IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CELERA CORPORATION SHAREHOLDER LITIGATION	))))	Consolidated Civil Action No. 6304-VCP

OPINION

Submitted: December 2, 2011
Decided: March 23, 2012

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PARSONS, Vice Chancellor.

This putative class action is before me on an application for the approval of a settlement of the class's claims for, among other things, breaches of fiduciary duty in connection with a merger of two publicly traded Delaware corporations. The merger was completed a number of months ago. The target's largest stockholder, which acquired the vast majority of its shares after the challenged transaction was announced, strenuously objects to the proposed settlement. In addition, the defendants' and the plaintiffs' counsel disagree about the appropriate level of attorneys' fees that should be awarded. Plaintiffs' counsel seek a fee of $3.5 million plus expenses, while the defendants seek to limit any award of fees to less than $1 million.

The putative lead plaintiff, New Orleans Employees' Retirement System ("NOERS"), accused various defendants of breaching their fiduciary duties in connection with the acquisition of Celera Corp. ("Celera" or the "Company") by Quest Diagnostics Inc. ("Quest"). The acquisition was structured in two tiers of, first, a tender offer by Quest for any and all shares of Celera at $8.00 per share and, second, a back-end squeeze-out merger at the same price (the "Merger"). Celera also provided Quest a top-up option, which permitted Quest to effect the back-end merger under 8 *Del. C.* § 253 without a shareholder vote. Approximately a month after NOERS filed its complaint and amidst briefing on a motion for a preliminary injunction, the parties entered into a Memorandum of Understanding (the "MOU"), conditionally settling the parties' dispute for therapeutic benefits but no increase in the Merger price. Thereafter, the tender offer succeeded, Quest exercised its top-up option, and the Merger closed.

After the tender offer succeeded but before the remaining shareholders were cashed out in a short-form merger, NOERS sold its shares on the secondary market at a slight premium to the Merger price. Hence, NOERS was not among the shareholders involuntarily cashed out when the Merger closed. The MOU, however, conditioned the settlement on confirmatory discovery, permitting NOERS to rescind the MOU and continue litigating on behalf of the class if it reevaluated the strength of those claims or the fairness of the settlement's terms. Celera's largest shareholder, BVF Partners L.P. ("BVF"), now argues forcefully that NOERS is neither a typical nor an adequate class representative because it is uniquely susceptible to the defense of acquiescence and suffered no transactional damages because it sold at a premium. Thus, BVF argues that NOERS lacked the economic incentive to conduct meaningful confirmatory discovery or to rescind the MOU had it uncovered facts undermining the settlement's fairness. As previously alluded to, BVF also objects to the merits of the proposed settlement because it claims to have uncovered an entitlement to monetary relief in which NOERS cannot share.

The class action mechanism originated in equity practice and is particularly important to the substantive law of corporations as a mechanism to address collective action problems. Accordingly, the Court of Chancery has an institutional interest in ensuring that mechanism functions effectively and efficiently at all times. Among other things, it depends on lead plaintiffs who take seriously the implications of representing others in the vindication of their legal rights. NOERS's careless and cavalier sale of all of its stock in Celera a few days before the short-form merger was effected definitely calls into question its suitability to serve as a class representative. Indeed, three recent decisions by members of this Court suggest that, at least as a prophylactic measure against similarly substandard behavior by future class representatives, NOERS deserves to be dismissed summarily for selling its shares.[1] In view of the significant waste of the Court's and the parties' resources caused by this unnecessary side issue, I probably will start from that premise in the future. Nevertheless, after careful consideration of the facts and circumstances of this case and the relevant precedents, I have concluded that, notwithstanding its questionable conduct, NOERS still satisfies, if only barely, the requirements for an appropriate class representative.

Therefore, for the reasons stated in this Opinion, I certify the class with NOERS as class representative, approve the settlement as fair and reasonable, and award attorneys' fees to class counsel, albeit in an amount well below what they requested.

I. BACKGROUND

A. The Parties

NOERS filed this class action on behalf of itself and all similarly situated shareholders of Celera ("Plaintiffs") to challenge the Merger as a breach of fiduciary duty by eleven defendants.

Defendant Celera is a healthcare business focusing on the integration of genetic testing into routine clinical care through a combination of products and services

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[1] *Steinhardt v. Howard-Anderson*, 2012 WL 29340 (Del. Ch. Jan. 6, 2012); *In re Labarage Inc. S'holders Litig.*, C.A. No. 6368-VCN (Del. Ch. Jan. 3, 2012) (TRANSCRIPT); *In re J. Crew Gp., Inc. S'holders Litig.*, C.A. No. 6043-CS (Del. Ch. Dec. 14, 2011) (TRANSCRIPT).

incorporating proprietary discoveries. Celera is a Delaware corporation with its principal place of business in Alameda, California. Before the Merger with Quest, Celera's common stock publicly traded on the NASDAQ Stock Market. As of February 2011, Celera had over 82 million common shares outstanding and several thousand holders of record.[2]

Celera's board of directors comprised the following individuals, each of whom also is a Defendant in this action: Richard H. Ayers, Jean-Luc Belingard, William G. Green, Peter Barton Hutt, Gail K. Naughton, Kathy Ordoñez, Wayne I. Roe, and Bennett M. Shapiro (collectively, the "Board"). In addition to her role as a director, Ordoñez has served as Celera's CEO since February 2008.

Defendant Quest is a leading provider of diagnostic testing, information, and other healthcare services to patients and doctors. Quest is a Delaware corporation with its principal place of business in Madison, New Jersey. Its stock trades on the New York Stock Exchange.

Defendant Spark Acquisition Corporation ("Spark") is a wholly-owned subsidiary of Quest formed for the purpose of acquiring Celera. Unless the context otherwise requires, I refer to Quest and Spark interchangeably herein as "Quest."

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[2] Celera Corp., Annual Report (Form 10-K), at 1, 54 (Mar. 18, 2011).

Each of the SEC filings cited in this Opinion was attached to one or more pleadings, affidavits, or other documents filed with the Court and, thus, constitutes part of the record the parties created in this action. For ease of reference, however, I cite to the SEC filings themselves, which are accessible online from the SEC's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system.

Before the Merger closed, BVF was Celera's largest shareholder; it ultimately held between 19.3 and 20.1 million of Celera's approximately 82 million shares, nearly a quarter of the Company.[3] At the Merger price, the value of BVF's equity interest exceeds $154 million. BVF objects to appointing NOERS as the class representative under Rule 23(a), certifying the class without opt out rights under Rule 23(b), and approving the fairness of the proposed settlement on its merits.

B. Facts and Procedural History

1. Background to the Merger

Celera has three primary business units: (1) lab services, which mainly provide genetic testing; (2) products, which sell FDA-approved testing kits; and (3) corporate, which holds intellectual property and royalty rights for drug compounds under development by third parties, including a cathepsin K inhibitor, odanacatib ("Cat-K"), a promising osteoporosis drug in phase III FDA trials. In November 2009, the Board began to consider strategic transactions. On February 3 and 4, 2010, the Board directed senior management and its financial advisor, Credit Suisse Securities (USA) LLC ("Credit Suisse"), to engage in targeted discussions with potential counterparties to a sale of the individual drug assets or business segments of the Company or the entire

[3] Celera Corp., Beneficial Owner Report (Schedule 13D), at 10 (May 13, 2011) (disclosing BVF's beneficial ownership of over 20.1 million shares, or 24.5% of the Company); Letter from Richard J. Thomas, Esq. to V.C. Parsons, Docket Item ("D.I.") No. 93, at 1 (Aug. 10, 2011) (asserting ownership of 19.3 million shares, or 23.5%).

Company.[4] In exchange for Credit Suisse's services, the Company agreed to pay (1) an upfront fee of $250,000, (2) $1 million to prepare a fairness opinion if Credit Suisse's efforts resulted in a sale of 50% or more of the Company, and (3) 1.3% of the total transaction value of any such deal. This contingent compensation structure ultimately entitled Credit Suisse to a fee of $8.8 million when the Merger closed. According to BVF, it also caused Credit Suisse to become "singularly focused on a sale of the entire Company and continuously [to] discourage[] the Board from pursuing alternative transactions."[5]

Credit Suisse and Ordoñez contacted nine potential bidders, five of which performed at least some measure of due diligence on the Company by April 2010: (1) Illumina, Inc.; (2) Inverness Medical Innovations, Inc.; (3) Laboratory Corporation of America Holdings; (4) Qiagen, N.V.; and (5) Quest. All five of these companies entered into confidentiality agreements with the Company that, among other things, expressly prohibited them from making offers for Celera shares without an express invitation from the Board. Moreover, the confidentiality agreements contained a broadly worded provision preventing the signing parties from asking the Board to waive this restriction (the "Don't-Ask-Don't-Waive Standstills").[6]

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4 Celera Corp., Recommendation Statement (Schedule 14D-9), at 13 (Mar. 28, 2011) [hereinafter Recommendation Statement].

5 BVF's Ans. Br. 8.

6 *See, e.g.*, Pl.'s Prelim. Inj. Br. App. Ex. 42, at CRA0005943-44 (Don't-Ask-Don't-Waive Standstill Agreement signed by Inverness Medical Innovations, Inc.).

In mid-April 2010, Quest submitted a nonbinding preliminary offer to acquire Celera for $10.00 per share in cash. Quest, however, conditioned its offer upon the execution of employment agreements with the Company's key personnel, including Ordoñez. Celera also received lesser offers from other parties, and one indication of interest from "Bidder C," which had not been contacted by Credit Suisse, to acquire only Celera's products division. On May 25, 2010, the Board appointed a special committee to manage and oversee the transaction process, with the Board retaining authority to make all major decisions. After negotiations with the special committee and further due diligence, Quest increased its offer to $10.25 per share on June 25. Finding that offer acceptable, the special committee then authorized Ordoñez to negotiate her separate employment agreement with Quest.

On June 29, 2010, Ordoñez met with representatives of Quest regarding her prospective employment agreement. At that time, one item she and Quest disagreed over was a one-time $3.4 million change-of-control payment. Ordoñez and the Quest representatives also discussed a then-unpublished, negative study of a gene variant called KIF6, which is a risk marker for heart disease. Celera had developed a test kit to identify patients with the KIF6 genotype, but the negative study created substantial risk regarding the future profitability of those test kits. Ordoñez knew about the the study but did not know if it would be published. The next day, Quest withdrew from the merger citing both the potential effects of the KIF6 study and "concerns regarding retention of the

Company's management following consummation of the proposed transaction."[7] The Board continued to seek strategic transactions throughout the rest of 2010, but no serious suitors emerged. Also during this period, Celera's business was deteriorating, due in part to the publication of the negative KIF6 study in October.

In January 2011, both the other members of the Board and the Company's shareholders were expressing at least some measure of dissatisfaction with Ordoñez's performance. Worse still, the Company's independent public accountant notified it of irregularities in previous public financial statements and the possible need for a financial restatement. Both NOERS and BVF contend that these developments motivated Ordoñez to consummate a sale of the Company. Defendants deny that characterization, arguing that the Company did not conclude a financial restatement was necessary until months later and that NOERS and BVF have overstated the Board's tepid, constructive criticism of Ordoñez's performance. In any event, on January 27, 2011, Quest offered $7.75 per share to acquire the Company.

Negotiations among the principals occurred in February 2011.[8] First, on February 3, the Board rejected an offer from Bidder C to acquire Celera's products division for $125 to $145 million and determined, instead, to focus on negotiations with Quest.

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[7] Recommendation Statement at 17. BVF alleges "Ordoñez's unreasonable employment demands" torpedoed the deal in June 2010. BVF's Ans. Br. 13.

[8] BVF asserts that negotiations occurred almost exclusively between Quest's CEO, Dr. Surya Mohapatra, and Ordoñez, whereas Defendants claim that Credit Suisse or the special committee conducted these negotiations. NOERS avers that agreement was reached "[a]fter minimal price negotiations." Pls.' Op. Br. 6.

Second, BVF had informed Ordoñez that it would try to block any transaction unless the Company's drug assets were sold separately or the deal provided some way for shareholders to participate in any future value attributable to those assets, especially if Cat-K reached market. Celera relayed these alternative deal terms to Quest in mid-February, but Quest refused to consider either of them. Rather than press harder, Celera made a counteroffer to sell the Company for $8.25 per share without carving out the drug assets or providing for any contingent value rights.[9] On February 17, however, Quest made its "best and final" offer of $8.00 per share, or a total transaction size of over $680 million.[10] Shortly thereafter, the Board unanimously approved the $8.00 price and authorized management and the Company's legal counsel to finalize definitive transaction agreements with Quest.

As in 2010, Quest conditioned its offer on, among other things, reaching a satisfactory employment agreement with Ordoñez. Unlike in 2010, however, Quest and Ordoñez agreed to a three-year contract with an annual base salary of $500,000, an annual bonus opportunity of 60% of her base salary, a one-time cash payment of about $2.3 million, and other benefits. BVF argues that this employment package was worth at least double the initial employment package offered by Quest in June 2010.

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9 According to BVF, "Ordoñez became concerned that [negotiating harder on this point] would slow down the deal and acted quickly to end discussions on the issue." BVF's Ans. Br. 18.

10 Celera Corp., Tender Offer Statement (Schedule TO), at 1 (Mar. 18, 2011). The corresponding enterprise value was less. Celera had over $327 million in cash, $117 million in tax credits, and no debt on its books. Thus, the implied value of Celera's operating assets reflected in Quest's offer arguably is closer to $236 million.

Although the Company's independent accountants still questioned whether a financial restatement was necessary, the Board decided on March 14, 2011 to restate its financials at the same time it announced the Merger. On March 17, the Board met to consider final approval of the proposed acquisition. In addition, Credit Suisse rendered its oral opinion, later confirmed in writing, that anything within the range of $6.78 to $8.55 per share would reflect a fair price to acquire the Company and, therefore, Quest's offer of $8.00 per share was fair to the public stockholders.

The fairness opinion and the underlying financial analysis performed by Credit Suisse constitute a significant aspect of this case. To value Celera, Credit Suisse needed, among other things, to value the Company's drug assets still in development. That required Credit Suisse to make various assumptions about the probabilities of each drug receiving FDA approval and reaching the market. Numerous empirical studies exist describing the probabilities of particular drugs reaching market given their current stage of development. Beginning in December 2010, Credit Suisse adopted the results of a Tufts study published in 2002 by the Milken Institute (the "Tufts Study") to probability-adjust Celera's drug assets. The Tufts Study reported the following probabilities of a drug reaching market from a given stage of development: phase I (20%); phase II (30%); phase III (67%); final application for FDA approval (81%). Credit Suisse, however, incorrectly believed that they reflected the probability of a drug merely advancing from one stage of development to the next. Thus, for example, whereas Credit Suisse should have assumed a 20% probability of success rate for a drug in phase I reaching market, it used a much lower 3% in its valuation, *i.e.*, the cumulative product of each stage's probability of success rate (*i.e.*, 3% ≈ 20% x 30% x 67% x 81%).[11]

These probability-adjustment errors were not discovered until after the parties entered into the MOU. Furthermore, BVF alleges that they may have undervalued the Company by $0.63 to $0.86 per share.[12] After making adjustments to account for a handful of other errors or questionable assumptions by Credit Suisse, BVF asserts that the fair range to acquire Celera may have been $8.15 to $10.21 per share, entirely above Quest's $8.00 offer. BVF argues that Credit Suisse made these errors because its contingent compensation agreement incentivized it to favor a sale at any price, and the Board knowingly accepted the errors because they too had self-interested reasons to see Celera sold.

Defendants concede that Credit Suisse erred, but contend the error was harmless. As the Company disclosed in its Recommendation Statement in favor of the Merger, Credit Suisse's fairness range encompassed a low end in which none of Celera's drug assets generated cash flow and a high end that assumed some possibility of success.

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11 *See* Thomas Aff., D.I. No. 149 Ex. 50, at 6 (As reported by the Tufts Study: "Average success rates (*the chances of reaching the market eventually*) are [the rates identified above] . . . (*e.g.*, about two out of three drugs in phase III trials will eventually reach the market)." (emphasis added)).

