IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE COMPELLENT TECHNOLOGIES, INC. SHAREHOLDER LITIGATION) Consol. C.A. No. 6084-VCL

MEMORANDUM OPINION

Date Submitted: September 15, 2011
Date Decided: December 9, 2011

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LASTER, Vice Chancellor.

The plaintiffs sought a preliminary injunction against the acquisition of Compellent Technologies, Inc. ("Compellent" or the "Company") by Dell Inc. The parties settled after significant discovery but before merits briefing or a hearing. The settlement consideration consisted of modifications to the deal protections in the merger agreement, including the rescission of a stockholder rights plan adopted in connection with the transaction, and six supplemental disclosures. The plaintiffs applied for a fee of $6 million. The defendants argued for not more than $1.25 million. I approved the settlement but reserved decision on the fee.

This opinion addresses the fee application. It does not consider how the challenged defensive measures might have fared under enhanced scrutiny had the injunction application gone forward. Nor does it say anything about what might have transpired had the litigation entered a post-closing phase. The settlement mooted those issues, the parties did not argue them, and I have not considered them.

Determining an appropriate fee award requires an evaluation of the benefits conferred by the settlement. Regardless of whether or not the defensive measures might have constituted a breach of fiduciary duty (a question I have not reached), the settlement shifted the agreement's protective array from the aggressive end of the spectrum towards the middle. The value of that benefit must be assessed as of the time settlement was reached by the two groups of fiduciaries who negotiated its terms: the attorneys who acted as fiduciaries for the class, and the Compellent directors who were sued for allegedly breaching their duties. Delaware law does not judge fiduciary decisions by hindsight or evaluate the merits of the decisions by what later transpired.

Deal protections provide a degree of transaction certainty for merging parties by setting up impediments to the making and accepting of a topping bid. Relaxing deal protections facilitates a topping bid. Here, the settlement resulted in the rescission of a rights plan (a rare result in the annals of Delaware corporate litigation) and a series of material changes to the suite of defensive measures. The principal benefit conferred by the settlement was therefore to increase the likelihood of a topping bid.

To estimate the value of the resulting benefit, I rely primarily on four studies that measure market-wide rates of topping bid activity and the incremental value generated by multiple bidders. In candor, the reported results seem high. I nevertheless have used the studies because they were submitted by the defendants and because they were more conservative and comprehensive than the figures advocated by the plaintiffs. They should not be construed as establishing definitive pricing guidance. I also evaluated the benefits conferred by the supplemental disclosures. In total, I award $2.4 million.

I. FACTUAL BACKGROUND

The facts are drawn from the record presented in connection with the parties' joint application for settlement approval and the plaintiffs' contested fee application. The record includes the public filings issued in connection with the merger, the operative agreements, and various documents produced and six depositions of fact witnesses taken during the injunction phase of the case. The parties engaged experts for the fee dispute, and the record contains their reports and deposition transcripts.

A. Consolidation In The Data Storage Market

Before its acquisition by Dell, Compellent was a publicly traded Delaware corporation headquartered in Minnesota. The Company developed, marketed, and serviced enterprise-class network storage solutions. According to Compellent, its technology enabled business customers to "significantly lower storage and infrastructure capital expenditures, reduce the skill level and number of personnel required to manage information and enable continuous data availability and storage virtualization." Compellent Annual Report on Form 10-K at 1 (Mar. 5, 2010).

Beginning in the second half of the first decade of the current millennium, corporate technology heavyweights competed to dominate the increasingly important cloud computing sector. Part of their strategy involved acquiring smaller data storage companies. In the years before 2010, major players like Dell, EMC, IBM, and Hewlett-Packard each made at least one acquisition in the data storage space, with Dell buying EqualLogic, IBM purchasing XIV, HP picking up LeftHand Networks, and EMC acquiring Avamar and Data Domain. *See* Transmittal Affidavit of Sean M. Brennecke, Ex. 2 at CML_00014768 (Morgan Stanley/Blackstone presentation to the Board identifying these acquisitions as comparable precedents for Dell-Compellent).

In 2010, at least three large companies—Dell, HP, and IBM—were looking for additional data storage targets. In August 2010, Dell announced that it would purchase 3PAR for $18 per share. The Dell-3PAR merger agreement favored Dell with a termination fee equal to approximately 4.2% of the transaction's equity value and the right to match any competing offer. Notwithstanding those protections, HP topped the

Dell-3PAR agreement by proposing to acquire 3PAR for $24 per share. HP made its public overbid despite having dropped out of 3PAR's non-public, pre-announcement process. A three-week contest ensued, with HP ultimately prevailing at $33 per share. During the same period, IBM acquired Netezza.

B. Dell Approaches Compellent.

After Dell lost out on 3PAR, speculation abounded that Dell would approach Compellent. Dell did, and the Compellent board of directors (the "Board") authorized preliminary discussions. According to the defendants, "Compellent viewed Dell as the most likely acquirer for a variety of reasons, including a similar work culture, complementary products, and what Compellent believed to be synergistic interests." Compellent Answering Br. at 7.

Dell representatives visited Compellent on September 7 and 17, 2010. On September 23, Dell presented Compellent with a non-binding indication of interest in a transaction at $23-25 per share conditioned on thirty days of exclusivity. The next day, the Board retained Morgan Stanley & Co. Inc. and Blackstone Advisory Partners L.P. as its financial advisors.

At the Board's request, Dell extended the expiration date for its indication of interest from September 26 to September 28. During this time, the Board and its financial advisors evaluated potential transaction partners. Because of Compellent's size, profitability, and valuation, the Board concluded that financial sponsors were unlikely to have interest in Compellent. The directors decided to approach three potential strategic partners: IBM, Oracle, and Microsoft. None expressed interest at that time. The Board

elected not to reach out to EMC, HP, or Cisco, which were identified by Morgan Stanley and Blackstone as potential acquirers that were active in the space.

Dell's initial indication of interest expired on September 28, 2010. Three days later, Morgan Stanley and Blackstone presented the Board with their preliminary financial analyses of Dell's proposal and Compellent's alternatives, including Compellent's value as a stand-alone company. After evaluating Compellent's prospects, the Board decided to make a counter-proposal to Dell.

On October 7, 2010, Philip E. Soran, Compellent's Chairman and CEO, proposed that Dell agree to acquire Compellent for (i) $35 per share with thirty days of exclusivity or (ii) $32 per share without any period of exclusivity. Dell told Compellent that because of differing price expectations, Dell was no longer interested. From October 9 to October 20, 2010, there were no further discussions between the parties.

C. Dell And Compellent Resume Discussions.

On October 21, 2010, a Blackstone representative spoke with Dell's Vice President for Corporate Development and raised the possibility of further discussions. Shortly afterwards, Dell told Compellent that it was pursuing other data storage alternatives and would not be interested in a transaction in Compellent's price range, but might be interested at a lower price. The Board decided to resume discussions.

On October 27, 2010, Compellent proposed that Dell acquire Compellent for $28 per share. Dell responded on November 2 with a written, non-binding indication of interest at $26 per share conditioned on thirty days of exclusivity. With its recent 3PAR experience in mind, Dell focused on avoiding any topping bids and achieving certainty of

closure. Dell therefore proposed a two-step tender offer that would enable the transaction to close faster than a one-step merger. Dell also identified a range of deal protections that would be "key conditions" for proceeding, including (i) a strict no-shop provision; (ii) a termination fee equal to 4.75% of equity value; (ii) the right to be notified of any competing offers with an unlimited five-day match right; (iii) a requirement that Compellent adopt a stockholder rights plan with a carve out for Dell's tender offer, and (iv) support agreements from senior management, board members, and their affiliates, who collectively held approximately 29% of Compellent's outstanding shares. Dell wanted the significant stockholders to commit to tender into (or vote in favor of) Dell's transaction and to refuse to tender into (and vote against) any competing transaction, regardless of whether the Board changed its recommendation on Dell's transaction or the merger agreement otherwise terminated. Dell also wanted the stockholders to agree to pay to Dell all of the upside that they would receive from any topping bid.

This was an aggressive opener. To use just one data point for comparison, the Mergers and Acquisitions Committee of the American Bar Association has prepared a model merger agreement for the acquisition of a public company. *See* ABA Mergers & Acqs. Comm., *Model Merger Agreement for the Acquisition of a Public Company* (2011) [hereinafter Model Agreement]. The Model Agreement "represents a hypothetical strategic buyer's first draft" that would be delivered by the buyer "to commence the negotiations." *Id.* at xi. In other words, it is a buyer-friendly agreement with "terms

generally slanted to buyer favorable positions." *Id.* at xii. Dell asked for much more than the Model Agreement contemplates as the pro-acquirer first draft.[1]

D. The Parties Agree To Exclusivity.

The Board rejected Dell's $26 price as inadequate. On November 10, 2010, Dell offered $27 per share but insisted on the other terms of its offer. On November 15, Compellent countered at $27.50 per share. The Board conceded on the rights plan but proposed a 3.5% termination fee, a three day match right for new offers with a two day match right for amendments, and support agreements that would expire on the termination of the merger agreement and which omitted the upside protection.

After much negotiation, the parties reached an impasse over the support agreements and upside protection. On November 24, 2010, Dell proposed an acquisition at $27.50 per share structured as a single-step merger. Dell lowered its termination fee demand to 4% and reduced its match right demand to four days for initial offers and three days for amendments. Dell also dropped its request for the upside protection in the support agreements, but insisted that the agreements survive for nine-months after the merger agreement terminated. Based on this proposal, the parties entered into an exclusivity agreement on the evening of November 24.

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[1] In using the Model Agreement for comparison, I necessarily recognize that "[n]othing in the Model Agreement or ancillary agreements is intended to set any practice standard or expectation regarding the 'right' way to negotiate a merger agreement for the acquisition of a public company." Model Agreement at xiii. The Model Agreement merely offers one helpful sign post for charting the parties' negotiation journey, as do the decisions of the Delaware courts, other treatises, articles, deal studies, and other precedent agreements.

E. The Market Trades Above The Transaction Price.

While Dell conducted due diligence and the parties negotiated a definitive agreement, Compellent's stock price rose. In early December, Compellent's shares traded over $33, significantly above the $27.50 price. Market watchers cited Compellent's decision not to attend an analyst conference hosted by Barclay's Capital.

