IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMAK WORLDWIDE, INC., Defendant-Below/Appellant, v. DONALD A. KURZ and SEMS DIVERSIFIED VALUE, LP, Plaintiffs-Below/Appellees, and BOUCHARD MARGULES & FRIEDLANDER, P.A., Appellee.	)	No. 512, 2011 On appeal from the Court of Chancery of the State of Delaware, C.A. No. 5019-VCL

AMENDED OPENING BRIEF OF
APPELLANT EMAK WORLDWIDE, INC.

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November 8, 2011

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NATURE OF THE PROCEEDINGS

This is an appeal from the Court of Chancery's award of $2.5 million in interim fees to Bouchard Margules & Friedlander, PA ("BMF") as counsel for plaintiffs-below/appellees Donald A. Kurz and Sems Diversified Value, LP (together, "Plaintiffs") in this action. As shown herein, the interim fees were based on improper factual findings made by the Court without a trial and were awarded despite the fact that the litigation provided no benefit to the common stockholders of defendant-below/appellant EMAK Worldwide, Inc. ("EMAK" or the "Company"). The Court of Chancery ordered EMAK to pay the unreasonably excessive award, which represented approximately 80% of the Company's available cash, within five business days with no right of appeal.

The Court of Chancery originally awarded BMF interim fees during a July 19, 2010 hearing on Plaintiffs' Amended Interim Fee Application (the "Fee Application") (*see* Transcript of the Court's Ruling, Exhibit A hereto). On July 29, 2010, the Court entered an order implementing its ruling, requiring EMAK to pay the $2.5 million award within five business days with no right to appeal (the "Interim Fee Award") (*see* Exhibit B hereto; *see also* Letter Decision, Exhibit C hereto). EMAK did not have sufficient funds to pay the Interim Fee Award and meet the short-term liquidity needs of its business. Accordingly, on August 5, 2010, EMAK filed for bankruptcy protection and this action was automatically stayed.

Nearly a year later, EMAK has emerged from bankruptcy. But EMAK's common stockholders – the claimed beneficiaries of counsel's efforts in this action – were wiped out; the preferred stockholder, Crown EMAK Partners, LLC ("Crown"), a defendant in this lawsuit, became the owner of the common and preferred stock of the reorganized entity, with 15% of the common stock reserved for incentive plans for management. After EMAK's reorganization plan became effective, the parties to this action sought dismissal of all of the remaining derivative claims, which were extinguished in the bankruptcy, as well as all counterclaims and third-party claims pending before the Court, and asked the Court to enter the Interim Fee Award as a Final Order and Judgment so that EMAK could immediately appeal.

This is EMAK's appeal from the Interim Fee Award as amended in the Final Order and Judgment of the Court of Chancery dated September 21, 2011 (*see* Exhibit D hereto).

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in awarding interim attorneys' fees to Plaintiffs' counsel because the litigation did not provide a benefit to EMAK or its stockholders. Under the American Rule, each party must pay its own attorneys' fees regardless of the outcome of the litigation; under the "corporate benefit" exception to the American Rule, the Court of Chancery has discretion to award attorneys' fees, but *only* where the litigation provided a benefit to the company or its stockholders. The Court of Chancery abused its discretion when it concluded that the litigation provided such a benefit by preventing the preferred stockholder, Crown, from taking control and instead putting into the hands of the common stockholders the ability to determine the direction of the Company. In fact, the litigation did nothing to prevent Crown from taking control of the Company, as it always had the ability to take control because it held 27.6% of the combined voting power and could act with the holders of 22.4% of the remaining voting power (or approximately 30% of the common stockholders, whose support it had) to amend the Company's bylaws to reduce the size of the Board of Directors (the "Board) and then exercise its right to designate a majority of those directors – and that is exactly what Crown did as a result of Plaintiffs' litigation. Further, because Plaintiffs and their insurgent group also controlled approximately 28% of the combined voting power, the common stockholders unaffiliated with either Crown or Plaintiffs always had the ability to determine the fate of the Company. Plaintiffs' litigation did not affect that right in any way. Moreover, the litigation cost the Company millions of dollars and resulted in a bankruptcy that destroyed the value of the common stock and completely wiped out the common stockholders' equity interests (including the shares held by Plaintiffs and their affiliates). Because the litigation provided *no benefit* to the stockholders of EMAK, an award of attorneys' fees was wholly inappropriate.

2. The Court of Chancery also erred in awarding interim attorneys' fees to Plaintiffs' counsel on the basis of improper factual findings. The only claims that had been adjudicated at the time of the Interim Fee Award were those claims pursuant to Section 225 of the Delaware General Corporation Law (the "DGCL") to determine the composition of the Board. The Court itself recognized that it had not heard testimony regarding Plaintiffs' fiduciary duty claims. Nevertheless, the Court ruled that interim fees were warranted because of "substantial and credible evidence" of breaches of the duty of loyalty and disclosure violations for which no evidence had been presented and no testimony of crucial witnesses had been heard. The Court abused its discretion when it awarded interim fees on the basis of factual findings on the merit of those claims without ever hearing testimony on those claims or conducting a hearing on their merits. The Court of Chancery should not have awarded "interim" fees, but

instead should have waited until the conclusion of the litigation to assess whether an award of attorneys' fees was appropriate.

3. The Court of Chancery erred when it ordered EMAK to pay interim attorneys' fees to Plaintiffs' counsel immediately with no right of appeal. First, the Interim Fee Award was premature because any "benefits" of the litigation could not be assessed prior to the conclusion of the litigation and while the state of the Company remained in flux. Second, the Interim Fee Award was unprecedented and contrary to basic notions of justice because it required the immediate payment of millions of dollars (constituting nearly all of EMAK's available cash) with no right to appeal, when EMAK had presented evidence that it would be unable to pay the award. Therefore, the Interim Fee Award should be vacated.

4. Finally, the amount of fees awarded to Plaintiffs' counsel was unreasonably excessive given the failure to produce a quantifiable benefit and the inequitable conduct of Plaintiffs and their attorneys. The amount of fees awarded must be fair and reasonable and proportionate to the benefit conferred. Even if the Court had appropriately found that the litigation provided some unquantifiable benefit to the stockholders, which EMAK contends it did not, the amount of the award – $2.5 million – was disproportionate because it constituted approximately 50% of the entire market capitalization of the common stock and nearly all of the Company's available cash. Further, the amount should have been reduced to account for the inequitable conduct by Plaintiffs and their attorneys, including Plaintiffs' improper purchase of shares, which they used to claim proxy contest success and take control of the Company for ten weeks (during which time Plaintiffs spent $800,000 of the Company's funds), and Plaintiffs' attorneys' actions in representing the Company in this litigation, which they had brought *against* the Company, and in providing advice to the Board while their interim fee application against the Company was pending, including advice about that fee application. Accordingly, if the Interim Fee Award is not vacated, it should be reduced substantially.

STATEMENT OF FACTS

I. KURZ INITIATES LITIGATION TO AID HIS ATTEMPT TO TAKE CONTROL OF EMAK

This Court is familiar with the factual background of this action. *See Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377 (Del. 2010) (A1048-73). When this action was instituted, defendant EMAK was a Delaware corporation based in Los Angeles. *Id.* at 380. It had two classes of stock – common and Series AA Preferred, which had a $25 million liquidation preference. *Id.*; *see* A274 at ¶ 17. There were 7,043,322 shares of common stock issued and outstanding. *Crown EMAK Partners*, 992 A.2d at 380.[1] When the litigation was commenced, EMAK's common stock was traded on the pink sheets at a price of less than $1 per share, *id.*, and, at the time of the Interim Fee Award, had recently traded at $0.75 per share. A611 at ¶ 10; A595. As Plaintiffs' complaint alleged, the bulk of EMAK's equity value "rests in its preferred stock, which carries a $25 million liquidation preference." A269 at ¶ 2. As plaintiff Kurz conceded, it was "questionable" whether the common stock had any value at all in light of the preferred stock's liquidation preference. A367. In fact, the common stock had virtually no value other than the speculative possibility that one day the Company would be worth more than the $25 million liquidation preference. A594.

Defendant Crown held all 25,000 shares of EMAK's preferred stock, *see Crown EMAK Partners*, 992 A.2d at 380, which it received in exchange for its $25 million investment in EMAK. A375 (Kurz). In addition to its liquidation preference, the preferred stock had the right to elect two directors to the Board (or three directors if the Board expanded to more than eight members). *See Crown EMAK Partners*, 992 A.2d at 380. It also had the right to vote with the holders of the common stock on an as-converted basis on all matters other than the election of directors. *Id.* The preferred stock was convertible into 2,777,777 shares of common stock, representing 27.6% of the Company's total voting power on all matters on which it had the right to vote, *i.e.*, on all matters except for the election of directors. *Id.*

When plaintiff Kurz initiated this litigation, he owned approximately 1,420,272 million shares of EMAK common stock (A370, A372), and, together with his co-plaintiff and their affiliates, controlled more than 38% of the common

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[1] Although the number of common shares issued and outstanding fluctuated slightly throughout the course of the litigation, it was always approximately 7 million.

stock. A73. Kurz had served as EMAK's chief executive officer ("CEO") from January 1999 until May 2005 (A375 (Kurz); A571), when he was asked to resign because the Company was performing poorly. A349; A571. When Kurz stepped down as CEO, the Company had millions of dollars of debt on its balance sheet and nearly $40 million in asset impairment charges, due in part to Kurz's failure to properly integrate the acquisitions made under his leadership using capital provided by Crown. A608 at ¶ 2; A351-52; A361; A571.

