IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DONALD A. KURZ and SEMS DIVERSIFIED VALUE, LP, Plaintiffs, v. JAMES L. HOLBROOK, JR., *et al.*, Defendants.	)	
JAMES L. HOLBROOK, JR., *et al.*, Counterclaim-Plaintiffs, v. DONALD A. KURZ and SEMS DIVERSIFIED VALUE, LP, Counterclaim-Defendants, and JAMES L. HOLBROOK, JR., *et al.*, Third Party Plaintiffs, v. TAKE BACK EMAK, LLC, Third Party Defendants,	)	C.A. No. 5019-VCL
CROWN EMAK PARTNERS, LLC, Counterclaim and Third-Party Plaintiff, v. DONALD A. KURZ, *et al.*, Counterclaim and Third-Party Defendants.	)	

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' AMENDED INTERIM FEE APPLICATION

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PRELIMINARY STATEMENT

The classic illustration of chutzpah is a youth who kills his parents and then pleads for the court's mercy on the ground of being an orphan.[1] EMAK's answering brief presents the corporate law analogue. EMAK's fiduciaries caused EMAK to pay teams of lawyers millions of dollars to implement and defend a failed, inequitable, and illegal scheme to prevent a competitive election, and EMAK now argues that the cost of that scheme was so high that plaintiffs' counsel should not be compensated for undoing it.

As of September 30, 2009, EMAK had $13.7 million in cash and cash equivalents, no debt and was profitable. (App. 1)[2] EMAK had just lost the customer that provided most of its revenues and profits, but its future direction was worth fighting over. Restive common stockholders wanted to replace CEO James Holbrook and install new leadership. Having overseen a 90% deterioration in EMAK's stock price, Holbrook had good reason to fear for his job. Crown had good reason to fear that a new board majority would be less inclined to meet Crown's demands that EMAK restructure Crown's investment at no discount to the $25 million that EMAK owed Crown only in the avoidable events of a change of control transaction or dissolution.

Holbrook, the Board and Crown made a fateful choice. They decided to expend significant corporate resources on a transaction that made it impossible for the common stockholders to elect a new Board majority. The emails quoted in the opening brief tell the story.

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[1] *See, e.g., Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 128 n.5 (2d Cir. 2009); *McCelland v. McGrath*, 31 F. Supp. 2d 616, 617 n.1 (N.D. Ill. 1998).

[2] Defined terms have the same meaning as used in plaintiffs' opening brief. The accompanying appendix of exhibits is cited as "App. __." The Declaration of John C. Kirkland, dated July 9, 2010, is cited as "Kirkland Decl." The Declaration of Donald A. Kurz, dated July 10, 2010 is cited as "Kurz Decl." The Third Declaration of Joel Friedlander, dated July 3, 2010, is cited as "Third Friedlander Decl."

Holbrook feared that "Don's group may buy shares after any BKC announcement" and "get to 51%." (App. 2) He thought the best way to defeat Kurz's group was to "approve[] full voting rights for the preferred." (App. 3) As Peter Ackerman testified, Crown worked with the incumbents "to block Mr. Kurz from taking control." (App. 4 ¶ 18)

Money was no object in preventing the common stockholders from replacing a Board majority. EMAK paid its lawyers and Crown's lawyers to implement the Exchange Transaction. When plaintiffs sued, EMAK's Board was presumably advised by their Delaware litigation counsel that the Exchange Transaction was susceptible to being enjoined. Nonetheless, EMAK's fiduciaries chose to pay multiple teams of lawyers up to $840 per hour (and possibly more) to defend the transaction and ratchet up the scope of the litigation, by pursuing meritless affirmative defenses, taking unnecessary discovery and filing frivolous motions to compel. The defendants waited until the literal eve of the injunction hearing to rescind the Exchange Transaction. When they did so, they had no intention of allowing a majority of common stockholders to elect a new Board majority. As Peter Ackerman stated in a subsequent open letter to EMAK's stockholders: "Crown agreed to rescind that transaction so it could file a stockholder consent to shrink the board, giving its two directors a majority of EMAK's Board[.]" (App. 5 at 2)

Upon the rescission of the Exchange Transaction, EMAK's Board and Crown learned that that they were exposed to paying the costs EMAK incurred from the transaction's implementation. Crown moved to dismiss on the ground of mootness, which elicited this response from the Court:

> [O]ne of the company's main points throughout this has been that Mr. Kurz has forced them to incur massive legal fees because of what was called an egregious and unfounded complaint…. If I believe and I find at trial that there has been a loyalty violation or a good faith violation, you know, there's a potential for a damages award. And I don't see why an alleged aider and abettor could not be jointly and severally liable for that type of damages order.

(App. 6 at 24-25) The prospect of a damages award to repay legal fees incurred by EMAK did not deter defendants from inviting additional shareholder litigation. EMAK's Board allowed Crown and its allies (including Holbrook and the rest of senior management) to adopt a board-shrinking bylaw on the eve of the conclusion of TBE's consent solicitation. The incumbent directors stood aside even though the bylaw was of dubious validity and they had just filed a brief attesting to Crown's predatory designs: "if the Exchange Transaction were not consummated, the Preferred Stockholder could, and was threatening to, take unilateral actions … that could have far more severe consequences for the common stockholders." (App. 7) Plaintiffs stepped forward once again and successfully litigated to invalidate the bylaw.

EMAK's newly professed concern for the corporate treasury masks continued contempt for EMAK's common stockholders. According to EMAK, litigating to allow a majority of the common stock to elect a majority of new directors is not a compensable benefit. EMAK writes that it was "a foregone conclusion" and "inevitable" that a sufficient minority of common stockholders would support Crown's seizure of control of EMAK. (Ans. Br. at 22, 24) This argument wrongfully presumes that the Board lacked authority to protect EMAK's common stockholders from predation and that the common stockholders were powerless to elect directors who were willing to oppose Crown.

The entire history of this litigation refutes EMAK's "inevitability" argument. Holbrook and Crown feared that a new Board majority could be elected in the absence of corporate machinations. The outcome of TBE's consent solicitation was decided by the determination on appeal of the validity of a single card. Any of several EMAK stockholders could have changed the outcome, including one shareholder who twice voted for the TBE slate and later changed his mind. The Board could have solicited against Crown and taken any number of steps, singly or in

combination, to prevent Crown from electing a Board majority of its choosing. Upon learning how the interim Board planned to defend against Crown, and seeing how the interim Board had successfully persuaded leading proxy advisors to recommend against Crown's latest consent solicitation, and had also signed up a term sheet for an advantageous acquisition, the remaining members of the predecessor Board obtained a contractual commitment requiring Crown to elect an independent director. Current directors Rednor and Holbrook, if they choose, can still prevent Crown from taking control of EMAK.