12 This allegation is overstated. BVF calculated Credit Suisse's valuation errors by, among other things, applying even higher probability of success rates than those prescribed by the Tufts Study and including the value of one particular drug asset, HDAC sarcoma, that Credit Suisse disclosed it had excluded. *See* Thomas Aff., D.I. No. 130 Ex. 71, at 3, 5-6, 8. While there may be justifiable reasons to question the reliability of the Tufts Study or the exclusion of HDAC sarcoma, those reasons do not speak to the magnitude of Credit Suisse's valuation errors caused by its misapprehension of the Tufts Study.

Thus, while Credit Suisse's errors may have truncated the range's upper bounds, those errors did not undermine Credit Suisse's expert opinion that a price as low as $6.78 per share would reflect fair consideration.

On March 17, 2011, the Board concluded that accepting Quest's offer of $8 per share was fair and in the best interests of the Company and its shareholders. Indeed, the offer reflected a premium of approximately 28% over the $6.27 closing price of Celera's common stock on March 17. Accordingly, the Board executed the definitive transaction agreements its counsel had been negotiating since February (the "Merger Agreement"). The following day, March 18, Celera and Quest jointly announced to the market both the Merger Agreement and Celera's need to restate its financials for 2008, 2009, and the first three quarters of 2010.

2. The terms of the Merger Agreement

The Merger Agreement contemplated a reverse triangular merger between Celera and Quest's acquisition subsidiary, Spark, structured in two tiers.[13] On the front end, Spark would commence a twenty-one-day tender offer for any and all shares of Celera common stock at $8 per share. Spark was required to extend its offer as necessary until it acquired voting control of the Company (the "Minimum Condition"). Once it achieved the Minimum Condition, Spark could commence a "subsequent offering period" of no more than twenty days to reach up to 90% of Celera's voting control. On the back end, assuming satisfaction of the Minimum Condition, Spark would cause itself and the

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[13] *See generally* Celera Corp., Current Report (Form 8-K) Ex. 2.1 (Mar. 18, 2011) [hereinafter Merger Agreement].

Company to merge, with Celera as the surviving corporation. If Spark held over 90% of Celera's voting stock, it could effect that merger under 8 *Del. C.* § 253 without Celera holding a shareholder vote. In either case, however, the back-end merger would cash out any remaining Celera shareholders, also at $8 per share. Consequently, Celera would become a wholly-owned subsidiary of Quest.

To protect Quest's interests, the Merger Agreement provided a number of deal protection devices, three of which are relevant to this action.[14] First, it required Celera to pay Quest $23.45 million if, among other possibilities, the Company terminated the Merger Agreement and accepted a competing offer (the "Termination Fee"). The size of the Termination Fee represented approximately 3.5% of the total $680 million transaction size, but arguably as much as 10% of Celera's enterprise value.[15]

Second, the Board agreed to terminate any existing discussions with, and not to solicit competing offers from, potential bidders other than Quest (the "No Solicitation Provision"). Plaintiffs argue that this deal protection measure was especially onerous in Celera's case because the most likely competing bidders were the companies already bound by the Don't-Ask-Don't-Waive Standstills. That is, Celera could not reach out to the companies it already knew were interested, and those companies could not reach out

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[14] In addition to protecting Quest's interests, the Merger Agreement indemnified the Board and the Company's officers from any liability, including in relation to the financial restatements, for at least six years. *Id.* § 6.8. Plaintiffs initially stressed this indemnification provision as evidence of self-interest by the entire Board. *See* Consol. Am. Compl. ¶ 1. Since the pleadings stage, however, neither NOERS nor BVF has argued that the Board, except for Ordoñez, was interested in the Merger.

[15] *See supra* note 10.

to Celera to take the necessary first step—requesting a waiver of the standstill restrictions—to make a competing offer.

Third, Spark received an irrevocable option (the "Top-Up Option"), exercisable only if Spark attained over 60% of Celera's voting power in the tender offer, to acquire as many of the Company's authorized but unissued shares as necessary for Spark to exceed, on a fully diluted basis, 90% of Celera's voting stock.[16] In that event, Spark could expedite the closing process with a short-form merger.

3. This litigation and settlement

BVF immediately and emphatically disagreed with the adequacy of the Merger price. On March 18, 2011 alone, the day the Merger Agreement was announced, BVF nearly doubled its interest from 6.6% to 12% of the Company. On March 30, it sent an open letter to Mohapatra, expressing its belief that $8 per share undervalued the Company and informing Quest that it would not tender, would seek out competing bids, and would exercise its appraisal rights unless the deal were restructured. Mohapatra replied publicly that $8 per share continued to reflect Quest's best and final offer. Before the Merger closed, BVF doubled its interest again, holding perhaps as much as 24.5% of Celera's then-outstanding shares by May 11, 2011.[17]

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[16] Top-up options may be lawful so long as the option holder first possesses voting control, usually one share more than 50%. *See generally Olson v. ev3, Inc.*, 2011 WL 704409, at *1-3 (Del. Ch. Feb. 21, 2011). The Top-Up Option here employed a higher 60% threshold apparently based on the fact that Celera was authorized to issue only 300 million shares and had approximately 82 million shares outstanding.

[17] Although it had threatened to seek appraisal, BVF did not perfect its appraisal rights.

NOERS took a different approach. On March 22, 2011, it filed a class action complaint and moved contemporaneously for expedited proceedings and a preliminary injunction.[18] On March 28, this Court entered a stipulated scheduling order, setting a hearing on NOERS's preliminary injunction motion for April 20. Also on March 28, Spark commenced the front-end tender offer and the Board filed a Recommendation Statement with the SEC encouraging shareholders to tender. As prescribed by the Merger Agreement, the tender offer was scheduled to expire twenty-one business days later on April 25. Between March 29 and April 14, Plaintiffs' counsel in this action received documentary discovery, deposed eight fact witnesses, and filed an opening brief in support of their motion for a preliminary injunction. Defendants filed their answering brief on April 17. The following day, informed by the discovery process and their respective preliminary injunction briefs, the parties entered into the MOU, conditionally settling this case. Also on April 18, they disclosed the MOU in a public filing with the SEC.

Defendants agreed in the MOU to the following therapeutic benefits: (1) reduction of the Termination Fee from $23.45 million to $15.6 million; (2) modification of the No Solicitation Provision to invite competing offers from the potential bidders subject to the Don't-Ask-Don't-Waive Standstills; (3) extension of the tender offer for seven days,

[18] Two other class actions were filed later and consolidated in this Court; four similar actions were filed in the Superior Court of Alameda County, California between March 23 and April 7, 2011 (the "California State Actions"); and two other actions were filed in United States District Court for the District of California on April 1 and 11 (together with the California State Actions, the "California Actions").

from April 25 to no earlier than May 2, 2011; and (4) amendment of the Recommendation Statement to provide supplemental disclosures about the transaction process and Credit Suisse's financial analysis. The MOU did not contain a monetary component or otherwise increase the $8 per share Merger consideration. In exchange, Plaintiffs agreed to a general release of any and all claims relating to the Merger, including any money damages claims the class might hold. The MOU also provided Plaintiffs "the right to withdraw from the Settlement in the event that they determine that the Settlement is not fair, reasonable, adequate or in the best interests of the Class."[19] BVF filed a notice of its intent to object to the settlement on May 2, 2011—*i.e.*, before the Merger had closed, Plaintiffs' counsel had conducted any confirmatory discovery, or the final settlement agreement had been submitted to the Court.[20]

4. Events after the MOU

On April 19, 2011, the day after the parties entered into the MOU, Black Horse Capital Management LLC ("Black Horse") sent a letter to Celera offering to partner with Quest by providing up to an additional $2.50 per share in cash for Celera's rights in Cat-K and certain other drug assets. Quest, however, was not interested in partnering with Black Horse. Furthermore, none of the other companies previously bound by the Don't-

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19 Memorandum of Understanding, D.I. No. 79 Ex. A, at 9 [hereinafter MOU].

20 In October 2011, another putative class member objected to the proposed settlement on the basis of the notice provided to the class. *See* Letter, D.I. No. 114, at 1 (Oct. 12, 2011). Contrary to that class member's assertion, I find that the notice distributed to the class sufficiently described the terms of the proposed settlement. *See* Aff. of Mailing of Notice, D.I. No. 140 Ex. A, at 5-6. Therefore, this objection is not well-founded.

Ask-Don't-Waive Standstills submitted competing offers. Thus, notwithstanding BVF's vocal disapproval of the $8 Merger price, no superior offer arose.

By 5:00 p.m. on May 2, the extended deadline of the tender offer, Spark had received only 49.22% of Celera's common stock. The shortfall below 50% meant that Spark had not satisfied the Minimum Condition. Accordingly, Spark extended its offer for an additional day. By the following evening, however, Spark had received 52.38%, enabling it to satisfy the Minimum Condition and complete the tender offer. After a "subsequent offering period," which closed May 10, 2011, Spark also exceeded the 60% threshold necessary to exercise its Top-Up Option. On May 11, Quest publicly announced its intent to exercise the Top-Up Option and effect a short-form merger "as promptly as practicable."[21] Thus, as of May 11, a squeeze-out merger of Celera's remaining stockholders—including, at that time, both BVF and NOERS—at $8 per share became a *fait accompli*.

Although Celera stock then effectively represented the right to receive $8 in cash in a matter of days, the trading price of the stock remained slightly above $8 even after May 11. Indeed, on May 13, NOERS sold all of its approximately 10,000 Celera shares on the secondary market at a price of $8.0457. That is, rather than hold until the Merger closed, NOERS sold its shares early to capture an additional profit in the range of $500. The Merger closed four days later, on May 17.

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[21] Celera Corp., Tender Offer Statement (Schedule TO) Amendment No. 13 Ex. 99(a)(5)(M), at 1 (May 11, 2011).

Approximately four months after the Merger closed, on August 9, 2011, the parties entered into a final Stipulation and Agreement of Compromise and Settlement (the "Settlement Agreement"). On August 15, the Court entered a scheduling order pursuant to which notice was sent to the proposed class and a hearing to consider whether to approve the Settlement Agreement was scheduled for November 18, 2011.

In advance of the hearing and in support of its objection to the settlement, BVF took the deposition of NOERS and obtained production of documents regarding NOERS's standing and adequacy to represent the class. The settlement hearing on November 18, 2011 lasted three and one-half hours. The issues regarding NOERS's standing and adequacy to represent the class, however, were not addressed to the Court's satisfaction. As a result and at the Court's invitation, the parties submitted supplemental letters on December 2, 2011 addressing these issues.

This Opinion constitutes the Court's rulings on numerous disputed matters regarding whether it should (1) certify the class, (2) approve the Settlement Agreement, and (3) award attorneys' fees to Plaintiffs' counsel in the amount they requested.

II. ANALYSIS

"Delaware law favors the voluntary settlement of corporate disputes."[22] Nonetheless, Court of Chancery Rule 23(e) requires court approval before a class action may be dismissed or compromised. This Rule is "intended to guard against surreptitious

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22 *In re Triarc Cos. Class & Deriv. Litig.*, 791 A.2d 872, 876 (Del. Ch. 2001) (citing *Kahn v. Sullivan*, 594 A.2d 48, 58 (Del. 1991)).

buy-outs of representative plaintiffs, leaving other class members without recourse."[23] Accordingly, the reviewing court "must balance the policy preference for settlement against the need to insure that the interests of the class have been fairly represented."[24] In doing so, the court must determine whether to certify the class under Rules 23(a) and (b), an inquiry with constitutional due process dimensions,[25] and apply its own business judgment in considering the fairness of the settlement.[26] The proponents of the settlement bear the burden of establishing that class certification is proper and the terms of the settlement agreement are fair.[27] Additionally, where a class action settlement confers an ascertainable benefit upon the class, whether monetary or therapeutic, class counsel may request a reasonable award of attorneys' fees for their efforts in creating the benefit.[28]

Although this matter is before the Court for approval of a settlement agreement, there are a number of issues in dispute. First, Plaintiffs and Defendants support certifying the class with NOERS as class representative under Rule 23(a) and without affording any class member a right to opt out of the settlement under Rule 23(b). The objector, BVF, however, asserts that due process requires both NOERS's disqualification and the

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[23] *Wied v. Valhi, Inc.*, 466 A.2d 9, 15 (Del. 1983).

[24] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1283 (Del. 1989).

[25] *Prezant v. De Angelis*, 636 A.2d 915, 925 (Del. 1994).

[26] *Polk v. Good*, 507 A.2d 531, 535-36 (Del. 1986).

[27] *Barkan*, 567 A.2d at 1285-86.

[28] *Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1165 (Del. 1989).

provision of opt out rights to at least BVF. Second, as to the fairness of the proposed settlement, Plaintiffs contend that the settlement is fair because both the claims to be released and the consideration received are commensurately strong, whereas Defendants argue that the settlement is fair because the claims and consideration are commensurately weak. For its part, BVF objects to the settlement as an unfair exchange of strong claims for weak consideration. Finally, because Plaintiffs and Defendants disagree on the value of the benefits conferred by the settlement, they also dispute the amount of attorneys' fees and expenses to which Plaintiffs' counsel is entitled—Plaintiffs request approximately \$3.6 million, and Defendants argue that no more than \$1 million is reasonable. The following subparts address each of these arguments in turn.

A. Class Certification

Under Rule 23, class certification involves a two-step analysis: the class action must, first, satisfy all four prerequisites mandated by Rule 23(a) and, second, fall within one or more of the three categories delineated in Rule 23(b).[29]

1. Requirements of Rule 23(a)

Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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[29] *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1224 (Del. 1991).

"Prerequisites (1) and (2) focus on the characteristics of the proposed class, while prerequisites (3) and (4) focus on the characteristics of the named party as the proposed class representative."[30]

The proposed class is defined as "[a]ny and all record holders and beneficial owners of any share(s) of Celera common stock who held any such share(s) at any time [between February 3, 2010 and May 17, 2011, inclusive], but excluding the Defendants."[31] There is no dispute that the first two requirements of Rule 23(a), numerosity and commonality of questions of law or fact, are satisfied. BVF disputes, however, whether NOERS satisfies the requirements of Rule 23(a)(3) and (4), typicality and adequacy of representation.

a. Rule 23(a)(3)—typicality

"The test of typicality is that 'the legal and factual position of the class representative must not be markedly different from that of the members of the class.'"[32] Where a putative lead plaintiff is susceptible to a unique defense—or, in some cases, even only the strong possibility of such a defense—typicality may not exist.[33] Plaintiffs characterize their claims as identical to all other class members and, therefore, assert that

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30 *Id.* at 1225.

31 Settlement Agreement, D.I. No. 79, at 14.

32 *Krapf*, 584 A.2d at 1225-26 (quoting *Singer v. Magnavox Co.*, 1978 WL 4651, at *2 (Del. Ch. Dec. 14, 1978)).

33 *See Dieter v. Prime Computer, Inc.*, 681 A.2d 1068, 1072-73 (Del. Ch. 1996) (disqualifying putative lead plaintiff due to the "spectre" of susceptibility to a unique defense).

NOERS is a typical class representative. In arguing to the contrary, BVF contends that NOERS is susceptible to a unique defense atypical of the class because it acquiesced in Defendants' allegedly wrongful conduct by selling its shares at a premium on the secondary market four days before the Merger closed. For the following reasons, I conclude that NOERS is not susceptible to an acquiescence defense and, even if it were, such susceptibility would not render NOERS's claims atypical under Rule 23(a)(3).[34]

i. Is NOERS susceptible to an acquiescence defense?

The equitable defense of acquiescence "may produce a *quasi* estoppel,"[35] similar to the doctrine of laches in certain respects.[36] In general, to be susceptible to an acquiescence defense, the plaintiff must: (1) have "full knowledge of his [or her] rights and all material facts"[37]; (2) possess a "meaningful choice" in determining how to act[38];

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34 My analysis of this issue would be very different, and much shorter, if this were a derivative action. In derivative suits, 8 *Del. C.* § 327 and Court of Chancery Rule 23.1 require representative plaintiffs to maintain their status as shareholders throughout the litigation. *Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del. 1984). In a direct action such as this, however, there is no contemporaneous and continuous ownership requirement.

35 3 *Pomeroy's Equity Jurisprudence* § 816, at 245 (5th ed. 1941) [hereinafter *Pomeroy's*].

