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Case No. 6027-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE DEL MONTE FOODS COMPANY SHAREHOLDERS LITIGATION	))	Consol. C.A. No. 6027-VCL

MEMORANDUM OPINION

Date Submitted: June 7, 2011
Date Decided: June 27, 2011

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LASTER, Vice Chancellor.

Plaintiffs seek an interim award of attorneys' fees and expenses for (i) causing the defendants to issue supplemental disclosures and (ii) obtaining a preliminary injunction, *see In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 1677458 (Del. Ch. Feb. 14, 2011) [hereinafter *Injunction Opinion*]. I award $2.75 million for the supplemental disclosures and defer ruling on the benefits conferred by the injunction.

I. FACTUAL BACKGROUND

The underlying facts are drawn from the Injunction Opinion, to which interested readers may refer for additional detail.

A. The Merger Announcement And Resulting Litigation

On November 25, 2010, Del Monte Foods Company ("Del Monte" or the "Company") announced that it had agreed to be acquired by a consortium of Kohlberg Kravis Roberts & Co. L.P. ("KKR"), Vestar Capital Partners ("Vestar"), and Centerview Partners ("Centerview"; collectively with KKR and Vestar, the "Sponsors"). Pursuant to an agreement and plan of merger by and among Del Monte, Blue Acquisition Group, Inc., and its wholly owned acquisition subsidiary, Blue Merger Sub Inc., Del Monte would merge with and into Blue Merger Sub Inc. and each share of Del Monte stock would be converted into the right to receive $19 in cash (the "Merger").

Between November 30 and December 21, 2010, a number of familiar entrepreneurial plaintiffs' firms filed putative class actions challenging the Merger. When the competing firms failed to self-organize, I consolidated the actions and established a procedure for resolving the leadership dispute. *See In re Del Monte Foods Co. S'holders Litig.*, C.A. 6027-VCL (Del. Ch. Dec. 23, 2010) (ORDER). I later

appointed NECA-IBEW Pension Fund as lead plaintiff and the firms of Grant & Eisenhofer, P.A. and Robbins Geller Rudman & Dowd LLP as co-lead counsel (together, "Lead Counsel"). *See In re Del Monte Foods Co. S'holders Litig.*, 2010 WL 5550677 (Del. Ch. Dec. 31, 2010) [hereinafter *Leadership Opinion*].

On January 9, 2011, Lead Counsel submitted a stipulation and proposed order setting out the expedited schedule they had negotiated with the defendants. On January 10, I approved the schedule with one minor change. The schedule provided as follows:

Plaintiff files consolidated verified class action complaint	On or before January 10, 2011
Plaintiff serves initial discovery requests	On or before January 10, 2011
Defendants serve document requests	On or before January 10, 2011
Commencement of rolling production of documents by Plaintiff and Defendants	On or before January 11, 2011
Service of Defendants' written discovery responses	On or before January 17, 2011
Service of Plaintiff's written discovery responses	On or before January 17, 2011
Completion of preliminary injunction phase document production by Plaintiff and Defendants	On or before January 20, 2011
Commencement of depositions	January 21, 2011
Completion of depositions	On or before January 28, 2011
Filing of Plaintiff's motion for injunctive relief, opening brief (and any supporting affidavits)	On or before February 2, 2011
Filing of Defendants' answering briefs in opposition to Plaintiff's motion for injunctive relief (and any supporting affidavits)	On or before February 7, 2011
Filing of Plaintiff's reply brief in support of motion for injunctive relief (and any supporting affidavits)	On or before February 10, 2011 at 12:00 p.m.
Hearing on Plaintiff's motion for injunctive relief	Commencing February 11, 2011 at 9:30 a.m.

Within the confines of this challenging schedule, Lead Counsel proceeded to litigate their application for a preliminary injunction. They served document requests and interrogatories on the defendants and pursued third-party discovery from Barclays

Capital, Inc.; JP Morgan Chase Bank, N.A.; Bank of America, N.A.; J.P. Morgan Securities, LLC; Morgan Stanley Senior Funding, Inc.; Merrill Lynch, Pierce, Fenner & Smith, Inc.; Perella Weinberg Partners, LP; Simpson Thacher & Bartlett, LLP; and Gibson Dunn & Crutcher, LLP. In total, Lead Counsel obtained and reviewed approximately 250,000 pages of documents and conducted seven depositions, including two members of the Del Monte board of directors, two representatives of Barclays, and one representative from each of KKR, Vestar, and Centerview.

B. The Proxy Supplement

On February 4, 2011, after the completion of the injunction-related discovery and after Lead Counsel filed their opening brief, Del Monte issued a proxy supplement to moot the plaintiffs' disclosure claims. *See* Del Monte Foods Co., Supplement #2 to Definitive Proxy Statement (Schedule 14A), (Feb. 4, 2011) (the "Proxy Supplement"). The filing addressed four major areas: (i) Barclays' role in the events leading up to the signing of the Merger Agreement, including information the Del Monte board learned only as a result of Lead Counsel's efforts, *id.* at 1-4; (ii) Barclays' fairness opinion, including related fees and financial conflicts and details of Barclays' underlying analysis, *id.* at 4-5; (iii) similar information regarding Perella Weinberg's fairness opinion, *id.* at 5-6; and (iv) the financial interests of members of management in the Merger, *id.* at 6-12.

With respect to Barclays' role, the disclosures included the following:

- "Since the filing of the Definitive Proxy Statement, the Company has learned that as early as January 2010, representatives of Barclays Capital had indicated their intent to seek to participate as a financing source in connection with any future transaction pursued by the Company subject to the internal approval of Barclays

Capital and subject to the approval of the Company if Barclays Capital were also acting as financial advisor to the Company." *Id.* at 2.

- "Since the filing of the Definitive Proxy Statement by the Company, the Company has learned that financing sources other than Barclays Capital could have provided sufficient financing for the transaction at $19.00 per share without the participation of Barclays Capital." *Id.* at 4.

- "Since the filing of the Definitive Proxy Statement, the Company has learned that beginning in August 2010 and September 2010, after Barclays Capital's engagement with the Company had formally concluded, Barclays Capital had routine business development discussions with, among others, KKR and Vestar, concerning potential strategic opportunities, including a potential acquisition of the Company. In the course of the discussions between Barclays Capital and Vestar, Barclays Capital and Vestar discussed that KKR/Centerview would be a good partner with Vestar and a good strategic match with Vestar if the potential for a transaction involving the Company arose. At the time of these discussions, Barclays Capital believed that Vestar and KKR/Centerview had had prior discussions about potential opportunities in the consumer sector, including the possibility of an acquisition of the Company if the opportunity reemerged. The Company also has learned since the filing of the Definitive Proxy Statement that, subsequent to the routine business development discussions in August and September 2010 discussed above, KKR/Centerview and Vestar had discussions about working together on an indication of interest regarding a transaction with the Company." *Id.* at 2-3.

