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Case No. 8066-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SMITH, KATZENSTEIN & JENKINS LLP; HARWOOD FEFFER LLP; and THE LAW OFFICES OF CURTIS V. TRINKO, LLP;	)	
Plaintiffs,	)	
v.	)	C.A. No. 8066-VCL
FIDELITY MANAGEMENT & RESEARCH COMPANY; FMR, LLC; FIDELITY SECURITIES FUND: LEVERAGED COMPANY STOCK FUND; FIDELITY ADVISOR SERIES 1: ADVISOR LEVERAGED COMPANY STOCK FUND; FIDELITY ADVISOR HIGH YIELD PORTFOLIO; FIDELITY INVESTMENTS CANADA ULC, AS TRUSTEE FOR FIDELITY CANADIAN BALANCED FUND; PENSION RESERVES INVESTMENT MANAGEMENT BOARD OF MASSACHUSETTS HIGH YIELD BOND ACCOUNT; and STATE STREET BANK AND TRUST COMPANY, AS TRUSTEE FOR THE FOLLOWING SUCCESSORS IN INTEREST TO GMAM INVESTMENT FUNDS TRUST (GENERAL MOTORS HOURLY-RATE EPT HIGH YIELD (OPPORTUNISTIC) BOND PORTFOLIO): GENERAL MOTORS HOURLY-RATE EMPLOYEES PENSION TRUST 7N1J AND GENERAL MOTORS SALARIED EMPLOYEES PENSION TRUST 7N1L;	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: January 17, 2014
Date Decided: April 16, 2014

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LASTER, Vice Chancellor.

The plaintiffs are law firms who successfully prosecuted a class action lawsuit on behalf of the stockholders of Revlon, Inc., against Revlon's controlling stockholder and its board of directors. The plaintiffs' litigation efforts resulted in a significant monetary settlement for the class. The defendants are investment funds and entities affiliated with the Fidelity financial services group. Collectively, the Fidelity defendants held or controlled shares constituting approximately 75% of the class. After the plaintiffs began pursuing their case, but before the plaintiffs settled on behalf of the class, the Fidelity defendants settled their claims for (i) \$3.25 per share plus (ii) a contingent payment based on any additional amount that the plaintiffs obtained for the rest of the class. The plaintiffs ultimately settled for \$5.50 per share, and the Fidelity defendants collected their contingent payment. Through this action, the plaintiffs seek to recover an award of attorneys' fees and expenses from the Fidelity defendants for the benefits that their efforts conferred. This post-trial decision awards \$3,986,777 to the plaintiffs.

I. FACTUAL BACKGROUND

The case was tried on October 30 and 31, 2013. The parties introduced 202 documentary exhibits and relied on deposition testimony from seven witnesses. Three witnesses testified live at trial. The plaintiffs bore the burden of proving their claims by a preponderance of the evidence.

A. The Merger Proposal

MacAndrews & Forbes Holdings Inc. is Revlon's controlling stockholder. Before the events giving rise to this litigation, Revlon had two classes of stock outstanding. Revlon's Class A Common Stock was (and is) listed on the New York Stock Exchange.

Revlon had issued 48,250,163 shares of Class A Common, of which 20,042,428 were owned by the public and the balance by MacAndrews & Forbes (directly or through affiliates). Revlon had issued 3,125,000 shares of Class B Common Stock, all owned by MacAndrews & Forbes. Through its equity ownership, MacAndrews & Forbes controlled 75% of Revlon's voting power. The board of directors of Revlon (the "Board") consisted of four representatives from MacAndrews & Forbes and eight directors whom Revlon described as independent under the NYSE listing standards.

On April 13, 2009, MacAndrews & Forbes proposed to cause Revlon to effectuate a merger though which each publicly traded share of Revlon's Class A Common would be converted into the right to receive shares of a newly created Series A Preferred Stock that would not be listed on any securities exchange (the "Merger Proposal"). In response to the Merger Proposal, the Board formed a special committee with a mandate to evaluate the Merger Proposal, negotiate its terms, and recommend to the board whether or not to proceed with the transaction (the "Special Committee").

After the announcement of the Merger Proposal, four purported class actions were filed in this court against MacAndrews & Forbes and the members of the Board. Each of the complaints ignored the fact that MacAndrews & Forbes only had made a negotiable proposal and there as yet was no transaction to challenge. All of the complaints were skimpy on the details and suggested a lack of meaningful pre-suit investigation. After filing, the plaintiffs' law firms (collectively, "Old Counsel") engaged in a short-lived squabble over who would control the litigation, then agreed to consolidate their cases under a leadership structure where everyone had a role.

As soon as a leadership structure was established, all litigation activity ceased. The next item on the docket after the June 24, 2009 consolidation order was an August 14, 2009 letter advising the court that the parties had entered into a memorandum of understanding to settle the case.

B. The Exchange Offer

Meanwhile, on May 6, 2009, the Special Committee was formally constituted. Its membership comprised all of the Revlon directors other than the representatives of MacAndrews & Forbes. The Special Committee hired a legal advisor and a financial advisor. After conducting diligence and attempting to value the Series A Preferred, the financial advisor expressed concern about the fairness of the Merger Proposal. On May 22, the Special Committee conveyed those concerns to MacAndrews & Forbes and expressed a strong preference for an all-cash transaction.

As originally proposed, each share of the Series A Preferred would have (i) carried a liquidation preference of $3.74 per share, (ii) paid quarterly cash dividends equal to 12.5% of the liquidation preference per year, (iii) been entitled to mandatory redemption four years after issuance at a price equal to the liquidation preference plus accrued but unpaid dividends, (iv) been entitled to a contingent payment if a sale of Revlon was consummated within certain parameters and not later than two years after the merger, (v) received $1 if a sale of Revlon was not consummated within two years, and (vi) carried voting rights comparable to the Class A Common but without the right to vote on any merger, combination, or similar transaction (subject to certain exceptions). After hearing the Special Committee's concerns, MacAndrews & Forbes stood firm on its proposed structure, but offered to raise the dividend on the Series A Preferred from 12.5% to 12.75% and increase the liquidation preference from $3.74 to $4.75 per share. In return for these changes, the Series A Preferred no longer would entitle the holder to a contingent payment in the event of a sale of the company or a $1.00 per share special dividend in the event that no change of control transaction was consummated within two years.

On May 28, 2009, the Special Committee's financial advisor indicated that it could *not* render an opinion that the Merger Proposal was fair from a financial point of view to holders of the Class A Common, either under the initial or improved terms. Later that day, the Special Committee advised MacAndrews & Forbes that the Special Committee could not recommend either alternative.

While this was going on, the Special Committee's counsel was discussing with MacAndrews & Forbes's counsel how the transaction might be restructured so it could move forward without the impediment of the Special Committee and its financial advisor. The lawyers hit upon the idea of Revlon launching a tender offer in which Class A Common holders could exchange their shares for the same Series A Preferred (the "Exchange Offer"). The Exchange Offer would not be conditioned on special committee approval but would include a non-waivable majority-of-the-minority tender condition. After learning from its counsel about this alternative path, the Special Committee disbanded.

Between June 10 and July 22, 2009, MacAndrews & Forbes negotiated the terms of the Exchange Offer with the management team of its controlled subsidiary. They agreed that the Series A Preferred would have the same terms contemplated by the Merger Proposal but would pay a dividend of 12.75%. On July 29 the Board authorized Revlon to proceed with the Exchange Offer. The Board declined to make any recommendation to the Class A Common stockholders on whether to tender their shares.

