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**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

--X		
IN RE COX COMMUNICATIONS, INC.	:	Consolidated
SHAREHOLDERS LITIGATION	:	C.A. No. 613-N
--X		

OBJECTORS BRIEF IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

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INTRODUCTION

This case involves what can fairly be described as "exquisitely choreographed litigation." The first complaints were filed almost immediately after Cox Enterprises, Inc. ("CEI") announced an offer to acquire for $32.00 per share the 38% interest in Cox Communications, Inc. ("CCI") that it did not own, subject to approval by a special negotiating committee ("SNC") of CCI's independent directors. From the moment that those complaints were filed, it was easy to predict how the proposed transaction and the related litigation would unfold.

First, the SNC would reject CEI's offer. The SNC and CEI then would engage in negotiations and eventually would agree in principle to a cash out at a higher price. Shortly thereafter — but before CCI and CEI formalized their agreement — plaintiffs' attorneys would agree to settle their claims on terms identical to those that the SNC had negotiated. Defendants would acquiesce in plaintiffs' attorneys' assertion that the latter be given some credit for the improved terms that the SNC had negotiated. An MOU would be signed, confirmatory discovery would follow, a formal stipulation of settlement would be negotiated, and plaintiffs' attorneys then would demand generous compensation for their "contribution." Defendants again would acquiesce, and would agree to pay a substantial fee to plaintiffs' attorneys, because the settlement would protect them against the uncertainties involved with litigating "entire fairness" claims under current law. The dance was as formalized and predictable as a minuet, and all the players had performed the steps many times before.

Every recent, large going-private transaction involving a Delaware target corporation has been challenged by similar, quickly filed, class action complaints. In all but a handful of those cases, including this Action, plaintiffs' attorneys have (i) agreed to settle for whatever price increase was negotiated by a SNC; (ii) claimed a share of the credit for that price increase; and

(iii) demanded a generous fee award. In a few such cases, plaintiffs have agreed voluntarily to dismiss their claims (for reasons that are not clear). But ***there has not been a single case*** in which a member of the normal plaintiffs' bar chose to challenge the fairness of a deal negotiated by a SNC when that attorney could claim a share of the credit for a price increase that the SNC had negotiated.

Only recently has this pattern of choreographed litigation been documented. Now that it has, this Court should bring it to a stop. Rewarding plaintiffs' attorneys for routinely filing and then settling "shared credit" cases undermines and conflicts with well established principles of Delaware law. It also calls into question the legitimacy of Delaware's judicial processes. Consequently, this Court should deny plaintiffs' request for an award of attorneys' fees and expenses in its entirety. By doing so, it will remove the financial incentives that encourage plaintiffs' attorneys to initiate and pursue this and similar "shared credit" cases.

Alternatively, if this Court determines that plaintiffs' request may not be denied, it should award plaintiffs' no more than a nominal amount, not the clearly excessive $5 million fee they have requested. As is explained in this Brief and the accompanying Affidavits, plaintiffs deserve no real credit for the price increase and majority-of-the-minority ("MOM") condition that was negotiated by the SNC. Their attorneys have prosecuted this Action in a highly inefficient fashion. Consequently, a nominal fee award (including expenses) will compensate them more than adequately.

NATURE AND STAGE OF THE PROCEEDINGS

The parties to this action filed a stipulation of settlement with the Court on November 11, 2004. Thereafter notice was mailed to the class, and, on January 13, 2005, the Objectors filed their Objection. The Objection argued that this case is part of a well established pattern of

"shared credit" litigation and that rewarding plaintiffs' attorneys for routinely filing and then settling cases such as this undermines and conflicts with well established principles of Delaware law. In the period since January 13, 2005, (i) the parties to this Action collectively made available to Objectors all depositions and deposition exhibits in this Action (except for certain "Highly Confidential" planning documents that Objectors declined to review); (ii) Defendants also produced for Objectors minutes of most of the SNC's meetings and logs of certain shareholders' calls to CEI (documents that had not previously been produced in this Action); (iii) the Objectors produced to the plaintiff information relating to the Weiss and White article upon which the Objectors rely; and (iv) Plaintiffs filed a brief in support of the proposed settlement ("Plaintiffs' Settlement Brief"). On March 16, 2005, Defendants filed with the Court two affidavits and a letter brief in support of the proposed settlement, which the Court subsequently approved. Also on March 16, Plaintiffs filed a brief ("Plaintiffs' Brief") and other documents relating to their fee request and the Objection. This is the Objectors' brief in support of their Objection.

STATEMENT OF FACTS

Most of the important facts relating to CEI's acquisition of CCI, this Action, Plaintiffs' request for a $5 million fee award and the Objection are set forth in the Notice of Settlement, the Objection and the Affidavits of Kevin G. Abrams, Janet M. Clarke, Arthur N. Abbey and Elliott J. Weiss. The following facts are particularly relevant to this Court's assessment of Plaintiffs' fee request and the Objection.

Early on August 2, 2004,[1] CEI (i) offered $32.00 per share to acquire the 38% equity interest in CCI that it did not own; (ii) stated that it expected CCI to form a SNC, which would retain its own legal and financial advisors; and (iii) explicitly conditioned its offer on securing the

[1] Unless otherwise stated, all date references that follow are to dates in 2004.

approval of the SNC. CEI did not exclude any other transaction terms.[2] Later that day, the three members of the CCI board who were not managers of CCI or affiliated with CEI — Janet M. Clarke, Rodney W. Schrock and Andrew Y. Young — agreed to serve as the SNC.

