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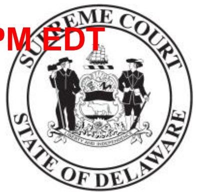

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE FIRE AND POLICE PENSION FUND, SAN ANTONIO,	)	No. 131, 2015
Plaintiff Below, Appellant/Cross Appellee,	)	
v.	)	CASE BELOW:
ARRIS GROUP INC.,	)	COURT OF CHANCERY OF THE STATE OF DELAWARE,
Nominal Defendant Below, Appellee/Cross Appellant.	)	C.A. No. 10078-VCG

APPELLEE'S ANSWERING BRIEF ON APPEAL AND
CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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Dated: June 3, 2015

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NATURE OF PROCEEDINGS

Plaintiff-appellant The Fire and Police Pension Fund, San Antonio ("San Antonio" or "Plaintiff") has appealed the Court of Chancery's generous award of $128,000 in legal fees to Plaintiff's counsel. Plaintiff's counsel selected the credit agreement between ARRIS Group, Inc. ("Arris," or the "Company") and Bank of America, N.A. ("BANA") dated March 27, 2013 (the "Credit Agreement") as one of the opening salvos in an effort to create a new industry for the Delaware plaintiff's bar—litigation over change of control provisions in credit agreements. Like many debt instruments, the Credit Agreement contained change of control provisions that gave BANA ***the option*** to accelerate Arris' debt under certain circumstances. Relevant to this litigation, the Credit Agreement included as a change of control the election of a new board majority within a twelve-month period (the "Continuing Director Provision"). At the time the Credit Agreement was entered into, there was no reason to think that the Continuing Director Provision would come into play—the Arris Board of Directors (the "Board") was not engaged in a proxy fight, had never faced a proxy fight, and did not expect a proxy fight. As admitted in Plaintiff's opening brief in support of Plaintiff's application for an order dismissing this action as moot and for an award of attorneys' fees and expenses before the Court of Chancery ("Plaintiff's Opening

Fee Brief"), Plaintiff's challenge came "in the absence of any known effort to unseat any directors of Arris." A34.

Arris and BANA voluntarily deleted the Continuing Director Provision from the Credit Agreement on October 22, 2014, solely to avoid the distraction and expense of litigation. Plaintiff's counsel then began its test to see what fee it could obtain for harassing Arris into deleting a dormant, innocuous provision. If Plaintiff's counsel received the $750,000 it sought, or some similarly bloated fee, it would expand the cottage industry identifying and suing all Delaware corporations whose debt instruments contained continuing director provisions, regardless whether those provisions posed any impediment to the stockholder franchise.

In a February 25, 2015 transcript ruling (the "Fee Ruling") (attached hereto as Exhibit A), the Court of Chancery appropriately recognized the modest benefit the efforts of Plaintiff's counsel provided to the Arris stockholders and awarded a fee based on the Vice Chancellor's factual determinations regarding the so-called "*Sugarland* factors." The Court of Chancery's $128,000 fee award represented a generous implied hourly rate of $800. Ex. A at 9–10.

Plaintiff appeals the $128,000 fee award, as reflected in the Court of Chancery's February 26, 2015 Order of Dismissal and Resolution of Plaintiff's Fee Application (the "Fee Order") (attached hereto as Exhibit B) and attacks the Court of Chancery's findings that (i) the elimination of the Continuing Director Provision

provided only a modest benefit to the Arris stockholder franchise, and (ii) the implied hourly rate reflected in the fee award in *San Antonio Fire & Police Pension Fund v. Bradbury*, 2010 WL 4273171 (Del. Ch. Oct. 28, 2010) ("*Amylin II*")[1] provided the appropriate benchmark for Plaintiff's counsel. B119–B120.

Arris has cross-appealed the Fee Order on two grounds. First, in calculating the fee, the Court of Chancery improperly included the hours Plaintiff's counsel expended after Arris and BANA deleted the continuing director provision. Second, the $800 implied hourly rate awarded by the Court of Chancery is excessive in light of the minimal benefits achieved by Plaintiff's counsel and inconsistent with the precedent upon which the Court of Chancery claimed to rely.

[1] *Amylin II* was the Court of Chancery's fee award decision. The Court of Chancery's ruling on the merits was *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*, 983 A.2d 304 (Del. Ch. 2009) ("*Amylin I*").

SUMMARY OF APPEAL ARGUMENT

1. DENIED. Contrary to Plaintiff's assertions, the Vice Chancellor reasonably exercised his discretion in determining that Plaintiff's counsel achieved only a "modest benefit" for Arris stockholders through the elimination of the Continuing Director Provision. The Vice Chancellor correctly recognized the minimal impact that the Continuing Director Provision had on Arris stockholders and the limited deterrent effect of such provisions due to developments in the law. The Vice Chancellor's findings were amply supported by the record. The Board never has been the subject of a proxy contest and no proxy contest was on the horizon when the Credit Agreement was adopted, when Plaintiff challenged the Continuing Director Provision, or when the Continuing Director Provision voluntarily was deleted. Plaintiff now attempts improperly to supplement the record with evidence that was not presented to the Vice Chancellor, including the assertion that the use of Continuing Director Provisions increased following the Court of Chancery's opinion in *Kallick v. SandRidge Energy, Inc.*, 68 A.3d 242 (Del. Ch. 2013) ("*SandRidge*"). Having failed to meet its burden to demonstrate that the $750,000 fee it requested in the Court of Chancery was appropriate, Plaintiff may not now seek to bolster the record with evidence and arguments it never presented to the Vice Chancellor.

2. DENIED. The Vice Chancellor reasonably exercised his discretion in applying the *Sugarland* factors and in awarding a fee based on *quantum meruit* and recognizing the modest corporate benefit achieved as a result of this litigation. The Court of Chancery consistently and correctly has relied on *quantum meruit* in determining fee awards for unquantifiable therapeutic benefits achieved by plaintiffs' counsel. The Vice Chancellor's methodology in choosing to award an implied hourly rate consistent with *Amylin II* was generous in light of the distinctions between that action and this one. *Amylin II* actually broke new ground in Delaware law and involved real contingency risk. Here, Plaintiff seeks a windfall for re-plowing old ground. Plaintiff's argument regarding incentives is precisely backward. The stockholders of Delaware corporations will not benefit by the plaintiff's bar tilting at windmills, which is exactly what will happen if Delaware courts award large mootness fees any time a Delaware corporation and its lenders agree to delete a Continuing Director Provision, despite the absence of any pending or threatened proxy fight.

SUMMARY OF CROSS-APPEAL ARGUMENT

1. The Vice Chancellor erred as a matter of law by incorporating into his fee award the hours expended by Plaintiff's counsel after the Continuing Director Provision was deleted on October 22, 2014. Plaintiff's counsel represented that it spent 159.7 hours on the litigation through December 8, 2014—the date the parties filed with the Court of Chancery a stipulation and proposed order providing for the dismissal of Plaintiff's complaint on mootness grounds (the "Stipulation for Considering Dismissal")—but did not disclose the number of hours expended between October 22, 2014 and December 8, 2014. Arris identified for the Vice Chancellor the inclusion by Plaintiff's counsel of non-compensable hours between October 22, 2014 and December 8, 2014, but the Court of Chancery nonetheless utilized the inflated figure. The inclusion of these post-deletion hours conflicts with prior precedent and creates a perverse incentive for counsel to expend unnecessary hours after their client's claims are mooted.

2. The Vice Chancellor abused his discretion by awarding Plaintiff's counsel an hourly rate that exceeded the rate received by counsel in *Amylin II*. As Plaintiff admits, the Court in *Amylin II* found the benefits achieved by counsel in that litigation—which was the first time the Court of Chancery addressed such a provision and which included the removal of a continuing director provision during an ongoing proxy contest—to be "substantial and significant." B120; *Amylin II*,

2010 WL 4273171, at *9; *see also id.*, at *8 (“Thus, specific and substantial benefits accrued to the Company’s stockholders.”). By contrast, the Vice Chancellor found the benefit achieved by Plaintiff’s counsel here to be only “modest.” Logic dictates that the implied hourly rate for the fee awarded in this action should be lower than the implied hourly rate in *Amylin II*. Instead, the Vice Chancellor awarded an implied hourly rate ($800) that was slightly higher than the implied hourly rate in *Amylin II* ($790).

