

A GUIDE TO PREDICTING THE CALCULATION OF ATTORNEYS'
FEES UNDER DELAWARE LAW FOR SHAREHOLDER SUITS

ABSTRACT

The Delaware Court of Chancery and Supreme Court recently made headlines that echoed throughout the plaintiff's bar when they approved an unprecedented attorneys' fee award amounting to over \$304 million in the In re Southern Peru Copper Corporation Shareholder Derivative Litigation. This award has highlighted an area of law that is unpredictable and in flux. Although these shareholder suits have traditionally served as a valuable policing resource for shareholders, the increased uncertainty surrounding attorney fee awards may be reducing the inherent value of this process through one-sided settlements, increased forum shopping, (arguably) punitive awards, and the filing of unmeritorious suits.

Within the practice of shareholder litigation is a complex web of methodology applied by courts in determining the actual value of fee awards that should be offered to successful plaintiffs. This complexity has led to inconsistency, which has in turn led to increased forum shopping and discouraged defendants who are increasingly willing to settle without a fight. The goal of this Note is to provide some sense of meaning behind the methodology used by Delaware courts in determining what the fee award should be for both common fund suits and those creating substantial non-monetary benefits.

This Note identifies that from the hundreds of cases that have been reviewed and analyzed under the Sugarland principles, a straightforward guideline has emerged, which is outlined in this Note with the intention of being used as a starting point in predicting the value of a fee award. Although fee awards will always be within the discretion of the court, the hope is this guideline can serve as a valuable resource and bargaining tool at the settlement table for otherwise complacent defendants entering into settlement negotiations with plaintiffs' attorneys representing the shareholders. Moreover, this guideline provides judges outside of Delaware a common framework to apply in valuating such awards, thus reducing the incentive to forum shop and instead ensuring these cases remain in Delaware courts. Finally, this consistent fee calculation application purports to reduce the risk of subjecting companies and shareholders to multiple suits among different jurisdictions regarding the same transaction.

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I. INTRODUCTION

Shareholder suits are becoming one of the most lucrative areas of practice in corporate litigation, due in part to the sheer unpredictability of the fee awards being granted.¹ The size and variance in fee awards from case-to-case has incentivized a race to the court house among the "frequent filers,"² while at the same time discouraging defendants from providing anything more than a superficial challenge to requested fees.³ This Note offers a practical guide to provide a sense of predictability toward identifying the true value of the fee award (or lack thereof). This guideline gives defendants a clear sense of the actual value of their case when entering into settlement negotiations. Additionally, this guideline decreases plaintiffs' incentive to forum shop in search of courts outside of Delaware that may be more inclined to approve a larger than deserved fee award.⁴

¹See Dionne Searcey & Ashby Jones, *Deals & Dealmakers: First, the Merger; Then the Lawsuit*, WALL ST. J., Jan. 10, 2011, at C1.

²Referring to Vice Chancellor Laster of the Delaware Court of Chancery's term for firms repeatedly representing plaintiffs in shareholder litigation following the announcement of a pending merger. See *id.*; *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 947 (Del. Ch. 2010).

³See Searcey & Jones, *supra* note 1 ("[T]he lawsuits have gotten out of hand – which has oddly been fueled by defense attorneys' willingness to settle.").

⁴See Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 3 (Apr. 2012) (unpublished manuscript), available at <http://papers.ssrn.com/abstract=1984758> ("[P]laintiffs' attorneys react to prior court decisions to bring future litigation in the most favorable forum.").

The American legal system adheres to the rule that parties in a suit are generally responsible for paying their own attorneys' fees.⁵ Exceptions to that rule, however, involve situations when an individual or class of shareholders sue a corporation, directly or derivatively, and seek to recover attorneys' fees for both monetary and non-monetary benefits.⁶ These benefits are achieved on behalf of all shareholders on record.⁷ The purpose behind these exceptions is to encourage corporate responsibility by rewarding entrepreneurial plaintiff shareholders for conferring a benefit upon all of the corporation's shareholders.⁸

Within the context of benefits that can be achieved for shareholders, there are two distinct categories.⁹ The first type of benefit is referred to as the "common fund benefit," which offers an award of attorneys' fees for plaintiffs whose actions generated a monetary benefit for all of the shareholders on record.¹⁰ This common fund benefit often results from

⁵See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) ("[T]he prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."). This rule is opposite of the English rule, that often awards attorneys' fees to the winning side. *Id.* Delaware follows the "American rule." *Brice v. State Dep't. of Corr.*, 704 A.2d 1176, 1178 (Del. 1998).

⁶The distinguishing factor between these two is whether the benefit achieved on behalf of the shareholders had a monetary value that reasonably could be determined. See *Attorneys' Fees – Substantial Benefit Doctrine – Delaware Supreme Court Grants Fees to Plaintiff Suing As an Individual Shareholder – Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162 (Del. 1989), 103 HARV. L. REV. 1187, 1187 nn.3-4 (1990) [hereinafter *Substantial Benefit Doctrine*].

⁷See *id.* at 1187 ("Two significant exceptions [to the American rule] . . . are the common fund doctrine and its extension, the substantial benefit doctrine. [They are] [d]esigned to prevent . . . unjust enrichment.") (footnotes omitted); see also *infra* notes 32-38 and accompanying text. The award of attorneys' fees in these situations is not limited to class action shareholder litigation; a single shareholder can be successful as well. *Id.* Additionally, the right to be awarded attorneys' fees when a benefit has been created for the entire class of shareholders is not limited to derivative suits. See *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1166 (Del. 1989) ("If, as here, the shareholder commences an individual action with consequential benefit for all other members of a class, or for the corporation itself, there is no justification for denying [fee awards that would be available for derivative suits].").

⁸See *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 395-96 (1970) (quoting *Bosch v. Meeker Coop. Light & Power Ass'n*, 101 N.W.2d 423, 427 (1960)) (citing to a "leading case" in which the court clarified that "[f]ees are awarded for] a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest").

⁹See, e.g., Mark J. Loewenstein, *Shareholder Derivative Litigation and Corporate Governance*, 24 DEL. J. CORP. L. 1, 2 (1999) (noting that courts historically required the formation of a common fund (an achieved monetary benefit) to trigger a fee award, but that they now recognize a substantial benefit (an achieved non-monetary benefit) may also warrant an award of attorneys' fees).

¹⁰See *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 850 (Del. Ch. 1998) (referring to the creation of a monetary benefit conferred upon all stockholders that warrants a fee award as the "common corporate benefit doctrine").

gaining an increase in the price per share over an originally agreed upon merger price.¹¹ The second type of benefit that warrants an award of attorneys' fees is substantially beneficial non-monetary benefits, otherwise referred to as a "substantial benefit."¹² These benefits generally come in the form of a supplemental disclosure, which provides valuable information for shareholders in deciding how to vote on a pending merger.¹³

Outside of identifying the type of benefit that may warrant an award, there is little to guide interested parties in predicting if, and how much, a defined benefit may be valued under Delaware law.¹⁴ One of the consequences of this uncertainty has been an increase in unnecessary litigation following a proposed merger, in addition to an over willingness on behalf of defendant corporations to settle with plaintiffs' attorneys.¹⁵ These defendants are not to blame, especially in light of the fact that the awarded fees, as determined "in the sound discretion of the [court],"¹⁶ are unpredictable and diminutive compared to the size of the merger deal.¹⁷ These factors have contributed to a wide disparity in the fee amounts that have been awarded, even among cases with substantially similar facts.¹⁸ This has made it increasingly difficult to predict the award in any given situation, and has led to an increase in forum shopping by claimants searching for less experienced courts applying Delaware law.¹⁹

¹¹See, e.g., *id.* at 852-53 (noting the plaintiffs' assertion that the price per share increased by \$18 per share as a result of their suit filing).

¹²See *Mills*, 396 U.S. at 395.

¹³See *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989) ("Changes in corporate policy or, as here, a heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees.").

¹⁴See *Chrysler Corp. v. Dunn*, 223 A.2d 384, 386 (Del. 1966) (describing the allowance of counsel fees as an "amount to be fixed in the sound discretion of the Chancellor").

¹⁵See *Searcey & Jones*, *supra* note 1.

¹⁶*Chrysler*, 223 A.2d at 386.

¹⁷See Sara Lewis, *Transforming the "Anywhere but Chancery" Problem into the "Nowhere but Chancery" Solution*, 14 STAN. J.L. BUS. & FIN. 199, 200 (2008) ("The risk of unpredictable outcomes and the prospect of long, drawn-out trials can cause directors and officers to settle even meritless 'strike' suits.").

¹⁸See generally *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *18, *apps. A, B, & C (Del. Ch. Apr. 29, 2011) (observing the range of discretionary awards from the Court of Chancery in various corporate disclosure cases).

¹⁹See Lewis, *supra* note 17, at 201 ("This is because non-Delaware judges may be less familiar with Delaware law (resulting in misapplications or misunderstandings of the law) or even hostile to it (resulting in unexpected departures from well-settled rules)."). The Court of Chancery alluded to this as creating a problem since familiarity of the law would actually be to the advantage of shareholders. See Transcript of Oral Argument at 11, *Continuum Capital v. Nolan*, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011).

This Note provides a guide that establishes a framework with a narrower window from which to predict fee awards. Moreover, this guide could potentially serve as a valuable resource and bargaining tool for defendants entering settlement negotiations with plaintiffs' attorneys representing the shareholders.²⁰ And, if courts have a basic framework to consistently calculate fees when applying Delaware law, the perceived benefit of forum shopping will be reduced and thus ensure these cases are kept in the more experienced and efficient Delaware courts.²¹ Finally, this consistent fee calculation application purports to reduce the risk of subjecting companies and shareholders to multiple suits among different jurisdictions regarding the same transaction.²²

To establish context, Part II of this Note begins with a discussion of the history and background behind the development of fee awards. Part III lays out a guideline providing the average fee calculation depending upon the type of benefit created for the shareholders. First, the guide in this section begins by summarizing the basic hurdles that must first be cleared in order to even consider applying for a fee award. Second, Part III articulates a framework for calculating fees when a common fund benefit has been established as a result (at least in part) of the litigation. Then, the latter portion of Part III focuses on supplemental disclosures, which are the most frequently obtained type of benefit warranting a fee award.²³

²⁰This guide will increase the motivation for defendants to challenge undeserving fee requests. See Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1872 tbl.10 (2004) (noting that of the cases studied, only two out of seven had objections filed against the request for attorneys' fees).