EMAK's opposition brief continues a strategy that has been a hallmark since the outset – throwing mud that has no factual foundation and no relevance to the issues at hand. EMAK has not taken to heart this Court's statement that "[a]ny fee application will not depend on the outcome of the TBE Consent Solicitation." *Kurz v. Holbrook*, 989 A.2d 140, 184 (Del. Ch.), *aff'd in part and rev'd in part on other grounds*, 992 A.2d 377 (Del. 2010). The bulk of EMAK's answering brief is devoted to events that post-date defendants' efforts to impede a free and fair consent solicitation, including empty accusations of improper conduct by plaintiffs' counsel following the installation of the interim Board.

Plaintiffs' counsel assumed many litigation risks and business risks when agreeing to work on a contingent basis to undo the Exchange Transaction and Crown's bylaw amendment. Those risks did not include imposition of an "offset" for EMAK's costs in litigating over the outcome of TBE's consent solicitation. EMAK cites no case supporting an "offset" and the law is to the contrary. EMAK has not tried to meet the high standard for fee shifting. Under the American Rule, defendants must bear their own costs.[3]

[3] EMAK nowhere mentions in its opposition that it has filed suit in Los Angeles County Superior Court seeking more than $1 million and punitive damages from Donald Kurz, Peter Boutros and TBE relating to the invalidated Boutros consent. (App. 8)

EMAK's plea for sympathy has no grounding in the *Sugarland* factors and no equitable basis. This Court's jurisprudence recognizes that fee awards should incentivize the filing and efficient pursuit of meritorious stockholder actions. Fiduciaries who authorize the payment of millions of dollar to lawyers who will implement and defend an inequitable or illegal action should expect that this Court will appropriately compensate lawyers retained on a contingent basis who succeed in undoing it. If contingent fees are reduced because of a company's market capitalization, then fiduciaries of those companies, who ultimately may be responsible for any fee award, will have good reason to expect that they will never be brought to account for their misconduct.

SUPPLEMENTAL STATEMENT OF FACTS

EMAK takes great liberty with the record in an attempt to obscure how plaintiffs litigated efficiently and successfully to confer substantial benefits on EMAK and its common stockholders. A correction of the record on several points is set forth below.

A. Defendants Spent Millions to Prevent a Contested Election

EMAK accuses plaintiff of "scorched-earth litigation tactics" and asserts that "EMAK gave plaintiffs plenty of opportunities to end the litigation." (Ans. Br. at 5, 8) EMAK refers to "plaintiffs' unwillingness to abandon the litigation" in the face of the purported ratification of the Exchange Transaction and the rescission of the Exchange Transaction. (*Id.* at 9)

This rendering of recent history is perverse. The adoption of the Exchange Transaction, the purported ratification of the Exchange Transaction, the rescission of the Exchange Transaction, and Crown's back-up strategy of amending EMAK's bylaws were all part of a continuing scheme to prevent a majority of common stockholders from electing a new Board majority. Instead of abandoning this project, EMAK's fiduciaries mounted a full-scale litigation defense of the Exchange Transaction and a full-scale counter-attack on plaintiffs and TBE. Plaintiffs had no choice but to continue litigating until the Exchange Transaction was rescinded and the Crown bylaw was invalidated. Only then could TBE consents be solicited and tabulated without the incumbents being the pre-ordained victors.

EMAK (again) makes no effort to wrestle with the emails block-quoted on pages 11-14 of plaintiffs' opening brief, which were copied from pages 8-11 of plaintiffs' reply brief in support of a preliminary injunction, which was filed the day before the defendants rescinded the Exchange Transaction. Those emails show that the Exchange Transaction was designed by Holbrook and Ackerman for the same improper purpose freely acknowledged by Ackerman in

his own affidavit: "to block Mr. Kurz from taking control." (App. 4 ¶ 18) The setting of the record date for the TBE consent solicitation immediately after consummation of the Exchange Transaction reflects the same improper purpose.[4]

The problematic nature of the Exchange Transaction was apparent before plaintiffs received any document discovery. The original Verified Complaint attached Kurz's email of the night before the Board meeting -- in which Kurz explained to his fellow directors that the Exchange Transaction was a "Violation of Blasius" -- and contrasted that email with the advice rendered by EMAK's outside counsel -- that the Exchange Transaction was "protected by the business judgment rule." (App. 11 ¶¶ 3, 51 & Ex. I) Rather than abandon the Exchange Transaction upon consulting with knowledgeable Delaware counsel, the director defendants filed an Answer containing multiple affirmative defenses, including a Second Affirmative Defense accusing Kurz of breaching his fiduciary duties for having disclosed the incompetent business judgment rule advice. (App. 12 at 9)

[4] In a confused footnote, EMAK discusses the proxy put in the Exchange Transaction (Ans. Br. at 21 n.8), which fulfilled Holbrook's improper purpose of "chang[ing] the preferred to be pill-like on a change of board." (App. 9 at EMK02157) As EMAK explained when seeking ratification, the proxy put in Crown's preferred stock was expanded: "Previously (as now), any person or group owning more than 20% of the Company's combined voting power that appointed a director without Crown's approval triggered a Change of Control. However, in the Old Preferred, Robeck's and Kurz's shares were given special treatment, so that Robeck or Kurz or their affiliates could individually hold more than 20% of the Company's stock." (App. 10 at 4) In other words, the original security allowed Kurz and his "affiliates" to form a group, acquire additional shares and run a consent solicitation. Since Crown's new security contained no exception for Kurz and his affiliates, a successful consent solicitation by TBE would trigger a $25 million put right for Crown. This expanded proxy put could not be justified under *Blasius* or *San Antonio Fire & Police Pension Fund v. Amylin Pharms, Inc.*, 983 A.2d 304 (Del. Ch. 2009). The Board offered no substantive or forthright reason for expanding the proxy put: "Now, 9 years later, Kurz only holds 14% and Robeck holds about 8% of the Company's voting stock, so the Board determined to remove the exception. While Robeck was willing to give up his special status, Kurz was upset that he no longer receives special treatment." (App. 10 at 4)

The purported ratification of the Exchange Transaction gave plaintiffs no reason to drop the litigation. In fact, the purported ratification illustrated how EMAK's fiduciaries and their counsel were driving up the expense of the litigation through improper litigation tactics and further breaches of fiduciary duty.

