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Valuing Therapeutic Benefits For an Award of Attorneys' Fees Post-*In re Compellent Technologies Shareholder Litigation*

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Under Delaware's corporate benefit doctrine, when '"a defendant corporation takes steps to settle or moot a case and in so doing produces the same or similar benefit sought by the shareholder's litigation,'" the court may, in its discretion, award reasonable attorneys' fees.[1] These corporate benefit fee awards frequently arise out of shareholder class action lawsuits challenging M&A transactions. The reasonableness of a fee award under these circumstances is committed to the discretion of the court and there can be no "mandatory methodology or particular mathematical model for determining" fee awards.[2] Rather, *Sugarland Industries, Inc. v. Thomas* provides a list of factors to be used in assessing the reasonableness of a fee award under Delaware law.[3] Of those factors, the most important and heavily weighted is the value of the benefit achieved.[4]

Traditionally, economic and non-economic benefits have not been valued in the same manner for the purposes of a fee award.[5] Economic benefits, such as a settlement fund or (where applicable) an increase in merger consideration, are easily quantifiable. Generally, attorneys' fees for these types of actual, economic benefits are measured as a percentage of the fund or amount secured for the class members.[6] Federal courts typically measure awards of attorneys' fees for economic benefits similarly.[7]

Attorneys' fees for non-economic benefits (so-called "therapeutic" benefits) have traditionally not been subject to similarly precise economic valuation—and perhaps for good reason. When class-action litiga-

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tion is settled for therapeutic benefits, no monetary recovery for the class is involved. Therapeutic benefits frequently consist of additional disclosure surrounding a corporate decision or the modification of (often customary) deal protection devices such as termination fees, match rights or no-solicitation provisions.[8] Fees for therapeutic benefits are generally based on precedent fee awards.[9] They have also been set by the Court with an understanding that therapeutic benefits are modest, deserving of a modest fee, when compared to the actual recovery of money for the class.[10]

Several Delaware Court of Chancery decisions call the dichotomy between economic and therapeutic benefits into question, suggesting that the valuation of therapeutic benefits may be subject to the same mathematical precision as economic benefits. *In re RehabCare Group, Inc. Shareholders Litigation*, *In re Compellent Shareholders Litigation* and *In re Celera Shareholders Litigation* each attempt to mathematically quantify the theoretical value to shareholders of modified deal protection provisions, and then award attorneys' fees as a percentage of that value.[11] Thus, according to this authority, fees for certain therapeutic benefits could be awarded in the same manner as with economic benefits.

Although this authority has resulted in fees within a range (albeit at the high-end) suggested by existing precedent in the limited applications thus far, it presents the possibility for outsized fee awards even in circumstances where the class receives no additional monetary consideration.

The Cases and the Formula

It appears that dicta in a 2011 unreported decision first suggested this new valuation technique for a fee award based on therapeutic benefits.[12] In *In re Del Monte Foods Company Shareholders Litigation*, Vice Chancellor J. Travis Laster awarded interim attorneys' fees for supplemental disclosures but declined to award fees on an interim basis for deal protection modifications.[13] The deal protection modifications resulted from a limited injunction barring defendants from proceeding with a shareholder vote on a proposed merger for 20 days and, during the interim, from enforcing the no-shop, match right and termination fee provisions of the merger agreement.[14] At that point in the litigation, no monetary recovery had been secured for the class.[15]

The court expressed the view that "the benefits conferred by the injunction do not vary depending on whether or not a topping bid actually emerged. Rather, the injunction provided the *opportunity* for a topping bid, and this benefit existed whether or not a competing bidder materialized."[16] The court analogized the benefit of modified deal protections to an insurance policy, suggesting the benefit could be measured similarly, from an economic standpoint:

> **As with an insurance policy, that opportunity was conferred whether or not a bid actually emerged. As with the premium charged for an insurance policy, the value of the benefit does not depend on an actual topping bid. Pricing the benefit requires two inputs: (i) the overall likelihood of a topping bid and (ii) the incremental gain that the likely topping bid would have created.[17]**

As to the first suggested input, the court noted that "[i]f there were some baseline chance of a topping bid, then the benefit calculation would need to focus on the incremental opportunity."[18] The court suggested expert testimony and empirical data on these topics could be helpful.

Several months later, *RehabCare* presented an opportunity to apply this approach. In a transcript ruling, Vice Chancellor Laster approved the settlement of class claims in connection with Kindred Healthcare, Inc.'s acquisition of RehabCare Group, Inc., a transaction valued at approximately $900 million.

The benefits conferred in the settlement included: (1) the reduction in a termination fee from $26 million to $13 million (*i.e.*, from approximately 2.9% to 1.4% of equity value); (2) the elimination of matching rights; (3) the release of eight financial buyers from standstill agreements; and (4) the creation of a $2.5 million settlement fund for the class.[19] No competing bidder emerged following these modifications.

