IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE RIVERBED TECHNOLOGY, INC. STOCKHOLDERS LITIGATION	Consolidated C.A. No. 10484-VCG

OBJECTION OF SEAN J. GRIFFITH TO PROPOSED SETTLEMENT AND APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

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DATED: July 13, 2015

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OBJECTION OF SEAN J. GRIFFITH TO PROPOSED SETTLEMENT AND APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

Sean J. Griffith (the "Objector"), a Class Member (as such term is defined in the Stipulation of Settlement filed in this action on April 8, 2015), through his counsel, respectfully submits this objection to the proposed settlement and application for attorneys' fees and expenses (the "Objection").[1]

I. PRELIMINARY STATEMENT

The Court is being asked to approve what appears to be an "unremarkable disclosure-only settlement" and award attorneys' fees.[2] However, not one of the disclosures conferred a material benefit on the plaintiff class. Moreover, this case was prosecuted in such a rote manner that at least one of the chief disclosures plaintiffs claim in their opening brief to have achieved simply is not to be found in this case. Over half of the disclosures the parties propose as consideration for the expansive global release correspond to claims that failed to make it past the motion to expedite stage. All are immaterial. Accordingly, the supplemental disclosures in this case cannot serve either as sufficient consideration for settlement nor for an award of attorneys' fees. The allegedly mooted

1 This Objection serves as written notice of intention to appear, statement of objections, grounds for such objections and provides the reasons the Objector desires to appear and be heard, through his counsel. Documentation evidencing the Objector's membership in the class is attached as Exhibit A hereto.

2 *In re PAETEC Holding Corp. S'holders Litig.*, 2013 WL 1110811, at *8 (Del. Ch. Mar. 19, 2013).

disclosures were equally immaterial and provide no separate basis for an award of attorneys' fees. Accordingly, both the settlement and plaintiffs' request for an award of attorneys' fees must be rejected.

Like other M&A cases, this settlement is the final stage of "ritualized quasi-litigation"[3] that began with a barrage of scattershot complaints. Those complaints contained at least eighty-one separate alleged breaches of the Riverbed directors' fiduciary duty of disclosure, all formulated in response to Riverbed's preliminary proxy. The preliminary proxy was superseded when Riverbed filed its definitive proxy two weeks later. However, as if shouting at someone who has left the room, the nine firms and more than twenty-five lawyers representing the plaintiffs never modified their claims: not when Riverbed filed its definitive proxy, not when the plaintiffs moved to expedite, and not even when this Court found just two of those disclosure claims colorable on the motion to expedite.

After the Court's ruling on the motion to expedite, all but two disclosure claims were dead. When discovery subsequently revealed those claims also to lack merit, rather than dismissing their case, plaintiffs reanimated the dead claims for settlement purposes. The present settlement amounts to a heap of meaningless disclosures, consisting principally of such undead claims. These

[3] *In re Activision Blizzard, Inc. S'holder Litig.*, 2015 WL 2438067, at *34 (Del. Ch. May 21, 2015) (describing settlements of the type at issue in this case as "routine disclosure-only settlements, entered into quickly after ritualized quasi-litigation, that plague the M & A landscape").

tactics are wasteful and do not serve the interests of the class. For this reason alone, the Court should decline to reward plaintiffs' counsel for this litigation even if, contrary to what is argued in this Objection, the Court approves the settlement.

Even if one ignores the improper resuscitation of dead claims and considers the merits of the settlement, it must be found to have none. All the disclosures at issue are immaterial, providing no compensable benefit. In support of the settlement and their fee request, plaintiffs "simply parrot[], out of context, [] other cases where, for example, an investment banker disclosure was meaningful because it tilted incentives one way or the other."[4]

The parroting in this case is most apparent with respect to the headline disclosure plaintiffs claim to have caused: "the free cash flow projections for the years 2014 through 2019 prepared by Riverbed management and relied upon by Riverbed's financial advisors Goldman Sachs & Co. ('Goldman Sachs') and Qatalyst Partners ('Qatalyst')."[5] The plaintiffs did not achieve any such disclosure in this case. The inapplicable description seems to have been cut and pasted from another case. What was actually disclosed here was not a free cash flow projection prepared by management, and it was not relied upon by Qatalyst and Goldman

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[4] *In re Transatlantic Holdings, Inc. S'holders Litig.*, C.A. No. 6574-CS, at 5:5-8 (Del. Ch. Feb. 28, 2013) (Transcript).

[5] Plaintiffs' Brief in Support of Proposed Settlement, Class Certification and Lead Counsel's Application for Attorney's Fees and Expenses ("Pl. Op. Br.") at 1-2.

Sachs. Instead, the disclosure was a single additional line item on top of thirty-two previously-disclosed, more meaningful line item disclosures in the management projections that one of the advisors used as a starting point in that advisor's separate calculation of free cash flow. Every other disclosure reveals itself to be immaterial under the light of adversarial inquiry.[6]

In short, the litigation results and litigation conduct in this case do not merit a settlement or payment to plaintiffs' counsel.

II. NATURE AND STAGE OF THE PROCEEDINGS

A. The Transaction Is Announced and Initial Complaints are Filed

On December 15, 2014, Riverbed announced that it would be acquired by Thoma Bravo, with additional equity financing provided in part by the Ontario Teachers' Pension Plan ("OTPP").

The first of seven complaints followed four days later. A timeline of certain key actions in the litigation, including the filing of each complaint or

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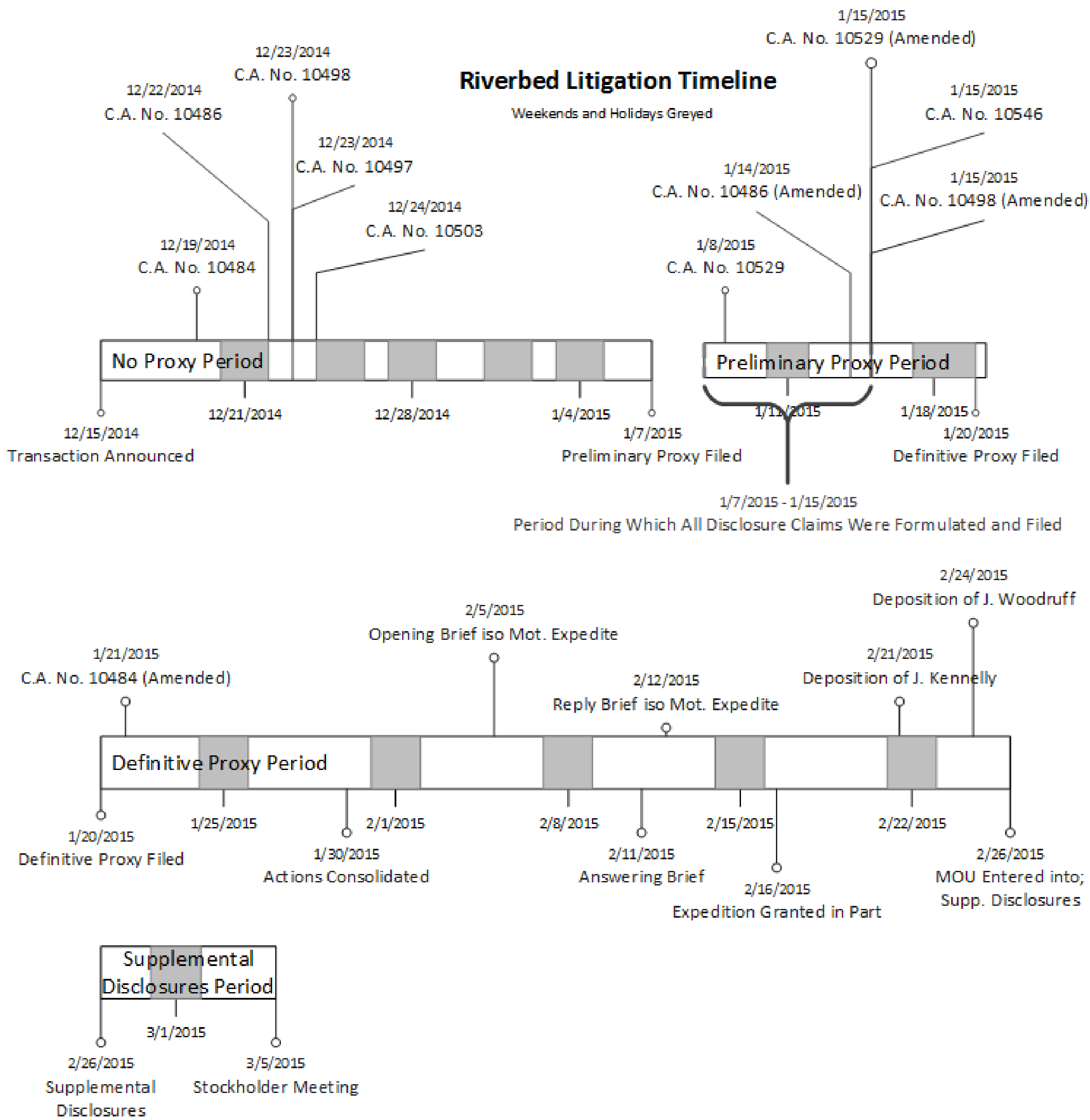
6 *In re Jefferies Group, Inc. S'holders Litig.*, 2015 WL 3540662, at *2 n. 5 (Del. Ch. Jun. 5, 2015) ("From a policy perspective, it would be beneficial in my view for fee applications to be subject to adversarial inquiry to provide the Court with a better record with which to evaluate the *Sugarland* factors, in particular the quality of the benefit achieved in the proposed settlement and the relative complexity of the case.").

amended complaint, is presented below. The five complaints filed before the preliminary proxy appeared generally did not include disclosure claims.[7]

[7] There were exceptions. The complaint filed in C.A. No. 10486-VCG on December 22, 2014 claimed at ¶ 72 that unless the directors' "conduct was enjoined . . . they will continue to breach their fiduciary duties . . . and will further a process that inhibits the . . . disclosure of material information." The complaint filed in C.A. No. 10497-VCG on December 23, 2014 recited at ¶ 71(e) that the directors were required to disclose all material information, but did not claim a violation.