STATEMENT OF FACTS

A. The Credit Agreement Contained a Standard Continuing Director Provision that Had No Cognizable Effect on Arris Stockholders.

When Arris and BANA entered into the Credit Agreement on March 27, 2013, the Continuing Director Provision appearing at Section 1.01 was on no one's mind. The Credit Agreement was the culmination of a financing commitment and fee letters that BANA provided to Arris in December 2012 in connection with Arris' transformative acquisition of an indirect subsidiary of Google ("Motorola Home") for $2.35 billion (the "Acquisition"). B68–B71. Google was unwilling to accept any financing condition to closing the Acquisition, and therefore Arris bore all the risk of obtaining sufficient capital. B69. To fund the Acquisition, Arris entered into the Credit Agreement, which ultimately provided Arris with a $2.175 billion senior secured credit facility. B70. Had Arris failed to close the Acquisition, Arris would have been liable for a $117.5 million break-up fee. B70–B71. Thus, even if Arris had focused on the Continuing Director Provision, Arris had little negotiating leverage against BANA. *Id.*

But no one was focused on the Continuing Director Provision, which the Board and Arris management considered to be a customary market term for this type of agreement. B71–B73. The Board never discussed the Continuing Director Provision but upon request was assured by Arris management that the Credit Agreement contained standard provisions that did not require the special attention

of the Board. B72–B73. Arris publicly announced that the events of default listed in the Credit Agreement were "customary for facilities of this type." *Id.*; B159.

The Continuing Director Provision was not adopted as a defensive measure in response to a pending or threatened proxy fight. Going back at least to 2001, the Board never had faced a proxy contest, nor had a stockholder even proposed candidates for the Board. B74. All of Arris' previous debt facilities contained similar continuing director provisions. B73–B74. Moreover, Arris achieved record-breaking financial performance immediately before entry into the Credit Agreement, and this strong performance continued through and even after the Continuing Director Provision was deleted. B74. Contrary to Plaintiff's improper arguments on appeal,[2] the Board "never understood, anticipated or intended that the Continuing Director Provision or any other term of the Credit Agreement would inhibit any proxy contest or any proposal to remove or replace directors."[3] B74–B75; *see also* B77. In fact, the Board did not learn of the Continuing Director Provision until Plaintiff's counsel went on the warpath in March 2014. B75–B76. Regardless, Plaintiff waived its argument that the Board purportedly was aware of Arris' supposed vulnerability to potential stockholder activism by waiting to raise

[2] As discussed below, Plaintiff waived this argument.

[3] Plaintiff's claim that the Continuing Director Provision resulted from entrenchment is belied by the expiration of Arris' shareholder rights plan on October 3, 2012, which the Board declined to replace. B123-B124 & n.1.

the issue until its reply brief in the Court of Chancery. *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999). Accordingly, this argument was not properly presented to the Court of Chancery and Plaintiff has waived its argument that "Arris's fiduciaries, managers, and advisers were certainly aware of the potential threat of stockholder activism in March 2013." B123–B124 & n.2–3; Del. Supr. Ct. R. 8.

B. Plaintiff's Counsel Engineer an Attack on the Continuing Director Provision as a Test Case.

From the outset, this action has been a claim in search of a client. Plaintiff's counsel sent Arris a letter dated March 25, 2014 (the "First Demand") that purported to request Arris documents regarding the Continuing Director Provision on behalf of a different client—the Louisiana Municipal Police Employees' Retirement System ("LAMPERS"). B75–B76 & B79–B87. By letter dated April 8, 2014, Arris informed Plaintiff's counsel that it would not produce documents in response to the First Demand because it did not comply with the form and manner requirements of 8 *Del. C.* § 220 ("Section 220") and failed to state a proper purpose for the demand. B75–B76 & B88–B92. Notably, Arris pointed out that the First Demand did not demonstrate that LAMPERS actually owned stock in Arris.

A month later, Arris received a second letter from Plaintiff's counsel, dated May 13, 2014, that purported to request Arris documents regarding the Continuing

Director Provision on behalf of San Antonio (the "Second Demand"). B76 & B93–B102. Tellingly, the Second Demand made no mention of the First Demand, nor did the Second Demand explain why counsel was now pursuing books and records on behalf of Plaintiff instead of LAMPERS.[4] B76. Arris informed BLBG by letter dated May 22, 2014 that it would not produce any documents in response to the Second Demand because of Plaintiff's failure to comply with the form and manner requirements of Section 220 and because the Second Demand failed to state a proper purpose for the demand. B76 & B103–B108.

Having finally located a viable plaintiff (*i.e.*, an actual Arris stockholder), Plaintiff's counsel filed an action purporting to be under Section 220 on June 27, 2014 (the "Section 220 Action"). Rather than pursue the Section 220 Action, Plaintiff filed its class action complaint in this action on September 3, 2014 (the "Complaint").

C. Arris and BANA Amend the Credit Agreement to Avoid the Distraction and Expense of Litigation.

Arris began to evaluate the potential removal of the Continuing Director Provision soon after the Complaint was filed. B77. On October 1, 2014, Arris proposed to BANA that the Continuing Director Provision be deleted, to which BANA agreed. *Id.* Arris informed Plaintiff's counsel of the proposed deletion by

[4] While criticizing Arris' response to the Second Demand, Plaintiff conveniently declined to inform the Court of the First Demand in the Opening Appeal Brief.

October 10, 2014. *Id.* The actual deletion of the Continuing Director Provision occurred on October 22, 2014 and was undertaken solely to avoid the distraction and expense of litigation. B77–B78. The only cost to Arris was $37,900 for reimbursement of BANA's legal fees. B78.

No Arris stockholder (other than LAMPERS and Plaintiff at the behest of Plaintiff's counsel) ever complained about, or commented on, the Continuing Director Provision. *Id.* No Arris stockholder, including LAMPERS and Plaintiff, ever communicated a proposal to mount a proxy contest or remove or replace any Arris director. B74, B78.

D. The Court of Chancery Generously Awards $128,000 to Plaintiff's Counsel.

Plaintiff's counsel filed their fee application and accompanying materials with the Court of Chancery on January 14, 2015. A8–A157. Contrary to Plaintiff's current (and legally incorrect) position, Plaintiff's Opening Fee Brief recognized that the "Court [of Chancery] has broad discretion to fashion a reasonable award of attorneys' fees." A29 (citing *In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, 1273 (Del. 2005)). Plaintiff's Opening Fee Brief also boasted that Plaintiff's counsel had "raise[d] a challenge no one else had conceived" in that "Plaintiff is challenging the adoption of a [Continuing Director Provision] in the absence of any known effort to unseat any directors of Arris." A33–A34. Plaintiff's counsel claimed that they expended 226.25 hours in the

matter, but this figure included hours through the day preceding the filing of Plaintiff's Opening Fee Brief. A36; A47.

Arris filed its opposition to the fee application on January 30, 2015 (the "Fee Opposition"). B1–B66. The Fee Opposition directly addressed the contention of Plaintiff's counsel that they had achieved a substantial benefit on behalf of the Arris stockholders. B39–B44; B46–B48. Importantly, the Fee Opposition recognized that:

> [D]espite its burden to justify the fee award it seeks, Plaintiff has produced no evidence that the Continuing Director Provision actually affected the willingness of Arris stockholders to seek change in the boardroom. Nor has Plaintiff produced evidence that the deletion of the Continuing Director Provision will change the behavior of Arris' stockholders in the future.

B40. The Fee Opposition distinguished the litigation giving rise to the fee award in *Amylin II*, and also argued that prior Court of Chancery decisions had "greatly minimized any deterrent effect continuing director provisions could have on proxy contests." B43–B44.

