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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MANTI HOLDINGS, LLC, MALONE MITCHELL, WINN INTERESTS, LTD., EQUINOX I. A TX, GREG PIPKIN, CRAIG JOHNSTONE, TRI-C AUTHENTIX, LTD., DAVID MOXAM, LAL PEARCE, and **JIM RITTENBURG,**	:	No. 354, 2020
Petitioners-Below/ Counterclaim Defendants-Below/Appellants/ Cross-Appellees,	:	Court Below: Court of Chancery of the State of Delaware C.A. No. 2017-0887-SG
v.	:	
AUTHENTIX ACQUISITION COMPANY, INC.,	:	
Respondent-Below/ Counterclaim Plaintiff-Below/Appellee/ Cross-Appellant.	:	

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

DATED: February 22, 2021

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INTRODUCTION[1]

Authentix's cross-appeal asserts two errors by the court below: first, that it was error to award Petitioners "prejudgment interest" on merger consideration as a matter of equity or otherwise, and second, that it was error to deny Authentix prejudgment interest on the attorneys' fees and expenses that the court below awarded to it.[2]

As to the first issue — equitable interest awarded on merger consideration — Petitioners' answering brief on cross-appeal surprisingly does not offer any argument supporting the basis actually utilized by the court below to award interest: equity.[3] Rather, Petitioners claim entitlement to prejudgment interest "as a matter of right" despite not having an underlying judgment in their favor or any contractual right to payment or interest that has been breached, and they seemingly assert an unpled "unjust enrichment" claim for interest despite the undisputed record that Authentix engaged in no wrongdoing and was not "enriched" by Petitioners'

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[1] All defined or abbreviated terms in this brief have the same meanings afforded them in Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal.

[2] Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal at 51-59 (referred to as "Authentix's Opening Brief" and cited as "Authentix's OB at __").

[3] Appellants' Reply Brief on Appeal and Answering Brief on Cross-Appeal at 36-43 (referred to as "Petitioners' Answering Brief" and cited as "Petitioners' AB at __").

decision to breach their agreement and litigate, but was instead impoverished thereby.

As to the second issue — prejudgment interest on the contractual award of attorneys' fees and expenses to Authentix — Petitioners do not dispute that Authentix is entitled to recover its fees and expenses under Section 13(i) of the Stockholders Agreement or argue that the amounts awarded in the court below were unreasonable. Nor do they address the argument advanced in Authentix's Opening Brief that the failure to award Authentix prejudgment interest on the judgment it obtained below was inequitable. Authentix's OB at 57-59. Instead they rely on indemnification and advancement cases that, properly read, actually support Authentix's right to interest, and advocate for a rule that would, without policy basis, effectively preclude payment of prejudgment interest on contractual fee awards under fee-shifting provisions, even where awarding such interest would be necessary to make the aggrieved party whole.

The interest award aspects of the final judgment entered below were in error and should be reversed.

ARGUMENT

I. STANDARD AND SCOPE OF REVIEW

The parties agree that this Court should review the prejudgment interest issues raised by the cross-appeal *de novo*. Authentix's OB at 52; Petitioners' AB at 36.

II. THE COURT BELOW ERRED IN ORDERING AUTHENTIX TO PAY PREJUDGMENT INTEREST ON PETITIONERS' MERGER CONSIDERATION

The court below premised its award of prejudgment interest on the merger consideration exclusively on the exercise of its equitable discretion, declining to address the express contractual provision of the Merger Agreement specifically disclaiming a right to interest (MA § 3.8 (JA0506)), the absence of any statutory right to interest under 8 *Del. C.* § 262(h) (inasmuch as the appraisal petition was being dismissed (Final Order and Judgment ¶ 3)), or the absence of any ripe contractual claim upon which to order payment of the merger consideration. 2020 Op. at 24-25.