²¹The benefit referred to is the likelihood of receiving a higher or an uncontested fee award. See *supra* note 4 and accompanying text.

²²See Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused this Problem, and Can it be Fixed?* 37 DEL. J. CORP. L. 1, 39-40 (2012) ("One potential reason for the multi-jurisdictional litigation problem stems from the entrepreneurial tendencies of plaintiffs' counsel to file a deal litigation raising Delaware law in a non-Delaware forum, where plaintiffs believe it will be easier to have a large fee award approved . . ."). See also Transcript of Status Conference at 10, *In re Burger King Holdings, Inc., S'holders Litig.*, C.A. No. 5808-VCL (Del. Ch. Jan. 19, 2011) ("[T]o avoid any type of risk of forum shopping in terms of fee awards, it's important for [courts] to be aware of how Delaware would price this [fee award]."); Peter E. Kazanoff, *Multi-Jurisdictional Shareholder Challenges to M&A Transactions*, in M&A LITIGATION 2011, at 43 (PLI Litig. & Admin. Practice Course Handbook Series, No. 31444, 2011) (noting that the problem of corporations facing similar suits in multiple jurisdictions has in recent years caused an increasing propensity in the Delaware courts to challenge the merit of certain suits and reduce fee awards).

²³Cain & Davidoff, *supra* note 4 (manuscript at 33 tbl.2) (showing that from a survey of 445 cases, disclosures made up over 52% of the types of benefits achieved).

Further, within Part III's supplemental disclosure section is a rubric providing a definitive sense of value for these highly variant fee awards. Considering that the most important factor a court uses when deciding on the amount of attorneys' fees to be awarded is the level of benefit achieved for the stockholders,²⁴ this rubric begins by grouping the benefits achieved into three distinct levels of materiality.²⁵ Within each level of materiality, there will be three sub-categories of decreasing value depending upon the other factors the court will consider in deciding how responsible the plaintiffs' actions were in establishing the benefit.²⁶ The supplemental disclosure fee rubric is organized in the Data Appendix.²⁷ Finally, the guideline is followed by a quick step-by-step analysis that can be applied in order to determine if, and at how much, the fee award may be valued.

Lastly, Part IV discusses the factor contributing to fee awards that cannot be quantified: the reality that fee awards are still in the sound discretion of the court.²⁸ The Court of Chancery has noted that "scientific precision is not required when awarding fees. This Court has substantial discretion in the methods it uses and the evidence it relies upon."²⁹ The courts, and in particular the Delaware Court of Chancery, often may be faced with outside influences and consequences that shape their decisions. For example, the various taxes associated with Delaware corporations attribute to approximately 35% of the State's total revenue, which is indicative of its reliance on corporate income and its desire to maintain dominance in the area of corporate law.³⁰ This Note concludes with an examination of the

²⁴*In re* Dr. Pepper/Seven Up Cos. S'holders Litig., 1996 WL 74214, at *5 (Del. Ch. Feb. 9, 1996), *aff'd*, 683 A.2d 58 (Del. 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.").

²⁵*See In re* Plains Res. Inc. S'holders Litig., 2005 WL 332811, at *5 (Del. Ch. Feb. 4, 2005) ("Whether disclosure is required under Delaware law turns on the question of materiality.").

²⁶*See infra* note 98 and accompanying text.

²⁷Admittedly this may not solve the increasing epidemic of defendants being forced to settle and award attorneys' fees despite the fact that the plaintiffs' claims are without merit. Searcey & Jones, *supra* note 1 ("[S]ome critics say the lawsuits have gotten out of hand – which has oddly been fueled by defense attorneys' willingness to settle."). The hope is that a clear guide can offer assistance by demonstrating to outside judges and defendants the actual merit in a claim so as to better prevent unnecessary settlements while still encouraging plaintiffs to hold companies accountable and truly benefit the stockholders. *See generally In re* Sauer-Danfoss Inc. S'holders Litig., 2011 WL 2519210, at *21 (Del. Ch. Apr. 29, 2011) ("By granting minimal [f]ees [sic] when deal litigation confers minimal benefits, [the] Court seeks to align counsel's interests with those of their clients and encourage entrepreneurial plaintiffs' lawyers to identify and litigate real claims.").

²⁸*In re* Compellent Techs., Inc. S'holder Litig., 2011 WL 6382523, at *18 (Del. Ch. Dec. 9, 2011).

²⁹*Id.* at *21.

³⁰DEL. DEPT. OF FIN., REPORT ON ANALYSIS OF STATE REVENUES, 144th Sess., at 21 tbl.1

consequences and reasoning behind what is arguably seen as a market response to forum shopping by establishing a more favorable atmosphere to plaintiffs' attorneys in these shareholder suits coming before the Delaware Court of Chancery.

II. BACKGROUND

The American rule traditionally requires each party in a lawsuit to pay for its own legal fees.³¹ Exceptions to the American rule in the context of corporate litigation is the "common corporate benefit doctrine"³² (referred to as the "common fund"), and its extension, the "substantial benefit doctrine."³³ The common fund exception to the American rule provides that when a party to a suit is able to recover a definable monetary benefit for all of the shareholders, including those not involved in the litigation, the plaintiff may recover reasonable attorneys' fees from that fund.³⁴ In the context of shareholder litigation, a common example of a common fund would be an increase in the price per share offered during a merger as a result of the plaintiff shareholders' actions, whereby all shareholders benefited from the increase.³⁵ The substantial benefit doctrine applies in situations when a substantial benefit³⁶ has been procured by the actions of the

(Del. 2008), available at <http://finance.delaware.gov/publications/GP2008.pdf>. This 35% figure includes taxes associated with Delaware corporate franchise, limited liability/limited partnership companies, and occupational and business licensing. *Id.* at 20. Additionally, Delaware's tax revenue attributable to business entities is also increased by its tax on abandoned property (namely, intangible property owned by business entities incorporated in Delaware); including tax revenue attributable to abandoned property raises the Delaware tax revenue in connection with Delaware business formation to 44%. *Id.* at 23, 26 tbl.2.

³¹See *Substantial Benefit Doctrine*, *supra* note 6, at 1187.

³²See *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 850 (Del. Ch. 1998).

³³See *Substantial Benefit Doctrine*, *supra* note 6, at 1187.

³⁴See, e.g., Tiana S. Mykkeltvedt, *Common Benefit and Class Actions: Eliminating Artificial Barriers to Attorney Fee Awards*, 36 GA. L. REV. 1149, 1157 (2002) (referencing how the common fund doctrine is frequently applied in situations where there is a class action and the attorney acts on behalf of an individual plaintiff and subsequently recovers a benefit for a group of individuals). The common fund exception "has been created, almost single-handedly, by the United States Supreme Court." John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1601 (1974).

³⁵See *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 150 (Del. 1980) (noting the Court of Chancery's calculation of a monetary benefit for over \$21.8 million as a result of the petitioners' implementation of a competitive bidding process that increased the value of the properties being sold well over the initial accepted bid amount); *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 359 n.3 (Del. Ch. 1999) (discussing the common fund exception argument made by plaintiffs through contending that due in part to their litigation efforts, stockholders received greater value in the acquisitions of their shares than would otherwise have been the case).

³⁶The Supreme Court has discussed the significance of a "substantial benefit," stating:
A substantial benefit must be something more than technical in its

plaintiff shareholder but is not quantifiable in monetary terms.³⁷ A common example of a qualifying benefit is when a supplemental disclosure for a proxy of previously withheld information, made available due to the actions of the plaintiff shareholder(s), is of value to all of the shareholders in deciding how to vote in a pending merger.³⁸

The calculation of fee awards under Delaware law are assessed based on a variety of factors established in *Sugarland Industries, Inc. v. Thomas*.³⁹ Many of the factors outlined in *Sugarland* are derived from Model Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct.⁴⁰ The *Sugarland* system, however, has unique features that separate it from Model Rule 1.5(a). In formulating the current fee calculation methodology, Delaware expressly rejected⁴¹ the rigid lodestar calculation method applied in the Third Circuit⁴² in order to provide courts with a flexible mechanism in determining fees.⁴³ It should be noted that one of the lodestar elements, the

consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396 (1970) (quoting *Bosch v. Meeker Coop. Light & Power Ass'n*, 101 N.W.2d 423, 427 (1960)).

³⁷See *First Interstate*, 756 A.2d at 357 (quoting *In re Dunkin Donuts S'holders Litig.*, 1990 WL 189120 (Del. Ch. Nov. 27, 1990), *reprinted in* 16 DEL. J. CORP. L. 1443, 1451(1990)) ("[T]he [substantial] corporate benefit doctrine comes into play when a tangible monetary benefit has not been conferred, but some other valuable benefit is realized by . . . the stockholders as a group.").

³⁸See, e.g., *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *10 (Del. Ch. June 27, 2011) (assigning a higher award of fees because due to the litigation, plaintiffs' lawyers forced supplemental disclosures of material information previously unknown to the shareholders).

³⁹See *infra* note 98 and accompanying text.

⁴⁰See *Aveta Inc. v. Bengoa*, 2010 WL 3221823, at *5 (Del. Ch. Aug. 13, 2010) ("The *Sugarland* factors are 'virtually identical' to [the] factors in Rule 1.5(a)."); DEL. LAWYERS' R. OF PROF'L CONDUCT § 1.5(a) (2010).

⁴¹See *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 150 (Del. 1980) ("[W]e are not persuaded that our case law governing [counsel] fee applications is an inadequate criterion for a fair judgment in this case, nor that new guidelines are needed for the Court of Chancery."); *accord Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000) ("*Sugarland* rejected more mechanical approaches to determining fee awards, explicitly disapproving the Third Circuit's 'lodestar method.'").

⁴²In the Third Circuit, "lodestar" is the total number of hours to be credited multiplied by the approved hourly rate. See *Sugarland*, 420 A.2d at 150.

