.

[25] *Id.* at 49-54.

[26] *Id.* at 50-54, 59-60.

[27] DOB 10.

found that "an oblique reference" to unspecified "unusual trading activity" in Board minutes that did not even mention the AIC was "quite skimpy" evidence of a wolf-pack.[28]

Following enactment of the Rights Plan, the Versum Board repeatedly reaffirmed its support for the Entegris Merger and repeatedly rejected Merck's $48 per share offer.[29] It concocted additional "synergies" in an effort to claim the value of the Entegris Merger might approach the value of Merck's offer.[30]

The initial complaint challenging the AIC was filed March 8, 2019.[31] Immediately following a March 13, 2019, teleconference on expedition, the Versum Board removed the AIC by a written consent (B6-10) that gave no reason for the Board's action.[32] Based on Plaintiffs' further complaints, this litigation moved towards a scheduled preliminary injunction hearing that challenged the Rights Plan and Entegris Merger.[33]

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[28] Opinion at 59. On appeal, Defendants do not show the Court of Chancery's finding was clearly wrong, but merely cite the same oblique minutes. DOB 9.

[29] Opinion at 54-55.

[30] *Id.*

[31] *Id.* at 55-56.

[32] *Id.* at 56.

[33] *Id.* at 56.

Merck issued a proxy statement against the Entegris Merger on March 22, 2019, and commenced a $48 per share tender offer on March 28, 2019.[34] The tender offer closing was conditioned on elimination of the Rights Plan.[35]

Following discussions Defendants first initiated on March 20, 2019, Defendants requested on March 26, 2019, that Plaintiffs reschedule depositions while the Board considered whether to remove the Rights Plan.[36] Plaintiffs refused to dismiss the litigation in exchange for removal of the Rights Plan, but on March 31, 2019, the parties entered into a stipulation (the "Stipulation") (A527-28) agreeing that Plaintiffs' preliminary injunction motion would be withdrawn if the Rights Plan was eliminated.[37] Versum announced the termination of the Rights Plan on April 2, 2019, triggering the Stipulation and mooting Plaintiffs' preliminary injunction motion.[38]

After the Rights Plan was removed, a short bidding contest ensued and the Versum Board terminated the Entegris Merger and entered into the $53 per share Merck Merger, which the Versum stockholders approved.[39]

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[34] *Id.* at 56-57.

[35] *Id.*

[36] *Id.* at 57. *See also* Declaration of Lee Rudy ("Rudy Dec.") (B520-23) at ¶¶ 4-11.

[37] Opinion at 57.

[38] *Id.* at 57-58.

[39] *Id.*

ARGUMENT

I. THE COURT OF CHANCERY'S FINDING THAT PLAINTIFFS' CLAIMS WERE MERITORIOUS WHEN FILED IS SUPPORTED BY THE RECORD

A. Question Presented

Is the Court of Chancery's finding that Plaintiffs pled provable facts which held out some reasonable hope of success supported by the record? A193-204; Opinion at 58-62.

B. Standard and Scope of Review

The standard of review for an attorneys' fee award based on mootness was stated in *EMAK*, 50 A.3d at 443:

> We review an attorneys' fee award for abuse of discretion. We do not substitute our own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness. We will not set aside or overturn the Court of Chancery's factual findings unless they are clearly wrong and justice requires it, or they are not the product of an orderly and logical deductive purpose. (Footnotes omitted).

C. Merits of Argument

The "meritorious when filed" standard for mootness fees only requires that Plaintiffs' complaints, when filed, pleaded claims that would survive a motion to dismiss and pleaded provable facts which held out some reasonable prospect for

ultimate success.[40] The Court of Chancery concluded Plaintiffs' *Unocal* claims challenging the AIC and Rights Plan were meritorious when filed.[41]

1. Defendants' Appeal Argument Was Not Raised Below

Defendants argued below that Plaintiffs' claims against the AIC and Rights Plan would not have survived a motion to dismiss.[42] On appeal, Defendants do not challenge the Court of Chancery's holding that the Complaints stated claims under *Unocal*.[43] Instead, Defendants assert that to establish that their claims were meritorious when filed Plaintiffs had to meet the preliminary injunction standard of "a reasonable likelihood of success."[44] Defendants did not raise this issue below and are precluded from asserting it on appeal.[45] Defendants initially failed to identify where their appeal points were preserved. Their corrected brief cites a page of their brief below that simply quotes the full meritorious when filed standard (A272) and does not show they argued below that the provable facts portion of the meritorious when filed standard requires Plaintiffs to meet the reasonably probability of success

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[40] *Allied Artists*, 413 A.2d at 878; *Chrysler Corp.*, 223 A.2d at 387.

[41] Opinion at 58, 62.

[42] DAB (A236-302) at 1-2, 27-37.

[43] Opinion at 58-62.

[44] DOB 2-3, 24, 27. "Likelihood" is a synonym for "probability" so a "reasonable likelihood of success" is equivalent to a "reasonable probability of success." Roget's 21st Century Thesaurus (3d ed. 2005); Merriam-Webster's Collegiate Dictionary (11th ed. 2003) p. 72; Black's Law Dictionary (11th ed. 2019), p. 113).

[45] Del. Sup. Ct. R. 8.

standard.[46] As noted, Defendants' brief below only argued that the Complaints would not survive a motion to dismiss. At oral argument Defendants made no argument at all on the meritorious claims issue.[47]

2. Defendants' Erroneous Statement of the Legal Standard

As Defendants acknowledge, the first prong of the mootness fee standard is whether the suit was meritorious when filed.[48] This test requires only that the complaint, "when filed" could survive a motion to dismiss and that "at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success."[49] As Defendants concede, that is a motion to dismiss test.[50]

Defendants repeatedly misrepresent that the meritorious when filed standard requires that Plaintiffs prove "a reasonable likelihood of success."[51] This attempt to impose a preliminary injunction standard is refuted by more than 50 years of Delaware precedent from *Chrysler* through the Opinion below.

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[46] Del. Sup. Ct. R. 14(b)(vi)A(1); DOB 23.

[47] July 16, 2020 Transcript at 25-35.

[48] DOB 23 (emphasis added) (citing *United Vanguard*, 693 A.2d at 1079).

[49] DOB 23-24 (emphasis added) (citing *Allied Artists*, 413 A.2d at 879).

[50] DOB 23-24.