B. The Preliminary Proxy Is Filed; Further Complaints and Amended Complaints Are Filed

On January 7, 2015, Riverbed filed its preliminary proxy. After this, five new or amended complaints were filed. The five new or amended complaints filed in the preliminary proxy period included 81 separate disclosure claims. No unique disclosure claims were filed after January 15, 2015.

C.A. Number	Date Filed	Number of Particular Disclosure Claims[8]
10529-VCG[9]	Jan. 8	0
10486-VCG (Amended)	Jan. 14	40
10498-VCG (Amended)	Jan. 15	26
10546-VCG	Jan. 15	15
10529-VCG (Amended)	Jan. 15	26* (duplicate of 10498 (Amended))
10484-VCG (Amended) [10]	Jan. 21	26* (duplicate of 10498 (Amended))
Total		81

C. The Definitive Proxy Is Filed; No Further Disclosure Claims

On January 20, 2015, Riverbed filed its definitive proxy.[11] No disclosure claims were filed in response to the definitive proxy. Riverbed made three pertinent changes to the proxy in the definitive version.

[8] Exhibit B identifies each individual claim and its appearances through the litigation. There are two additional mooted disclosures claimed in plaintiffs' opening brief that we are unable to trace to any allegation from any of the complaints, thus increasing the total number to 83.

[9] The complaint filed in C.A. No. 10529-VCG on January 8, 2015 claims generally at ¶¶ 28 and 56 that the directors were "knowingly or recklessly breaching their fiduciary duties of candor by failing to disclose all material information" and failing "to provide Riverbed shareholders with [complete and accurate information]" without further explanation of how.

[10] The amended complaint filed in C.A. 10484-VCG on January 21, 2015 (i.e. after the definitive proxy was filed) is included because it duplicated preliminary proxy period claims. Page numbers and defined terms referring to the preliminary proxy were also used despite the filing of the definitive proxy. *See* each duplicate complaint, at ¶¶ 14, 125(h).

[11] Riverbed, Definitive Proxy Statement (Schedule 14A) (Jan. 20, 2015) (the "definitive proxy").

First, two line items were added to join the thirty-two line items disclosed in the management projections tables: "Cash Flow from Operating Activities" and "Capital Expenditures."[12] These two line items were appended to the table of non-GAAP financial line items.[13] No changes were made to the table reconciling the projections to GAAP to incorporate these additional line items.

Second, the definitive proxy added the following underlined text to the phrase describing Qatalyst's calculation of unlevered free cash flow: "the estimated future unlevered free cash flows of Riverbed, derived from forecasted non-GAAP operating income based on the Management Projections with adjustments provided by Riverbed management, including adding depreciation and decreases in working capital and subtracting capital expenditures and taxes."[14]

Third, the definitive proxy added the following underlined text to the language after a table of Riverbed management projections for 2014-2018 which was reconciled to GAAP: "The resulting fiscal year 2019 projections included (in millions): $1,597 for Non-GAAP Revenue; $1,262 for Non-GAAP Gross Profit; $469 for Non-GAAP Operating Income; $502 for EBITDA; $288 for Cash Flow from Operating Activities (treating stock based compensation as a cash expense and excluding interest income and expense and the associated tax effects); and

12 Definitive proxy at 58. Exhibits C and D provide excerpts of the key pages from the preliminary and definitive proxy, respectively.

13 The amounts for 2019 were also added at page 60 of the definitive proxy.

14 *Compare* preliminary proxy at 48 *with* definitive proxy at 48.

($35) for Capital Expenditures."[15] No disclosure was added with respect to adjustments to Cash Flow from Operating Activities in relation to the 2014-2018 projections.

D. The Actions Are Consolidated; Plaintiffs Move to Expedite; Disclosure Claims Unchanged

On January 30, 2015, the Court consolidated the actions under C.A. No. 10484-VCG.[16] The amended complaint filed in C.A. No. 10498-VCG on January 15, 2015 was designated as the operative complaint. The plaintiffs moved to expedite discovery on February 5, 2015 and pressed twenty of the twenty-six disclosure claims from their operative complaint in their opening brief.[17]

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15 Definitive proxy at 60.

16 A further order of consolidation was entered on February 2, 2015 to consolidate C.A. No. 10546-VCG, which had previously not been included in the order of consolidation. Order Consolidating The Related Action With Consolidated Action, C.A. No. 10484-VCG and C.A. No. 10546-VCG (Feb. 2, 2015).

17 The claims are nearly identically presented in the amended complaint in C.A. 10498-VCG (filed January 15, 2015) (the "operative complaint") and the Brief In Support Of Plaintiffs' Motion For Expedited Proceedings (filed February 5, 2015) (the "opening brief on plaintiffs' motion to expedite"). A redline of the language from the operative complaint against the related language in the opening brief on plaintiffs' motion to expedite, reordered to be presented in the same order, is appended as Exhibit E. Whether there was any reduction in disclosure claims is debatable. The disclosure claims that are in the operative complaint but not found in the brief are from ¶¶ 113 and 118 of the operative complaint and relate to the presentation of multiples. The opening brief on plaintiffs' motion to expedite replaces these specific claims with the catchall claim that the "Proxy is incomplete and misleading with respect to the multiples observed in Qatalyst's and Goldman's respective selected companies analysis." Brief In Support Of Plaintiffs' Motion For Expedited Proceedings at 28.

In their reply brief, filed on February 12, plaintiffs dropped their *Revlon* claims entirely as a basis for expedition, claimed credit for allegedly mooted disclosures (allegedly mooted three weeks earlier in the definitive proxy) and appeared to reduce their outstanding disclosure claims to four.[18]

E. The Court Rules on the Motion to Expedite

On February 16, 2015, the Court ruled on plaintiffs' motion to expedite. The Court found that the "overwhelming majority of the disclosure claims that were argued in the plaintiffs' opening brief I find were already moot at the time that brief was written, having been disclosed in the definitive proxy."[19] As to the claims that were still live, the Court found that the only colorable claim was that Goldman had material undisclosed conflicts that caused the Riverbed board to retain Qatalyst.[20] The Court noted that the total mix of information already addressed this issue, including specific disclosure as to Goldman's dealings with Thoma Bravo, the only potentially conflicting relationship identified in plaintiffs' briefing.[21] The Court observed that "I'm doubtful, frankly, that

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18 C.A. No. 10484-VCG, Brief in Support of Plaintiffs' Motion for Expedited Proceedings (Feb. 5, 2015).

19 *In re Riverbed Tech., Inc. S'holders Litig.*, C.A. No. 10484-VCG, at 4 (Feb. 16, 2015) (Transcript) ("Motion to Expedite Transcript").

20 *Id.* at 5-6.

21 C.A. No. 10484-VCG, Plaintiffs' Reply Brief in Further Support of Their Motion for Expedited Proceedings at 8-9 (Feb 12, 2015) ("Reply Brief on Motion to Expedite") (omitting any discussion of potential conflicts of Qatalyst or with respect to OTPP).

discovery is going to lead to a finding of material omission here."[22] Accordingly, the Court ordered "narrowly—and I mean narrowly—targeted discovery."[23]

F. Discovery Is Taken; Settlement Involving Supplemental Disclosures Follows

On February 17, 2015, the plaintiffs served interrogatory requests on Goldman Sachs and the defendants. On February 19 and February 20, 2015, the defendants produced documents to plaintiffs.[24] Without revealing the confidential content of the discovery, a table summarizing the discovery is set forth below.

Date	Content	Pages
February 19, 2015	4 banker books	78
	2 engagement letters	25
	7 sets of board minutes	25
February 20, 2015	4 banker books	118
	2 engagement letters	12
	1 letter agreement with advisor	2
	2 sets of board minutes	28
Total		328

22 Motion to Expedite Transcript at 5-6.

23 *Id.* at 6-7.

24 The parties provided the Objector with access to the discovery on an attorneys'/experts' eyes only basis, the same basis upon which the discovery was provided to the plaintiffs. Since lead plaintiffs have always been prohibited from knowing the content of discovery, it is questionable how closely they monitored this litigation.

On February 21, the plaintiffs deposed Riverbed's CEO. On February 23, the Riverbed defendants served responses to interrogatories on the plaintiffs.[25] On February 24, the plaintiffs deposed a senior member of Goldman Sachs. On February 26, 2015, the plaintiffs and defendants entered into the MOU.

The MOU was a typical disclosure-only settlement MOU. It identified three allegedly mooted disclosures: the two line items added to the management projections section[26] and the further description of Qatalyst's calculation of free cash flows. Defendants included a placeholder disavowal that plaintiffs caused the allegedly mooted disclosure,[27] but have not taken further steps to disprove causation. The substance of the settlement consisted of seven items of supplemental disclosure, five of which related to matters that had not made it past the motion to expedite phase.[28]

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25 The docket does not reflect the service of responses on the part of other defendants or Goldman Sachs.

26 MOU at 2-3.

27 *Id.* at 3; Stipulation of Settlement at 3.

28 Exhibit F (Riverbed Current Report (Form 8-K) (Feb. 26, 2015)) (page numbers have been added for ease of reference).

G. The Stockholder Meeting Is Held; The Merger is Approved; Confirmatory Discovery

On March 5, 2015, Riverbed held its special meeting to vote on the merger. The following were the results of the vote:

- 122,346,152 votes were cast in respect to the Merger Proposal;
- 121,706,202 in favor (99.48% of votes cast);
- 554,435 against (0.45% of votes cast); and
- 85,515 abstentions (0.07% of votes cast).[29]

On March 10, 2015, defendants produced additional documents to plaintiffs consisting of 627 additional pages. This includes three copies of a three-volume collection of Goldman Sachs general industry research consisting of 435 pages. Other bank analyst research notes comprised 81 pages.[30]

III. ARGUMENT

A. The Settlement Should Be Rejected Because The Supplemental Disclosures Provided No Value

Like other disclosure-only settlements, the parties here propose to trade an expansive global release for supplemental disclosures.[31] The Court should reject the settlement because the supplemental disclosures that constitute the

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[29] Riverbed, Current Report (Form 8-K) (Mar. 6, 2015) available at http://1.usa.gov/1JDNayR.