Dell expressed concern to Compellent about the run-up. Dell also worried that analysts would question Dell representatives about a Compellent deal at the Barclay's conference. Dell asked Compellent to issue a press release announcing their discussions, adding that Dell would issue the press release itself if Compellent did not agree to a joint release. On December 9, Dell and Compellent announced that they had entered into an exclusivity agreement and were discussing a transaction at $27.50 per share. This figure was 18% less than Compellent's closing price of $33.65 per share on December 8. Compellent's stock price promptly declined, closing at $29.04 on December 9 and at $28.71 on December 10.

Between December 9 and December 12, Dell and Compellent continued to negotiate the merger agreement. On Friday, December 10, Compellent's stock again closed above the deal price. On Saturday, December 11, with the parties nearing execution, Blackstone asked Dell whether it would increase its price. On Sunday, December 12, without any increase in hand, the Board approved the merger agreement. Dell then informed Blackstone that it would increase its price to $27.75 per share. The parties executed the merger agreement that evening and announced the transaction on Monday, December 13. Compellent's stock price closed that day at $27.98.

F. The Terms Of The Original Merger Agreement

The merger agreement as executed on December 12, 2010 (the "Original Merger Agreement" or "OMA") contemplated a reverse triangular merger between Compellent and a Dell acquisition subsidiary. The transaction valued Compellent's equity at approximately $960 million. The deal price of $27.75 per share represented a discount of 17.5% to Compellent's closing price of $33.65 on December 8, the day before the parties jointly announced the exclusivity agreement. It represented a discount of 3.3% to Compellent's closing price of $28.71 on December 10, the business day before the Original Merger Agreement was announced. It represented a premium of 134% to Compellent's closing price of $11.86 on August 13, the last business day before Dell announced its proposed acquisition of 3PAR.

Consistent with Dell's demands for deal protection in its indication of interest, the Original Merger Agreement contained an aggressive combination of defensive measures. M&A practitioners have developed a taxonomy of familiar provisions that frequently appear in merger agreements, such as no-shop clauses, information rights, matching rights, and termination fees. Embracing these generic terms, the defendants have listed the types of provisions found in the Original Merger Agreement and labeled them "customary." Compellent Answering Br. at 24. But to identify defensive measures by type without referring to their details ignores the spectrum of forms in which deal protections can appear. Taking an obvious example, to say that a merger agreement contains a termination fee is an unhelpful banality. Anyone evaluating the transaction would want to know the size of the fee in absolute terms and as a percentage of equity

value and enterprise value, the events that could trigger the fee, the amount of expense reimbursement, whether there was a stock option lock-up and its terms, and any other deal-specific attributes. It is equally critical to understand the terms and operation of a no-shop clause, information rights, and matching rights.

In this case, the Original Merger Agreement combined aggressive variants of each familiar provision with additional pro-buyer twists. Because the value of the settlement turns on changes to these provisions, I will review them in some detail, reiterating that my task is not to rule on their validity or speculate on whether their adoption might have constituted a breach of duty. The discussion centers on the provisions targeted by the plaintiffs; any failure to mention other provisions should not be taken as a silent blessing.

1. The No-Shop Clause

Section 4.3 of the Original Merger Agreement provided broadly that Compellent could not solicit, provide information to, or engage in discussions with any potential bidder other than Dell. As is customary, the provision then created an exception by identifying circumstances under which Compellent could respond to a competing bidder. In the buyer-friendly Original Merger Agreement, the prohibition was expansive and unqualified, while the exception was cabined and constrained.

Section 4.3(a) of the Original Merger Agreement established the general prohibition on Compellent interacting with actual or potential bidders. It stated:

> The Company shall not and shall ensure that the other Acquired Corporations do not, and the Company shall not permit any Person that is a Representative of any of the Acquired Corporations to, directly or indirectly:

> (i) solicit, initiate or knowingly encourage, assist, induce or facilitate the making, submission or announcement of any Acquisition Proposal or Acquisition Inquiry (including by approving any transaction, or approving any Person becoming an "interested stockholder," for purposes of Section 203 of the DGCL) or take any other action that could reasonably be expected to lead to an Acquisition Proposal or Acquisition Inquiry;
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> (ii) furnish or otherwise provide access to any information regarding any of the Acquired Corporations to any Person in connection with or in response to an Acquisition Proposal or Acquisition Inquiry;
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> (iii) engage in discussions or negotiations with any Person with respect to any Acquisition Proposal or Acquisition Inquiry; or
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> (iv) resolve or publicly propose to take any of the actions referred to in clause "(i)," "(ii)" or "(iii)" of this sentence.

OMA § 4.3(a) (the "No-Shop Clause") (formatting added).

Several buyer-friendly features jump out. First, subsection 4.3(a) imposed strict contractual liability on Compellent for any breach, direct or indirect, including by any representative, without limitation as to scope or qualification as to knowledge. *See* Model Agreement at 153. More balanced versions limit the universe of covered persons, include a knowledge qualifier (*e.g.* "knowingly solicit"), require that the target "not authorize or permit" covered persons to engage in prohibited activities, or call for the target to "use its best efforts and act in good faith to cause" covered persons not to engage in prohibited activities. *See, e.g.*, Lou R. Kling & Eileen T. Nugent, 2 *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* § 13.05[1] at 13-28-29 (2001). In addition, the restrictions found in subsection (i) extended not only to Acquisition Proposals (defined broadly to include any transaction involving 15% of Compellent's stock or assets), but also to Acquisition Inquiries, defined as any "inquiry, indication of

interest or request for non-public information (other than an inquiry, indication of interest or request for non-public information made or submitted by Parent or any of its Subsidiaries) that could reasonably be expected to lead to an Acquisition Proposal." *See* Model Agreement at 152. Target-friendly variants apply more narrowly, for example by setting a higher percentage threshold or by limiting coverage to actual offers or proposals.

Section 4.3(b) of the Original Merger Agreement then carved out the exception to the general prohibition imposed in Section 4.3(a). In its entirety, Section 4.3(b) stated:

> Notwithstanding anything to the contrary contained in Section 4.3(a), prior to the adoption of this Agreement by the Requisite Stockholder Approval, the Company may furnish non-public information regarding the Acquired Corporations to, and may enter into discussions or negotiations with, any Person in response to an unsolicited, bona fide, written Acquisition Proposal that is submitted to the Company by such Person (and not withdrawn) if:
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> (i) neither any Acquired Corporation nor any Representative of any Acquired Corporation shall have breached or taken any action inconsistent with any of the provisions set forth in this Section 4.3, in Section 5.2[2] or in the Confidentiality Agreement;
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> (ii) the board of directors of the Company determines in good faith, after having consulted with an independent financial advisor of nationally recognized reputation and the Company's outside legal counsel, that such Acquisition Proposal constitutes or is reasonably likely to result in a Superior Offer;
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> (iii) the board of directors of the Company determines in good faith, after having consulted with the Company's outside legal counsel, that the failure to take such action would constitute a breach by the Company's

[2] Section 5.2 addressed Compellent's obligation to hold a special meeting of stockholders and the Board's obligation to recommend in favor of the merger. *See* OMA § 5.2. This section is discussed in greater detail below. *See infra* Part I.F.3.

board of directors of its fiduciary obligations to the Company's stockholders under applicable Delaware law;

(iv) at least two business days prior to furnishing any such non-public information to, or entering into discussions or negotiations with, such Person, the Company

(A) gives Parent written notice of the identity of such Person and of the Company's intention to furnish non-public information to, or enter into discussions or negotiations with, such Person,

(B) receives from such Person, and delivers to Parent a copy of, an executed confidentiality agreement (which the Company will be permitted to negotiate with such Person during the two business-day notice period referred to in this clause "(ii)") containing

(1) customary limitations on the use and disclosure of all non-public written and oral information furnished to such Person by or on behalf of the Acquired Corporations,

(2) a provision (that the Company determines in good faith to be customary in scope) prohibiting the solicitation by such Person and its Affiliates and their respective Representatives of employees of any of the Acquired Corporations for a period of 275 days, subject to customary exceptions,

(3) a customary "standstill" provision (that does not contain any "sunset" or "fall-away" clause or any other clause or provision pursuant to which such "standstill" provision or any portion thereof may be suspended or may terminate prior to the expiration of its full term) prohibiting such Person and its Affiliates and their respective Representatives (to the extent such Representatives are acting on behalf of or at the direction of such Person or any of its Affiliates), for a period of 275 days, from acquiring voting securities of the Company, making Acquisition Proposals to or with respect to any Acquired Corporation, commencing a tender or exchange offer with respect to any voting securities of the Company, initiating or participating in a proxy contest or consent solicitation relating to the Company or assisting, proposing or knowingly facilitating any of the foregoing, and

> (4) other provisions no less favorable to the Company than the provisions of the Confidentiality Agreement as in effect immediately prior to the execution of this Agreement; and
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> (v) at least 24 hours prior to furnishing any non-public information to such Person, the Company furnishes such non-public information to Parent (to the extent such non-public information has not been previously furnished by the Company to Parent).

OMA § 4.3(b) (the "Superior Offer Out") (formatting added).

The Superior Offer Out had several buyer-friendly aspects. First, subsection (i) required strict compliance with Sections 4.2 and 5.3 without any qualifiers based on materiality, intent, or a relationship between the breach and the party making the offer. *See* Model Agreement at 159. A more balanced provision would include these types of qualifiers, most notably by requiring some connection between the breach of the no-solicitation requirement and the Superior Offer. Second, subsection (iii) framed the necessary determination by the Board as whether the failure to take action "would constitute a breach . . . of its fiduciary obligations." Examples of more flexible formulations include whether the failure to act "could constitute a breach," "would be reasonably likely to constitute a breach" or "would be inconsistent with the fiduciary duties of the Company's board of directors." *See* Model Agreement at 160-61. Third, even if Compellent complied with all other requirements, subsection (iv) required two days advance notification to Dell before Compellent could enter into discussions, and subsection (v) required 24-hours advance notice to Dell of all information provided to the second bidder. The Superior Offer Out literally required the Board to knowingly breach its fiduciary duties, albeit for a limited period of time, by first requiring the Board to

determine that failing to act constituted a breach of its fiduciary obligations and then forbidding the Board to act until subsequent contractual conditions were met. This last problem could have been avoided by using a pure Superior Offer clause, rather than a hybrid with a Superior Offer trigger and a fiduciary duty determination. *See* John F. Johnston, *A Rubeophobic Delaware Counsel Marks Up Fiduciary-Out Forms: Part II*, 14 Insights: The Corp. & Sec. L. Advisor, No. 2, 16, 18-19 (Feb. 2000) [hereinafter Rubeophobe Part II].