Plaintiff's counsel filed their reply brief on February 6, 2015 ("Plaintiff's Reply Fee Brief"). A170–A193. Plaintiff's Reply Fee Brief was notable only for the plethora of arguments raised for the first time therein, including belated arguments that "abuse of proxy puts persists" even after *Amylin II* and *SandRidge* and the unsourced *ipse dixit* that "[t]he board was undoubtedly aware of Arris's

vulnerability to stockholder activism and its changing stockholder profile." A175, A179.

The Court of Chancery heard argument on February 11, 2015. A194–A252. On February 25, 2015, the Court of Chancery issued the Fee Ruling. *See* Ex. A. The Court of Chancery correctly recognized that it "has broad discretion to fashion a reasonable award of attorneys' fees." *See* Ex. A at 7. Applying the well-known and controlling *Sugarland* factors, the Court of Chancery ruled that Plaintiff's counsel had achieved a "cognizable but modest benefit" that merited a $128,000 fee. *Id.* The Court of Chancery's finding of a "modest benefit" was supported by "the narrowed focus of the proxy put at issue here, both in terms of the provision resetting every year and requiring a majority of dissident directors be elected to take effect, [which] dilute the provision's harmful effect, leaving much of the stockholders' franchise intact." *Id*. at 7–8. The Court of Chancery also found that prior precedent had weakened the force of continuing director provisions generally such that "the value of removing such a device [has] decrease[d]." *Id.* at 8.

Relying on *Amylin II*, the Court of Chancery determined that "the benefit here, as there, is difficult to quantify" and calculated a *quantum meruit* fee based on "the time spent on the case, mindful of the fact that this matter was taken on a contingent fee and that [the Court of Chancery] must take that risk into account to encourage wholesome litigation." *Id.* The Court of Chancery asserted that it

considered "only the time plaintiff's counsel spent in obtaining the benefit supporting the fee application." *Id.* at 8–9. Nevertheless, the Court of Chancery included all of the time Plaintiff's counsel expended after the deletion of the Continuing Director Provision on October 22, 2014 through December 8, 2014. *Id.* at 9. Relying on Plaintiff's argument that *Amylin II* was "squarely on point," the Court of Chancery adopted an hourly rate of $800 an hour and awarded a $128,000 fee, based on the 159.7 hours Plaintiff's counsel expended on the litigation through December 8, 2014 filing of the Stipulation for Considering Dismissal. A177; Ex. A at 8–9.

APPEAL ARGUMENT

I. THE VICE CHANCELLOR REASONABLY EXERCISED HIS DISCRETION IN DETERMINING THAT PLAINTIFF'S COUNSEL ACHIEVED ONLY A "MODEST BENEFIT" FOR ARRIS STOCKHOLDERS CONTINUING DIRECTOR PROVISION.

A. Question Presented

Did the Court of Chancery act within its broad discretion in determining that the elimination of the Continuing Director Provision from the Credit Agreement achieved only a "modest benefit" in light of the facts that: (1) the Board had never been the subject of stockholder activism, (2) no proxy contest was pending or foreseeable, (3) Arris' debt instruments historically contained similar provisions, (4) the Board was informed that the Credit Agreement contained standard, market terms, (5) the Continuing Director Provision left much of the stockholder franchise intact, and (6) Delaware precedent has stripped such provisions of their proxy contest-deterrent effect? B39–B44, B46–B48.

B. Scope of Review

This Court reviews "an award of attorneys' fees for an abuse of discretion." *Ams. Min. Corp. v. Theriault*, 51 A.3d 1213, 1262 (Del. 2012). "[T]he challenge of quantifying fee awards is entrusted to the trial judge and will not be disturbed on appeal in the absence of capriciousness or factual findings that are clearly wrong." *Id.* So long as the trial judge "carefully weigh[s] and consider[s] all of the *Sugarland* factors," this Court will affirm the fee awarded by the trial judge "if his

or her judgment was the product of reason and conscience, as opposed to being either arbitrary or capricious." *Id.*; *see also Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1166 (Del. 1989) (noting the "plenary power of the Court of Chancery over" awards of attorneys' fees).

C. Merits of Argument

1. Plaintiff misstates the standard of review.

In purporting to set forth the applicable scope of review, Plaintiff cites to decisions indicating that this Court reviews *de novo* "the legal principles" or "the legal standard" applied by the trial court. B129–B130. The only "legal standard" at issue in Plaintiff's appeal—and the only "legal standard" that the Court of Chancery applied—are the "*Sugarland* factors" that Delaware trial courts must apply in determining an award of attorneys' fees. Plaintiff does not claim that the Court of Chancery failed to apply *Sugarland*, nor could Plaintiff credibly offer such an argument. The Court of Chancery expressly and properly applied the *Sugarland* factors. Ex. A at 7.

Plaintiff's true complaint is that the Court of Chancery exercised its discretion to determine that, on the facts before it, Plaintiff's counsel achieved only a "modest benefit" for the Arris stockholders. *See, e.g.*, *id.* at 8 (considering "the narrow focus of the proxy put ***at issue here***") (emphasis added); B130. The Vice Chancellor further determined that the modest benefit achieved by this litigation

was "difficult to quantify" and, consistent with *Amylin II* and numerous other precedents involving unquantifiable, therapeutic benefits, applied the *Sugarland* factors to award fees grounded in *quantum meruit* while remaining mindful of the contingency risk undertaken and the ability of Plaintiff's counsel. Ex. A at 8–10. In an attempt to avoid the applicable abuse of discretion standard of review, Plaintiff seeks to transform the Court of Chancery's fact-based determinations underlying the fee award into the resolution of a legal question. B135 ("[T]he Court of Chancery's categorization of the removal of [the Continuing Director Provision] as a 'modest benefit,' rather than a 'substantial' benefit, rests on two separate legal errors."). Plaintiff's transparent attempt to avoid the applicable and highly deferential abuse of discretion standard of review should be rejected.

Plaintiff's arguments regarding the supposed "legal errors" committed by the Vice Chancellor in determining that the corporate benefit obtained in this case was modest are meritless on their face. Prior precedent from this Court demonstrates that the determination of the amount of the benefit obtained in the context of a request for fees is a factual determination subject to review for abuse of discretion. For instance, in *Thorpe v. CERBCO, Inc.*, 703 A.2d 645 (Table), 1997 WL 776169, at *2 (Del. 1997), plaintiffs challenged the Court of Chancery's determination that certain non-pecuniary benefits "were highly speculative and did not warrant an award of fees." This Court found no abuse of discretion and affirmed the decision

below. *Id.* In *Sugarland* itself, this Court rejected the petitioners' motion for reargument seeking to attack a $500,000 fee award, finding that the "award, while modest, ***is not subject to reversal from either side as an abuse of discretion because there are considerations relating to quality of corporate benefit*** on the one hand and considerations of genuine non-pecuniary benefits on the other." *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 153 n.2 (Del. 1980) (emphasis added). And in *EMAK*—a decision on which Plaintiff extensively relies—this Court recognized that the *Sugarland* factors call for factual findings, not legal conclusions, and held that "[t]his Court remains content to leave the challenge of quantifying fee awards to the trial judge in the absence of capriciousness or factual findings that are clearly wrong." *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433–34 (Del. 2012). Indeed, in the very first paragraph of the *EMAK* decision, this Court explained the basis for its holding in a manner that is fatal to Plaintiff's appeal: "The record supports the Vice Chancellor's ***factual finding*** that the voting rights preserved by the litigation were meaningful, and we decline the invitation to fine tune the amount he awarded." *Id.* at 430 (emphasis added).

Beyond the clear teachings of this Court's prior precedent regarding the factual nature of (1) the *Sugarland* analysis generally and (2) the determination of the size of the benefit achieved when the stockholder franchise is at issue, Plaintiff's arguments fare no better when specifically examined. Plaintiff first

argues that the Vice Chancellor's determination that the Continuing Director Provision "le[ft] much of the stockholders' franchise intact" is somehow a legal error. *See* Ex. A at 8; B136–B140. The Vice Chancellor's ruling, however, was informed by the practical—and ***factual***—realities that distinguished this litigation from the authorities on which Plaintiff relied. B39–B42, B56–B65. While Plaintiff bemoans the fact that the Vice Chancellor did not find as a factual matter that this litigation was similar to Plaintiff's proffered precedents, that regret does not change the Vice Chancellor's factual determination into legal error.

