EFiled: Oct 08 2020 04:49PM EDT
Filing ID 66001918
Case Number 266,2020

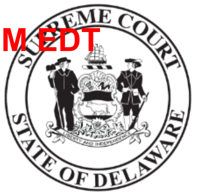

EXHIBIT A

IN THE

Supreme Court of the State of Delaware

IN RE VERSUM MATERIALS, INC.
STOCKHOLDER LITIGATION

No. 266,2020

COURT BELOW: COURT OF CHANCERY
OF THE STATE OF DELAWARE,
C.A. NO. 2019-0206-JTL

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, JOSEPH A. GRUNDFEST, AND SEAN J. GRIFFITH AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

William B. Chandler III (#116)
Shannon E. German (#5172)
WILSON SONSINI GOODRICH
& ROSATI, P.C.
222 Delaware Avenue, Suite 800
Wilmington, Delaware 19801
(302) 304-7600
Attorneys for Amicus Curiae *Joseph A. Grundfest*

OF COUNSEL:

Daryl Joseffer
Tara S. Morrissey
U.S. CHAMBER LITIGATION
CENTER
1615 H Street, N.W.
Washington, D.C. 20062

Anthony A. Rickey (#5056)
MARGAVE LAW LLC
3411 Silverside Road
Baynard Building, Suite 104
Wilmington, Delaware 19810
(302) 604-5190
Attorney for Amici Curiae *The Chamber of Commerce of the United States of America and Sean J. Griffith*

October 8, 2020

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Delaware's Mootness Fee Jurisprudence Influences Corporate Law Nationwide. 5

II. Excessive Mootness Fees Encourage Inefficient Litigation and Harm Delaware Stockholders. 10

A. This Court's "Reasonable Likelihood of Success" Test is Necessary to Discourage Inefficient Litigation 11

B. The Trial Court Applied an Irrebuttable Presumption of Causation. 14

C. Stockholders Suffer When Misgivings Support Large Fee Awards. 18

D. The Mootness Fee Process Allows Stockholders Little Influence Over Fees Paid to Uncertified Representatives. 20

CONCLUSION 24

TABLE OF CITATIONS

Page(s)

CASES

Alaska Elec. Pen. Fund. v. Brown,
988 A.2d 412 (Del. Ch. 2010) 15

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

Ams. Mining Corp. v. Theriault,
51 A.3d 1213 (Del. 2012) 9

Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co.,
404 F. Supp. 3d 486 (D. Mass. 2018) 22

Boilermakers Local 154 Ret. Fund v. Chevron Corp.,
73 A.3d 934 (Del. Ch. 2013) 1, 9

Brinckerhoff v. Tex. E. Prods. Pipeline Co.,
986 A.2d 370 (Del. Ch. 2010) 18

Bushansky v. Remy Int'l, Inc.,
262 F. Supp. 3d 742 (S.D. Ind. 2017) 2

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

City Trading Fund v. Nye,
72 N.Y.S.3d 371 (N.Y. Sup. Ct. 2018), *aff'd and appeal dismissed in part*, 171 A.D.3d 508 (N.Y. App. Div. 2019) 8, 9, 13

Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n,
902 A.2d 1084 (Del. 2006) 5

EMAK Worldwide, Inc. v. Kurz,
50 A.3d 429 (Del. 2012) 15

Franklin Balance Sheet Inv. Fund v. Crowley,
2007 WL 2495018 (Del. Ch. Aug. 30, 2007) 19

Gimbel v. Signal Cos.,
316 A.2d 599 (Del. Ch. 1974) 11

Griffith v. Quality Dist., Inc.,
--- So.3d ----, 2018 WL 3403537
(Fla. Dist. Ct. App. July 13, 2018) 1, 9

Grobow v. Perot,
539 A.2d 180 (Del. 1988) 12

In re Am. Real Estate Partners,
1997 WL 770718 (Del. Ch. Dec. 3, 1997) 15

In re PMFG, Inc. S'holder Litig.,
2017 Del. Ch. LEXIS 258 (Del. Ch. Apr. 28, 2017).....................................5

In re Trulia, Inc. S'holder Litig.,
129 A.3d 884 (Del. Ch. 2016) ....*passim*

In re Walgreen Co. S'holder Litig.,
832 F.3d 718 (7th Cir. 2016) 6, 9

In re Xoom Corp. S'holder Litig.,
2016 WL 4146425 (Del. Ch. Aug. 4, 2016)...7, 12

