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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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Rules and Statutes

PRELIMINARY STATEMENT[1]

The Court of Chancery abused its discretion by awarding Plaintiffs' counsel a $12 million fee where Plaintiffs created no monetary benefit. Plaintiffs challenged a rights plan that was being used exactly as has been endorsed by Delaware courts. The Versum Board implemented the Rights Plan after MKDG made a hostile bid; after MKDG indicated it was open to increasing its bid, the Board negotiated with MKDG to achieve an additional $5/share above the original MKDG offer. While the Board amended and then removed the Rights Plan so as to moot Plaintiffs' litigation, neither action played any role in the additional $5/share negotiated by the Board. The Court of Chancery's ruling that Plaintiffs' attorneys are nonetheless entitled to a percentage of the benefit received by shareholders—and an implied $11,000 per hour billed—is premised on two fatal errors.

First, the court applied only a motion to dismiss standard in assessing whether Plaintiffs' claim was meritorious when filed and did not also determine whether Plaintiffs had shown "knowledge of provable facts which hold out some reasonable likelihood of ultimate success." *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 879 (Del. 1980). Plaintiffs do not dispute that this holding underpins the Court's $12 million award. But, Plaintiffs contend the meritorious when filed

[1] Capitalized terms not otherwise defined herein shall have the meaning defined in Defendants' Corrected Opening Brief dated October 9, 2020 (the "Brief").

standard is equivalent to the standard on a motion to dismiss. In doing so, they ignore this Court's plain language in *Baron* that holds them to a higher standard.

Second, the court found that because the Board mooted Plaintiffs' litigation, Plaintiffs were entitled to a percentage of the benefit the Board negotiated for shareholders. Again, Plaintiffs do not dispute that this holding underpins the Court's $12 million award but, instead, double down, trying to contort the law to justify the result. Plaintiffs argue that to obtain a percentage-of-the-benefit award, they need not actually show their litigation was a cause of the benefit. This is incorrect. If defendants moot plaintiffs' claims, plaintiffs get a presumption that they caused the mooting action. But if shareholders realized some <u>later</u> benefit of which plaintiffs seek a portion, they must show their litigation, or defendants' mooting actions, caused that benefit. Absent such a showing, plaintiffs would reap a windfall by inserting themselves in a process in which they provide no value. The Court of Chancery abused its discretion by awarding Plaintiffs such a $12 million windfall. All evidence shows that Plaintiffs' litigation was not a cause of the $53 deal with MKDG. To the contrary, Plaintiffs' litigation was a distraction. Any fee Plaintiffs receive should be based on *quantum meruit*—not the size of a deal they played no role in.[2]

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[2] Plaintiffs' Answering Brief claims that Defendants "abandon" their primary arguments below. Ans. at 1. Plaintiffs' failure to meet the meritorious when

filed standard and failure to prove they achieved any quantifiable benefits were Defendants' primary arguments below. *See* A270–94; Ex. B at 25–34.

ARGUMENT

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

A. The Question Is Preserved

The trial court failed to evaluate whether Plaintiffs' lawsuit was "meritorious when filed," which requires the court to determine whether the suit could "withstand a motion to dismiss on the pleadings if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success. It is not necessary that factually there be absolute assurance of ultimate success, but only that there be some reasonable hope." *Baron*, 413 A.2d at 879. Rather than applying this standard, the Court of Chancery evaluated only whether Plaintiffs' claims would survive a "motion to dismiss" and applied a "reasonably conceivable" standard. Ex. B at 58–61.

Contrary to Plaintiffs' contention, Defendants plainly raised this issue below. A question is "fairly presented to the trial court" under Rule 8, and may be raised on appeal, where "that issue was briefed in the trial court." *Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002); *see also N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382–83 (Del. 2014) (rejecting a Rule 8 challenge because the "broader issue" had been raised before the trial court). Defendants' brief set out the correct "meritorious when filed" legal standard. *See* A272 ("A suit is

deemed 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.'"). Indeed, Plaintiffs' brief also quoted the correct standard. A193. The Court of Chancery erred by failing to apply it.