[30] Like the previous discovery, the confirmatory discovery was designated attorneys' eyes only.

[31] The full list of disclosures at issue, supplemental and allegedly mooted, is provided in Exhibit G.

consideration provided no value to the Class in exchange for the global release. In addition, the settlement is unreasonable because, given the narrow scope of discovery, neither the parties nor the Court have a basis to assess the value (or lack thereof) of the claims that are offered for release.

1. Applicable Legal Standard

The Court of Chancery "'play[s] the role of fiduciary in its review of [class] settlements.'"[32] A Court may approve a settlement of representative litigation if the settlement consideration is a fair, adequate and reasonable trade for the claims compromised in the settlement, applying its own business judgment.[33] In other words, the Court must "assess[] the reasonableness of the 'give' and the 'get' . . . ."[34] The "give" in this context is a global release of claims and the "get" is the supplemental disclosures. It is the burden of the settlement proponents to prove the fairness of the settlement.[35] Since "[r]emedying an immaterial omission through supplemental disclosure does not benefit stockholders"[36] the settlement proponents' burden is to show that the disclosures were material enough to be of such value they reasonably could be traded for the global release by a fiduciary.

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[32] *In re Activision*, 2015 WL 2438067, at *12 (Del. Ch. May 21, 2015) (quoting *In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 266 (Del. 1990)).

[33] *Id*. at *31 n. 26 (collecting cases describing standard).

[34] *Id*. at *13.

[35] *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *9 (Del. Ch. May 6, 2010) (citing *Barkan* v. *Amsted Indus., Inc.*, 567 A.2d 1279, 1285-86 (Del. 1989)).

[36] *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1128 (Del. Ch. 2011).

Where the consideration is insufficient, the settlement must be rejected. "I don't think [this disclosure-only settlement is] enough to justify a release . . . giving out releases lightly, I think, is something we've got to be careful about."[37] Where a claim has not been seriously investigated, the Court is cautious in approving such claim's release because the value of the claim is an "unknown unknown."[38]

The standard for materiality is well-established. "Information is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. In other words, information is material if, from the perspective of a reasonable stockholder, there is a substantial

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[37] *In re Medicis Pharma. Corp. S'holders Litig.*, C.A. No. 7857-CS, at 24 (Del. Ch. Feb. 26, 2014) (Transcript); *Acevedo* v. *Aeroflex Holding Corp.*, C.A. No. 7930-VCL, at 73 (Del. Ch. Jul. 8, 2015) (Transcript) ("I don't think this relief [deal term changes and supplemental disclosures] is sufficient to support an intergalactic release.").

[38] *Acevedo*, C.A. No. 7930-VCL, at 15 (Transcript) ("You're giving a global release. Right? Before you do that, you ought to look into these things. And you ought to have an informational basis from which to make a decision."). *Haverhill Retirement Sys.* v. *Asali*, C.A. No. 9474-VCL, at 39 (Del. Ch. Jun. 8, 2015) (Transcript) ("The fundamental problem in this case is I simply do not know the types of things that may have gone on here or the types of things that might be covered by this global release."). *See also In re Theragenics Corp. S'holders Litig.*, C.A. No. 8790-VCL, at 4 (Del. Ch. May 5, 2014) (Transcript) ("[B]ased upon my review of the record . . . there were issues that I don't think were adequately explored. As a result, I cannot approve the settlement as presented today.").

likelihood that it *significantly alter[s]* the 'total mix' of information made available."[39]

A disclosure that only reinforces the view already advocated by a board of directors is immaterial; to alter the total mix, a disclosure achieved by plaintiffs "should be in a way that contradicts, not reinforces, management's recommendation."[40] The lack of votes against the view advocated by a board of directors after supplemental disclosures are made is evidence that such disclosures did not contradict the board's view and were immaterial. The Chief Justice explained this proposition as follows:

> And I asked about the vote for a big reason. What we should be awarding fees for – and I have happily awarded big fees for disclosures – is when a disclosure involves the disclosure of facts or other kinds of information that materially changes the informational mix, and it should be in a way that contradicts, not reinforces, management's recommendation. This appears like the number of no votes was a rounding error [45,304,030 in favor (85.44% of votes

[39] *In re Family Dollar Stores, Inc. S'holder Litig.*, 2014 WL 7246436, at *19 (Del. Ch. Dec. 19, 2014) (citations and quotations omitted) (emphasis original).
[40] *In re Medicis*, C.A. No. 7857-CS, at 22 (Transcript).

> cast); 50,381 against (0.10% of votes cast); 7,670,716 abstained (14.47% of votes cast)].[41]

"[I]f, after the disclosure, you know, 99 percent of the electorate voted for the merger, it's not clear what informational benefit the plaintiffs have obtained."[42]

2. The Two Groups of Supplemental Disclosures

The supplemental disclosures, all of which are immaterial, consist of seven disclosures that break down into two groups. In Group 1 are claims on which the Court permitted discovery. In Group 2 are claims that the Court found non-meritorious in its ruling on the motion to expedite or that plaintiffs failed to assert in their motion to expedite, implicitly acknowledging that they did not meet the standard for expedition. The disclosures in both groups are immaterial. But in addition to being immaterial, the Group 2 claims should not be considered as settlement consideration either because the Court has already adjudicated their merit and found them wanting or because in failing to assert them in the motion to expedite, plaintiffs effectively waived them. By asserting scattershot claims that were left behind at the motion to expedite stage, plaintiffs are imposing a net detriment on the Class.

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[41] *Id.* at 22 (Transcript); Medicis voting results available at http://1.usa.gov/1HwaYCk; *see also In re Coventry S'holders Litig.*, C.A. No. 7905-CS, at 51 (Del. Ch. Aug. 29, 2013) (Transcript) ("[W]hat tends to change the mix most is one that contradicts the picture that's portrayed by the original mix of information.").

[42] *In re Coventry*, C.A. No. 7905-CS, at 51 (Transcript).

(a) Group 1: The Supplemental Disclosures That Survived the Motion to Expedite

The Court permitted expedition as to the claim that Qatalyst was retained because of Goldman Sachs's conflicts and that, relatedly, material conflicts of Goldman Sachs were omitted from the proxy. The Court made clear that "[g]iven the disclosures already made, however, I'm doubtful, frankly, that discovery is going to lead to a finding of material omissions here."[43] The Court's prediction has proven correct. Discovery did not reveal material omissions.

(1) The Rationale for Qatalyst's Retention

The preliminary proxy disclosed that Riverbed "engaged Qatalyst Partners to provide financial advice based on Qatalyst Partners' qualifications, expertise, reputation and knowledge of our business and affairs and the industry in which we operate."[44] The definitive proxy disclosed the same rationale, unchanged.[45] The plaintiffs argued that further disclosure on this topic would be material "**[i]f**," the real reason Qatalyst was retained was "because [the Riverbed board] was concerned about Goldman's conflicts due to its extensive ties to Thoma

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43 Motion to Expedite Transcript at 6.

44 Preliminary proxy at 5. *See also id.* at 46 ("We selected Qatalyst Partners to act as a financial advisor based on Qatalyst Partners' qualifications, expertise, reputation and knowledge of our business and affairs and the industry in which we operate.").

45 Definitive proxy at 5, 46.

Bravo."[46] The Court granted expedited discovery to probe whether conflicts were the underlying reason Qatalyst was hired. If that was the real reason, the existing disclosure was false or, at least, misleading and would have to be changed. The supplemental disclosure made no changes to the existing disclosure, a clear indication that the rationale, as stated in the preliminary and definitive proxy, was accurate all along.[47] The supplemental disclosures on this topic substantially duplicated the existing disclosure and did not significantly alter the total mix of information.

In addition to the supplemental disclosure related to causation behind Qatalyst's retention, a paragraph concerning correlation was added.[48] The correlation paragraph stands in contrast to the disclosures relating to the <u>reasons</u> Qatalyst was retained and can only be read as a further disavowal that conflicts or potential conflicts drove the decision to retain Qatalyst. The defendants, presumably, refused to state that conflicts drove the retention because any such

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[46] Plaintiffs' reply brief on the motion to expedite at 8.

[47] The accuracy of the original disclosure was confirmed by discovery. *See* Kennelly Transcript at 36:1-9 (discussing reasons for retaining Qatalyst and noting that it was "not a matter of believing there should be two"); *id.* at 56-69, 72-76 (testifying that it was unknown at the time Qatalyst was retained who would bid, that no conflict check of Goldman was ever initiated by Riverbed and that "[w]e considered Goldman irrelevant to Thoma Bravo, because all our dealings with Thoma Bravo went through Qatalyst Partners.").

[48] Riverbed 8-K of supplemental disclosures at 3.

statement would have been false. As such, the total mix was not significantly altered by the supplemental disclosure.

(2) Goldman Sachs's Lack of Conflicts

Not surprisingly, since its partner claim failed, the claim that Goldman Sachs had material undisclosed conflicts also fails. The supplemental disclosures restated the paragraph relating to Goldman Sachs's relationships without any indication of what had changed as compared to the definitive proxy.[49] Only a stockholder with the time, inclination and software to run a selective blackline of the supplemental disclosure against the definitive proxy could render the supplemental disclosure into a form that would be understandable, let alone material.[50] This disclosure was facially not useful and, as a practical matter, its unhelpful form alone dictated that there probably was not a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[51] Exhibit H sets forth a blackline, but the blackline only reveals that the additional disclosures are immaterial.

Plaintiffs pointed to six supposed conflicting Goldman Sachs engagements in their opening brief on the motion to expedite and reiterated three in

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[49] *See* Exhibit F for the form in which the disclosure was conveyed to stockholders.

[50] *See Red Oak Fund, L.P.* v. *Digirad Corp.*, 2013 WL 5740103, at *10 (Del Ch. Oct. 23, 2013) ("[W]hat is material and thus needs to be disclosed is a function of what would be important to the reasonable stockholder's voting decision.").

[51] *Rosenblatt* v. *Getty Oil Co.*, 493 A.2d 929, 944 (Del.1985).

their reply brief.[52] Zero of those engagements were ultimately included in the supplemental disclosures.

