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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE LEAR CORPORATION SHAREHOLDER LITIGATION	))	Consolidated C.A. No. 2728-VCS

THE LEAR DEFENDANTS' ANSWERING BRIEF IN OPPOSITION
TO THE FEE APPLICATION SUBMITTED BY PLAINTIFFS' COUNSEL

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PRELIMINARY STATEMENT

The Lear director defendants and Lear Corporation ("Lear" or the "Company,") oppose the application submitted by Plaintiff's Counsel for an award of attorneys' fees and expenses in the amount of $2.95 million (the "Fee Application"). The Fee Application is grossly excessive and unreasonable, because Plaintiffs' Counsel achieved a single therapeutic disclosure. Under the numerous decisions issued by Delaware courts to set fee awards in stockholder litigation resulting in only supplemental disclosures, the Fee Application should be rejected and the award of fees and expenses should be no more than the generous amount of $450,000.

In this consolidated action, Plaintiffs' Counsel launched a full-scale attack in an effort to enjoin the acquisition of Lear by certain affiliates of Carl Icahn (the "AREP Entities") for $36 per share (the "Merger"). Challenging the substance of the Merger, Plaintiffs alleged that the Company's Board of Directors (the "Board") violated its *Revlon* duties by failing to act reasonably to secure the highest price available. Identifying 35 separate alleged deficiencies in the Company's preliminary proxy statement and other public filings, Plaintiffs also asserted that the Board breached its fiduciary duty of disclosure.

Despite the breadth of their attack, Plaintiffs met with little success. The Court "largely denied" Plaintiffs' motion for preliminary injunction, requiring only that the Company make a single, additional disclosure prior to the Annual Meeting. The Court determined Plaintiffs had no reasonable probability of success on their *Revlon* claims as well as their remaining disclosure claims. Though the Court's decision essentially

terminated the viability of those claims, they were definitively mooted when the Lear stockholders failed to approve the Merger.

Plaintiffs' Counsel readily concede that the single disclosure ordered by the Court is the sole benefit attributable to their efforts in this litigation. (POB 5). Nonetheless, the award sought by Plaintiffs' Counsel is an unbelievable multiple–approximately 10x–of the average award in cases involving only therapeutic benefits such as supplemental disclosures. In fact, the award sought by Plaintiffs' Counsel is nearly 2.5 times the size of the award in *Globis Capital Partners, LP v. SafeNet, Inc.*, which Lear believes to be the largest fee award by this Court on a contested fee application in a supplemental disclosure benefit case. Incredibly, while acknowledging that the size of the benefit conferred is the central inquiry in determining a reasonable fee (POB 5), Plaintiffs' Counsel request this exorbitant award despite the fact that by any objective standard the *SafeNet* disclosures were far more substantial than those created by their efforts. Plaintiffs' Counsel do not articulate any justification for such a significant departure from precedent awards in supplemental disclosure cases.

The Lear Defendants respectfully submit that an award of fees and expenses of $450,000 is reasonable, consistent with this Court's many precedents in this context, and more than adequately compensates Plaintiffs' Counsel for the limited benefit they obtained in this litigation.

STATEMENT OF FACTS

On February 9, 2007, Lear announced the Initial Merger Agreement, pursuant to which the AREP Entities agreed to acquire all the outstanding shares of Lear common stock for $36 per share (the "Merger"). The Initial Merger Agreement provided for a 45-day go-shop period, during which Lear could seek a superior bid. The Initial Merger Agreement also contained a two-tiered termination fee and matching rights.

Immediately following the announcement of the Merger, Plaintiff Market Street Securities, Inc. ("Market Street") filed the original complaint in this action on behalf of a purported class consisting of Lear's public stockholders. Market Street claimed that each of the eleven members of the Board (the "Individual Defendants"), breached their fiduciary duties by approving the Initial Merger Agreement. Market Street further claimed that the AREP Entities aided and abetted the Individual Defendants' breach of their fiduciary duties. Plaintiffs Harry Massie, Jr. and Classic Fund Management filed separate purported class actions asserting similar claims on February 15, 2007 and February 21, 2007, respectively. Together, Plaintiffs are represented by eight different law firms.

On February 21, 2007, this Court consolidated the three actions. The following day the Plaintiffs filed a Consolidated Class Action Complaint and a motion seeking a preliminary injunction prohibiting the Merger (the "Preliminary Injunction Motion"). Plaintiffs also sought expedited proceedings. On February 28, 2007, the Court held a scheduling conference and denied Plaintiffs' request for expedited proceedings,

recognizing that such proceedings would distract the Board and Company management during the go-shop-process.