B. The Court Of Chancery Applied The Wrong Legal Standard.

The Answering Brief concedes that the standard quoted above from *Baron* applies to Plaintiffs' claim. Ans. at 11–12. Plaintiffs do not dispute that the Court of Chancery failed to even recite this standard in its opinion. The court wrongly held that "[a] claim is meritorious when filed if it would survive a motion to dismiss" (Ex. B at 58) and proceeded to apply only a "reasonably conceivable" standard to Plaintiffs' claim (*id.* at 61).

In an effort to justify the court's error, Plaintiffs claim the *Baron* standard requires them to show only that their claim can survive a motion to dismiss. This argument ignores the Supreme Court's language in *Baron.* It also contradicts Plaintiffs' briefing to the Court of Chancery, where they acknowledged they were required to show their claim "would survive a motion to dismiss *and* have 'some reasonable likelihood of ultimate success.'" A193 (emphasis added); *see also id.* at

A194 (claiming Plaintiffs' challenge had a "Reasonable Likelihood of Success Under *Unocal*").

Plaintiffs' other arguments are straw men. First, Plaintiffs incorrectly claim that Defendants advocate for a preliminary injunction standard. *See* Ans. at 13, 16. But Plaintiffs do not point to anything in Defendants' brief. Far from advocating for "conflicting standards" (Ans. at 16), Defendants argue that the court failed to apply the very standard Plaintiffs concede applies to their claim.

Second, Plaintiffs contend that the "pertinent timeframe" for evaluating whether a claim was meritorious is the time of filing. Ans. at 14. The point in time at which the merits of Plaintiffs' claims are assessed is not the question at issue in this appeal. The question is what *standard* applies in making that assessment. On the substance, moreover, Plaintiffs' argument is contradicted by their own positions below. Plaintiffs specifically relied on allegations regarding events up through the removal of the Rights Plan—weeks *after* the complaints were filed. *See* A193–94. In opposition, Plaintiffs continue to argue that post-filing conduct—namely, the mooting of their claim—suggests it was meritorious. *See* Ans. at 19–20. This is simply wrong. Whether Defendants mooted a claim is an entirely separate inquiry from whether the claim was meritorious. *See United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997) (plaintiffs must establish suit was meritorious, and, separately, that the action producing a benefit to the corporation

was taken by the defendants before a judicial resolution was achieved).[3] Holding that a claim is meritorious because it was mooted would have the perverse incentive of incentivizing boards to engage in unnecessary litigation.

The Court of Chancery failed to apply the "reasonable likelihood of ultimate success" standard, and Plaintiffs do not meet it. Plaintiffs premise their fee application in large part on the removal of the Rights Plan, but Plaintiffs' original complaint *conceded* that, absent an AIC Provision, a generic rights plan provided "no [other] cause to petition the Court for relief." A48. The court—in applying the wrong standard—faulted the Board for "refus[ing] to engage with [MKDG] and "fail[ing]" to determine that the [MKDG] bid was reasonably likely to lead to a superior proposal." Ex. B at 61. But the court ignored that the Board's deferral of this decision was an express negotiating tactic intended to increase the Board's leverage, which was well within the Board's business judgment under *Unocal*. *See* A463. Analysts immediately predicted that MKDG would respond by increasing its bid. Br. at 11–12. And, indeed, MKDG did respond by indicating it would increase

[3] *Iroquois Indus., Inc. v. Lewis*, 318 A.2d 134 (Del. 1974) (PER CURIAM) does not say otherwise. There, the court gave plaintiffs leeway in their pleading because they did not have the opportunity to amend their complaint. *Id.* at 134–35. Here, Plaintiffs did amend.

its bid. The Board then negotiated a $5/share increase. *Id.* at 14–16. Applying the correct standard, Plaintiffs' suit was not meritorious.

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

A. Plaintiffs Have The Burden To Show Their Litigation Caused A Quantifiable Benefit

The Court of Chancery erred by awarding Plaintiffs $12 million in fees measured as a percentage of a purported "benefit conferred" where Plaintiffs did *not* show their litigation achieved any quantifiable benefits. Plaintiffs did not obtain a monetary benefit. Instead, they obtained a corporate therapeutic benefit (in the form of causing amendment and removal of the Rights Plan), but this therapeutic benefit does not equate to the ultimate benefit for which Plaintiffs seek credit: shareholders' receipt of increased consideration under the MKDG deal.

