ADJUSTING ATTORNEYS' FEE AWARDS: THE DELAWARE COURT OF CHANCERY'S ANSWER TO INCENTIVIZING MERITORIOUS DISCLOSURE-ONLY SETTLEMENTS

Phillip R. Sumpter*

ABSTRACT

Disclosure-only settlements, which often conclude deal litigation, are settlements in which plaintiffs' lawyers obtain fee awards—often amounting to hundreds of thousands of dollars—in exchange for additional disclosures to a company's shareholders. The Delaware Court of Chancery and many commentators have criticized these settlements, and some practitioners have argued that disclosure-only settlements are on their way out. Although the Court has criticized disclosure-only settlements, the Court has shown no inclination to cut these settlements out of Delaware's corporate law. This Article argues that disclosure-only settlements play an important role in the corporate governance system by creating proper incentives for future deal litigants. This Article also demonstrates that the Court is mindful of the incentives it provides to future litigants and, as a result, has responded to the potential problems created by disclosure-only settlements by awarding varying levels of attorneys' fees to plaintiffs' counsel in one of three fee-award bands, thereby either encouraging or discouraging similar settlements in the future.

* Associate, Ashby & Geddes, P.A.; Member, Delaware bar. J.D., J. Reuben Clark Law School, Brigham Young University; B.S., Brigham Young University-Idaho. Special thanks to Professor D. Gordon Smith for his friendship and generous contribution of time and advice regarding this Article and to Chancellor William B. Chandler III for providing me with the many transcript opinions cited throughout this Article. Thanks also to Richard D. Heins and Steven T. Margolin for posing the question that led to this Article.

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INTRODUCTION

Danvers Bancorp, Inc. ("Danvers") was a bank holding company headquartered in Danvers, Massachusetts.[1] The company's sole subsidiary, Danversbank, was a bank with twenty-eight branches in the Greater Boston area.[2] On January 20, 2011, People's United Financial, Inc. announced that it would pay $493 million to acquire Danvers.[3] The purchase offer included an approximate thirty-five percent premium over Danvers' closing share price on the day before the announcement.[4] Over the next several weeks, three separate class action lawsuits were filed in the Delaware Court of Chancery (the "Court"), each alleging that Danvers' board of directors had breached its fiduciary duties to Danvers' shareholders, challenging the purchase offer as inadequate and unfair, complaining that the merger

1. *People's United Financial, Inc. Completes Acquisition of Danvers Bancorp, Inc.*, PR NEWSWIRE, http://www.prnewswire.com/news-releases/peoples-united-financial-inc-completes-acquisition-of-danvers-bancorp-inc-124842779.html (last visited Apr. 8, 2013).

2. *Id.*

3. Tim McLaughlin, *People's United Buying Danvers Bancorp*, BOSTON BUSINESS JOURNAL (last updated Mar. 7, 2011, 10:31 AM), http://www.bizjournals.com/boston/news/2011/01/20/peoples-united-buying-danvers-bancorp.html.

4. *Id.* The merger agreement between the companies provided that shareholders could either receive twenty-three dollars in cash or 1.624 shares of People's United common stock in exchange for each of their shares of Danvers. Stipulation and Agreement of Compromise, Settlement and Release at 1, *In re* Danvers Bancorp, Inc. S'holders Litig., C.A. No. 6162-CS, (Del. Ch. July 28, 2011). The merger agreement also included a proration mechanism by which "approximately 55% of Danvers shares were exchanged for stock and 45% for cash." *Id.*

"preclude[d] competitive bidding," and claiming that the individual defendants used the merger to benefit themselves at the expense of the company's shareholders.[5] After the three suits were consolidated, the plaintiffs filed a consolidated complaint on March 10, 2011, adding allegations that the defendant's Form S-4 Registration Statement "disclosed materially misleading information and omitted material information."[6] The plaintiffs then filed a motion for preliminary injunction on the following day, received 7,400 pages of discovery on April 1, 2011, and deposed three people connected with the merger a week later.[7] By mid-April, the plaintiffs recognized that their initial claims were essentially groundless and the parties entered settlement negotiations. On April 22, 2011, the parties signed a memorandum of understanding, by which the plaintiffs would release their claims in exchange for additional disclosures.[8] Interestingly, in the settlement hearing, the Court stressed that the initial claims were weak and that there was not "any colorable basis" on which to prosecute them.[9] Moreover, the Court noted that the additional disclosure that the plaintiffs had obtained for the shareholders had little value since those disclosures did not alter the mix of information available to the shareholders.[10] Nevertheless, the Court awarded the plaintiffs' lawyers $150,000 for their efforts.[11]

This type of case is referred to as a disclosure-only settlement, and is not unique.[12] Indeed, there is an entire line of cases and transcript opinions upholding these settlements. As demonstrated in the *Danvers* case above, disclosure-only settlements flow from deal litigation. Following the announcement of a merger or acquisition, shareholder-plaintiffs often bring class actions, alleging breaches of directors' fiduciary duties or claiming an unfair transaction price, only to learn during discovery of the unquestioned fairness of the deal. As a result, the plaintiffs release any and all claims they may have against the company, and in return, the company provides additional disclosures to the shareholders.[13]

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5. Stipulation and Agreement of Compromise, Settlement and Release at 2-3, *Danvers*, C.A. No. 6162-CS.

6. *Id.* at 4.

7. *Id.* at 5-6.

8. *Id.* at 6-8.

9. Transcript of Settlement Hearing and Application for Attorneys' Fees and Costs and the Court's Ruling at 22, *In re* Danvers Bancorp, Inc. S'holders Litig., C.A. No. 6162-CS, (Del. Ch. Oct. 19, 2011).

10. *Id.* at 23.

11. *Id.* at 29.

12. See discussion *infra* Part II.B for a more detailed description of disclosure-only settlements.

13. The facts of *Fessahaye v. Faleschini*, C.A. No. 5553-CC (Del. Ch. Nov. 4, 2010)

Disclosure-only settlements are based on the premise that in exchange for only additional disclosures, plaintiffs' lawyers are entitled to fee awards. As a result, the announcement of a merger or acquisition almost always triggers speedy deal litigation, and the number of deals that result in litigation has increased at a meteoric rate over the last decade. For example, ten years ago, shareholders filed suit on just 12% of deals.[14] Today, a recent study[15] shows that an incredible 94.2% of deal-related transactions attracted lawsuits,[16] and that each of the transactions averaged

and *County of York Employees' Ret. Plan v. Merrill Lynch & Co., Inc.*, C.A. No. 4066-VCN (Del. Ch. Aug. 31, 2009) are particularly interesting in this regard. In *Fessahaye*, the plaintiffs initially contended that the company's "board breached [its] fiduciary duties in connection with the merger by agreeing to sell the company at an unfairly low price, and by agreeing to allegedly unreasonable deal protection devices." Transcript of Settlement Conference at 5, *Fessahaye*, C.A. No. 5553-CC. However, after the plaintiffs reviewed board minutes, advisory committee meeting minutes, and presentations from the company's banker to its board with their financial expert, they "came to the view that the deal price likely was within the range of fairness." *Id.* at 7-8. The plaintiffs also "concluded that the board had conducted a good process in which the directors reasonably determined that the merger . . . was the best transaction realistically attainable." *Id.* at 7-8. As a result, the plaintiffs dropped their original claims in exchange for additional disclosures. *Id.* at 10. Similarly, in *County of York*, after reviewing "the testimony and the documents, plaintiffs came to the belief that they would not prevail necessarily on the . . . deal-based claims." Transcript of Settlement Hearing at 12, *County of York*, C.A. No. 4066-VCN. The discovery showed "that the board was independent; that while there was a very compressed time frame here, the board was advised by independent" financial and legal advisers, "both from a financial perspective and legal advice," and that the financial analyses conducted by the company's banker "determined and indicated the fairness of the proposed transaction." *Id.* at 12-13. As a result, the plaintiffs admitted that "there [was] no doubt in [their] minds that the shareholders of [the company] received a fair price." *Id.* at 15. The plaintiffs then settled in exchange for additional disclosures.

14. *See* David Marcus, *The Dramatic Increase in M&A Litigation*, DEAL MAGAZINE (Nov. 28, 2011), http://www.thedeal.com/magazine/ID/043019/commentary/the-dramatic-increase-in-m&a-litigation.php (explaining that in 1999 shareholders filed lawsuits on only twelve percent of deals).

15. Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2011* (Feb. 2, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998482. The study was limited to all transactions that were completed by January 15, 2012 that met the following criteria: (1) "the target [was] a U.S. firm publicly traded on the NYSE, AMEX, or NASDAQ stock exchanges"; (2) "the transaction size [was] at least $100 million"; (3) "the offer price [was] at least $5 per share"; and (4) "a merger agreement [was] signed and publicly disclosed through an SEC filing." *Id.* at 1. These criteria created a sample size of 103 deals. *Id.* The 2011 figure is larger than 2010's 84.7%, and considerably larger than the percentage from 2005 of 38.7%. *Id.* at 2.

16. *Id.* *American Lawyer* reported that in 2006 there were only twenty-seven deal-related class actions filed. Amy Kolz, *Rigging the Game?*, AM. LAW., Mar. 2011, at 14. That number had increased to 327 such lawsuits in 2010. *Id.* And this trend is not lost on practitioners. Indeed, one defense lawyer noted that where in the past "you would tell the client to expect to be sued" in significant merger deals, today "you have that expectation about really small transactions, as well as an expectation that there will be [suits in] multiple

4.8 unique complaints.[17] These statistics are even more surprising when one considers that there is an established pattern where plaintiffs sue on deals despite there being a super-majority of independent directors running the sale process, "active shopping" of the company, and not even a "hint of discrimination."[18]

While the Court continues to approve disclosure-only settlements, it has also been vocal in criticizing them.[19] For instance, the Court has noted that there is a disturbing trend where plaintiffs viciously attack a deal and then settle for only marginal disclosures. The Court has also pointed out that often only the lawyers for the two parties stand to benefit from these settlements. Additional criticism targets the problem that deal litigation often nitpicks otherwise good disclosures. And finally, disclosure-only settlements create an incentive for companies to not disclose certain details in their initial disclosures.

Because of the troubling nature of disclosure-only settlements and the Court's criticisms of them, several practitioners have argued that disclosure-only settlements are on their way out.[20] However, while it is

forums." *Id.* (internal quotation marks omitted).

17. Cain & Davidoff, *supra* note 15, at 2, 3 (indicating that this number "represents a doubling from the mean number in 2005 of 2.2 lawsuits").

18. Transcript of Settlement Hearing and Application for Attorney's Fees and Costs and the Court's Ruling, *In re* Danvers Bancorp, Inc. S'holders Litig., C.A. 6162-CS, at 24-25 (Del. Ch. Oct. 19, 2011).

19. See discussion *infra* Part II.E, for a more detailed description of the Court's criticisms.

20. This feeling has been expressed by attorneys on both sides of the Delaware bar. For example, both Elizabeth McGeever and Pamela Tikellis have commented on this at forums sponsored by the Practising Law Institute. Ms. McGeever stated that "[a] recent series of transcript rulings from the Delaware Court of Chancery may temper the rush to the supplemental disclosure altar." Elizabeth M. McGeever, *Another Microscope: Disclosure Only Settlements and Fee Awards*, *in* DELAWARE LAW DEVELOPMENTS 2010: WHAT ALL BUSINESS LAWYERS NEED TO KNOW 3 (PLI Corp. Law & Practice, Course Handbook Series No. B-1808, 2010) (citing *In re* Monogram Biosciences, Inc. S'holders Litig., C.A. 4703-CC (Del. Ch. Jan. 26, 2010); IBEW Local Union 98 v. Noven Pharms., Inc., C.A. 4732-CC (Del. Ch. Dec. 8, 2009); Rosen v. Wind River Sys., Inc., C.A. 4674-VCP (Del. Ch. Dec. 8, 2009); Masucci v. Fibernet Telecom Group, Inc., C.A. 4680-VCS (Del. Ch. Nov. 25, 2009); Smith v. CuraGen Corp., C.A. 4670-VCS (Del. Ch. Nov. 9, 2009)). In particular, she mentioned that there has been "heightened judicial scrutiny" of cases where the plaintiffs drop their "fair price claims in exchange for marginal disclosures that confirm the fairness of the initial transaction pricing." McGeever, *supra* at 399. Ms. Tikellis agreed with this notion, saying that there is "intense judicial scrutiny" over cases "where a plaintiff exchanges his fair price claims for marginal disclosures confirming the fairness of the initial deal price." Pamela S. Tikellis, *Under the Microscope—Disclosure Based Settlements and Mutli-Jurisdictional Litigation*, in M&A LITIGATION 2011, at 97 (PLI 2011). And on the defense side, Peter Ladig wrote that "recent decisions of the Court of Chancery . . . have cast some doubt on the ability of a 'disclosure only' settlement to serve as the sole

true that the Court has heavily criticized these types of cases,[21] this should not be interpreted to mean that the Court wants to cut these settlements out of Delaware's corporate law.[22] Indeed, this Article argues that not only are disclosure-only settlements not going anywhere, but also that such settlements are a good thing, since they play an important role in the corporate governance system by creating proper incentives for future deal litigants. The judges on the Court are mindful of the incentives they are providing to future litigants and, as a result, have responded to the potential problems created by disclosure-only settlements by awarding varying levels of attorneys' fees to plaintiffs' counsel in one of three fee-award bands, thereby either encouraging or discouraging similar settlements in the future.

This Article proceeds as follows. Part I introduces disclosure-only settlements and provides background information on disclosure and settlements generally. Part II outlines the analysis undertaken by the Court of Chancery in determining the appropriate award of attorneys' fees for work performed in connection with a settlement. Part III analyzes the way in which the Court of Chancery awards attorneys' fees in disclosure-only settlements and argues that the fees fit into three award "bands," each designed to provide incentives or disincentives to similar future litigation. This Article briefly concludes in Part IV. This Article also includes three appendices setting out each of the cases that were reviewed in writing this Article according to the three fee-award bands.

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consideration for a settlement or a substantial fee." Peter B. Ladig, *The Viability of the Disclosure Only Settlement*, DELAWARE BUSINESS COURT INSIDER, May 11, 2011, http://www.morrisjames.com/newsroo
m-articles-73.html.

21. *See infra* Part II.E (discussing criticisms of disclosure-only settlements).

22. In fact, the Court has approved many disclosure-only settlements in the last year. *See infra* apps. A–C; *see also* Ladig, *supra* note 20 (noting that the Court "has not recently issued a written opinion refusing to approve a 'disclosure only' settlement"). And, as will be discussed in Part III.C., several of these very-recent settlements have involved huge attorneys' fees as a result of the benefits achieved by plaintiff's counsel. In my research for this Article, I found only a few instances where the Court refused to approve a disclosure-only settlement. *See In re* SS & C Techs., Inc. S'holders Litig., 911 A.2d 816, 817–18 (Del. Ch. 2006) (refusing to approve the settlement because "the parties were dilatory in presenting [the agreement] for approval," and "the court [could] not conclude from the record presented that the potential claims belonging to the class were adequately or diligently investigated or pursued"); *In re* FLS Holdings, Inc. S'holders Litig., 1993 WL 104562, at *281 (Del. Ch. Apr. 21, 1993) (rejecting the settlement because the "claims [were] certainly litigable," and if the plaintiffs were successful, "their claims could possibly be worth several million dollars").

I. BACKGROUND ON DISCLOSURE & SETTLEMENTS GENERALLY

This Part will present a general background on both disclosure and settlements under Delaware law. This Part will discuss the following: (1) what constitutes a valid disclosure claim; (2) what constitutes a disclosure-only settlement; (3) what drives disclosure-only settlements; (4) what disclosure-only settlements have accomplished; and (5) the main criticisms of disclosure-only settlements.

A. What Constitutes a Valid Disclosure Claim?

In Delaware, boards of directors have a duty of disclosure to their shareholders.[23] This duty is judicially imposed and arises from the duties of care and loyalty.[24] While there is not a "checklist of items that must be disclosed"[25] to shareholders, the duty of disclosure obligates boards to "'disclose fully and fairly all *material* facts and information within [the boards'] control' when seeking shareholder action,"[26] and to correspond "'publicly or directly with shareholders about corporate matters.'"[27] A board breaches its duty of disclosure when it fails to disclose a "material fact," provides a "false statement," or presents only "partial disclosure that is materially misleading."[28] As a result, a valid disclosure claim can survive a motion to dismiss only if it "identif[ies] a material misstatement or omission."[29]

23. *See, e.g.*, Cinerama v. Technicolor, Inc., 663 A.2d 1156, 1170 (Del. 1995) (explaining that the fiduciary duties of care and loyalty give rise to a director duty to disclose material facts related to a merger vote).

24. *See In re* Transkaryotic Therapies, Inc., 954 A.2d 346, 357 (Del. Ch. 2008) ("Although usually labeled and described as a duty, the obligation . . . is merely a specific application of the duties of care and loyalty.") (internal citations omitted).

25. Transcript of Settlement Hearing at 33, *In re* Wyeth S'holders Litig., C.A. No. 4329-VCN (Del. Ch. June 29, 2010).

26. Joseph Allerhand & Tamika Montgomery, *Thinking Ahead: Avoiding Common Pitfalls in Drafting Disclosures*, *in* WHAT ALL BUSINESS LAWYERS MUST KNOW ABOUT DELAWARE LAW DEVELOPMENTS 2009 953 (PLI Corp. Law & Practice, Course Handbook Series No. B-1740, 2009) (quoting Ryan v. Lyondell Chem. Co., 2008 WL 2923427, at *19 (Del. Ch. July 29, 2008)); *accord In re* Plains Resources Inc. S'holders Litig., No. Civ.A. 071-N, 2005 WL 332811, at *5 (Del. Ch. Feb. 4, 2005) ("Whether disclosure is required under Delaware law turns on the question of materiality.").

27. Allerhand & Montgomery, *supra* note 26, at 953 (quoting Malone v. Brincat, 722 A.2d 5, 10 (Del. 1988)).

28. *Id.* (quoting *In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 376 (Del. Ch. 1998)).

29. *In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *8 (Del. Ch. Apr. 29, 2011). For example, in *Khanna v. McMinn*, the Court held that a

Materiality turns on whether "there is a substantial likelihood that a reasonable shareholder would consider [the disclosure] important in deciding how to vote."[30] This standard does not require that the "disclosure of [an] omitted fact would have caused the reasonable investor to change his vote."[31] Instead, the Court looks to see whether, under the totality of the circumstances, there is a "substantial likelihood" that the additional disclosure "assumed actual significance in the deliberations of the reasonable shareholder."[32] In applying this test, the Court often queries whether the added disclosure "alter[s] the total mix of information made available" to the shareholder.[33]

On the other hand, bringing a complaint that seeks to provide shareholders with additional disclosures that simply remedies "an immaterial omission" does not create a valid disclosure claim.[34] For

disclosure claim would be dismissed if the Court was "satisfied with reasonable certainty that no set of facts could be proved that would permit the plaintiffs to obtain relief under the allegations made." No. Civ.A. 20545-NC, 2006 WL 1388744, at *29 (Del. Ch. May 9, 2006).

30. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 439 (1976); *see also In re* Golden State Bancorp Inc. S'holders Litig., No. Civ.A. 16175, 2000 WL 62964, at *2 (Del. Ch. Jan. 7, 2000) ("For purposes of this motion, it is enough that a reasonable Golden State stockholder might have considered the additional [disclosures] . . . of some interest in deciding how to vote.").

31. *TSC Indus.*, 426 U.S. at 449.

32. *Id.*

33. *In re* Dr. Pepper/Seven Up Cos. S'holders Litig., C.A. No. 13109, 1996 WL 74214, at *3 (Del. Ch. Feb. 27, 1996) ("Simply stated, materiality turns on whether 'there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'") (quoting Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985)); *see also In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *8 ("[T]he materiality standard requires a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available").

34. *See, e.g.*, *Sauer-Danfoss*, 2011 WL 2519210, at *8. For example, in *In re Wyeth Shareholders Litigation*, the Court noted that the question becomes whether the additional disclosures arise because of "incomplete information, inaccurate information," or "something else that you could add that would be nice to know." Transcript of Settlement Hearing at 26, *In re* Wyeth S'holders Litig., C.A. No. 4329-VCN (Del. Ch. June 29, 2010). The Court was careful to point out that "just because it's nice to know doesn't mean that the law requires that it be disclosed." *Id.* Part of the reason for which the remedy of an immaterial omission does not create a valid disclosure claim is because otherwise "'disclosures in proxy solicitations will become so detailed and voluminous that they will no longer serve their purpose.'" Blake Rohrbacher & John Mark Zeberkiewicz, *Fair Summary: Delaware's Framework for Disclosing Fairness Opinions*, 63 BUS. LAW. 881, 883 (2008) (quoting TCG Sec., Inc. v. S. Union Co., No. 11-282, 1990 WL 7525, at *7 (Del. Ch. Jan. 31, 1990)); *see also* Clements v. Rogers, 790 A.2d 1222, 1245 (Del. Ch. 2001) (arguing that certain types of disclosures should not be required or else it "would turn proxy statements

example, asking the company why it took a particular action remedies an immaterial omission.[35] Similarly, seeking additional information about whether something happened does not remedy a material omission.[36] Likewise, when a complaint merely questions a board's subjective judgment, it does not constitute a valid disclosure claim.[37] And as a final example, when a complaint quibbles with a banker's opinion, in reality, it is simply seeking to remedy an immaterial omission.[38]

B. What is a Disclosure-Only Settlement?

A disclosure-only settlement is a settlement in which the plaintiffs release any claims they may have against a company, and in return, the company provides additional disclosures. As a result, the benefit to the plaintiff class is therapeutic at best. There are several common threads among disclosure-only settlements. For instance, one commonality is that the plaintiffs almost always first bring a suit alleging claims such as a breach of fiduciary duty or inadequate price. Then, after reviewing discovery materials, the plaintiffs learn that their original claims are

into vast compilations of information of little utility").

35. *See Sauer-Danfoss*, 2011 WL 2519210, at *10, *12 (rejecting plaintiffs' claim for credit for supplemental disclosures where the plaintiffs questioned why the company had altered sales growth projections, stating that "Delaware law does not require that a fiduciary disclose its underlying reasons for acting"); Newman v. Warren, 684 A.2d 1239, 1246 (Del. Ch. 1996) (holding that Delaware law does not require directors to give "the grounds of their judgment for or against a proposed shareholder action. . . . The board or the corporation may of course in all events choose to state reasons for a board recommendation. If that is done, the statement of those reasons must, of course, be true and not misleading").

36. *See Sauer-Danfoss*, 2011 WL 2519210, at *13 ("Omitting a statement that the board *did not* do something is not material, because 'requiring disclosure of every material event that occurred *and* every decision not to pursue another option would make proxy statements so voluminous that they would be practically useless.'" (quoting *In re* Lukens Inc. S'holders Litig., 757 A.2d 720, 736 (Del. Ch. 1999))); *see also In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 204 (Del. Ch. 2007) ("So long as what the investment banker did is fairly disclosed, there is no obligation to disclose what the investment banker did not do."). For that reason, in *Sauer-Danfoss*, a "supplemental disclosure explicitly stating that the board and its advisors did not adjust its projections was immaterial." 2011 WL 2519210, at *13.

37. *See Sauer-Danfoss*, 2011 WL 2519210, at *14 (deciding that "[w]hen a plaintiffs 'only beef is that [an investment banker] made mistakes in subjective judgment, even though those judgments were disclosed to the . . . stockholders,' then the plaintiff has not identified a material omission or misstatement." (quoting *In re* JCC Hldg. Co., 843 A.2d 713, 721 (Del. Ch. 2003) (alterations in original)).

38. *Id.* at *15 ("A 'quibble with the substance of a banker's opinion does not constitute a disclosure claim.'" (quoting *JCC Hldg.*, 843 A.2d at 721)).

baseless, and settle instead on disclosure-only grounds.[39] As a result, the case "turns into" a disclosure case.[40] In addition, disclosure-only settlements derive from representative litigation, and always arise in conjunction with deal litigation. Disclosure-only settlements are dependent on a plaintiff's ability to obtain additional disclosures for a company's shareholder base, and because the Court "errs on the side of [disclosing] more information"[41] to shareholders, disclosure-only settlements have become an important part of Delaware's deal-litigation law.

Another common thread of disclosure-only settlements is that the original deal litigation is often filed by the same plaintiffs' firms every time.[42] As a result, the Court has referred to these firms as both "frequent fliers"[43] and "Pilgrims."[44] These plaintiffs' firms are extremely quick to

39. *See, e.g.*, Motion for Class Certification, Settlement and Attorneys' Fees and the Court's Ruling at 20, Becker v. Am. Commercial Lines Inc., C.A. No. 5919-VCL (Del. Ch. Sept. 9, 2011) (stating that the plaintiff "determined that there would be a difficulty in demonstrating that the merger consideration fell outside the range of fairness," and so it agreed to release its original claims in return for disclosures); *Sauer-Danfoss*, 2011 WL 2519210, at *2 (alleging claims of inadequate price and breaches of fiduciary duty and settling instead on disclosure-only grounds); Augenbaum v. Forman, No. Civ.A. 1569-N, 2006 WL 1716916, at *1 (Del. Ch. June 21, 2006) ("The plaintiff filed an amended complaint, alleging breaches of fiduciary duty and disclosure violations. During discovery, however, the plaintiff became convinced that the merger price was fair, and negotiated a settlement to correct what the plaintiff believed were materially misleading disclosures.").

40. *See, e.g.*, Transcript of Settlement Hearing at 23, Henkel v. Gemstar-TV Guide Int'l, Inc., C.A. No. 3419-VCN (Del. Ch. Dec. 16, 2008) (explaining that after plaintiffs concluded that their original claims were baseless, the "case turned into a disclosure case").

41. Transcript of Settlement Hearing at 59, N.J. Bldg. Laborers Pension & Annuity Funds v. Applebee's Int'l, Inc., C.A. No. 3124-CC (Del. Ch. Feb. 27, 2008) ("Fundamentally, this Court errs on the side of more information. And our decisions force more disclosures and more information beyond even what the SEC requires. . . . I think some lawyers make the mistake that if it's okay with the SEC, it's got to be okay with the Delaware Courts. That isn't so.").

42. For example, commenting on the litigation that followed the Del Monte Foods Company's announcement regarding its acquisition by a group of institutional investors, the court stated that "a number of familiar entrepreneurial plaintiffs' firms" quickly "filed putative class actions challenging the Merger." *In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *1 (Del. Ch. June 27, 2011).