Following his forced resignation, Kurz attempted to re-gain control of EMAK and to be re-appointed CEO. A368-69; A571. He made repeated personal threats of retribution through litigation and attempted on multiple occasions to control the composition of the Board. A76; A350; A572. He was, essentially, trying to take control of the Company for the purpose of becoming CEO without paying a premium to the stockholders.

In June 2009, the Company invited Kurz back to the Board, hoping to avoid further contention and instead to make him a productive part of the team. A353; A572. Kurz understood that the capital structure of EMAK needed to be restructured. *See* A74 (stating that the Company had a "broken capital structure"); A367, A371 (testifying the same); A382 (stating the same). Several proposals were made, but Kurz did not agree to them. Instead, on October 12, 2009, Kurz and his affiliates, members of Take Back EMAK, LLC ("TBE"), delivered an initial consent to EMAK, thereby launching a consent solicitation to gain control of the EMAK Board (the "TBE consent solicitation"). *Crown EMAK Partners*, 992 A.2d at 378, 380.

On October 19, 2009, the Board set October 22, 2009 as the record date for the TBE consent solicitation. *Id.* at 380. The Board also approved a transaction that it had been negotiating with Crown pursuant to which Crown exchanged its shares of Series AA Preferred stock for shares of new Series B Preferred stock that was identical to the old Series AA Preferred except that it (i) voted with the holders of the common stock on all matters, including the election of directors but (ii) did not have the right to elect two directors to EMAK's Board (the "Exchange Transaction"). *Id.*

On October 26, 2009, Plaintiffs filed a Verified Complaint for Declaratory and Injunctive Relief in the Court of Chancery, asserting direct, individual claims against EMAK, the members of the Board (other than Kurz) and Crown, and seeking, among other things, to enjoin the Exchange Transaction. *Crown EMAK Partners*, 992 A.2d at 380; *see* A44-65. Plaintiffs also moved for a preliminary injunction and sought an expedited hearing on that application. *Crown EMAK Partners*, 992 A.2d at 380. During a scheduling

conference, the parties agreed that the deadline for delivering consents to EMAK in connection with the TBE consent solicitation would be December 21, 2009. *Id.* The Court entered an order to that effect and also granted Plaintiffs' motion to expedite and scheduled a hearing on Plaintiffs' preliminary injunction application for December 4, 2009. *Id.*

The members of TBE collectively owned more than 38% of EMAK's common stock. While TBE continued to solicit consents to reach the 50% threshold it needed to effect action, the Company began to solicit consents from stockholders to ratify the Exchange Transaction. *Id.* at 381. The holders of more than 50% of the outstanding common shares voted to ratify the Exchange Transaction.[2] A81 at ¶ 10; A92 at ¶ 20; A123. The reasons for this are obvious. Stockholders did not want Kurz back in control. They also recognized that in the absence of the Exchange Transaction, Crown could act with holders of common stock who held just 22.4% of the total voting power (or approximately 30% of the common stock) to reduce the size of the Board to two or three members, and thereby permanently control the Board.[3] The ratification vote made it crystal clear that Crown had significant support of holders of the common stock, and would eventually control EMAK – which is exactly what ensued.

Instead of negotiating a settlement, Kurz pressed ahead with his lawsuit and consent solicitation. In several hearings, the Court of Chancery signaled hostility to the Exchange Transaction. Since it was obvious that Crown was going to control EMAK with or without the Exchange Transaction, Crown agreed with EMAK on the evening of December 3, 2009, to rescind the Exchange Transaction, and EMAK's counsel immediately informed Plaintiffs and the Court of the rescission. A154; A196; *see Crown EMAK Partners*, 992 A.2d at 380. Plaintiffs' counsel asked the Court to hold the preliminary injunction hearing anyway, to address alleged disclosure claims (even though such claims were not asserted in any complaint). A157-58.

The Court declined to hold a preliminary injunction hearing on Plaintiffs' unpled disclosure allegations but gave Plaintiffs leave to amend their complaint to assert such claims (A159), which Plaintiffs did on December 3, 2009. A161-95. On December 7, 2009, EMAK and the individual defendants filed

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[2] These shares, when coupled with the preferred, constituted more than 64% of the voting power of the Company.

[3] Crown had the right to 27.6% of the combined voting power on all matters other than the election of directors, including bylaw amendments to fix the size of the Board.

counterclaims and a third-party complaint challenging the disclosures in the TBE consent solicitation. *See Crown EMAK Partners*, 992 A.2d at 381; A203-19. The next day, however, the parties agreed to "defer litigating their disclosure claims and to fight it out at the ballot box" and to resume the litigation on December 22, 2009, after the deadline for the TBE consent solicitation. *Crown EMAK Partners*, 992 A.2d at 381; *see* A220-22.

II. THE SECTION 225 LITIGATION

On December 11, 2009, Crown delivered a written consent to the Company to amend EMAK's bylaws to reduce the size of the Board to three directors, thereby commencing its own consent solicitation (the "Crown consent solicitation"). *Crown EMAK Partners*, 992 A.2d at 381; *see* A223. Since EMAK's charter guaranteed Crown the right to elect two directors, the bylaw amendment would guarantee Crown the right to control the Board. Simultaneously, Crown exercised its right to elect a second director, Jason Ackerman, to the EMAK Board. *Crown EMAK Partners*, 992 A.2d at 381.

On December 21, 2009 (the last possible day), TBE delivered a notice stating that it had sufficient consents to have elected its slate. *Id.* at 385. The same day, Plaintiffs sought leave to file a second amended complaint that added derivative claims alleging that the individual defendants had breached their fiduciary duties in connection with their response the "threats posed by Crown" (A225 at ¶ 4) – specifically, with respect to the Exchange Transaction and the Crown consent solicitation – and also added a claim for relief pursuant to Section 225 of the DGCL, seeking a declaration that the TBE consent solicitation had validly effected corporate action. *See* A228-67. The proposed second amended complaint marked the first time that Plaintiffs sought to assert derivative claims. Both of their prior complaints had sought only individual claims.

On December 29, 2009, Plaintiffs filed a Verified Third Amended and Supplemental Complaint (the "Third Amended Complaint") that, among other things, challenged the Crown consent solicitation to amend EMAK's bylaws as legally invalid and the product of breaches of fiduciary duty and sought declaratory relief pursuant to Section 225 of the DGCL. A268-310. On January 6, 2010, Crown answered the Third Amended Complaint and filed counterclaims and third-party claims in connection with the TBE consent solicitation, including claims for declaratory relief pursuant to Section 225. A311-40.

On January 22, 2010, the Court of Chancery held a one-day trial on the competing requests for relief pursuant to Section 225 in connection with the TBE and Crown consent solicitations. *See Kurz v. Holbrook*, 989 A.2d 140, 144 (Del.

Ch. 2010) (A411-55). On February 9, 2010, the Court issued an opinion in which it held that (1) the Crown consent solicitation was invalid because the bylaw amendment conflicted with the DGCL and (2) the TBE consent solicitation validly effected corporate action. *Id.* at 145. The Court concluded that the Board was composed of incumbent directors Kurz, Ackerman and Jeffrey Deutschman and newly elected TBE directors Philip Kleweno, Michael Konig and Lloyd Sems, with one vacancy remaining (the "TBE Board"). *Id.* The Court of Chancery entered a partial final judgment pursuant to Court of Chancery Rule 54(b) in connection with its opinion. A456-57; *see* A518-21. It did not rule, or hear any evidence, on any of the parties' disclosure or fiduciary duty claims.

The TBE Board took control immediately. Kurz's first order of business was to install himself as President while seeking to have Holbrook removed as CEO (A608-09 at ¶¶ 4-5), although the Court of Chancery halted this attempt by entering a Status Quo Order. A472-73; A481-86. In addition, BMF entered its appearance on behalf of EMAK on February 19, 2010 and Morris, Nichols, Arsht & Tunnell LLP ("MNAT") simultaneously withdrew its appearance on behalf of EMAK. A479-80. From that point on, BMF and Luce, Forward, Hamilton & Scripps LLP ("Luce Forward") acted as Company counsel and purported to advise EMAK on how to handle the litigation that BMF and Luce Forward had brought against it – despite the obvious conflict in representing the plaintiffs and a defendant in the same lawsuit.[4] On February 24, 2010, BMF filed an opening brief seeking an interim fee award against EMAK (which BMF and Luce Forward represented at the time) for fees incurred by BMF and Luce Forward in connection with their litigation *against* EMAK. A487-511. EMAK director Deutschman testified that Luce Forward even advised EMAK about the fee application. A633 at ¶ 6.

