IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOSE DIAS, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	*Civil Action No. 7199-VCG*
FREDERICK E. PURCHES, ANTHONY D'AGOSTINO, ESTHER EGOZI CHOUKROUN, GLENN GOPMAN, ROBERT MITZMAN, PARLUX FRAGRANCES, INC., PERFUMANIA HOLDINGS, INC., and PFI MERGER CORP.,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: July 31, 2012
Date Decided: October 1, 2012

Blake A. Bennett and Gregory F. Fischer, of COOCH AND TAYLOR, P.A., Wilmington, Delaware; OF COUNSEL: Donald J. Enright and Elizabeth K. Tripodi, of LEVI & KORSINSKY LLP, Washington, DC; W. Scott Holleman, of LEVI & KORSINSKY LLP, New York, NY, Attorneys for Plaintiff.

Elizabeth Sloan and Victoria A. Guilfoyle, of BLANK ROME LLP, Wilmington, Delaware; OF COUNSEL: Alvin B. Davis, Digna B. French, and Rafael M. Langer-Osuna, of SQUIRE SANDERS (US) LLP, Miami, Florida, Attorneys for Defendants Parlux Fragrances, Inc., Frederick E. Purches, Glenn Gopman, Robert Mitzman, Esther Egozi Choukroun, and Anthony D'Agostino.

Raymond J. DiCamillo and Kevin M. Gallagher, of RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; OF COUNSEL: John J. Tumilty, of EDWARDS WILDMAN PALMER LLP, Boston, Massachusetts, Attorneys for Defendants Perfumania Holdings, Inc. and PFI Merger Corp.

GLASSCOCK, Vice Chancellor

Before me are cross motions for attorneys' fees in connection with a dispute over a merger between Perfumania Holdings, Inc. ("Perfumania"), and Parlux Fragrances, Inc. ("Parlux"). The Plaintiff, Jose Dias, as a stockholder of Parlux, sought to enjoin the merger on the basis that the Parlux directors failed to secure the best price for the Parlux stockholders and failed to disclose all material information in regard to the merger. On April 5, 2012, I granted the Plaintiff's preliminary injunction motion in part and ordered a supplemental corrective disclosure. Parlux made the additional disclosure before the merger vote, so the merger went forward without delay.

Both parties have moved for attorneys' fees. The Plaintiff argues that he is entitled to attorneys' fees under the "corporate benefit" doctrine because the supplemental disclosure generated a non-monetary benefit to Parlux stockholders. Parlux Fragrances, Inc., Frederick E. Purches, Glenn Gopman, Robert Mitzman, Esther Egozi Choukroun, and Anthony D'Agostino (collectively "the Parlux Defendants" or "the Defendants") contend that they are entitled to attorneys' fees under the bad faith exception to the American rule on fees and costs, or as a sanction under Court of Chancery Rule 11. For the reasons below, I deny the Defendants' fee application and award the Plaintiff a portion of the fees that he seeks.

I. BACKGROUND

A. The Companies

Parlux is a Delaware corporation, headquartered in Florida, which manufactures and distributes "prestige fragrances"[1] and beauty products.

Perfumania is a Florida corporation, headquartered in New York, which distributes and sells perfumes and fragrances.

B. Procedural History

On December 23, 2011, Perfumania announced an agreement to acquire Parlux (the "Proposed Transaction"). Within a month, the Proposed Transaction was the target of several lawsuits, each purporting to champion the rights of Parlux stockholders. The first of these actions was filed in Florida state court on January 5, 2012 (the "Florida Action"). Another stockholder sought to intervene in the Florida Action on January 19, 2012, before filing his own action on February 8, 2012. On January 30, 2012, Plaintiff Jose Dias filed suit in this Court. All three actions sought to enjoin Perfumania's acquisition of Parlux, on behalf of Parlux stockholders, based upon similar allegations of inadequate disclosure and breach of fiduciary duty.

On February 6, 2012, the Plaintiff filed a Motion to Expedite this litigation. The parties briefed the issue, and on February 15, 2012, I heard argument on the

[1] Compl. ¶ 2.

Plaintiff's Motion. Rather than address whether the Plaintiff's claims were colorable, the Defendants argued—although they had not so moved—that this action should be stayed in favor of the Florida Action. Because the Defendants had implicitly conceded that the Plaintiff set forth colorable claims, I granted the Plaintiff's Motion to Expedite, and instructed the Defendants to file a motion to dismiss or stay as they saw fit.

That same day, the Defendants filed their Motion to Stay in favor of the Florida Action. The parties fully briefed the issue, and on March 5, 2012, I issued a memorandum opinion denying the Motion to Stay.[2]

The parties briefed the Plaintiff's Motion for a Preliminary Injunction, and on March 23, 2012, I heard argument on that Motion. On April 5, 2012, in an oral ruling, I ordered that a single supplemental corrective disclosure be made.