43. Vice Chancellor Laster stated that "I characterize certain law firms as frequent fliers based on my personal experience, which happily accords with an empirical analysis of the plaintiffs' firms who file most frequently in the Court of Chancery." *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 943 n.1 (Del. Ch. 2010) (citing Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 186-87 (2004)). Professors Thompson and Thomas "found that lawsuits brought by their list of frequent fliers 'settle more quickly on average than suits filed by other attorneys.'" *In re* Revlon, Inc. S'holders Litig., 990 A.2d at 945, n.4 (quoting Thompson & Thomas, *supra* note 43, at 186).

44. *In re* Revlon, Inc. S'holders Litig., 990 A.2d at 945 ("Firms who are early filers are frequently early settlers, leading some wags in the defense bar to label them 'Pilgrims.'").

file suit in the wake of a merger or acquisition announcement.[45] The Court has noted that "the first cases often appear minutes or hours after the announcement with others following within a matter of days."[46] For example, in *In re Revlon, Inc. Shareholders Litigation*,[47] the Court stated that four class actions were filed in the three weeks that followed the announcement of Revlon's controlling stockholder's merger proposal. The Court commented on the number of actions being "noteworthy only because similar announcements of controlling stockholder transactions historically have triggered more numerous filings within a much shorter period."[48] Another example, *In re Cox Communications*,[49] demonstrates the speed with which plaintiffs' firms file these lawsuits. In *Cox*, a proposal to acquire all of the public shares of Cox was announced at 4:06 a.m. on August 2, 2004.[50] By 8:36 a.m. of that same day, the first of "a flurry of hastily drafted complaints" was filed with the Court.[51] By 9:28 a.m., the firm that would become lead counsel in the lawsuit had filed its complaint, and by day's end, six complaints had been filed with the Court.[52] As a result of the quickness in filing, the lead counsel's complaint included "strained accusations of wrongdoing" that "did not maturely and thoughtfully confront[] the reality that the [proposed merger] was just that, a proposal, subject to the expected evaluation of a Special Committee of independent directors, which would soon be formed and have the chance to hire advisers."[53]

45. In *In re Cox Communications, Inc.*, then-Vice Chancellor Strine described the "hastily-filed, first-day complaints" as "serv[ing] no purpose other than for a particular law firm and its client to get into the medal round of the filing speed (also formerly known as the lead counsel selection) Olympics." 879 A.2d 604, 608 (Del. Ch. 2005).

46. *Revlon*, 990 A.2d at 943. The Court has also noted that "[t]oo often judges of this Court face complaints filed hastily, minutes or hours after a transaction is announced, based on snippets from the print or electronic media." TCW Tech. LP v. Intermedia Commc'ns, Inc., No 18336, 2000 WL 1654504, at *3 (Del. Ch. Oct. 17, 2000). The Court stated that "the speed with which [these pleadings] are filed in reaction to an announced transaction" is quite "remarkable." *Id.*

47. 990 A.2d 940, 943 (Del. Ch. 2010).

48. *Id.*

49. *Cox*, 879 A.2d at 604.

50. *Id.* at 608.

51. *Id.* (describing the first complaint as a series of "paragraphs cobbled together from public documents").

52. *Id.*

53. *Id.*

C. *What Drives Disclosure-Only Settlements?*

This section will build on the basics of disclosure-only settlements by describing the various factors that drive disclosure-only settlements, and then examining the potential danger of collusion that these settlements create.

1. Factors Driving Disclosure-Only Settlements

There are several factors that drive disclosure-only settlements. First, disclosure-only settlements take advantage of the fact that "Delaware law favors the voluntary settlement of corporate disputes."[54] Settlements streamline the judicial system and allow parties to reach mutually-beneficial resolutions. Furthermore, the Court's enhanced disclosure requirements, as set out in case law and transcript opinions, have greatly increased the room for parties to settle deal litigation.[55]

A second major factor driving disclosure-only settlements is that both plaintiffs and defendants have built-in incentives to settle. Plaintiffs' firms have a huge incentive to settle once they realize that their original claims lack merit.[56] While the Court conducts an independent review of the settlement's fairness, disclosure-only settlements survive this review because the plaintiffs are releasing weak claims on which there is a very small likelihood that they would have succeeded, and in exchange, the shareholder class receives enhanced disclosures.[57] Defendants similarly have a motivating incentive to settle since they can thereby obtain a broad

54. *In re* Countrywide Corp. S'holders Litig., C.A. No. 3464-VCN, 2009 Del. Ch. LEXIS 155, at *6-7 (Del. Ch. Aug. 24, 2009); *see also* Polk v. Good, 507 A.2d 531, 535 (Del. 1986) (noting that "Delaware law favors the voluntary settlement of contested issues" (citing Rome v. Archer, 197 A.2d 49 (Del. 1964)).

55. *See* McGeever, *supra* note 20, at 395 ("As the type of information required to be disclosed has expanded, the ability of parties to settle shareholder fiduciary litigation in exchange for supplemental disclosures has expanded as well.").

56. As discovery unfolds, plaintiffs may discover that some or all of their initial claims lack merit, and since often "the disclosure claims [have] more merit, the plaintiffs presumably use[] these claims to leverage [a] settlement." *In re* Golden State Bancorp Inc. S'holders Litig., No. Civ.A. 16175, 2000 WL 63964, at *2 (Del. Ch. Jan. 7, 2000). For example, in *Golden State Bancorp*, the plaintiffs' counsel weighed "the likelihood of success on the merits against the costs of further litigation," and "considered the settlement the optimal resolution for [the company's] shareholders"; thus, the plaintiffs dropped their original *Revlon* claim and settled for disclosures. *Id.*

57. *See, e.g.*, Transcript of Settlement Hearing at 13, *In re* Monogram Biosciences, Inc. S'holders Litig., C.A. No. 4703-CC (Del. Ch. Jan. 26, 2010) ("Were there stronger claims, these modest benefits might not support the settlement or the release.").

release of all potential deal-related claims.[58] The release contained in disclosure-only settlements often includes language that "extends to all possible claims, known or unknown, asserted or unasserted, arising out of or relating to the events that were the subject of the litigation."[59] Furthermore, the standard release "also encompasses claims that could not have been litigated in the settled action, such as federal securities claims."[60] Defendants are also motivated to settle when they know that the terms of the litigated deal were fair to the shareholders. Chancellor Strine described the defendants' thought process as follows:

> This is a stinky case that should have never been brought against my clients. It is a waste of their time, and I have an ethical obligation as a lawyer to try to get it resolved on as cost-effective a basis as possible. And because of the realities of, you know, multi-forum litigation, the cost of motions to dismiss and other things, frankly, if we can tell more information about the deal—we're proud of the deal. You want to know everything about the deal? That's fine, if that gets it done and we can move on in a productive way.[61]

Chancellor Strine described this as rational behavior, and noted that even if the defense believes they would have prevailed in the end, defendants should move to settle these cases.[62]

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58. *See, e.g.*, Brinckerhoff v. Texas E. Prods. Pipeline Co., 986 A.2d 370, 385 (Del. Ch. 2010) ("The defendants get a broad release. Defendants 'customarily seek[] a release with the broadest scope.'" (quoting *In re* Phila. Stock Exch., Inc., 945 A.2d 1123, 1145 (Del. 2008))).

59. *Id.* (commenting that even this description "fails to capture the expansive breadth of these typically multi-page, 'prolix,' and sometimes 'incomprehensible' provisions") (quoting UniSuper Ltd. v. News Corp., 898 A.2d 344, 347 (Del. Ch. 2006)).

60. *Id.* (citing Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 386 (1996)).

61. Settlement Hearing and Application For Attorneys' Fee and Costs and the Court's Ruling at 28, *In re* Danvers Bankcorp, Inc. S'holders Litig., C.A. 6162-CS (Del. Ch. Oct. 19, 2011).

62. *Id.* In *Masucci v. Fibernet Telecom Group, Inc.*, C.A. No. 4680-VCS, (Del. Ch. Nov. 25, 2009), then-Vice Chancellor Strine remarked that it is often the case that "the defendants would probably have prevailed in the end on a motion to dismiss or something." However, because the cost of litigating the case to that point "exceeds the cost of simply putting out more information," the defendants run a cost-benefit analysis and make the additional disclosure in order to obtain "deal certainty" and resolve the litigation. Transcript of Settlement Hearing at 19, *Masucci*, C.A. No. 4680-VCS; *see also* Transcript of Settlement Hearing at 84-85, *In re* Clarient, Inc. S'holders Litig., C.A. No. 5932-CS (Del. Ch. Aug. 2, 2011) ("The defendants provide some assurance that it's not a totally crazy fee. But it doesn't at all assure it's a reasonable one because they have every rational right to say this is a stupid lawsuit. It's pending in two courts, but there's no good claims. But by the time we brief the motions to dismiss, it will waste the time of our clients and our money and we might as well pay the fee.").

These factors create a sort of "hydraulic pressure" that causes the parties to settle.[63] In *In re Burlington Northern Santa Fe Shareholders Litigation*,[64] the Court noted that in deal litigation, because defendants want "deal closure and a broad release," and the plaintiffs want "to use the benefits of additional disclosure in the proxy statement to settle," there is an understanding that there is "going to be an opportunity for a disclosure settlement." In essence, the defendants oblige the plaintiffs, reasoning that all they have to do is disclose additional details about the deal, which is information that they are eager to share anyway and would have likely been disclosed upfront but for the reluctance of being "accused of puffery."[65]

2. Possibility of Collusion

Although the Court encourages settlement, it is also reluctant to turn a blind eye to settlement agreements that are agreed to by both parties to the lawsuit. The Court has a responsibility to monitor these settlements and to make an independent determination regarding their reasonableness.[66] For example, in *In re Dr. Pepper/Seven Up Cos. Shareholders Litigation*,[67] the plaintiffs and defendants brought a negotiated settlement to the Court for approval. One aspect of the settlement involved attorneys' fees for the plaintiffs' counsel, for which the defendants agreed to pay the full amount requested by the plaintiffs. The plaintiffs argued that the Court should not reduce the fee since that would "upset[] the rational product of a negotiated

63. *See, e.g.*, Motion for Class Certification, Settlement and Attorneys' Fees and the Court's Ruling at 40, Becker v. Am. Commercial Lines Inc., C.A. No. 5919-VCL (Del. Ch. Sept. 9, 2011) (describing the "hydraulic pressure that forces settlement"); Transcript of Settlement Hearing and Rulings of the Court at 65, *In re* Burlington N. Santa Fe S'holders Litig., C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010) (describing the "hydraulic forces involved" in the settlement negotiations).

64. Transcript of Settlement Hearing and Rulings of the Court at 65, *Burlington Northern*, C.A. No. 5043-VCL.

65. *See* Transcript of Settlement Hearing at 23, *Masucci*, C.A. No. 4680-VCS; *see also* Transcript of Settlement Hearing at 20–21, Smith v. Curagen Corp., C.A. No. 4670-VCS, (Del. Ch. Nov. 9, 2009) ("There's a reason why people, frankly, sometimes are reluctant to disclose everything about what makes a deal fair precisely because the natural bias is supposed to be that people already attacked you for puffery, for overstating your case in favor of a deal.").

66. *See In re* Nat'l City Corp. S'holders Litig., C.A. No. 4123-CC, 2009 WL 2425389, at *5 (Del. Ch. July 31, 2009) (quoting Goodrich v. E.F. Button Grp., Inc., 681 A.2d 1039, 1045–46 (Del. 1996)) ("The Delaware Supreme Court has unequivocally held that, where plaintiffs and defendants agree upon fees in settlement of a class action lawsuit, a trial court 'must make an independent determination of reasonableness' of the agreed to fees.").

67. *In re* Dr. Pepper/Seven Up Cos. S'holders Litig., C.A. No. 13109, 1996 WL 74214, at *5 (Del. Ch. Feb. 27, 1996).

issue between plaintiffs' counsel and defendants' counsel."[68] The Court rejected this argument, stating that while "it would be much easier for the Court to defer to the fee request . . . it would also be an abdication of the Court's responsibility" to determine whether the award was "fair and reasonable."[69] While the *Dr. Pepper* Court cut the negotiated fee by more than one half, the Court can and will "consider the fact" that the settlement was the product of an "arm's length negotiation process between parties with adverse economic interests."[70] For example, in *New Jersey Building Laborers Pension & Annuity Funds v. Applebee's International, Inc.*, the Court declined to "second guess" the negotiated fee because there was nothing "extraordinary" about the case that would cause the Court to set the fee award aside.[71]

The Court scrutinizes negotiated settlements for three reasons. First, the Court is deprived of the adversary process when it is presented with a negotiated fee.[72] As a result, the court is presented with a unique circumstance where the plaintiffs and the defendants, once "former adversaries," have joined together "to convince the court that their settlement is fair and appropriate."[73] Moreover, the benefits to both sides[74]

68. *Id.*

69. *Id.*

70. Transcript of Settlement Hearing at 36, *In re* Wyeth S'holders Litig., C.A. No. 4329-VCN (Del. Ch. June 29, 2010).

71. Transcript of Settlement Hearing at 57, *New Jersey Bldg. Laborers Pension & Annuity Funds v. Applebee's Int'l, Inc.*, C.A. No. 3124-CC (Del. Ch. Feb. 27, 2008).

72. *See In re* Nat'l City Corp. S'holders Litig., C.A. No. 4123-CC, 2009 WL 2425389, at *5 (Del. Ch. July 31, 2009) (observing that "[a] negotiated fee arrangement 'by its nature deprives the court of the advantages of the adversary process'" (quoting Weinberger v. Great Neekosa Corp., 925 F.2d 518, 525 (1st Cir. 1991))).

73. Brinckerhoff v. Tex. E. Prods. Pipeline Co., 986 A.2d 370, 385 (Del. Ch. 2010) (quoting Ginsburg v. Philadelphia Stock Exch., Inc., C.A. No. 2202-CC, 2007 WL 2982238, at *1 (Del. Ch. Oct. 9, 2007)) (internal quotations omitted). I observed this behavior in many of the settlement hearing transcripts that I read while researching this Article. In negotiated settlements, after the plaintiffs had presented their arguments in favor of the settlement, the Court would turn to the defense to see if it had anything to add. Almost without exception, the defendants would decline to say anything—they were totally on board with the settlement and, in some cases, even argued in favor of the settlement agreement. *See, e.g.*, Transcript of Settlement Hearing, Roffe v. Eagle Rock Energy GP, L.P., C.A. No. 5258-VCL (Del. Ch. Oct. 28, 2010) (describing the conversation between the Court and the defense counsel, where the only thing that the defense counsel added in response to the Court's query was to highlight the fairness of the settlement); Transcript of Settlement Hearing at 18-19, Rosen v. Wind River Sys., Inc., C.A. No. 4674-VCP (Del. Ch. Dec. 8, 2009) ([Defense counsel, in response to the Court questioning them if they had anything to add]: "Your Honor, I don't think we have anything to add on behalf of [the company]."); Transcript of Settlement Hearing at 16, Masucci v. Fibernet Telecom Group, Inc., C.A. No. 4680-VCS (Del. Ch. Nov. 25, 2009) ("The Court: Anything from the defendants? [Defense counsel]: Nothing to add, Your Honor.").

may cause the interests of the parties to align even before they reach a negotiated settlement.[75] Such behavior "makes heightened judicial oversight of this type of agreement highly desirable."[76]

Second, there is an "omnipresent threat" that the plaintiffs' counsel will settle for anything so long as they get a fee out of the deal.[77] For instance, in *In re National City Corp. Shareholders Litigation*,[78] the Court stated that negotiated settlements do "not obviate the need for independent judicial scrutiny of the fee because of the omnipresent threat that plaintiffs would trade off settlement benefits for an agreement that the defendant will not contest [the] fee award." In *Brinckerhoff v. Texas Eastern Products Pipeline Co.*,[79] the Court followed a similar line of reasoning, stating that it would not "require much suspicion or imagination to think that extrinsic factors might have colored the judgment of the special committee and plaintiffs' counsel when agreeing to [the] settlement."[80] The Court indicated several extrinsic factors that likely contributed to the settlement: the "lure of a premium transaction," the "self-evident benefits of settlement to the controller and other defendants," the "prospect of an easy end to the litigation," and the possibility of a "large fee" for the plaintiffs' counsel.[81] The Court also noted that these extrinsic factors could take effect without anyone "cross[ing] the line of collusion or conscious shirking," since "'human nature may incline even one acting in subjective good faith to rationalize as right that which is merely personally beneficial.'"[82]

Finally, representative litigation presents an inherent agency problem.[83] For example, in class actions, the shareholders are the claim-holding members. However, they "have little or no role in negotiating the settlement of the action or the fees their agents, the attorneys, will receive in conjunction with the settlement of the claims that belong to them."[84] The Court has pointed out that at most the role played by shareholders is to

74. *See supra* Part I.C.1.

75. *Brinckerhoff*, 986 A.2d at 385 ("The attractiveness of a transactional settlement thus creates risk that the interests of defendants and plaintiffs' counsel will coincide well before they officially align in support of an agreed-upon settlement").

76. *Nat'l City*, 2009 WL 2425389, at *5 (quoting *Weinberger*, 925 F.2d at 525).

77. *Id.*

78. *Id.* at *5.

79. *Brinckerhoff*, 986 A.2d at 374.

80. *Id.*

81. *Id.*

82. *Id.* (quoting City Capital Assocs. v. Interco Inc., 551 A.2d 787, 796 (Del. Ch. 1988)).

83. *See Nat'l City*, 2009 WL 2425389, at *5 ("Additionally, skepticism of negotiated fee agreements is justified by the classic agency problem inherent in class action litigation").

84. *Id.*

"object to a proposed award of attorney fees."[85] Therefore, the Court must be "vigilant" in preventing negotiated agreements from taking advantage of the agency relationship between the agents and principals in representative litigation.[86]

Because of these three reasons, to adequately protect the interests of the shareholder class members, the Court must "be suspicious," and "exercise such powers as it may possess to look imaginatively beneath the surface of events, which, in most instances, will itself be well-crafted and unobjectionable."[87] As a result, the Court will reject settlement agreements where it does not find that the class would be sufficiently benefited. For example, in *In re FLS Holdings, Inc. Shareholders Litigation*,[88] the Court rejected the parties' negotiated settlement. Although the parties argued that the settlement provided the "material benefit" of enhanced disclosure to the shareholder class, the Court found that the plaintiffs' claims were "certainly litigable," and that if the plaintiffs were "successful their claims could possibly be worth several million dollars."[89] Because the plaintiffs' counsel was willing to release the claims in exchange for "some therapeutic measures and no monetary benefit for the class," the Court refused to approve the settlement.[90]

D. What Have Disclosure-Only Settlements Accomplished?

While the Court must be wary when reviewing negotiated disclosure-only settlements, the case law and transcript rulings that have shaped disclosure-only settlements in Delaware have accomplished much good for shareholders of Delaware corporations. In particular, companies now provide much better disclosure to their shareholders in relation to mergers and acquisitions.[91] And much of the improved disclosure can be attributed,

85. *Id.*

86. *Id.*

87. *In re* Fort Howard Corp. S'holders Litig., C.A. No. 9991, 1988 WL 83147, *703, *719 (Del. Ch. Aug. 8, 1988).

88. 1993 WL 104562 (Del. Ch. Apr. 21, 1993); *see also In re* SS & C Techs., Inc. S'holders Litig., 911 A.2d 816, 817–18 (Del. Ch. 2006) (noting that a court will not approve a settlement where the claims belonging to the class were not adequately investigated or pursued).

89. *FLS Holdings*, 1993 WL 104562, at *281.

90. *Id.* at *280-81 ("Plaintiffs' claims are of arguable merit and the therapeutic measures of the type offered in this case are scant consideration to support their surrender.").

91. For example, a recently-retired M&A practitioner noted that "the concern over litigation substantially improves the decision-making and disclosure" by corporations. Ronald Barusch, *Dealpolitik: The Useful Corruption of Shareholder Lawsuits*, WALL ST. J.

at least in part, to the disclosure-only line of cases.

Several of the judges on the Court have commented on the marked improvement in disclosure. For example, then Chancellor Chandler remarked that companies are disclosing things "that would have never been in a proxy statement 20 years ago."[92] And then-Vice Chancellor Strine stated that "disclosure in this area has gotten increasingly more informative. And that's in part the result of changes at the Securities & Exchange Commission and, frankly, decisions of this Court."[93] Vice Chancellor Laster commented that "we have made tremendous progress in terms of quality of disclosure that goes out to stockholders. And there is no question that . . . the plaintiffs' bar . . . deserve[s] a lot of credit for that."[94]

There is an inverse relationship between enhanced disclosure and the availability of obtaining quality disclosure-only settlements. Accordingly, as disclosure has steadily improved, the opportunities for obtaining quality disclosure-only settlements have become smaller. Chancellor Strine commented that with companies making "fuller" and "richer" disclosures, "[t]hat should actually lead people to file fewer suits about financial information rather than more."[95] Therefore, as "corporate America learns from previous cases and disclosure gets better, the target for disclosure-only settlements gets narrower."[96] As a result, the information obtained by

BLOGS (Jan. 13, 2011, 1:28 PM), http://blogs.wsj.com/deals/2011/01/13/dealpolitik-the-useful-corruption-of-shareholder-lawsuits/. This is because while plaintiffs most often settle shareholder litigation early (as in disclosure-only settlements), other times plaintiffs "buy the lottery ticket and pursue the case." *Id.* And when these cases succeed, corporations and even directors pay out large amounts of money. *Id.* (referring to the WorldCom litigation in which the outside directors paid one third of the $54 million settlement from their own pockets). As a result, "lawyers, investment bankers and directors behave to be sure theirs is not the case that becomes the lottery ticket." *Id.*

92. Transcript of Settlement Hearing at 14, *In re* Monogram Biosciences, Inc. S'holders Litig., C.A. No. 4703-CC (Del. Ch. Jan. 26, 2010).

93. Transcript of Settlement Hearing and Rulings of the Court at 19, *In re* Sepracor Inc. S'holders Litig., C.A. No. 4871-VCS (Del. Ch. May 21, 2010); *accord* Transcript of Settlement Hearing at 21, Masucci v. Fibernet Telecom Group, Inc., C.A. No. 4680-VCS (Del. Ch. Nov. 25, 2009) (observing that "frankly, if you compare the quality and substance of the disclosures that are given today to those given even ten years ago, there's no comparison").

94. Transcript of Motion for Class Certification, Settlement and Attorneys' Fees and the Court's Ruling at 24, Becker v. Am. Commercial Lines Inc., C.A. No. 5919-VCL (Del. Ch. Sept. 9, 2011).

95. Transcript of Settlement Hearing at 22, *Masucci*, C.A. No. 4680-VCS.

96. Transcript of Settlement Hearing and Application for Attorney's Fees and Costs and the Court's Ruling at 29, *In re* Danvers Bankcorp, Inc. S'holders Litig., C.A. No. 6162-CS (Del. Ch. Oct. 19, 2011). And corporate America is learning from, and paying attention to, these disclosure cases. In *Turberg v. Arcsight, Inc.*, C.A. No. 5821-VCL (Del. Ch. Sept. 20, 2011), Vice Chancellor Laster spoke with the defense counsel in regarding this topic. The defense counsel commented that the disclosure-only transcripts are widely circulated

plaintiffs' counsel has become "more tangential,"[97] and there is not much opportunity for plaintiffs to score a "home run" disclosure result.[98]

E. Criticisms of Disclosure-Only Settlements

The Court has not shied away in its criticism of disclosure-only settlements.[99] There are four main areas of criticism: (1) the Court has tired of plaintiffs who attack a deal and then settle for marginal disclosures, (2) often only the lawyers for the two parties really stand to benefit from disclosure-only settlements, (3) the lawsuits often nitpick otherwise good disclosures, and (4) there is an incentive for companies not to disclose everything up front. These criticisms are described below.

First, the Court has noted that it has grown "weary" of plaintiffs who attack a deal, only to settle shortly thereafter for marginal disclosures.[100] This pattern plays out repeatedly in deal litigation. The plaintiffs first "cr[y] outrage" over a deal, making "very serious" accusations that the defendants have breached their fiduciary duties.[101] They allege that the board was "unfaithful to [its] trust," and claim that it "knowingly eschewed a better deal, or, frankly, didn't engage in a diligent search process to optimize value."[102] Then, after conducting discovery, the plaintiffs realize

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and that able lawyers are "scouring these things," and accordingly, "we all have our memos and what we know should go in" the disclosures, which results in "better disclosure" each time. Transcript of Settlement Hearing at 38, *Turburg*, C.A. No. 5821-VCL.

97. Transcript of Settlement Hearing and Application for Attorney's Fees and Costs and the Court's Ruling at 29, *Danvers*, C.A. No. 6162-CS. The Court noted that it has seen this playing out in disclosure cases. *Id.* ("That's what we're seeing. And as a result, people shouldn't expect that they've set a novel precedent when they haven't.").

98. *See* Transcript of Settlement Hearing at 44-45, Kwait v. Berman, C.A. No. 5306-CC (Del. Ch. Aug. 16, 2010) (describing the different types of disclosure success as "single[s]," "double[s]," "triple[s]," and "home run[s]").

99. *See, e.g.*, Transcript of Courtroom Status Conference at 19, Scully v. Nighthawk Radiology, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010) (noting that "historically, plaintiffs' lawyers have been subjected to criticism for the practice of suing on the announcement of every deal, then agreeing to global disclosure statements. I've criticized you all for it. My colleagues have criticized you all for it.").

100. *See, e.g.*, Transcript of Settlement Hearing at 14, *In re* Monogram Biosciences, Inc. S'holders Litig., C.A. No. 4703-CC (Del. Ch. Jan. 26, 2010) (observing that "there is a sort of continuing pattern of people just challenging deals, basically raising sort of increasingly marginal disclosure claims, like 'Now, you have told us the projections. You told us things that would have never been in a proxy statement 20 years ago at all. Now tell us even more. And then when you tell us, we will settle at the original price'").