Defendants first advised plaintiffs' counsel about EMAK's solicitation of purported ratification consents on Saturday, November 21, 2009, after the depositions of defendants had been completed and just two days before the due date of plaintiffs' opening brief in support of their motion for a preliminary injunction. (App. 13 at 7-8) EMAK had begun soliciting revocations on November 7, but concealed those efforts from plaintiffs, thereby preventing plaintiffs from questioning defendants on the issue during their noticed depositions. (*Id.* at 17). Plaintiffs immediately propounded discovery directed to EMAK's solicitation of ratification consents, which EMAK opposed. On November 24, plaintiffs moved to compel. The Court granted plaintiffs' motion to compel and sanctioned defendants:

> The idea that oral communications are not discoverable is, frankly, preposterous…. [T]he idea that we don't look into this stuff, the idea that this is not discoverable, this is one of those few times when I think the F word, frivolous, is appropriate. The cases that were cited to me are not apposite at all…. And frankly, to have cited those cases to me as if it supported the idea that this discovery was off limits is not a fair presentation of those cases….
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> * * *
>
> I shift fees because I think that, again, this is an argument that was not supportable. And not only has no support been provided for it, but the support that was provided for it is not apposite. Particularly in expedited cases, we cannot have counsel pulling stunts like this. The Court cannot adjudicate expedited cases effectively if we are going to have people hiding the ball for 18 days and then suddenly saying, "Oh, by the way, we have 50 percent in hand, and we are not going to let you know what we have told anybody." It doesn't work that way.

(App. 13 at 18-19, 21)

The written disclosures soliciting the purported ratification defense were materially misleading in multiple respects, as discussed on pages 19-25 of plaintiffs' December 2, 2009 reply brief in support of a preliminary injunction. (App. 39) A notable example was the representation that "Over the years Crown has been diligent in working with us as a partner implementing our long-term strategic plans." EMAK's incumbents chose not to disclose the events that inspired the following sentence from their contemporaneous sealed brief: "Crown was threatening to take draconian measures to ensure it received its liquidation preference, irrespective of the effect such measures would have on the value of the common stock or the future of EMAK." (App. 7 at 41)

The exercise of seeking ratification consents was fraudulent, without legal effect, and not predictive of the outcome of the TBE consent solicitation. The record date for the ratification consents was subsequent to November 7, 2009, the date when EMAK issued 250,000 shares of common stock (representing 3.4% of the common stock outstanding) to 16 management employees upon the full vesting of their restricted stock units. (*See* App. 14 ¶ 9; App. 15 at EMK017907) Those shares did not count for purposes of the TBE consent solicitation.

EMAK criticizes plaintiffs for amending their complaint on December 3, 2009, "to allege various disclosure allegations in connection with the Ratification, even though withdrawal of the Exchange Transaction made the Ratification moot[.]" (Ans. Br. at 9) EMAK overlooks that the false and misleading ratification disclosures tainted the TBE consent solicitation, especially considering that the litigation record containing the reality of the Board's conduct was under seal. On December 3, plaintiffs filed an application for curative disclosures. Later that day, plaintiffs filed an amended complaint alleging breach of the duty of disclosure, in response to the Court's letter "encourag[ing] plaintiffs do so promptly" and finding "good cause" for leave to

amend. (App. 16) The need for curative disclosures by EMAK was obviated when the parties agreed the next day to unseal the entire record, as plaintiffs had advocated. (App. 6 at 8) On Monday, December 7, EMAK and certain of the individual defendants filed disclosure counterclaims and third-party claims. That day, plaintiffs, EMAK and the individual defendants filed a Stipulation agreeing to a qualified standstill of any disclosure litigation pending the conclusion of the TBE consent solicitation.

At that point, the parties could have awaited the outcome of the TBE consent solicitation without further litigation activity. Unfortunately for EMAK's argument, plaintiffs' willingness to stop litigating following the rescission of the Exchange Transaction inspired new misconduct by Crown and the Board. Crown decided to solicit consents to shrink EMAK's Board, since otherwise TBE might prevail in its consent solicitation! Jeffrey Deutschman so testified at trial:

> Q. … What triggered Crown launching its consent?
>
> A. … Suddenly, we were getting a report that the Take Back EMAK side was happy to no longer litigate. I think the report came back was, "Let's pick up this litigation when the consent period is done." That was reported back as a strange signal. It was an unexpected signal. Then there was a substantial volume of shares traded. And that --- Those two events convinced the Crown side that [TBE] may be actually able to get the consents. And so that triggered the thinking that, "Well, to do nothing would probably be a mistake."

(App. 17 at 223)

Crown delivered its board-shrinking written consent on or about December 11, 2009, and the Board allowed it to be enacted in advance of the conclusion of the TBE written solicitation. Thus, on December 21, 2009, when plaintiffs believed they had delivered sufficient written consents to prevail, plaintiffs were compelled to file a new complaint and seek emergency relief to seat the TBE nominees and challenge the bylaw amendment, so that the new directors could defend against the threat posed by Crown before the purported Board shrinkage could occur at

the special election contemplated by Crown's bylaw. Plaintiffs' successful challenge to the bylaw amendment was litigated through an expedited trial and appeal in early 2010.

EMAK's production of law firm invoices allows for an approximation of the costs incurred by EMAK due to the defendants' efforts to make it impossible for the TBE consent solicitation to succeed. In just the months of September to December 2009, EMAK's counsel and Crown's counsel billed EMAK more than $2.1 million:

Firm	Number Attorneys	Attorney Hours	Number Non-Attorneys	Invoice Amount (Sept-Dec. 2009)
Ropes & Gray	9	1,566	14	$ 927,476
Gibson Dunn	?[5]	?	?	$ 598,948
Morris Nichols	7	527	2	$ 342,388
Ashby & Geddes	4	636	1	$ 244,420
Total				**$ 2,113,232**

(App. 40 at EMK30222-59, 30260-75; App. 41 at EMK30920-28; App. 42 at EMK30936-52; App. 43 at EMK30785-90) The principal costs in those months relate to the negotiation and defense of the Exchange Transaction. EMAK spent hundred of thousands of additional dollars in 2010 in a failed effort to defend the bylaw amendment.

EMAK also made extraordinary cash commitments in this period to senior executives who had previously been granted large amounts of unvested restricted stock and who uniformly voted those shares against TBE and in accordance with the wishes of Holbrook and Crown. On September 9, 2009, when the loss of the Burger King account was imminent and Kurz was agitating for Holbrook's termination, Holbrook executed amended employment agreements with four executives that included a new bonus formula not approved by the Board, as well as enhanced severance upon termination. (App. 18 ¶ 5 & Exs. H, I, J, K; App. 19 ¶ 2; App. 20 ¶

[5] The Gibson Dunn invoices consist of one-line bills without any backup information.