KT4 Partners LLC v. Palantir Techs. Inc.,
203 A.3d 738 (Del. 2019)...1

La. Mun. Police Emps.' Ret. Sys. v. Crawford,
918 A.2d 1172 (Del. Ch. 2007) 12

Rosenfeld v. Time, Inc.,
2018 WL 4177938 (S.D.N.Y. Aug. 30, 2018) 8

Salzberg v. Sciabacucchi,
227 A.3d 102 (Del. 2020)..1, 9

Sciabacucchi v. Salzberg,
2019 WL 2913272 (Del. Ch. July 8, 2019), *rev'd on other grounds*, 227 A.3d 102 (Del. 2020)...20

Seafarers Pension Plan v. Bradway,
2020 WL 3246326 (N.D. Ill. June 8, 2020)..9

Seinfeld v. Coker,
847 A.2d 330 (Del. Ch. 2000) 19

Skeen v. Jo-Ann Stores, Inc.,
750 A.2d 1170 (Del. 2000)..13

Solomon v. Take-Two Interactive Software, Inc.,
C.A. No. 3604-VCL (Del. Ch. July 18, 2019) (TRANSCRIPT) 19

Sugarland Indus., Inc. v. Thomas,
420 A.2d 142 (Del. 1980)..15

Tandycrafts, Inc. v. Initio Partners,
562 A.2d 1162 (Del. 1989)..15, 21

United Vanguard Fund, Inc. v. TakeCare, Inc.,
693 A.2d 1076 (Del. 1997)..14, 15, 17

Unocal Corp. v. Mesa Petroleum Co.,
493 A.2d 946 (Del. 1985)..17

Wayne Cty. Ret. Sys. v. Corti,
954 A.2d 319 (Del. Ch. 2008) 12

Weinberger v. UOP, Inc.,
457 A.2d 701 (Del. 1983) 17

RULES

Del. Ct. Ch. R. 23(c)(1) 21

MISCELLANEOUS

Richard A. Booth, *Class Conflict in Securities Fraud Litigation*,
14 U. PA. J. BUS. L. 701 (2012) 13

Matthew D. Cain et al., *Mootness Fees*,
72 VAND. L. REV. 1777 (2019) ....*passim*

Stephen J. Choi et al., *The Price of Pay to Play in Securities Class Actions*, 8 J. EMPIRICAL LEGAL STUDIES 650 (2011) 21

Chubb, *From Nuisance to Menace: The Rising Tide of Securities Class Action Litigation*, (2019), https://www.chubb.com/us-en/_assets/doc/from-nuisance-to-menace--the-rising-tide-of-scas-ws.pdf 6

Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review* (2020), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review 7, 8

Sean J. Griffith & Natalia Reisel, *Dead Hand Proxy Puts and Shareholder Value*, 84 U. CHI. L. REV. 1027 (2017) 22

Sean J. Griffith, *Class Action Nuisance Suits: Evidence from Frequent Filer Shareholder Plaintiffs* (Fordham Law Legal Studies Research Paper No. 3470330), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470330 22

Kevin M. LaCroix, *D&ODiary.com*, https://www.dandodiary.com/2020/01/articles/securities-litigation/federal-court-securities-suit-filings-remain-at-elevated-levels/ (Jan. 1, 2020) 19

U.S. Chamber Institute for Legal Reform, *Containing the Contagion: Proposals to Reform the Broken Securities Class Action System* (2019), https://instituteforlegalreform.com/wp-content/uploads/media/Securites-Class-Action-System-Reform-Proposals.pdf 7

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Joseph A. Grundfest and Sean J. Griffith (together with the Chamber, "*Amici*") study and teach corporate and federal securities law and are often cited. *See, e.g.*, *Salzberg v. Sciabacucchi*, 227 A.3d 102, 103 (Del. 2020); *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738 (Del. 2019); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013). Professor Grundfest founded the Stanford Securities Class Action Clearinghouse, which provides detailed information about federal class action securities fraud litigation.

Professor Griffith is an academic and an activist investor whose efforts as a litigant and *amicus* have assisted courts in rejecting unfair settlements. *See, e.g.*, *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016) (*amicus curiae*); *Griffith v. Quality Dist., Inc.*, --- So.3d ----, 2018 WL 3403537 (Fla. Dist. Ct. App.

July 13, 2018) (adopting *Trulia*); *Bushansky v. Remy Int'l, Inc.*, 262 F. Supp. 3d 742 (S.D. Ind. 2017).

Excessive stockholder litigation imposes significant burdens on Delaware stockholders and the Chamber's members. Mootness fees, increasingly used to terminate stockholder litigation, encourage inefficient lawsuits if awarded too frequently or generously. *Amici*, and the Chamber's members, thus have a strong interest in the question presented here: whether a mootness fee awarding over $11,000 per hour to plaintiffs who secured no monetary benefit is appropriate in Delaware.

SUMMARY OF ARGUMENT

This appeal challenges a $12-million mootness award in an action that generated no common fund. The trial court justified this generosity by assuming that plaintiffs' lawsuit indirectly influenced a bidder's success. While Appellants highlight the specific legal errors in the trial court's decision, *Amici* emphasize the systemic challenges created by mootness fee awards that have promoted wasteful litigation.