In fixing an award of attorneys' fees for the deal protection modifications, the court applied,

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without expert analysis or other deal-specific guidance, the conceptual methodology outlined in *Del Monte*. The court concluded that the increased likelihood of a topping bid as a result of the deal modifications was approximately 10%, and that the incremental value of such a bid would be approximately 2%, for a range of $50-$100 million. The court awarded plaintiffs' counsel approximately 25% of this "benefit" as well as 25% of a small settlement fund, for a total fee award of $1.7 million, plus expenses.[20] The court noted that measuring therapeutic benefits in this manner "means that the bigger the deal, the bigger the benefit, because there's more potential upside for stockholders. So this, unlike disclosure, is something where size of the deal does matter in the calculation."[21]

Several months later, the Court of Chancery further explained the *Del Monte* and *RehabCare* methodologies in a written opinion. In *In re Compellent Technologies Shareholder Litigation*, parties settled class claims arising out of Dell Inc.'s acquisition of Compellent Tech., Inc., a transaction valued at approximately $960 million. The settlement consideration consisted of, among other things: (1) modification of no-shop, information rights and superior offer clauses; (2) reduction in a termination fee from $37 million to $31 million (*i.e.*, from approximately 3.85% to 3.23% of equity value); (3) rescission of a rights plan adopted in connection with the merger—a modification the court characterized as "exceptional relief"; and (4) a 21-day delay in the scheduled shareholder meeting.[22] Despite these modifications, no competing bidder emerged.

The court found that the benefits of the modified deal protections must be "assessed as of the time settlement was reached by the two groups of fiduciaries who negotiated its terms: the attorneys who acted as fiduciaries for the class, and the Compellent directors who were sued for allegedly breaching their duties."[23] Echoing *Del Monte* and *RehabCare*, the court stated that the "benefit generated from modifying deal protections . . . is an ***increased opportunity for stockholders to receive greater value***."[24] The court reasoned that, for example, a termination fee reduction of $10 million allows more consideration from a topping bid to go to the shareholders rather than the original acquiror:

> **The modification only pays off if there is a topping bid, giving the modification a contingent value at the time of the settlement equal to $10 million discounted by the likelihood that a topping bid will emerge. If the likelihood of a topping bid were approximately 7-10%, then the benefit measured at the time of settlement would not be $10 million, but $700,000 to $1 million. And this figure in turn would not represent the amount of the attorneys' fee award, but rather the benefit that could then be used under a percentage-of-the-benefit analysis. If a plaintiff's efforts warranted approximately 25% of the benefit, then the fee for the reduction would range from $175,000 to $250,000.[25]**

The court further opined that the incremental value shareholders receive from the modification of deal protections includes both the direct benefit from a reduction in the termination fee itself, as well as "the additional, more contingent and causally attenuated value from price increases generated by the topping bid and further bidding."[26] According to the court, such a calculation depends on the increased likelihood of a topping bid under the revised defensive measures. Thus, the court created and applied a formula to determine the value of the benefits and the size of a fee award.

As to a reduction in a termination fee, the court explained that attorneys' fees should be the product of the amount of reduction, multiplied by the increased likelihood of a topping bid, multiplied by a percentage of benefit. Expressed mathematically: (amount of reduction) x (increased likelihood) x (percentage of benefit) = plaintiff counsel's fee for the termination fee reduction.[27]

The court further explained that attorneys' fees for the increased likelihood of a topping bid could be similarly measured. As suggested in *RehabCare*, this component of a fee award would be partially dependent on the size of the transaction: (value of transaction) x (increased likelihood) x (incremental value) x (percentage of

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benefit) = plaintiff counsel's fee for the increased likelihood.[28]

In determining the proper inputs for this formula, the court considered an expert report from Professor Steven M. Davidoff and four empirical studies published in financial journals. Together with its own understanding and research, the court calculated the increased likelihood of a topping bid in *Compellent* to be 8% and the incremental value of such a bid to be 11.37%. The court awarded 25% of the value of the benefit to plaintiffs' counsel. As a result, the court found "the baseline fee award for these two elements of the settlement is approximately $2,303,040."[29]

While Chancellor Leo E. Strine, Jr. has expressed some skepticism concerning this percentage of benefit approach in the context of therapeutic benefits,[30] Vice Chancellor Donald F. Parsons, Jr. applied it in a transaction valued at approximately $680 million. The parties to *In re Celera Shareholder Litigation* settled class claims for benefits that included: (1) a reduction of a termination fee from $23.45 to $15.6 million (*i.e.*, from approximately 3.5% to 2.3% of transactional value); (2) a modification of a no-solicitation provision; (3) an extension of a tender offer for 7 days; and (4) supplemental disclosures.[31] Again, no competing bidder emerged following these modifications. Without any proffered expert or empirical guidance, the court utilized the *Compellent* formula, relying in part on inputs utilized in *RehabCare*, finding the therapeutic benefits in both cases were similar.

The court concluded that the likelihood of a competing bid after the deal protection modifications was approximately 4%. The court found that there were at least four potential competing bidders that had previously performed due diligence on the target, and could have promptly formulated a competing bid after the settlement. The court found the incremental increase of such a bid to be "something in the range of $40 to $75 million."[32] Based on the deal size, the court estimated the value of the therapeutic benefits to the class to be "approximately $1.6 million to $3 million."[33] The court awarded 25% of this value, for a range of $400,000 to $750,000.[34] Together with disclosures valued at $550,000 to $650,000, the court awarded $1,350,000 in fees, inclusive of expenses.[35] As in *RehabCare*, the *Celera* court stated that benefits conferred by modifications to deal protection devices "vary with deal size."[36]

Concerns With the Approach

The *Compellent* court hypothesizes that a termination fee reduction would result in more consideration from a topping bid going to the target shareholders rather than to the original acquiror. This is not necessarily true.[37] For example, imagine an unsolicited bidder willing to pay one dollar more per share in merger consideration than the original acquiror, and absorb the cost of the termination fee. Once the fee is reduced, the bidder could simply make the same one dollar more per share offer and capture for itself the cost savings from the reduced termination fee. In other words, if another bidder emerges after a termination fee is reduced there is no guarantee that the cost savings will end up in the hands of the target's shareholders. Yet, the *Compellent* formula compensates plaintiffs' counsel on the theory that the cost savings will flow to the class, and not the new bidder.

