COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *In re PAETEC Holding Corp. Shareholders Litigation*,
Civil Action No. 6761-VCG

Dear Counsel:

This matter arises out of a merger between Defendant PAETEC Holding Corp. ("PAETEC") and Defendant Windstream Corp. ("Windstream"). On December 13, 2012, I approved settlement in this matter but reserved judgment on the issue of whether and in what amount PAETEC should pay the Plaintiffs' attorneys' fees and costs. For the following reasons, I have decided to award Plaintiffs' counsel $500,000 in fees and costs.

A. Background

PAETEC is a Delaware corporation that operates in the telecommunications industry, offering internet and phone service primarily to businesses.[1] Windstream is also in the telecommunications business, offering residential phone, TV and internet services as well as networking and communication services for business and government customers.[2]

On August 1, 2011, PAETEC announced it had entered into an agreement with Windstream whereby Windstream would acquire all outstanding shares of PAETEC through a stock-for-stock merger.[3] The agreement valued PAETEC at approximately $2.3 billion, or $5.52 per share.[4] One week after the deal was announced, on August 8, 2011, the Plaintiffs filed this action, in which they alleged that PAETEC directors breached their fiduciary duties by selling the company for an inadequate price through a flawed sales process, and that Windstream aided and

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[1] Compl. ¶¶ 5, 30.
[2] *Id.* ¶ 16.
[3] *Id.* ¶ 41.
[4] *Id.* ¶¶ 41, 43.

abetted those breaches of fiduciary duty.[5] The Plaintiffs sought injunctive relief and damages.

The Plaintiffs supported their allegations of inadequate price by pointing out that PAETEC's ongoing strategy of expansion by acquisition was yielding impressive dividends to stockholders, with robust revenue growth in early 2011 as well as an increase in PAETEC's stock price from $3.07 in March 2011 to $4.78 in July 2011.

The Plaintiffs further alleged that the Merger Agreement unlawfully precluded the Board of Directors from obtaining the best price for the company because: (1) certain directors and officers of PAETEC who collectively owned approximately 6.7% of the company signed a Voting Agreement in which they pledged to vote their shares in favor of the merger,[6] (2) the Merger Agreement contained a No Solicitation clause prohibiting PAETEC from inviting additional bids and also gave Windstream the right to match a competing offer,[7] and (3) the Merger Agreement provided for a $40 million termination fee payable to Windstream in the event the board of directors accepted another offer.[8]

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[5] *Id.* ¶ 2.
[6] *Id.* ¶ 53.
[7] *Id.* ¶¶ 55-56.
[8] *Id.* ¶ 58. The termination fee represents less than 2% of the deal value.

On September 12 and 13, 2011, the Windstream and PAETEC defendants, respectively, filed motions to dismiss arguing that the Plaintiffs' allegations failed to state a cause of action for breach of fiduciary duty because (1) the Defendants owed no *Revlon* duties, as the merger would consist of stock-for-stock strategic merger of widely held, publicly traded companies; and (2) Delaware law has recognized that the deal protection devices listed in the Complaint are acceptable and not preclusive.[9] The Defendants also jointly filed a Motion to Stay Discovery along with their Motions to Dismiss.[10]

Until this time, this matter had been pending before Vice Chancellor Parsons, but on September 15, 2011, it was transferred to me. Also on September 15, the Plaintiffs filed a Motion to Expedite.[11] The Defendants opposed the Motion on the same grounds articulated in their earlier Motion to Dismiss—they argued that the Plaintiffs' claims of breach of fiduciary duty were not colorable.[12] However, despite the fact that the parties briefed the Motion to Expedite, it was never argued. Rather, the Plaintiffs filed a Motion for a Preliminary Injunction on

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[9] *See* Def. Windstream's Br. Supp. Mot. Dismiss 4-6; PAETEC Defs.' Br. Supp. Mot. Dismiss 5-11. Windstream further argued that even if a breach by the PAETEC board of directors had actually occurred, the Plaintiffs had failed to allege that Windstream knew of that breach, and therefore the Plaintiffs' aiding and abetting claims must fail. *See* Def. Windstream's Br. Supp. Mot. Dismiss 7.

