IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOANNE OLSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 5583-VCL
	)	
EV3, INC., COV DELAWARE CORPORATION, JOHN K. BAKEWELL, JEFFREY B. CHILD, RICHARD B. EMMITT, DOUGLAS W. KOHRS, DANIEL J. LEVANGIE, JOHN L. MICLOT, ROBERT J. PALMISANO, THOMAS E. TIMBIE and ELIZABETH H. WEATHERMAN,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: January 28, 2011
Date Decided: February 21, 2011

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LASTER, Vice Chancellor.

Plaintiff Joanne Olson challenged the use of a top-up option to facilitate a two-step acquisition. The parties agreed to a settlement that achieved everything the plaintiff could have hoped to accomplish through litigation. The parties then attempted without success to negotiate the amount of a fee award that the defendants would not oppose. On January 28, 2011, I approved the settlement. I now grant the plaintiff a fee award of $1.1 million, representing the full amount requested.

I. FACTUAL BACKGROUND

The facts are drawn from the record presented for settlement approval and the parties' briefing on the fee dispute.

A. The Development Of Top-Up Options

A top-up option is a stock option designed to allow the holder to increase its stock ownership to at least 90 percent, the threshold needed to effect a short-form merger under Section 253 of the Delaware General Corporation Law (the "DGCL"), 8 *Del. C.* § 253. A top-up option typically is granted to the acquirer to facilitate a two-step acquisition in which the acquirer agrees first to commence a tender offer for at least a majority of the target corporation's common stock, then to consummate a back-end merger at the tender offer price if the tender is successful. *See* Edward B. Micheletti & Sarah T. Runnells, *The Rise and (Apparent) Fall of the Top-Up "Appraisal Dilution" Claim*, 15 M&A Law. 9, 9 (2011).

The top-up option speeds deal closure if a majority of the target's stockholders have endorsed the acquisition by tendering their shares. Once the acquirer closes the first-step tender offer, it owns sufficient shares to approve a long-form merger pursuant to

Section 251 of the DGCL, 8 *Del. C.* § 251. Under the merger agreement governing the two-step acquisition, the parties contractually commit to complete the second-step merger. A long-form merger, however, requires a board resolution and recommendation and a subsequent stockholder vote, among other steps. *See id.* § 251(b) & (c). When the deal involves a public company, holding the stockholder vote requires preparing a proxy or information statement in compliance with the federal securities law and clearing the Securities and Exchange Commission. *See* 15 U.S.C. § 78n; 17 C.F.R §§ 240.14a-1 to -20 (rules for proxy solicitation); *id.* at § 240.14a-101 (information required in proxy statement); *id.* at § 239.25 (information "for the registration of securities issued in business combination transactions"). This process can take two to three months and cost tens of thousands of dollars. *See, e.g.*, E. Thom Rumberger, Jr. et al., *The Acquisition and Sale of Emerging Growth Companies: The M&A Exit* § 6.4 (2d ed. 2009).

The top-up option accelerates closing by facilitating a short-form merger. Pursuant to Section 253, a parent corporation owning at least 90% of the outstanding shares of each class of stock of the subsidiary entitled to vote may consummate a short-form merger by a resolution of the parent board and subsequent filing of a certificate of ownership and merger with the Delaware Secretary of State. *See* 8 *Del. C.* § 253(a). This simplified process requires neither subsidiary board action nor a stockholder vote. *Id.*

In a third-party arm's-length transaction, the top-up option offers the constituent corporations what appears to be a win-win. The second step closes sooner, minimizing transaction risk for both sides. Target stockholders get the consideration faster, avoiding

lost time value of money. The whole process costs less. Not surprisingly, given these advantages, top-up options have become ubiquitous in two-step acquisitions. They appeared in more than 93% of two-step deals during 2007, 100% of two-step deals during 2008, and more than 91% of two-step deals during 2009. *See* Jim Mallea, *2009 Year in Review*, FactSet Mergers, Jan. 25, 2010, https://www.mergermetrics.com (follow "View Archive" hyperlink; then follow "2009 Year in Review" hyperlink).

B. Pre-ev3 Challenges To Top-Up Options

From time to time, plaintiffs have brought claims challenging top-up options. Prior to 2010, there were no written Delaware opinions addressing this deal feature. The only decisions were two transcript rulings, each ruling on a motion to expedite. *See In re Gateway, Inc. S'holders Litig.*, C.A. No. 3219-VCN (Del. Ch. Sep. 14, 2007) (TRANSCRIPT); *NECA-IBEW v. Prima Energy Corp.*, C.A. No. 522-VCL (Del. Ch. June 30, 2004) (TRANSCRIPT).

In *Prima Energy*, a stockholder plaintiff sought an expedited hearing on a motion to enjoin a standard two-step acquisition that contemplated the use of a top-up option. The plaintiff theorized that the target directors breached their fiduciary duties by agreeing to the top-up option and thereby interfering with stockholder voting rights. The top-up option allegedly acted "to emasculate the [stockholders' Section] 251 voting rights" by facilitating a Section 253 merger, thereby constituting a breach of fiduciary duty under *Blasius Industries Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988). *Prima Energy*, Tr. at 7-8. Vice Chancellor Lamb rejected this argument and denied the motion to expedite.

> THE COURT: Why are they emasculating voting rights, if instead they took down the 88 percent and put the merger to a vote, they had been entitled to vote their 88 percent and they would all vote in favor of the merger and that would be the end of it. All it's doing is getting the money into the hands of the remaining shareholders faster, if it's needed. It isn't taking away anything. You have the same appraisal right. You have—you would have the same right to vote, if they didn't exercise it. It's just they would have 88 percent of the vote, which they would be entitled to vote. Don't you agree?
>
> PLAINTIFFS' COUNSEL: Yes, Your Honor. If they closed the tender at 88 percent, they would be entitled to vote that.
>
> THE COURT: They would have 88 percent of the vote, which they then would cast in favor of the merger. Instead of that happening quickly, it would take several months for it to happen.

Id. In other words, once an acquirer had sufficient shares to approve a long-form merger pursuant to Section 251, the top-up option could not interfere with voting rights because the acquirer could effect the merger regardless.