Under Section 4.3(b)(iv), Compellent could not provide any information unless a potential bidder agreed to a 275 day standstill without any exceptions, sunsets, or fall-away provisions. Section 4.3(e) then imposed contractual limitations on Compellent's ability to waive any standstill. Section 4.3(e) provided:

> The Company (i) agrees that it will not, and shall ensure that each other Acquired Corporation will not, release or permit the release of any Person from, or amend, waive or permit the amendment or waiver of any provision of, any confidentiality, non-solicitation, no-hire, "standstill" or similar agreement or provision to which any of the Acquired Corporations is or becomes a party or under which any of the Acquired Corporations has or acquires any rights (including the "standstill" provision contained in any confidentiality agreement entered into by the Company pursuant to clause "(iv)(B)" of Section 4.3(b)), and
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> (ii) will use its commercially reasonable efforts to enforce or cause to be enforced each such agreement or provision at the request of Parent;
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> *provided*, *however*, that the Company may release a Person from, or amend or waive any provision of, any such "standstill" agreement or provision if
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> > (1) neither any Acquired Corporation nor any Representative of any Acquired Corporation shall have breached or taken any action inconsistent with any of the provisions set forth in Section 4.3, in Section 5.2 or in the Confidentiality Agreement,

(2) the Company's board of directors determines in good faith, after having consulted with an independent financial advisor of nationally recognized reputation and the Company's outside legal counsel, that the failure to release such Person from such agreement or provision, the failure to amend such agreement or the failure to waive such provision would constitute a breach by the Company's board of directors of its fiduciary obligations to the Company's stockholders under applicable Delaware law, and

(3) the Company provides Parent with written notice of the Company's intent to take such action at least four business days before taking such action.

OMA § 4.3(e) (formatting added). As with the Superior Offer Out, the Board's ability to waive a standstill was conditioned on strict contractual compliance with the No Shop Clause, without any qualifiers based on materiality, intent, or a relationship between the breach and Superior Offer. Once again, the Board had to determine that failing to act "would constitute a breach . . . of its fiduciary obligations," rather than a more flexible standard. And again, even if the Board determined that not acting constituted a breach of fiduciary duty, the Board could not act for at least four business days.

2. The Information Rights

If the Board satisfied the Superior Offer Out, then Section 4.3(c) granted Dell expansive information rights that required Compellent to keep Dell updated in real time on all discussions with competing bidders. Section 4.3(c) provided:

> If the Company, any other Acquired Corporation or any Representative of any Acquired Corporation receives an Acquisition Proposal or Acquisition Inquiry, then the Company shall promptly (and in no event later than 24 hours after receipt of such Acquisition Proposal or Acquisition Inquiry)
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> (i) advise Parent in writing of such Acquisition Proposal or Acquisition Inquiry (including the identity of the Person making or

> submitting such Acquisition Proposal or Acquisition Inquiry and the material terms and conditions thereof) and
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> (ii) provide Parent with copies of all documents and written communications (and written summaries of all oral communications) received by any Acquired Corporation or any Representative of any Acquired Corporation setting forth the terms and conditions of, or otherwise relating to, such Acquisition Proposal or Acquisition Inquiry.
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> The Company shall keep Parent reasonably informed with respect to the status of any such Acquisition Proposal or Acquisition Inquiry and any modification or proposed modification thereto, and shall promptly (and in no event later than 24 hours after transmittal or receipt of any correspondence or communication) provide Parent with a copy of any correspondence or written communication (and a written summary of any oral communication) between (A) any Acquired Corporation or any Representative of any Acquired Corporation and (B) the Person that made or submitted such Acquisition Proposal or Acquisition Inquiry, or any Representative of such Person.

OMA § 4.3(c) (the "Information Rights") (formatting added). Drawing an analogy to Texas Hold 'Em, the plaintiffs observe that this provision enabled Dell to see every card dealt to every other player.

3. The Recommendation Provision

As authorized by Section 146 of the General Corporation Law, Section 5.2(e) of the Original Merger Agreement required Compellent to submit the transaction for approval at a special meeting of Compellent's stockholders, regardless of whether the Board maintained its recommendation in favor of the transaction. Dell obtained support agreements from holders of 27% of Compellent's outstanding shares.

A force-the-vote provision elevates the importance of a board's ability to change its recommendation. *See* John F. Johnston, *Recent Amendments to the Merger Sections of the DGCL Will Eliminate Some—But Not All—Fiduciary Out Negotiation and Drafting*

Issues, 1 Mergers & Acqs. L. Rep. (BNA) No. 20, 777, 781-82 (July 20, 1998). "The carve-out from the target board's obligation to recommend the agreement to the target's stockholders raises issues that are fundamentally different from those raised by the no-shop and termination carve-outs because it implicates the duties of the target directors to communicate truthfully with its stockholders." Rubeophobe Part II at 19; *see also* Steven M. Haas, *Limiting Change of Merger Recommendations to "Intervening Events*," 13 No. 8 M&A Law. 15 (Sept. 2009); R. Franklin Balotti & A. Gilchrist Sparks, III, *Deal-Protection Measures and the Merger Recommendation*, 94 Nw. U. L. Rev. 467 (2002); John F. Johnston, *A Rubeophobic Delaware Counsel Marks Up Fiduciary-Out Forms: Part I*, 13 Insights: The Corp. & Sec. L. Advisor, No. 10 (Nov. 1999).

Consistent with the Original Merger Agreement's pro-acquirer stance, Section 5.2 cabined the Board's ability to change its recommendation. So extensive and complex were the contractual hurdles that they merit quotation in full:

> (b) Subject to Section 5.2(d), (i) the Proxy Statement shall include a statement to the effect that the board of directors of the Company (A) has unanimously determined and believes that the Merger is advisable and fair to and in the best interests of the Company and its stockholders, (ii) has unanimously approved and adopted this Agreement and unanimously approved the Contemplated Transactions, including the Merger, in accordance with the requirements of the DGCL, and (iii) unanimously recommends that the Company's stockholders vote to adopt this Agreement at the Company Stockholders' Meeting. (The unanimous determination that the Merger is advisable and fair to and in the best interests of the Company and its stockholders and the unanimous recommendation of the Company's board of directors that the Company's stockholders vote to adopt this Agreement are collectively referred to as the "Company Board Recommendation.") The Company shall use commercially reasonable efforts to ensure that the Proxy Statement includes the opinions of the financial advisors referred to in Section 2.29.

(c) Neither the board of directors of the Company nor any committee thereof shall:

(i) except as provided in Section 5.2(d), withdraw or modify in a manner adverse to Parent or Merger Sub the Company Board Recommendation (*it being understood and agreed that the Company Board Recommendation shall be deemed to have been modified by the board of directors of the Company in a manner adverse to Parent and Merger Sub if the Company Board Recommendation shall no longer be unanimous* (except for any vote that is not unanimous solely because a director is not present for the vote due to incapacity or because he is not reasonably available to attend a meeting), including as a result of actions of individual members of the board of directors of the Company indicating that the board of directors of the Company does not unanimously support the Merger or does not unanimously believe that the Merger is advisable and fair to and in the best interests of the Company and its stockholders);

(ii) recommend the approval, acceptance or adoption of, or approve, endorse, accept or adopt, any Acquisition Proposal;

(iii) approve or recommend, or cause or permit any Acquired Corporation to execute or enter into, any letter of intent, memorandum of understanding, agreement in principle, merger agreement, acquisition agreement, option agreement, joint venture agreement, partnership agreement or other similar document or Contract constituting or relating directly or indirectly to, or that contemplates or is intended or could reasonably be expected to result directly or indirectly in, an Acquisition Transaction, other than a confidentiality agreement referred to in clause "(iv)(B)" of Section 4.3(b); or

(iv) resolve, agree or publicly propose to, or permit any Acquired Corporation or any Representative of any Acquired Corporation to agree or publicly propose to, take any of the actions referred to in this Section 5.2(c).

(d) Notwithstanding anything to the contrary contained in clause "(i)" of Section 5.2(c), at any time prior to the adoption of this Agreement by the Requisite Stockholder Approval, the board of directors of the Company may withdraw or modify the Company Board Recommendation, refuse to reaffirm the Company Board Recommendation, refuse to publicly state that the Merger and this Agreement are in the best interests of the Company's stockholders, refuse to issue a press release announcing its opposition to an

Acquisition Proposal or recommend a Superior Proposal (each of the foregoing being referred to as a "Recommendation Change"), but only:

(i) if: (A) an unsolicited, bona fide, written Acquisition Proposal is made to the Company and is not withdrawn;

(B) such Acquisition Proposal did not result directly or indirectly from a breach of or any action inconsistent with any of the provisions set forth in Section 4.3, in Section 5.2 or in the Confidentiality Agreement or from a breach of any "standstill" or similar agreement or provision under which any Acquired Corporation has or had any rights;

(C) the Company's board of directors determines in good faith, after having consulted with an independent financial advisor of nationally recognized reputation and the Company's outside legal counsel, that such Acquisition Proposal constitutes a Superior Offer;

(D) the Company's board of directors determines in good faith, after having consulted with the Company's outside legal counsel, that, in light of such Superior Offer, the failure to make a Recommendation Change would constitute a breach by the Company's board of directors of its fiduciary obligations to the Company's stockholders under applicable Delaware law;

(E) at least four business days prior to making a Recommendation Change pursuant to this clause "(i)," the Company's board of directors delivers to Parent a written notice (a "Recommendation Change Notice")

(1) stating that the Company has received a Superior Offer that did not result directly or indirectly from a breach of or any action inconsistent with any of the provisions set forth in Section 4.3, in Section 5.2 or in the Confidentiality Agreement or from a breach of any "standstill" or similar agreement or provision under which any Acquired Corporation has any rights,

(2) stating the Company's board of directors' intention to make a Recommendation Change as a result of such Superior Offer and describing the nature of such intended Recommendation Change,

(3) specifying the material terms and conditions of such Superior Offer, including the identity of the Person making such Superior Offer, and

(4) attaching copies of the most current and complete draft of any Contract relating to such Superior Offer and all other documents and written communications (and written summaries of all oral communications) relating to such Superior Offer;