Several class action complaints were filed shortly after CEI's announcement. All were premature, because the SNC and CEI had not agreed upon — indeed, had not yet begun to discuss — the terms of the proposed cash out. Moreover, at that time Plaintiffs did not possess, and ***could not have possessed***, knowledge of provable facts that held out some reasonable likelihood of ultimate success because (i) CEI's offer was contingent on acceptance by the SNC and (ii) CEI had neither said nor suggested that, if no agreement was reached, it would respond with some coercive or retaliatory action. Nonetheless, Plaintiffs' complaints could not be dismissed because they sufficed to shift to CEI, CCI's controlling shareholder, the burden of proving that the proposed cash out was "entirely fair."

Within a few days, 13 complaints were filed in this Court, and three more were filed in Georgia. All but one of the Delaware complaints relied on "boilerplate" allegations typically made in cash out cases. Weiss Aff. ¶ 29. The only exception was C.A. No. 630-N, filed by Prickett, Jones & Elliott, P.A. ("Prickett Jones"), which included a non-standard claim based on provisions in CCI's Articles of Incorporation. However, as this Court observed at the August 24 Consolidation Hearing ("8/24 Hearing") and as Plaintiffs have since conceded, that claim, although creative, lacked merit.

In an effort to be named lead counsel, Prickett Jones also moved for consolidation, expedited discovery and a hearing on a motion for a preliminary injunction. Law firms

[2] It excluded only the possibility of CEI selling its CCI stock.

representing other plaintiffs opposed its request. Subsequent to August 2, Abbey Gardy, LLP had filed a second complaint on behalf of M&R Capital, which owned 178,000 shares of CCI stock. As a consequence, attorneys representing other plaintiffs agreed that Abbey Gardy should chair the Plaintiffs' Executive Committee and also agreed that Shiffrin & Barroway, LLP, Milberg Weiss Bershad & Schulman, LLP, and Bernstein Liebhard & Lifshitz, LLP, should serve as members of the Executive Committee. At the 8/24 Hearing, the Court consolidated the 13 Delaware actions and ordered that Prickett Jones be added as a member of that Committee.

Counsel for both CEI and the SNC opposed expedition on the grounds that the Delaware complaints were "premature." CEI's counsel pointed out: "This Court simply isn't in a position today and won't be in any position prior to a decision by the special committee to approve, disapprove or alter the transaction proposal, to apply any applicable standard of review, and certainly will not have the appropriate factual record to render an informed decision on the propriety of the special committee's conduct." 8/24 Transcript at 49:5-12. The SNC's counsel argued: "I would have thought that the plaintiffs and the Court would want to see what the product of the special committee's work had been, and then we'd have a consolidated complaint that would address the real issues presented by the transaction. * * * So, in terms of the procedure, it would seem it's highly premature right now to be considering specific claims by plaintiffs." *Id.* at 52:16-53:16. The Court agreed that it would be premature to hold a hearing on a preliminary injunction prior to the SNC's reaching a decision. *Id.* at 63-68. The Court also chastised plaintiffs' attorneys for creating "an utterly false emergency borne of intra-plaintiffs' bar considerations. . . . over what? — a business transaction that was announced as a proposal,

hadn't been approved by a special committee, was subject to approval by a special committee that hadn't yet been organized?" *Id.* at 79:11-20.

While plaintiffs' attorneys were maneuvering to obtain control of this Action, the SNC retained Fried, Frank, Harris, Shriver & Jacobson, LLP, as its legal advisor and Goldman, Sachs & Co. as its financial advisor and set about its work. The SNC negotiated vigorously with CEI concerning the fair value of CCI and the terms of the proposed transaction. It first rejected CEI's suggestion that it not rely on the most recent long-range plan developed by CCI's management. Then, armed with a valuation prepared by Goldman Sachs, the SNC asked CEI to increase its offer to $37.00. CEI declined to do so but did make two lower, but improved, offers, describing each as its highest, best and final offer. The SNC rejected both. Finally, on the evening of Friday, October 15, following a day of tense negotiations, Ms. Clarke, on behalf of the SNC, agreed in principle to a cash out at $34.75 per share, subject to receipt by the SNC of a fairness opinion from Goldman Sachs and to a non-waivable MOM condition. At that time, Defendants had "considerable doubt" that Goldman Sachs would render such an opinion. Transcript of January 26, 2005, Settlement Hearing ("1/26 Hearing") at 33:18-34:2 (remark of Mr. Abrams).

The SNC had advised Mr. Golden of Fried Frank much earlier in the process that it considered a non-waivable MOM condition a very important part of the proposed transaction. Clarke Deposition at pp. 134, 159-60. Mr. Golden then began discussing the need for such a condition with counsel for CEI. *See* Minutes of 9/28/04 SNC meeting, CCI060021.

On October 15, Ms. Clarke also asked CEI to try to settle this Action and the Georgia litigation, but the record makes clear that she did not consider such settlements to be conditions

precedent to a formal agreement with CEI. Ms. Clarke explained that she sought a settlement "with the intention of attempting to avoid potential disruption and distraction that might obstruct or delay completion of the potential transaction." Clarke Aff. ¶ 17; *see also* 1/26 Transcript at 43:12-17 (The SNC's counsel explains that the SNC's interest was "in having certainty of completion of the deal [which was] what motivated the discussion about let's make sure the litigation is resolved.") Moreover, Mr. Abrams (CEI's Delaware counsel) told Mr. Abbey on October 15 that if there was no settlement, "we're prepared to proceed with this transaction without you." *Id.* at 35:7-12.