Although once particular to Delaware practice, mootness fees spread nationwide after the Court of Chancery attempted to restrain "merger tax" lawsuits in 2016. In theory, mootness fees restore an adversarial process to stockholder litigation. In reality, the courts have deviated from this Court's precedents, resulting in unmerited and excessive awards such as the one challenged here.

Reversal and remand will both provide justice to the parties to this appeal and improve the efficiency of representative litigation in Delaware and across the county. Specifically, stockholder litigation will be improved by:

1. Restoring a merits check to the mootness fee process. Fees are warranted only when plaintiffs can demonstrate actual "knowledge of provable facts which hold out some reasonable likelihood of ultimate success." *Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966).

Trial courts often omit this merits check, thereby encouraging plaintiffs to bring weak claims.

2. Clarifying the Presumption of Causation. Plaintiffs seeking a mootness fee should not enjoy a presumption that their lawsuit contributed to any advantageous post-filing event. This *post-hoc ergo propter hoc* fallacy is inconsistent with the rationale for the underlying law and, as in this case, can become effectively irrebuttable.

3. Requiring Fee Awards that Respect Absent Stockholders' Interests. Trial courts that have "misgivings" over fee awards should resolve those doubts for the benefit of the stockholders who pay the fee, rather than adopt one party's extreme position.

4. Allowing stockholder input when determining mootness fees. Mootness fees should be awarded only after a trial court assures a certification process that promotes meaningful stockholder participation.

ARGUMENT

I. Delaware's Mootness Fee Jurisprudence Influences Corporate Law Nationwide.

Mootness fees represent an equitable departure from the American rule that litigants pay their own counsel fees. *See Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006). This exception encourages representatives to pursue claims on behalf of fellow stockholders when opponents could otherwise moot claims without payment in advance of judicial resolution. *See Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980). Within limits, mootness fees can serve an important purpose. Indeed, Professor Griffith received a mootness fee for prompting the withdrawal of a disclosure settlement before he could file an objection. *See In re PMFG, Inc. S'holder Litig.*, 2017 Del. Ch. LEXIS 258 (Del. Ch. Apr. 28, 2017).

However, following the Court of Chancery's decision in *In re Trulia, Inc. Stockholders Litigation*, 129 A.3d 884 (Del. Ch. 2016), mootness fee awards became unmoored from this Court's precedent, both in Delaware and, increasingly, nationwide. The outcome of this appeal can thus have a salutary effect far beyond the First State.

Mootness fees, once rare in corporate litigation, exploded after *Trulia* attempted to eliminate the "merger tax," an egregious species of wasteful litigation that the Seventh Circuit aptly described as "no better than a racket." *In re Walgreen*

Co. S'holder Litig., 832 F.3d 718, 724 (7th Cir. 2016); *see also* Matthew D. Cain et al., *Mootness Fees*, 72 VAND. L. REV. 1777, 1791 (2019) (collecting data). Class plaintiffs in merger-tax cases settle or withdraw claims for supplemental proxy disclosures of minimal value and collect attorneys' fees. *See Trulia*, 129 A.3d at 894. By 2015, the easy availability of fee awards led deal litigation to "explode in the United States beyond the realm of reason," with the percentage of large deals facing litigation reaching a peak of 94.9 percent in 2014. *Id*. Chubb, a large insurer, estimated that the average direct cost to settle merger lawsuits between 2012 and 2017 was $3.8 million, with attorneys' fees constituting 61 percent of these costs. Chubb, *From Nuisance to Menace: The Rising Tide of Securities Class Action Litigation*, at 4 (2019), https://www.chubb.com/us-en/_assets/doc/from-nuisance-to-menace--the-rising-tide-of-scas-ws.pdf.

Trulia offered a two-prong solution. First, it held that future disclosure settlements only would be approved if they included "plainly material" disclosures—in other words, omitted material information that would have supported a preliminary injunction. *Trulia*, 129 A.3d at 898-99. Second, it announced a preference for "mootness dismissals," where plaintiffs dismiss individual claims without a class-wide release and seek a court-approved or negotiated "mootness" award. *Id.* at 897. In theory, defendants would be motivated

to challenge excessive fee requests, thereby encouraging judicial monitoring of the fee process.

It was a good plan. It failed.