Three years later, in *Gateway,* a stockholder plaintiff again challenged a top-up option in a two-step acquisition. Unlike the straightforward structure in *Prima Energy*, the merger agreement in *Gateway* contained additional features, such as a mechanism that provided for a separate auction of an option to acquire a third-party corporation in the event of a superior proposal. The *Gateway* plaintiffs challenged the top-up option, the auction mechanism, a no-shop clause in the merger agreement, and the termination fee, in addition to raising disclosure claims.

As in *Prima Energy*, the *Gateway* plaintiffs sought an expedited hearing on a motion for preliminary injunction. Faced with *Prima Energy,* the *Gateway* plaintiffs did not claim interference with voting rights. They instead argued that the option

impermissibly enabled the defendants to avoid fiduciary duty review because appraisal would be the stockholders' exclusive remedy under *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242 (Del. 2001). *See Gateway*, Tr. at 32. Vice Chancellor Noble granted the motion to expedite without explicitly addressing the challenges to the top-up option. He generally described the plaintiffs' claims as "far from compelling," but scheduled an injunction hearing because the plaintiffs had demonstrated a minimally colorable claim based on a "confluence of many different factors." *Gateway*, Tr. at 39-40.

The *Gateway* plaintiffs also argued that the top-up option coerced stockholders to tender because of the threat of "appraisal dilution." According to this theory, a top-up option threatens stockholders who might seek appraisal with the issuance of a significant number of shares at less than what the dissenting stockholder believes is fair value. Because the top-up shares will be outstanding at the time of the short-form merger, any remaining stockholders who might otherwise have sought appraisal would find their proportionate interest in the firm diluted by the issuance of what they regard as underpriced shares. The top-up option allegedly makes appraisal less attractive and thereby coerces stockholders who otherwise would seek appraisal into tendering for reasons unrelated to the economic merits of the transaction. The *Gateway* case settled after expedited discovery and briefing, with the settlement consideration consisting of supplemental disclosures and an agreement by the acquirer not to argue that any shares issued pursuant to the top-up option or any related consideration should be considered for purposes of appraisal.

C. The Merger Agreement

At a time when *Prima Energy* and *Gateway* provided the only guidance on top-up options, defendant ev3, Inc. ("ev3" or the "Company") and Covidien Group S.a.r.l. ("Covidien") entered into an agreement and plan of merger (the "Merger Agreement" or "MA"). The Merger Agreement provided for Covidien to acquire ev3 via a standard two-step acquisition, facilitated by a top-up option if certain conditions were met. In the first step, Covidien's wholly owned acquisition subsidiary, COV Delaware Corporation ("COV"), would offer to purchase ev3's outstanding shares for $22.50 per share in cash (the "Tender Offer"). If COV owned a majority of ev3's outstanding shares after the Tender Offer, then the parties would effect a prompt second-step merger in which all remaining ev3 stockholders would receive the same consideration, subject to their right to seek appraisal (the "Merger"). So long as COV obtained a majority of ev3's shares in the first-step Tender Offer, then the parties were contractually obligated to complete the second-step Merger "as promptly as practicable."[1] If COV acquired sufficient shares to do so, COV was required to close the second step via a short-form merger.[2]

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[1] *See, e.g.*, MA § 2.3(a) ("If Company Stockholder Approval is required under the DGCL, the Company shall . . . duly call, give notice of, convene and hold a special meeting of the Company Stockholders (including any adjournment or postponement thereof, the 'Special Meeting') as promptly as practicable after the Share Acceptance Time, for the purpose of considering and voting on the matters requiring Company Stockholder Approval."); *id.* § 2.3(c) ("At the Special Meeting or any postponement or adjournment thereof, the Parent shall vote, or cause to be voted, all of the Shares then owned of record by the Parent or the Purchaser or with respect to which the Parent or the Purchaser otherwise has, directly or indirectly, voting power in favor of the adoption of this Agreement and approval of the Merger and the Parent shall use its reasonable best efforts to deliver or provide (or cause to be delivered or provided), in its capacity as a

Section 1.4 of the Merger Agreement granted COV a top-up option. It stated:

> Section 1.4 Top-Up Option.
>
> (a) Grant and Availability of Top-Up Option. Subject to the terms and conditions set forth herein, the Company hereby grants to the Purchaser an irrevocable option (the "Top-Up Option") to purchase, at a price per share equal to the Offer Price, that number of newly issued Shares (the "Top-Up Option Shares") equal to the lowest number of Shares that, when added to the number of Shares owned by the Purchaser, the Parent and their wholly owned Subsidiaries at the time of exercise of the Top-Up Option (including all Shares validly tendered and not properly withdrawn in the Offer at the Share Acceptance Time but excluding Shares tendered pursuant to guaranteed delivery procedures that have not yet been delivered in settlement or satisfaction of such guarantee), constitutes one Share more than 90% of all outstanding Shares (assuming the issuance of the Top-Up Option Shares). The Top-Up Option shall only be exercised one time by the Purchaser in whole but not in part. The Top-Up Option shall be exercised by the Purchaser (and the Parent shall cause the Purchaser to exercise the Top-Up Option) promptly (but in no event later than one (1) Business Day) after the Share Acceptance Time or the expiration of a Subsequent Offering Period, as applicable, if (i) at the Share Acceptance Time or the expiration of any such Subsequent Offering Period, as applicable, the Parent, the Purchaser or any wholly owned Subsidiary own in the aggregate at least 75% of all Shares then outstanding (excluding Shares tendered pursuant to guaranteed delivery procedures that have not yet been delivered in settlement or satisfaction of such guarantee) and (ii)

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stockholder of the Company, any other approvals that are required by applicable Law to effect the Merger.").