- "Since the filing of the Definitive Proxy Statement, the Company has learned that during the period between October 11, 2010 and the week of November 8, 2010 there were discussions among the sponsors concerning the conversations between KKR/Centerview and the Company and about potentially adding Vestar as an acquisition partner at a later point in time in the event negotiations progressed with the Company." *Id.* at 3.

With respect to Barclays' fees and financial conflicts, the disclosures included the following:

- "As compensation for its services in connection with the merger, the Company paid Barclays Capital $2.5 million upon the delivery of Barclays Capital's opinion. Additional compensation of $23.5 million will be payable on completion of the merger; however, such transaction fee, if any, will be reduced by the amount of the fee previously paid by the Company to Barclays Capital upon delivery of its opinion. In addition, Barclays Capital and its affiliates could receive compensation ranging from $21 million to $24 million in connection with

their participation in the debt financing necessary for Parent to complete the merger." *Id.* at 5.

- "In connection with the various investment banking and financial services that Barclays Capital has performed for the Company in the past two years (other than fees payable in connection with the merger), Barclays Capital has received fees for such services in the past two years in an aggregate amount equal to approximately $3.6 million." *Id.*

- "Barclays Capital has performed various investment banking and financial services for KKR and many of its portfolio companies in the two years prior to the date of its fairness opinion and has received fees for such services in an aggregate amount of approximately $66 million. Such services included acting as bookrunner, co-manager, arranger, lender or financing agent in connection with various capital raising transactions, or as financial advisor in connection with acuqisitons involving, these portfolio companies." *Id.*

- "Barclays Capital has performed various investment banking and financial services for Vestar and certain of its portfolio companies in the two years prior to the date of its fairness opinion and has received fees for such services in an aggregate amount of approximately $5.5 million. Such services include acting as bookrunner in connection with capital raising transactions by these portfolio companies." *Id.*

With respect to the analysis underlying Barclays' fairness opinion, the disclosures included the following:

- A table depicting "[t]he unlevered free cash flows calculated by Barclays Capital using the Company's LRP Forecast [which was disclosed in the definitive proxy], and used for purposes of performing the discounted cash flow analysis." *Id.* at 4.

- The following description of how Barclays derived its cash flow estimates:

> Barclays Capital based its projections for the fiscal year ended April 2015 and the six months ending October 2015 on guidance from management and utilizing the growth rates and margins that were assumed in the LRP Forecast for each respective business segment for the 2014 fiscal year, the last fiscal year for which the LRP Forecast included projections. As a result, Barclays Capital assumed a revenue growth rate of 4.7% and an EBITDA margin of 16.1% for fiscal 2015 and for the 6 months ending October 2015.

> In preparing its discounted cash flow analysis in connection with rendering its fairness opinion, Barclays Capital determined, in its professional judgment, that using the 5 year period beginning November 1, 2010 more accurately reflected the actual cash flows of the Company, which are affected by the seasonal fluctuations in working capital due to the operations of the Consumer Product segment, and reflected the unlevered free cash flows for the 5-year period closest to the date it delivered its opinion, as is customary for Barclays Capital.

Id. at 5.

- "Barclays Capital's estimate of the Company's weighted-average cost of capital of 8.0% served as the midpoint for the 7.5% to 8.5% discount rate range used by Barclays Capital in its discounted cash flow analysis." *Id.* at 4.
- "The range of terminal EBITDA multiples of 6.5x to 7.5x was estimated by Barclays Capital utilizing its professional judgment and experience, taking into account the LRP Forecasts and historical forward trading multiples of the Company (which trading multiple was 6.8x for the calendar year ending December 31, 2011 based on the management forecasts)." *Id.*

With respect to Perella Weinberg's fees, financial incentives, and the analysis underlying its fairness opinion, the disclosures included the following:

- "The $3.0 million fee paid by the Company to Perella Weinberg was paid in connection with the delivery of its opinion to the board of directors of the Company. As a result, no portion of such fee is contingent upon the closing of the merger." *Id.* at 6.
- "Perella Weinberg has performed various investment banking and financial services for the sponsors and their portfolio companies in the past two years and has received fees for such services in an aggregate amount equal to approximately $11.1 million. Specifically, Perella Weinberg acted as an advisor to Masonite International in connection with a refinancing of approximately $2.7 billion of liabilities, which at the time of the engagement was a portfolio company of KKR and Sealy Corporation in connection with a comprehensive refinancing of approximately $650 million of indebtedness, which is currently a portfolio company of KKR." *Id.*
- A table depicting "[t]he unlevered free cash flows calculated by Perella Weinberg," which differed from those calculated by Barclays. *Id.* at 5.

- Disclosure to the effect that "[u]nlevered free cash flow was calculated by Perella Weinberg using the company's LRP Forecast, as modified by the 2011E November Forecasts [both of which were disclosed in the definitive proxy], by taking the Company's EBITDA plus other cash flows (including stock based compensation expense, deferred taxes, loss/(gain) of sale and other cash flow adjustments), minus taxes, total capital expenditures and the increase in working capital." *Id.*

- "The range of terminal year multiples of 6.5x to 7.5x NTM EBITDA was estimated by Perella Weinberg utilizing its professional judgment and experience, taking into account the LRP Forecasts, as modified by the 2011E November Forecasts, and historical trading multiples of the Company. Based on publicly available information for the Company, Perella Weinberg performed a weighted-average cost of capital analysis of the Company that resulted in a 7.7% rate for the Company. For purposes of the discounted cash flow analysis, Perella Weinberg used an estimated weighted-average cost of capital of 8.0%, which acted as the midpoint for the 7.5% to 8.5% discount range selected by Perella Weinberg." *Id.*

With respect to the interests of certain individuals in the Merger, the disclosures included "the proceeds each executive would receive upon an involuntary termination outside of the context of a change in control and the difference between these proceeds and the change of control proceeds." *Id.* at 6. In more extensive versions of tables found in the original proxy statement, the Proxy Supplement provided individualized comparative information about the proceeds that eleven senior executives would receive from (i) stock options, (ii) performance share units, (iii) restricted stock units, and (iv) deferred stock units. The Proxy Supplement revealed that in total, the eleven senior officers would receive incremental compensation of $63,629,322 as a result of the Merger compared to an involuntary termination outside of the context of a change of control. *Id.* at 6-8. Del Monte's CEO and CFO would receive, respectively, aggregate incremental compensation of $24,353,452 and $5,460,442.