15) In late 2009, these four executives were slated for termination as of March 31, 2010, triggering over $1.5 million in severance payments: $545,000 for Teresa Tormey; $305,000 for Roy Dar; $378,000 for Michael Sanders and $340,000 for Duane Johnson. (App. 18 Exs. L, M) These four executives also received large bonuses for 2009 and 2010 under their Holbrook-amended employment agreements, plus new consulting contracts to retain their services post-termination![6] EMAK's retention of all four former executives as consultants (App. 21 at 3) raises the question why they were given notices of termination in the midst of TBE's consent solicitation.

Additionally, EMAK made questionable payments to the 16 management employees whose 250,000 restricted stock units fully vested on November 7, 2009. Just prior to seeking ratification of the Exchange Transaction, Tormey advised Holbrook that it "will be important to keep this block 'in the fold' for voting purposes," and she implemented an improper vote-buying strategy to that end. (App. 15 at EMK017907) Recipients were paid a "cash bonus" for entering into a Resale Restriction Agreement that prevented them from selling their shares, which employees had typically done in prior years. (*See id*.; *see* App. 22)

B. The Outcome of the Control Contest Was Not Inevitable

EMAK contends that it was "inevitable" and "a foregone conclusion" that the TBE consent solicitation would fail and Crown would take control of EMAK's Board. (Ans. Br. at 22, 24). This contention is not supported by the record. The contemporaneous words and actions of the parties demonstrate the exact opposite. Plaintiffs' litigation victories afforded EMAK's common stockholders a genuine opportunity to elect a new board majority that could resist Crown's threat to take control.

[6] We believe the aggregate bonus payments to the four executives exceeded $800,000.

As an initial matter, the extraordinary time and effort undertaken by the members of TBE attests to the perceived feasibility of a consent solicitation they knew would be highly contentious. D.F. King & Co, Inc., TBE's proxy solicitor, was sufficiently bullish on TBE's prospects that it structured most of its compensation to be contingent on TBE "gaining board control." (App. 23)

Holbrook's and Ackerman's contemporaneous words and deeds evidence their belief that TBE could prevail. In a September 7 email, Holbrook wrote:

> What Peter wants to do is to be able to not let Don get control of the board… So we could do something like he proposed, or something simple like giving him voting rights in return for a standstill. Lets discuss in the AM….

(App. 24 at EMK013933) On the morning September 24, Holbrook wrote:

> I suspect that Don's group may buy shares after any BKC announcement, assuming the price drop…. They are at roughly 2.6M shares or 37% of voting (for the board)… So they need an additional million shares to get to 51%....

(App. 2) Later that morning, Holbrook described his ideal solution: "full voting rights for the preferred**."** (App. 3) He and Ackerman implemented that plan "to block Mr. Kurz from taking control." (App. 4 ¶ 18)

When the Exchange Transaction was rescinded, TBE had secured consents from 48.87% of EMAK's common stockholders and was on the cusp of victory. (App. 25 ¶ 2) In early December 2009, RiskMetrics Group, Inc. and Glass Lewis & Co. issued positive reports recommending that EMAK stockholders support TBE. (App. 26, 27) That is when Crown rounded up written consents from Holbrook and his subordinates for the admitted purpose of seeking to trump a TBE victory at the polls. (App. 5 at 2; App. 17 at 223)

Ultimately, TBE's consent solicitation fell 116,325 votes short of victory. (Ans. Br. at 12) That margin meant that a single stockholder could tip the balance. It excludes the 150,000

votes cast by Boutros for TBE. His vote was up for grabs in the waning days of the consent solicitation. The election could also have been swayed by Jim Daniels, who held about 124,000 shares, and had exercised a written consent in TBE's favor on *two* different occasions during the consent solicitation prior to revoking the consents. (App. 17 at 95-96) The vote of any other single large stockholder would have made the difference.

Had TBE prevailed in the vote count, a reconstituted Board could have resisted Crown's renewed consent solicitation. This Court left open the questions whether the Board could use the interim period prior to the record date of Crown's revised written consent to defend against Crown, such as by adopting a supermajority vote requirement, or whether the Board could terminate Holbrook for cause or issue stock to acquire a company. EMAK touts Crown's receipt of 60.66% of the total votes, which represents significantly less than a majority of the common stock plus Crown's preferred stock. (*See* Tormey Decl. Ex. B) Had the Board terminated Holbrook for cause and adopted a mere 60% supermajority vote requirement Crown would not have had sufficient votes to shrink the Board at the 2010 annual meeting.

Even today, despite TBE's failure to secure a Board majority and despite adoption of Crown's latest board-shrinking bylaw amendment, Crown does not control the Board. The remaining incumbents took the minimal step of securing a commitment by Crown to nominate an "independent" director for one of its two slots. (Tormey Decl. Ex. C) The non-Crown incumbents had the leverage to demand that concession because of the work of the interim Board. The interim Board documented Crown's history of predatory threats and Crown's conflict of interest, successfully campaigned to obtain April 2010 recommendations by Glass Lewis & Co. and ISS Proxy Advisory Services against Crown's consent solicitation, and secured a term sheet to acquire Omelet LLC, a full-service branding, marketing and entertainment

company (*see* www.omeletla.com), and thereby grow EMAK without restructuring Crown's investment. (App. 28 Exs. D, E & F) The non-Crown directors still possess the power and authority to act in the best interest of EMAK and its common stockholders and defend against Crown.

C. EMAK's Expenditures

EMAK contends that it has incurred either $5.2 or $5.6 million defending against plaintiffs' claims. (Ans. Br. at 5, 23, 24) Invoices produced by the Company reflect a lower total, about $5.13 million. (App. 40-45) That amount includes about $400,000 in fees and expenses concerning the unadjudicated California derivative litigation. (App. 40 at EMK30188-221; App. 45) It also includes almost $2.2 million paid to outside counsel for Crown (App. 41, 43), of which approximately $140,000 is for the period from December 2008 to August 2009. (App. 41,at EMK30901-18) The hourly rates in the Ropes & Gray invoices run as high as $840 per hour. (App. 40 at EMK30329) Gibson Dunn's hourly rates may be even higher. EMAK's brief does not discuss the prospect of obtaining reimbursement of any of these amounts from EMAK's D&O insurance. Amounts advanced to EMAK's directors for litigation defense have to be returned to EMAK if not indemnifiable, and the director defendants and Crown may be responsible for amounts spent by EMAK on EMAK's behalf or Crown's behalf.