[10] *See* Defs.' Mot. Stay Discovery 1.

[11] Pls.' Mot. Exped. Proceedings & Discov. 1.

[12] *See* PAETEC Defs.' Br. Opp. Pls.' Mot. Exped. Proceedings & Discov. 1; Def. Windstream's Br. Opp. Pls.' Mot. Exped. Proceedings & Discov. 1.

September 23, and shortly thereafter the parties agreed to proceed directly to a hearing on the Preliminary Injunction.[13] Approximately one week before the hearing date, on October 14, 2011, the parties settled the matter.[14]

Though the Plaintiffs never filed an amended complaint in this matter, by the time of the settlement it was clear that, rather than focusing on the purportedly preclusive deal protections, the Plaintiffs were supporting their claims for breach of fiduciary duty with allegations of inadequate and misleading disclosures in Windstream's proxy filings.[15] The claims relating to inadequate disclosure were the only claims for which the Plaintiff's argued that they had demonstrated a reasonable probability of success on the merits.[16]

In their brief supporting the Motion for a Preliminary Injunction, the Plaintiffs alleged the following deficiencies in Windstream's S-4.

1. <u>Failure to Provide Key Information Concerning PAETEC's Net Operating Losses</u>

The S-4 disclosed that PAETEC had accrued approximately $1.4 billion worth of net operating losses ("NOLs"), which can provide value by reducing

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[13] *See* Pls.' Mot. Prelim. Inj. 1; *see also* Letter to Counsel Confirming Prelim. Inj. Hr'g 1, Sept. 26, 2011.
[14] *See* Mem. Underst'g 1, Oct. 14, 2011.
[15] *See* Br. Supp. Pls.' Mot. Prelim. Inj. 1 ("Plaintiffs seek to enjoin the October 27, 2011 shareholder vote unless and until PAETEC's Board of Directors travel down the road of full disclosure and give PAETEC's stockholders the information they need in order to make intelligent, rational and informed decisions about whether to vote in favor of the Proposed Transaction.") (citations omitted) (internal quotation marks omitted).
[16] *Id.* at 16.

future income taxes.[17] The Plaintiffs alleged that the S-4 failed to inform PAETEC stockholders how each of PAETEC's three financial advisors valued the NOLs.[18] Because the different financial advisors projected substantially different valuations for the NOLs, the Plaintiffs argued that investors needed to be aware of how the advisors arrived at those values in order to evaluate the weight to assign the different fairness opinions.[19]

2. <u>Failure to Disclose Material Facts Concerning Deutsche Bank's Accretion/Dilution Analysis of Windstream.</u>

The Plaintiffs alleged that the Defendants provided an incomplete, misleading summary of Deutsche Bank's accretion/dilution analysis with respect to the surviving entity.[20] The Plaintiffs were concerned that the S-4's summary of Deutsche Bank's analysis did not specify the extent to which the accretive effect of the merger depended on the realization of anticipated synergies.[21] The Plaintiffs argued that this deficiency impaired the ability of stockholders to compare the PAETEC-Windstream merger with potential alternatives.[22]

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[17] *Id.* at 17. *See* Bennet Aff. Ex. 2, at 43 ("Windstream cannot assure you whether, when, or in what amounts it will be able to use PAETEC's net operating losses following the merger.").
[18] Br. Supp. Pls.' Mot. Prelim. Inj. 17.
[19] *Id.* at 18 ("[W]hile BofA present value calculation for the NOLs in the base case discounted cash flow analyses was from $255 - $225 million, Houlihan Lokey's present value calculation for the NOLs in a discounted cash flow analysis was $161.2 million.").
[20] *Id.* at 18-19.
[21] *Id.* at 19.
[22] *Id.*

3. <u>Failure to Disclose Material Information Concerning Financial Advisors.</u>

