IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROBERT ZIMMERMAN, Plaintiff, v. KATHERINE D. CROTHALL, MICHAEL GAUSLING, PETER MOLINARO, ROBERT TONI, STEVE BRYANT, ORIGINATE ADHEZION A FUND, INC., a Delaware corporation, ORIGINATE ADHEZION Q FUND, INC., a Delaware corporation, ORIGINATE VENTURES, LLC, a Delaware limited liability company, LIBERTY VENTURES H, L.P., a Delaware limited partnership, LIBERTY ADVISORS, INC., a Delaware corporation, and THOMAS R. MORSE, Defendants, - and - ADHEZION BIOMEDICAL LLC, a Delaware limited liability company, Nominal Defendant.	)	C.A. No. 6001-VCP

MEMORANDUM OPINION

Submitted: June 28, 2013
Decided: October 14, 2013

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PARSONS, Vice Chancellor.

After conducting a full trial in this matter, I entered an Opinion on the merits on January 31, 2013 (the "Post-Trial Opinion").[1] At the conclusion of the Post-Trial Opinion, I directed counsel to confer and submit a proposed form of final judgment. This action currently is before me on two substantive motions: Defendants' motion to dismiss for lack of standing, and Plaintiff's motion to enter a final judgment and petition for an award of attorneys' fees. For the reasons set out below, I grant Defendants' motion, and thus, also deny Plaintiff's motion for entry of final judgment on the merits of the underlying dispute. After Plaintiff, Robert Zimmerman, moved for entry of a final, post-trial order, he divested all of his interests in the Nominal Defendant, Adhezion Biomedical LLC (the "Company" or "Adhezion"), on whose behalf he had sued. Thereafter, Defendants moved to dismiss, arguing that Zimmerman no longer had standing to prosecute this derivative action. I grant the petition, however, of Zimmerman's former counsel, now Intervenor, The Williford Firm LLC ("TWF"), and award them $300,000.00 in attorneys' fees and expenses, payable by Adhezion.

I. BACKGROUND

A. The Parties

Plaintiff, Zimmerman, is the co-founder, former CEO, and a former director of Adhezion. At the time of my Post-Trial Opinion, Zimmerman owned 86,900 Class A Common units and 40,000 Class B Common units in Adhezion. On April 12, 2013, he

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[1] *Zimmerman v. Crothall*, 62 A.3d 676 (Del. Ch. 2013).

sold all of his Adhezion stock to William A. Graham, IV, an Adhezion investor who held Series A and B Preferred units.

Intervenor, TWF, represented Zimmerman from the commencement of this action through the conclusion of trial, post-trial briefing, and issuance of the Post-Trial Opinion. On April 1, 2013, TWF simultaneously filed (1) a motion to withdraw as counsel to Zimmerman and to intervene as an interested party and (2) a reply in support of the motion to enter a final order and petition for attorneys' fees. On May 10, 2013, I granted TWF's motion, thereby enabling it to withdraw as Zimmerman's counsel and to intervene on its own behalf.[2]

Nominal Defendant, Adhezion, is a privately held Delaware limited liability company with its principal place of business in Wyomissing, Pennsylvania. Adhezion is an early-stage medical device company that develops and commercializes surgical, wound management, and infection-prevention technologies.

The defendants in this action include the five members of Adhezion's board of directors (the "Board") and entities that, directly or indirectly, have invested in Adhezion (collectively, "Defendants").

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[2] For events occurring after April 1, 2013, I refer to TWF solely in its capacity as an interested party, not as counsel to Zimmerman. I also note that, although Zimmerman technically filed the motion to enter a final order and petition for attorneys' fees, since April 13, 2013, only TWF has sought to pursue that motion. Consequently, I treat it as essentially TWF's motion.

Defendants Katherine D. Crothall, Michael J. Gausling, Peter Molinaro, Robert Toni, and Steven R. Bryant are Adhezion's Board members. Molinaro is Adhezion's CEO and the Board Chairman.

The remaining named Defendants, Liberty Advisors, Inc., and Originate Ventures, LLC, are not relevant to the pending motions.

B. Facts and Procedural History

The background facts relevant to the underlying disputes between the parties are recited in detail in the Post-Trial Opinion. This Memorandum Opinion recites only those facts necessary to my decision on the pending motions.

On November 18, 2010, Zimmerman filed a derivative complaint in this action alleging that the individual defendants breached their fiduciary duties by causing the Company to enter into several financing transactions (the "Challenged Transactions") that Zimmerman contended violated the Company's Operating Agreement (the "Operating Agreement" or the "Agreement"). On May 19, 2011, I granted Zimmerman's motion to amend the complaint to add additional defendants, and he filed an amended complaint the same day. Defendants later moved for summary judgment. In a Memorandum Opinion dated March 5 and revised on March 27, 2012, I granted summary judgment in Defendants' favor on Zimmerman's duty of care claims, but denied summary judgment on his claims for breach of the duty of loyalty, breach of contract, and aiding and abetting a breach of the duty of loyalty.[3] Trial on these surviving claims took

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[3] *Zimmerman v. Crothall*, 2012 WL 707238, at *21 (Del. Ch. Mar. 27, 2012).

place on April 23–25, 2012. After hearing post-trial arguments on September 14, 2012, I issued the Post-Trial Opinion on January 31, 2013.[4]

In the Post-Trial Opinion, I held that Defendants breached the Operating Agreement by entering into the Challenged Transactions without first obtaining the approval of the Class A Common unitholders. Because I also held, however, that the breach caused no damage to Adhezion, *i.e.*, that the Challenged Transactions were entirely fair, I awarded the Company nominal damages of only $1. I also held that the director Defendants did not breach their fiduciary duties and that, therefore, there could be no liability for aiding and abetting such a breach. At the conclusion of the Post-Trial Opinion, I directed the parties to confer and submit a final, post-trial judgment or order.

The parties could not agree on an appropriate form of final order. On March 11, 2013, Zimmerman moved for entry of his proposed final order and petitioned for an award of attorneys' fees. Then, on April 1, TWF moved both to withdraw as counsel to Zimmerman and to intervene for the limited purpose of securing attorneys' fees for the work they performed in this litigation.[5] I granted TWF's motion on May 10, 2013, but before I did, on April 12, Zimmerman sold all of his stock in the Company to Graham. On May 17, Defendants moved to dismiss this derivative action based on Zimmerman's April 12 sale, arguing that it extinguished his standing to continue to prosecute claims on

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4 *Zimmerman*, 62 A.3d 676.