EMAK asserts it must indemnify Crown's fees and expenses because of a provision in the Securities Purchase Agreement ("SPA") pursuant to which Crown purchased its preferred stock in March 2000. (*See* Ans. Br. at 37) The operative provision states that the Company shall bear expenses incurred "in connection with the negotiation, preparation, execution, delivery and performance of [the SPA] and the Contemplated Transactions." (App. 29 § 9.5) "Contemplated Transactions" is defined as "all of the transactions contemplated by this Agreement, including,

without limitation, (i) the sale by the Company of the Series A Preferred Stock and the Warrants to the Investor, (ii) the execution, delivery, and performance of the Registration Rights Agreement and the Voting Agreements, (iii) the performance by the Investor and the Company of their respective covenants and obligations under this Agreement and (iv) the Investor's acquisition and ownership of the Purchased Securities." (App. 29 § 1.1) It is hardly apparent how those definitions encompass (a) plotting to take actions detrimental to EMAK and its common stockholders, (b) litigating over a transaction restructuring Crown's security, (c) litigating over an invalid bylaw amendment, or (d) litigating over the composition of the Board of Directors. When rescinding the Exchange Transaction, the EMAK board by majority vote (with Kurz voting against and Rednor abstaining) approved a Rescission Agreement expressly providing for the reimbursement of Crown's legal fees relating to the Exchange Transaction litigation. (App. 30 at EMK30820)

EMAK criticizes the interim Board's expenditures during the pendency of the appeal. (Ans. Br. at 14) EMAK does not question that the interim Board was duly seated or that the expenditures were duly authorized. Crown litigated and lost its challenge to the interim Board's authority to pay its advisors. (*See* App. 31 at 83 ("I'm saying those checks should be cut, yes.")) The largest single line item was for retention of Richards, Layton & Finger ("RLF") as Delaware corporate counsel. (Tormey Decl. ¶ 6) Just before filing its answering brief, EMAK's current Delaware counsel took exception to the notion that the current Board is not pursuing the steps about which the interim Board was advised:

> The facts are to the contrary. With respect to Crown, EMAK has entered into an agreement with Crown ensuring that one of the two directors elected by Crown will be independent (as defined by the rules of the New York Stock Exchange), both from Crown and from EMAK. That agreement expires in one year, such that the relationship between EMAK and Crown – the genesis of the Delaware Litigation (as defined in your letter) – is continuously being evaluated by EMAK.

> With respect to the transaction with Omelet, EMAK has received, and is in the process of reviewing, documents from Diamond Capital Partners regarding that potential transaction, and the subject of the Omelet transaction has been discussed at most, if not all, of the meetings held by the EMAK Board since the Delaware Supreme Court issued its opinion. Finally, with respect to Mr. Holbrook, the EMAK Board is investigating the allegations raised in the work product of Fox, Wang & Morgan, P.C.…

(App. 32 at 1)

D. EMAK's Accusations of "Ethical Violations" are Unfounded

EMAK accuses plaintiffs' counsel of "ethical violations" and "obvious conflicts" in connection with counsel's representation of EMAK during the pendency of the appeal. (Ans. Br. at 13, 26) The accusations are factually unfounded.

Plaintiff's counsel was not "suing EMAK in this litigation, asserting *individual* claims against EMAK (not *derivative* claims)[.]" (Ans. Br. at 13 (emphasis in original)) Nor does this fee application relate to "claims asserted against the Company." (Ans. Br. at 14) EMAK has been identified in each complaint as a nominal defendant, whether for purposes of obtaining equitable relief relating to the Exchange Transaction or for purposes of alleging derivative claims on EMAK's behalf. (App. 11 ¶ 10; App. 33 ¶ 10; App. 34 ¶ 4) The California complaint also identifies EMAK as a nominal defendant. (App. 35 ¶ 10)

BMF and Luce Forward were retained to advise EMAK and its interim Board during the pendency of the appeal, to which EMAK was not a party. During that time frame, the underlying litigation here lay dormant (apart from the filing of plaintiffs' initial fee application). The California Court denied a motion by the individual defendants to disqualify Luce Forward. (Kirkland Decl. ¶ 6 & Exs. C, D)

EMAK's brief asserts without support that BMF "advised the Board on … this fee application" and Luce Forward "advised the Company not to challenge" the fee application.

(Ans. Br. at 26) The supporting declaration of Jeffrey Deutschman says nothing about BMF advising the Board and is much narrower as to Luce Forward. Deutschman states that he made two proposals to the Board: (i) that EMAK publicly disclose the fee application; and (ii) that the Board appoint a two-person committee including director defendant Rednor to investigate the fee application. (Deutschman Decl. ¶ 6) As Kirkland and Kurz explain in declarations submitted herewith, Deutschman made these proposals in the middle of a full-day Board meeting that had no agenda items respecting this litigation. Kirkland was the only outside counsel present, and a majority of the Board asked that he remain in attendance while they considered Deutschman's proposals. (Kirkland Decl. ¶¶ 3-5 & Ex. B; Kurz Decl. ¶ 4) Kirkland did not advise the Board regarding the interim fee application. (Kurz Decl. ¶ 5) Kurz explained at the meeting that the Board would be advised by RLF on this issue. (*Id.*) EMAK's Litigation and Structural Review Committee ("LSRC") subsequently approved resolutions for the retention of BMF, Luce Forward and RLF expressly stating that EMAK was represented by RLF with respect to plaintiffs' fee application. (App. 36 ¶ 10 & Ex. G)

BMF and Luce Forward ceased representing EMAK upon entry of the Partial Final Judgment entered on April 26, 2010, which reconstituted the board following the Supreme Court's decision. In response to correspondence from EMAK, BMF turned over its correspondence and work product relating to its representation of EMAK and provided a written analysis of why BMF's prior representation of EMAK does not prevent BMF from representing the plaintiffs in this action to seek damages on EMAK's behalf. (App. 37)

ARGUMENT

I. PLAINTIFF'S COUNSEL ARE ENTITLED TO A FEE AWARD FOR HAVING RESTORED THE FRANCHISE RIGHTS OF THE COMMON STOCKHOLDERS AND PRESERVED THE AUTHORITY OF THE BOARD TO DEFEND AGAINST CROWN

Of the three elements of the common benefit doctrine, only one is disputed by EMAK: whether "an ascertainable group received a substantial benefit." *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006) (citing *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1167 (Del. 1989)). EMAK makes several arguments for why the rescission of the Exchange Transaction and the invalidation of the Crown Consents are not compensable benefits: (i) it was "inevitable" or a "foregone conclusion" that Crown would eventually take control of EMAK with the support of a minority of the common stockholders (Ans. Br. at 22, 24); (ii) "the litigation has only harmed the Company" by forcing it to incur legal expenses (Ans. Br. at 23); (iii) litigation that aids a proxy contestant is not compensable (Ans. Br. at 26); (iv) unspecified "ethical violations" and "conflicts of plaintiffs' counsel" preclude a fee recovery (Ans. Br. at 26); and (v) the litigation did not benefit "all corporate constituents," such as Crown or those common stockholders who did not express consents in support of TBE (Ans. Br. at 27). All of these arguments are meritless.