Prior to October 15, Plaintiffs' attorneys had discussed their demands only with CEI's Delaware counsel. Abrams Aff. ¶ 4. They had no contact with the SNC, nor did CEI's counsel keep them apprised of the status of negotiations between the SNC and CEI. *Id.* Neither Mr. Hayes — CEI's Chief Financial Officer and the only CEI official deposed by Plaintiffs — nor Mr. Parker — the head of the Lehman Bros. ("Lehman") team and the only one of CEI's financial advisors deposed by Plaintiffs — mentioned Plaintiffs or their demands when describing the process by which the terms of the proposed cash out were negotiated.[3]

At Mr. Abbey's request, CEI's counsel did arrange an October 12 telephonic meeting between Richard L. Smithline, Plaintiffs' financial advisor, and CEI's financial advisors. Mr. Smithline sent them his "presentation materials" (Parker Ex. 40) in advance of that meeting. As Professor Carleton, a financial expert witness for the Objectors, points out, all data in those materials appears to have been drawn from other analysts' valuations of CCI. Moreover, Mr.

[3] Apart from the meeting between Mr. Smithline and CEI's financial advisors, discussed *infra*, which Mr. Parker mentioned briefly in response to questions by Mr. Abbey.

Smithline provided no explanation or justification for the key assumptions on which he based his valuation. Consequently, his "presentation materials" were not likely to have, and appear not to have had, any influence on the thinking of CEI's financial advisors. Affidavit of Willard T. Carleton, ¶ 3.

Mr. Smithline does not appear to have been any more persuasive when he spoke with CEI's financial advisors. Mr. Parker, who did not know Mr. Smithline personally or by reputation, said that analysts at Lehman and Citigroup did review Mr. Smithline's materials, but only as one of many inputs they considered. Parker Deposition at 130. In response to a question from Mr. Abbey suggesting that Mr. Smithline's valuation was similar to one prepared by Morgan Stanley, Mr. Parker said Lehman had reviewed the Morgan Stanley analysis and concluded that its projections, which were more bullish than those of other cable industry analysts, were too high. *Id.* at 134. CEI's financial advisors rejected Mr. Smithline's valuation for much the same reasons that they had previously rejected valuations of CCI prepared by Goldman Sachs, Abrams Aff. ¶ 8, Abbey Aff. ¶ 30, which were considerably more sophisticated than Mr. Smithline's "presentation materials." Carleton Aff. ¶ 3.

On October 15, after Ms. Clarke and Mr. Kennedy reached agreement in principle on a cash out at $34.75, subject to a non-waivable MOM condition, Mr. Abrams advised Mr. Abbey that CEI was prepared to settle on exactly the same terms, which he made clear was CEI's "best and final offer." Weiss Affidavit ¶ 41. Mr. Abbey, faced with a choice between a settlement that would allow plaintiffs' attorneys to claim some credit for the price increase or a challenge to the fairness of the $34.75 price that may well have failed,[4] accepted the deal Mr. Abrams had

[4] Plaintiffs themselves have identified the substantial obstacles that they would have faced had

proposed (without, apparently, consulting with M&R Capital). He and Mr. Abrams then negotiated and signed a MOU *See* Weiss Affidavit ¶¶ 37-43; Abrams Affidavit ¶¶ 12-15; Abbey Affidavit ¶ 34. CEI also agreed to settle the Georgia action and to pay $1.25 million to the Georgia attorneys who, at that point, had not even received any discovery materials. Weiss Aff. ¶¶ 31.D, 38. Following confirmatory discovery, Plaintiffs and CEI signed a formal Stipulation of Settlement. CEI agreed, *inter alia*, not to oppose Plaintiffs' request for a fee award of up to $4.95 million (including expenses).

ARGUMENT

A. This Action Exemplifies a Legal Process Gone Awry

This Action, when viewed in relation to the numerous similar actions challenging cash outs filed and settled in the past ten years,[5] presents a classic example of legal process gone awry. The story starts with *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) ("*Weinberger*"), which (i) eliminated the business purpose test (which allowed virtually every cash out merger to be challenged on the ground that its sole purpose was to freeze out minority shareholders at an inadequate price);[6] (ii) strongly suggested that the best way to ensure the fairness of a cash out was for the target company's board to appoint a SNC to negotiate at arm's length with the

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they chosen to challenge the fairness of the increased price negotiated by the SNC. Plaintiffs' Settlement Brief at 10-11.

[5] That is, subsequent to the Delaware Supreme Court's decisions in Kahn v. Lynch Communications, Sys., Inc., 638 A.2d 1110 (Del. 1994) ("*Lynch I*") and Kahn v. Lynch Communications, Sys., Inc., 669 A.2d 79 (Del. 1995) ("*Lynch II*").

[6] *See* Elliott J. Weiss, *The Law of Take Out Mergers: A Historical Perspective,* 56 N.Y.U. L. Rev. 624, 667-671 (1981); Elliott J. Weiss, *Balancing Interests in Cash-out Mergers: The Promise of* Weinberger v. UOP, Inc., 8 Del. J. of Corp. L. 1, 43 (1983).

controlling shareholder; and (iii) attempted to rein in class actions challenging cash outs by holding that, in general, the appropriate remedy for a dissatisfied shareholder was the liberalized appraisal proceeding that the court's decision had established.