C. The Injunction Opinion

On February 14, 2011, I issued the Injunction Opinion, in which I held preliminarily that

> Barclays secretly and selfishly manipulated the sale process to engineer a transaction that would permit Barclays to obtain lucrative buy-side financing fees. On multiple occasions, Barclays protected its own interests by withholding information from the Board that could have led Del Monte to retain a different bank, pursue a different alternative, or deny Barclays a buy-side role. Barclays did not disclose the behind-the-scenes efforts of its Del Monte coverage officer to put Del Monte into play. Barclays did not disclose its explicit goal, harbored from the outset, of providing buy-side financing to the acquirer. Barclays did not disclose that in September 2010, without Del Monte's authorization or approval, Barclays steered Vestar into a club bid with KKR, the potential bidder with whom Barclays had the strongest relationship, in violation of confidentiality agreements that prohibited Vestar and KKR from discussing a joint bid without written permission from Del Monte.
>
> Late in the process, at a time when Barclays was ostensibly negotiating the deal price with KKR, Barclays asked KKR for a third of the buy-side financing. Once KKR agreed, Barclays sought and obtained Del Monte's permission. Having Barclays as a co-lead bank was not necessary to secure sufficient financing for the Merger, nor did it generate a higher price for the Company. It simply gave Barclays the additional fees it wanted from the outset. In fact, Barclays can expect to earn slightly more from providing buy-side financing to KKR than it will from serving as Del Monte's sell-side advisor. Barclays' gain cost Del Monte an additional $3 million because Barclays told Del Monte that it now had to obtain a last-minute fairness opinion from a second bank.

Injunction Opinion, 2011 WL 1677458, at *1-2. I ruled that the plaintiffs had

> established a reasonable probability of success on the merits of a claim for breach of fiduciary duty against the individual defendants, aided and abetted by KKR. By failing to provide the serious oversight that would have checked Barclays' misconduct, the directors breached their fiduciary duties in a manner reminiscent of *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989). In that decision, the Delaware Supreme Court enjoined a transaction—ironically a leveraged buyout sponsored by KKR—when self-interested management and their financial advisor concealed

> information from the board. Like management's deal-specific, buy-side conflict in *Mills*, Barclays' deal-specific, buy-side conflict tainted the advice it gave and the actions it took.

Id. at *2.

As a partial remedy, I enjoined the defendants for a period of 20 days from proceeding with the stockholder vote on the Merger. Pending the vote, the parties to the Merger Agreement were enjoined from enforcing the no-solicitation and match-right provisions in Section 6.5(b), (c), and (h) and the termination fee provisions relating to topping bids and changes of recommendation in Section 8.5(b). *Id.* at *29. I recognized, however, that "[a]t this stage, it is not possible to remedy fully the effects of Barclays' maneuvers without blocking the deal and sending the parties back to the drawing board." *Id.* at *23. The injunction nevertheless went "part of the way." *Id.*

> The core injury inflicted on the stockholders was Barclays' steering the deal to KKR. Barclays won by doubling up on fees. KKR won by getting Del Monte, free of meaningful competition, and securing a leg-up on potential competing bidders through the defensive measures in the Merger Agreement. The injunction . . . partially cures this injury by limiting KKR's leg-up and providing a final window during which a topping bid could emerge.

Id. I conditioned the injunction on the posting of a bond in the amount of $1.2 million. *Id.* at *28. On February 15, 2011, Lead Counsel posted this amount in cash.

D. Post-Injunction Events

On February 17, 2011, Del Monte directed Perella Weinberg to contact third parties about potentially acquiring the Company. Perella contacted 70 parties, 53 of whom previously had been contacted during the 45-day go-shop provided in the Merger Agreement. Del Monte did not receive a topping bid during the additional window.

On March 7, 2011, Del Monte stockholders approved the Merger. At the meeting of stockholders, 75.15% of the outstanding shares voted in favor. The defendants observe that of the shares voted, 99% voted in favor. Because the operative standard for the merger vote was a majority *of the outstanding shares*, *see* 8 *Del. C.* § 251(b), the 99% figure is irrelevant. Under this voting standard, not voting is the same as voting against, and the proxy statement informed stockholders of this fact. *See* Del Monte Foods Co., Definitive Proxy Statement (Schedule 14A), at 20 (Jan. 12, 2011) ("**If you fail to submit a proxy, fail to vote in person at the special meeting, or abstain, it will have the same effect as a vote 'AGAINST' the proposal to adopt the merger agreement.**" (emphasis in original)). For the defendants now to rely on the percentage of votes cast both conflicts with the operative voting standard and contravenes the representations they made as fiduciaries in the proxy statement, because it pretends that abstentions and non-votes had no effect rather than having "**the same effect as a vote 'AGAINST' the proposal to adopt the merger agreement.**" *Id.* The Merger closed on March 8, 2011.

II. LEGAL ANALYSIS

The power to award fees, including interim fees, "is part of the original authority of the chancellor to do equity in a particular situation." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393 (1970) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939)); *see id.* at 389 (noting a finding of liability under Section 14(a) of the Securities Exchange Act of 1934 would mean that "petitioners would have been entitled to an interim award of litigation expenses and reasonable attorneys' fees"). A trial court may grant interim fees for a variety of reasons, including as a consequence for discovery

abuse, as a sanction for making frivolous legal arguments or engaging in bad-faith litigation tactics, as a remedy for contempt of an interlocutory court order, or under specific statutory authority. *See Kurz v. Holbrook*, 2010 WL 3028003, at *1 (Del. Ch. July 29, 2010) (citing authorities) [hereinafter *Kurz II*].

In *Louisiana State Employees Retirement System v. Citrix Systems, Inc.*, 2001 WL 1131364 (Del. Ch. Sept. 17, 2001), Chancellor Chandler recognized that "interim fee awards may be appropriate where a plaintiff has achieved the benefit sought by the claim that has been mooted or settled and that benefit is not subject to reversal or alteration as the remaining portion of the litigation proceeds." *Id.* at *4. In *Kurz II*, I awarded interim fees, 2010 WL 3028003, at *4, after determining in a prior ruling that the case met the *Citrix* test:

> The facts surrounding the mooting of the application for injunctive and other equitable relief against the Exchange Transaction have been established and are not subject to revision. The benefits from mooting that transaction can be evaluated. The appropriate amount of a fee award based on those benefits can be determined.