Remarkably, in their Answering Brief, Petitioners make no effort to support or even to explain that exercise of discretion. This is undoubtedly because the two factors that the court below identified as the "equities of the situation" do not support the equitable conclusion reached.[4] To the contrary, Petitioners, and Petitioners alone, were responsible for not asking for or receiving the merger consideration, preferring instead to breach their contractual obligation to refrain from exercising

[4] That "Petitioners were stripped of their stock and entitled to consideration therefore [sic] from the time of the 2017 Merger" and that "[t]hese funds of the Petitioners have been held by [Authentix] for the duration of this now-lengthy action" (suggesting an incorrect assumption by the court below that Authentix benefited from holding these funds). 2020 Op. at 24.

appraisal rights by bringing this Section 262 action, and Authentix derived no benefit from Petitioners' choice. Authentix's OB at 55-56; JA2478-80 (Ang Aff.).[5]

Nor do Petitioners offer any argument as to why, on *de novo* review, this Court should exercise its equitable discretion to affirm an award of prejudgment interest on merger consideration. Petitioners do not deny Authentix's showing that Petitioners could have, at any time, chosen to receive the merger consideration but chose not to; that Petitioners, not Authentix, chose to breach the Stockholders Agreement by filing and pursuing this appraisal action; or that the undisputed factual record shows that Authentix did not benefit from Petitioners' choice to forego receipt of the merger consideration so they could litigate this case. Nor do they dispute that the "several novel issues at the intersection of contract and corporate law" at issue in this litigation (2020 Op. at 24) were all resolved *against* Petitioners and in favor of Authentix. All of these factors weigh on Authentix's side of the equitable scale. Against them in counterbalance Petitioners offer none.

Rather than offering any support for the articulated basis of the decision below, Petitioners claim that they are entitled to prejudgment interest on merger

[5] The bald statement in Petitioners' Answering Brief that "[t]he buyer wants an interest-free windfall from its retention of Petitioners' funds since the closing of the Merger" (Petitioners' AB at 36), blatantly ignores the uncontested factual record as to how the merger consideration was held and the consequent absence of benefit to Authentix (or "the buyer") from Petitioners' unilateral decision not to claim the merger consideration.

consideration under Section 262(h). Petitioners' AB at 37. But the court below correctly determined that Petitioners were not entitled to appraisal because "the Petitioners were bound contractually to consent and not object to the sale, which general duty includes a duty [to] 'refrain from exercise of appraisal rights.'" 2018 Op. at 9; *accord.* 2018 Op. at 12. As Petitioners are not entitled to appraisal, they are not entitled to recover interest under Section 262(h), which applies only to interest on "fair value" determined by judicial appraisal.

To get around this, Petitioners seek to manufacture a basis for an award of interest, arguing that the court below "followed *Ford Holdings*" and held that the "specified merger consideration constitutes 'fair value'" on which interest could be awarded. Petitioners' AB at 37. Petitioners' contention is belied by the plain language of the Court of Chancery's decisions. Although Petitioners are correct that the Court of Chancery's 2019 decision was "informed by Delaware precedent, *including* the *Ford Holdings* case" (2019 Op. at 8 (emphasis added)), the court below plainly relied on *In re Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973 (Del. Ch. 1997) for the proposition that a "waiver of appraisal rights is permitted under Delaware law…." (2019 Op. at 9). And Petitioners' appraisal petition was dismissed with prejudice because Petitioners had agreed to "'refrain' from exercising appraisal rights," not because Petitioners agreed in advance to specified merger consideration in the event of a Company Sale. *Id.* at 7-10; Final Order and

Judgment ¶ 3.[6] Moreover, *Ford Holdings* is inapposite because unlike the Designations that established the precise consideration that would be paid to preferred stock in that case (698 A.2d at 978), the Stockholders Agreement did not fix the "'fair value' at a set price" for Petitioners' shares (Petitioners' AB at 37); Authentix did not argue that the Stockholders Agreement fixed the fair value; and the court below made no finding that it did. Rather than fixing a "'fair value' at a set price" in Petitioners' appraisal case, the court below entirely dismissed Petitioners' suit. Petitioners' argument simply ignores what the court below actually did.

Furthermore, Petitioners make no effort to rebut Authentix's showing that there was and is no ripe controversy on which the court below could properly order payment of the merger consideration. Petitioners do not dispute that any entitlement they may have to payment of the merger consideration arises only by virtue of the Merger Agreement, that they have not taken the simple steps required under that agreement to obtain payment (but instead have intentionally chosen *not* to do so), and that Authentix has not denied them payment of the merger consideration in breach of that agreement. There being neither demand for payment nor refusal to

[6] *See also* 2019 Op. at 5 ("Does the DGCL forbid the sophisticated owners of a corporation from negotiating a term as part of a merger agreement that binds them to a future sale and waives statutory appraisal rights? I concluded that it does not.").