By letter dated March 2, 2010, the Court of Chancery informed the parties that it would defer ruling on Plaintiffs' interim fee application until this Supreme Court decided the then-pending appeal from the Court of Chancery's February 9, 2010 Opinion and Rule 54(b) Order, but would not wait until the conclusion of the litigation. *See Kurz v. Holbrook*, 2010 WL 761205, at *1 (Del. Ch. Mar. 2, 2010) (A515-17). The Court of Chancery also stated in its letter that, "[a]lthough interim fees applications are disfavored, this case offers the rare situation where one is appropriate," *id.*, suggesting that the Court had already

[4] Luce Forward served as co-counsel to BMF in this action and as lead counsel in an action by Kurz, TBE and other TBE affiliates against the Company and its directors in California. A533.

made up its mind to award interim fees before EMAK had an opportunity to respond to the fee application.

During the ten weeks that TBE controlled the Board, it caused EMAK to pay more than $800,000 to consultants and advisors, including to companies owned by Kurz and TBE director Koenig. A609 at ¶ 6; A580. A significant portion of those payments funded TBE's efforts to appoint Kurz as President of EMAK and to terminate Holbrook's employment as CEO (A608-09 at ¶¶ 4-6), in flagrant disregard of the Court's Status Quo Order. A481086; A472-73. EMAK also paid $50,000 in fees to Luce Forward for its purported advice to the Company regarding, among other things, Plaintiffs' interim fee application, and $133,000 in fees to BMF for its purported representation of EMAK while Crown's appeal and BMF's fee application were pending. A609 at ¶ 6; A579-80.

On April 21, 2010, this Court issued its opinion holding that Kurz's purchase of 150,000 shares of restricted common stock from former EMAK employee and consultant Peter Boutros, which Kurz had purported to vote in favor of the TBE consent solicitation, "was an improper transfer" that violated the Restricted Stock Grant Agreement between Boutros and EMAK. *Crown EMAK Partners*, 992 A.2d at 379. This Court concluded that "Kurz was not entitled to vote those shares" and that TBE did not have sufficient shares to act by written consent without those votes. *Id.* at 392 & n.21 (finding it "unnecessary to address either the defendants' insider trading theory or Kurz's violation of EMAK's insider trading policy" as a result of Kurz's illegal share purchase, but stating that "an actual finding of insider trading violations requires an appropriate remedy").

This Court also held that the Crown consent solicitation was ineffective because it purported to reduce the size of the Board to less than the number of sitting directors between annual meetings, but recognized that under Section 141(b) of the DGCL and EMAK's bylaws, "stockholders exercising a majority of EMAK's outstanding voting power, including the Series AA Preferred, can alter the size of the Board through a bylaw amendment" and therefore could lawfully reduce the size of the Board to three members effective at the next annual meeting. *Id.* at 399-402. Because Crown had garnered votes of more than 50% of EMAK's voting power in support of the bylaw amendment, *id.* at 385, and EMAK's 2010 annual meeting was imminent, it was again apparent that all of Kurz' efforts were for naught – Crown was eventually going to obtain control of EMAK.

Indeed, by the time of this Court's April 21, 2010 opinion, Crown had already delivered new consents to the Company to amend EMAK's bylaws to set

the size of the Board to three directors as of the 2010 annual meeting and provide that the bylaws could be further amended or repealed only by unanimous resolution of the Board or by the holders of a majority of the Company's stock. *See* A458; *see also* A632 at ¶ 4. That solicitation attracted the support of the holders of 60.66% of EMAK's outstanding stock, including more than 3.3 million shares of common stock. *See* A633 at ¶ 5; A610 at ¶ 8, A613-14.

Thus, effective at EMAK's June 10, 2010 annual meeting, the Board was reduced to three members. Crown exercised its right to elect two of the three members of the Board.[5] Thus, the withdrawal of the Exchange Transaction resulted in exactly what EMAK and the individual defendants had feared and predicted – Crown obtained the right to elect a majority of the Board.

III. PLAINTIFFS' AMENDED INTERIM FEE APPLICATION

On May 3, 2010, MNAT entered its appearance for EMAK once again. A522-23. BMF withdrew is appearance for EMAK soon after. A555-57.

Also on May 3, 2010, BMF filed an Opening Brief in Support of Plaintiffs' Amended Interim Fee Application seeking $2.85 million in fees for benefits purportedly obtained for the common stockholders of EMAK in connection with the rescission of the Exchange Transaction, certain disclosures in connection with the TBE consent solicitation, and the invalidation of the first Crown consent solicitation. A524-54. Plaintiffs claimed that their "hard-fought corporate governance litigation" efforts "yielded significant benefits for EMAK . . . and its common stockholders" because Plaintiffs had "prevented the Board from transferring control to EMAK's preferred stockholder . . . for no consideration, preserved the right of common stockholders to act by written consent to replace a Board majority, and preserved the authority of the Board to defend against the threat posed by Crown to take control of the Company for its own purposes." A529. As a result of their efforts, Plaintiffs claimed, "Crown was prevented from taking control of the Board *at least until the next annual meeting*" (*id.*) – which at the time was little more than a month away.

On July 19, 2010, after Crown had assumed control of EMAK at the 2010 annual meeting, the Court of Chancery held oral argument on Plaintiffs' Fee Application and, in a bench ruling, awarded Plaintiffs' counsel $2.5 million

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[5] Crown agreed, however, that until the next annual meeting, one of the directors it appointed would be independent. A610-11 at ¶ 9; A620-21 §§ 1.4-1-5, 2.1.

in interim fees, inclusive of expenses, payable within five days of the entry of an order. *See* Ex. A at 76, 108.

On July 29, 2010, over EMAK's objection, the Court of Chancery entered an Order in a form proposed by Plaintiffs that required EMAK to pay BMF $2.5 million within five business days *with no right of appeal*. *See* Ex. B. In a letter decision issued the same day, the Court stated that it had the "inherent power" to enter that order. *See* Ex. C at 2.

IV. EMAK FILES FOR BANKRUPTCY PROTECTION

Unable to pay the fee award, which EMAK had advised the Court represented approximately 80% of its available cash, or to work out a payment plan that was acceptable to BMF, EMAK filed for bankruptcy protection. On August 6, 2010, EMAK filed a voluntary petition for bankruptcy pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court in the Central District of California, Los Angeles Division (the "Bankruptcy Court"). A678-81. As a result of the bankruptcy filing, the action pending before the Court of Chancery was automatically stayed pursuant to Section 363(a)(1) of the Bankruptcy Code. A677.

On June 10, 2011, the Bankruptcy Court entered an Order (the "Confirmation Order") confirming EMAK's plan of reorganization (the "Reorganization Plan" or the "Plan"). A975-1020. Pursuant to the Reorganization Plan, EMAK's creditors were paid in full with interest on June 30, 2011, the date the Reorganization Plan became effective (the "Effective Date"). A982, A989-90; A1021-37. The fee award owed to BMF was paid into a segregated account, pending a determination by a court of competent jurisdiction as to whether the claim should be allowed. The Official Committee of Unsecured Creditors (the "Committee") supported the Reorganization Plan. A978. BMF, which served as the Chair of the Committee, was the only Objector to the Reorganization Plan. A977-78.[6]

As part of the confirmed Plan, all shares of common stock of EMAK were cancelled, with no distribution. A989. Thus, the result of the *fee award* was to cause a bankruptcy that eliminated the interests of the very stockholders whose supposed "benefit" formed the basis for that award. The reorganized

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[6] BMF's objection as an individual creditor was based on the post-confirmation interest rate for claims, which objection was overruled by the Bankruptcy Court. A1000.

EMAK issued to Crown new shares of common stock and two series of new preferred stock with a combined liquidation preference of $25 million. A992. No other former stockholder of EMAK received stock in the reorganized entity. Soon after the Effective Date, the reorganized EMAK was merged with and into a new entity, EMAK Holdings, Inc. ("EMAK Holdings"), and Crown received 100% of the stock of EMAK Holdings. A992-93, A1007. As part of the Plan, Crown reserved 15% of the fully diluted common stock of EMAK Holdings for a management incentive plan to be implemented by the new entity.[7] A995.

V. THE COURT OF CHANCERY DISMISSES THE REMAINING CLAIMS PENDING IN THIS ACTION AND ENTERS THE FEE AWARD AS A FINAL JUDGMENT

On July 18, 2011, BMF belatedly recognized that its actions in pursuing its fee claim had resulted in the destruction of the value of the equity holders whom it represented, and filed a motion to withdraw as counsel for Kurz in this action and instead to enter its appearance on its own behalf. A682-89.

Pursuant to an agreement among the parties and BMF to resolve the remaining procedural issues in the litigation (*see* A1038-39), the remaining claims were dismissed (*see* A1040-43; A1044-46), and on September 20, 2011, the Court of Chancery entered a Final Order and Judgment amending the Interim Fee Award to be a final judgment and ordering payment of the award to BMF "at such time and upon such terms, including with accrued interest, as are consistent with the Confirmation Order" entered by the Bankruptcy Court. Ex. D; *see* A1047.

This is EMAK's appeal of the Final Order and Judgment awarding interim fees to BMF.

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[7] Crown also offered EMAK's former common stockholders, who received nothing in return for their cancelled shares, the option to receive (a) a cash payment of $0.10 per share (available to all holders of 150,000 or fewer common shares) or (b) an equivalent amount of common stock in EMAK Holdings (available to all holders of 150,000 or more common shares), in exchange for a release of all direct claims against, among others, Crown, EMAK, and certain directors and officers of EMAK. A964-72; A984, A1012-13. This release was in addition to the releases of all of EMAK's claims as provided in the Reorganization Plan. Although a majority of the common stockholders accepted the Crown offer and received a cash payment, neither Kurz nor Sems returned release forms to Crown. A709.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN AWARDING INTERIM ATTORNEYS' FEES TO PLAINTIFFS' COUNSEL BECAUSE THE LITIGATION DID NOT PROVIDE A BENEFIT TO EMAK OR ITS STOCKHOLDERS.