(F) throughout the period between the delivery of such Recommendation Change Notice and any Recommendation Change, the Company engages (to the extent requested by Parent) in good faith negotiations with Parent to amend this Agreement; and

(G) at the time of the Recommendation Change, a failure to make such Recommendation Change would constitute a breach by the Company's board of directors of its fiduciary obligations to the Company's stockholders under applicable Delaware law in light of such Superior Offer (after taking into account any changes to the terms of this Agreement proposed by Parent as a result of the negotiations required by clause "(F)" above or otherwise); or

(ii) if: (A) there shall arise after the date of this Agreement any change in circumstances affecting the Acquired Corporations that does not relate to any Acquisition Proposal and that leads the Company's board of directors to consider making a Recommendation Change (any such change in circumstances unrelated to an Acquisition Proposal being referred to as a "Change in Circumstances");

(B) the Company's board of directors determines in good faith, after having consulted with an independent financial advisor of nationally recognized reputation and the Company's outside legal counsel, that, in light of such Change in Circumstances, the failure to make a Recommendation Change would constitute a breach by the Company's board of directors of its fiduciary obligations to the Company's stockholders under applicable Delaware law;

(C) no less than four business days prior making a Recommendation Change pursuant to this clause "(ii)," the Company's board of directors delivers to Parent a written notice

(1) stating that a Change in Circumstances has arisen,

(2) stating that it intends to make a Recommendation Change in light of such Change in Circumstances and describing the nature of such intended Recommendation Change, and

(3) containing a reasonably detailed description of such Change in Circumstances;

(D) throughout the period between the delivery of such notice and such Recommendation Change, the Company engages (to the extent requested by Parent) in good faith negotiations with Parent to amend this Agreement; and

(E) at the time of such Recommendation Change, the failure to make such Recommendation Change would constitute a breach by the Company's board of directors of its fiduciary obligations to the Company's stockholders under applicable Delaware law in light of such Change in Circumstances (after taking into account any changes to the terms of this Agreement proposed by Parent as a result of the negotiations required by clause "(D)" above or otherwise).

For purposes of clause "(i)" of the first sentence of this Section 5.2(d), *any change in the form or amount of the consideration payable in connection with a Superior Offer, and any other material change to any of the terms of a Superior Offer, will be deemed to be a new Superior Offer (or other Acquisition Proposal), requiring a new Recommendation Change Notice and a new advance notice period; provided, however*, that the advance notice period applicable to any such change to a Superior Offer pursuant to clause "(i)(E)" of the first sentence of this Section 5.2(d) shall be three business days rather than four business days.

The Company agrees to keep confidential, and not to disclose to the public or to any Person, any and all information regarding any negotiations that take place pursuant to clause "(i)(F)" or clause "(ii)(D)" of the first sentence of this Section 5.2(d) (including the existence and terms of any proposal made on behalf of Parent or the Company during such negotiations), except to the extent such disclosure is required by applicable law or the rules and regulations of any applicable U.S. Governmental Body to which the Company is subject or submits.

The Company shall ensure that any Recommendation Change: (x) does not change or otherwise affect the approval of this Agreement or the Support Agreements by the Company's board of directors or any other

> approval of the Company's board of directors; and (y) does not have the effect of causing any corporate takeover statute or other similar statute (including any "moratorium," "control share acquisition," "business combination" or "fair price" statute) of the State of Delaware or any other state to be applicable to this Agreement, any of the Support Agreements, the Merger or any of the other Contemplated Transactions.
>
> (e) The Company's obligation to call, give notice of and hold the Company Stockholders' Meeting in accordance with Section 5.2(a) shall not be limited or otherwise affected by the making, commencement, disclosure, announcement or submission of any Superior Offer or other Acquisition Proposal, by any Change in Circumstances or by any Recommendation Change. Without limiting the generality of the foregoing, the Company agrees that (i) unless this Agreement is terminated in accordance with Section 8.1, the Company shall not submit any Acquisition Proposal to a vote of its stockholders and (ii) the Company shall not (without Parent's prior written consent) adjourn, postpone or cancel (or propose to adjourn, postpone or cancel) the Company Stockholders' Meeting, *except to the extent required to obtain the Requisite Stockholder Approval.*

OMA § 5.2 (the "Recommendation Provision") (emphasis and formatting added).

This aggressive provision raises a host of questions. For example, if stockholders are entitled to a current, candid, and accurate board recommendation, can a merger agreement contractually prevent the board from updating its recommendation for "at least four business days" and potentially longer given procedural hurdles and a requirement that "any change in the form or amount of the consideration payable in connection with a Superior Offer, and any other material change to any of the terms of a Superior Offer, will be deemed to be a new Superior Offer (or other Acquisition Proposal), requiring a new Recommendation Change Notice and a new advance notice period"? *See id.* § 5.2(d). If a company's constitutive documents contemplate that directors take action by a majority of those present at a meeting where a quorum exists, can the board nevertheless agree contractually that "the Company Board Recommendation shall be deemed to have

been modified by the board of directors of the Company in a manner adverse to Parent and Merger Sub if the Company Board Recommendation shall no longer be unanimous"? *See id.* § 5.2(c)(i). If the board determines that its fiduciary duties require the postponement or adjournment of the special meeting so that stockholders can receive and digest material information or a change in recommendation, can the company nevertheless be bound contractually not to "(without Parent's prior written consent) adjourn, postpone or cancel (or propose to adjourn, postpone or cancel) the Company Stockholders' Meeting, except to the extent required to obtain the Requisite Stockholder Approval"? I need not attempt to answer these or other questions that the Recommendation Provision raises. For now, it is sufficient to recognize that the provision added novel and decidedly acquirer-friendly features to what otherwise resembled a pro-buyer first draft to which a target corporation would have manifold and legitimate objections. *See* Model Agreement at 169-89.

4. The Rights Plan Provision

Section 4.2(e) of the Original Merger Agreement required Compellent to adopt a stockholder rights plan with a 15% trigger (the "Rights Plan"). The provision stated:

> Promptly (but no later than three days) after the date of this Agreement, the Company shall adopt a stockholder rights plan in the form previously approved by Parent (and otherwise satisfactory in form and substance to Parent). The Company shall not, without Parent's prior written consent, amend or waive any provision of such rights plan or redeem any of the rights issued under such rights plan; *provided*, *however*, that the board of directors of the Company may amend or waive any provision of such rights plan or redeem such rights if:
>
> (i) (A) neither any Acquired Corporation nor any Representative of any Acquired Corporation shall have breached or taken any action inconsistent

with any of the provisions set forth in Section 4.3, in Section 5.2 or in the Confidentiality Agreement,

(B) the Company's board of directors determines in good faith, after having consulted with the Company's outside legal counsel, that the failure to amend such rights plan, waive such provision or redeem such rights would constitute a breach by the Company's board of directors of its fiduciary obligations to the Company's stockholders under applicable Delaware law, and

(C) the Company provides Parent with written notice of the Company's intent to take such action at least four business days before taking such action; or

(ii) a court of competent jurisdiction orders the Company to take such action or issues an injunction mandating such action.

OMA § 4.2(e) (the "Rights Plan Provision") (formatting added).

The Rights Plan Provision in itself was novel and bidder-friendly. Merger agreements have not traditionally required that a target board adopt a rights plan. This is not to say that the provision was improper. When a target corporation already has a rights plan in place, it is not uncommon for a merger agreement to include a covenant providing that the rights plan will remain in place except for any amendments required to facilitate the acquisition. *See, e.g.*, *In re Orchid Cellmark Inc. S'holder Litig.*, 2011 WL 1938253, at *7 (Del. Ch. May 12, 2011); Model Agreement at 205-06. In addition, there have been occasions when a target board could have used a rights plan to stop a creeping takeover and obtain greater value for stockholders. *See, e.g.*, *NACCO Indus. v. Applica, Inc.*, 997 A.2d 1, 31 (Del. Ch. 2009); *La. Mun. Police Empls.' Ret. Sys. v. Fertita*, 2009 WL 2263406, at *8 (Del. Ch. July 28, 2009). But regardless of the Rights Plan's potentially beneficial use, the Rights Plan Provision represented another pro-buyer

innovation in the Original Merger Agreement.[3] The provision also was buyer-friendly in now-familiar ways, such as (i) the prohibition of any redemption unless there had been no breach whatsoever of the No-Shop Clause or the Recommendation Provision, and (ii) the requirement that the Board wait four days to act even after determining that action was required to avoid a breach of fiduciary duty.

5. The Termination Fee

The Original Merger Agreement gave Dell the right to terminate and require Compellent to pay a $37 million termination fee plus $960,000 in expense reimbursement under a variety of circumstances, most notably the occurrence of any "Triggering Event." *See* OMA §§ 8.1(e) & 8.3(d). A more apt label would have been "Hair-Trigger Event," because a "Triggering Event" was deemed to have occurred if

> (a) the board of directors of the Company or any committee thereof shall have made a Recommendation Change;
>
> (b) the board of directors of the Company or any committee thereof, or any Acquired Corporation or Representative of any Acquired Corporation, shall have taken, authorized or publicly proposed any of the actions referred to in Section 5.2(c) of the Agreement;

[3] *See* Latham & Watkins LLP, *Adoption of Poison Pill to Deter Activist Investor Opposition to Negotiated Mergers*, M&A Commentary at 1 (Feb. 2011), *available at* http://www.lw.com/upload/pubContent/_pdf/pub3988_1.pdf (last visited December 9, 2011) ("The recently announced cash acquisition of Compellent Technologies by Dell included a novel feature. Compellent, which did not have a poison pill in effect, adopted a poison pill at the behest of Dell when it approved the merger agreement. The Compellent pill presumably was included by Dell in its 'deal protection' requests to deter hedge funds and other activist shareholders from accumulating a large position in Compellent stock as a base from which to run a 'vote no' campaign against shareholder approval of the acquisition agreement."); Model Agreement at 205 (noting that a pill "can help from the buyer's perspective to protect the transaction against interlopers").