101. Transcript of Settlement Hearing at 24, Smith v. Curagen Corp., C.A. No. 4670-VCS (Del. Ch. Nov. 9, 2009).

102. *Id.* at 25.

that the deal was indeed fair,[103] and settle in return for "five or ten additional marginal pieces of information that they didn't know about, which suggested that the deal [was] even cooler" than they had originally thought, "or, at the very least, [were] not at all inconsistent with the idea that the board was making a good recommendation in the first place."[104] The Court has noted that such behavior is paradoxical because at the time of the settlement hearing, in most cases, the shareholder-clients have already voted in favor of the deal. Therefore, "at the time that they're being certified to represent the class, they have already decided to take the money in the deal they have already challenged."[105] For that reason, the Court has described the incentive system created by this pattern as inappropriate,[106] and has likened the Court's part in the settlements as a facilitator in "the sale of indulgences."[107] Moreover, such file-and-settle actions could indicate a larger problem—that plaintiffs bring litigation "more for the sake of litigation being brought than because any plaintiff genuinely believes that the terms of the transaction are actually unfair."[108]

The Court has also criticized disclosure-only settlements because in such cases, only the lawyers stand to benefit monetarily from the settlement.[109] The shareholder class, which in an ordinary class action would receive some sort of monetary benefit, receives additional

103. *Id.* ("Then, to have the settlements come in on a repeated basis being, 'Oh, no, frankly, we all took the deal. Turned out the deal was cool.'").

104. *Id.*

105. Transcript of Settlement Hearing at 67, *In re* Clarient, Inc. S'holders Litig., C.A. No. 5932-CS (Del. Ch. Aug. 2, 2011).

106. *See, e.g.*, Transcript of Settlement Hearing at 25, *Smith*, C.A. No. 4670-VCS (observing that "[t]he incentive system that that creates is not, in my view, wholesome"); Transcript of Motion for Class Certification, Settlement and Attorneys' Fees and the Court's Ruling at 37, Becker v. Am. Commercial Lines Inc., C.A. No. 5919-VCL (Del. Ch. Sept. 9, 2011) (explaining that "[h]istorically, we have tried to err on the side of allowing defendants to dispose of weak cases by entering into [disclosure-only] settlements like this. I think, certainly, the Chancellor [Strine] and I have commented on the potentially bad incentives that that creates systematically in terms of encouraging people to file suit on these types of actions and in terms of allowing defendants to obtain broad releases in these types of actions").

107. Transcript of Settlement Hearing at 33, Roffe v. Eagle Rock Energy GP, L.P., C.A. No. 5258-VCL (Del. Ch. Oct. 28, 2010). Such behavior is "like using [the] Court to facilitate the sale of indulgences," whereby the plaintiffs "excus[e] the defendants from any of their actual or potential sins." *Id.*

108. Transcript of Settlement Hearing at 14, *In re* Monogram Biosciences, Inc. S'holders Litig., C.A. No. 4703-CC (Del. Ch. Jan. 26, 2010) (noting that "[h]onestly, it's not the kind of litigation that is particularly edifying. It doesn't seem to be inspired, as much as it should be, or perhaps at all, by the economic motivations of stockholders or the class.").

109. *See* Transcript of Settlement Hearing and Application for Attorneys' Fees and Costs and the Court's Ruling at 25, *In re* Danvers Bankcorp, Inc. S'holders Litig., C.A. No. 6162-CS (Del. Ch. Oct. 19, 2011).

information about the deal, but absolutely no economic value.[110] Chancellor Strine made an interesting comparison between the outcomes in a disclosure-only case and those in a tort case:

> [I]t's an odd thing about this job that you can award a lot of money to someone for a case and award money to an attorney when, in other contexts of the law—no medical malpractice plaintiff's lawyer walks out of cases with money in her pocket and turns on the client and says, 'Well, remember, you've got that explanation about why the doctor made his choice in the operating room, and I know you feel a lot better. You don't have any money, but you know why the doctor made the choice he made with the scalpel, and I've got a couple hundred thousand dollars.'[111]

Remarking that he did not "think tort plaintiffs would take that," Chancellor Strine stated that because "this dynamic" exists solely in disclosure-only cases, the Court has to carefully scrutinize such settlements.[112]

A third reason for which the Court has criticized disclosure-only settlements is because often, when identifying supplemental disclosures on which to base the settlement, plaintiffs are merely "nitpick[ing]" otherwise good disclosures.[113] The Court is concerned that at times plaintiffs attempt

110. This curious situation does not seem to bother some shareholders. The Court has commented that there are "supposed[] stockholders" who repeatedly file suit on mergers and acquisitions. The Court has called them "hungry readers," since "[t]hese folks seem to like to read more interstitial details about deals," and then "conclude that the deals are fair and accept their money." *Id.* at 24. If additional information is all that these people want, "maybe they should write companies and say, 'I'll give you 50,000 if you give me some information on [a deal]. I won't trade on it. I just want to read it.'" *Id.* The Court has also noted that "we have rapidly gotten to the point now where the types of things that people are focusing on and providing us for settlements are things that appear of, at most, academic interest to [financial experts]. . . as opposed to something that is of real benefit to investors." Transcript of Motion for Class Certification, Settlement and Attorneys' Fees and the Court's Ruling at 24, Becker, C.A. No. 5919-VCL.

111. Transcript of Settlement Hearing and Application for Attorneys' Fees and Costs and the Court's Ruling at 30, Danvers, C.A. No. 6162-CS. Chancellor Strine also compared this situation to a contract action: "I don't think when you represent somebody in a contract action, again, the other side explains its situation, and the client says, 'Okay. I've got the explanation. Now the lawyer gets the fee.'" *Id.* at 30–31.

112. *Id.* The Court has also warned that if it identifies a "consistent pattern" wherein plaintiffs bring deal litigation and "settl[e] without any change, then perhaps an inquiry will need to be done at some point as to why these plaintiffs are bringing these actions, because if there are plaintiffs who don't really care about the outcome, then that will give the Court concern." Transcript of Settlement Hearing at 15, *Monogram Biosciences*, C.A. No. 4703-CC; *see also id.* (noting the fiduciary obligation that comes when shareholders file class actions).

113. *See* Transcript of Settlement Hearing at 21, Masucci v. Fibernet Telecom Group,

to "go out 18 decimal points" with their additional disclosures, forgetting that they should instead focus on omissions that are "genuinely material."[114] For example, rather than attempting to obtain "everything in the world that could be in the reams of materials that a board gets," plaintiffs should identify false statements or instances where the board misled shareholders.[115]

Finally, the Court has criticized disclosure-only settlements because companies have an incentive to not disclose everything up front in order to later settle on disclosure-only grounds in exchange for a global release on the deal. Vice Chancellor Laster, in a recent transcript, stated that one of the things that worried him about disclosure-only settlements was that they created a twisted incentive structure for all the parties involved in a deal.[116] From the outset, the investment bankers have a strong incentive to not put in certain disclosures.[117] Then, the issuer, who should be policing the banker's disclosures to ensure that they are adequate, instead "has an incentive not to really push hard back on the bankers," because when plaintiffs "come along"[118] and file suit, since "there's always more financial information" that can be disclosed,[119] the company "can add this stuff in and get a settlement"[120] that will get the plaintiffs off their backs in exchange for a global release and deal certainty.

II. BACKGROUND ON ATTORNEYS' FEES IN SETTLEMENTS

A. The Corporate Benefit Doctrine

In awarding attorneys' fees, the Court begins its analysis with the American Rule, which requires that parties, even the prevailing party, are responsible for the payment of their own counsel fees unless a statute or

Inc., C.A. 4680-VCS (Del. Ch. Nov. 25, 2009) (observing that "it does worry me that there seems to be a repeated pattern of essentially hidden hope disclosure claims, where we're going to nitpick disclosures which, frankly, if you compare the quality and substance of the disclosures that are given today to those given even ten years ago, there's no comparison").

114. *Id.* at 22.

115. *Id.* at 24.

116. *See* Transcript of Settlement Hearing at 19, Turberg v. Arcsight, Inc., C.A. No. 5821-VCL (Del. Ch. Sept. 20, 2011).

117. *Id.*

118. *Id.* at 19.

119. Transcript of Settlement Hearing at 17, *Masucci*, C.A. No. 4680-VCS (discussing the notion that "because defendants don't want to engage in puffery or exaggeration of the merits of the deal, they have more stuff that they can tell" at a later date).

120. Transcript of Settlement Hearing at 19, *Arcsight*, C.A. No. 5821-VCL.

contract provides otherwise.[121] From this baseline, the Court has established certain instances in which it will implement "fee-shifting," whereby a second party may be required to pay the first party's counsel fees.[122] For instance, attorneys' fees and expenses in corporate litigation are awarded to plaintiffs' counsel under the "common corporate benefit" doctrine,[123] which is an exception to the American Rule.[124] It "provides that where a litigant has conferred a common monetary or therapeutic benefit upon an identifiable class of stockholders, all of the stockholders should contribute to the costs of achieving that benefit."[125] And because the definition of a corporate benefit is quite broad,[126] "the benefit need not be measurable in economic terms."[127] Therefore, the Court may award

121. *See* Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1164 (Del. 1989) (citing Walsh v. Hotel Corp. of America, 231 A.2d 458, 462 (Del. 1967)).

122. *See id.*

123. *In re* Plains Res. Inc. S'holders Litig., C.A. No. 071-N, 2005 WL 332811, at *2 (Del. Ch. Feb. 4, 2005) (citing Weinberger v. UOP, Inc., 517 A.2d 653, 656 (Del. Ch. 1986)); *accord Tandycrafts*, 562 A.2d at 1164 (explaining that "[i]n the realm of corporate litigation, the Court may order the payment of counsel fees and related expenses to a plaintiff whose efforts result in . . . the conferring of a corporate benefit" (citing Chrysler Corp. v. Dann, 223 A.2d 384, 386 (Del. 1966))).

124. *See* La. State Employees' Ret. Sys. v. Citrix Sys., Inc., C.A. No. 18298, 2001 WL 1131364, at *4 (Del. Ch. Sept. 19, 2001) [hereinafter *LASERS*] (describing the corporate benefit doctrine as an exception to the default rule that parties are responsible for the payment of their own counsel fees).

125. *Plains Res.*, 2005 WL 332811, at *2; *accord* Berger v. Pubco Corp., 2008 WL 4173860, at *1 (Del. Ch. Sept. 8, 2008) (explaining that "[t]he corporate benefit doctrine provides that where a common benefit has been conferred upon stockholders, all stockholders should contribute to the costs incurred to confer the benefit"). Generally, the fees and expenses that are incurred to obtain a corporate benefit are paid out of a fund that a plaintiff's efforts have created. *See, e.g.*, *In re* Triarc Cos. S'holders Litig., C.A. No. 16700, 2006 WL 903338, at *2 (Del. Ch. Mar. 29, 2006) (explaining that Delaware law allows counsel fees to be paid out the fund resulting from the litigation). However, although a plaintiff's efforts may not create a fund, meaning that the benefit is solely "therapeutic," this does not mean that the Court will deny compensation. *See In re* Dunkin' Donuts S'holders Litig., C.A. No. 10825, 1990 WL 189120, at *4 (Del. Ch. Nov. 27, 1990) (allowing for attorneys' fees in a corporate benefit case without the creation of a fund).

126. *Tandycrafts*, 562 A.2d at 1165 (describing the definition as "elastic") (citing *Chrysler*, 223 A.2d at 386; Allied Artists Pictures Corp. v. Baron, 413 A.2d 876, 878 (Del. 1980)).

127. *Id.*; *see also* Frank v. Elgamal, C.A. No. 6120-VCN, 2011 WL 3300344, at *2 (Del. Ch. July 28, 2011) (holding that "[n]otably, the litigation need not achieve a pecuniary benefit under that exception; rather, a plaintiff may be entitled to a fee award if the lawsuit produces a substantial benefit to the corporation or its stockholders") (citing Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n, 902 A.2d 1084, 1090 (Del. 2006)); *In re* Wm. Wrigley Jr. Co. S'holders Litig., C.A. No. 3750-VCL, 2009 WL 154380, at *5 (Del. Ch. Jan. 22, 2009) (responding to objectors who argued that the class settlement "should be rejected because it [did] not result in any monetary compensation and, thus, provide[d] no benefit to the class," the Court stated that the benefit conferred need not be

attorneys' fees when a meritorious suit generates only a "heightened level of corporate disclosure."[128] As a result, the Court may find that a disclosure-only settlement provides a corporate benefit to a company's shareholders.[129]

Once the Court has identified a corporate benefit, the plaintiff will be entitled to attorneys' fees if: (1) "the suit was meritorious when filed," (2) "the action producing the corporate benefit was taken by the defendant corporation before a judicial resolution," and (3) "the resulting corporate benefit was causally related to the lawsuit."[130] Each of these three requirements is examined below.

1. Meritorious at Filing

For plaintiffs to receive an award of attorneys' fees, their complaint must be meritorious when filed. A plaintiff's claim is meritorious when filed "if it can withstand a motion to dismiss on the pleadings."[131] In other words, a plaintiff must have "knowledge of provable facts which hold out some reasonable likelihood of ultimate success."[132] Consequently, if a plaintiff makes "a series of unjustified and unprovable charges of wrongdoing to the disadvantage of the corporation," the Court will find that the suit lacked merit, and therefore, that the plaintiff is not entitled to an award of attorneys' fees.[133] In *Allied Artists Pictures Corp. v. Baron*,[134] the Delaware Supreme Court rejected the notion that "in a settled or mooted case, 'it should not matter whether the suit had legal merit,' so long as the action resulted in some benefit to stockholders."[135] Such a rule would fly in

monetary in nature, as long as there is a specific benefit to the class); *In re* Dr. Pepper/Seven Up Cos. S'holders Litig., C.A. No. 13109, 1996 WL 74214, at *4 (Del. Ch. Feb. 27, 1996) (noting that "[i]t is not necessary, of course, for the benefit conferred to be monetary in nature, provided there is a specific benefit to the class").

128. *Tandycrafts*, 562 A.2d at 1165.

129. *See, e.g.*, *In re* FLS Holdings, Inc. S'holders Litig., 1993 WL 104562, *273, *280 (Del. Ch. Apr. 21, 1993) (observing that "[i]mproved disclosures may certainly prove beneficial to class members and may constitute consideration of a type which will support a settlement of claims").

130. *Elgamal*, 2011 WL 3300344, at *2 (citing United Vanguard Fund, Inc. v. TakeCare, Inc., 693 A.2d 1076, 1079 (Del. 1997)).

131. *Chrysler*, 223 A.2d at 387.

132. *Id.* ("It is not necessary that factually there be absolute assurance of ultimate success, but only that there be some reasonable hope.").

133. *In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *6 (Del. Ch. Apr. 29, 2011) (internal quotation marks omitted).

134. 413 A.2d 876, 879 (Del. 1980).

135. *Sauer-Danfoss*, 2011 WL 2519210, at *6 (quoting *Allied Artists*, 413 A.2d at 879).

the face of "Delaware's public policy of 'discouraging baseless litigation.'"[136] However, in determining whether the claim was meritorious when filed, the Court is not limited to the original complaint, and may look as well at the plaintiff's amended complaints.[137]

2. The Action Producing the Corporate Benefit Preceded a Judicial Resolution

In addition to finding that the plaintiffs filed a meritorious complaint, the Court must also determine that the action producing the corporate benefit was undertaken by the defendant corporation prior to a judicial resolution. Of the three prongs, this is the most straightforward. Often, all that is required by the Court is a simple comparison of two dates: the date on which the defendant took the action producing the benefit and the date on which the judicial resolution occurred.[138] When the timing of these events is unclear, the Court examines whether "the controversy continues to be 'subject to further judicial scrutiny which could . . . change[] the result.'"[139] And any actions undertaken by the defendant during this period of judicial scrutiny are "deemed to occur before a judicial resolution."[140]

136. *Id.* (quoting *Allied Artists*, 413 A.2d at 879).

137. *See, e.g.*, *id.* (rejecting the plaintiffs' argument that because the original complaint did not assert a meritorious claim when it was filed, that the plaintiffs were not entitled to attorneys' fees, stating "I disagree, however, that a court awarding fees under Delaware law must look only to the original complaint"); *In re* First Interstate Bancorp Consol. S'holder Litig., 756 A.2d 353, 362 (Del. Ch. 1999) (finding that claims in a third amended complaint satisfied the requirement of being meritorious when filed). A rule allowing a Court to review amended complaints "is consistent with the liberal approach for amending pleadings that governs under Rule 15." Sauer-Danfoss, 2011 WL 24519210, at *7 (citing CT. CH. R. 15(a)) (stating that "leave to amend 'shall be freely given when justice so requires'")). Accordingly, the Court "should look to the complaint that first asserted the benefit-conferring claim. If other claims in the pleading or asserted in prior iterations of the complaint were not meritorious when filed or did not confer a benefit, then the court can reduce the fee award accordingly." *Id.* (citing *In re* BEA Sys., Inc. S'holders Litig., C.A. No. 3298-VCL, 2009 WL 1931641, at *1 (Del. Ch. June 24, 2009) ("[C]alculating fees based on estimation that one-quarter of the time and costs are rationally attributable to the claims that resulted in the benefit") (internal quotation marks omitted).

138. *See* Off v. Ross, C.A. No. 3468-VCP, 2009 WL 4725978, at *6 (Del. Ch. Dec. 10, 2009) ("There is no dispute that [the company] extended the Rights Offering to its shareholders on March 7, 2008, long before the provisional resolution of the Delaware Action on November 26, 2008.").

139. San Antonio Fire & Police Pension Fund v. Bradbury, C.A. No. 4446-VCN, 2010 WL 4273171, at *10 (Del. Ch. Oct. 28, 2010).

140. *Id.*

3. The Corporate Benefit Was Causally Related to the Lawsuit

The Court's final task in determining whether plaintiffs are entitled to attorneys' fees is to find whether the corporate benefit was causally related to the plaintiffs' lawsuit. In Delaware, the standard that plaintiffs must meet to show that a corporate benefit is causally related to a lawsuit is quite low. This is because plaintiffs are "entitled to a rebuttable presumption that a causal connection existed between the litigation and the subsequent benefit conferred on the corporation."[141] Accordingly, if the corporation takes an action that benefits its shareholders, and if that action "chronologically follow[s] the filing of a meritorious suit," then the corporation assumes the burden of showing "'that the lawsuit did not in any way cause'" the corporate action.[142] The Court has noted that this is a "heavy burden" that the corporation rarely satisfies.[143] For example, in *Louisiana State Employees' Retirement System v. Citrix Systems, Inc.*,[144] the corporation demonstrated that its withdrawal of a shareholder proposal was motivated by multiple reasons, including a new on-point Chancery opinion, a deteriorating climate, and the plaintiffs' lawsuit. While the Court recognized the various motivating factors, it noted that it did not need to "determine th[e] issue with mathematical exactitude."[145] Instead, the Court needed only to find "that the withdrawal was, at least in part, precipitated by th[e] lawsuit," and as a result, the Court found that the corporate benefit was causally related to the lawsuit.[146]

B. The Award of Attorneys' Fees Must be "Reasonable"

Once the Court finds that the three elements described above are satisfied, the Court *may* award attorneys' fees.[147] An award of attorneys'

141. *In re* Plains Res. Inc. S'holders Litig., C.A. No. 071-N, 2005 WL 332811, at *2 (Del. Ch. Feb. 4, 2005) (citing United Vanguard Fund, Inc. v. Takecare, Inc., 693 A.2d 1076, 1080 (Del. 1997)).

142. Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1165 (Del. 1989) (quoting Allied Artists Pictures Corp. v. Baron, 413 A.2d 876, 880 (Del. 1980)); *accord* LASERS, C.A. No. 18298, 2001 WL 1131364 at *5 (Del. Ch. Sept. 19, 2001) (noting that "[u]nder well-established Delaware law, the fact that the corporate action mooting the plaintiff's claim occurred after the filing of that claim 'is enough to create an inference that the two events were connected'") (quoting Grimes v. Donald, 455 A.2d 388 (Del. 2000)).

143. Plains Res., 2005 WL 332811, at *3.

144. *LASERS*, 2001 WL 1131364, at *6.

145. *Id.*

146. *Id.*

147. *See id.* (stating that attorneys' fees "*may* be awarded" once the three elements are satisfied (emphasis added)).

fees is certainly not guaranteed, and the fees must always be reasonable under "all the circumstances."[148] Attorneys' fees are awarded under "the discretion of the [C]ourt,"[149] and the discretion will not be disturbed by the Delaware Supreme Court except "upon a clear showing of abuse of such discretion."[150]

The Court's use of "cost and fee shifting mechanisms" provides an economic incentive for private attorneys "to bring suits on behalf of nominal shareholder plaintiffs."[151] However, not every transaction warrants litigation.[152] As a result, the Court must carefully determine what constitutes a reasonable award in order to encourage or discourage certain lawsuits. The Court does this by (1) balancing two competing policy objectives, (2) applying what are termed the "*Sugarland* factors," and (3) awarding similar fees in cases where similar disclosures were obtained.

1. A Reasonable Fee Carefully Balances Two Competing Policy Objectives

The first way in which the Court determines what constitutes a reasonable fee award is by balancing two competing policy objectives. The first policy objective is to "encourag[e] monitoring behavior by stockholders," and the second is to "protect[] the assets of Delaware corporations from unreasonable opportunistic demands."[153] Accordingly, the Court must contemplate the incentive that its fee award creates so that

148. *In re* Gilmartin v. Adobe Res. Corp., No. 12467, 1992 WL 12580455, at *1 (Del. Ch. June 29, 1992); *see also In re* Golden State Bancorp Inc. S'holders Litig., No. Civ.A. 16175, 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000) (noting that "Delaware courts examine the totality of circumstances when deciding whether a fee is appropriate").

149. *In re* Plains Res. Inc. S'holders Litig., No. Civ.A. 071-N, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005) (citing Krinsky v. Helfand, 156 A.2d 90 (Del. 1959)); *accord In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *6 (Del. Ch. June 27, 2011) (noting that "[t]he power to award fees, including interim fees, 'is part of the original authority of the chancellor to do equity in a particular situation'") (quoting Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393 (1970)); *In re* Dr. Pepper/Seven Up Cos. S'holders Litig., C.A. No. 13109, 1996 WL 74214, at *5 (Del. Ch. Feb. 27, 1996) (explaining that "[l]ooking at the benefit achieved, I have tried to exercise carefully the discretion vested in this Court with regard to fee applications").

150. Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1165 (Del. 1989).

151. *In re* Fuqua Indus., Inc. S'holders Litig., 752 A.2d 126, 133 (Del. Ch. 1999).

152. *See, e.g.*, Hearing on Plaintiffs' Counsel's Application For Attorneys' Fees and Expenses and Rulings of the Court at 63, *In re* Zenith Nat'l Ins. Corp. S'holders Litig., C.A. No. 5296-VCL (Del. Ch. July 26, 2010) (remarking that "[y]ou know, the reality is that not every deal merits a lawsuit").

153. *In re* James River Group, Inc. S'holders Litig., C.A. No. 3173-VCL, 2008 WL 160926, at *2 (Del. Ch. Jan. 8, 2008).

on one hand, plaintiffs are incented to undertake "future meritorious lawsuits," but on the other hand, "'socially unwholesome windfalls'" are not doled out.[154] A reasonably-balanced fee award will also cause boards of directors "to remain vigilant regarding potential liability to stockholders or to the corporation when they are acting."[155]

2. A Reasonable Fee Follows the *Sugarland* Factors

The second way in which the Court determines a reasonable fee award is by applying what the Court refers to as the *Sugarland* factors. "When a plaintiff pursues a cause of action relating to the internal affairs of a Delaware corporation and generates benefits for the corporation or its stockholders, Delaware law calls for an award of attorneys' fees and expenses based on the factors set forth in *Sugarland Industries, Inc. v. Thomas*."[156] The *Sugarland* factors that the Court focuses on include: (1) "the results achieved for the benefit of the shareholders"; (2) "the efforts of counsel and the time spent in connection with the case"; (3) "the contingent nature of the fee"; (4) "the difficulty of the litigation"; and (5) "the standing and ability of counsel involved."[157] It is important to note that while these factors are useful to the Court in determining the appropriate fee, "they do not provide anything resembling an arithmetic formula or quantitative model."[158] Indeed, Delaware is unique from the federal courts in that it

154. Berger v. Pubco Corp., C.A. No. 3414-CC, 2008 WL 4173860, at *1 (Del. Ch. Sept. 8, 2008) (quoting Korn v. New Castle County, C.A. No. 767-CC, 2007 WL 2981939, at *2 (Del. Ch. Oct. 3, 2007)); *accord* Transcript of Settlement Hearing at 45, Turberg v. Arcsight, Inc., C.A. No. 5821-VCL (Del. Ch. Sept. 20, 2011) (explaining that "Delaware's goal in awarding attorneys' fees is to provide real rewards for plaintiffs who file real claims and do real work. Our goal is not to confer socially unwholesome windfalls on people who simply file upon the announcement of a transaction and then don't do very much."); *In re* Nat'l City Corp. S'holders Litig., C.A. No. 4123-CC, 2009 WL 2425389, at *5 (Del. Ch. July 31, 2009) ("The fee award should also encourage plaintiffs' attorneys to remain alert in identifying and filing claims that will allow courts to catch the occasional instance of overreaching board conduct. This latter incentive must be balanced with the proper awareness by the Court that an appropriate fee should also help both to deter frivolous lawsuits against defendants, and to avoid financial windfalls to plaintiffs' attorneys.").

155. *Nat'l City*, 2009 WL 2425389, at *5.

156. *In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *8 (Del. Ch. June 27, 2011) (citing Sugarland Industries, Inc. v. Thomas, 420 A.2d 142 (Del. 1980)); *accord Plains Res.*, 2005 WL 332811, at *3 (noting that "[i]n determining the amount of an award of fees in a given case, the court typically considers the factors laid out in *Sugarland Indus. v. Thomas*").

157. *LASERS*, 2001 WL 1131364, at *6 (Del. Ch. Sept. 19, 2001) (citing *Sugarland*, 420 A.2d 142, 149).