In addition, it is not entirely clear whether the purpose of the formula is to provide another mechanism by which to cross-check the reasonableness of a fee under *Sugarland*, or to serve as a strict determinant of a fee award. The latter may run counter to existing Delaware Supreme Court authority.[38]

That said, *Compellent* can be read as suggesting the formula is best used as a cross-check. As the *Compellent* court explained, the formula may aid in "***resisting*** overly generous awards."[39] To that end, each application of the formula by the Court of Chancery has resulted in a substantial reduction of a plaintiff's fee request.[40] In fact, the three fees awarded thus far by application of the formula have been roughly in line with recent Court of Chancery therapeutic benefit precedent.[41]As a result, the formula might rightly be viewed as yet another mechanism by which to cross-check the reasonableness of a fee, rather than as a strict determinant. There is precedent for this type of cross-check in Delaware—for example, the lodestar method serves a similar purpose.[42]

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If, however, the formula were to be applied as a strict mathematical determinant of a fee award, it would appear to conflict with prior authority. For example, in *Wisconsin Investment Board v. Bartlett*, a plaintiff argued that it should be credited for a $48,000,000 "benefit" resulting from the movement in the stock price of two companies involved in a stock-for-stock merger during a fifteen day delay of a shareholder vote during which supplemental disclosures were disseminated to shareholders.[43] The plaintiff requested 15% of the $48,000,000 benefit in attorneys' fees, for a total award of $7,209,263 plus expenses. Former Chancellor William B. Chandler, III explained that, while the price movement had created a "theoretical" increase in the value of the merger for target shareholders, the projected value "lack[ed] connection to the real world."[44] The court therefore rejected plaintiffs' request for a percentage of the recovery, explaining that the "$48,000,000 'benefit' is a mathematical construct that springs from the fertile and creative imagination of those who would lay claim to a part of it, and expect someone else to pay it."[45]

The *Bartlett* court awarded only $234,063 for the benefits of the supplemental disclosures.[46] The Delaware Supreme Court affirmed the decision.

The Court of Chancery rejected a similar argument that a fee award should be based on a percentage of a theoretical benefit in *Roizen v. Multivest, Inc.*[47] There, a plaintiff argued that its efforts in forcing the abandonment of an underpriced squeeze-out transaction by a controlling shareholder benefited each minority shareholder by $7.25 per share—the difference between the unfair squeeze-out price and the actual value of a minority share.[48] Plaintiff's counsel sought 20% of this "benefit," for a fee award of $320,000. The court rejected this position, finding "no realistically determinable monetary benefit" had resulted from plaintiff's efforts. The court awarded a reduced fee of $218,500, plus expenses, based on the court's own determination under *Sugarland*.

As *RehabCare*, *Compellent* and *Celera* demonstrate, a strict application of the formula would seem to permit exactly what *Bartlett* and *Roizen* refused. Shareholders in *RehabCare*, *Compellent* and *Celera* received no additional consideration from the modification of deal protections, yet the court awarded a fee as a percentage of a theoretical recovery. It appears from a review of the records of *RehabCare*, *Compellent* and *Celera* that no party brought either the *Bartlett* or *Roizen* decisions to the court's attention.

Therapeutic benefits are not the same as monetary recoveries, and, as *Bartlett* and *Roizen* suggest, fee awards based on these differing benefits should not be calculated the same way either. If class counsel is to be compensated on a percentage of recovery basis when deal protections are reduced and no bidder emerges, any percentage of zero should result in a fee award of zero. In addition, it is unlikely that members of a class of shareholders would approve of their counsel being paid as if a competing bidder emerged and made a topping bid, when none actually did. While a reduction in deal protections is a benefit to the shareholder class, and one sufficient to support the settlement of claims, it is not a benefit from which a percentage of recovery fee award should be derived. Indeed, hypothesizing a theoretical monetary recovery when the class actually receives no added merger consideration, and then compensating plaintiffs' lawyers based on the hypothetical, appears to undermine the principles animating contingent fee awards.[49]

The Formula and Large Transactions

Notably, the formula has thus far been applied to small (in M&A terms) transactions—each below $1 billion in total deal value.[50] This is perhaps the reason fee awards under the formula have remained in line with applicable fee award precedent. Both *RehabCare* and *Celera*, however, appear to contemplate that under the formula the modification of deal protections in larger transactions should produce larger benefits, and (arguably) in turn larger awards of attorneys' fees.

Unfortunately, this suggestion and the inputs used in the formula create the opportunity for absurd results and socially unwholesome windfall awards.[51] This concern is compounded when one considers that many class action challenges to M&A transactions involving companies domiciled in Delaware are filed outside of Delaware,