On March 20, 2007, Lear filed its preliminary proxy statement (the "Preliminary Proxy"). On March 27, 2007, Plaintiffs filed the Amended Consolidated Class Action Complaint (the "Amended Complaint"). The Amended Complaint was a blunderbuss attack on the Merger. Plaintiffs asserted that the Board had breached its *Revlon* duties by failing to act reasonably to secure the highest price reasonably available for the Lear stockholders. In particular, Plaintiffs alleged that the Board acted unreasonably by agreeing to the deal protection measures, failing to engage in an extensive sale process prior to entering into the Initial Merger Agreement, and accepting an inadequate price. Plaintiffs also claimed that the Board had breached its fiduciary duty of disclosure and identified 35 alleged deficiencies in the Company's Preliminary Proxy and other public statements.

On March 27, 2007, the go-shop period ended. Despite contacting a total of forty-one parties, including both strategic buyers and financial sponsors, Lear did not receive a single acquisition proposal during or after the go-shop-period. After reporting the results of the go-shop process to the Court, Defendants agreed to expedited discovery and the Court scheduled a hearing on the Preliminary Injunction Motion.

On May 23, 2007, Plaintiffs filed their opening brief in support of the Preliminary Injunction Motion. Abandoning almost all of the disclosure claims in the Amended Complaint, Plaintiffs pursued just three alleged disclosure deficiencies. Specifically, Plaintiffs asserted that the Board failed to adequately disclose information regarding (a)

the projections used by the Special Committee's financial advisor, J.P. Morgan; (b) the market check conducted by the Special Committee and its financial advisors prior to signing the Initial Merger Agreement and during the go-shop period; and (c) Rossiter's once-expressed interest in retiring in order to shield his personal finances, a large portion of which consisted of Lear stock and retirement benefits, from an industry downturn. Plaintiffs also continued to press all of their *Revlon* claims in the Amended Complaint attacking the pre-agreement and post-agreement sale process conducted by the Board, as well as the fairness of the $36 per share offered by the AREP Entities. Mirroring their new disclosure allegations, Plaintiffs also inserted a new *Revlon* claim alleging that the Board acted unreasonably by permitting Rossiter to serve as the lead negotiator in light of his concern regarding his retirement benefits and financial security.

On June 7, 2007, Plaintiffs submitted a motion for leave to file a Second Amended Complaint. The proposed Second Amended Complaint included, for the first time, the new allegations raised in Plaintiffs' opening brief regarding Rossiter's concern about his retirement benefits and financial security. Otherwise, the Second Amended Complaint alleged the same claims as the Amended Complaint, including the numerous disclosure claims which were effectively abandoned in Plaintiffs' opening brief in support of the Preliminary Injunction Motion.

On June 8, 2007, the Court held a hearing on the Preliminary Injunction Motion. On June 15, 2007, the Court "largely denied" the Preliminary Injunction Motion. *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 123 (Del. Ch. 2007). The Court held that Rossiter's concern regarding his retirement benefits and financial security was a material

piece of information and required its supplemental disclosure prior to the Lear stockholder vote on the Merger. *Id.* at 114. That was Plaintiffs' lone success. The Court denied Plaintiffs' remaining disclosure claims. *Id.* at 110-12. Similarly, the Court concluded that the "overall approach to obtaining the best price taken by the Special Committee appears … to have been reasonable." *Id.* at 117-18. The Court noted that the "valuation information in the record, when fairly read, does not incline me toward a finding that the Lear Board was unreasonable in accepting the Icahn bid [of $36.00 per share]." *Id.* at 122. The Court, therefore, held Plaintiffs had not demonstrated a reasonable likelihood of success on any of their *Revlon* claims. *Id.* at 118.

On June 18, 2007, the Company submitted to the Court a draft supplemental proxy statement (the "Supplemental Proxy") which included, in relevant part, six paragraphs on less than one page regarding Rossiter's concerns about his retirement benefits and financial security (the "Rossiter Disclosure"). Satisfied with the substance and timing of the Supplemental Proxy, the Court permitted the Company to mail the Supplemental Proxy to Lear stockholders the same day and to proceed with its Annual Meeting as scheduled on June 27, 2007.

On June 21, 2007, based on the Board's concern that the Initial Merger Agreement would not be approved by Lear's stockholders, the Company postponed the Annual Meeting to provide additional time to solicit stockholder support. The Company also engaged in extensive negotiations with the AREP Entities regarding improving the terms of the Initial Merger Agreement. On July 9, 2007, the AREP Entities agreed to an Amended Merger Agreement pursuant to which the merger consideration was increased

by $1.25 to $37.25 per share. At the Annual Meeting on July 16, 2007, the Company's stockholders failed to approve the Amended Merger Agreement.