The supplemental disclosures plaintiffs did extract are wholly immaterial as to Goldman Sachs' supposed conflicts.[53] Zero additional engagements between Goldman Sachs and Thoma Bravo were disclosed.[54] The total compensation flowing from Thoma Bravo to Goldman Sachs in the previous two years was revealed to be just $1.6 million. For perspective, the Investment Banking Division of Goldman Sachs had revenues of approximately $12 billion during that period.[55] The disclosure of $1.6 million in fees did not contradict the existing informational mix.

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52 Pl. Op. Br. Mot. Expedite at 5-6; Pl. Reply Br. Mot. Expedite at 8 n. 6.

53 *In re Atheros Commc'ns, Inc. S'holder Litig.*, 2011 WL 864928, at *8 (Del. Ch. Mar. 4, 2011) ("[T]he conflicts and arguably perverse incentives that may influence the financial advisor in the exercise of its judgment and discretion must be fully and fairly disclosed."); *David P. Simonetti Rollover IRA* v. *Margolis*, 2008 WL 5048692, at *8 (Del. Ch. Jun. 27, 2008) ("Thus, it is imperative for the stockholders to be able to understand what factors might influence the financial advisor's analytical efforts.").

54 Technically, two additional engagements between Goldman Sachs and Thoma Bravo are added in the Supplemental Disclosures, but, for reasons unknown, they are verbatim duplicates of engagements that had been disclosed a few lines above all along: that Goldman Sachs had served as "sole arranger for a bridge loan (aggregate principal amount of $700 million) provided to Blue Coat" in May 2013 and "co-manager for a bank loan (aggregate principal amount of $50 million) provided to Blue Coat Systems in February 2014." *Cf.* preliminary proxy at 55; definitive proxy at 55; 8-k of supplemental disclosures at 4.

55 Goldman Sachs' revenue attributable to its Investment Banking Division in 2014 was $6.46 billion; in 2013, that number was 8% lower. Goldman Sachs, Press Release, at 2 (Jan. 16, 2015) available at

Plaintiffs tout the disclosure that Goldman Sachs "was providing" services to Thoma Bravo, OTPP and/or their respective affiliates and portfolio companies. This disclosure was immaterial. Both versions of the proxy divide Goldman Sachs' relationships into two time periods: past/ongoing and future. In the past/ongoing disclosure, certain engagements are included and disclose that Goldman Sachs "has received, and may receive, compensation" therefor.[56] Thus, this disclosure already addressed the most important aspects of the ongoing nature of the relationship, the prospect of future compensation and that it was ongoing.[57] Zero simultaneous additional engagements were added to the disclosure. As to the future time period, both versions of the proxy disclose that "Goldman Sachs may also [i.e. apart from the potential ongoing compensation disclosed with respect to the past/ongoing time period] in the future provide" services to the parties on the buy side of the transaction.[58]

Even the disclosure of the aggregate fees, potentially the most meaningful additional disclosure on this topic, is not only immaterial, but

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http://www.goldmansachs.com/media-relations/press-releases/current/pdfs/2014-q4-results.pdf.

[56] *See* preliminary proxy at 55-56; definitive proxy at 55-56.

[57] To the extent the simultaneous engagements were certain to result in additional future compensation, plaintiffs failed to correct the disclosure to state that as a result of the simultaneous engagements they tout Goldman Sachs would receive additional compensation rather than may. Given the existing total mix, such a correction would likely also have been immaterial.

[58] *See* preliminary proxy at 56; definitive proxy at 56.

meaningless in context. The proxy discloses aggregate fees paid by Thoma Bravo, OTPP and their respective affiliates and portfolio companies, without regard to whether Thoma Bravo or OTPP actually control those other companies. If someone other than Thoma Bravo or OTPP has the power of engaging, or not engaging, Goldman Sachs at those companies, those relationships would not reasonably be expected to skew Goldman Sachs's incentives. Stockholders are not told how much such uncontrolled fees account for of the total fees. For all the stockholders know, all of the fees are attributable to engagements that OTPP and Thoma Bravo did not even control or in which they had immaterial financial interests. The supplemental disclosure allows for no judgment of incentives beyond what was already disclosed.

The larger context should also be remembered. Before the supplemental disclosures were made, the total mix of information already disclosed (a) contacts between Goldman Sachs, on the one hand, and Thoma Bravo and OTPP, on the other hand, and (b) that Riverbed was not relying solely on Goldman Sachs's analysis, but had instead also retained a separate, highly-respected advisor, Qatalyst. It was in light of the existing disclosure, it is presumed, that the Court expressed its doubt that discovery would reveal material undisclosed conflicts. In fact, discovery revealed that Riverbed "considered Goldman irrelevant to Thoma Bravo, because all our dealings with Thoma Bravo went through Qatalyst

Partners" and Goldman was the "secondary advisor, [while] Qatalyst ran the process."[59] To the extent a stockholder was at any time doubtful of the value of Goldman Sachs's opinion, the stockholder could at all times look to the Qatalyst opinion as a check; Qatalyst had zero engagements with other transaction parties.[60] The supplemental disclosures effected no material change to the total informational mix.

(b) Group 2: The Supplemental Disclosures That Did Not Make It Past The Motion to Expedite Phase Are Immaterial

The immateriality of the remaining supplemental disclosures is apparent and each can be treated summarily.

(1) Tax rate used by Qatalyst

The Supplemental Disclosures added a further parenthetical to the phrase describing how Qatalyst calculated unlevered free cash flow. Plaintiffs seek compensation for the further disclosure that Qatalyst "(us[ed] a 15% tax rate associated with non-GAAP operating income as provided by Riverbed's management)."[61] This single parenthetical in a 103-page document (excluding

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[59] Kennelly Transcript at 59:17-19; 36:8-9.

[60] Nevertheless, plaintiffs reported that if the case had continued, they would have argued that Qatalyst had disabling conflicts. Leviton Affidavit at 18, ¶24 ("Lead Plaintiffs would have argued that both Qatalyst and Goldman Sachs were heavily conflicted . . . .").

[61] 8-k of supplemental disclosures at 3.

exhibits) is too granular to be material.[62] Further, if a stockholder had looked back to Riverbed's historical tax rate as reported in its 2014 10-K, he or she would have found that "[Riverbed's] effective tax rate was 25%, 53%, and 42%, for the years ended December 31, 2014, 2013, and 2012, respectively."[63] Thus, Qatalyst used a rate that was more favorable than any of Riverbed's recent historical rates. Knowing the rate that Qatalyst actually used only reinforces the board's view that this was a favorable transaction.[64]

(2) Adding two relatively meaningless data points to three relatively meaningful data points

Next, the plaintiffs seek compensation for disclosure of the two Calendar Year 2015 P/E Multiples that were not already disclosed in Qatalyst's

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[62] *In re TriQuint Semiconductor, Inc. S'holders Litig.*, 2014 WL 2700964, at *4 (Del. Ch. June 9, 2014) ("Plaintiffs, in effect, seek additional details that are not just granular, but border on minutiae."); *In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *12 (Del. Ch. Feb. 29, 2012) ("In requesting the separate disclosure of net operating loss carry-forwards, however, Plaintiffs are requesting a level of granular disclosure not required under our law.") (citing *In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *7 (Del. Ch. Apr. 11, 2011)).

[63] Riverbed, Annual Report (Form 10-K), at 48 (Feb. 13, 2015), available at http://1.usa.gov/1EkM0RP.

[64] *See In re Netsmart Technologies, Inc. Shareholders Litig.*, 924 A.2d 171, 200-01 (Del. Ch. 2007) ("Using the dated Scalia projections as a basis for an independent valuation of Netsmart's future earnings would demonstrate only that the Merger consideration offered was 'fairer' to the selling shareholders than the projections presented in the Proxy imply. As such, that portion of the Scalia model would not materially influence any rational shareholder's vote, and no duty was breached by its omission."); *In re Coventry*, at 51 (Transcript).

Selected Companies analysis.[65] In the definitive proxy (and the preliminary proxy), the high, median and low multiples had been disclosed. Since the multiples were "based upon research analyst consensus estimates for calendar year 2015 and using the closing prices as of December 12, 2014" – publicly available information – and since three of the five data points had already been disclosed, including those setting the analytical range and center of the analysis, this disclosure did not significantly alter the total mix of information.[66] The disclosed information does nothing to contradict the existing mix of information.[67]

(3) Tax rate used by Goldman Sachs

Like the tax rate used by Qatalyst, the tax rate used by Goldman Sachs is immaterial granularity. The disclosure revealed that Goldman Sachs chose a rate

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65 Plaintiffs describe the supplemental disclosure as having "disclosed the CY15E P/E Multiples for the selected companies." Pl. Op. Br. at 25. The most straightforward reading of that description is that no multiples had been previously disclosed, but the high, low and median (three of the five total) multiples had already been disclosed. *See* preliminary and definitive proxies at 49 ("The low, median and high CY15E P/E Multiple among the [five] selected companies analyzed were 11.9x, 12.9x and 19.8x, respectively.").

66 *See also In re Family Dollar Stores*, 2014 WL 7246436, at *22 ("Plaintiffs have not shown a reasonable probability that a reasonable stockholder would think that the undisclosed (but publicly available) analyst projections—as opposed to the disclosed ranges of implied share prices derived from them—would significantly alter the total mix of information available in the Proxy.").

67 *Joyce* v. *Hittite Microwave Corp.*, C.A. No. 9758-VCP, at 18 (Del. Ch. Mar. 11, 2015) (Transcript) ("Item four relating to the supplemental disclosures about the comparable companies trading multiples and transaction multiples also adds little value beyond what either was already disclosed in the original 14D-9 or is publicly available.").

that approximated the most favorable rate that had applied to Riverbed in the three prior years, 26%.

(4) Disclosure that Goldman Sachs used its professional judgment and experience

The following sentence was added as part of the Supplemental Disclosures: "The range of perpetuity growth rates was estimated by Goldman Sachs utilizing its professional judgment and experience, taking into account the Forecasts and market expectations regarding long-term real growth of gross domestic product and inflation." Plaintiffs describe this as a "material disclosure[]" of "how the range of perpetuity growth rates were estimated."[68] We submit that disclosing that Goldman Sachs used its professional judgment and experience did not significantly alter the total mix of information available.