158. Transcript of Settlement Hearing at 34, County of York Employees' Ret. Plan v.

does not utilize the lodestar approach, which determines attorneys' fees "on the basis of reasonable hourly rates multiplied by the number of attorney hours expended."[159]

While the Court applies all of the *Sugarland* factors in determining reasonable attorneys' fees, the benefit achieved by the plaintiffs is the most important factor.[160] The Court's application of this factor is discussed at length in Part IV, but a brief review of the remaining *Sugarland* factors follows below.

a) *Time and Effort*

The time and effort that plaintiffs' counsel spends in a case works as "a cross-check" on the overall reasonableness of a fee award.[161] When the Court considers this factor, it is particularly examining the time and effort that were spent in "relat[ion] to the actual benefit" that the plaintiff obtained.[162] There are two reasons why this factor is useful. First, the time and effort might be so substantial that the plaintiff's attorneys deserve a bump in their fees.[163] Second, and perhaps more important, the hours that the plaintiffs claimed might be drastically off base, suggesting that there is

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Merrill Lynch & Co., Inc., C.A. No. 4066-VCN (Del. Ch. Aug. 31, 2009); *see also* Transcript of Settlement Hearing at 40, Globis Capital Partners v. Safenet, C.A. No. 2772-VCS (Del. Ch. Dec. 20, 2007) (Then-Vice Chancellor Strine noting that "I'm not a person who buys into the idea that you can make the process of awarding fees into some sort of mathematical formula. The Federal Courts tried to do that with the lodestar for years. It never really amounted to as much mathematical rigor as it promised.").

159. *In re* Gilmartin v. Adobe Res. Corp., No. 12467, 1992 WL 12580455, at *1 (Del. Ch. June 29, 1992).

160. *See In re* Dr. Pepper/Seven Up Cos. S'holders Litig., C.A. No. 13109, 1996 WL 74214, at *5 (Del. Ch. Feb. 27, 1996) ("Delaware courts have traditionally considered as most important the benefit that the litigation produced in determining the appropriate amount of attorneys fees to award. In contrast with other jurisdictions, Delaware courts avoid the tendency to make hours expended the essential inquiry."); *see also* Augenbaum v. Forman, No. Civ.A. 1569-N, 2006 WL 1716916, at *2 (Del. Ch. June 21, 2006) (explaining that "[f]irst, and most important among those [*Sugarland*] factors, is the benefit achieved by the litigation"); *Nat'l City*, 2009 WL 2425389, at *5 ("This Court has consistently noted that the most important factor in determining a fee award is the size of the benefit achieved.") (citing Seinfeld v. Coker, 847 A.2d 330, 336 (Del. Ch. 2000)); *In re* Golden State Bancorp Inc. S'holders Litig., No. Civ.A. 16175, 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000) (noting that "the Court has given the size of the benefit conferred the greatest weight").

161. *Del Monte Foods*, 2011 WL 2535256, at *12 (internal quotations omitted).

162. Transcript of Oral Argument at 75, Continuum Capital v. Nolan, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) ("[T]he time and effort expended by counsel has to relate to the actual benefit that you got.").

163. *See infra* Part III.C.2.

some element of time padding going on.[164] For that reason, this factor is "a secondary consideration" used mainly "to avoid windfall" in cases where plaintiffs' attorneys "put in a little bit of time."[165]

b) Contingency Risk

The Court may adjust an award of attorneys' fees as a result of a plaintiff's contingency risk in order to incentivize future plaintiffs to bring meritorious deal-related lawsuits. For example, because plaintiffs "don't get a hit in every case,"[166] the award of attorneys' fees includes an element of compensation that serves "to reward people for the risk they take in the cases they don't get compensated in."[167] However, in disclosure-only cases, the Court recognizes that the forces that pressure the parties to settle[168] do not create particularly high contingency risks for plaintiffs.[169] Therefore, in disclosure-only settlements, attorneys' fees do not need to reflect a high contingency risk that might otherwise be present in another class action.

c) The Difficulty of the Litigation

The Court may also consider the difficulty of the litigation. In considering this factor, the Court interprets the term "difficulty" to mean "novel things," and not that a plaintiff "brought a case that really only had a

164. For example, in *Del Monte Foods*, the Court noted that "[t]his is not a situation in which an enormous number of hours contrasts so markedly with minimal litigation activity as to suggest someone was padding the numbers. Given the substantial investment by Lead Counsel, I am not concerned at this point about conferring an unjustified windfall." 2011 WL 2535256, at *12.

165. Transcript of Settlement Hearing and Rulings of the Court at 59, IBEW Local Union 98 v. Noven Pharms. Inc., C.A. No. 4732-CC (Del. Ch. Dec. 8, 2009).

166. *See id.*

167. Transcript of Settlement Hearing at 31, Globis Capital Partners v. Safenet, C.A. No. 2772-VCS (Del. Ch. Dec. 20, 2007).

168. See discussion of this "hydraulic pressure" *supra* Part I.C.1.

169. *See, e.g.*, Transcript of Settlement Hearing and Rulings of the Court at 65, *In re* Burlington N. Santa Fe S'holder Litig., C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010) (explaining that "[b]ecause of the hydraulic forces involved in defendants wanting deal closure and a broad release and the plaintiffs being able to use the benefits of additional disclosure in the proxy statement to settle, deal litigation does not carry anywhere near the same contingent risk [as those that 'require serious effort over a long time where there are . . . heavy fact disputes and where you don't have a—an obvious settlement opportunity']").

small possibility of success because settled law was so against you on most of it."[170] A case is not complex or difficult when, for example, it "involve[s] quite settled issues of Delaware law."[171] A case would be considered difficult when the plaintiffs' case requires "hard-nosed discovery," when plaintiffs compile "complex and detailed" factual records, and when plaintiffs "penetrate and expose" complex issues.[172]

d) *Standing and Ability of Counsel*

The final factor that may be considered by the Court—the standing and ability of counsel—is one that the Court notes is "rarely at issue" because of the high quality "lawyers who come in here and litigate."[173] However, the factor can be used as a sort of cross-check in the following two instances. First, the Court "consider[s] the standing and ability of counsel as a degree to which it justifies the hourly rates."[174] For example, "if somebody is a first year person coming in claiming $1000 billing rates, that doesn't make any sense,"[175] and the Court would likely discount the fee award. Second, the Court looks at this factor when "there [has been] a fast settlement."[176] Specifically, if the plaintiff's counsel shows that the reason for which the defendants quickly settled the case was "because they know [the plaintiff's counsel] and [he or she] has a history of taking these things the distance," and the counsel can show that he or she has "spent [his or her] career building a reputation of getting tangible results," that is something that the Court will take into account.[177] It is noteworthy that the number of plaintiff's counsel involved in a case has nothing to do with the fee size, since the size of the benefit that is created does not vary based on the number of lawyers involved in the case.[178]

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170. *Id.* at 66–67.
171. *Id.* at 66.
172. *In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *13 (Del. Ch. June 27, 2011).
173. Transcript of Oral Argument at 75, Continuum Capital v. Nolan, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011).
174. *Id.* at 75.
175. *Id.* at 75–76.
176. *Id.* at 76.
177. *Id.*
178. Transcript of Settlement Hearing and Rulings of the Court at 63, *In re* Burlington N. Santa Fe S'holder Litig., C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010) (reasoning that "I don't see any reason why the number of lawyers involved has any bearing on fee pricing. You know, if there are multiple firms involved, you're still creating the same benefit and it still should price the same way.").

3. The Court Attempts to Award Similar Fees in Cases Where Similar Results Were Obtained

The third way in which the Court attempts to make its fee awards reasonable is by awarding similar attorneys' fees in cases where similar results were obtained.[179] Taking a standardized approach like this allows the Court to "develop a jurisprudence that has more consistency," which makes sense since disclosure-only settlements all produce certain "informational benefit[s]" that can easily be identified and compared to one another.[180] Obviously not all supplemental disclosures are created equal.[181] As a result, in looking for similar cases, the Court focuses its analysis on "the qualitative importance of the disclosures obtained" in the various disclosure-only cases, and juxtaposes those.[182]

Standardizing fee awards in disclosure-only settlements has five benefits. First, it promotes fairness. Because "[a]ll disclosures are not created equal,"[183] "[c]onsistency promotes fairness by treating like cases alike and rewarding similarly situated plaintiffs equally."[184] Second, standardized fees streamline the negotiation process between the plaintiffs and defendants. Plaintiffs are provided a baseline from which they can operate in requesting reasonable fees in disclosure-only settlements.[185]

179. *See In re* Plains Res. Inc. S'holders Litig., No. Civ. A. 071-N, 2005 WL 332811, at *5 (Del. Ch. Feb. 4, 2005) (noting that "[t]he court awards fees for supplemental disclosures by 'juxtapos[ing] the case before it with cases in which attorneys have achieved approximately the same benefits'") (alteration in original) (quoting *In re* Golden State Bancorp, Inc. S'holders Litig., No. Civ.A. 16175, 2000 WL 2964, at *3 (Del. Ch. Jan. 7, 2000)); *In re* Dr. Pepper/Seven Up Cos. S'holders Litig., C.A. No. 13109, 1996 WL 74214, at *5 (Del. Ch. Feb. 27, 1996) (explaining that "[f]ee applications in class actions resulting in nonquantifiable, nonmonetary benefits have generated decisions from this Court that provide guidance for the exercise of this discretion").

180. Transcript of Settlement Hearing and Rulings of the Court at 56-57, IBEW Local Union 98 v. Noven Pharms. Inc., C.A. No. 4732-CC (Del. Ch. Dec. 8, 2009).

181. *See In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *8 (Del. Ch. June 27, 2011) (clarifying that "'[a]ll supplemental disclosures are not equal'") (quoting *In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *17 (Del. Ch. Apr. 29, 2011)).

182. *Id.* It is important to note that the Court does not base its fee award on the "average" disclosure-only fee award. For example, in *In re Plains Resources Inc. Shareholders Litigation*, the defendants argued that the plaintiff's counsel's fee award should not be greater than $275,000 for the supplemental disclosures obtained since "the average award for therapeutic benefit[s] in this court [was] $273,856." 2005 WL 332811, at *5. This reasoning is incorrect as fees are not based on an average, but instead on other, similar disclosure-only fee awards.

183. Transcript of Settlement Hearing and Rulings of the Court at 57, *IBEW*, C.A. No. 4732-CC.

184. *Sauer-Danfoss*, 2011 WL 2519210, at *17.

185. *See id.* (noting that "[e]stablishing baseline expectations helps plaintiffs' counsel

Similarly, the defense is better informed of what a reasonable fee award would look like depending on the disclosures that the plaintiffs obtained in a given case.[186] Third, standardized fees are beneficial because they provide guidance to other jurisdictions that hear cases applying Delaware law.[187] Fourth, the uniformity provided by standardized fees "reduces opportunities for forum shopping and other types of jurisdictional arbitrage, such as litigating in one court and then settling in another or presenting multiple fee applications to multiple courts."[188] Finally, standardized fees reduce judicial strain. In particular, the Court has been troubled in the past with plaintiffs who fail to provide the Court "with any comparisons to other cases."[189] Instead, plaintiffs would cite a case, call it a disclosure case, and say that the plaintiffs received a certain dollar amount, all without providing any other details.[190] The Court then had to use its resources to determine what fee to award without any help from the parties. By establishing a standardized fee analysis, plaintiffs know how to do the legwork, thus reducing the strain on the Court.[191]

After the Court satisfies itself that it has appropriately juxtaposed the case before it with other similar disclosure cases, using the fee awards from those other cases as a baseline, the Court may then either upgrade or downgrade its ultimate fee award based on the *Sugarland* factors—in particular the benefit obtained by the plaintiff. Part III discusses the three

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evaluate litigation opportunities and assists parties in negotiating reasonable fee awards").

186. *See* Transcript of Settlement Hearing at 26, *In re* Clarient, Inc. S'holders Litig., C.A. 5932-CS (Del. Ch. Aug. 2, 2011). In *Clarient*, the defense counsel recognized that Delaware has sufficient disclosure-only jurisprudence that "we're comfortable leaving a fee decision to the Delaware court because we have some idea what the parameters are" and "there's enough of these cases that come around that you have an idea as to what's going to be received for disclosure-only settlement." *Id.* The court went on to note that "[u]nfortunately, for better or worse, there isn't that same kind of jurisprudence in California or many other states and therefore, you know, if one gets into a contested issue as to what is kind of from a benefit to the class, what would be an appropriate award of fees, it's a much more open-ended and risky process." *Id.*

187. *See Sauer-Danfoss*, 2011 WL 2519210, at *17 (observing that "[r]ecognizing the ranges developed through case-by-case adjudication—often in unreported transcript rulings—provides sister jurisdictions with helpful guidance when awarding fees in cases governed by Delaware law").

188. *Id.*

189. Transcript of Settlement Hearing and Rulings of the Court at 57, IBEW Local Union 98 v. Noven Pharms. Inc., C.A. No. 4732-CC (Del. Ch. Dec. 8, 2009).

190. *Id.*

191. *See id.* at 60 (noting that "I want people to make responsible decisions about what cases are worth so that the Court can—can assess these matters"). The Court has also asked plaintiffs to be more specific in their briefs regarding precedent for the fee awards they seek, stating that string cites are "useless" unless they provide a "basis on which to figure out whether [the] case is analogous to those cases or not." *Id.* at 26.

fee-award bands into which the Court's fee decisions are placed.

III. FEE AWARD BANDS

In *In re Del Monte Foods Co. Shareholders Litigation*, the Court noted that its fee award decisions "reveal a range of discretionary awards with concentrations at certain levels."[192] This Article divides the Court's fee awards into three fee award "bands." Band 1 includes awards of attorneys' fees ranging from $0 to $299,999. Band 2 includes awards ranging from $300,000 to $500,000. And Band 3 includes awards in excess of $500,000.

The Court's fee award analysis begins with the assumption that a plaintiff's award of attorneys' fees fits in Band 2.[193] From this default baseline, the award can be adjusted upwards, or "upgraded" into Band 3, or adjusted downwards, or "downgraded" into Band 1, according to the Court's discretion and its review of the *Sugarland* factors.[194] This Part will analyze the many factors that cause an award to either be left alone in Band 2, or to be upgraded or downgraded. Because the Court begins its analysis with an assumption that a requested fee fits in the Band 2 range, this Article

192. C.A. No. 6027–VCL, 2011 WL 2535256, at *8 (Del. Ch. June 27, 2011). The *Del Monte Foods* opinion was written by Vice Chancellor Laster. It is interesting to review his comments in *Zenith National* in light of the *Del Monte Foods* opinion. *See* Transcript of Hearing on Plaintiffs' Counsel's Application for Attorneys' Fees and Expenses and Rulings of the Court at 61, *In re* Zenith Nat'l Ins. Corp. S'holders Litig., C.A. No. 5296-VCL (Del. Ch. July 26, 2010) (stating that there "have been principled efforts to apply the *Sugarland* factors, but perhaps more range-bound or indicative answers" were needed). His goal was to provide those ranges, and in *Sauer-Danfoss*, he provided a rough outline of fee award ranges. *See Sauer-Danfoss*, 2011 WL 2519210, at *21 (setting out three appendices with short descriptions of disclosures obtained by plaintiff's counsel, and the corresponding fee awards).

193. *See, e.g.*, Transcript of Settlement Hearing and Rulings of the Court at 59, *IBEW*, C.A. No. 4732-CC (explaining that "I start from the assumption that a disclosure case is worth about 400, 500,000 in fees"); *see also infra* Part III.A.

194. *See, e.g.*, Transcript of Settlement Hearing and Rulings of the Court at 59, *IBEW*, C.A. No. 4732-CC (explaining that "[y]ou dial up if they get more than, you know, say, two or three meaningful disclosure—disclosures, and you also consider how much work was put in. You dial it down if the disclosures were not very meaningful or if there wasn't a lot of work put in."); Transcript of Hearing on Plaintiffs' Counsel's Application for Attorneys' Fees and Expenses and Rulings of the Court at 62, *Zenith*, C.A. No. 5296-VCL (reasoning that in a case involving "an informational benefit, like the disclosures here, you approach it from a 400 to 500,000-ish band and then you depart upwards or depart downwards"). The policy behind this analysis is that the Court has "sought to align the interests of entrepreneurial plaintiffs' counsel with the classes they represent by granting minimal fees for minimal benefits and major fees for major results." *Del Monte Foods*, 2011 WL 2535256, at *14.

will first address Band 2 awards, after which it will discuss Band 1 and Band 3 awards.

A. Band 2 Awards

To begin the discussion of Band 2 awards, it seems necessary to describe why the range of $300,000 to $500,000 was selected.[195] The author recognizes that Vice Chancellor Laster has repeatedly commented in his written opinions and transcript decisions that he begins his analysis by assuming that an award of attorneys' fees belongs in the $400,000 to $500,000 range.[196] However, several of the Court's disclosure-only decisions suggest that the range for a Band 2 award should be slightly broader, to include amounts from $300,000 to $500,000.[197]

This section has three components. It will first address why Band 2 is the baseline for the Court's attorneys' fee analysis. It will then discuss the types of disclosures that are deserving of a Band 2 fee award. Finally, this section examines reasons for which a fee award would not be upgraded to Band 3.

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195. For a list of cases in which the Court awarded a Band 2 fee, see *infra* app. B.

196. *See, e.g.*, Transcript of Oral Argument at 98, Continuum Capital v. Nolan, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) (noting that "I start from the premise that a disclosure case is worth 400 to 500,000"); *Sauer-Danfoss*, 2011 WL 2519210, at *18 (noting that "[t]his Court has often awarded fees of approximately $400,000 to $500,000 for one or two meaningful disclosures"); Transcript of Settlement Hearing and Rulings of the Court at 67, *Burlington*, C.A. No. 5043-VCL (noting that "I think the general guideline that I use is 400 to 500,000 for a good disclosure claim"); Transcript of Settlement Hearing at 35, Roffe v. Eagle Rock Energy GP, L.P., C.A. No. 5258-VCL (Del. Ch. Oct. 28, 2010) (explaining that "[w]hat I have said in other cases is that, when somebody provides a meaningful additional quantum of information, I think the baseline ought to be in the 400 to 500,000 range"); *see also* Tikellis, *supra* note 20, at 97 (confirming that "[o]ver the past two years, the Court of Chancery has established benchmarks for assessing the benefits of the disclosures relied on as the settlement consideration and awarding attorney fees. The benchmarking provides for a set fee award between $400,000–$500,000").

197. *See, e.g.*, Transcript of Teleconference of Court's Ruling at 8, 13, *In re* Intergraph Corp. S'holders Litig., C.A. No. 2398-VCP (Del. Ch. Sept. 10, 2007) (reasoning that the fee award should not go "into the higher valuation type category," and instead awarding $330,000); Transcript of Settlement Hearing and Rulings of the Court at 68, 71, *In re* Cardiac Science, Inc. S'holders Litig., C.A. No. 1138-N (Del. Ch. Jan. 4, 2006) (reasoning that the disclosures did not warrant an upgrade or a downgrade, and awarding instead $300,000); *see also* Richard B. Kapnick et al., *Evaluations Attorney Fee Requests in Mergers & Acquisitions Litigation*, MERGERS & ACQUISITIONS LAW REPORT, Vol. 14, No. 2, at 6 (Jan. 10, 2011) (explaining that "Delaware courts in recent years have tended to award attorneys' fees in disclosure-only settlements in the range of $250,000 to $500,000").

1. Why is Band 2 the Default Range?

There are several reasons for which the Court begins its analysis by assuming that an attorneys' fee award belongs in Band 2. First, disclosure-only fee awards seem to have a center mass at that range. Second, this range incorporates the fixed cost to litigate a disclosure-only settlement. And third, the $300,000 to $500,000 range adequately compensates plaintiffs' contingency risks.

a) The Band 2 Range is the Center Mass for Disclosure-only Fee Awards

The Court has reasoned that satisfactory awards in disclosure-only settlements have a center mass "in the range of [a] bell curve to one or two standard deviations."[198] Applying the bell curve analogy to fee award bands places this range within Band 2. Such a range "recognize[s] that there will usually be one really good [disclosure] and a few others that are close, probably decent, [but] that you don't get to just dial up for each time you check something off the list."[199] When parties bring a negotiated award to the Court that sits within Band 2, there is almost a presumption that the award will be approved.[200] For example, in *In re James River*

198. Transcript of Settlement Hearing and Rulings of the Court at 58, *IBEW*, C.A. No. 4732-CC.

199. Transcript of Oral Argument at 100, *Continuum Capital*, C.A. No. 5687-VCL. This range also includes ordinary, or "modest," disclosure-only settlements. *See In re* Nat'l City Corp. S'holders Litig., C.A. No. 4123-CC, 2009 WL 2425389, at *6 (Del. Ch. July 31, 2009) (describing the benefit obtained by the plaintiffs as "modest," yet granting an award of $400,000). Furthermore, Band 2 fee awards "appear[] to be driven by the Court's desire to disincentivize plaintiffs from settling for disclosures where there are other merit based claims and to discourage the practice of filing on every deal with an eye towards a quick disclosure settlement." Tikellis, *supra* note 20, at 97; *see also In re* FLS Holdings, Inc. S'holders Litig., 1993 WL 104562, at *281 (Del. Ch. Apr. 2, 1993) (rejecting the parties' proposed disclosure-only settlement because the "claims [were] certainly litigable," and reasoning that if the plaintiffs were "successful their claims could possibly be worth several million dollars").

200. *See, e.g.*, Transcript of Settlement Hearing at 45, Turberg v. Arcsight, Inc., C.A. No. 5821-VCL (Del. Ch. Sept. 20, 2011) (explaining that "[w]hat I have said and what I stand by is that I am going to give some deference to the negotiations of counsel when I think the disclosures fall within the type of range that is not irrational, even if the Court would likely have come to a different view had I considered the matter myself. . . . Had this been a really litigated and contested fee petition, I would have gone through those [disclosures] and given you greater detail about my thoughts and what [the disclosures] were worth."); Transcript of Hearing on Plaintiffs' Counsel's Application for Attorneys' Fees and Expenses and Rulings of the Court at 59, *In re* Zenith Nat'l Ins. Corp. S'holders

Group, Inc. Shareholders Litigation,[201] the plaintiff requested a fee of $450,000. The defendants argued that because the plaintiffs had "abandoned their initial *Revlon* claims and then agreed to a disclosure based settlement within a month of filing their complaint" the fee award should be significantly lowered.[202] Vice Chancellor Lamb, however, reasoned that "[w]hile these observations are true and would afford a basis for the court to reduce any patently excessive fee request, they have less force where, as is true here, the fee requested is not patently unreasonable."[203] Similarly, in *Fessahaye v. Faleschini*,[204] Chancellor Chandler approved the requested fee, stating that because it "falls well within the range of fees that we approve in these sorts of matters, I'll approve the fee." In *In re Hawk Corp. Shareholders Litigation*,[205] Vice Chancellor Laster declined to make an award of attorneys' fees at the settlement hearing, and asked the parties for additional on-point briefing. However, he explained that if the parties could show why their requested fee award fell within the $400,000 to $500,000 range, the Court would not "second-guess the decision."[206]

Litig., C.A. No. 5296-VCL (Del. Ch. July 26, 2010) (deciding that "if parties negotiate at arm's length with at least some meaningful incentive on the defendants' part to limit fees and for their insurers to limit fees, if they reach something that is within the range, within that band, there isn't as much reason for the Court to second-guess it"); Transcript of Settlement Hearing and Rulings of the Court at 59, *IBEW*, C.A. No. 4732-CC (reasoning that if the requested award sits in the one or two standard deviation range, "the Court isn't going to mess with it. It's only if it's really outside the band that the Court is going to really worry about it."); Transcript of Settlement Hearing at 57, N.J. Bldg. Laborers Pension & Annuity Funds v. Applebee's Int'l, Inc., C.A. No. 3124-CC (Del. Ch. Feb. 27, 2008) ("I am not inclined to second guess a negotiated fee agreement because then I think I have the least justification for engaging in arm-chair quarterbacking. I just don't think at that point I have a basis to do that, unless there's something extraordinary about the matter that leads me to believe I should.").

201. C.A. No. 3173-VCL, 2008 WL 160926, at *1 (Del. Ch. Jan. 8, 2008).

202. *Id.*

203. *Id.* (awarding $400,000).

204. Transcript of Settlement Conference at 22–23, Fessahaye v. Faleschini, C.A. No. 5553-CC (Del. Ch. Nov. 4, 2010); *see also In re* Double-Take Software, Inc. S'holder Litig., No. 5569-CC, 2011 WL 795843 (Del. Ch. Mar. 7, 2011) (approving the settlement agreement without going into detailed reasoning for the decision where the fee award was $360,000).

205. Transcript of Telephonic Status Conference at 8, *In re* Hawk Corp. S'holders Litig., C.A. No. 5925-VCL (Del. Ch. Nov. 29, 2010).

206. *Id.*; *see also* Transcript of Settlement Hearing at 15, Ubaney v. Rubinstein, C.A. No. 5459-VCL (Del. Ch. Dec. 1, 2010) (noting that "I think you have a base range of 400 to 500,000. I think when people negotiate within that range, I am not going to really second guess it."). In *Ubaney*, the Court noted that the requested fee of $500,000 was reasonable, and that it was "not going to second guess whether th[at] was a $400,000 case or $450,000 case." *Id.* at 17. Instead, it would "grant th[e requested] fee award as reasonable and

b) *The Band 2 Range Incorporates the Fixed Cost to Litigate a Disclosure-only Settlement*

Vice Chancellor Laster has indicated that part of what goes into his baseline fee-award calculation is the "fixed cost to litigate."[207] He explained that this cost does not "vary very much" across cases, regardless of whether the plaintiff is bringing "one, two, three, four, [or] five disclosures."[208] Accordingly, although a plaintiff might obtain several solid disclosures, the Court is unlikely to upgrade the fee automatically into the Band 3 range. It may, however, increase the fee "by some amount," likely pushing the fee into the upper-reaches of Band 2, such "that [the fee] recognizes the incremental value of the disclosure but factors out the fact that you only had to litigate the case once."[209] For example, in *Continuum Capital*, the plaintiffs argued that one or two meaningful disclosures deserved an award of between $450,000 and $500,000, and argued that their award should be bumped up from the baseline because they had three meaningful disclosures.[210] Vice Chancellor Laster rejected this argument, stating that because the fixed litigation costs really did not fluctuate much across disclosure-only cases, the plaintiffs' request for a bump up to $950,000 "would seem to me to be windfall prone."[211] However, acknowledging the "small bit" of increased costs and the "incremental value of the disclosure," the Court awarded attorneys' fees of $525,000.[212]

c) *The Band 2 Range Adequately Compensates Plaintiffs' Contingency Risks*

Band 2 awards level out the contingency-risk discrepancy borne by

appropriate." *Id.*

207. Transcript of Oral Argument at 42, Continuum Capital v. Nolan, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011); *accord* Transcript of Hearing on Plaintiffs' Counsel's Application for Attorneys' Fees and Expenses and Rulings of the Court at 24-25, *In re* Zenith Nat'l Ins. Corp. S'holders Litig., C.A. No. 5296-VCL (Del. Ch. July 26, 2010) (explaining that "if you're going to get a fully—a fully-expedited tight deal team going, you know, it's in the range of what it would cost. And since you guys are able to settle a number of cases before you have to go the distance, you know, the thought is is [sic] that it washes out. . . . You're essentially saying 'All right. To go the distance, it would be that price. You guys get the benefit of cases where you don't have to go the distance and, therefore, get a higher multiple but still get the same result.'").