Kurz v. Holbrook, 2010 WL 761205, at *1 (Del. Ch. Mar. 2, 2010) [hereinafter *Kurz I*]. By contrast, if further litigation could alter the nature or scope of the relief obtained, or if there are reasons why benefits cannot yet be evaluated, then an interim award would be premature. *See Frazier v. Worldwide Energy Corp.*, 1991 WL 74041, at *4 (Del. Ch. May 2, 1991) (declining to award interim fees "until the precise amount of the benefit has been ascertained," which "cannot occur until the litigation is concluded because the

possibility of successful indemnity and/or contribution claims by the corporate defendants might (at least theoretically) operate to reduce the Fund").[1]

Regardless of whether a party can satisfy the requirements for an interim fee award, the decision to entertain the application remains at the discretion of the trial court. *See Mills*, 396 U.S. at 393; *Kurz II*, 2010 WL 761205, at *1; *Emerald P'rs v. Berlin*, 1994 WL 48993, at *1 (Del. Ch. Feb. 4, 1994). A trial judge is never required to consider an interim application. The trial judge could well prefer that the parties hold some or all of their applications until the end of the case, when a single fee determination can be made. Alternatively, a trial judge might choose to entertain an interim fee application under particular circumstances. *Compare In re Lear Corp. S'holder Litig.*, C.A. 2728-VCS (Del. Ch. June 3, 2008) (TRANSCRIPT) (granting interim award for benefits achieved by injunction proceeding), *with In re Emulex S'holder Litig.*, C.A. 4536-VCS (Del. Ch. Dec. 18, 2009) (ORDER) (declining to entertain application for interim fee award on

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[1] In *Gans v. MDR Liquidating Corp.*, 1993 WL 193526 (Del. Ch. May 28, 1993), Justice Hartnett, then a Vice Chancellor, declined to award fees because the benefits obtained could be overturned on appeal. *See id.* at *1. He commented that "[j]udicial economy and the orderly conduct of litigation are usually better served if interim awards of attorneys' fees are avoided and applications for attorney fees are often rejected if the litigation has not been completed." *Id.* He then noted "the possibility that the claimed benefit to the trust . . . may be reversed on appeal after a final judgment is rendered [which would] eliminate one of the primary bases for the claim for attorneys' fees." *Id.* Because subsequent Delaware Supreme Court precedent requires that any outstanding fee application be resolved before an order can become final and appealable, *see infra,* note 2, the risk that appellate review might eliminate the basis for the fee award no longer distinguishes interim from final awards. *Gans* nevertheless still supports the general proposition that interim fees should not be awarded if the underlying benefit could be modified or set aside by later proceedings, albeit with the focus now at the trial level.

basis of defendants' pre-adjudication remedial measures, reasoning: "Piecemeal requests for attorneys fees are not favored, and for good reason. Efficiency concerns suggest that, absent some exigency, requests for fees all be heard one time at the end of a case.").

Two decisions by Justice Hartnett exemplify the discretionary approach. In *Campbell v. Caravel Academy, Inc.*, 1989 WL 25804 (Del. Ch. Mar. 16, 1989), an appraisal case, then-Vice Chancellor Hartnett noted that he previously declined to "address the issue of attorneys fees and costs in [his] June 16, 1988 [merits] decision" because, in his view, "[c]osts and attorney fees are best addressed after the appellate process is completed." *Id.* at *1.[2] Only after the Delaware Supreme Court affirmed his award of fair value, *see Caravel Acad., Inc. v. Campbell*, 553 A.2d 638 (Del. 1988) (TABLE), did he consider all of the petitioner's claims for fees and costs, including a request for attorneys' fees relating to a prior motion to compel. *See* 1989 WL 25804, at *1. By contrast, in *Emerald Partners v. Berlin*, then-Vice Chancellor Hartnett exercised his discretion to entertain an interim fee application, notwithstanding his general view that "[i]nterim attorneys' fees are not favored." 1994 WL 48993, at *1. He denied the

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[2] Since *Campbell*, the Delaware Supreme Court has held that a final order remains interlocutory until any outstanding applications for attorneys' fees have been adjudicated. *See Emerald P'rs v. Berlin*, 811 A.2d 788, 790-91 (Del. 2001) ("This Court has consistently held, and recently reaffirmed, that a judgment on the merits is not final until an outstanding application for an award of attorney's fees has been decided."); *accord Lipson v. Lipson*, 799 A.2d 345, 348 (Del. 2001); *Gaffin v. Teledyne, Inc.*, 602 A.2d 1081, 1991 WL 181488, at *1 (Del. 1991) (TABLE); *Moskowitz v. Moskowitz*, 588 A.2d 1142, 1991 WL 32164, at *1 (Del. 1991) (TABLE). It is therefore no longer possible for a trial court to defer awarding fees until after the merits appeal is completed, unless the trial court first certifies its merits ruling as interlocutory or as a partial final judgment pursuant to Rule 54(b).

application on the merits for a series of reasons, including the lack of a causal connection between the plaintiffs' litigation efforts and the increased tender offer price. *See id.* at *3-4.

When I have expended judicial resources ruling on a preliminary injunction application *and* a plaintiff can meet the *Citrix* requirements, I generally prefer to address a fee petition relating to the injunction application promptly on an interim basis. I personally find that I can address the fee issue more efficiently while the fee-generating proceeding remains fresh in my mind. This does not mean that I invariably will entertain post-injunction fee applications, nor that any of my colleagues need share my preference. As noted, the decision to entertain an interim fee application rests in the discretion of the trial court.

Here, the relief for which Lead Counsel seeks interim fees meets the *Citrix* requirements. The defendants disseminated the Proxy Supplement and complied with the 20-day preliminary injunction. Those benefits cannot be revised or modified as a result of future events. Having recently issuing the Injunction Opinion, my knowledge of the injunction proceeding and Lead Counsel's efforts has likely peaked and only will fade with time. For these reasons, I can and will award fees at this stage for the Proxy Supplement. As a matter of discretion, however, I will not award interim fees for the 20-day injunction. As discussed below, further developments in the case should help refine my assessment of the benefits it conferred. *See Frazier*, 1991 WL 74041, at *4.

A. Interim Fees For The Proxy Supplement

When a plaintiff pursues a cause of action relating to the internal affairs of a Delaware corporation and generates benefits for the corporation or its stockholders, Delaware law calls for an award of attorneys' fees and expenses based on the factors set forth in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980). "[T]he amount of an attorneys' fee award is within the discretion of the court." *In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005). In determining an appropriate award, a court applying Delaware law should consider

> (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.