5 TWF asserts that it had a contingent fee agreement with Plaintiff, but has not received any compensation under that agreement or otherwise, and also notes that, since April 13, 2013, Zimmerman has refused to seek attorneys' fees on TWF's behalf.

behalf of Adhezion. Having heard argument on June 28 on the pending motions and considered the parties' subsequent filings, I now provide my rulings on those motions.[6]

C. Parties' Contentions

The two motions under consideration are: (1) formerly Zimmerman's (now TWF's) motion to enter a final judgment and petition for attorneys' fees; and (2) Defendants' motion to dismiss. The motions substantively overlap in that Defendants' motion addresses roughly the same issues as TWF's, *i.e.*, TWF's current ability to obtain the relief requested in the motion and petition originally filed by Zimmerman. Thus, I will address all the parties' arguments together.

1. Defendants' Motion to Dismiss

Defendants argue that the Court must dismiss this action because Zimmerman extinguished his standing to prosecute claims on behalf of Adhezion by selling all of his interests in the Company before entry of a final judgment.[7] Defendants request that the

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[6] On July 1, 2013, TWF moved for leave to file a sur-reply in support of their petition for an award of attorneys' fees, which Defendants opposed. TWF argues that Defendants did not raise their contention that "any fee awarded to Intervenor should be reduced to the extent Intervenor's time was properly assignable to [the claims on which Zimmerman was unsuccessful]" until the June 28 argument and that, therefore, that argument should be considered waived. I agree that aspect of Defendants' arguments could have been addressed more clearly in their briefs, but I also do not find that the surrounding circumstances warrant my holding that Defendants have waived that argument. Rather, to avoid prejudicing TWF, I grant its motion and accept for filing both TWF's sur-reply and Defendants' response in opposition to it.

[7] Defs.' Mot. to Dismiss Pursuant to 6 *Del. Code* § 18-1002 & R. 23.1 ("Defs.' Mot.") at 1–2. TWF questioned whether Zimmerman actually sold all of his interests, or whether he retains some small number of shares. *See* The Williford Firm's Response in Opp'n to Defs.' Mot. to Dismiss ("TWF's Opp'n") at 2–4. In

Court apply, by analogy, the corporation law-based "continuous ownership rule," which—except in narrow circumstances—requires a plaintiff stockholder who purports to sue derivatively on behalf of a company to own stock in the represented company throughout the litigation. In support of its position, Defendants note that 6 *Del. C.* § 18-1002, the statutory provision governing standing in derivative actions against limited liability companies, sets out the same requirements as its sister corporation law statute.[8] On that basis, Defendants contend that Zimmerman and TWF now lack standing to seek relief in any capacity.

TWF responds that, for several reasons, the continuous ownership rule, and any violation of it here, does not undermine their right to the relief sought in Plaintiff's motion. First, TWF argues that the rule (and thus Defendants' standing argument) is irrelevant to its ability to seek a fee award based on the fact that its litigation efforts conferred a benefit on the Company. Second, TWF suggests that Zimmerman's sale to Graham falls within the fraud exception to the continuous ownership rule, *i.e.*, that the sale was a sham transaction designed to end-run Zimmerman's standing to prosecute his motion to enter a final order and petition for attorneys' fees. In support, TWF emphasizes that Graham is well-connected to the Company's Board, personally

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their reply brief, however, Defendants cured any such defect and explained that Zimmerman and Graham have submitted amended purchase agreements showing that Zimmerman actually did sell all of his stock to Graham and that any indication otherwise was a clerical error. Defs.' Reply in Support of Their Mot. to Dismiss Pursuant to 6 *Del. C.* § 18-1002 and R. 23.1 ("Defs.' Reply") at 1–2 (citing Ex. A, Am. 1).

[8] Defs.' Reply at 2 (citing 6 *Del. C.* § 18-1002; 8 *Del. C.* § 327).

participated in the Challenged Transactions, and has acknowledged that he may convey to Defendants the shares that he obtained from Zimmerman. TWF also notes that Zimmerman discontinued his efforts in this litigation and sold his stock to Graham only after he had moved to enter a final order and facilitated TWF's attempt to obtain a fee award. Finally, TWF asserts that, in any event, Zimmerman's purported lack of standing does not affect the Court's ability to enter a final order pursuant to the Post-Trial Opinion (including a declaration therein of the Class A Common unitholders' approval rights), which TWF characterizes as a "clerical" event.[9]

2. TWF's Motion to Enter Final Order and Petition for Attorneys' Fees

This motion, originally filed on behalf of Zimmerman, and now pursued by TWF, focused primarily on recovery of attorneys' fees.

TWF argues that their litigation efforts, from the commencement of this action through post-trial briefing and argument, created a "common fund of tangible and substantial monetary benefit to Adhezion in improvements to subsequent financing transactions . . . ."[10] In addition, TWF contends that their success on Zimmerman's breach of contract claim preserved the stockholder franchise, thus conferring a corporate benefit on Adhezion, "by giving the Class A Common unitholders the power to negotiate

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9 TWF Opp'n at 6.

10 Pl.'s Mot. to Enter Final Order & Pet'n for Award of Att'ys' Fees ("Pl.'s Mot.") at 4.

or challenge subsequent financing transactions unfair to the Company."[11] In support of their common fund argument, TWF alleged that Defendants "improved" the terms of the two financing transactions completed during the pendency of this litigation in July 2011 and June 2012, respectively (the "Unchallenged Transactions"). For example, Zimmerman asserted that the warrant coverage in the July 2011 transaction was one-fifth and one-sixth of the warrant coverage in certain of the Challenged Transactions. According to TWF, this obviated the need for Adhezion to grant warrants for 168,750 units, thereby allegedly saving the Company $516,375. In the June 2012 transaction, TWF notes, the price per convertible unit "almost doubled, from $4.00 [in February 2010 and July 2011] to approximately $7.0588235 [in June 2012]." This favorable conversion rate allegedly enabled Adhezion to retain 81,250 more units, saving the Company $573,529.41. TWF further argues that Defendants must have structured the Unchallenged Transactions with an eye toward Zimmerman's litigation position through the trial's end, which ultimately succeeded, thereby saving the Company (and its stockholders) significant money and, essentially, mooting potential future claims.

