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Re: *In re Quest Software Inc. Shareholders Litigation*
Consolidated Civil Action No. 7357-VCG

Dear Counsel:

The following represents my decision on the Plaintiffs' request for attorneys' fees under the corporate benefit doctrine. This case presents an unusual fact situation, in which suit was commenced to enjoin a merger during a go-shop period during which a superior deal emerged, mooting the initial claim. The question in such a case is whether the plaintiffs were premature intermeddlers whose presence was, if anything, an impediment to the board's ultimately-

successful pursuit of its fiduciary duties; or a necessary goad without which the ultimate result would not have been reached. This case raises issues of the proper timing of litigation in the hyper-expedited world of merger litigation, with potential injunctive relief providing the best, and perhaps only, remedy. As with burglary, so with merger litigation; the greatest utility comes from the watchdog biting the burglar on the way *in*, not the way out. Because I find evidence that the Plaintiffs contributed to the result achieved here by the directors on behalf of the stockholders, I find a fee award appropriate.

This matter involves the merger of Quest Software, Inc. ("Quest") into Dell, Inc. ("Dell"), and the process leading up to this transaction. Before merging with Dell, the Quest Board entered into a merger agreement with Insight Holdings Group, LLC ("Insight"), an entity in which a Quest director, executive and substantial minority stockholder, Vincent Smith, had an interest. The Plaintiffs filed several actions, consolidated into this civil action, seeking to enjoin that transaction. The suits were filed during the pendency of a sixty-day go-shop period called for in the merger agreement between Quest and Insight (the "Insight Merger Agreement"). During this go-shop period, Dell emerged as a potential purchaser. The Board ultimately withdrew from the Insight Merger Agreement and entered into a merger agreement with Dell (the "Dell Merger Agreement"), providing a substantially better deal for Quest stockholders. The Plaintiffs argue

that they caused this result, and accordingly seek fees and expenses of $2.8 million. The Quest Defendants[1] vigorously oppose this fee request. For the reasons outlined below, I find that the Plaintiffs are entitled to a fee award of $1 million.

A. Background

Defendant Quest is a global software company and Delaware corporation with over sixty offices in twenty-three countries; its headquarters are in Aliso Viejo, California.[2] Quest is involved in "design[ing], develop[ing], market[ing], distribut[ing], and support[ing] enterprise systems management software products."[3] Defendant Insight Holdings Group, LLC ("Insight"), a Delaware limited liability company, is the parent and administrator of several private equity and venture capital funds.[4] Defendant Vincent Smith served as Quest's CEO, President and Board Chairman.[5] Prior to the Dell merger, Smith was "the beneficial owner of approximately 34% of Quest's outstanding common stock,"[6] as

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[1] Defendants Smith and Insight take no position with respect to the fee request.
[2] Compl. ¶ 17. I note that all references to the Complaint made in this Letter Opinion refer to the Verified Class Action Complaint filed on April 17, 2012 by Plaintiffs Plumbers Local 98 Defined Benefit Pension Fund and International Union of Operating Engineers of Pennsylvania and Delaware, on behalf of themselves and similarly situated Quest stockholders, in Civil Action Number 7432-VCG, which has been consolidated into this action and which the Plaintiffs rely on in their Application for an Award of Attorneys' Fees and Expenses.
[3] *Id.*
[4] Pls.' Opening Br. for Application of an Award of Attorneys' Fees & Expenses [hereinafter Pls.' Opening Br.] at 4.
[5] Compl. ¶ 23; Pls.' Opening Br. at 3.
[6] Compl. ¶ 23.

well as a "limited partner in various Insight funds and portfolio companies."[7] Quest Directors H. John Dirks, Doug Garn, Kevin M. Klausmeyer, Augustine L. Nieto II, and Paul Sallaberry are also Defendants.

The facts in this matter are extensive; what follows is a summary of the merger process leading up to the fee application before me. In August 2011, representatives of Insight first met with Smith and other members of Quest's management to explore a possible acquisition of Quest.[8] Following this display of interest and anticipating Smith's participation in the proposed buyout, the Quest Board, at its September 19 meeting, established a Special Committee comprised of Dirks, Klausmeyer and Nieto to oversee the process; Dirks served as Committee Chairman.[9] In late September, the Special Committee retained Potter Anderson & Corroon LLP ("Potter Anderson") as outside legal counsel.[10] The Special Committee selected Morgan Stanley & Co. LLC ("Morgan Stanley") as financial advisor.[11]

I will omit the extensive history of the Special Committee's negotiation of a deal with Insight, which would have been relevant to the fiduciary duty action that was ultimately mooted. For purposes of this decision, it should suffice to say that the Special Committee undertook a lengthy negotiation with Smith and Insight.