The Plaintiffs alleged that the S-4 failed to inform PAETEC stockholders of the conflict of interest arising from one of Windstream's financial advisors, Stephens.[23] Stephens had been engaged by PAETEC in connection with PAETEC's acquisition of a company called XETA.[24] In the course of that representation, Stephens had access to PAETEC's confidential information.[25] When Windstream later hired Stephens in connection with Windstream's merger with PAETEC, at least three Stephens employees worked on that engagement who had previously worked for PAETEC on the XETA transaction.[26] The Plaintiffs alleged that all the details of Stephens' relationship with PAETEC should be disclosed to allow PAETEC stockholders to judge the relevance and severity of any potential conflict of interest.[27]

4. <u>Inadequate Disclosure of Board Refusal to Engage Another Bidder.</u>

The Plaintiffs objected to the lack of detail in the S-4 regarding the PAETEC Board's decision not to let the exclusivity agreement with Windstream lapse in

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[23] *Id.*
[24] *Id.* at 19-20.
[25] *Id.* at 20.
[26] *Id.*; Wilson Depo. 134:25-135:6 ("Q: Were there any of the members of that same team that were advising on Stephens' behalf [sic] PAETEC with the XETA transaction on the team working for Windstream to advise Windstream in the proposed transaction then proposed of PAETEC? A: Yes.").
[27] Br. Supp. Pls.' Mot. Prelim. Inj. 20.

order to solicit another offer at potentially a higher price. The Plaintiffs allege that the real reason why the board decided to proceed with the Windstream merger rather than wait for a superior proposal was because the board concluded that a potential competing bidder was not serious, but was simply seeking to disrupt the Windstream deal.[28] The S-4 indicated that the PAETEC board's reason for forgoing the alternative proposal was that the third-party bidder had uncertain financing for a deal.[29] The Plaintiffs argued that PAETEC stockholders were entitled to know the full range of explanations behind the board's decision to enter into the exclusivity agreement with Windstream.[30]

B. Post-Settlement Disclosure

After the parties agreed to settle, Windstream made several corrective disclosures.

1. <u>Disclosures Concerning Conflicted Financial Advisors.</u>

The supplement informed stockholders that Stephens had performed work for PAETEC in which it had access to PAETEC's confidential information, and

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[28] *Id.* at 22.

[29] *Id. See* Bennet Aff. Ex. 2, at 54 ("Representatives of BofA Merrill Lynch further noted that Company A's proposal had not indicated whether Company A had a plan for obtaining the financing, that Windstream had provided that its proposal would not be subject to a financing contingency, and that, based on the respective abilities of Windstream and Company A to raise financing in the public markets previously, Windstream would be expected to have less difficulty doing so than Company A.").

[30] Br. Supp. Pls.' Mot. Prelim. Inj. 22.

that several of the same employees that worked for PAETEC also worked for Windstream in connection with Windstream's acquisition of PAETEC.[31]

2. <u>Disclosures concerning Conflicted Management.</u>

Before settlement, the S-4 made no disclosure about the compensation arrangements for PAETEC's CEO.[32] After settlement, the S-4 included the following supplemental disclosure:

> During the July 8 meeting, Mr. Chesonis stated that he had no expectation of, and no intention of accepting, any employment, consulting or other relationship with Windstream in the event a transaction was consummated.
>
> . . . .
>
> During the July 10 meeting, Mr. Chesonis stated that he did not expect to be retained in any capacity by the combined entity and had no intention of accepting any employment with the combined entity in the event a transaction was consummated, regardless of whether the Company entered into a transaction with Windstream or Company A.[33]

3. <u>Disclosures Concerning the Selection of Financial Advisors</u>

As originally drafted, the S-4 contained no details about why each of PAETEC's financial advisors was retained and why they retained three different financial advisors. After settlement, the S-4 included disclosures that (1) PAETEC hired BofA Merrill Lynch to assist in negotiating the merger because of BofA

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[31] *See* Pls.' Br. Supp. Settlement, Cert. Class, & Attys' Fees 10. (hereinafter "Pls. Br. Supp. Settlement").
[32] *Id*. at 11.
[33] *Id.*