36 *See id.* § 817, at 249 ("Upon obtaining knowledge of the facts, [the plaintiff] should commence the proceedings for relief as soon as reasonably possible. Acquiescence consisting of unnecessary delay after such knowledge will defeat the equitable relief.").

37 Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 11.04, at 11-18 to 11-19 (2010) [hereinafter Wolfe & Pittenger]; *accord Norberg v. Sec. Storage Co. of Wash.*, 2000 WL 1375868, at *5 (Del. Ch. Sept. 19, 2000) ("the [plaintiff] must have been adequately informed of all material facts relevant to the transaction"); 3 *Pomeroy's* § 817, at 246 ("acquiescence must be with knowledge of the wrongful acts themselves, and of their injurious consequences").

38 *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1076 (Del. Ch. 2001); *accord Kahn v. Household Acq. Corp.*, 1982 WL 8778, at *2 (Del. Ch. Jan. 19, 1982) (finding shareholder's acceptance of freeze-out merger consideration did not operate as

and (3) act voluntarily in a manner "show[ing] unequivocal approval" of the challenged conduct.[39] Thus, the doctrine of acquiescence protects defendants from being misled into believing that their conduct has been approved.[40]

As applied to shareholder actions, acquiescence may preclude recovery by a fully informed shareholder who accepts the benefits of a transaction after filing a complaint challenging its merits.[41] In *Norberg*, for example, a minority shareholder challenged a freeze-out merger by filing a complaint alleging breach of fiduciary duty against the company's directors and majority shareholder. Approximately seventeen months later, the shareholder tendered his shares for the original merger consideration and gave no indication that he intended to continue litigating his unfairness claims. Thus, although the plaintiff's complaint indicated that he was fully informed of the material facts, "he abandoned his appraisal claim, challenged the fairness of the price and the process and later, despite his declared assessment of the unfairness of the transaction, freely and

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acquiescence because, in part, "plaintiff did no more than accept the amount she was powerless to do anything about").

39 *In re Best Lock*, 845 A.2d at 1080; *accord Clements v. Rogers,* 790 A.2d 1222, 1238 n.46 (Del. Ch. 2001) (observing that acquiescence requires a showing that the plaintiff "has acknowledged the legitimacy of the defendant's conduct").

40 *See* 3 *Pomeroy's* § 817, at 246 (The plaintiff's conduct "must last for an unreasonable length of time, so that it will be inequitable even to the wrong-doer to enforce the peculiar remedies of equity against him, after he has been suffered to go on unmolested, and his conduct apparently acquiesced in.").

41 *See, e.g., Bershad v. Curtiss-Wright Corp.,* 535 A.2d 840, 848 (Del. 1987); *Norberg*, 2000 WL 1375868, at *5; *Trounstine v. Remington Rand, Inc.*, 194 A. 95, 100 (Del. Ch. 1937).

voluntarily accepted the merger consideration."[42] Under those facts, the court held that the doctrine of acquiescence applied and the plaintiff, as a matter of law, could not succeed on his complaint.[43]

Nevertheless, the mere act of tendering one's shares while simultaneously pursuing an equitable claim is not sufficient to show acquiescence.[44] Rather, the defendant still must show all three elements of the general defense. For example, a finding that the shareholder was unaware of all of the material facts precludes a showing of acquiescence, even though the shareholder knew enough to plead upon information and belief in the complaint.[45] Similarly, where "the approval process takes on an aura of inevitability," shareholders may lack a meaningful choice.[46] Finally, evidence that a shareholder voted against a deal, or simply abstained from voting, does not show the requisite unequivocal approval of the challenged conduct.[47]

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42 *Norberg*, 2000 WL 1375868, at *6-7.

43 *Id.* at *7.

44 *In re Best Lock*, 845 A.2d at 1078.

45 *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *30 n.129 (Del. Ch. May 3, 2004) ("[A] plaintiff who accepts the merger consideration could not have acquiesced where she knew some, but not all of the material facts." (citing *Clements*, 790 A.2d at 1238)); *Iseman v. Liquid Air Corp.*, 1993 WL 40048, at *2 (Del. Ch. Feb. 11, 1993).

46 *Serlick v. Pennzoil*, 1984 WL 8267, at *3 (Del. Ch. Nov. 27, 1984).

47 *In re PNB Hldg. Co.*, 2006 WL 2403999, at *21 (holding acquiescence does not bar shareholders who "never endorsed the [challenged merger] by voting yes" because "all of them, by not voting or abstaining, effectively cast a no vote," and that "stockholders who do not vote for a transaction and who simply accept the transactional consideration rather than seek appraisal are not barred from making or participating in an equitable challenge to the transaction").

In this action, NOERS filed an initial, a consolidated, and an amended consolidated class action complaint alleging that the Board breached its duty of loyalty by agreeing to sell the Company after a defective process. Additionally, NOERS conducted expedited discovery regarding the allegations made in those complaints. As a result, NOERS likely possessed full knowledge of its rights and all material facts regarding its challenge to the Merger, similar to the plaintiff in *Norberg*.

The stage of these proceedings, however, is salient; whether NOERS is susceptible to the acquiescence defense arises in the context of a settlement hearing. NOERS's willingness to settle itself indicates a degree of "acquiescence," in the ordinary sense of the word, to the conduct it challenged in its various complaints. An implicit assumption of BVF's objection, however, is that the acquiescence defense would preclude NOERS from continuing to litigate its claims *if it had uncovered additional information during confirmatory discovery* suggesting that the proposed settlement was not fair, reasonable, adequate, or in the best interests of the class. Thus, the basis of the objection presumes that NOERS was not fully informed when it sold its shares. Had NOERS uncovered additional information and rescinded the MOU, the situation would be more analogous to *Iseman* than it would be to *Norberg*.[48] That is, to be partially or even mostly informed

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[48] *See Iseman*, 1993 WL 40048, at *2 ("The fact that plaintiffs were able to make such allegations does not mean that they had somehow learned all of the information that had been withheld from or misrepresented to the stockholders of [the company]. It only means that they had been able to piece together enough [information] . . . to satisfy the standards of Chancery Court Rule 11 in making allegations upon information and belief.").

does not satisfy the requirement that a plaintiff be fully informed.[49] For this reason alone, the acquiescence defense would not have barred NOERS from continuing to litigate had it uncovered new information strengthening its claims.

Additionally, NOERS arguably did not have a meaningful choice when it sold its shares. Where a squeeze-out merger extinguishes the minority's legal right to remain shareholders of the corporation, "the 'choice' between accepting the possibly inadequate merger consideration and pursuing a possibly inadequate appraisal remedy" is not "a meaningful choice."[50] This conclusion derives from the "aura of inevitability" inherent in such transactions.[51] In that respect, the market knew as of May 11, 2011 that Quest

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49 *Clements*, 790 A.2d at 1238 (finding no acquiescence where "the defendants fail to show that [the plaintiff] was aware of *all* the material facts, not simply that she was aware of some of the material facts that buttress her claims").

50 *In re Best Lock*, 845 A.2d at 1075-76; *accord In re PNB Hldg. Co. S'holders Litig.*, 2006 WL 2403999, at *21-22 (Del. Ch. Aug. 18, 2006); *In re JCC Hldg. Co. S'holders Litig.*, 843 A.2d 713, 724 (Del. Ch. 2003); *Clements*, 790 A.2d at 1238; *Serlick*, 1984 WL 8267, at *3. Appraisal may be inadequate because 8 *Del. C.* § 262(h) limits the shareholders' recovery to the "fair value" of their stock, whereas a plenary action for breach of fiduciary duty can provide additional remedies to redress fraud, self-dealing, waste, or other corporate misconduct. *See Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 466-68 (Del. Ch. 2011); *Wood v. Frank E. Best, Inc.*, 1999 WL 504779, at *3 (Del. Ch. July 9, 1999). Appraisal carries the additional procedural disadvantages of limited compensation mechanisms, most notably the absence of fee-shifting, to fund appraisal actions and the possibility that the "fair value" the class receives ultimately may be less than the contested merger consideration. 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 9.37, at 9-83 to 9-84 (3rd ed., rev. vol. 2012).

51 *Serlick*, 1984 WL 8267, at *3. Much of the case law evaluating the existence of a "meaningful" choice relates to reasoning from *Kahn v. Lynch Communications, Inc.*, 638 A.2d 1110 (Del. 1994), which concerns voting dynamics that may arise where there is a controlling shareholder. This case does not involve a controlling shareholder. The Merger at issue here was structured as a front-end tender offer with a back-end top-up option and short-form merger. Nevertheless, it is the inevitable nature of squeeze-out transactions, not simply the voting dynamics presumed by *Lynch*, that frustrates

intended to exercise its Top-Up Option and cash out all remaining Celera shareholders "as promptly as practicable,"[52] *i.e.*, that the transaction NOERS was challenging had become inevitable. At that point, the choice between accepting the Merger consideration "under protest" and seeking appraisal was not meaningful. Concededly, NOERS did not actually accept the Merger consideration. On May 13, NOERS sold its Celera shares, which equated to a right to receive $8 in cash in four days, for $8.05. The presence of that alternative offer, however, arguably still did not provide a meaningful choice. Although NOERS may have chosen rationally, from its perspective, the lesser of two evils, the marginal market premium NOERS obtained does not necessarily reflect acquiescence in the approximately $8 Merger price or negate or resolve the concerns of inevitability that animate the controlling shareholder cases.

As to the third and final element of acquiescence—showing unequivocal approval of the transaction—I note that NOERS technically evinced its disapproval of the Merger terms by accepting a superior offer from the secondary market. Furthermore, to the extent that the five cent premium NOERS received may be characterized as de minimis or effectively equivalent to accepting the challenged consideration, NOERS's decisions

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meaningful choice. *See In re PNB Hldg. Co*, 2006 WL 2403999, at *21-22 ("I begin with the important recognition that this is not a transaction governed by the *Lynch* doctrine . . . . Acceptance of the merger consideration is simply an abandonment of the appraisal right, no more and no less, at least in the usual case."); *Serlick*, 1984 WL 8267, at *3 (holding, ten years before *Lynch*, acquiescence inapplicable where approval of transaction appeared inevitable).

52 Celera Corp., Tender Offer Statement (Schedule TO) Amendment No. 13 Ex. 99(a)(5)(M), at 1 (May 11, 2011).

not to tender its shares to Quest on the front-end and to hold its shares until the Merger became a certainty on the back-end, all while simultaneously pursuing this action, belies an unequivocal showing of acquiescence. Indeed, in the ordinary 8 *Del. C.* § 251 context, only shareholders "who cast yes *votes* are barred by the doctrine of acquiescence,"[53] because they "cannot assume a pose of approval *in the voting process* and then seek to litigate under a contrary position in a Court of Equity."[54] In the context of a two-tiered tender offer and squeeze-out merger, the closest analogy to a shareholder vote essentially is the decision to tender on the front-end. NOERS, however, did not tender its shares. Instead, it withheld its approval of the challenged transaction and accepted the rough equivalent of the Merger consideration only after becoming "powerless to do anything about" the Merger.[55] Other than by accepting a marginally superior offer and conditionally settling this action, NOERS showed no support for the Merger, let alone unequivocal support.

BVF's reliance on *Norberg* is misplaced for at least one additional reason. In *Norberg*, the plaintiff challenged the fairness of a transaction in his pleadings. But, seventeen months later, he effectively accepted a settlement without "offering some caveat to his tender that he intended to pursue his litigation further."[56] The court,

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[53] *In re PNB Hldg. Co.*, 2006 WL 2403999, at *21 (emphasis added).

[54] *Kahn v. Household Acq. Corp.*, 591 A.2d 166, 176-77 (Del. 1991) (emphasis added).

[55] *Kahn v. Household Acq. Corp.*, 1982 WL 8778, at *2 (Del. Ch. Jan. 19, 1982).

[56] *Norberg v. Sec. Storage Co. of Wash.*, 2000 WL 1375868, at *7 (Del. Ch. Sept. 19, 2000).

therefore, found it "difficult to see how Norberg's conduct under these circumstances does not imply an intent to relinquish his right to challenge the fairness of the merger transaction."[57] Here, by contrast, NOERS conditionally settled its claims while reserving expressly its "right to withdraw from the Settlement in the event [it] determine[d] that the Settlement [was] not fair, reasonable, adequate or in the best interests of the Class."[58] Unlike in *Norberg*, NOERS explicitly manifested its intent not to relinquish its claims. Stated differently, because Defendants expressly granted NOERS the right to continue litigating, Defendants cannot contend seriously (nor do they claim) to have been misled into believing that their conduct was "apparently acquiesced in."[59]

In sum, NOERS is not susceptible to an acquiescence defense, as BVF's objection asserts, because the objection presumes that NOERS was not fully informed of all the material facts, NOERS arguably lacked a meaningful choice, and NOERS did not show unequivocal approval of the challenged transaction.

ii. Alternatively, even if NOERS were susceptible to an acquiescence defense, would that make it atypical under Rule 23(a)(3)?

Rule 23(a)(3) requires that a class representative's claims or defenses not be "markedly" different from those of the other class members, but it does not require that all claims or defenses be coextensive or identical.[60] Thus, even assuming NOERS were

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57 *Id.*

58 MOU at 9.

59 3 *Pomeroy's* § 817, at 246.

60 *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1225-26 (Del. 1991).

susceptible to an acquiescence defense, I would have to determine whether that susceptibility renders its position markedly different from the rest of the class before finding that the typicality requirement had not been met.

The class in this case includes all beneficial and record holders of Celera stock at any time between the dates when the Board first began to consider a sale of the Company and when the Merger closed. Thus, the class includes shareholders who traded even before the Merger Agreement was announced as well as those who tendered on the front-end, were cashed out involuntarily on the back-end, and, like NOERS, sold their shares on the secondary market in the interim. To the extent BVF contends that NOERS is susceptible to the acquiescence defense, then so too would be all other class members who sold or tendered their shares before May 17, 2011, *i.e.*, the majority of the class.[61] In this regard, NOERS's exposure to the acquiescence defense would not render it susceptible to a unique defense atypical of the claims or defenses of the class.[62] Rather, "the different positions of class members on the issue of acquiescence . . . could be

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61 Between May 11 and May 17, 2011, Quest held approximately 60% of the Company's outstanding shares and BVF held approximately 25%. Quest, as a Defendant, is excluded from the class. Thus, the class members who were cashed out involuntarily on May 17 include only BVF and the holders of the remaining 15% of Celera's outstanding shares.

62 *See* 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1764 (3d ed., rev. vol. 2011) ("In general, the [typicality] requirement may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and the other class members." (footnotes omitted)). In this regard, I note that Court of Chancery Rule 23 is almost identical to Rule 23 of the Federal Rules of Civil Procedure. *Nottingham P'rs v. Dana*, 564 A.2d 1089, 1094 & n.4 (Del. 1989) (citing *Federal Practice & Procedure* as relevant authority). "This Court, therefore, often looks to federal decisions interpreting [Rule 23] for precedent that may help to construe and apply its Court of Chancery counterpart." *O'Malley v. Boris*, 2001 WL 50204, at *4 (Del. Ch. Jan. 11, 2001).

addressed fairly in one class action, with at most the possible need for the creation of subclasses."[63] Moreover, any decision on such a need for subclasses can be deferred until the potential conflict arises.[64]

Even where a defense is unique to the class representative, that fact does not automatically preclude satisfaction of the typicality requirement. "A unique defense will render the proposed class representative's claims atypical only if it is likely to be a 'major focus' of the litigation and not if it is insignificant or improbable."[65] To determine whether a unique defense is likely to be a "major focus," Delaware courts consider when issues concerning the defense would need to be resolved. In *O'Malley v. Boris*, a class of brokerage customers brought claims for breach of the duties of loyalty and disclosure against their broker, but the putative class representative admitted at his deposition that the alleged disclosure violations were not material or misleading to him.[66] While acknowledging that those admissions eventually could prevent that particular plaintiff from recovering damages, Chancellor Chandler found Rule 23(a)(3) satisfied based on the following federal precedent:

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63 *In re JCC Hldg. Co.*, 843 A.2d at 725 n.34 (emphasis omitted).