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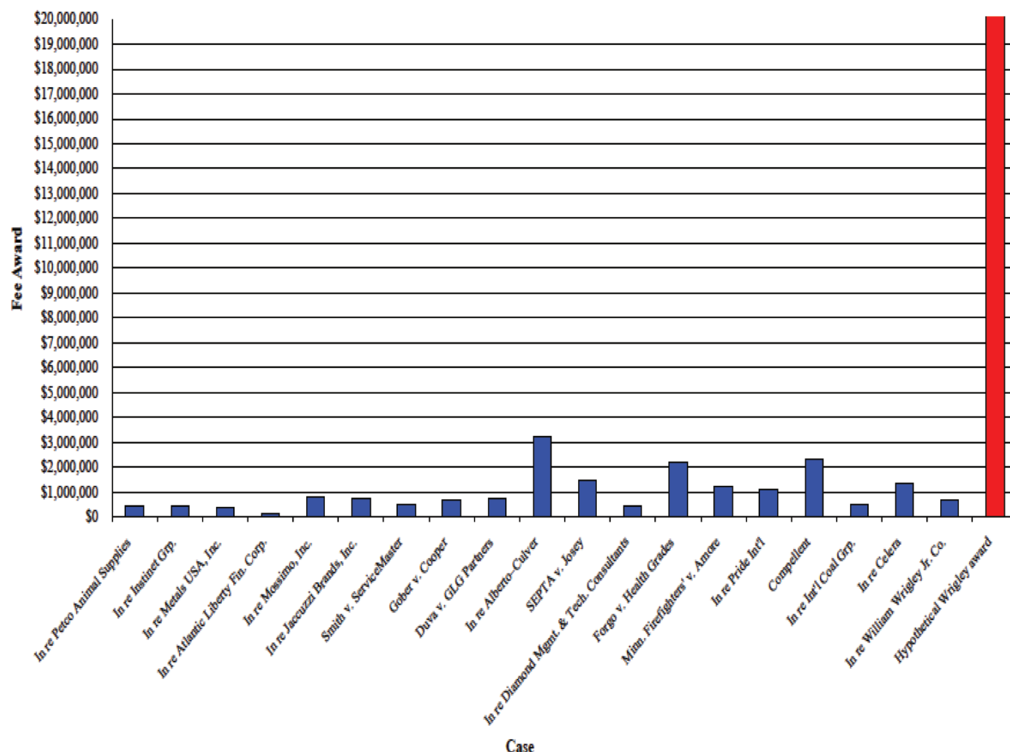
in part, because plaintiffs and their counsel believe that the opportunity for larger fee awards is greater.[52] Non-Delaware judges, perhaps unaware of traditional notions governing therapeutic fee awards in Delaware, might mechanically apply the formula and the *Compellent* inputs.

Although the *Compellent* court cautioned that it did not intend to set out "definitive pricing guidance" for future fee awards,[53] in some ways it has done exactly that. After all, neither *RehabCare*, *Compellent*, nor *Celera* applied deal and industry specific guidance in finding the proper inputs.[54] Indeed, *Celera* simply borrowed the inputs from *RehabCare* because, among other reasons, the two settlements were supported by similar therapeutics. Doing so in the context of a large transaction could be problematic.

The 2009 settlement of litigation arising out of the Wrigley-Mars Inc. merger illustrates the concern. In *In re William Wrigley Jr. Company Shareholders Litigation*,[55] the Court of Chancery approved a fee award of $690,000 in connection with the settlement of class claims based on a 10% reduction in an approximately $690 million termination fee.[56] However, applying the inputs from *Compellent* to the approximately $23 billion Wrigley-Mars Inc. merger would result in an attorneys' fee award in excess of $53 million,[57] an amount wildly out of line with applicable precedent.[58] Further underscoring the aberrant results where the formula is applied to large transactions is that a plaintiff's lawyer would normally need to secure in excess of $200 million for the class in order to warrant such an award.[59]

CHART 1:

Actual Delaware Chancery Fee Awards In Settlements Involving Termination Fees Compared To Hypothetical *Wrigley* Fee Award As Calculated Using *Compellent*



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It seems safe to assume the Court of Chancery never intended to award fees in a manner that encourages plaintiff's lawyers to *avoid* economic benefits on behalf of the class in favor of therapeutics.[60] Yet a mechanical application of the formula to large deals risks exactly that.

As the above chart illustrates, of the 19 Delaware cases of which the authors are aware in the past 10 years settled based on a reduction in termination fee and no monetary consideration for shareholders, the attorneys' fees awarded in those cases are, for the most part, significantly lower than the *Compellent* award. These precedent awards are dramatically lower than the hypothetical *Wrigley* award that would result under the *Compellent* formula.

The result that *Compellent* produces for *Wrigley* is not an outlier. Strict application of the *Compellent* formula would produce aberrational results in virtually every large transaction. Of the eight cases involving transactions over $1 billion since 2003, the median fee award for settlements involving reduction in termination fees is $950,000.[61] Application of the *Compellent* formula to these actual fee awards produces a median fee award of $8,161,000, a dramatic upward departure. In fact, the multiple of the *Compellent* hypothetical award to the actual fees awarded ranges from a low of 2.5x of the fees to a high of 74.2x, with a median of 9.45x the actual fees awarded.

As this data demonstrates, the *Compellent* formula could lead to windfall fee awards in large transactions, resulting in fees well beyond what Delaware's traditional *Sugarland* analysis would produce.

Comparison Of Actual Attorneys' Fees Awarded And Those Calculated Using *Compellent*'s Inputs In Settlements Of Court Of Chancery Litigation Where Transaction Value Was $1 Billion Or Greater

1/1/2003-12/21/2011

Target	Acquirer	Transaction Value ($ million)	Actual Attorney Fees ($ million)	*Compellent* Attorney Fees ($ million)	Hypothetical *Compellent* Fee as a Multiple of Actual Fees
The ServiceMaster Co.	Clayton, Dubilier & Rice, Inc.	$4,558	$0.500	$10.550	21.1x
Wm. Wrigley Jr. Co.	Mars, Inc.	$21,918	$0.690	$51.220	74.2x
Mariner Energy, Inc.	Apache Corp.	$2,669	$1.500	$7.409	4.9x
GLG Partners, Inc.	Man Grp. plc	$1,040	$0.750	$2.805	3.7x
Alberto-Culver Co	Unilever NV	$3,699	$3.351	$8.913	2.7x
Terremark Worldwide, Inc.	Verizon Commc'ns Inc.	$1,281	$1.250	$3.152	2.5x
Pride Int'l, Inc.	Ensco plc	$7,356	$1.100	$18.028	16.4x
Int'l Coal Grp., Inc.	Arch Coal, Inc.	$2,981	$0.500	$6.978	14.0x
Median		**$3,340**	**$0.925**	**$8.161**	**9.45x**

The statistics in this chart were prepared with the assistance of Kevin Dages and other employees of Compass Lexecon, Inc, and used herein with their permission.