Rabkin v. Philip A. Hunt Chemical Corp. ("*Rabkin*"), 498 A..2d 1099 (Del. 1985), which reversed the dismissal of a class action complaint that alleged the timing of a proposed cash out was unfair, substantially undermined the last of these holdings. *Rabkin* also charged the Chancery Court with striking a balance "between sustaining complaints averring faithless acts, which taken as true would constitute breaches of fiduciary duties that are reasonably related to and have a substantial impact upon the price offered, and properly dismissing those allegations questioning judgmental factors of valuation."*Id.* at 1107-08. However, the Chancery Court found this to be an impossible task. *See Turner v. Bernstein*, 776 A.2d 530, 546 (Del. Ch. 2000); *Andra v. Blount*, 772 A.2d 183, 192-195 (Del. Ch. 2000). Consequently, it began to deny motions to dismiss class action complaints whenever they included standardized allegations relating to the timing, pricing or other allegedly "unfair" features of a proposed cash out. *Id.*

Lynch I magnified the impact of these procedural rulings. It held that proof that a SNC has negotiated a cash out in true arm's length fashion shifts the burden of proof on the fair price issue but does not shift the standard of review from "entire fairness" to business judgment. *Lynch I*, 638 A.2d at 1117. Thus, unless it is able to negotiate a settlement and a release of all cash out-related claims, a controlling shareholder will find it almost impossible to eliminate the risk that it will be forced to defend on the merits a claim that the price agreed upon by the SNC is not "entirely fair." *See In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 547-551 (Del. Ch. 2003); *In re Pure*

Resources, Inc. S'holders Litig., 808 A.2d 421, 435-437 (Del. Ch. 2002); *Andra v. Blount*, 772 A.2d 183, 192-195 (Del. Ch. 2000); 1/26 Transcript at 18:7-19:12.

As the Weiss affidavit explains, the current structure of Delaware law thus provides defendants with a powerful incentive to settle, especially if plaintiffs' attorneys are prepared to sign off on transaction terms identical to those that a SNC has already indicated it is prepared to accept. Weiss Affidavit ¶ 37. At the 1/26 Hearing, counsel for CEI acknowledged that this is so, and that it is the risk of a possible future "quasi-appraisal on behalf of a class consisting of hundreds of millions of shares" that leads defendants to settle cases such as this. 1/26 Transcript at 29:17-22.[7] Moreover, as the Weiss affidavit points out, CEI apparently perceived this risk to be so large that it agreed to pay up to $1.25 million to the attorneys for the Georgia plaintiffs, even though, at the time CEI signed that agreement, "no discovery had taken place in the Georgia Action" and CEI had not engaged in any substantive discussions with the plaintiffs' attorneys in the Georgia action. *Id.* ¶ 38 (citation omitted).

The structure of Delaware cash out law also has provided plaintiffs' attorneys with a powerful incentive to settle on whatever improved terms they understand have been negotiated. By settling, they can virtually assure themselves that defendants will agree to pay, or will be required to pay, a generous fee award. If they persisted in challenging the fairness of a proposed cash out, they run a substantial risk of ending up empty-handed. See *id.* ¶ 36.

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[7] Thus, CEI's counsel also carefully choreographed his negotiations with Mr. Abbey to ensure that CEI could obtain a binding settlement and release. *See* Weiss Affidavit ¶¶ 39-41.

These incentives have led to the development of a highly predictable pattern of transactions and litigation.[8] A controlling shareholder announces an offer to cash out public shareholders, but almost never offers the highest price that it is prepared to pay.[9] Delaware law effectively discourages it from doing so. A controller that made its best and final offer at the start of the process would find it more difficult to prove that a cash out at that price was entirely fair, either because no SNC would be appointed or because, if a SNC was appointed, the controller would not be able to point to a "negotiated" price increase as evidence that the SNC had represented public shareholders' interests effectively.

The controller also would find it more difficult and expensive to settle the class action lawsuits that almost inevitably would be filed. Plaintiffs' attorneys, if denied the opportunity to free ride on the efforts of a SNC, would have a much greater incentive to challenge vigorously the fairness of whatever price the controller had offered to pay. Weiss Aff. ¶ 31. In fact, it would be far from surprising if experienced defense counsel, such as counsel for Defendants in this Action, advised their clients more or less as follows:

> Offer less than the highest price you are prepared to pay, then negotiate with the SNC, which may sign off on a price below your maximum. However you proceed, plaintiffs' attorneys are almost sure to file lawsuits as soon as you make your announcement, but you don't need to worry about them. They'll settle for whatever price increase the SNC is prepared to accept, so long as you allow them to claim a share of the credit, which will

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[8] *See* Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions* (June 2, 2004). Mr. Abbey and Professors Miller and Subramanian all question the validity of the findings in that article. But, as Professors Weiss and White point out, the arguments that they make are refuted by that article, are not supported by the data on which they rely, or are otherwise not persuasive. *See* Weiss Aff. ¶¶ 28-51; White April 18, 2005 Aff. ¶¶ 5-12.

[9] The controller has no fiduciary duty to disclose the highest price it is prepared to pay. *See Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 939 (Del. 1985).

> virtually guarantee that they receive a fee award. That's the way they've proceeded in every other cash out case in the past ten years when they've been able to claim a share of the credit for whatever price increase a SNC has negotiated.