64 *Singer v. Magnavox Co.*, 1978 WL 4651, at *4 (Del. Ch. Dec. 14, 1978) ("Should a conflict among members of the class develop *at the remedy stage*, the Court has the power under Rule 23 to establish subclasses or fashion other appropriate measures." (emphasis added)).

65 1 William B. Rubenstein, *Newberg on Class Actions* § 3:45 (5th ed., rev. vol. 2011) (footnotes omitted). "The 'major focus' test is designed to insure that defenses unique to the class representative would not consume a significant portion of class resources or distract from issues common to the class." *Id.*

66 *O'Malley*, 2001 WL 50204, at *3.

> The defendants' contention that the existence of a unique defense renders a representative's claim atypical has been rejected where the overriding question common to the class is "logically prior" to special defenses against the named plaintiff. . . . Where, as here, an alleged defense may affect the individual's ultimate right to recover, but it does not affect the presentation of the case on the liability issues for the plaintiff class, that defense should not make a plaintiff's claim atypical.[67]

Thus, in *O'Malley*, the court held that the unique defense was not certain to be a major focus of the litigation.

In *Dieter v. Prime Computer, Inc.*,[68] then-Vice Chancellor, now-Chief Justice Steele applied consistent reasoning, but reached a contrary conclusion, to *O'Malley*. In *Prime Computer*, the putative lead plaintiffs brought a direct action challenging a merger, but they had purchased their shares after the merger announcement. On that basis, the defendants challenged the lead plaintiffs' standing. The court first observed that "no Delaware court has spoken to this issue [of standing] in a class action context," in contrast to the contemporaneous ownership requirement under 8 *Del. C.* § 327 and Rule 23.1 in the derivative action context.[69] Ultimately, the court found that "the spectre of the defense does disqualify the [putative lead plaintiffs] as appropriate class representatives."[70] In contrast to *O'Malley*, the lead plaintiffs in *Prime Computer* were

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[67] *Id.* at *4 (alteration in original) (quoting *Zeffiro v. First Pa. Banking & Trust Co.*, 96 F.R.D. 567, 570 (E.D. Pa. 1983)).

[68] 681 A.2d 1068 (Del. Ch. 1996).

[69] *Id.* at 1072.

[70] *Id.* at 1072-73.

subject to a unique defense (*i.e.*, standing, a jurisdictional requirement) that necessarily would assume a major role relatively early in the litigation. Therefore, the typicality requirement was not met.

Turning to this case, allegations of acquiescence are not "logically prior" to liability issues. Acquiescence is an affirmative defense that neither "cut[s] off the party's title, nor his remedy at law; it simply bars his right to equitable *relief*."[71] In this regard, NOERS's unique acquiescence in Celera's conduct, if any, renders this case more analogous to *O'Malley* and *Singer* than to *Prime Computer*. That is, although acquiescence "may affect [NOERS's] ultimate right to recover, . . . it does not affect the presentation of the case on the liability issues for the plaintiff class,"[72] and "[s]hould a conflict among members of the class develop at the remedy stage, the Court has the power under Rule 23 to establish subclasses or fashion other appropriate measures."[73] Therefore, disqualification of NOERS as a class representative is not necessary.

iii. Has NOERS satisfied its burden to demonstrate typicality?

Although NOERS's alleged acquiescence does not disqualify it from serving as class representative, NOERS still bears the affirmative burden to show that its claims and defenses are typical of the class.[74] "A representative's claim or defense will suffice if it 'arises from the same event or course of conduct that gives rise to the claims [or

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71 3 *Pomeroy's* § 817, at 246 (emphasis added).

72 *O'Malley*, 2001 WL 50204, at *4.

73 *Singer*, 1978 WL 4651, at *4.

74 *Barbieri v. Swing-N-Slide Corp.*, 1996 WL 255907, at *3 (Del. Ch. May 7, 1996).

defenses] of other class members and is based on the same legal theory.'"[75] Here, NOERS's claims are identical to those of the other class members. "Because all [c]lass members face the same injury flowing from the defendants' conduct in connection with the merger, the typicality requirement is satisfied."[76]

b. Rule 23(a)(4)—adequacy

A class action may be maintained only if the class representative also "will fairly and adequately protect the interests of the class."[77] The United States Supreme Court has held that "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members."[78] The adequacy requirement, like the typicality requirement, attempts to ensure that the class representative has proper incentives to advance the interests of the class; typicality requires overlapping claims in particular, whereas adequacy speaks to alignment of interests more generally.[79] The courts generally accord the greatest weight to the presence or absence of conflicts of interest or economic antagonism when evaluating a

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75 *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1226 (Del. 1991) (alteration in original) (quoting *Zeffiro*, 96 F.R.D. at 569).

76 *In re Talley Indus., Inc. S'holders Litig.*, 1998 WL 191939, at *9 (Del. Ch. Apr. 13, 1998).

77 Ct. Ch. R. 23(a)(4).

78 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

79 *See* 1 William B. Rubenstein, *Newberg on Class Actions* § 3:32.

lead plaintiff's adequacy.[80] Nevertheless, "purely hypothetical, potential, or remote conflicts of interest never disable the individual plaintiff."[81]

BVF contends that, because NOERS voluntarily sold its shares on the secondary market, NOERS suffered no transactional damages from Defendants' alleged wrongdoing. Consequently, according to BVF, NOERS could not recover monetary relief from either a settlement or final judgment and, therefore, lacked the economic interest to conduct meaningful confirmatory discovery or to rescind the MOU and pursue a monetary recovery. Based on that reasoning, BVF argues that, after NOERS sold its Celera stock, the class lacked an adequate plaintiff and, therefore, the proposed settlement cannot be approved.[82] Ultimately, however, this argument is unpersuasive.

NOERS is a member of a class to which fiduciary duties allegedly were breached. Because claims for breach of fiduciary duty are personal, they do not transfer to a later purchaser of the initial shareholder's stock.[83] Moreover, if NOERS's fiduciary claims

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80 Wolfe & Pittenger, § 9.03[b][1][iv], at 9-151 to 9-152.

81 *Youngman v. Tahmoush*, 457 A.2d 376, 380 (Del. 1983).

82 *See Prezant v. De Angelis*, 636 A.2d 915, 925 (Del. 1994) ("In addition to the due process concern, if, in fact, there was no adequate class representative, the entire settlement process was tainted.").

83 *Schultz v. Ginsburg*, 965 A.2d 661, 667-68 & n.12 (Del. 2009). In concluding that personal claims, as opposed to charter violation claims, do not transfer to later purchasers, the *Schultz* Court relied on the wording of the Uniform Commercial Code as enacted in Delaware. Specifically, 6 *Del. C.* § 8-302(a) provides, "a purchaser of a . . . security acquires all rights in the security that the transferor had or had power to transfer." "The phrase 'all rights in the security' means rights in the security itself as opposed to personal rights." *Schultz*, 965 A.2d at 667 n.12. This reasoning is in accord with Delaware's "strong policy against the purchase of a lawsuit." *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1170 (Del. Ch. 2002).

were derivative, it would not be able to recover because the corporation would receive the relief and NOERS no longer holds stock in the corporation.[84] Because the claims involved in this case are both personal and direct, however, NOERS is not categorically barred from receiving monetary relief, even though it no longer owns Celera stock.[85]

Furthermore, this may be true even if NOERS suffered no transactional damages. "Once disloyalty has been established, [Delaware law] requires that a fiduciary not profit personally from his conduct, and that the beneficiary not be harmed by such conduct."[86] Indeed, this Court "can, and has in the past, awarded damages designed to eliminate the possibility of profit flowing to defendants from the breach of the fiduciary relationship."[87] In a counter-factual world, NOERS could have found irrefutable evidence during confirmatory discovery that the $8 per share merger consideration was grossly inadequate and, in that case, arguably might have found it more difficult to prove its entitlement to a damages award. Alternatively, NOERS could have found irrefutable evidence that $8 per share was fair, but that the Celera Board conducted a disloyal sales

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84 *Schultz*, 965 A.2d at 668.

85 *Cf. In re Beatrice Cos., Inc. Litig.*, 522 A.2d 865 (Del. 1987) (ORDER) (To have standing, "the plaintiff must have been a stockholder at the time the terms of the merger were agreed upon because it is the terms of the merger, rather than the technicality of its consummation, which are challenged.").

86 *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996) (imposing monetary liability to remedy breach of loyalty despite the absence of transactional damages).

87 *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1154 (Del. Ch. 2006).

process designed to extract grossly excessive personal benefits.[88] In this latter case, the members of the class might not have suffered transactional damages, but they and NOERS still might be entitled to share in an equitable disgorgement remedy. Thus, as a class member, NOERS continued to have an incentive to pursue vigorously any monetary relief that might flow to the class.

Although the sale of its shares did not preclude NOERS from receiving a monetary recovery, it might have created a disabling conflict of interest for NOERS in deciding how to allocate or distribute whatever funds might have become available to the class. "An allocation plan must be fair, reasonable, and adequate[, but a] reasonable plan does not need to compensate [c]lass members equally . . . and may consider the relative value of competing claims."[89] The extent of any potential conflict for NOERS in this regard, however, necessarily would depend on the amount of, and basis for, whatever funds became available. Thus, it is only a potential, nondisabling conflict.[90]

In arguing to the contrary, BVF supports a bright line test. It contends that a lead plaintiff that sells its shares before the challenged merger closes necessarily is inadequate

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88 Indeed, this scenario more closely tracks the allegations NOERS actually made. *See* Consol. Am. Compl. ¶ 1 ("In the face of mounting personal liability, the Celera Board struck a deal to sell the Company in exchange for broad indemnification and lucrative continued employment.").

89 *Schultz*, 965 A.2d at 667 (footnotes omitted).

90 *Youngman v. Tahmoush*, 457 A.2d 376, 380 (Del. 1983); *cf. In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 962 (Del. Ch. 2010) ("The settlement involves . . . non-monetary consideration that already ha[s] been provided to the class. Thus if I approve the settlement, no conflicts will arise, and all that remains will be settlement implementation.").

under Rule 23(a)(4) based on three recent cases—*Steinhardt v. Howard-Anderson*,[91] *In re Labarage Inc. Shareholders Litigation*,[92] and *In re J. Crew Group, Inc. Shareholders Litigation*.[93] BVF's contention, however, overstates the holdings of these cases, and especially so as to *Steinhardt*. Steinhardt was a lead plaintiff who received confidential information about the defendant company during discovery and, while possessing that inside information, shorted the company's stock before the market learned of the strength of the class's claims.[94] Among other things, the court dismissed Steinhardt from the case and ordered him to disgorge whatever profits he had received from the improper short sales.[95] The court did not hold categorically, however, that a lead plaintiff simply cannot sell his or her shares before the challenged transaction is consummated. Rather, because a lead plaintiff is a fiduciary to the class, the analysis relied on the black-letter principle that "[i]t is an act of disloyalty for a fiduciary to profit personally from the use of information secured in a confidential relationship."[96] Here, by contrast, "the NOERS investment advisor . . . sought a risk-free arbitrage"[97] opportunity only after all material information regarding the lawsuit, settlement, and transaction were disclosed to the

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91 2012 WL 29340 (Del. Ch. Jan. 6, 2012).

92 C.A. No. 6368-VCN (Del. Ch. Jan. 3, 2012) (TRANSCRIPT).

93 C.A. No. 6043-CS (Del. Ch. Dec. 14, 2011) (TRANSCRIPT).

94 *Steinhardt*, 2012 WL 29340, at *6-7.

95 *Id.* at *11.

96 *Id.* (quoting *Oberly v. Kirby*, 592 A.2d 445, 463 (Del. 1991)); *accord* Rest. (3d) Agency § 8.05(2) (2006) ("An agent has a duty . . . not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.").

97 Hr'g Tr. 96.

marketplace.[98] NOERS's sale of all of its Celera shares appears to have resulted from carelessness or imprudence. Nevertheless, NOERS's conduct is not comparable in nature or degree to Steinhardt's potentially substantive offense.

The *Labarage* case also involved a co-lead plaintiff that sold its shares while in possession of nonpublic company information and during the negotiation of a settlement, but before the settlement publicly was disclosed. Hence, as in *Steinhardt*, the court's "real concern" was that the lead plaintiff traded with the "knowledge before any other shareholder that nothing is going to come of the suit in terms of increasing the consideration."[99] Counsel represented, however, that an independent investment manager sold the shares on the co-lead plaintiff's behalf despite clear instructions to the contrary. Additionally, to avoid even the appearance of impropriety, the co-lead plaintiff immediately disclosed the unintentional trade to all parties, voluntarily withdrew from the case, and left a second co-lead plaintiff to continue to represent the class.[100] Thus, *Labarage* is distinguishable in at least two respects. First, the offending co-lead plaintiff withdrew from the case pursuant to an agreement among the parties; the court did not order that result. Second, as in *Steinhardt*, the wrongdoing at issue was trading on inside information. Here, there is no indication that NOERS possessed any material, nonpublic information when it sold its shares.

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[98] The MOU was publicly disclosed on April 18, 2011, and Quest announced on May 11 that it would effect a short-form merger. NOERS did not sell its shares until May 13.

[99] C.A. No. 6368-VCN, tr. at 7-8 (Del. Ch. Jan. 3, 2012).

[100] *Id.* at 7.

The facts of *J. Crew* are more closely analogous. Most obviously, the lead plaintiff was NOERS. Nevertheless, the case is distinguishable. There, NOERS challenged the terms of a going-private transaction but ultimately voted at a shareholders meeting to approve the deal. Such conduct unequivocally evinces acquiescence.[101] Here, by contrast, NOERS sold its shares only after the transaction had become a *fait accompli*.[102]

While NOERS's imprudent sale of its Celera stock is distinguishable from these recent cases, the frequency with which Delaware courts have had to address the conduct of lead plaintiffs in recent months is troubling. When a class representative purports to object on behalf of itself and all others similarly situated only to decide later that the objected-to conduct may not have been all that bad, that representative is prone to appear more concerned about its own interests than those of the class. That appearance undermines the trust shareholders place in lead plaintiffs and, in turn, effaces courts'

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101 *Kahn v. Household Acq. Corp.*, 591 A.2d 166, 176-77 (Del. 1991); *In re PNB Hldg. Co.*, 2006 WL 2403999, at *21.

102 In a final, but still unsuccessful, effort to show that NOERS lacked economic incentive in this case, BVF also notes that the negotiated settlement approved by Vice Chancellor Laster in *In re Del Monte Foods Co. Shareholders Litigation* did not allocate any portion of the approximately $89 million settlement fund to shareholders who sold their shares before the challenged merger closed. As in *J. Crew*, however, the challenged transaction in *Del Monte* required an approving shareholder vote. *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *6 (Del. Ch. June 27, 2011) [hereinafter *Del Monte II*] ("the operative standard for the merger vote was a majority of the outstanding shares" (emphasis omitted)). Hence, shareholders who sold early—and thereby forfeited their power to prevent the supposed harm from occurring—also forfeited their right to equitable relief. *See* 2 *Pomeroy's* § 418, at 169 ("The principle embodied in th[e] maxim [equity aids the vigilant, not those who slumber on their rights] operates throughout the entire remedial portion of equity jurisprudence . . . .").

confidence in the adequacy of the representation that a lead plaintiff is capable of providing.[103] Although I conclude ultimately that NOERS is an adequate class representative in this case, I do not reach that conclusion lightly. Lead plaintiffs must remain committed to fulfilling their obligations to those they represent throughout the litigation. Among other things, that should include thinking about more than the technical permissibility of their conduct, but also how their conduct is likely to be perceived. Here, NOERS engendered a host of legitimate criticisms to its commitment to this case by choosing to take advantage of a "risk-free arbitrage" opportunity. Technically permissible or not, that choice failed to reflect an appropriate level of regard and respect for NOERS's position as a fiduciary for the class. As this case demonstrates, Delaware courts have good reason to expect more from those who would serve as lead plaintiffs in representative litigation. Accordingly, I may well employ a more bright line test in the future.