(5) Disclosure of cash balance as of a different date than was used by financial advisor

Finally, in the narrative relating to the Management Projections, the "estimated net cash balance for September 30, 2014" was supplementally disclosed to be "approximately $143 million, which reflects the estimated net proceeds from the Divestitures."[69] The definitive proxy had only one reference to "net cash." In the description of Qatalyst's DCF analysis in the definitive proxy, it was disclosed that Qatalyst had used "[Riverbed's] estimated net cash as of December 31,

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[68] Pl. Op. Br. at 24.

[69] 8-K of supplemental disclosures at 5.

2014."[70] So far as we are able to discern, there is no reconciliation of the supplementally disclosed September 30, 2014 net cash balance to the estimated net cash as of December 31, 2014. In other words, it seems the number is meaningless to the disclosure it supplements because one is unable to see how it even fits into the previously disclosed analyses.[71]

3. The Group 2 Supplemental Disclosures Should Not Be Considered Settlement Consideration Under the Law of the Case and Waiver

In claiming to have achieved a benefit for disclosures attributable to claims that did not make it past the motion to expedite stage, plaintiffs are seeking to make something out of nothing. None of the claims underlying the Group 2 supplemental disclosures survived the Court's ruling on the motion to expedite. "Under the 'law of the case doctrine,' a court's legal ruling at an earlier stage of proceedings controls later stages of those proceedings, provided the facts underlying the ruling do not change."[72] The Group 2 supplemental disclosures fall under application of the law of the case doctrine and therefore cannot serve as a basis for the settlement.

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70 Definitive proxy at 48.

71 Perhaps plaintiffs have a theory of how this fits into the existing disclosure. The crucial point here, however, is that any such theory making this connection is likely to elude shareholders. Information that shareholders cannot understand cannot constitute meaningful disclosure.

72 *Nationwide Emerging Managers, LLC* v. *NorthPointe Holdings, LLC*, 112 A.3d 878, 894 (Del. 2015).

In ruling on the motion to expedite, the Court held that all but two disclosure claims were not colorable and, *a fortiori*, non-meritorious when filed.[73] The Court limited discovery to those two issues and underscored that it "expect[ed] the discovery to be very narrow."[74] The disclosure claims were considered at the

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[73] *In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *4 n. 46 (Del. Ch. Oct. 16, 2013) ("The standard for a motion to expedite is 'colorability' and the standard for a motion to dismiss under Rule 12(b)(6) is 'reasonable conceivability['] – in my view, a higher, although still minimal, pleading burden.") (citations omitted); *Sinchareonkul* v. *Fahnemann*, 2015 WL 292314, at *1 n. 1 (Del. Ch. Jan. 22, 2015) ("'[T]he standard for expedition, colorability, which simply implies a non-frivolous set of issues, is even lower than the 'conceivability' standard applied on a motion to dismiss.'") (quoting *In re BioClinica*, 2013 WL 5631233, at *1 n. 1).

[74] Motion to Expedite Transcript at 6-7. Although the discovery volume was consistent with a narrow scope, the issues explored in discovery went well beyond the narrow scope ordered by the Court. *See e.g.,* Woodruff Tr. at 108-110 (questioning regarding reasons behind Riverbed board's pursuit of a sale); *id* at 125-127 (questioning why certain bidders behaved as they did in the process and board's rationale for its decisions); *id* at 132 (questioning regarding Mr. Kennelly's retention post-acquisition). Nearly all of the pages of the Woodruff deposition that have been excised concern topics outside the scope of expedited discovery.

motion to expedite stage and did not survive.[75] Thus, the Court's colorability findings are the law of the case.[76]

To the extent that the Court did not expressly address disclosure claims that later appeared in the supplemental disclosures, for effectively the same rationale as the law of the case, plaintiffs waived disclosure claims they left behind at the motion to expedite stage. If stockholders needed these disclosures on an emergency basis, plaintiffs should have pursued such claims at the motion to expedite stage. Having made the judgment that the claims were not sufficiently necessary or valuable to pursue at that stage, plaintiffs should be held to that judgment when proposing that such claims now have sufficient value to support a global release.

In light of the foregoing, the Group 2 supplemental disclosures do not provide any consideration for the global release. However, the prosecution of these claims should not be ignored altogether. The Court should take these facts

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[75] Thus, unlike the plaintiffs in *In re BioClinica*, 2013 WL 5631233, the plaintiffs here must live with the findings relating to colorability that applied to the operative complaint. *Id.* at *4 ("Nonetheless, because the Plaintiffs amended their Complaint after I decided that they had failed to state a colorable claim, I consider the Plaintiffs' claims in light of the additional allegations contained in the Amended Complaint.") (citing for the same situation, *In re K-Sea Transp. Partners L.P. Unitholders Litig.*, 2012 WL 1142351, at *4-12 (Del. Ch. Apr. 4, 2012)).

[76] *See also In re BEA Sys., Inc. S'holders Litig.*, 2009 WL 1931641, at *1 (Del. Ch. Jun. 24, 2009) ("I rejected the large majority of their claims in the hearing on the motion for preliminary injunction. Thus, the bulk of the claims asserted produced no compensable benefit at all.").

into account to reduce any fee that would otherwise be awarded because their prosecution was detrimental to the class, a point to which we return in more detail in Part III.B.5 below.[77]

4. The Voting Results Provide Further Evidence of Immateriality

Even after the dissemination of the supplemental disclosures, 99.48% of stockholders voting on the Riverbed merger voted in favor.[78] "[I]f, after the disclosure, you know, 99 percent of the electorate voted for the merger, it's not clear what informational benefit the plaintiffs have obtained."[79] It is no surprise that the supplemental disclosures in this case had no impact on shareholder voting—they rarely do.[80] However, the overwhelming vote in favor of the merger notwithstanding the supplemental disclosures is an important factor for the Court

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77 "Stockholders ultimately pay for the defense of meritless expedited litigation, offsetting the benefits received by a stockholder class." *Dias* v. *Purches*, 2012 WL 4503174, at *7 (Del. Ch. Oct. 1, 2012); *Haverhill*, C.A. No. 9474-VCL, at 40 (Transcript) (noting that class counsel must engage in a cost-benefit analysis as fiduciaries to the class to determine whether prosecuting claims of weak merit is a net detriment to a class).

78 *In re Medicis*, C.A. No. 7857-CS, at 22 (Transcript) (noting that "no" votes were "a rounding error" and this was evidence of the immateriality of disclosures); Medicis voting results available at http://1.usa.gov/1HwaYCk; *see also In re Coventry*, C.A. No. 7905-CS, at 51 (Transcript) ("[W]hat tends to change the mix most is one that contradicts the picture that's portrayed by the original mix of information.").

79 *In re Coventry*, C.A. No. 7905-CS, at 51 (Transcript).

80 *See* Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 957 (2015) (demonstrating lack of correlation between disclosure settlements and voting outcomes).

to consider in deciding whether to approve a settlement that has apparently had no impact on shareholders at all.

B. No Fees Should Be Awarded Because No Corporate Benefit Was Achieved

1. Applicable Legal Standard

Counsel for a stockholder plaintiff can be compensated by defendants when litigation confers a "specific and substantial" corporate benefit on a corporate defendant or its stockholders, an exception to the American rule on attorneys' fees.[81] Shifting fees under the corporate benefit doctrine is within the sound discretion of the Court.[82] In exercising its discretion as to the amount of such fees, the Court applies the *Sugarland*[83] factors:

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81 *See, e.g.*, *In re PAETEC*, 2013 WL 1110811, at *4 (summarizing the corporate benefit doctrine); *see also Stroud* v. *Milliken*, 1989 WL 120353, at *3 (Del. Ch. Oct. 6, 1989) ("In litigation brought on behalf, or for the benefit, of shareholders, recovery of attorneys' fees may be had if there is a specific and substantial benefit to the corporation or its shareholders.") (citing *Chrysler Corp.* v. *Dann*, 223 A.2d 384 (Del. 1966)); Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 9.05[a], at 9-230 (noting that in non-monetary recovery cases a plaintiff must "nonetheless [show] a specific and substantial benefit resulting to an entire class" and collecting cases, including *Sugarland*).

82 *Dias*, 2012 WL 4503174, at *5 (citing *Swann Keys Civic Ass'n* v. *Shamp*, 971 A.2d 163, 170 (Del. 2009)). *See also* Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 41-46 (2015) (discussing the history of fee shifting under the "corporate benefit" doctrine).

83 *Sugarland Indus., Inc.* v. *Thomas*, 420 A.2d 142, 149-150 (Del. 1980).

> (i) the amount of time and effort applied to the case by counsel for the plaintiffs; (ii) the relative complexities of the litigation; (iii) the standing and ability of petitioning counsel;[84] (iv) the contingent nature of the litigation; (v) the stage at which the litigation ended; (vi) whether the plaintiff can rightly receive all the credit for the benefit conferred or only a portion thereof; and (vii) the size of the benefit conferred.[85]

This Court places the "greatest weight upon the benefits achieved by the litigation."[86] In addition, where claims have been mooted or settled, in order to be compensated under the corporate benefit doctrine "the plaintiff must show that '(1) the suit was meritorious when filed; (2) the action producing benefit to the corporation was taken by the defendants before a judicial resolution was achieved;

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[84] In *Sugarland*, the Court also noted that the parties agreed that the "elements of the Delaware standard" included "the skills applied to [the particular claims'] resolution by counsel." 420 A.2d at 149. This case-specific factor is seldom included when listing the *Sugarland* factors, but could have utility in cases with complex claims and experienced counsel, but the resolution of claims did not require a full application of their skill. *See Aveta Inc.* v. *Bengoa*, 2010 WL 3221823, at *5 (Del. Ch. Aug. 13, 2010) (discussing history of *Sugarland* and including this factor); *In re Triarc Companies, Inc. S'holders Litig.*, 2006 WL 903338, at *2 n. 15 (Del. Ch. Mar. 29, 2006) (quoting a formulation of *Sugarland* that included this factor).