The events involved in this Action proceeded exactly as predicted. *See* White January 10, 2005 Affidavit ("White 1/10 Affidavit"), ¶¶ 16-18. CEI first offered $32.00 per share and made its offer subject to acceptance by a SNC. Thirteen class action complaints were filed shortly thereafter by attorneys seeking to play some role in the prosecution of this Action. The SNC rejected CEI's initial offer and eventually agreed in principle to a cash out at a higher price — $34.75 per share — with a MOM condition. Plaintiffs' attorneys, when advised that $34.75 was CEI's "best and final offer," agreed to settle for that price and a MOM condition. Weiss Aff. ¶¶ 41-43. In exchange, Defendants acknowledged that "the efforts of plaintiffs' counsel . . . were causal factors that led to [the price increase and the MOM condition]." Shortly thereafter, the SNC and CCI's board formally approved a cash out on the same terms. Plaintiffs' attorneys then engaged in desultory confirmatory discovery[10] and then agreed to a formal stipulation of settlement. In it, Defendants agreed not to object to a request for, and to pay, a $5 million attorney fee award. CEI presumably agreed to (indirectly) pay this fee --- which amounts to about $0.25 per CCI share --- because the settlement provided it with valuable "litigation insurance" — a broadly worded release of all transaction-related claims. In addition, the settlement agreement reduced the likelihood that some other shareholder would challenge the fairness of the $34.75

[10] Although Ms. Clarke advised plaintiffs' attorneys, in the course of her deposition, that minutes of the SNC's meeting following the meeting in which Goldman Sachs was hired had been prepared but not signed, plaintiffs attorneys did not even take the standard precautionary step of demanding copies of those minutes, which would have provided them with a cross check on the accuracy of Ms. Clarke's testimony. Objectors subsequently requested copies of those minutes and have lodged them with the Court.

price, because to do so it first would have to convince the Court to reject an agreement that had the support of both Plaintiffs and Defendants.

Objectors did not challenge the fairness of the now consummated cash out of CCI's public shareholders. Their review of that transaction — now bolstered by their review of the discovery record — supports the conclusion that the SNC represented public shareholders' interests effectively and, in fact, may well have persuaded CEI to pay a higher price than it originally intended. Their Objection is directed at the pattern of litigation found in this and many similar cash out cases, which clearly undermines the *Lynch I* court's holding that cash out mergers are always subject to entire fairness review. That court reasoned that providing for such stringent scrutiny was necessary to protect minority shareholders' interests, because, even if a cash out is "negotiated by disinterested, independent directors[,] no court could be certain whether the transaction terms fully approximate what truly independent parties could achieve in an arm's length negotiation." *Lynch I*, 638 A.2d at 1117, quoting *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 502 (Del.Ch. 1990).

The pattern of litigation in this Action and similar cash out cases undermines that holding. Although class actions have been filed challenging every large cash out during at least the past six years that has involved a Delaware target corporation, in not a single case have plaintiffs' attorneys chosen to challenge improved transaction terms negotiated by a SNC. Weiss Affidavit ¶¶ 14-15. In the vast majority of such cases, they have been content to free ride on the efforts of the SNC and to claim a share of the credit for whatever improvement in terms it has negotiated. Only when such free riding was not possible have members of the plaintiffs' bar chosen to

challenge the fairness of cash out terms approved by SNCs, and in the two cases in which plaintiffs' attorneys mounted such challenges, they achieved substantial success. *Id.*, ¶ 30. One can only speculate as to whether plaintiffs' attorneys would have achieved additional successes had they elected to challenge other cash outs rather than free ride. But it is clear that in at least three cases, where substantial shareholders elected to opt out of, or announced they were prepared to oppose, settlements agreed to by members of the plaintiffs' bar, those shareholders were able to prove that the fair value of the target companies was far higher — in two cases, more than three times higher — than the consideration plaintiffs' attorneys had agreed to accept. Weiss Aff. ¶¶ 17-27.

This Court should discourage the continuation of this pernicious pattern of free riding litigation. It can most effectively do so by denying in its entirety Plaintiffs' request in this Action for a $5 million fee award. That will eliminate the incentive that encourages plaintiffs' attorneys to file boilerplate complaints and then free ride in most cash out situations. It also will go a long way toward restoring real meaning to the entire fairness review that the Delaware Supreme Court has held should apply to all cash out mergers.[11]

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[11] Objectors are aware that past and present members of this Court have suggested that business judgment review would be more appropriate for cash out mergers that are approved by an effective SNC or a majority of minority shareholders. *See* William T. Allen, Jack B.Jacobs and Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56. Bus. Law. 1287, 1306-09 (2001). One effect of such a change would be to reduce the incentives for defendants, and perhaps for plaintiffs' attorneys, to engage in carefully choreographed litigation such as this Action. To date the Delaware Supreme Court has not seen fit to act on their suggestion, perhaps because it continues to believe that ***meaningful*** enforcement of the entire fairness standard has the potential to protect minority shareholders' interests. In any event, ***meaningless*** "shared credit" litigation does not constitute an acceptable substitute for revising the relevant standard of review.

Plaintiffs assert that "Objectors argue that a special committee should have the exclusive power to negotiate a conflicted action. . . ." Plaintiffs' brief at 36. As the foregoing arguments

B. This Action Was Not Meritorious When Filed

Objectors have pointed out that *Chrysler Corp. v. Dann*, 223 A.2d 384 (Del. 1966) "*Chrysler Corp.*"), and *Allied Artists Pictures Corp. v. Baron,* 413 A.2d 876 (Del. 1980) ("*Allied Artists*"), provide an alternative basis on which this Court should deny Plaintiffs' request for a fee award. Objection at 14-16. Those cases express the Delaware courts' long-standing desire to discourage baseless shareholder litigation. Plaintiffs' reply is that those cases do not apply to this Action because Plaintiffs' claims were "meritorious when filed." Plaintiffs' Brief at 28. They cite two reasons: (i) Their complaints could not be dismissed at the pleading stage; and (ii) This Court has approved the settlement. Their arguments miss the mark.

As the Objection explains, *Chrysler Corp.* holds that an action is "meritorious when filed" only if plaintiffs can satisfy a ***two-part*** test:

> A claim is meritorious within the meaning of the rule [**1.**] if it can withstand a motion to dismiss on the pleadings [and **2.**] ***if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success.***

Objection at 15, quoting *Chrysler Corp.*, 223 A.2d at 387 (emphasis added); *accord, Allied Artists*, 413 A.2d at 879.