A. Rendering a Control Contest Feasible Is a Substantial Benefit

Argument (i) above is factually wrong, for the reasons discussed in the Supplemental Statement of Facts. Rescission of the Exchange Transaction prevented the creation of a Crown/incumbent/management voting alliance that would make it impossible for the TBE slate to get elected. Put differently, rescission of the Exchange Transaction gave the common stockholders the practical power to act by written consent to elect a new Board majority. Invalidation of Crown's bylaw amendment had the same effect, since otherwise the Board would

have been shrunk to three as of December 18, 2009, and a stockholder majority would have been deprived of the power to elect a Board majority. Invalidation of the Crown bylaw amendment also had the secondary effect of creating an interim period in which the Board, however constituted, could defend against Crown before the solicitation or effectuation of a bylaw amendment to shrink the size of the Board at the next annual meeting. In short, the litigation allowed a common stockholder majority to assert control over EMAK and halted Crown from seizing control with the support of a minority of common stockholders.

EMAK arguments (iii) and (v) above assert that eliminating insuperable obstacles to an election contest is not a compensable benefit, or it is only compensable if some stockholder who is not a proxy contestant achieves them. Delaware law is to the contrary.

In *Tandycrafts*, the Delaware Supreme Court recognized that attorneys' fees could be awarded to a stockholder who sues individually, and not in a representative capacity. "[T]he critical inquiry is not the status of the plaintiff but the nature of the corporate or class benefit which is causally related to the filing of suit." 562 A.2d at 1166. The compensable benefit achieved by the individual plaintiff could be "[c]hanges to corporate policy or, as here, a heightened level of corporate disclosure[.]" *Id.* at 1165.

Tandycrafts is indistinguishable from this case. The plaintiff in *Tandycrafts* was "the largest single independent shareholder" of the company, who had "approached Tandycrafts management with the prospect of [plaintiff] acquiring a larger, and perhaps controlling, interest in the company through a cooperative effort between the parties." *Id.* at 1163. Tandycrafts management rebuffed the plaintiff and proceeded to solicit "two charter amendments which would limit any future takeover effort." *Id.* Plaintiff filed suit alleging that the company's proxy materials were materially misleading and "launched its own proxy campaign in which it sought

to counter what it viewed as distortions in Tandycrafts' proxy material." *Id.* Management issued corrective disclosures, and the proposed charter amendments were defeated, mooting the lawsuit. In upholding the fee award for the corrective disclosures, the Court reasoned that "there is no justification for denying recourse to the fee shifting standard which has evolved for the therapeutic purpose of rewarding individual effort which flows to a class." *Id.* at 1166.

Tandycrafts refutes EMAK's argument that a fee award may be denied to plaintiffs because they supposedly "waged their proxy contest for control solely for personal gain." (Ans. Br. at 26) The plaintiff in *Tandycrafts* had an obvious personal agenda. It was interested in significantly increasing its position in Tandycrafts. That agenda was irrelevant because what mattered was that its lawsuit benefited all other common stockholders by giving them better information for purposes of voting on whether to adopt anti-takeover measures. It was similarly irrelevant how many Tandycrafts stockholders were sympathetic to the plaintiff's agenda or whether the charter amendments were adopted or defeated. The "heightened level of corporate disclosure" was the compensable benefit.

Here, a heightened level of corporate disclosure was a byproduct of this lawsuit. More significantly, common stockholders received an unimpeded opportunity to participate meaningfully in a pending contest over the future direction of the company. The benefit here is similar to, and perhaps greater than, the benefits in *In re Yahoo! S'holders Litig.*, C.A. No. 3561-CC, let. op. (Mar. 6, 2009), and *Minneapolis Firefighters' Relief Ass'n v. Ceridian Corp.*, C.A. No. 2996-CC, tr. (Del. Ch. Feb. 25, 2008). Both of those cases involved the elimination of coercive impediments to a potential future proxy contest. In *Ceridian*, a substantial benefit was the elimination of "a termination right for the merger partner in the event a new slate of directors was elected before the merger closed." *In re Yahoo!*, let. op. at 3. Other benefits allowed for the

potential emergence of an alternative transaction and allowed the "shareholders to be able to make a fully informed decision about whether to accept this deal, or whether to try to press the board perhaps to consider alternatives …." *Ceridian*, tr. at 24. In *Yahoo!*, a substantial benefit was the elimination of a "dead-hand provision" in an employee severance plan, so that stockholders potentially could elect new directors with the authority to change the plan, rather than being coerced into voting for the incumbents. *In re Yahoo!*, let. op. at 3. Other changes to the plan "lower[ed] the cost to acquire of any potential buyer." *Id.*

Here, the relief did not lower barriers to a potential future proxy contest or a potential future strategic transaction. The rescission of the Exchange Transaction and the invalidation of Crown's bylaw amendment presented common stockholders with a huge benefit in real time: the right to cast a decisive vote in a pending control contest. TBE and the incumbents had radically different agendas, both for the operation of the company and whether to pursue a strategic transaction with Crown. The TBE consent solicitation was underway. If plaintiffs failed, the opportunity for a common stockholder majority to change the direction of the company could be lost forever. If plaintiffs prevailed, the future of the company would be vested immediately in a common stockholder majority. Plaintiffs did prevail. Crown was held at bay and the fate of EMAK rested on the tabulation of the votes of the common stockholders.

In re Dunkin' Donuts S'holders Litig., 1990 WL 189120 (Del. Ch. Nov. 27, 1990), and *Mentor Graphics Corp. v. Quickturn Designs Sys., Inc.*, 789 A.2d 1216 (Del. Ch. 2001), are of no assistance to EMAK. *Dunkin' Donuts* denied reimbursement of fees to a "losing bidder in a contest for corporate control." 1990 WL 189120, at *1. Its "status as a bidder for control" was determinative because the bidder's efforts were aimed at "acquir[ing] the target" at the lowest possible price (not benefiting the corporation or the stockholders generally), the bidder did not

"need[] an award of legal fees as an incentive for it to bring legal action against target directors or management," and its "attorneys were not employed on a contingency basis[.]" *Id.* at *8, 10, 11. *Mentor Graphics* followed *Dunkin' Donuts* in denying fees to a losing hostile bidder.