The court presumed that because Plaintiffs' litigation led to corporate action, Plaintiffs were entitled to a fee "based on benefit conferred." Ex. B. at 82–83. In an effort to justify this error, Plaintiffs contend they had no burden. They argue that because the litigation caused the Board to amend the Rights Plan and terminate it earlier than it otherwise would have, they are entitled to a "presumption" that the litigation contributed to the increased merger consideration received by shareholders. *See* Ans. at 23.

This is not the law. To obtain fees measured as a percentage of a benefit (as opposed to *quantum meruit*), Plaintiffs must establish that their litigation—or the

corporate actions taken to moot it—were a cause of the benefit. Br. at 28–30 (collecting cases). In determining a fee award, the court is to assess the factors from *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980), and "[a]ll of the *Sugarland* factors are contingent upon the benefit at issue being *causally related to the efforts of counsel* in pursuing their action." *In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 293 (Del. 2002); *see also e.g.*, *In re Am. Real Estate Partners*, 1997 WL 770718, at *6 (Del. Ch. Dec. 3, 1997) ("[P]laintiffs have the burden of establishing the value of the claimed benefit."); *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 benefit from plaintiff's litigation, which challenged a rights plan amendment, "cannot be quantified"); *In re QVC, Inc. S'holders Litig.*, 1997 WL 67839, at *3 (Del. Ch. Feb. 5, 1997) (where "the benefit is susceptible of neither precise attribution nor quantification . . . a *quantum meruit* analysis provides the means of determining an appropriate award"); *Chrysler Corp. v. Dann*, 223 A.2d 384, 389–90 (Del. 1966) (affirming *quantum meruit* award where claimed benefit could not be measured); *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *8 (Del. Ch. Nov. 27, 1990) (applying *quantum meruit* because of "the attenuated nature of the benefit conferred").[4]

[4] Plaintiffs' attempt to factually distinguish these cases misses the point. All stand for the legal principle that the benefit must be quantifiable to merit a

Plaintiffs also conflate the question of whether they are entitled to *any* fees with whether they are entitled to a percentage-based award. Plaintiffs cite *TakeCare* for the proposition that where a defendant moots the litigation, it bears the burden of rebutting the presumption of causation. In *TakeCare*, however, the Court addressed whether plaintiffs were entitled to any fees, and, in that inquiry, defendants that moot a litigation do bear the burden. 693 A.2d at 1080. The *TakeCare* Court expressly did *not* address how fees are to be measured, or whether the plaintiff was entitled to a percentage of a purported benefit. *Id.* at 1081 n.17 ("We express no opinion whether [plaintiff], even if it shows that its suit had some causative effect on the increased tender offer price obtained, is entitled to fees and costs in any particular sum."). On remand, the Court of Chancery found plaintiffs were entitled to fees because defendant did not rebut the presumption of causation, but awarded fees measured on *quantum meruit* because any contribution by plaintiffs to the corporate benefit was not quantifiable. *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 857 (Del. Ch. 1998).

Elsewhere, Plaintiffs acknowledge it is their burden to "establish[] the value of the claimed benefit," but contend they have done so because it is a

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percentage of the benefit award. Plaintiffs also mischaracterize Defendants by claiming they "admit" they have the burden. Ans. at 26. The Brief says the opposite. *See* Br. at 29.

"mathematical fact" that shareholders received $1.17 billion more in consideration from MKDG's $53/share offer compared with the implied value of the Entegris merger of equals. Ans. at 21–22, 24–25. But the relevant question is not whether shareholders achieved some benefit after the litigation was filed. "[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); *see also Sugarland*, 420 A.2d at 150 ("[Petitioners] seeking compensation for services rendered in litigation . . . are not brokers or real estate agents seeking a commission or a percentage of sale price for having produced a buyer. And how much anyone would pay [for company property] . . . was a circumstance neither caused nor influenced by petitioners.").[5]

Finally, Plaintiffs slay a straw man in arguing they need not show they were the "sole" cause for a benefit to obtain fees measured as a percentage of that benefit (Ans. at 23, 27). This point is undisputed. As Plaintiffs' case citations

[5] *See also* FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 327.10 ("[B]enefits . . . not caused by plaintiff's efforts, generally do not provide any basis for awarding a fee."); *Chappaqua Family Tr. v. MGM/UA Commc'ns Co.*, 1997 WL 33173285, at *2 (Del. Ch. July 10, 1997) (denying fee application "because here nothing was done in the litigation itself to achieve the benefit that is claimed").