Following *Trulia*, the deal litigation rate briefly dipped to 74 percent in 2016, before rebounding to 83 percent by 2018. Cain, *Mootness Fees*, 72 VAND. L. REV. at 1787. Class plaintiffs preserved the merger tax by securing a decision permitting mootness awards for "helpful," but immaterial, disclosures. *See In re Xoom Corp. S'holder Litig.*, 2016 WL 4146425, at *3-4 (Del. Ch. Aug. 4, 2016). *Xoom* thereby undermined this Court's requirement that plaintiffs demonstrate a "reasonable likelihood of ultimate success" to merit a fee, long a bulwark against wasteful litigation. *See infra* Section II.A. Merger-tax plaintiffs then largely left Delaware to avoid scrutiny. Merger challenges in federal court doubled in 2017, and again in 2018, while the percentage of cases brought in Delaware plummeted from 52 percent to five percent. *See* Cornerstone Research, Securities Class Action Filings: 2019 Year in Review (2020), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review ("Cornerstone"); Cain, *Mootness Fees*, 72 VAND. L. REV. at 1787; U.S. Chamber Institute for Legal Reform, *Containing the Contagion: Proposals to Reform the Broken Securities Class Action System*, at 6-7 (2019), https://instituteforlegalreform.

com/wp-content/uploads/media/Securites-Class-Action-System-Reform-Proposals.pdf.

While *Trulia* slightly reduced the magnitude of the merger tax, it mainly shifted the tax collector's office a few blocks up Wilmington's King Street to the federal courthouse. *See* Cain, *Mootness Fees*, 72 VAND. L. REV. at 1803 (comparing median settlement fees of $200,000 to $450,000 between 2014 and 2017 to typical mootness fees of $50,000 to $150,000); Cornerstone at 2, 14 (126 of 160 merger cases in 2019 filed in Delaware federal court). Mootness fees are today possibly the most common means of resolving stockholder litigation nationwide.

Unfortunately, the mootness fee process strayed from this Court's teachings, even in Delaware. *See infra* Section II. The situation outside of Delaware is worse. Other courts routinely omit protections mandatory in this State, such as notice requirements. *See, e.g.*, Cain, *Mootness* Fees, 72 VAND. L. REV. at 1807 (noting mootness payments are "rarely disclosed" outside Delaware).

This appeal presents a much-needed opportunity to reinforce this Court's teachings on mootness fee practice, adjust incentives promoting excessive litigation, and provide guidance to courts struggling with a fee paradigm common to Delaware but novel elsewhere.[1] This Court's guidance can have a salutary national effect.

---

[1] *See, e.g.*, *Rosenfeld v. Time, Inc.*, 2018 WL 4177938, at *1 (S.D.N.Y. Aug. 30, 2018) (considering recent frequency of mootness fees in federal court that "principally benefit plaintiff's counsel"); *City Trading Fund v. Nye*, 72 N.Y.S.3d

See, e.g., *Walgreen*, 832 F.3d at 725; *Griffith*, 2018 WL 3403537, at *7 (adopting *Trulia* into Florida law); *Seafarers Pension Plan v. Bradway*, 2020 WL 3246326 (N.D. Ill. June 8, 2020) (following *Salzberg* and *Boilermakers*). Absent action by this Court, federal courts or Congress may impose their own solution, potentially erasing Delaware's ability to respond.

Fortunately, this Court's precedent, appropriately applied, can address the mootness fee problem. This appeal is the ideal vehicle. Most mootness fees go unchallenged and without appellate review. This appeal considers a rare challenge by an adversarial defendant. A similar opportunity may not soon present itself.

371, 395 n.26 (N.Y. Sup. Ct. 2018), *aff'd and appeal dismissed in part*, 171 A.D.3d 508 (N.Y. App. Div. 2019).

II. Excessive Mootness Fees Encourage Inefficient Litigation and Harm Delaware Stockholders.

Delaware stockholders bear the cost of oversized fees (here, exceeding $11,000 per hour) paid to attorneys who claim benefits based on speculation. There is no seven- to ten-figure cash judgment in this case—or any cash judgment at all. *Cf. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1252 (Del. 2012) (approving approximately $304-million fee award following $2.03-billion post-trial judgment). Plaintiff's $12-million award comes from the pockets of other stockholders, directly or indirectly, on the unestablished and speculative premise that withdrawal of an unexercised deal protection had a "material effect on the likelihood of the [Merck] offer being completed." Tr. Op. at 70:21-22. No rational stockholder would agree to pay supra-competitive rates absent clear, non-speculative evidence that counsel produced real value. Here, there is none. *See* Appellants' Op. Br. at 30-36.