pay, the court below had no ripe claim on which to grant judicial relief requiring payment of the merger consideration, and therefore no basis for entry of any money judgment on which "prejudgment" interest could be predicated.[7]

Although Petitioners now argue that Authentix's reliance on Section 3.8 of the Merger Agreement is "misplaced" (Petitioners' AB at 38), they offer no explanation as to why the provision limiting dissenting holders to merger consideration "without any interest" where their appraisal action has failed is unenforceable. MA § 3.8 (JA0506).[8] *See, e.g.*, *In re Appraisal of Dell, Inc.*, 2016 WL 3077828, at *1 (Del. Ch. May 31, 2016) (petitioners "are not entitled to … compensation for taking th[e] risk [that they would not qualify for appraisal] in the

[7] This is not a matter of pleading, as Petitioners' argument would have it. Petitioners' AB at 37-38. By definition, an appraisal claimant seeks appraisal, not the merger consideration. If the claimant's petition for appraisal fails, the claimant has a contractual claim for the merger consideration. But until that contractual claim is made and refused, there is no claim or controversy to plead — in the alternative or otherwise. And, as Petitioners' reference to JA0154 makes clear (Petitioners' AB at 37), Authentix was at all times prepared to provide for payment of the merger consideration if and when requested in accordance with the Merger Agreement.

[8] "[I]f any … holder of Dissenting Shares" — *i.e.* shares for which stockholders chose to pursue appraisal under Section 262 — "shall have failed to establish such holder's entitlement to appraisal rights as provided in Section 262 of the DGCL, … such holder shall forfeit the right to appraisal of such shares and each such share shall … [be] converted … into a right to receive from the Surviving Corporation the portion of the Merger Consideration deliverable in respect thereof … without any interest thereon …." MA § 3.8 (JA0506). Provisions disclaiming a right to interest are standard in merger agreements because no acquirer wants to give target holders a free option to receive interest by simply not turning in shares.

form of an interest award that … the merger agreement did not contemplate"). Nor can they (nor did the court below) explain why it was appropriate for the court below to use equitable powers to override this express contractual language and direct the payment of prejudgment interest to wrongdoers who failed to prevail on any claims. *See, e.g.*, *Neal v. Ala. By-Prods. Corp.*, 1988 WL 105754, at *5 (Del. Ch. Oct. 11, 1988) (refusing to award prejudgment interest on merger consideration to a party that failed to perfect its appraisal rights because (i) Section 262 only authorizes interest to parties entitled to pursue appraisal; and (ii) the notice of merger advised that stockholders were "entitled to receive the merger consideration, *without interest*, upon surrender of their stock certificates").

Similarly, Petitioners make no effort to explain how they were relieved of their contractual obligation to provide a Letter of Transmittal and surrender their share certificates because "Authentix filed a Section 262(f) list." Petitioners' AB at 38.[9] The Section 262(f) list — a list of who has demanded appraisal and is therefore

[9] *See* MA § 3.8 (JA0506) ("[I]f any … holder of Dissenting Shares shall have failed to establish such holder's entitlement to appraisal rights as provided in Section 262 of the DGCL, … each such share … shall be treated as if it had been a Preferred Share or Common Share, as applicable, immediately prior to the Effective Time and converted, as of the Effective Time, into a right to receive from the Surviving Corporation the portion of the Merger Consideration deliverable in respect thereof as determined in accordance with this Article III, without any interest thereon (and such holder shall be treated as a Pre-Closing Holder)."); § 3.1(a) (JA0494-95) (at the Effective Time, each preferred share "shall become the right to receive, subject to surrender of the share certificates evidencing such shares and a duly completed and

a potential member of the appraisal class — is statutorily mandated but does not constitute any admission by the corporation, and indeed Authentix's list contained such a disclaimer. JA0046-48; *In re Universal Pictures Co.*, 37 A.2d 615, 622-23 (Del. Ch. 1944). The filing of the Section 262(f) list did not establish or admit ownership and right to transfer shares, and does not render the obligation to provide a Letter of Transmittal unenforceable; and Authentix's obligation to pay the merger consideration, for sound contractual reasons, is not triggered until this condition is satisfied.[10] *See, e.g.*, Restatement (Second) of Contracts § 225(1) (Am. L. Inst. 2020) ("Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.").