In addition to terminating the Amended Merger Agreement, the negative stockholder vote mooted Plaintiffs' class action claims challenging the Merger and related disclosures–the same claims which had comprised the entirety of the Second Amended Complaint. On September 11, 2007, Plaintiffs filed a Third Amended Consolidated Shareholder Complaint (the "Third Amended Complaint"), which inexplicably included all of the *Revlon* and disclosure claims in the Second Amended Complaint. The Third Amended Complaint also included derivative claims regarding Lear's payment to the AREP Entities of the no-vote termination fee pursuant to the Amended Merger Agreement. After the Lear and AREP Defendants promptly advises Plaintiffs that their class claims were moot and could not be the subject of further litigation, Plaintiffs filed on November 16, 2007 a motion for leave to file a Fourth Amended Complaint containing only derivative claims.

On March 5, 2008, the Court entered a stipulated order dismissing all of Plaintiffs' *Revlon* and disclosure claims, permitting Plaintiffs to file a Fourth Amended Derivative Complaint challenging solely the no-vote termination fee, and providing for the Court to consider this Fee Application in conjunction with the Lear and AREP Defendants' motions to dismiss the Fourth Amended Derivative Complaint.

ARGUMENT

I. THE FEE REQUEST BY PLAINTIFFS' COUNSEL IS EXCESSIVE AND SHOULD BE DENIED.

The Lear Defendants do not dispute that Plaintiffs' Counsel are entitled to a reasonable award of attorneys' fees and expenses in this action. Under this Court's well-established standards for awarding attorneys' fees in stockholder litigation, however, the $2.95 million award sought by Plaintiffs' Counsel is plainly excessive and unreasonable. In light of the relatively insubstantial therapeutic benefit provided by the litigation, an aggregate award of fees and expenses of $450,000 would be more than fair.

A. The Legal Standard.

The determination of a reasonable award of attorneys' fees and expenses is left to the sound discretion of the court. *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 147-50 (Del. 1980); *Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000). In making that determination, the Court does not employ a mechanical approach, such as a mathematical formula. *Seinfeld*, 847 A.2d at 336; *Globis Capital Partners, LP v. SafeNet, Inc.*, C.A. No. 2772-VCS (transcript of December 20, 2007 hearing), at 40 (hereinafter "*SafeNet*"). Rather, the Court considers the factors set-forth by the Supreme Court in *Sugarland*: "(i) the benefits achieved in the action; (ii) the efforts of counsel and the time spent in connection with the case; (iii) the contingent nature of counsel's engagement; (iv) the difficulty of the litigation; and (v) the standing and ability of counsel involved." (POB 4 (citing *Sugarland*, 420 A.2d at 149-50)).

B. <u>The Litigation Achieved A Relatively Insubstantial Therapeutic Benefit.</u>

As Plaintiffs' Counsel recognize (POB 5), the benefit conferred is accorded the greatest weight in determining the fee to be awarded. *In re Vitalink Commc'ns Corp. S'holders Litig.*, C.A. No. 12085, 1991 WL 238816, at *17 (Del. Ch. Nov. 8, 1991), *aff'd sub nom. Grimes v. John P. McCarthy Profit Sharing Plan*, 610 A.2d 725 (Del. 1992). This is particularly true, where as here, the only benefit is a supplemental disclosure. In such cases, the "court awards fees … by 'juxtapos[ing] the case before it with cases in which attorneys have achieved approximately the same benefits.'" *In re Plains Res. Inc. S'holders Litig.*, C.A. No. 071, 2005 WL 332811, at *5 (Del. Ch. Feb. 4, 2005) (quoting *In re Golden State Bancorp, Inc. S'holders Litig.*, C.A. No. 16175, 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000)). Measured against that standard, the $2.95 million Fee Application is not only unreasonable and excessive, it is absurd.

In his 2001 decision in *Citrix Systems*, Chancellor Chandler determined that the average award of attorneys' fees and expenses in therapeutic benefit cases was $273,586, based on a survey of cases over the prior three years (the "*Citrix Systems* Survey"). *La. State Employees' Ret. Sys. v. Citrix Sys., Inc.*, C.A. No. 18298, 2001 WL 1131364, at *10 n.57 (Del. Ch. Sept. 19, 2001). The pending $2.95 million fee request not only dwarfs the average award in the *Citrix Systems* Survey, but far exceeds the average fee award of approximately $300,000 in more recent cases in which the benefits were limited to or consisted primarily of supplemental disclosures. *See, e.g., In re Intergraph Corp. S'holders Litig.*, Consol. C.A. No. 2398-VCP, (transcript of September 10, 2007 hearing), at 13 (awarding $330,000 in fees and expenses); *Augenbaum v. Forman*, C.A. No. 1569,