Plaintiff next argues that the Vice Chancellor's determination that any deterrent effects of continuing director provisions have weakened as a result of *Amylin I*, *Amylin II*, and *Sandridge* is also a legal error. B143. Again, however, the Vice Chancellor's ruling was informed by the practical realities facing an Arris stockholder as of October 2014 when the Continuing Director Provision was deleted. Ex. A at 7–8; B43–B44. This determination was self-evidently a factual determination regarding the potential deterrent effect the Continuing Director Provision had on Arris stockholders and is subject to review for abuse of discretion. *See* Ex. A at 7–8 (evaluating "the proxy put at issue here" and "similar proxy puts"). In fact, Plaintiff admits that the deterrent effect of the Continuing Director Provision is a factual question by arguing (for the first time on appeal) that "[m]arket evidence points in favor of" Plaintiff's view that such provisions

remain potent. B143. What "market evidence" does or does not show about the subjective beliefs of corporate boards and their lenders is a factual, not a legal, issue. Regardless, the merits of Plaintiff's newfound factual support should not be considered by this Court, as Plaintiff failed to present this evidence to the Court of Chancery. Del. Supr. Ct. R. 8.

2. The "voting rights" decisions relied upon by Plaintiff do not undercut the Court of Chancery's "modest benefit" determination.

Plaintiff's counsel argued before the Court of Chancery that the fee awards in five actions—(1) *Amylin II*; (2) *Minneapolis Firefighters' Relief Association v. Ceridian Corp.*, C.A. No. 2996-CC (Del. Ch.); (3) *Forsta AP-Fonden v. News Corp.*, C.A. No. 7580-CS (Del. Ch.); (4) *EMAK Worldwide, Inc. v. Kurz*, C.A. No. 5019-VCL (Del. Ch.); and (5) *In re Yahoo! S'holders Litig.*, C.A. 3561-CC (Del. Ch.)—support the contention of Plaintiff's counsel that they had achieved a substantial benefit for the Arris stockholders. A31–A33. Plaintiff's Opening Appeal Brief relies on the same five authorities. B132–B136. These authorities are no more applicable now than they were before the Court of Chancery.

In determining a reasonable fee award based on therapeutic benefits obtained on behalf of a class, the Court of Chancery considers similar cases "for the obvious reason that like cases should be treated alike." *Olson v. EV3, Inc.*, 2011 WL 704409, at *8 (Del. Ch. Feb. 21, 2011); *see also In re Dr. Pepper/Seven*

Up Co.s Inc. S'holders Litig., 1996 WL 74214, at *5 (Del. Ch. Feb. 9, 1996) ("Fee applications in class actions resulting in nonquantifiable, nonmonetary benefits have generated decisions from this Court that provide guidance for the exercise of . . . discretion."); *In re Sauer-Danfoss, Inc.*, 65 A.3d 1116, 1136 (Del. Ch. 2011) ("Consistency promotes fairness by treating like cases alike and rewarding similarly situated plaintiffs equally."). Only four of the five "precedents" relied upon by Plaintiff's counsel were about voting rights, and each of those four "precedents" (*Amylin II*, *Ceridian*, *EMAK*, and *Forsta*) involved material, non-speculative improvements to stockholder voting rights. Nevertheless, Plaintiff's counsel seek an implied hourly rate that is ***multiples*** of the hourly rates implied by these "precedents," as shown by the chart below that was presented to the Vice Chancellor. B52. This Court has recognized the propriety of a reduction in fees by the Court of Chancery where the fee sought by plaintiff's counsel is disproportionate to the precedents on which counsel rely. *See Abercrombie & Fitch*, 886 A.2d at 1273–74.

Case	Attorney Hours	Fee Award Sought	Expenses	Implied Hourly Rate Sought	Final Award Granted	Final Implied Hourly Rate Granted	Current Action Fee as Multiple of Rate Granted
Amylin II	3,339	$5.86 MM	$262,751	$1,677	$2.9 MM	$790	5.9
Ceridian Corp.	2,776	$6 MM	$140,400	$2,111	$5.14 MM	$1,801	2.6
Forsta	1,001	$1.3 MM	$24,893	$1,274	$1.3 MM	$1,274	3.7
EMAK	1,587	$2.8 MM	$140,584	$1,707	$2.5 MM	$1,487	3.2
Yahoo	5,500	$12 MM	$287,590	$2,130	$8.4 MM	$1,475	3.2
Current Litigation	160[5]	$750,000	--[6]	$4,696	--	--	--

a. *Amylin II*

The *Amylin* plaintiff brought its claim during the middle of a heated proxy contest. *Amylin I*, 983 A.2d 309–10. In the face of the proxy contest, the Amylin Board raised the continuing director provision as a shield against the insurgent stockholders' nominees. *Id.* at 310. The *Amylin* plaintiff's efforts led the Amylin Board to agree to approve the dissidents for purposes of the relevant debt instrument and, when Bank of America resisted, the *Amylin* plaintiff litigated the case to its final conclusion, including an appeal. *Id.* at 311–13; *Amylin II*, 2010 WL 4273171, at *4–*6.

As described by the Court of Chancery:

> Plaintiff's Counsel litigated this matter on an expedited basis, against defendants represented by sophisticated counsel. Plaintiff's Counsel undertook this

[5] Includes an undisclosed number of irrelevant hours between deletion of Continuing Director Provision on October 22, 2014 and December 8, 2014.

[6] No separate accounting of expenses was provided.

> representation on a fully contingent basis, litigating the validity of contractual provisions that, while increasingly common in corporate debt instruments, have received little judicial scrutiny. This was a complex engagement. The quality of the work was excellent. The standing and ability of Plaintiff's Counsel cannot be questioned.

Amylin II, 2010 WL 4273171, at *13.

Plaintiff's counsel sought $5.6 million in attorneys' fees and $262,750.87 in expenses based on a claimed 3,338.55 attorney hours expended on a fully contingent basis. *Id.* Despite the achievements recognized by the Court, the Court awarded plaintiff's counsel only $2.9 million, inclusive of $262,750.87 of expenses. *Id.* This fee award implied an hourly rate of $789.94.[7]

Amylin was a hard-fought battle over matters of first impression, and the outcome sent shockwaves through the corporate community. By contrast, this litigation is noteworthy only because the plaintiffs' bar is intensely interested to know how large of a fee award they might receive for locating through a basic EDGAR search other Delaware corporations with continuing director provisions and bringing strike suits against those corporations.

b. *Minneapolis Firefighters' Relief Ass'n v. Ceridian Corp*.

Ceridian was a hybrid fee award that addressed not only stockholder voting

[7] This figure is reached by subtracting $286,750.87 in expenses from the fee award of $2,900,000 and then dividing the resulting $2,637,249.13 by 3,338.55 hours.

rights but also disclosures and deal protection mechanisms. In early 2007, Ceridian's largest stockholder announced that it was launching a proxy contest. Soon thereafter, the incumbent board announced that it would review strategic alternatives and, only three months later, announced that it was selling Ceridian for $36 per share. There was evidence that the incumbent board was manipulating the corporate machinery to protect the deal. Moreover, the prospect of a topping offer was limited by the presence of "don't ask, don't waive" standstill provisions. The fiduciary out also was limited to transactions involving at least two-thirds of the company's assets, which foreclosed several transaction structures that had been previously proposed.

The parties ultimately settled. The director election was moved up to coincide with the vote on the merger agreement. The "don't ask, don't waive" standstill provisions were waived and previous bidders were informed of this. Furthermore, the stockholders received additional disclosures that the Court found to be "quite significant." *Minneapolis Firefighters' Relief Ass'n v. Ceridian Corp.*, C.A. No. 2996-CC, at 24:8–9 (Del. Ch. Feb. 25, 2008) (Transcript) (Compendium Tab 2). Then-Chancellor Chandler commented that the issues presented were "very intriguing" and "quite novel." *Id.* at 21:7, 9.