Defendants presented three counterarguments. First, Defendants accuse TWF of misreading the terms of the transactions TWF has compared. Defendants point to several notices of offer of securities and explain that the terms of the Unchallenged Transactions, in fact, were not improved from those of the Challenged Transactions. This misreading, Defendants contend, demonstrates the nonexistence of any tangible "fund" benefitting the

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[11] *Id.* *See also* Reply of Interested Party Williford Firm LLC on Pl.'s Mot. ("TWF Reply Supp. Pl.'s Mot.") at 6.

stockholders of Adhezion from which TWF could recover their attorneys' fees.[12] Second, Defendants disagree that the Court's conclusion that, in future financing transactions, Class A Common unitholders must approve any increase in the number of units conferred any benefit on Adhezion. Indeed, Defendants assert that the ruling detracts from the rights of unitholders in other classes and series. Third, Defendants argue that, in any event, the allegedly improved financial terms of the Unchallenged Transactions could "just as easily be due to" an increase in Adhezion's revenues.[13] Regarding points two and three, TWF counters that the Company's improved financial status comports with the economic benefit that this litigation has conferred on the Company.[14]

Defendants also challenged a specific aspect of TWF's proposed order. Paragraph 4 of Zimmerman's (now TWF's) final order and judgment reads: "[w]ithin [30] days of this Final Order, Defendants (exclusive of nominal defendant Adhezion) shall provide Plaintiff with the amount awarded to him by the Court in [the paragraph setting out the

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12 On this point, Defendants also contend that "[n]o Delaware court has ever found that litigation created a 'fund' simply because later, unchallenged transactions supposedly 'improved' upon transactions the court found were fair." Defs.' Br. in Opp'n to Pl.'s Mot. ("Defs.' Opp'n") at 3–4.

13 Defs.' Opp'n at 4.

14 Pl.'s Mot. at 3–4, 6–7 ("Revenues in 2010 were $450,000. In 2011 they increased approximately 538% to $2,423,199. In 2012 they increased approximately 163% to $3,940,423. Thus, the benefits from these improvements in terms [which Zimmerman's success at trial precipitated] have become increasingly valuable.").

damages and the attorneys' fee award]."[15] Defendants contend that this paragraph improperly attempts to require the individual defendants to personally cover any fee award in contravention of Delaware law, especially where, as here, the Court held that Defendants breached no fiduciary duties.[16] In response, TWF argues that Defendants misread the proposed order, noting that Paragraph 4 expressly refers to the first half of Paragraph 3, which sets out the nominal damages award, *i.e.*, $1. On this issue, I find TWF's position persuasive. Paragraph 5 of the proposed order specifies that Adhezion would cover the fee award: "[w]ithin [30] days of this Final Order, Adhezion shall provide Plaintiff's counsel with the amount *awarded to counsel* in paragraph three of this Order."[17] Thus, although the drafting may have been inartful, I accept TWF's representation that their proposed order seeks to require only Adhezion to cover any fee award.

II. ANALYSIS

A. Motion to Dismiss

In Delaware, the rule, as embodied in 8 *Del. C.* § 327 and Court of Chancery Rule 23.1, that "[a] derivative plaintiff must maintain stockholder status throughout the

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15 Pl.'s Proposed Final Order & J. ("Pl.'s Prop. Order") at 3.

16 Defs.' Opp'n at 7 & n.4 ("The fact that [Zimmerman] is seeking fees from [] part[ies] other than the persons who received the [alleged] benefit is an independent reason why [his] application must be denied.") (quoting *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 789 A.2d 1216, 1231 n.39 (Del. Ch. 2001)).

17 Pl.'s Prop. Order at 3 (emphasis added). The second half of Paragraph 3 reads: "Plaintiff's counsel is awarded _____ in attorneys' fees." *Id.* at 2.

litigation," is sacrosanct.[18] This remains true even where a plaintiff ceases to be a stockholder because the company to be sued merged with another, extinguishing the stockholder's interest in the former.[19] Our courts have carved out narrow exceptions to the continuous ownership rule,[20] but a stockholder's voluntary divestiture of all of his stock and interests in the entity at issue after commencing suit is not within any exception.[21]

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[18] *See Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 940 (Del. Ch. 2008) (noting that the "continuous ownership requirement" is a "bedrock tenet of Delaware law and is adhered to closely."). *See also Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984) (noting that a long line of cases have held that, under 8 *Del. C.* § 327 and Rule 23.1, "a derivative shareholder must not only be a stockholder at the time of the alleged wrong and at time of commencement of suit but [] he must also maintain shareholder status throughout the litigation.") (citations omitted).

[19] *See Lewis*, 477 A.2d at 1046, 1049.

[20] Among the exceptions are where (1) "a proposed merger is sought to be used for the coverup of wrongful acts of management," *i.e.*, the "fraud exception," or (2) the plaintiff maintains equity ownership interest in the surviving enterprise. *See, e.g.*, *Bokat v. Getty Oil Co.*, 262 A.2d 246, 249 (Del. 1970) ("If a proposed merger is sought to be used for the coverup of wrongful acts of management, a Court of Equity in an action making a direct attack on the merger can and will protect the innocent stockholder victim."); *Helfand v. Gambee*, 136 A.2d 558, 562 (Del. Ch. 1957) ("[T]he fact that [the derivative plaintiff] holds two pieces of paper rather than one . . . should not, in my opinion, foreclose her from complaining of acts antedating the incorporation of [the new corporation] when such corporation is in effect a successor to [another corporation].").

[21] *Parfi Hldg. AB*, 954 A.2d at 940 ("I have no hesitance in holding that a derivative plaintiff who empties itself of any interest in the underlying litigation loses standing.").

In this case, both parties are limited liability companies; therefore, the Delaware General Corporation Law ("DGCL") is not directly applicable.[22] Nevertheless, because Zimmerman voluntarily sold all his stock in the Company, and because the only claim on which he prevailed at trial was derivative,[23] Defendants request that I apply, by analogy, the continuous ownership rule and dismiss this action. Furthermore, TWF virtually concedes that Zimmerman no longer has standing.