208. Transcript of Oral Argument at 42, *Continuum Capital*, C.A. No. 5687-VCL.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

plaintiff's firms. This is because Band 2 awards "contain[] inherent compensation for contingency risks for entrepreneurial plaintiffs' firms who bring these actions on a regular basis."[213] Essentially, the Court takes into account "what the market pays defendants to litigate these things on a noncontingent basis," and then, recognizing that the plaintiff is not litigating "on a pay-as-you go" basis, adds some "risk adjustment" to that amount.[214]

2. What Drives a Band 2 Fee Award?

When plaintiffs obtain disclosures that satisfy either of the following two categories, it is likely that the Court will leave the attorneys' fee in the default Band 2 range, without upgrading or downgrading it. The Court awards Band 2 fees when (1) plaintiffs obtain a single meaningful disclosure, or (2) plaintiffs obtain lesser disclosures, but do "real work" in litigating the case.

a) *One Meaningful Disclosure*

When plaintiffs obtain "one meaningful quanta of information," it is likely that the fee award will remain in the Band 2 range.[215] A review of the disclosure-only case law[216] shows that the Court seems to consider three types of disclosures to be meaningful.[217] Disclosure of a company's financial projections is the first type of meaningful disclosure.[218] For

213. *Id.* at 99.

214. Transcript of Hearing on Plaintiffs' Counsel's Application for Attorneys' Fees and Expenses and Rulings of the Court at 24, *In re* Zenith Nat'l Ins. Corp. S'holders Litig., C.A. 5296-VCL (Del. Ch. July 26, 2010).

215. *See* Transcript of Oral Argument at 40, *Continuum Capital*, C.A. No. 5687-VCL (recounting that "[t]his Court said in *Burlington Northern* and in *Roffe v. Eagle Rock*, if one meaningful quanta of information is obtained, the fee should be in the four to 500,000 range"). *But see In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027–VCL, 2011 WL 2535256, at *9 (Del. Ch. June 27, 2011) (explaining that "[t]his Court has often awarded fees of approximately $400,000 to $500,000 for one or two meaningful disclosures") (internal quotation marks omitted).

216. *See infra* Appendices A-C.

217. This discussion about whether a disclosure is meaningful applies both to the current examination of Band 2 awards and to Band 3 awards, as discussed in Part III.C.2.

218. *See, e.g.*, Transcript of Settlement Hearings and Rulings of the Court at 59, IBEW Local Union 98 v. Noven Pharms. Inc., C.A. No. 4732-CC (Del. Ch. Dec. 8, 2009) (awarding $450,000, and stating that "the meaningful disclosure relief that was obtained here was the projections"); *see also* Transcript of Settlement Hearing at 37, *In re* Clarient,

example, in *In re Zenith National Insurance Corp. Shareholders Litigation*,[219] the Court described the disclosure of management projections that were used by the company's banker in connection with its fairness opinion as a meaningful, or "major," disclosure. Similarly, in *In re Burlington Northern Santa Fe Shareholders Litigation*, the Court found that the plaintiffs' additional disclosure of "four sets of management projections" was a "substantial" disclosure to the shareholders.[220] The disclosure of projections has consistently generated attorneys' fee awards from the Court. This is because when projections are withheld from shareholders, the Court infers that the withheld projections did not favor the deal, and so their subsequent disclosure is presumed to be meaningful.[221]

Inc. S'holders Litig., C.A. No. 5932-CS, at 37 (Del. Ch. Aug. 2, 2011) (describing Chancellor Strine's opinion that projections of future estimate cash flows are relevant to shareholders); Transcript of Oral Argument at 100, *Continuum Capital*, C.A. No. 5687-VCL (noting that for disclosure awards in the $400,000 to $500,000 range, "[u]sually one of them, like projections, is really good"); Transcript of Settlement Hearing at 5, Ubaney v. Rubinstein, C.A. No. 5459-VCL (Del. Ch. Dec. 1, 2010) (awarding $500,000 for projections, and calling the projections "a good get"); Transcript of Settlement Hearing and Rulings of the Court at 31, *In re* Burlington N. Santa Fe S'holder Litig., C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010) (explaining "I like projections. I like to see people disclosing projections. I think they're material. I think people ought to have them in there."). *But see* Transcript of Settlement Hearing, Masucci v. Fibernet Telecom Group, Inc., C.A. No. 4680-VCS (Del. Ch. Nov. 25, 2009) (awarding a Band 1 fee of $200,000 despite a negotiated fee request of $227,500); Gottdiener v. Odeen, C.A. No. 3145-VCN (Del. Ch. May 20, 2008) (awarding a Band 1 fee of $289,702 despite three sets of management projections).

219. Transcript of Hearing on Plaintiffs' Counsel's Application for Attorneys' Fees and Expenses and Rulings of the Court at 61, *Zenith Nat'l*, C.A. 5296-VCL (awarding $400,000). It is noteworthy that the projections obtained by the *Zenith National* plaintiffs likely could have produced a larger result if the plaintiffs had been consistent in their views of the projections. *See id.* at 64. For example, the Court noted that at the preliminary injunction hearing, the plaintiffs took the view that the projections were not meaningful, but then at the settlement hearing, the plaintiffs claimed that those same disclosures were indeed meaningful. *Id.* As a result, the amount of the award was decreased.

220. Transcript of Settlement Hearing and Rulings of the Court at 8, 61, *Burlington*, C.A. No. 5043-VCL; *see also* Transcript of Settlement Hearing and Rulings of the Court at 54, *IBEW*, C.A. No. 4732-CC (describing projections as a "meaningful disclosure").

221. In *Continuum Capital*, Vice Chancellor Laster explained the rationale for this inference:

> Our courts have not gotten into analyzing specifically whether the projections were good or bad, or bad for the deal in terms of disclosure, and I think with good reason. You know, fiduciaries, who believe that the deal is in the best interest of the stockholder and want it approved, have an incentive to put out favorable information about the deal. You don't really worry that they're not telling the full story about the good stuff. You worry that they're not telling you the stuff that would cause stockholders to vote against the deal. So, when somebody withholds projections that were given to a banker or used in deal

Disclosures regarding bankers' analyses are the second type of meaningful disclosure.[222] For example, in *Turberg v. Arcsight, Inc.*,[223] the Court awarded $500,000 in attorneys' fees because the plaintiffs obtained previously-undisclosed banker's analysis. Similarly, in *In re Sepracor Inc. Shareholders Litigation*,[224] the Court awarded a Band 3 fee in part because the plaintiffs obtained disclosures that included a "precedent transaction analysis" prepared by the company's banker.

Disclosure of conflict-oriented information about fiduciaries or their legal or financial advisors is the third type of meaningful disclosure.[225] For example, in *Continuum Capital v. Nolan*,[226] the Court awarded a Band 3 fee award to the plaintiffs for obtaining "two conflict-oriented disclosures about the [company's] bankers." These disclosures included information showing that while the banker "was representing [the company], it was simultaneously discussing with [a potential buyer of the company] the possibility of being engaged by [the buyer] for other assignments."[227] Although the Court noted that "information about the banker's interests

> pricing, there's an inference, and I think a quite fair and reasonable inference that those projections could be construed as not favoring the deal. So I don't feel a need to go into what type of discounted cash flow analysis these types of projections could feasibly support, or whether they change the description of the banker's book. I think our law, primarily decisions by Vice Chancellor Strine, have elucidated why projections are important, and so we don't go into deep debate when they have been withheld.

Transcript of Oral Argument at 95-96, *Continuum Capital*, C.A. No. 5687-VCL.

222. *See, e.g.*, *In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *9–10 (Del. Ch. June 27, 2011) (noting that the Court often awards fees in the $400,000 to $500,000 range for "meaningful disclosures" and placing "supplemental disclosures about banker analyses" in that range).

223. Transcript of Settlement Hearing at 14, 43, Turberg v. Arcsight, Inc., C.A. No. 5821-VCL (Del. Ch. Sept. 20, 2011); *see also* Stipulation of Settlement, *In re* CommScope Corp. S'holders Litig., C.A. No. 5936-VCL, 2011 WL 1059608, at *1 (awarding $400,000 for "additional disclosures in the Definitive Proxy Statement relating to free cash flows and EBITDA values"); *In re* Hawk Corp. S'holders Litig., C.A. No. 5925-VCL, 4 (Del. Ch. Nov. 29, 2010) (awarding $450,000 in part because of disclosures regarding the analysis performed by the company's banker).

224. Transcript of Settlement Hearing and Rulings of the Court at 10, 13, 21, *In re* Sepracor Inc. S'holders Litig., C.A. No. 4871-VCS (Del. Ch. May 21, 2010); *see also* Transcript of Settlement Hearing at 21, Henkel v. Gemstar-TV Guide Int'l, Inc., C.A. No. 3419-VCN (Del. Ch. Dec. 16, 2008) (awarding $1,100,000 because of two meaningful disclosures, including the disclosure of the company's banker's analysis).

225. *See, e.g.*, *Del Monte Foods*, 2011 WL 2535256, at *9–10 (noting that a disclosure is meaningful when it regards "conflicts faced by fiduciaries or their advisers" or other information relating to the banker's relationship to the company).

226. Transcript of Oral Argument at 100, *Continuum Capital*, C.A. No. 5687-VCL.

227. *Id.* at 23.

[was] quite material" to the *Continuum* shareholders,[228] such disclosure does not appear to be as beneficial to shareholders as the other two types of meaningful disclosure, namely financial projections and bankers' analyses. For example, in *In re Hawk Corp. Shareholders Litigation*,[229] the Court awarded the plaintiffs' ask of $450,000. What is interesting, however, is that while the set of disclosures obtained by the plaintiffs should have bumped the fee up into Band 3,[230] the Court stated that seeking more than the amount awarded "would not have been supportable."[231] Following this same trend, in *In re Allion Healthcare Inc. Shareholders Litigation*[232] and *In re Compellent Technologies, Inc. Shareholders Litigation*,[233] the Court awarded a Band 1 fee although the plaintiffs obtained conflict-oriented disclosures. For example, in *Allion*, the disclosures detailed the role that several interested shareholders played in the exploration of strategic alternatives to the proposed transaction.[234] However, the Court awarded only a Band 1 fee. And while it may be likely that this fee award was driven by the disclosures showing conflicted shareholders rather than fiduciaries or their advisors, it does not explain the fee award in *Compellent Technologies*, where the Court awarded a Band 1 fee despite disclosures detailing the company's financial advisors' conflicts of interest.[235] Together, these examples suggest that from the Court's perspective, conflict-oriented disclosures are not nearly as beneficial as either projections or bankers' analyses.

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228. *Id.* at 96.

229. Transcript of Telephonic Status Conference, *In re* Hawk Corp. S'holders Litig., C.A. No. 5925-VCL (Del. Ch. Nov. 29, 2010).

230. As will be discussed in Part III.C.2, the disclosures in *Hawk*, which included two separate and distinct, meaningful disclosures (banker's analysis and potential conflicts of interest), should have upgraded the award.

231. Transcript of Telephonic Status Conference at 8, *Hawk*, C.A. No. 5925-VCL. This same result played out in *In re Double-Take Software, Inc.*, No. 5569-CC, 2011 WL 795843 (Del. Ch. Mar. 7, 2011), where the plaintiffs again sought a Band 2 award despite obtaining two separate and distinct, meaningful disclosures.

232. C.A. No. 5022-CC, 2011 WL 1135016 (Del. Ch. Mar. 29, 2011) (awarding $250,000).

233. C.A. No. 6084-VCL, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011) (awarding $100,000).

234. Plaintiffs' Brief in Support of Approval of the Proposed Settlement and an Award of Attorneys' Fees and Reimbursement of Expenses at 12, *In re* Allion Healthcare, Inc. S'holders Litig., C.A. No. 5022-CC, 2010 WL 5241869 (Del. Ch. Dec. 20, 2010).

235. *Compellent Technologies*, 2011 WL 6382523, at *27.

b) Lesser Disclosures Plus Real Work

When plaintiffs do "real work," although the disclosures they obtain may not generate a meaningful benefit, it is likely that the Court will still award a Band 2 fee.[236] Plaintiffs engage in real work when they litigate a case through a preliminary injunction.[237] This is true even if the plaintiffs lose on their preliminary injunction motion.[238] Similarly, where there is intense litigation activity by skilled attorneys over a short period of time, the Court may award a Band 2 fee, even if the benefit created by the disclosures would not otherwise provide for such a fee. For example, in *In re Dr. Pepper/Seven Up Cos. Shareholders Litigation*,[239] after awarding the plaintiffs $300,000 in attorneys' fees, the Court stated that the amount awarded included a premium "because of the intense effort required over a short period of time by skilled attorneys that produced some benefit for the class." Additionally, in *Berger v. Pubco Corp.*,[240] the Court found that the plaintiff's counsel had "prosecuted th[e] action in a diligent and competent manner." Noting that the defendants had pointed out "that plaintiff's counsel ha[d] engaged in similar cases and may have simply copied some of the legal arguments," the Court reasoned that this did "not necessarily militate against a higher award. Rather, *it supports a higher award* because plaintiff's counsel are experienced in practicing before this court and were, therefore, able to prosecute[] this action in a diligent and competent manner."[241]

236. *See* Transcript of Oral Argument at 98, Continuum Capital v. Nolan, C.A. 5687-VCL (Del. Ch. Feb. 3, 2011) (stating that it began "at the top" of the Band 2 range because "the plaintiffs did real work").

237. *See* Transcript of The Court's Ruling on Plaintiffs' Application for Attorneys' Fee at 12, *In re* Art Tech. Group, Inc. S'holders Litig., C.A. No. 5955-VCL (Del. Ch. May 16, 2011) (noting that litigating a case through a preliminary injunction, even if the plaintiffs lost, would place the fee in the range of "300 to $500,000-ish"). In *In re Gilmartin v. Adobe Resources Corp.*, No. 12467, 1992 WL 12580455, ¶ 3(a) (Del. Ch. June 29, 1992), the Court awarded a Band 3 award for a single disclosure, in part because it had granted a preliminary injunction in the case.

238. *See* Transcript of The Court's Ruling on Plaintiffs' Application for Attorneys' Fee at 12, *Art Tech. Group*, C.A. No. 5955-VCL.

239. *In re* Dr. Pepper/Seven Up Cos. S'holders Litig., C.A. No. 13109, 1996 WL 74214, at *5 (Del. Ch. Feb. 27, 1996).

240. Berger v. Pubco Corp., C.A. No. 3414-CC, 2008 WL 4173860, at *2 (Del. Ch. Sept. 8, 2008).

241. *Id.* (emphasis added) (internal quotation marks omitted). In *Berger*, the Court awarded a Band 1 fee of $250,000. *Id.* at *1. Accordingly, the Court's reference to the diligence and competence of plaintiff's counsel as supporting a "higher award" is relative to the defendant's ask of $92,000. *Id.* at *1-2. Therefore, competence and diligence may not always cause the Court to award a Band 2 fee; however, it is worth some increased monetary amount. It is also important to note that *Berger* is not a typical disclosure-only

3. What Would Prevent a Fee Award From Being Upgraded to Band 3?

There are several factors that may cause the Court to not upgrade a fee award to Band 3. First and foremost, the Court will not upgrade a fee award unless the plaintiffs' counsel obtains a sufficient benefit to the class to justify such an action.[242] For example, in *In re Dr. Pepper*, the plaintiffs requested an award of $690,000.[243] Awarding $300,000, the Court reasoned that "[t]his premium is not as significant as plaintiffs' attorneys have requested because the benefit, nonmonetary and nonquantifiable, is not as substantial as the benefit achieved in those cases where the full attorneys' fee request has been granted."[244] Second, when the additional disclosures are not "significant enough to warrant placement as an amendment to the proxy statement," it is highly unlikely that the Court would upgrade the fee award.[245] For example, in *National City*, the Court called the disclosures obtained by plaintiffs' counsel "meager" because they did not warrant placement on the company's proxy statement, and instead "were only reported on [the company's] form 8-K."[246] Accordingly, the Court awarded $400,000 instead of the $1,200,000 that was requested by the parties in their negotiated settlement.[247] Third, when the disclosures do not change the outcome of the shareholder vote, it is unlikely that the Court will upgrade a fee award.[248] Fourth, the Court will not upgrade a fee award where the litigation was not complex.[249] For that reason, in *Berger*, although the Court noted that the benefits that the plaintiffs obtained were "substantial," because "the litigation was not overly complex or novel," it "militate[d] against a larger attorneys' fee award."[250] Finally, an award will not be upgraded if the plaintiffs' counsel

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case. The *Berger* plaintiffs had brought an improper disclosure claim, which was decided in the cited opinion, and did not release other claims in favor of additional disclosures.

242. *See Dr. Pepper*, 1996 WL 74214, at *5.

243. *Id.* at *1.

244. *Id.* at *5.

245. *See In re* Nat'l City Corp. S'holders Litig., C.A. No. 4123-CC, 2009 WL 2425389, at *6 (Del. Ch. July 31, 2009).

246. *Id.*

247. *Id.* at *1-2.

248. *See id.* at *6 (explaining that "[n]o evidence exists that the additional disclosures significantly affected the outcome of the shareholder vote. Indeed, [the company's] shareholders overwhelmingly voted in favor of the merger.").

249. *See* Berger v. Pubco Corp., C.A. No. 3414-CC, 2008 WL 4173860, at *2 (Del. Ch. Sept. 8, 2008).

250. *Id. But see In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *13 (Del. Ch. June 27, 2011) (finding that "[t]his was not cookie-cutter deal litigation in which Lead Counsel advanced routine process and disclosure arguments,

fails to continue litigating.[251] In *National City*, the plaintiffs' counsel won a motion to expedite early on, and then "did not press any subsequent motion and only deposed two witnesses."[252] The Court found that such an effort, "regardless of the amount of hours spent, [did] not justify" the substantial fee award requested by the parties.[253]

B. Band 1 Awards

Attorneys' fees in the Band 1 range fall between $0 and $299,999.[254] Such an award represents an instance where, for whatever reason, the Court has used its discretion to downgrade an award from the default Band 2 range. In *Kwait v. Berman*,[255] the Court used baseball parlance to describe Band 1 awards, calling them "single[s]." In *Kwait*, the plaintiffs' counsel got a "beneficial result," however, "[i]t wasn't a home run result," or a "triple" or even a "double." As a result, then-Chancellor Chandler elected "to scale the request back to . . . a reasonable rate of compensation for a single being hit."[256] He determined that "for singles I am going to stay in the range of single-land which is in that $200,000 to $300,000 range."[257]

This section has two components. First, this section will analyze the reasons for which the Court may downgrade a fee. Next, this section will discuss why the Court even bothers to award attorneys' fees in instances where plaintiffs' counsel obtains such meager disclosures.

1. What Would Cause the Court to Downgrade a Fee?

The following factors represent reasons for which the Court will downgrade an award of attorneys' fees from the Band 2 range: (1) the disclosures obtained by the plaintiffs' counsel provided a meager benefit to

then accepted a standard package of board minutes and bankers' books before agreeing to a disclosure-only settlement," and awarding $2,750,000).

251. *See Nat'l City*, 2009 WL 2425389, at *6.

252. *Id.*

253. *Id.*

254. *See, e.g.*, Transcript of The Court's Ruling on Plaintiffs' Application for Attorneys' Fee at 12, *In re* Art Tech. Group, Inc. S'holders Litig., C.A. 5955-VCL (Del. Ch. May 16, 2011) (noting that "a small, supplemental type disclosure case . . . would be in the lower range of 100 to 200,000").

255. Transcript of Settlement Hearing at 45, Kwait v. Berman, C.A. No. 5306-CC (Del. Ch. Aug. 16, 2010).

256. *Id.* at 44–45.

257. *Id.* at 45.

the shareholders, (2) the plaintiffs' claims were weak from the outset, (3) the plaintiffs' counsel either claimed excessive hours, or else spent a majority of their hours on aspects of the litigation that derived no benefit, or (4) the case settled early in the litigation.

a) Meager Benefit

The first reason for which the Court will downgrade a fee award occurs when the additional disclosures provide only a "meager" benefit to the shareholder class.[258] The following disclosures demonstrate what would constitute a meager benefit.

First, disclosures that simply "fill in the picture" constitute a meager benefit.[259] In *In re Danvers Bankcorp, Inc. Shareholders Litigation*, the Court noted that "fill[ing] in the picture more fully" is "not always something that is of value."[260] This is because such disclosures are really "tell-me-more type things" that only fill in information "around-the-edges,"[261] and they do not provide a substantive benefit to the shareholders. Disclosures fill in the picture when all that they accomplish is to give shareholders even more of "a reason to vote in accordance with the board's original recommendation."[262] For example, in *Mandell v. Ablest, Inc.*,[263]

258. The Court has noted that "[i]n the context of a therapeutic benefit case," which would include disclosure-only settlements, "fee awards are minimized where the benefit is intangible or limited in duration." *In re* Golden State Bancorp Inc. S'holders Litig., No. Civ.A. 16175, 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000) ("This Court has at times awarded fees even after concluding that the benefit created by the litigation was meager or speculative. In such cases, however, the Court often discounts the fees accordingly."); *see also In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *9 (Del. Ch. June 27, 2011) (observing that "[d]isclosures of questionable quality have yielded much lower awards [than $400,000]"); Transcript of Settlement Hearing at 35, Roffe v. Eagle Rock Energy GP, L.P., C.A. No. 5258-VCL (Del. Ch. Oct. 28, 2010) (recommending that if "[y]ou fail to provide a meaningful quantum of information, dial down"); *In re* Plains Res. Inc. S'holders Litig., No. Civ.A. 071-N, 2005 WL 332811, at *5 (Del. Ch. Feb. 4, 2005) (reasoning that the court may "discount[] the fees accordingly if the benefits are meager or the disclosures are only marginally material").

259. *See* Transcript of Settlement Hearing and Application for Attorneys' Fees and Costs and the Court's Ruling at 23, *In re* Danvers Bankcorp, Inc. S'holders Litig., C.A. No. 6162-CS (Del. Ch. Oct. 19, 2011).

260. *Id.* at 23, 25 (noting that what would be of value would be disclosing something "that is actually concerning" rather than disclosing trivial or "mundane" details).

261. Transcript of Settlement Hearing and Rulings of the Court at 51, *In re* Burlington N. Santa Fe S'holder Litig., C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010) (reasoning that if plaintiffs achieved such disclosures, they "might support a settlement," but "it would be a quite thin rule in terms of materiality and in terms of having any type of tangible benefit").

262. Transcript of Settlement Hearing at 21, Smith v. Curagen Corp., C.A. No. 4670-VCS (Del. Ch. Nov. 9, 2009); *see also* Transcript of Settlement Hearing and Application for

the Court awarded $250,000 where the supplemental disclosures "confirmed the absence of any conflicts," and "include[d] the fact that the investment bank provided a fairness opinion to the special committee that supported the merger."[264]

Disclosures similarly fill in the picture when they provide information that simply "clarif[ies] issues rather than providing an additional, meaningful quantum of information."[265] For example, in *Roffe v. Eagle Rock Energy, GP*, the disclosures showed unitholders why, when their subordinated interests were extinguished, their subordinated arrearages were also extinguished.[266] Because the Court was "not impressed" with the disclosures, it "dial[ed] down from [the] midrange," and awarded $200,000 rather than the $535,000 requested by the plaintiffs.[267] *In re Allion Healthcare Inc. Shareholders Litigation*[268] is another example of a case in which the Court awarded a Band 1 fee when the supplemental disclosures simply clarified issues. In *Allion*, the disclosures included information about the company's engagement of legal and financial advisers, described the role that several interested shareholders played in the exploration of strategic alternatives to the proposed transaction, and offered the reasoning behind why the company accepted a reduced offer price.[269] Because of the meager benefit provided, the Court awarded $250,000 instead of the $500,000 requested by the plaintiffs.

Disclosures fill in the picture when they provide only a fact-fixing service. For example, in *In re Sauer-Danfoss Inc. Shareholders Litigation*, the Court awarded a $75,000 fee because the benefit conferred by the

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Attorneys' Fees and Costs and the Court's Ruling at 30, *Danvers Bankcorp.*, C.A. No. 6162-CS (explaining that "if you're going to come in and you're going to say something is a stinky deal and it's unfair and the end of it is that it's the same deal that goes through, then all you've done is share a little bit more information about it that doesn't materially affect the thing, and then my sense is that a modest fee is involved").

263. Transcript of Settlement Hearing at 13, Mandell v. Ablest, Inc., C.A. No. 2958-VCN (Del. Ch. Dec. 18, 2007).

264. *Id.* The disclosures also gave shareholders "additional detail regarding the efforts taken by [the banker] in connection with the proposed merger agreement market check," including "the nature and number of potential acquirers contacted by [the banker], the responses by the solicited parties, the substance and result of additional discussions" with an interested acquirer, and "the reasons why the company ultimately decided against pursuing a transaction with [that company]." *Id.* at 13–14.

265. Transcript of Settlement Hearing at 35, Roffe v. Eagle Rock Energy GP, L.P., C.A. No. 5258-VCL (Del. Ch. Oct. 28, 2010).

266. *Id.* at 6–8, 20–21.

267. *Id.* at 20, 36.

268. C.A. No. 5022-CC, 2011 WL 1135016 (Del. Ch. Mar. 29, 2011).

269. Plaintiffs' Brief in Support of Approval of the Proposed Settlement and an Award of Attorneys' Fees and Reimbursement of Expenses at 12, *In re* Allion Healthcare, Inc. S'holders Litig., No. 5022-CC, 2010 WL 5241869 (Del. Ch. Dec. 20, 2010).

disclosures was simply to correct "inaccurate information," including the end dates of two fifty-two-week periods used to calculate the company's shares' high closing price (in both cases the end dates were two days off), and correcting the 52-week high share price from $9.75 to $9.90.[270]

Disclosures also fill in the picture when they provide information relating "to the background of [a] merger."[271] For example, in *Smith v. Curagen Corp.*,[272] the Court awarded $200,000 for disclosures that included details regarding the company's board's attempts to market a particular product, the board's deliberations regarding whether to remain as a stand-alone entity, and reasons for which the company terminated discussions with two other potential acquirers. Similarly, in *Augenbaum v. Forman*,[273] the Court awarded $225,000 for merger-related disclosures, including information regarding the negotiation process and changes in the price term.