C. Fidelity's Role

While developing the eventually withdrawn Merger Proposal and the subsequently employed Exchange Offer, MacAndrews & Forbes consulted with the Fidelity defendants. In early 2009, before making a proposal to Revlon, MacAndrews & Forbes representatives discussed the contemplated transaction with Tom Soviero, the portfolio manager of several Fidelity funds, and Nate Van Duzer, a Fidelity managing director who focused on special situations for Fidelity's mutual fund business. After MacAndrews & Forbes made its proposal, the Special Committee's financial advisor discussed the Merger Proposal with Fidelity representatives.

The Fidelity representatives generally favored the Merger Proposal, at least in part because the Fidelity funds had idiosyncratic reasons for wanting to dispose of their Class A Common. The Fidelity funds that held the Class A Common were high-yield funds that had originally invested in Revlon debt, then exchanged that debt for Class A Common in 2004. The investment profile of the Class A Common did not match the investment criteria that the fund managers were supposed to follow. An instrument with a yield would match up better with the funds' investment criteria. The MacAndrews & Forbes proposal offered the fund managers an opportunity to realign their Revlon holdings with the investment criteria of the funds they managed.

In late May 2009, MacAndrews & Forbes informed Fidelity that the Merger Proposal was being restructured to take the form of the Exchange Offer and asked Fidelity to execute a support agreement by which the Fidelity funds would commit to tender their shares. MacAndrews & Forbes also asked Fidelity to review disclosures in draft Exchange Offer materials that described Fidelity's intention to tender. MacAndrews & Forbes hoped to use either a support agreement from Fidelity or an expression of Fidelity's intention to tender as an indication of fairness. If Revlon's other stockholders were not advised or did not understand that the Fidelity funds had idiosyncratic reasons for wanting to dispose of their Class A Common, then Revlon's stockholders might infer that what was good for Fidelity was good for them.

Fidelity declined to execute a support agreement. Fidelity also stated in a letter to Revlon dated July 29, 2009, that any decision Fidelity made relating to the Exchange Offer should not be relied on by any third parties—including the Revlon board—as an endorsement of the transaction. Fidelity asked that the Exchange Offer materials include these admonitions.

During the same period, Fidelity representatives had discussions with Revlon about Fidelity Management Trust Company ("FMTC"), which acted as the directed trustee for Revlon's 401(k) plan. As a directed trustee, FMTC had to follow the instructions of plan participants to tender their shares into the Exchange Offer, unless those instructions would violate ERISA. ERISA required that any exchange of plan participant shares be supported by adequate consideration. Because the Exchange Offer involved exchanging shares of publicly traded Class A Common, which had an observable market price, for shares of new Series A Preferred, which had no market price, FMTC needed grounds to believe that the Exchange Offer provided adequate consideration for the Class A Common. Otherwise, FMTC could not permit the plan participants to tender.

FMTC asked Revlon to obtain an opinion from a financial advisor to the effect that the Exchange Offer provided adequate consideration for the Class A Common (the "Adequate Consideration Opinion"). Revlon did not want to seek such an opinion and argued vigorously against it. Fidelity insisted, and Revlon eventually agreed to pay for an Adequate Consideration Opinion from Duff & Phelps LLC and to indemnify the firm for its work. But Revlon imposed two critical conditions. First, FMTC, rather than Revlon, would have to retain Duff & Phelps. Second, FMTC had to agree not to disclose the opinion to Revlon. Duff & Phelps opined that the consideration in the Exchange Offer was not adequate, and FMTC therefore did not permit any participants in the Revlon 401(k) plan to tender their shares into the Exchange Offer.

On August 10, 2009, Revlon launched the Exchange Offer. Revlon knew about the existence of the Duff & Phelps opinion. Revlon also knew that FMTC was not permitting any participants in the Revlon 401(k) plan to tender, which necessarily meant that Duff & Phelps had opined that the consideration was inadequate. Revlon nevertheless did not disclose the existence or contents of the Duff & Phelps opinion—or the view expressed by Duff & Phelps—in the Exchange Offer materials. The Exchange Offer materials did include multiple references to the Fidelity funds' intent to tender into the Exchange Offer and cited the Fidelity funds' intentions as a factor that the Revlon board and MacAndrews & Forbes considered in assessing the fairness of the offer.

D. Old Counsel Help Close The Deal.

As of September 10, 2009, the deadline for the Exchange Offer, fewer than half of Revlon's minority holders of Class A Common had tendered their shares. Revlon extended the Exchange Offer until September 17, but garnered only a small number of additional shares. To get around this problem, the Board sought to reduce the number of shares required to meet the minimum tender condition, which operated as a *de facto* waiver of the non-waivable condition. Old Counsel agreed to an amended memorandum of understanding that blessed this change.

After another extension, the Exchange Offer closed on October 7, 2009, satisfying the new, lower tender condition. The Fidelity funds tendered 6,933,526 shares of Class A Common Stock, representing 74.26% of the total 9,336,905 shares tendered.

E. Revlon's Third Quarter Earnings

Approximately three weeks after the Exchange Offer closed, Revlon made a pre-market announcement of positive earnings for the third quarter (the "Earnings Surprise"). Revlon's stock price shot up from a closing price of $5.75 on October 28, 2009, to a closing price of $8.24 per share on October 29. The stock continued to rise thereafter.

On December 21, 2009, the Delaware law firm of Smith Katzenstein & Furlow LLP (now Smith Katzenstein & Jenkins LLP) filed two new putative class actions challenging the Exchange Offer. In the first case, Smith Katzenstein's co-counsel was the Law Offices of Curtis V. Trinko, LLP. In the second case, Smith Katzenstein's co-

counsel was Harwood Feffer LLP. These three law firms are the plaintiffs in the current litigation. This decision refers to them collectively as "New Counsel."

Unlike the original four actions, which challenged a negotiable proposal, the complaints filed by New Counsel challenged an actual transaction—the Exchange Offer—and asserted that its terms were substantively unfair. With challengers on the scene, Old Counsel roused themselves. On January 6, 2010, Old Counsel filed an amended complaint, and on January 12, they moved to consolidate the two new actions with the prior consolidated action and asked the court to confirm the original leadership structure. The defendants sought to enforce their settlement agreement with Old Counsel. Pursuant to that agreement, Old Counsel had favored the defendants with a capaciously broad and synonym-encrusted release on behalf of a non-opt-out class encompassing all Revlon stockholders from April 20, 2009, through the consummation of the Exchange Offer, together with "their successors in interest and transferees, immediate and remote." Ex. A to Defs.' Mot. To Enforce Settlement Agreement at 9-10, *In re Revlon, Inc. S'holders Litig.*, Consol. C.A. No. 4578-VCL (Del. Ch. Jan. 8, 2010). The settlement agreement contemplated releases

> by the Plaintiffs and the Class, fully finally and forever compromising, settling, extinguishing, discharging and releasing with prejudice, and an injunction barring, any and all claims, demands, actions or causes of action, rights, liabilities, damages, losses, obligations, judgments, suits, matters and issues of any kind or nature whatsoever, whether known or unknown (including Unknown Claims (as defined below)), contingent or absolute, suspected or unsuspected, disclosed or undisclosed, that have been or could have been asserted in the Delaware Actions or in any court, tribunal or proceeding (including, but not limited to, any claims arising under federal or state law, or any other law or regulation, including claims relating to alleged fraud, breach of any duty, negligence or violation of federal or state