Plaintiff's counsel sought and received an expedited schedule, engaged in written discovery, took depositions, and were preparing for an expedited trial less

than a month away when the litigation settled. The parties ultimately agreed to a fee award in the amount of $5,140,000, which the Court approved. In light of the 2,775.90 hours devoted by plaintiff's counsel to the litigation, the *Ceridian* fee award implied an hourly rate of $1,801.07.[8]

Like *Amylin*, *Ceridian* addressed novel issues rather than walking in the ruts of earlier decisions. By contrast, this litigation is merely riding the bandwagon of previous decisions. The *Ceridian* settlement cleared the way for additional transactions to be considered and, indeed, additional transaction structures were proposed (before the economic downturn put a damper on credit markets). *Ceridian* also involved "quite significant" disclosures.

For all of these reasons, *Ceridian* is inapposite here.

c. *Forsta AP-Fonden v. News Corp.*

In *Forsta*, the voting rights of foreign stockholders had been suspended because News Corp. was concerned that such voting violated the foreign voting provisions of the Communications Act of 1934. The litigation involved motions to dismiss, motions to expedite, and a motion for preliminary injunction. *See Forsta AP-Fonden v. News Corp.*, C.A. No. 7580-CS, at 3 (Del. Ch. Apr. 26, 2013) (Transcript) (Compendium Tab 1). Ultimately, the parties agreed to settle the

[8] This figure is reached by subtracting $140,400.40 in expenses from the fee award of $5,140,000 and then dividing the resulting $4,999,599.60 by 2775.90 hours.

litigation. The "centerpiece" of the settlement was the restoration of the stockholders' voting rights. *Id.* at 5. The settlement also included amendments to the audit committee charter "to provide a procedure going forward to try to minimize any potential suspension of voting rights[.]" *Id.* at 6. Plaintiffs sought a fee award of $1.3 million, which defendants agreed not to oppose and which the Court granted.[9]

The substantial benefit achieved in *Forsta* was far superior to the modest benefit here. In *Forsta*, an entire class of News Corp. stockholders had been stripped of all voting rights. There was no question that the stockholders had been harmed. One day they had voting rights and the next day those rights were taken away. This harm was even quantifiable because News Corp. had both voting and non-voting shares. *Id.* at 5.[10] By contrast, the deletion of the Continuing Director Provision ***might*** *have* marginally benefit the Arris' stockholders ***if*** all of the events described in Section I.C.4 below took place. As a secondary consideration, the litigation in *Forsta* included motions to dismiss, motions to expedite, and a motion for preliminary injunction, while this litigation included only a complaint before it

[9] Notably, the *Forsta* defendants agreed to a $1.3 million fee only after significant arm's length bargaining. *See Forsta*, Tr. at 10–11 (Compendium Tab 1).

[10] Indeed, unlike Plaintiff here, the *Forsta* plaintiffs retained an expert witness to value the benefit and the Court of Chancery gave weight to the expert's analysis as confirmatory of the magnitude of the benefit achieved. *See Forsta*, Tr. at 10–11 (Compendium Tab 1).

was mooted. Third, *Forsta* was litigated in the "very unusual context" where Delaware corporate law intersected with the federal Communications Act. *Id.* at 9. By contrast, this litigation has covered no new ground beyond *Amylin I* and *SandRidge*.

d. ***EMAK Worldwide, Inc. v. Kurz.***

In *EMAK*, this Court affirmed the Court of Chancery's fee award of $2.5 million in litigation arising from a long-running control dispute between common stockholders and the single preferred stockholder of EMAK Worldwide, Inc. *See EMAK*, 50 A.3d at 430–32. Three and a half years after the founder and longtime CEO, Kurz, stepped down, the company's stock had gone from "trading on NASDAQ at $11 to trading on the pink sheets at $.21." *Id.* at 430. When Kurz, holding the plurality of the common stock, attempted to take back control of the company, EMAK's management sided with the preferred stockholder. In the course of the contest, Kurz (1) prevented EMAK from dramatically increasing the preferred stockholder's voting power, (2) corrected the disclosures EMAK made in seeking ratification of that action, and (3) thwarted EMAK's attempt to reduce EMAK's board from seven to three members, when the preferred stockholder could unilaterally appoint two.

In *EMAK*, as in the other precedents Plaintiff cites, plaintiff's counsel actually achieved a substantial benefit for company stockholders. Had EMAK and

the preferred stockholder succeeded, they would have all but disenfranchised the common stockholders. Kurz's counsel secured these benefits by litigating complex and novel issues during a "long, back-and-forth control dispute" that involved "real evidence of loyalty breaches" and fundamental corporate change *Id.* at 430, 434.

e. *In re Yahoo! Shareholders Litigation*.

Yahoo! is first and foremost a deal protection device decision and not a stockholder voting rights decision. In response to an unsolicited offer from Microsoft in early 2008, Yahoo!'s board implemented wildly generous employee severance plan that essentially permitted Yahoo!'s entire workforce to quit upon a change of control while receiving significant cash and equity benefits for two years. Internal Yahoo documents estimated that at a deal price of $35 per share ($4 above Microsoft's opening offer), the employee severance plan would cost Yahoo! $1–$2.4 billion. Microsoft got cold feet after the implementation of the employee severance plan but announced its continuing interest in a major transaction if a new Yahoo! board were elected. Plaintiff filed suit on February 21, 2008 and on February 22, 2008 moved to expedite. Nearly three months later, after extensive discovery and the filing of an amended complaint, Carl Icahn announced that he was launching a proxy contest. *See* B150–B157.

Defendants eventually settled and significantly narrowed the employee severance plan. First, defendants limited events that would trigger application of

the plan by (1) eliminating a sale of Yahoo!'s search business as a change of control, (2) exempting a successful stockholder proxy contest from a change of control, and (3) removing the "dead hand" provision that purported to prevent the board from modifying the employee severance plan once a proposed change of control had been announced. Second, defendants narrowed the reasons employees could invoke to resign. Third, defendants cut in half the duration of severance benefits under the plan.

Plaintiffs' counsel dedicated 5,500 attorney hours (plus almost 1,400 non-attorney hours) and incurred $287,590 in expenses taking expedited discovery—including five depositions and the production of 200,000 pages of documents—and submitted affidavits from leading experts on executive compensation and employment law. Plaintiff's counsel sought a fee award of $12 million, but the Court awarded only $8.4 million, for an implied hourly rate of $1,474.98.[11]

Yahoo!—where plaintiffs' counsel achieved the removal of the primary impediment to a potential $47.5 billion deal and received $8.4 million in fees and expenses—demonstrates the unreasonableness of Plaintiff's Fee Application.[12]

[11] This figure is reached by subtracting $287,590 in expenses from the fee award of $8,400,000 and then dividing the resulting $8,112,410.00 by 5,500 hours. This calculation does not account for the nearly 1,400 additional hours in non-attorney time.

[12] *Yahoo!* also demonstrates that Plaintiff's counsel has little hesitation in seeking to have their cake and eat it too. While Plaintiff here argues that the time

3. **The disclosure decisions relied upon by Plaintiff do not undercut the Court of Chancery's "modest benefit" determination.**

Plaintiff's counsel argues that the benefit here somehow must be greater than "the ubiquitous stockholder challenges to acquisitions that are resolved by the issuance of immaterial supplemental disclosures." B135. In support, Plaintiff's counsel relies on the fee award in *In re Talbots, Inc. Stockholders Litigation*, where then-Chancellor Strine awarded plaintiff's counsel $237,500 (yielding an implied hourly rate of $300) for weak supplemental disclosures. *See* Cons. C.A. No. 7513-CS, at 9, 14 (Del. Ch. Dec. 16, 2013) (Transcript) (Appellant's Compendium Tab 2). Then-Chancellor Strine warned counsel that he did not want "to ever see this cited back as some sort of market indication" and explained that if defendants had not agreed to the fee, he "could have easily given 50,000, 75,000, 100,000 for this" or even "simply not approved the settlement." *Id.* at 15. Failing to heed that warning, Plaintiffs here argue that *Talbots* effectively set a floor on any fee award in the Court of Chancery. B135.