All of the above factors support a compensable benefit here. Plaintiffs' overwhelming interest was to maximize the value of their common stock, and not to obtain some "personal" benefit at the expense of EMAK's stockholders. This Court so concluded after trial: "I do not believe that Kurz has any reason to vote other than in the manner he thinks would best maximize the value of EMAK as a corporation." *Kurz*, 989 A.2d at 181. EMAK identifies no personal interest of plaintiff Sems Diversified Value, LP. Plaintiffs sought to elect new directors, not buy control of EMAK. In order to have a reasonable prospect of success in the consent solicitation, plaintiffs brought suit to vindicate the franchise rights of all common stockholders. Moreover, the incentive of fee-shifting was critical, as plaintiffs retained counsel to litigate this case on a contingent basis out of economic necessity. (App. 17 at 69)[7]

EMAK cites no law in support of its argument that a fee award is only appropriate if the litigation benefits "all corporate constituents," including preferred stockholder Crown. (Ans. Br. at 27) The correct test is whether "an ascertainable group received a substantial benefit." *Dover Historical Soc'y*, 902 A.2d at 1089. Here, that "ascertainable group" is the body of common stockholders. They were entitled to participate in a full and fair consent solicitation to replace the non-Crown directors. Since Crown had not bargained for abrogation of that right, EMAK's directors were obliged to protect it. *See LC Capital Master Fund, Ltd. v. James*, 990 A.2d 435, 452 (Del. Ch. 2010) ("[I]t is the duty of directors to pursue the best interests of the corporation

[7] EMAK questions whether Kurz retained Luce Forward on a contingent basis. (Ans. Br. at 33 n.10) Luce Forward was retained for a flat fee, with a carve-out for litigation, which would be handled on a contingency fee basis. (Kirkland Decl. ¶ 2 & Ex. A; Kurz Decl. ¶ ¶ 2-3)

and its common stockholders, if that can be done faithfully with the contractual promises owed to the preferred[.]"); *Commonwealth Assocs. v. Providence Health Care, Inc.*, 1993 Del. Ch. LEXIS 231, *27-28 (Oct. 22, 1993) ("If one concludes that Section 228 creates a right in corporate shareholders to take effective action and that the duty of loyalty ought to bar those in control of the corporation from taking action designed solely or primarily to thwart effective exercise of that right, then I conclude that it follows that the bare-bones facts not in dispute show that it is quite likely that a wrong has been done here.").

Both the Exchange Transaction and Crown's invalid bylaw amendment were calculated to deprive a common stockholder majority from effectively exercising the right to execute written consents electing a new Board majority. Plaintiffs vindicated the rights of the common stockholders by causing the rescission of the Exchange Transaction and the invalidation of Crown's board-shrinking bylaw amendment. Whether or not a given common stockholder ultimately supported the TBE slate is beside the point. Plaintiffs vindicated the rights of all common stockholders to participate effectively in the consent solicitation, with their voting power undiluted.

B. The Expense of a Contested Election Is No Bar to a Fee Award

EMAK contends that the cost of holding a contested election without a predetermined winner outweighed the benefits. According to EMAK, the Board approved the Exchange Transaction in order to avoid "extreme disruption" and EMAK would be better off if Holbrook and the incumbents had been able to focus on "revitalizing the Company and attempting to work out an agreeable solution with Crown." (Ans. Br. at 23)

This argument ignores that "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests." *Blasius Indus., Inc. v. Atlas Corp.*, 564

A.2d 651, 659 (Del. Ch. 1988). The period immediately preceding TBE's consent solicitation was no Golden Age. Holbrook presided over the freefall of the common stock and then lost the Burger King account. Ackerman sought to extract $25 million for Crown's preferred stock, through negotiations that culminated in a September 17, 2009 conversation that Holbrook summarized as follows:

> He hung up on me….
> He said this deal bears no resemblance to anything remotely interesting to him or that he would ever consider.…
> …
> His issues are:
> …
> 3. no discount
> I explained to him the following:
> - There is real value in this proposal, value that exceeds what he wants, if he is our partner
> - I need something that we (Jim, Christopher, Tracy) feel may not be best deal, but is a deal the board should 'hold their noses' and approve
>
> …
> He said he'll be bidding on the company. I asked him if he wants his latest proposal voted on by the board and he said he'd think about it.
> Then he hung up.

(App. 38 at EMK0438) The one thing Holbrook and Ackerman agreed on was that election of a new Board majority was undesirable. The corresponding benefit of a competitive election presented common stockholders with the power to choose an alternative path for EMAK.

No law supports denying a fee award due to the cost of achieving a benefit. In *Rovner v. Health-Chem Corp.*, 1998 WL 227908 (Del. Ch. 1998), defendants opposed a fee application arguing that the benefit from the litigation was "dwarfed by the amount Health-Chem was forced to spend to defend against plaintiffs' suit." *Id.* at *4. Chancellor Chandler flatly rejected the argument:

> Although the benefits that accrued to Health-Chem shareholders were not great, they were still real and substantial…. Finally, I note that the fact that defendants expended significant resources to defend against plaintiffs' claim does not

> diminish these benefits. Accordingly, plaintiffs are entitled to an award of attorneys' fees.

Id. See also Thorpe v. CERBCO, Inc., 1997 Del. Ch. LEXIS 18, *5, 18 (Feb. 6, 1997) (awarding "one-third of the common fund," the "very top of the range of percentages that this court grants," though the case "unquestionably represents an instance in which there is a huge disproportion between the amount of time, work and expense invested in the case and the financial rewards represented by the final judgment"), *aff'd*, 1997 Del. LEXIS 438 (Dec. 3, 1997).

Here, plaintiffs are seeking a fee for litigation efforts that achieved the precise benefit sought – an opportunity for common stockholders to participate in a full and fair consent solicitation. There was no disproportion between cost and benefit. The cost of obtaining rescission of the Exchange Transaction and the invalidation of the Crown bylaw is attributable to the defendants, who put those measures into place and defended (unsuccessfully) their legality to the bitter end. The fact that the defendants litigated so long and at such cost to defend the Exchange Transaction and the Crown bylaw amendment attests to the value of allowing common stockholders a free choice on the election of a majority of EMAK's directors.

Plaintiffs are not seeking any fee for the cost of adjudicating whether the TBE slate received the requisite number of valid votes. That cost is logically distinct from and irrelevant to the benefit of producing a competitive election. Indeed, the cost of litigating over the tabulation of votes is a product of plaintiffs having achieved the benefit of a competitive contest in which the winner is not preordained.

C. The Unfounded Claims of "Ethical Violations" Are No Bar to a Fee Award

EMAK argues that "conflicts of plaintiffs' counsel" and "ethical violations" of plaintiffs' counsel preclude recovery of any fee award. (Ans. Br. at 26) The argument is unfounded, as discussed in the Supplemental Statement of Facts. EMAK has not demonstrated the existence of

any conflict or ethical violation. The California defendants lost a motion to disqualify Luce Forward, based on the lack of any conflict between representing TBE and EMAK during the pendency of the appeal. (Kirkland Decl. ¶ 6 & Exs. C, D) BMF supplied EMAK's counsel with an analysis of why BMF's representation of EMAK during the pendency of the appeal created no conflict for purposes of BMF representing plaintiffs in this action. (App. 37) EMAK cites no legal authorities and makes no reasoned argument to the contrary.