> securities laws) by or on behalf of the Plaintiffs and any and all of the members of the Class (and the Plaintiffs' and Class members' present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, associates, affiliates, employers, employees, agents, consultants, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financing, legal and other advisors, investment bankers, underwriters, lenders, and any other representatives of any of these persons and entities), whether individual or class, legal or equitable, against any and all Defendants in the Actions, and/or any of their families, parent entities, associates, affiliates or subsidiaries and each and all of their respective past, present or future officers, directors, stockholders, representatives, employees, attorneys, financial or investment advisors, lenders, consultants, insurers, auditors, accountants, investment bankers, commercial bankers, engineers, advisors or the agents, heirs, executors, trustees, general or limited partners or partnerships, personal representatives, estates, administrators, predecessors, successors and assigns of any of them, including without limitation, Barclays, its affiliates and their respective directors, officers, employees, advisors and other representatives (collectively, the "Released Persons") which the Plaintiffs or any member of the Class ever had, now has, or hereafter can, shall or may have by reason of, arising out of, relating to or in connection with the allegations, facts, events, transactions, acts, occurrences, statements, representations, misrepresentations, omissions or any other matter, thing or cause whatsoever, or any series thereof, embraced, involved, set forth or otherwise related to the Claims, the transactions, occurrences and events set forth in the complaints in the Delaware Actions, the Proposal, the Revised Transaction, the Senior Subordinated Term Loan and/or the Contribution Agreement, including without limitation the Exchange Offer and any amendments or revisions thereto and any approvals, authorizations, disclosures, non-disclosures or public statements made in connection with any of the foregoing (collectively, the "Settled Claims"); provided, however, that the Settled Claims shall not include claims to enforce the Stipulation and the Settlement.

Id. at 10-11 (the "Global Release"). Not surprisingly, the defendants wanted to preserve the Global Release. Old Counsel also preferred the settlement, under which they were likely to get a fee. Old Counsel and the defendants therefore submitted a proposed stipulation and order which contemplated that the defendants would withdraw their motion to enforce the settlement and Old Counsel would proceed with confirmatory discovery in support of the settlement.

In the current action involving New Counsel's claim to recover a fee from the Fidelity defendants, Fidelity has maintained consistently that the Fidelity defendants possessed unique claims against Revlon arising out of the Exchange Offer. The Fidelity defendants also have argued that to the extent Revlon's stockholders were harmed by tendering shares into the Exchange Offer, the Fidelity funds were better positioned than New Counsel to pursue those claims. Yet in the face of the Global Release, which would extinguish all claims relating to the Exchange Offer, and despite efforts by the defendants and Old Counsel to move forward with a settlement that would implement the Global Release, the Fidelity defendants did nothing. They did not file a case, did not seek to intervene, did not file an objection, and did not take any other action designed to preserve or pursue their claims. Only New Counsel sought to challenge the Exchange Offer on behalf of Revlon's stockholders.

On March 5, 2010, the court held a hearing on the leadership structure in the underlying action. The court found that Old Counsel had not provided adequate representation for the class and replaced them with New Counsel. *See In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940 (Del. Ch. 2010). Shortly thereafter, Revlon informed New Counsel that the non-monetary relief secured by Old Counsel, such as it was, would remain in place and that the defendants would not seek to enforce the Global Release.

Having been placed in the leadership role, New Counsel filed an amended complaint, commenced written discovery, and retained an expert. Unlike Old Counsel, New Counsel vigorously prosecuted the case. New Counsel responded to discovery on behalf of the class, deposed multiple witnesses, and filed numerous document requests, interrogatories, motions for commission, and subpoenas.

F. Fidelity Responds To The SEC.

On March 19, 2010, Fidelity received a letter from the SEC stating that the agency was conducting a non-public inquiry into events relating to the Exchange Offer and asking Fidelity to produce documents. Jody Forchheimer, Senior Vice President, Deputy General Counsel, oversaw Fidelity's response to the SEC investigation. Fidelity's in-house legal team investigated the Exchange Offer, reviewed the civil complaints against Revlon, identified potential document custodians, interviewed the Fidelity employees involved in the communications with Revlon, and collected, reviewed, and produced documents. Fidelity also consulted with Dechert LLP, which had provided legal advice to Fidelity mutual funds for many years.

In addition to document production, Fidelity produced employees who provided multiple days of on-the-record testimony for the SEC in 2010 and 2012. Fidelity's in-house counsel and Dechert prepared the Fidelity employees for their testimony.

As the investigation progressed, the SEC focused on the Adequate Consideration Opinion, including how it was obtained and to whom it was provided. Fidelity came to believe that Revlon had not been forthright about the Adequate Consideration Opinion. Fidelity also came to the conclusion that Revlon misused Fidelity's name in the public disclosures relating to the Exchange Offer.

G. New Counsel Pursue The Case.

With the Delaware litigation and the SEC investigation moving forward, Revlon decided that it would be strategically beneficial to settle with Fidelity. Just as Revlon had tried to use Fidelity's intent to tender into the Exchange Offer as an indicator of fairness, a settlement with Fidelity could be presented to this court as a fair resolution on the theory that it represented how a large stockholder valued the plaintiffs' claims. Once Fidelity had settled, it would be difficult and risky for New Counsel to go to trial and seek more. Revlon and its counsel believed that if they settled with Fidelity, New Counsel would sign on for the same deal and the Delaware litigation would be resolved. A settlement also might help with the SEC inquiry by showing that regardless of whether Revlon agreed with the SEC's position, the company was trying to do the right thing.

In February 2011, Schwartz approached Van Duzer, one of the Fidelity representatives who had participated in the initial discussions about the Merger Proposal, about a potential settlement. Van Duzer put Schwartz in touch with Forchheimer. In March, Forchheimer participated in a series of calls with attorneys from Skadden, Arps, Slate, Meagher & Flom ("Skadden"), who were representing Revlon. During those calls, Revlon socialized a settlement figure in the range of $2.00 per share. Forchheimer and Skadden ultimately agreed to have a lawyers-only meeting on April 6 to discuss a possible settlement. In advance of the meeting, Forchheimer retained Steven Feirson of Dechert to assist with settlement negotiations.

At the meeting on April 6, 2011, Forchheimer raised for the first time Fidelity's belief that Revlon had misused Fidelity's name in connection with the Exchange Offer (the "Name Misuse Issue"). The lead lawyer from Skadden, Robert Zimet, had no idea what she was talking about. Forchheimer also raised for the first time Fidelity's belief that Revlon had not been forthright about the Adequate Consideration Opinion and Fidelity's disappointment at being forced to participate in the SEC inquiry (the "Adequacy Opinion Issue"). Zimet was aware of the Adequacy Opinion Issue, but he considered it to be unimportant for the settlement negotiations.

The bulk of the meeting was devoted to discussing the merits of claims relating to Revlon's third quarter earnings announcement. The parties held a follow-up teleconference on April 15, 2011, at which Revlon presented its experts' opinions on liability and damages. During that call, Revlon made a formal settlement offer of $2.00 per share.

In this case, Fidelity has argued that Revlon made this settlement offer in significant part because Fidelity raised the Name Misuse Issue and the Adequacy Opinion Issue. While Fidelity may have attached importance to those issues, the record reflects that Revlon (i) did not regard those issues as important or as raising compensable claims, (ii) was focused on the claims relating to the third quarter earnings announcement, and (iii) made its initial $2.00 per share offer based solely on the potential risk associated with the third quarter earnings claims.