Petitioners suggest that they had a legal entitlement to prejudgment interest "as a matter of right," citing *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992) for the unremarkable proposition that "[i]n Delaware, prejudgment interest is awarded as a matter of right …. [and] is to be computed from the date payment is due." Petitioners' AB at 38-39 (second and third alterations in original). Petitioners' argument fails to support an award of prejudgment interest, however,

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executed letter of transmittal …, the applicable portion of the Merger Consideration"); § 3.1(b) (JA0495) (same for common shares).

[10] The requirement to submit shares for payment with a Letter of Transmittal is no mere formality, but provides, among other things, assurance that the payee actually owns the shares, has the right to submit them, and has the right to payment.

because payment of the merger consideration — by Petitioners' own choice — is not now and never has been due to them. They, and they alone, have chosen not to ask for, or to take the simple steps to receive, the merger consideration, because they wanted to litigate this case instead. The element necessary to trigger the commencement of prejudgment interest — a payment due — does not yet exist, by Petitioners' own choice.

Mehta v. Smurfit-Stone Container Corp., 2014 WL 5438534 (Del. Ch. Oct. 20, 2014) is equally inapt. In dicta, the *Smurfit-Stone* court concluded that an unjust enrichment theory could support *pro se* plaintiffs' claim for merger consideration where the corporation had withheld such funds despite repeated demands from plaintiffs for payment of the merger consideration. 2014 WL 5438534, at *2, *4-5. Here, Petitioners have made no demand for the merger consideration, nor has Authentix withheld the merger consideration from Petitioners. Moreover, Petitioners have failed to explain how Authentix — the aggrieved party — was unjustly enriched given that Authentix did not benefit from holding the merger consideration and, in fact, was impoverished through payment of attorneys' fees and expenses required to remedy Petitioners' breach.[11]

[11] That Authentix could have held the "Merger consideration in an interest-bearing account" rather than placing it with a paying agent who held it in a non-interest-bearing account, or could have pre-paid the merger consideration as permitted under Section 262(h) (Petitioners' AB at 39 n.6), does not amount to enrichment, and

In sum, Petitioners voluntarily elected to forego receiving the merger consideration, gambling that a court would allow them to pursue appraisal. The logic of *In re Appraisal of Dell, Inc.* addresses precisely the consequence of taking such a risk:

> [T]he petitioners knew, at a minimum, that there was a significant risk that they would not qualify for appraisal, … The petitioners could decide to accept that legal risk in the hope that their arguments would prevail, … What they are not entitled to at this point is compensation for taking that risk in the form of an interest award that the statute does not authorize and that the merger agreement did not contemplate.

2016 WL 3077828, at *1. So here. Petitioners' efforts to distinguish *Dell* because it is a "failure-to-perfect" case are unavailing. Petitioners' AB at 38. Just like the petitioners in *Dell*, Petitioners knowingly gambled in pursuing a judicial appraisal remedy, and equity should not intervene to relieve them of the burden associated with legal risks they willingly accepted. *See also Neal*, 1988 WL 105754, at *6 (holding "[e]ven if this Court were to ignore the law [which required payment of merger consideration without interest] and consider only the equities, the result would be the same. ABC has not wrongfully withheld money due to the beneficial owners and there is no evidence that ABC has been unjustly enriched.").

Petitioners offer no basis or authority to suggest that Authentix was required to take either such step.

III. THE COURT BELOW ERRED IN DENYING AUTHENTIX PREJUDGMENT INTEREST

In their Answering Brief, Petitioners do not dispute that Authentix was entitled to recover its attorneys' fees and expenses under Section 13(i) of the Stockholders Agreement, which "entitle[s] [the prevailing party] to recover reasonable attorneys' fees and expenses in addition to any other available remedy." JA0317.[12] Nor do they contest that Authentix was the prevailing party, the court below having dismissed Petitioners' appraisal action — Petitioners' only claim in this case — and granted summary judgment to Authentix on its counterclaims (Final Order and Judgment ¶¶ 2-3). Petitioners likewise do not contest the reasonableness of the attorneys' fees and expenses awarded. The sole issue for appeal regarding Authentix's fees and expenses is whether Authentix is entitled to prejudgment interest on them.