Finally, disclosures fill in the picture when they provide additional information regarding the company's banker's fee.[274] For example, in *Becker v. American Commercial Lines, Inc.*, the only thing the disclosure accomplished was to inform shareholders of "the allocation of the banker's fee."[275] As a result, the Court downgraded the fee.[276] Likewise, in *In re*

270. *In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *10 (Del. Ch. Apr. 29, 2011); *accord In re* BEA Sys., Inc. S'holders Litig., C.A. No. 3298-VCL, 2009 WL 1931641, at *1 (Del. Ch. June 24, 2009) (awarding $81,297). In *BEA Systems*, the disclosures corrected a typographical error regarding "the source of certain cash flow data" and "clarified a detail about the timing of a press release." Defendants' Answering Brief in Opposition to Plaintiffs' Application for an Award of Attorneys' Fees and Expenses at 6, *In re* BEA Sys., Inc. S'holders Litig., No. 3298-VCL, 2009 WL 1454710 (Del. Ch. May 22, 2009). The Court found that the "two revised disclosures were of some benefit to the class," however, "the benefit achieved in the litigation was unmistakably modest." *BEA Systems*, 2009 WL 1931641, at *1.

271. Transcript of Motion for Class Certification, Settlement and Attorneys' Fees and the Court's Ruling at 36, Becker v. Am. Commercial Lines Inc., C.A. No. 5919-VCL (Del. Ch. Sept. 9, 2011) (describing such disclosures as "supplemental 'tell me more'-type disclosures").

272. Transcript of Settlement Hearing at 12–13, 26, Smith v. Curagen Corp., C.A. No. 4670-VCS (Del. Ch. Nov. 9, 2009).

273. Augenbaum v. Forman, No. Civ.A. 1569-N, 2006 WL 1716916, at *2 (Del. Ch. June 21, 2006).

274. *See* Transcript of Settlement Hearing and Application for Attorneys' Fees and Costs and the Court's Ruling, *In re* Danvers Bancorp, Inc. S'holders Litig., C.A. No. 6162-CS, 25, 29 (Del. Ch. Oct. 19, 2011) (awarding $150,000 for disclosures that provided previously-omitted information regarding the banker's compensation).

275. Transcript of Motion for Class Certification, Settlement and Attorneys' Fees and the Court's Ruling at 36, *Becker*, C.A. No. 5919-VCL.

276. *Id.* at 15, 40 (rejecting the requested award of $400,000 and awarding instead $200,000).

Del Monte Foods Co. Shareholders Litigation,[277] the Court awarded $200,000 for disclosures that provided background information comparing "the proceeds each executive would receive on consummation of a merger," and what they would obtain "if terminated without a change in control."[278]

Second, where what the plaintiffs' counsel gained greatly differs from what was sought, the additional disclosures provide a meager benefit.[279] For example, in *Smith v. Curagen Corp.*, the Court downgraded the parties' negotiated fee award request because "what [was] gained [was] so markedly dissimilar from what [was] sought" by the plaintiffs.[280] The plaintiffs initially brought *Revlon* claims, doing so "before there was any sort of disclosure document."[281] Once the company filed its preliminary proxy, the plaintiffs realized "that there [were] far greater efforts to conduct not only a market check, but also to canvas the market for potential purchasers" of the company's main product.[282] As a result, the plaintiffs abandoned their original claims in favor of a disclosure-only settlement. In determining whether to award the Band 2 fee requested by the parties, the Court reasoned that since "there [was] no attainment" of the original claims, and "no risk taken to obtain any economic advantage on behalf of the class," it would downgrade the award to $200,000.[283]

Third, the Court will find that the plaintiffs' counsel provided a meager benefit where the benefit was not caused solely by the plaintiffs.[284] For example, in *Zlotnick v. Metex Inc.*, the Court awarded plaintiffs' counsel $60,000, although the benefit conferred on the shareholder class was $2.5 million, because the Court found that, compared to the plaintiffs' "meager" role in creating the benefit, the special committee's role had a much bigger impact.[285] Similarly, in *LASERS*, the Court found that the plaintiffs' counsel's efforts "were important to achieving the desired result," however, "those efforts were not the *only* cause of the benefit conferred upon the [company's] stockholders."[286] Accordingly, the Court

277. *In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *12 (Del. Ch. June 27, 2011).

278. *Id.*

279. *See* Transcript of Settlement Hearing at 25, Smith v. Curagen Corp., C.A. No. 4670-VCS (Del. Ch. Nov. 9, 2009).

280. *Id.*

281. *Id.* at 5.

282. *Id.* at 6.

283. *Id.* at 25–26.

284. *See* Zlotnick v. Metex, Inc., C.A. No. 9781, 1989 Del. Ch. LEXIS 159, at *3–4 (Del. Ch. Nov. 14, 1989).

285. *Id.*

286. *LASERS*, 2001 WL 1131364, at *6 (Del. Ch. Sept. 19, 2001). It should be noted

downgraded the fee request to $148,000.[287]

b) Weak Claims

The second reason for which the Court will downgrade a fee award occurs where the plaintiffs bring such weak claims that the lawsuit never should have been filed in the first place.[288] For example, in *American Commercial Lines*, the Court noted that the plaintiffs brought "a very weak case" that should never have been filed.[289] The Court found that the only possible basis for filing was a price action.[290] However, the Court reasoned that plaintiffs' counsel do not "have some general right to challenge a sale process and second-guess what directors have done without some suggestion as to why it actually leads to a breach of fiduciary duty."[291] And here, the case was "filed prior to the preliminary proxy," which supported the Court's feeling that the case was filed prematurely since "until you actually see the preliminary proxy, you don't know what the directors did, and so you can't really evaluate whether you have *Revlon* claims and you certainly don't know whether or not you have disclosure claims."[292] As a result, the Court downgraded the fee, noting that "it was a near thing" that it approved the settlement at all.[293]

that the plaintiffs requested a fee award of $2 million. *Id.* at *1.

287. *Id.* at *1.

288. *See, e.g.*, Transcript of Motion for Class Certification, Settlement and Attorneys' Fees and the Court's Ruling at 33, Becker v. Am. Commercial Lines Inc., C.A. No. 5919-VCL (Del. Ch. Sept. 9, 2011) (explaining that the decision whether to award fees was a close one, since Vice Chancellor Laster did not believe there was a good basis for filing the complaint); Transcript of Settlement Hearing at 28, Globis Capital Partners v. Safenet, C.A. No. 2772-VCS (Del. Ch. Dec. 20, 2007) (observing that "there can be cases, frankly, from a defendant's perspective, where what you would want me to do was approve the settlement, because of how weak the plaintiffs' claims were, that they were barely vibrant, and getting virtually anything in exchange for them supported the settlement, but because what they achieved was so insubstantial, they should get a $25,000 fee").

289. Transcript of Motion for Class Certification, Settlement and Attorneys' Fees and the Court's Ruling at 33, 37, *Becker*, C.A. No. 5919-VCL (stating that "[a]ll in all, this was a very weak case," and "I don't believe there was any reason to file when it was filed").

290. *Id.* at 33.

291. *Id.* at 34.

292. *Id.*

293. *Id.* at 33.

c) Issues with the Hours

The third reason for which the Court will downgrade an award into the Band 1 range is because the plaintiffs' counsel either claimed excessive hours, or else spent a majority of their hours on aspects of the litigation that derived no benefit.[294] For example, in *In re BEA Systems, Inc. Shareholders Litigation*, the Court rejected the plaintiffs' request for an award of $350,000, finding that "the bulk of the claims asserted produced no compensable benefit at all."[295] And of the claims that did produce a disclosure benefit, they constituted "only a minor aspect of [the] complaint," and more importantly, a great majority of the plaintiffs' time and effort were "spent on aspects of the litigation that produced no benefit."[296] Similarly, when a large portion of a law firm's hours are expended following the signing of a Memorandum of Understanding, the Court has noted that this will decrease the award of attorneys' fees.[297]

Finally, the Court has downgraded attorneys' fee awards where the plaintiffs' counsel submits an excessive number of hours worked.[298] For example, in *Brinckerhoff*, the plaintiffs' counsel contended that they "spent at least 2,760.2 hours" on a case that generated what the Court found to be meager disclosures.[299] The Court found the hours claimed to be "facially

294. *See, e.g.*, Brinckerhoff v. Tex. E. Prods. Pipeline Co., 986 A.2d 370, 397 (Del. Ch. 2010) (describing hours claimed as "implausible"); *In re* BEA Sys., Inc. S'holders Litig., C.A. No. 3298-VCL, 2009 WL 1931641, at *1 (Del. Ch. June 24, 2009) (attributing a portion of time claimed to portions of the litigation producing no benefit).

295. *BEA Systems*, 2009 WL 1931641, at *1.

296. *Id.*; *see also In re* Triarc Cos. S'holders Litig., C.A. No. 16700, 2006 WL 903338, at *2 (Del. Ch. Mar. 29, 2006) (awarding $75,000 in fees and holding that only the effort that the plaintiffs' counsel had put forth in regards to the amended complaint, and not the original complaint, should be counted in determining the fee award, since that was the work that produced the shareholder benefit).

297. *See In re* James River Group, Inc. S'holders Litig., C.A. No. 3173-VCL, 2008 WL 160926, at *1 (Del. Ch. Jan. 8, 2008) (noting that such expenditure of hours "certainly cautions against an overly generous award").

298. *See Brinckerhoff*, 986 A.2d at 397 (Vice Chancellor Laster describing the number of hours claimed with no supporting records as "facially implausible" and adding that "I do not credit it"). The Court has counseled plaintiffs' firms that "there has to be some connection [with the hours]—you can't just generate, like we don't generate—people generate hours to pop up hours. The work you do has to be connected in some way to the benefit that results." Transcript of Oral Argument at 76, Continuum Capital v. Nolan, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011). *Continuum Capital* compared the plaintiffs' counsel's reasonable submission of 589 hours pre-MOU, and 132 post-MOU with "other firms that would have put in front of me a claim for 2000 hours . . . which is just not credible." Transcript of Oral Argument at 37, Continuum Capital v. Nolan, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011).

299. *Brinckerhoff*, 986 A.2d at 397; *see also In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *app. B. (Del. Ch. Apr. 29, 2011) (describing

implausible," and significantly downgraded the fee award.[300]

d) Settled Early

The fourth reason why the Court will downgrade a fee award is where the plaintiffs' counsel settles early in the litigation without achieving a solid benefit.[301] It is important to note that "the court does not penalize plaintiffs' counsel who achieve significant settlements early in litigation."[302] Instead, what the Court will carefully scrutinize is instances where, after "recogniz[ing] the inherent weakness of their claims," plaintiffs' counsel quickly settles the case "for modest gains."[303] Such behavior will not "be rewarded with premium fee awards," and likely will result in a downgraded award.[304] The Court has noted, however, that there are certain cases that reach a quick settlement because the plaintiffs' counsel has a history of taking cases the distance, and so the defendants cave in early.[305] Such settlements will not result in a downgraded award.[306]

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the disclosures in *Brinckerhoff* to consist of "[d]etails of discount rates used in [a] fairness opinion").

300. *Brinckerhoff*, 986 A.2d at 397 (rejecting the plaintiffs' request of $500,000 and awarding $80,000).

301. *See In re* Instinet Group, Inc. S'holders Litig., C.A. No. 1289-N, 2005 WL 3501708, at *2 (Del. Ch. Dec. 14, 2005).

302. *Id.*

303. *Id.*; *see also* Transcript of Oral Argument at 31, *Continuum Capital*, C.A. No. 5687-VCL (explaining that "[w]hen somebody rolls in and doesn't do any work and settles on a disclosure only basis for jots and tiddles around the edges, I'm deeply suspicious").

304. *Instinet Group*, 2005 WL 3501708, at *2; *see also* Ladig, *supra* note 20 (concluding that "[t]he consistent thread throughout these opinions, including the recent *Sauer-Danfoss* decision, is that non-meaningful disclosures that were agreed to after little work by plaintiffs will not merit substantial fee awards"). *But see In re* James River Group, Inc. S'holders Litig., C.A. No. 3173-VCL, 2008 WL 160926, at *1 (Del. Ch. Jan. 8, 2008). In *In re James River*, the defendants argued that because the plaintiffs had "abandoned their initial *Revlon* claims and then agreed to a disclosure based settlement within a month of filing their complaint," the fee award should be downgraded. 2008 WL 160926, at *1. The court noted, however, that "[w]hile these observations are true and would afford a basis for the court to reduce any patently excessive fee request, they have less force where, as is true here, the fee requested is not patently unreasonable." *Id.*

305. *See* Transcript of Oral Argument at 76, *Continuum Capital*, C.A. 5687-VCL. In *Continuum Capital*, Vice Chancellor Laster gave the following example:

> So let's say, for example, that you guys [the defendants] had caved on this right off the bat and [the plaintiffs] came in and said to me, "The reason they caved is because they know me and I have a history of taking these things the distance, and I can point to you, Vice Chancellor Laster, this is not just me talking; I can point to you these seven times when I have gone all the way to the mat and that has given me standing such that, you know, that this case is not just some

2. Why Even Award a Band 1 Fee?

As can be seen in Appendix A, Band 1 fees have been awarded in cases where the plaintiffs' counsel has obtained relatively insignificant disclosure, and often in instances where the Court has noted that the lawsuit should not have been filed in the first place. It may seem that in such a case, a reasonable fee award would be no fee award at all. However, there are three reasons why the Court awards fees in these situations. First, Delaware law recognizes that "supplemental disclosures merit a fee award of some amount."[307] As a result, "even a meager settlement that affords some benefit for stockholders is adequate to support its approval."[308] The *Kwait* Court noted that when plaintiffs' counsel can demonstrate that the disclosure-only settlement produced some shareholder benefit, then "an entitlement to a fee award" arises.[309] The Court described the policy behind this entitlement as "recogniz[ing] the contingent risks" that the plaintiffs' counsel undertook in bringing the litigation.[310] Second, the Court awards plaintiffs' counsel fees for meager disclosures because otherwise, "it would punish the defendants not to approve the settlement."[311] Accordingly, "anything the plaintiffs got" would support the settlement and the defendant's accompanying release—however, the plaintiffs' counsel is "going to get a fee that reflects that."[312] Finally, by awarding a low-range Band 1 award, the Court "seeks to align counsel's interests with those of their clients and encourage entrepreneurial plaintiffs' lawyers to identify

> throw-away. The defendants caved because I have spent my career building a reputation of getting tangible results."

Id.

306. *See id.*

307. Brinckerhoff v. Texas E. Prods. Pipeline Co., 986 A.2d 370, 397 (Del. Ch. 2010).

308. *In re* Dr. Pepper/Seven Up Cos. S'holders Litig., C.A. No. 13109, 1996 WL 74214, at *4 (Del. Ch. Feb. 27, 1996); *see also In re* Golden State Bancorp Inc. S'holders Litig., C.A. No. 16175, 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000) (explaining that "[t]his Court, nonetheless, has noted in similar circumstances that even a meager settlement that affords some benefit for stockholders is adequate to support its approval") (internal quotation marks omitted).

309. Transcript of Settlement Hearing at 40-41, Kwait v. Berman, C.A. No. 5306-CC (Del. Ch. Aug. 16, 2010).

310. *Id.*

311. Transcript of Settlement Hearing at 29, Globis Capital Partners v. Safenet, C.A. No. 2772-VCS (Del. Ch. Dec. 20, 2007); *see also In re* FLS Holdings, Inc. S'holders Litig., 1993 WL 104562, at *280 (Del. Ch. Apr. 21, 1993) (noting that "[w]hen such weak claims are presented, settlement in exchange for the minimal benefit represented by the adoption of therapeutic measures is one relatively cheap way of concluding worthless litigation on a voluntary basis").

312. *See* Transcript of Settlement Hearing at 28–29, *Globis Capital Parnters*, C.A. 2772-VCS (describing the award of trifling fees in the $12,500 to $25,000 range).

and litigate real claims."[313]

C. Band 3 Awards

Band 3 awards include those awards greater than $500,000.[314] Because the Court carefully scrutinizes attorneys' fee awards in disclosure-only settlements, the Court will grant a Band 3 award only where plaintiffs have achieved substantial additional disclosures and made a showing regarding why such a fee is reasonable.[315] The Court awards Band 3 fees as a reward for plaintiffs who take "real risk" and hit "home run[s]."[316] As a result, because corporate disclosure has become increasingly better over the

313. *In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *21 (Del. Ch. Apr. 29, 2011).

314. There are no "upward caps" on fee awards in disclosure-only settlements—the only limit to the fee award is the quality of the disclosures obtained. *See* Transcript of Settlement Hearing at 34, *Globis Capital Partners*, C.A. No. 2772-VCS. For a list of cases in which the Court awarded a Band 3 fee, see app. C, *infra*.

315. When plaintiffs ask for a Band 3 award without having achieved substantial disclosures or without basing their request on similar precedents, the Court has consistently awarded much smaller attorneys' fees. *See, e.g.*, Transcript of Settlement Hearing and Application for Attorney's Fees and Costs and the Court's Ruling at 31, *In re* Danvers Bancorp, Inc. S'holders Litig., C.A. No. 6162-CS (Del. Ch. Oct. 19, 2011) (awarding $150,000 although plaintiffs' ask was $750,000); *Sauer-Danfoss*, 2011 WL 2519210, at *1 (awarding $75,000 although plaintiffs' ask was $750,000); Transcript of Settlement Hearing at 18, 44, *Kwait*, C.A. No. 5306-CC (awarding $200,000 although plaintiffs' ask was $950,000); Brinckerhoff v. Texas E. Prods. Pipeline Co., 986 A.2d 370, 394–95, 397 (Del. Ch. 2010) (awarding $80,000 although plaintiffs' ask was $500,000); *In re* Nat'l City Corp. S'holders Litig., C.A. No. 4123-CC, 2009 WL 2425389, at *5–6 (Del. Ch. July 31, 2009) (awarding $400,000 although plaintiffs' ask was $1.2 million); Berger v. Pubco Corp., C.A. No. 3414-CC, 2008 WL 4173860, at *1 (Del. Ch. Sept. 8, 2008) (awarding $250,000 although plaintiffs' ask was $600,000); Transcript of Teleconference of Court's Ruling at 6, *In re* Intergraph Corp. S'holders Litig., C.A. No. 2398-VCP (Del. Ch. Sept. 10, 2007) (awarding $330,000 although plaintiffs' ask was $750,000). This is true even where the defendants have agreed to pay the full amount requested by the plaintiffs. *See, e.g.*, *Brinckerhoff*, 986 A.2d at 386; *Nat'l City*, 2009 WL 2425389, at *5. For this reason, plaintiffs seeking a Band 3 award must carefully consider their arguments for why such an award is reasonable.

316. Transcript of Settlement Hearing at 34, *Globis Capital Partners*, C.A. No. 2772-VCS. Then-Vice Chancellor Strine reasoned that where members of the Court "have been willing to reduce requests for fees when insubstantial gains are achieved, there comes almost a special obligation to also recognize when something substantial was achieved, and the risk that was taken." *Id.*; *see also* Transcript of Settlement Hearing and Rulings of the Court at 59–60, IBEW Local Union 98 v. Noven Pharms. Inc., C.A. No. 4732-CC (Del. Ch. Dec. 8, 2009) (explaining that "I think people ought to get rewarded for getting results. If you get good results in this Court, you're going to get a big fee").

last decade, Band 3 awards are not often granted.[317] However, this is not to say that the Court has ceased granting Band 3 awards altogether. Indeed, even within the last year, the Court has granted significant fee awards for plaintiffs' lawyers' work in disclosure-only settlements.[318]

There are several reasons for which the Court will upgrade a fee into the Band 3 range. These reasons include: (1) instances in which plaintiffs have obtained significant or exceptional disclosures; (2) cases in which plaintiffs have fully litigated their claims rather than settling early; and (3) circumstances where the combination of the *Sugarland* factors other than benefit achieved necessitates an upgrade. Each is described below.

1. Significant or Exceptional Disclosures

Band 3 awards are generally "reserved" for those disclosure-only cases in which plaintiffs obtain "particularly significant or exceptional disclosures."[319] There are several types of disclosures that the Court has found to be significant or exceptional. First, a disclosure is significant or exceptional when it changes the "mix of information" available to the shareholders.[320] Plaintiffs change the mix of information when they obtain disclosures that would undermine the confidence of the shareholders regarding the fairness of the deal.[321] As described in Part III.B.1.a above,

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317. *See supra* Part I.D.

318. *See, e.g.*, Transcript of Settlement Hearing at 91, *In re* Clarient, Inc. S'holders Litig., C.A. No. 5932-CS (Del. Ch. Aug. 2, 2011) (awarding $700,000); *In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *16 (Del. Ch. June 27, 2011) (awarding $2,750,000); Transcript of Oral Argument at 102-03, Continuum Capital v. Nolan, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) (awarding $525,000).

319. *Del Monte Foods*, 2011 WL 2535256, at *9 (quoting *Sauer-Danfoss*, 2011 WL 2519210, at *18).

320. Transcript of Settlement Hearing at 86, *Clarient*, C.A. No. 5932-CS.

321. *See id.*; *see also* Transcript of Settlement Hearing and Application for Attorney's Fees and Costs and the Court's Ruling at 25, *Danvers*, C.A. No. 6162-CS (holding that "what's more important is if there is something to disclose that is actually concerning"). For example, in *Virgin Islands Government Employees' Retirement System v. Alvarez*, the Court awarded the full $1,250,000 requested by the plaintiffs, noting that the additional disclosures showed that shareholders could potentially get more for the company than what was provided for in the deal presented to them, and that the disclosures gave them the ability to put together a large enough shareholder group to stop the transaction. Transcript of Settlement Hearing at 44–46, *Virgin Islands Gov't Emps.' Ret. Sys. v. Alvarez*, C.A. No. 3976-VCS (Del. Ch. Dec. 2, 2008). Similarly, in *Rosen v. Wind River Systems, Inc.*, the Court found that the defendant's original disclosure was "partial" and even possibly "misleading," and that the additional disclosures "included information that could be considered important for purposes of the shareholders in making their decisions on th[e] transaction." Transcript of Settlement Hearing at 22, *Rosen v. Wind River Sys., Inc.*, C.A.

simply filling in the picture is not confidence undermining, and so does not change the mix of information.[322] Instead, an example of a confidence-undermining disclosure would be a case where plaintiffs show that when they apply reasonable assumptions to a company's projections, it places the mid-range of the discounted cash flow estimate above that of the deal price.[323] Such information would be valuable to the shareholders and constitutes a change to the mix of information.

Likewise, disclosures undermine confidence when they provide shareholders with information that was previously unknown to them. For example, in *In re Lear Corp. Shareholders Litigation*,[324] the additional disclosures obtained by the plaintiffs showed that the company's chief executive officer had an incentive to act in a self-interested fashion while carrying out the board's instructions. The Court described this disclosure as "an important and valuable victory"[325] because it alerted shareholders to a possible situation in which the officer might have gone with a less-optimal outcome just to have a deal, as opposed to negotiating for the good of the company.[326] Similarly, in *Globis Capital Partners v. Safenet*,[327] the Court awarded substantial fees where the plaintiffs provided an incredible one hundred pages of previously-unavailable information to the shareholders. Noting that this was "not an average case," the Court found that the company "chose to go to its stockholders with extremely bare-bone, noninformative disclosures, took a calculated risk and lost."[328]

Second, disclosures are significant or exceptional when they reveal material information to a company's board of directors that was previously unknown to them.[329] For example, in *Del Monte*, the disclosures obtained

No. 4674-VCP (Del. Ch. Dec. 8, 2009). As a result, the plaintiffs conferred a "real and substantial benefit" on the class and so the Court awarded $700,000. *Id.* at 24.

322. *See, e.g.*, Transcript of Settlement Hearing and Application for Attorney's Fees and Costs and the Court's Ruling at 23, *Danvers*, C.A. No. 6162-CS (describing that the Court could not "make any sense of the value of the [additional] disclosure in the sense of altering the mix of information that [shareholders] had. Does it fill in the picture more fully? Yeah, but that's not always something that is of value.").

323. *See id.* at 27 (explaining that "where it's influenced me is because somebody said, Look, here's what the banker did. If you use these projections and you apply the reasonable assumptions to the banker, then the mid-range of the DCF is $3 above the deal, and somebody should want to know that.").

324. Transcript of Oral Argument and the Court's Ruling at 92, *In re* Lear Corp. S'holder Litig., C.A. No. 2728-VCS (Del. Ch. June 3, 2008).

325. *Id.* at 92.

326. *See In re* Lear Corp. S'holders Litig., 926 A.2d 94, 114 (Del. Ch. 2007).

327. Transcript of Settlement Hearing at 18, Globis Capital Partners v. Safenet, C.A. No. 2772-VCS (Del. Ch. Dec. 20, 2007).

328. *Id.* at 45 (noting that "the amended 14D-9 alone, I believe, if you stack it up against the disclosures in the surveyed cases, would put them all to shame").

329. *See In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL

by the plaintiffs revealed to the company's board that its banker was working both the sell-side advisory business and the buy-side financing role.[330] Moreover, the disclosures showed that despite the board's instructions to the banker to shut down the sale process, the banker continued the process, and even steered two "competing bidders into a joint offer."[331] As a result of the plaintiffs' efforts, the directors were "empowered" to reconsider "their prior decisions and reliance on [the banker]."[332]

Third, disclosures are significant or exceptional when plaintiffs obtain two or more meaningful disclosures that are separate and distinct.[333] As mentioned earlier in Part III.A.2.a, there are three types of "meaningful" disclosures: (1) projections, (2) bankers' analyses, and (3) information detailing conflicts of interest in fiduciaries or their financial or legal advisors. While each of these disclosures is "meaningful," each is insufficient by itself to upgrade an award into Band 3.[334] For that reason, to upgrade an award the Court requires two or more separate and distinct meaningful disclosures.[335] For example, in *Burlington Northern*, Vice Chancellor Laster reasoned that although the plaintiffs obtained four sets of financial projections, they did not "ever get to doubling" the amount of

2535256, at *10 (Del. Ch. June 27, 2011) (explaining that "[l]ead Counsel rightly argues that Delaware should award higher fees when plaintiffs' lawyers uncover material information hitherto unknown to the directors themselves").