C. The Supplemental Disclosure

At the preliminary injunction hearing, the Plaintiff argued that the Defendants failed to disclose free cash flow projections prepared by Parlux's management and provided to Parlux's financial advisor, Peter J. Solomon Company ("PJSC"). Parlux's S-4 as well as its March 6, 2012 Definitive Proxy Statement (the "Proxy") disclose that "PJSC conducted a discounted cash flow analysis . . . based on the future free cash flows for Parlux . . . and for Perfumania .

[2] *Dias v. Purches*, 2012 WL 689160, at *1 (Del. Ch. Mar. 5, 2012).

. . as estimated and provided to PJSC by the managements of Parlux and Perfumania, respectively."[3] As the Plaintiff pointed out, this Court has held that "management's best estimate of the future cash flow of a corporation that is proposed to be sold in a cash merger is clearly material information."[4] The Proxy did not disclose the management projections purportedly provided to PJSC. The Defendants eventually submitted an affidavit attesting that Parlux's management did *not* prepare future free cash flow estimates. Accordingly, any indications to the contrary in Parlux's S-4 and Proxy were simply, and presumably inadvertently, false. I found this inaccuracy material because a stockholder could give extra weight to PJSC's discounted cash flow analysis if he believed that the analysis was based on management's own estimates; therefore, I ordered a correction that disclosed that the Proxy was inaccurate and that PJSC had relied on its own future free cash flow estimates rather than management's estimates.

The Defendants incorrectly assert that I did not grant the Plaintiff's Motion for a Preliminary Injunction.[5] The Defendants operate under the premise that because I did not enjoin the merger itself, the Plaintiff's claims were mooted. I did not enjoin the merger because I assumed—correctly, as it turned out—that the

[3] Parlux Fragrances, Inc., Proxy Statement 75 (Sched. 14A) (Mar. 6, 2012); Compl. ¶ 49.
[4] *Maric Capital Master Fund, Ltd. v. Plato Learning Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010).
[5] *See* Parlux Defs.' Br. Opp'n Pl.'s Mot. Att'ys' Fees (hereinafter "Parlux Defs.' Opp'n Att'ys' Fees") at 1 ("Plaintiff asserted 67 separate disclosure claims in his non-verified complaint. The Court rejected them all. . . . No injunction was entered. Not a single one of these efforts succeeded."); Opening Br. Supp. Parlux Defs.' Mot. Dismiss at 9 ("The Court did not preliminary enjoin this merger because it found that such a request was 'unwarranted.'").

supplemental disclosure could be made without a delay in the merger timetable. Nevertheless, I informed the parties that if the supplemental disclosure could not be made, I would revisit the Plaintiff's request to enjoin the merger.[6] The Defendants seemingly overlook the fact that I found the S-4 and Proxy to be materially misleading and that I entered a positive injunction ordering that a correction to the Proxy be made, thus granting the Plaintiff's motion for preliminary injunction in part.

D. Current Motions

Before me now are the Plaintiff's Motion for Attorneys' Fees, the Defendants' Motion for Sanctions and Attorneys' Fees, and the Defendants' Motion to Dismiss. The Plaintiff asserts that as a result of his efforts, the stockholders received a benefit from the supplemental corrective disclosure, and the Plaintiff has moved for $500,000 in attorneys' fees and expenses for obtaining that benefit. In addition to opposing the Plaintiff's Motion, the Defendants have filed their own Motion for Sanctions and Attorneys' Fees. The Defendants argue that the Plaintiff did not properly verify the Complaint before it was filed, in violation of Court of Chancery Rules 3(aa) and 11(b)(3).[7] The Defendants contend, therefore, that they should be awarded attorneys' fees based on the bad-faith

[6] *See* Prelim. Inj. Ruling Tr. at 26:13-15 (Apr. 5, 2012) ("I assume that the disclosures can be made without enjoining the merger. If it can't, of course, let me know and I will decide how to proceed.").
[7] *See* Ch. Ct. R. 3(aa); Ch. Ct. R. 11(b)(3).

exception to the American rule[8] or as sanctions under Court of Chancery Rule 11 ("Rule 11").[9]

For the reasons below, I deny the Defendants' Motion for Sanctions and Attorneys' Fees, and I award the Plaintiff attorneys' fees and costs in the amount of $266,667. I also grant the Defendants' Motion to Dismiss the remainder of this action, a motion the Plaintiff does not oppose.