Further, the premise of Plaintiff's argument—that elimination of the Continuing Director Provision is inherently more significant than supplemental

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expended to achieve a corporate benefit is irrelevant (or, if anything, that *Sugarland* suggests quickly-mooted cases deserve a high implied hourly rate), in *Yahoo!* the plaintiff argued that the time involved justified a "premium multiple" relative to *Ceridian*. *Yahoo!*, Tr. at 37 (Compendium Tab 5) ("We submit it's appropriate to get a premium multiple of the effort and the time it took to get the relief. That litigation [*Ceridian*] didn't take as long. This one took ten months.").

disclosures related to a merger or other end-stage transaction—is false. As Arris explained during argument before the Court of Chancery:

> [Counsel for Arris] Well, in disclosure settlements, obviously, those affect stockholder franchise quite directly, and usually they're coming up in the context of a merger where the corporation, as it previously existed, is going to be gone, it's going to disappear. That's probably the most fundamental thing that a stockholder can vote on, the most fundamental type of corporate change that there is.

A236; *see also* A237; A241. Moreover, as the authorities cited by Plaintiff recognize, run of the mill supplemental disclosures do not merit a $400,000 fee. *Talbots*, Tr. at 15–16; *Sauer-Danfoss*, 65 A.3d at 1136–37, 1143. Only when disclosures are material such that the Court of Chancery would consider enjoining the transaction do fee awards reach or exceed the $400,000 threshold. *Talbots*, Tr. at 16.

4. The Vice Chancellor correctly determined as a factual matter that the Continuing Director Provision left much of the Arris stockholder franchise intact.

During the course of their argument that the Court of Chancery committed legal errors in determining that the corporate benefit achieved here was modest, Plaintiff's counsel claim that the deletion of the Continuing Director Provision was a colossal victory for the stockholder franchise at Arris and Delaware corporations everywhere. As an initial matter, because Plaintiff did not argue that the Court of Chancery abused its discretion in making the factual determinations that led to its

fee award, that argument has been waived. Del. Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."). Further, as explained to the Court of Chancery, the notion that the benefit achieved here was significant is factually erroneous for at least four reasons. *See* B39–B42.

First, there is no evidence in the record—and the Complaint does not even attempt to allege—that the Board faced a pending or contemplated proxy contest at the time the Credit Agreement was approved or any time thereafter. Plaintiff admits that the deletion of the Continuing Director Provision would only be relevant in a "potential future proxy contest." A31. Moreover, despite its burden to justify the fee award it seeks, Plaintiff produced no evidence to the Court of Chancery that the Continuing Director Provision actually affected the willingness of Arris stockholders to seek change in the boardroom. Nor did Plaintiff produce evidence that the deletion of the Continuing Director Provision would change the behavior of Arris' stockholders in the future.[13]

Second, the Continuing Director Provision could not have been triggered unless a majority of new directors took office within a twelve-month period. More

[13] By all accounts, the deletion of the Continuing Director Provision has had no effect on the Arris stockholder franchise. B78. Unlike the plaintiffs in *Compellent Technologies*, Plaintiff here did not attempt to quantify the value of the therapeutic benefits achieved. *See* 2011 WL 6382523, at *18–*24.

often than not, insurgent stockholders are not successful in getting any nominees elected to the board. Replacing a board majority is even rarer. Therefore, it is completely speculative for Plaintiff to assert that the Continuing Director Provision would have been triggered even if there had been a proxy contest. Unlike in *Amylin I*, dissident stockholders could have replaced the entire Arris Board over time without ever implicating the Continuing Director Provision.

Third, even if a change of control occurred under the Continuing Director Provision, it is unlikely that this change would have caused the lenders to accelerate the Company's debt.[14] The Court of Chancery has recognized that lenders infrequently accelerate debt based on continuing director provisions. *See Pontiac Gen. Emps. Ret. Sys. v. Ballantine*, C.A. No. 9789-VCL, at 27:20–28:1 (Del. Ch. Oct. 14, 2014) (Transcript) ("*Healthways*") (Vice Chancellor Laster: "So to the extent these [continuing director] provisions are market and are providing meaningful protection to creditors, how often are they invoked." Counsel: "Truthfully, Your Honor, I would say infrequently." Vice Chancellor Laster: "That's what I think, too.") (Compendium Tab 3).

A new board majority of qualified candidates likely would not have changed the risk profile of Arris, and the lenders accordingly would have been comfortable

[14] BANA could not have accelerated the Company's debt absent the consent of lenders holding a majority of the Company's debt.

to lend to Arris under the existing terms of the Credit Agreement. Even if Arris' risk profile changed, the Company could have renegotiated the terms of Credit Agreement with the existing lenders without accelerating the debt. Such renegotiation occurred with respect to the credit agreement in the *Amylin* litigation. *See Amylin I*, 983 A.2d at 312.[15] Importantly, Plaintiff's counsel has admitted that BANA agreed to delete the Continuing Director Provision for no amendment fee. A33 ("Additionally, Bank of America agreed to eliminate the Dead Hand Proxy Put at no cost to Arris."). It simply is irrational to think that, if BANA was willing to delete the Continuing Director Provision for no amendment fee in the absence of a proxy contest, BANA would have insisted on an amendment fee in the presence of a proxy contest (when *Amylin I* and *SandRidge* would be in full force).[16]

Fourth, if Armageddon had occurred and (1) the Company underwent a proxy contest, (2) the insurgents succeeded in electing a new Board majority in less than a twelve-month period, (3) the new Board majority changed the risk profile of the Company and the lenders were unwilling to continue to lend to the

[15] Plaintiff's counsel made no attempt to calculate for the Court of Chancery, based on current market conditions, how much, if anything, it might cost to obtain an amendment.

[16] The Court of Chancery already has recognized "the relative ease with which consents or waivers are obtained in bank lending agreements," as compared to other public debt instruments such as indentures. *Amylin I*, 983 A.2d at 315 n.30. The *Amylin I* Court even found that the waiver of a similar continuing director provision mooted the plaintiff's putative class claims related to the credit agreement. *Id.* at 312 & nn.13–14.

Company under the Credit Agreement's existing terms or renegotiate the terms of the Credit Agreement, Arris would have had the opportunity to refinance its debt with other lenders. It is entirely speculative to assume that debt markets at the time of any such refinancing would have resulted in worse financing terms than those under the Credit Agreement. Moreover, voluntary refinancings are routine in situations where control shifts.

The Court of Chancery appropriately focused on these realities in determining that the Continuing Director Provision "le[ft] much of the stockholders' franchise intact." Ex. A at 8; *see also San Antonio Fire & Police Pension Fund v. Amylin Pharm., Inc.*, 981 A.2d 1173 (Table), 2009 WL 3182602, at *1 n.2 (Del. 2009) (affirming the Court of Chancery because "no showing was made that approving the 'proxy put' at that point in time would involve any reasonably foreseeable material risk to the corporation or its stockholders. That risk materialized only months later, and was aggravated by the unexpected, cataclysmic decline in the nation's financial system and capital markets beginning in the Spring of 2008."). Mere disagreement by a disappointed plaintiff with the Court of Chancery's factual determinations does not merit reversal. *See Abercrombie & Fitch*, 886 A.2d at 1275.

5. The Vice Chancellor correctly determined as a factual matter that the Court of Chancery's precedents significantly weakened the deterrent effects of continuing director provisions on proxy contests.