This excessive fee award stems from the trial court's failure to abide by this Court's guidelines designed to discourage wasteful litigation. First, as is now common in mootness cases, the court below did not require plaintiffs to demonstrate "some reasonable likelihood of ultimate success" on the merits. *See infra* Section II.A. Second, the court below effectively afforded plaintiffs an irrebuttable presumption that plaintiff's lawsuit contributed to any later positive event, based upon its speculative effects on hundreds of unnamed and unknowable market actors. *See infra* Section II.B. Third, the trial court inappropriately ignored its own

"misgivings" about the fee, giving greater weight to plaintiffs' counsel's interests than to the corporation's stockholders. *See infra* Section II.C. These errors are not unique to this case, or to mootness fees, but the often non-adversarial mootness process is particularly vulnerable to excessive awards. *Amici* thus recommend a further reform: plaintiffs seeking mootness fees should be required to certify their cases, thereby subjecting these lawsuits to scrutiny by absent class members and the courts. *See infra* Section II.D.

A. This Court's "Reasonable Likelihood of Success" Test is Necessary to Discourage Inefficient Litigation.

The $12-million fee here did not undergo the rigorous merits check that this Court requires to discourage suits "wholly lacking merit for the sole purpose of obtaining counsel fees." *Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966). The trial court unfortunately abbreviated the relevant legal standard when it stated that "[a] claim is meritorious when filed if it would survive a motion to dismiss" (Tr. Op. at 58:18-19), omitting the additional requirement that a plaintiff must ***also*** "possess[] knowledge of provable facts which hold out some reasonable likelihood of ultimate success." *Chrysler*, 223 A.2d at 387; *accord Allied Artists*, 413 A.2d at 879.

This second requirement tracks the language describing the more rigorous factual predicate necessary to secure a preliminary injunction. *See Gimbel v. Signal Cos.*, 316 A.2d 599, 603 (Del. Ch. 1974) (to earn a preliminary injunction, plaintiff

must demonstrate, *inter alia*, "a reasonable probability of succeeding on the merits of [the] claim"). Appellants demonstrate that the court below failed to apply this standard. *See* Appellants' Op. Br. at 23-27. There is a world of difference between surviving a motion to dismiss, where a court must accept alleged facts as true, *see, e.g., Grobow v. Perot*, 539 A.2d 180, 187 & n.6 (Del. 1988), and obtaining a preliminary injunction, which requires an assessment of the complaint's allegations in light of other facts presented to the court, and imposes the burden of proof on the plaintiff. *See, e.g.*, *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185 (Del. Ch. 2007).

The failure to enforce this factual requirement is not unique to this appeal and is a key factor in the persistence of "merger tax" litigation. *Trulia*'s "plainly material" standard effectively requires settling plaintiffs to secure disclosures that, if not part of a settlement, would support a preliminary injunction. *Compare Trulia*, 129 A.3d at 898-99, *with Wayne Cty. Ret. Sys. v. Corti*, 954 A.2d 319, 322-34 (Del. Ch. 2008) (holding that only "material" omissions support a preliminary injunction). *Trulia* is thus consistent with *Chrysler* and *Allied Artists*.

A few months after *Trulia*, however, the Court of Chancery held that mootness fees are available when plaintiffs secure disclosures that are "helpful" and "provide[] some benefit to stockholders, whether or not material to the vote." *Xoom*, 2016 WL 4146425, at *3-4. This standard omits a merits check. Delaware directors have no

fiduciary obligation to disclose "helpful" but immaterial facts. *See Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172-74 (Del. 2000). As a New York court noted, "[s]ince companies are only legally required to disclose all *material* facts in connection with a merger, every single proxy will surely omit at least some immaterial fact that might be of some benefit to the shareholders." *City Trading Fund*, 72 N.Y.S.3d at 395 n.26. *Xoom*'s weakened standard predictably resurrected merger-tax lawsuits to near pre-*Trulia* levels. *See* Cain, *Mootness Fees*, 72 VAND. L. REV. at 1787. Assured of payment, plaintiffs continue to sue on nearly every merger. A stronger merits check, consistent with *Chrysler* and *Trulia*, discourages lawsuits in cases where, as here, plaintiffs enjoy procedural advantages regardless of the weakness of the alleged facts.

Mootness fee awards for weak yet purportedly "meritorious" litigation are particularly unhelpful to large, diversified stockholders. Institutional investors owning stock in both targets and acquirers are harmed by repetitive litigation that siphons cash from both parties to counsel in the absence of a demonstrated material benefit. For these investors, as in securities fraud litigation, "recovery via class action is an expensive rearrangement of wealth from one pocket to another—minus a cut for the lawyers." Richard A. Booth, *Class Conflict in Securities Fraud Litigation*, 14 U. PA. J. BUS. L. 701, 706 (2012).

Requiring, as this Court already does, a demonstration of a "reasonable likelihood of ultimate success" realigns a process currently biased in favor of excessive litigation and unwarranted payments to class counsel. The court below applied an incorrect standard that contributes to the continuing parade of meritless lawsuits, including "merger tax" cases, that do not "hold out a reasonable likelihood of ultimate success."