The Objection points out that plaintiffs' claims were not "meritorious when filed" because plaintiffs cannot satisfy the ***second*** part of this test. Objection at 15-16. This is self evident. At the time plaintiffs filed their complaints, CEI's offer was contingent on acceptance by the SNC, and CEI had not excluded the possibility that it would agree to other transaction terms. Consequently,

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make clear, that clearly is not (and never was) true. To the contrary, Objectors' claim is that it is the manner in which "shared credit" cases are being litigated that vitiates effective review of such transactions. *See* Objection at 14.

plaintiffs could not know on what terms the proposed cash out would be consummated or even if it ever would be consummated. Moreover, CEI did not threaten to take any coercive or retaliatory action if its offer was not accepted or if the proposed cash out was not consummated. Plaintiffs make no claims to the contrary.[12] Consequently, as counsel for CEI and the SNC, as well as the Court, all pointed out at the 8/24 hearing, plaintiffs' attorneys were arguing about "a business transaction that was announced as a proposal, hadn't been approved by a special committee, [and] was subject to approval by a special committee that hadn't yet been organized[.]" *See* pp.5-6 above, quoting 8/24 Transcript at 79:11-20.

Chrysler Corp. established this two-part test to discourage plaintiffs' attorneys from filing "actions wholly lacking merit for the sole purpose of obtaining counsel fees." *Chrysler Corp.*, 223 A.2d at 387. The second part of the test — that a plaintiff must "possess[] knowledge of provable facts which hold out some reasonable likelihood of ultimate success" — is particularly pertinent to cases such as this in which a plaintiff "can withstand a motion to dismiss" simply by alleging that a cash out merger has been proposed and then adding boilerplate allegations concerning the timing, pricing or other terms of the proposed transaction. *See supra* p. 10.

Plaintiffs make no attempt to demonstrate that, at the time they filed their complaints, they possessed knowledge of provable facts that held out some reasonable likelihood of ultimate success. Consequently, *Chrysler Corp.* and *Allied Artists* require that their request for a fee award be denied.

[12] In fact, plaintiffs concede that the SNC "was afforded adequate time to review [CEI's offer] and participate in negotiations" and that the SNC "could say 'No.'" Plaintiffs' Settlement Brief at 8.

C. No Significant Benefits Were Produced by Plaintiffs

Plaintiffs point out that the most important determinant of their entitlement to the $5 million fee they request is the benefit that Plaintiffs "achieved." Plaintiffs' Brief at 18. Plaintiffs then go on to claim a share of the credit for the $675 million difference between CEI's initial offer and the price CEI eventually agreed to pay and for the MOM condition. They point to Mr. Smithline's presentation to CEI's financial advisors and to the MOM-related allegations in their complaints to support this claim, but provide no persuasive explanation as to how Mr. Smithline, those allegations, or anything else that Plaintiffs did — as opposed to the efforts of the SNC and its advisors — led to even a penny of the price increase or to the MOM condition. The record makes clear that they did not.

Moreover, Plaintiffs concede --- at least implicitly --- that the SNC deserves the lion's share of the credit for the price increase and MOM condition. They point out that they have requested a fee equal to only 0.73% of the price increase. *Id.* at 20. If one assumes that successful plaintiffs' attorneys ordinarily would be entitled to a fee equal to about 20% of any benefit that their efforts produced and further assumes that the MOM condition has no value, then Plaintiffs' request amounts to a tacit concession that they deserve less than 4% of the credit for the price increase and the SNC deserves more than 96%. If, as Plaintiffs argue, the MOM condition also had great value, then Plaintiffs tacitly concede that they deserve even less of the credit and that the SNC deserves more.

As concerns Mr. Smithline, Professor Carleton points out that his "presentation materials" contained neither new financial information nor any persuasive valuation arguments. Carleton

Aff. ¶ 3. When Mr. Smithline spoke by telephone to Lehman and Citicorp, they rejected his valuation arguments for essentially the same reasons that they had rejected similar arguments (made with considerably more sophistication) by Goldman Sachs. Nothing else in the record suggests that the arguments made by Mr. Smithline, or comparable arguments that Plaintiffs' attorneys may have advanced, had any impact on CEI.[13] Plaintiffs also admit that their attorneys had no contact with the SNC.

As for the MOM condition, Plaintiffs place great emphasis on the fact that they raised this issue in some of their complaints --- *i.e.*, before the SNC or its advisors had begun to negotiate with CEI. *Id.* at 31. Plaintiffs, however, point to no evidence that the SNC's decision to instruct its counsel to seek a MOM condition or Ms. Clarke's decision to demand such a condition before reaching an agreement in principle with Mr. Kennedy was in any way precipitated by Plaintiffs' complaints — or even that the SNC was aware that plaintiffs had raised the MOM issue.[14]

This absence of evidence forces Plaintiffs to rely on two fall back arguments: (i) that Delaware law creates a presumption of a causal connection between their efforts and the settlement benefits, *Id.* at 28; and (ii) that Defendants have acknowledged the causal role of Plaintiffs' efforts. *Id.* at 23-24. In Objectors view, (i) the presumption on which Plaintiffs rely either does not apply or has been rebutted and (ii) the Court should give no weight to Defendants'

[13] Plaintiffs describe the "intensive and hard fought" price negotiations that followed Mr. Smithline's meeting with CEI's financial advisors, which included discussions about whether CEI would withdraw its offer. *Id.* 22. Such negotiations and discussion clearly occurred, but the record contains no evidence that Plaintiffs' attorneys — as opposed to the SNC and CEI — were involved.