illustrate, however, to obtain percentage-of-the benefit fees, they must show their litigation, at least in part, achieved the benefit.[6] The purpose of such fee awards is to incentivize litigation that achieves shareholder benefits and compensate attorneys for having achieved those benefits. *See Goodrich v. E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1050 (Del. 1996). Were Plaintiffs able to receive percentage-of-"benefit" awards without actually establishing their litigation was a cause of any benefit, this purpose would be undermined and attorneys would reap windfalls at shareholders' expense.

B. Plaintiffs Did Not Create A Quantifiable Benefit

The court also erred by awarding Plaintiffs $12 million in fees measured as a percentage of the increased merger consideration because the record demonstrated that—regardless of which party carries the burden—Plaintiffs' litigation played no causal role. In short: MKDG made its initial $48 offer before Plaintiffs filed suit (A309–10), at which point MKDG already had approval from its boards to offer up to $50/share (*id.*). While the Rights Plan was still in place: the Versum Board obtained permission from Entegris to engage in discussions with

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6 *See Smith v. Fid. Mgmt. & Research Co.*, 2014 WL 1599935, at *11 (Del. Ch. Apr. 16, 2014) (plaintiffs must play a "contributory role in generating the result"); *Aaron v. Parsons*, 139 A.2d 365, 367–68 (Del. Ch. 1958) (finding that plaintiffs' counsel did not achieve "an ascertainable part of a calculable fund" and therefore were not entitled to fees "related to the size of the settlement").

MKDG (A541); MKDG conveyed the possibility that it would improve its $48 offer after review of further diligence (*id.*); the Board then determined MKDG's offer could reasonably lead to a Superior Proposal (a decision they expressly deferred when the offer was first made, *see supra* page 6); the Board agreed to an NDA with MKDG and provided it with nonpublic information (A542); and MKDG shared a draft merger agreement with Versum (*id.*). Then, after removing the Rights Plan, the Board negotiated with MKDG and achieved a revised offer of $53, which, after considering a counter offer from Entegris, it accepted. A542–44. The record shows that Plaintiffs had no involvement in negotiations with MKDG; nor did the amendment and removal of the Rights Plan play any role.[7]

The Werth Declaration (from MKDG's Global Head of M&A) underscores that the amendment and removal of the Rights Plan played no role. Mr. Werth stated, "[t]he presence, absence or modification of the poison pill did not

[7] At most, then, Plaintiffs' award should be based on *quantum meruit* like in *In re First Interstate Bancorp Consolidated Shareholders Litigation*, 756 A.2d 353 (Del. Ch. 1999), *aff'd sub nom. First Interstate Bancorp v. Williamson*, 755 A.2d 388 (Del. 2000). While Plaintiffs try to distinguish the facts, the legal principle in that case applies equally here. The court described plaintiffs' claims related to the rights plan at issue as "a prominent claim rendered moot by the defendants' actions," but awarded fees on a *quantum meruit* basis because "plaintiffs have shown only a relatively weak correlation between their efforts and the outcome or benefit claimed." *Id.* at 357, 364. Here, Plaintiffs have shown no correlation.

influence MKDG's plans or strategies in any way or at any time." A311. The relevant boards that approved the initial and increased MKDG offers did not even know about the Rights Plan. A317.

Marketplace evidence further shows that no portion of the increased merger consideration from MKDG's $53 offer was attributable to Plaintiffs. While it is undisputed that Plaintiffs' litigation played a causal role in the Board's decision to amend and then terminate the Rights Plan earlier than it would have otherwise, Versum's stock price did not move with any statistical significance following the announcement of these events. A576–77, A588–89. The stock price returns and trading volumes on both days following the announcements were also not statistically significantly different from normal. A601–02. This illustrates that the market did not perceive these events to be quantifiable benefits. *Id.*

Notwithstanding this factual record, the Court of Chancery erroneously held that Plaintiffs were entitled to a fee award measured as a percentage of the increase in merger consideration because the litigation caused the amendment and removal of the Rights Plan. Ex. B at 82–83. The only "evidence" the court cited for the proposition that these corporate governance events played a causal role in the $53/share deal with MKDG was the Beach Reply. But, as Plaintiffs do not dispute, the court cited the Beach Reply for opinions that Beach did not offer. *See* Br. at 40–41. Beach observed only statistically insignificant variations—which he did *not*

attribute to amendment or removal of the pill—and did *not* opine that these constituted material benefits to shareholders. A636–37. Yet the court claimed Beach had calculated a "total benefit" to shareholders, and it used that purported benefit to calculate a fee award. Ex. B at 76. This was an abuse of discretion because there were no facts—and the court found no facts—to show any portion of that "total benefit" was caused by Plaintiffs.