330. *Id.* at *9.

331. *Id.*

332. *Id.* at *10.

333. For example, in Transcript of Hearing on Plaintiffs' Counsel's Application for Attorneys' Fees and Expenses and Rulings of the Court at 61-63, *In re* Zenith Nat'l Ins. Corp. S'holders Litig., C.A. No. 5296-VCL (Del. Ch. July 26, 2010), the Court found that the plaintiffs had obtained one "major disclosure," and one "secondary benefit." Because there was no "additional major informational benefit," the Court declined to grant the plaintiffs' $1 million ask and instead awarded $400,000. *See also* Transcript of Settlement Hearing at 35, Roffe v. Eagle Rock Energy GP, L.P., C.A. No. 5258-VCL (Del. Ch. Oct. 28, 2010) (explaining that "[w]hat I have said in other cases is that, when somebody provides a meaningful additional quantum of information, I think the baseline ought to be in the 400 to 500,000 range. You do better than that. You provide two meaningful quanta of information, dial up.").

334. *See, e.g.*, Transcript of Teleconference of Court's Ruling, *In re* Intergraph Corp. S'holders Litig., C.A. No. 2398-VCP (Del. Ch. Sept. 10, 2007) (awarding $330,000 for the disclosure of internal projections that had been provided to the company's bankers).

335. For example, in *In re Wyeth Shareholders Litigation*, the disclosures included merger-related details, banker assumptions, and projections. Transcript of Settlement Hearing at 29, *In re* Wyeth S'holders Litig., C.A. No. 4329-VCN (Del. Ch. June 29, 2010). However, the Court awarded a Band 2 fee of $460,000, indicating that merger-related details and banker assumptions, even when taken together, do not constitute meaningful disclosure.

their award as a result.[336] On the other hand, in *Continuum Capital*, the Court awarded a Band 3 fee because the plaintiffs obtained projections and conflict-oriented disclosures about the company's banker, which constituted two separate and distinct types of meaningful disclosures.[337] Similarly, in *In re Sepracor Inc. Shareholders Litigation*,[338] the Court awarded a Band 3 fee where the plaintiffs obtained disclosures of the company's banker's analysis and ten sets of projections.

Finally, disclosures are significant or exceptional when they address two different bankers' financial analyses.[339] Such disclosure may at first blush seem to violate the separate and distinct rule since the disclosure involves two of the same types of disclosure. However, because the information comes from two different bankers, the disclosure is indeed separate and distinct. The Court's decision in *Del Monte Foods* substantiates this point. In *Del Monte Foods*, the Court noted that the proper range for attorneys' fees in a case where two sets of bankers' analyses were disclosed because of the plaintiff's efforts was worth between $750,000 and $950,000.[340] The Court reasoned that fees should be awarded for each set of the banker disclosures because it "takes into account the defendants' obvious belief that stockholders should have both financial analyses, and the fact that the defendants paid both bankers for their work," and as a result, the plaintiff's counsel "deserves compensation

336. Transcript of Settlement Hearing and Rulings of the Court at 8, 62, *In re* Burlington N. Santa Fe S'holder Litig., C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010) (awarding $450,000 instead of the $900,000 requested by the plaintiffs).

337. The Court's fee analysis began with a default fee of $500,000 for the disclosure of the projections. Transcript of Oral Argument at 100, Continuum Capital v. Nolan, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011). However, because of the conflict-oriented disclosures, the Court bumped the fee award up to $700,000. *Id.* at 101. Ultimately the Court awarded $525,000 to the plaintiffs because the plaintiffs had initially filed suit in Virginia and then moved the case to Delaware, so the Court subtracted the time spent on the Virginia litigation from the fee calculation. *Id.* at 102–03.

338. Transcript of Settlement Hearing and Rulings of the Court at 10, 13, 21, *In re* Sepracor Inc. S'holders Litig., C.A. No. 4871-VCS (Del. Ch. May 21, 2010).

339. *See* Transcript of Oral Argument at 98, *Continuum Capital*, C.A. No. 5687-VCL (explaining that "I think that, here, the combination of the two banker disclosures merits an incremental bump"); *see also* Transcript of Settlement Hearing and Rulings of the Court at 19-21, *Sepracor*, C.A. No. 4871-VCS (awarding $550,000 for obtaining disclosures about two bankers' fairness analyses); Transcript of Settlement Hearing at 6, Globis Capital Partners v. Safenet, C.A. No. 2772-VCS (Del. Ch. Dec. 20, 2007) (awarding $1,200,000 for obtaining supplemental disclosures to rectify "a bare bones or naked fairness opinion" issued by two investment bankers). *But see* Transcript of Settlement Hearing at 37-38, *Wyeth*, C.A. No. 4329-VCN (awarding $460,100 for obtaining disclosures about two bankers' fairness analyses).

340. *See In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *12 (Del. Ch. June 27, 2011).

for obtaining material supplemental disclosures about each banker."[341]

2. The Combination of the *Sugarland* Factors Necessitates An Upgrade

A third possible, but rarely-used reason for which the Court would upgrade a fee award into Band 3 is based on the Court's view of the combination of the *Sugarland* factors other than benefit achieved. Essentially, after determining the appropriate fee-award range based on the benefit provided to the shareholders by the additional disclosures, the Court determines whether, when taken as a whole, the remaining *Sugarland* factors place the fee award into the bottom or top of that range. For example, in determining the proper fee award in *Globis Capital Partners v. Safenet*,[342] the Court considered the contingency risks that the plaintiffs undertook and the fact that they litigated their case in an expedited time frame, and together with the benefit achieved, reasoned that the plaintiffs deserved an upgrade to their fee award. Likewise, in *Del Monte Foods*, the Court reasoned that it would award a Band 3 fee because the plaintiffs "undertook real contingency risk."[343] Specifically, by litigating a "hotly contested injunction application," the plaintiffs "forsook their easiest path to compensation [by settling early for supplemental disclosures about banker analyses] and risked receiving nothing for their time and expenses."[344] Then, after the injunction was issued, the plaintiffs once again risked their own money for the shareholders' benefit by posting a $1.2 million bond.[345] Such actions supported "an award at the higher end of the range."[346]

341. *Id.*

342. Transcript of Settlement Hearing at 49–50, Globis Capital Partners v. Safenet, C.A. No. 2772-VCS (Del. Ch. Dec. 20, 2007).

343. *Del Monte Foods*, 2011 WL 2535256, at *13 (referring to this risk as a "*bona fide* contingency risk").

344. *Id.*

345. *Id.*

346. *Id.*; *see also* Transcript of Settlement Hearing at 24–25, Henkel v. Gemstar-TV Guide Int'l, Inc., C.A. No. 3419-VCN (Del. Ch. Dec. 16, 2008) (awarding $1,100,000 for two separate and distinct, meaningful disclosures, and noting that the litigation was "difficult," the issues were "complex" and the standing and ability of counsel was "[un]questioned").

CONCLUSION

Although the Court has criticized disclosure-only settlements, this does not mean that such settlements are on their way out. There is still an important place for them and the recent case law and transcript opinions approving a majority of proposed disclosure-only settlements bear this out. However, what this criticism does show is that the Court is not approving disclosure-only settlements without first looking closely at the plaintiff's counsel's fee award. The Court will adjust its award of attorneys' fees to either encourage or discourage similar future litigation, and the system that the Court uses in examining the requested fee award is based on policy decisions that are good for Delaware corporations. Furthermore, as a result of plaintiffs' work over the last decade or so, corporations are learning from the disclosure line of cases, and are adjusting their initial disclosure to account for the Court's decisions. Consequently, companies' improved disclosure has greatly diminished the likelihood that plaintiffs will achieve substantial additional disclosure. Therefore, because the plaintiffs' fees are tied to the benefit provided by the disclosures, disclosure-only settlements will only truly disappear if plaintiffs' firms cease bringing deal litigation because of the lower probability of getting a home-run fee award. Until then, the Court will continue to adjust fee awards to match the benefits achieved by the plaintiffs in the litigation.

APPENDIX A: BAND 1 FEE AWARDS ($0 TO $299,999)
(*NUMBERS ARE IN THOUSANDS*)
(*NUMBERS ARE ROUNDED TO THE NEAREST THOUSAND*)[347]

CASE NAME	CITATION	ASK	BID	AWARD	TYPE	DESCRIPTION
In re Compellent Techs., Inc. S'holders Litig.	C.A. No. 6084-VCL, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011)	$600 to $900	$75 to $225	$100	- Potential conflict of interest of banker[348]	
In re Danvers Bancorp, Inc. S'holders Litig.	C.A. No. 6162-CS (Del. Ch. Oct. 19, 2011)	$750	$0	$150	- Banker's compensation [349]	- The disclosures were "mundane." *Id.* at 25. - They merely "fill[ed] in the picture more fully." *Id.* at 23. - Nothing changed "the fundamental question before the stockholders." *Id.* at 27.
Becker v.	C.A. No.	$400	$400	$200	-Banker's	-It was a "near thing"

347. The following applies to all three appendices. "Ask" means what the plaintiffs sought from the defendants in the particular settlement. "Bid" means the amount that the defendants countered. "Award" means what the Court gave as attorneys' fees. "Type" refers to the classification of disclosures that the Court found relevant. I have tried to make these as generic as possible, to enable comparisons among different cases; however, in many cases, I have used footnotes to describe the specific disclosures in the various cases. "Description" refers to how the Court described the disclosures and insight into the reasoning for which the Court granted the specific fee award.

348. The disclosures showed that neither the company nor the acquirer retained one of the two financial advisors in the two years before the merger or paid any compensation to them, but that representatives from the financial advisor met with the two companies "to discuss market conditions, potential strategic transactions, and other matters relating to the companies' prospects." *In re* Compellent Techs., Inc. S'holders Litig., C.A. No. 6084-VCL, 2011 WL 6382523, at *27 (Del. Ch. Dec. 9, 2011). The disclosures also showed that the other financial advisor had "provided strategic advice to [the acquirer] on mergers and acquisitions, assisted [the company] with its initial public offering in 2007 and a secondary stock offering in 2009, and received approximately $2 million in fees from [the company] in the two years preceding the merger." *Id.*

349. The initial disclosures omitted the banker's compensation. Transcript of Settlement Hearing and Application for Attorneys' Fees and Costs and the Court's Ruling at 25, *In re* Danvers Bancorp. Inc. S'holders Litig., C.A. No. 6162-CS (Del. Ch. Oct. 19, 2011).

Am. Commercial Lines, Inc.	5919-VCL (Del. Ch. Sept. 9, 2011)				compensation[350]	that the Court approved the settlement. *Id.* at 33. -The case was "filed prematurely," and was a "very weak case." *Id.* at 33, 37. -"[T]he work that was done didn't seem to me to add much value." *Id.* at 37.
In re Sauer-Danfoss Inc. S'holders Litig.	C.A. No. 5162-VCL, 2011 WL 2519210 (Del. Ch. Apr. 29, 2011)	$750	$0	$75	-Fact fixing[351]	-The plaintiffs did not accomplish much, and instead "filed fast, sat idle, then shifted into settlement mode." *Id.* at *20.
In re Allion Healthcare Inc. S'holders Litig.	C.A. No. 5022-CC, 2011 WL 1135016 (Del. Ch. Mar. 29, 2011)	$500	$200	$250	-Information about advisors -Potential conflict of interest of shareholders[352] -Merger-related details[353]	

350. The supplemental disclosures clarified "the allocation of the banker's fee." Transcript of Motion for Class Certification, Settlement and Attorneys' Fees and the Court's Ruling at 36, Becker v. Am. Commercial Lines, Inc. C.A. No. 5919-VCL (Del. Ch. Sept. 9, 2011).

351. The plaintiffs fixed "inaccurate information," including the end dates of two fifty-two-week periods used to calculate the company's shares' high closing price (in both cases the end dates were two days off), and correcting the 52-week high share price from $9.75 to $9.90. *In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *10 (Del. Ch. Apr. 29, 2011).

352. The additional disclosures described the role that several interested shareholders played in the exploration of strategic alternatives to the proposed transaction. Plaintiffs' Brief in Support of Approval of the Proposed Settlement and an Award of Attorneys' Fees and Reimbursement of Expenses at 12, *In re* Allion Healthcare, Inc. S'holders Litig., C.A. No. 5022-CC, 2010 WL 5241869 (Del. Ch. Dec. 20, 2010).

353. These details included the reasoning for which the company accepted a reduced offer price. *Id.*

Fessahaye v. Faleschini	C.A. No. 5553-CC (Del. Ch. Nov. 4, 2010)	$247	$247	$247	-Financial projections (5 years) -Banker's assumptions and multiples[354] -Banker's compensation [355]	-The Court noted that the fee request was "well within" the appropriate range of fees for cases with these disclosures. *Id.* at 22-23.
Roffe v. Eagle Rock Energy GP, L.P.	C.A. No. 5258-VCL (Del. Ch. Oct. 28, 2010)	$535	$535	$200	-Merger-related details[356]	-The Court noted that it seemed that the plaintiffs "bailed early for disclosures," although the deal did not look "clean." *Id.* at 9, 14. -The Court found that there was "not a sufficient basis" to second-guess the settlement. *Id.* at 31. -The Court downgraded the fees because (1) the early settlement eliminated any difficulty in the litigation or any contingency risk, and (2) the Court was not impressed with the disclosures. *Id.* at 34-

354. These included the "assumptions underlying the projections," "information concerning [the banker's] selection of the perpetual growth rate that it used in its discounted cash flow analysis," and "the multiples observed by [the banker] in its selected public benchmarks analysis and its selected precedent transaction analysis." Transcript of Settlement Conference at 9, 10, Fessahaye v. Faleschini, C.A. No. 5553-CC (Nov. 4, 2010).

355. The additional disclosures provided details regarding the contingent arrangement of the banker's fee. *Id.* at 10.

356. Specifically, the disclosures showed unitholders why, when their subordinated interests were extinguished, their subordinated arrearages were also extinguished. Transcript of Settlement Hearing at 6, Roffe v. Eagle Rock Energy GP, L.P., C.A. No. 5258-VCL (Del. Ch. Oct. 28, 2010).

						35.
Kwait v. Berman	C.A. No. 5306-CC (Del. Ch. Aug. 16, 2010)[357]	$950	$130	$200	-Details regarding the banker's multiples[358] -Details of the company's three-year plan	-The Court described the disclosures as "beneficial," but classified them as a mere "single" in baseball parlance. *Id.* at 44-45.
In re Monogram Biosciences, Inc. S'holders Litig.	C.A. No. 4703-CC (Del. Ch. Jan. 26, 2010)	$215	$215	$215	-Financial projections[359] -Banker's assumptions	-The disclosures included "modestly useful information that particularly curious investors might have found to be of some interest." *Id.* at 12-13. -The Court noted that this was the "top level of a fee" for cases with these disclosures. *Id.* at 15.
Brinckerhoff v. Texas E. Prods. Pipeline Co.	986 A.2d 370 (Del. Ch. 2010)	$500	$500	$80	-Details of fairness opinion[360]	-The Court downgraded its fee award because it discredited the number of hours claimed by plaintiffs as "facially implausible," and it did not believe that the plaintiffs

357. Although the *Monogram* case was assigned to Chancellor Chandler, Vice Chancellor Laster presided over the settlement hearing.

358. Specifically, why the company's banker disregarded certain multiples and used other multiples. Transcript of Settlement Hearing at 14, Kwait v. Berman, C.A. No. 5306-CC (Del. Ch. Aug. 16, 2010).

359. The financial projections included projections of revenue and free cash flow and "an upside case projection of revenue" for two of the company's divisions. Transcript of Settlement Hearing at 8, 10, *In re* Monogram Biosciences, Inc. S'holders Litig., C.A. No. 4703-CC (Del. Ch. Jan. 26, 2010).

360. The disclosures included "[d]etails of discount rates used in [a] fairness opinion." *In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at app. B (Del. Ch. Apr. 29, 2011).

						undertook any meaningful contingency risk. *Id.* at 397.
Masucci v. Fibernet Telecom Group, Inc.	C.A. No. 4680-VCS (Del. Ch. Nov. 25, 2009)	$227	$227	$200	-Financial projections (1 year)[361]	-The Court did not find that the disclosures contradicted in any way the board's recommendation to approve the deal. *Id.* at 16.
Smith v. Curagen Corp.	C.A. No. 4670-VCS (Del. Ch. Nov. 9, 2009)	$300	$300	$200	-Liquidation projections[362] -Merger-related details[363]	-The fee award was based on the "very modest risk" undertaken by the plaintiffs, and the fact that the disclosures were of "very moderate value." *Id.* at 26.
In re BEA Sys., Inc. S'holders Litig.	C.A. No. 3298-VCL, 2009 WL 1931641 (Del. Ch. June 24, 2009)	$350	$0	$81	-Fact fixing[364]	-The Court described the benefit as "unmistakab-ly modest." *Id.* at *1.

361. The disclosures comprised one year of undisclosed projections that were used by the company's banker in its financial analysis of the company, and which were provided to a potential buyer. Transcript of Settlement Hearing at 6-7, Masucci v. Fibernet Telecom Group, Inc., C.A. No. 4680-VCS (Del. Ch. Nov. 25, 2009).

362. These were projections used in a liquidation analysis, and did not describe earning potential. Transcript of Settlement Hearing at 8, 10, Smith v. Curagen Corp., C.A. No. 4670-VCS (Del. Ch. Nov. 9, 2009).

363. The plaintiffs also obtained disclosures that provided information regarding the company's board's attempts to market a particular product, the board's deliberations regarding whether to remain as a stand-alone entity, and reasons for which the company terminated discussions with two other potential acquirers. *Id.* at 12–13.

364. The disclosures corrected a typographical error regarding "the source of certain cash flow data" and "clarified a detail about the timing of a press release." Defendants' Answering Brief in Opposition to Plaintiffs' Application for an Award of Attorneys' Fees and Expenses at 6, *In re* BEA Sys., Inc. S'holders Litig., C.A. No. 3298-VCL, 2009 WL 1454710 (Del. Ch. May 22, 2009).

Berger v. Pubco Corp.	C.A. No. 3414-CC, 2008 WL 4173860 (Del. Ch. Sept. 8, 2008)[365]	$600	$92	$250	-Informed shareholders of a remedy[366]	-The Court described the disclosure as "substantial," but found that the litigation was "not overly complex or novel," which "militate[d] against a larger attorneys' fee award." *Id.* at *2.
Gottdiener v. Odeen[367] (Gottdiener)	C.A. No. 3145-VCN (Del. Ch. May 20, 2008)	$679	$125	$290	-Merger-related details[368] -Management projections (3 years) -Banker's compensation	-The disclosures were "material," and "rich in detail," but they were not "critical." *Id.* at 8. -The matter was resolved within one week of the filing of the complaint, which limited the time and effort that were expended. *Id.*
Gottdiener v. Odeen (Priever)	C.A. No. 3145-VCN (Del. Ch.	$235	$0	$105	-Information about projections[369]	-The disclosure was of small benefit to the shareholders. *Id.* at

365. It is important to note that *Berger* is not a typical disclosure-only case. The *Berger* plaintiffs had brought an improper disclosure claim, which was decided in this opinion, and did not release other claims in favor of additional disclosures. However, the case does provide insight into the value that the Court placed on the benefit achieved.

366. The disclosures "afford[ed] shareholders additional information from which to determine whether to pursue [a] quasi-appraisal remedy as well as the opportunity for the remedy itself." Berger v. Pubco Corp., C.A. No. 3414-CC, 2008 WL 4173860, at *1 (Del. Ch. Sept. 8, 2008).

367. This transcript opinion decided two cases, which I refer to as *Gottdiener* and *Priever*.

368. This included additional information regarding alternatives to the merger, the auction process, and information concerning the financial analysis prepared by the banker. Plaintiff's Opening Brief in Support of His Petition for Award of Attorneys' Fees and Reimbursement of Litigation Costs and Expenses on Behalf of Counsel for Ernest Gottdiener and the Putative Class of Avaya, Inc. Shareholders at 12, Gottdiener v. Odeen, C.A. No. 3145-VCN (Del. Ch. Jan. 22, 2008).

369. This disclosure "address[ed] how projections were made and calculated for a two-year period." Transcript of Rulings of the Court From Oral Argument on Plaintiffs' Motions for Award of Attorneys' Fees and Expenses at 10, Gottdiener v. Odeen, C.A. No.

	May 20, 2008)					10.
Mandell v. Ablest, Inc.	C.A. No. 2958-VCN (Del. Ch. Dec. 18, 2007)	$250	$250	$250	-Merger-related details[370] -Financial projections	-The Court was concerned that this case was one where it was filed and then the plaintiffs "search[ed] for a cause of action later." *Id.* at 18-19.
In re Strategic Distribution, Inc. S'holders Litig.	C.A. No. 2575-VCL (Del. Ch. Aug. 6, 2007)	$250	$250	$250	-Financial projections (2 years) -Assumptions used in liquidation analysis -Liquidation analysis	-The plaintiffs noted that the fees that they sought were "somewhat less than fees awarded in comparable disclosure cases." *Id.* at 12.
Levy Investments, Ltd. v. Open Solutions, Inc.	C.A. No. 2479-VCL (Del. Ch. May 18, 2007)	$287	$287	$287	-Merger-related details[371] -Information about the comparable companies' analysis[372] -Banker's assumptions[373]	

3145-VCN (Del. Ch. May 20, 2008).

370. These details included additional information on "the process leading up to the merger, the terms of the merger and other agreements, as well as the value of [the company]." Transcript of Settlement Hearing at 5, Mandell v. Ablest, Inc., C.A. No. 2958-VCN (Del. Ch. Dec. 18, 2007).

371. These disclosures included the criteria that the company used to select "which private equity firms to contact regarding a potential transaction with the Company," the fact that a firm that "provided an indication of interest to purchase the Company, indicated that it also generally issued to its affiliates preferred and common equity in the acquiring company and also made available to certain members of management common equity in the acquiring company," and details regarding the financing behind one of the purchase offers. Plaintiff's Brief in Support of Proposed Settlement and Application for Attorneys' Fees and Expenses at 16, Levy Investments, Ltd. v. Open Solutions, Inc., C.A. No. 2479-VCL, 2007 WL 2808945 (Del. Ch. May 14, 2007).

372. This disclosure revealed the "identity of the 22 selected companies" used in this analysis. *Id.* at 17.

373. Specifically, the criteria used by the banker "to select the parameters used in its

					-Information related to the premiums-paid analysis[374]	
Augenbaum v. Forman	C.A. No. 1569-N, 2006 WL 1716916 (Del. Ch. June 21, 2006)	$450	$75	$225	-Merger-related details[375]	-The disclosures "permitted stockholders to view the final price term and related information from a materially different perspective." *Id.* at *2. -The disclosures did not, however, "reveal fiduciary misconduct or call into question the fundamental fairness of the final deal." *Id.* -As a result, the disclosures were "modest." *Id.*
In re Triarc Cos. S'holders Litig.	C.A. No. 16700, 2006 WL 903338 (Del. Ch. Mar. 29, 2006)	$256	$0	$75	-Merger-related details[376]	-The Court reasoned that the fee award was reasonable because it took into account the effort plaintiffs put forth in regards to the amended complaint, and not the original complaint. *Id.* at *2-

discounted cash flow analysis." *Id.*

374. This information included reference transactions announced since November 1, 2005, upon which the banker relied to perform its premiums paid analysis. *Id.*

375. These details included "information about the negotiation process" and changes in the price term. Augenbaum v. Forman, C.A. No. 1569-N, 2006 WL 1716916, at *2 (Del. Ch. June 21, 2006).

376. The disclosures showed that the company's special committee was unwilling to recommend a buyout at $18, although that price was less than a later-announced "Dutch auction tender offer . . . of not less than $16.25 and not more than $18.25 per share." *In re* Triarc Cos. S'holders Litig., C.A. No. 16700, 2006 WL 903338, at *2 (Del. Ch. Mar. 29, 2006).

						3.
Tandycrafts, Inc. v. Initio Partners	562 A.2d 1162 (Del. 1989)	$180	$0	$180	-Details regarding share holdings[377] -Clarification of charter amendment	

377. This included a supplemental statement that "disclosed the combined holdings of the employee benefit plans and the management controlled shares." Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1164 (Del. 1989).

APPENDIX B: BAND 2 FEE AWARDS ($300,000 TO $500,000)
(*NUMBERS ARE IN THOUSANDS*)
(*NUMBERS ARE ROUNDED TO THE NEAREST THOUSAND*)

CASE NAME	CITATION	ASK	BID	AWARD	TYPE	DESCRIPTION
Turberg v. Arcsight, Inc.	C.A. No. 5821-VCL (Del. Ch. Sept. 20, 2011)	$500	$500	$500	-Banker's analysis[378]	-The Court noted that to provide a "fair summary," the information that was provided by the additional disclosures needed to be provided to shareholders, just as it was to the company's board. *Id.* at 43. -The Court specifically noted that "I do not plan to rely on this fee award as an indication of the value of any aspect of this settlement, to the extent there's a future contested proceeding. I was heavily influenced by the fact that experienced counsel negotiated the amount." *Id.* at 46.
In re CommScope Corp. S'holders Litig.	C.A. No. 5936-VCL, 2011 WL 2595672 (Del. Ch. June 29, 2011)	$650	$300	$400	-Banker's analysis[379]	
In re Double-	C.A. No.	$360	$360	$360	-Merger-	

378. This information included multiples for the year 2010 and EBITDA numbers. Transcript of Settlement Hearing at 14, Turberg v. Arcsight, Inc., C.A. No. 5821-VCL (Del. Ch. Sept. 20, 2011).

379. The disclosures included information regarding the free cash flows and EBITDA values. Stipulation of Settlement ¶ 1, *In re* CommScope Corp. S'holders Litig., C.A. No 5936-VCL, 2011 WL 1059608 (Del. Ch. Mar. 17, 2011).