[14] As noted above, although CEI announced that it would not sell its stock in CCI, it said nothing one way or the other concerning whether it would agree to a MOM condition.

acknowledgment. Our reasons are as follows.

The Delaware Supreme Court recently reiterated that for the presumption of causation to apply, a plaintiff first must show that "the suit was meritorious when filed." *Cal-Maine Foods, Inc. v. Pyles*, 858 A.2d 927, 929 (Del. 2004), quoting *United Vanguard Fund v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del.1997). As we point out above, *Chrysler Corp.* established the criteria for determining when a suit will be considered "meritorious when filed" and Plaintiffs fail to satisfy those criteria in this Action.

Moreover, the pattern of litigation in "shared credit" cases documented in *File Early, Then Free Ride* and in the Affidavits of Professors Weiss and White provides this Court with a more than adequate factual basis on which to conclude that the presumption of causation has been rebutted. There has not been a single case in the past six years in which a SNC has negotiated some improvement in the terms of a cash out after a suit was filed and plaintiffs' attorneys have then chosen to contest the fairness of the improved terms that the SNC negotiated. Plaintiffs' attorneys have chosen to argue that terms negotiated or approved by a SNC were unfair only in cases where there was no opportunity for them to free ride on the efforts of a SNC.[15] These data clearly support two inferences: (i) That plaintiffs' attorneys in this and similar "shared credit" cases contribute nothing of value; and (ii) That whatever improvements in terms are negotiated should be attributed to the efforts of the SNCs or to the bargaining dynamic that Delaware law effectively promotes.[16]

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[15] *Cal-Maine Foods, supra*, arguably represents a third example of such a case.

[16] As explained above, controlling shareholders always offer less than the highest price they are prepared to pay. In every cash out merger case in the past six years, a SNC has been able to negotiate some increase in that price. What remains unclear, and will remain unclear for so long

As for Defendant's acknowledgment of Plaintiffs' efforts, we believe the Court should view it as meaningless — a necessary concession by Defendants to secure the settlement and associated release that they desire.[17] Defendants clearly would have jeopardized the settlement had they instead stated what appears to be the case — that they agreed to settle solely to secure protection against needless and costly entire fairness claims. So Defendants agreed to a *pro forma* acknowledgment "that the efforts of plaintiffs' counsel in the Action were causal factors that led to (i) the increased consideration offered to CCI minority stockholders in the Tender Offer and Merger and (ii) the Majority of the Minority Condition." Stipulation ¶15. One can find a similar acknowledgment in every "shared credit" case.[18] The same data that rebut the presumption of causation should lead the Court to recognize that this acknowledgment is meaningless.

Similarly, the Court should not give any weight to Defendants' agreement to pay a fee of up to $5 million, if awarded by the Court. Plaintiffs quote the court's statement in *In re Azurix Corp. S'holders Litig.*, C.A. 18463 (Nov. 16, 2001) (Lamb, V.C.) that such agreements should be given "a lot of weight. . . " Plaintiffs' Brief at 24. But Plaintiffs do not mention the court's statements in *In re Donna Karan Int'l S'holders Litig.*, C.A. No. 18559 (Sept. 10, 2002) (Strine, V.C.), tr. 72-78, to the effect that (i) it also is important to look at the incentive effects of large fee awards; (ii) pragmatic considerations often lead defendants in cases such as this to include their

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as the current pattern of litigation is allowed to persist, is whether the prices SNCs negotiate approximate those that would result from true arm's length bargaining. In at least a few cases, they clearly have not. Weiss Aff. ¶¶ 17-27.

[17] Similarly, plaintiffs in this and similar cases allow defendants to deny any wrongdoing.

[18] The same is true of CEI's statement that "it took into account the desirability of satisfactorily addressing the claims asserted in the Action in agreeing to [improve its offer]." *Id.*

"friends, plaintiffs' counsel," in the negotiations and then, since the initial offer inevitably will go up, to concede that plaintiffs' counsel deserve a share of the credit for that increase; and (iii) for similar reasons, defendants also agree to pay plaintiffs' attorneys substantial fees in exchange for their agreement to drop claims that defendants believe have no merit.

In *Donna Karan*, the court did not have the data about the pattern of cash out litigation that has been presented in this Action. Nonetheless, it awarded plaintiffs' attorneys a fee of only $200,000 — far less than the $925,000 that defendants had agreed to pay.

In two other recent cases in which defendants agreed to pay substantial fees awards to avoid the cost of defending against nuisance claims asserted in shareholder suits, two different U.S. Courts of Appeals directed entry of judgments denying plaintiffs' attorneys any fees whatsoever. *See Kaplan v. Rand*, 192 F.3d 60 (2d Cir. 1999); *Zucker v. Westinghouse Elec. Corp.*, 265 F.3d 171 (3d Cir. 2001). Both courts recognized that defendants simply had chosen the lowest cost means of disposing of non-meritorious claims and reasoned that plaintiffs' attorneys should not be rewarded for their "efforts." The Third Circuit explicitly recognized that its decision might "complicate the settlement of complex corporate litigation" but held that "sound principles [nonetheless] require that we reach it." *Id.* at 177. The court observed:

> We close our discussion by pointing out that we live in a real world and thus anticipate that attorneys may seek to circumvent the effect of this opinion by constructing elaborate frameworks within which fee applications will be included. Accordingly, the district courts must review settlements in derivative litigation in which attorney's fees will be sought with great care to ensure that a fee is not assessed against a corporation following the settlement of derivative litigation unless the corporation has received a substantial benefit ***from the litigation itself and not simply from its settlement***. After all, when derivative litigation is terminated a corporation always can be said to have obtained a benefit, as it will save further legal fees.