Petitioners' Answering Brief fails even to address Authentix's showing that an award of interest is necessary and appropriate to make Authentix whole given that Petitioners' breach of contract — their failure to refrain from exercising appraisal rights — foreseeably caused Authentix to pay attorneys' fees and expenses to defend, thereby depriving Authentix of other productive uses *pendente lite* of the

[12] Petitioners do not contest that they conceded below, and have not disputed on appeal, that Section 13(i) survived the Merger. *See* Authentix's OB at 57-58 & n.19; Petitioners' AB at 40-43.

funds expended. Petitioners also make no effort to reconcile the irreconcilable contrast between the award of prejudgment interest to Petitioners on merger consideration they chose to forego, and the denial of prejudgment interest on defense costs that Authentix was forced by Petitioners' breach to incur.

Instead, Petitioners advance only a hyper-technical but incorrect argument that an attorneys' fee award under a contractual fee-shifting provision is analogous to an indemnification claim and, therefore, can never bear prejudgment interest because it is not due until awarded. However, unlike an action for indemnification where the resolution of the underlying claim in a certain way is an element of the contractual indemnification obligation itself, the attorneys' fees and expenses were incurred by Authentix because Petitioners breached an independent contractual obligation to refrain from exercising appraisal rights.[13]

Petitioners' references to advancement cases are ironic because those cases support an award of prejudgment interest to Authentix. In advancement cases, the courts have held that once an advancement claim is made and the requisite statutory

[13] *See, e.g.*, *Branin v. Stein Roe Inv. Counsel, LLC*, 2015 WL 4710321 (Del. Ch. July 31, 2015), a case on which Petitioners rely (Petitioners' AB at 40-41), noting that in that indemnification case, the existence of any obligation to provide indemnification — *i.e.*, to perform — could only be determined following resolution of long-running claims in a separate suit in a separate jurisdiction. Here, Authentix was due Petitioners' performance of their obligations under the Stockholders Agreement from the date of approval of the Merger.

undertaking is given, the contractual obligation to perform (to advance funds) arises and prejudgment interest begins to run. *See*, *e.g.*, *Citadel Hldg. Corp.*, 603 A.2d at 826 & n.10. Here, Authentix was entitled to Petitioners' contractual performance (in an advancement case, to advance funds; here, to refrain from exercising appraisal rights) from the moment the Merger was approved. Moreover, Petitioners were aware since at least the filing of Authentix's Counterclaims that Authentix demanded payment for fees and expenses incurred in enforcing its rights. JA0040-44. *See Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 509 (Del. 2001) (upholding prejudgment interest award running from date performance was demanded in the complaint: "with filing of the complaint …. the insurers 'undeniably knew that Hercules was making a claim and undeniably decided not to pay'"); *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *19 (Del. Ch. May 30, 2008) (awarding prejudgment interest at legal rate from the date invoices were paid, once required undertaking was provided — such an undertaking is an element not required by the fee-shifting provision here); *O'Brien v. IAC/InterActive Corp.*, 2010 WL 3385798, at *16 (Del. Ch. Aug. 27, 2010) (prejudgment interest due from date of demand for contractual performance, even though performance delayed "through several levels and years of court proceedings").[14]

[14] To the extent Petitioners draw on advancement cases to suggest that Authentix was required periodically to specify the amount of fees and expenses claimed, they overlook that a specification of fees due is a fundamental element required to trigger

Contrary to Petitioners' assertion that there is no obligation until judgment on the merits is rendered, the attorneys' fees and expenses incurred and paid by Authentix in this case are best characterized as "direct damages" resulting from Petitioners' willful violation of the Stockholders Agreement. *See, e.g.*, *Pro Done, Inc. v. Basham*, 210 A.3d 192, 202-03 (N.H. 2019).[15] Thus, prejudgment interest is entirely consistent with the terms of the Stockholders Agreement, which provides not only for "reasonable attorneys' fees and expenses," but also "any other available remedy," and precedent. SA § 13(i) (JA0317). As the court in *Delphi Petroleum, Inc.* explained:

> Pre-judgment interest is awarded as a matter of right in a Delaware action based on breach of contract or debt. The

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an advancement obligation, whereas in a prevailing-party fee-shifting context the obligation exists independent of any specification, and specification is only necessary to quantify the ultimate damages. And in any event, the court's observation in *Citrin v. Int'l Airport Ctrs. LLC*, 922 A.2d 1164, 1168 (Del. Ch. 2006), would dispose of the issue: "International Airport cannot rely on Citrin's failure to specify the amount of reimbursement he sought as a defense to pre-judgment interest because its own actions prevented Citrin from doing so. … International Airport chose to flatly reject Citrin's demand …. [and] ridiculed the very notion that Citrin was entitled …. Given this conduct, International Airport cannot … avoid a later imposition of pre-judgment interest."