In the final analysis, however, and having carefully considered BVF's challenges to NOERS's motives and qualifications to serve as lead plaintiff for the class here, I find that NOERS had a continuing economic interest in prosecuting its claims and that there is no evidence of actual antagonism between NOERS and other class members. Moreover,

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[103] *See In re J. Crew Gp., Inc. S'holders Litig.*, C.A. No. 6043-CS, tr. at 81 (Del. Ch. Dec. 14, 2011) ("The fact that in a high profile situation they actually vote for the deal [does not] make[] them look good. It casts doubts in the minds of people that they're seeking to represent.").

NOERS engaged highly qualified and experienced counsel. Therefore, I conclude that NOERS is an adequate class representative under Rule 23(a)(4).[104]

2. Requirements of Rule 23(b)

Where, as here, "the provisions of subsection (a) are satisfied, the next step is to properly fit the action within the framework provided for in subsection (b)."[105]

> Rule 23(b) divides class actions into three categories. Subdivision (b)(1) applies to class actions that are necessary to protect the party opposing the class or the members of the class from inconsistent adjudications in separate actions. Subdivision (b)(2) applies to class actions for class-wide injunctive or declaratory relief. . . .
>
> Rule 23(b)(3) has . . . been called the "damage class action" because it authorizes a single lawsuit for monetary redress on behalf of numerous persons having similar disputes with the defendant, when economies of time, effort, and expense would be achieved by representative group litigation.[106]

"Class suits are not necessarily mutually exclusive; an action may be certified under more than one subdivision of Rule 23(b) in appropriate circumstances."[107] That said, constitutional due process requires that class members receive actual notice and the right to opt out of a class certified under subdivision (b)(3).[108] There is no comparable requirement for (b)(1) or (b)(2) classes, but the Court "has discretionary power . . . to

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104 *See Oliver v. Boston Univ.*, 2002 WL 385553, at *7 (Del. Ch. Feb. 28, 2002).

105 *Nottingham P'rs v. Dana*, 564 A.2d 1089, 1095 (Del. 1989).

106 *Id.* at 1095-96 (footnotes, citations, and internal quotation marks omitted).

107 *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1226 (Del. 1991).

108 *Nottingham P'rs*, 564 A.2d at 1097.

provide for an opt out right . . . if it believes that an opt out right is necessary to protect the interest of absent class members."[109]

Plaintiffs and Defendants seek class certification under both subdivisions (b)(1) and (b)(2), and they expressly conditioned their settlement on having the class certified without opt out rights.[110] BVF counters that the United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*[111] requires that this class be certified under subdivision (b)(3) or, in the alternative, that the Court exercise its discretion to permit opt out rights. For the following reasons, certification under subdivisions (b)(1) and (b)(2), without opt out rights, is proper in this case.

a. Is this a (b)(1), (2), or (3) class action?

"Delaware courts repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2)."[112] In addition, this Court has held that the availability of post-closing damages does not invoke the "damages class action" framework of subdivision (b)(3).

> In short, if a finding of damages occurs, the damages will be mathematically allocated on a per share basis to all the stockholders in similar circumstances. There is a total absence of individual issues and therefore there would be no

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109 *Id.* at 1101.

110 Settlement Agreement ¶ 21(b) & Ex. F ¶ 3.

111 -- U.S. --, 131 S. Ct. 2541 (2011).

112 *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *8 (Del. Ch. May 6, 2010) (citing, among other cases, *Nottingham P'rs*, 564 A.2d at 1096-97).

> reason for the Court to make a separate finding of damages as to each share or each shareholder.[113]

Thus, under well-settled Delaware precedent, this case should be certified under subdivisions (b)(1) and (b)(2), rather than under (b)(3).

Contrary to BVF's assertion, *Wal-Mart v. Dukes* did not overturn Delaware law in this respect. *Wal-Mart* concerned certification of a class of approximately 1.5 million current and former female employees of Wal-Mart alleged to have suffered wage and promotion discrimination in violation of Title VII of the Civil Rights Act of 1964.[114] To remedy a Title VII violation, a court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate."[115] Although Title VII also permits compensatory damages, the class in *Wal-Mart* predominately sought injunctive relief and related backpay. On that basis, the plaintiffs requested certification under subdivision (b)(2). The Supreme Court, however, held that each class member's request for backpay involved an individualized claim for money damages. Thus, assuming the suit could be maintained as a class action at all, due process required certification under subdivision (b)(3).[116]

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113 *Joseph v. Shell Oil Co.*, 1985 WL 21125, at *5 (Del. Ch. Feb. 8, 1985).

114 131 S. Ct. at 2547.

115 42 U.S.C. § 2000e–5(g)(1).

116 *Wal-Mart*, 131 S. Ct. at 2557-58.

The plaintiffs' argument that backpay issues would not "predominate" over the class-wide request for injunctive relief did not dissuade the Supreme Court from holding that due process required the actual notice and opt out rights provided by Rule 23(b)(3).[117] In that regard, though, the Supreme Court acknowledged Fifth Circuit precedent holding

> that a (b)(2) class would permit the certification of monetary relief that is "incidental to requested injunctive or declaratory relief," which it defined as "damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." In [the Fifth Circuit's] view, such "incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations."[118]

But, the Supreme Court stated expressly that "we need not decide in [*Wal-Mart*] whether there are any forms of 'incidental' monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced" because the putative class plaintiffs "do not argue that they can satisfy this standard, and in any event they cannot."[119]

When this Court provides monetary relief for a breach of fiduciary duty, it generally is not making an individualized determination of each shareholder's loss. Rather, much like the Fifth Circuit precedent considered by the Supreme Court in *Wal-Mart*, the monetary relief flows directly from a finding of liability to the class as a whole

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[117] *Id.* at 2559.

[118] *Id.* at 2560 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)).

[119] *Id.*

on the claims forming the basis for equitable relief—*i.e.*, it is the remedy for violation of an equitable right owed simultaneously and equally to all class members. The fact that allocation of a common fund does not need to compensate class members equally does not invoke the procedural requirements of subdivision (b)(3). Put differently, apportionment of the relief is not synonymous with idiosyncrasy of the claims.[120]

Nothing in *Wal-Mart*, therefore, indicates that shareholders deserve an opt out right whenever they claim a corporate fiduciary breached a duty potentially entitling the shareholder class to monetary relief.[121] Accordingly, the Delaware Supreme Court's holdings in *Nottingham Partners* and similar cases continue to control.[122]

b. Should the Court nevertheless provide opt out rights to the class?

Even where due process does not require the right to opt out,

> the Court of Chancery has discretionary power [to provide it] if it believes that an opt out right is necessary to protect the interest of absent class members. *Penson v. Terminal Transp. Co.*, 634 F.2d [989, 993-94 (5th Cir. 1981)]. In exercising its discretion, . . . the Court of Chancery must balance the equities of the defendants' desire to resolve all claims in a single proceeding against the individuals' interest in having their own day in Court.[123]

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120 *See Joseph*, 1985 WL 21125, at *5.

121 *See In re Del Monte Foods Co. S'holders Litig.*, C.A. No. 6027-VCL, tr. at 48-49 (Del. Ch. Dec. 1, 2011) ("The idea that a court can't certify a class under (b)(2) simply because it involves money damages . . . is based on an overly cramped and unpersuasive reading of *Shutts* and *Wal-Mart*.").

122 *Nottingham P'rs*, 564 A.2d at 1096-97 (affirming certification under subdivision (b)(2) because "the *primary* relief sought and *obtained* in the Settlement was declaratory, injunctive and rescissory").

123 *Id.* at 1101.

BVF asks the Court to exercise that discretion here because BVF is "a significant stockholder [that] wishes to pursue money damages claims" and "it would be fundamentally unfair to permit a holder of a small amount of stock to use the class action process to drag the significant stockholder into a class action[,] . . . settle at the injunction stage for non-monetary consideration, and then seek millions of dollars in attorneys' fees."[124] BVF's argument, however, is unpersuasive.

As indicated above, *Nottingham Partners* relied on *Penson* for the proposition that a trial court can permit opt out rights in appropriate (b)(2) class actions. In *Penson*, the Fifth Circuit reasoned that due process ordinarily does not require opt out rights for (b)(2) classes because there is a "cohesiveness [to the class] claimed to result from both the group nature of the harm alleged and the broad character of the relief sought" that is not present in a (b)(3) class.[125]

> This theory, however, has broken down [where] individual monetary relief for class members, typically back pay, is sought in addition to classwide injunctive or declaratory relief. . . . [In such a case], there has been more concern with protecting the due process rights of the individual class members to ensure they are aware of the opportunity to receive the monetary relief to which they are entitled.[126]

Thus, the concerns animating the need for discretionary opt out rights in (b)(1) and (b)(2) classes stem from the same issues involved in *Wal-Mart*, *i.e.*, individualized claims for backpay amidst an otherwise classwide claim for equitable relief. As already discussed,

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[124] BVF's Ans. Br. 51-52.

[125] *Penson*, 634 F.2d at 994.

[126] *Id.* (citations omitted).

those issues typically are not present in the corporate context; the fact that class members may hold varying amounts of the defendant corporation's stock does not undermine the assumption of cohesiveness or the group nature of the alleged harm.

This is not to say that a significant shareholder's objection to a proposed settlement is irrelevant. To the contrary, the importance of such an objection manifests itself in at least two ways, but neither relates to the Court's determination of whether to provide discretionary opt out rights. First, the relative magnitude of a putative class representative's financial interest in the suit compared to the objector's interest and the relative support, or lack thereof, the lead plaintiff receives from other class members can speak to the adequacy requirement of Rule 23(a)(4). In that regard, however, "the court has paid little heed to arguments that the representative lacks sufficient support from other class members . . . [and] has often certified class representatives even though they have a relatively small personal financial interest in the litigation."[127] Second, the Court generally considers the merits of objections when reviewing the substantive fairness of the proposed settlement,[128] discussed in Part II.B, *infra*, rather than in the context of class certification.

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127 Wolfe & Pittenger § 9.03[b][1][iv], at 9-152 (footnotes omitted) (citing, among other cases, *Van de Walle v. Salomon Bros., Inc.*, 1997 WL 633288 (Del. Ch. Oct. 2, 1997) and *Van De Walle v. Unimation, Inc.*, 1983 WL 8949 (Del. Ch. Dec. 6, 1983)). In any event, as noted in Part II.A.1.b, *supra*, NOERS possesses sufficient economic interest in this suit and has exhibited no antagonism to other class members; therefore, NOERS adequately can represent the class notwithstanding BVF's objection.

128 *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1283-84 (Del. 1989).

In the latter regard, I also note that Defendants seek complete peace in this settlement, and permitting BVF to litigate "the identical claims being settled . . . would utterly defeat the purpose of the settlement."[129] Not surprisingly, therefore, the Settlement Agreement is conditioned on the class being certified without opt out rights.[130] Thus, providing opt out rights effectively would amount to disapproving the settlement altogether. I prefer to consider whether such a result is appropriate based on the merits, and not Rule 23.

In sum, I find that NOERS has satisfied the four prerequisites of Rule 23(a) and that this litigation falls within the framework provided by Rule 23(b)(1) and (2). Therefore, I certify the class as specified in Plaintiffs' Motion for Final Approval of the Settlement. Additionally, based on the circumstances of this case, I decline to provide any opt out rights.

B. Approval of the Settlement

1. Standard of review for settlements

Under Rule 23(e), the voluntary dismissal or compromise of a class action requires prior approval by the Court. "Because of the fiduciary character of a class action, . . . it is incumbent upon the Court to determine the intrinsic fairness of a settlement."[131] Essentially, the reviewing court, in the exercise of its own business judgment, must be

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[129] *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1137 (Del. 2008).

[130] Settlement Agreement ¶ 21(b) & Ex. F ¶ 3.

[131] *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *8 (Del. Ch. May 6, 2010) (citing *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964)), *aff'd*, 9 A.3d 475 (Del. 2010) (TABLE).

satisfied that the benefits provided and claims extinguished by the proposed settlement reflect a fair, adequate, and reasonable exchange.[132] This analysis necessarily entails an assessment of "the nature of the claim[s], the possible defenses thereto, [and] the legal and factual circumstances of the case."[133] If the consideration the class receives is at least commensurate with the reviewing court's assessment of their released claims, then approval of the settlement is warranted and vice versa.[134] Application of independent business judgment also necessarily involves a measure of discretion.[135] Although the reviewing court "must carefully consider all challenges to the fairness of the settlement,"[136] it need not actually try the issues presented or "decide any of the issues on the merits."[137] Finally, the proponents of a proposed class action settlement, here NOERS and Defendants, bear the burden of proving that the settlement is fair and reasonable.[138]

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132 *Barkan*, 567 A.2d at 1285; *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986).

133 *Polk v. Good*, 507 A.2d at 535.

134 *Barkan*, 567 A.2d at 1285; *In re Prime Hospitality, Inc.*, 2005 WL 1138738, at *7 (Del. Ch. May 4, 2005).

135 *Barkan*, 567 A.2d at 1284.

136 *Id.*

137 *Polk v. Good*, 507 A.2d at 536.

138 *Barkan*, 567 A.2d at 1285-86.

2. Benefits of the settlement to the stockholders

a. Therapeutic modifications

The Settlement Agreement provides Celera stockholders with two categories of benefits, the first of which is therapeutic changes to the terms of the Merger. Specifically, Defendants agreed to waive the Don't-Ask-Don't-Waive Standstills, to reduce the Termination Fee from $23.45 million to $15.6 million, and to extend the closing of the tender offer by one week. Defendants did not agree, however, to increase the Merger price or otherwise provide Celera stockholders any monetary benefit. Nevertheless, "[t]he benefit generated from modifying deal protections . . . is an increased opportunity for stockholders to receive greater value."[139] In waiving the Don't-Ask-Don't-Waive Standstills, for example, Defendants invited back to the bargaining table the four bidders arguably most likely to make a superior offer (because they already had performed some due diligence and perhaps could evaluate more quickly whether to make a competitive offer). Similarly, "termination fee[s] . . . serve as the lower bound

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[139] *In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *19 (Del. Ch. Dec. 9, 2011). Thus, Defendants' and BVF's criticisms of these benefits as ineffectual because no superior offer actually emerged are misplaced. I also reject BVF's denigration of the one-week extension to May 2. Because Quest extended the tender offer three more times until May 10, BVF contends that "an extension of time for the tender offer would have occurred even without the Proposed Settlement." BVF's Ans. Br. 48. The extensions from May 3-10, however, were necessary only for Quest to reach the 60% threshold to exercise its Top-Up Option. For purposes of making a superior bid, the tender offer effectively closed on May 3. As to the one-day extension from May 2 to May 3, I note that Quest had obtained over 49% of the voting stock as of May 2. If anything, the fact that a handful of shareholders sat on the fence until the last moment while BVF and others vocally dissented to the Merger Agreement undermines BVF's assertion that the one-week extension was worthless.

for the incremental value of a topping bid."[140] Lowering a termination fee thus reduces the barrier to making a superior offer in the first place and increases the amount of the superior offer's consideration that would go directly to shareholders. Lastly, extending the closing date of the tender offer afforded potential bidders more time to conduct due diligence and consider whether to make a competing bid. It also afforded stockholders more time to consider the Company's supplemental disclosures, discussed *infra*.

Whatever the intrinsic value of these therapeutic benefits, I also note that, as to a handful of Plaintiffs' claims, the therapeutic deal changes may represent the maximum relief that Plaintiffs could have obtained. For example, Plaintiffs may have been able to show that the combined potency of the Don't-Ask-Don't-Waive Standstills and the No Solicitation Provision was problematic. The terms of the Don't-Ask-Don't-Waive Standstills restricted the potential bidder from, among other things, acquiring, offering to acquire, or soliciting proxies of Celera securities in any manner (including by assisting others to do any of the same) without the Company's express written invitation. Furthermore, the affected bidders agreed "not to request the Company (or its directors, officers, employees or agents), directly or indirectly, to amend or waive any provision of [the relevant standstill terms] (including this sentence)."[141] Viewed in isolation, these Don't-Ask-Don't-Waive Standstills arguably foster legitimate objectives: "ensur[ing] that confidential information is not misused . . . [,] establish[ing] rules of the game that

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140 *Del Monte II*, 2011 WL 2535256, at *15.