2006 WL 1716916, at *2 (Del. Ch. June 21, 2006) (awarding $225,000 in fees and expenses); *In re Triarc Cos. S'holders Litig.*, C.A. No. 16700, 2006 WL 903338, at *2-3 (Del. Ch. Mar. 29, 2006) (awarding $75,000 in fees and expenses); *State of Wisconsin Inv. Bd. v. Bartlett*, C.A. No. 17727, 2002 WL 568417, at *4 (Del. Ch. Apr. 9) ("*SWIB*") (awarding $327,998 in fees and expenses), *aff'd,* 808 A.2d 1205 (Del. 2002).[1]

The $2.95 million fee request also exceeds awards in several recent cases involving both quantifiable monetary benefits *and* supplemental disclosures. In fact, the Co-Chairs of Plaintiffs' Executive Committee in this litigation recently received an award of only $500,000 (reduced from a request for $1.5 million) in an action in which their efforts contributed to a monetary benefit of more than $2.2 million and resulted in additional disclosures. *Helaba Invest Kapitalanlagegesellschaft mbH v. Fialkow*, C.A.

[1] *See also In re Strategic Distribution, Inc. S'holders Litig.*, Consol. C.A. No. 2575-VCL (Del. Ch. Apr. 30, 2007) (Stipulation at ¶¶8-10) & (Del. Ch. Aug. 6, 2007) (Order at ¶10) (awarding $250,00 in fees and expenses); *Levy Invs., Ltd. v. Open Solutions, Inc.*, C.A. No. 2479-VCL (Del. Ch. May 18, 2007) (Order at ¶10) & (Del. Ch. June 5, 2007) (Settlement Hearing Tr. at 9) (awarding $287,500 in fees and expenses); *Kahn v. Demetriou*, C.A. No. 2335-VCS (Del. Ch. Dec. 13, 2006) (Stipulation at ¶1) & (Del. Ch. Mar. 26, 2007) (Order at ¶9) (awarding $185,740 in fees and expenses); *In re Sports Auth., Inc. S'holders Litig.*, Consol. C.A. No. 1897 (Del. Ch. May 26, 2006) (Stipulation at ¶1) & (Del. Ch. Aug. 22, 2006) (Order at ¶10); *In re Cardiac Science, Inc. S'holder Litig.*, Consol. C.A. No. 1138-N (Del. Ch. Oct. 24, 2005) (Stipulation at ¶¶15-20) & (Del. Ch. Jan. 5, 2006) (Order at ¶11) (awarding $300,000 in fees and expenses); *In re Genecor Int'l, Inc. S'holders Litig.*, Consol. C.A. No. 1052-N (Del. Ch. Mar. 23, 2005) (Stipulation at ¶X) & (Del. Ch. June 2, 2005) (Order at ¶10) (awarding $450,000 in fees and expenses); *In re Loehmann's Holdings, Inc. S'holders Litig.*, Consol. C.A. No. 400 (Del. Ch. Oct. 29, 2004) (Stipulation at ¶1) & (Del. Ch. Feb. 8, 2005) (Order at ¶8) (awarding $312,000 in fees and expenses); *In re Insignia Fin. Group, Inc. S'holders Litig. (CBRE)*, Consol. C.A. No. 20321-NC (Del. Ch. Nov. 6, 2003) (Stipulation at ¶1) & (Del. Ch. Feb. 9, 2004) (Order at ¶7) (awarding $225,000 in fees and expenses).

No. 2683, 2008 WL 1128721, at *3-4 (Del. Ch. Apr. 11, 2008).[2] Importantly, the additional disclosures in *Helaba*, which consisted of, among other things, the financial projections employed by the company's financial advisor in rendering the fairness opinion, were much more substantial than the Rossiter Disclosure. *Id.* at *1 (cataloguing the disclosures). *See also In re Instinet Group, Inc. S'holders Litig.*, C.A. No. 1289, 2005 WL 3501708, at *1 (Del. Ch. Dec. 14, 2005) (awarding $450,000 in fees and expenses, despite an application for more than $1.6 million in fees, where the litigation resulted in "the payment of $1 million in additional compensation to Instinet's minority stockholders, a 15% reduction in the break up fee …, and certain enhanced disclosures in the proxy material").