A. Question Presented.

Did the Court of Chancery err when it awarded interim attorneys' fees to Plaintiffs' counsel even though the litigation provided no benefit to the Company or its stockholders? A583-A596.

B. Scope of Review.

This Court reviews awards of attorneys' fees for abuse of discretion. *See William Penn P'ship v. Saliba*, 13 A.3d 749, 758 (Del. 2011) (citing *Mahani v. Edix Media Group, Inc.*, 935 A.2d 242, 245 (Del. 2007)); *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010) (citations omitted). The Court does not substitute its own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness. *William Penn P'ship*, 13 A.3d at 758 (citing *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006)).

Where in issue, this Court reviews *de novo* the legal principles the Court of Chancery applied in reaching its decision. *See Alaska Elec. Pension Fund*, 988 A.2d at 417 (citations omitted); *Dover Historical Soc'y*, 902 A.2d at 1089 ("Where it is in issue, we review the [trial court's] formulation of the appropriate legal standard *de novo*.").

C. Merits of Argument.

Delaware generally follows the American Rule, pursuant to which litigants are responsible for their own attorneys' fees regardless of the outcome of the lawsuit. *Alaska Elec. Pension Fund*, 988 A.2d at 417 (citing *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996)). The "common corporate benefit" doctrine is one exception to the American Rule long recognized by the Delaware courts. *Id.* (citing *Goodrich*, 681 A.2d at 1044). The doctrine permits the reimbursement of attorneys' fees and expenses in corporate litigation that provides a benefit to the corporation or its stockholders. *Id.* An applicant is only entitled to attorneys' fees, however, if it can show, as a preliminary matter, that: (1) the lawsuit was meritorious when filed; (2) the

action resulting in the benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and (3) the resulting corporate benefit was causally related to the lawsuit. *Id.* (citing *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980)). The corporate benefit doctrine "insures that, even without a favorable adjudication, counsel will be compensated for *the beneficial results* they produced." *Id.* (quoting *Allied Artists*, 413 A.2d at 878). Here, EMAK challenges only the second prong, whether a benefit was achieved.[8]

Once the plaintiff establishes the three preliminary factors, the Court may, in its discretion, award attorneys' fees "based on the fairness and reasonableness of the fee requested in proportion to the benefit achieved by the litigation." *La. State Emps. Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *4 (Del. Ch. Sept. 19, 2001) (citation omitted). In determining what fee is appropriate, the Court typically considers: (1) the results achieved for the benefit of the shareholders; (2) the efforts of counsel and the time spent in connection with the case; (3) the contingent nature of the fee; (4) the difficulty of the litigation; and (5) the standing and ability of counsel. *Id.* at *6 (citing *Sugarland Indus. v. Thomas*, 420 A.2d 142, 149 (Del. 1980)).

The benefit achieved by the litigation usually is given the most weight. *Id.* (quoting *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *8 (Del. Ch. Nov. 27, 1990)); *see In re AXA Fin., Inc.*, 2002 WL 1283674, at *7 (Del. Ch. May 22, 2002) (The first issue considered by the Court in deciding to award fees is "the size of the benefit created.") (citations omitted); *In re Anderson Clayton S'holders Litig.*, 1988 WL 97480, at *1 (Del. Ch. Sept. 19, 1988) ("Delaware courts have traditionally considered as most important the benefits that the litigation has produced."); *id.* at *3 ("[T]his court has traditionally placed greatest weight upon the benefits achieved by the litigation.").

Where the litigation does not create a benefit for the corporation or its stockholders, an award of attorneys' fees is not appropriate. *See Greenfield v. Frank B. Hall & Co.*, 1992 WL 301348, at *3 (Del. Ch. Oct. 19, 1992) ("The Court of Chancery has broad discretion in awarding attorneys' fees and may deny them altogether if the Court finds that the litigation did not result in any ascertainable benefit to the corporation.") (citing *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1166-67 (Del. 1989)); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 855 (Del. Ch. 1998) ("The determination of the allowance of fees is a discretionary act, and is ascertained *solely by reason of the*

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[8] EMAK also contends that, if a benefit was achieved, it did not warrant a $2.5 million award. *See* Argument IV, *infra*.

benefit conferred on [the company's] shareholders by reason of the litigation.") (emphasis added) (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 389 (Del. 1966)). Accordingly, a defendant corporation will not be responsible for attorneys' fees where it can show no benefit was conferred on the stockholders. *See Rovner v. Health-Chem Corp.*, 1998 WL 227908, at *3 (Del. Ch. Apr. 27, 1998) (citing *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1080 (Del. 1997)). Moreover, in awarding fees from a corporation – which results in a direct reduction in the stockholders' value – the Court necessarily focuses on whether the action conferred a financial benefit on the stockholders against whom fees are sought to be taxed. *In re Katy Indus., Inc., S'holders Litig.*, 1994 WL 444765, at *5 (Del. Ch. Aug. 11, 1994) ("Even assuming, however, that is some significant sense applicants' work was an important contributing factor to the abandonment of the proposed merger, nevertheless, *there is insufficient basis to allow one to conclude that the abandonment constituted a financial benefit to the public shareholders*.").

The Court of Chancery erred when it ruled that the litigation provided any benefit, much less a financial benefit, to EMAK and all of its stockholders, thereby warranting fees under the mootness doctrine. *See* Ex. A at 78. On its face, the litigation in no sense "benefitted" holders of the common stock. To the contrary, it caused a bankruptcy that wiped out their equity interests and resulted in the complete destruction of their investment. Thus, the litigation destroyed the value of the common stockholders' investment.

The Court of Chancery tried to skirt this problem by asserting that rescission of the Exchange Transaction "was a direct and obvious benefit to *all* stockholders" because it presented "the opportunity to change the direction of the company." *Id.* at 94 (emphasis added). This ruling was erroneous for two reasons. First, there was no "new" ability by holders of common stock to control the Company as a result of the rescission of the Exchange Transaction. *Both before and after rescission, Crown had the ability to team up with holders of 22.4% of the combined voting power (approximately 30% of the common stock) to control EMAK.* Moreover, it was apparent early on – certainly by the time of the vote to ratify the Exchange Transaction – that Crown had substantial support of the holders of the common stock. Thus it was evident that Crown's eventual control of EMAK was inevitable, and that Plaintiffs' efforts were doomed to failure. But Plaintiffs pressed ahead anyway.[9]

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[9] One reason may have been that Plaintiffs asserted only individual claims, and were hoping that EMAK would buy them out.

Second, in all events, the efforts of Plaintiffs and their counsel did not benefit all of the stockholders of EMAK. At best, they may have benefitted the few holders of common stock who supported Plaintiffs' consent solicitation,[10] or perhaps even the common stockholders generally. But those efforts surely did not benefit Crown, which was a defendant in Plaintiffs' lawsuit, and was, by virtue of its $25 million liquidation preference, the primary owner of EMAK's equity.[11] Thus, the effect of requiring EMAK to pay $2.5 million of fees for an action brought to benefit some (or even all) of the holders of the common stock was to cause the holder of the preferred stock to pay for the costs of a lawsuit that did not benefit it. Plaintiffs themselves expressly conceded that their efforts did not benefit Crown. A664 (stating that the litigation need not benefit all stockholders, including the preferred stock, as long as it benefits an "ascertainable group" and that "[h]ere, that 'ascertainable group' is the body of common stockholders").

The Court rejected this obvious – and conceded – point, resorting to the circular reasoning that the litigation benefitted EMAK, and because the preferred stock owned an interest in EMAK, the holders of the preferred stock somehow must have benefitted:

> [T]he preferred stock is part of the entity. The entity and all its stockholders were benefitted by this action. All of the people who voted in the control contest were benefitted by this action. The fact that the preferred did not bargain for a right to vote in the election of directors doesn't give it the opportunity to say, "Oh no, we were not harmed, not helped." . . . The election itself, free and unaffected by a 28 percent thumb on the scales, was good. And so that benefits all stockholders, and it is not problematic in my view to have the corporation pay the fee award as a collective action mechanism for the stockholders.

Ex. A at 99-100. It is difficult to understand how Crown could have benefitted from a suit filed against it seeking to prevent it from voting shares that it owned. Similarly, it is difficult to understand how Plaintiffs' lawsuit benefitted the other

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[10] Plaintiffs and their affiliates ultimately received support from only 10% of the common shares they did not own. *See Crown EMAK Partners*, 992 A.2d at 383 (excluding the Boutros shares, 48.4% of the common voted for the TBE slate).

[11] This is borne out by the bankruptcy – because the common stock was underwater, it received no distribution.

stockholders – holders of a majority of the common stock, who, as it turns out, did not support Plaintiffs' actions. Indeed Kurz admitted in his testimony at the Section 225 trial that his lawsuit was not intended to benefit the holders of more than 50% of the Company's stock who did not support his slate:

> Q: Now, in saying you are protecting the common stockholders, you are certainly not protecting those people voting for Crown. Right?
>
> A: Honestly, I think they need to be protected, but they are not aware. ***But no, I'm not protecting them.***

A376 (Kurz). Therefore, the Court's ruling that the litigation benefitted all stockholders was clearly wrong and not supported by the factual evidence or trial testimony.