[2] *See* MA § 2.4 ("Notwithstanding the terms of Section 2.3, if after the Share Acceptance Time and, if applicable, the expiration of any Subsequent Offering Period provided by the Purchaser in accordance with this Agreement or the Purchaser's exercise of the Top-Up Option, the Parent and the Purchaser shall then hold of record, in the aggregate, at least 90% of the outstanding shares of each class of capital stock of the Company entitled to vote on the adoption of this Agreement under applicable Law (the 'Short Form Threshold'), the parties hereto agree to take all necessary and appropriate action to cause the Merger to become effective as promptly as practicable, but no later than the time set forth in Section 2.2, without a meeting of Company Stockholders in accordance with Section 253 of the DGCL.").

after giving effect to the exercise of the Top-Up Option, the Parent, the Purchaser and any wholly owned Subsidiary of the Parent or the Purchaser would own in the aggregate one share more than 90% of the number of outstanding Shares (after giving effect to the issuance of the Top-Up Option Shares but excluding Shares tendered pursuant to guaranteed delivery procedures that have not yet been delivered in settlement or satisfaction of such guarantee); *provided, however*, that the obligation of the Purchaser to exercise the Top-Up Option and the obligation of the Company to deliver Top-Up Option Shares upon the exercise of the Top-Up Option is subject to the conditions, unless waived by the Company, that (x) no provision of any applicable Law and no applicable order, injunction or other judgment shall prohibit the exercise of the Top-Up Option or the delivery of the Top-Up Option Shares in respect of such exercise, (y) upon exercise of the Top-Up Option, the number of Shares owned by the Parent or the Purchaser or any wholly owned Subsidiary of the Parent or the Purchaser (excluding Shares tendered pursuant to guaranteed delivery procedures that have not yet been delivered in settlement or satisfaction of such guarantee) constitutes one Share more than 90% of the number of Shares that will be outstanding immediately after the issuance of the Top-Up Option Shares, and (z) the number of Top-Up Option Shares issued pursuant to the Top-Up Option shall in no event exceed the number of authorized and unissued shares of Company Common Stock less the maximum number of shares of Company Common Stock potentially necessary for issuance with respect to all outstanding Company Stock Options, Company Restricted Stock, Company RSUs or other obligations of the Company. The parties shall cooperate to ensure that the issuance of the Top-Up Option Shares is accomplished consistent with all applicable Laws, including compliance with an applicable exemption from registration of the Top-Up Option Shares under the Securities Act; provided, further, that the Top-Up Option shall terminate concurrently with the termination of this Agreement.

(b) Exercise of Top-Up Option. Upon the exercise of the Top-Up Option in accordance with Section 1.4(a), the Parent shall so notify the Company and shall set forth in such notice (i) the number of Shares that are expected to be owned by the Parent, the Purchaser or any wholly owned Subsidiary of the Parent or the Purchaser immediately preceding the purchase of the Top-Up Option Shares and (ii) a place and time for the closing of the purchase of the Top-Up Option Shares (which, subject to applicable Law and any required regulatory approvals, shall be effected as promptly as practicable and not more than two (2) Business Days after date such notice is delivered to the Company). Such notice shall also include an undertaking signed by the Parent and the Purchaser that, as promptly as practicable following such

exercise of the Top-Up Option, the Purchaser shall, and the Parent shall cause the Purchaser to, as promptly as practicable after such exercise and the delivery by the Company of the Top-Up Option Shares, consummate the Merger in accordance with the terms hereof. The Company shall, as soon as practicable following receipt of such notice, notify the Parent and the Purchaser of the number of Shares then outstanding and the number of Top-Up Option Shares. At the closing of the purchase of the Top-Up Option Shares, the Parent or the Purchaser, as the case may be, shall pay the Company the aggregate price required to be paid for the Top-Up Option Shares, and the Company shall cause to be issued to the Parent or the Purchaser, as applicable, a certificate representing the Top-Up Option Shares. The aggregate purchase price payable for the Top-Up Option Shares may be paid by the Parent or the Purchaser (i) in cash or (ii) by executing and delivering to the Company a promissory note having a principal amount equal to the balance of the aggregate purchase price for the Top-Up Option Shares, or some combination thereof. Any such promissory note shall be on terms as provided by the Parent or the Purchaser, which terms shall be reasonably satisfactory to the Company. Upon the delivery of the appropriate exercise notice and the tender of the consideration described above, the Purchaser shall, to the extent permitted by applicable Law, be deemed to be the holder of record of the Top-Up Option Shares issuable upon that exercise, notwithstanding that certificates representing those Top-Up Option Shares shall not then be actually delivered to the Purchaser or the Company shall have failed to [sic] refused to designate the account described above.

(c) Accredited Investor Status. The parties shall cooperate to ensure that the issuance of the Top-Up Option Shares is accomplished consistent with all applicable Law. Consistent therewith, the Parent and the Purchaser acknowledge that the Top-Up Option Shares that the Purchaser may acquire upon exercise of the Top-Up Option will not be registered under the Securities Act of 1933, as amended (the "Securities Act"), and will be issued in reliance upon an exemption thereunder for transactions not involving a public offering. Each of the Parent and the Purchaser hereby represents and warrants to the Company that the Purchaser will be upon the purchase of the Top-Up Option Shares an "accredited investor," as defined in Rule 501 of Regulation D under the Securities Act. The Purchaser agrees that the Top-Up Option and the Top-Up Option Shares to be acquired upon exercise of the Top-Up Option are being and will be acquired by the Purchaser for the purpose of investment and not with a view to, or for resale in connection with, any distribution thereof (within the meaning of the Securities Act).

MA § 1.4.

Section 1.4(a) of the Merger Agreement thus provided COV with an irrevocable option to purchase, at a price per share equal to the Tender Offer price, a number of shares that when added to the shares owned by Covidien and its affiliates would constitute one share more than 90% of all outstanding shares. Section 1.4(b) of the Merger Agreement provided that COV could pay for the Top-Up Option Shares in cash or by delivering a promissory note to ev3 with a principal amount equal to the purchase price of the Top-Up Shares, *with the promissory note's terms to be set in the future and determined in the first instance by Covidien or COV*. MA § 1.4(b) ("Any such promissory note shall be on terms as provided by the Parent or the Purchaser, which terms shall be reasonably satisfactory to the Company.").

The record reflects that the attorneys working on the Merger Agreement focused on the payment feature of the Top-Up Option. ev3's counsel originally proposed terms for the promissory note. Covidien's counsel struck those terms and substituted the language contemplating a future determination, and ev3 accepted the change. I suspect the drafters saw little reason to dwell on the note's terms when they believed it would be outstanding for a matter of hours. If the Top-Up Option were exercised, it would be for the purpose of effecting a short-form merger. The shares would be issued and the note outstanding only for the period of time required for COV to file a certificate of ownership and merger with the Delaware Secretary of State.