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[7] Pls.' Opening Br. at 4; *see also* Compl. ¶ 44.
[8] Herbert Transmittal Aff. PX1 (Preliminary Proxy, Apr. 12, 2012) at 54.
[9] *Id.*
[10] *Id.* at 56.
[11] *Id.*

On March 7 and 8, 2012, the Special Committee, Smith, Insight, and various advisors and lawyers negotiated a definitive merger agreement, as well as other agreements related to the transaction.[12] Also, on March 8, the Special Committee met with its legal counsel and Morgan Stanley, at which time Potter Anderson reviewed the Special Committee's fiduciary duties in relation to the merger.[13] In addition, Morgan Stanley provided a summary of its financial analyses and gave an oral fairness opinion, concluding that the transaction was fair to Quest stockholders.[14] Following a discussion of the proposed transaction and related documents, the Special Committee unanimously adopted resolutions:

> (i) declaring the Merger Agreement and the transactions contemplated thereby, including the Merger, to be fair to and in the best interests of the holders of Company common stock, other than the Rollover Investors, (ii) recommending the submission of the Merger Agreement to the Board, (iii) recommending that the Board approve and adopt the Merger Agreement and the Merger, and declare that the Merger Agreement, the Merger and the transactions contemplated thereby, are advisable, fair to and in the best interests of the holders of Company common stock, and (iv) recommending that the Board submit the Merger Agreement to the holders of Company common stock for adoption, and resolve to recommend that the holders of Company common stock adopt the Merger Agreement.[15]

A Board meeting, with all directors present, followed the meeting of the Special Committee; Morgan Stanley and Potter Anderson, among others, also

[12] *Id.* at 80.
[13] *Id.* at 82.
[14] *Id.*
[15] *Id.*

attended.[16] Legal counsel reviewed the Board's fiduciary duties in relation to the merger, and Morgan Stanley noted that it had provided the Special Committee with its oral fairness opinion, and presented the Board with a summary of its financial analyses.[17] After Smith excused himself from the meeting, the Board engaged in further discussion and, substantially relying on the Special Committee's recommendation, "approved and declared advisable the Merger Agreement, and resolved to recommend that the holders of [Quest] common stock adopt the Merger Agreement."[18]

Later that day, after several months of negotiations and discussions, Quest and Insight entered into the Insight Merger Agreement, as well as related agreements, whereby Insight would buy out each outstanding share of Quest common stock for $23 in cash, excluding those shares owned by Smith.[19] The Insight Merger Agreement included a sixty-day go-shop period that expired on May 7, 2012.[20] Notably, as a result of the Insight Merger Agreement, "Smith would roll over his 34% equity stake in the company in exchange for an approximate 78.32% equity stake in the surviving entity and receive a $120 million loan from Insight to pay off indebtedness encumbering his Quest shares."[21] On

[16] *Id.*
[17] *Id.*
[18] *Id.* at 83.
[19] *Id.*; Compl. ¶ 3.
[20] Herbert Transmittal Aff. PX3 (Definitive Proxy, Aug. 24, 2012) at 23.
[21] Pls.' Opening Br. at 8 (internal citations and quotation marks omitted).

March 9, with the go-shop period now underway, Morgan Stanley began reaching out to potential acquirers.[22]

Between March 9 and March 26, Morgan Stanley reached out to thirty-eight financial sponsors and seventeen strategic bidders, including Dell.[23] By March 26, at least nineteen non-disclosure agreements had been circulated.[24] Ultimately, of the twenty-three non-disclosure agreements circulated during the go-shop period, seventeen were executed.[25] Potential suitors that had executed non-disclosure agreements were provided with management's projection and access to Quest's data room; nine of the proposed purchasers also met with Quest management.[26]

However, Morgan Stanley noted that many of the potential purchasers were hesitant to bid because of Smith's ownership interest and interest in acquiring Quest.[27] To appease this apprehension, the Special Committee discussed offering the "19.9% Option" to certain bidders.[28] Under this mechanism, the company would issue "an option to acquire newly issued Quest shares constituting up to 19.9% of [Quest's] issued and outstanding shares of common stock . . . to an acquirer that made a superior proposal—if Mr. Smith declined to support that