⁴³See *Seinfeld*, 847 A.2d at 336 ("By establishing a flexible standard . . . the [Delaware] Supreme Court has attempted to avoid the pitfalls associated with percentage of the fund and lodestar methods."). The rejection of the lodestar method was reaffirmed by the Delaware Supreme Court in 2012. *Americas Mining Corp. v. Theriault*, 2012 WL 3642345, at *36 (Del. Aug. 27, 2012), *aff'g en banc sub nom. In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 2011 WL 6440761 (Del. Ch. Oct. 14, 2011), *vacated*, 2011 WL 6476919 (Del. Ch. Dec. 22, 2011), *revised* 2011 WL 6866900 (Del. Ch. Dec. 29, 2011).

number of hours expended, remains a critical element in fee calculation under *Sugarland*.⁴⁴

Despite any established methodology or guideline, the calculation of the corresponding attorneys' fees due to plaintiff shareholders is ultimately left to the discretion of the court.⁴⁵ This practice will continue to be a wild card that will greatly hinder any goal of complete predictability. Courts will generally look to precedent for cases that created a similar benefit to determine the fee to be awarded.⁴⁶ Because the majority of corporations are incorporated in Delaware, Delaware courts have historically heard the majority of these cases and therefore, established the precedent used to calculate fees.⁴⁷ This poses a problem because the vast number of cases to use as precedent makes it possible to "cherry pick" cases that comport with the desired fee award, often resulting in fee awards that vary greatly for the same benefit.⁴⁸ Until recently, the plaintiffs' bar has seen the Court of Chancery use its "discretion" in a manner that is hostile to their financial interest, and as such, they have increasingly been filing in other forums seen as more favorable to their contingent efforts.⁴⁹ As will be discussed below, this trend may have generated a response in the plaintiffs' favor.

⁴⁴See, e.g., *Seinfeld*, 847 A.2d at 338-39 (comporting with *Sugarland*'s efforts of counsel and time expended factor by mandating plaintiff counsel's fee be reduced from 20 to 10% where the attorneys merely expended 190 hours).

⁴⁵See *In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005); see also *In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *21 (Del. Ch. Dec. 9, 2011) (stating that there is no mathematical equation when awarding fees and the court has "substantial discretion in the methods it uses and the evidence it relies upon").

⁴⁶See, e.g., *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *23 (Del. Ch. May 6, 2010) ("While plaintiffs have not shown that they are entitled to . . . a percentage four times greater than the highest percentage awarded in comparable cases, they have shown that this case was sufficiently different and difficult to warrant an award slightly higher than in similar cases.").

⁴⁷See Lewis, *supra* note 17, at 200 ("In part because of its large market share . . . the Delaware Chancery and Supreme Court have developed an extensive and thorough body of corporate law.").

⁴⁸*Compare* *Augenbaum v. Forman*, 2006 WL 1716916, at *2 (Del. Ch. June 21, 2006) (awarding \$225,000 for a modest disclosure that included some useful information for the shareholders), with *In re BEA Sys., Inc. S'holders Litig.*, 2009 WL 1931641, at *1 (Del. Ch. June 24, 2009) (awarding \$81,297 for two corrective but "unmistakably modest" disclosures that were of some benefit to the class). See also Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 154 (2011) ("[T]he Delaware courts have become increasingly aggressive in the policing of plaintiffs' fees, particularly with respect to cookie-cutter challenges to controlling shareholder transaction cases where the legal standards tend to guarantee plaintiffs with a settlement irrespective of the underlying facts.").

⁴⁹See Lewis, *supra* note 17, at 200 (noting the trend in plaintiffs' lawyers bringing shareholder suits in any jurisdiction other than the Delaware Chancery to avoid its predictability and efficiency).

III. GUIDELINE

A. *Basic Tenants to Qualify for Consideration of a Fee Award*

The basic starting point for any fee award in Delaware is Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct. Rule 1.5(a) states, whether it is fixed or contingent, an attorney may not "make an agreement for, charge, or collect an unreasonable fee."⁵⁰ In step with that standard, it would be an unreasonable request to seek a fee award if there was not a discernable benefit created for the shareholders.⁵¹ Even assuming a benefit has been procured on behalf of the shareholders, there are certain minimum requirements the plaintiff must prove: (1) the claim was meritorious at the time of filing;⁵² (2) the action producing the benefit was achieved prior to judicial resolution;⁵³ and (3) there was "a causal connection to the conferred benefit" stemming from the litigation.⁵⁴

In determining whether the claim filed was meritorious, "the standard the Court will look to is whether the claim would have been able to withstand a motion to dismiss."⁵⁵ In making this determination, the court will see if there was a factual basis when the claim was filed that would support a "reasonable hope" of success.⁵⁶ A common example of a meritorious issue is a disclosure claim seeking previously withheld information that the plaintiff believes, moving forward, could be material in altering the decision process of the shareholders.⁵⁷ The court, in *In re Sauer-Danfoss Inc. Shareholders Litigation*, even rewarded a simple fact-checking

⁵⁰DEL. LAWYERS' R. OF PROF'L CONDUCT § 1.5(a) (2010).

⁵¹The mere filing of a derivative action against a corporation lacks merit and does not warrant an award of fees to plaintiffs' counsel because such a practice would result in the filing of multiple actions simply for the purpose of obtaining a monetary award. *See Chrysler Corp. v. Dann*, 223 A.2d 384, 386-87 (Del. 1966).

⁵²*Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980).

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 850 (Del. Ch. 1998). An action that would fail on a motion for summary judgment can still be considered meritorious in a fee request if there plaintiff had a reasonable belief of success on the pleadings. *Chrysler*, 223 A.2d at 387.

⁵⁶*Chrysler*, 223 A.2d at 387 ("It is not necessary that factually there be absolute assurance of ultimate success, but only that there be some reasonable hope."). It is worth noting that this standard can be complied with through an amended complaint. *See In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *6 (Del. Ch. Apr. 29, 2011) (disagreeing with the contention that a court applying Delaware law to award fees is restricted to the original complaint).

⁵⁷*See Sauer-Danfoss*, 2011 WL 2519210, at *10 (discussing how the plaintiffs corrected and supplemented inaccurate information when the corporation's original disclosure was vague).

effort by the plaintiff that resulted in a correction because the court found it to be sufficiently meritorious to deserve compensation.⁵⁸

The second requirement, that the action be taken prior to a judicial resolution, can easily be met.⁵⁹ In fact, Delaware courts have even held that an action that was decided against the plaintiff on a motion for summary judgment could still be classified as "prior to judicial resolution" if the matter was settled or mooted while the judgment is on appeal.⁶⁰

For the third requirement, which mandates a causal connection (once a meritorious claim has been established, and the sought after benefit is achieved), there is a presumption of causation that exists.⁶¹ The burden then shifts to the defendant to prove a lack of a causal connection.⁶² In many scenarios, there is still evidence of a causal connection even when other factors have contributed to the benefit,⁶³ or the object of the original complaint is rendered moot.⁶⁴ An award of attorneys' fees may be reduced or denied if the causal connection is reduced or generally weak.⁶⁵

⁵⁸*Id.* ("Reputable media publications have long known that fact-checking has value, and they pay people to do it. Here, the plaintiffs provided that service, and the first corrective disclosure provided a *compensable benefit*.") (emphasis added).

⁵⁹In all of the cases that have awarded a fee award under this concept, corrective measures (like submitting a proposed merger to a "go-shop" period) were taken by defendant corporations prior to a final judicial resolution of the matter. *See, e.g., In re Del Monte Co. S'holders Litig.*, 2011 WL 2535256, at *15 (Del. Ch. June 27, 2011) (examining a number of going-private deals that adopted a "go-shop" provision as a result of pending litigation).

⁶⁰*See Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980) ("This rule [of not precluding a fee award in motions for summary judgment where defendant attempts to settle or moot the case] insures that, even without a favorable adjudication, counsel will be compensated for the beneficial results they produced, provided that the action was meritorious and had a causal connection to the conferred benefit.").

⁶¹*See In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 363 (Del. Ch. 1999) (quoting *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 852 (Del. Ch. 1998)) ("The presumption of causation is a heavy one 'and it is to be expected that defendant will not often be able to satisfy it.'").

⁶²*See United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1080 (Del. 1997) (noting that the defendants, being in the best position to know the reasoning behind their actions, have the burden of rebutting the presumption by showing their actions were not in any way caused by the lawsuit).

⁶³*See, e.g., First Interstate*, 756 A.2d at 363 ("[W]hile other factors, especially the overriding economic considerations presented by the competing offers, undoubtedly played a large role in the directors' decision making, [the court] cannot conclude that the litigations played none.").

⁶⁴*See United Vanguard Fund*, 693 A.2d at 1080 ("Where . . . a corporate defendant . . . takes action that renders the claims asserted in the complaint moot, Delaware law imposes on it the burden of persuasion to show that no causal connection existed between the initiation of the suit and any later benefit to the shareholders.").

⁶⁵*See, e.g., In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *4 (Del. Ch. Feb. 4, 2005) (stating that while the court could not conclude the defendants had satisfied their burden of rebutting the causal connection to the role of litigation and the \$56 million aggregate benefit, the

B. Common Fund Calculation

A common fund is created when the actions of the plaintiff shareholder result in an actual monetary benefit that was created for all of the shareholders.⁶⁶ The theory is that because the efforts of the plaintiff have conferred a benefit on all of the shareholders, they should share in the cost of achieving this.⁶⁷ The most frequent example of a monetary benefit is an increase in the price per share offered in a merger agreement following the plaintiff shareholder's litigation efforts.⁶⁸

A reasonable percentage-based fee award is generally upheld in situations where the plaintiff-shareholder is unilaterally responsible for the common fund,⁶⁹ which was created for all of the shareholders, and the attorneys' were acting on a purely contingent fee basis.⁷⁰ This type of award has been referred to as "hitting the jackpot" for plaintiffs' attorneys.⁷¹ Traditionally, the Court of Chancery reviewed the billable hours as a secondary check to make sure an excessive windfall was not awarded.⁷²

connection was "relatively weak because of the limited and passive activities of the plaintiffs' counsel at that time").