[51] *Id.*

The meritorious when filed standard requires that the complaint meet a motion to dismiss standard. This test requires that "at the same time" (i.e., when the suit is filed) plaintiffs possess "provable" facts "that hold out some reasonable likelihood of ultimate success." The provable facts element focuses on the same timeframe as the "when filed" and motion to dismiss aspects – when the complaint was filed.[52] *Chrysler* made clear that the provable facts element relates to the factual allegations of the pertinent complaint:

> To justify an allowance of fees the action in which they are sought must have had merit at the time it was filed. It may not be a series of unjustified and unprovable charges of wrongdoing to the disadvantage of the corporation. The plaintiff must have some factual basis at least for the making of the charges.[53]

The pertinent timeframe for "the threshold determination of merit" is "the time of filing."[54]

The only authority Defendants cite does not support their position.[55] *Allied Artists* affirmed the trial court's award of a mootness fee because the "[t]he Vice Chancellor specifically found that, '***when filed,***' the suits 'had some 'reasonable

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[52] *Allied Artists*, 413 A.2d at 879; *Full Value Partners, L.P. v. Swiss Helvetica Fund, Inc.*, 2018 WL 2748261, at *4-5 (Del. Ch. June 7, 2018).

[53] *Chrysler Corp.*, 223 A.2d at 387 (emphasis added).

[54] *Allied Artists*, 413 A.2d at 879.

[55] DOB 24.

hope' of being successful. . . .'"[56] Even though summary judgment had been entered against the plaintiff, this Court found no error in the fee award because plaintiff's complaint "pleaded provable facts which showed that his action had reasonable hope of success."[57] "Provable" facts means facts that are capable of being proven, not facts that are proven.[58] The provable facts test merely reinforces the motion to dismiss concept that the complaint cannot just state a barebones legal claim, but must also allege some facts which, if proven, would provide some hope of establishing the claim.[59] The provable facts test, therefore, only requires that Plaintiffs allege a set of provable facts supporting their claims.[60] Furthermore, Plaintiffs' factual allegations were drawn primarily from the public filings of Versum and Merck and are, therefore, deemed admissions.[61] Because the provable facts element is governed

[56] 413 A.2d at 880 (emphasis added).

[57] *Id*. at 879.

[58] Black's Law Dictionary (11th ed.), p. 1480.

[59] *Chrysler Corp.*, 223 A.2d at 387; *United Vanguard*, 727 A.2d at 857; *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1123-24 (Del. Ch. 2011); *Full Value Partners, L.P.*, 2018 WL 2748261, at *4-5.

[60] *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013); *Full Value Partners*, 2018 WL 2748261, at 5; *In re Quest Software Inc. S'holders Litig.*, 2013 WL 5978900, at *6 (Del. Ch. Nov. 12, 2013).

[61] *In re Am. Real Estate Partners, L.P. Litig.*, 1997 WL 770718, at *4 (Del. Ch. Dec. 3, 1997).

by a motion to dismiss standard, the test is whether Plaintiffs alleged a reasonably conceivable set of provable facts that would make out their claims.[62]

Defendants ignore the pertinent language of the standard: (i) "when filed," (ii) "at the same time," (iii) "provable facts," and (iv) "some reasonable likelihood," of "ultimate" success. They do not harmonize the "provable facts" element with the "when filed" and motion to dismiss aspects.

Defendants would require Plaintiffs to meet two different and inconsistent standards: a motion to dismiss standard and a preliminary injunction "reasonable probability" standard. This Court has rejected attempts to require a standard more onerous than a motion to dismiss.[63]

The inappropriateness of conflicting standards is particularly acute here. One mooting event was the termination of the Rights Plan in exchange for withdrawal of Plaintiffs' preliminary injunction motion and related expedited discovery. Defendants now contend that to obtain a mootness fee, Plaintiffs have to win the substantive element of the very motion Defendants stipulated would be mooted by the elimination of the Rights Plan. Defendants' proof of reasonable probability of success standard would require that Plaintiffs reinstate document and deposition

[62] Opinion at 60-61; *Quest*, 2013 WL 5978900, at *6.

[63] *See Chrysler Corp.*, 223 A.2d at 387 and *Allied Artists*, 413 A.2d at 879 (rejecting arguments that summary judgment standard should apply).

discovery to build a preliminary injunction record. The Court of Chancery would then have to render an opinion on a mooted issue in a dead case.

3. The Court of Chancery's Factual Findings Establish That Plaintiffs Alleged Provable Facts

The trial court found that Plaintiffs alleged provable facts supporting their claims.[64] Those findings are supported by the record and therefore, should be affirmed.[65]

Plaintiffs' complaints contained detailed allegations that the AIC was an unusual and draconian provision whose purpose and effect was to protect the Entegris Merger and thwart the superior Merck offer.[66] The Court of Chancery analyzed the AIC in detail, including its asymmetric structure that carved out the Entegris Merger, and made a factual finding that there was no evidence of a wolf-pack threat and even assuming a valid threat had existed, the expansive terms and potential effects of the AIC were not proportional to any such threat.[67] It found

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[64] Opinion at 58-62. *See also id.* at 48-58.

[65] *Cal-Maine*, 858 A.2d at 928.

[66] P&S Amended Complaint (A65-86) at ¶¶ 5, 8-9, 36-42, 58, 62, 64; City of Providence Complaint (A102-38) at ¶ 51.

[67] Opinion at 46, 50-54, 59-60. *See also* Rights Plan Section 1(a) (A422-23). Merck's assertion that it was oblivious to the AIC does not alter the AIC's terms and effects. Opinion at 60. Merck's supposed ignorance of the AIC is irrelevant to whether the AIC was a reasonable response by the Versum Board to a perceived threat, but is also contradicted by its contemporaneous statements. Merck April 2, 2019 Investor Presentation (B482-519) at 32 (B514) (describing the AIC terms as "egregious provisions").

that "an oblique reference" in minutes, which did not even mention the AIC, did not support Defendants' strained assertion that there was wolf pack activity that justified the AIC.[68] Defendants admit the Board must have had reasonable grounds to believe there was a threat to corporate policy and the AIC must be proportional to the threat.[69] The Court of Chancery found that these criteria were not met.[70]

Defendants do not address the Vice Chancellor's detailed AIC findings. Their admission that the AIC claim was mooted by their removal of the provision five days after Plaintiffs challenged it shows the claim was meritorious, not the opposite.[71] The Court of Chancery found Defendants' rapid removal of the AIC and the absence of any evidence from any defense witness that the AIC was removed for any reason other than the litigation confirmed that the AIC claim had merit.[72] The Vice Chancellor's AIC findings are not clearly wrong and are supported by the record.

The court below also found the Rights Plan claim was meritorious when filed.[73] The court found "that the Versum board could be using the rights plan to

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[68] Opinion at 59-60.

[69] DOB 24-25.

[70] Opinion at 58-60.

[71] DOB 24.

[72] Opinion at 46, 56, 62-63. *See also Iroquois Indus., Inc. v. Lewis*, 318 A.2d 134-35 (Del. 1974) (PER CURIAM) (The speed with which defendants withdrew the transaction after the filing of the complaint showed the claim was meritorious).