The Court's ruling also ignored that the Exchange Transaction did not enhance the ability of the stockholders unaffiliated with TBE and Crown to determine the direction of the Company in TBE's consent solicitation. At the outset of the TBE consent solicitation, Plaintiffs and their TBE affiliates collectively owned more than 38% of the common stock, and nearly 28% of the combined voting power of the common and preferred. A567-70; *see* A73. The Exchange Transaction would have given Crown "the right to wield 27.6% of the total voting power in an election of directors." *Crown EMAK Partners*, 992 A.2d at 380. With or without the Exchange Transaction, the fate of the Company would be in the hands of the remaining unaffiliated common stockholders because, given the nearly equal voting stakes controlled by Crown and TBE, it would have required the same number of votes from those unaffiliated stockholders to either elect a slate of directors or approve a bylaw amendment to reduce the size of the Board.

In any event, no stockholder received the right to vote in a free and fair election as a result of Plaintiffs' efforts. Rather, Plaintiffs own inequitable conduct caused an unfair election. Though TBE started with more than 38% of the common stock (*see* A73), it only was able to garner the support of 48.4% of the common stockholders. *See Crown EMAK Partners*, 992 A.2d at 383. Almost no holders of common stock supported it. Recognizing that his slate would not prevail by the impending deadline, Kurz decided to pay a holder of non-transferrable shares, Peter Boutros, to vote for the TBE slate – a transaction that this Court has already overturned as improper. *Id.* at 390-92. It was clear that EMAK's stockholders did not support Kurz, which is why he resorted, at the eleventh hour, to an illegal stock purchase.

The Court also erred when it found that the rescission of the Exchange Transaction and the invalidation of the Crown consent solicitation provided a benefit because they gave the Board a window to act to address the threat from Crown. *See* Ex. A at 95. The Court apparently believed that the stockholders benefitted from Plaintiffs having cheated in their own consent solicitation, because it enabled TBE to temporarily take control of the Board during the short time between the Court of Chancery's February 9, 2010 opinion and this Court's April 21, 2010 decision on appeal, thereby giving the TBE slate "the opportunity to deploy its board power," which it would not have had if "the incumbents remained in power." *Id.* at 96. But the TBE slate was never properly elected. That Plaintiffs could have provided a benefit by taking illegal conduct (and spending $800,000 of EMAK's funds and causing the defendants to spend even more funds to litigate Plaintiffs' illegal conduct) is incomprehensible.

In reality, the litigation did not give the Board any "power" to resist Crown's efforts to take control. At best, it delayed the inevitable. Crown had 27.6% of the voting power and, as demonstrated by the ratification vote (in November 2009) and its two consent solicitations (in December 2009 and February 2010), the support of the holders of far more than 30% of the common stock (*i.e.*, 22.4% of the combined voting power) that it needed to control the Company. Thus, it was going to control the Board at the next annual meeting. Even BMF acknowledged this fact. It stated in its brief in support of its Fee Application that, as a result of its efforts, "Crown was prevented from taking control of the Board *at least until the next annual meeting*." A529 (emphasis added). And, it is undisputed that at EMAK's June 10, 2010 annual meeting, EMAK's bylaws were amended to reduce the size of the Board to three directors. Because Crown had the right to elect two directors, the amendment gave Crown the right to unilaterally elect a majority of the Board – the very result that the Exchange Transaction was designed to prevent.

In short, Plaintiffs' litigation did not benefit EMAK or its stockholders. Instead, it resulted in contentious and destructive litigation designed to "protect" a consent solicitation that was doomed to, and did, fail. Indeed, Plaintiffs' actions eventually led to EMAK's bankruptcy and the destruction of the value of the common stock whose holders were the alleged beneficiaries of Plaintiffs' lawsuits.

II. THE COURT OF CHANCERY ERRED IN AWARDING INTERIM ATTORNEYS' FEES TO PLAINTIFFS' COUNSEL ON THE BASIS OF IMPROPER FACTUAL FINDINGS.

A. Question Presented.

Did the Court of Chancery err when it awarded interim attorneys' fees to Plaintiffs' counsel on the basis of improper factual findings regarding Plaintiffs' breach of fiduciary duty and disclosure claims without a hearing on the merits of those claims? A674.

B. Scope of Review.

This Court reviews awards of attorneys' fees for abuse of discretion. *See* § I.B., *supra*. However, this Court reviews *de novo* the legal principles applied by the trial court in reaching its decision. *See id.*

C. Merits of Argument.

Any award of fees must be proportional to the benefit achieved. *See Citrix Sys.*, 2001 WL 1131364, at *4 ("Where the plaintiff has prevailed on this three factor inquiry [for whether mootness fees are merited], attorneys' fees are awarded at the discretion of the Court based on the fairness and reasonableness of the fee requested in proportion to the benefit achieved by the litigation.") (citation omitted). Here, there was no trial, and no opportunity to present live testimony about the merits of Plaintiffs' claims. Yet, the Court of Chancery premised its fee award on apparent factual findings that the Court itself recognized it was not in a position to make.

Thus, the Court of Chancery recognized that it had not made "factual findings regarding whether, in fact, there were breaches of loyalty," because it had not yet "address[ed] [those claims] on the merits." Ex. A at 79. The Court also admitted, "***I have not heard Mr. Holbrook testify. Perhaps he has wonderful and credible explanation for all this. I have not heard Mr. Ackerman testify.***" *Id.* at 91-92.[12] Nevertheless, the Court concluded:

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[12] The Court never held a hearing on Plaintiffs' preliminary injunction application challenging the Exchange Transaction because the transaction was rescinded prior to the hearing. Ex. A at 79-80 ("[T]he rescission of the Exchange Transaction mooted the need for me to issue a preliminary injunction decision."). Nor did it focus on the fiduciary duty claims during (Continued . . .)

> ***I think there is substantial and credible evidence that Mr. Holbrook breached his duty of loyalty*** in connection with the exchange transaction. ***I think there is substantial and credible evidence that Mr. Holbrook misled the board*** and/or withheld material information in connection with the events leading up to the exchange transaction.

Id. at 80. The Court made these conclusions without the presentation of any evidence regarding those allegations and based on the following factual findings:

> This litigation did not suddenly spring forward with the dropping of [TBE's] consent. It actually had its roots in a dispute that went much further back, over control of the corporation. Mr. Holbrook succeeded Mr. Kurz as CEO.
>
> And while it has never been my job and still is not my job to determine whether Mr. Kurz's tenure was more successful or Mr. Holbrook's tenure was more successful, that's always been for the board; and who the board is, is up to the stockholders. ***One can say as an outside observer that there were at least external indications that Mr. Holbrook's tenure was less than satisfactory***. He presided over an approximately 90 percent drop in the value of the stock, and there were other problems as well.

Id. at 80-81. Therefore, the Court of Chancery reasoned, "it was not surprising" that Mr. Kurz wanted to re-gain control of EMAK and that he filed a Schedule 13D stating that he was considering a potential acquisition of EMAK and also would seek changes in management and Board composition. *Id.* at 81-82. The Court further concluded:

> ***It's clear from the record that Mr. Holbrook regarded this 13D as a threat***, because in November of 2008, he wrote to EMAK's

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(. . . continued)
the Section 225 trial. *See Kurz v. Holbrook*, 989 A.2d at 144. The Section 225 trial focused solely on which individuals comprised the Board of Directors of EMAK. *See* Ex. A at 80 ("I didn't go that route in the 225 trial, . . . a one-day affair where a number of the individuals who potentially could have faced personal liability from an adverse duty of loyalty finding did not appear and did not testify. Hence, I didn't feel that I should reach duty of loyalty issues with potential personal liability implications unless it was absolutely necessary.").

> advisors that he planned to contact [Peter] Ackerman [of Crown] to ask [him] to support the implementation of the staggered board, and he stated the reasons bluntly, "We want to move to a staggered board in order to avoid a proxy slate by Don."

Id. at 81-82.

The Court made factual findings spanning a total of fourteen pages of the transcript of the July 19, 2010 hearing on Plaintiffs' Fee Application (*see id.* at 80-94). The Court "found," among other things, that:

- Mr. Holbrook's responses to Kurz' efforts to regain control of the Company were in breach of the duty of loyalty;
- Holbrook tried to align with Crown to "keep his job," rather than for any legitimate reason; and
- If the Board had full information, it may not have approved the Exchange Transaction.

Id. at 85-86, 90, 91. Each of these claimed facts was highly contested. Thus, the Court of Chancery abused its discretion when it awarded $2.5 million of interim fees based on the factual findings it made without any testimony from crucial witnesses, including Messrs. Holbrook and Ackerman. Had the Court held a hearing at which such testimony could be presented, it might have been persuaded that the evidence did not support those inappropriate factual findings.