⁶⁶See *United Vanguard Fund*, 727 A.2d at 850 (referring to the common fund in the shareholder litigation actions as a "common corporate benefit").

⁶⁷*Id.*

⁶⁸See, e.g., *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *21 (Del. Ch. May 6, 2010) ("[I]t became evident shortly after the Delaware [a]ction was filed that [defendant] would need to increase the tender offer price to succeed, virtually guaranteeing [p]laintiffs' counsel a fee in excess of what they might obtain in a disclosure-based settlement."). Also, it is worth noting that a supplemental disclosure that results in an increase in the price per share would be awarded based on common fund calculation principles, and not via the "substantial benefit" analysis. See *id.* at *20, *23 (applying the common fund benefit doctrine to award fees for a \$1 per share price increase resulting from a supplemental disclosure).

⁶⁹See *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 150 (Del. 1980) (acknowledging that the Court of Chancery would have been reasonable in awarding a 20% fee award subject to a \$3 million cap for a total offer increase of \$21 million if the plaintiffs had been completely responsible for the increase as held). The recent jackpot that was awarded in *In re Southern Peru Copper Corp.*, and subsequently affirmed by the Delaware Supreme Court identified this factor as being important. *Americas Mining Corp. v. Theriault*, 2012 WL 3642345, at *36 (Del. Aug. 27, 2012), *aff'g en banc sub nom. In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 2011 WL 6440761 (Del. Ch. Oct. 14, 2011), *vacated*, 2011 WL 6476919 (Del. Ch. Dec. 22, 2011), *revised* 2011 WL 6866900 (Del. Ch. Dec. 29, 2011) ("[A]nything that was achieved . . . by this litigation [was] by these plaintiffs.") (internal quotation marks and citation omitted).

⁷⁰See *United Vanguard Fund*, 727 A.2d at 855-56 (noting that plaintiffs' attorneys were denied a "success bonus" since they were not acting on a contingent basis, and thus were only awarded actual fees charged to plaintiff).

⁷¹See, e.g., *Weiss & White*, *supra* note 20, at 1810 ("Delaware law made it moderately attractive for plaintiffs' attorneys to file suits challenging sales of control. . . . [T]hey might even 'hit the jackpot' if a competing bidder emerged.").

⁷²See *In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *6 (Del. Ch. Feb. 4, 2005) (stating that the award—which translated into a fee of about \$1,165 per hour—was not out of line

However, in a recent case, *In re Southern Peru Copper Corp.*, the court alluded that this may no longer be the protocol.⁷³ Following a reduction in the number of shares required to merge the two companies, the benefit in that case created a common fund that was valued at nearly two and a half billion dollars.⁷⁴ This benefit was achieved as a direct result of the plaintiff shareholders' contingent efforts.⁷⁵ The Court of Chancery awarded the percentage-based contingent fee that resulted in a fee award equating to over \$35,000 per billable hour.⁷⁶ Although it is true that a common fund benefit of this type has traditionally seen the largest fee awards, this case signals a change in the status quo, which originally included back checking the hourly rate as a means of preventing a windfall.⁷⁷ Once a large common fund has been created exclusively by the efforts of the plaintiff shareholder, it now appears that the Delaware Court of Chancery is more likely to award the contingent risk taken by the plaintiffs' attorneys without any significant windfall reduction.⁷⁸

Surprisingly, the Delaware Supreme Court recently affirmed this jackpot fee award.⁷⁹ This decision is monumental in that it has expressly rejected many of the arguments that traditionally would have resulted in a

with fees that had previously been awarded); *see also* Seinfeld v. Coker, 847 A.2d 330, 338 (Del. Ch. 2000) (noting that the contingent fee percentage of 20% would result in an hourly fee of over \$2,600 per hour, one that the court considered an overcompensation). Before the *Southern Peru Copper* decision, the highest per hour award uncovered by this author was in the range of \$4,000 per hour for an exception benefit. *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *14 (Del. Ch. Aug. 30, 2007) (finding from comparing the hourly rate to similar cases, the court did not believe the rate to be unreasonable in light of the fact that the litigation produced especially favorable results for the plaintiffs).

⁷³*See S. Peru Copper*, 2011 WL 6440761, at *43. *Southern Peru Copper* made clear that the Court of Chancery did not review the billable hours when granting its enormous award of over \$1 billion plus post-judgment interest, an amount from which the court mandated attorneys' fees be paid from. *Id.* Moreover, this sum was not substantially reduced in price in the revised final order assigning plaintiffs' counsel fees. *S. Peru Copper*, 2011 WL 6866900, at *1.

⁷⁴*See S. Peru Copper*, 2011 WL 6440761, at *43.

⁷⁵*See id.* (stating that the plaintiff shareholders were entitled to receive a number of their shares as a result of their efforts).

⁷⁶Brief for Plaintiff at 9, *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, No. 961-CS, 2011 WL 5240160 (Del. Ch. Oct. 28, 2011) (basing the calculation of award on a calculation of 8597 hours).

⁷⁷*See supra* note 72 and accompanying text.

⁷⁸*See supra* note 73 and accompanying text.

⁷⁹*Americas Mining Corp. v. Theriault*, 2012 WL 3642345 (Del. Aug. 27, 2012), *aff'g en banc sub nom. In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 2011 WL 6440761 (Del. Ch. Oct. 14, 2011), *vacated*, 2011 WL 6476919 (Del. Ch. Dec. 22, 2011), *revised* 2011 WL 6866900 (Del. Ch. Dec. 29, 2011). Defendant Grupo Mexico has since filed a motion with the Delaware Supreme Court for a rehearing. Dave Graham, *Grupo Mexico files motion against U.S. court decision*, REUTERS (Sept. 12, 2012), <http://in.reuters.com/article/2012/09/12/us-grupomexico-court-idINBRE88A1JC20120912>.

⁷⁹*Seinfeld v. Coker*, 847 A.2d 330, 338 (Del. Ch. 2000).

reduced fee award. First, the fee could have arguably been reduced for being unreasonable under the Delaware Lawyers' Rules of Professional Conduct by way of Rule 1.5(a)'s considerations: (1) the time and labor expended, and (2) the fee customarily charged in the locality.⁸⁰ To that point, as stated above, the hourly rate in *Southern Peru Copper* equates to over \$35,000 an hour⁸¹—plainly lending a strong argument that the award is a windfall. Moreover, this fee award is the highest on record for Delaware,⁸² and the Court of Chancery only eleven years earlier considered a \$2,500 per hour fee award only for the same type of benefit to be an unreasonable windfall.⁸³ The Delaware Supreme Court, however, countered that Rule 1.5 expressly provides for contingent fees based on a percentage.⁸⁴ Secondly, the award is arguably punitive against the remaining shareholders when considering its sheer size compared to the hours expended, even if it is only a small percentage of the total sum gained.⁸⁵ It appears that the Delaware courts have pivoted in a direction to the benefit of the plaintiff's bar, and now determines the reasonableness of an award strictly based on the percentage received.⁸⁶ Apparently, the policy of "backstop checking" the fee on per hour monetary scale no longer carries any significance.⁸⁷ Section IV of this Note will theorize the actual motivation behind this blockbuster award.⁸⁸

Often the common fund that has been created has resulted from a number of factors unique to the plaintiff's suit.⁸⁹ In *In re Dunkin' Donuts Shareholders Litigation*, the auction that resulted in an increase in the price

⁸⁰See DEL. LAWYERS' R. OF PROF'L CONDUCT §§ 1.5(a)(1), 1.5(a)(3) (2010).

⁸¹See *supra* note 76 and accompanying text.

⁸²Tom Hals, *Plaintiffs Attys in So Copper Case Get \$285 Mln Fee*, REUTERS (Dec. 19, 2011), [http://newsandinsight.thomsonreuters.com/Legal/News/2011/12_-_December/Plaintiffs_attys_in_So_Copper_case_get_\\$285 mln_fee/](http://newsandinsight.thomsonreuters.com/Legal/News/2011/12_-_December/Plaintiffs_attys_in_So_Copper_case_get_$285 mln_fee/).

⁸³*Seinfeld v. Coker*, 847 A.2d 330, 338 (Del. Ch. 2000).

⁸⁴*Americas Mining Corp.*, 2012 WL 3642345, at *34 n.69.

⁸⁵See, e.g., *Seinfeld*, 847 A.2d at 334 ("[I]f a fee of \$500,000 produces these incentives [of encouraging meritorious suits and litigation] in a particular case, awarding \$1 million is a windfall, serving no other purpose than to siphon money away from stockholders and into the hands of their agents.").

⁸⁶*Americas Mining Corp.*, 2012 WL 3642345, at *42 ("The record supports its factual findings and its well-reasoned decision that a reasonable attorneys' fee is 15% of the benefit created.").

⁸⁷*Id.* at *38 (indicating that the "backstop" method that examines the computed hourly rate no longer is required); see also *supra* note 72 and accompanying text.

⁸⁸See *infra* Part IV.

⁸⁹See, e.g., *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *5 (Del. Ch. Aug. 30, 2007) (arguing in response to plaintiff's request for attorney's fees that the litigation was not the "sole cause" for the company's decision to go private, but instead there were multiple reasons for the decision).

per share was inseparably related to market conditions, the acquiring companies' increased offer, and the plaintiff shareholders' lawsuit.⁹⁰ In these circumstances, a *quantum meruit* approach is applied since it is virtually impossible to precisely calculate the amount of responsibility for the monetary benefit that can be attributed to the plaintiff.⁹¹ When applying this approach, the court primarily reviews the average computed value of the attorneys' time spent litigating the case.⁹² This generally comes out to an average of \$400 per hour based on a survey of fees that have been awarded in this category.⁹³ The court will allow for fees for all claims relating to the litigation process that resulted in the benefit to be recovered, but not for time spent seeking attorneys' fees.⁹⁴ This includes the discovery process and pursuit of alternative claims that did not survive but added toward establishing the value-adding claim.⁹⁵ The next part of this guideline examines the most frequent type of benefits achieved: non-monetary benefits created for the class.