II. DEFENDANTS' MOTION FOR SANCTIONS AND ATTORNEYS' FEES

Before I address the Defendants' arguments, a few words are warranted on how Jose Dias came to represent the Parlux stockholders' cause. Dias is a Portuguese national.[10] Based on Dias' testimony and an affidavit submitted by his counsel, it appears that Dias read a Levi & Korsinsky LLP ("L&K") press release, issued on December 27 or 29, 2011, announcing that the firm was "investigating the Board of Directors of Parlux . . . for possible breaches of fiduciary duty and other violations of state law in connection with the sale of the Company to Perfumania."[11] The press release contained a brief description of the terms of the merger and indicated that L&K was investigating such nonspecific concerns as whether the Parlux board "fail[ed] to adequately shop the Company" or whether

[8] *See Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 545-46 (Del. 1998); *Beck v. Atl. Coast PLC*, 868 A.2d 840, 850-51 (Del. Ch. 2005).
[9] Ch. Ct. R. 11.
[10] Teleph. Dep. Jose Dias 3:11-7:9 [hereinafter Dias Dep.], Decl. Blake A. Bennett Supp. Pl. Jose Dias' Opp'n Parlux Defs.' Mot. Sanctions & Att'ys' Fees Ex. 2; s*ee also* Verification to the Compl.
[11] Aff. Donald J. Enright Ex. 1 [hereinafter Enright Aff.].

"Perfumania [was] underpaying for Parlux shares."[12] Dias first contacted L&K by email on December 29, 2011,[13] and on January 30, 2012, Dias and L&K filed the Complaint in this action. The Defendants contend that Plaintiff's counsel was the true impetus behind the litigation, motivated by the search for attorneys' fees.[14]

A. Bad-Faith Litigation

The Defendants seek to recover their fees under the bad-faith exception to the American rule.[15] "There is no single standard of bad faith . . . rather, bad faith is assessed on the basis of the facts presented in the case."[16] Examples of bad-faith conduct include unnecessarily prolonging or delaying litigation, falsifying records, knowingly asserting frivolous claims, "misleading the court, altering testimony, or changing position on an issue."[17] However, parties claiming bad faith must meet

[12] *Id.*
[13] *Id.* ¶¶ 3, 5; Dias Dep. 16:22-17:15.
[14] At the preliminary injunction hearing, Defendants' counsel "found it difficult . . . to understand why [Parlux had] spent literally hundreds of thousands of dollars dealing with a complaint that is completely unknown by the Plaintiff who runs a gas station in Portugal." Prelim. Inj. Hr'g Tr. 107:2-6 (Mar. 23, 2012). First, the parties dispute whether Dias is a gas station owner or economist. *Compare* Dias Dep. 5:20-21, *with* Prelim. Inj. Hrg. Tr. 106:21-107:8. In my view, the two occupations are not mutually exclusive. Second, and more importantly, if Defendants' counsel was attempting to disparage Dias with his comments, that endeavor was misplaced. *See* Prelim. Inj. Hrg. Tr.106:21-24 ("I know the Court does not want to hear this and my local counsel, who has been invaluable to me, has told me that she is going to stand up and tackle me if I got into this issue."); *see also id.* 107:7-9 ("I was told I shouldn't say that . . . It's demeaning. It's probably a wonderful gas station."). All stockholders of Delaware corporations—gas station owners and economists alike—are entitled to fair treatment at the hands of their fiduciaries.
[15] *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 232 (Del. Ch. 1997).
[16] *Beck v. Atlantic Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005).
[17] *Id.*

"the stringent evidentiary burden of producing 'clear evidence' of bad-faith conduct."[18]

Defendants allege that Dias engaged in bad-faith litigation because he failed to comply with the complaint-verification requirements of Court of Chancery Rules 3(aa) and 11(b)(3). Rule 3(aa) requires all parties in a lawsuit to verify their claims by swearing or affirming their belief that the matters contained therein are true.[19] Similarly, Rule 11(b)(3) requires that a plaintiff's counsel certify "that to the best of the person's knowledge, information, and belief," the allegations in a pleading "have evidentiary support or, if specially so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[20] The Defendants assert that Dias admitted in his deposition that he did not read the S-4 before filing the Complaint, and thus could not verify the truthfulness of the claims in his Complaint.[21]

The Defendants fail to carry their burden of providing clear evidence that Dias did not accurately verify the complaint. While Dias' testimony contains some inconsistencies regarding when he reviewed the S-4,[22] the deposition was done over the telephone with someone whose first language is not English.[23] More

[18] *Id.*
[19] Ch. Ct. R. 3(aa).
[20] Ch. Ct. R. 11(b)(3).
[21] Parlux Defs.' Br. Supp. Mot. Sanct. & Att'ys' Fees 5-6.
[22] *See* Dias Dep. 18:13-14.
[23] *Id.* at 3:11-18.

importantly, Dias testified that before he filed the Complaint he consulted with his Portuguese counsel, who helped him review the S-4 and evaluate the merits of the case.[24] Such a consultation, in light of the circumstances, was a prudent way to proceed, and would provide a sufficient basis for Dias to verify his belief as to the truthfulness of the claims in the Complaint. Accordingly, Defendants have failed to establish by "clear and convincing" evidence that Dias or his counsel acted in bad faith.

B. Rule 11 Sanctions

The Defendants' Rule 11 argument resembles their argument that Dias brought this litigation in bad faith. Essentially, the Defendants argue that Dias did not review the S-4 prior to filing the Complaint and was merely a conduit through which L&K pursued its own interests. For the same reasons that the Defendants failed to meet their burden to show Dias acted in bad faith, I find no reason to exercise my discretion and award attorneys' fees as a sanction.[25]

Having so found, the Defendants' motion for fees or sanctions is denied.