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[22] Herbert Transmittal Aff. PX1 (Preliminary Proxy, Apr. 12, 2012) at 21.
[23] *Id.* at 21; Dirks Aff. ¶ 20.
[24] Dirks Aff. ¶ 20.
[25] Herbert Transmittal Aff. PX3 (Definitive Proxy, Aug. 24, 2012) at 21.
[26] *Id.* at 21; Dirks Aff. ¶ 20.
[27] Herbert Transmittal Aff. PX3 (Definitive Proxy, Aug. 24, 2012) at 21.
[28] *Id.* at 22.

proposal."[29] The Special Committee also discussed whether to allow parties to form partnership arrangements, ultimately deciding to consent to these arrangements.[30] Financial Sponsor A and Dell entered into a non-exclusive partnering arrangement, as did Financial Sponsors D and E.[31] Eventually, Financial Sponsor A removed itself from the bidding process.[32]

Over the next few weeks, the Special Committee received and evaluated several written proposals.[33] On May 6, Dell submitted a written proposal to acquire all outstanding stock of Quest for $25 per share in cash; at this time, Dell also submitted a proposed merger agreement.[34] This agreement had no financing contingency; required Smith to enter into a voting agreement supporting the merger; included a sixteen-day exclusivity period; and provided for a termination fee of 2.5%.[35] Further, the agreement provided that, if Smith refused to enter into a voting agreement with Quest, then the 19.9% Option and a 3.5% termination fee should apply.[36] At a meeting on May 7 to review the bid, the Special Committee designated Dell as a qualified go-shop bidder.[37]

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 22-23.
[34] *Id.* at 23.
[35] *Id.*
[36] *Id.*
[37] *Id.*

After the go-shop period expired at 11:59 pm on May 7, New York City time, Quest terminated discussions with all potential bidders that were not qualified go-shop bidders.[38] On May 9, Quest issued a press release that announced the go-shop period had expired, noting that there were additional bidders and that the recommendation of the Special Committee had not changed.[39]

On May 8, Morgan Stanley, at the behest of the Special Committee, delivered a counter-proposal to Dell, which included an offer of $27 per share; the 19.9% Option; a termination fee of either 3.5% or 2.5%, depending on the circumstances; and a seven-day exclusivity period.[40] However, the Special Committee made clear that "the decision to enter into a voting agreement supporting the May 6 Dell proposal resided with Mr. Smith."[41] On May 10, Dell amended this proposal slightly, including by adopting the proposed seven-day exclusivity period but retaining its offer of $25 per share.[42] On May 12, after engaging in further discussion and extending the expiration date of Dell's May 10 proposal, the Special Committee and Dell executed an exclusivity agreement for a five-day period.[43] On May 16, after further negotiations, Dell submitted its revised proposal of $25.75 per share; Dell also submitted a revised draft of the proposed

[38] *Id.*
[39] *Id.* at 24; Pls.' Opening Br. at 11.
[40] Herbert Transmittal Aff. PX3 (Definitive Proxy, Aug. 24, 2012) at 23-24.
[41] *Id.* at 24.
[42] *Id.*
[43] *Id.* at 25.

merger agreement and other documents related to the transaction.[44] On May 17, the exclusivity period with Dell was extended until May 25.[45] During negotiations, a significant portion of the discussion centered on those conditions under which Smith would vote to support Dell's proposal; Smith professed that he would support a proposal of $28 per share.[46] While negotiations with Dell were ongoing, Insight received permission to share confidential information with four potential financial sponsors, as a financial partnering was necessary in order for Insight to increase its proposal price.[47]

After further negotiations, and several additional offers from both Dell and Insight, Dell made an offer on June 10 to acquire the outstanding shares of Quest for $25.50 per share on substantially the same terms as its May 20 proposal, with an added requirement that Quest amend the parties' exclusivity agreement.[48] On June 13, the Special Committee adopted resolutions recommending that the Board deem Dell's proposal on June 10 the superior proposal, and notify Insight that its match right period, pursuant to the Insight Merger Agreement, had begun.[49] Quest

[44] *Id.*
[45] *Id.* at 26.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 27.
[49] *Id.* at 28.