(c) the Company shall have failed to include the Company Board Recommendation in the Proxy Statement;

(d) the board of directors of the Company shall have failed to reaffirm, unanimously (except for any vote that is not unanimous solely because a director is not present for the vote due to incapacity or because he is not reasonably available to attend a meeting) and publicly, the Company Board Recommendation within five business days after Parent requests that the Company Board Recommendation be reaffirmed publicly;

(d) [sic] a tender or exchange offer relating to shares of Company Common Stock shall have been commenced and the Company shall not have sent to its securityholders, within ten business days after the commencement of such tender or exchange offer, a statement disclosing that the Company recommends rejection of such tender or exchange offer and reaffirming the Company Board Recommendation;

(e) an Acquisition Proposal shall have been publicly announced, and the Company shall have failed to issue a press release that reaffirms unanimously the Company Board Recommendation within five business days after such Acquisition Proposal is publicly announced;

(f) any of the Acquired Corporations or any Representative of any of the Acquired Corporations shall have breached or taken any action inconsistent with any of the provisions set forth in Section 4.3 of the Agreement; or

(g) the Company

(i) fails to adopt the rights plan referred to in Section 4.2(e) of the Agreement, amends such rights plan, waives any provision of such rights plan or redeems any of the rights issued under such rights plan,

(ii) delivers a notice to Parent pursuant to clause “(i)(C)” of the proviso to the second sentence of Section 4.2(e) of the Agreement [*viz.*, informing Dell that the Board was redeeming the rights plan],

(iii) releases any Person from, or amends or waives any provision of, any “standstill” agreement or provision (including the “standstill” provision contained in any confidentiality agreement entered into pursuant to clause “(iv)(B)” of Section 4.3(b) of the Agreement), or

(iv) delivers a notice to Parent pursuant to clause “(3)” of the proviso to Section 4.3(e) of the Agreement [*viz.* informs Dell that the Board plans to release a party from a standstill].

OMA Ex. A at A-A-7 (formatting added).

Under these definitions, if a competing acquisition proposal emerged, the Board responded to it or changed its recommendation, and Dell terminated, then Compellent would have to pay Dell the termination fee plus expenses. The $37 million termination fee plus $960,000 in expenses represented approximately 3.95% of Compellent's equity value at the deal price. By contrast, under Section 8.3(b), if a competing acquisition proposal emerged, the Board took no action in response, and Dell terminated, then Compellent only would owe Dell expense reimbursement, giving the Board a strong financial inducement not to respond to a bid or provide stockholders with an updated recommendation. If the Board exercised its right to change its recommendation due to a "Change in Circumstances," *i.e.* other than because of a topping bid, the termination fee increased to $47 million. Together with the expense reimbursement, the toll for the Board to exercise its fiduciary responsibilities when faced with a "Change in Circumstances" was approximately 5% of Compellent's equity value at the deal price. In addition, the $37 million fee plus expenses would be due if (i) Compellent's stockholders failed to approve the transaction or it failed to close by June 30, 2011, (ii) a competing acquisition proposal was made prior to termination, and (iii) Compellent was acquired or agreed to be acquired by another company within 275 days after the date of the termination—a nine month tail.

G. This Litigation

On December 13, 2010, Compellent and Dell issued a joint press release announcing the merger. Two days later, the first putative class action challenging the

merger was filed in Minnesota state court, followed by a second on December 22. Between December 17 and December 29, six putative class action lawsuits were filed in this Court. The Delaware actions were consolidated and certified as a class action. The Minnesota plaintiffs responsibly agreed to intervene in this proceeding and work with the Delaware plaintiffs. In doing so, the plaintiffs' firms promoted the interests of the stockholder class by joining forces, avoiding unnecessarily duplicative and wasteful litigation in multiple forums, and moving forward in the jurisdiction whose law governed the dispute and where, if necessary, the parties could have obtained a prompt and definitive answer from the Delaware Supreme Court—the only decision-maker empowered under the United States Constitution to rule definitively on Delaware law.

On December 30, 2010, Compellent filed its preliminary proxy statement. On January 14, 2011, Compellent filed its definitive proxy statement. On January 17, the plaintiffs filed an amended complaint that fleshed out their breach of fiduciary duty claims in connection with the merger in greater detail and added disclosure claims.

During expedited discovery, the defendants and their advisors produced over 106,000 pages. Between January 13 and 29, 2011, the plaintiffs took six depositions: three Compellent directors, a representative from each of Compellent's financial advisors, and the lawyer who served as Dell's lead negotiator. As their expert on deal protections, the plaintiffs retained Professor Steven M. Davidoff from The Ohio State University Michael E. Moritz College of Law. Davidoff is more popularly known for his regular column on the *DealBook* website, where he writes as "The Deal Professor."

Settlement negotiations commenced in January 2011. Davidoff assisted in the negotiations and helped draft modifications to the Original Merger Agreement.

By agreement effective as of January 31, 2011, the plaintiffs settled the litigation in exchange for modifications to the deal protections and a half-dozen supplemental disclosures. Compellent and Dell executed an amended merger agreement (the "Amended Merger Agreement") to implement the changes.

First, the defendants modified the No-Shop Clause and Superior Offer Out. They removed the requirement that any competing bidder enter into a 275-day standstill agreement before receiving non-public information, and they loosened the language of the Superior Offer Out from a proposal that "constitutes or is reasonably likely to result in a Superior Offer" to a proposal that "constitutes, or could (after review by such Person of confidential information and after negotiations between such Person and the Company) reasonably be expected to lead to, a Superior Offer." The defendants also modified Compellent's previously unqualified contractual liability for breach by limiting exposure for any breach, regardless of materiality, to those committed by an officer, director or financial advisor. As to other representatives, Compellent only would be responsible for "action inconsistent in any material respect."

Second, the defendants moderated the Information Rights. Under the Original Merger Agreement, Compellent was required to provide Dell with (i) the identity of the potential competing bidder at least two business days before entering into discussions with the bidder and (ii) any non-public information at least twenty-four hours before providing it to a third-party bidder. The Amended Merger Agreement shortened both

time periods to "prior to." For an initial Acquisition Proposal or Acquisition Inquiry, the Amended Merger Agreement added a materiality qualifier so that Dell enjoyed a right to receive "written summaries of all material oral communications." The Amended Merger Agreement eliminated Dell's on-going right to receive copies of subsequent written communications and summaries of oral communications, substituting only a general requirement that the Company "keep Parent reasonably informed."

Third, the defendants changed the "Triggering Events" to eliminate "(d)," the failure of the Board to "reaffirm, unanimously . . . and publicly, the Company Board Recommendation within five business days after Parent requests." The Amended Merger Agreement also modified "(f)" to add a materiality qualifier, such that a Triggering Event would occur only if the No-Shop Provision was breached "in any material respect."

Fourth, the defendants lowered the termination fee from $37 million to $31 million. The percentage of equity value fell from approximately 3.85% to 3.23%.

Fifth, the defendants rescinded the Rights Plan. This was exceptional relief. Since 1988, no Delaware court has forced a public company to redeem its rights plan or invalidated a public company's rights plan in its entirety.

Finally, the defendants issued supplemental disclosures on a Form 8-K (the "Disclosure Supplement") and delayed Compellent's meeting of stockholders for at least twenty-one days. The Disclosure Supplement elaborated on the events leading up to the Original Merger Agreement and the fees historically received by Morgan Stanley and Blackstone for providing services to Compellent and Dell.

H. The Merger Closes.

Despite the reduced defensive measures and the additional twenty-one days, no competing bidder emerged. On February 22, 2011, Compellent's stockholders approved the Amended Merger Agreement with more than 83% of the issued and outstanding shares voting in favor. The transaction closed that day.

II. LEGAL ANALYSIS

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

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

Id. (citing *Sugarland*, 420 A.2d at 149). "The last two elements are often considered the most important." *Id.* In setting fee awards, the Court seeks to reward plaintiffs' counsel appropriately for bringing meritorious claims while avoiding socially unwholesome windfalls. *See In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *20 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010) (TABLE).

A. The Benefit Conferred By Modifying The Deal Protection Measures

The plaintiffs achieved a significant benefit by loosening the aggressive deal protections in the Original Merger Agreement. To reiterate, it is not my task to determine whether the original deal protections, individually or collectively, would have passed muster under enhanced scrutiny. The parties settled, mooting that issue. The relevant question is rather the value of the changes to Compellent's stockholders.

This question deserves attention, because modifying deal protections has emerged as a handy and frequently employed method for settling merger litigation.

> [Litigants] have perfected this technique as a basis for settling cases challenging third-party deals, where a transaction is typically announced after a merger agreement has been executed. A classic example of a transactional tweak is to lower the termination fee, which is a contingent aspect of a transaction that only becomes operative in the event of a topping bid. Lowering the termination fee and supplemental disclosures provide a particularly convenient way to settle litigation over a deal that already has been exposed to the market for some time, by which point it is relatively clear to the parties that an interloper is unlikely to appear.

In re Revlon, Inc. S'holders Litig., 990 A.2d 940, 947 (Del. Ch. 2010).

Because parties to a settlement frequently negotiate an attorneys' fee award that the defendants will pay in conjunction with the settlement, this Court historically has not been required to develop a framework for evaluating the benefits from changes in deal protections. There is a "natural judicial tendency when reviewing an uncontested fee application that will be paid by the defendants (rather than as a deduction from a common fund otherwise distributable to the class) to defer if the amount falls within a plausible range." *In re Sauer–Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *18 (Del. Ch. Apr. 29, 2011); *see Olson v. ev3, Inc.*, 2011 WL 704409, at *16 (Del. Ch. Feb. 21, 2011)

(noting "a natural element of judicial deference to a negotiated fee that fell within (albeit at the upper end of) a range of comparable awards"). The broad discretion that this Court enjoys when awarding attorneys' fees under the tractable multi-factor *Sugarland* test further alleviates the impetus for inquiry.

The benefit generated from modifying deal protections is easy to conceive but difficult to quantify. The benefit is an increased opportunity for stockholders to receive greater value. To take a simple example, a settlement that reduces a termination fee by $10 million generates a benefit in that more of the consideration from a topping bidder will go to the stockholders rather than the original acquirer. A court can use the full amount of the reduction because a target board would breach its fiduciary duties by approving a termination fee so large as to preclude any topping bid. The original transaction parties therefore cannot reasonably dispute that a topping bidder should be willing to pay at least the value implied by the deal price plus the original termination fee. *See In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *15 (Del. Ch. June 27, 2011) ("the $120 million termination fee should serve as a lower bound for the incremental value of a topping bid").