Plaintiff argues for the first time on appeal that "*Amylin*, *Kallick* [and] *Healthways* had [no] impact" on the use of continuing director provisions and cites to "a recent empirical study." B141–B143. Plaintiff did not make this argument or present this purported evidence to the Court of Chancery and thus has waived this argument on appeal. Del. Supr. Ct. R. 8. In any event, the "proxy put" bulldog does not have any teeth. First in *Amylin I & II*, then in *SandRidge*, and again in *Healthways*, the Court of Chancery has addressed continuing director provisions that are used to by incumbent boards to gain an advantage in a proxy contest. B43–B44. The Court of Chancery has made clear that such posturing will be highly scrutinized and will not be tolerated absent compelling justification.[17]

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[17] Contrary to the arguments of Plaintiff's counsel, small fee awards for eliminating dormant continuing director provisions will not create improper incentives. *Contra* B120, B147–B148. The Court of Chancery remains able and willing to award substantial fees where incumbent boards adversely impact the stockholder franchise by attempting to use continuing director provisions to influence proxy contests. For example, in the *Healthways* litigation the Court of Chancery recently approved a $1.2 million fee award negotiated among the parties where the continuing director provision was adopted "in the shadow of a proxy contest." *Pontiac Gen. Emps. Ret. Sys. v. Ballantine*, C.A. No. 9789-VCL, at 35 (Del. Ch. May 8, 2015 (Transcript) (Compendium Tab 4). In approving the fee award, the Court of Chancery explicitly distinguished the Arris litigation from the *Healthways* facts, explaining that it could not "be stressed enough" that *Healthways* addressed a "provision [that] was inserted in the shadow of a control contest." *Id.* at 35, 41. That fact (which is absent here) drove the award and the

The Court of Chancery correctly determined as a factual matter that these precedents limited the impact the Continuing Director Provision ever would have on the Arris stockholders. Ex. A at 8. Plaintiff's counsel continue to argue, as they argued before the Court of Chancery, that the approvable nature of the continuing director provision at issue in *SandRidge* makes that decision of limited applicability. B140–B141; A185–A186; A200–A202. The Court of Chancery did not abuse its discretion by considering and rejecting this argument. *See In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d at 1275.

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prior motion to dismiss decision in *Healthways*. As Vice Chancellor Laster put it, the notion that there is liability for "any lender who at any point for any company" inserted a continuing director provision into a credit agreement is "silly," indicating that the issue assumed significance only because it was adopted in the shadow of a proxy contest. *Id.* at 35–36.

II. THE VICE CHANCELLOR REASONABLY EXERCISED HIS DISCRETION BY UTILIZING *QUANTUM MERUIT* IN CALCULATING THE APPROPRIATE FEE FOR THE UNQUANTIFIABLE, THERAPUITIC BENEFITS ACHIEVED BY PLAINTIFF'S COUNSEL.

A. Question Presented

Did the Court of Chancery act within its discretion by awarding a *quantum-meruit*-based fee to compensate Plaintiff's counsel for the modest, unquantifiable, and solely therapeutic benefits they achieved for Arris stockholders utilizing an hourly rate from a decision that Plaintiff asserted was "squarely on point"? A239–A242; A177; Ex. A at 8–9.

B. Scope of Review

This Court reviews an award of attorneys' fees for an abuse of discretion. *See supra* Section I.B.

C. Merits of Argument

Like the White Queen, Plaintiff's counsel asks this Court to believe two impossible things before breakfast. *See* Lewis Carroll, *Through the Looking-Glass And What Alice Found There* 81 (Rand McNally ed. 1917). In particular, Plaintiff's counsel asks this Court to believe that the Court of Chancery erred by (1) awarding a *quantum-meruit*-based fee, and (2) adopting the implied hourly rate of the decision Plaintiff's counsel asserted was the most relevant prior precedent.

1. The Vice Chancellor appropriately relied on *quantum meruit*.

"Where, as here, the benefit achieved is unquantifiable, a *quantum meruit* standard 'gives the Court [of Chancery] a more equitable means of determining a reasonable fee.'" *Amylin II*, 2010 WL 4273171, at *12 (quoting *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *8 (Del. Ch. Nov. 27, 1990)). The Court of Chancery frequently relies on *quantum meruit* in determining fee awards for therapeutic benefits. *See, e.g.*, *La. State Emps.' Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364 (Del. Ch. Sept. 19, 2001); *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 359 (Del. Ch. 1999) *aff'd sub nom. First Interstate Bancorp v. Williamson*, 755 A.2d 388 (Del. 2000).[18]

Plaintiff claims that "the Court of Chancery did not subordinate the hours expended to the benefit achieved, and thereby penalized San Antonio's counsel for achieving victory quickly." B145. This argument is demonstrably false, and the Court of Chancery did not ignore the benefit achieved through a myopic reliance on hours. Instead, as the Court of Chancery explained:

[18] The Court of Chancery maintains the discretion to depart from the *quantum meruit* standard in exceptional cases. *See, e.g.*, *EV3*, 2011 WL 704409, at *15 (declining to rely on *quantum meruit* where the benefit was "non-quantifiable and immeasurable but . . . quite substantial"). Moreover, the Court of Chancery also has exercised its discretion to reduce a fee award below the level implied by the benefit obtained to avoid a windfall. *See Dias v. Purches*, 2012 WL 4503174, at *10 (Del. Ch. Oct. 1, 2012) (reducing the fee award by a third to reflect "the disparity between the fees typically available based on benefit and the crosscheck based on effort").

> The most important and heavily weighted factor in determining a fee award is the significance of the benefits achieved in the litigation. I find the elimination of the proxy put a cognizable but modest benefit . . . Because the benefit here, as [in *Amylin II*], is difficult to quantify, I turn, consistent with *Sugarland*, to the time spent on the case, mindful of the fact that this matter was taken on a contingent fee and that I must take that risk into account to encourage wholesome litigation. I am also mindful that relying on compensation based solely on time spent could encourage churning, but it is clear that such is not the case here . . . . I find [the] fee to be appropriate in light of the benefit conferred and consistent with the other factors of *Sugarland* as well.

Ex. A at 7–10. This approach to *quantum meruit* was identical to the approach in *Amylin II*, upon which the Vice Chancellor explicitly relied. *Id.* As explained in *Amylin II*:

> Where, as here, the benefit achieved is unquantifiable, a *quantum meruit* standard gives the Court a more equitable means of determining a reasonable fee. Applying such a standard, and considering *Sugarland* and its progeny, the Court consider[s] the work the attorneys performed to achieve the benefit, and the amount and value of attorney time required for that purpose, taking into account the experience of counsel and the contingent nature of the case. In applying its discretion to determine a fee award, the Court recognizes the central importance of considering the benefits created by the litigation.

Amylin II, 2010 WL 4273171, at *12 (internal quotation marks and footnotes omitted) (alteration in original). This approach is not unique to litigation involving continuing director provisions. "Oftentimes, when [the] Court [of Chancery]

determines fee awards in a therapeutic benefit case, it uses a *quantum meruit* analysis." *In re Golden State Bancorp Inc. S'holders Litig.*, 2000 WL 62964, at *3 (Del. Ch. Jan. 7, 2000). And the Court of Chancery often looks to *quantum meruit* while recognizing that the size of the benefit conferred is entitled to the greatest weight in the *Sugarland* analysis. *Id.* Thus, the approach taken by the Court of Chancery here, which Plaintiff claims is legal error, is actually *de rigueur* in actions involving therapeutic benefits.

Plaintiff asks this Court to establish a bright-line rule that the Court of Chancery may not award attorneys' fees using a *quantum meruit* standard where plaintiff's counsel expends "relatively few hours" because that is purportedly "tantamount to disregarding the magnitude of the benefit achieved, disregarding the risk of undertaking the contingent representation, and disregarding the experience and efficiency of counsel[.]" B146. Plaintiff's counsel again miss the mark.

The argument that the Vice Chancellor's reliance on *quantum meruit* was "tantamount to disregarding the magnitude of the benefit achieved" merely reflects the disagreement of Plaintiff's counsel with the Vice Chancellor's assessment of the benefit. The Vice Chancellor recognized the preeminence under *Sugarland* of the magnitude of the benefit achieved and rationally determined that the "modest" and unquantifiable benefit was properly analogized to the fee awarded in the case

that Plaintiff has argued is directly on point—*Amylin II*. Ex. A at 7–8. The Vice Chancellor also evaluated and applied the other *Sugarland* factors. *Id.* at 8–10.