Although there is no case precisely on point (at least in the LLC context), I agree with Defendants that, when he conveyed all his stock to Graham, Zimmerman extinguished his standing to prosecute this derivative action. In other words, I see no reason not to apply the continuous ownership rule in this case.[24] Because Zimmerman no

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22 *See In re Seneca Invs. LLC*, 970 A.2d 259, 261 (Del. Ch. 2008) ("An LLC is primarily a creature of contract[, over which DGCL governs where the parties to the contract so declare.]"). The Agreement here does not provide for the application of the DGCL. JX 38 ¶ 15.5. Nevertheless, this action still is subject to Court of Chancery Rule 23.1, which, along with 8 *Del. C.* § 327, embodies the spirit of the "continuous ownership" rule. *Feldman v. Cutaia*, 956 A.2d 644, 660 (Del. Ch. 2007) (citing *Lewis*, 477 A.2d at 1046, 1049). In addition, the standing statute in the Limited Liability Company Act, 6 *Del. C.* § 18-101, sufficiently tracks its sister statute in the DGCL, as to suggest that the General Assembly intended that the "continuous ownership" rule also would apply in the LLC context. *Compare* 6 *Del. C.* § 18-1002 *with* 8 *Del. C.* § 327.

23 *Zimmerman v. Crothall*, 62 A.3d 676, 689 n.83 (Del. Ch. 2013).

24 TWF argues that because the "continuous ownership" rule is a matter of common law, I need not apply it here. TWF Opp'n at 6 (citing *Lambrecht v. O'Neal*, 3 A.3d 277, 284 (Del. 2010)). TWF does not dispute, however, that this case falls squarely within the rule's jurisprudence. That is, although Zimmerman has fully divested himself of an equity interest in the Company, TWF has not identified any persuasive reason why this Court should permit Zimmerman to continue derivatively to seek relief (1) against a company in which he has no interest and (2) on behalf of people he no longer can be said to represent. *See Ala. By-Prods.*

longer holds any real interest in redressing any harm done to the Company, I grant Defendants' motion to dismiss for lack of standing.

B. Petition for Attorneys' Fees

Having granted Defendants' motion to dismiss, I now address TWF's petition for attorneys' fees. Before analyzing that claim, I note two preliminary matters. First, I conclude that my grant of Defendants' motion to dismiss the underlying action does not preclude TWF from seeking a fee award. This Court has held in similar contexts that an attorney whose efforts secured a common fund "may independently request an award of fees from that [] fund."[25] Although, as discussed *infra*, I conclude that this is not a "common fund" case, I apply the same principles underlying that rule in reaching my conclusion. Second, I focus, instead, on whether and to what extent TWF is entitled to a fee award based on the corporate benefit theory and Zimmerman's success on his breach of contract claim.

The standard for awarding attorneys' fees is well established. Courts across the United States apply the American Rule, under which "prevailing litigants normally are responsible for their own attorney's fees."[26] TWF has invoked two common law exceptions to the American Rule in support of their fee petition: the "common fund" and

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Corp. v. Cede & Co. ex rel. Shearson Lehman Bros., 657 A.2d 254, 265 (Del. 1995).

[25] *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 358 (Del. Ch. 1999) (hereinafter *In re First Interstate*).

[26] *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *6 (Del. Ch. Nov. 27, 1990). *See also Boeing Co. v. Van Gemert*, 444 U.S. 472, 483 (1980) (noting the rule's pervasiveness).

"corporate benefit" doctrines.[27] Under the common fund doctrine, if the underlying litigation confers a common monetary benefit upon an ascertainable class, then, in equity, the litigant or lawyer whose efforts secured the benefit is entitled to "'reasonable attorneys' fees from the fund as a whole.'"[28] On the other hand, litigation triggers the corporate benefit doctrine where "'a tangible monetary benefit has not been conferred,' but some other valuable benefit is realized by the corporate enterprise or the stockholders as a group."[29] Under both doctrines, fees may be awarded only if: (1) the claim was meritorious when filed; (2) the action benefitted an identifiable group; and (3) the benefit was causally related to the lawsuit.[30] At all times, however, the "grant or denial of

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27 *Franklin Balance Sheet*, 2007 WL 2495018, at *6.

28 *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1253 (Del. 2012) [hereinafter *Southern Peru*] (quoting *Van Gemert*, 444 U.S. at 478). *See also Goodrich v. E.F. Hutton Gp., Inc.*, 681 A.2d 1039, 1044 (Del. 1996) (citing *Van Gemert*, 444 U.S. at 478; *Maurer v. Int'l Re-Ins. Corp.*, 95 A.2d 827, 830 (Del. 1953)).

29 *In re First Interstate*, 756 A.2d at 357 (quoting *In re Dunkin' Donuts S'holders Litig.*, 16 Del. J. Corp. L. 1443, at *1451 (Del. Ch. Nov. 27, 1990)).

30 *Korn v. New Castle Cty.*, 922 A.2d 409, 412–13 (Del. 2007) (citation omitted). *Compare In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1124 n.1 (Del. Ch. 2011) (noting that this three-pronged test is applied in corporate benefit cases) *with In re First Interstate*, 756 A.2d at 355–56 (noting that the same three-factor test applies in common fund cases) *and Tandycrafts, Inc. v. Initio P'rs,* 562 A.2d 1162, 1167 (Del. 1989) (same).

counsel fees lies within the sound discretion of the court,"[31] as does the amount, if any, of fees awarded.[32] Here, TWF advances arguments under both doctrines.

1. The Common Fund Doctrine

Under the common fund doctrine, a common monetary benefit must pass to an identifiable class of stockholders as a result of the underlying litigation.[33] The principle underlying this doctrine is that the stockholders receiving the benefit should share the costs of achieving it by having the attorneys' fees and expenses incurred by the claimant's counsel paid from the fund that counsel's efforts created.[34] The benefit, therefore, must be ascertainable, though it need not result in a "fund" in any formal sense.[35] For example, in *Franklin Balance Sheet*, this Court held that a premium paid in

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31 *In re First Interstate*, 756 A.2d at 356 (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).

32 *Franklin Balance Sheet*, 2007 WL 2495018, at *6 (citing *Chrysler Corp.*, 223 A.2d at 386).

33 *Id.*

34 *Weinberger v. UOP, Inc.*, 517 A.2d 653, 654 (Del. Ch. 1986) ("Under [the common fund] exception, where a party, acting on behalf of a class, is successful in creating a common fund for the benefit of all class members, attorneys' fees will be paid from the common fund or property.") (citing *CM & M Gp., Inc. v. Carroll*, 453 A.2d 788, 795 (Del. 1982)). *See also Southern Peru*, 51 A.3d at 1253 ("[This doctrine] is founded on the equitable principle that those who have profited from litigation should share its costs.") (citing *Goodrich*, 681 A.2d at 1044).