Id. at *3 (citing *Sugarland*, 420 A.2d at 149). "The last two elements are often considered the most important." *Id.*

1. The Benefit Conferred By The Supplemental Disclosures

"All supplemental disclosures are not equal. To quantify an appropriate fee award, this Court evaluates the qualitative importance of the disclosures obtained." *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 1632336, at *17 (Del. Ch. Apr. 29, 2011). "The court awards fees for supplemental disclosures by juxtaposing the case before it with cases in which attorneys have achieved approximately the same benefits." *Plains Res.*, 2005 WL 332811, at *5 (internal quotation marks omitted). Recent contested fee

awards for disclosure benefits reveal a range of discretionary awards with concentrations at certain levels.

> This Court has often awarded fees of approximately $400,000 to $500,000 for one or two meaningful disclosures, such as previously withheld projections or undisclosed conflicts faced by fiduciaries or their advisors. Disclosures of questionable quality have yielded much lower awards. Higher awards have been reserved for plaintiffs who obtained particularly significant or exceptional disclosures.

Sauer-Danfoss, 2011 WL 1632336, at *18 (internal citations omitted).

a. Barclays' Activities

The most significant disclosures in the Proxy Supplement adverted to Barclays' behind-the-scenes activities during the sale process. The discovery record developed by Lead Counsel indicated preliminarily that Barclays sought to achieve a fee event for itself by putting Del Monte into play, securing both the sell-side advisory business and a lucrative buy-side financing role, and steering two competing bidders into a joint offer in violation of their standstill agreements and after the Del Monte board instructed Barclays to shut down the sale process. To quantify an appropriate fee for this aspect of the Proxy Supplement, I start from a contested fee award precedent that involved supplemental disclosures about a similar (albeit less serious) conflict of interest: *In re Lear Corp. Shareholder Litigation*, C.A. 2728-VCS (Del. Ch. June 3, 2008) (TRANSCRIPT). *See generally Sauer-Danfoss*, 2011 WL 1632336, at *18 (explaining rationale for relying on contested fee award precedents).

In *Lear*, the target company's CEO was approaching retirement. *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 100, 112-13 (Del. Ch. 2007). The bulk of his personal

wealth depended on the financial fortunes of Lear Corporation, a major supplier to America's then-doddering automotive industry. Fearing for his non-diversified nest egg and unsecured pension, the CEO asked Lear's board to let him cash in his retirement benefits without actually retiring. *Id.* at 113. Shortly thereafter, the same CEO played the lead role in negotiating a going-private transaction with Carl Icahn. *See id.* at 101-02. Chancellor Strine, then a Vice Chancellor, held that the CEO had an economic motivation that "could rationally lead that negotiator to favor a deal at a less than optimal price, because the procession of a deal was more important to him, given his overall economic interest, than only doing a deal at the right price." *Id.* at 114. Chancellor Strine enjoined the transaction pending the issuance of supplemental disclosure about the CEO's conflict of interest and the pre-deal discussions regarding his retirement benefits. *Id.* at 115.

> Because the CEO might rationally have expected a going private transaction to provide him with a unique means to achieve his personal objectives, and because the merger with Icahn in fact secured for the CEO the joint benefits of immediate liquidity and continued employment that he sought just before negotiating the merger, the Lear stockholders are entitled to know that the CEO harbored material economic motivations that differed from their own that could have influenced his negotiating posture with Icahn. Given that the Special Committee delegated to the CEO the sole authority to conduct the merger negotiations, this concern is magnified.

Id. at 98. After entertaining an interim application for fees and expenses, Chancellor Strine awarded $800,000. *See In re Lear Corp. S'holder Litig.*, C.A. 2728-VCS, at 95 (Del. Ch. June 3, 2008) (TRANSCRIPT).

As described in the Injunction Opinion, Barclays' conduct in this case went far beyond the CEO's activities in *Lear*. The disclosures in the Proxy Supplement, however,

blandly described a conflict quite similar to *Lear*. The Proxy Supplement identified Barclays' "intent to seek to participate as a financing source," the absence of any need for Barclays to serve as a source of financing, and Barclays' discussions with KKR and Vestar about a joint bid. These anodyne disclosures warrant using the $800,000 fee award in *Lear* as a starting point.

What differentiates this case from *Lear* is that Lead Counsel uncovered facts not previously known to the Del Monte board. The Proxy Supplement repeatedly stated that it was disclosing information about Barclays that Del Monte learned "since the filing of the Definitive Proxy Statement." The Lear board already knew what its CEO was doing. The Del Monte directors only learned critical facts through this litigation, and those facts supported the reasonable inference that Barclays "secretly and selfishly manipulated the sale process to engineer a transaction that would permit Barclays to obtain lucrative buy-side financing fees." Injunction Opinion, 2011 WL 1677458, at *1. By revealing previously unknown information, Lead Counsel empowered the Del Monte directors to re-evaluate their prior decisions and reliance on Barclays. Lead Counsel rightly argues that Delaware should award higher fees when plaintiffs' lawyers uncover material information hitherto unknown to the directors themselves.

Because Lead Counsel caused two corporate decision-making bodies to become informed about Barclays' activities, *viz.* the stockholders and the board, symmetry suggests an award of up to two times the *Lear* fee. The greater fee also recognizes that the evidence uncovered by Lead Counsel revealed conduct by Barclays that was more serious, extensive, and prejudicial than the CEO's discussions in *Lear*. The injunction

record in *Lear* depicted a CEO who had an incentive to act in a self-interested fashion while carrying out his board's instructions, but Chancellor Strine did not find (preliminarily or otherwise) that the CEO "acted in any way inappropriately." 926 A.2d at 114. The injunction record in this case depicted an investment bank that sought out and seized opportunities to pursue its own interests while acting directly contrary to the Del Monte board's instructions. I therefore start with a range of $800,000 to $1.6 million for this aspect of the fee application.

b. The Bankers' Analyses

A second portion of the Proxy Supplement disclosed both Barclays' and Perella Weinberg's estimates of Del Monte's future free cash flows, derived from previously disclosed management earnings projections, as well as additional information about the summaries of the investment bankers' analyses. The Proxy Supplement quantified the fees the bankers would earn for the Merger and identified past engagements for Del Monte and the Sponsors along with the magnitude of fees previously earned. Awards for supplemental disclosures about banker analyses and relationships cluster around $400,000 to $500,000. *See Sauer-Danfoss*, 2011 WL 1632336, at app. A (listing fee awards in this range for similar disclosures); *see also, e.g.*, *In re Art Tech. Gp., Inc. S'holders Litig.*, C.A.5955-VCL, at 91 (Del. Ch. May 16, 2011) (TRANSCRIPT) (awarding $400,000 for disclosure of banker's fee arrangement and past engagements). At least two precedent fee awards remained in this range even when the supplemental disclosures addressed two bankers' analyses rather than one. *See, e.g.*, *In re Wyeth S'holders Litig.*, C.A. 4329-VCN, at 37-38 (Del. Ch. June 29, 2010) (TRANSCRIPT)

(awarding $460,100 for obtaining disclosures about two bankers' fairness analyses); *In re Sepracor Inc. S'holders Litig.*, C.A. 4871-VCS, at 19-21 (Del. Ch. May 21, 2010) (TRANSCRIPT) (awarding $550,000 for obtaining disclosures about two bankers' fairness analyses).