Similarly, EMAK cannot avoid a fee award by arguing that since "Mr. Kurz testified that both BMF and Luce Forward advised him with respect to the Boutros transaction," "it is appropriate that counsel's request for attorney fees be reduced" by the costs EMAK incurred related to that transaction. (Ans. Br. at 38-39) EMAK ignores the rule that "to constitute bad faith [and thus warrant shifting of attorney fees contrary to the American Rule], the defendants' action must rise to a high level of egregiousness." *In re Sunbelt Beverage Corp. S'holders Litig.*, 2010 Del. Ch. LEXIS 1, *59-60 (Del. Ch. Jan. 5, 2010) (internal quotation omitted). There was no "egregious, vexatious or bad faith" conduct by plaintiffs or plaintiffs' counsel. *Id.* at *60. Defendants simply prevailed on appeal respecting the interpretation of a transfer restriction.

II. THE *SUGARLAND* FACTORS AND PUBLIC POLICY SUPPORT THE FEE REQUEST

Plaintiffs seek an award of $2.85 million to compensate counsel for expending 1,587 hours of attorney time and $139,378 in out of pocket costs on a contingent basis to the rescission of the Exchange Transaction and the invalidation of Crown's bylaw amendment. (*See* Op. Br. at16-17; Third Friedlander Decl. ¶¶ 2-3) The fee request is equivalent to roughly $1,700 per hour,[8] as compared to *In re Yahoo!* (over $1,500 per hour), *Ceridian* ($1,800 per hour) and

[8] EMAK asserts that this amount is "four or five times actual hourly rates." (Ans. Br. at 28) This statement, made without factual support, is an exaggeration.

Globis Capital Partners v. Safenet, C.A. No. 2772-VCS (Del. Ch. Dec. 20, 2007) (approximately $1,500 per hour).

EMAK argues that if any fee is awarded, it should be "no more than [plaintiffs' counsel's] regularly hourly rates, discounted [by] the expenses the Company has been forced to incur to litigate the invalidity of the TBE Consents." (Ans. Br. at 39) EMAK makes this argument even though it concedes most of the *Sugarland* factors – "this litigation presented difficult legal issues"; "BMF is a reputable firm that expended significant efforts on this litigation"; "this case did proceed on an expedited basis all the way to trial and an expedited appeal"; and "the contingent nature of the undertaking." (Ans. Br. at 36, 37)

EMAK makes essentially one argument for why an appropriate benchmark is counsel's regular hourly rates. According to EMAK, the benefit here is insubstantial. EMAK argues that the most apt cases are not *In re Yahoo!*, *Ceridian* or *Globis*, but *Off v. Ross*, 2009 WL 4725987 (Del. Ch. Dec. 10, 2009), and *Siegman v. Palomar Medical Technologies, Inc*., 1998 WL 409352 (Del. Ch. July 13, 1998). Neither *Off* nor *Siegman* involved a benefit resembling a successful challenge to machinations that either foreclosed an ongoing contest for control (as here) or impeded a potential future change of control (as in *Yahoo!* and *Ceridian*). EMAK's comparison cases are flawed on their face.

In *Off*, the benefit was so meager that the Court initially rejected the proposed settlement. The corporation extended a rights offering, and while there was "some evidence from which one could infer Defendants would have made the Rights Offering regardless of Plaintiff's lawsuit," it was reasonable to infer that plaintiff's negotiations obtained some terms, "such as the enlargement of the time during which the Rights Offering remained open and the backstopping provisions[.]" 2009 WL 4725987, *7. The size of the fee award reflected a "modest multiplier

for contingency." *Id.* at n.40. In *Seigman*, the benefit was even less substantial. The issuance of ten series of preferred stock was challenged as void "because Palomar's certificate of incorporation did not expressly authorize the issuance of stock in series[.]" 1998 WL 409352, at *1. Shortly after the case was filed, the corporation filed Certificates of Correction adding language authorizing the board of directors to issue preferred stock in series. *Id.* The Court awarded the equivalent of "an hourly rate of more than $650 per hour for each attorney who worked on the case." *Id.* *6 n.19.

EMAK also tries to distinguish *Yahoo!*, *Ceridian* and *Globis* on the basis that the fee awards in those cases did not "amount to a significant portion of the value of the company at issue." (Ans. Br. at 35) Yet EMAK has not identified any case that benchmarks the fee to the value of the corporation. In all of the above cases, as is typical in corporate benefit cases and seen sometimes in common fund cases, the fee award is evaluated in terms of the effective hourly rate. *See Seinfeld v. Coker*, 847 A.2d 330, 338 & n.33 (Del. Ch. 2000).

"The importance of hourly rates is reflected in *Sugarland*'s second factor—the efforts of counsel and the time spent in connection with the case." *Id.* at 337-38. Hourly rates are examined for sound reasons of policy – "to maximize future plaintiffs' incentives to bring meritorious cases and to litigate them efficiently." *Id.* In that context, the Court considers whether "heroic efforts characterized counsel's performance," if the lawsuit was "particularly hard fought" and "cost-intensive" and if "accelerated proceedings were sought." *Id.* Determining the "appropriate rate of pay for counsel's services" through the *Sugarland* factors "reduces the risk of overcompensating plaintiffs' counsel, yet properly rewards high performing counsel who efficiently prosecute meritorious lawsuits." *Id.* at 339. Applying this principle a decade ago in a non-expedited case that settled almost immediately after it was filed, the Court

awarded a fee representing "an hourly rate of over $1,300." *Id.* at 338.

All of the above factors support the requested fee award. Plaintiff's counsel jumped into the middle of an expedited contest for control. The litigation was not only hard fought, plaintiffs litigated it efficiently using a small team of lawyers, mostly partners. Even though defendants spared no expense, plaintiffs wholly succeeded in preventing defendants from stymying the consent solicitation. This is litigation that should be rewarded and incentivized, by means of an hourly rate that reflects the significant contingent risk and effort. Even for disputes involving franchise rights at large companies, there is a limited pool of lawyers willing, on a contingent basis, "to engage in the hard work of actual litigation." *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 963 (Del. Ch. 2010). The effective hourly rate to litigate corporate governance disputes at small companies should not be artificially capped. Otherwise, "entrepreneurial litigators [cannot] produce a public good by deterring corporate wrongdoing." *Id.* at 959.

CONCLUSION

For all the foregoing reasons and those stated in the opening brief, plaintiffs respectfully request that the Court grant plaintiffs' amended interim fee application and direct entry of a final judgment pursuant to Court of Chancery Rule 54(b), as there is not just reason for delay.

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