Simply put, the Court of Chancery should not have awarded millions of dollars of interim fees on the basis of the alleged "substantial and credible evidence" of breach of loyalty or the allegedly false and misleading disclosures, *see id.* at 80, without a hearing on those issues. *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, LP*, 624 A.2d 1199, 1206-07 (Del. 1993). This Court held in *Desert Equities* that, because "there has been no discovery in this case, there are no facts of record from which the Court of Chancery may discern the reasonableness of the General Partner's actions. Therefore, because reasonableness is a question of fact, the Court of Chancery erred when it found, as a matter of law, that defendants acted reasonably in their dealings with Desert Equities." *Id.* at 1207. While there was some discovery here, the allegedly wrongful conduct at issue involves questions of fact, which were contested, and as to which there had been no hearing. The Court in essence granted summary judgment despite its own recognition that the facts were contested and that there could be explanations for what appeared to the Court at

first blush to be wrongdoing. This was an abuse of discretion. *Cf. Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998) (finding Court of Chancery did not abuse its discretion in awarding attorneys' fees under the bad faith exception to the American Rule because the Court of Chancery "made definitive findings of fact showing bad faith," which were demonstrated by "specific instances during the course of trial" that the Court pointed to as demonstrating bad faith).

The Court similarly erred when it concluded that the disclosures Plaintiffs claimed to have obtained from the unsealing of the record, which defendants did not oppose (*see* A199, A200-01), provided a benefit because "the disclosures [by the Company] were false and misleading." Ex. A at 96. When the Court ruled on the Fee Application, there were various claims, counterclaims and third-party claims pending regarding the disclosures in connection with the competing consent solicitations (*see* A203-19; A268-310; A311-40), but no evidence or testimony on the disclosures had been presented to the Court because the parties had agreed to defer any adjudication of those claims. *Crown EMAK Partners*, 992 A.2d at 381; *see* A220-22. The Court acknowledged, however, that defendants had a "legitimate" argument that the Company's disclosures seeking ratification of the Exchange Transaction and, effectively, revocation of consents for TBE, balanced the disclosures issued by TBE and provided the stockholders with the total mix of information, which they could accept or reject as they chose. Ex. A at 96. Yet, the Court still concluded, without hearing any testimony, that "the idea that the consent solicitation materials that were put out [by the Company] for the ratification statement are accurate is just not one that I can agree with. And I think that had I been forced to write on that and square up those issues, that is exactly the outcome I would have reached." *Id.* The clear error here is that the Court of Chancery *was not* "forced to write on that" and in fact had no record of evidence on those issues.

In this case, it was improper for the Court to make factual findings and legal conclusions of breaches of fiduciary duty without testimony on those claims. To award Plaintiffs attorneys' fees on the basis of those findings and conclusions was an abuse of discretion. *See In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *7 n.1, *16 (Del. Ch. June 27, 2011) (noting that "interim fees should not be awarded if the underlying benefit could be modified or set aside by later proceedings, albeit with the focus now at the trial level" and declining to award interim fees to plaintiffs on the basis of claimed benefits from obtaining a preliminary injunction because "the fruits of post-injunction discovery and the insights provided by live witnesses at trial should help me develop a more tailored assessment" of the appropriate amount of attorneys' fees to award) (citing *Gans v. MDR Liquidating Corp.*, 1993 WL

193526, at *1 (Del. Ch. May 28, 1993) (declining to award interim attorneys' fees because the benefits obtained could be overturned on appeal and noting that "applications for attorney fees are often rejected if the litigation has not been completed")). Simply put, the Court of Chancery should not have awarded interim attorneys' fees, but instead should have awaited final disposition of the action and the development of an appropriate record to make any fee award.

III. THE COURT OF CHANCERY ERRED WHEN IT ORDERED EMAK TO PAY INTERIM ATTORNEYS' FEES TO PLAINTIFFS' COUNSEL IMMEDIATELY WITH NO RIGHT OF APPEAL.

A. Question Presented.

Did the Court of Chancery err when it ordered EMAK to pay an award of interim attorneys' fees to Plaintiffs' counsel within five business days without the right to appeal? Ex. A at 108-10; A672-75; *see* A512-14.

B. Scope of Review.

This Court reviews an award of attorneys' fees for abuse of discretion. *See* § I.B, *supra*. However, this Court reviews *de novo* the legal principles applied by the trial court in reaching its decision. *See id.*

C. Merits of Argument.

Applications for interim awards of attorneys' fees have long been disfavored in Delaware. *See Emerald Partners v. Berlin*, 1994 WL 48993, at *1 (Del. Ch. Feb. 4, 1994) (citing *MDR Liqidating Corp.*, 1993 WL 193526, at *1). Rather, it has been the long policy of the Delaware courts to consider applications for attorneys' fees only after the claims have been fully litigated so that the Court may evaluate the application with the benefit of a settled and final record. *See MDR Liquidating Corp.*, 1993 WL 193526, at *1 ("Judicial economy and the orderly conduct of litigation are usually better served if interim awards of attorneys' fees are avoided and applications for attorney fees are often rejected if the litigation has not been completed. Perhaps more importantly here, there is the possibility that the claimed benefit to the trust – the removal of the original trustees – may be reversed on appeal after a final judgment is rendered. This would eliminate one of the primary bases for the claim for attorneys' fees.") (internal citations omitted).

1. The Interim Fee Award was Premature.

In its July 19, 2010 ruling, the Court of Chancery acknowledged that "interim legal fees are discouraged." Ex. A at 76. Nonetheless, the Court ruled: "[T]o reiterate my ruling I made by letter dated March 2nd, 2010, this is the type of case where I think it's appropriate to consider an interim award." *Id.*; *see*

Kurz, 2010 WL 761205, at *1 ("Although interim fee applications are disfavored, this case offers the rare situation where one is appropriate.").[13]

The Court of Chancery reasoned that interim fees with respect to the Exchange Transaction were appropriate because:

> [T]he facts surrounding the mooting of that application for injunctive and other equitable relief were established at that point. They were not subject to revision. The benefits from that act would be assessed as of that date, and ***I do assess them as of that date***.
>
> It's effectively a separate phase of the case. And so, as I noted then and as I still believe, what ***happened after that doesn't change the benefit conferred as of that time***.

Ex. A at 76-77. This ruling was erroneous because, as of March 2, 2010, any benefits of the rescission of the Exchange Transaction remained to be seen. Moreover, we know that by the time that the Court awarded fees – July 19, 2010 – it was clear that there was not, and never could have been, any benefit. Rather, holders of the common and preferred stock collectively owning more than 60% of the combined voting power had not supported Plaintiffs, and Crown and holders of the common stock had acted together to reduce the size of the Board and to ensure that Crown would elect a majority of the Board in future elections. Therefore, the Court should not have assessed any purported benefit as of the date the transaction was rescinded. Indeed, this case illustrates why the Court of Chancery's interim ruling was inappropriate, because, in fact, the overall results of the rescission of the Exchange Transaction harmed the holders of EMAK's common stock, as the situation changed, first, from one in which holders of a plurality of the voting stock could control the election of directors to one in which Crown would control the election of directors and, second, to one in which the entire value of the common stock was eliminated as a result of the Interim Fee Award, which drove the Company into bankruptcy.

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[13] At the time of the Court of Chancery's March 2, 2010 letter ruling, the only issue before the Court was whether to entertain Plaintiffs' February 24, 2010 fee application immediately or to wait until after this Court issued its decision in the then-pending appeal. *See Kurz*, 2010 WL 761205, at *1-2. In stating in the March 2, 2010 letter that interim fees were appropriate, *see id.*, the Court apparently had already determined – before EMAK had an opportunity to respond – that it intended to award Plaintiffs interim fees in this action.

2. The Court Should Not Have Required Immediate Payment of $2.5 Million with No Right to Appeal.

Compounding the inappropriateness of the award, the Court of Chancery entered an order, over EMAK's objections, which required EMAK to pay the $2.5 million in attorneys' fees to BMF within five business days with no right to an appeal. *See* Ex. B. Indeed, BMF itself recognized that this was inappropriate. It originally requested that the Court grant its Interim Fee Application pursuant to a Rule 54(b) certification. A671 ("[P]laintiffs respectfully request that the Court grant plaintiff's amended interim fee application and direct entry of a final judgment pursuant to Court of Chancery Rule 54(b), as there is no just reason for delay."). But ultimately, the Court entered an order, over EMAK's objection (*see* Ex. A at 108-09; A672-75), requiring a $2.5 million payment within five business days, with no right of appeal. *See* Ex. B.

In issuing its Order, the Court of Chancery stated that it had the inherent authority to award interim fees to be paid immediately before final adjudication of the action and with no right to an immediate appeal. *See* Ex. C at 1-2, 4. The Court believed it could direct payment of an interim fee award without a Rule 54(b) certification because "the power to award fees, including interim fees, 'is part of the original authority of the chancellor to do equity in a particular situation.'" *Id.* at 1 (quoting *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 393 (1970), and *Sprague v. Taconic Nat'l Bank*, 307 U.S. 161, 166 (1939)). The Court stated that the Court of Chancery may award interims fees for many reasons, including to "compensate counsel for conferring a corporate benefit." *Id.* at 2 (citing *Citrix Sys.*, 2001 WL 1131364, at *4). In addition, the Court reasoned that, "an interim order awarding fees does not hang in suspension until the entry of a final judgment." *Id.* Instead, the Court explained, "[a] trial court has the inherent power to enforce its orders and direct timely payment." *Id.* (citing *Forsythe v. CIBC Emps. Private Equity Fund (U.S.) I, L.P.*, 2006 WL 846007, at *2 (Del. Ch. Mar. 22, 2006) ("This court . . . retains inherent authority to enforce its decisions, even in the absence of specific authorization by rule."), and *Cebenka v. Upjohn Co.*, 559 A.2d 1219, 1225 (Del. 1989) ("[T]he Superior Court has 'inherent power' to enforce its own orders which are issued pursuant to valid authority.")).