35 *See, e.g., Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *7 (Del. Ch. Nov. 27, 1990). *See also In re First Interstate*, 756 A.2d 353, 359 n.3 (Del. Ch. 1999) ("To award fees on the basis of the "common fund" exception, it would seem to be necessary to identify the source and amount of the fund claimed to have been created.").

a merger, which was instigated by the plaintiff's litigation efforts, constituted such a monetary benefit.[36] Typically, however, it is the "successful derivative or class action suit[] which result[s] in the recovery of money or property wrongfully diverted from the corporation . . . [that is] viewed as [the] fund creating action[]."[37]

For TWF to be entitled to fees and expenses under the common fund doctrine, TWF must show that: (1) the action was meritorious at the time it was filed; (2) an ascertainable class received a substantial benefit; and (3) a causal connection existed between the action and the benefit.[38] Under Delaware law, "[a] claim is meritorious within the meaning of the rule if it can withstand a motion to dismiss on the pleadings if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success."[39] Zimmerman's cause of action, which was actually litigated through a trial on the merits, easily satisfies the standard for a meritorious action. Accordingly, I turn to the issue of whether the action created a substantial benefit.

With regard to the creation of a substantial benefit, TWF argues that their litigation efforts on behalf of Zimmerman and the Company created a "common fund," consisting of the difference between the costs to the Company of the two Unchallenged

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36 *Franklin Balance Sheet*, 2007 WL 2495018, at *7.

37 *Tandycrafts, Inc. v. Initio P'rs,* 562 A.2d 1162, 1164–65 (Del. 1989).

38 *In re Dunkin' Donuts S'holders Litig.*, 16 Del. J. Corp. L. 1443, at *1453 (Del. Ch. Nov. 27, 1990).

39 *Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966).

Transactions as executed and the costs to the Company of the Unchallenged Transactions if they were completed on the same terms as the prior Challenged Transactions. As explained above, TWF characterizes the terms of the Unchallenged Transactions as "improvements" over the terms of the Challenged Transactions, which they cite in comparison. TWF claims that, as a result of these improvements, Adhezion saved $1,089,904.41, and "safeguarded the value of [the stock of the Company] whose revenues have rocketed upwards during the past several years."[40] I agree with Defendants that, even if the terms of the Unchallenged Transactions could be considered superior to those in the Challenged Transactions, neither Zimmerman nor TWF have demonstrated the existence of a "common fund." Moreover, even if the savings TWF claims Adhezion realized did constitute a "common fund," it is unlikely that TWF's litigation efforts created it.

TWF's claimed "common fund" is based on multiple assumptions and is too speculative to yield a quantifiable benefit. Taking as true TWF's assertion that the terms of the Unchallenged Transactions represent some "savings" when compared to the terms of the Challenged Transactions (which itself is questionable), the amount of the "fund" still cannot be quantified. The "common fund" line of cases generally have similar factual circumstances: stockholders challenge a current transaction, causing the defendant

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[40] Pl.'s Mot. at 5–7.

corporation to alter, in some way, the terms of that transaction.[41] In this scenario, the Court has a starting point and an endpoint for calculating the size of the "fund," *i.e.*, the Court can ascertain the difference between the transaction's value *before* and *after* the challenge was launched. In this case, there is no starting point. TWF asserts in conclusory fashion that the Unchallenged Transactions are of greater value to the Company than the Challenged Transactions, but they have not adduced any evidence that Defendants negotiated the Company's position from A to B having in mind the possibility of Zimmerman's success at trial. TWF focuses almost entirely on the terms of earlier transactions. This argument is flawed, however, because TWF has not shown that the earlier transactions were other than arm's length, negotiated transactions; rather, TWF assumes that the terms of the earlier transactions would have been repeated in the Unchallenged Transactions but for this action. Because I have held that those terms were fair, it would be speculation for the Court to attempt to specify the difference between "what would have been" and "what was" in terms of the later Unchallenged Transactions. Thus, TWF has not satisfied the second common fund criterion.

The final element of the common fund doctrine mandates that there be a causal connection between the plaintiff's action and the benefit that the class received. TWF argues that because it has satisfied the first two criteria of a common fund, the burden shifts to Adhezion to demonstrate that the lawsuit did not cause the improvements to the Unchallenged Transactions. Even assuming TWF satisfied the first two criterion of a

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41 *See In re First Interstate*, 756 A.2d at 359 & n.3.

common fund, which as explained above, they did not, TWF's burden shifting argument still fails. In support of its argument, TWF cites this Court's decisions in *San Antonio Fire & Police Pension Fund v. Bradbury*[42] and *Franklin Balance Sheet Investment Fund v. Crowley*. But, those cases are distinguishable from this action in that both involved claims that were either settled or mooted by the defendant's actions after the lawsuit was commenced and the settlement or mooting served as the basis for shifting the burden of proof on the issue of causation to the defendant.[43] TWF avers that "mooting" of claims is present here, because Adhezion mooted "a potential claim" with respect to the Unchallenged Transactions by improving the terms and "thereby reducing any claimed unfairness."[44] TWF's mooting claim is not persuasive. TWF has not cited any authority for its contention that mooting a potential claim, as opposed to an actually filed claim, can serve as the basis of a common fund award. Furthermore, it is unclear at this juncture how TWF can claim that potential claims regarding the Unchallenged Transactions are moot when, in briefing, TWF expressly stated that it does not concede that the Unchallenged Transactions were fair and that TWF reserved its rights to challenge the

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42 2010 WL 4273171, at *11 (Del. Ch. Oct. 28, 2010).

43 *See id.* (finding burden of disproving causation was on the defendant because "the defendant . . . is in a position to know the reasons, events and decisions leading up to the defendant's [mooting] action.") (quoting *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 880 (Del. 1980)); *Franklin Balance Sheet Inv. Fund*, 2007 WL 2495018, at *8 (Del. Ch. Nov. 27, 1990) (holding that "[b]ecause the first two common fund doctrine requirements are satisfied here, Defendants bear the burden of demonstrating that the lawsuit in no way caused the benefit," when the benefit was the result of a settlement.)

44 Pl.'s Reply to Defs.' Opp'n at 9–10.

terms of these transactions.[45] Having failed to establish that any of its claims were settled or mooted by Adhezion's actions, the underlying reasons for shifting the burden of proof as to causation to defendants[46] are not present in this case. Accordingly, TWF bears the burden of establishing that its actions caused the "improvements" in terms of the Unchallenged Transactions.