Nominally, however, the size of the promissory note and the number of shares issued would be prodigious. As of June 7, 2010, ev3 had (i) 300 million shares of

common stock authorized, (ii) 114,792,961 shares issued and outstanding, (iii) 8,068,577 share of common stock issuable upon the exercise of outstanding options and (iv) 216,451 shares of common stock underlying restricted stock units. This left 176,922,011 shares of common stock authorized and available for issuance as Top-Up Option Shares. COV would reach the 75% threshold if it acquired a total of approximately 86.1 million of ev3's approximately 114.8 million outstanding shares. To raise its ownership from 75% to 90%, COV would need approximately 172.2 million Top-Up Option Shares, or one-and-a-half times ev3's pre-exercise capitalization. At $22.50 per share, the nominal cost to COV to exercise the Top-Up Option and increase its ownership from 75% to 90% would be approximately $3.9 billion.

D. The Stockholder Litigation

On June 18, 2010, Olson filed a detailed, 34-page complaint and sought a preliminary injunction blocking the transaction on the grounds that (i) the Top-Up Option failed to comply with Sections 152, 153 and 157 of the DGCL, 8 *Del. C.* §§ 152, 153 & 157, (ii) the exercise of the Top-Up Option would coerce stockholders to tender because of the threat of "appraisal dilution," (iii) the ev3 directors breached their fiduciary duties in granting the Top-Up Option, and (iv) COV aided and abetted their breach. Olson simultaneously moved for an expedited hearing on her injunction application. On June 24, the defendants filed a lengthy and substantive opposition to the motion to expedite. Olson replied on June 25. A hearing on the motion to expedite took place later that day.

I granted the motion to expedite. Two factors weighed critically in that determination. First, Olson's complaint advanced a strong claim that the Top-Up Option

as granted in the Merger Agreement failed to comply with Sections 152, 153, and 157 of the DGCL. If COV effected the second-step Merger using shares received through the exercise of an invalid option, then the Merger itself would be subject to attack as *ultra vires* and void. Second, at the time of the hearing, *Prima Energy* and *Gateway* were the only extant Delaware authorities on top-up options. Neither addressed the creative notion of "appraisal dilution." As discussed below, there is Delaware authority that can be cited in support of the post-exercise share calculation that underlies the theory. *See* Part II.A, *infra*. The "appraisal dilution" claim therefore was colorable, if barely so.

The Olson complaint also included disclosure claims on issues unrelated to the Top-Up Option, such as the sufficiency of the description of the investment bankers' work. After reviewing the disclosures issued in connection with the Tender Offer, I held that the disclosure claims were not colorable and declined to expedite that aspect of the litigation.

At the conclusion of the hearing on the motion to expedite, I scheduled a hearing on the plaintiff's application for a preliminary injunction for July 8, 2010. Discovery was limited to the challenges to the Top-Up Option. A flurry of litigation activity ensued. On June 29, the defendants produced approximately 6,000 pages of documents. On June 30, the plaintiff deposed ev3's Chief Financial Officer as the Rule 30(b)(6) designee. Later on June 30, the defendants produced approximately 1,500 additional pages of documents.

E. The Settlement

One week after the hearing on the motion to expedite, the parties entered into a memorandum of understanding dated June 2, 2010 (the "MOU"). Although the

settlement was reached quickly, it provided the plaintiff with all the relief she could have hoped to achieve on the merits.

The MOU called for comprehensive amendments to the Top-Up Option and Merger Agreement to cure the statutory challenges. Section 1.4(b) of the Merger Agreement was amended to specify the consideration to be received for the Top-Up Shares. The amended provision specified the material terms of the promissory note and mandated that the par value of the Top-Up Shares be paid in cash. To ensure board-level compliance with the DGCL, the MOU required that the amendments to the Merger Agreement be approved by the ev3 board of directors at a meeting where the terms and operation of the Top-Up Option were thoroughly reviewed and the necessary statutory determinations made. In addition, Section 9.1 of the Merger Agreement was supplemented to prevent any amendment of Section 1.4 in a manner that would adversely affect the rights of other ev3 stockholders after COV became a majority stockholder. The MOU resolved any concern about "appraisal dilution" by providing that Top-Up Option Shares and related consideration would not be considered for purposes of appraisal. The MOU also provided for supplemental disclosures describing the revised terms of the Top-Up Option and how it would operate.

F. The Deal Closes.

On July 6, 2010, the ev3 board held a special telephonic meeting with senior management and counsel. Prior to the meeting, the directors received description materials and copies of the MOU, the proposed amendment, a draft promissory note, and draft resolutions approving the amendment and promissory note. During the meeting,

counsel reviewed the principal terms of the documents. After discussion, the board unanimously approved the amendment to the Merger Agreement. Following the meeting, ev3, COV, and Covidien executed it. Later that day, ev3 filed an amended Schedule 14D-9 that announced the terms of the settlement, attached the amendment to the Merger Agreement, and provided additional disclosures. Among other things, the amended Schedule 14D-9 stated that "[f]or the avoidance of doubt, the Company, Parent and Purchaser have acknowledged and agreed that, in any appraisal proceeding described herein, the fair value of the Shares subject to the appraisal proceeding shall be determined in accordance with the DGCL without regard to the Top-Up Option, any Shares issued upon exercise of the Top-Up Option or the Promissory Note." Davenport Aff. Ex. C at 10.

On July 12, 2010, Covidien announced that the Tender Offer had closed. COV obtained approximately 87.68% of ev3's stock in the Tender Offer and was issued 26,675,587 shares after exercising the Top-Up Option. Covidien paid the par value in cash and gave a promissory note for the balance. COV then consummated the Merger pursuant to Section 253.

G. The Parties Disagree Over A Reasonable Fee Award.

Having reached agreement on the substantive terms of the settlement, the parties next bargained over the amount of a fee award that the defendants would agree not to oppose. They were unsuccessful. In submitting the settlement, plaintiff's counsel sought an award of $1.1 million. The defendants argued for an award of not more than $525,000.

II. LEGAL ANALYSIS

When a stockholder has pursued causes of action relating to the internal affairs of a Delaware corporation and generated benefits for a class of stockholders or the corporation, Delaware law calls for the stockholder to be compensated based on the factors identified in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980). "In determining the size of an award of attorney's fees, courts assign the greatest weight to the benefit achieved" in light of the nature of the claims and the likelihood of success on the merits. *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *8 (Del. Ch. Aug. 30, 2007). Secondary factors include the complexity of the litigation, the standing and skill of counsel, and the contingent nature of the fee arrangement together with the level of contingency risk actually involved in the case. *Gatz v. Ponsoldt*, 2009 WL 1743760, at *3 (Del. Ch. June 12, 2009). Hours worked are considered as a cross-check to guard against windfall awards, particularly in therapeutic benefit cases. *See Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*, 986 A.2d 370, 396 (Del. Ch. 2010). Precedent awards from similar cases may be considered for the obvious reason that like cases should be treated alike.