⁹⁰*In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120 (Del. Ch. Nov. 27, 1990), reprinted in 16 DEL. J. CORP. L. 1443, 1454-55 (1991) (explaining that the defendant was successful in demonstrating that the benefit conferred was "at least partly attributable to other causes").

⁹¹*Id.* at 1457 (requiring that a *quantum meruit* basis be applied in determining the fee award because of the "attenuated nature of the benefit conferred").

⁹²Despite claiming that it is not a controlling consideration, the time factor is still examined by the Delaware courts. See *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 150 (Del. 1980) (rejecting defendants' request for the court to follow case precedent that focused on the time factor and was the sole consideration for the fee award).

⁹³The average of \$400 per hour comes from a survey of cases that awarded a benefit based on the creation of a common fund. *E.g.*, *Louisiana State Emps.' Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *9 n.56 (Del. Ch. Sept. 17, 2001) (awarding \$500 per hour, which includes a 100% premium for "quality work"); *Seinfeld v. Coker*, 847 A.2d 330, 338 (Del. Ch. 2000) (awarding an hourly rate of \$1,300 following a quick settlement); *PaineWebber R & D Partners II, L.P. v. Centocor, Inc.*, 2000 WL 130632, at *4 & n.21 (Del. Ch. Jan. 31, 2000) (awarding \$200 per hour); *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 364 n.6 (Del. Ch. 1999) (awarding \$308 per hour for lawyers and \$133 per hour for paralegals or law clerks); *Sonet v. Plum Creek Timber Co.*, 1999 WL 608849, at *5 (Del. Ch. Aug. 5, 1999) (awarding \$175-470 per hour depending upon seniority); *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120 (Del. Ch. Nov. 27, 1990), reprinted in 16 DEL. J. CORP. L. 1443, 1457 (awarding \$922,000 for 2100 hours worked, amounting to approximately \$439 per hour); *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *23 & n.172 (Del. Ch. May 6, 2010) (awarding \$1,077,038 for the 2500 hours billed for the litigation, thereby "yield[ing] a putative, blended hourly rate of just over \$400").

⁹⁴See *First Interstate*, 756 A.2d at 364 (determining that even the pleadings that did not survive the motion to dismiss in some measure contributed to the final pleading, but rejecting the time spent in litigation that was of no benefit to the class); see also *Louisiana State Emps.*, 2001 WL 1131364, at *9 (noting that time spent seeking attorneys fees is not included in the fee award).

⁹⁵See *First Interstate*, 756 A.2d at 364 (noting that non-duplicative time spent on discovery, in a now dismissed action in another jurisdiction, still produced a benefit that warranted consideration within the expended hours).

C. *Substantial Benefit Calculation*

In situations when only a non-monetary benefit has been achieved for all of the shareholders, plaintiff shareholder(s) may still recover attorneys' fees pursuant to the substantial benefit doctrine.⁹⁶ These non-monetary benefits are generally in the form of supplemental disclosures of information that a shareholder would consider beneficial when deciding how to vote on a merger agreement.⁹⁷

In order to qualify, the court considers additional factors outside of the three minimum requirements discussed above in subsection A.⁹⁸ When a plaintiff requests a fee as a result of a disclosure, the court's first consideration is whether the disclosure was material.⁹⁹ This is based on whether there is "a substantial likelihood that the disclosure of the omitted [or incorrect] fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."¹⁰⁰

If the benefit obtained as a result of the plaintiff's litigation is considered to be material, the court will then turn to the factors outlined in *Sugarland* to determine the value of the benefit:

- (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;
- (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.¹⁰¹

⁹⁶See *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396 (1970) (quoting *Murphy v. N. Am. Light & Power Co.*, 33 F.Supp. 567, 570 (S.D.N.Y. 1940)) ("[P]rivate stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders . . .").

⁹⁷See *supra* note 38. The majority of the cases reviewed that involved an award of attorneys' fees for a non-monetary benefit were the result of a supplemental disclosure achieved.

⁹⁸See *supra* notes 52-54 and accompanying text.

⁹⁹*In re Sauer-Danfoss, Inc. S'holders Litig.*, 2011 WL 2519210, at *8 (Del. Ch. May 3, 2011) ("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*." (emphasis added).

¹⁰⁰*Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). An item is material if it would be considered by a reasonable investor as important towards deciding how to vote; it does not matter whether the item actually caused a person to change his vote. See *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994).

¹⁰¹*In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005)

In reviewing those factors, the first five are of secondary importance to the court.¹⁰² A weak showing in one or more of the first five factors generally will not preclude an award of attorneys' fees but, instead, will reduce it.¹⁰³ The sixth and seventh *Sugarland* factors are of primary importance to the court in its analysis.¹⁰⁴ For the sixth factor, the court looks to see whether the litigation was at least partially responsible for the resulting benefit.¹⁰⁵ An award will be denied under this factor if there is a showing that the benefit would have resulted without the plaintiffs' litigation efforts.¹⁰⁶ Additionally, the sixth factor is unique to *Sugarland* as it has no comparable factor in Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct.¹⁰⁷ The court uses *Sugarland's* seventh factor—the size and value of the benefit achieved—as the other major factor in making its determination in calculating attorneys' fees.¹⁰⁸ The seventh factor is also discussed as the degree of materiality that can be associated with the benefit achieved.¹⁰⁹ While all of Rule 1.5(a) the factors may be considered to determine the

(citing to what are commonly referred to as the "*Sugarland*" factors).

¹⁰²The reason for this is because the first five factors are considered secondary to the sixth and seventh due to the fact the court will only consider a fee award if it is first shown that the last two elements are met. If they are met, the first five factors are of primary consideration to the court in determining the reasonableness of the fee requested. *See id.* at *3 ("The last two elements are often considered the most important.").

¹⁰³If the last two *Sugarland* factors are met, the court will inevitably conclude that the plaintiffs are deserving of a fee award based on equitable legal principles, with the only question remaining being what amount of an award is reasonable. *See generally In re Anderson Clayton S'holders Litig.*, 1988 WL 97480, at *2 (Del. Ch. Sept. 19, 1988) ("It is . . . the case that counsel's efforts did play a role in achieving that result [*Sugarland's* sixth factor], that the result itself was beneficial to the class [*Sugarland's* seventh factor], and that, under applicable legal principles, they are entitled to the award of an attorney's fee for the work, effort invested and the results achieved.").

¹⁰⁴*See supra* notes 102-03 and accompanying text.

¹⁰⁵*See, e.g., Plains Res.*, 2005 WL 332811, at *5 ("Based on the documents before the court, the court concludes that the plaintiffs' counsel played a significant role in the \$0.50 increase per share . . .").

¹⁰⁶*See In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 290 (Del. 2002). If the benefit that the plaintiff is claiming was a result of the litigation and would have occurred regardless of his actions, the court will most likely preclude an award. There only needs to be a showing that the plaintiff was at least partially responsible in order to avoid denial of an award based on this factor. *See id.* ("[C]ounsel applying for attorneys' fees do not need to show that they were the sole cause of a benefit conferred by settlement in order to have earned a fair, adequate and reasonable fee for their work on behalf of the class.").

¹⁰⁷*Compare* DEL. LAWYERS' R. OF PROF'L CONDUCT § 1.5(a) (2010) (accounting for eight factors in determining the reasonableness of a fee) *with Plains Res.*, 2005 WL 332811, at *3 (noting that the plaintiffs' counsel played a significant role in the per share increase, which contributed to the court's decision whether to allow a counsel fee award).

¹⁰⁸This will be one of the primary classifications used in formulating the fee rubric. *See In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *20 (Del. Ch. May 6, 2010) ("[T]he size of the benefit [is] of paramount importance."); *see also* Data Appendix (listing the expected benefit for 1-2 supplemental disclosures).

¹⁰⁹*See Plains Res.*, 2005 WL 332811, at *5.

reasonableness of a fee, none of which are explicitly stated as being controlling over the other,¹¹⁰ it is the sixth and seventh factors of *Sugarland* that create the x and y axes of the supplemental disclosure fee rubric included in the Data Appendix.¹¹¹

1. Supplemental Disclosures

The most common non-monetary result of shareholder litigation is in the form of a supplemental disclosure.¹¹² These benefits truly are monetarily unquantifiable, and the only way Delaware courts have been able to determine a fee award is through the use of precedent.¹¹³ In determining whether the supplemental disclosure was sufficiently material to all shareholders to award attorneys' fees, the court looks to see whether the omission or "defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote."¹¹⁴ Additionally, depending upon the perceived value of disclosure, there is a wide variance among those benefits that are considered material.¹¹⁵

In light of the varying degrees of benefits that can be achieved within the context of supplemental disclosures, it is peculiar to read absolute assertions from plaintiffs' attorneys in a courtroom or in briefs in support of a settlement claiming that the court awards \$400,000 to \$500,000 for material supplemental disclosures.¹¹⁶ A survey of the cases discussed below show

¹¹⁰See DEL. LAWYERS' R. OF PROF'L CONDUCT § 1.5(a); *but see supra* notes 102-103 and accompanying text.

¹¹¹See *infra* Data Appendix.

¹¹²See *supra* note 23 and accompanying text.

¹¹³See, e.g., *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *18 (Del. Ch. Apr. 29, 2011) ("A court can readily look to fee awards granted for similar disclosures in other transactions because enhanced disclosure is an intangible, non-quantifiable benefit."); *In re Golden State Bancorp, Inc. S'holders Litig.*, 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000) ("In cases generating nonquantifiable, nonmonetary benefits, this Court has juxtaposed the case before it with cases in which attorneys have achieved approximately the same benefits.").

¹¹⁴*Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 384 (1970).

¹¹⁵See *Sauer-Danfoss*, 2011 WL 2519210, at *17 ("All supplemental disclosures are not equal. To quantify an appropriate fee award, this Court evaluates the qualitative importance of the disclosures obtained.").