But just as it is easy to see how the target stockholders could receive an additional $10 million in consideration, it is equally easy to see that the value of the modification does not equal the face amount of the reduction. The modification only pays off if there is a topping bid, giving the modification a contingent value at the time of the settlement equal to $10 million discounted by the likelihood that a topping bid will emerge. If the likelihood of a topping bid were approximately 7-10%, then the benefit measured at the

time of settlement would not be $10 million, but $700,000 to $1 million. And this figure in turn would not represent the amount of the attorneys' fee award, but rather the benefit that could then be used under a percentage-of-the-benefit analysis. If a plaintiff's efforts warranted approximately 25% of the benefit, then the fee for the reduction would range from $175,000 to $250,000.

Modifications to other types of defensive measures can be evaluated similarly. Loosening a no-shop clause, weakening information rights or matching rights, and ameliorating restrictions on a board changing its recommendation should, all else equal, increase the chance of a topping bid. The resulting benefits can be estimated as a function of the incremental amount that stockholders would receive if a higher bid emerged times the probability of the higher bid.[4]

The incremental value that stockholders receive includes both the direct benefit from a reduction in the termination fee or other hard costs, as well the additional, more contingent and causally attenuated value from price increases generated by the topping bid and further bidding. The probability of receiving a higher bid must take into account that reducing the barriers makes a bid marginally more likely. The calculation consequently depends on the increased likelihood of a topping bid under the revised defensive measures. Because more extreme defensive measures should have a more

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[4] *See Del Monte*, 2011 WL 2535256, at *14; *cf.* G. William Schwert, *Markup Pricing in Mergers and Acquisitions*, 41 J. Fin. Econ. 153, 182-84 (1996) ("One interpretation of the pre-bid runup is that it is the change in the probability of a takeover times the premium that will be paid if a takeover occurs: $Runup_i = \Delta Prob_i * Premium_i$").

powerful dampening effect, settlements that ameliorate stronger forms of deal protection should warrant larger fees.

Importantly, under this approach, the size of the benefit is not affected by whether or not a topping bid actually emerges. The revised deal protection provisions "provide[] the opportunity for a topping bid, and this benefit exist[s] whether or not a competing bidder materialized." *Del Monte*, 2011 WL 2535256, at *14.

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

Id. Modifications to deal protections operate similarly, but rather than protecting against the risk of loss, they create a greater opportunity for gain. "As with an insurance policy, that opportunity was conferred whether or not a bid actually emerged. As with the premium charged for an insurance policy, the value of the benefit does not depend on an actual topping bid." *Id.* Assessing the benefits of the settlement as of the time it was agreed to, rather than in light of after-the-fact events knowable only through hindsight, comports with how Delaware courts evaluate decisions made by fiduciaries.[5]

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[5] *See In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 830 (Del. Ch. 2011) ("Time-bound mortals cannot foresee the future. The test [for evaluating a fiduciary breach under enhanced scrutiny] therefore cannot be whether, with hindsight, the directors actually achieved the best price. 'Rather, the duty can only be to try in good faith, in such a setting, to get the best available transaction for the shareholders.

In my view, estimating the benefit of reduced defensive measures in this fashion helps anchor this Court's discretionary fee determinations to something more objective than the boldness of the plaintiffs' ask and the vigor or passivity of the defendants' response. The calculation does not aspire to mathematical exactitude. To predict accurately how alternative takeover scenarios might play out is impossible. *See* Schwert, *supra* note 4, at 185-87 (explaining why market participants cannot accurately forecast takeover premiums).[6] The calculation only serves to help establish an order of magnitude

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Directors are not insurers.'") (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 1988 WL 53322, at *16 n.17 (Del. Ch. May 19, 1988) (Allen, C.)); *Cox Radio*, 2010 WL 1806616, *14 ("The Appraisal Objectors, on the other hand, base their criticism of the price as unfair on the October 2009 stock prices of companies comparable to Cox Radio—data that post-dates the MOU by over five months. While hindsight is generally 20/20, it cannot be used to second guess the business judgment of Delaware directors; thus, this data is irrelevant in determining whether the price that Cox Radio's shareholders received was fair."); *In re Fort Howard Corp. S'holders Litig.*, 1988 WL 83147, at *14 (Del. Ch. Aug. 8, 1988) (Allen, C.) ("*Revlon* explicitly recognized that a disinterested board acting in good faith and in an informed manner may enter into lock-up agreements if the effect was to promote, not impede, shareholder interests. (That can only mean if the *intended* effect is such, for the validity of the agreement itself cannot be made to turn upon how accurately the board did foresee the future)."); *Thompson v. Enstar Corp.*, 1984 WL 8240, at *4 (Del. Ch. June 20, 1984) ("The test of whether the Enstar board acted reasonably on May 22nd, however, is not whether something happened on June 12th which, in hindsight, may show that the directors of Enstar should have delayed. The judgment of the directors must be measured on the facts as they existed on May 22, 1984.").

[6] Schwert's explanation of why the market cannot accurately forecast takeover premiums demonstrates why an event study would not find measurable incremental value from the increased likelihood of a topping bid until the actual announcement of the bid. *See* Schwert, *supra* note 4, at 185-87. I have therefore not relied on an event study of market returns surrounding the announcement of the settlement in this action, which the defendants used to argue that the value of the revised deal protections was immeasurable in a negative sense. A market which is semi-strong-form efficient cannot assess the value of reduced defensive measures because the intentions of unknown bidders remain private.

within which this Court can craft an appropriate award. Perhaps most important, it aids the Court in resisting overly generous awards by establishing a link between non-monetary benefits and one measure of economic value.

Although the resulting calculation is admittedly rough, scientific precision is not required when awarding fees. This Court has substantial discretion in the methods it uses and the evidence it relies upon. *See Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1166 (Del. 1989) (noting "the plenary power of the Court of Chancery over the allowance of [attorneys'] fees"). Delaware Supreme Court jurisprudence recognizes that this Court must make fee determinations on an incomplete record and without the benefit of a full trial.[7] Indeed, the Delaware Supreme Court has described this Court's task as one of

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Arbitrageurs and other market participants both over- and underprice the likelihood of deal closure or topping bids because they lack access to private information. In the current case, the market overpriced the anticipated value of the Dell's bid for Compellent until Dell and Compellent revealed their intentions on December 9. Regardless, in awarding fees under *Sugarland*, I am not constrained to follow the market's lead, and our law accords value to benefits other than the present value of projected future cash flows as reflected in market prices.

[7] *See Goodrich v. E.F. Hutton Gp., Inc.*, 681 A.2d 1039, 1042 (Del. 1996) (upholding grant of attorneys' fee award "supported by the record and the product of a logical deductive process"); *Tandycrafts*, 562 A.2d at 1165 ("[I]n the fixing of the amount of the award the Court of Chancery enjoys a level of discretion which this Court will disturb only upon a clear showing of abuse . . . ."); *Chavin v. Cope*, 243 A.2d 694, 699 (Del. 1968) ("When this court sits in review of the discretionary acts of trial judges, we will ordinarily not reverse if the trial judge has acted in good faith and with deliberate judgment. Discretionary rulings will not be disturbed unless it clearly appears that they were based on clearly unreasonable or capricious grounds.").

exercising its own "sound business judgment" when setting a fee award.[8] Business judgments inevitably are made using the limited information at hand.[9] Evaluating changes to deal protections necessarily involves healthy measures of discretion, but assessing a non-monetary benefit always does.

1. The Increased Likelihood Of A Topping Bid

The first input is the increased likelihood of a topping bid. To assist me in quantifying this variable, the plaintiffs provided an expert report from Professor Davidoff containing empirical evidence about other transactions. The defendants did not offer comparable expert testimony or argument, choosing to attack Davidoff's analysis. The defendants also argued that Davidoff's work lacks sufficient evidence of scientific

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[8] *See Chrysler Corp. v. Dann*, 223 A.2d 384, 389 (Del. 1966) ("The fees to be allowed are solely by reason of the benefit conferred . . . . Obviously, this benefit cannot be measured in dollars; yet, the Chancellor has held, and we have affirmed, that a longrange benefit has been conferred. This being so, plaintiffs are entitled to counsel fees measured by that benefit. This can be accomplished only by the exercise of sound business judgment. This, the Chancellor did . . . .").

[9] *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 126 (Del. Ch. 2009) ("Business decision-makers must operate in the real world, with imperfect information, limited resources, and an uncertain future."); *Citron v. Fairchild Camera & Instrument Corp.*, 1988 WL 53322, at *17 (Del. Ch. May 19, 1988) (Allen, C.), *aff'd*, 569 A.2d 53 (Del. 1989) ("[I]n the world of business (as elsewhere), persons are often (or always) required to act on less than perfect or complete information."); *Solash v. Telex Corp.*, 1988 WL 3587, at *8 (Del. Ch. Jan. 19, 1988) (Allen, C.) ("Information is not without costs of various kinds. Whether the benefit of additional information is worth the cost—in terms of delay and in terms of alternative uses of time and money—is always a question that may legitimately be addressed by persons charged with decision-making responsibility."); William T. Allen et. al., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem*, 96 Nw. U. L. Rev. 449, 451-52 (2002) (noting that business decisions are routinely made "in an environment of imperfect (that is, limited or incomplete) information").

reliability to be admitted under Delaware Rule of Evidence 702. Given the nature of the Court's role and the utility of Davidoff's data, I believe that this Court can consider Davidoff's report.

Davidoff estimated the increased likelihood of a topping bid by evaluating the strength of the suite of deal protections in both the Original Merger Agreement and the Amended Merger Agreement, then comparing them to suites found in comparable transactions. Davidoff used data from Factset MergerMetrics to identify signed deals in the Electronic Technology Sector with a transaction value over $100 million that were announced between January 1, 2008 and June 30, 2011. Eliminating still pending and duplicative transactions left a sample of sixty-two deals. Davidoff reviewed those transactions for the four most prominent deal protections found in the Original Merger Agreement and assigned to each transaction a number from zero to eight. He awarded two points for each of the following features: (i) a termination fee over 4%; (ii) strong information rights; (iii) a standstill requirement for competing bidders; and (iv) a poison pill at announcement. Davidoff defined strong information rights as those requiring all communications, written or oral, between the target and the competing bidder to be provided to the initial acquirer. Davidoff awarded one point for medium information rights, defined as requiring written terms and correspondence and *material* oral communications to be provided to the initial acquirer. He awarded zero points for weak information rights, defined as requiring only written terms and general status to be provided to the initial acquirer. Davidoff also awarded one point if a no-shop provision required a competing bidder to enter into a confidentiality agreement no less stringent

than the initial acquirer's, because confidentiality agreements routinely contain standstills.