[24] *Id*. at 26:24-27:20.

[25] Because Rule 11(c) indicates that this Court, after providing a party with "notice and a reasonable opportunity to respond . . . *may* . . . impose sanctions for misrepresentations made in papers filed with the Court. . . . [t]he imposition of such sanctions . . . is wholly discretionary." *Paron Capital Mgmt., LLC v. Crombie*, 2012 WL 214777, at *6 (Del. Ch. Jan. 24, 2012) (footnote omitted) (quoting Ch. Ct. R. 11(c)).

III. DIAS' MOTION FOR ATTORNEYS' FEES

A. Entitlement to Fees and Expenses

Under the corporate benefit doctrine, plaintiffs may be reimbursed for attorneys' fees and expenses in corporate litigation.[26] Generally, under the American system each side bears its own costs; however, when a litigant confers a benefit upon a stockholder class the litigant can recoup an award for fees and expenses for its work in generating the benefit.[27] The "corporate benefit need not be measurable in economic terms, and as a result, changes in corporate policy or a heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees."[28]

Here, the Plaintiff conferred a benefit upon Parlux stockholders by obtaining the supplemental corrective disclosure. Hence, the Plaintiff can recoup a fee award for generating that benefit. The only remaining issue is the proper amount of that award.

B. The Fee Award Standard

When determining the amount to award, this Court is cognizant of the need to prevent unwholesome windfalls while simultaneously encouraging counsel to

[26] *See United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).
[27] *Id*.
[28] *San Antonio Fire & Police Pension Fund v. Bradbury*, 2010 WL 4273171, at *7 (Del. Ch. Oct. 28, 2010).

assert meritorious claims in the future.[29] Delaware courts address these interests through the factors set forth by our Supreme Court in *Sugarland Industries, Inc. v. Thomas*.[30] These factors are:

> (i) the amount of time and effort applied to the case by counsel for the plaintiffs; (ii) the relative complexities of the litigation; (iii) the standing and ability of petitioning counsel; (iv) the contingent nature of the litigation; (v) the stage at which the litigation ended; (vi) whether the plaintiff can rightly receive all the credit for the benefit conferred or only a portion thereof; and (vii) the size of the benefit conferred.[31]

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[29] *See In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *18 (Del. Ch. Dec. 9, 2011) ("In setting fee awards, the Court seeks to reward plaintiffs' counsel appropriately for bringing meritorious claims while avoiding socially unwholesome windfalls."); *San Antonio Fire*, 2010 WL 4273171, at *12 ("The Court is mindful that, in making its determination, the amount of the award should incentivize stockholders (and their attorneys) to file meritorious lawsuits and prosecute such lawsuits efficiently without generating any unnecessary windfall."); *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *20 (Del. Ch. May 6, 2010) ("A court's goal in setting a fee award should be to avoid windfalls to counsel while encouraging future meritorious lawsuits."); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *12 (Del. Ch. Aug. 30, 2007) ("Historically, Delaware courts grant attorney's fee awards in shareholder suits to promote efficient litigation of meritorious lawsuits, while avoiding windfalls. Fee awards should encourage future meritorious lawsuits by compensating the plaintiffs' attorneys for their lost opportunity cost (typically their hourly rate), the risks associated with the litigation, and a premium."); *see also Julian v. Eastern States Const. Serv., Inc.*, 2009 WL 154432, at *2 (Del. Ch. Jan. 14, 2009) ("The public policy of Delaware includes 'provid[ing] an incentive to stockholders to bring a derivative suit to enforce the rights of the corporation as a whole under circumstances in which filing suit to enforce only their individual rights would be prohibitively costly or otherwise impracticable, thereby leaving unchallenged actionable wrongs against the corporation.'" (quoting *Carlson v. Hallinan*, 925 A.2d 506, 547-48 (Del. Ch. 2006))).

[30] *EMAK Worldwide, Inc. v. Kurz*, 2012 WL 1319771, at *4 (Del. Apr. 17, 2012).

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

The magnitude of the benefit conferred and whether the plaintiff can rightly receive all credit for the benefit conferred receive the greatest weight.[32] Ultimately, though, the amount of an award is within the sound discretion of this Court.[33]

Below, I address the *Sugarland* factors. In addition to the size of the benefit conferred, I pay special attention to the time and effort applied to the case by counsel for the Plaintiff.

C. Contingency, Credit, and Experience

The contingent nature of the litigation and the credit for the benefit conferred require little analysis. Plaintiff's counsel has affirmatively represented on the record that it took this case on a contingent basis[34] and the Plaintiff can rightly receive all the credit for the benefit conferred.