A. The Benefits Conferred By Remedying The Threat Of "Appraisal Dilution"

One of the benefits conferred by the settlement was to alleviate any threat of "appraisal dilution." By securing agreement from ev3, COV, and Covidien that shares issued under the Top-Up Option and any related consideration would not be considered for purposes of appraisal, Olson obtained complete relief on this claim. The resulting benefit is ephemeral at best.

According to Olson, the Top-Up Option created the threat that as many as 175 million shares of ev3 common stock could be issued and outstanding on a fully diluted basis on the effective date of the Merger, more than one-and-a-half times more than the number of shares outstanding immediately prior to the Tender Offer. In return for those shares, under the pre-settlement Merger Agreement, ev3 would have received an unsecured promissory note with unknown terms. Olson argues that the promissory note would be discounted deeply in an appraisal proceeding, lowering the fair value of ev3 and diluting the proportionate share that any stockholder who sought appraisal could receive.

Admittedly, the Delaware courts have not yet determined conclusively whether shares issued pursuant to a top-up option and the related consideration would be treated as part of the pre-merger operative reality of the target corporation when determining fair value in an appraisal proceeding. Decisions could be cited to argue that top-up shares must be considered. The Delaware Supreme Court has held that "the question of entitlement to a specific number of shares is alien to an appraisal action" and that "[t]o require the Court of Chancery to conduct a preliminary reallocating of shares based on intra-shareholder disputes, such as dilution claims, would inject into the proceeding a nonvaluation task incompatible with the appraisal purpose." *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1146 (Del. 1989) (holding that dilution from exercise of option that allegedly was fraudulently assigned could not be addressed in an appraisal action). In at least two cases, this Court has declined to address wrongful dilution claims in light of *Cavalier Oil*. *See Prescott Gp. Small Cap, L.P. v. Coleman Co.*, 2004 WL 2059515, at

*12 (Del. Ch. Sept. 8, 2004) (holding that a wrongful dilution claim "falls outside the scope of issues the Court is empowered to decide in a statutory appraisal proceeding"); *Gentile v. SinglePoint Fin., Inc.*, 2003 WL 1240504, at *5 (Del. Ch. Mar. 5, 2003) (declining to address shareholder dilution claim in appraisal proceeding).

Each of these decisions involved a claim that the challenged shares should not be considered in an appraisal because the directors breached their fiduciary duties when issuing them. By requesting that the number of shares outstanding be reduced for purposes of the appraisal determination, the petitioner in each case implicitly sought rescission of the wrongfully issued shares. Rescission is unavailable in an appraisal proceeding, where "the only relief available is a judgment against the surviving corporation for the fair value of the dissenters' shares." *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1187 (Del. 1988). None of the decisions addressed the treatment of shares issued pursuant to a top-up option granted in connection with the merger and used to facilitate the closing of the transaction.

Rather than requiring the inclusion of top-up shares and related consideration, the plain language of the appraisal statute calls for their exclusion. Section 262(h) provides:

> After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing appraisal proceedings. Through such proceeding the Court shall determine the fair value of the shares *exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation*, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors.

8 *Del. C.* § 262(h) (emphasis added). Under this exception, debt incurred to finance a cash-out merger has been excluded as an element of value arising out of the accomplishment or expectation of the merger. *See Cede & Co. v. JRC Acq. Corp.*, 2004 WL 286963, at *7 & n.71 (Del. Ch. Feb. 10, 2004). So have business concessions conditioned on the completion of the merger that cannot take effect unless the merger is completed. *See Allenson v. Midway Airlines Corp.*, 789 A.2d 572, 582 (Del. Ch. 2001). The same exclusion would apply directly to the issuance of shares to facilitate the merger and the receipt of cash or a promissory note in payment for those shares.[3]

In the unlikely event that Section 262(h) did not govern, there are practical reasons to regard "appraisal dilution" as a clever legal theory without real-world heft. A key assumption driving the theory is a judicial finding of a fair value in excess of the deal price. If, instead, the deal price exceeds fair value, then the issuance of top-up shares at the deal price increases the value of the corporation and, theoretically, appraisal value. In an arm's-length, synergistic transaction, the deal price generally will exceed fair value because target fiduciaries bargain for a premium that includes both a share of the

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[3] *See In re Protection One, Inc. S'holders Litig.*, C.A. No. 5468-VCS, at 16-18 (Del. Ch. Oct. 6, 2010) (TRANSCRIPT) ("I would never think . . . in [my] wildest dreams that you would hit an appraisal petitioner . . . you would reduce the value of any award to an appraisal petitioner because of a top-up option included in . . . the merger agreement that gave rise to the appraisal triggering event . . . ."); *In re Am. Italian Pasta Co. S'holder Litig.*, C.A. No. 5610-VCN, at 85 (Del. Ch. Oct. 13, 2010) (TRANSCRIPT) ("[I]t seems much more likely than not that even if there had been an appraisal action, the top-up shares and the top-up note would not be deemed to influence the fair price either, because their issuance literally on the eve of, if not closer to, the actual merger date, would have made them part of the merger process . . . .").

anticipated synergies and a portion of the reduced agency costs that the acquirer will enjoy as a result of sole ownership. Although no presumption attaches to the deal price for purposes of appraisal,[4] the ability of target fiduciaries to obtain a premium to market implies that they successfully extracted a portion of the value that the acquirer planned to create and that the merger consideration therefore exceeds the fair value of the stand-alone entity as a going concern.[5] If set at the deal price in a third-party transaction, the consideration paid for the top-up shares likely results in "appraisal accretion," not "appraisal dilution."

Procedurally, the mechanics of the appraisal statute work against the possibility of coercion from "appraisal dilution." Under Section 262, a stockholder must make a

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[4] *See Golden Telecom, Inc. v. Global GT LP*, 2010 WL 5387589, at *2 (Del. Dec. 29, 2010).