The significance of the banker disclosures in this case warrants a fee outside the cluster. In *Globis Capital Partners, LP v. SafeNet, Inc.*, C.A. 2772-VCS (Del. Ch. Dec. 20, 2007), then-Vice Chancellor Strine awarded $1.2 million where the supplemental disclosures about the bankers' analyses were more significant than usual. The *Globis* case challenged a two-step merger where the board obtained fairness opinions from two financial advisors. Although the initial Schedule 14D-9 disclosed the management projections on which the fairness opinions were based, *see* SafeNet, Inc., Solicitation/Recommendation Statement (Schedule 14D-9), at 24 (Mar. 12, 2007), and the text of the opinion letters themselves, *id.* at Annex I, II, it did not describe any of the financial analyses that the bankers used to reach their opinions, *see id.* at 9-11 (disclosing fact that board received opinions, but no discussion of analyses). After the plaintiff filed its opening preliminary injunction brief, the defendants amended the disclosures to include a summary of the financial analyses. *See* SafeNet, Inc., Solicitation/Recommendation Statement (Amendment No. 3 to Schedule 14D-9), at 2-12 (Mar. 27, 2007). The plaintiff then identified disclosure problems that had not been remedied as well as aspects of the summaries that did not accurately reflect the underlying analyses. After the injunction hearing, the parties agreed to settle the case for disclosure of both complete bankers' books. *See* SafeNet, Inc., Current Report (Form 8-

K), Exs. 99.1, 99.2 (Apr. 3, 2007). Together, the supplemental disclosures totaled more than 100 pages. In awarding $1.2 million of fees and expenses, now-Chancellor Strine described the disclosures as "very substantial and informative" and noted that "the amended 14D-9 alone . . . , if you stack it up against the disclosures in the surveyed cases, would put them all to shame." *Globis*, tr. at 45-46.

Standing alone, the supplemental disclosures about Barclays merit a fee of $400,000 to $550,000. The disclosures included the "unlevered free cash flows calculated by Barclays Capital" and other valuation inputs. Proxy Supp. at 4-5. Equally important, the Proxy Supplement disclosed Barclays' extensive financial conflicts, including the $21 to $24 million in fees that the bank would receive for providing buy-side financing for the Sponsors (comparable to and potentially more than its $23.5 million fee for serving as a sell-side advisor) and the over $70 million in fees that Barclays had received from the Sponsors in the prior two years. *Cf. Art Tech. Gp.*, C.A. 5955-VCL, at 1 (Del. Ch. Dec. 21, 2010) (ORDER) (enjoining merger pending disclosure of sell-side banker's past engagements by, and fees from, buyer); *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.").

The supplemental disclosures about Perella Weinberg merit a lesser award of $350,000 to $400,000. The Perella Weinberg disclosures included similar information about the projections they derived and other valuation inputs. The disclosures also quantified Perella Weinberg's fees and past work for the Sponsors, but those

relationships were not nearly as significant as Barclays'. In addition, the lower range for the Perella Weinberg information recognizes that the challenges to the two sets of bankers' disclosure necessarily overlapped to some degree.

My decision to award fees for each set of banker disclosures takes into account the defendants' obvious belief that stockholders should have both financial analyses, and the fact that the defendants paid both bankers for their work. *See* Injunction Opinion, 2011 WL 1677458, at *10. Lead Counsel similarly deserves compensation for obtaining material supplemental disclosures about each banker. Taken together, the disclosures in the Proxy Supplement about the Barclays opinion, the Perella Weinberg opinion, and the bankers' respective fees and historical engagements support an award in the range of $750,000 to $950,000.

c. The Individual Compensation Arrangements

The definitive proxy statement disclosed eleven pages of information about the proceeds each executive would receive on consummation of a merger, including via their (i) options, (ii) performance share units, (iii) restricted stock, and (iv) deferred stock. *See* Del Monte Foods Co., Definitive Proxy Statement (Schedule 14A), at 51-62 (Jan. 12, 2011). The original proxy statement did not, however, compare those figures to what the executives would obtain if terminated without a change in control. The Proxy Supplement provided that comparison. Similar disclosures have generated awards of approximately $200,000. *See Sauer-Danfoss*, 2011 WL 1632336, at app. B (listing fee awards in this range for similar disclosures). An award of $200,000 is appropriate for this benefit.

2. The Time And Effort Of Counsel

"The time and effort expended by counsel serves [as] a cross-check on the reasonableness of a fee award." *Sauer-Danfoss*, 2011 WL 1632336, at *20. "This factor has two separate but related components: (i) time and (ii) effort." *Id.*

"The time (*i.e.*, hours) that counsel claim to have worked is of secondary importance." *Id.* Lead Counsel and their supporting firms expended a total of approximately 4,708 hours litigating this action from filing suit until March 8, 2011, the date on which the Del Monte deal closed. The total includes non-compensable time devoted to fighting over control of the case and hours incurred after the injunction hearing, after Lead Counsel already had obtained the benefits supporting the fee application.[3] But even with a deduction for these hours, Lead Counsel invested significant time in the case. This is not a situation in which an enormous number of hours contrasts so markedly with minimal litigation activity as to suggest someone was padding the numbers.[4] Given the substantial investment by Lead Counsel, I am not concerned at this point about conferring an unjustified windfall.

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[3] *Cf. In re BEA Sys., Inc. S'holders Litig.*, 2009 WL 1931641, at *1 (Del. Ch. June 24, 2009) (denying fees for time "spent on aspects of the litigation that produced no benefit"); *In re Triarc Cos., Inc. S'holders Litig.*, 2006 WL 903338, at *2 (Del. Ch. Mar. 29, 2006) (limiting fees to compensate only for work that obtained benefit); *Stroud v. Milliken*, 1989 WL 120353, at *4 (Del. Ch. Oct. 6, 1989) ("[T]he reasonableness of the counsel fees must be based on the time actually spent before [the benefit occurred], on those claims which were meritorious when filed.").