The Court of Chancery was well within its discretion in recognizing the modest nature of the corporate benefit obtained and in awarding a fee based on *quantum meruit*. This Court previously has affirmed the Court of Chancery's use of *quantum meruit* in awarding fees and should do so here. *See Sugarland*, 420 A.2d at 152; *Chrysler Corp. v. Dann*, 223 A.2d 384, 389–90 (Del. 1966).

2. Plaintiff's counsel should not quibble that the Vice Chancellor looked to the precedent upon which Plaintiff's counsel most heavily relied.

Plaintiff surprisingly argues that *Amylin II* "did not present similar facts" to this litigation, despite the representation by Plaintiff to the Court of Chancery that "*Amylin II* is squarely on point." B145; A177. Plaintiff's counsel unconvincingly argue that the risk they undertook was greater than that faced in *Amylin*, despite the fact that *Amylin* was the first time Delaware Courts ***ever*** had addressed continuing director provisions. B146. When plaintiff's counsel request a fee that is inconsistent with the precedents upon which they rely, the Court of Chancery may appropriately conclude that a lower fee is warranted. *Abercrombie & Fitch*, 886 A.2d at 1273–75.

Plaintiff argues that, when few hours are expended, "the logic of *Sugarland*" suggests that the implied hourly rate should be relatively high. B146. Again,

Plaintiff puts the rabbit in the hat by mischaracterizing the significance of the benefit achieved here. Moreover, $800 per hour as a blended rate reflecting all attorney and paralegal time ***is*** a high implied rate. If anything, the implied hourly rate awarded by the Vice Chancellor was generous. The benefits in *Amylin II* were "significant and substantial," as opposed to the "modest benefit" here. *Amylin II*, 2010 WL 4273171, at *7; Ex. A at 7.

3. This Court should not incentivize litigation over dormant continuing director provisions.

This litigation is among the first of an explosion of suits challenging continuing director provisions apart from a pending or threatened proxy contest. Arris is aware of six recent Section 220 or class action suits—*Pontiac General Employees Retirement System. v. Ballantine*, C.A. No. 9789-VCL (Del. Ch.); *The Fire and Police Pension Fund, San Antonio v. Stanzione*, C.A. No. 100078-VCG (Del. Ch.); *In re MGM Resorts International Litigation*, C.A. No. 10290-VCG (Del. Ch.); *Ironworkers Local No. 25 Pension Fund v. Doheny II*, C.A. No. 10341-VCP (Del. Ch.); *Ironworkers Local No. 25 Pension Fund v. Siegel*, C.A. No. 10343-VCG (Del. Ch.); and *Zelazny v. Retrophin, Inc.*, C.A. No. 10842-VCP (Del. Ch.)—and dozens of Section 220 demands addressing this issue. The plaintiff's bar is intensely interested in the outcome of this appeal because the fee awarded will determine how lucrative these suits will be. As Plaintiff's counsel admit, "[i]f challenges to [continuing director provisions] yield only a minimal fee if mooted at

the outset, then there is little incentive to file suit." Arris fails to see the injustice with this result. As demonstrated by *Amylin*, *SandRidge*, and *Healthways*, the Court of Chancery is ready to act when incumbent boards threaten to use continuing director provisions inequitably. There is no need to burden the Court of Chancery's docket with scores of suits over dormant provisions. Issuing large fee awards in such suits would represent the type of "unwholesome windfall[]" that the Court of Chancery properly seeks to avoid in setting fee awards. *In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *18 (Del. Ch. Dec. 9, 2011) (citation omitted).

CROSS-APPEAL ARGUMENT

I. THE COURT OF CHANCERY IMPROPERLY INCLUDED HOURS EXPENDED BY PLAINTIFF'S COUNSEL AFTER THE OCTOBER 22, 2014 DELETION OF THE CONTINUING DIRECTOR PROVISION.

A. Question Presented

Did the Court of Chancery err by including in its *quantum meruit* calculation hours that Plaintiff's counsel expended after the deletion of the Continuing Director Provision from the Credit Agreement? B50; Ex. A at 8–9; A47.

B. Scope of Review

Although this Court reviews fee awards for abuse of discretion, the Court reviews the legal principles applied by the trial Court *de novo*. *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010). Moreover, this Court will not affirm factual findings "that are clearly wrong." *Ams. Min.*, 51 A.3d at 1262.

C. Merits of Argument

In awarding the fee, the Court of Chancery claimed to have considered only "the time plaintiff's counsel spent in obtaining the benefit supporting the fee application." Ex. A at 8–9. The Court of Chancery then used the 159.7 hours expended by Plaintiff's counsel through December 8, 2014, the date the parties submitted the Stipulation for Considering Dismissal to the Court of Chancery. *Id.* at 9. *See* A47. This was error.

The Continuing Director Provision was deleted on October 22, 2014. This deletion was the only "benefit supporting the fee application." Therefore, to be consistent with its own ruling, the Court of Chancery should have considered only the hours expended by Plaintiff's counsel through October 22, 2014. This error was precipitated by the failure of Plaintiff's counsel to identify the hours expended through October 22, 2014. A36; A47; A239–A240.

To the extent the Court of Chancery's inclusion of attorney hours following the mooting of Plaintiff's claim was deliberate, this inclusion conflicted with established precedent, which limits compensable attorney time only to hours expended achieving the benefit. *See In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *12 (Del. Ch. June 27, 2011) ("The total includes ***non-compensable time*** devoted to fighting over control of the case and hours incurred after the injunction hearing, after Lead Counsel ***already had obtained the benefits supporting the fee application***.") (emphasis added); *First Interstate Bancorp*, 756 A.2d at 364 ("Obviously, time spent in connection with the pleadings and motion practice (including briefing and court appearances) in those cases ***produced no benefit to the class and will not be compensated***.") (emphasis added).

II. THE COURT OF CHANCERY ERRED IN AWARDING AN IMPLIED HOURLY RATE THAT EXCEEDED THE HOURLY RATE IN THE DECISION UPON WHICH THE VICE CHANCELLOR RELIED.

A. Question Presented

Did the Court of Chancery err in awarding an implied hourly rate of $800 for the "modest benefit" achieved by Plaintiff's counsel, when the Court in *Amylin II* awarded $790 an hour for the "significant and substantial" benefit achieved by plaintiff's counsel in that litigation? Ex. A at 8–9; B56–B58.

B. Standard of Review

Although this Court reviews fee awards for abuse of discretion, the Court reviews the legal principles applied by the trial Court *de novo*. *Alaska Elec.*, 988 A.2d at 417. Moreover, this Court will not affirm factual findings "that are clearly wrong." *Ams. Min.*, 51 A.3d at 1262.

C. Merits of Argument

As described above, the efforts expended and results achieved by plaintiff's counsel in *Amylin* bear little resemblance to this litigation. *See supra* Appeal Argument Section I.C.2.a. Most importantly, the *Amylin* litigation was truly a matter of first impression, while this litigation merely followed on the coattails of *Amylin*, *SandRidge*, and *Healthways*. A241–A244; B26–B37, B43–B44.

Here, however, the Vice Chancellor awarded Plaintiff's counsel an implied hourly rate that marginally ***exceeded*** the hourly rate awarded in *Amylin II*. The fee

award was inconsistent with the Court of Chancery's determination that Plaintiff's counsel achieved only a modest benefit here and an abuse of discretion. An implied hourly fee of $300 is reasonable. B65–B66.

CONCLUSION

This litigation is all about incentives. Plaintiff's counsel hopes to be in the vanguard of a new wave of strike suits obtaining windfall profits for the deletion of dormant continuing director provisions that are having no effect on the stockholder franchise of Delaware corporations. The Court of Chancery correctly determined that the benefit achieved by plaintiff's counsel in these circumstances was "modest" at best and correctly looked to *quantum meruit* in calculating the fee.

Nevertheless, the Court of Chancery improperly included attorney hours that did not contribute to the benefit achieved and awarded an implied hourly rate that was inconsistent with the precedent upon which the Court of Chancery explicitly relied. This Court should remand this action to the Court of Chancery with instructions to require Plaintiff's counsel producing records to show time expended through October 22, 2014 so that the Court of Chancery may revise its fee award to reflect an implied hourly rate of $300 multiplied by those hours.

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