Take Software, Inc.	5569-CC, 2011 WL 795843 (Del. Ch. Mar. 7, 2011)				related details[380] -Banker's analysis -Potential conflicts of interest of advisor	
Ubaney v. Rubinstein	C.A. No. 5459-VCL (Del. Ch. Dec. 1, 2010)	$500	$500	$500	-Projections -Financial-related details[381]	-The projections were the "primary disclosure" and the financial-related details were "around the edges stuff that is nice, but it's not great." *Id.* at 14.
In re Hawk Corp. S'holders Litig.	C.A. No. 5925-VCL (Del. Ch. Nov. 29, 2010)	$450	$450	$450	-Banker's analysis[382] -Potential conflicts of interest of advisor[383]	-The Court noted that for the disclosures in this case, seeking more than $450,000 "would not have been supportable." *Id.* at 8.
In re Burlington N. Santa Fe S'holder Litig.	C.A. No. 5043-VCL (Del. Ch. Oct. 28,	$900	$450	$450	-Management projections (four sets)[384]	-These projections were "substantial" because they were not made available in the original preliminary proxy. *Id.* at

380. This included "information relating to the process by which the defendants entered into the merger agreement. . . ." Plaintiffs' Opening Brief in Support of Settlement and Application for an Award of Attorneys' Fees and Reimbursement of Expenses at 23, *In re* Double-Take Software, Inc., C.A. No. 5569-CC, 2011 WL 758454 (Del. Ch. Feb. 28, 2011).

381. The disclosures included information regarding whether data was analyzed using the weighted average cost of capital (WACC) or using a capital asset pricing model (CAPM). Transcript of Settlement Hearing at 5, Ubaney v. Rubinstein, C.A. No. 5459-VCL (Del. Ch. Dec. 1, 2010).

382. This included the free cash flow values, which were used to assess the transaction. Transcript of Telephonic Status Conference at 4, *In re* Hawk Corp. S'holders Litig., C.A. No. 5925-VCL (Del. Ch. Nov. 29, 2010).

383. "[I]nformation related to the process and the earlier advisory firm that had rendered services related to the preferreds that management held" in the company. *Id.* at 5.

384. These projections dealt with "how and when" the recession would end: one assuming a recovery in 2010, another assuming a recovery in 2011, one assuming no recovery at all, and a fourth assuming a "deeper recession." Transcript of Settlement Hearing and Rulings of the Court at 8-9, *In re* Burlington N. Santa Fe S'holder Litig., C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010).

	2010)					61. -The Court also noted that "the plaintiffs correctly triaged their claims and settled for what they would have gotten on the merits had they taken this to an injunction." *Id.* at 51.
In re Zenith Nat'l Ins. Corp. S'holders Litig.	C.A. No. 5296-VCL (Del. Ch. July 26, 2010)	$1,000	$400	$400[385]	-Management projections (5 years) -Banker's compensation	-Projections were the only "major disclosure" in this case. The banker's compensation disclosure was "a secondary benefit," but not one that would upgrade the fee award. *Id.* at 61-2.
In re Wyeth S'holders Litig.	C.A. No. 4329-VCN (Del. Ch. June 29, 2010)	$495	$495	$460	-Merger-related details[386] -Management projections -Banker's assumptions	-The initial disclosures were not "paltry or inconsistent or inaccurate," however, they "were enriched" in such a way that they were "helpful and benefiting" to the shareholders. *Id.* at 34. -Getting the additional disclosures was "not particularly difficult," and this lack of difficultly does not

385. It is possible that the Court would have upgraded the fee award in this case if not for the fact that at the preliminary injunction hearing, the plaintiffs took the view that the projections were not meaningful, and then at the settlement hearing, they claimed that those same disclosures were meaningful. Transcript of Hearing on Plaintiffs' Counsel's Application For Attorneys' Fees and Expenses and Rulings of the Court at 64, *In re* Zenith Nat'l Ins. Corp. S'holders Litig., C.A. No. 5296-VCL (Del. Ch. July 26, 2010).

386. This included information regarding "the negotiation process, the history of a contingent value right," and "the likelihood of other potential bidders. . . ." Transcript of Settlement Hearing at 29, *In re* Wyeth S'holders Litig., C.A. No. 4329-VCN (Del. Ch. June 29, 2010).

						support a higher fee. *Id.* at 35, 37.
IBEW Local Union 98 v. Noven Pharms. Inc.	C.A. No. 4732-CC (Del. Ch. Dec. 8, 2009)	$975	$200	$450	-Projections -Fairness analysis-related details[387]	-The projections constituted "the meaningful disclosure relief." *Id.* at 59.
In re Nat'l City Corp. S'holders Litig.	C.A. No. 4123-CC, 2009 WL 2425389 (Del. Ch. July 31, 2009)	$1,200	$1,200	$400	-Potential conflict of interest of advisor[388] -Merger-related details[389] -Miscellaneous information[390]	-Even taken together, the disclosures "amount[ed] to an exceedingly modest benefit to the shareholder class." *Id.* at *4. -The disclosures did "not justify a substantial fee." *Id.*
N.J. Bldg. Laborers Pension & Annuity Funds v. Applebee's	C.A. No. 3124-CC (Del. Ch. Feb. 27, 2008)	$521	$300[391]	$358	-Projections[392]	-The disclosure "added value in the sense that it provided [shareholders] useful information to act on; and that's a good thing." *Id.* at 58.

387. Specifically, this included "why comparable companies had been chosen," and "what the various discount and termination rates for the discounted cash flow were." Transcript of Settlement Hearing and Rulings of the Court at 10, IBEW Local Union 98 v. Noven Pharms. Inc., C.A. No. 4732-CC (Del. Ch. Dec. 8, 2009).

388. This included information that the company's financial adviser had advised both the company and the acquirer at various times. *In re* Nat'l City Corp. S'holders Litig., C.A. No. 4123-CC, 2009 WL 2425389, at *3 (Del. Ch. July 31, 2009).

389. These details included a "review of the alternative transactions available to" the company and details regarding how the company "had searched for other transaction partners, all of which were inferior to the option presented by [the acquirer]." *Id.*

390. This information included the company's "potential participation in the troubled asset purchase arrangements" and "[m]ore detailed information about the investment agreements and warrants found in reports filed with the SEC." *Id.*

391. The defendants did not state a bid amount, but instead argued that "the number ought to be several $100,000 lower" than the amount asked by the plaintiffs. Transcript of Settlement Hearing at 38, N.J. Bldg. Laborers Pension & Annuity Funds v. Applebee's Int'l, Inc., C.A. No. 3124-CC (Del. Ch. Feb. 27, 2008). I chose the $300,000 figure because this is at least "several $100,000 lower" than the plaintiffs' ask.

392. These projections included "revenues and net income, . . . EBITDA, the capital expenditures, and the free cash flow." *Id.* at 19.

Int'l, Inc.						
In re James River Group, Inc. S'holders Litig.	C.A. No. 3173-VCL, 2008 WL 160926 (Del. Ch. Jan. 8, 2008)	$450	$350[393]	$400	-Projectio-ns[394] -Merger-related details[395]	-The award was "predicated substantially on the significance of the added disclosures and the total number of hours [over 500] spent by counsel on th[e] case." *Id.* at *2.
In re Everlast Worldwide Inc. S'holders Litig.	C.A. No. 3077-VCL (Del. Ch. Dec. 20, 2007)	$450	$450	$450	-Banker's compensation[396] -Merger-related details[397] -Banker's analysis[398]	-The disclosures were "material" and "were important to shareholders in making the decision that they were required to make." *Id.* at 22.
In re Intergraph Corp. S'holders Litig.	C.A. No. 2398-VCP (Del. Ch. Sept. 10, 2007)	$750	$300	$330	-Internal projections[399]	-While the projections were "useful in considering what a shareholder should do" in this case, it was "not the same level of importance as actual

393. The defendants did not state a bid amount, but instead argued that the award should be "a significantly lower, but unspecified, amount." *In re* James River Group, Inc. S'holders Litig., C.A. No. 3173-VCL, 2008 WL 160926, at *1 (Del. Ch. Jan. 8, 2008). I chose the $350,000 figure because this is at least "significantly lower" than the ask.

394. The projections were those "underlying the company's investment banker's fairness analysis." *Id.*

395. This disclosure included "details of activity during a 'go shop' period." *Id.*

396. Specifically, that the banker "was receiving a substantial amount of consideration in a success fee." Transcript of Settlement Hearing at 12, *In re* Everlast Worldwide Inc. S'holders Litig., C.A. No. 3077-VCL (Del. Ch. Dec. 20, 2007).

397. This included information "regarding the negotiation of the transaction" and "certain voting agreements that were entered into by major shareholders of the company. . . ." *Id.*

398. This disclosure included the discounted cash flow analysis and projections that the banker used to evaluate the company. *Id.* at 12–13.

399. These were "internal projections that were shared with the [banker in] providing a fairness opinion in the case or valuation opinions related to the transaction. . . ." Transcript of Teleconference of Court's Ruling at 7–8, *In re* Intergraph Corp. S'holders Litig., C.A. No. 2398-VCP (Del. Ch. Sept. 10, 2007).

						operating results or things of that nature." *Id.* at 7-8. -"If I have to put [the disclosures] on a spectrum, I'm not convinced that this case goes into the higher valuation type category." *Id.* at 8.
In re Cardiac Science, Inc. S'holders Litig.	C.A. No. 1138-N (Del. Ch. Jan. 4, 2006)	$520	$250	$300	-Merger-related details[400] -Potential conflicts of interest of management[401]	-"[T]hese disclosures don't exactly knock my socks off," however, they are things that were "useful for shareholders to have." *Id.* at 67. -"The main factor for me is I didn't view the improvements in disclosure as being, in the overall mix of information, all that considerable." *Id.* at 69.
In re Genencor Int'l, Inc. S'holders Litig.	C.A. No. 1052-N (Del. Ch. June 2, 2005)	$450	$350	$450	-Banker's compensation -Banker's analysis[402] -Merger-related details[403]	-The Court noted that the plaintiff's counsel devoted "a substantial amount of time" to the matter, over a "brief period" of time. *Id.* at 22, 23.

400. This included details about the negotiation process and the valuation of certain assets. Transcript of Settlement Hearing and Ruling of the Court at 13–17, *In re* Cardiac Science Inc. S'holders Litig., C.A. No. 1138-N (Del. Ch. Jan. 4, 2006).

401. This included details on the company's management's interest in the merger. *Id.*

402. These disclosures included information regarding the banker's failure to place a positive value on the company's healthcare business. Transcript of Settlement Hearing at 8, *In re* Genencor Int'l, Inc. S'holders Litig., C.A. No. 1052-N (Del. Ch. June 2, 2005). The original valuation factored in a $170 million negative valuation for the business, but the supplemental disclosures showed that "earlier valuations" for the healthcare business ranged from "zero dollars to as much as $100 million." *Id.*

403. This included details regarding the negotiation process and information showing that the company's chief executive officer believed the sale price should have been greater than the deal price. *Id.* at 9, 10.

						-The disclosures were "substantial" and "appear[ed] to be matters of interest to the stockholders who were asked to tender their shares." *Id.* at 21.
In re Loehmann's Holdings, Inc. S'holders Litig.	C.A. No. 400-N (Del. Ch. Feb. 8, 2005)	$312	$312	$312	-Banker's analysis[404]	-Recognizing that the disclosures had "some value," the Court decided not to "second guess or to be an armchair quarterback" on the fee. *Id.* at 16, 17.
In re Plains Res. Inc. S'holders Litig.	No. Civ.A. 071-N, 2005 WL 332811 (Del. Ch. Feb. 4, 2005)	Unkn-own[405]	$275	$1,100[406]	-Updated banker's analysis -Merger-related details[407]	
In re Golden State Bancorp Inc. S'holders Litig.	C.A. No. 16175, 2000 WL 62964 (Del. Ch. Jan. 7,	$1,325	$1,325	$500	-Updated, unaudited financial information[408] -Updated	-"The plaintiffs' attorneys in this case have requested a vastly higher fee than the typical fee this Court has awarded for settlements

404. This disclosure included the "comparable companies transaction, the comparable transactions for selecting companies, [and] discounted cash flow on a leveraged buyout analysis." Transcript of Settlement Hearing at 9, *In re* Loehmann's Holdings, Inc. S'holders Litig., C.A. No. 400-N (Del. Ch. Feb. 8, 2005).

405. The plaintiffs' ask included more than just the disclosure portion, so I did not include the ask amount.

406. The Court declined to separate the fee award amount; accordingly, the award includes two components: one for the disclosures and the other for an increase in share price. However, by comparing this case to others with similar disclosures, it is quite likely that the disclosure fee award would be in the Band 2 range.

407. Specifically, the disclosures provided "the detailed reasoning behind [one of the special committee member's] change of mind" regarding the adequacy of the offer. *In re* Plains Res. Inc. S'holders Litig., No. Civ.A. 071-N, 2005 WL 332811, at *6 (Del. Ch. Feb. 4, 2005).

408. This included an additional quarter of financial information. *Id.* at *3.

	2000)				fairness opinion[409] -Acquirer's financials	providing only therapeutic benefits." *Id.* at *3. Here, the disclosures provided only a "limited benefit." *Id.*
In re Dr. Pepper/Seven Up Cos. S'holders Litig.	C.A. No. 13109, 1996 WL 74214 (Del. Ch. Feb. 27, 1996)	$690	$690	$300	-Banker's analysis[410] -Acquirer's deal benefits[411]	-The Court noted that the settlement "provided [the company's] shareholders with additional information that might have been material in deciding whether to tender their stock." *Id.* at *4.

409. This opinion was updated to take into account the decline in stock price and other recent developments. *Id.*

410. These disclosures included the following: (1) a supplement to the Schedule 14D-9 that "disclosed the range of per share value for the company as yielded by each discrete valuation technique used by [the company's bankers] to determine the fairness" of the acquirer's purchase offer (the original 14D-9 noted that the bankers used four "separate analyses," but it "did not identify the ranges of value yielded by *each* valuation method"); and (2) "other valuation estimates provided to [the company's] board." *In re* Dr. Pepper/Seven Up Cos. S'holders Litig., C.A. No. 13109, 1996 WL 74214, at *1, 2 (Del. Ch. Feb. 27, 1996).

411. These benefits included (1) the fact that the acquirer would capture "substantial operating synergies" because of its acquisition, which would "result[] in significant cost savings for the combined companies," and (2) the fact that the acquirer "would probably benefit from the ability to use [the company's] federal income tax loss carry forwards of about $270 million." *Id.* at *2.

APPENDIX C: BAND 3 FEE AWARDS (GREATER THAN $500,000)
(*NUMBERS ARE IN THOUSANDS*)
(*NUMBERS ARE ROUNDED TO THE NEAREST THOUSAND*)

CASE NAME	CITATION	ASK	BID	AWARD	TYPE	DESCRIPTION
In re Clarient, Inc. S'holders Litig.	C.A. No. 5932-CS (Del. Ch. Aug. 2, 2011)	$900	$900	$700 [412]	-Projectio-ns[413]	-The disclosures "gave a fuller information base to people about why something was essentially fair." *Id.* at 82. -None of the disclosures showed that "this was a stinky deal done by faithless fiduciaries." *Id.* at 86. -Rather, they are valuable only because "a reasonable investor could say this gives me more of a basis to vote in an informed way." *Id.*
In re Del Monte Foods Co. S'holders Litig.	No. 6027-VCL, 2011 WL 2535256 (Del. Ch. June 27, 2011)	$12,000	$800	$2,750	-Significant merger-related details that were unknown to board or shareholders [414] -Fairness	-"Lead Counsel achieved a major result." *Id.* at *14.

412. This case was litigated in both Delaware and California and both sets of plaintiffs' counsel sought separate fees. The Court opted to award $700,000, with half going to Delaware counsel and the other half to California counsel. Because the only disclosures in this case were projections, it is quite likely that but for the two sets of plaintiffs' counsel, the award would have been $350,000, placing it in the Band 2 range.

413. These projections were more "optimistic" than those that were originally filed in the 14d-9. Transcript of Settlement Hearing at 32–33, *In re* Clarient, Inc. S'holders Litig., C.A. No. 5932-CS (Del. Ch. Aug. 2, 2011).

414. This information included the company's banker's (Barclays) "behind-the-scenes activities during the sale process." *In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *9 (Del. Ch. June 27, 2011). Specifically, "Barclays sought to achieve a fee event for itself by putting [the company] into play, securing both the sell-side advisory business and a lucrative buy-side financing role, and steering two competing bidders into a joint offer in violation of their standstill agreements and after the [company's] board instructed Barclays to shut down the sale process." *Id.* For this disclosure, the Court awarded $1.6 million. *Id.* at *14.

					opinions from two different bankers,[415] including information regarding (i) the bankers' compensation,[416] (ii) the bankers' conflicts of interest, and (iii) the bankers' methodologies -Managemen-t's potential conflicts of interest[417]	
Continuum Capital v. Nolan	C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011)	$950	$450	$525 [418]	-Projections (5 years)[419] -Conflict of interest of banker[420] -Banker's	-"I think you got great disclosure. I'll tell you that right now. The three biggies that you focused on, each one of those is solid." *Id.* at 25.

415. For the disclosures regarding Barclays, the Court noted that the fee award should be in the neighborhood of $400,000 to $550,000. *Id.* at *11. The other banker was Perella Weinberg, and for the disclosures regarding that firm, the Court stated that the fee award should be between $350,000 and $400,000. *Id.*

416. The disclosures "quantified the fees the bankers would earn for the Merger and identified past engagements for [the company] and the Sponsors along with the magnitude of fees previously earned." *Id.* at *10.

417. These disclosures revealed the difference between "the proceeds each executive would receive on consummation of a merger," and what they "would obtain if terminated without a change in control." *Id.* at *12. This was worth a fee award of about $200,000. *Id.*

418. Because the plaintiffs initially filed suit in Virginia and then moved the case to Delaware, the Court took the plaintiffs' view that twenty-five percent of their time was spent on the Virginia-related litigation, and so it discounted the fee award (originally $700,000) by twenty-five percent, or $175,000. *Id.* at 102–03.

419. The projections included revenue, EBITDA, and net income. Transcript of Oral Argument at 94, Continuum Capital v. Nolan, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011).

420. The disclosures showed that while the banker was representing the company, "it was simultaneously discussing with [the buyer] the possibility of being engaged by [the buyer] for other assignments." *Id.* at 23.

					compensation [421]	
In re Sepracor Inc. S'holders Litig.	C.A. No. 4871-VCS (Del. Ch. May 21, 2010)	$550	$550	$550	-Banker's analysis[422] -Projections (10 years)	-The disclosures included "information that shed useful light on the choice that the [company's] stockholders had to make whether to accept this deal or reject it." *Id.* at 19. -The Court granted the full request because it was "well within the range of . . . fees that this Court would traditionally award in a case like this." *Id.* at 21.
County of York Employees' Ret. Plan v. Merrill Lynch & Co., Inc.	C.A. No. 4066-VCN (Del. Ch. Aug. 31, 2009)	$950	$950	$950 [423]	-Merger-related details[424] -Source of financial information [425] -Potential conflicts of interest of bankers[426]	-The Court stated that the disclosures were "significant," "helpful," and "material," but "ultimately were fairly ordinary." *Id.* at 31, 33. However, the litigation was "difficult," "complicated," and carried out "on an expedited basis." *Id.* at 34.

421. The amount of the banker's "fees that were contingent [on] the consummation of the merger were not [previously] disclosed." *Id.* at 23.

422. This was the precedent transaction analysis prepared by the company's banker. Transcript of Settlement Hearing and Rulings of the Court at 13, *In re* Sepracor Inc. S'holders Litig., C.A. No. 4871-VCS (Del. Ch. May 21, 2010).

423. A portion of this fee was to be distributed to the plaintiffs' counsel in a parallel New York proceeding. Transcript of Settlement Hearing at 34–35, County of York Employees' Ret. Plan v. Merrill Lynch & Co., Inc., C.A. No. 4066-VCN (Del. Ch. Aug. 31, 2009).

424. This included disclosures regarding (i) "the impact or potential impact of the Lehman Brothers bankruptcy on the board's deliberative process and the speed with which it undertook that effort," (ii) "the risk of the [company's] potential credit downgrade and its impact on [the company's] access to short-term financing," and (iii) "other potential business combinations or strategic alternatives." *Id.* at 27.

425. This financial information was used by the company's financial advisors "for estimates and projections." *Id.*

426. Here, the disclosures regarded "some of the financial interests of various senior Merrill Lynch executives and the outcome of the transaction." *Id.*

					-Legal proceedings[427]	
In re Countrywide Corp. S'holders Litig.	C.A. No. 3464-VCN, 2009 Del. Ch. LEXIS 158 (Del. Ch. Aug. 28, 2009)	$750	$750	$750	-Merger-related details[428] -Fairness opinion information[429]	-The Court noted that the disclosures were "material and beneficial" to the shareholders. *Id.* at *3. -The Court reviewed all of the *Sugarland* factors and found that they justified a Band 3 award. *See id.* at *3-4.
Henkel v. Gemstar-TV Guide Int'l, Inc.	C.A. No. 3419-VCN (Del. Ch. Dec. 16, 2008)	$1,250	$1,250	$1,100	-Projections[430] -Banker's analysis[431] -Merger-related details[432]	-The Court reviewed the *Sugarland* factors, finding that "[t]he litigation was difficult," the issues were "complex," the "standing and ability of counsel [could not] be questioned," and the risk of the litigation was entirely on the plaintiff's counsel. *Id.* at 24-25. "When I look at the disclosures, I come away with a sense that there's important additional financial information and these additional disclosures

427. These disclosures dealt with the "various pending legal proceedings attacking the transaction." *Id.*

428. Specifically, that Bank of America was the company's only suitor, and "that there had been discussions earlier of a higher price." *In re* Countrywide Corp. S'holders Litig., C.A. No. 3464-VCN, 2009 Del. Ch. LEXIS 158, at *3 (Del. Ch. Aug. 28, 2009).

429. This disclosure revealed "that changing forecasts had influenced [the company's] financial advisors in the preparation of their fairness opinions." *Id.*

430. These were projections of revenues and earnings. Transcript of Settlement Hearing at 21, Henkel v. Gemstar-TV Guide Int'l, Inc., C.A. No. 3419-VCN (Del. Ch. Dec. 16, 2008).

431. These disclosures included "information used by the financial advisor in reaching its fairness opinion," and "additional information regarding certain comparables." *Id.*

432. These details showed the "factors that the [company's] board had considered" in approving the transaction. *Id.*

						do justify a significant award." *Id.* at 25, 26.
V.I. Gov't Employees' Ret. Sys. v. Alvarez	C.A. No. 3976-VCS (Del. Ch. Dec. 2, 2008)	$1,250	$1,250	$1,250	-Called the fairness of the deal into question[433] -Banker's methodologies[434] -Projections (2 years) -Manageme-nt's post-deal compensation	-The disclosure calling the fairness of the deal into question was "very valuable information, and the plaintiff class doesn't get that for free." *Id.* at 44-45. -The disclosures were "very rich and informative disclosures regarding valuation that allowed the electorate to make a more informed determination for themselves whether to accept the deal price, whether to vote no, whether to be active." *Id.* at 44. -The disclosures gave stockholders the ability to put together a large enough stockholder group to stop the transaction. *Id.* at 45-46.
Rosen v. Wind River Sys., Inc.	C.A. No. 4674-VCP (Del. Ch. Dec. 8, 2009)	$700	$700	$700	-Projections (3 years)[435] -Banker's compensation -Potential conflict of interest of	-"It was important that, having made a partial disclosure, that the defendants were careful to go on and make sure that that was a full and complete disclosure so that there

433. There was a disclosure showing the full range of the banker's valuation of the company, which showed that "you could get more potentially, this [deal] could be worth more." Transcript of Settlement Hearing at 44, V.I. Gov't Employees' Ret. Sys. v. Alvarez, C.A. No. 3976-VCS (Del. Ch. Dec. 2, 2008).

434. The disclosures showed how the banker "came up" with the upper-range valuation for the company, and also described how the banker "did their discounted cash flow analysis, how they generated the discount rate they used, how they determined the beta that they used, [and] the justification for the selection of the comparable companies." *Id.* at 8, 44.

435. The projections that were disclosed originally made it look like the company was in "a bit of a trough," but the supplemental projections showed "that management's projections in a longer term were actually much more optimistic." Transcript of Settlement Hearing at 10–11, Rosen v. Wind River Sys., Inc., C.A. No. 4674-VCP (Del. Ch. Dec. 8, 2009).

					management [436] -Merger-related details[437] -Banker's methodologies [438]	wouldn't be anything misleading about it." *Id.* at 22. -"[T]here was significant effort on the part of the plaintiff's counsel to ensure that the disclosures . . . included information that could be considered important for purposes of the shareholders in making their decisions on this transaction." *Id.*
In re Lear Corp. S'holders Litig.	C.A. No. 2728-VCS (Del. Ch. June 3, 2008)	$3,000	$450	$800	-Potential conflict of interest of CEO[439]	-The disclosures revealed information to shareholders that was "important" and "material." *Id.* at 94. This provided a "value" to the shareholders because they "had more information on the vote." *Id.* at 96. -Despite the "important and valuable victory," it was "not nearly substantial enough to justify the very, very large fee request" that they sought. *Id.* at 92.
Globis Capital Partners v. Safenet,	C.A. No. 2772-VCS (Del. Ch. Dec.	$1,200	$108	$1,200	-100 pages of supplemental disclosures	-In this case, "the original 14D-9 actually didn't even really purport to describe what the bankers did at all."

436. This disclosure revealed details regarding management's discussions with the acquirer regarding future employment. *Id.* at 12.

437. This include additional information regarding the "process leading to the transaction" and the "investigation of strategic alternatives." *Id.* at 13.

438. This disclosure revealed the criteria "used to select comparable companies" by the company's banker. *Id.*

439. Plaintiffs obtained disclosures showing that the chief executive officer of the company had an incentive to act in a self-interested fashion while carrying out his board's instructions, because there was "motivation" for him that "could rationally lead [him] to favor a deal at a less than optimal price, because the procession of a deal was more important to him, given his overall economic interest, than only doing a deal at the right price." *In re* Lear Corp. S'holders Litig., 926 A.2d 94, 114 (Del. Ch. 2007).

	20, 2007)					*Id.* at 6. -The disclosures were "very substantial and informative." *Id.* at 46. -"This was not an average case. The corporation here chose to go to its stockholders with extremely bare-bone, noninformative disclosures, took a calculated risk and lost." *Id.* at 45.
In re Gilmartin v. Adobe Res. Corp.	No. 12467, 1992 WL 12580455 (Del. Ch. June 29, 1992)	$750	$200	$750	-Court-ordered proxy disclosure	-The Court granted a preliminary injunction in this case, which likely increased the settlement value. -This case was litigated essentially "on a 'drop everything' basis." ¶ 3(b).