H. Revlon And Fidelity Negotiate.

After the meeting on April 6, 2011, and further demonstrating that the parties were focused on claims associated with Revlon's third quarter earnings, Fidelity retained an expert to perform an event study analysis of the Earnings Surprise. Fidelity then countered Revlon's $2.00 per share offer with a demand for $8.00 per share. The parties, along with their counsel and their experts, met again on July 1. At that meeting, the parties' experts exchanged views regarding damages. At the end of the meeting, Revlon offered Fidelity $2.50 per share. Fidelity rejected that offer and left without making a counteroffer. Over the weeks that followed, Feirson and Schwartz continued to negotiate over price. Ultimately, at the end of August 2011, Revlon and Fidelity agreed to settle for $3.25 per share.

Fidelity insisted that the same deal be offered to the rest of the class. A global settlement benefited Fidelity in at least two ways. First, Fidelity feared that its reputation would be harmed if it appeared that Fidelity had settled on favorable terms while smaller stockholders were left behind. Second, a global settlement would resolve the Delaware litigation and eliminate the burden that the case would impose on Fidelity employees, who otherwise would have to respond to discovery, sit for depositions, and potentially appear at trial.

Fidelity believed that $3.25 per share was a good deal and that New Counsel would get on board. In an effort to convince New Counsel to accept the offer, Fidelity provided New Counsel with a copy of its expert's damages analysis. New Counsel, however, disagreed with Fidelity's analysis because it only looked at compensatory damages and did not incorporate the prospect of rescissory damages. Based on the possibility of rescissory damages, New Counsel believed that $3.25 per share was inadequate, and they rejected the offer on behalf of the class.

After New Counsel rejected the proposed settlement, Fidelity and Revlon continued to negotiate. Fidelity was anxious to finalize a settlement, because as long as non-public settlement negotiations were taking place, Fidelity's portfolio managers could not buy or sell Revlon stock. But Fidelity feared the public relations hit if Fidelity accepted $3.25 and New Counsel got more.

In an effort at compromise, Revlon proposed that if New Counsel secured a significantly higher price, Fidelity could receive a portion of it, but only if the higher price exceeded an intermediate "free zone" where Fidelity would not receive more. In this case, Fidelity has argued that it charitably proposed the "free zone" to facilitate a global settlement so that additional funds could go to the non-Fidelity class members. The record reflects that Fidelity wanted a contingent upside payment if New Counsel obtained more and that Revlon countered with the "free zone" to limit its exposure and restrict Fidelity's ability to eat its cake and still have it. As evidenced by a contemporaneous email to Feirson from an attorney representing MacAndrews & Forbes, the purpose of the "free zone" was "to bridge the gap between Fidelity's desire for greater value if the class plaintiffs achieve a better settlement and defendants' desire to achieve greater certainty through a settlement with Fidelity." JX 104. As the email explained, "what Fidelity want[ed was] akin to 'insurance' protection against a later, larger settlement" and therefore certain "insurance-inspired principles" should apply. *Id.* The "free zone" was one of those insurance-inspired principles.

Revlon initially offered a hard cap on liability above $4.00 per share, which evolved into a "free zone" from $4.00 per share to $10.00 per share. Fidelity countered with a "free zone" from $4.00 per share to $6.00 per share. Over the next few months, Revlon and Fidelity negotiated extensively over the "free zone," and they ultimately agreed on a zone from $4.00 per share to $8.00 per share. Negotiations broke down, however, over the issue of whether Fidelity would receive additional compensation if New Counsel obtained a judgment against Revlon or only if Revlon settled with New Counsel before trial. Unable to resolve that issue, Fidelity broke off settlement negotiations on March 8, 2012.

At that point, Fidelity determined that it "would be part of the class action and win, lose or draw with the rest of the class." JX 189 at 128 (Forchheimer Dep.). As of March 8, 2012, Fidelity had decided to let New Counsel litigate the case and to rely on New Counsel's efforts.

I. Fidelity And Revlon Reach A Deal.

On April 13, 2012, Revlon moved for a commission to obtain documents from Fidelity and to depose one of its representatives. New Counsel offered to oppose the motion for Fidelity, and Fidelity accepted New Counsel's offer. New Counsel argued that Fidelity was part of the class and that typically parties were not permitted to take discovery of class members. The court held that by communicating with Revlon about the Merger Proposal and the Exchange Offer, Fidelity had opened itself to discovery about those matters.

Four days after the court granted the motion for a commission, Fidelity and Revlon renewed their settlement discussions. They executed a memorandum of understanding on June 21, 2012, and signed a final settlement agreement on July 20.

Under the terms of the settlement agreement, Fidelity would receive up to $0.575 per share in additional compensation if the rest of the class settled or obtained a judgment for an amount between $3.25 per share and $4.00 per share. Revlon would not owe any additional compensation beyond the $0.575 per share if the rest of the class settled or obtained a judgment for an amount between $4.00 per share and $8.00 per share. Beyond $8.00 per share, Fidelity would participate with the rest of the class dollar for dollar. This decision refers to this agreement as the "Fidelity Settlement."

During the final negotiations over the Fidelity Settlement, Forchheimer believed that New Counsel had performed valuable services and "would expect to get paid." JX 189 at 85 (Forchheimer Dep.). She assumed, however, that Revlon would pay their fee. *Id.* at 85-86. At the time, Forchheimer had not researched Delaware law regarding the common fund and common benefit doctrines.

J. New Counsel Settle With Revlon.

After Revlon and Fidelity had agreed to a settlement, Revlon approached New Counsel about settling the claims for the rest of the class. On June 20, 2012, Revlon made an initial offer of $4.25 per share. New Counsel countered with an offer of $6.50 per share. On August 10, the parties agreed to settle for a total dollar figure that equated to $5.45 per share. This decision refers to this agreement as the "New Counsel Settlement."

The New Counsel Settlement ultimately yielded $5.50 per share for the non-Fidelity class members because certain Revlon executives were excluded from the class, which increased the per-share consideration. Under the terms of the Fidelity Settlement, the Fidelity defendants received an additional $0.575 per share because New Counsel achieved a settlement that exceeded $4.00 per share.

After settling with Revlon, New Counsel contacted Fidelity about compensation for the benefits that New Counsel had conferred on the Fidelity defendants. Fidelity declined to pay New Counsel anything. On November 27, 2012, New Counsel filed this lawsuit against the Fidelity defendants for the compensation they believed they were due.

On March 28, 2013, the court approved the New Counsel Settlement and awarded New Counsel fees and expenses of $2 million. The fee award represented solely compensation for the benefits that New Counsel conferred on the class members other than the Fidelity defendants. This case proceeded through discovery and trial.