Of the sixty-one deals other than the Dell-Compellent transaction, 52.46% (32) received two points or less, 40.98% (25) received greater than two points to five points, and only 6.56% (4) received six points or more. Davidoff calculated an incidence of topping bids for each category. He found that 9.38% of the deals in the lowest category were topped, 8.00% in the intermediate category were topped, and none of the deals in the highest category were topped.

The Original Merger Agreement received the full eight points. The Amended Merger Agreement received one point. Based on his analysis, Davidoff concluded that the changes to the Amended Merger Agreement increased the likelihood of a topping bid by approximately 9.38%.

I do not regard the Davidoff analysis as a statistically valid study, nor do I accept it as a precise calculation of the increased likelihood of a topping bid. Yet despite its flaws, Davidoff's analysis provides relevant and probative evidence of the directional trend of the changes in the Amended Merger Agreement and the potential for topping bids in the Electronic Technology Sector.

For purposes of this decision, I find more persuasive the four empirical studies published in financial journals that the defendants submitted to attack Davidoff's work.[10]

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[10] *See* Audra L. Boone & J. Harold Mulherin, *How Are Firms Sold?*, 62 J. Fin. 847 (2007); Randall A. Heron & Erik Lie, *On the Use of Poison Pills and Defensive Payouts by Takeover Targets*, 79 J. Bus. 1783 (2006); Schwert, *supra* note 4; Robert Comment &

Although not cited by the defendants for this specific purpose, each provides helpful data on the market-wide incidence of topping bids. As previously noted, my use of the studies for purposes of this opinion should not be construed as establishing definitive guidance going forward. They simply comprise the record the parties created for this motion.

One study of 1,814 successful and unsuccessful takeovers of listed firms during 1975-91 found that multiple public bidders emerged in 20.5% of the cases. *See* Schwert, *supra* note 4, at 166. An earlier study of 669 successful takeovers of listed firms during 1975-91 found that multiple public bidders emerged in 24.1% of the cases. *See* Comment & Schwert, *supra* note 10, at 17-18. A study of 526 acquisition attempts between 1985 and 1998, which limited its sample to bids not solicited initially by the target firm, found that 42.78% of the attempts involved multiple public bidders. *See* Heron & Lie, *supra* note 10, at 1790-91. A study of 400 takeovers of major U.S. corporations announced over the 1989 to 1999 time period found that 12.75% (51/400) involved more than one public bidder. Boone & Mulherin, *supra* note 10, at 852.

In candor, the rates in these studies strike me intuitively as high. Previously, I have cited studies that suggest rates of topping bid activity.[11] I suspect that additional

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G. William Schwert, *Poison or Placebo? Evidence on the Deterrence and Wealth Effects of Modern Antitakeover Measures*, 39 J. Fin. Econ. 3 (1995).

[11] *See Del Monte*, 2011 WL 2535256, at *15 (citing Guhan Subramanian, *Go–Shops vs. No–Shops in Private Equity Deals: Evidence and Implications*, 63 Bus. Law. 729 (2008)); *id.* at *16 (citing Matthew D. Cain et al., *Broken Promises: Private Equity Bidding Behavior and the Value of Reputation*, at 34 tbl. 1 (May 1, 2011)). Davidoff co-authored the latter study. The parties did not rely on either, presumably because the studies examined private equity transactions and the Dell-Compellent merger is a

studies are available, but I have not sought them out or relied on work other than what the parties submitted.

Each of the defendants' studies supports an incidence of topping bid activity that is higher than the 9.38% rate that Davidoff estimated. I therefore start with Davidoff's lower figure as an estimate of the market rate, but I will not use the full 9.38%. Three additional considerations support lowering the rate somewhat.

First, for purposes of crafting an attorneys' fee award, I conclude comfortably that the realistic likelihood of a topping bid under the Original Merger Agreement, while not zero, was negligible. Dell sought to lock-up its deal with Compellent after its experience with 3PAR, the Original Merger Agreement contained aggressive forms of each type of individual defensive measure, and in combination the measures had a powerful antitakeover effect. Together with the Rights Plan, the provisions conveyed a clear message that any interloper would be resisted vigorously and should stay away. Only a

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strategic acquisition. There are doubtless differences between strategic buyers and financial buyers, such as a strategic buyer's ability to price a transaction by incorporating synergies that would not be available to a typical financial buyer. That said, the ability to tap synergies might suggest that financial deals should be priced lower and therefore would be more easily topped (assuming the financial buyer's cost of funds was not subsidized by a liquidity-fueled debt bubble). One might therefore posit that private equity deal studies would be relevant because their higher rate of topping bids would suggest an upper bound. Moreover, there can be similar deal dynamics in both the private equity and strategic contexts, particularly when a large company acquires a smaller one. Like a financial buyer, a strategic buyer can have a strong interest in retaining target management. And just as a financial buyer often sells itself as providing refuge from the quarter-by-quarter imperatives and regulatory burdens of the public markets, a strategic buyer might be favored because it offers a particularly comfortable home.

uniquely determined and well-funded competitor who viewed Compellent as a critical asset would have been likely to challenge Dell. Some small reduction is warranted for this slight possibility.

Second, although I am equally comfortable concluding that the reduced battery of defensive measures left Compellent materially more open to a topping bid, the Amended Merger Agreement did not substitute an overly loose set of protections. For example, Compellent did not commence a go-shop, lower its termination fee to the 1%-2% range, offer expense reimbursement to a second bidder, or take similarly assertive actions to induce a topping bid. Largely because of the strength of the defenses in the Original Merger Agreement, the Amended Merger Agreement remained restrictive and buyer-friendly. Dell still could force a vote on the merger and veto any adjournment, postponement, or cancelation of the stockholder meeting "except to the extent required to obtain the Requisite Stockholder Approval," and Dell would go into any meeting with 27% of the outstanding shares committed under support agreements. Dell still enjoyed information rights that provided for real-time information about any competing bid and to advance notice of any information conveyed to a second bidder. Dell continued to have multi-day, unlimited matching rights that gave Dell a right of first refusal on Compellent. Dell still would receive a healthy termination fee equal to 3.23% of equity value if the deal terminated due to a topping bid. No changes were made to the procedural gauntlet that restricted the Board's ability to change its merger recommendation or the 5%-of-equity toll attached to a recommendation change due to a "Change in Circumstances." To my eye, the defensive suite in the Amended Merger Agreement took several steps

towards a balanced, middle-of-the-road agreement, but remained squarely on the buyer's side of the street.

Third, record evidence weakly suggests a below-market likelihood of a competing bid for Compellent. Before entering into the Original Merger Agreement, Compellent did reach out quickly to three possible buyers in an abbreviated pre-agreement canvass. None were interested at that time. There also was a fleeting three-day period after Dell and Compellent announced their discussions on December 9 and before the execution of the Original Merger Agreement on December 12 during which a fast-reacting suitor might have approached. No one did.

Because the plaintiffs only can take credit for the increased likelihood of a topping bid, my estimate must incorporate these factors. On balance, and taking into account the higher indications for topping incidence suggested by the defendants' studies, I adopt a rate of 8%. Had Compellent engaged in a more extensive pre-agreement process, I would have reduced the rate further because of the additional evidence that a topping bid was unlikely to be forthcoming. If the Original Merger Agreement had contained less aggressive provisions, I similarly would have reduced because of a higher initial chance for a topping bid.

2. The Expected Value Of A Topping Bid

The second input for estimating the value of the changes in the Amended Merger Agreement is the expected value of the topping bid. The plaintiffs again provided helpful information in the form of Davidoff's report. The defendants did not provide any data, choosing only to attack Davidoff's analysis.

Davidoff calculated the expected value of a topping bid by focusing on the five transactions from his sixty-two deal sample where a second bidder emerged. In the five cases, the mean increase over the initial merger price was 39.56%. I accept and have considered his data, but I give it slight weight because of the small sample size and wide dispersion of price increases. For similar reasons, I give less weight to his analysis of four contested deals in the cloud computing sector.

As with the incidence of topping bids, I give primary weight to data from the published studies that the defendants submitted. One study examined 1,814 successful and unsuccessful takeovers of listed firms during 1975-91 to determine whether there was any correlation between the pre-bid run-up in the target corporation's stock price and the post-announcement markup, defined as "the increase in the stock price beginning the day the first bid is announced." Schwert, *supra* note 4, at 154; *see id.* at 156 (diagramming pre-bid run-up period and post-bid markup period). As the article explains,

> [o]nce the first bid announcement occurs, public investors become aware of that bidder's intentions (at least to the extent that they are revealed by their bid). After that time, the target is 'in play' and it is possible that other bidders will compete to acquire the target firm. Such a multiple bid auction usually leads to higher control premiums than when the initial bid is successful. The final outcome occurs when one bidder succeeds in taking over the target, or when all bidders quit trying. If the target is acquired by a bidder, the post-bid markup period represents the period between the first bid announcement and the final outcome, so that the change in the target firm's stock price in this period (perhaps adjusted for market movements) reflects the post-bid markup.

Id. at 156. The study found that the average post-bid markup in the sample was 10.5%. The average markup for all successful takeovers in the sample was 15.8%. Successful takeovers involving only a single transaction partner had an average markup of 8.5%.

Successful transactions in which a second bidder emerged had a higher mean markup of 18.2%. Schwert, *supra* note 4, at 164-65, 167.

An earlier study of 669 successful takeovers of listed firms during 1975-91 found that takeovers involving multiple public bidders generated mean stockholder returns that were 11.37% higher than single bidder takeovers. Comment & Schwert, *supra* note 10, at 31-32. A third study of 526 acquisitions attempts from 1985-98 where the initial bid was not solicited by the target firm found that multiple bidders were involved in 225 cases (43% of the contests). *See* Heron & Lie, *supra* note 10, at 1790-91. Overall, stockholders enjoyed mean cumulative returns that were 15% greater in multiple-bidder scenarios than in single-bidder scenarios. *Id.* at 1804-05. Although a fourth study of 400 takeovers from 1989-99 found no statistically significant difference in returns between single-bidder transactions and those involving multiple private or public bids, the authors did not provide data on transactions where multiple public bids were made after the initial public deal announcement. *See* Boone & Mulherin, *supra* note 10.