[73] Opinion at 60-61.

block a higher-valued cash deal and protect its merger of equals" with Entegris, citing numerous provable facts:

> Supporting evidence at the time included the board's persistent refusal to engage with Merck, its failure to determine that the Merck bid was reasonably likely to lead to a superior proposal, despite ample indications of that, the adoption of a rights plan with a 12.5 percent trigger, and the locating of new synergies. And I would also say, as to this, it's not just the 12.5 percent trigger, but it's the original adoption of an aggressive plan that includes the acting-in-concert provision.[74]

The Court of Chancery's conclusion that "there were litigable questions about whether the Versum board could maintain the rights plan in the face of Merck's tender offer,"[75] to protect the lower valued Entegris Merger is amply supported by the record and not clearly erroneous. Defendants' withdrawal of the Rights Plan within 21 days, in response to Plaintiffs' Rights Plan claim, supports the Court of Chancery's finding that there were provable facts supporting Plaintiffs' claims.[76] As depositions and the preliminary injunction hearing on the Rights Plan approached, Defendants negotiated the Stipulation for withdrawal of the preliminary injunction motion if the Rights Plan was withdrawn; they then terminated the Rights Plan.[77]

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[74] *Id.* at 61.

[75] *Id.* at 61-62.

[76] *Id*. at 46, 57, 63. *See Iroquois Indus.*, 318 A.2d at 134-35.

[77] Opinion at 46, 57, 63.

On appeal, Defendants ignore the Vice Chancellor's findings that the evidence showed that they repeatedly rebuffed Merck and reconfirmed their support for the Entegris Merger, which had a lower value even with the made-up additional synergies.[78] They merely rehash factual contentions from their brief below, citing cases that the Court of Chancery did not find factually similar or legally compelling.[79] This Court should affirm that the Court of Chancery's findings and conclusions are not clearly erroneous.[80]

[78] DOB at 54-56.

[79] *Compare* DOB 24-46 *with* DAB (A236-302) at 32-36 and Plaintiffs' Reply Brief (B348-95) at 5 & n.10, 12-13.

[80] *McDonnell Douglas Corp. v. Palley*, 310 A.2d 635, 637-38 (Del. 1973).

II. THE COURT OF CHANCERY'S FACTUAL FINDING OF A CAUSAL CONNECTION TO THE INCREASED MERGER CONSIDERATION IS NOT CLEARLY WRONG

A. Question Presented

Is the Court of Chancery's factual finding of some causal connection between the litigation and the Versum Board's consideration of Merck's higher offers and ultimate determination to abandon the Entegris Merger and accept Merck's $53 offer clearly wrong? A205-10; Opinion at 63-72.

B. Standard and Scope of Review

A mootness fee award is reviewed for abuse of discretion and the Supreme Court will not substitute its judgment unless the trial judge's decision was arbitrary and capricious.[81] Factual findings will not be set aside unless clearly wrong.[82] Causation is an issue of fact.[83]

C. Merits of the Argument

1. The Issue Is Causation, Not Benefit

To avoid the presumption of causation and shift their burden of proving a complete lack of causation, Defendants disguise their position as a lack of benefit argument.[84] However, Defendants' brief demonstrates that they are arguing a

[81] *EMAK*, 50 A.3d at 432.

[82] *Id.*

[83] *United Vanguard*, 693 A.2d at 1080.

[84] DOB 6, 28-36.

complete lack of causation, not lack of benefit.[85] The Board's abandonment of the Entegris Merger and agreement to the $1.17 billion in additional merger consideration arising from the Merck offer occurred prior to resolution of the litigation. The value of the benefit is a mathematical fact. Consequently, the issue is not lack of benefit but whether the Court of Chancery's factual finding that there was not a complete lack of causal connection between the litigation and that ultimate large monetary benefit is clearly wrong.[86]

2. Defendants Concede the Litigation Caused Elimination of the AIC and Rights Plan

The Court of Chancery's factual findings that the litigation caused the Versum Board to eliminate the AIC and Rights Plan are supported by the record.[87]

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[85] *Id.* at 1 ("Plaintiffs did not play any role in causing that price increase"), 3 ("the litigation must also have caused the ultimate price increase"), 4 ("a price increase that was not caused by the litigation"), 6 (litigation "did not cause" Merck's offers), 30 ("Plaintiffs' Litigation Did Not Cause the $53 Per Share Deal"), 34 ("corporate action caused by their litigation" and "caused the increase in the transaction price").

[86] In a further attempt to obscure the issues, Defendants combine causation issues and attacks on the reasonableness of the fee award into a single argument. *Id.* at 28-46. Consistent with longstanding Delaware law, Plaintiffs will separately address causation and reasonableness.

[87] Opinion at 56-58, 63. *See also* Plaintiffs' Reply Brief (B348-95) at 17-31 (summarizing causation evidence); March 13, 2019 Written Consent (B6-10); March 31, 2019 Stipulation (B113-14); May 13, 2019 Proxy Statement ("May 13 Proxy") (B142-347) at 37, 40-41; March 12, 2019 Renewed Motion for Expedited Proceedings (B400-12); March 13, 2019 emails from M. Valente (B413-15); March 13, 2019 Telephonic Scheduling Conference (B416-30); Defendants' Privilege Log (B431-49) at Doc. Nos. 1103, 1111-16, 1119-20, 1169, 1172-75, 1192, 1221, 1225, 1233-46, 1248-49, 1251 (documents reflecting Board's consideration of litigation);

Defendants failed to produce any minutes or director affidavits suggesting any reason other than the litigation for the elimination of these defensive measures.[88] Defendants admit on appeal that the "litigation caused the Board to amend and ultimately remove the Rights Plan."[89] Because Defendants now admit the litigation caused the Board's removal of obstacles to Merck's offer (i.e., the AIC and the Rights Plan), they cannot rebut the presumption that the litigation contributed to the Board's decisions to consider Merck's offers, terminate the Entegris Merger, and agree to the Merck Merger, which increased the merger consideration by $1.17 billion.

3. Defendants' Attempt to Shift the Causation Burden and Change the Causation Standard Is Contrary to Delaware Law

Defendants' argument, that because they failed to rebut the presumption that the litigation caused the removal of the AIC and Rights Plan, the causation burden shifted to Plaintiffs to prove the litigation was the sole cause of the increase in merger consideration that subsequently occurred, is illogical.[90] Not surprisingly, Defendants cite no case endorsing such a shifting, bifurcated causation burden. This

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March 22, 2019 Board Meeting Agendas (B450-51) (reflecting "Litigation Update"); and March 22, 2019 Management Presentation (B452-81) at 7 (same).

[88] Opinion at 63.

[89] DOB 3.

[90] *Id.* at 3-4, 30-31.