[85] *In re Quest Software Inc. S'holders Litig.*, 2013 WL 5978900, at *5 (Del. Ch. Nov. 12, 2013) (quoting *In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005)).

[86] *In re Anderson Clayton S'holders Litig.*, 1988 WL 97480, at *3 (Del. Ch. Sept. 19, 1988).

and (3) the resulting corporate benefit was causally related to the lawsuit.'"[87] "'A claim is meritorious within the meaning of the rule if it can withstand a motion to dismiss on the pleadings.'"[88] It is not enough for a disclosure to provide "some benefit to stockholders."[89] "For a disclosure claim to be meritorious when filed and provide a compensable benefit to stockholders, the supplemental disclosure that was sought and obtained must be material. . . . Remedying an immaterial omission through supplemental disclosure does not benefit stockholders and will not support a fee award."[90] In Part III.A.1 above, the applicable law as to materiality is summarized and it applies here as well.

2. The Supplemental Disclosures Provide No Basis For The Award of a Fee

Above, we discussed the supplemental disclosures in the context of arguing that the settlement is not fair, adequate and reasonable. The value of the supplemental disclosures is also at issue in deciding whether the plaintiffs have conferred a corporate benefit and should be awarded a fee. For the same reasons argued above, we submit that the supplemental disclosures had no value. In particular, the Group 2 supplemental disclosures that did not make it past the motion to expedite stage, but which now form the basis for a requested award,

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[87] *In re Sauer-Danfoss*, 65 A.3d 1116, 1123 (Del. Ch. 2011) (quoting *United Vanguard Fund, Inc.* v. *TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).

[88] *Id.* at 1123-24 (quoting *Chrysler Corp.*, 223 A.2d at 387).

[89] *Id.* at 1124.

[90] *Id.* at 1127.

should be considered non-compensable as a result of the application of the law of the case and waiver. Instead, their prosecution was a detriment and should result in a reduction to any award. As we demonstrate in the next section, plaintiffs' request for attorneys' fees on the basis of the alleged mooted disclosures is likewise without merit.

3. The Alleged Mooted Disclosures Are Immaterial

The alleged mooted disclosures conferred no corporate benefit because they are immaterial.

(a) Free Cash Flow Disclosure

(1) Threshold Issues: Clarifying What Was Actually Disclosed

Plaintiffs claim their efforts caused the disclosure of "the free cash flow projections for the years 2014 through 2019 prepared by management and relied upon by" Qatalyst and Goldman Sachs.[91] That contention is false. In fact, (1) management did not prepare free cash flows in their projections, (2) the advisors did not rely on free cash flow numbers provided by management (because they did not prepare any) and (3) the definitive proxy did not disclose free cash flow numbers that were omitted from the preliminary proxy.

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[91] Pl. Op. Br. at 1-2.

The disclosure at issue was made in the definitive proxy and added the line item "Cash Flow from Operating Activities" to the table from the management projections section reproduced below:[92]

Riverbed — Management Projections[93]

($MM)

	Actual	Projections				
	FY'2013	FY'2014	FY'2015	FY'2016	FY'2017	FY'2018
Non-GAAP Revenue	**$ 1,057**	**$1,050**	**$1,129**	**$1,225**	**$1,340**	**$1,463**
Non-GAAP Gross Profit	**$ 835**	**$ 826**	**$ 892**	**$ 968**	**$1,059**	**$1,156**
Non-GAAP Operating Income	**$ 243**	**$ 254**	**$ 292**	**$ 329**	**$ 377**	**$ 429**
Non-GAAP Net Income	**$ 169**	**$ 180**	**$ 206**	**$ 233**	**$ 269**	**$ 307**
EBITDA	**$ 265**	**$ 284**	**$ 326**	**$ 361**	**$ 407**	**$ 459**
Cash Flow from Operating Activities	**$ 217**	**$ 218**	**$ 285**	**$ 323**	**$ 358**	**$ 402**
Capital Expenditures	**($ 25)**	**(51)**	**(32)**	**(32)**	**(32)**	**(32)**

Cash flow from operating activities is not a "free cash flow" projection but rather projects Cash Flow from Operating Activities, a different concept.[94] There is no "free cash flow" in the management projections section of the proxy. The advisors calculated free cash flows separately. One of the two advisors used cash flow from operating activities as a starting point from which to make its (still undisclosed)

92 Definitive proxy at 58.

93 The analogous amount for 2019 Cash Flow from Operating Activities, $288 million, was disclosed in the definitive proxy at page 60. *But see* Part III.B.(3).(b) for a discussion of whether the 2019 number is directly comparable to the 2014-2018 numbers.

94 The one advisor that began with Cash Flow from Operating Activities had to make additional calculations to reach free cash flow.

calculation of free cash flows and the other started with Non-GAAP Operating Income, which had been disclosed from the beginning.[95]

In fact, plaintiffs themselves recognized the critical fact that free cash flow had been calculated by the advisers separate from each other and were not part of the management projections. Two of the three non-duplicative complaints filed in response to the preliminary proxy reflect an understanding that the methods of deriving unlevered free cash flow were different as between the advisors and, thus, not taken directly from the management projections.[96] Specifically, paragraphs 106(b)(ii) and 107(b)(ii) of the Amended Complaint in C.A. No. 10486-VCG call for "the definition and amount of unlevered free cash flows [for Goldman Sachs]" and separately for "the definition and amount of 'unlevered free cash flows' [for Qatalyst]"), respectively. In the same way, Paragraph 107 of the

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95 We do not suggest that the disclosure of the ultimate calculation of free cash flows would have materially altered the total mix, only that, contrary to plaintiffs' contention, no such free cash flows were ever disclosed. Disclosure of the advisors' free cash flow calculations would have been immaterial. *See In re Plains Exploration & Prod. Co. S'holder Litig.*, 2013 WL 1909124, at *8 (Del. Ch. May 9, 2013) ("Where, as here, management has disclosed estimates of its discretionary cash flow, EBITDA, and net income . . . the disclosure of Barclays-derived cash flow numbers becomes less important and, indeed, immaterial because investors already have management's inside view of the Company's future financial performance . . . ."); *In re SeraCare Life Scis., Inc. S'holder Litig.*, C.A. No. 7250-VCG, at 6 (Del. Ch. Mar. 20, 2012) (Transcript) ("[W]here the advisor derived the [free cash flow] projections on its own, those projections do not have to be disclosed.").

96 As described above at Part II.B, six complaints or amended complaints were filed in response to the preliminary proxy, but only three had unique disclosure claims.

Complaint in C.A. No. 10546-VCG calls for "how either firm [Goldman Sachs and Qatalyst] defined free cash flow." Plaintiffs' own complaints thus provide evidence of the clarity of the preliminary proxy disclosure that each advisor arrived at its calculation of unlevered free cash flows separate both from management projections and from the other advisor.[97]

(2) Over the Threshold: The Disclosure Was Immaterial

The disclosure of cash flow from operating activities, the figure that was actually disclosed, was immaterial. Plaintiffs rely on *Maric Capital Master Fund, Ltd.* v. *PLATO Learning, Inc.*[98] and *In re Netsmart Techs., Inc. S'holders Litig.*,[99] but this is parroting. The context of those cases reveals their inapplicability to the present case.[100]

In *Maric Capital*, a company's sole financial advisor had consistently stated that it relied on projections of tax-free, unlevered free cash flow taken wholesale from management, which management had used in the ordinary course

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97 In *In re Plains Exploration*, 2013 WL 1909124, at *8, plaintiffs similarly "misread[]" the proxy. In that case, plaintiffs argued for the disclosure of management free cash flow numbers that the proxy, like the one here, made clear did not exist. Instead, the financial advisor had, like the ones here, derived the free cash flow numbers. The derivation was found to be immaterial. *Id.*

98 11 A.3d 1175 (Del. Ch. 2010); Pl. Op. Br. at 21.

99 924 A.2d 171 (Del. Ch. 2007); Pl. Op. Br. at 21.

100 *See In re Transatlantic*, C.A. No. 6574-CS, at 5 (Transcript) ("There is simply parroting, out of context, of other cases where, for example, an investment banker disclosure was meaningful because it tilted incentives one way or the other.").

of its operations and which were omitted from the proxy statement.[101] This omission, together with other disclosure violations, resulted in a preliminary injunction as the Court remarked that "[i]n particular, the proxy statement for some inexplicable reason excised the free cash flow estimates that had been <u>made by PLATO's management</u> and provided to Craig-Hallum."[102]

The situation here is significantly different. The Riverbed preliminary proxy included 32 separate line items in its management projections section, created in connection with the strategic review.[103] Not only were the projections detailed, but they were also reconciled to GAAP figures so that any Riverbed stockholder could put the projections side-by-side with Riverbed's historical GAAP-reported performance. As a result, from the outset, the reconciliation made the Riverbed preliminary proxy figures significantly more informative than the figures ultimately ordered to be disclosed in *Maric Capital*. The additional two line items are not reconciled to GAAP, effectively making them orphans that do

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[101] PLATO Learning, Inc., Preliminary Proxy Statement (Schedule 14A), at 24 (Apr. 5, 2010), available at http://1.usa.gov/1FwW1k0.

[102] *Maric Capital*, 11 A.3d at 1178 (emphasis added).

[103] This Court has recognized that, all else equal, projections created in the ordinary course, like PLATO Learning's, would be more salient than projections created outside the ordinary course, such as in connection with a sales process, like Riverbed's. *See, e.g.*, *Merion Capital, L.P.* v. *3M Cogent, Inc.*, 2013 WL 3793896, at *11 (Del. Ch. July 8, 2013) (discussing this concept in the context of appraisal); *Huff Fund Investment Partnership* v. *CKx, Inc.*, 2013 WL 5878807, at *9 (Del. Ch. Nov. 1, 2013) (same).

not tie into the existing disclosure.[104] This orphaning makes it difficult to see how the new information even fits into the total mix, let alone how it contradicts the point of view advocated by the board. The additional two line items are immaterial in light of the already-disclosed 32 line items, including Non-GAAP Operating Income, which one of the advisors used as a sufficient alternative starting point to perform a DCF analysis.