I find that neither Zimmerman nor TWF has shown that their litigation efforts caused the Company to save any money in the sense of "improving" the terms of the Unchallenged Transactions over those of the Challenged Transactions. The record in this case is not sufficient to demonstrate that the Unchallenged Transactions were anything other than arm's length transactions or that the parties to those transactions somehow changed their positions based on this litigation. In this respect, this Court considers the benefits conferred by the litigation itself, not those simply accruing after the commencement of the litigation and claimed by the plaintiff on a *post hoc ergo propter*

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45 Pl.'s Mot. at 7 n.5.

46 *See United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1080 (Del. 1997) ("Where, as here, a corporate defendant, after a complaint is filed, 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. This rebuttable presumption exists because 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.") (quotations and citations omitted); *Allied Artists Pictures Corp. v. Baron*, 413 A.2d at 880 ("The main concern apparent in our cases has been that the party who takes the action that cures the alleged wrong to the corporation's benefit and thereby moots or settles the lawsuit should bear the burden of demonstrating that the lawsuit did not in any way cause their action.") (citations omitted).

hoc basis.[47] TWF asserts that, because it appeared after trial that Zimmerman's suit would be successful, Defendants altered the terms of the Unchallenged Transactions. They offer no concrete evidence to support this theory, however. Simply put, correlation does not *ipso facto* show causation. Thus, TWF has not shown that the Unchallenged Transactions, which were never part of this litigation, gave rise to a common fund benefiting Adhezion that could provide a basis for an award of attorneys' fees here.

2. The Corporate Benefit Doctrine

The corporate benefit doctrine applies where no tangible monetary benefit has passed to the stockholders; rather, the underlying litigation creates a "non-mandatory and 'therapeutic' benefit, worthy of compensation . . . ."[48] The "definition of a corporate benefit . . . is elastic . . . and need not be measurable in economic terms."[49] Likewise, it is sufficient that "the underlying litigation has 'specifically and substantially' benefited the [stockholders]."[50]

Here, I find that TWF's efforts (specifically, its success on Zimmerman's breach of contract claim) conferred a significant corporate benefit on the Company and its unitholders. In this action, Zimmerman initially brought several derivative claims,

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

48 *In re Dunkin' Donuts S'holders Litig.*, 16 Del. J. Corp. L. 1443, at *1452 (Del. Ch. Nov. 17, 1990) (citing *Eisenberg v. Chicago Milwaukee Corp.*, 14 Del. J. Corp. L. 690, 695–96 (Del. Ch. Oct. 25, 1988)).

49 *Tandycrafts, Inc.*, 562 A.2d 1162, 1165 (Del. 1989).

50 *In re Dunkin' Donuts*, 16 Del. J. Corp. L. at *1451 (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).

including claims for breach of the fiduciary duties of care and loyalty, aiding and abetting those breaches, and breach of contract.[51] I granted Defendants' motion for summary judgment as to all claims, except for Zimmerman's claims for breaches of contract and the duty of care and for aiding and abetting, on which the parties went to trial. Although I held after trial that Defendants did not breach their fiduciary duties, I also concluded that Defendants breached the Agreement by not seeking the Class A Common unitholders' approval before authorizing new shares in the Challenged Transactions. My ruling directly applied to the Challenged Transactions. In a broader sense, however, the ruling also could affect the ongoing relationship between management and stockholders, and the required voting processes, under the Agreement. In the Post-Trial Opinion, I held that Zimmerman was entitled to a declaratory judgment regarding the Class A Common unitholders' contractual rights under the Agreement.[52] This aspect of the Post-Trial Opinion arguably represents the type of "benefit" that our courts would recognize as fitting within the corporate benefit doctrine.[53]

Defendants advance two substantive arguments against TWF's request for fees. First, Defendants assert that, as a practical matter, TWF's efforts generated no benefit at

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51 *See* Pl.'s First Am. Compl.

52 *Zimmerman v. Crothall*, 62 A.3d 676, 691–99 (Del. Ch. 2013).

53 *See, e.g.*, *Richman v. DeVal Aerodynamics, Inc.*, 185 A.2d 884, 885–86 (Del. Ch. 1962). In *Richman*, the Court awarded attorneys' fees under the corporate benefit doctrine after stockholders successfully sought an injunction simultaneously compelling the president to call a special meeting and preventing the board of directors from taking certain threatened actions until the meeting could be held. *Id.*

all because the declaratory relief Zimmerman proved was appropriate will cause the Company difficulty in raising additional capital.[54] That is, Defendants contend that, even if such a declaration will advance the Class A Common unitholders' interests, it will not provide litigation benefits to *all* the Adhezion equity holders and, therefore, does not provide a basis for this Court to grant attorneys' fees.[55] Defendants are correct that, under the corporate benefit doctrine, the benefit must accrue to the Company.[56] The remainder of their argument, however, erroneously conflates efficient management with the importance of attracting investors without acknowledging the importance of a Delaware business entity operating in conformance with its governing documents. The Post-Trial Opinion raised no *new* barrier to management acting in the best interests of the Company; rather, it recognized and validated an existing right of the Class A Common unitholders that the Board had by pattern and practice ignored based on a misreading of

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[54] Defs.' Opp'n at 5–7. Defendants also assert that there is no *net* benefit here, because the costs of this litigation outweigh the benefit. *Id.* at 6–7 (citing *Thorpe v. CERBCO, Inc.*, 1997 WL 67833, at *2 n.1 (Del. Ch. Feb. 6, 1997)). Defendants' reliance on the *Thorpe* case is misplaced, however, because there the attorneys sought some $1.66 million in fees and expenses incurred while litigating to advance a benefit that, ultimately, would have accrued to the company in any event. *Thorpe*, 1997 WL 67833, at *3–5. In contrast, TWF estimates its total fees and costs to be $337,359.59. Pl.'s Mot. at 10. Moreover, unlike the situation in *Thorpe*, I find that Zimmerman's litigation efforts *directly* precipitated the claimed corporate benefit to the Company.

[55] Defs.' Opp'n at 5–7.

[56] *Cf. Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 153 (Del. 1980) ("[T]he award [of attorneys' fees] was based on the benefit *which the stockholders received* and the nature of [counsel's] contribution, including time, effort and skill, in producing that benefit.").

Adhezion's Operating Agreement. Although I found that the Challenged Transactions were entirely fair, and that, based on the unique circumstances of this case, the error did not warrant anything more than nominal damages despite the repeated breaches of the Agreement, that does not detract from the fact that the Post-Trial Opinion clarified that Class A Common unitholders have approval rights in transactions such as the Challenged Transactions. The Company's position that adherence to the Court's ruling will impede its ability to raise additional capital underscores the materiality of the clarification through Zimmerman's (and TWF's) litigation efforts on the Company's behalf.[57] The additional fact that the Company did not seek or obtain the approval of the Class A Common unitholders for the two later Unchallenged Transactions that TWF focused on in their fee request demonstrates the continuing importance of the Court's ruling. I find, therefore, that Zimmerman and TWF did achieve a "corporate benefit" for the Company.