Merrill Lynch's prior experience with PAETEC and general expertise in the telecommunications industry; (2) PAETEC hired Deutsche Bank to assist in negotiating the merger because of Deutsche Bank's international reputation, as well as its prior experience with PAETEC and general expertise in the telecommunications industry; and (3) PAETEC hired a third financial advisor because it wanted a fairness opinion from a financial advisor independent from the deal whose compensation was not contingent on closing the deal.[34]

4. Disclosures Concerning Negotiations with Third Parties.

The S-4, which had disclosed the potential interest of two alternative merger partners, was supplemented by the following disclosures concerning the PAETEC Board of Directors' communication with third parties in the period following the signing of the Merger Agreement with Windstream:

> As a result of PAETEC having entered into the exclusivity agreement with Windstream, PAETEC was contractually prohibited from engaging in, and did not engage in, any discussions or negotiations with Company B.
>
> . . . .
>
> As a result of PAETEC having entered into the exclusivity agreement with Windstream, PAETEC was contractually prohibited from engaging in, and did not engage in, any discussions or negotiations with Company A, including with respect to the July 31 letter.[35]

[34] *Id*. at 12.
[35] *Id.* at 13.

5. <u>Disclosures Concerning the Valuation of NOLs.</u>

The S-4 was supplemented with information concerning the valuation that each financial advisor assigned to PAETEC's NOLs—considered separately from PAETEC's other assets—as well as the valuation method and discount rates used in arriving at that valuation.[36]

6. <u>Disclosures Concerning Treatment of Competing Offers.</u>

The S-4 was supplemented with information concerning why PAETEC chose to sign a Merger Agreement with Windstream rather than pursue a potential offer from another bidder, Company A. The board was concerned that:

> [T]he current Company A proposal was, as described above, significantly less developed than the Windstream proposal, that any discussions with Company A were unlikely to result in a definitive agreement and that Company A may have had additional intentions and motivations with respect to engaging in renewed discussions regarding a proposed business combination.[37]

7. <u>Disclosures Concerning Accretion/Dilution Analysis.</u>

The S-4 was supplemented with further explanation of how the accretion/dilution analysis of Deutsche Bank could change depending on the realization of anticipated synergies. In particular, the supplemental disclosure informed shareholders that without those synergies, the merger would be accretive to Windstream's estimated 2012 levered free cash flows by approximately 1.6%,

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[36] *Id.* at 14-16.
[37] *Id.* at 16.

and with the synergies, the merger would be accretive to estimated 2012 levered free cash flows by approximately 6.4%.[38]

* * *

The parties submitted a final settlement agreement on September 25, 2012.[39] On December 13, 2012, I heard the Plaintiff's Motion for Final Approval of the Settlement, and I approved the settlement as fair and reasonable for the class. I reserved decision on the request for fees.[40]

C. Analysis

Delaware generally follows the American Rule for apportioning the costs of litigation, requiring that each litigant must pay its own attorneys' fees regardless of the outcome.[41] One exception to this rule is the "corporate benefit doctrine," which allows a litigant to receive reimbursement from a corporate defendant for attorneys' fees when the litigants' efforts produce a benefit to stockholders or the corporate enterprise.[42] The Delaware Supreme Court set forth the standard in *Sugarland Industries, Inc. v. Thomas* that I should apply when determining the amount of fees to which the Plaintiffs' attorneys are entitled under that doctrine.[43]

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[38] *Id.* at 17.
[39] *See* Stip. & Agm't Compromise, Settlement, & Release 1.
[40] *See* Tr. Settlement Hr'g 13-14, Feb. 5, 2013.
[41] *See* *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966).
[42] *Dover Historical Soc., Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006).
[43] *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del.1980).