The Answering Brief attempts to muddle the issues by conflating legal standards and making a new (and meritless) argument not raised below. Plaintiffs repeatedly tout the court's findings that the litigation caused the amendment and removal of the Rights Plan. *See* Ans. at 31–32. But, as discussed above, the fact that Defendants mooted Plaintiffs' litigation does not entitle Plaintiffs to a portion of some future benefit received by stockholders unless Plaintiffs show the mooting actions played a role in achieving that benefit. This analysis is missing both from the court's opinion and the Answering Brief.

Much of Plaintiffs' Answering Brief is devoted to the contention that Defendants failed to prove that the Board's decision to accept MKDG's $53/share offer and terminate the merger agreement with Entegris was not caused by the litigation. Ans. at 28–30, 34–35. However, it is Plaintiffs that carry the burden, and they did not argue below that the litigation caused the Board to accept MKDG's revised offer. Plaintiffs' attempt to raise it on appeal further illustrates the fallacy of

their argument that Defendants bear the burden: Defendants cannot be required to rebut an argument Plaintiffs did not make.[8]

Moreover, Plaintiffs' new argument is plainly meritless. On April 7, the Board considered MKDG's $53 offer and determined it was a Superior Proposal. A543. At this point, Plaintiffs had already (on April 3) withdrawn their motion for expedited proceedings, indicated they were no longer seeking an injunction, and stopped taking discovery. A156–57. The crux of Plaintiffs' Complaint was that the Board breached its duties by implementing the Rights Plan. A102–03; *see also* Ans. at B521 (declaration from Plaintiffs' counsel asserting that the Rights Plan is "the primary subject of this Action"). As of April 3, the Rights Plan was withdrawn. A156. While the litigation had not been dismissed, there is no reason it would have any effect on the Board—nor do Plaintiffs even propose such a reason.

Furthermore, the definitive proxy statement relating to the MKDG merger—which Defendants submitted in opposition to Plaintiffs' fee application—explains the reasons why the Board selected MDKG's $53 bid. Those reasons had nothing to do with the litigation. The Board carefully considered the potential value

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[8] Plaintiffs misleadingly suggest this new argument was considered by the court. Ans. at 29. It was not. Plaintiffs' citations are to portions of the court's oral decision finding that Defendants did not contest that the litigation had a causal effect on the amendment and removal of the pill. *See* Ex. B at 13–14, 35–36, 63.

of the competing Entegris and MKDG offers and concluded that MKDG offered more value for shareholders and that $53 was "the highest price per share [MKDG] was willing to pay." A539–40, A545. The discussion in the proxy, which was subject to the SEC's rigorous disclosure requirements (and unchallenged by Plaintiffs), further underscores a common-sense fact that Plaintiffs did not even contest below: the litigation had nothing to do with the Board's acceptance of MKDG's $53 offer.[9]

Notably, while attempting to raise a new argument, Plaintiffs largely abandon the arguments they made below: that the litigation was a cause of the $53/share deal with MKDG because the amendment and removal of the Rights Plan removed an "obstacle" to MKDG, "opened the door" for MKDG, and "resulted in a bidding contest between [MKDG] and Entegris." A190, A218–21. Plaintiffs downplay their prior arguments because the Court of Chancery's decision did not

[9] By contrast, in the cases cited in the Answering Brief, the plaintiffs were either directly involved in negotiations or caused a third party to settle claims on terms that created a benefit to the corporation. *Smith*, 2014 WL 1599935, at *13 (where "class counsel monitors the work of the special committee and *negotiates separately* with the controller," counsel is "deemed to have played a material role in causing the controller to increase the transaction price") (emphasis added); *Aaron*, 139 A.2d at 367 (derivative lawsuit by stockholders against corporation and third-party bank led to settlement between corporation and bank conditioned on settlement of stockholder suit). Here, Plaintiffs were not involved in negotiations with MKDG, and Plaintiffs' litigation did not influence anything MKDG did.