Further, strictly applying the formula would ignore the reality that modified deal protections in large transactions virtually never result in competing bids. It is the authors' understanding that in announced transactions since 2003 with a value in excess of $1 billion only *once* did modified deal protections result in additional merger consideration for the target's shareholders. That transaction was the $1.4 billion acquisition of Genesis healthcare by Formation Capital and JER partners.

The authors further understand that, of the transactions in excess of $10 billion since 2003, there is *no* instance in which modified deal protections resulted in additional merger consideration for the target's shareholders. Since 2003, there have been nine transactions over $10 billion where a termination fee was reduced, whether through litigation, settlement or otherwise. *None* of those transactions resulted in a competing bid for shareholders.

A study by Cornerstone Research corroborates these findings. According to the study, of the 190 included settlements related to 2010-2011 M&A deals, none resulted in a higher bid for the target.[62] While a possibility remains that a competing bid could be made after a modification of deal protections, that possibility is not sufficiently likely (or quantifiable) so as to support a massive fee award. Thus, the formula offers little utility (if any) in setting fee awards for modified deal protections in large transactions. Nevertheless, plaintiffs lawyers now have the potential blueprint for windfall fees.

The only apparent defense, barring further clarification from the Court of Chancery, is a costly battle of the experts with no guarantees. Particularly with large fee requests, parties are left with little choice but to employ expensive experts capable of explaining the industry and deal specific data demonstrating that competing bids were unlikely. Unfortunately, these are the sort of litigation costs that settlements are designed to avoid.[63]

Conclusion

It appears that the formula and its recent applications were borne out of good intentions. Therapeutic benefits, while sufficient to support a settlement, have long presented difficult valuation questions when plaintiffs' counsel seek a fee award. The desire to create a more formalistic way to guard against large awards for non-economic settlements is understandable. Nevertheless, the new valuation technique embodied in the formula contains opportunities for mischief and unwholesome windfalls, particularly as applied to large M&A transactions. Today, nearly every major transaction results in litigation, an increasing amount of which occurs in non-Delaware jurisdictions.[64] In the fast-moving world of M&A litigation, further guidance from the Delaware Courts on how and when the formula should be utilized would be helpful.

NOTES

1. *Rosan v. Chi. Milwaukee Corp.*, C.A. No. 10526, 1994 WL 30524, at *1 (Del. Ch. Jan. 19, 1994) (quoting *Allied Artists Pictures Corp. v. Baron*, 412 A.2d 876, 878 (Del. 1980)).
2. *Goodrich v. E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1050 (Del. 1996).
3. 420 A.2d 142 (Del. 1980).
4. *Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000) ("*Sugarland*'s first factor is indeed its most important—the results accomplished for the benefit of the shareholders.").
5. *See In re Nat'l City Corp. S'holders Litig.*, C.A. No. 4123-CC, 2009 WL 2425389, at *4 (Del. Ch. July 31, 2009) (stating that plaintiff's application for attorney's fees was too high because the class benefit was "non-monetary, therapeutic and modest"), *aff'd mem.*, 998 A.2d 851 (Del. 2010); *In re William Wrigley Jr. Co. S'holders Litig.*, C.A. No. 3750-VCL, 2009 WL 154380, at *6 (Del. Ch. Jan. 22, 2009) (noting that modest fee application was appropriate when there was no monetary benefit for the case); Transcript at 20, *Minard v. Warburg Pincus Private Equity IX, LP*, C.A. No. 4894-VCS (Del. Ch. May 26, 2010) (remarking "to the extent that this Court has awarded . . . very, very big fees . . . those very, very big fee awards are reserved where they should be, which is when there is a genuinely large economic benefit produced by litigants on behalf of the class"); Transcript at 13-14, *In re Mediacom Commc'ns Corp.*, C.A. No. 5548/5552-VCS (Del. Ch. June 6, 2011) ("People don't invest in equities typically for…therapeutic healing. They invest to make money.").
6. *See, e.g.*, *Am. Mining Corp. v. Theriault*, 51 A.3d 1213, 1259-61 (Del. 2012); *In re Emerson Radio S'holder Deriv. Litig.*, C.A. No. 3392-

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VCL, 2011 WL 1135006, at *3 (Del. Ch. Mar. 28, 2011) ("When a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically including multiple depositions and some level of motion practice, fee awards range from 15-25% of the monetary benefits conferred.").