The Defendants argue that the standing and ability of Plaintiff's counsel does not support the requested fee because Plaintiff's counsel did not adequately rely on its experience when bringing this suit. The Defendants assert that if Plaintiff's counsel's experience was effectively used in this instance, Plaintiff's counsel would have realized that its claims were meritless. I find this argument unpersuasive. The Plaintiff's success at trial is proof that Plaintiff's counsel

[32] *Celera*, 2012 WL 1020471, at *30.
[33] *Swann Keys Civic Ass'n v. Shamp*, 971 A.2d 163, 170 (Del. 2009) ("The Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded." (quoting *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 506 (Del. 2005))).
[34] The Defendants argue that I should not consider this factor because Plaintiff's counsel has failed to provide evidence showing this arrangement. I am, however, satisfied with Plaintiff's representation.

effectively employed its experience. To the extent the Plaintiff brought weak claims, I address that consideration elsewhere in this opinion.

D. Time, Effort, Benefit Conferred, Complexities and Stage of the Litigation

For better or worse, after the announcement of a merger or acquisition, stockholder class action suits typically follow like mushrooms follow the rain. Because mergers proceed on an urgent timeline, and because stockholders generally lack specific information about directors' conduct in selling the company, complaints challenging the mergers are often "clad in boilerplate, seeking injunctive relief or damages, with the expectation that a substantial amendment to the complaint will ensue following discovery and once the proxy materials became available."[35] Rather than carefully considering what claims have merit, some plaintiffs file a broad and general complaint, taking a scattershot approach in the hopes that the case will be expedited. Those plaintiffs then rely on the Court to winnow their claims, determining which are meritorious and what value they confer upon the stockholders.

This dynamic obviously creates a risk of excessive merger litigation, where the costs to stockholders exceed the benefits. On the other hand, the diffuse nature of corporate ownership means that, absent class actions, many wrongs would not be remedied. Class actions give any stockholder sufficiently interested the ability

[35] *Dias v. Purches*, 2012 WL 689160, at *1 (Del. Ch. Mar. 5, 2012).

to act as an independent prosecutor and vindicate stockholders' rights. Class actions also give attorneys a reason to represent clients whose claims are individually worth little but in the aggregate are worth much more.[36]

But what then is the analog of prosecutorial discretion in corporate class actions? It is the ability of bench judges over many diverse jurisdictions to shift fees in a way that discourages overuse or abuse of the class action mechanism while encouraging meritorious suits. The fact that merger litigation has gone from common to ubiquitous in just a few years suggests that the current balance of incentives is flawed.[37]

This suit raises the issue of how to apply *Sugarland* where a plaintiff brings a meritorious claim alongside unproductive, boilerplate claims. Consider two potential challenges to a merger. One complaint raises a single claim, and the plaintiff successfully litigates that claim, achieving a material disclosure for the benefit of the stockholders after 100 hours of litigation effort. A second complaint

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[36] *See generally In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 133 (Del. Ch. 1999) ("Our legal system has privatized in part the enforcement mechanism for policing fiduciaries by allowing private attorneys to bring suits on behalf of nominal shareholder plaintiffs. In so doing, corporations are safeguarded from fiduciary breaches and shareholders thereby benefit. Through the use of cost and fee shifting mechanisms, private attorneys are economically incentivized to perform this service on behalf of shareholders.").

[37] Robert Daines & Olga Koumrian, Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions 2 (2012), *available at* http://www.cornerstone.com/files/News/9e101f01-847a-47ff-a62d-b23e3d019cca/Presentation/NewsAttachment/5d699795-5f25-4864-8e7f-b656446965b5/Cornerstone_Research_Shareholder_MandA_Litigation_03_2012.pdf (last visited Aug. 30, 2012) (indicating that acquisitions valued at over $500 million attracted lawsuits 53% of the time in 2007, and over 95% of the time in 2010 and 2011).

raises the same disclosure claim and the plaintiff successfully litigates it to the same result. The second complaint also alleges a number of unsuccessful, perhaps even uncolorable, claims. The total time invested by plaintiffs' counsel in litigating the second complaint is 200 hours. Which action should be better rewarded? In this opinion I consider such an issue.

1. Benefit Conferred

The size of the benefit conferred by a corrective supplemental disclosure is inherently incapable of direct calculation, and "[a]ll supplemental disclosures are not equal."[38] In light of this problem, this Court attempts to at least achieve consistency, looking at prior decisions to guide future ones.[39] This method "promotes fairness by treating like cases alike and rewarding similarly situated plaintiffs equally."[40] Moreover, consistency brings systemic benefits, such as "reduc[ed] opportunities for forum-shopping and other types of jurisdictional arbitrage."[41] As a benefit to both the bench and the bar, Vice Chancellor Laster, in *In re Sauer-Danfoss Inc. Shareholders Litig.*, catalogued a series of cases, the principal disclosure/benefit in those cases, and the fee ultimately awarded. *Sauer-Danfoss* indicates that "[t]his Court has often awarded fees of approximately