Id. at 178 (emphasis added).[19]

In this Action, Defendants followed a strategy similar to the strategy that the defendants had followed in *Kaplan v. Rand* and *Zucker v. Westinghouse*.[20] This Court should adopt the same approach followed by the courts in those cases and deny Plaintiffs' fee request in its entirely.

D. In No Event Should Plaintiffs Receive More Than a Nominal Fee

Should the Court determine that plaintiffs' fee request may not be denied, it should award plaintiffs' no more than a nominal fee, not the clearly excessive $5 million fee that they have requested. As we point out above, plaintiffs deserve no credit for the price increase or the MOM condition. In addition, the record makes clear that plaintiffs bore no significant contingency risks,[21] and plaintiffs' own submissions make clear that they prosecuted this Action in a highly inefficient fashion. Consequently, a nominal fee award (including expenses) will constitute adequate compensation.

Plaintiffs rely principally on two additional arguments in an attempt to justify their request for an enormous fee award. The first is that their contingent engagement was subject to a high degree of risk. Plaintiffs' Brief at 21-23. As the data in *File Early, Then Free Ride* and in the Weiss and White Affidavits makes clear, there was no more than a trivial risk that plaintiffs'

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[19] *See also Steiner v. Williams*, 2001 WL 604035 at *5 (S.D. N.Y. 5/31/01) (denying any fees to plaintiffs whose efforts conferred no substantial benefit on the plaintiff class; *Fruchter v. Florida Progress Corp.*, 2002 WL 1558220 at *11 (Fla.Cir.Ct. 3/20/02) (declining to approve settlement that court described as class action equivalent of "benefits" provided by "'Squeegee boys.'")

[20] That is made abundantly clear by Defendants' agreement to pay $1.25 million to plaintiffs' attorneys in the Georgia action, in exchange for their agreement to dismiss the claims that they had filed, despite the fact that those attorneys had not even begun to take discovery.

[21] Aside from the risk that a class member would object to their fee request.

attorneys would devote substantial time and effort to this Action and emerge empty handed. There has not been a single occasion in the past six years in which a member of the plaintiffs' bar has actively litigated a challenge to a cash out by a controlling shareholder and then not received a fee award.[22] Indeed, Plaintiffs' counsel himself remarked at the first settlement hearing: "You can argue about [whether plaintiffs or the special committee caused the price increase.] I will tell you that it's a shared credit case, *and . . .every time you had a special committee litigation you're going to have a shared credit case.*" Weiss Aff. ¶ 53.[23]

Plaintiffs' other argument is that they devoted substantial time to this Action. Relatedly, they argue that the relevant benchmarks for valuing their efforts are the hourly fees and success premiums that they claim are regularly paid to large defendants' law firms. Plaintiffs' Brief at 24-26.[24] The data that plaintiffs have submitted as Exhibit B to Mr. Abbey's Affidavit, make clear that the comparison they suggest is far from apt and that, in fact, plaintiffs litigated this Action in a highly inefficient fashion.

This Action did not involve any unique legal or factual issues, and all of Plaintiffs' attorneys have litigated many similar cases. Yet plaintiffs chose to involve 34 lawyers from the five firms that make up Plaintiffs' Executive Committee --- 21 partners, 9 associates and 4

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[22] Objectors do not place *In re Siliconix S'holders Litig.*, 2001 WL 716787 (Del. Ch. 2001), in this category because it was prosecuted primarily by Richards, Layton and Finger, a firm that most often represents defendants.

[23] Plaintiffs have offered no response to the objectors' argument that their attorneys' efforts to be appointed lead counsel are inconsistent with claims that this Action involved significant contingency risk. Objection at 17-18. *See also* Weiss Aff. ¶ 29.

[24] The hourly rates that Plaintiffs cite, Objectors note, are the rates that Plaintiffs assert are paid to the most senior partners and associates. *See id.* at 25.

counsels. Even if one excludes lawyers who were involved only incidentally --- say those who worked less than five hours --- plaintiffs' attorneys staffed this case with 27 lawyers from those five firms, 16 of whom were partners. While big, complex cases may require a lot of lawyers, this case involved no particularly complex issues. It seems highly unlikely that so many lawyers could have worked together efficiently. Sixteen partners --- in other words, 16 chefs --- is simply a recipe for chaos.

Another of the many indicators of overstaffing and inefficiency is that Plaintiffs' attorneys devoted a total of 321.3 hours to pre-filing research and drafting complaints. Most of those complaints were filed within hours after CEI announced its offer. All but Prickett Jones' complaint contained only "boilerplate" allegations or reiterated claims that Prickett Jones had made. If one removes the 87.3 hours that Prickett Jones spent on its complaint, the remaining plaintiffs' firms still devoted 224 hours to the preparation of their boilerplate pleadings.

Plaintiffs' staffing of this Action also was quite different from that usually followed by the large firms that represent defendants. Although most of the document review in cases such as this is relatively routine, and usually is assigned in defendants' firms to paralegals or relatively junior associates, about two-thirds of the hours that plaintiffs' attorneys devoted to this Action were worked by partners. At Abbey Gardy and Bernstein Liebhard, partners accounted for more than 90% of the hours billed.[25] Plaintiffs provide no explanation for their staffing decisions.

[25] At Milberg Weiss, the largest of the Plaintiffs' firms, 82% of the hours were billed by associates or counsel.

CONCLUSION

For the foregoing reasons, plaintiffs' request for a fee award should be denied. In no event should the Court award plaintiffs more than a nominal amount.

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