issued a press release on June 14, informing stockholders that it had received a superior proposal.[50]

On June 17, Insight proposed amendments to the Insight Merger Agreement, including a modification of its offer price to $25.75 per share; this proposal added Vector Capital to Insight's buyout group.[51] After further negotiation, Dell raised its offer price to $27.50 per share on June 21.[52] The Special Committee recommended, at this point, that the Board adopt Dell's June 21 offer as the superior proposal.[53] Again, Insight was afforded the opportunity to match this offer pursuant to the Insight Merger Agreement.[54] During this time, Dell continued to negotiate with Smith and his advisors.[55] On June 27, Dell raised its proposed offer price to $28 per share "in exchange for securing Mr. Smith's agreement to enter into a voting agreement with respect to the transaction."[56] Insight confirmed, at this time, that it would not oppose termination of the Insight Merger Agreement, and the parties began to take steps to terminate that agreement in favor of an agreement with Dell.[57] On June 30, Quest executed the Termination Agreement,

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[50] *Id.*
[51] *Id.*
[52] *Id.* at 29.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 30.
[57] *Id.*

Dell Merger Agreement, and Dell Voting Agreement.[58] On July 2, 2012, the Special Committee announced that it was terminating the Insight Merger Agreement, in favor of consummating a merger agreement with Dell.[59]

B. The Litigation

Meanwhile, beginning on March 27, 2012, the Plaintiffs had filed five civil actions that, on April 25, 2012, were consolidated into this case.[60] The Plaintiffs made several allegations involving the Insight merger, including allegations that the merger process with Insight was flawed; that Smith, the Special Committee, and the Quest Board of Directors breached their fiduciary duties; that Quest shares were "significantly undervalued" in the proposed merger with Insight; that the Defendants were motivated to sell Quest to Insight because "Smith and Quest had a long-standing relationship with Insight, and Defendants would receive personal financial benefits which would not be shared by Quest's public shareholders"; and that the April 12 Preliminary Proxy was tainted with incomplete disclosures.[61] The Plaintiffs sought to preliminarily enjoin the impending merger with Insight.[62] If the merger were to proceed, the Plaintiffs sought damages.[63]

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[58] *Id.* at 31.
[59] *Id.*
[60] Pls.' Opening Br. at 9.
[61] *Id.* at 9-10.
[62] *Id.* at 9.
[63] Compl. ¶ 14.

The Plaintiffs moved to expedite proceedings. During a teleconference held on April 25, 2012, in light of the ongoing go-shop period, I declined to grant the Plaintiffs' Motion.[64] On May 7, the parties discussed a discovery schedule and confidentiality agreement, and the Plaintiffs prepared additional discovery requests.[65] On May 9, I held a telephonic status conference with the parties.[66] On May 10, the parties held a meet and confer, and on May 14, the Court entered the parties' Stipulated Confidentiality Order.[67] Document production began on May 11.[68] On May 29, the Plaintiffs served their second request for document production upon Smith.[69] On June 6, the Plaintiffs served the Defendants with a set of interrogatories.[70] There were additional teleconferences with this Court on May 18, May 29, and June 21.[71]

Notably, as the matter before me was filed during the pendency of the sixty-day go-shop period provided for in the Insight Merger Agreement, which, as described fully above, permitted Quest to solicit competing bids through May 7, 2012, I allowed only limited litigation to proceed during this period, in an attempt not to interfere unduly with that process.

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[64] Pls.' Opening Br. at 11; Oral Arg. Tr. 14:23-15:12 (Mot. to Expedite).
[65] Pls.' Opening Br. at 11.
[66] *Id.* at 11-12.
[67] *Id.* at 12.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 12-13.

In light of the Dell Merger Agreement, the Plaintiffs' action was dismissed without prejudice as moot on August 3, 2012 pursuant to a Stipulated Order. On September 7, 2012, the Plaintiffs filed their Opening Brief in Support of Plaintiffs' Application for an Award of Attorneys' Fees and Expenses, seeking $2.8 million in attorneys' fees and expenses. Plaintiffs contend that:

> After more than three months of aggressively prosecuting the case, six telephonic conferences with the Court, service of two document requests, one set of interrogatories and one subpoena, numerous exchanges with Defendants regarding discovery matters, and review of more than 163,000 pages of documents, Quest public shareholders will now receive approximately $283 million in cash more for their Quest shares than under the original Insight Merger Agreement.[72]

A leisurely period of discovery followed, and the matter was briefed. I heard oral argument on August 6, 2013.