[5] *See Highfields Capital, Ltd. v. AXA Fin., Inc.*, 939 A.2d 34, 59-60 (Del. Ch. 2007) (holding, in appraisal, that where "the sale of the company in question resulted from an arm's-length bargaining process where no structural impediments existed that might prevent a topping bid . . . the transaction giving rise to th[e] appraisal action is a solid indicator of [the subject company's] fair value"); *Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Gp., Ltd.*, 847 A.2d 340, 350, 357 (Del. Ch. 2004) (holding fair value in appraisal may be based on "the transaction that gives rise to the right of appraisal, so long as the process leading to the transaction is a reliable indicator of value and merger-specific value is excluded"; reasoning that "[t]his real-world market check is overridingly important evidence of value"); *Dobler v. Montgomery Cellular Hldg. Co.*, 2004 WL 2271592, at *11 (Del. Ch. Sept. 30, 2004) ("[A] merger price resulting from arm's-length negotiations where there are no claims of collusion is a very strong indication of fair value." (internal quotation marks omitted)), *aff'd in relevant part*, 880 A.2d 206 (Del. 2005); *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991) ("The fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair.").

demand prior to the vote on a long-form merger or within 20 days *after* the date on which the corporation mails notice of the completion of a short-form merger. *See* 8 *Del. C.* § 262(d). The stockholder then has an additional period within which to withdraw the demand and accept the merger consideration. *See* 8 *Del. C.* § 262(e) ("[A]t any time within 60 days after the effective date of the merger or consolidation, any stockholder . . . shall have the right to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation."). Because of the timing of the appraisal demand and the ability to withdraw it for 60 days after closing, stockholders who oppose the merger and plan to seek appraisal have every incentive not to tender. If the tender offer fails, then they have achieved their goal. If the acquirer closes the tender offer but does not obtain sufficient shares to exercise the top-up option, then the stockholders can demand appraisal well before the second-step long-form merger and without any potential dilution from the top-up shares. If the acquirer closes the tender offer, exercises the top-up option, and effects a short-form merger, then the stockholder can accept the merger consideration and be in the same position as someone who tendered. By waiting, the stockholder who opposes the deal loses nothing, preserves flexibility, and may help defeat the transaction.

The theory of "appraisal dilution" thus founders on the language of the appraisal statute and the real-world operation of the appraisal process. But assuming there remained some residual uncertainty from *Cavalier Oil*, the problem can be fixed with ease. As the settlements in *Gateway* and in this case demonstrate, a respondent corporation can agree not to count top-up shares and the related consideration in any

appraisal proceeding arising out of the merger. *See In re ICX Techs., Inc. S'holder Litig.*, C.A. No. 5769-VCL, at 5-8 (Del. Ch. Sept. 17, 2010) (TRANSCRIPT) (rejecting appraisal dilution claim as not meritorious when filed where transaction parties excluded top-up shares and related consideration for purposes of appraisal); *Gholl v. eMachines, Inc.*, 2004 WL 2847865, at *18 (Del. Ch. Nov. 24, 2004) (using parties' agreed-upon figure for number of shares in appraisal following two-step acquisition involving top-up option); *see also In re Sunbelt Beverage Corp. S'holder Litig.*, 2010 WL 26539, at *1 n.1 (Del. Ch. Jan. 5, 2010) (accepting parties' stipulation as to number of shares for purposes of appraisal).

For all these reasons, I regard the settlement of the "appraisal dilution" claim as conferring at best a minimal benefit. It eliminated legal uncertainty that the constituent corporations could have addressed themselves by agreement in their disclosure documents. A fee award of $100,000 adequately compensates the plaintiff for this aspect of the settlement.

B. The Benefits Conferred By Remedying The Statutory Invalidity Issues

In contrast to the questionable benefit resulting from the elimination of "appraisal dilution," the litigation conferred a meaningful benefit on ev3 and its stockholders by addressing the statutory problems with the Top-Up Option. As originally structured in the Merger Agreement, the Top-Up Option and any shares issued upon its exercise likely were void. *See STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991). To the extent a short-form merger closed in reliance on the resulting shares, the validity of the Merger could be attacked. The invalidity of that transaction in turn could have called

into question subsequent acts by the surviving corporation. By defusing a potential corporate landmine, Olson and her counsel conferred an unquantifiable but nevertheless significant corporate benefit on ev3 and its stockholders – and on Covidien and its stockholders as well.

Section 157 of the DGCL provides, in the pertinent part, as follows:

> (b) The terms upon which, including the time or times which may be limited or unlimited in duration, at or within which, and the consideration (including a formula by which such consideration may be determined) for which any such shares may be acquired from the corporation upon the exercise of any such right or option, shall be such as shall be stated in the certificate of incorporation, or in a resolution adopted by the board of directors providing for the creation and issue of such rights or options, and, in every case, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options. In the absence of actual fraud in the transaction, the judgment of the directors as to the consideration for the issuance of such rights or options and the sufficiency thereof shall be conclusive.
>
> . . . .
>
> (d) In case the shares of stock of the corporation to be issued upon the exercise of such rights or options shall be shares having a par value, the consideration so to be received therefor shall have a value not less than the par value thereof. In case the shares of stock so to be issued shall be shares of stock without par value, the consideration therefor shall be determined in the manner provided in § 153 of this title.

8 *Del. C.* § 157. Section 157(b) thus requires that the option terms, including the consideration to be provided for the shares, be set forth in the certificate of incorporation "or in a resolution adopted by the board of directors providing for the creation and issue of such rights or options, and, in every case, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options."

The Merger Agreement was the "instrument . . . evidencing" the Top-Up Option. Olson had a strong argument that the instrument did not set forth the consideration to be paid for the shares or a formula by which the consideration could be determined. Section 1.4(b) of the Merger Agreement authorized the consideration for the Top-Up Shares to be paid with a promissory note, but failed to set forth the material terms of the note, including the terms of repayment, provisions for interest, whether the note will be secured, negotiable or transferable, or other material terms. Section 1.4(b) expressly contemplated that the material terms would be set in the future "on terms as provided by the Parent or the Purchaser, which terms shall be reasonably satisfactory to the Company." MA § 1.4(b).