[38] *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *17 (Del. Ch. Apr. 29, 2011).
[39] *Id.*; *In re Golden State Bancorp Inc. S'holders Litig.*, 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000) ("In cases generating nonquantifiable, nonmonetary benefits, this Court has juxtaposed the case before it with cases in which attorneys have achieved approximately the same benefits.").
[40] *Sauer-Danfoss*, 2011 WL 2519210, at *17.
[41] *Id.*

$400,000 to $500,000 for one or two meaningful disclosures, such as previously withheld projections."[42]

The benefit that the Plaintiff conferred on the stockholders here was a single material supplemental corrective disclosure.[43] The Plaintiff's initial theory—that management projections had been withheld—was based directly on the proxy materials, but proved to be incorrect. The actual disclosure achieved was that, contrary to Parlux's proxy, no management cash flow projections had been made or communicated to PJSC. To my mind, this is a disclosure that, though material, provides less value to stockholders than the disclosure of actual, relied-on, internal management forecasts. I find, therefore, that an award of $400,000, including costs, which is the lower end of the *Sauer-Danfoss* range, would be consistent with prior awards.

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[42] *Id.* at *18.

[43] The Defendants argue that Plaintiff's conferred no benefit to stockholders because the disclosure that I directed the Defendants to make was different than what Plaintiffs sought. Parlux Defs.' Opp'n Att'ys' Fees at 1 ("The Court did require one brief additional corrective disclosure pertaining to one of two fairness opinions. This disclosure found no mention in the non-verified complaint or in the motion for injunctive relief."). The Defendants assert that "[r]ather than disclosing what Plaintiff's counsel requested be disclosed, Parlux made one disclosure to clarify an existing disclosure clarifying that Plaintiff had no basis for a claim." Parlux Defs.' Opp'n Att'ys' Fees at 9. The Defendants argument is that if a proxy statement incorrectly informs a reader that certain material information existed, but in reality that information did not exist, a complaint requesting the disclosure of this information cannot be meritorious, because the undisclosed material information can never actually be disclosed. In short the Defendants are saying "Because we filed a false proxy statement with the Securities and Exchange Commission, it was impossible for the Plaintiff to be right; therefore, the Plaintiff's suit could not have been meritorious." The Defendants' logic is unconvincing.

2. Time and Effort

As a cross-check on whether a fee award is reasonable, this Court examines the time and effort expended by counsel.[44] This Court considers both the time and the effort spent because of the different motivations and incentives that each produces.[45] Emphasizing only time might invoke perverse incentives.[46] This Court, therefore, emphasizes the effort put forth by the plaintiff.[47] "What did the plaintiff do?" Did the plaintiff "engage[] in adversarial discovery, obtain[] documents from third parties, pursue[] motions to compel, and litigate[] merit-oriented issues?"[48] Or did the plaintiff let the case "sit idle for extended periods of time, and then settle . . . without evidence of any action?"[49]

The Plaintiff, here, did put forth a substantial amount of effort to obtain the supplemental corrective disclosure. The Plaintiff engaged in adversarial discovery and successfully litigated (1) a motion to expedite, (2) a motion to stay, and (3) a preliminary injunction hearing.

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[44] *Sauer-Danfoss*, 2011 WL 2519210, at *20 ("The time and effort expended by counsel serves as a cross-check on the reasonableness of a fee award.").
[45] *Id.*
[46] *Id.*
[47] *See Ams. Mining Corp. v. Theriault*, 2012 WL 3642345, at *39 ("In this case, the Court of Chancery properly realized that more important than hours is effort, as in what [p]laintiffs' counsel actually did" (internal punctuation removed)); *Compellent*, 2011 WL 6382523, at *28 ("More important than hours is 'effort, as in what plaintiffs' counsel actually did.'" (quoting *Sauer-Danfoss*, 2011 WL 2519210, at *20.)).
[48] *Sauer-Danfoss*, 2011 WL 2519210, at *20.
[49] *Id.*

However, it is exceedingly difficult to determine the degree to which Plaintiff's counsel deserve to benefit from their overall litigation effort. In addition to the successful claim, the Complaint listed many weak, even non-colorable claims, as I describe below. Not only did Plaintiff' present dozens of meritless claims, but Plaintiff's counsel has also made it difficult for me to determine how Plaintiff's counsel divided its time between wheat and chaff. Plaintiff's counsel asserts that it spent over 617 hours and approximately $35,560 in expenses litigating this action through the preliminary injunction hearing, yet fails to include a detailed account of what time was spent on what particular task. Instead, the Plaintiff has merely presented affidavits with lump sums for expenses and the total hours spent by each individual attorney. I am unable to determine how many of those 617 hours were devoted to providing value to Parlux stockholders, and how many were devoted to claims that amounted to a waste of resources. Stockholders ultimately pay for the defense of meritless expedited litigation, offsetting the benefits received by a stockholder class.