The Court of Chancery reasoned that the Supreme Court had "implicitly" recognized this inherent power to award interim fees and require their immediate payment in *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1212, 1214 (Del. 2009), when the Supreme Court affirmed the Court of Chancery's entry of a default judgment against the plaintiffs after the plaintiffs failed to pay attorneys' fees that had been awarded to defendants as a discovery sanction. *See* Ex. C at 2.

"There was no suggestion in *Minna* that the Court of Chancery lacked authority to require payment of a final judgment, or that the Court of Chancery only could create a presently enforceable order by entering a partial final judgment pursuant to Rule 54(b)." *Id.*

In addition, the Court of Chancery concluded that an order requiring the payment of interim attorneys' fees need not afford the party against whom the award is entered an immediate right to appeal. *Id.* "If it did, then interim fee awards could not be enforced, because there generally is no basis to appeal from an interim fee award." *Id.* (citing 10 Moore's Fed. Prac. § 54.158 (3d ed. 1997 & 2010 supp.)). Further, the Court concluded that, although the Delaware Supreme Court had not yet addressed the precise question, an interim fee award generally cannot be certified pursuant to Court of Chancery Rule 54(b). *Id.* at 3 (citing *Estate of Drayton v. Nelson*, 53 F.3d 165, 167 (7th Cir. 1994)). The Court concluded that "***EMAK can be directed to pay the interim fee award now***. . . . ***[A]n immediate right of appeal is neither required nor warranted***, and . . . the fee award can be reviewed on appeal from the final order in the case and recovered at that time if altered or set aside." *Id.* at 4 (emphasis added).

It is perhaps consistent with notions of equity to award relatively small sanctions, or even "interim" fee awards, where doing so will not affect the viability of the party ordered to make payment. In such circumstances, the paying party will eventually have an opportunity to appeal and, if the amount at issue is modest, it may not be critical when the funds are required to be paid. Here, however, the amount at issue was not modest – it was $2.5 million. More importantly, as EMAK advised the Court of Chancery, the $2.5 million constituted nearly all of EMAK's available cash, with the foreseeable result that requiring immediate payment would cause EMAK to have to seek bankruptcy protection. A567; *see* A608 at ¶ 3. This is in fact what occurred.

In the circumstances here, the Court of Chancery abused its discretion by ordering EMAK to pay the Interim Fee Award immediately, with no right to appeal. No precedent permits the award of sanctions or interim fees, with no right of appeal, in an amount that will plainly jeopardize the continued existence of the party against whom the fees are awarded. Rather, in *Minna*, upon which the Court relied *to justify* its interim award, the Court of Chancery awarded the plaintiff $700,000 in attorneys' fees for a discovery violation by the defendant; however, the Court of Chancery ordered the *Minna* defendant to pay only that portion of the sanction that the defendant conceded was reasonable. *See Minna*, 984 A.2d at 1214. The defendant had acknowledged that more than $400,000 in fees was reasonable but made no payment. *Id.* On appeal, this Court concluded that the award of sanctions was not improper under the circumstances and, in any

event, by admitting that $400,000 was reasonable and also "*failing to provide evidence that he was financially unable to pay those fees*," the defendant waived his right to contest the award. *Id.*

Minna does not provide support for the Court of Chancery's fee award in this case; rather, it demonstrates that the Court of Chancery acted improperly here. In stark contrast to the *Minna* defendant, EMAK *did* present evidence that it was unable to pay the fee award, specifically, that the fee constituted nearly all of EMAK's available cash. Therefore, the immediate requirement to pay the entire amount of the large monetary award was, for practical purposes, a non-reviewable judgment that significantly affected EMAK's business. Indeed, it caused its bankruptcy filing. In these circumstances, the Court of Chancery abused its discretion in granting fees of this magnitude and requiring that the entire amount be paid immediately with no right of appeal. Therefore, the Interim Fee Award should be vacated.

IV. THE COURT OF CHANCERY ERRED IN AWARDING AN UNREASONBLY HIGH FEE AWARD TO PLAINTIFFS' COUNSEL, THEREBY REWARDING PLAINTIFFS' AND THEIR ATTORNEYS' INEQUITABLE CONDUCT.

A. Question Presented.

Was the Court of Chancery's award of $2.5 million in attorneys' fees to Plaintiffs' counsel unreasonably excessive given the failure to produce a quantifiable benefit and the inequitable conduct of Plaintiffs and their attorneys? A596-605.

B. Scope of Review.

This Court reviews awards of attorneys' fees for abuse of discretion. *See* § I.B., *supra*. However, a party challenging the fee award will prevail on appeal where it can "establish either that the [trial judge] failed to assess the reasonableness of the fees and expenses or that his determination that the fees and expenses were reasonable was capricious or arbitrary." *Mahani*, 935 A.2d at 245.

C. Merits of Argument.

1. The Interim Fee Award was Unreasonably Excessive.

The amount of fees awarded "rests in the sound discretion of [the Court of Chancery], and must be reasonable in relation to the benefit conferred." *See In re 14 Realty Corp.*, 2009 WL 2490902, at *9 (Del. Ch. Aug. 4, 2009) (citing *Korn v. New Castle County*, 922 A.2d 409, 412-13 (Del. 2007), and *Chrysler Corp.*, 223 A.2d at 286). To determine the reasonableness of the requested fee amount, the Court considers: (1) the time and effort expended by the plaintiff's counsel; (2) the complexity and difficulty of the case; (3) whether the representation was contingent in nature; (4) the standing and ability of plaintiff's counsel; and (5) the benefit conferred. *See Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at *5 (Del. Ch. July 13, 1998) (citing *Sugarland*, 420 A.2d at 149-50, and *Goodrich*, 681 A.2d at 1050).

Where a plaintiff does not obtain some value-creating benefit, such as an increase in the price offered to stockholders in a merger, it must demonstrate the existence of some otherwise compensable benefit to the Company or its stockholders. *See Helaba Invest Kapitalanlagegesellschaft mbH v. Fialkow*, 2008 WL 1128721, at *3 (Del. Ch. Apr. 11, 2008) (The benefit conferred need not be a tangible, monetary benefit, but it must be "some other *valuable* benefit

[that] is realized by the corporate enterprise or the stockholders as a group.") (emphasis added) (citations omitted); *see also Korn*, 922 A.2d at 412; *Dover Historical Soc'y*, 902 A.2d at 1090. Where the nature of the benefit is not quantifiable, "plaintiffs can be compensated only on a limited *quantum meruit* basis." *Dunkin' Donuts*, 1990 WL 189120, at *8. "[T]he *quantum meruit* approach gives the Court a more equitable means of determining a reasonable fee." *Id.*; *see also In re First Interstate Bancorp. Consol. S'holder Litig.*, 756 A.2d 353, 363 (Del. Ch. 1999); *In re Golden State Bancorp Inc. S'holders Litig.*, 2000 WL 62964, *3 (Del. Ch., Jan. 7, 2000); *In re Diamond Shamrock Corp.*, 1988 WL 94752, at *4 (Del. Ch. Sept. 14, 1988).

Plaintiffs conceded that the alleged benefit in this case was "non-monetary" (A548) and "not quantifiable." A549. Therefore, in awarding fees, the Court of Chancery should have followed the *quantum meruit* approach to determine a fair amount. Had the Court properly applied such an approach, it could not possibly have awarded anything more than a very modest fee.

This Court has specifically stated that, where the benefit is "meager or speculative," the Court of Chancery should discount the fees. *Golden State*, 2000 WL 62964, at *3. Because any benefit this litigation provided was minimal at best – if not non-existent – only a small fee would have been appropriate. *See, e.g., id.* (stating that lawsuits resulting in increased disclosure of information confer only a minimal benefit on stockholders and merit only a small fee award and awarding $500,000 in fees for "a quite modest benefit" rather than the requested amount of $1.325 million).