In support of their $2.95 million request, Plaintiffs' Counsel rely on this Court's recent decision in *SafeNet* awarding $1.2 million in attorneys' fees and expenses for supplemental disclosures. (POB 8). That decision, however, only further undermines the Fee Application. In *SafeNet*, the company issued a Schedule 14D-9 in connection with a proposed tender offer containing "extremely bare-bone, noninformative disclosures." *SafeNet*, at 45. Stockholder plaintiffs brought suit to enjoin the transaction based on the inadequate disclosures, particularly as they related to the financial analysis performed by the Company's financial advisor in issuing a fairness opinion. *Id.* at 6-7. Plaintiffs engaged in extensive expedited discovery. *Id.* The day after plaintiffs submitted their

[2] The Court concluded in *Helaba* that the plaintiff's attorneys: (i) "secured" a payment settlement of $0.10 per share, "equating to a roughly $260,000 benefit to the class," and (ii) "played a significant but less than instrumental role" in increasing the

opening brief on their injunction motion, the Company issued an amended Schedule 14D-9. *Id.* Though the amended Schedule 14D-9 addressed many of the disclosure deficiencies, plaintiffs were concerned that it did not fairly and accurately disclose the analysis undertaken by the company's financial advisor and decided to move forward with their preliminary injunction motion. Following the hearing on the preliminary injunction motion, the Company agreed to disclose the banker's books provided to the company's board by the financial advisor explaining the details of its financial analysis. *Id.* at 9-10.

As result of the effort by plaintiff's counsel in *SafeNet*, 100 pages of detailed financial information were ultimately provided to the Company's stockholders. *Id.* at 19. These supplemental disclosures were "substantively … way out of the ordinary." *Id.* at 30. According to the Court, the disclosures were "inarguably 10 to 15 times more substantial and more material and more informative than the disclosures at issue in [the cases in the *Citrix Systems* Survey]." *Id.* at 29. The Court, therefore, had little trouble reconciling the $1.2 million award with the average award for disclosures cases included in the *Citrix Systems* Survey: "[I]f you compare these cases where the average disclosure was [$]300,000, its very easy to justify a fee award of four times that here, because the disclosures were far more than four times more informative, on average, than the disclosures … in those cases." *Id.* at 50.

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merger consideration by $0.75 per share, worth approximately $1.95 million to the class. *Helaba*, 2008 WL 1128721, at *3-4.

Here, the efforts of Plaintiffs' Counsel resulted in the disclosure of just six paragraphs of non-financial information. The Rossiter Disclosure pales in comparison to the disclosure of 100 pages of financial information in *SafeNet*. Nonetheless, Plaintiffs' Counsel seek to recover more than twice the award in *SafeNet*. If anything, however, *SafeNet* suggests that the Rossiter Disclosure is at best average. An award of $450,000, therefore, is more than reasonable.

While the substantial disclosures were the most significant factor in the Court's analysis in *SafeNet*, the above average award was also impacted by the unreasonable position taken by counsel for SafeNet. *See SafeNet*, at 21 (stating that "where people have fundamentally irrational positions or irreconcilable issues, I am going to go with the one that is closer to the mark"). Notwithstanding the significance of the disclosures, Safenet's counsel proposed a fee of $108,000–approximately one-third of the average award in disclosure-only cases–which the Court viewed as an insult to plaintiff's counsel. *SafeNet*, at 18. By contrast, despite the insubstantial benefit provided by the lone disclosure, Lear has suggested a fee of $450,000 more than 50% above the average award in disclosure only cases. Since the $2.95 million requested by Plaintiffs' Counsel is "fundamentally irrational" in the context of the solitary benefits of the Rossiter Disclosure, the rationale of *SafeNet* dictates that the Court should go with the still generous amount recommended by the Lear Defendants.

Plaintiffs' Counsel also cite the $2.75 million fee award in *In re Staples, Inc. Shareholders Litigation*, 792 A.2d 934 (Del. Ch. 2001) in support of their fee request. (POB 8). It, however, is also inapposite. In *Staples*, counsel for plaintiffs' obtained an

$8 million monetary benefit, as well as therapeutic benefits consisting of an adjusted record date for a stockholder vote and numerous supplemental disclosures including, among other things, the conclusions of plaintiffs' valuation expert. *In re Staples, Inc. S'holders Litig.*, C.A. No. 18784, (transcript of August 16, 2001 hearing), at 5-8, 10 (hereinafter "*Staples* Tr."); *see also Staples*, 792 A.2d at 954-60 (cataloging disclosure deficiencies addressed by plaintiffs, all of which related to the valuation of the transaction). In awarding the full amount of the unopposed request, the Court relied on both the size of the monetary benefit as well as the significance of the disclosures:

> [C]learly, even just looking at the monetary benefits alone, one could justify a fee at the level that was requested. And clearly, when you ass what are not trivial–these are not cosmetic disclosure issues. This is–it's not a cosmetic issue to get a record date change. These were real substantive things that were achieved [and] the fees and expenses are clearly fair and well earned.