Accordingly, Plaintiffs' attorneys should not get credit for larding a complaint with obviously meritless claims. In *In re BEA Systems, Inc. Shareholders Litigation*, a fee-award claim was "premised on the fact that, after the complaint was filed, the company made two changes to its proxy materials to deal

with misstatements pointed out in the complaint."[50] The plaintiffs' counsel asserted that they spent "436 hours on the litigation by the time that the corrective disclosures were made" and that they had "$19,430 in costs during that the same period."[51] The Court noted that "the two corrective disclosures [that] the plaintiffs claim[ed] credit for were only a minor aspect of the complaint" and that "[u]ndoubtedly, most of [the plaintiffs' counsel's time and costs were] spent on aspects of the litigation that produced no benefit."[52] The Court, with little discussion, "assume[d] that one-quarter of the time and costs [were] rationally attributable to the claims that resulted in the benefit" and awarded fees accordingly.[53]

Unlike *BEA*, the Plaintiff here fully litigated his claims rather than having the claims mooted by the Company. However, the *BEA* rationale is still applicable in this case. As in *BEA*, the corrective disclosure that the Plaintiff achieved for Parlux stockholders was the result of a single allegation among many in the Complaint. Lacking guidance from Plaintiff's counsel on how its time was spent, I am left to compare the number of colorable claims found in the Complaint to the number of uncolorable ones to determine the appropriate adjustment.

[50] 2009 WL 1931641, at *1 (Del. Ch. June 24, 2009).
[51] *Id.*
[52] *Id.*
[53] *Id.*

3. The Meritorious Claim

The Plaintiff's single meritorious claim alleged that the S-4 failed to "disclose the free cash flow projections for Parlux, Perfumania, and the Combined Company that Parlux and Perfumania prepared and provided to the boards of directors of both companies, their independent committees and their respective financial advisors."[54] This Court "give[s] credence to the notion that managers ha[ve] meaningful insight into their firms' futures that the market d[oes] not"[55] and stockholders "who are being advised to cash out are entitled to the best estimate of the company's future cash flows."[56] When the Plaintiff, accurately, asserted that the S-4 provided that management gave this information to PJSC and American Appraisal, the Plaintiff had not only a colorable claim, but a solid claim. In fact, that claim led directly to the material disclosure that is the basis for a fee award here. Unfortunately, Plaintiff's counsel surrounded this claim with meritless, makeweight claims.

4. The Other Claims

Besides the single claim with merit, the Complaint contained various fruitless claims. A brief adumbration follows.

[54] Compl. ¶ 49.
[55] *In re Netsmart Technologies, Inc. S'holders Litig.*, 924 A.2d 171, 203 (Del. Ch. 2007).
[56] *Gaines v. Narachi*, 2011 WL 4822551, at *2 (Del. Ch. Oct. 6, 2011).

a. *Revlon* Claims

The Plaintiff alleged that the Board violated its duties under *Revlon* to maximize the sale value of Parlux.[57] In particular, the Plaintiff argued that the Board failed to obtain a price collar for the benefit of Parlux stockholders.

As consideration in the Proposed Transaction, Parlux stockholders could elect to receive either $4.00 in cash and .20 shares of Perfumania stock or .53333 shares of Perfumania stock for each share of Parlux stock that they held.[58] When Perfumania announced its acquisition of Parlux, Perfumania stock was trading at $19.55 per share; therefore, the Proposed Transaction valued Parlux stock between $7.91 and $8.55 a share.[59] On January 27, 2012, three days before the Complaint was filed, Perfumania stock was trading at $9.83; thus, the Proposed Transaction then valued Parlux stock between $5.24 and $5.97.[60] The Plaintiff alleged that the Board violated its *Revlon* duties because it failed to obtain a price collar to protect the stockholders against volatility in the price of Perfumania stock.

In *In re NYMEX Shareholder Litigation*, the plaintiff a brought a post-merger suit challenging, in part, the failure of two defendant directors to obtain a price collar for the stock portion of the merger consideration.[61] Vice Chancellor

[57] *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).
[58] Compl. ¶ 4.
[59] Compl. ¶ 35.
[60] Compl. ¶¶ 38, 39.
[61] *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *8 (Del. Ch. Sept. 30, 2009).

Noble granted the defendants' motion to dismiss and noted that: "The mere failure to secure deal protections that, in hindsight, would have been beneficial to stockholders does not amount to a breach of the duty of care."[62] Here, the Plaintiff made exactly the same argument. Accordingly, the claim was not colorable.

b. Disclosure Claims

The Plaintiff alleged that the S-4 was incomplete because it failed to provide certain information relating to the merger's background or the fairness opinions provided by Parlux's financial advisors. However, these allegations are not colorable under Delaware law.