Court has held that the burden of proof on causation does not shift even where defendants were granted summary judgment.[91]

The presumption of causation exists because Defendants are better positioned to produce evidence of the reasons, events and discussions leading up to their decision to finally entertain Merck's higher offer.[92] Therefore, the presumption applies to the Board's abandonment of the Entegris Merger and agreement to an increased acquisition price.[93] Defendants admit that the removal of the AIC and Rights Plan was "a change in corporate policy" caused by the litigation.[94] However, they do not address the second change in policy that occurred: the Versum Board's decision to abandon the Entegris Merger in favor of Merck's $53 offer. Defendants presented no minutes, director affidavits nor any other evidence that the litigation, including the elimination of the AIC and Rights Plan, had no influence whatsoever on the Versum Board's change in policy, which created a $1.17 billion benefit for stockholders. Defendants also confuse Plaintiffs' "burden of establishing the value of the claimed benefit" with Defendants' burden to prove a complete lack of

[91] *Allied Artists*, 413 A.2d at 880 (also observing the usefulness of a single causation rule where the burden remains on the fiduciaries who are in a position of trust and know the reasons for their actions in mooting the suit).

[92] *United Vanguard*, 693 A.2d at 1078-80.

[93] *Id.*

[94] DOB 29.

causation of the benefit.[95] The value of the benefit of increased merger consideration is plain: $1.17 billion. The presumption of a causal connection to the Board's decisions resulting in this increased merger consideration is not "an unwarranted presumption" (DOB 4) – it is established Delaware law.

4. Defendants' Causation Burden Applies to Shared Credit Situations

This Court has long recognized that the presumption of causation applies to a merger effected after the litigation commenced, even where the merger itself was not the objective.[96] Here, Plaintiffs challenged the Board's persistent support for the Entegris Merger in the face of Merck's higher offer.[97]

In *United Vanguard*, plaintiff contended its lawsuit contributed to the TakeCare board's decision to let a letter of intent lapse and conduct an auction that resulted in a $271 million price increase benefitting the stockholders.[98] "[T]he Court of Chancery ruled that TakeCare had met its burden of showing that the Vanguard lawsuit had no causative effect on the subsequent shareholder benefit arising from the increased tender offer price."[99] The Supreme Court reversed, holding that the

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[95] *Id.* (quoting *In re Am. Real Estate Partners*, 1997 WL 770718, at *6).

[96] *Allied Artists*, 413 A.2d at 877-78 (merger resulted in removal of directors and other relief litigation sought).

[97] City of Providence Complaint (A102-38) at 1-2, ¶¶ 44-73, 87-91.

[98] 693 A.2d at 1078-79.

[99] *Id.* at 1079 (emphasis added).

presumption of causation imposed on the corporation the burden of proving that "no causal connection existed between the initiation of the suit and any later benefit to the shareholders."[100]

The presumption of causation and Versum's burden of proving no causal connection between the litigation and any later benefit to stockholders applies in this joint causation situation. Therefore, as Defendants admit, they must prove that the litigation had no role whatsoever in the Board's decision to abandon the Entegris Merger and accept Merck's $53 offer, which increased the consideration the shareholders received by $1.17 billion.[101] To rebut the presumption that Plaintiffs' litigation was a contributing cause of the $1.17 billion increase in consideration, Defendants had to prove that the litigation's contribution was zero.

Defendants' contention that "there is no presumption under *Sugarland*" that contributing to an increased price confers a quantifiable benefit is refuted by *Sugarland* itself.[102] In *Sugarland*, 420 A.2d at 145, plaintiffs obtained a temporary restraining order against the corporation's sale of land in the face of a higher bid, forcing the board to consider a higher offer which ultimately resulted in a bidding process that yielded an even higher final price. The Supreme Court found the Court

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[100] *Id.* at 1080 (emphasis added); *see also Cal-Maine*, 858 A.2d at 929.

[101] *E.g.*, DOB 1-2, 3, 6, 31, 32 (repeated references to Plaintiffs having no role in causing the price increase).

[102] DOB 29.

of Chancery's award of 20% of the benefit from the initial higher bid was appropriate, but 20% of the increase represented by the final price was unreasonable because other factors, including the emergence of a new bidder willing to pay more, also contributed to the result.[103] Because the Plaintiffs were only entitled to "some credit," not "full credit," for the second price increase, the Supreme Court determined that 5% of the additional price increase was a reasonable fee.[104]

Sugarland was not the first "shared credit" case in Delaware.[105] Since *Sugarland*, Delaware courts have regularly evaluated shared-credit situations involving various scenarios and now have over 50 years of experience establishing that the shared-credit rule works.[106] Even where another actor is principally responsible for the benefit, "Delaware courts nevertheless consistently have awarded fees in these situations to the stockholder plaintiffs for their contributory role in generating the result."[107] Even when the litigation served only a monitoring role, "class counsel is still deemed to have played a material role in causing the controller

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[103] 420 A.2d at 150-51.

[104] *Id.*

[105] *Smith v. Fidelity Mgmt. & Research Co.*, 2014 WL 1599935, at *11 (Del. Ch. April 16, 2014) (citing *Aaron v. Parsons*, 139 A.2d 365 (Del. Ch.) *aff'd*, 144 A.2d 155 (Del. 1958)).

[106] *Smith*, 2014 WL 1599935, at *11.

[107] *Id.*

to increase the transaction price."[108] Unlike some scenarios considered in *Smith*, Plaintiffs' contribution here was greater because (i) there was no special committee, (ii) the competing bidder did not control or even participate in the litigation, (iii) Plaintiffs' suit was not "monitoring" litigation, and (iv) the litigation achieved concrete results (i.e., elimination of the AIC and Rights Plan). Significantly, Plaintiffs only agreed to withdraw their preliminary injunction motion if the Rights Plan was removed, but refused to agree to dismiss the litigation.[109] Thus, the continued pendency of the litigation still served as an incentive when the Board mooted the case by abandoning the challenged Entegris Merger and agreeing to the $53 per share Merck deal, thereby providing Plaintiffs with the ultimate relief they sought – increased consideration for the stockholders.[110]

5. Defendants Failed to Rebut the Presumption and Meet Their Burden of Proof

Defendants simply failed to produce evidence to meet their burden of proving a complete lack of any causal connection between the litigation and the Versum Board's decision to abandon the Entegris Merger and enter into the Merck Merger,

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[108] *Id.* at 14, n.4.

[109] Rudy Dec. (B520-23) at ¶¶ 4-11.

[110] *Smith*, 2014 WL 1599935, at 13; *Aaron v. Parsons*, 139 A.2d 365, 367 (Del. Ch.), *aff'd*, 144 A.2d 155 (Del. 1958) ("mere pendency of suit with its implications… served in part to induce the [defendants] to settle").

which resulted in the Versum Stockholders receiving an additional $1.17 billion. The Court of Chancery held there was a failure of proof:

> Ultimately, the standard for defeating causation is the defendants have to establish the complete absence of any causal relationship between the litigation and their actions which rendered moot plaintiff's claims. That's from the *TakeCare* decision. Defendants didn't do that.[111]

Although the proxy statement for the Merck Merger referenced Versum Board meetings on March 22, March 28, April 7 and April 11, 2019,[112] Defendants produced no minutes, director affidavits nor any other documents relating to those meetings.[113] "Silence then becomes evidence of the most convincing character."[114]

Defendants' failure to present evidence from the directors was forcefully raised below and specifically noted by the Court of Chancery.[115] Defendants' appeal brief, however, offers no explanation for their complete failure to offer evidence of the reasons, events and decisions leading up to the Board's termination of the

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[111] Opinion at 72.