cite any facts to support them, and the record contradicts them. The AIC Provision had no effect on MKDG. This is confirmed by the Werth Declaration (A317–18); MKDG's contemporaneous documents—which do not mention the AIC Provision and note the Rights Plan "[d]oes not preclude any of our currently contemplated actions" (A324); and the fact that, while the AIC provision was in place, MKDG filed a preliminary proxy statement opposing the Entegris merger and met and communicated with shareholders regarding its $48 offer and opposition to the Entegris merger (A314–16). The court did not cite any evidence to show that the AIC Provision had an effect on MKDG. It erroneously premised its award on its speculative concerns that the AIC Provision *could* have affected MKDG under certain theoretical circumstances that did not actually occur. *See* Br. at 38–39; *see also* Ex. B at 65 ("[MKDG] well *could* have blundered into a situation where Versum *could* wield the [AIC Provision]) (emphasis added).

The Rights Plan as a whole also had no effect on MKDG. MKDG expected that Versum would institute a rights plan because it is "a routine response to an unsolicited acquisition proposal." A310. MKDG's contemporaneous documents similarly demonstrated that rights plans such as Versum's were "nothing unusual after receiving an unsolicited proposal" and "[i]n practice . . . are never triggered." A324. The "poison pill did not then, or ever, have any impact on MKDG's planning or thinking with regard to its acquisition strategies." A310.

While the court found that, in theory, a rights plan can be used as a "just-say-no" defense (Ex. B at 64, 70), there is no evidence that it was used that way here. The Board consisted of a majority (5 of 7) of independent directors. After implementing the Rights Plan, the Board continued to analyze MKDG's offer, and, while the Rights Plan was in place, commenced the negotiations with MKDG that yielded the improved $53 offer. *See* Br. at 11–14.[10]

The Court of Chancery also emphasized that MKDG's $48 tender offer could not be consummated with the Rights Plan in place. Ex. B at 64, 68. But this shows the Rights Plan was benefitting shareholders; not hurting them. Had MKDG's $48 offer closed, shareholders would have received $5/share less than they received from the $53/share offer that the Board negotiated. Rather than inhibiting a bidding contest—which was the premise of Plaintiffs' fee application (A220)—the Rights Plan facilitated a bidding contest by requiring MKDG to engage with the

[10] Plaintiffs' assertion that negotiations between MKDG and Versum on March 28 and April 1–2 were "not substantive" (Ans. at 34) is meritless on its face. The parties' meetings on those dates resulted in both an indication by MKDG that it would improve the terms of its original offer, negotiation of an NDA, and an initial draft of a merger agreement being shared following the parties' due diligence meetings over two days. *See* A541–42. Plaintiffs' assertion that settlement discussions between Defendants' and Plaintiffs' counsel were ongoing before Defendants negotiated with MKDG (Ans. at 34) is of no relevance. Plaintiffs do not explain why settlement discussions were relevant to Defendants' negotiations with MKDG, nor do they demonstrate that Plaintiffs caused the Board to engage with MKDG.

Versum Board, which negotiated for increased consideration. As explained by Professor Subramanian, and endorsed by Delaware courts, this is precisely how rights plans should be used for the benefit of shareholders. A572; *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 481 (Del. Ch. 2000) (a rights plan "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 response, Plaintiffs raise only irrelevant, and incorrect, quibbles. They claim the Werth Declaration is somehow inconsistent with MKDG's proxy filings, which said its $48 tender offer was contingent on removal of the Rights Plan. But the Werth Declaration makes that very statement. A316–17.[11] Tellingly, Plaintiffs do not (and cannot) dispute that, as reflected in the Werth Declaration, the Rights Plan in no way inhibited MKDG from increasing its offer to $53, nor did its elimination in any way cause MKDG to increase its offer.

Plaintiffs introduced no evidence that shows the amendment and removal of the Rights Plan affected MKDG's bidding or in any way caused the Board to negotiate with MKDG and achieve the increase in consideration that

[11] Because Defendants and Mr. Werth do not dispute that MKDG's $48 offer was contingent on removal of the Rights Plan, Plaintiffs' contention that such a dispute was not "raised below" is a red herring. *See* Ans. at 33.