C. Standard

In a mooted case, this Court may award fees under the corporate benefit doctrine, provided the plaintiff demonstrates that "(1) the suit was meritorious when filed; (2) the action producing benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and (3) the resulting corporate benefit was causally related to the lawsuit."[73] A claim is meritorious if it would, as filed, withstand a motion to dismiss, and if the plaintiff, at the time of

[72] Pls.' Opening Br. at 15.
[73] *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1123 (Del. Ch. 2011) (quoting *United Vanguard Fund, Inc. v. TakeCare, Inc.,* 693 A.2d 1076, 1079 (Del.1997)).

filing, "possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success."[74] Under Delaware law, an "absolute assurance of ultimate success" is not necessary to prove that a mooted claim was meritorious when filed.[75]

When determining whether a causal relationship exists between a mooted lawsuit and the resulting corporate benefit, this Court imposes the burden of persuasion on the defendant as the party who "is in a position to know the reasons, events and decisions leading up to the defendant's action."[76] Thus, in instances where the defendant acts in such a way after a complaint has been filed "that renders the claims asserted in the complaint moot," the defendant must rebut the presumption of causation by demonstrating the lawsuit "did not in any way cause [its] action."[77]

After determining that it is appropriate to award attorneys' fees, this Court has the discretion to decide the appropriate amount to award.[78] This Court is

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[74] *Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966).
[75] *In re Sauer-Danfoss Inc.*, 65 A.3d at 1123 (quoting *Chrysler Corp*, 223 A.2d at 387).
[76] *United Vanguard Fund, Inc.*, 693 A.2d at 1080 (quoting *Allied Artists Pictures Corp. v. Baron,* 413 A.2d 876, 880 (1980)).
[77] *United Vanguard Fund, Inc.*, 693 A.2d at 1080 (internal quotation marks omitted); *see also Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989).
[78] *In re Sauer-Danfoss Inc.*, 65 A.3d at 1135; *In re Plains Res. Inc.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005).

guided in its determination by the seven so-called *Sugarland* factors.[79] Specifically, this Court considers:

> (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.[80]

The size of the benefit conferred and the portion of this benefit attributable to plaintiffs are often considered the two most important elements,[81] while "[t]he time expended by counsel is considered as a cross-check to guard against windfalls, particularly in therapeutic benefit cases."[82]

D. Discussion

The Plaintiffs seek attorneys' fees and expenses for a mooted claim. I find that an award of attorneys' fees is appropriate in this instance, as the Plaintiffs' (subsequently consolidated) lawsuits seeking to enjoin the Insight merger were meritorious when filed; Quest withdrew from the Insight Merger Agreement and entered into the Dell Merger Agreement before judicial resolution in this matter; and the Defendants have failed to rebut the presumption that a causal connection

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[79] *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980).
[80] *In re Plains Res. Inc.*, 2005 WL 332811, at *3 (citing *Sugarland Indus., Inc.*, 420 A.2d at 149-50).
[81] *In re Sauer-Danfoss Inc.*, 65 A.3d at 1136; *In re Plains Res.*, 2005 WL 332811, at *3.
[82] *In re Sauer-Danfoss Inc.*, 65 A.3d at 1136.

exists between the Plaintiffs' consolidated action and the resulting corporate benefit to Quest shareholders.

1. The Plaintiffs' Suits Were Meritorious When Filed.

I find that the Plaintiffs' suits were meritorious when filed, as they would have survived a motion to dismiss; they also demonstrated the Plaintiffs' "knowledge of provable facts which hold out some reasonable likelihood of ultimate success."[83]

This Court will only dismiss a complaint when there are no reasonably conceivable circumstances that would entitle the plaintiff to recover.[84] In considering a motion to dismiss, this Court must "draw all reasonable inferences in favor of the [p]laintiff, and accept all well pled factual allegations as true."[85] At this stage of litigation, "even vague allegations are well-pleaded if they give the opposing party notice of the claim."[86] In this instance, the Plaintiffs' allegations—drawing all reasonable inferences in their favor—illustrate a merger process between Quest and an entity associated with an insider that could conceivably entitle the Plaintiffs to recover. In other words, the Plaintiffs present in their

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[83] *See Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966) ("The plaintiff must have some factual basis at least for the making of the charges. If there is none, then the conclusion follows that the action lacked merit and the plaintiff is entitled to no allowance for fees.").
[84] *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531, 535 (Del. 2011).
[85] *Paul v. Delaware Coastal Anesthesia, LLC*, 2012 WL 1934469, at *1 (Del. Ch. May 29, 2012).
[86] *Simplexity, LLC v. Zeinfeld*, 2013 WL 5702374, at *5 (Del. Ch. Oct. 17, 2013) (internal quotation marks omitted).

complaints, subsequently consolidated, well-pleaded allegations that would survive a motion to dismiss.