Second, Defendants argue that my finding in favor of Zimmerman on the breach of contract claim constitutes a "rule of law," which is not a "substantial, identifiable economic benefit upon which to base an award of attorneys' fees."[58] In essence, Defendants contend that, at this juncture, the Post-Trial Opinion authorizing the declaration of the Class A Common unitholders' approval right merely constitutes the

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[57] Indeed, the Company's argument strengthens the plausible inference that the purchase by another Adhezion investor of all of Zimmerman's units at a premium of over 300 percent compared to his previous sale of such units, in fact, may have been motivated solely by a desire to enable the Company to flout this Court's ruling in the future.

[58] Defs.' Opp'n at 6 (quoting *Thorpe*, 1997 WL 67833, at *4).

"law of the case" and confers only a speculative benefit on the Company. The premise for this position appears to be that the Company and its Board remain free to ignore the Post-Trial Opinion and continue their past practice, and that the Class A Common unitholders can do little more than urge future courts to give deference to the Post-Trial Opinion because they would not be required to do so.

In support of their position, Defendants rely on *Thorpe v. CERBCO, Inc.*, in which the Court of Chancery rejected the plaintiff's corporate benefit theory that, through prior opinions, he had amassed several decisions that the Company could use offensively in the future. The Court dismissed that argument, in part, because the "rule of law" that the plaintiff asserted as support required a "highly speculative endeavor" even to "extrapolate" it from the Court's prior rulings.[59] The relevant facts of this case differ from those in *Thorpe*, however. There, the Court based its decision on at least two circumstances not present here. First, the Court in *Thorpe* reasoned that extracting a "rule of law" from its previous decisions would be a "highly speculative endeavor." The same cannot be said in this case because the issue involved was quite narrow and the ruling called for entry of a very specific declaratory judgment. Second, in *Thorpe*, nothing in the record indicated that the breach that was alleged and litigated was likely to recur in the future.[60] Here, Defendants vigorously oppose the entry of a final order implementing the Post-Trial Opinion, and, specifically, the declaratory relief on which

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[59] *Thorpe*, 1997 WL 67833, at *4.

[60] *Id.*

TWF has based its corporate benefit theory. Furthermore, as noted above, *every* Challenged Transaction in issue in this litigation, as well as the two later Unchallenged Transactions, followed a process that I have held contravened the Agreement. Thus, unlike the situation in *Thorpe*, it is likely that the wrong in question in this case will recur. Furthermore, although no final declaratory judgment will issue in this case, the Court's Post-Trial Opinion remains a matter of public record.

To the extent Defendants argue that the Post-Trial Opinion does not confer a corporate benefit because it lacks issue or claim preclusive effect, that argument is also not persuasive. I conclude that, by fully litigating this matter, TWF provided Adhezion with a corporate benefit by clarifying the issue of the Class A Common unitholders' approval rights pursuant to the Agreement. Under the circumstances of this case, litigating that issue and procuring the Post-Trial Opinion conferred a compensable corporate benefit on Adhezion and its unitholders, whether or not the Post-Trial Opinion is given preclusive effect in future litigation. As a result, I need not resolve or express a definitive opinion on the question of, for example, the issue-preclusive effect of the Post-Trial Opinion. In that regard, however, I note that this Court's Post-Trial Opinion serves as the basis for my decision in this Memorandum Opinion to award attorneys' fees to TWF over Defendants' objections. Thus, I will enter a final order reflecting that decision and my reliance on the portion of the Post-Trial Opinion regarding the Class A Common unitholders' rights of approval. Depending on the issues and circumstances, that order conceivably might have issue-preclusive effect in a future case.

TWF asserts correctly that, whether or not this Court enters a final order on the merits of Zimmerman's derivative request for a declaratory judgment, the Court still has the authority to grant an award of attorneys' fees. As this Court explained in *In re First Interstate*, "fee shifting is an equitable device . . . not properly confined to rigid, predictable circumstances."[61] As in that case, I find that, in the circumstances of this action, "it is more fair to require [the Company] to pay a fee to plaintiffs' counsel than to deny them any fee at all."[62]

The only questions remaining are: (1) were Zimmerman's claims meritorious when filed?; (2) did Zimmerman's litigation efforts cause a corporate benefit?; and (3) did Zimmerman's efforts benefit an identifiable group?[63] As previously stated, a claim is "meritorious when filed" if it can withstand a motion to dismiss.[64] Zimmerman attacked the validity of all four Challenged Transactions on the basis that they lacked the requisite approval of the Class A Common unitholders. That aspect of Zimmerman's claims survived Defendants' motion for summary judgment and, ultimately, prevailed at trial. Hence, the requirement of a meritorious claim has been met. As previously discussed, Zimmerman's litigation efforts caused a corporate benefit in that the litigation clarified the meaning of the Agreement regarding the relative rights of certain of the Company's

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61 *In re First Interstate*, 756 A.2d 353, 362 (Del. Ch. 1999).

62 *Id.*

63 *See United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

64 *In re First Interstate*, 756 A.2d at 362 (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966)).

unitholders and demonstrated that the Company's directors repeatedly had misconstrued the nature of those rights. I also find that the resulting clarification benefited not only the Class A Common unitholders, but also the Company in that it probably will remove a point of dispute and uncertainty in anticipated future transactions of a similar type. Thus, all the requirements for an award of attorneys' fees based on the achievement of an unquantifiable corporate benefit have been met in this case.