7. *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, C.A. No. 04-5184 (GEB), 2009 WL 411856, at *5 (D.N.J. Feb. 17, 2009) (percentage of recovery appropriate where counsel obtained "the significant result of $62,000,000 for [] the Class"); *Merola v. Atl. Richfield Co.*, 515 F.2d 165, 172 (3d Cir. 1975) (stating that lodestar method appropriate where no tangible benefit conferred by settlement).
8. *In re 3Com S'holders Litig.*, C.A. No. 5067-CC, 2009 WL 5173804, at *7 & n.37 (Del. Ch. Dec. 18, 2009) (discussing customary deal protections).
9. *See, e.g.*, *In re Sauer-Danfoss Inc. S'holders Litig.*, C.A. No. 5162-VCL, 2011 WL 2519210, at *7-8 (Del. Ch. Apr. 29, 2011) (comparing disclosures with those of other cases); *Franklin Balance Sheet Inv. Fund v. Crowley*, C.A. No. 888-VCP, 2007 WL 2495018, at *13-14 nn.71-74 (Del. Ch. Aug. 30, 2007) (comparing facts with those of other cases).
10. *Augenbaum v. Forman*, C.A. No. 1569-N, 2006 WL 1716916, at *2 (Del. Ch. June 21, 2006) (awarding $225,000 where benefits were "modest and entirely therapeutic in nature").
11. Transcript, *In re RehabCare Grp., Inc. S'holders Litig.*, C.A. No. 6197-VCL (Del. Ch. Sept. 8, 2011); *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011); *In re Celera Corp. S'holder Litig.*, C.A. No. 6304-VCP, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012).
12. C.A. No. 6027-VCL, 2011 WL 2535256 (Del. Ch. June 27, 2011).
13. The decision to award interim fees is discretionary, and the Court of Chancery has declined to award interim fees in other cases. *See, e.g.*, *In re Novell, Inc. S'holder Litig.*, C.A. No. 6032-VCN, 2011 WL 4091502 (Del. Ch. Aug. 30, 2011).
14. 2011 WL 2535256, at *14.
15. The litigation was ultimately settled for, among other things, a nearly $90 million settlement payment to the class. The court awarded $22,300,000 in attorneys' fees in connection with the settlement. *See* 2011 WL 4802848.
16. 2011 WL 2535256, at *14 (emphasis added).
17. *Id.*
18. *Id.* at *16.
19. Transcript at 4, *RehabCare*, C.A. No. 6197-VCL.
20. *Id.* at 46-47.
21. *Id.* at 43-44.
22. *Compellent*, 2011 WL 6382523, at *17-18.
23. *Id.* at *1.
24. *Id.* at *19 (emphasis added).
25. *Id.*
26. *Id.* at *20.
27. *Id.* at *19-20.
28. *Id.* at *20-26.
29. *Id.* at *26. The court rounded that sum to $2.3 million, and also awarded $100,000 for supplemental disclosures for a total fee award of $2.4 million in the case.
30. Transcript at 77, *In re J. Crew Grp., Inc. S'holders Litig.*, C.A. No. 6043-CS (Del. Ch. Dec. 14, 2011) ("I'm still not buying into the mathematical models of the probabilities of topping bids and all this kind of stuff.").
31. *Celera*, 2012 WL 1020471, at *7.
32. *Id.* at *31.
33. *Id.*
34. *Id.*
35. *Id.* at *34.
36. *Id.* at *32. An objector to the settlement appealed the decision.
37. *Compellent*, 2011 WL 6382523, at *19-20.
38. *See SWIB v. Bartlett*, C.A. No. 17727, 2002 WL 568417, at *3 (Del. Ch. Apr. 9, 2002), *aff'd*, 808 A.2d 1205 (Del. 2002); *see also Am. Mining Corp.*, 51 A.3d at 1263 (Justice Berger dissenting, explaining that "the trial court did not apply *Sugarland*, it applied its own world views on incentives, bankers' compensation, and envy"); *Goodrich*, 681 A.2d at 1050 ("The adoption of a mandatory methodology or particular mathematical model for determining attorney's fees in common fund cases would be the antithesis of the equitable principles from which the concept of such awards originated.").
39. *Compellent*, 2011 WL 6382523, at *20 (emphasis added); *see also Korn v. New Castle Cnty.*, C.A. No. 767-CC, 2007 WL 2981939, at *2 (Del. Ch. Oct. 3, 2007) (a fee award should avoid "socially unwholesome windfalls" (citation omitted)); *Seinfeld v. Coker*, 847 A.2d 330, 334 (Del. Ch. 2000) (explaining that a fee award above a level necessary to produce meritorious suits is merely "a windfall, serving no other purpose than to siphon money away from stockholders and into the hands of their agents").
40. *Compellent*, 2011 WL 6382523, at *1, *26 (reducing fee request by more than 60%); Transcript at 41, 46-47, *RehabCare*, C.A. No. 6197-VCL (reducing fee request by approx. 50%); *Celera*, 2012 WL 1020471, at *8, *34 (reducing fee request by approx. 60%).
41. *See, e.g.*, Transcript at 74-76, 78-82, *Minneapolis Firefighters' Relief Ass'n v. Amore*, C.A. No. 6175-VCN (Del. Ch. July 25, 2011) (granting contested award of $1.25 million for additional disclosures, a $12.5 million reduction in the post-go-shop termination fee, the elimination