[112] May 13 Proxy (B142-347) at 38-39, 40-41.

[113] Defendants did produce agendas and a Management Presentation for the March 22, 2019 meeting showing there was a "Litigation Update" at that meeting. March 22, 2019 Meeting Agendas (B450-51); March 22, 2019 Management Presentation (B452-81) at 7.

[114] *In re Western Nat. Corp. S'holders Litig.*, 2000 WL 710192, at *19 (Del. Ch. May 22, 2000) (quoting *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208, 226 (1939)).

[115] Plaintiffs' Reply Brief (B348-95) at 19-27; Opinion at 13-14, 35-36, 63.

Entegris Merger and acceptance of Merck's $53 per share offer. That alone requires rejection of their appeal.

Defendants' naked claim that the amendment and removal of the Rights Plan did not influence Versum's decision to accept Merck's $53 per share offer (DOB 31) cites absolutely no record evidence. Defendants' failure to produce evidence that the Board did not consider the litigation when it determined to accept Merck's offer and terminate the Entegris Merger effectively conceded a causal connection existed between the litigation and the increased consideration.

6. The Court of Chancery's Joint Causation Finding Is Supported by the Record

Defendants' repeated assertions that the Court of Chancery merely "presumed" a causal connection between removal of the AIC and Rights Plan and the increased merger consideration are simply wrong.[116] The Court of Chancery found that, as in *United Vanguard*, Plaintiffs were claiming to be a contributing cause, not the sole cause, of the success of the Merck offer by eliminating obstacles to, and paving the way for, the increased bidding.[117] The Vice Chancellor found that elimination of the AIC and Rights Plan "had a causal linkage to the likelihood of

[116] DOB 3, 4, 28, 29, 30-31, 34-35.

[117] Opinion at 63-64 (citing *United Vanguard*, 693 A.2d at 1080, and noting its finding was "straight out of *TakeCare*").

success of the Merck offers"[118] and the litigation was a causal factor in the Versum Board's agreement to the higher price Merck Merger.[119]

The Court of Chancery found that the AIC "necessarily had some limiting effect on Merck's ability to pursue its offer [and] to solicit against the merger of equals."[120] The Vice Chancellor's detailed analysis of the AIC's provisions supports these findings.[121] The Werth Declaration claiming Merck was unaware of the AIC is irrelevant to the Versum Board's reasons for removing the AIC, and the Court of Chancery found it unpersuasive.[122] The court below also rejected Defendants' argument, made without citing any record support, that the Board pulled the AIC because no wolf-pack had emerged.[123] The Board consent removing the AIC (B6-10) gave no such reason, and there are no minutes, affidavits nor any other documents evidencing that the Board ever considered such a rationale. Many of Defendants' withheld documents reflect that the Board did consider the litigation.[124]

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[118] Opinion at 63.

[119] *Id.* at 64.

[120] *Id.* at 64-65.

[121] *Id.* at 50-54.

[122] *Id.* at 65-67.

[123] *Id.* at 67.

[124] Defendants' Privilege Log (B431-49) at Doc. Nos. 1103, 1111-12, 1114-16, 1119-20, 1169, 1172-73, 1175, 1192, 1221.

The court's finding that "Merck's offer could not proceed in the face of the rights plan"[125] is fully supported by the record. Merck's tender offer was conditioned on elimination of the Rights Plan because "the rights plan effectively prevents the tender offer from closing unless it's redeemed or eliminated."[126] Merck, its financial advisor and even Defendants' expert admitted that completing a tender offer with the Rights Plan in place would be prohibitively expensive.[127]

7. The Record Supports the Court of Chancery's Finding that Merck's Contemporaneous Statements Disproved Its Revisionist Claim that the Rights Plan Was Not an Obstacle

The Court of Chancery rejected Merck's revisionist history that it did not consider the Rights Plan an obstacle to its offer.[128] The Werth Declaration was not "unrefuted."[129] Citing Merck's tender offer, press releases, presentations and other proxy materials, the court found that "in real time" (i.e., March and April 2019 when Merck's offer was pending), Merck repeatedly represented that the Rights Plan was

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[125] Opinion at 64.

[126] *Id.* at 56-57. *See also In re Gaylord Capital Container Corp. S'holders Litig.*, 753 A.2d 462 (Del. Ch. 2000) ("a poison pill absolutely precludes a hostile acquisition so long as the pill remains in place.")

[127] Werth Decl. (A303-18) at ¶ 20 and Ex. A, ¶ 22 & Ex. B; Subramanian Rebuttal Report (A546-626) at ¶¶ 54, 63.

[128] *Cf.* DOB 31-32.

[129] *Cf.* DOB 38.

an obstacle precluding its offer.[130] Therefore, "removing the rights plan had a material effect on the likelihood of the offer being completed."[131]

Defendants now claim Merck's proxy filings were "only part of a public relations campaign" and that Merck actually thought the Rights Plan did not preclude its offer.[132] Versum, now owned by Merck, is claiming that its parent committed securities fraud by falsely telling Versum's stockholders and the investing public that the Rights Plan would preclude its offer when it believed the opposite. This argument, which was not raised below, is contrary to Merck's real time admissions that its offer could not close with the Rights Plan in place.[133]

The court below also found that Merck was not willing to try to defeat the Entegris Merger, then wait more than a year to pursue a hostile proxy contest to remove and replace the Board.[134] The Court of Chancery found Werth's declaration that Merck was only interested in a negotiated deal indicated that Merck was not

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[130] Opinion at 56-57, 64, 69. *See* April 2, 2019 Merck Investor Presentation (B482-519) at 28, 32; March 26, 2019 Merck Proxy Solicitation (A509-22) at 5; Werth Decl. (A303-18) at ¶ 20 and Ex. A.

[131] Opinion at 70.

[132] DOB 31, n.2.

[133] Werth Decl. (A303-18) at ¶ 20 and Ex. A. Werth's personal observations are irrelevant to whether the litigation influenced the decision of the Versum Board to abandon the Entegris Merger and accept Merck's $53/share offer.