The Defendants contend that the Plaintiffs' claims were not meritorious when filed because they were premature;[87] "the Special Committee had already begun the robust Go-Shop process that Plaintiffs' complaints sought to compel, and that process resulted in a 21% increase in the offer price for stockholders."[88] However, this contention misstates the meritorious standard for a fee application in a mooted case. To qualify for a fee award, claims must be meritorious *when filed*. Although the go-shop period, already underway when the Plaintiffs filed their claims, did ultimately result in a better buyout price for Quest stockholders, the mere existence of a go-shop period when the Plaintiffs filed their action does not render the Plaintiffs' claims frivolous; under this Court's meritorious standard, I am not to review the *outcome* of a process that is underway when a complaint is filed but whether that complaint asserted claims that were meritorious *when filed*. Notably, a definitive merger agreement with Insight had been reached before suit

[87] Quest Defs.' Answering Br. in Opp'n to Pls.' Mot. for a $2.8 Million Award of Attorneys' Fees [hereinafter Defs.' Answering Br.] at 12; Oral Arg. Tr. 32:6-7 (Fee Application). The Defendants rely on Chancellor Strine's decision in *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604 (Del. Ch. 2005). *See* Defs.' Answering Br. at 12; Oral Arg. Tr. 38:24-40:5 (Fee Application). However, in that case, the Plaintiffs' challenged a fully negotiable proposal by a controlling stockholder that "was conditioned on settlement of the outstanding lawsuits, receipt of a final fairness opinion, and agreement on the terms of a final merger agreement" with the special committee of independent directors. *In re Cox Commc'ns, Inc.*, 879 A.2d at 605. That situation is not analogous to the one before me, as the Insight Merger Agreement reflected a finalized agreement, although it did contain a go-shop period and other deal protection mechanisms.

[88] Defs.' Answering Br. at 9.

was filed; thus, the Defendants had either complied with or breached their fiduciary duties with respect to that agreement. The fact that, happily, those issues subsequently became moot does not mean that they were unripe. Consequently, I find that, under the reasonable conceivability standard, Plaintiffs' claims were meritorious when filed.

2. The Claims Before This Court Were Mooted Before Judicial Resolution.

The resolution sought by the Plaintiffs occurred before judicial action was taken; Quest's withdrawal from the Insight Merger Agreement to enter into the Dell Merger Agreement mooted the Plaintiffs' claims before judicial resolution.

3. A Causal Connection Exists Between Plaintiffs' Consolidated Suit and the Resulting Corporate Benefit.

The Plaintiffs are entitled to a rebuttable presumption that their consolidated lawsuit compelled the Quest Board to terminate the Insight Merger Agreement in order to enter into the Dell Merger Agreement, which resulted in a benefit to the corporation. The Defendants deny that the robust, and ultimately successful, go-shop was influenced in any way by the Plaintiffs' suit. They argue that, despite having entered into a definitive merger agreement with an insider for a price that proved more than 20% under the market, the Insight Merger Agreement contained a go-shop and fiduciary out sufficient both to comply with the requirements of their fiduciary duty and to achieve the better deal ultimately reached, which deal

they would have reached regardless of the existence of Plaintiffs' suit. The Defendants may be correct. However, their bald denial that this litigation had any effect on them, under these circumstances, is insufficient to rebut the presumption enjoyed by the Plaintiffs. I note the following email, sent by counsel for the Special Committee to Smith's attorney, and forwarded to the Special Committee and Quest counsel:

> [I]f we didn't have [Smith's] support, then it would mean we need to ask the [Board] to vote on both proposals and then hope that [Smith] later agrees to support. If that were the case, I said everyone would be better served by having a lower naked no fee (lowers the injunction risk, *lowers the [attorney] fee award for Stuart Grant*, etc) . . . .[89]

I find that the Defendants have failed to rebut causal connection between the filing of the Plaintiffs' consolidated lawsuit and any of the resulting benefit to Quest shareholders, although I find this causal connection limited, for the reasons described below.