Staples Tr. at 21, *see also id.* at 19-20 (stating that "plaintiffs achieved an awful lot in terms of disclosures…. [T]hey got excellent disclosures"). Plaintiffs' Counsel here, however, can neither point to a large monetary benefit nor qualitatively significant disclosures to justify their $2.95 million Fee Application.

The large fee awards from foreign jurisdiction cited by Plaintiffs' Counsel are similarly unhelpful. (POB 8 n.5) The fee awards in those cases were premised on different legal standards and have no bearing on the determination of a reasonable fee award under Delaware law. Though Plaintiffs' Counsel failed to provide the decisions in these unreported cases, their description of the decisions indicate that most of the awards involved benefits beyond supplemental disclosures and were calculated pursuant to the

lodestar method–a method this Court has rejected. *See, e.g., Seinfeld*, 847 A.2d at 336 ("*Sugarland* rejected more mechanical approaches to determining fee awards, explicitly disapproving the Third Circuit's 'lodestar method.'") (citing *Sugarland*, 420 A.2d at 149-50). Moreover, Plaintiffs' Counsel cited these same cases in support of their request for fees and expenses in *Helaba* and they were disregarded by the Court. *See* Plaintiffs' Brief in Support of Proposed Settlement and Application for Attorneys' Fees and Expenses, *Helaba Invest Kapitalanlagesellschaft mbH v. Fialkow*, C.A. No. 2683 (Del Ch. Feb. 6, 2008), at 30-32; *Helaba*, 2008 WL 1128721, at *3-4 (reducing the $1.5 million dollar request to $450,000 despite significant supplemental disclosures and a monetary benefit of approximately $2.2 million).

Unable to justify their fee request in comparison with awards in other supplemental disclosure cases, Plaintiffs' Counsel contend that a substantial award is warranted because the Rossiter Disclosure "galvanize[d] stockholder opposition to a transaction widely perceived in the market as being financially unfair." (POB 9). Premised on the Supreme Court's decision in *Cal-Maine Foods* (*id.*), this contention is fundamentally flawed. In *Cal-Maine Foods*, the Court determined a fee award was appropriate because counsel's litigation efforts helped thwart an *unfavorably* priced transaction. *Cal-Maine Foods, Inc. v. Pyles*, 858 A.2d 927, 928-29 (Del. 2004). There is simply no evidence the Merger was unfavorably priced. Indeed, all evidence suggests the Merger price was more than fair. Now, almost ten months after stockholders failed to

approve the Merger, Lear stock continues to trade more than 18% below the Merger price.[3]

C. Plaintiffs' Counsel Are Not Entitled to Compensation For All Of Their Claimed Hours.

Plaintiffs' Counsel claim to have spent 2,445 hours pursuing this litigation. (POB 10) As proponents of the Fee Application, Plaintiffs' Counsel have the burden of establishing the claimed benefit resulting from the hours they expended. *In re Diamond Shamrock Corp.*, C.A. No. 8798, 1988 WL 94752, at *4 (Del. Ch. Sept. 14, 1988). Plaintiffs' Counsel, however, failed to provide any of the time records necessary for the Court to determine whether the time was incurred in connection with the Rossiter Disclosure. On that basis alone, the Court should reject the Fee Application. *Boyer v. Wilmington Material, Inc.*, C.A. No. 12549, 1999 WL 342326 (Del. Ch. May 17, 1999) (refusing to grant the fee award requested, in part, due to counsel's failure to submit itemized billing records); *Diamond Shamrock*, 1988 WL 94752, at *4 (stating that the Court could not value a therapeutic benefit intelligently without an affidavit from counsel disclosing, among other things, the level of experience and normal hourly rate of each professional whose time is included in the request and the number of hours expended on activities unrelated to the benefit conferred).

The complete failure by Plaintiffs' Counsel to provide any time records is all the more troubling because it is clear that a large portion of the their claimed hours are not

[3] By way of comparison, in *Cal-Maine Foods*, the transaction price was $7.35 per share. *Cal-Maine Foods*, 858 A.2d at 928. On the day the transaction was abandoned the

compensable. Plaintiffs' Counsel alleged and pursued a litany of claims in this litigation and were almost entirely unsuccessful. The 2,455 hours claimed in the Fee Application include all time incurred in connection with the litigation through the hearing on the Preliminary Injunction Motion. Obviously, a large percentage of that time was not related to the Rossiter Disclosure–the lone success by Plaintiffs' Counsel–and is therefore not recoverable. *See, e.g., Siegman v. Palomar Med. Techs, Inc.*, C.A. No. 15894, 1998 WL 409352, at *7 (Del. Ch. July 13, 1998) ("[A]ttorneys' fees cannot be awarded as compensation for litigative efforts that, with the perspective of hindsight, turned out to be unsuccessful."); *Diamond Shamrock*, 1988 WL 94752, at *4 ("[T]he Court [will] consider the work the attorney performed to achieve the benefit, and the amount and value of attorney time required for that purpose."); *SWIB*, 2002 WL 568417, at *5 (finding that only hours expended achieving the claimed benefits were recoverable). Similarly, with eight different law firms representing Plaintiffs, a substantial portion of the claimed hours undoubtedly were the product of duplication of efforts.[4] Such time, even if related to the Rossiter Disclosure, is not compensable. *See, e.g. In re Diamond Shamrock Corp.*, C.A. No. 8798, 1989 WL 17424, at *2 (Del. Ch. Feb. 23, 1989) (holding that duplicative efforts are not compensable, because they provide no benefit).