The lack of specificity in the Merger Agreement pointed to a second statutory flaw. Section 157(b) requires that the option terms be set forth in the certificate of incorporation or "in a resolution adopted by the board of directors providing for the creation and issue of such rights or options." 8 *Del. C.* § 157(b). Because the Merger Agreement failed to set any terms for the promissory note, one could readily infer at the pleadings stage that there was no board resolution. Discovery revealed that was indeed the case.

In addition, Section 157(d) requires that the consideration to be received for shares with par value "have a value not less than the par value thereof." Section 153 imposes a similar requirement. 8 *Del C.* § 153(a) ("Shares of stock with par value may be issued for such consideration, having a value not less than the par value thereof, as determined from time to time by the board of directors, or by the stockholders if the certificate of

incorporation so provides."). Because the terms of the promissory note were not set at the time the ev3 board attempted to grant the Top-Up Option, the board could not make this determination.

Finally, longstanding Delaware case law interpreting Section 152 and its statutory predecessors requires that the board of directors determine the sufficiency of the consideration received for shares. "[U]nder the Delaware statutes the directors of a Delaware corporation may not delegate, except in such manner as may be explicitly provided by statute, the duty to determine the value of the property acquired as consideration for the issuance of stock." *Field v. Carlisle Corp.*, 68 A.2d 817, 820 (Del. Ch. 1949) (Seitz, V.C.); *accord Bowen v. Imperial Theatres, Inc.*, 115 A. 918, 920 (Del. Ch. 1922).

> The requirement of board approval for the issuance of stock is not limited to the act of transferring the shares of stock to the would-be stockholder, but includes an antecedent transaction that purports to bind the corporation to do so. As noted, Section 152 requires the directors to determine the "consideration . . . for subscriptions to, or the purchase of, the capital stock" of a corporation. Thus, director approval of the transaction fixing such consideration is required. Moreover, it is well established in the case law that directors must approve a sale of stock. This duty is considered so important that the directors cannot delegate it . . . .

Grimes v. Alteon, Inc., 804 A.2d 256, 261 (Del. 2002) (quoting 8 *Del. C.* § 152) (internal footnotes omitted). *See generally* David A. Drexler et al., 1 *Delaware Corporation Law and Practice*, §17.02, at 17-16 (2010) ("[T]he board must set the terms of sale for [the issuance of] shares."). Directors are authorized to determine the form and manner of payment, such as with a note, but they actually must make those determinations. Under the original Merger Agreement, the directors did not make those determinations but

rather left them to a future date, and the terms of the promissory note would be set in the first instance by Covidien and COV.

Cases interpreting Sections 151(a) and 251(b) of the DGCL reinforce the strength of the invalidity claim. Section 151(a) authorizes the terms of a class or series of stock to be "made dependent upon facts ascertainable outside the certificate of incorporation or of any amendment thereto, or outside the resolution or resolutions providing for the issue of such stock."[6] Section 251(b) authorizes the terms of a merger agreement to be "made dependent upon facts ascertainable outside of [the] agreement."[7] This Court has held that a board abdicated its statutory duty under Section 251(b) when it delegated the determination of the merger consideration to an investment bank selected by the

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[6] 8 *Del. C.* § 151(a) ("Any of the voting powers, designations, preferences, rights and qualifications, limitations or restrictions of any such class or series of stock may be made dependent upon facts ascertainable outside the certificate of incorporation or of any amendment thereto, or outside the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by its certificate of incorporation, provided that the manner in which such facts shall operate upon the voting powers, designations, preferences, rights and qualifications, limitations or restrictions of such class or series of stock is clearly and expressly set forth in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors. The term 'facts,' as used in this subsection, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.").

[7] 8 *Del. C.* § 251(b) ("Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term 'facts,' as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.").

acquirer.[8] Sections 152, 153, and 157 do not contain a similar grant of statutory authority to condition terms on "facts ascertainable" outside the governing instrument, indicating that those provisions should be read more narrowly than Sections 151(a) and 251(b).

The defendants have attempted to minimize the import of these statutory problems by suggesting that the directors understood the general nature of the Top-Up Option, its efficacy in speeding deal closure, and the lack of any prejudice to minority stockholders. *Cf. In re Cogent, Inc. S'holders Litig.*, 7 A.3d 487, 505 (Del. Ch. 2010). That level of knowledge would be pertinent, as in *Cogent*, to a breach of fiduciary duty claim attacking the board's decision to approve the Top-Up Option. *See id.* If the board actually made a determination about the sufficiency of the consideration received, that level of knowledge also would be pertinent to the "absence of actual fraud" standard found in Section 152 and Section 157. *See id.* at 506. Knowing about the generalities of the transaction structure does not satisfy the explicit statutory requirements of Sections 152, 153 and 157(b) and (d).

The defendants also have pointed out that if all worked as planned, the Top-Up Option Shares would be issued and outstanding for only a brief period—as it happened, less than a day. A brief statutory violation is nonetheless a statutory violation. In

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[8] *Nagy v. Bistricer*, 770 A.2d 43, 61-64 (Del. Ch. 2000); *see also Jackson v. Turnbull*, 1994 WL 174668, at *4-5 (Del. Ch. Feb. 8, 1994) (holding board impermissibly abdicated statutory obligation to set merger consideration by delegating task to its investment bankers), *aff'd*, 653 A.2d 306 (Del. 1994) (TABLE); *Sealy Mattress Co. of N.J. v. Sealy, Inc.*, 532 A.2d 1324, 1338 (Del. Ch. 1987) (holding that board "could not abdicate its obligation to make an informed decision on the fairness of the merger by simply deferring to the judgment of the controlling stockholder").

Waggoner, the Delaware Supreme Court rejected a similar attempt to "trivialize" the requirements for issuing stock as "mere 'technicalities.'" 588 A.2d at 1136. "The issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise. The law properly requires certainty in such matters." *Id.*; *accord Grimes*, 804 A.2d at 261-62; *see also Blades v. Wisehart*, 2010 WL 4638603, at *10 (Del. Ch. Nov. 17, 2010) ("Delaware law is clear that strict compliance with statutory requirements is expected when boards change the capital structure of the corporation.").