B. The Trial Court Applied an Irrebuttable Presumption of Causation.

The trial court's award also rests upon an effectively irrebuttable presumption that a lawsuit necessarily contributes, at least in part, to ***any*** favorable event that takes place after filing, based on plaintiff's speculative influence on unnamed and unknowable actors. *See* Tr. Op. at 63:11-14 ("Under [*United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1080 (Del. 1997)], the plaintiffs are entitled to a presumption that there was a causal connection between the lawsuit and the benefits that resulted from mooting their claims."). This *post-hoc ergo propter hoc* fallacy is a recent addition to jurisprudence. This case demonstrates the perverse results that flow from the extension of that presumption beyond its intended purpose.

Early cases allowed a rebuttable presumption of causation with respect to corporate action. *See Allied Artists*, 413 A.2d at 880 ("[T]he party who takes the action that cures the alleged wrong to the corporation's benefit and thereby moots . . . the lawsuit should bear the burden of demonstrating that the lawsuit did not in

any way cause their action”); *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1167 (Del. 1989) (“It was . . . incumbent upon [Defendant] to demonstrate that there was no causal connection between the suit and the subsequent action.”). The presumption stems from the observation that “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.’” *TakeCare*, 693 A.2d at 1080 (quoting *Allied Artists*, 413 A.2d at 880).

Later cases, however, extend this principle from corporate ***action*** to post-filing corporate ***benefits***, placing a burden of persuasion on defendants to show no causal connection between “initiation of the suit and any later benefit to the shareholders.” *TakeCare*, 693 A.2d at 1080; *see also EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012). However, *TakeCare*, *EMAK*, and *Allied Artists* require the presumption to be rebuttable, as it is based upon knowledge in defendants’ possession. *See Alaska Elec. Pen. Fund. v. Brown*, 988 A.2d 412, 417-18 (Del. Ch. 2010). Furthermore, under *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980), a plaintiff seeking a fee award as a percentage of claimed benefits achieved has the burden to quantify the benefit. *See, e.g.*, *In re Am. Real Estate Partners,* 1997 WL 770718, at *6 (Del. Ch. Dec. 3, 1997).

Here, the trial court did not focus upon ***facts*** but ***probabilities***. It assumed that Plaintiffs were a “contributing cause” to the Merck offer’s success, and that the offer

was "higher than it would have been in the case where there had been no lawsuit." *See* Tr. Op. at 64:4-7. But the ***factual*** evidence indicated otherwise. *See id*. at 65:14-66:9. The trial court reached its conclusion even "taking [Merck's] affidavit as true" while putting weight not on what happened, but on what could have happened. *Id*. It speculated that "[e]ven if Merck didn't appreciate the implications of [the Acting in Concert ("AIC") provision] . . . institutional investors could well have been affected by it." *Id*. at 66:12-16. The trial court hypothesized that the provision "would have had effects on folks focused on it, that were problematic." *Id*. at 67:10-13.

This logic turns *TakeCare*'s justification upside-down. The decision-making processes of institutional investors (including Plaintiffs who could, presumably, submit evidence as to their own actions) are not within the "reasons, events and decisions leading up to the defendant's action" justifying a burden shift. Defendants have no plausible means of presenting evidence demonstrating that a deal provision had ***no*** effect on ***any*** of hundreds of large institutional investors.

Requiring defendants to prove a negative—that no stockholder is in any way impacted by a deal protection provision—will deter directors from adopting measures to protect valuable deals on behalf of stockholders, or from abandoning such provisions when no longer necessary, because their actions will inevitably result in the corporation, or its buyer, paying a seven- or eight-figure attorneys' fee

(plus their defense costs). Such a broad interpretation of *TakeCare* encourages plaintiffs to file ***weak*** cases that are nonetheless ***deemed meritorious*** because they serve as lottery tickets, paying off if a deal attracts an improved bid for any reason. Ultimately, stockholders are forced to fund payments to attorneys filing claims with no or little actual merit. Only plaintiffs' counsel and third-party litigation funders benefit from this litigation.

"[O]ur corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 957 (Del. 1985); *see, e.g.*, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 704 (Del. 1983) (overruling exclusive use of Delaware block method in appraisal cases and "business purpose rule" for analyzing minority squeeze-out mergers employed in three prior decisions). Remand provides an opportunity to clarify the presumptions applicable to mootness fees under *TakeCare*. *Allied Artists*' limited presumption in favor of corporate actions makes sense, based upon potentially unique knowledge that defendants possess. But even if *TakeCare* applies to post-filing benefits, it should be limited to facts about which defendants might have unique knowledge. When plaintiffs seek an award based on a deal provision's potential effect on dozens, if not hundreds, of parties not before the trial court, about whom defendants have no special insight, plaintiffs should bear the burden of proof.