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or modification of a force-the-vote provision and a top-up option, and a two-week extension of the tender offer); Transcript at 19-24, *Se. Pa. Transp. Auth. v. Josey*, C.A. No. 5427-VCP (Del. Ch. Mar. 14, 2011) (approving uncontested award of $1.5 million for elimination of $67 million termination fee and supplemental disclosures); *In re Mossimo, Inc. S'holders Litig.*, C.A. No. 1246-N (Del. Ch. Dec. 4, 2006) (Lamb, V.C.) (order awarding $800,000 where settlement provided for additional disclosures, a 30% decrease in merger agreement, and an agreement to pay liquidated damages under certain circumstances); *see also* Transcript at 6, 76-82, *Forgo v. Health Grades, Inc.*, C.A. No. 5716-CS (Del. Ch. June 29, 2011) (awarding $2.2 million on contested fee application where settlement of litigation followed the preliminary injunction hearing resulted in a $2.1 million reduction in the termination fee, issuance of a Fort Howard press release, the creation of special committee to review incoming bids, and an extension of the tender offer for twenty-seven days); Transcript at 4, 10, 42-46, *In re Alberto-Culver Co. S'holder Litig.*, C.A. No. 5873-VCS (Del. Ch. Feb. 21, 2011) (awarding $3.25 million plus $101,000 in expenses on contested application for a settlement that eliminated matching rights, reduced the termination fee by $25 million, delayed the shareholder vote, and provided supplemental disclosures regarding potential conflicts with the company's board chair and banker); Transcript at 45, *Duva v. GLG Partners, Inc.*, C.A. No. 5512-VCS (Del. Ch. Jan. 24, 2011) (granting $750,000 in fees in connection with $1.6 billion sale, where settlement obtained 45.8% reduction in termination fee, reduction in tail fee, shortening of matching rights period, and additional disclosures).

42. *Sugarland v. Thomas*, 420 A.2d 142, 147 (Del. 1980) (declining to adopt strict lodestar approach to fee applications, but recognizing its utility in cross-checking a fee's reasonableness); *Seinfeld*, 847 A.2d at 337-38 (applying lodestar within *Sugarland*'s factors).
43. C.A. No. 17727, 2002 WL 568417, at *2 (Del. Ch. Apr. 9, 2002), *aff'd*, 808 A.2d 1205 (Del. 2002).
44. *Id.* at *3-4.
45. *Id.* at *4.
46. *Id.* at *7.
47. C.A. No. 6535, 19982 WL 17841 (Del. Ch. Dec. 29, 1982).
48. *Id.* at *4.
49. *See, e.g.*, *In re Instinet Grp., Inc. S'holders Litig.*, C.A. No. 1289-N, 2005 WL 3501708, at *2-4 (Del. Ch. Dec. 14, 2005) (explaining that contingent fee awards compensate plaintiffs' counsel when their "efforts bear fruit"). *See also* Transcript at 13-14, *In re Mediacom Commc'ns Corp.*, C.A. No. 5548/5552-VCS (Del. Ch. June 6, 2011) ("People don't invest in equities typically for . . . therapeutic healing. They invest to make money."); Transcript at 20, *Minard v. Warburg Pincus Private Equity IX, LP*, C.A. No. 4894-VCS (Del. Ch. May 26, 2010) (remarking "to the extent that this Court has awarded. . .very, very big fees . . . those very, very big fee awards are reserved where they should be, which is when there is a genuinely large economic benefit produced by litigants on behalf of the class"); *In re William Wrigley Jr. Co. S'holders Litig.*, C.A. No. 3750-VCL, 2009 WL 154380, at *6 (Del. Ch. Jan. 22, 2009) (noting that modest fee application was appropriate when there was no monetary benefit for the case); *In re Nat'l City Corp. S'holders Litig.*, C.A. No. 4123-CC, 2009 WL 2425389, at *4 (Del. Ch. July 31, 2009) (stating that plaintiff's application for attorney's fees was too high because the class benefit was "non-monetary, therapeutic and modest"), *aff'd mem.*, 998 A.2d 851 (Del. 2010).
50. *Compellent*, 2011 WL 6382523, at *4 ($960 million total transactional value); *RehabCare*, C.A. No. 6197-VCL ($900 million total transactional value); *Celera*, 2012 WL 1020471, at *4 ($680 million total transactional value).
51. *See Sanders v. Wang*, C.A. No. 16640, 2001 WL 1131353, at *3 (Del. Ch. Sept. 18, 2001) ("An attorney fee is not a pot of nectar available to any attorney who represents any shareholder." (quoting *In re Resorts Int'l S'holders Litig.*, C.A. Nos. 9470, 9605, slip op. at 4 (Del. Ch. Oct. 11, 1990))); *see also Korn v. New Castle Cnty.*, C.A. No. 767-CC, 2007 WL 2981939, at *2 (Del. Ch. Oct. 3, 2007) (a fee award should avoid "socially unwholesome windfalls").
52. Transcript at 19, 20, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011) (suggesting that one reason plaintiffs' attorneys file in multiple jurisdictions is to "get control of a piece of the litigation for purposes of the fee negotiations").
53. *Compellent*, 2011 WL 6382523, at *1.
54. Transcript at 43, *RehabCare*, C.A. No. 6197-VCL (explaining that the analysis was conducted "without deal specific data"); *Compellent*, 2011 WL 6382523, at *22 (finding the only expert report submitted on the likelihood of a topping was not a "statistically valid study"); *Celera*, 2012 WL 1020471, at *31 (explaining that "the parties did not submit—nor did the Court request—empirical data from which to estimate values for the (x) and (y) inputs [of the formula]").
55. C.A. No. 3750-VCL, 2009 WL 154380 (Del. Ch. Jan. 22, 2009).