Deep faults could have developed in the ev3 corporate structure if the Top-Up Option Shares were found invalidly issued and the Merger invalidly consummated. The settlement administered a preventative cure. First, Section 1.4(b) was amended to specify the material terms of the promissory note. The amended section provided as follows:

> Any such promissory note shall be on terms as provided by the Parent or the Purchaser, which terms shall include the following: (i) the principal amount and accrued interest under the promissory note shall be payable upon the demand of the Company, (ii) the unpaid principal amount of the promissory note will accrue simple interest at the per annum rate of 3.0%, (iii) the promissory note may be prepaid in whole or in part at any time, without penalty or prior notice and (iv) the unpaid principal amount and accrued interest under the promissory note shall immediately become due and payable in the event that (x) Purchaser fails to make any payment of interest on the promissory note as provided therein and such failure continues for a period of 30 days or (y) Purchaser files or has filed against it any petition under any bankruptcy or insolvency law or makes a general assignment for the benefit of creditors.

By requiring that the Merger Agreement spell out the terms of the promissory note, the settlement ensured that the "instrument . . . evidencing" the Top-Up Option set forth the consideration to be paid for the shares as required by Section 157(b).

Second, the settlement required that the ev3 board meet to approve the amended Merger Agreement and adopt an implementing resolution. This term ensured that the board would determine the consideration to be received for the Top-Up Option Shares, as required by Sections 152, 153(a), and 157(d), and that a board resolution would exist that provided for the creation and issuance of the Top-Up Option, as required by Section 157(b).

Third, Section 1.4(b) was amended to require that Covidien pay the par value of any Top-Up Shares in cash. Prior to 2004, payment of the par value in cash was necessary to provide "constitutional consideration" for the shares. *See* Drexler, *supra*, § 17.02, at 17-17 (describing the requirements of Del. Const. art. IX, § 3 and Section 152 as they existed prior to the 2004 amendments). Section 152 now provides that consideration may consist of "cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof." 8 *Del. C.* § 152. Nevertheless, providing for payment of the par value in cash eliminates any conceivable debate over whether the value of the consideration received for the Top-Up Option Shares might be less than the par value of those shares, as required by Section 153(a).

By pursuing this litigation and obtaining the settlement, Olson and her counsel prevented the seeds of a future legal crisis from germinating. The resulting benefit is non-quantifiable and immeasurable but in my view quite substantial. An award of $1 million is fair and reasonable compensation for a settlement that cured serious statutory flaws.

C. The Benefits Conferred By The Top-Up Disclosures

The settlement required disclosure of the amendments to the Merger Agreement and changes to the Top-Up Option. The disclosures accurately described the substantive benefits achieved by the litigation. They did not provide any incremental value beyond the substantive terms already discussed. *See Cogent*, 7 A.3d at 510 (finding that disclosures regarding total number of shares to be issued pursuant to top-up option, total price to be paid, and terms of promissory note to be issued were not material). I do not award any incremental fees for the disclosures.

D. The Secondary *Sugarland* Factors

The secondary *Sugarland* factors do not weigh significantly in my fee award. Although this case was not terribly complex, it raised novel issues. At the time the lawsuit was filed, the transcript rulings in *Prima Energy* and *Gateway* comprised the extent of Delaware authority on top-up options. The complaint mounted the first meaningful full-scale challenge to the use of a top-up option. Once this action was expedited, the landscape changed. The plaintiffs' bar sensed a profit-making opportunity, and a slew of complaints followed. As a result of rulings in these actions and related practitioner commentary, the law on top-up options has rapidly become settled.

In pursuing this litigation, plaintiff's counsel assumed moderate contingency risk. They indisputably undertook the case on a contingent basis, but as with most stockholder litigation filed against a pending transaction, there was a high likelihood that the defendants would want the protection conferred by a global release and therefore come to the table with a settlement opportunity.

I give no weight to the hours expended. Counsel achieved via settlement all of the relief that they could have obtained by litigating through a merits hearing. Counsel should not be penalized for achieving complete victory quickly.

The law firms who represented the plaintiffs are well known to the Court, and they are qualified and experienced in handling corporate litigation. The Prickett Jones firm in particular has a well-established track record of evaluating potential litigation opportunities, filing targeted claims, and then litigating vigorously to achieve tangible results. This factor reinforces my decision not to reduce the fee award for an early victory. Part of the defendants' willingness to agree to a settlement that provided full relief likely can be attributed to their knowledge that Prickett Jones would be game to go the distance, as the firm frequently has in the past.

Two precedent settlements involving top-up options influence my award. In *Gateway*, the parties agreed to a fee of $850,000, which this Court approved, for a settlement that consisted primarily of supplemental disclosures but also resolved an "appraisal dilution" claim. The case did not involve a meaningful statutory challenge to the validity of the top-up option. The litigation settled just before the hearing on a preliminary injunction, after expedited discovery and the completion of briefing. I regard *Gateway* as a typical disclosure settlement where the award departed upward because of the stage of the litigation, the top-up option, and a natural element of judicial deference to a negotiated fee that fell within (albeit at the upper end of) a range of comparable awards.

More pertinent is the recent award in *American Italian Pasta*, in which the Court awarded $825,000 for a settlement that resolved similar but less serious challenges to the

validity of a top-up option, mooted an appraisal-dilution claim, and included supplemental disclosures. *See In re Am. Italian Pasta Co. S'holder Litig.*, C.A. No. 5610-VCN, at 84-88 (Del. Ch. Oct. 13, 2010) (TRANSCRIPT). Although submitted for approval before the settlement in this case, the substantive terms in *American Italian Pasta* were negotiated after and modeled on the settlement in this litigation. The problems with the ev3 Top-Up Option appear more significant and the resulting benefits from this litigation concomitantly more comprehensive. Approving a greater award in this case is therefore an appropriate exercise of discretion. That said, if the defendants had pegged their proposed award at the *American Italian Pasta* figure, I likely would have awarded that amount given the similarities between the two cases. Instead, the parties bracketed the *American Italian Pasta* award with a lower bid and a higher ask. To split the baby and award the *American Italian Pasta* figure would encourage similar bracketing. Viewed on its own merits, the plaintiffs' fee request is reasonable. The defendants' figure under-prices what the plaintiffs achieved. It would be appropriate for a routine disclosure-only settlement, not a case where the plaintiff obtained full relief and remedied potential statutory violations.

III. CONCLUSION

For the foregoing reasons, plaintiff's counsel is awarded fees and expenses of $1.1 million. **IT IS SO ORDERED**.