¹¹⁶See Transcript of Oral Argument at 40, *Continuum Capital v. Nolan*, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) ("[I]f one meaningful quanta of information is obtained, the fee should be in the four to 500,000 range. And if there are two or more, the Court dials up."). Interestingly, a law review article that focused on critiquing fee awards claimed that for non-monetary settlements, the fee award had an average award of \$492 per hour, with a median fee award of \$472 per hour. Weiss & White, *supra* note 20, at 1830. By grouping all non-monetary awards together, plaintiffs are increasing the risk of more unearned fee awards since defendants will be more willing to settle

that this basic assertion is an oversimplification of the analysis the court uses in calculating attorneys' fees.¹¹⁷ In fact, the Court of Chancery has noted that it will grant "minimal fees for minimal benefits and major fees for major results."¹¹⁸

Within the process of calculating the attorneys' fees for supplemental disclosures, there are a myriad of factors that are considered, which stem from the seven factors identified in *Sugarland*.¹¹⁹ Before considering the *Sugarland* factors, however, one of the more critical considerations is determining the level of materiality for a particular disclosure.¹²⁰ Fittingly, the value of the disclosure and corresponding attorneys' fees previously negotiated through a settlement process are given a harder look by the courts to verify that the result was one derived from a true adversarial process.¹²¹ The guideline below will separate the disclosures into three main categories of materiality: very material, material, and minimally material disclosures.¹²² Within each level of materiality and the internal subcategories, the average fee awards will be listed and account for the various other factors from *Sugarland* that effect the final determination.¹²³ It is worth noting that some cases may result in awards that are slightly higher than the average range if the fee was negotiated and agreed to in a settlement.¹²⁴

for a higher amount if they believe this is the average for any material supplemental disclosure. *Id.*

¹¹⁷This is also a major issue in scholarly articles that derive an "average" award from a number of fee awards without distinguishing the benefits achieved. *See, e.g.,* Cain & Davidoff, *supra* note 4 (manuscript at 15) ("The average attorneys' fees for disclosures are \$793,000, considerably lower than other settlement types. ").

¹¹⁸*In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *14 (Del. Ch. June 27, 2011).

¹¹⁹*See supra* note 101 and accompanying text.

¹²⁰*See* *Augenbaum v. Forman*, 2006 WL 1716916, at *2 (Del. Ch. June 21, 2006) (admitting the difficulty in ascertaining the materiality of a disclosure, but nonetheless noting its importance in the court's evaluation).

¹²¹*See* *Weiss & White*, *supra* note 20, at 1851-52. Many of the cases where the court considers a fee award merely involve an approval of a settlement (memorandum of understanding, "MOU") that included a fee award. *See id.* at 1851. Often these settlements are agreed to quickly, with the fee award not being a hotly contested item since, in comparison to the size of the deal being considered, it is miniscule. The fee that the parties agree to must still be approved by the court. *See id.* (noting that defendants are often overly willing to agree to a settled amount of attorneys' fees as a means of disposing of a "nuisance," whereas the plaintiffs' attorneys are actually acting for their own benefit and not the shareholders).

¹²²*See infra* Parts III.C.1.i-iii.

¹²³*See infra* Parts III.C.1.i-iii.

¹²⁴*See* Transcript of Settlement Conference and Plaintiffs' Application for Attorneys' Fees at 12, *In re Clariant, Inc. S'holders Litig.*, C.A. No. 5932-VCS (Del. Ch. Jun. 15, 2011) (stating the court "would not quibble" with slightly higher fees than preferred because they were negotiated).

a. *Very Material Disclosure*

The first category of supplemental disclosures is those that are considered to be very material toward the evaluation of a pending decision or matter. These benefits often include a previously withheld financial projection or undisclosed conflict of interest.¹²⁵ A recent example of a very material disclosure involved the disclosure that Barclays Bank, which was acting as a financial advisor for Del Monte Foods Company in its pending sale, was operating under a serious conflict of interest; Barclays was also to receive over \$20 million in a buy-side financing from the company acquiring Del Monte.¹²⁶ In these situations there are normally only one or two meaningful disclosures that account for the majority of the plaintiffs' fees.¹²⁷ A benefit is considered to be very material if it is something that is exceptional.¹²⁸ These exceptional benefits are most lucrative for plaintiffs' attorneys who are seeking to achieve a non-monetary benefit for a class of shareholders. Within the realm of very material benefits, there are three tiers of benefit calculations.

The maximum award results when a very material benefit has been created as a result of the plaintiff shareholders' efforts while meeting all of the following factors from *Sugarland*: (1) the plaintiffs' efforts are completely responsible for the resulting disclosure,¹²⁹ (2) the attorneys operated on a contingency basis,¹³⁰ (3) the time and effort expended in the

¹²⁵See *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *18 (Del. Ch. Apr. 29, 2011) (noting that the court often awards attorneys' fees for disclosures of "previously withheld projections or undisclosed conflicts faced by fiduciaries or their advisors").

¹²⁶See *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *9 (Del. Ch. June 27, 2011).

¹²⁷See *id.* (quoting *Sauer-Danfoss*, 2011 WL 2519210, at *18); Transcript of Oral Argument at 100, *Continuum Capital v. Nolan*, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) (noting that ordinarily there is one disclosure, such as a projection, that "is really good, and then usually a couple other are borderline, and then things tail off after that").

¹²⁸See *Sauer-Danfoss*, 2011 WL 2519210, at *18 ("Higher awards have been reserved for plaintiffs who obtained particularly significant or exceptional disclosures."); Transcript of Oral Argument at 100-01, *Continuum Capital v. Nolan*, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) (noting that conflict-oriented disclosures are considered exceptional and therefore, very material). See, e.g., *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 644 (Del. Ch. 2008) (disclosing information about the CEO's conflict of interest and role in the negotiations and sale process).

¹²⁹The benefit achieved was directly and completely the result of the plaintiff shareholders' litigation. See *supra* note 101 and accompanying text (listing the sixth *Sugarland* factor as whether "the plaintiff can rightly receive all the credit for the benefit conferred or only a portion thereof").

¹³⁰The attorneys for the plaintiff shareholders were operating on a pure contingency basis in that they were taking a real risk in pursuing this litigation. See *supra* note 101 and accompanying text (listing the fourth *Sugarland* factor as "the contingent nature of the litigation").

process of litigation was substantial,¹³¹ and (4) the issue was complex.¹³² The award in these situations for one to two disclosures generally will average \$900,000 to \$1.1 million.¹³³ It is important to note that in many of the cases that have achieved a very material benefit, the total award is actually much higher than the initial value of the achieved benefit because it is possible for the creation of other material benefits for the class in the course of pursuing the litigation.¹³⁴

In most circumstances, all of the *Sugarland* factors will not be met and therefore, attorneys will not be awarded the maximum benefit. Some common limiting factors that preclude attorneys from receiving the maximum fee award include when attorneys operate on something other than a pure contingency basis (*Sugarland's* fourth factor),¹³⁵ or the fact that the issue was quickly moved to settlement (*Sugarland's* first factor).¹³⁶ In addition to the *Sugarland* factors, other outside factors can contribute to

¹³¹Here, the court will consider if the attorneys actually litigated the matter or if they were merely seeking a quick settlement. See *supra* note 101 and accompanying text (listing the first *Sugarland* factor as "the amount of time and effort applied to the case by counsel for the plaintiffs"). The court will also consider the hours billed by the attorneys to ensure that there will not be a windfall conferred by the court. See *Sauer-Danfoss*, 2011 WL 2519210, at *20 ("The time and effort expended by counsel serves [as] a cross-check on the reasonableness of a fee award.").

¹³²See *supra* note 101 and accompanying text (listing the second *Sugarland* factor as "the relative complexities of the litigation"). In examining the available case law, this author has found few examples when the court has been willing to reduce a fee based on the complexity factor. Generally, almost all attorneys involved in these shareholder class action suits are considered capable by the court. If the court does limit fees based on this factor, it generally is on the basis of a disclosure that was similar to a fact-checking effort, which would not qualify as a very material benefit. See, e.g., *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 641 (Del. Ch. 2005) ("[T]here was not much work to be done . . . [because] [t]here is no special complexity to the case; indeed, it is entirely characteristic of prior going private cases attacking negotiable proposals.").

¹³³See *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *10 (Del. Ch. June 27, 2011) (citing *Lear* in identifying the lower range to be \$800,000, and the higher echelon to be \$1.6 million, which was awarded in the *Del Monte* case); see also Transcript of Settlement Hearing at 49-50, *Globis Capital Partners v. Safenet, Inc.*, C.A. 2772-VCS (Del. Ch. Dec. 20, 2007) (awarding \$1.2 million where the supplemental disclosures regarding the bankers' analyses were substantial).

¹³⁴See, e.g., *Del Monte*, 2011 WL 2535256, at *14 (determining that although the very material benefit was valued at \$1.6 million, the final fee award totaled \$2.75 million in light of other benefits achieved and fees expended).

¹³⁵See, e.g., *Julian v. E. States Constr. Serv. Inc.*, 2009 WL 154432, at *2 (Del. Ch. Jan. 14, 2009) (awarding a lower fee in light of the fact that the plaintiffs' firm worked only partially on a contingent fee basis).

¹³⁶See *Del Monte*, 2011 WL 2535256, at *20 (quoting *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *20 (Del. Ch. Apr. 29, 2011)) (noting that "[m]ore important than hours is 'effort, as in what plaintiffs' counsel actually did,'" and that the court would reduce a fee if the plaintiff appeared to seek a quick settlement as opposed to diligently pursuing the case in the best interest of the plaintiff shareholders).

obtaining supplement disclosures, and therefore, limit fee recovery. For example, in *Kapitalanlagegesellschaft mbH v. Fialkow*, "the court [was] mindful that the upward movement in the deal price" was the result of not only the supplemental disclosure made by the defendant through the plaintiff's litigation efforts, but also the persistent competing offers from a third party.¹³⁷ For the attorneys being compensated for a very material benefit but where their benefit has been slightly marginalized by an outside factor or one or more of the *Sugarland* limiting factors, the average fee award is in the range of \$700,000 to \$800,000.¹³⁸

Finally, there are situations when a very substantial benefit has been obtained, but the efforts of the plaintiffs' attorneys are only minimally related to the achievement of this benefit. An example of this is a disclosure that was immediately offered following the initiation of a lawsuit, but nonetheless would have likely been disclosed at a later point.¹³⁹ In these situations, Delaware courts have offered a minimal award based on the qualitative importance of the benefit, and the social policy of encouraging the enforcement of proper disclosure by corporations.¹⁴⁰ Fearing the prospect of potentially paying substantial attorney fee awards for material disclosures, it is not uncommon for defendants to negotiate a higher than expected fee award for these benefits that have been greatly marginalized by the *Sugarland* factors.¹⁴¹ Although no case law is available to quantify an average value for an award of this type, this author hypothesizes that it would be in the \$70,000 to \$80,000 range, since that appears to be the minimal fee awarded.¹⁴²

¹³⁷2008 WL 1128721, at *4 (Del. Ch. Apr. 11, 2008).