[4] *Cf. In re Cox Radio S'holder Litig.*, 2010 WL 1806616, at *21 (Del. Ch. May 6, 2010) (regarding the "over 1,600 hours" claimed as "excessive, especially in light of the early stage at which the litigation ended"), *aff'd*, 9 A.3d 475 (Del. 2010) (TABLE);

More important than hours is "effort, as in what plaintiffs' counsel actually did." *Sauer-Danfoss*, 2011 WL 1632336, at *20. In this case, the answer is "quite a bit." Lead Counsel fully litigated an expedited injunction application. They engaged in thorough and diligent discovery, obtained documents from approximately a dozen third parties, and fully briefed their motion for preliminary injunction. Indeed, it was only through the effective use of discovery that the plaintiffs were able to "disturb[] the patina of normalcy surrounding the transaction." Injunction Opinion, 2011 WL 1677458, at *1. Lead Counsel's demonstrated commitment to pursuing their claims supports an award at the higher end of the range.

3. The Relative Complexity Of The Litigation

This was not cookie-cutter deal litigation in which Lead Counsel advanced routine process and disclosure arguments, then accepted a standard package of board minutes and bankers' books before agreeing to a disclosure-only settlement. Lead Counsel engaged in hard-nosed discovery to penetrate and expose problems with practices that Wall Street considered "typical." *See* Gina Chon & Anupreeta Das, *A Ruling to Chill Wall Street*, Wall St. J., Feb. 18, 2011. The resulting factual record was complex and detailed. Admittedly, two Delaware decisions presaged the outcome. *See Mills Acq. Co. v.*

Brinckerhoff v. Tex. E. Prods. Pipeline Co., 986 A.2d 370, 397 (Del. Ch. 2010) (rejecting counsel's claim that they "spent at least 2.760.2 hours combined in prosecuting the Texas Actions and in litigating the Objections" as "facially implausible"); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 642 (Del. Ch. 2005) ("[T]he hours worked on the matter are excessive in relation to what was usefully done, involved an inefficient allocation between partners and associates, and involved work done on poorly crafted complaints and organizational infighting . . . .").

Macmillan, Inc., 559 A.2d 1261, 1283-84 (Del. 1989); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1006 (Del. Ch. 2005). Nevertheless, Lead Counsel had to develop, assemble, and advance persuasive legal arguments. The relative complexity of the litigation supports an award at the higher end of the range.

4. Contingency Risk

Lead Counsel undertook real contingency risk. In contrast to many transactional challenges where entrepreneurial plaintiffs' firms nominally pursue cases on contingency but in reality take the relatively safe course of settling routinely for disclosures and a fee, Lead Counsel pressed forward with a hotly contested injunction application. This decision speaks volumes, because the Del Monte litigation could have been harvested for supplemental disclosures about the investment banker analyses. By refusing to accept this ready-made settlement opportunity, Lead Counsel forsook their easiest path to compensation and risked receiving nothing for their time and expenses. Then, after the injunction issued, Lead Counsel again put their own capital at risk for the stockholders' benefit by posting a $1.2 million bond. *See* Injunction Opinion, 2011 WL 1677458, at *28. The assumption of *bona fide* contingency risk supports an award at the higher end of the range.

5. The Standing And Ability of Counsel

The firms who served as Lead Counsel have an established track record of generating meaningful results in this Court. *See* Leadership Opinion, 2010 WL 5550677, at *9-10 (discussing track records). Guided primarily by the benefits conferred and other

Sugarland factors, I see no reason to modify the award in light of Lead Counsel's standing and ability.

6. Summing Up

Delaware courts recognize the value of representative litigation.[5] In deal cases, Delaware decisions have sought to align the interests of entrepreneurial plaintiffs' counsel with the classes they represent by granting minimal fees for minimal benefits and major fees for major results. Lead Counsel achieved a major result. I award $1.6 million for uncovering Barclays' surreptitious activities and $950,000 for the disclosures about the investment bankers' fairness opinions, fees, and relationships. Each award represents the high end of the range. I award $200,000 for the disclosures about the executives' incremental compensation from the Merger. The total award for Lead Counsel for the disclosure aspect of the case is therefore $2.75 million.

B. Interim Fees For The 20-Day Injunction

The Proxy Supplement was not the only benefit that Lead Counsel obtained. Perhaps more significantly, Lead Counsel sought and obtained a limited injunction

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[5] *See, e.g.*, *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 133 (Del. Ch. 1999) ("Our legal system has privatized in part the enforcement mechanism for policing fiduciaries by allowing private attorneys to bring suits on behalf of nominal shareholder plaintiffs. In so doing, corporations are safeguarded from fiduciary breaches and shareholders thereby benefit. Through the use of cost and fee shifting mechanisms, private attorneys are economically incentivized to perform this service on behalf of shareholders."); *Bird v. Lida, Inc.*, 681 A.2d 399, 402-03 (Del. Ch. 1996) (Allen, C.) (explaining that entrepreneurial plaintiff lawyers, incentivized by contingent fees, can "pursue monitoring activities that are wealth increasing for the collectivity (the corporation or the body of its shareholders)").

barring the defendants from proceeding with the stockholder vote on the Merger for a period of 20 days and, in the interim, from enforcing the no-shop, match right, and termination fee provisions in the Merger Agreement.

The defendants minimize the value of the injunction because "[n]o topping bid emerged." Sponsors' Ans. Br. Opp'n Pl.'s Mot. Fees at 1; *see id.* at 2, 11, 17-19, 25-26. They envision a benefit determination that would work like a lottery. A lucky plaintiff who both secured an injunction *and* was blessed by a third-party bid could claim an outsized benefit and windfall fees. An unlucky plaintiff who secured comparable litigation results without a third-party bid would get a nominal fee. Rather than rewarding counsel for benefits conferred by the litigation, this approach would make fee awards depend on the decisions of unrelated market participants.

In my view, the benefits conferred by the injunction do not vary depending on whether or not a topping bid actually emerged. The injunction provided the opportunity for a topping bid, and this benefit existed whether or not a competing bidder materialized.

Think of an insurance policy. Insureds purchase policies to protect against the possibility of losses. Insurers earn underwriting profits by charging premiums sufficient to cover their anticipated losses discounted by the likelihood of occurrence. Insureds pay for and receive the protection provided by their policies whether or not losses actually occur. If an insured purchases a policy and is fortunate enough not to suffer a loss, the policyholder cannot seek a refund on the grounds that the policy provided no benefit. During the policy period, the insured benefited from the opportunity to shift the loss.

The injunction operated similarly, but rather than protecting against the risk of loss, it created the opportunity for gain. As with an insurance policy, that opportunity was conferred whether or not a bid actually emerged. As with the premium charged for an insurance policy, the value of the benefit does not depend on an actual topping bid. Pricing the benefit requires two inputs: (i) the overall likelihood of a topping bid and (ii) the incremental gain that the likely topping bid would have created.