Netsmart is similarly inapplicable. The financial advisor there used management projections for the company's current year plus five additional years in its DCF analysis.[105] The multiple of the terminal year projection accounted for 82-86% of the total estimated value.[106] But the proxy disclosed just three years of projections, leaving out projections for three other years: the terminal year, the year prior to it and the current year.[107] The corrective disclosures disclosed eleven line items for all six years.[108] The situation is nothing like that here, where far more than sufficient information was already disclosed in the preliminary proxy.

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[104] It should also be remembered that *Maric Capital* involved a single financial advisor. Here two financial advisors and the summaries of their financial analyses were part of the total informational mix, moderating the materiality of any disclosure that affects only one of the two as compared with the single financial advisor in *Maric Capital*.

[105] *In re Netsmart*, 924 A.2d at 202.

[106] *Id.*

[107] *Id.* at 202-203.

[108] Interestingly, in its corrective disclosures, Netsmart also put their historical numbers in respect of those eleven line items next to the projections, allowing exactly what the Riverbed proxy did from the start, an apples to apples

(b) At the Threshold Again: Clarifying What Was Not Disclosed

In their opening brief, one of the "most significant" disclosures plaintiffs claim to have achieved was the disclosure of "the treatment of stock-based compensation in management's projections."[109] Again, that description does not apply in this case. In fact, it appears the disclosure at issue may have made the proxy more misleading or, at least, more confusing. It is not altogether clear, but it appears that plaintiffs are referring to the disclosure that the extrapolated 2019 projections included "$288 [million] for Cash Flow from Operating Activities (treating stock based compensation as a cash expense and excluding interest income and expense and the associated tax effects)."[110] This disclosure of the description of the adjustments applies to 2019 and, at least facially, does not apply to the 2014-2018 projections. Thus, the 2019 number (adjusted) appears to be an apples-to-oranges number compared to the 2014-2018 projections of cash flow from operating activities (not adjusted).[111] But it is immaterial either way: If it is

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comparison of the historical performance to the projections. Netsmart Technologies, Inc., Exhibit A to Definitive Additional Materials (Schedule 14A) (Mar. 20, 2007), available at http://1.usa.gov/1QGmXjf.

109 Pl. Op. Br. at 8.

110 We reach this tentative conclusion because no other mooted disclosure addresses "stock-based compensation." Nevertheless, it is a tentative conclusion because the focus of the disclosure is the 2019 projection of cash flow from operating activities, not the treatment of stock-based compensation.

111 Non-GAAP Revenue, Non-GAAP Gross Profit, Non-GAAP Operating Income, Non-GAAP Net Income and EBITDA (2014-2018 projections are found on

apples-to-apples (if all had the same adjustment), a similar adjustment description should have been added for the 2014-2018 numbers because the inconsistent description introduced by the allegedly mooted disclosure actually renders the disclosure more misleading than before. If it is apples-to-oranges, the disclosure was unhelpful in leaving the stockholders without a comparable, unadjusted 2019 number. Ultimately, we simply do not know either way from the disclosure, which admission leads to the same conclusion—that this unclear change was not a material benefit.

Furthermore, in their reply brief on the motion to expedite, plaintiffs claimed that defendants had committed a disclosure violation in their disclosure of cash flow from operating activities because they failed to include the number for 2019.[112] The Court found that claim was not colorable because the numbers were, in fact, disclosed.[113] Plaintiffs have since abandoned the claim that there was a disclosure violation. Instead, in the MOU and their opening brief in support of the settlement, plaintiffs claim that the disclosure they had previously argued was

page 58 of the definitive proxy; 2019 on page 60) each trend consistently upward year-over-year from 2014-2019. For reasons unknown and not disclosed, the amount of Cash Flow from Operating falls sharply from $402 million in 2018 to $288 million in 2019. This appears to be consistent with an apples-to-oranges issue.

112 Reply Brief on Motion to Expedite at 4-5 ("The Final Proxy, however, fails to disclose management's projected cash flow from operating activities for calendar year 2019.").

113 Motion to Expedite Transcript at 4 ("As to the first claim involving the 2019 cash flow projections, that information is disclosed.").

actionably incomplete is now a benefit they caused and for which they should be compensated. Although the plaintiffs' position has changed, the underlying disclosure has not. Plaintiffs should not be compensated for achieving disclosures they previously claimed were not there.

(c) Capital Expenditures Disclosure

Plaintiffs seek compensation for another line item, "the capital expenditures projections for the years 2014 through 2019 prepared by management and relied upon by Qatalyst and Goldman Sachs." The arguments made above as to the immateriality of disclosing Cash Flow From Operating Activities apply here and will not be repeated. This additional orphaned, unreconciled line item simply did not alter the existing total mix of information in light of the already-extensive, GAAP-reconciled disclosure.

(d) Qatalyst's Calulation of Free Cash Flow

The preliminary proxy disclosed that Qatalyst used "estimated future unlevered free cash flows of Riverbed, based on the Management Projections" in its DCF analysis.[114] From this disclosure, a reasonable stockholder would surmise that Qatalyst had <u>based</u> its calculation of free cash flow on the Management Projections, but had not extracted the number unchanged from the Management

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[114] Preliminary proxy at 48.

Projections.[115] The revision added the following underlined text: "the estimated future unlevered free cash flows of Riverbed, derived from forecasted non-GAAP operating income based on the Management Projections with adjustments provided by Riverbed management, including adding depreciation and decreases in working capital and subtracting capital expenditures and taxes."[116] From this disclosure, a reasonable stockholder would understand the same thing: that Qatalyst had based its calculation of free cash flow on the Management Projections, but had not extracted the number unchanged from the Management Projections.[117] The disclosure does not move a stockholder closer to knowing the actual unlevered free cash flow number since it does not quantify the adjustments (even when considered with the management projections) or purport to have included a comprehensive list of the adjustments, leaving the total mix unchanged.[118]

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[115] Even plaintiffs recognized this, as shown above in Part III.B.3.(a).(1).

[116] Definitive proxy at 48. As is always the case, stockholders were not provided with a blackline of the changes between the preliminary proxy and definitive proxy. Thus, the reasonable stockholder likely is not aware of such fine adjustments to the disclosure as between the preliminary proxy and definitive proxy.

[117] *See In re Plains Exploration*, 2013 WL 1909124, at *8 ("Where, as here, management has disclosed estimates of its discretionary cash flow, EBITDA, and net income . . . the disclosure of Barclays-derived cash flow numbers becomes less important and, indeed, immaterial because investors already have management's inside view of the Company's future financial performance . . . .").

[118] Providing detail sufficient for total reconstruction of the analysis is not required because it goes beyond a fair summary. *In re Pure Resources, Inc. S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002) ("[S]tockholders are entitled to a fair

(e) The Remaining Alleged Mooted Disclosures

Even plaintiffs admit that the remaining alleged mooted disclosures are less valuable than the disclosures discussed above.[119] Plaintiffs devote no argument to demonstrating how these additional disclosures were important. Indeed, from the MOU, through their opening brief, plaintiffs have never listed any of the other specific allegedly mooted disclosures among their achievements.[120] Plaintiffs have shown no hesitancy to list disclosure claims in scattershot fashion and their lack of trumpeting to this point should lead to an inference that they either do not believe these remaining disclosures are important or that they did not cause them. In fact, these other disclosures seem to be simply changes defendants happened to have made that plaintiffs belatedly want to take credit for. There is no mention whatsoever of disclosure claims relating to non-disclosure agreements in any of the plaintiffs eighty-one disclosure claims, but plaintiffs claim that they caused language on that issue to be added to "the fifth full paragraph on page 37 of the Preliminary Proxy."[121] The language added to the "second full paragraph on page 56 of the Preliminary Proxy" is similarly untraceable to any claim. Thus, it

summary of the substantive work performed by the investment bankers . . . ."). "Directors do not have to make it possible for stockholders to re-run the analyses in the fairness opinion." Blake Rohrbacher and John Mark Zeberkiewicz, *Fair Summary: Delaware's Framework for Disclosing Fairness Opinions*, 63 Bus. Law. 881, 901 (2008).

[119] Pl. Op. Br. at 8. Listing the "most significant" allegedly mooted disclosures.

[120] *See* MOU at 2-3; Pl. Op. Br. at 8, 21, 33.

[121] Leviton Aff. at ¶ 13.

seems that plaintiffs continue to add to their eighty-one disclosure claims even now.

4. The Burden of Showing Causation Should Rest With Plaintiffs

In addition to showing materiality sufficient to confer a corporate benefit, a plaintiff must demonstrate a causal link between their suit and the allegedly mooted disclosures.[122] Plaintiffs cite to *Grimes* v. *Donald*[123] for the proposition that when mooting actions are taken <u>after</u> a suit is filed, defendants have the burden of proving by a preponderance of the evidence that the mooting action was <u>not</u> taken as a result of the litigation.[124] In other words, mere sequencing creates a rebuttable presumption of causation.[125] According to plaintiffs, this is a "common sense" presumption.[126] We disagree. This proposition traces back to cases like *Allied Artists Pictures Corp.* v. *Baron*[127] and

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[122] *In re Sauer-Danfoss*, 65 A.3d at 1123 (quoting *United Vanguard Fund, Inc.*, 693 A.2d at 1079).

[123] 755 A.2d 388 (Del. 2000) (Table).

[124] Pl. Op. Br. at 30.

[125] *But see In re Anderson Clayton S'holders Litig.*, 1988 WL 97480, at *3 (Del. Ch. Sept. 19, 1988) ("[R]ecent cases have caused us to recall that what is relevant is the benefit *achieved by the litigation*, not simply a benefit that, *post hoc ergo procter [sic] hoc*, is conferred after the litigation commences.") (emphasis original); *In re Josephson Int'l, Inc. S'holders Litig.*, 1988 WL 112909, at *3 (Del. Ch. Oct. 19, 1988) ("The mere pendency of litigation does not indicate a causal connection between plaintiffs' efforts and beneficial changes in the merger terms.").

[126] Pl. Op. Br. at 31.