[134] Opinion at 64-65, 68-70.

prepared to pursue litigation or a proxy contest to remove the Rights Plan, thereby making the Rights Plan an effective deterrent to Merck's offer.[135]

Defendants' assertion that negotiations with Merck began "before the Rights Plan was terminated" (DOB 32) ignores that negotiations between Defendants and Plaintiffs began on March 20, 2019, seven days before Defendants claim discussions with Merck began.[136] The Merck Merger Proxy indicates that the discussions on March 28 and April 1 and 2, 2019, were not negotiations and were not substantive.[137] Indeed, at a March 28, 2019, Board meeting; in a March 29, 2019, 14D-9; and in April 1 and 2, 2019, press releases, 8-Ks, and investor presentations; the Versum Board again rejected Merck's offer, recommended that the stockholders reject that offer, and reaffirmed its support for the Entegris Merger.[138]

8. Defendants' Weak Secondary Evidence of Lack of Causation

Instead of producing evidence from the Versum directors concerning why the Versum Board acted, Defendants submitted a 16-page declaration from Merck and a 56-page report of a Harvard professor, neither of whom were at any Versum Board meetings or have any knowledge of the reasons the directors abandoned the Entegris

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[135] *Id.* at 68-69.

[136] Rudy Dec. (B520-23) at ¶¶ 4-11.

[137] May 13 Proxy (B142-347) at 38-39.

[138] *Id.*; Versum Schedule 14D-9 (B11-112) at 7, 12, 28-33 and Ex. (a)(2); April 1, 2019 Versum Investor Presentation (B115-36) at Ex. 99.1 at pp. 1-17; April 2, 2019 Versum Shareholder Letter (B137-41).

Merger and accepted Merck's $53/share deal. Reliance on weak evidence from secondary sources with no personal knowledge when strong evidence from the directors themselves should have been available can only lead to the conclusion that the direct evidence from the Versum Board would be adverse (i.e., show a causal connection between the litigation and the increased consideration).[139]

The Court of Chancery rejected as not credible the simplistic, theoretical speculation of Defendants' expert that Merck's offer would have ultimately prevailed, despite the Rights Plan, because the high bid always wins.[140] The court noted the absurdity of Prof. Subramanian's theory, observing that in his hypothetical world, causation never exists for removal of any defensive measure and litigation never has any effect because the higher bidder always triumphs.[141]

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[139] *Smith v. Van Gorkom*, 488 A.2d 858, 878-89 (Del. 1985); *Chesapeake Corp. v. Shore*, 771 A.2d 293, 301, n.7 (Del. Ch. 2000).

[140] Opinion at 70-71.

[141] *Id.* at 71.

III. THE COURT OF CHANCERY'S FEE AWARD WAS NOT AN ABUSE OF DISCRETION

A. Question Presented

Did the Court of Chancery abuse its discretion by awarding a reasonable fee that was supported by multiple factors? A211-29; Opinion at 72-79.

B. Standard and Scope of Review

An attorneys' fee award is reviewed for abuse of discretion.[142]

C. Merits of the Argument

Defendants admit the determination of the amount of a fee award is a matter of discretion based on the facts and circumstances of the particular case.[143] The Court of Chancery has "discretion in the methods it uses and the evidence it relies upon when pricing the benefit and the resulting fee."[144]

1. Increased Merger Consideration Is a Quantifiable Benefit

The Court of Chancery awarded $12 million in fees and expenses based on the factors in *Sugarland,* which mandates that the benefits achieved by the litigation are given the greatest weight.[145] Because the benefit of $1.17 billion in increased

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[142] *EMAK*, 50 A.3d at 432.

[143] DOB 28; Opinion at 72. *See also In re James River Grp. S'holders Litig.*, 2008 WL 160926, at *2 (Del. Ch. Jan. 8, 2008).

[144] Opinion at 73. *See also Compellent*, 2011 WL 6382523, at *21 (citing *Tandycrafts, Inc. v. Initio* Partners, 562 A.2d 1162, 1166 (Del. 1989)).

[145] Opinion at 72-73 (citing *Sugarland*, 420 A.2d at 142 and *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012)).

consideration is quantifiable, *Sugarland* calls for a fee award based on a percentage of the benefit.[146] Percentage of the increased consideration is the usual method of determining fees where the benefit is increased merger consideration.[147] Quantifiable benefits are not limited to monetary funds or money judgments.[148] Where the elimination of obstacles to the success of a competing offer results in a higher acquisition price, that is a quantifiable benefit.[149] The Court of Chancery recognized that "eliminating a rights plan or a feature of a rights plan is a really rare result in Delaware corporation litigation."[150]

2. The Court of Chancery Properly Applied *Sugarland*

The Court of Chancery recognized that Plaintiffs sought credit for improving the prospects for Merck's offers to succeed, not for the offers themselves:

> The plaintiffs can't, and don't, claim credit for delivering that Merck [$48/share] offer. What they claim is credit for increasing the likelihood that stockholders would actually receive that offer. Value isn't value if it's not received. It's just potential in the ether. And so what the plaintiffs are claiming credit for is increasing the chances of receiving that offer. Similarly, they don't claim credit for the bump to $53. That was the result of decisions Merck made and market forces. But they do claim credit for

[146] Opinion at 72-73.

[147] *Id.* at 73 (citing *In re Cox Radio, Inc.*, 2010 WL 1806616 (Del. Ch. May 6, 2010)).

[148] *Cf.* DOB 1, 35-36.

[149] *United Vanguard*, 693 A.2d at 1080; *United Vanguard*, 727 A.2d at 853-54.

[150] Opinion at 73.

> increasing the likelihood that stockholders would receive that value.[151]

The Court of Chancery employed several different methods of analyzing the portion of the benefit attributable to the litigation and the appropriate fee, including (i) fees in joint causation cases, (ii) fees in monitoring litigation, (iii) the *Compellent* framework, (iv) percentage of benefit implied by the fee requested, and (v) the "helpful tables" and "insightful ways" for determining fees provided by Plaintiffs' briefs.[152] The court found that Plaintiffs had "done a good job of supporting their analysis and justifying their $12 million fee request, while "[t]he defendants haven't given me anything."[153]

The court commented that "in the abstract" and "without any input from the parties" it might have thought about a lower fee.[154] However, the purpose of briefing and argument is to provide the parties' input so that the court's decision is based on a record and informed by the parties' advocacy, and not rendered "in the abstract." The Court of Chancery properly made its fee determination based on the record and arguments before it. The court found Defendants' extreme positions and failure to

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[151] Opinion at 74.

[152] *Id.* at 75-79. *See also* Plaintiffs' Opening Brief (A158-235) at 44-62; Plaintiffs' Reply Brief (B348-95) at 32-37.

[153] Opinion at 79.