¹³⁸*See, e.g., Del Monte*, 2011 WL 2535256, at *9-*10 (distinguishing the \$800,00 fee award in *Lear*, where the value of the fee award for a very material benefit was reduced because plaintiff's counsel uncovered facts that were already known by the Lear board, unlike in *Del Monte* where the facts were not previously disclosed to the Del Monte board).

¹³⁹*See Brinckerhoff v. Tex. E. Prods. Pipeline Co.*, 986 A.2d 370, 384 (Del. Ch. 2010) (quoting *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 622 (Del. Ch. 2005)) ("By suing on the [initial] proposal [to negotiate a going private merger], the plaintiffs' lawyers can claim that they are responsible, in part, for price increases in a deal context in which price increases are overwhelmingly likely to occur . . .").

¹⁴⁰*See Brinckerhoff*, 986 A.2d at 397 (awarding only \$80,000 for supplemental disclosures because "the objectors did not add meaningfully or create the type of benefits that merit more than a nominal fee award"). *But see* James D. Cox, *The Social Meaning of Shareholder Suits*, 65 BROOK. L. REV. 3, 6 (1999) ("[S]hareholder suits, if commonly understood to be frivolous, will not in their commencement, prosecution and settlement affirm the social norms the suit's defendants allegedly violated.").

¹⁴¹*See Cox Commc'ns*, 879 A.2d at 642 (awarding a fee larger than the court otherwise would have given due to the size of the obtained benefit and the negotiation of the fee by the defendants).

¹⁴²*See Brinckerhoff*, 986 A.2d at 397 (awarding \$80,000 after noting that only a marginal

b. *Material Disclosures*

In a large number of cases awarding attorneys' fees following a shareholder litigation suit, which resulted in a supplemental disclosure, the benefit achieved falls within the category of a material disclosure. Examples of material disclosures include disclosures of new details of corporate activity during the "go shop" period,¹⁴³ withheld information from fairness reports,¹⁴⁴ and disclosures of future revenue and cash flow predictions.¹⁴⁵ These are benefits that are considered to have the potential to be valuable in the decision-making process, but are not necessarily determinative of how a shareholder will vote.¹⁴⁶ As with the very material disclosures, the fees are broken down into three subcategories depending upon the degree in which the plaintiff shareholder was responsible for achieving the disclosure under the *Sugarland* analysis.

When the material supplemental disclosure is directly related to the plaintiff shareholders' efforts, and not limited by any of the other *Sugarland* factors, the average award for one to three of these disclosures is \$400,000 to \$500,000.¹⁴⁷ This benefit category, the most commonly awarded for supplemental disclosure, is most likely responsible for the misguided perception that all supplemental disclosures are worth this amount.¹⁴⁸ For

benefit was conferred, but "[n]evertheless, under [Delaware] law, the supplemental disclosures merit a fee award of some amount").

¹⁴³See *In re James River Grp., Inc. S'holders Litig.*, 2008 WL 160926, at *1 (Del. Ch. Jan. 8, 2008).

¹⁴⁴See *id.*

¹⁴⁵See Transcript of Settlement Conference and Plaintiffs' Application for Attorneys' Fees at 10, *In re Clariant, Inc. S'holders Litig.*, C.A. No. 5932-VCS (Del. Ch. Jun. 15, 2011); Transcript of Settlement Hearing at 8, *In re Monogram Biosciences, Inc. S'holders Litig.*, C.A. No. 4703-CC (Del. Ch. Jan. 26, 2010).

¹⁴⁶See *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396-97 (1970); Transcript of Rulings of the Court from Settlement Hearing at 3-4, *In re Valeant Pharm. Int'l S'holders Litig.*, C.A. No. 5644-VCS (Del. Ch. Jan. 24, 2011) (noting that there were modest disclosures, but that "additional information regarding value of the combined entity, the value of the company, [and] some of the incentives of financial advisors . . . could be of interest to a stockholder deciding how to vote on th[e] transaction").

¹⁴⁷See *James River Grp.*, 2008 WL 160926, at *2 (awarding \$400,000); Transcript of Settlement Conference and Plaintiffs' Application for Attorneys' Fees at 42-43, *In re Clariant, Inc. S'holders Litig.*, C.A. No. 5932-VCS (Del. Ch. June 15, 2011) (noting that \$450,000 in attorneys' fees was agreed to in a settlement because it was "within the range of fairness for a fee [pertaining to this type of benefit] in Delaware"); Transcript of Rulings of the Court from Settlement Hearing at 6, *Valeant Pharm.*, C.A. No. 5644-VCS (awarding \$420,000 for disclosures); Transcript of Status Conference at 9, *In re Burger King Holdings, Inc.*, S'holders Litig., C.A. No. 5808-VCL (Del. Ch. Jan. 19, 2011) (noting that the Court of Chancery routinely awards \$400,000 to \$500,000 for benefits of this nature); Transcript of Settlement Hearing at 20, *In re BJ Servs. Co. S'holders Litig.*, C.A. No. 4851-VCN (Del. Ch. July 15, 2010) (awarding \$500,000).

¹⁴⁸See *supra* notes 116-19 and accompanying text.

those material benefits that were related to the plaintiff shareholder litigation seeking a fee award, but have been marginally reduced in merit and value by one or more of the *Sugarland* factors, the average fee award is in the \$150,000 to \$200,000 range.¹⁴⁹ Lastly, material benefits that were achieved, but had only a minimal relation to the efforts of the plaintiff shareholder litigation, or were significantly limited by the *Sugarland* factors, have generally not been awarded a fee.¹⁵⁰

c. *Minimally Material Disclosure*

Many fee applications for supplemental disclosures are significantly reduced by the Court of Chancery for being of little to no benefit to the corporation's shareholders. In order to receive compensation, the plaintiffs' attorney should show that they were completely responsible for the minimal benefit conferred.¹⁵¹ Examples of minimally material benefits conferred as a result of plaintiffs' litigation efforts may include a corrected factual misstatement on the company's proxy statement or information that provided nominal benefits to shareholders in making an informed decision on a merger vote.¹⁵² For example, in *In re BEA Systems, Inc. Shareholders Litigation*, the defendants corrected two misstatements on their proxy materials after the plaintiffs pointed it out in their complaint.¹⁵³ This minimal material benefit was enough to warrant a modest fee award because the corrections "were of some benefit to the class."¹⁵⁴ The average award of fees for this category is \$70,000 to \$90,000.¹⁵⁵ Lastly, *de minimus* material

¹⁴⁹The author derived this range from analyzing a number of cases awarding plaintiffs' attorney fees where there was a material disclosure. See, e.g., *LA State Emps. Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *10 (Del. Ch. Sept. 19, 2001) (awarding \$140,000).

¹⁵⁰See *Waterside Partners v. C. Brewer & Co., Ltd.*, 739 A.2d 768, 770 (Del. 1999) (denying a fee award when the corporate benefit resulted from a proxy contest rather than a contemporaneous derivative action).

¹⁵¹It even appears that a fee is not guaranteed in these situations in light of the fact that this determination is within the discretion of the court, and the court may in fact determine that the benefit was not material at all. See *In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *21 (Del. Ch. Dec. 9, 2011) ("This Court has substantial discretion in the methods it uses and the evidence it relies upon [when determining the fees and whether the benefit was material].").

¹⁵²See, e.g., *Brinckerhoff v. Tex. E. Prods. Pipeline Co.*, 986 A.2d 370, 397 (Del. Ch. 2010) (awarding a modest fee award because "[t]he supplemental disclosures provided some additional information and conferred a marginal benefit by helping to ensure that the vote on the Merger was informed").

¹⁵³2009 WL 1931641, at *1 (Del. Ch. June 24, 2009).

¹⁵⁴*Id.*

¹⁵⁵See, e.g., *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *21 (Del. Ch. Apr. 29, 2011) (awarding \$75,000 in fees); *Brinckerhoff*, 986 A.2d at 397 (awarding \$80,000 in fees); *BEA Sys.*, 2009 WL 1931641, at *1 (awarding \$81,297 in fees and expenses).

benefits that were the result of minor outside factors or related to a plaintiff shareholder litigation that had been marginally reduced in value by the *Sugarland* factors, have not been shown to qualify for a fee award.¹⁵⁶

D. Putting it All Together

This section gives a quick checklist to go through in applying the fee prediction guidelines established above. By following this list in order, any party involved in a fee award calculation relating to a shareholder suit should be able to quickly determine a narrow value range, allowing for informed settlement negotiations and consistency between cases.

First, make sure the initial hurdles outlined under Part III.A are cleared.¹⁵⁷ These rarely prevent fee awards, as it is rather simple to prove a claim was meritorious and was at least minimally related to a benefit achieved for the shareholders.¹⁵⁸

Second, one must identify what type of award has been created. For example, was it a monetary benefit, like an increase in the price per share being offered, or was it a non-monetary benefit that assisted all of the shareholders in a merger vote?

If it was a monetary benefit, refer to Part III.B of this Note, as a common fund has been created.¹⁵⁹ If the plaintiff was completely responsible for the achieved benefit while working on a pure contingent fee basis, expect a large percentage-based award to be approved.¹⁶⁰ If the plaintiff was only partially responsible, or was working on something other than a pure contingent basis, expect a *quantum meruit* calculation in the \$400 per billable hour range.¹⁶¹

If the benefit was non-monetary, first determine the level of materiality for the benefit achieved.¹⁶² Was it exceptional, and thus very material, or was it only minimally beneficial to the decision process and thus within the "minimally material" category? Refer to the chart in the Data Appendix and match the level of materiality with the degree to which the *Sugarland* factors reduced the value of the award.¹⁶³ This will provide an estimated fee range.