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stock closed at $11.00. *Id.* at 929. Less than two months later, the stock traded as high as $43.59. *Id.* at 928.

[4] As but one obvious example, Plaintiffs' Counsel took ten depositions in this litigation. Despite the fact those depositions covered the same basic material, the depositions were taken by five different attorneys from four separate law firms. There is no question that this resulted in unnecessary duplication of effort.

In the Fee Application, Plaintiffs' Counsel tout the various services they provided in connection with this litigation. (POB 10). This summary list confirms that Plaintiffs' Counsel are seeking compensation for work wholly unrelated to the Rossiter Disclosure. For instance, Plaintiffs' Counsel highlight time spent drafting pleadings (*id.*), but the allegations giving rise to the Rossiter Disclosure did not appear until the Second Amended Complaint was filed the day before the preliminary injunction and are addressed in 25 paragraphs of the 184-paragraph complaint. Similarly, Plaintiffs' Counsel also claim to have engaged in "extensive consultation with plaintiffs' financial advisor regarding complex valuation, industry-related and financial issues relating to the litigation." (*Id.*) Such activities are plainly directed at the substantive challenges to the Merger, not the Rossiter Disclosure, and are not recoverable. *See SWIB*, 2002 WL 568417, at *5 (holding that time related to a substantive attack on the merger does "not warrant an award payable by the company" where the sole benefit is a supplemental disclosure).

For many of the same reasons, Plaintiffs' Counsel should not be awarded the entire $225,883 in expenses they claim to have incurred in this litigation. Though Plaintiffs' Counsel have failed to provide any details of these expenses, a significant portion are no doubt attributable to fees paid to Plaintiffs' valuation expert. Those expenses are not recoverable. *See id.* (holding that $180,000 in "expert witness fees related to valuation and pooling of interests issues involved in the substantive attack on the merger" were not recoverable because they were unrelated to the supplemental disclosure).

Ultimately, the essential inquiry is the significance of the Rossiter Disclosure, not the number of hours expended in achieving it. *See In re Dr. Pepper/Seven Up Cos. S'holders Litig.*, C.A. No. 13109, 1996 WL 74214, at *5 (Del. Ch. Feb. 27) (noting that the "Delaware courts avoid the tendency to make hours expended the essential inquiry" focusing instead on the benefit achieved), *aff'd*, 683 A.2d 58 (Del. 1996); *accord Golden State Bancorp.*, 2000 WL 62964, at *3; *Vitalink Commc'ns Corp.*, 1991 WL 238816, at *17; *In re MAXXAM Group, Inc.*, C.A. No. 8636, 1987 WL 10016, at *11 (Del. Ch. 1987). This Court, therefore, has not hesitated to significantly reduce fee requests where, as in this case, plaintiff's counsel have expended considerable time and effort, but have achieved insubstantial benefits. For example, in *Instinet Group*, counsel spent in "excess of 2,600 hours" pursuing a case that resulted in a $1 million dollar monetary benefit, a 15% reduction in the break-up fee, and enhanced disclosures. *Instinet Group*, 2005 WL 3501708, at *1-2. Determining those benefits to be "modest," the Court rejected counsel's request for more than $1.6 million in fees and expenses and awarded $450,000. *Id.* Simply put, where as here, the benefit is modest, counsel is entitled to only a modest award, regardless of the time expended to achieve that benefit.[5]

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[5] *See generally Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178, 184 (Del. Ch. 2003) ("Limiting fees on fees awards by imposing a proportionality requirement encourages parties seeking advancement or indemnification to raise only substantial claims and encourages corporations to compromise worthy claims (lest they suffer a fees on fees award) and resist less meritorious claims (knowing that success will bar a fees on fees recovery for the plaintiff)."); *id.* at 186 ("In other words, Fasciana's requested fees on fees will be discounted such that the amount of fees on fees awarded 'is reasonable in relation to the results obtained' by Fasciana.") (citation omitted).