[154] *Id.* at 79.

meaningfully engage with the pertinent precedents was "just unhelpful and a nonstarter."[155]

3. Defendants' Attacks on the Fee Award Do Not Establish an Abuse of Discretion

Defendants' attack on the reasonableness of the Court of Chancery's fee award is largely a rehash of (i) their improper attempt to shift the causation burden and (ii) their unsuccessful causation arguments rejected below.

a. Defendants' Continuing Failure to Address Precedents

Defendants do not address the percentage awards in *Sugarland* and other precedents attributing to litigation up to 20-25% of the benefit in joint causation cases or the precedents awarding 1.25–1.5% of price increases in monitoring cases.[156] They do not mention the *Smith* case the Court of Chancery cited, which summarizes the fee awards in various joint causation cases.[157] Just as the court found below, Defendants on appeal refuse to engage with the pertinent precedents and persist in their no claim, no causation, no fee (or minimal fee) approach.[158]

b. *Compellent*

The Court of Chancery did not base its fee award on *Compellent*, as Defendants contend (DOB 36). *Compellent* was "only one marker on the

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[155] *Id.* at 80.

[156] *Id.* at 78-79.

[157] *Id.* at 78 (citing *Smith*, 2014 WL 1599935, at * 14-15, n.4).

[158] Opinion at 79-80.

chessboard."[159] The Vice Chancellor cited *Compellent* as showing that a substantial fee could be awarded even if Plaintiffs had caused elimination of the Rights Plan but no higher bid occurred.[160] *Compellent* was not a direct precedent but an effort to price the benefits of litigation removing a rights plan where no topping bid emerged.[161] Under the *Compellent* analysis, a fee of $4 to $6 million would be warranted "in the absence of the Merck bid."[162] As Defendants acknowledged, *Compellent* was "Different Than What Actually Occurred"[163] in this case. What actually occurred here was a far larger benefit because the removal of the Rights Plan contributed to the success of an actual topping bid that increased the merger consideration by $1.17 billion. As the Vice Chancellor observed "[here] we have two real events:" "the Merck first proposal at $48" and "the second Merck bump to $53."[164] Because of Plaintiffs' contribution to the success of the Merck bid, a substantially higher fee is warranted.

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[159] *Id.* at 76.

[160] *Id*. at 75-76.

[161] *Id*.

[162] *Id*.

[163] DOB 36; Opinion at 75.

[164] Opinion at 74.

c. Professor Subramanian

The Court of Chancery found the analysis of Defendants' expert, Professor Subramanian, purporting to show no statistically significant increase in Versum's stock price when the AIC and Rights Plan were removed, "a little skimpy" and found the rebuttal by Plaintiffs' expert, Murray Beach, raised "persuasive criticisms."[165] Mr. Beach showed that Subramanian's analysis (i) was not a valid event study and (ii) improperly used a comparison of closing to opening prices.[166] Citing several studies, Mr. Beach explained why an event study was not appropriate for measuring the effects of the removal of the AIC and Rights Plan.[167] Moreover, he demonstrated that using closing prices and a one or two day window, there was some evidence that the elimination of the AIC and Rights Plan may have caused some increase in Versum's stock price.[168] The court's findings rejected Prof. Subramanian's analysis and used Mr. Beach's rebuttal as another guidepost it considered. Moreover, the effect on the market is not a valid proxy for the effect of the litigation on the Board's decision to finally entertain Merck's offer.

Defendants' complaints about Mr. Beach's rebuttal and the court's discussion of stock price movement (DOB 39-42) are disingenuous because Defendants and

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[165] *Id*. at 76. *See* Beach Reply Report (A627-57) at ¶¶ 2(b), 6-14.

[166] *Id.* at ¶ 7 (A631); ¶¶ 10-13 (A633-37).

[167] *Id.* at ¶ 7 (A631); ¶¶ 8-9 & nn 7-12 (A633-37); ¶ 14 (A637).

[168] *Id.* at ¶¶ 10-13 (A633-37).

their expert injected the concept that the fee should be based on stock price movements. Plaintiffs and the court simply responded to Defendants' argument.

4. Defendants' Inapposite Case Law

Defendants' grab bag of inapposite cases from 20 or more years ago (DOB 29-30) involved stockholder litigation that resulted only in transaction modifications other than a price increase,[169] or that achieved no concrete result and only played a secondary "monitoring" role.[170] In contrast, this case was the only litigation, not a monitoring action. It caused specific results (i.e. elimination of the AIC and Rights Plan) that removed obstacles to Merck's $48/share offer and paved the way for the higher $53 per share merger consideration.

First Interstate[171] did not, as Defendants suggest (DOB 30), cause the removal of the poison pill and other defensive devices. The defensive mechanisms were removed as part of a three party settlement agreement among the company and the

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[169] *E.g.*, *In re Am. Real Estate Partners*, 1997 WL 770718, at *6-7; *Chrysler Corp.*, 223 A.2d at 387-88.

[170] *In re Anderson Clayton S'holders Litig.*, 1988 WL 97480, at *4 (Del. Ch. Sept. 19, 1988); *In re QVC, Inc.*, 1997 WL 67839, at *2-3 (Del. Ch. Feb. 5, 1997); *Robert M. Bass Grp., Inc. v. Evans*, 1989 WL 137936, at *3-4 (Del. Ch. Nov. 16, 1989); *In re Dunkin Donuts S'holders Litig.*, 1990 WL 189120, at *7 (Del. Ch. Nov. 27 1990).

[171] *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353 (Del. Ch. 1999) *aff'd sub nom.*, *First Interstate Bancorp v. Williamson*, 755 A.2d 388 (Del. 2000).

two competing bidders.[172] Because the litigation did not achieve any concrete results, the causal connection to the increased offer was too attenuated.[173] Moreover, the court was unable to make a percentage of the benefit fee award because a large part of the increase in the value of Wells Fargo's successful stock-for-stock exchange offer reflected the increase in the market price of Wells Fargo's stock between its original proposal and the final transaction.[174] Furthermore, there was strong evidence that First Interstate's stockholders would not have approved the competing white knight stock-for-stock merger because the other bidder's stock price had declined, while Wells Fargo's stock price increased.[175]

5. The Fee Award Was Not Excessive or Punitive

Defendants' argument that any fee award should be based on lodestar (DOB 41-42) has been consistently rejected in Delaware, from *Sugarland*[176] through *Americas Mining*.[177] Percentage of the benefit is the method for determining fees, not implied hourly rates.[178]

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[172] *In re First Interstate Bancorp Consol. S'holder Litig.*, 729 A.2d 851, 857 (Del. Ch. 1998).

[173] *First Interstate*, 756 A.2d at 363, n.2.

[174] *Id.*

[175] *Id. See also First Interstate*, 729 A.2d at 856.

[176] 420 A.2d at 149-50.

[177] 51 A.3d at 1213, 1254, 1257-58.

[178] *Id.*

A $12 million fee representing about 1% of a $1.17 billion benefit is not unreasonable. In *Sugarland*, 420 A.2d at 149-151, the Supreme Court awarded $640,000 (20% of the first $3.2 million price increase) plus $573,609 (5% of the additional increase) for a total fee of $1,213,609, where plaintiffs' counsel had expended only $122,881 of time at regular hourly rates. *Americas Mining*, 51 A.3d at 1252, approved a fee of 15% of a $2 billion benefit resulting in an over $300 million fee, representing an implied hourly rate of over $35,000 per hour.