1. Role of the Court in Examining Uncontested Fee Requests

Before proceeding to a substantive analysis of the Plaintiff's request for fees, I must dispose of Plaintiffs' counsel's argument that judicial scrutiny of an "agreed-to" fee award is generally inappropriate.[44] Plaintiffs' counsel contends that the role of the Court in scrutinizing an unopposed request for attorneys' fees in a class-action settlement is limited to "ferreting out collusion."[45] Indeed, counsel for the Plaintiffs goes so far as to assert that, absent collusion, *Sugarland* should not factor into my analysis at all when considering an agreed-to class-action settlement and uncontested fee request, because "the defendant has already undertaken a *Sugarland*-type assessment for the court."[46]

This argument must fail for at least three reasons. First, in their Brief supporting the final approval of the agreed-to settlement, the Plaintiffs themselves argued at some length that their request for attorneys' fees was appropriate under *Sugarland*.[47] In no way did Plaintiff's counsel indicate that a *Sugarland* analysis was simply a fall-back position, and that it could be considered entirely irrelevant in assessing the settlement. Accordingly, as formal matter, the Plaintiffs waived their argument concerning the judicial scrutiny (or lack thereof) warranted here.

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[44] Pls.' Addt'l Stm't on Mot. Attys.' Fees 2.
[45] *Id.*
[46] *Id.* at 7 n.2.
[47] Pls.' Br. Supp. Mot. Final Approval Prop. Settlem't 26-31.

Second, even if the Plaintiffs had appropriately preserved the argument, they misinterpret the settlement agreement. The Defendants here have *not* agreed to the amount requested by Plaintiffs' counsel. Rather, as is customary, they have agreed not to oppose a fee request above a certain amount.[48] There is nothing in the record supporting Plaintiffs' counsel's contention that Defendants actually engaged in a *Sugarland*-style analysis of determining an appropriate award in light of the efforts of Plaintiff's counsel and the "benefit" of the additional disclosures. To the contrary, the Defendants made clear in PAETEC's supplemental materials that,

> Windstream, PAETEC and the other defendants deny all of the allegations in the Consolidated Lawsuit and believe the disclosures in the Proxy Statement/Prospectus are adequate under the law. Nevertheless, Windstream, PAETEC and the other defendants have agreed to settle the Consolidated Lawsuit in order to avoid costly litigation and reduce the risk of any delay to the completion of the merger.[49]

There is no indication that the Defendants intended their decision not to oppose fee shifting—a decision borne, presumably, of a simple cost-benefit analysis—to substitute for this Court's independent evaluation of the fee requested.

Third, and most fundamentally, the position of Plaintiffs' counsel stands contrary to this Court's case law and longstanding practice of exercising judicial

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[48] *See* Settlement Stip. ¶ 16 ("Plaintiffs will apply to the Court for an award of attorneys' fees and expenses to Plaintiffs' counsel not to exceed $500,000 [the "Fee Petition"]. Defendants agree not to oppose the Fee Petition.").

[49] *Id*., Ex. B at 2.

scrutiny over attorneys' fees even in cases where the fee request is uncontested by the defendant or by any members of the stockholder class. This Court has unambiguously held that "In both [contested and uncontested fee applications], the Court has an independent duty to award a fair and reasonable fee."[50] In practice, the Court has consistently applied that principle when considering uncontested fee requests.[51]

Plaintiff's point to decisions from this Court in which a class-action settlement and uncontested fee request was approved with little scrutiny. It is certainly true that "[t]here is a "natural judicial tendency when reviewing an uncontested fee application that will be paid by the defendants . . . to defer if the amount falls within a plausible range."[52] In fact, that tendency toward judicial deference can militate in *favor* of close judicial scrutiny of the fee because "[a]