[127] 413 A.2d 876 (Del. 1980).

cases in that line of authority. Today, the M&A litigation landscape is utterly different from when *Allied Artists* was decided in 1980 and it should not apply to relieve plaintiffs of their burden to show causation in this case.[128]

Plaintiffs should bear the burden of showing causation because disclosure litigation, especially in a transaction of this size, is now a near-certainty.[129] In this environment, it is often more economical for defendants to settle rather than exposing their transaction to the uncertainties associated with contesting litigation on the merits. What this means, of course, is that defendants have no incentive to oppose plaintiffs' assertions of causation at the time of settlement. Yet *Allied Artists* and its progeny rest on the premise that defendants have sufficient incentive to rebut plaintiffs' claim to have caused the benefit.[130]

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[128] *See* Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 52-55 (2015) (arguing that the burden for establishing causation of the benefit should be shifted in certain classes of cases).

[129] The merger consideration here was more than $1 billion, making a disclosure suit at least 96% likely. Olga Koumrian, Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation, Cornerstone Research, at 2, available at http://tinyurl.com/lpom3uh. Since the Cornerstone study does not break down the percentages more specifically for transactions larger than $1 billion, it is quite likely that the odds for this $3.6 billion transaction were even higher.

[130] 413 A.2d at 880 ("[T]he party who takes the action that cures the alleged wrong to the corporation's benefit and thereby moots or settles the lawsuit should bear the burden of demonstrating that the lawsuit did not in any way cause their action.").

The rule in *Allied Artists* can be best explained by reference to the problem of information asymmetry. When one party will predictably have access to information that the other party cannot be expected to possess, it makes sense to place the burden on that party in order to induce them to reveal their private information. In the settlement context, the private information is the "true" cause of the relief provided by the defendant. If defendants provided the relief for some reason other than plaintiffs' claim, it is justifiable to place the burden on them to say so.

In the context of this and other "disclosure-only" settlements, however, the adversarial process, at least as between plaintiffs and defendants, has effectively ended. Plaintiffs want fees, and defendants want a release. The incentives and interests of both, therefore, are aligned in winning approval of the settlement. The stipulation of settlement in this case, which is typical, makes this alignment express. "No fees or expenses shall be paid to Plaintiffs' Counsel pursuant to the Settlement in the absence of approval by the Court of a complete release of all Released Parties, in substantially the same form as described herein."[131] Given this alignment of incentives, applying a presumption of causation in favor of plaintiffs effectively insulates the settlement from Class Member scrutiny. Placing the burden on objectors to disprove a fact in the sole

[131] Stipulation of Settlement at 22.

possession of the settling parties effectively erects the precise information asymmetry that the rule in *Allied Artists* was designed to avoid and, contrary to the concerns expressed in that case, makes the presumption effectively conclusive.[132]

While we recognize that the *Allied Artists* presumption has been applied by the Court of Chancery in similar cases in the past,[133] we are aware of no Delaware Supreme Court cases that apply it to a typical M&A litigation in the present environment—that is, against a background in which 90% of merger transactions result in disclosure claims. We further submit that the best reading of *Allied Artists* would be not to apply the presumption in favor of plaintiffs when the question of causation is raised by objectors, but only when the causation dispute is between plaintiffs and defendants. In cases such as this one, where defendants and plaintiffs have joined hands in favor of settlement, the settling parties should be made to establish causation. Because neither party has made any effort to demonstrate causation in this case—Defendants have made a placeholder

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[132] It is worth noting that one of the overarching goals of the *Allied Artists* court was to "discourage[e] baseless litigation" and as a result it expressly rejected a rule that would have allowed compensation without inquiry into substantive merit. *Allied Artists*, 413 A.2d at 879.

[133] *But see In re TPC Group Inc., S'holders Litig.*, 2014 WL 5500000, at *3 (Del. Ch. Oct. 29, 2014) (analyzing causation, rejecting plaintiffs' claims of substantial causation and remarking that "in this era, almost every merger of a public company is greeted with litigation, and relatively few price increases result [the result plaintiff claimed to have caused]") (citing and quoting Wolfe & Pittenger, § 9.05 [d][2], at 9–255 (2014) ("Thus, it is clear that the mere pendency of litigation does not, in and of itself, establish a causal connection between the plaintiffs' efforts and any beneficial changes that may ensue.")).

disavowal that plaintiffs were the cause—plaintiffs should not reap a fee for the allegedly mooted disclosures.

Requiring plaintiffs to carry the burden would also be consistent with *Cox Communications*, where the Chief Justice, then a Vice Chancellor, was faced with a similar confluence of certainties and rejected a presumption of causation for mootness applications.[134] There, the Court gave no credence to the purported causal link because it was a near-certainty that a price increase negotiated by a special committee would follow plaintiffs' suit. The Court found that "it is most probable that the defendants settled simply because they had . . . no other economically efficient option for disposal of the lawsuit."[135] Requiring plaintiffs to show causation would help to ensure that, in keeping with the underlying concern of *Allied Artists* and *Cox*, M&A litigation is not settled simply for nuisance value.

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[134] "[T]here should be no presumed entitlement to a fee by the plaintiffs, if the plaintiffs attempt to argue that their unripe claims are now moot and that the pendency of those claims influenced the controller to offer the special committee fair terms." *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 606 (Del. Ch. 2005).

[135] *In re Cox Commc'ns*, 879 A.2d at 606 (Del. Ch. 2005). *But see Acevedo*, C.A. No. 7930-VCL, at 67 (Transcript) ("We now know you can get enhanced scrutiny claims dismissed at the pleading stage, and it's not so hard.").

5. Any Award Should Be Discounted Because Scattershot Litigation Is a Detriment to the Class

Even if, contrary to Objector's foregoing arguments, the Court finds that some of the disclosures merit an award of attorneys' fees, the Objector submits that the Court should reduce any fees payable to the plaintiffs' counsel as a consequence of their litigating non-meritorious claims. The Court has done this in appropriate cases in the past under the auspices of the first *Sugarland* factor as a discount against the time and effort purported to have been spent on the litigation.[136] The Objector further submits that the appropriate reduction in this case is substantial.

This is a case where "[r]ather than carefully considering what claims have merit, [these] plaintiffs file[d] a broad and general complaint, taking a scattershot approach in the hopes that the case will be expedited [and] rel[ied] on the Court to winnow their claims, determining which are meritorious and what

[136] *See, e.g.*, *Dias*, 2012 WL 4503174; *In re Sauer-Danfoss*, 65 A.3d at 1126 ("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.") (citing and quoting *In re BEA Sys.*, 2009 WL 1931641, at *1 (calculating fees based on estimation that "one-quarter of the time and costs are rationally attributable to the claims that resulted in the benefit"); *In re Triarc*, 2006 WL 903338, at *2 (denying fees for work on initial complaint concerning proposed transaction that was abandoned for reasons unrelated to litigation)).

value they confer upon the stockholders."[137] Here, after filing three scattershot complaints, plaintiffs took the further step of forcing defendants to respond to, and the Court to consider, an opening brief on their motion to expedite that was filled with the very same scattershot claims "the overwhelming majority" of which "were already moot at the time that brief was written" as a result of the definitive proxy filed over two weeks earlier.[138] Furthermore, the discovery in this case was both too narrow and too broad. Having been granted leave to explore narrow issues, the plaintiffs should have limited themselves to that scope (and, when they found nothing on those claims, should have dropped the threat of an injunction) but did not.[139] But to responsibly give an expansive global release, they would first have needed to conduct much broader discovery, which they have not done.

This case stands in contrast to cases where plaintiffs litigated more responsibly. For example, in *In re BioClinica, Inc. Stockholder Litigation*, the Court noted that plaintiffs filed "scattershot complaints," taking a "blunderbuss approach" but going on to note that "[t]o their credit, the Plaintiffs, in presenting their Motion to Expedite . . . reduced their claims to a few cogent and interesting

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[137] *Dias*, 2012 WL 4503174, at *5; *see also In re Family Dollar Stores*, 2014 WL 7246436, at *19 n. 129 ("At the outset, I note that submitting what is effectively a laundry list of disclosure claims is not a persuasive framework in which to argue that a proxy statement fails to disclose all material information.").

[138] Motion to Expedite Transcript at 4.

[139] *Acevedo*, C.A. No. 7930-VCL, at 25-26 ("[W]hen you've got nothing, you've got to acknowledge you've got nothing and just go away.").

issues."[140] Here, plaintiffs did the opposite and more. Not only did they <u>not</u> reduce their claims in arguing the motion to expedite, they did not even modify scattershot claims fired off at quarry—the preliminary proxy—that had already gotten away.

Still further, after the Court and defendants had expended resources to winnow claims for the plaintiffs in connection with the motion to expedite, plaintiffs simply dumped the chaff back into the hopper and forced defendants to negotiate the settlement of claims that had not made it past the motion to expedite stage.[141] Now, plaintiffs request a reward that rests in part on these tactics.

For reasons that are even clearer than in *Dias*, the plaintiffs should face the consequences of wasting time and resources on a persistently scattershot approach. Any fees to which they might otherwise be entitled should be reduced in light of their wasteful tactics. Plaintiffs had nine firms involved in the leadership structure and seek compensation for over 800 hours of work, including by some 25 attorneys, yet none of them took the time to tailor the litigation to the actual case at hand. Thus, even if, contrary to our arguments above, the Court identifies some basis for awarding fees, the fees should be reduced to zero in light of plaintiffs' wasteful tactics. Indeed, our argument above is that the proper baseline for fees in

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[140] 2013 WL 673736, at *1.

[141] Exhibit B shows visually how claims from non-operative complaints and dead claims persisted to crop up.

this case is zero because none of the relief obtained by plaintiffs conferred a benefit to the plaintiff class, implying that a proper fee award would be negative. In spite of this plain implication, we do not ask the Court to assess the fees of defendants or the Objector to plaintiffs or their counsel.

IV. CONCLUSION

For the reasons stated herein, the Objector respectfully requests that the settlement be rejected and that no fees be awarded to plaintiffs' counsel.

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Dated: July 13, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2015, I caused the foregoing Objection of Sean J. Griffith to Proposed Settlement and Application for Attorneys' Fees and Expenses and Exhibits thereto and this Certificate of Service to be served via File & Serve*Xpress* upon the following counsel:

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General Information

Court	Delaware Court of Chancery
Docket Number	10484

Notes

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