II. LEGAL ANALYSIS

An attorney can recover an award of fees and expenses when the attorney creates a common fund for, or confers a common benefit upon, a readily ascertainable group. *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006). "The purpose underlying these fee-shifting doctrines is to balance the equities." *Id.* at 1090. They are "founded on the equitable principle that those who have profited from litigation should share its costs." *Goodrich v. E.F. Hutton Gp., Inc.*, 681 A.2d 1039, 1044 (Del. 1996). "Otherwise, 'persons who obtain the benefit of a lawsuit without contributing to its cost [freeriders] are unjustly enriched at the successful litigant's expense.'" *Id.* (alteration in original) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

The power to award fees for a common fund or benefit "is a flexible one based on the historic power of the Court of Chancery to do equity in particular situations." *Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1166 (Del. 1989). To be entitled to a fee award, the attorney does not have to sue in a representative capacity. "[T]he critical inquiry is not the status of the plaintiff but the nature of the corporate or class benefit which is causally related to the filing of suit." *Id.* "The form of suit is not a deciding factor; rather, the question to be determined is whether a plaintiff, in bringing a suit either individually or representatively, has conferred a benefit on others." *Id.*

To obtain an award of attorneys' fees and expenses from the Fidelity defendants, New Counsel must show that (i) the claims in the underlying lawsuit were meritorious at the time it was filed, (ii) the underlying lawsuit created a common fund for, or conferred an identifiable benefit on, the Fidelity defendants, and (iii) a causal connection existed between the litigation and the benefit. *Dover Historical Soc'y,* 902 A.2d at 1089; *accord Tandycrafts*, 562 A.2d at 1167. When defendants have acted unilaterally to cure the alleged wrong or agreed to a settlement, they "bear the burden of demonstrating that the lawsuit did not in any way cause their action." *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 880 (Del. 1980). "It is the defendant, and not the plaintiff, who is in a position to know the reasons, events and decisions leading up to the defendant's action," and it is therefore appropriate to place the disclosure burden on the defendant. *Id.* Although that principle arguably could apply to the Fidelity defendants and Revlon, the burden of proof was not outcome-determinative, and this decision has made factual findings on the assumption that the burden remained with New Counsel.

A. New Counsel's Complaints Were Meritorious When Filed.

The first requirement for a fee award is that New Counsel filed meritorious complaints in the underlying action. The Fidelity defendants do not dispute that the complaints challenging the Exchange Offer were meritorious when filed. The first requirement is therefore satisfied.

B. New Counsel Conferred Benefits On All Revlon Stockholders, Including The Fidelity Defendants.

The second requirement for a fee award is that New Counsel's efforts created a common fund for, or conferred a common benefit on, the Fidelity defendants. New Counsel conferred a common benefit on all of Revlon's Class A Common stockholders, including the Fidelity defendants, by filing their cases challenging the Exchange Offer, taking over the litigation, and eliminating the preclusive effect of the Global Release.

Before New Counsel's involvement in the case, Old Counsel had negotiated a settlement under which the putative class would receive no monetary relief whatsoever and would release all claims against Revlon and its co-defendants. At that point, the Fidelity defendants were not participating in the litigation, except as passive putative class members. Fidelity had not considered filing a lawsuit or raising an objection to the settlement. The trial record demonstrates that Fidelity generally does not become involved in stockholder litigation. Forchheimer could not recall Fidelity ever filing a lawsuit against the directors of a company that Fidelity's funds had invested in, much less a challenge to a particular transaction. 2 Trial Tr. 406-07. Consistent with its general practice, Fidelity intended to let Old Counsel proceed with the original settlement.

Inconveniently for the Fidelity defendants and all of Revlon's stockholders, the amended memorandum of understanding bound the parties in the underlying action to enter into a stipulation containing the Global Release. As a class member, Fidelity would have been bound by the Global Release, which would have released "any and all claims" against Revlon and its co-defendants. Assuming Fidelity could have stated a claim based on the Name Misuse Issue and the Adequacy Opinion Issue, those claims would have been foreclosed by the Global Release. If New Counsel had not prevented Old Counsel from settling the underlying action, the Fidelity defendants and Revlon's other common stockholders would have lost their ability to challenge the Exchange Offer and assert any of their claims.

Due to New Counsel's efforts, the underlying litigation instead resulted in a common fund for the benefit of Revlon's Class A Common stockholders, including the Fidelity defendants. The aggregate common fund had two components: (i) the portion contributed by the New Counsel Settlement and (ii) the portion contributed by the Fidelity Settlement.

Because the Fidelity defendants entered into the Fidelity Settlement before New Counsel achieved the New Counsel Settlement, and because the Fidelity defendants gave up as part of their settlement a portion of their entitlement to participate fully in the New Counsel Settlement, this case raises issues of shared causation. Those issues are addressed as part of the third element for determining a fee award. *See infra* Part II.C. For purposes of the second element, New Counsel's efforts in the underlying litigation generated a common fund for the benefit of Revlon's Class A Common stockholders, including the Fidelity defendants. The second element is satisfied.

C. New Counsel's Causal Role In Generating The Benefits Conferred

The third requirement for a fee award is the existence of a causal connection between New Counsel's efforts and the benefits conferred. In granting a fee award for the New Counsel Settlement, this court determined that New Counsel were the sole cause of the common fund of $5.50 per share received by the Revlon Class A Common stockholders other than the Fidelity defendants. The critical question in this case is the degree to which New Counsel contributed causally to the Fidelity Settlement.

For purposes of analyzing the causal relationship, the benefits conferred by the Fidelity Settlement can be broken down into three components: (i) the $2.00 per share that Revlon initially offered, (ii) the incremental $1.25 per share that Fidelity obtained, and (iii) the contingent payment of $0.575 per share. Before analyzing each component, this decision addresses the Fidelity defendants' principal defense: their claim that because they retained their own counsel and engaged in settlement negotiations with Revlon, New Counsel cannot claim any credit for the benefits conferred by the Fidelity Settlement.

1. The Fidelity Defendants' "Own Counsel" Defense

The Fidelity defendants argue for a bright-line rule that any party who retains its own counsel cannot be liable to another party's counsel or to class counsel for a fee. According to the Fidelity defendants, a party that hires its own counsel has gone its own way and is responsible for its own fate, thereby breaking the chain of causation necessary for a fee award. This position is contrary to long-standing Delaware precedent.

The Delaware Supreme Court has recognized that counsel can recover a fee even though multiple factors may have contributed causally to the creation of a common fund or benefit. The leading Delaware decision on fee awards in common fund and common benefit situations is *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980). Under *Sugarland*, when quantifying the amount of a fee award, the court must consider the results achieved by counsel. *Id.* at 149. When evaluating the results achieved, the court must consider the degree to which counsel contributed causally to the results obtained. *Id.* at 150-51. The *Sugarland* decision illustrates this type of analysis. The Court of Chancery had awarded the petitioners 20% of the benefit obtained in the form of a higher price for the corporation's property. The Delaware Supreme Court held that the petitioners could not claim "full credit" for the entire price increase. *Id.* at 151. For the benefit conferred by an initial price increase, the Delaware Supreme Court affirmed the 20% figure, agreeing that the petitioners caused the benefit by obtaining an injunction against a pending transaction. As for later benefits conferred by subsequent price increases, the Delaware Supreme Court disagreed, noting that the benefits resulted in part from the petitioners' efforts but also from a competitive bidding process and market dynamics. The high court held that the petitioners only should receive credit for 5% of the later benefits. *Id.*

Sugarland did not break new ground by awarding fees in a shared-credit scenario. Twenty-two years before *Sugarland*, Vice Chancellor Marvel considered a shared-credit fee application in *Aaron v. Parsons*, 139 A.2d 365 (Del. Ch.), *aff'd*, 144 A.2d 155 (Del. 1958). Plaintiffs' counsel had filed a lawsuit alleging misappropriation of corporate funds, but the plaintiffs did little to pursue the case until after a newly elected board hired its own counsel and pursued the claims itself, ultimately settling them for a significant benefit to the corporation. *Id.* at 365-66. The Vice Chancellor held that "counsel for plaintiffs are entitled to be compensated for the part played by this suit insofar as it contributed to the benefits received by the corporation in the settlement." *Id.* at 367. He therefore asked, "[W]hat exactly was this part and what contribution, if any, did this action make to the final settlement?" *Id.* Vice Chancellor Marvel recognized that "the mere pendency of this suit with its implications . . . served in part to induce the [defendant] to settle," but he reasoned that "inasmuch as the part played by the suit was largely procedural and unaccompanied by responsible legal activity on the part of plaintiffs' attorneys, their fees should not be directly related to the size of the settlement." *Id.* at 367-68. The Delaware Supreme Court affirmed his analysis, reasoning "that all of the factors referred to [in *Swacker v. Pennroad Corp.*, 57 A.2d 63 (Del. 1947), a predecessor to *Sugarland*], must enter into the fixing of the final amount, but that of them the most important and critical is the contribution of counsel's efforts to the creation or preservation of the common fund." 144 A.2d at 159.