Plaintiffs are trying to claim a portion of. The court abused its discretion by awarding Plaintiffs "percentage of the benefit" fees for a benefit Plaintiffs did not show they played any quantifiable role in achieving.

C. The Court Of Chancery's Award Was Punitive

The Court of Chancery noted that it had "paused over" Plaintiffs' $12 million request, equal to an implied hourly rate of nearly $11,000, but proceeded to grant the full request because it found Defendants made "really aggressive" or "extreme" arguments in opposition. Ex. B at 80, 83. The court's award was "influenced by" Defendants' position, which it described as "unhelpful and a nonstarter." *Id.* at 80. As explained above, Defendants' arguments were not aggressive or extreme. Moreover, the court's decision punishes and potentially deters zealous, good faith advocacy—a result that clearly constitutes reversible error.[12]

In opposition, Plaintiffs make the sweeping assertion that "[p]ercentage of the benefit is the method for determining fees, not implied hourly rates" (Ans. at

[12] Plaintiffs incorrectly claim that Defendants failed to address "pertinent precedents" below such as *Smith*, and monitoring cases where counsel were awarded 1.25–1.5% of price increases. In fact, Plaintiffs addressed both. *See* A292. In *Smith* and the precedents it cites, plaintiffs' counsel both monitored the work of others *and* took an active part in negotiating the terms of a transaction. The monitoring cases often involved agreed settlements, and the absolute dollar amounts were far below the $12 million Plaintiffs were awarded here.

43)—ignoring the Delaware precedent awarding fees based on *quantum meruit* where plaintiffs' litigation causes no quantifiable benefit. *See supra* pages 8–9. Further, none of the facts or precedent cited by the Court of Chancery or Plaintiffs support an award of the magnitude Plaintiffs sought and the court granted in full.

- The sole "evidence" cited by the court in support of its $12 million award was from the Beach Reply. As discussed above, however, the Court relied on opinions that Beach did not offer. *See supra* page 14.
- The court leaned heavily on an "imagined hypothetical" drawn from the Vice Chancellor's decision in *In re Compellent Technologies, Inc. Shareholder Litigation*, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011) (which the court found justified only a $4–$6 million award). The facts of this case are far different from *Compellent.* Br. at 36–38. In opposition, Plaintiffs claim that they are entitled to an even bigger award than plaintiffs in *Compellent* because here, an actual topping bid emerged. Ans. at 39–40. But Plaintiffs had nothing to do with MKDG's topping bid and conceded below that MKDG's "ability and willingness to raise the price to $53 was not controlled by Plaintiffs." A223.
- Plaintiffs claim the court's award is reasonable in light of *Sugarland* and *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012). Ans. at 43–44. Neither case justifies the award. The *Sugarland* court premised a much smaller $640,000 award on plaintiffs' achievement in actually enjoining a sale. 420 A.2d at 145. Here, Defendants were not enjoined from consummating the Entegris merger, and competitive bidding had already been fostered by Versum, Entegris, and MKDG without any involvement by Plaintiffs. *Americas Mining* is the only case Plaintiffs cite where the fee award had an implied hourly rate in the same stratosphere as the nearly $11,000 awarded to Plaintiffs; Plaintiffs in *Americas Mining* recovered over $2 billion from a controlling shareholder in a derivative action that was

> litigated through trial. 51 A.3d at 1218. Plaintiffs here did not recover anything for shareholders.[13]

The court's award punished Defendants' shareholders for counsel's good faith (and correct) arguments in opposition to Plaintiffs' fee application. Such punishment has no basis in Delaware law and was an abuse of discretion.

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[13] Plaintiffs' attempt to justify the Chancery Court's reliance on *Solomon v. Take-Two Interactive Software, Inc.*, C.A. No. 3604-VCL (Del. Ch. June 18, 2009) (TRANSCRIPT) emphasizes a procedural point of how fees were awarded while ignoring why the court found they were justified in that case. Ans. at 46. The factors that influenced the court's award in *Take-Two*—defendants advocating for inconsistent positions—are not present here.

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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CERTIFICATE OF SERVICE

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