Based on the rather suspicious circumstances in which Zimmerman disposed of his stock in the Company in April 2013, Defendants are hardly in a position to press that fact as a predicate for denying an award of fees here. A month later, Zimmerman filed his motion to enter a final order and petition for an award of attorneys' fees on March 11, 2013. Zimmerman sold all of his stock in the Company to Graham, an investor owning a significant number of Preferred units and an individual well known to the Company's Board.[65] I am not convinced that TWF has adduced sufficient evidence in connection with the pending motions to support a reasonable inference that Graham acted as the Board's puppet to deprive Zimmerman (and TWF) of standing to seek a final order and attorneys' fees here. By the same token, however, nothing about the circumstances of

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[65] *See* TWF Reply Supp. Pl.'s Mot. at 7. *See also Ark. Teacher Ret. Sys. v. Countrywide Fin. Corp.*, 2013 WL 4805725, at *5 (Del. Sept. 10, 2013) (explaining that facts supporting invocation of the fraud exception to the "continuous ownership" rule in that case "were not present . . . because the record did 'not reflect that [the corporation's] directors prospectively sought and approved a merger, *solely to deprive stockholders of standing to bring a derivative action*.'") (emphasis added) (quoting *Ark. Teacher Ret. Sys. v. Caiafa*, 996 A.2d 321, 323 (Del. 2010)).

Zimmerman's divestment of his interests in Adhezion provide any basis for favoring Defendants in assessing the relative equities as to TWF's request for fees.

For all of these reasons, I find that TWF is entitled to an award of attorneys' fees for its efforts in the underlying litigation.

C. The Amount of the Fee Award

TWF's fee petition seeks an award of $400,000 in attorneys' fees and expenses. According to TWF, this amount allocates "[1] $200,000 to the improvements in the terms of the [two Unchallenged Transactions] and [2] $200,000 to the increase in monitoring ability by the Class A Common over transactions subsequent to the [Challenged Transactions]."[66] TWF handled this matter on a contingent basis, but estimated that their fees and expenses, based on their usual hourly rates, were $337,359.59.[67] Because I concluded in Part II.B.1 *supra* that TWF's litigation efforts neither created a common fund nor precipitated any alleged savings associated with the Unchallenged Transactions, I have not attributed any fees to that alleged benefit.

In cases such as this one, where the benefit conferred on the company by virtue of the underlying litigation is real but unquantifiable, courts have awarded attorneys' fees on

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66 Pl.'s Mot. at 11.

67 *Id.* at 10–11. Zimmerman calculated this figure based on his counsel personally having spent 581 hours at $465.00 per hour, a paralegal having spent 63.2 hours at $165.00 per hour, and TWF having incurred $56,766.59 in "expert fees, filing fees, and fees for depositions and transcripts." *Id.* at 10.

a *quantum meruit* basis.[68] In performing a *quantum meruit* analysis, courts consider the work the attorneys performed to achieve the benefit and the amount and value of the attorney time required for that purpose, taking into account the experience of counsel and the contingent nature of the case.[69]

After carefully reviewing the record of this case for the purpose of determining TWF's on a *quantum meruit* basis, I find that it is fair and equitable to award an aggregate amount of $300,000.00 to be paid by the Company for all of TWF's attorneys' fees, costs,[70] and expenses. First, TWF spent 644.2 hours litigating this case from its inception through a three-day trial and post-trial briefing and argument on a contingent fee basis. Second, TWF prosecuted this action on behalf of a holder of common units

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68 *See La. State Emps.' Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *10 (Del. Ch. Sept. 19, 2001) (awarding attorneys' fees under *quantum meruit* in a corporate benefit case); *In re First Interstate*, 756 A.2d 353, 363 (Del. Ch. 1999) (same); *In re Dunkin' Donuts S'holders Litig.*, 16 Del. J. Corp. L. 1443, at *1457 (Del. Ch. Nov. 27, 1990) (same); *Chrysler Corp*., 223 A.2d at 389–90 (upholding the same).

69 *In re First Interstate*, 756 A.2d at 363.

70 TWF also seeks an award of its costs under the independent theory that such an award is warranted based on Court of Chancery Rule 54(d), under which costs "shall be allowed as of course to the prevailing party unless the court otherwise directs." Ct. Ch. R. 54(d). For the purposes of Rule 54(d), costs include "expenses necessarily incurred in the assertion of a right in court, such as court filing fees, fees associated with service of process or costs covered by statute. . . . [I]tems such as computerized legal research, transcripts, or photocopying are not recoverable." *See FGC Hldgs. Ltd. v. Teltronics, Inc.*, 2007 WL 241384, at *17 (Del. Ch. Jan. 22, 2007). Because Zimmerman arguably succeeded on only one of his claims, it is questionable whether he qualifies as a "prevailing party" for purposes of Rule 54(d). I need not resolve that issue here, however, because any costs to which TWF might be entitled already are encompassed in the aggregate award to TWF of attorneys' fees and expenses in the amount of $300,000.

who sued derivatively on behalf of the entity and successfully challenged the validity of the Board's actions regarding the issuance of additional classes of stock. Third, after it moved to withdraw as counsel to Zimmerman, TWF properly and promptly moved to intervene in this action. Fourth, as discussed at length above, TWF's litigation efforts resulted in a significant, but unquantifiable, benefit to the Company that was solely and directly attributable to those efforts. Finally, the award being granted lies above the $200,000 that TWF attributed to its success on the breach of contract claim, but falls below the total fees and expenses of $400,000 that they sought. In addition, the award is below TWF's purported lodestar of $337,359.59, which includes 581 hours spent by Zimmerman's counsel, Evan O. Williford, Esquire, at his normal hourly rate of $465.00, as well as some paralegal time and various expenses. The total award of $300,000.00 net of expenses and the fees attributable to the paralegal work still yields a relatively high imputed hourly rate for Mr. Williford of approximately $400.00. Based on Mr. Williford's skillful presentation of Zimmerman's case and the complexity of the subject matter involved, however, I conclude that an award of $300,000.00 to TWF on a *quantum meruit* basis is appropriate in the circumstances of this case.

Moreover, under the corporate benefit doctrine, "those who benefit should compensate whoever has caused the benefit."[71] In these cases, "[t]ypically the corporation benefits . . . so the corporation must compensate."[72] Here, because I find that

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[71] *In re Dunkin' Donuts S'holders Litig.*, 16 Del. J. Corp. L. 1443, at *1452 (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149) (Del. 1980)).

[72] *Id. See also Weinberger v. UOP, Inc.*, 517 A.2d 653, 656 (1986).

TWF's litigation efforts conferred a benefit of general value to the Company, the Company is responsible for paying TWF's attorneys' fees.

III. CONCLUSION

For the reasons stated, I hold that TWF is entitled to receive from Adhezion a payment of its reasonable attorneys' fees and expenses in the amount of $300,000.00. A final order to that effect is being filed concurrently with this Memorandum Opinion.

I also grant Defendant Adhezion's motion to dismiss Zimmerman's derivative First Amended Complaint and deny Plaintiff's related motion for entry of a final judgment on the merits of the underlying dispute.