141 Pl.'s Prelim. Inj. Br. App. Ex. 42, at CRA000594.

promote an orderly auction, and . . . giv[ing] the corporation leverage to extract concessions from the parties who seek to make a bid."[142] Similarly, the No Solicitation Provision, viewed in isolation, appears legitimate; although it prevented the Company from contacting potentially interested parties, including the previously identified parties, it also contained a "fiduciary out" permitting the Board to waive the Don't-Ask-Don't-Waive Standstills if strict compliance with the Merger Agreement would violate the Board's fiduciary duty to maximize shareholder value.[143]

Taken together, however, the Don't-Ask-Don't-Waive Standstills and No Solicitation Provision are more problematic. "[The Delaware Supreme] Court has stressed the importance of the board being adequately informed in negotiating a sale of control: 'The need for adequate information is central to the enlightened evaluation of a transaction that a board must make.'"[144] Here, the Don't-Ask-Don't-Waive Standstills block at least a handful of once-interested parties from informing the Board of their willingness to bid (including indirectly by asking a third party, such as an investment bank, to do so on their behalf), and the No Solicitation Provision blocks the Board from inquiring further into those parties' interest. Thus, Plaintiffs have at least a colorable argument that these constraints collectively operate to ensure an informational vacuum. Moreover, the increased risk that the Board would outright lack adequate information

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142 *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 91 (Del. Ch. 2007).

143 Merger Agreement § 6.4(a).

144 *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 44 (Del. 1994) (quoting *Barkan*, 567 A.2d at 1287).

arguably emasculates whatever protections the No Solicitation Provision's fiduciary out otherwise could have provided. Once resigned to a measure of willful blindness, the Board would lack the information to determine whether continued compliance with the Merger Agreement would violate its fiduciary duty to consider superior offers. Contracting into such a state conceivably could constitute a breach of fiduciary duty.[145]

To be clear, I do not find, either in the circumstances of this case or generally, that provisions expressly barring a restricted party from seeking a waiver of a standstill necessarily are unenforceable. Such a ruling should be made, if ever, only on the merits of an appropriately developed record, especially because these provisions may be relatively common.[146] Rather, based on the issues it redresses, I find this aspect of the settlement consideration to be valuable. Had Plaintiffs succeeded on this claim, the likely remedy would have been an injunction against enforcing the Standstill agreements.[147] Therefore, Defendants' agreement to waive voluntarily those problematic contractual provisions mooted Plaintiffs' claims in this regard.

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145 *See QVC*, 637 A.2d at 51 ("To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable."); *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95, 106 (Del. Ch. 1999) (finding no solicitation provision "pernicious" where it arguably required "an abdication by the board of its duty to determine what its own fiduciary obligations require"); *see also In re RehabCare Gp., Inc. S'holder Litig.*, C.A. No. 6197-VCL, tr. at 46 (Del. Ch. Sept. 8, 2011) (expressing doubt that don't-ask-don't-waive standstills are "ever going to hold up if it's actually litigated, particularly after *Topps*").

146 *See* 1 Arthur Fleischer, Jr. & Alexander R. Sussman, *Takeover Defense: Mergers & Acquisitions* § 8.04[A], at 8-21 (6th ed., rev. vol. 2012).

147 *See In re Topps*, 926 A.2d at 92 (enjoining shareholder vote on merger until target waived standstill agreement used improperly).

Similarly, to the extent that Plaintiffs complained of a deficient or disloyal market check, the likely remedy would have been limited injunctive relief, long enough to recreate an active market check but "without blocking the deal and sending the parties back to the drawing board."[148] Where a company has been exposed to the market and potential transactions shopped for some time, even an egregious case of process defects probably would have led to an injunction of only twenty days or so.[149] Furthermore, where no rival bidder has made its presence known, preliminary injunctive relief may be completely illusory.[150] Although post-closing damages still may be available if preliminary injunctive relief is only limited in nature or denied altogether, the alleged process violations here, as discussed further *infra*, were significantly less severe than in *Del Monte* or *El Paso*. Hence, the one-week extension arguably obtained all the relief that was likely.

b. Supplemental disclosures

The second category of benefits obtained by the Settlement Agreement is a six-page amendment to the Recommendation Statement, which was filed publicly with the

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148 *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 841 (Del. Ch. 2011) [hereinafter *Del Monte I*] (enjoining transaction for twenty days due to substantial process defects and banker conflicts).

149 *See id.*

150 *See In re El Paso Corp. S'holder Litig.*, 2012 WL 653845, at *11 (Del. Ch. Feb. 29, 2012) (declining to enjoin transaction despite likelihood of success on the merits because "no rival bid for [the target] exists"); *see also id.* at *11 n.56 ("Although it is true that the absence of a pre-signing market check and the presence of strong deal protections may explain the absence of a competing bid, . . . [i]n the era in which *Revlon* was decided, bidders wishing to disrupt transactions actually made their presence known and litigated to achieve their objectives.").

SEC on April 18, 2011 (the "Supplemental Disclosure"). Of the supplemental information provided to Celera stockholders, the most significant relates to the discounted cash flow (DCF) analysis Credit Suisse performed.[151] In particular, the original Recommendation Statement disclosed the facts that Credit Suisse had "calculated the present value of the Company's interest in its non-commercial, development stage drug assets" and that Credit Suisse factored those calculations into the ultimate, full-Company DCF analysis, but the Recommendation Statement did not disclose the individual drug-by-drug cash flow projections.[152] The Supplemental Disclosure, by contrast, provides the "probability-adjusted after-tax free cash flows through 2025 for the Company's development stage drug assets," including Cat-K.[153] Although more granular financial information is not necessarily material,[154] the estimated value of Celera's drug assets engendered various challenges to the adequacy of the Merger's financial terms and thereby assumed actual significance in this case. For example, during the Board's negotiations with Quest in February 2011, BVF informed Ordoñez that it would try to block any transaction unless the Company's drug assets were sold separately or the deal

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151 The Supplemental Disclosure provides Celera stockholders with a litany of additional information. For purposes of evaluating the fairness of the proposed settlement, I focus on the two disclosures I consider most valuable to the class. When determining *infra* an appropriate award of attorneys' fees, however, I review the panoply of supplemental disclosures somewhat further.

152 Recommendation Statement at 37.

153 Celera Corp., Recommendation Statement (Schedule 14D-9) Amendment No. 7, at 5 (Apr. 18, 2011) [hereinafter Supplemental Disclosure].

154 *See Zirn v. VLI Corp.*, 1995 WL 362616, at *4 (Del. Ch. June 12, 1995) (Delaware law attempts to "guard against the fallacy that increasingly detailed disclosure is always material and beneficial disclosure."), *aff'd*, 681 A.2d 1050 (Del. 1996).

provided some way for shareholders to participate in future value attributable to those assets. Similarly, Black Horse offered to contribute an additional $2.50 per share to Quest's bid in exchange for Celera's drug assets. All in all, I find that the supplemental information provided about the standalone value of the Company's development stage drug assets probably assisted stockholders' ability to assess the fairness of the consideration Quest offered.

Also valuable, albeit less so than the above, was the additional information regarding certain assumptions Credit Suisse made in its DCF analysis. As disclosed in the Supplemental Disclosure,

> [s]tock-based compensation expense . . . often is treated in the same manner as depreciation and amortization and bad debt expense for the purposes of [DCF] analysis. However, because the Company has relatively large stock-based compensation expense relative to its actual and estimated EBITDA, Credit Suisse determined that the Company's stock-based compensation should be treated as a cash expense for purposes of its [DCF] analysis. Accordingly, for purposes of calculating the Company's unlevered free cash flows, [Credit Suisse excluded] approximately $5-6 million per year of stock-based compensation included in the February 2011 Forecast. Had the Company's unlevered, after-tax cash flows been increased by the amount of its stock-based compensation expense, the per share equity reference ranges for the Company disclosed on page 37 would have been increased.[155]

To a degree, this passage states a commonsense notion: had Credit Suisse made different assumptions, its analysis would be different. The Supplemental Disclosure is more valuable here, however, because it indicates that Credit Suisse made at least one unusual,

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155 Supplemental Disclosure at 4.

though arguably justifiable, assumption. Thus, although this particular disclosure does not alter Credit Suisse's bottom-line valuation of the Company, it better enables stockholders to assess for themselves the reasonableness of Credit Suisse's favorable fairness opinion.[156]

3. Costs of the settlement to the stockholders

By settling, Plaintiffs release any and all claims against Defendants, whether known or unknown, in any way related to the Merger.[157] In assessing the cost of this release, I must evaluate "the nature of the claim[s], the possible defenses thereto, [and] the legal and factual circumstances of the case," although I need not "decide any of the issues on the merits."[158] In this regard, BVF objects to the proposed settlement primarily because it undervalues "valuable claims for money damages" against the Board and Credit Suisse "worth millions of dollars."[159] Accordingly, in assessing the nature of the claims and defenses, I focus on the claims that BVF contends are especially meritorious.

a. Fiduciary duty claims against the Board

Plaintiffs challenged a sale of Celera for cash, thus requiring enhanced judicial scrutiny of the Board's actions under *Revlon, Inc. v. MacAndrews & Forbes Holdings*[160]

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156 *See In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002) ("The real informative value of the banker's work is not in its bottom-line conclusion, but in the valuation analysis that buttresses that result.").

157 Settlement Agreement § 1(i) (defining "Released Claims").

158 *Polk v. Good*, 507 A.2d at 535-36.

159 BVF's Ans. Br. 50, 51-52.

160 506 A.2d 173 (Del. 1986).

and its progeny. "When directors have commenced a transaction process that will result in a change of control, a reviewing court will examine whether the board has reasonably performed its fiduciary duties 'in the service of a specific objective: maximizing the sale price of the enterprise.'"[161] This enhanced scrutiny "has both subjective and objective components."[162] Subjectively, the directors must have tried in good faith to get the best available price, and those good faith efforts must have been objectively reasonable.[163] Many decisions and actions, however, may be reasonable ones; "there is no single blueprint that a board must follow to fulfill its duties."[164] Thus, while *Revlon* review is more searching than business judgment rule deference, a court still may not "second-guess reasonable, but debatable, tactical choices that directors have made in good faith."[165]

As the Delaware Supreme Court has made clear, *Revlon* review does not alter directors' traditional fiduciary duties of care and loyalty, but merely specifies the application of those duties in the context of control transactions.[166] In that regard, the Company's certificate of incorporation, which contains an exculpatory provision pursuant

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161 *In re Alloy, Inc.*, 2011 WL 4863716, at *7 (Del. Ch. Oct. 13, 2011) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)).

162 *Del Monte I*, 25 A.3d at 830.

163 *Id.* (citing, among other cases, *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 43 (Del. 1994)).

164 *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242-43 (Del. 2009) (quoting *Barkan*, 567 A.2d at 1286) (internal quotation marks omitted).

165 *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005).

166 *Malpiede*, 780 A.2d at 1083.

to 8 *Del. C.* § 102(b)(7) eliminating monetary liability for breaches of the duty of care,[167] cabins the strength of Plaintiffs' claims against the Celera Board. Because "the challenged transaction has closed and neither injunctive relief nor rescission is available," claims that the Board failed to maximize the sales price of the enterprise "are of little or no value unless that failure is predicated upon the directors' disloyalty or bad faith."[168] With these general principles in mind, I next turn to NOERS's and BVF's specific accusations of bad faith or the absence of reasonable efforts to maximize the sales price of Celera.

i. Oversight of the sales process

Plaintiffs assert that the Board unreasonably abdicated responsibility for the negotiation process to Ordoñez and Credit Suisse, both of whom were conflicted. Assuming the Board, in fact, did hand over negotiations to conflicted fiduciaries and advisors, Plaintiffs would possess a strong claim.[169] If, however, the Board was not

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167 Cook Aff., D.I. No. 149 Ex. 57, Art. SIXTH.

168 *In re Prime Hospitality, Inc.*, 2005 WL 1138738, at *8 (Del. Ch. May 4, 2005); *accord Lyondell*, 970 A.2d at 239 (Because the "charter includes an exculpatory provision, . . . this case turns on whether any arguable shortcomings on the part of the Lyondell directors also implicate their duty of loyalty, a breach of which is not exculpated.").

169 *See Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1281 (Del. 1989) (A board "may not avoid its active and direct duty of oversight in a matter as significant as the sale of corporate control."); *In re Toys "R" Us*, 877 A.2d at 1002 ("[T]he paradigmatic context for a good *Revlon* claim . . . is when a supine board under the sway of an overweening CEO bent on a certain direction[] tilts the sales process for reasons inimical to the stockholders' desire for the best price.").

supine, but "actively engaged throughout the sale process," then the claim would fail.[170] Thus, the strength of this claim turns on the nature of the Board's involvement in the negotiation process.

At least one director, Richard Ayers, testified that the Board expected Ordoñez and Credit Suisse to lead the relevant negotiations.[171] Ordoñez testified, however, that she never negotiated the sales price, leaving those negotiations to other, outside directors and Credit Suisse.[172] Furthermore, the fact that the Board may have apportioned and delegated necessary tasks does not mean that it failed to exercise oversight or otherwise acted in bad faith.[173] In that regard, it is relevant that the Board regularly discussed and debated the sales process during at least sixteen meetings and that neither Ordoñez nor Credit Suisse could have bound the Board to any deal of which it disapproved.[174]

As to the reasonableness of Credit Suisse's involvement, a board generally may rely in good faith on qualified experts selected with reasonable care.[175] There is no allegation in this case that Credit Suisse lacked the requisite expertise to advise the

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170 *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 498 (Del. Ch. 2010); *accord In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 602 (Del. Ch. 2010).

171 Cook Aff., D.I. No. 147 Ex. 1, at 16.

172 Cook Aff., D.I. No. 147 Ex. 6, at 158 ("[A]ll the [price] negotiations were done either through the bankers or with Bill Green. My job was to provide the diligence . . . ."), 223 ("as I've said multiple times, I didn't negotiate the price") [hereinafter Ordoñez Dep.].

173 *See In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *7 (Del. Ch. Sept. 30, 2009) ("It is well within the business judgment of the Board to determine how merger negotiations will be conducted, and to delegate the task of negotiating to . . . the Chief Executive Officer.").

174 *See id.*

175 8 *Del. C.* § 141(e).

Board. Nevertheless, "this Court has . . . examined banker conflicts closely to determine whether they tainted the directors' process."[176] Of particular concern in this context is whether the banker's conflicts were disclosed to the board and whether the board reasonably could rely on the banker's expert advice despite an alleged conflict.[177]

Here, the principal accusation of disabling self-interest is the contingent structure of Credit Suisse's fee. The Board presumably was aware of that conflict because it negotiated the fee.[178] Arguably, the fee structure incentivized Credit Suisse to favor a single, rather than piecemeal, sale of the Company. Alternatively, the largest portion of Credit Suisse's fee ultimately was its entitlement to 1.3% of the transaction size, which provided proper incentives to negotiate zealously for the highest possible price. In this factual context—*i.e.*, where a financial advisor's disclosed fee structure potentially provides proper incentives, but arguably does not—the contingent nature of the fee, standing alone, is unlikely to make delegation of subordinate tasks to that adviser unreasonable. Indeed, as this Court has recognized, "[c]ontingent fees are undoubtedly routine; they reduce the target's expense if a deal is not completed; perhaps, they properly incentivize the financial advisor to focus on the appropriate outcome."[179]

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176 *Del Monte I*, 25 A.3d at 832.

177 *See id.* at 836 (finding reliance on conflicted banker unreasonable where the banker deceived the board by failing to disclose its conflict).

178 Thus, this case is readily distinguishable from *Del Monte*, which involved multiple, egregious, and furtive conflicts of interest. *See id.*

179 *In re Atheros Commc'ns, Inc.*, 2011 WL 864928, at *8 (Del. Ch. Mar. 4, 2011); *see also In re Alloy, Inc.*, 2011 WL 4863716, at *11 (Del. Ch. Oct. 13, 2011) (The "need to

In sum, although the factual record leaves some room for doubt, I consider any claim by the class that the Board acted disloyally or in bad faith because Ordoñez and Credit Suisse participated meaningfully in the negotiation process to have been relatively weak and unlikely to succeed.

ii. Reliance on Credit Suisse's flawed financial analysis

The parties generally agree that, beginning in March 2011, Credit Suisse misapprehended the Tufts Study and undervalued the development-stage Cat-K drug by employing inaccurate probability of success rates. Additionally, in December 2010, Ordoñez sent an email expressing at least some measure of doubt about Credit Suisse's valuation of certain other drug assets. The email stated, "I don't think CS got the analysis right."[180] Because of Celera's § 102(b)(7) exculpatory provision, however, the Board's carelessness, if any, in failing to recognize these errors cannot support a claim for money damages. Rather, the viability of this claim depends on whether the Board acted in bad faith by relying on what it knew was an inaccurate analysis.