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[50] *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *18 (Del. Ch. Apr. 29, 2011)
[51] *See, e.g.*, *Brinkerhoff v. Tex. E. Prods. Pipeline Co., LLC*, 986 A.2d 370, 395-96 (Del Ch. 2010) (applying *Sugarland* to reduce the plaintiff's requested, unopposed fee award from $17.5 million to $10 million); *In re Nat'l City Corp. S'holders Litig.*, 2009 WL 2425389, at *5 (Del. Ch. July 31, 2009) (applying *Sugarland* to an unopposed fee request of $1.2 million and awarding $400,000) *aff'd sub nom.*, *In re Nat'l City Corp. S'holders Litig.*, 998 A.2d 851 (Del. 2010). *De Angelis v. Salton/Maxim Housewares, Inc.*, 641 A.2d 834, 836 (Del. Ch. 1993) (approving settlement but refusing to award any attorneys' fees despite uncontested fee request) *rev'd on other grounds sub nom.*, *Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994); *Stern v. Day*, 1989 WL 89120, at *4 (Del. Ch. Aug. 11, 1989) (awarding $500,000 fee award despite $1 million uncontested fee application); *In re N. Am. Philips S'holders' Litig.*, 1987 WL 28434, at *5 (Del. Ch. Dec. 16, 1987) (awarding $2.5 million fee award despite uncontested fee request for $3.875 million); *Fox v. Chase Manhattan Corp.*, 1986 WL 673, at *5 (Del. Ch. Jan. 9, 1986) (awarding $3 million in attorneys' fees despite uncontested fee request for $5.6 million, citing *Sugarland*).
[52] *Sauer-Danfoss*, 2011 WL 2519210, at *18.

negotiated fee arrangement by its nature deprives the court of the advantages of the adversary process . . . [and] makes heightened judicial oversight of this type of agreement highly desirable."[53]

In the *National City Corp. Shareholders Litigation*, then-Chancellor Chandler explained the reasoning for this heightened scrutiny:

> [S]kepticism of negotiated fee agreements is justified by the classic agency problem inherent in class action litigation. In class actions, the principals, the claim-holding members of the shareholder class, have little or no role in negotiating the settlement of the action or the fees their agents, the attorneys, will receive in conjunction with the settlement of the claims that belong to them. At most, the principals (the class members) possess the opportunity to object to a proposed award of attorney fees. This Court is required to be vigilant, so that counsel's fee requests do not take advantage of the agent-principal relationship between class action plaintiffs and their attorneys.[54]

In light of the arguments presented by Plaintiffs' counsel, I find it necessary to reaffirm the principle that in the approval of a class-action settlement, close judicial scrutiny of the settlement can be warranted, notwithstanding an uncontested fee request.

This is especially true in the context of merger litigation that produces a disclosure-only settlement. Though defendants surely consider many factors when settling a case seeking to enjoin a pending merger, settlement is especially easy

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[53] *Nat'l City*, 2009 WL 2425389, at *5.
[54] *Id. Cf. Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 279 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.").

when there are so few negative repercussions to the directors and officers who are usually named as defendants. Plaintiffs seeking to enjoin a merger because of inadequate disclosures in proxy materials rely on alleged violations of a director's duty of *care*. Though this breach of duty can in some cases justify injunctive relief, directors and officers of Delaware corporations are generally not liable for money damages arising from breaches of their duty of care.[55] Accordingly, a settlement which produces additional disclosures in advance of a stockholder vote creates no issues related to director liability or whether the release of claims arising from such liability is appropriate. There is a risk in any disclosure-only settlement that both the plaintiffs and the defendants have agreed to trivial disclosures as the path of least resistance to a desired end: for the defendants, the release of claims without significant cost, and for the plaintiffs, access to fees and costs. It is proper, therefore, for this Court to scrutinize disclosure-only settlements, both substantively and to determine whether the plaintiffs' efforts have conferred a benefit on the class.

2. <u>Plaintiffs' Request for Attorneys' Fees</u>

I now address the substantive merits of the Plaintiffs' request for attorneys' fees. Though the Plaintiffs in their supplemental briefing characterized their

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[55] *See* 8 *Del C.* § 102(b)(7).

request for fees as a contractual arrangement with the Defendants,[56] as I noted above, the Defendants did not agree to pay anything; they simply agreed not to oppose a fee request above $500,000. Accordingly, the Plaintiffs must support their request for fees under the common benefit exception to the American Rule. The common benefit doctrine provides that "a litigant who confers a common monetary benefit upon an ascertainable stockholder class is entitled to an award of counsel fees and expenses for its efforts in creating the benefit."[57] In this case, I find that the supplemental disclosures qualify as a common benefit to the stockholder class meriting the award of attorneys' fees.