C. Stockholders Suffer When Misgivings Support Large Fee Awards.

The trial court admitted having "misgivings" about the fee award's magnitude, highlighting data that would have informed a more precise decision. Tr. Op. at 83:3; *id*. at 76:21-77:4 ("I would have liked to know if any of this was tied to some type of news about Entegris. . . . Nobody told me whether something happened with Entegris on those days, but I'm going with what I have."). If additional information would have contributed to a more precise fee, the court should have sought that evidence, rather than adopting plaintiffs' theories wholesale at the expense of absent stockholders and despite its own misgivings.

Appellants' opening brief (at 43) faults the trial court for "punishing Defendants" over their purportedly aggressive litigation tactics, but the fee award actually punishes stockholders. Without a common fund, fees are paid by corporations, insurance companies, and stockholders, not corporate directors:

> If insurance covers the fee, then in the short run the release is free. In the long run, stockholders pay via returns dragged down by higher insurance premiums and the other costs of a litigation model in which outcomes become decoupled from the merits of the underlying claims. If insurance is not available, the acquiring company pays, and in the long run stockholders again foot the bill.

Brinckerhoff v. Tex. E. Prods. Pipeline Co., 986 A.2d 370, 385 (Del. Ch. 2010). It is imperative that trial courts account for these absent stockholders. An appropriate fee strikes a balance between "encourag[ing] future meritorious lawsuits" for

stockholders' benefit and avoiding a "socially unwholesome windfall" that promotes wasteful litigation. *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *12 (Del. Ch. Aug. 30, 2007) (quoting *Seinfeld v. Coker*, 847 A.2d 330, 334 (Del. Ch. 2000)).

Fee awards exceeding $11,000 per hour—for cases that benefit from favorable pleading standards, involve little trial risk, and lack a causal connection between the litigation and a stockholder benefit—constitute an "unwholesome windfall." The ready availability of excessive fees leads to a litigation spiral that contributes to the recent explosion in D&O insurance costs. *See, e.g.*, Kevin M. LaCroix, *D&ODiary.com*, https://www.dandodiary.com/2020/01/articles/securities-litigation/federal-court-securities-suit-filings-remain-at-elevated-levels/ (Jan. 1, 2020) ("The fact that D&O insurers must now assume a significantly higher lawsuit frequency level than in the past is one of several factors driving the current D&O insurance pricing increases.").

The court below was correct in its misgivings, but wrong to ignore them. A court dissatisfied with parties' submissions or a factual record may appoint neutral *amicus curiae* to assist. *See Trulia*, 129 A.3d at 899 n.47. This is not the first case, however, in which a trial court declined to do so in favor of an "up or down" solution that adopted an extreme position at stockholders' expense. *See, e.g.*, *Solomon v. Take-Two Interactive Software, Inc.*, C.A. No. 3604-VCL, at 63:11-22 (Del. Ch. July

18, 2019) (TRANSCRIPT); *Sciabacucchi v. Salzberg*, 2019 WL 2913272, at *5-6 (Del. Ch. July 8, 2019), *rev'd on other grounds*, 227 A.3d 102 (Del. 2020) (awarding plaintiff's requested $11,262.26 per hour fee where defendants' proposal supposedly "not reasonable").

Delaware trial courts should not approve fee applications when they harbor misgivings about the fee's magnitude. The outsized award now before this Court harms the stockholders in this case, and inspires future lawsuits in the form of both merger-tax cases and copycat deal protection cases filed in the wake of this action.[2] Reversal and remand will serve to emphasize the trial courts' role in protecting absent stockholders, particularly in mootness cases where stockholders cannot today protect themselves.

D. The Mootness Fee Process Allows Stockholders Little Influence Over Fees Paid to Uncertified Representatives.

Alternatively, the Court may give absent stockholders the ability to protect their own interests rather than relying upon a trial court to supplement the parties' submissions. As is typical in mooted cases, neither Merck nor Versum stockholders could weigh in on an appropriate fee or the adequacy of their purported

---

[2] *See, e.g.*, *Wolosky v. Armstrong*, C.A. No. 2020-0707-KSJM (filed Aug. 27, 2020) (challenging "acting in concert" provision in stockholder rights plan); *Vladimir Gusinsky Revocable Trust v. Crenshaw*, C.A. No. 2020-0716-KSJM (filed Aug. 28, 2020) (same); *Vladamir Gusinsky Revocable Trust v. Anderson*, C.A. No. 2020-0714-KSJM (filed Aug. 28, 2020) (same).

representatives. Restricting mootness fees to certified class representatives gives a voice to absent stockholders and promotes the interests of justice and judicial economy.