In breaking down the $2.5 million award, the Court of Chancery explained that it was awarding Plaintiffs $1.7 million for the rescission of the Exchange Transaction. Ex. A at 106. The Court "analogize[d] the knocking out of the exchange transaction . . . to when someone knocks out a defensive measure [in a deal case], like a termination fee or an option lockout" and reasoned that "this type of knocking out of a defense to create the benefit is precisely analogous to what happened in *Ceridian* and *Yahoo*. *Id.* at 77. The Court stated that $1.7 million in fees for the rescission of the Exchange Transaction was "reasonable . . . given the comparables, given the amount of work, given the benefits conferred." *Id.* at 106-07. The Court awarded Plaintiffs $400,000 for the invalidation of the Crown consent solicitation, explaining that "essentially, although it was a victory, what it really did was delay the Crown strategy until the annual meeting." *Id.* at 107. Therefore, the Court reasoned, "it's similar to a deal injunction, and so I draw on that type of precedent by analogy." *Id.* Finally, the Court awarded $400,000 for the disclosures, stating, "I think these were

meaningful disclosures that corrected what were false and misleading solicitation materials." *Id.*

If one assumes that an appropriate amount of fees would be equal to 25% of the benefit created, then, to justify the $2.5 million fee, which represented a premium hourly rate of approximately $1,600 per hour,[14] the Court of Chancery would have had to have found that Plaintiffs' efforts provided the Company with an intangible benefit equivalent to $10 million. The Court did not make such a finding. Nor could it have. As Kurz conceded, the Exchange Transaction did not destroy the value of the common stock. At most, it had a minor impact on voting rights. Moreover, as Kurz conceded, it was "questionable" whether the common stock had any value at all. In light of the $0.75 stock trade around the time that Plaintiffs' Fee Application was pending, the entire equity value of the common stock could be said to be approximately $5.4 million, although, given the preferred stock's $25 million liquidation preference, the value of the common was likely nothing. The "benefit" of rescinding the Exchange Transaction was, at most, a fraction of the total value of the shares. A proper fee award could be, at most, a percentage (*e.g.*, 20-30%) of that benefit.

Instead, the fee award by the Court for allegedly preserving a fraction of the value of the common stock (*i.e.*, temporarily preserving certain voting rights) was nearly 50% of the entire market capitalization of the common stock and nearly all of the Company's available cash. Such a fee cannot be said to be reasonable.

2. The Court of Chancery Failed to Consider Equitable Factors in Determining the Appropriate Amount of Fees.

When appropriate, the Court of Chancery may consider other equitable factors in determining an appropriate amount of fees. *See, e.g., First Interstate Bancorp*, 756 A.2d at 360-61 (taking into consideration other equitable factors in deciding whether to award fees). "The purpose underlying these fee-shifting doctrines is to balance the equities to prevent 'persons who obtain the benefit of a lawsuit without contributing to its cost [from being] unjustly enriched at the

[14] Plaintiffs claimed that they spent a total of more than 1,500 hours on the relevant parts of the litigation and $139,378 in expenses. A545; A559 at ¶ 2. That amount included 1,170 hours BMF spent litigating Plaintiffs' individual claims challenging the Exchange Transaction, 233 hours challenging the validity of the Crown Consents and 184 hours incurred by Luce Forward. A532-33, A544-45; A559 at ¶ 3.

successful litigant's expense.'" *Korn*, 922 A.2d at 412 (quoting *Dover Historical Soc'y*, 902 A.2d at 1090).

It was an abuse of the Court of Chancery's discretion to require EMAK to fund litigation that was wholly self-serving to Plaintiffs and was prolonged as a result of Plaintiffs' inequitable conduct in connection with the TBE consent solicitation (*i.e.*, the improper Boutros share purchase). The Court of Chancery should have taken into account Plaintiffs' inequitable conduct in assessing fees. Plaintiffs expended $800,000 of EMAK's funds during the ten weeks that they improperly controlled EMAK's Board. In addition, EMAK was forced to expend $5.2 million in attorneys' fees to defend against Plaintiffs' claims, including $2.8 million to defend against Plaintiffs' invalid consent solicitation "victory." A610 at ¶ 7; *see* A590.

The Court of Chancery justified its fee award largely by disagreeing with, or distorting, this Court's holdings. Despite this Court's clear language to the contrary in this Court's April 21, 2010 opinion, *see Crown EMAK Partners*, 992 A.2d at 390-98, the Court of Chancery stated, "I think the Boutros share issue was fairly litigable." Ex. A at 97. In addition, seemingly ignoring this Court's April 2010 opinion, the Court of Chancery inaccurately characterized the litigation as follows:

> [T]he defendants didn't largely prevail. They won on what I think was a difficult interpretation of a stock restriction. I think it could have gone either way. I think there are reasonable arguments either way. I obviously reached one decision. The Supreme Court reached another, as is their power as the higher Court. Otherwise, the plaintiffs won.[15] And the plaintiffs won not only on the Rule 54(b) decision, but they won completely on the mooting of the exchange transaction.

Id. at 98-99.

The Court of Chancery also erred in refusing to take into account the Company's diminishing cash position resulting from Plaintiffs' actions, even though the Court acknowledged that it could properly to do so in circumstances

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[15] In fact, this Court commented on, but did not reach, the Court of Chancery's ruling that consents need not be executed by stockholders of record and that there is no remedy for Kurz's insider trading. *Crown EMAK Partners*, 992 A.2d at 392 n.21, 398. Therefore, it is not true that "[o]therwise, the plaintiffs won." Ex. A at 98.

where the defendants largely prevailed. *Id.* at 98 (citing *Thorpe v. CERBCO, Inc.*, 1997 WL 67833, at *2 n.1 (Del. Ch. Feb. 6, 1997)). Rather than take into account the expenditures that Plaintiffs caused EMAK to make during the ten weeks they wrongfully claimed title to office and the costs of the litigation that EMAK's stockholders were forced to bear, the Court of Chancery considered *a justification for the fee award* that "the defendants spent $5.2 million litigating the same action, and they did so without any contingency risk." *Id.* at 97. The Court reasoned, "[w]hen you've got two sides litigating the same dispute, what one side incurs is at least relevant to the reasonableness of fees." *Id.*

First, EMAK did not spend $5.2 million defending the claims on which Plaintiffs purport to have prevailed. Rather, $2.8 million of its fees were in defense of Plaintiffs' unlawful consent solicitation. A610 at ¶ 7. Moreover, the trial court's reasoning is inconsistent with *Thorpe v. CERBO.* There, in determining the amount of a plaintiffs' attorney's fee, the Court of Chancery explained that the litigation had caused substantial expense to the company and took into consideration "what portion of the heavy cost of the prosecution of the case by plaintiffs the shareholders of CERBCO should in equity be required to bear." *CERBCO,* 1997 WL 67833, at *2. The Court also noted that, where the defendants prevailed on some issues in the litigation, the net benefits provided by the litigation might result in an award of little or no fees to plaintiffs in light of the substantial litigation costs imposed on the shareholders. *Id.* at *2 & n.1. Specifically, the Court stated:

> Notably, if one assumes that it would be appropriate to look at the *net benefits* to the corporation produced by the litigation (that is net of the corporation's own necessary expenses in either indemnifying its officers with respect to aspects of the suit on which they prevailed or net of the corporation's own expenses for independent legal counsel in connection with the suit) then, in this instance, despite the modest judgment to be entered in favor of CERBCO on this remand, there would apparently be no benefit to the corporation by reason of the prosecution of this case. There would rather be a substantial cost that will be borne of course by the shareholders indirectly. But, while, in principle I cannot imagine why an inquiry into *net* benefit of the litigation to the corporation would not be a sound technique for judging the equity of fee shifting in a case where defendants prevail on the most central issues, I pass over that point as unnecessary to decide in this instance.

Id. at *2 n.1.

Here, the Court of Chancery stood the *CERBO* principle on its head by holding that the significant fees incurred by EMAK somehow justified the interim fee award. The opposite is true. Plaintiffs' illegal conduct – their adjudicated wrongdoing in unlawfully purchasing the Boutros shares and improperly voting those shares in favor of their consent solicitation to claim victory – cost the Company millions of dollars, both in the expenditures that Plaintiffs made while in office and in the costs of defending against their wrongful conduct. It was a clear error for the Court of Chancery to fail to take this into account. Similarly, the Court of Chancery should have considered the net benefits of the litigation, including that control of EMAK's Board was shifted to Crown as a predictable (and predicted) consequence of that litigation.

Finally, the Court refused to take into account the BMF and Luce Forward conflict issues during the time while TBE was in office. The Court stated, "I think the conflict issues . . . arise out of the odd situation that we're dealing with corporate claims and we have a change in control over the corporation. So all of a sudden, people who used to be on the outside are on the inside." Ex. A at 101-02. The Court concluded that conflict rules "need to be applied with an understanding of the realities of what happens when a new group of lawyers comes in who has been representing the outsiders." *Id.* at 102.

This ruling cannot be justified. It is improper for counsel to simultaneously represent the plaintiffs and defendants in the same lawsuit, under any circumstances. BMF and Luce Forward could have, and ethically were required to, decline representation of EMAK (whom they were suing, and from whom they were seeking fees). They chose not to because they did not want EMAK to have independent advice. Indeed, director Deutschman testified that Luce Forward – which was (and is) seeking fees for 184 hours of its work (A544), approximately $700,000 – advised the Board not to oppose its own fee application. A633 at ¶ 6. Such outrageous conduct should not be countenanced, much less rewarded.

Plaintiffs' inequitable conduct in connection with the TBE consent solicitation, compounded by counsels' conflicts and the Company's diminishing cash position as a direct result of the litigation balance the equities in this case against an award of counsel fees. As a result of the litigation, the Company's treasury was depleted and the common stockholders were eliminated. Neither Plaintiffs nor their counsel should have been rewarded by the Company or its stockholders for this outcome. Therefore, the Interim Fee Award should be substantially reduced if it is not vacated.

CONCLUSION

For the foregoing reasons, Appellant EMAK respectfully requests that this Court reverse the Court of Chancery's September 21, 2001 Final Order and Judgment and render judgment vacating the Interim Fee Award or reducing it substantially.

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November 8, 2011

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