The standard by which I examine the appropriate amount of attorneys' fees was set forth by the Supreme Court in *Sugarland*.[58] The relevant factors are:

> (i) the amount of time and effort applied to the case by counsel for the plaintiffs; (ii) the relative complexities of the litigation; (iii) the standing and ability of petitioning counsel; (iv) the contingent nature of the litigation; (v) the stage at which the litigation ended; (vi) whether the plaintiff can rightly receive all the credit for the benefit conferred or only a portion thereof; and (vii) the size of the benefit conferred.[59]

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[56] *See* Pls.' Addt'l Stm't on Mot. Attys.' Fees 3 ("[T]here is an exception to the American Rule when the parties agree to a fee amount.") (citing *Jackson's Ridge Homeowners Ass'n v. May*, 2008 WL 241617, at *1 n.3 (Del. Ch. Jan. 23, 2008)). *But see* Pls.' Br. Supp. Mot. Final Approval Prop. Settlem't 25 ("Plaintiffs' Counsel are entitled to their requested attorneys' fees and litigation expenses under the corporate benefit doctrine.").

[57] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

[58] *Sugarland*, 420 A.2d at 143.

[59] *In re Celera Corp. S'holders Litig.*, 2012 WL 1020471, at *30 (Del. Ch. Mar. 23, 2012) (quoting *In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005)).

a. Magnitude of the Benefit Conferred

"This court has traditionally placed greatest weight upon the benefits achieved by the litigation."[60] Naturally, estimating the pecuniary value to stockholders of supplemental disclosures is difficult. Therefore, in order to promote fairness and consistency, I determine the appropriate fee award for the Plaintiffs here in light of prior decisions involving similar supplemental disclosures.[61]

In this case, the disclosures Plaintiffs' counsel obtained run the gamut from the valuable to the vacuous. Most useful, by far, was the supplemental disclosure concerning the existence of a possible conflict for Windstream's financial advisor, Stephens, Inc. This Court has recognized that "[b]ecause of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, [stockholders are entitled to] full disclosure of investment banker compensation and potential conflicts."[62] The materiality of a disclosure of

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[60] *In re Anderson Clayton S'holders Litig.,* 1988 WL 97480, at *3 (Del.Ch. Sept.19, 1998).

[61] *See In re Dr. Pepper/Seven Up Cos. S'holders Litig.*, 1996 WL 74214, at *5 (Del. Ch. Feb. 9, 1996) ("Fee applications in class actions resulting in nonquantifiable, nonmonetary benefits have generated decisions from this Court that provide guidance for the exercise of . . . discretion."); *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *17 (Del. Ch. Apr. 29, 2011) ("Consistency promotes fairness by treating like cases alike and rewarding similarly situated plaintiffs equally.").

[62] *In re Del Monte Foods Co. S'holders Litig*., 25 A.3d 813, 832 (Del. Ch. 2011).

a conflicted financial advisor does not necessarily depend on whether the conflict actually harmed the sales process.[63]

Here, as a result of the settlement, the Defendants supplemented the S-4 with information explaining the existence of a conflict of interest for Stephens, and the steps PAETEC took to mitigate the potential harm of that conflict.[64] I find this disclosure to be material. A reasonable stockholder would likely be interested to know that one of Windstream's financial advisors had access to PAETEC's nonpublic financial information mere months before the announcement of the Windstream-PAETEC merger. Even more important is the fact that the same *individuals* who had access to PAETEC's nonpublic financial information later advised Windstream in its acquisition of PAETEC. At the hearing on final approval of the settlement, Plaintiffs' counsel also expressed the view that this

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[63] *See In re John Q. Hammons Hotels Inc. S'holders Litig.,* 2009 WL 3165613, at *16 (Del. Ch. Oct. 2, 2009) ("There is no rule . . . that conflicts of interest must be disclosed only where there is evidence that the financial advisor's opinion was actually affected by the conflict"). *See also David P. Simonetti Rollover IRA v. Margolis,* 2008 WL 5048692, at *8 (Del. Ch. June 27, 2008) ("[I]t is imperative for the stockholders to be able to understand what factors might influence the financial advisor's analytical efforts . . . . For that reason, the . . . benefits of the Merger to [the investment bankers,] beyond its expected fee, must also be disclosed to . . . stockholders.").