The Court of Chancery's award of a very low percentage of the benefit (approximately 1%) took into account joint causation, success at an early stage of the litigation, and the limited time expended.[179] The 1% fee ($12 million) essentially represented only 10% causation credit ($120 million of the $1.17 billion) multiplied by a 10% early stage of the litigation fee percentage.[180]

Defendants' hourly rate argument ignores the contingent risk of getting no fee, the large amount of time and expenses Plaintiffs have had to expend in pursuit of getting <u>any</u> fee, and what will end up being a two-year delay before any fee may be paid. In contrast, Versum in 2019 paid its financial advisors $30 million for little

[179] July 16, 2020 Transcript at 18-21, 23-24, 40-45. Opinion at 77-79.

[180] July 16, 2020 Transcript at 19, 23, 40-41; Opinion at 77-78.

work in a limited time period,[181] and its lawyers have been paid regularly for the last two years.

Defendants argue that the court abused its discretion because the fee award imposed punitive damages. DOB 44-46. This argument fails factually and legally for several reasons.

First, the Court of Chancery's 32 pages of factual findings and legal reasoning show that the court did not make the fee award to punish Defendants.[182] Rather, the court rejected as unhelpful and a non-starter Defendants' aggressive and unreasonable positions the that court should award no fee or a fee limited to Plaintiffs' lodestar.[183] Defendants' approach simply failed.

Second, the fee award was based on the well-established *Sugarland* factors including, primarily, the benefit achieved and the court's careful review of various ways of quantifying that benefit.[184] Plaintiffs offered persuasive evidence and cited applicable precedents supporting the full requested fee. As in *Take-Two*,[185] Defendants failed to engage meaningfully with the precedents and made arguments

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[181] May 13 Proxy (B142-347) at 54, 60.

[182] *Cf.* DOB 43 ("the court opined that Defendants' position…was unreasonable and therefore a justification for granting the full $12 million requested by Plaintiffs.").

[183] Opinion at 47, 80.

[184] *Id.* at 72-83

[185] *Solomon v. Take-Two Interactive Software, Inc.*, C.A. No. 3604-VCL (June 18, 2009) (Transcript).

that were unhelpful.[186] The court's lament reflects disappointment that Defendants failed to provide helpful counter-arguments, not an intent to punish them.

Third, Defendants offer no pertinent legal support for their punitive damages theory. *Beals v. Washington Int'l. Inc.*, 386 A.2d 1156 (Del. Ch. 1978) (DOB 44) only holds that the Court of Chancery does not have jurisdiction to award punitive damages. That did not occur here. The court simply found that Plaintiffs' strong factual evidence and legal support justified the full fee when weighed against Defendants' weak evidence and strained legal arguments.[187]

Fourth, contrary to Defendants' "Henny Penny the sky is falling" argument (DOB 46), the fee award will not deter defense counsel from vigorous advocacy in opposing fee requests. As this case demonstrates, Vice Chancellor Lamb's rejection

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[186] Opinion at 80, 83. *Take-Two* was a comparable situation where the defendants argued for no or, alternatively, a minimal fee award. Vice Chancellor Lamb rejected the defendants' position, and applied *Sugarland* to award a fee based on "a series of substantial benefits achieved." Tr. 63-64. The settlement posture of *Take-Two* does not distinguish it from this case. *Cf.* DOB 45-46. As Vice Chancellor Lamb explained, "[b]ut whether I awarded the fee as a settlement fee or I awarded the fee as a fee in a moot case, I think the fee that I award would probably be the same, given the position that the defendants had taken." *Id*. at 65.

[187] *See e.g.* Opinion at 80 (explaining that Plaintiffs "engaged meaningfully with the precedents and concepts" while Defendants did not). The court did not engage in "baseball-style arbitration." *Cf.* DOB 45. The Court of Chancery has discretion and is not required to make "an award falling in between" Plaintiffs' reasonable ask and Defendants' unreasonable response. *Id.* Here, the court considered a range of fees based on "insightful" and "helpful" tables provided by Plaintiffs and found the $12 million fee was within the range of reasonableness. Opinion at 79.

of overzealous and unreasonable advocacy in *Take-Two* has not deterred corporate defendants from vigorously opposing fee awards. Rather than chill advocacy, affirming the Court of Chancery's discretionary fee award will encourage parties to take reasonable positions supported by credible evidence and precedent.

CONCLUSION

The Court of Chancery's findings are supported by the record and are not clearly wrong. This Court should not substitute its own judgment and second-guess the Court of Chancery's discretionary award. Therefore, the Court of Chancery's judgment should be affirmed.

PRICKETT, JONES & ELLIOTT, P.A.

By: */s/ Michael Hanrahan*
Michael Hanrahan (#941)
Elizabeth M. McGeever (#2057)
Kevin H. Davenport (#5327)
1310 King Street
Wilmington, Delaware 19801
(302) 888-6500

Attorneys for Plaintiff City of Providence

OF COUNSEL:

Lee D. Rudy
Grant D. Goodhart III
KESSLER TOPAZ
MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

Patrick C. Lynch
LYNCH & PINE
1 Park Row, 5th Floor
Providence, Rhode Island 02903
(401) 680-0921

LABATON SUCHAROW LLP

By: */s/ Ned Weinberger*
Ned Weinberger (#5256)
Derrick Farrell (#5747)
Mark Richardson (#6575)
Thomas Curry (#5877)
300 Delaware Avenue, Suite 1340
Wilmington, Delaware 19801
(302) 573-2540

Attorneys for Plaintiff Plumbers and Steamfitters Local 60 Pension Trust

OF COUNSEL:

John Vielandi
David MacIsaac
LABATON SUCHAROW LLP
140 Broadway
New York, New York 10005

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CERTIFICATE OF SERVICE

I, Michael Hanrahan, do hereby certify on this 2nd day of November, 2020, that I caused a copy of Appellees' Answering Brief to be served by eFiling via File & ServeXpress upon the following counsel of record:

William M. Lafferty, Esquire
Ryan D. Stottmann, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
Wilmington, Delaware 19801

Ned Weinberger, Esquire
Derrick Farrell, Esquire
Mark Richardson, Esquire
Thomas Curry, Esquire
300 Delaware Avenue, Suite 1340
Wilmington, Delaware 19801

William B. Chandler III, Esquire
Shannon E. German, Esquire
Wilson Sonsini Goodrich & Rosati, P.C.
222 Delaware Avenue, Suite 800
Wilmington, Delaware 19801

Anthony A. Rickey, Esquire
Margrave Law LLC
3411 Silverside Road
Baynard Building, Suite 104
Wilmington, Delaware 19810

/s/ Michael Hanrahan
Michael Hanrahan (#941)