As seen in the *Sugarland* and *Aaron* decisions, Delaware cases have long taken into account the degree of causation between counsel's efforts and the result when awarding reasonable attorneys' fees. Delaware courts have not adopted a bright-line rule that precludes plaintiffs' counsel from obtaining a fee just because another actor retains counsel and contributes to the creation of the benefit. Two recurring scenarios illustrate the shared-credit approach: (i) cases where a stockholder plaintiff challenges a transaction proposed by a controlling stockholder, then a special committee of the controlled corporation's board of directors negotiates improved terms with the controller,[1] and (ii) cases where a stockholder plaintiff challenges a target corporation's refusal to agree to a transaction with a bidder, then the bidder takes the lead in litigating a breach of fiduciary duty case, and the target eventually agrees to be acquired or sells itself to a different acquirer for a higher price.[2] In both scenarios, the actor principally responsible for generating the benefits (the special committee or the bidder) retains its own counsel and takes the laboring oar in achieving the result. Delaware courts nevertheless consistently have awarded fees in these situations to the stockholder plaintiffs for their contributory role in generating the result. Delaware courts also have crafted shared-credit fee awards in other scenarios.[3] Contrary to Fidelity's contention

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[1] *See, e.g.*, *In re Quest Software Inc. S'holders Litig.*, 2013 WL 5978900 (Del. Ch. Nov. 12, 2013); *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010) (TABLE); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604 (Del. Ch. 2005); *In re AXA Fin., Inc.*, 2002 WL 1283674 (Del. Ch. May 22, 2002); *Dow Jones & Co. v. Shields*, 1992 WL 44907 (Del. Ch. Mar. 4, 1992); *Zlotnick v. Metex, Inc.*, 1989 WL 150767 (Del. Ch. Nov. 14, 1989); *In re Josephson Int'l, Inc.*, 1988 WL 112909 (Del. Ch. Oct. 19, 1988).

[2] *See, e.g.*, *In re NCS Healthcare, Inc. S'holders Litig.*, 2003 WL 21384633 (Del. Ch. May 28, 2003); *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353 (Del. Ch. 1999), *aff'd sub nom. First Interstate Bancorp v. Williamson*, 755 A.2d 388 (Del. 2000) (TABLE); *United Vanguard Fund, Inc. v. Takecare, Inc.*, 727 A.2d 844 (Del. Ch. 1998); *Dunkin' Donuts S'holders Litig.*, 1990 WL 189120 (Del. Ch. Nov. 27, 1990); *In re Anderson Clayton S'holders' Litig.*, 1988 WL 97480 (Del. Ch. Sept. 19, 1988) (Allen, C.); *In re Maxxam Gp., Inc. S'holders Litig.*, 1987 WL 10016 (Del. Ch. Apr. 16, 1987) (Allen, C.).

[3] *See, e.g.*, *In re Emerson Radio S'holder Deriv. Litig.*, 2011 WL 1135006, at *6 (Del. Ch. Mar. 28, 2011) (giving plaintiffs' counsel 50% credit for therapeutic benefits valued at $1 million where "the Audit Committee and [its counsel] paved the road to reform, so the plaintiffs must share credit with them"); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *1 (Del. Ch. Aug. 30, 2007) (giving plaintiffs' counsel partial credit for filing

that a shared-credit rule is unworkable, the Delaware courts have been engaging in such analyses on a regular basis for over fifty years.

The Fidelity defendants cite only one Delaware decision in support of their bright-line rule that a party can avoid a fee award by hiring its own counsel: *In re 14 Realty Corp.*, 2009 WL 2490902 (Del. Ch. Aug. 5, 2009). In the *14 Realty* case, Chief Justice Strine, then a Vice Chancellor, reviewed a ruling made by a trustee charged with dissolving a complex family of entities and making distributions to two warring siblings. One sibling (Jude) sought an award of attorneys' fees from the other (Daniel) for having reduced the amount of debt that the dissolved entities owed. The decision applied traditional common benefit principles by first determining the amount of the benefit conferred, then evaluating the degree of causation between the benefit and Jude's role. The court discounted the size of the benefit because the other sibling "did not sit on the sidelines . . . while Jude alone defended the assets of the Dissolving Entities. Rather, Daniel had to hire his own counsel and incur his own costs in order to address Jude's many claims, placing Jude and Daniel in a position often more akin to adversaries . . . than to a representative shareholder." *Id.* at *10. The court did not hold, as the Fidelity defendants argue, that Daniel did not have to pay a fee award because Daniel hired his

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derivative action that led eventually to going-private transaction by controller); *In re Coleman Co. S'holders Litig.*, 750 A.2d 1202, 1212-13 (Del. Ch. 1999) (awarding $1.2 million out of a settlement fund of $12.3 million to counsel representing minority stockholders where plaintiffs' counsel accepted the terms of an earlier settlement obtained by the majority stockholder); *Mutual Shares Corp. v. Texas Air Corp.*, 1987 WL 18105, at *3 (Del. Ch. Sept. 30, 1987) (awarding plaintiffs' counsel $3 million where claimed benefit of $41 million was partly caused by the efforts of plaintiffs' counsel in a parallel action who "did all the considerable discovery and prepared exhaustive briefs").

own counsel. The court rather held that the reduction in the debt represented a smaller benefit to Daniel than otherwise claimed because he had offsetting legal costs that he incurred responding to other claims advanced by his sibling. *Id.* To the extent the *14 Realty* decision is relevant to the current case, it supports New Counsel's application. They pursued claims on behalf of all Revlon stockholders, including the Fidelity funds, and conferred benefits on the Fidelity funds, thereby earning a fee award. Unlike in *14 Realty*, New Counsel did not take any action against the Fidelity defendants that would have caused them to hire their own counsel, so there is no reason to discount the benefits conferred because of the Fidelity defendants' choice.

Shifting to the realm of public policy, the Fidelity defendants argue that Delaware's longstanding approach encourages additional litigation and penalizes parties who select their own counsel. Given that the Delaware Supreme Court adopted the shared-causation approach in *Sugarland*, this court does not have the latitude to implement its own public policy calculus. *See Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 813 n.12 (Del. 2013). Regardless, neither of Fidelity's positions is correct. The shared-credit approach ensures that those who generate valuable benefits are compensated in proportion to their role in creating the benefit. The shared-credit approach does not create a risk that parties will pay twice for the same work. If a party shows that its own efforts generated the entire benefit, then the party has shown that the other counsel did not contribute to the benefit and the other counsel will not recover a fee. When a court awards fees under Delaware's shared-credit system, it is because multiple actors played a role in generating the benefit.