The defendants' three studies report mean increases in stockholder value from the involvement of competing public bidders of 18.2%, 11.37%, and 15%, respectively. As previously discussed, the terms of the Dell-Compellent deal remained on the restrictive side even after the settlement, and the information rights, matching rights, termination fee and other defensive measures likely would have had a dampening effect on any price competition. I therefore adopt the 11.37% figure.

3. The Percentage Of The Benefit To Which Counsel Is Entitled

A third fee award input is the percentage of benefit that counsel should receive. The stage at which litigation is settled factors into the determination.

> When a case settles early, this Court tends to award 10–15% of the monetary benefit conferred. . . . 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. . . . [H]igher percentages are warranted when cases progress further or go the distance to a post-trial adjudication.

In re Emerson Radio S'holder Deriv. Litig., 2011 WL 1135006, at *3 (Del. Ch. Mar. 28, 2011) (alteration in original; internal quotation marks omitted). The phase-based ranges do not establish bright-line breakpoints. They are rather indications for the Court to consider when crafting a discretionary award under *Sugarland*.

In this case, plaintiffs' counsel reviewed over 106,000 pages of documents produced by Compellent, Dell, and third parties and took six depositions in less than three weeks. Although the matter settled at a relatively early stage, plaintiffs' counsel engaged in substantial effort on an abbreviated timeframe. A fee award of 25% of the benefit is reasonable under the circumstances of this case.

4. The Estimated Value Of The Modifications

The plaintiffs obtained a reduction in the termination fee from $37 million to $31 million. Using an increased likelihood of a topping bid of 8% and a 25% benefit allocation to counsel, the baseline fee award for this aspect of the settlement is $120,000. The plaintiffs created a more significant benefit in the form of an increased possibility for a topping bid with a transaction value north of $960 million. Using an increased

likelihood of a topping bid of 8%, an average incremental value for a topping bid of 11.37%, and a 25% benefit allocation to counsel, the baseline fee award for this benefit is approximately $2,183,040. Together, the baseline fee award for these two elements of the settlement is approximately $2,303,040, which I round to $2.3 million.

B. The Benefit Conferred By The Supplemental Disclosures

"All supplemental disclosures are not equal. To quantify an appropriate fee award, this Court evaluates the qualitative importance of the disclosures obtained." *Sauer–Danfoss*, 2011 WL 2519210, at *17. "The court awards fees for supplemental disclosures by juxtaposing the case before it with cases in which attorneys have achieved approximately the same benefits." *Plains Res.*, 2005 WL 332811, at *5 (internal quotation marks omitted). Recent contested fee awards for disclosure benefits reveal a range of discretionary awards with concentrations at certain levels.

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

Sauer–Danfoss, 2011 WL 2519210, at *18 (internal citations omitted). "For a disclosure claim to . . . provide a compensable benefit to stockholders, the supplemental disclosure that was sought and obtained must be material." *Id.* at *8. A disclosure is material if there is a substantial likelihood that it would be viewed by a reasonable investor as significantly altering the total mix of available information. *See Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985).

The Disclosure Supplement contained six additional disclosures. The first provided additional detail about a meeting between Dell's lead negotiator and a Blackstone representative on October 21, 2010. The plaintiffs felt that the proxy statement painted the meeting as a chance encounter. The Disclosure Supplement made clear that Dell's lead negotiator and the Blackstone representative discussed beforehand that they should meet in connection with a scheduled corporate development dinner and that Compellent CEO Soran told the Blackstone representative to raise the topic of a strategic combination. These tangential tidbits did not alter the total mix of information.

The second supplemental disclosure provided additional detail about Compellent's efforts to seek out alternative bidders before granting exclusivity to Dell. The proxy statement already disclosed that after Dell's September 23 proposal, the Board told Blackstone and Morgan Stanley to reach out to the potential strategic partners that the Board felt would have the greatest interest in making a bid and that none of the parties expressed interest at that time. The Disclosure Supplement provided reasons why these parties did not have any interest, such as their internal development strategies, existing product offerings, and other potential strategic transactions. The marginal additional information provided by this disclosure was not material.

The third supplemental disclosure provided incremental information about the December 9 joint press release that announced the exclusivity agreement. The Disclosure Supplement added that Dell likely would have issued a press release alone if Compellent did not agree to a joint release and that Dell believed the increase in Compellent's stock

price would work to the detriment of all parties, including Compellent's stockholders. This was interesting, but not material.

The fourth supplemental disclosure explained that Compellent cancelled its attendance at the Barclay's analyst conference because of pending discussions with Dell. The additional detail only confirmed what a reader would have assumed.

The final two supplemental disclosures addressed Morgan Stanley and Blackstone's potential conflicts of interest. The Disclosure Supplement noted that in the two years prior to the merger, neither Compellent nor Dell retained Blackstone for any services or paid any compensation to Blackstone, but that Blackstone representatives in the ordinary course of business met with Dell and Compellent to discuss market conditions, potential strategic transactions, and other matters relating to the companies' prospects. The Disclosure Supplement also informed stockholders that Morgan Stanley provided strategic advice to Dell on mergers and acquisitions, assisted Compellent with its initial public offering in 2007 and a secondary stock offering in 2009, and received approximately $2 million in fees from Compellent in the two years preceding the merger. The additional information about the financial advisors' relationships merits some compensation. An award of $100,000 is warranted for these disclosures.

C. The Time And Effort of Counsel

"The time and effort expended by counsel serves [as] a cross-check on the reasonableness of a fee award." *Sauer–Danfoss*, 2011 WL 2519210, at *20. "This factor has two separate but related components: (i) time and (ii) effort." *Id.*

"The time (*i.e.,* hours) that counsel claim to have worked is of secondary importance." *Id.* Plaintiffs' counsel submitted affidavits representing that they expended a total of approximately 2,416 hours litigating the case prior to settlement. There was undoubtedly some duplication of effort among the many plaintiffs' firms involved in the case. On balance, however, the plaintiffs' firms have not claimed an excessive number of hours in light of what they accomplished. "This is not a situation in which an enormous number of hours contrasts so markedly with minimal litigation activity as to suggest someone was padding the numbers." *Del Monte*, 2011 WL 2535256, at *12.

More important than hours is "effort, as in what plaintiffs' counsel actually did." *Sauer–Danfoss*, 2011 WL 2519210, at *20. In this case, the plaintiffs made a real effort. The case settled at a relatively early stage, but before settling plaintiffs' counsel reviewed a substantial document production, conducted six fact depositions, and retained and worked with an expert. On balance, the time and effort of plaintiffs' counsel supports the baseline fee award.

D. The Relative Complexity Of The Litigation

This was not cookie-cutter deal litigation in which plaintiffs' counsel advanced routine process and disclosure arguments, then accepted a standard package of board minutes and bankers' books before agreeing to a disclosure-only settlement. Although this case did not present complex issues relative to other transaction-related litigation, plaintiffs' counsel engaged in expedited discovery and negotiated for meaningful changes in the deal protections. The complexity of the case supports the baseline fee award.

E. Contingency Risk

Plaintiffs' counsel pursued this case on a contingent basis. They invested a significant number of hours and incurred expenses of $141,160.97, but they settled before briefing and a hearing. This factor does not merit an upward or downward adjustment.

F. The Standing And Ability Of Counsel

The plaintiffs' lawyers are well-known practitioners who competently prosecuted the action. This factor does not merit an upward or downward adjustment.

G. A Comparison To Other Fee Awards

Precedent fee awards for settlements in which the consideration consisted of revised deal protections and supplemental disclosures have ranged from mid-six-figures to $5.14 million.[12] Precedent contested fee awards have ranged from mid-six figures to

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[12] *See, e.g., Minneapolis Firefighters' Relief Ass'n v. Amore*, C.A. No. 6175-VCN, at 74-76, 78-82 (Del. Ch. July 25, 2011) (TRANSCRIPT) (granting contested award of $1.25 million for additional disclosures, a $12.5 million reduction in the post-go-shop termination fee, the elimination or modification of a force-the-vote provision and a top-up option, and a two-week extension of the tender offer); *Forgo v. Health Grades, Inc.*, C.A. No. 5716-CS, at 6, 76-82 (Del. Ch. June 29, 2011) (TRANSCRIPT) (awarding $2.2 million on contested fee application where settlement of litigation followed the preliminary injunction hearing resulted in a $2.1 million reduction in the termination fee, issuance of a *Fort Howard* press release, the creation of special committee to review incoming bids, and an extension of the tender offer for twenty-seven days); *Se. Pa. Transp. Auth. v. Josey*, C.A. No. 5427-VCP, at 19-24 (Del. Ch. Mar. 14, 2011) (TRANSCRIPT) (approving uncontested award of $1.5 million for elimination of $67 million termination fee and supplemental disclosures); *In re Alberto-Culver Co. S'holder Litig.*, C.A. No. 5873-VCS, at 4, 10, 42-46 (Del. Ch. Feb. 21, 2011) (TRANSCRIPT) (awarding $3.25 million plus $101,000 in expenses on contested application for a settlement that eliminated matching rights, reduced the termination fee by $25 million, delayed the shareholder vote, and provided supplemental disclosures regarding potential conflicts with the company's board chair and banker); *In re Wm. Wrigley Jr. Co. S'holders Litig.*, 2009 WL 154380, at *5-*6 (Del. Ch. Jan. 22, 2009) (approving

$3.35 million. *See generally Sauer–Danfoss*, 2011 WL 2519210, at *18 (explaining rationale for relying primarily on contested fee award precedents). The award of $2.4 million falls well within these ranges.

III. CONCLUSION

The modifications to the deal protection provisions and the rescission of the Rights Plan were significant results. The supplemental disclosures were not. I award $2.3 million for the former and $100,000 for the latter, inclusive of expenses. **IT IS SO ORDERED.**

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uncontested award of $690,000 for additional disclosures and $69 million reduction in the termination fee); *Minneapolis Firefighters' Relief Ass'n v. Ceridian Corp.*, C.A. No. 2996-CC (Del. Ch. Mar. 24, 2008) (ORDER) (approving uncontested award $5.14 million for eliminating walk-away right triggered by election of new directors, releasing competing bidders from standstill agreements, lowering threshold for Superior Proposal from 66.66% of shares to 40%, and supplemental disclosures); *In re Chips & Techs., Inc. S'holders Litig.*, 1998 WL 409155, at *1-*2 (Del. Ch. June 24, 1998) (granting contested award of $667,500 in fees and expenses for settlement that provided additional disclosures, a reduction of $7.5 million in the termination fee, and a one month extension of walk-away date).