The drafters of an S-4 or proxy statement face the difficult task of providing stockholders enough information to make an informed decision while simultaneously not miring the reader in insignificant details. With regard to the background of a merger, once defendants begin to describe the history leading up to a merger "they have an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events," but Delaware law does not require a play-by-play description of negotiations.[63] Similarly, a fiduciary is not required to disclose "its underlying reasons for acting," and asking why a fiduciary

[62] *Id.*
[63] *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *14 (Del. Ch. Nov. 30, 2007).

took a certain action does not state a meritorious disclosure claim.[64] That is, all material *facts* must be disclosed, but individual directors need not state "the grounds of their judgment for or against a proposed shareholder action."[65]

In regard to financial advisors' opinions, stockholders are entitled to a fair summary of the work completed by the financial advisor that the Board relied upon, but "this duty does not require the directors to provide financial information that is merely helpful or cumulative or the full range of information needed to permit stockholders to make an independent determination of fair value."[66] Additionally, the criteria used to select the ranges, multiples, or transactions that the financial advisors use in their analyses are not material.[67] As a result, "[w]hen a plaintiffs' only beef is that [an investment banker] made mistakes in subjective judgment even though those judgments were disclosed to the . . . stockholders, then the plaintiff has not identified a material omission or misstatement."[68] These

[64] *Sauer-Danfoss*, 2011 WL 2519210, at *12.
[65] *Id.* (quoting *Newman v. Warren*, 684 A.2d 1239, 1246 (Del. Ch. 1996)).
[66] *In re OPENLANE, Inc.*, 2011 WL 4599662, at *13 (Del. Ch. Sept. 30, 2011) (internal quotation marks removed); *In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *2 (Del. Ch. Nov. 1, 2007) ("[A] disclosure that does not include all financial data needed to make an independent determination of fair value is not . . . per se misleading or omitting a material fact. The fact that the financial advisors may have considered certain non-disclosed information does not alter this analysis." (quoting *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *16 (Del. Ch. May 4, 2005))).
[67] *See Sauer-Danfoss*, 2011 WL 2519210, at *14.
[68] *Id.* (quoting *In re JCC Hldg. Co.*, 843 A.2d 713, 721 (Del. Ch. 2003)).

principles serve to prevent "disclosures in proxy solicitations [from becoming] so detailed and voluminous that they will no longer serve their purpose."[69]

In the Complaint, the Plaintiff alleged a litany of claims that this Court has unambiguously indicated do not support a disclosure claim. The Plaintiff alleged disclosure violations in four separate paragraphs of the Complaint.[70] One paragraph addressed the background of the merger. This paragraph alleged that the S-4 failed to disclose 15 individualized pieces of information. With regard to the fairness opinions rendered by the financial advisors, the two paragraphs of the Complaint, together with their subparts, contained 48 items that the Plaintiff contended should have been disclosed. In the fourth paragraph, the only one without subparts, contains the Plaintiff's valid claim. The disclosures sought by the Plaintiff were a smorgasbord of requests: the Board' justification for certain actions; the financial advisor's rationale for certain selections; play-by-play information concerning the merger's background; and underlying financial data that would allow the Plaintiff to make its own independent judgment as to the advisability of the merger. This level of disclosure is not required.[71]

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[69] *TCG Sec., Inc. v. S. Union Co.*, 1990 WL 7525, at *7 (Del. Ch. Jan. 31, 1990); *see also In re Delphi Financial Group S'holder Litig*., 2012 WL 729232, at *18 (Mar. 6, 2012) ("Delaware law recognizes that too much disclosure can be a bad thing.").
[70] *See* Compl. ¶¶42, 49, 50, 51.
[71] *Delphi*, 2012 WL 729232, at *18.

E. The Appropriate Award

By my count, the Plaintiff made one good claim and 64 poor claims. Should I assume that Plaintiff's counsel divided its time equally among the various claims, I would find that they spent approximately 9.5 hours litigating the one good claim.[72] As discussed above, I have determined that a fee award of $400,000 is commensurate with the benefit that the supplemental disclosures gave to Parlux stockholders. When divided by 9.5 hours attributable to the successful claim, this results in an effective hourly rate of more than $42,000 an hour, which would be, obviously, an unacceptable windfall to Plaintiff's counsel.

I suspect that the actual percentage of time devoted by Plaintiff's counsel to the successful claim is far higher than calculated above. Nonetheless, the disparity between the fees typically available based on benefit and the cross-check based on effort indicates that a downward adjustment is appropriate here. This adjustment will ensure that the compensation to Plaintiff's counsel is appropriate, and it should encourage similarly situated attorneys to more carefully consider what claims they include in their complaints. I therefore award the Plaintiff two-thirds of the amount suggested under *Sauer-Danfoss*, or $266,667, inclusive of costs.

[72] I take the 617 hours worked and multiply it by 1/65 for a total of 9.5.

IV. MOTION TO DISMISS

The Parlux Defendants, Perfumania Holdings, Inc. and PFI Merger Corp. have moved to dismiss under Rule 12(b)(6). The Plaintiff does not oppose that Motion. Accordingly, I grant the Motion.

V. CONCLUSION

For the foregoing reasons, the Defendant's Motion for Sanctions and Attorneys' Fees is denied, and the Plaintiff's Motion for Attorney's Fees is granted in part. The Plaintiff should submit an appropriate form of order.