For similar reasons, the shared-credit rule does not infringe on the Fidelity defendants' right to counsel of their choosing. The Fidelity defendants were free to hire their own counsel, as they did. If their chosen counsel had vindicated the Fidelity defendants' rights completely, then New Counsel would not be able to claim any credit for creating a common fund or benefit, and the Fidelity defendants would not owe New Counsel any fee. In this case, however, New Counsel played a causal role in generating the benefits that the Fidelity defendants enjoyed. If the Fidelity defendants were able to escape compensating New Counsel for conferring those benefits, then the Fidelity defendants would receive a windfall and be "unjustly enriched at the successful litigant's expense." *Goodrich*, 681 A.2d at 1044.

Fidelity also has maintained that New Counsel should not be permitted to recover a fee award because Fidelity wanted to settle the case for $3.25 per share. Fidelity claims that when New Counsel rejected that proposal as too low, New Counsel acted contrary to Fidelity's interests. In making this argument, Fidelity confuses its business interests as a profit-driven fund manager with the interests of the Fidelity funds as holders of Class A Common and members of the class. Fidelity understandably preferred to settle because of its business relationship with Revlon, including its role as the custodian of Revlon's 401(k) plan, and because a reputation for litigating against clients would not help its overarching business model of working closely with issuers. The managers of the Fidelity funds similarly liked the deal because it would help them meet their portfolio guidelines. Neither factor necessarily reflected what was best for the Fidelity funds as holders of Class A Common, which is why Fidelity did not want Revlon to use its original tender decision as an indicator of fairness. But viewed solely from the perspective of their status as stockholders, the Fidelity funds had the same interests as every other holder of Revlon Class A Common: to get the most value possible from the litigation.

Recognizing that the interests of individual class members may sometimes diverge from the interests of the class, Delaware law permits class counsel to act in a manner that class counsel believes is in the best interests of the class as a whole. *See, e.g.*, *In re M & F Worldwide Corp. S'holders Litig.*, 799 A.2d 1164, 1177 (Del. Ch. 2002) (rejecting argument that class counsel should be disqualified because the interests of some of the named plaintiffs had diverged from the interests of the rest of the class); *see also* Restatement (Third) of Law Governing Lawyers § 128 cmt. d(iii) (2000) ("[In the class action context,] the lawyer may proceed in what the lawyer reasonably concludes to be the best interests of the class as a whole, for example urging the tribunal to accept an appropriate settlement even if it is not accepted by class representatives or members of the class."). By rejecting the $3.25 per share offer and continuing to litigate, New Counsel properly exercised independent judgment for the benefit of all holders of the Revlon Class A Common. It is irrelevant that the methods New Counsel used to obtain the benefit ran contrary to the methods that Fidelity preferred. Indeed, by acting contrary to Fidelity's desires and rejecting the $3.25 per share offer, New Counsel caused Fidelity to ultimately receive additional compensation in the form of the contingent payment. As such, New Counsel's decision not to comply with Fidelity's wishes is not an impediment to them recovering a fee from Fidelity.

2. The Initial $2.00 Offer

The first component of the Fidelity Settlement is the $2.00 per share of consideration that Revlon initially was prepared to offer. Having considered the evidence, this decision finds that New Counsel were solely responsible for causing this benefit.

Before New Counsel's involvement in the case, Old Counsel planned to present a settlement that would have provided no monetary compensation to holders of Revlon's Class A Common and would have released all claims against Revlon and its co-defendants. New Counsel prevented the original settlement from being approved, then engaged in discovery and pushed the case forward. New Counsel's diligence brought Revlon to the settlement table with Fidelity. Revlon's initial $2.00 per share offer was made before Fidelity was actively involved in the case and before substantial negotiations had taken place between Fidelity and Revlon.

Contrary to the Fidelity defendants' claims at trial, the Name Misuse Issue and the Adequacy Opinion Issue played no meaningful role in bringing Revlon to the settlement table. The lead Skadden lawyer was not even aware of the Name Misuse Issue and did not think the Adequacy Opinion Issue was important. Revlon was focused on the claims involving its third quarter earnings that New Counsel were advancing in the Delaware action. The Name Misuse Issue and the Adequacy Opinion Issue affected how the Fidelity defendants viewed their business relationship with Revlon, but neither represented a concern that the Revlon defendants took seriously, much less a quantifiable claim warranting a monetary payment. Revlon offered Fidelity $2.00 per share to achieve its strategic goal of resolving the Delaware litigation. Had the Fidelity defendants exerted no effort whatsoever, they could have obtained $2.00 per share.

New Counsel therefore caused a benefit of $2.00 per share to be conferred on Fidelity, and it is entitled to a fee for the work it did in order to obtain that benefit. New Counsel therefore can claim 100% of the credit for the initial $2.00 per share offer.

3. The Increase From $2.00 To $3.25

The next component of the Fidelity Settlement is the increase in consideration from the initial $2.00 per share offered by Revlon to the $3.25 per share in up-front consideration that the Fidelity defendants obtained. Fidelity actively negotiated for that increase, and New Counsel did not take part in those discussions. But although New Counsel were not responsible for negotiating the increase from $2.00 per share to $3.25 per share, New Counsel's continuing prosecution of the underlying action gave Fidelity leverage, including the ability to "say no" and participate with the rest of the class. This was not a theoretical possibility; Fidelity in fact exercised that option. When its negotiations with Revlon reached an impasse, Fidelity did not seek to file its own suit. Instead, Fidelity decided that it "would be part of the class action and win, lose or draw with the rest of the class." JX 189 at 128 (Forchheimer Dep.).

For purposes of this component of the Fidelity Settlement, New Counsel shared causal credit with Fidelity. Shared-credit precedents involving special committee negotiations provide guidance. Like Fidelity, a special committee confronted with a controlling stockholder proposal retains its own advisors and negotiates with the controller. Meanwhile, class counsel monitors the work of the special committee and negotiates separately with the controller. *See Cox Commc'ns,* 879 A.2d at 620-22. Delaware precedents illustrate that under those circumstances, class counsel is still deemed to have played a material role in causing the controller to increase the transaction price. Although the discretionary application of the *Sugarland* factors results in awards with a high degree of variability, plaintiffs' counsel often have been credited with 20% to 25% of the benefit conferred.[4]

Other shared-credit cases have used a similar range even though counsel's contribution appeared attenuated. In *Sugarland*, the Delaware Supreme Court awarded counsel 5% of the incremental value achieved through a competitive bidding process where counsel obtained a preliminary injunction that led to the auction. 420 A.2d at 151. For benefits that were solely attributable to plaintiffs' counsel, the court awarded a 20% fee, suggesting that plaintiffs' counsel received 25% of the credit for the value obtained through the competitive bidding process. In the *Franklin Balance Sheet* case, counsel filed a derivative action against a controlling stockholder and its affiliates to recover $23.5 million in damages, and the suit eventually led to a going-private transaction in which the minority stockholders, who owned 30% of the company, received a premium

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[4] *See, e.g.*, *Cox Radio*, 2010 WL 1806616 (approximately 25%); *In re Prodigy Commc'ns Corp. S'holders Litig.*, 2002 WL 1767543 (Del. Ch. July 26, 2002) (approximately 20%); *Zlotnick v. Metex, Inc.*, 1989 WL 150767 (approximately 24%); *Josephson*, 1988 WL 112909, at *5 (giving plaintiffs' counsel credit for approximately 27% of the benefit conferred); *see also In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *6 (Del. Ch. Feb. 4, 2005) (determining that fee of 4% of benefit was appropriate for portion of price increase predominantly caused by plaintiffs' counsel, but that 1% was appropriate for portion where plaintiffs' counsel shared credit with the special committee, implying that plaintiffs' counsel received 25% of the causal credit for the joint benefit).

of $37.25 million over their stock's over-the-counter trading price. *Franklin Balance Sheet*, 2007 WL 2495018, at *1. The Court of Chancery awarded counsel 15% of the initial $23.5 million in value, but only 5% of the remaining incremental benefit, suggesting that plaintiffs' counsel received 33% of the credit for the remaining benefit. *Id.* at *13.