Although there is some evidence from which one could infer that the Board was aware of Credit Suisse's errors—most notably, Ordoñez's December 2010 email—other evidence supports a conclusion that Credit Suisse's errors were neither conspicuous nor significant. As to the conspicuousness of the errors, Credit Suisse's valuation of Cat-K had been declining gradually in the year preceding the flawed March 2011 analysis, and

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disclose does not imply that contingent fees necessarily produce specious fairness opinions.").

180 Thomas Aff., D.I. No. 127 Ex. 2, at 1.

the undervaluation caused by the erroneous probability adjustments comports with that general decline.[181] Similarly, the erroneous analysis performed in March 2011 footnoted only the fact that the present value of Cat-K reflected a discount based on the Tufts Study's probability adjustments; the numerical value of the probability adjustments actually employed are disclosed elsewhere in an appendix of additional information.[182] Furthermore, Ordoñez's December 2010 email did not refer to the probability adjustments. It expressed doubts about Credit Suisse's classification of one particular drug and, in turn, the relevant market for that drug. Finally, although I find this argument less persuasive, Defendants also note that the dollar value of Credit Suisse's error with respect to Cat-K—undervaluing the drug in the range of $11.5 million to $12.7 million—amounts to less than 2% of the approximately $680 million total deal size.

Regarding the significance of Credit Suisse's errors, there is evidence to support a conclusion that their effect was harmless. First, as indicated *supra*, the lower bound of Credit Suisse's fairness opinion assumed that none of Celera's drug assets would generate future cash flows. Thus, the errors would not have affected the lower bound of the values Credit Suisse considered fair. Instead, its flawed analysis may have undervalued the upper bounds of its fairness opinion. That is, adjusting for the errors would not contradict Credit Suisse's expert opinion that any price above $6.78 would be fair. Second, although Credit Suisse's March 2011 analysis contained errors, the

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[181] *See* BVF's Ans. Br. 34 n.177 (itemizing confidential, successive, and declining valuations for Cat-K between February 2010 and March 2011).

[182] Thomas Aff., D.I. No. 128 Ex. 29, at CSRA00032067 n.1, CSRA00032073.

analyses it presented to the Board in February 2011 correctly applied the Tufts Study's probability of success rates.[183] Therefore, when the Board determined in February 2011 that Quest's offer of $8 per share was acceptable, it had not been exposed to Credit Suisse's errors.

In these circumstances, I accord only minimal weight to the claim for monetary relief based on the Board's apparent reliance on a flawed probability adjustment for five or so drug products in Celera's pipeline. Even in view of the evidence presented by BVF, it seems unlikely that a stockholder could show that the Board acted disloyally or in bad faith in approving the challenged transaction.

iii. Sufficiency of the market check and commitment to a whole-company sale

Plaintiffs and BVF characterized the Board's sales process as rushed and inadequate, accusing it of "failing to conduct a market check on Quest's January 2011 offer [or] . . . to seriously investigate the potential merits of selling the Company in parts rather than as a whole."[184] Defendants take issue with that characterization, asserting that the Board engaged in a seventeen-month sales process from November 2009 to March 2011, accepted the highest bid offered, achieved a 28% premium for Celera stockholders, considered all options, and had legitimate business reasons for preferring a whole-company transaction.[185]

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183 Thomas Aff., D.I. No. 128 Ex. 29, at CSRA00032045 n.2.

184 BVF's Ans. Br. 39.

185 Hr'g Tr. 106-07; Defs.' Reply Br. 1, 4 n.2.

There is, at least, some merit to both sides' respective positions. For example, rather than one extensive sales process, the Board's efforts reasonably could be characterized as a series of attempted and aborted negotiations. In that regard, the market could have assumed that Celera's willingness to sell itself in late 2009 and early 2010 had become stale by the time Quest made its successful offer in January 2011. If so, a reasonable board might have considered reinitiating contact with past bidders, or the market generally, to determine if there was any renewed interest in the Company.

Nevertheless, *Revlon* does not impose "a judicially prescribed checklist of sales activities. . . . The mere fact that a board did not, for example, do a canvass of all possible acquirers before signing up an acquisition agreement does not mean that it necessarily acted unreasonably."[186] Here, for example, the Board appears to have accumulated a wealth of information about the Company's inherent value and the state of the market from the numerous valuation studies it had received in 2010 and early 2011.[187] Alternatively, because the Board knew BVF would oppose the deal's terms,[188] it may have expected that such decentralized and vocal shareholder dissent would uncover any

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186 *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 192 (Del. Ch. 2007) (footnotes omitted).

187 *Compare Barkan*, 567 A.2d at 1287 ("When . . . directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market.") *with In re Netsmart*, 924 A.2d at 195 n.76 ("[W]hen they do not possess reliable evidence of the market value of the entity as a whole, the lack of an active sales effort is strongly suggestive of a *Revlon* breach." (emphasis omitted)).

188 *See supra* note 9 and accompanying text.

possible topping bids. In fact, BVF's vocal dissent caused Black Horse publicly to express an interest in the transaction, although it ultimately did not top Quest's offer.

Nor does the Black Horse offer, or Bidder C's offer to acquire the products division, demonstrate necessarily that the Board acted unreasonably by selling the Company as a whole. Cat-K was one of Celera's most promising assets, if not the most promising, yet Black Horse offered only $2.50 per share to acquire it. Similarly, Bidder C's offer to acquire the products division was in the range of $1.75 per share.[189] Selling off these assets piecemeal could have made it more difficult for Celera to attract interest in its remaining, less valuable business lines. It also could have left the Company in a "financially . . . weaker and riskier" position in the interim.[190] In any case, Plaintiffs' claims would require an evaluation of the reasonableness of the Board's conduct in light of the information available to it in this regard, which would involve a fact-intensive analysis and, most likely, an uncertain outcome.

b. Fiduciary duty claims against Ordoñez

In addition to their claims against the Board as a whole, Plaintiffs asserted claims against Ordoñez in her capacity as an officer. "[O]fficers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and . . . the fiduciary duties of officers

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189 Bidder C's offer of $125 to $145 million, divided by the 82 million shares of Celera stock then outstanding, equates to an implied offer of $1.52 to $1.77 per share.

190 Ordoñez Dep. 104.

are the same as those of directors."[191] In *Gantler v. Stephens,* the Supreme Court held that allegations that an officer intentionally "sabotaged" a merger proposal when he was self-interested in a competing proposal were sufficient to withstand a motion to dismiss under Rule 12(b)(6) for failure to state a claim against that officer for breach of loyalty.[192]

Here, BVF claims that Ordoñez acted disloyally in two regards. First, the day after attempting to negotiate a prospective employment agreement with Ordoñez in June 2010, Quest walked away from its earlier offer of $10.25 per share and cited among its reasons concerns about the "level of commitment Celera's senior management team was prepared to make" to a post-acquisition company.[193] Second, alleging that Ordoñez's job as CEO was in "jeopardy" in late 2010 and early 2011, BVF argues that "Ordoñez had every reason to ensure that a sale of the Company occurred, regardless of the price, with

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191 *Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009). Unlike with directors, "there currently is no statutory provision [like § 102(b)(7)] authorizing comparable exculpation of corporate officers." *Id.* at 709 n.37. In the case of a defendant who is both an officer and a director, however, § 102(b)(7) cannot apply to "actions taken *solely* in his [or her] capacity as an officer," but the exculpatory power of § 102(b)(7) may apply to the officer-director's actions *qua* director. 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 4.13[B], at 4-97 (3rd ed., rev. vol. 2012) (emphasis added). In this case, NOERS and BVF have not attempted to distinguish Ordoñez's allegedly wrongful acts as a director from those as an officer. Accordingly, I presume that § 102(b)(7) continues to exculpate her from monetary liability for any breaches of her duty of care. *See Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270, 1288 (Del. 1994) (§ 102(b)(7) barred claims where plaintiff failed to distinguish between defendant's acts as director and officer); *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *6 n.3 (Del. Ch. Jan. 25, 1999) (same), *aff'd*, 741 A.2d 16 (Del. 1999) (TABLE).

192 *Gantler*, 965 A.2d at 709.

193 Recommendation Statement at 17.

the buyer offering her continued employment."[194] In sum, BVF insinuates that Ordoñez's aggressive negotiation tactics in June 2010 effectively sabotaged a higher offer and, once those tactics backfired on her, she deliberately sold out the Company to salvage what she could of a fleeting opportunity.

Although such allegations arguably might state a claim under *Gantler*, it appears unlikely from the record before me that a plaintiff could succeed on such a claim. As to the June 2010 negotiations, the record does not convince me that Ordoñez did, in fact, sabotage those negotiations. Quest was at least equally, if not more, concerned about the imminent KIF6 paper.[195] Indeed, the deterioration of Celera's stock price in late 2010 and early 2011 coincides with the publication of the negative KIF6 paper in October 2010. Regarding the second round of negotiations in January 2011, BVF's allegation that Ordoñez's job was in "jeopardy" arguably supports a reasonable inference that she championed a deal with Quest for improper reasons. Still, the record does not corroborate that allegation. There is some evidence that the Board criticized Ordoñez's management style as too supportive of her employees and not sufficiently "hardnosed." There also is evidence of the Board's concern about her limited experience on some business matters. But, the Board appears to have offered these criticisms in the vein of constructive feedback and to have appreciated Ordoñez's talents in the science and

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194 BVF's Ans. Br. 29.

195 Recommendation Statement at 17 (mentioning concerns about the KIF6 study before concerns with management); Cook Aff., D.I. No. 147 Ex. 5, at 78-79 (Mohapatra deposition, indicating that "KIF6 was a major factor" causing Quest to lower its offer).

regulatory sides of the business.[196] These mixed messages do not indicate that Ordoñez's job was in jeopardy or suggest that she necessarily acted disloyally at any point during the negotiations with Quest. Furthermore, as indicated *supra*, there is no evidence that Ordoñez exerted improper influence over the majority of outside directors who ultimately approved the Merger Agreement. Whatever Ordoñez's faults as a CEO, the record provides no convincing support for a claim that she is a bad actor who intentionally sabotaged the Company's efforts to maximize shareholder value.

c. Claims against Credit Suisse

Finally, BVF asserts that at least two of its released claims against Credit Suisse—(1) aiding and abetting the Board's breaches of fiduciary duty and (2) securities fraud under § 14(e) of the Securities Exchange Act of 1934[197]—are particularly valuable.

i. Aiding and abetting

"A third party may be liable for aiding and abetting a breach of a corporate fiduciary's duty to the stockholders if the third party 'knowingly participates' in the breach."[198] As indicated *supra*, I doubt that BVF could have supported a claim that the Board breached its fiduciary duty of loyalty. In this regard, however, "Sections 102(b)(7) and 141(e) do not protect aiders and abetters, and disgorgement of transaction-related

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196 Cook Aff., D.I. No. 147 Ex. 3, at 144-55 (Green deposition, synthesizing comments received from the Board, management, and outsiders during review of Ordoñez's performance at Celera).

197 15 U.S.C. § 78n(e).

198 *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001).

profits may be available as an alternative remedy."[199] Thus, the aiding and abetting claim for money damages against Credit Suisse may remain viable even if the Board breached only its duty of care. Still, the element of "knowing participation" makes "[t]he standard for an aiding and abetting claim . . . a stringent one, one that turns on proof of scienter of the alleged abettor."[200]

BVF asserts that "Credit Suisse knew its [financial analysis] was questionable."[201] To support that assertion, BVF relies on three emails written in February 2011 by Mark Page, the leader of Credit Suisse's transaction team. In the first, dated February 2, Page wrote that he was "seriously considering going to a simple whole company [DCF analysis] rather than sum of the parts," which would show only "nominal cash flows" if the Company insisted on including various drug assets in the analysis.[202] On February 22, he wrote two more emails arguably supportive of BVF's claim. In one, he asked his team to ensure that all of the assumptions relating to a particular drug were accurate because he did "not want to spring this on" the "committee."[203] In the other, he said that the weighted average cost of capital assumptions, which are used to calculate the

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[199] *Del Monte I*, 25 A.3d at 838.

[200] *Binks v. DSL.net, Inc.*, 2010 WL 1713629, at *10 (Del. Ch. Apr. 29, 2010).

[201] BVF's Ans. Br. 33.

[202] Thomas Aff., D.I. No. 130 Ex. 66, at CSCRA00011555.

[203] Thomas Aff., D.I. No. 130 Ex. 67, at CSCRA00011817.

applicable discount rate for a DCF analysis, for that same drug "should be high . . . in case our Tufts framework approach is not appreciated by IBC."[204]

The acronym "IBC" stands for "Investment Banking Committee," the same "committee" to which Page referred in his first February 22 email.[205] Page testified that, "before we ever actually put a presentation in front of our clients in the board situation, we have to go through an internal committee,"[206] and, in Celera's case, Page brought his team's analysis to Credit Suisse's IBC "at least in excess of six or seven times."[207] Thus, to whatever extent these emails arguably support a claim that Page and his team attempted to manipulate their valuation of Celera, they equally could reflect no more than an internal debate within Credit Suisse (either between members of Page's team or between Page's team and the IBC) about the proper approach, assumptions, and metrics to employ in conducting an expert financial analysis. Having considered the evidence and arguments presented by BVF, I am not convinced that these emails constitute some type of "smoking gun" or otherwise are sufficient to overcome the stringent scienter element of an aiding and abetting claim. Therefore, BVF's contention that this claim should not be settled on the terms provided in the Settlement Agreement is unpersuasive.

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204 Thomas Aff., D.I. No. 130 Ex. 68, at CSCRA00011825.

205 Thomas Aff., D.I. No. 129 Ex. 30, at 172 (defining "IBC") [hereinafter Page Dep.]; Thomas Aff., D.I. No. 130 Ex. 67, at CSCRA00011817.

206 Page Dep. 123.

207 Page Dep. 131.

ii. Securities fraud

Finally, BVF asserts that it has a valuable claim for money damages against Credit Suisse for violation of § 14(e) of the Securities Exchange Act of 1934, which prohibits, among other things, making "any untrue statement of a material fact . . . in connection with any tender offer."[208] According to BVF, Celera stated falsely in the Recommendation Statement that Credit Suisse employed the probability adjustments supplied by the Tufts Study and, because Credit Suisse allegedly participated in the preparation of the Recommendation Statement, Credit Suisse may be liable for that false statement.

In assessing the value of this claim, I note at the outset an apparent circuit split regarding the elements of an actionable claim under § 14(e). The Ninth Circuit, for example, requires only (1) the misstatement of a material fact (2) in connection with a tender offer.[209] The Second, Third, and Fifth Circuits further require "proof of scienter, *i.e.*, 'a mental state embracing intent to deceive, manipulate, or defraud.'"[210] In either case, however, the strength of this claim is limited by the uncertainty, discussed *supra*, regarding the materiality of Credit Suisse's misapprehension of the Tufts Study and the extent to which it knew that it had misapplied the Tufts Study probability adjustments.

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208 15 U.S.C. § 78n(e).

209 *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1167 (9th Cir. 2009).

210 *In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)) (citing *Conn. Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 961 (2d Cir. 1987) and *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 605 (5th Cir. 1974)). Additionally, plaintiffs in the Second Circuit must show detrimental shareholder reliance. *Lewis v. McGraw*, 619 F.2d 192, 195 (2d Cir. 1980).

Therefore, it would be at least as difficult to prove this securities fraud claim as it would be Plaintiffs' fiduciary duty and aiding and abetting claims.