The bulk of the discovery and briefing on the Preliminary Injunction Motion addressed arguments on which Plaintiffs were unsuccessful. Indeed, the Rossiter Disclosure argument is advanced factually and legally, on only 12 of 83 pages of Plaintiffs two preliminary injunction briefs–the bulk of which addressed Plaintiffs' unsuccessful disclosure and *Revlon* claims. (*See* Docket Entries 76 & 106). The narrow disclosure claim on which Plaintiffs' Counsel succeeded involved an extremely small portion of the overall work. By way of example, of the 1004 pages of depositions conducted by Plaintiffs' Counsel, the Rossiter Disclosure issue is addressed on only 36 pages.

The brevity of the depositions conducted by Plaintiffs' Counsel is also noteworthy in light of the massive number of hours (2,445) supposedly expended. Plaintiffs' Counsel completed the deposition of all three members of the Lear Board's Special Committee, Messrs. Wallace, Stern and McCurdy, in a total of just over five and a half hours. That total includes breaks, as well as time used by defense counsel to question deponents and adequately develop the record for the Preliminary Injunction Motion. For instance, of the mere 37 pages of the deposition transcript for Mr. Wallace, 18 pages consist of questions from defense counsel. Furthermore, Plaintiffs' Counsel did not use a single exhibit in the deposition of either Mr. Wallace or Mr. McCurdy, who served as the chairman of the Special Committee.

The success of Plaintiffs' Counsel was extremely limited in light of the broad relief sought in the Second Amended Complaint, and the bulk of the activities by Plaintiffs' Counsel related to contentions rejected convincingly by the Court, an award of

$450,000 would err on the side of generosity based on any qualitative or quantitative assessment of the Fee Application.

D. <u>The Litigation Was Not Complex or Difficult</u>

Plaintiffs' Counsel alleged and pursued straightforward *Revlon* and disclosure claims. Such a case, even when it proceeds on an expedited basis, "is not overly complex or difficult by the standards of this Court." *SWIB*, 2002 WL 568417, at *6. "While the litigation presented several difficult factual issues, the complexity and novelty of this case were commensurate with those often encountered in corporate litigation before this court." *Plains Res.*, 2005 WL 332811, at *6. As such, the complexity and difficulty of the litigation does not merit any substantial increase over the awards made in ordinary supplemental disclosure cases, much less the $2.95 million award Plaintiffs' Counsel have requested.

E. <u>Neither The Contingent Nature of the Fee Arrangement Nor the Standing of Counsel Support the Excessive Fee Request.</u>

Plaintiffs' Counsel "are highly experienced in corporate, class action litigation of this nature …, and undertook their representation on a purely contingent basis." (POB 11). While these factors are relevant to the Court's determination of a reasonable fee, they cannot compensate for the fact that Plaintiffs' Counsel were almost wholly unsuccessful, achieving only a limited, therapeutic benefit. *See Instinet Group*, 2005 WL 3501708, at *3 ("[W]here little is accomplished, the fact that the case was undertaken on a contingent fee basis militates in favor of awarding only a modest fee that reflects the value of the benefits achieved."). In similar therapeutic benefit cases, while recognizing

the standing of counsel and the contingent nature of their engagement, this Court has awarded far less than the amount sought by Plaintiffs' Counsel here. *See, e.g., Triarc Cos.*, 2006 WL 903338, at *2-3 (awarding $75,000 to counsel after considering "all … relevant factors, including the contingent nature of the undertaking"); *Citirix Sys.*, 2001 WL 1131356, at *9-10 (stating that an award of $148,250 adequately compensated counsel, who was of "superior standing and ability," for "the contingent risk inherent in [the] litigation"); *Dr. Pepper*, 1996 WL 74214, at *5 (awarding $300,000 to "skilled attorneys" working on a contingency basis).

F. Public Policy Considerations Favor a Reasonable Award, Not the Excessive Award Sought by Plaintiffs' Counsel.

Finally, Plaintiffs' Counsel contend that public policy considerations favor their request for $2.95 million in fees and expenses. Public policy considerations do indeed support an award of fees and expenses where counsel's efforts have conferred a corporate benefit. Those policy considerations, however, are best served by an award that is reasonable and commensurate with the benefit achieved. *See Seinfeld*, 847 A.2d 330, 333-34 (Del. Ch. 2000) (noting that awarding an "appropriate" fee provides incentives to counsel to pursue meritorious litigation without creating "a windfall, serving no other purpose than to siphon money away from stockholders and into the hands of their agents"). As demonstrated above, the $2.95 million Fee Application is neither reasonable nor commensurate with the benefit achieved; it is excessive.

CONCLUSION

For the foregoing reasons, the Fee Application submitted by Plaintiffs' Counsel for \$2.95 million should be rejected and reduced to \$450,000.

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