[15]"[A] defendant in an action brought in violation of a covenant not to sue bargained to receive, and exchanged consideration for, the opposing party's promise that it would forbear from bringing suit. Under these circumstances, the lawsuit itself is the object that the bargain intended to prohibit. … [C]onsequential damages resulting from a breach of a covenant not to sue may include, but are not limited to, attorney's fees and costs in defending the action. … [based on] ordinary contractual principles." *Pro Done, Inc*, 210 A.3d at 202-03.

> purpose is two-fold: "first, it compensates the plaintiff for the loss of the use of his or her money; …" Generally, pre-judgment interest accumulates from the date payment [*i.e.*, performance] was due to a party, or alternatively "when the plaintiff first suffered a loss at the hands of the defendant."

Delphi Petroleum, Inc. v. Magellan Terminal Hldgs., L.P., 177 A.3d 610 (Del. 2017) (TABLE) (footnotes omitted). *See also BTG Int'l, Inc. v. Wellstat Therapeutics Corp.*, 188 A.3d 824 (Del. 2018) (TABLE) (awarding prejudgment interest from the point at which "the breach of contract began to impose injury"); *CFLP v. Cantor*, 2003 WL 21488707, at *3 (Del. Ch. June 19, 2003) ("the fair triggering dates are those when CFLP lost the use of its funds by paying the costs to remedy the wrong perpetrated upon it by the Defendants").[16]

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[16] The smattering of out-of-state cases Petitioners cite are inapposite. The prevailing-party provision in *Shared Communications Services of ESR, Inc. v. WHTR Real Estate Ltd. Partnership* — an opinion expressly designated as non-precedential by the court — did not include the "in addition to any other available remedy" portion of Section 13(i). 2017 WL 1372777, at *4 (Pa. Super. Ct. Apr. 13, 2017). The provision in *PPG Industries, Inc. v. Zurawin* explicitly limited the right to attorneys' fees "upon any final judicial determination." 52 Fed. App'x 570, 581 (3d Cir. 2002) (applying Pennsylvania law). The *Gleason* court emphasized repeatedly that it was declining to award interest on attorneys' fees in light of New Jersey's "strong policy disfavoring the shifting of attorneys' fees" (*Gleason v. Norwest Mortg., Inc.*, 2008 WL 2945989, at *5 (D.N.J. July 30, 2008) (applying New Jersey law)), which is inconsistent with Delaware's freedom-of-contract approach that specifically recognizes fee-shifting in stockholders agreements (*see* Original Synopsis §§ 2-3, Del. S.B. 75, 148th Gen. Assem. (2015) (discussing fee-shifting provision in stockholders agreement in connection with new Sections 102(f) and 109(b), 8 *Del. C.* §§ 102(f) and 109(b))).

At bottom, Petitioners advocate for a ruling that would effectively preclude prejudgment interest on all contract-based awards of attorneys' fees and expenses, regardless of whether such fees and expenses were direct damages that the parties agreed would be paid in the event of a contractual breach of the agreement, because, by their logic, the obligation to pay those fees and expenses could only arise once a determination of success on the underlying contract breach had been made and fees and expenses assessed. No policy reason for such a prohibition is advanced, and it would be contrary to the oft-stated purpose of prejudgment interest awards — to make a party that is harmed by contract breach whole. *See, e.g.*, *Trans World Airlines, Inc. v. Summa Corp.*, 1987 WL 5778, at *1 (Del. Ch. Jan. 21, 1987), *aff'd*, 540 A.2d 403 (Del. 1988), *cert denied*, 488 U.S. 853 (1988).

The unexplained refusal of the court below to award Authentix prejudgment interest on fees and expenses actually incurred, from the date so incurred, should be reversed and the case remanded for calculation and award of prejudgment interest at the legal rate.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Authentix's Opening Brief, Authentix respectfully requests that the Supreme Court affirm the Court of Chancery's final judgment in all respects except that the Supreme Court should (i) reverse the award of merger consideration and prejudgment interest to Petitioners, and (ii) remand to the Court of Chancery to award Authentix (a) attorneys' fees and expenses incurred in this appeal, and (b) prejudgment interest on the attorneys' fees and expenses it incurred on appeal and in the court below.

DATED: February 22, 2021

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