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56. *Id.* at *5. In *Wrigley*, class claims challenging the approximately $23 billion Wrigley-Mars Inc. merger were settled for: (1) a reduction in a $690 million termination fee by 10%; (2) shortening by three months the "tail" period for payment of the termination fee; and (3) modifying and supplementing disclosures contained in the proxy materials. *Id.* at *5-6.
57. ($69 million) x (8%) x (25%) = $1,380,000; ($23 billion) x (8%) x (11.37%) x (25%) = $52,302,000; $52,302,000 + $1,380,000 = $53,682,000
58. Cases settled based on modifications to deal protections and disclosures only, with no economic benefits provided to members of the class, have awarded much lower fees. *See, e.g., In re Celera Corp. S'holder Litig.*, Consol. C.A. No. 6304-VCP, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012) (awarding $1,350,000 in fees); *In re Int'l Coal Grp., Inc. S'holders Litig.*, C.A. No. 6464-VCP (Del. Ch. Jan. 30, 2012) (awarding $500,000 in fees); *In re Pride Int'l, Inc. S'holders Litig.*, C.A. No. 6201-CS (Del. Ch. Nov. 23, 2011) (awarding $1,100,000 in fees); *Minneapolis Firefighters' Relief Ass'n v. Amore*, C.A. No. 6175-VCN (Del. Ch. July 25, 2011) (awarding $1,250,000 in fees); *Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS (Del. Ch. June 29, 2011) (awarding $2,200,000 in fees); *In re Diamond Mgmt. & Tech. Consultants, Inc. S'holder Litig.*, C.A. No. 5765-CC (Del. Ch. May 25, 2011) (awarding $450,000 in fees); *Se. Pa. Transp. Auth. v. Josey*, C.A. No. 5427-VCP (Del. Ch. Mar. 14, 2011) (awarding $1,500,000 in fees); *In re Alberto-Culver Co. S'holder Litig.*, C.A. No. 5873-VCS (Del. Ch. Feb. 21, 2011) (awarding $3,250,000 in fees); *Duva v. GLG Partners, Inc.*, C.A. No. 5512-VCS (Del. Ch. Jan. 24, 2011) (awarding $750,000 in fees); *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL, 2011 WL 6382523 (Del. Ch. Jan. 13, 2011) (awarding $2,300,000 in fees); *Gober v. Cooper*, C.A. No. 4276-CC (Del. Ch. Nov. 23, 2009) (awarding $700,000 in fees); *In re William Wrigley Jr. Co. S'holders Litig.*, C.A. No. 3750-VCL, 2009 WL 154380 (Del. Ch. Jan. 22, 2009) (awarding $690,000 in fees); *Smith v. ServiceMaster Co.*, C.A. No. 2924-VCS (Del. Ch. Oct. 15, 2008) (awarding $500,000 in fees); *In re Jacuzzi Brands, Inc. S'holders Litig.*, C.A. No. 2477-CC (Del. Ch. June 26, 2007) (awarding $725,000 in fees); *In re Metals USA, Inc. S'holders Litig.*, C.A. No. 1367-N (Del. Ch. Dec. 22. 2006) (awarding $400,000 in fees); *In re Mossimo, Inc. S'holders Litig.*, C.A. No. 1246-N (Del. Ch. Dec. 4, 2006) (awarding $800,000 in fees); *In re Atl. Liberty Fin. Corp. S'holders Litig.*, C.A. No. 1863-CC (Del. Ch. June 30, 2006) (awarding $135,000 in fees); *In re Petco Animal Supplies, Inc. S'holders Litig.*, C.A. No. 18056-NC (Del. Ch. June 7, 2001) (awarding $475,000 in fees).
59. Assuming 25% of a $200 million settlement fund, plaintiffs' counsel would receive $50 million in fees.
60. *Cf.* Transcript at 20, *Minard*, C.A. No. 4894-VCS ("[T]o the extent that this Court has awarded . . . very, very big fees . . . those very, very big fee awards are reserved where they should be, which is when there is a genuinely large economic benefit produced by litigants on behalf of the class."); Transcript at 13-14, *In re Mediacom Commc'ns Corp.*, C.A. No. 5548/5552-VCS (Del. Ch. June 6, 2011) ("People don't invest in equities typically for . . . therapeutic healing. They invest to make money.").
61. Those cases were: *In re Int'l Coal Grp., Inc. S'holders Litig.*, C.A. No. 6464-VCP (Del. Ch. Jan. 30, 2012); *In re Pride Int'l, Inc. S'holders Litig.*, C.A. No. 6201-CS (Del. Ch. Nov. 23, 2011); *Minneapolis Firefighters' Relief Ass'n v. Amore*, C.A. No. 6175-VCN (Del. Ch. July 25, 2011); *In re Alberto-Culver Co. S'holder Litig.*, C.A. No. 5873-VCS (Del. Ch. Feb. 21, 2011); *Se. Pa. Transp. Auth. v. Josey*, C.A. No. 5427-VCP (Del. Ch. Mar. 14, 2011); *Duva v. GLG Partners, Inc.*, C.A. No. 5512-VCS (Del. Ch. Jan. 24, 2011); *In re William Wrigley Jr. Co. S'holders Litig.*, C.A. No. 3750-VCL, 2009 WL 154380 (Del. Ch. Jan. 22, 2009); *Smith v. ServiceMaster Co.*, C.A. No. 2924-VCS (Del. Ch. Oct. 15, 2008).
62. Cornerstone Research, Recent Developments In Shareholder Litigation Involving Mergers And Acquisitions at 10 (2012).
63. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (explaining that application for attorneys' fees should not turn into a "second major litigation").
64. A recent report noted that in the past two years, "almost every acquisition [over $100 million] elicited multiple lawsuits" immediately after the deals were announced, in which "[c]ommon allegations" challenged "the existence of restrictive deal protections that discouraged additional bids." *See* http://blogs.law.harvard.edu/corpgov/2012/03/04/developments-in-ma-shareholder-litigation/.

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