4. Does the settlement reflect a fair exchange?

On balance, I find that the benefits secured by the Settlement Agreement outweigh the costs it imposes on the class. Admittedly, the benefits are relatively modest, *viz.*, therapeutic modifications of the deal terms and a handful of supplemental disclosures. But, these benefits provided stockholders the opportunity to receive a superior offer for their shares and remedied, at least in part, many of Plaintiffs' claims of a defective sales process. On the cost side of the scale, Plaintiffs' released claims for money damages against the Board, Ordoñez, and Credit Suisse are either weak, difficult to prove, or both. Plaintiffs have asserted that, once Defendants waived the Don't-Ask-Don't-Waive Standstills, "Plaintiffs' ability to succeed on the remaining claims was highly uncertain. . . . While Plaintiffs could have continued litigating this case through an injunction proceeding, the Class very well may have received nothing."[211] That assessment conforms to my own independent business judgment that the benefits provided and claims extinguished by the proposed settlement reflect a fair, adequate, and reasonable exchange.

As a final matter, BVF argues that the Settlement Agreement is presumptively unreasonable because Plaintiffs' counsel already has breached it.[212] Specifically, BVF

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[211] Pls.' Reply Br. 14.

[212] Hr'g Tr. 59-60.

notes that Plaintiffs' counsel "represent[ed] and warrant[ed] that one or more of their respective clients have been stockholders of Celera throughout the Settlement Class Period,"[213] defined as "February 3, 2010, *through and including* May 17, 2011."[214] As previously discussed, NOERS sold its shares before May 17. Nevertheless, that fact does not amount to a breach of the Settlement Agreement. While the Settlement Agreement identifies NOERS as the "Delaware Lead Plaintiff,"[215] counsel represented only that one or more of their "clients" held Celera shares until May 17. In this context, the term "clients" would include, at least, any of the putative lead plaintiffs who filed one of the three class action complaints that were consolidated into this action. Furthermore, one of those plaintiffs, Ariel Holdings LLC, submitted an affidavit swearing that it held its Celera stock until May 17.[216] Hence, BVF's argument in this regard is without merit.

For the foregoing reasons, in the exercise of my independent business judgment, I approve the Settlement Agreement as fair, adequate, and reasonable.

C. Attorneys' Fees

"[A] litigant who confers a common . . . benefit upon an ascertainable stockholder class is entitled to an award of counsel fees and expenses for its efforts in creating the benefit."[217] Although counsel is entitled to an award of attorneys' fees even where the

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213 Settlement Agreement § 37.

214 *Id.* § 1(m) (emphasis added).

215 *Id.* Recital G, at 5.

216 Khaghan Aff., D.I. No. 165 Ex. D, at ¶ 2.

217 *United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

benefit created is nonmonetary,[218] the goal is "to avoid windfalls to counsel while encouraging future meritorious lawsuits."[219] In that regard, the reviewing court retains discretion to determine the reasonable amount of a fee award,[220] guided by the following, well-known *Sugarland* factors:

> (i) the amount of time and effort applied to the case by counsel for the plaintiffs; (ii) the relative complexities of the litigation; (iii) the standing and ability of 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.[221]

Among these factors, the last two receive the greatest weight.[222]

Here, Plaintiffs' counsel seek an award of their fees and expenses in the aggregate amount of approximately $3.6 million. Defendants contend that the modest benefits conferred by the Settlement Agreement compel a fee of no more than $1 million. In addition, Defendants contend that Plaintiffs' counsel's expenses are excessive in that they include the redundant efforts of seven different plaintiffs firms and over 100 lawyers and other professionals who billed time on this matter. Accordingly, Defendants ask the Court to award only that portion of the more than $100,000 in expenses claimed that was necessary for the prosecution of this action.

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218 *Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1165 (Del. 1989).

219 *In re Cox Radio*, 2010 WL 1806616, at *20.

220 *In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, 1273 (Del. 2005).

221 *In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005) (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980)).

222 *Id.*

1. The benefit conferred by modifying the deal terms

"The benefit generated from modifying deal protections is easy to conceive but difficult to quantify."[223] As a theoretical matter, loosening deal protection devices makes topping bids more likely. Thus, one may conceptualize the economic value of therapeutic benefits as (x) the increased likelihood of a topping bid due to the deal modifications multiplied by (y) the likely incremental value of such a bid.[224] Theoretically, once the reviewing court derives a dollar value of the therapeutic benefit itself, it then can determine the percentage of that value the plaintiffs' counsel deserve for their efforts.[225] As observed in *In re Compellent Technologies, Inc. Shareholders Litigation*, "[t]he calculation does not aspire to mathematical exactitude. To predict accurately how alternative takeover scenarios might play out is impossible. The calculation only serves to help establish an order of magnitude within which this Court can craft an appropriate award."[226]

In this case, the parties did not submit—nor did the Court request—empirical data from which to estimate values for the (x) and (y) inputs identified above. Rather, the Court relies on the fee awarded in *In re RehabCare Group, Inc. Shareholders*

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[223] *In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *19 (Del. Ch. Dec. 9, 2011).

[224] *See id.* at *19-21.

[225] *Id.* at *25.

[226] *Id.* at *20 (citation and footnote omitted).

Litigation[227] as a comparable precedent. That case concerned a challenge to a roughly $900 million acquisition. The settlement, among other things, reduced a termination fee from $26 million to $13 million (*i.e.*, from 2.9% to 1.4% of equity value), eliminated a matching rights provision, and released eight financial buyers from standstill agreements, which contained don't-ask-don't-waive provisions similar to those challenged here.[228] Also as in this case, the defendant company had been shopped for several months before a deal was announced and, although eight prospective bidders were constrained by the standstills, no other alternative bidders emerged between the deal's public announcement and the settlement.[229] Under those circumstances, the court determined that the therapeutic benefits reasonably could have increased the likelihood of a topping bid by approximately 2%, and the incremental increase of such a topping bid would have been in the range of $50 to $100 million.[230]

There are, however, a handful of differences between *RehabCare* and this case. First, the termination fee in *RehabCare* already was less than 3% of the aggregate deal size. Here, Plaintiffs' counsel achieved a reduction from approximately 3.5% of the total deal size, which is at the high end of the generally acceptable range,[231] to around 2.3%. Therefore, the reduction Plaintiffs' counsel achieved probably made a topping bid

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227 C.A. No. 6197-VCL (Del. Ch. Sept. 8, 2011) (TRANSCRIPT).

228 *Id.* at 4, 46.

229 *Id.* at 31-32.

230 *Id.* at 43-44.

231 *See In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 503 & nn.44, 47 (Del. Ch. 2010).

slightly more likely than it did in *RehabCare*. Furthermore, as indicated *supra*, it is debatable whether Celera's market canvas should be viewed as one uninterrupted, seventeen-month process. Thus, in my judgment, the probability that the reduced Termination Fee and other therapeutic benefits would lead to a topping bid under the circumstances of this case would be a bit higher. As such, I have used a figure of 4%. Lastly, the deal size in this case was approximately 75% of the total deal size involved in *RehabCare*, $680 million here compared to $900 million there. Accordingly, I have reduced proportionally the $50-100 million input employed in *RehabCare* to something in the range of $40 to $75 million. Employing these revised inputs, I estimate the value of the therapeutic benefits the class received in this case as approximately $1.6 million to $3 million.

I next consider the appropriate percentage of the therapeutic benefits that counsel should receive. "When a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically including multiple depositions and some level of motion practice, fee awards range from 15-25% of the monetary benefits conferred."[232] In this case, Plaintiffs' counsel conducted expedited discovery during a fast-paced transaction, deposed eight witnesses, prepared and submitted a preliminary injunction brief, and settled on the eve of a preliminary injunction hearing. Accordingly, a fee award of 25%

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[232] *In re Emerson Radio S'holder Deriv. Litig.*, 2011 WL 1135006, at *3 (Del. Ch. Mar. 28, 2011).

of the therapeutic benefits conferred, or something in the range of $400,000 to $750,000, is reasonable under these circumstances.

2. The benefit conferred by the supplemental disclosures

To provide a compensable benefit, the supplemental disclosures obtained must be material to stockholders.[233] A disclosure is "material" if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[234] Even where a supplemental disclosure is material, however, "[a]ll supplemental disclosures are not equal. To quantify an appropriate fee award, this Court evaluates the qualitative importance of the disclosures obtained."[235] In past settlements,

> [t]his 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.[236]

Unlike the benefit conferred by modifications to deal protection devices, the value of supplemental disclosures generally does not vary with deal size.[237]

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233 *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *8 (Del. Ch. Apr. 29, 2011).

234 *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

235 *Sauer-Danfoss*, 2011 WL 2519210, at *17.

236 *Id.* at *18 (citations omitted).

237 *RehabCare*, C.A. No. 6197-VCL, tr. at 44 (Del. Ch. Sept. 8, 2011).

As noted in Part II.B.2.b, *supra*, at least two of the supplemental disclosures related to Credit Suisse's DCF analysis—*i.e.*, the drug-specific cash flow projections and the uncommon, though apparently justified, treatment of stock-based compensation—were significant in the circumstances of this case. Taken together, those disclosures are sufficiently meaningful to merit a fee in the range of $400,000 to $500,000.

At least two other supplemental disclosures were meaningful in the circumstances of this case. First, whereas the Recommendation Statement disclosed only the fact that Credit Suisse had factored the Company's net operating losses into the DCF analysis, the Supplemental Disclosure discloses the annual dollar amount of these tax savings and that they would be fully utilized by 2017.[238] Second, in addition to the DCF analysis, Credit Suisse performed a Selected Companies Analysis and a Selected Transactions Analysis. As to these Analyses, the initial Recommendation Statement disclosed: (1) the specific companies and transactions Credit Suisse identified as comparable to Celera and to a Celera-Quest deal, respectively; (2) the particular market multiples compared; and (3) a range of the implied per share value of Celera derived by applying those market multiples to Celera's financial information. It also disclosed that Credit Suisse used only publicly available financial data as to both the comparable companies and Celera.[239] The

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238 The aggregate dollar value of these tax savings is $72.4 million. Supplemental Disclosure at 4. Discounted to net present value, and assuming the same discount rates as Credit Suisse employed throughout its DCF analysis, these tax savings amount to something in the range of $43.7 million to $46.5 million, or approximately 6-7% of the $680 million transaction size.

239 *See* Recommendation Statement at 34-36.

Recommendation Statement did not disclose, however, the numeric value of the market multiples derived for the comparable companies or transactions.

The Supplemental Disclosure, by contrast, included charts of illustrative ranges of the various market multiples Credit Suisse derived—specifically, the high, low, median, and mean multiples.[240] These charts concisely and clearly conveyed the heart of Credit Suisse's Selected Companies and Selected Transactions Analyses, but they did not, contrary to Plaintiffs' assertion, "*add*[] important information."[241] The supplemental charts compiled information that already was publicly available; therefore, it is questionable whether they altered the "total mix" of available information. Nevertheless, as a matter of best practices, a fair summary of a comparable companies or transactions analysis probably should disclose the market multiples derived for the comparable companies or transactions.[242] Accordingly, despite the fact that the Selected Companies and Selected Transactions Analyses comprised only public companies, I consider the benefit of the supplemental disclosures regarding them to be compensable.

Although these latter two supplemental disclosures are meaningful and compensable, their quality is more questionable than those discussed in Part II.B.2.b, *supra*. Accordingly, I find that a fee of $150,000 is appropriate for counsel's efforts in

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240 *See* Supplemental Disclosure at 2-3.

241 Pls.' Op. Br. 15 (emphasis added).

242 *Turberg v. ArcSight, Inc.*, C.A. No. 5821-VCL, tr. at 43 (Del. Ch. Sept. 20, 2011) ("[I]f you were to consider what really constitutes a fair summary, then the background multiples should be in there, just like they're in there when you give them to the board. . . . [Y]ou would never see a board book that would go to the board without the background multiples.").

obtaining them. The remaining supplemental disclosures, however, are of lesser quality. Without going through an extended discussion and evaluation of each and every supplemental disclosure, I note a salient example. The Recommendation Statement contained an apparent clerical error in that it stated that Credit Suisse's DCF analysis had discounted the Company's projected cash flows through 2015, whereas the Supplemental Disclosure clarified that the analysis involved discounting cash flows through 2014 and using the 2015 projections to calculate the Company's terminal value.[243] This sort of increasingly detailed disclosure has limited significance and is probably immaterial. Therefore, neither it nor any of the remaining disclosures that have not been discussed merits further consideration.

Collectively, therefore, I conclude that an award of $550,000 to $650,000 provides reasonable compensation for the supplemental disclosures obtained in this action.

3. 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."[244] Plaintiffs' counsel devoted 4,748.45 hours to prosecuting this case.[245] Assuming a total fee award of between $950,000 and $1.4 million (*i.e.*, accounting for both the therapeutic changes and supplemental disclosures), the imputed hourly rate for the time Plaintiffs' counsel billed to this case falls somewhere in the range of $200 to $300. This implied hourly rate is significantly less than Plaintiffs'

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243 Recommendation Statement at 36; Supplemental Disclosure at 4.

244 *Sauer-Danfoss*, 2011 WL 2519210, at *20.

245 Pls.' Op. Br. 30 n.8.

counsel's normal hourly billing rates, generally in the range of $400 to $500.[246] In that regard, however, I note that the proffered number of hours includes time spent up to and including October 4, 2011, which is well after the MOU was executed on April 18, 2011. The post-MOU hours, at best, only tangentially relate to the benefits conferred by the settlement and for which an award of attorneys' fees is justified in the first instance.[247] In any event, nothing about the time spent by counsel causes me to question the reasonableness of the fee award previously discussed.

Defendants also contend that the expenses Plaintiffs' counsel incurred, which exceeded $100,000, resulted from unnecessarily duplicative efforts by the various Plaintiffs' firms involved in this matter. Therefore, Defendants urge the Court to allow reimbursement of only that portion of those expenses that Plaintiffs needed to incur. Having already allocated a significant amount of the Court's—and taxpayers'—resources to this settlement, the Court declines to entangle itself further in any attempt to parse "necessary" from "unnecessary" expenses.

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246 Plaintiffs' counsel represented that the time they expended equates to a lodestar of approximately $2.1 million. That lodestar, divided by the 4,748.45 hours billed, amounts to an implied hourly rate of approximately $440.

247 Furthermore, at least some of the time spent from late August through early October 2011 relates to BVF's objection to certification of NOERS as lead plaintiff and related discovery requests. Had NOERS and its counsel more diligently monitored NOERS's trading practices during the course of this litigation, such wasteful expenditures of Plaintiffs' counsel's time could have been prevented.

Based solely on the hours expended before the MOU, the implied hourly rate would be in the range of approximately $225 to $330.

Rather, I consider it more productive and principled to treat the reimbursement of expenses as being subsumed within the analysis of Plaintiffs' counsel's request for attorneys' fees. Such an approach provides a better incentive to counsel to manage their litigation expenses efficiently.[248] Using that approach and for reasons discussed above,[249] I award Plaintiffs' counsel their attorneys' fees and expenses at the upper end of the range that I have identified as reasonable, namely, $700,000 for the therapeutic changes and $650,000 for the supplemental disclosures, for a total of $1.35 million.

III. CONCLUSION

For the reasons stated in this Opinion, I (1) certify the class under Rules 23(a), (b)(1), and (b)(2) with NOERS as class representative; (2) deny BVF's request to certify the class on only an opt out basis; (3) approve the settlement as fair and reasonable; and (4) award attorneys' fees to Plaintiffs' counsel in the amount of $1,350,000, inclusive of expenses. An Order implementing these rulings is being entered concurrently with this Opinion.

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248 *See Brinckerhoff v. Tex. E. Prods. Pipeline Co.*, 986 A.2d 370, 395 (Del. Ch. 2010) ("As [now] Chancellor Strine has explained, an all-in award is more straightforward for the Court and incentivizes counsel to be efficient with expenses." (citing *In re Telecorp PCS, Inc. S'holders Litig.*, C.A. No. 19260 (Del. Ch. Nov. 19, 2003) (TRANSCRIPT))).

249 None of the remaining *Sugarland* factors—the relative complexities of the litigation, the standing and ability of counsel, the contingent nature of the litigation, or the stage at which the litigation ended—warrants an upward or downward adjustment to the attorneys' fees amounts derived from my analysis of the size of the benefits conferred.