4. The Appropriate Fee to be Awarded to the Plaintiffs.

Having determined that a fee award is proper, I now turn to the amount of fees that are appropriate. The difference between the consideration flowing to Quest stockholders from the Dell merger, compared with the Insight deal originally approved by the Defendants, is $283 million. The Plaintiffs contend that they are responsible for the entire $283 million corporate benefit to the Quest stockholders.

[89] Fioravanti Transmittal Aff., Exs. 19 & 20; Oral Arg. Tr. 20:3-22:4 (Fee Application).

I disagree, however, that the entire corporate benefit, or even a substantial portion thereof, can be attributed to this litigation. In particular, nothing about this litigation changed the terms under which the go-shop operated, and the "19.9% Option"—designed to ensure that Smith would be amenable to cooperate if a superior offer emerged—was considered by the Special Committee before the first lawsuit was filed. Furthermore, the litigation did not cause Dell to emerge, as it is clear that the Dell transaction was largely market driven. In addition to any motivating influence this litigation had, the Special Committee was also motivated towards the Dell transaction by both self-interest and its existing fiduciary duty.[90] In a universe where litigation resulting from public company mergers is ubiquitous, it is likely that the Board's awareness of its fiduciary duties would have provided substantial leverage on the Special Committee and the Board to pursue the opportunities that the market, independent of the Plaintiffs' efforts, provided: leverage to achieve the result in fact achieved, even without the existence of this consolidated lawsuit.[91] On the other hand, the record makes it clear that the Board

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[90] *See, e.g.* Pls.' Reply Br. in Support of Their Application for an Award of Attorneys' Fees and Expenses at 13 ("At a May 29, 2012 Special Committee meeting, the Special Committee discussed the fiduciary implications for the Board's non-committee directors in failing to permit the Board to consider the Dell Proposal.") (internal quotation marks omitted); Herbert Transmittal Aff. PX1 (Preliminary Proxy, Apr. 12, 2012) at 68, 82 (noting that Potter Anderson, at various times throughout the merger process, reviewed with the Special Committee its fiduciary duties).

[91] *See In re Sauer-Danfoss Inc. Shareholders Litig.*, 65 A.3d 1116, 1136 (Del. Ch. 2011) ("In weighing the benefit conferred, the Court must recall that what is relevant is the benefit *achieved*

was well aware of the eyes, raptorious and unblinking in oversight, of the Plaintiffs' counsel, and responded accordingly. With respect to the latter assertion, I find particularly persuasive the statement from Potter Anderson quoted above.

As a result, I find that the existence of this litigation contributed 5% of the benefit achieved. Considering the difference between the initial and ultimate deals, $283 million, as the benefit realized by Quest, and multiplying that number by .05, I derive a benefit driven by the litigation of perhaps $14.15 million. This benefit achieved means that equity requires that Plaintiffs' counsel be compensated for its efforts. In light of this benefit, and in light of the contingent nature of counsels' work, as well as the standing and demonstrated ability of Plaintiffs' counsel in litigation before this Court; and in light of the fact that some of the benefit achieved was a result not of active litigation but of simple oversight, an award of $1 million, or roughly 7.5% of the benefit, is appropriate here.

The remaining *Sugarland* factors do not suggest that such an amount is unreasonable. Most importantly, the time expended from this matter's inception through July 27, 2012 was 2264.1 hours, which results in a fee of approximately $441 per hour. This fee award, despite first appearance, is generous, although not unreasonably so, considering that, with five separate complaints filed, there was inevitable overlap among the work performed by Plaintiffs' counsel. For instance,

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by the litigation, not simply a benefit that, *post hoc ergo procter hoc,* is conferred after the litigation commences.") (internal quotation marks omitted).

roughly 625 hours went into the initiation of this case, including researching, drafting, and amending *five* separate complaints; approximately 339 hours were devoted to "lead counsel issues."[92] Much of this time can have contributed nothing to the benefit of the class. Accordingly, a fee award of $1 million is appropriate.

To the extent that the foregoing requires an Order to take effect, IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

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[92] Pls.' Response to Ct.'s Request for Additional Information Regarding Work Performed, Exs. 1-5.