Work by Professor Guhan Subramanian speaks to the first input. *See* Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications*, 63 Bus. Law. 729 (2008). Professor Subramanian examined all going-private deals between January 2006 and August 2007 that were larger than $50 million in value and involved a private equity sponsor. He determined whether the transaction included a traditional no-shop provision or a go-shop provision, and he further subdivided the go-shop transactions into those involving (i) single bidder negotiations followed by a post-signing go-shop, which he termed a "pure go-shop," versus (ii) some degree of pre-signing market canvass followed by a post-signing go-shop, which he termed an "add-on go-shop." *Id.* at 730. He also identified go-shop transactions where management participated in the initial bid ("MBOs"). *See id.* at 731. Professor Subramanian found that traditional no-shop transactions generated a higher bid 8% of the time. *Id.* at 747 Go-shop transactions in the aggregate generated a higher bid 12.5% of the time. *Compare id.* at 743 tbl. 1 (48 go-shop transactions) *with id.* at 749 tbl. 3 (6 topping bids). Go-shops in MBO transactions never generated a higher bid. *Id.* at 750. Go-shops in non-MBO transactions generated a higher bid 15.8% of the time. *Compare*

id. at 745 tbl. 2 (38 go-shop transactions not involving management) *with id.* at 749 (6 topping bids). Pure go-shops in non-MBO transactions generated a higher offer 23% of the time. *Id.* at 731. Add-on go-shops in non-MBO transactions generated a higher offer only 6.25% of the time. *Compare id.* at 745 tbl. 2 (16 add-on go-shop transactions not involving management) *with id.* at 743 (one topping bid).

As to the second element, the $120 million termination fee should serve as a lower bound for the incremental value of a topping bid. The defendants asserted that the $120 million fee would not have precluded a topping bid from emerging and was not intended to do so. Sponsor Defs.' Br. Opp. P.I. at 3-4; Del Monte Defs.' Br. Opp. P.I. at 1-2, 40. The negotiated $120 million fee therefore represented the parties' responsible estimate of the minimum incremental price increase that a serious acquirer would be willing to offer.[6] There is some evidence in the record that might support a higher price, including KKR's internal documents analyzing the Del Monte opportunity and projected rates of return, Barclays' financing work, and the amount by which Vestar initially outbid KKR. *See, e.g.*, Injunction Opinion, 2011 WL 1677458, at *6-11.

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[6] *Cf., e.g.*, *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 503 (Del. Ch. 2010) (finding termination fee reasonable where previous expression of interest exceeded deal price by more than amount of termination fee, indicating that subsequent bidder could top by amount exceeding fee); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1018-19 (Del. Ch. 2005) (accepting fee as non-preclusive because it would not deter a determined bidder but only "someone who would want to make a bid that is trivially larger"); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000) ("From the preclusion perspective, it is difficult to see how a 3.5% [termination] fee would have deterred a rival bidder who wished to pay materially more for Intercargo.").

Different values for the two inputs produce a range of possible benefits. Treating the post-injunction period as an add-on go-shop and using the termination fee as a floor results in a lower bound of $7.5 million (6.25% of $120 million). Analogizing the post-injunction procedure to a generic go-shop results in a benefit of nearly $19 million (15.8% of $120 million). Equating the post-injunction period with a pure go-shop (on the grounds that Barclays' earlier efforts were tainted) results in a benefit of $27.6 million (23% of $120 million).

If warranted procedurally, I could rough out an award on the present record. *Cf.* Injunction Opinion, 2011 WL 1677458, at *28 (setting injunction bond in part based on preliminary view of likelihood of topping bid). When approving settlements, this Court often has loosely gauged the value of similar transactional modifications for purposes of awarding fees.[7] In this case, the fruits of post-injunction discovery and the insights

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[7] *See, e.g.*, *Se. Pa. Transp. Auth. v. Josey*, C.A. 5427-VCP, at 19-20, 22-24 (Del. Ch. Mar. 14, 2011) (TRANSCRIPT) (approving uncontested award of $1.5 million where settlement eliminated $67 million termination fee); *In re Alberto-Culver Co. S'holder Litig.*, C.A. 5873-VCS, at 45-47 (Del. Ch. Feb. 21, 2011) (TRANSCRIPT) (granting award of $3.25 million on contested application where settlement eliminated match right, reduced termination fee, and provided supplemental disclosure); *In re Yahoo! S'holders Litig.*, C.A. 3561-CC, at 1-2 (Del. Ch. Mar. 6, 2009) (granting award of $8.4 million on contested application where settlement eliminated dead-hand provision protecting employee severance plan and "ma[de] the company a more attractive target to potential suitors"); *In re Wm. Wrigley Jr. Co. S'holders Litig.*, 2009 WL 154380, at *5-6 (Del. Ch. Jan. 22, 2009) (granting uncontested award of $690,000 where settlement reduced termination fee by 10% and provided supplemental disclosure); *Minn. Firefighters Relief Ass'n v. Ceridian Corp.*, C.A. 2996-CC, at 27 (Del. Ch. Feb. 25, 2008) (TRANSCRIPT) & *id.* (Del. Ch. Mar. 24, 2008) (ORDER) (granting uncontested award of $5.14 million where settlement eliminated termination right and enabled potential buyer to present proposal).

provided by live witnesses at trial should help me develop a more tailored assessment. Further proceedings may show, for example, that the likely incremental value of a topping bid was more than $120 million or that a topping bid for Del Monte was relatively more or less likely. Each of the sample benefit calculations assumes that, because the injunction issued approximately 18 hours before the scheduled stockholder vote, there was zero chance of a topping bid absent an injunction. If there were some baseline chance of a topping bid, then the benefit calculation would need to focus on the incremental opportunity. The parties may wish to submit expert testimony on these or other topics, including additional empirical data. *See, e.g.*, Matthew D. Cain et al., *Broken Promises: Private Equity Bidding Behavior and the Value of Reputation*, at 34 tbl. 1 (May 1, 2011), *available at* http://ssrn.com/abstract=1540000 (analyzing sample of 227 private-equity buyouts from 2004 to 2010 and finding 15 deals (6.6%) that failed due to topping bid). Because further proceedings should help refine the analysis, I decline to award interim fees for the benefits conferred by the 20-day injunction. *See Frazier*, 1991 WL 74041, at *4.

III. CONCLUSION

The application for an interim fee award is granted with respect to benefits conferred by the Proxy Supplement. For those benefits, Lead Counsel is awarded fees and expenses of $2.75 million. The application is otherwise denied without prejudice and may be renewed at a later time. **IT IS SO ORDERED.**