[64] Pls.' Br. Supp. Mot. Final Approval Prop. Settlem't 10 ("As a result of Plaintiffs' efforts in this litigation, the S4 was supplemented with the following material information regarding PAETEC's relationship with Stephens: . . . 'Certain members of the Stephens team advising PAETEC on the XETA transaction were also on the Stephens team that advised Windstream on the PAETEC merger. . . . PAETEC took steps to ensure and then confirmed that Stephens did not use any other information gained from PAETEC during the XETA transaction in its advice to Windstream.'").

disclosure was the most important.[65] Prior decisions in which settlements have produced disclosures of similar conflicts for investment advisors have resulted in fees ranging from $358,185 to $525,000.[66] For this disclosure alone, I find that the requested fee of $500,000 is appropriate.

I find the other supplementary disclosures provided for in the settlement to be of such doubtful materiality that they do not warrant any additional fees. Disclosures providing further explanation of the valuation of PAETEC's NOLs or further explanation of how an accretion/dilution analysis would change depending on the realization of synergies provide a level of detail beyond what the law of Delaware requires.[67] Disclosures explaining trivial details such as the fact that PAETEC actually followed the terms of its exclusivity agreement once it signed an agreement with Windstream, or that PAETEC's CEO was entirely *un*conflicted, are of marginal utility, let alone materiality, to stockholders.

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[65] Settlement Hr'g Tr. 6:6-13 ("THE COURT: Which of the disclosures that you achieved do you think provided the most value to the stockholders? MR. O'BRIEN: Yes, I think some were better than others. I was thinking about this earlier today, because I was anticipating this question. The most important disclosure, Your Honor, in my opinion, is the Stephens disclosure.").

[66] *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *21 (Del. Ch. Apr. 29, 2011).

[67] *See In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. Oct. 7, 2002) ("stockholders are entitled to a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely."); *Cf. In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 204 (Del. Ch. Mar. 19, 2007) (explaining that the plaintiffs' objections to proxy disclosures were "mere nit-picking" where plaintiffs sought additional disclosure of how the financial advisor's projections may have changed depending on different growth rate assumptions, or the fact that the ultimate sales price came from the low-end of the advisor's valuation analysis.).

b. Time and Effort of Counsel and Contingent Nature of the Fee

The time and effort Plaintiffs' counsel expended prosecuting this action serves as a cross-check on the reasonableness of the fee award suggested by the benefit conferred. Though this is not the most important factor, I credit Plaintiffs' counsel for their diligence in prosecuting this action. Counsel fully briefed, but did not argue, both a Motion to Expedite as well as a Motion for a Preliminary Injunction. More importantly, counsel for the Plaintiffs engaged in extensive discovery on an expedited basis, including taking key depositions that formed the basis for the most valuable supplemental disclosure concerning conflicts of interest faced by PAETEC's financial advisor. Plaintiffs' counsel also expended approximately 1100 hours of labor, and incurred $47,962 in direct expenses while prosecuting this action, meaning that the requested $500,000 fee would imply an hourly rate of approximately $411. Because this is well within a reasonable range of hourly billing rates, particularly in light of the contingent nature of Plaintiffs' counsel's fee, I find that this factor does not compel any adjustment to the fee award determined by the benefit of the disclosure to the shareholder class.

c. Other Factors

I find none of the remaining *Sugarland* factors especially relevant to my determination of an appropriate fee award. This is an unremarkable disclosure-only settlement of merger litigation. The settlement provided a single material disclosure, was obtained by competent, experienced counsel who prosecuted this case on a contingency fee basis through extensive expedited discovery and moderate pretrial-motion practice, which directly caused the Defendant's supplemental disclosures. These facts do not compel either an upward or downward adjustment of a fee determined by the value of the benefit obtained for stockholders.

Accordingly, I award Plaintiffs' counsel $500,000 in fees and costs.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III