Plaintiffs' counsel currently can receive mootness fees without being appointed a class representative. *See Tandycrafts*, 562 A.2d at 1165. In theory, class certification protects absent stockholders by ensuring that their representatives are adequate and certification must occur "as soon as practicable after the commencement of an action." Del. Ct. Ch. R. 23(c)(1). In reality, this rarely occurs. Plaintiffs here neglected to seek certification in the seven months between filing and dismissing their complaints. A1-34. Versum stockholders thus never had the opportunity to express any view regarding the value of the "service" provided by Plaintiffs.

This input is critical. Class plaintiffs, particularly repeat plaintiffs, often have interests that differ from those of other stockholders. One study shows that public sector pension funds in securities class actions generally benefited classes by paying lower counsel fees than individual lead plaintiffs—except when lead counsel made campaign contributions to officials with influence over the funds. *See* Stephen J. Choi et al., *The Price of Pay to Play in Securities Class Actions*, 8 J. EMPIRICAL LEGAL STUDIES 650, 651 (2011). Recently, a Massachusetts federal court discovered an undisclosed $4.1-million referral fee paid by lead counsel to an

attorney who did no work on the case but introduced lead counsel—Labaton Sucharow LLP—to the Arkansas Teacher Retirement System. *See Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, 404 F. Supp. 3d 486, 492 (D. Mass. 2018). Trial courts rarely explore these conflicts unless prompted by outside stockholders.

Mootness fee proceedings provide stockholders with few avenues to mount challenges. If the parties agree on a mootness fee, Delaware courts do not typically hold a hearing. *See Trulia*, 129 A.3d at 898. Even in contested cases, such as this one, the absence of class certification means stockholders have no opportunity to participate. The mootness fee process insulates fee awards from class-member objections so thoroughly that many stockholder lawsuits are no longer brought as class actions at all. *See* Sean J. Griffith, *Class Action Nuisance Suits: Evidence from Frequent Filer Shareholder Plaintiffs*, at 16-17 (Fordham Law Legal Studies Research Paper No. 3470330), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470330 (noting an increasing number of M&A challenges brought as individual actions); *see also* Sean J. Griffith & Natalia Reisel, *Dead Hand Proxy Puts and Shareholder Value*, 84 U. Chi. L. Rev. 1027, 1051 n.117 (2017) (describing allegations that counsel demanded companies remove a proxy put "(and pay a mootness fee) or face litigation"). Plaintiffs sue as individuals but seek fees from an uncertified class.

Class plaintiffs' fellow stockholders ultimately pay these fees and should have a voice in the process. It is time to revisit mootness fee jurisprudence, and to conclude that Delaware law does not support mootness fees paid to uncertified plaintiffs. Plaintiffs' attorneys claiming fees on the basis of class-wide relief should be required to certify a class so that absent class members receive notice and an opportunity to participate. Counsel seeking mootness fees for uncertified classes should be limited to fees based upon the client's proportional interest in the benefit.

CONCLUSION

Appellants set forth the arguments in favor or reversing and remanding the specific order in this case. This appeal, however, presents larger issues arising from the upsurge in mootness fees across the country. *Amici* respectfully suggest that this Court, on remand, instruct the trial court to:

1. deny a mootness fee unless plaintiffs demonstrate actual "knowledge of provable facts which hold out some reasonable likelihood of ultimate success" on the merits of their case (*Chrysler*, 223 A.2d at 387);

2. deny a mootness fee unless plaintiffs demonstrate that litigation caused an actual benefit to stockholders, without a presumption in favor of such benefits, or with a presumption applying only to facts plaintiffs cannot obtain "except by asking his adversary" (*Allied Artists*, 413 A.2d at 876);

3. set a "carefully weighed" mootness fee (*id*. at 880), if any, reflecting the interest of Versum's absent stockholders, based upon sufficient data to permit confidence in an appropriate fee; and

4. certify the class action before awarding class-wide fees to Plaintiffs' counsel.

Such a ruling prevents injustice to Versum stockholders. More importantly, it strengthens this Court's jurisprudence concerning mootness fees, the abuse of which presently afflicts Delaware corporations in this state and nationwide.

WILSON SONSINI GOODRICH & ROSATI, P.C.

/s/ William B. Chandler III
William B. Chandler III (#116)
Shannon E. German (#5172)
222 Delaware Avenue, Suite 800
Wilmington, Delaware 19801
(302) 304-7600
Attorneys for Amicus Curiae *Joseph A. Grundfest*

MARGRAVE LAW LLC

/s/ Anthony A. Rickey
Anthony A. Rickey (#5056)
3411 Silverside Road
Baynard Building, Suite 104
Wilmington, Delaware 19810
(302) 604-5190
Attorney for Amici Curiae *The Chamber of Commerce of the United States of America and Sean J. Griffith*

OF COUNSEL:

Daryl Joseffer
Tara S. Morrissey
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

October 8, 2020