For purposes of the increase in value from $2.00 per share to $3.25 per share, Fidelity, like the special committee in many monitoring cases, clearly took the laboring oar in terms of securing the increase in compensation. It hired an expert to perform an event study to assess damages from the third quarter earnings claim and was solely responsible for negotiating the settlement. Nevertheless, Fidelity took advantage of New Counsel's presence, and when Fidelity and Revlon reached an impasse, Fidelity chose to rely on New Counsel to prosecute its claims as part of the class action, rather than filing its own suit. Fidelity also allowed New Counsel to oppose Revlon's motion for a commission on behalf of the class—including Fidelity. By analogy to the special committee precedents, New Counsel can readily be credited with 20% to 25% of the benefit conferred and potentially with a higher figure.

Fidelity has argued, however, that New Counsel's share of the credit should be reduced because the increase from $2.00 per share to $3.25 per share took into account the Name Misuse Issue and the Adequacy Opinion Issue. As previously discussed, the evidence at trial demonstrated that neither issue played a meaningful role in Revlon's analysis. The increase was based primarily on the Revlon defendants' desire to settle, their concern about their exposure for damages resulting from the third quarter earnings claim, and their assessment of the risk-adjusted damages.

New Counsel's prosecution of the underlying action, which sought to recover damages resulting from the third quarter earnings claim, played a contributory role in generating the increase in consideration that the Fidelity defendants obtained. As such, New Counsel are entitled to 20% of the credit for the increase from $2.00 per share to $3.25 per share, without reduction for the Name Misuse Issue or the Adequacy Opinion Issue. This degree of causal attribution is conservative and favors the Fidelity defendants. In light of the precedents discussed above, New Counsel could have been credited with a greater causal role.

4. The Contingent Payment

The last part of the compensation that Fidelity received is the contingent payment. The contingent payment was expressly based on the amount that New Counsel obtained for the class. On its face, this component of the value from the Fidelity Settlement is solely attributable to the efforts of New Counsel.

To dispute New Counsel's causal role, the Fidelity defendants have argued that they could have extracted a higher total settlement for themselves, but that they accepted a lower contingent figure so that Revlon could pay more to New Counsel and achieve a global settlement. Factually, this argument does not work. In 2011, the Fidelity defendants negotiated a settlement at $3.25 per share that did not include any contingent payment. The Fidelity defendants expected New Counsel would accept the same deal and resolve the entire case. Had New Counsel done so, then Fidelity would have received $3.25 per share. The contingent payment clause only came into being because New Counsel rejected Revlon's offer. New Counsel's decision to continue to prosecute the case—and later, its negotiation of a higher price for the class—was the sole and direct cause of Fidelity receiving the contingent payment. New Counsel are entitled to a fee for conferring that benefit on Fidelity.

D. Fidelity Is Not Entitled To A Portion Of New Counsel's Fee.

Fidelity has asserted counterclaims against New Counsel on the theory that Fidelity's settlement discussions with Revlon conferred a benefit on the rest of the class and that New Counsel received a fee for that benefit. Fidelity did not develop these claims in either its pre-trial or post-trial briefing, nor did it vigorously assert them at trial. To the extent that Fidelity has not waived its counterclaims, this decision rejects them as contrary to the factual record. The proximate cause of the New Counsel Settlement was New Counsel's refusal to settle at a price that they felt was inadequate. The Fidelity defendants' claim that the $3.25 per share price in the Fidelity Settlement "set a floor" for New Counsel's negotiations with Revlon was not borne out by the facts. That price was below New Counsel's own self-imposed floor, as evidenced by the fact that New Counsel rejected the $3.25 per share offer. New Counsel did not benefit from Fidelity setting a floor that was outside the zone of possible agreement.

Fidelity's argument that it conferred a benefit on the rest of the class by agreeing to a "free zone" is similarly unavailing. If Fidelity had agreed to a settlement that was truly separate from New Counsel's continuing efforts on behalf of the class, then there would not have been a contingent payment and there would have been no need for a "free zone." Fidelity would have received its $3.25 per share settlement, and New Counsel could have negotiated their own settlement without the overhang of possible additional compensation to Fidelity. The contingent payment actually represented a detriment to the class because it made settling with New Counsel more expensive for Revlon than it otherwise would have been. The "free zone" reduced the size of this detriment by limiting the contingent payment, but the net effect of the contingent payment on the rest of the class was still negative. Fidelity's agreement to a "free zone" did not confer a legally cognizable benefit on the rest of the class, and Fidelity is not entitled to a portion of New Counsel's fee.

E. The Reasonableness Of The Requested Fee

Based on the above analysis, New Counsel were responsible for (i) the $2.00 per share initial offer, (ii) $0.25 per share of the increase from $2.00 per share to $3.25 per share, and (iii) the $0.575 per share contingent payment. In total, these benefits amount to $2.825 per share. Multiplied by the number of shares that Fidelity held, that number yields a total benefit to Fidelity of roughly $19.6 million. Pursuant to an agreement with Fidelity, New Counsel has agreed to limit their request to $3,986,777—the amount of the contingent payment to Fidelity. That amount represents roughly 20% of the benefit conferred on Fidelity.

In determining the reasonableness of a fee request, Delaware courts apply the *Sugarland* factors: (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 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. 420 A.2d at 149.

When awarding fees for the New Counsel Settlement, the court applied the *Sugarland* factors and determined that a fee award of roughly 22% of the benefit conferred was appropriate. Factors (i) through (v) remain the same, and nothing suggests a need to reconsider them. New Counsel expended significant resources and effort prosecuting a complex case, and their standing and ability are unchallenged. In addition, New Counsel took on real contingency risk, first by intervening to prevent the inadequate settlement that had been negotiated by Old Counsel from releasing the third quarter earnings claim and then by turning down the temptation of an easy settlement on the terms Fidelity accepted. Based on the stage of the proceedings when the case settled, a typical fee award would range from 15% to 25% of the benefit conferred. The 20% requested falls right in the middle of that range.

The only factors that differ are factors (vi) and (vii). The requested fee has already been discounted to account for the fact that New Counsel cannot rightly claim all the credit for the benefit conferred, so factor (vi) is satisfied. Similarly, the fee is directly proportional to the amount of the benefit conferred, consistent with factor (vii). Under the circumstances, the requested fee is reasonable.

III. CONCLUSION

New Counsel conferred a benefit on the Fidelity defendants, and they are entitled to be paid for their efforts. This decision awards $3,986,777 to New Counsel, plus prejudgment interest and costs. New Counsel shall submit a proposed form of Final Order and Judgment upon notice to the Fidelity defendants.