¹⁵⁶See *supra* note 65 and accompanying text.

¹⁵⁷See *supra* Part III.A.

¹⁵⁸See *supra* notes 55-58 and accompanying text.

¹⁵⁹See *supra* Part III.B.

¹⁶⁰See *supra* notes 69-70 and accompanying text.

¹⁶¹See *supra* notes 90-93 and accompanying text.

¹⁶²See *supra* Part III.C.

¹⁶³See *infra* Data Appendix.

IV. THE "X" FACTOR: MARKET INFLUENCES ON DELAWARE JUDGES

Irrespective of this Note's guide to reasonably ascertaining the calculation of attorneys' fees in a particular matter, it is impossible to develop a precise calculation, because fee awards are always within the sound discretion of the court.¹⁶⁴ The trend of plaintiffs' attorneys seeking forums outside of Delaware¹⁶⁵ has led for a call by some practitioners to change the corporate structure to require that these suits be brought in the state that the company is incorporated, which is often Delaware.¹⁶⁶ The trend out of Delaware, however, may prove to be unnecessary because the Delaware Court of Chancery appears to be responding to the current market conditions.¹⁶⁷

On November 11, 2011, Chancellor Strine stood before the M&A bar and proclaimed that Delaware is not hostile to plaintiff fee-seeking efforts.¹⁶⁸ Recent Court of Chancery cases affirm Chancellor Strine's sentiment, and have indicated that the court will be friendlier to plaintiffs' attorneys moving forward. In *Southern Peru Copper*,¹⁶⁹ for example, the Court of Chancery awarded a record breaking fee (albeit in the less frequent "common fund" category of award) that produced headlines and signaled to practitioners that Chancellor Strine meant what he said.¹⁷⁰ Although the majority of the Delaware Supreme Court affirmed this award, Justice Berger pointed out in her dissent that despite discussing *Sugarland*, "[the court's] analysis . . . focused on the perceived need to incentivize plaintiffs' lawyers

¹⁶⁴See *supra* note 45 and accompanying text.

¹⁶⁵See *supra* note 4 and accompanying text.

¹⁶⁶See Micheletti & Parker, *supra* note 22, at 41 (seeking the application of a "state of incorporation rule" to solve the problems associated with forum shopping).

¹⁶⁷See Alison Frankel, *Strine to M&A bar: Don't stop believing . . . in Delaware*, REUTERS (Nov. 14, 2011), http://newsandinsight.thomsonreuters.com/Legal/News/2011/11_November/Strine_to_M_A_bar_Don_t_stop_believing_in_Delaware/; Ronald Barusch, *Dealpolitik: Is a Whopping Legal Fee a Marketing Pitch by a Delaware Court?*, WALL ST. J. BLOGS (Dec. 28, 2011, 3:32 PM) <http://blogs.wsj.com/deals/2011/12/28/dealpolitik-is-a-whopping-legal-fee-a-marketing-pitch-by-a-delaware-court/> ("The enormous fee award against [defendant] Grupo Mexico seems . . . to likely be part of a conscious strategy for marketing the Delaware courts.").

¹⁶⁸Frankel, *supra* note 167.

¹⁶⁹2011 WL 6866900, at *1 (Del. Ch. Dec. 29, 2011).

¹⁷⁰*Id.* (awarding \$304,742,604.45 in fees and expenses, plus post-judgment interest until the award is satisfied), *aff'd sub nom.*, Americas Mining Corp. v. Theriault, 2012 WL 3642345 (Del. Aug. 27, 2012). See also Maxwell S. Kennerly, *When \$35,000 An Hour in Attorneys' Fees Is Justified In Shareholder Lawsuits*, LITIG. & TRIAL BLOG (Dec. 21, 2011), <http://www.litigationandtrial.com/2011/12/articles/attorney/contingent-fee/attorneys-fee-shareholder-lawsuits/> (exclaiming "Hallelujah!" to the fact that the court recognized the risks in contingent fee litigation).

to take cases to trial."¹⁷¹ Furthermore, Vice Chancellor Laster in *In re Compellent Technologies, Inc. Shareholder Litigation* indicated that the court is less hostile to negotiated settlement efforts (even from passive defendants) by stating that "[t]he broad discretion that this Court enjoys when awarding attorneys' fees under the tractable multi-factor *Sugarland* test further alleviates the impetus for inquiry [into negotiated settlements]."¹⁷² Compare this with statements from only a year ago when the court criticized the plaintiffs for "suing on the announcement of every deal," in search of a quick fee award.¹⁷³ The change in rhetoric and willingness to award higher fees in the last few months seems to be less of a coincidence, and more of a response to market conditions that were driving plaintiffs away from Delaware.¹⁷⁴

These market factors may allow fee awards in the higher range established within the guideline above, at least in the near future. Although the trend of plaintiffs' filing suits outside of Delaware should decrease in frequency following this favorable shift by the Court of Chancery, there is still the underlying problem of fee unpredictability that has created this "race to the top" among the states.¹⁷⁵ The fee rubric employed by this Note aims to reduce the effectiveness of forum shopping for undeserving fee awards. The sense of predictability of fee awards offered by this guideline will also strike a more reasonable balance between the positive benefits of shareholder litigation (i.e., the policing of unscrupulous fiduciaries) and the actual benefit obtained.¹⁷⁶

¹⁷¹*Americas Mining Corp.*, 2012 WL 3642345, at *43 (Berger, J., dissenting).

¹⁷²*In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *19 (Del. Ch. Dec. 9, 2011).

¹⁷³Transcript of Courtroom Status Conference at 18-19, *Scully v. NightHawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010).

¹⁷⁴*See* Barusch, *supra* note 167.

¹⁷⁵The race to the top refers to the theory that states will allow more claims to proceed, and award higher fees in order to attract the litigation. *See* Jonathan Macey, *Delaware: Home of the World's Most Expensive Raincoat*, 33 HOFSTRA L. REV. 1131, 1132 (2005) ("The Delaware judiciary has created an environment in which lawsuits are plentiful, legal fees are high, and attorneys' fees generously awarded . . .").

¹⁷⁶*See* *Julian v. E. States Constr. Serv., Inc.*, 2009 WL 154432, at *2 (Del. Ch. Jan. 14, 2009). There, the Court of Chancery held that awarding the full amount of attorneys' fees in that case would foster the public policy of Delaware, which includes:

[P]roviding an incentive to stockholders to bring a derivative suit to enforce the rights of the corporation as a whole under circumstances in which filing suit to enforce only their individual rights would be prohibitively costly or otherwise impracticable, thereby leaving unchallenged actionable wrongs against the corporation.

Id. (quoting *Carlson v. Hallinan*, 925 A.2d 506, 548 (Del. Ch. 2006)).

V. CONCLUSION

Due to the lucrative nature of shareholder litigation suits, such suits will continue to be attractive to corporate plaintiffs' attorneys and be burdensome to the companies involved in merger agreements defending them.¹⁷⁷ The hope is that the guideline set forth in this Note will provide practitioners and courts with predictability in ascertaining fee awards in a particular matter. The ability to properly value fee awards is essential to giving defendant corporations the tools needed to offer a proper adversarial challenge to requested fee awards. Too often the fee award being requested is not challenged by the defendants because the company will "negotiate an attorneys' fee award that the defendants will pay in conjunction with the settlement."¹⁷⁸

When reviewing these uncontested negotiated fee applications that will be paid by the defendants, the Delaware Court of Chancery tends to defer to the stipulated amount if it falls within a "plausible" settlement range.¹⁷⁹ Instead of thinking that *all* non-monetary benefits achieved are worth \$500,000,¹⁸⁰ or are not worth the risk of litigating, defendants will be able to utilize this guide to challenge these benefits and reduce the frequency of undeserving fee awards that are achieved for the benefit of the plaintiffs' attorneys, not the stockholders as a whole. In addition, the predictability of fee awards offered by this guide should reduce the incentive to forum shop for jurisdictions that are seen as more likely to award higher attorneys' fees.¹⁸¹ Lastly, this guide will also serve as a quick reference for plaintiffs' attorneys (at least those that are not "frequent filers") in making a judgment call about when to pursue litigation, and what fee may be awarded as a result.

Jason W. Adkins

¹⁷⁷See Searcey & Jones, *supra* note 1 (concluding that the number of shareholder litigation suits has increased "because the practice has proven lucrative for plaintiffs' attorneys who know that companies are eager to be rid of litigation and have been settling quickly").

¹⁷⁸*In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *19 (Del. Ch. Dec. 9, 2011); see also Kazanoff, *supra* note 22, at 43 ("With plaintiffs in multiple jurisdictions, defense counsel charged with ensuring deal certainty may be motivated to negotiate and reach a settlement with plaintiffs' counsel who are the most willing to settle their claim and forgo a preliminary injunction hearing.").

¹⁷⁹See *Compellent Techs.*, 2011 WL 6382523, at *19.

¹⁸⁰See *supra* notes 113-14 and accompanying text.

¹⁸¹See Micheletti & Parker, *supra* note 22, at 8 (suggesting that one cause of the multi-jurisdictional litigation problem is due to the fact that "[i]t became well known in the early part of last decade that the Court of Chancery would not lavishly reward plaintiffs' counsel with fees arising from settled or mooted disclosure claims"); Kazanoff, *supra* note 22, at 43 (noting that "[b]y bringing a case in an alternative jurisdiction, plaintiffs may see an opportunity to obtain approval of a settlement—and a fee for their counsel—that might otherwise raise concerns in Delaware").

DATA APPENDIX

Expected benefit for 1-2 Supplemental Disclosures

	No <i>Sugarland</i> Limitations	Some <i>Sugarland</i> Limitations	Numerous <i>Sugarland</i> Limitations
Very Material Disclosure	\$900,000 to \$1.1 million	\$700,000 to \$800,000	\$50,000 to \$80,000
Material Disclosure	\$400,000 to \$500,000	\$150,000 to \$200,000	No Award
Minimally Material Disclosure	\$70,000 to \$90,000	No Award	No Award