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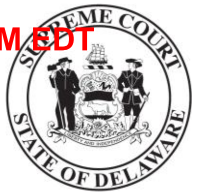

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE FIRE AND POLICE PENSION FUND, SAN ANTONIO, Appellant, Plaintiff-Below/Cross Appellee, v. ARRIS GROUP INC., Appellee, Nominal Defendant-Below/ Cross Appellant.	No. 131, 2015 On appeal from the Court of Chancery of the State of Delaware, C.A. No. 10078-VCG

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

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SUMMARY OF APPEAL ARGUMENT[1]

The answering brief ("Answering Brief" or "AB") of appellee nominal defendant ARRIS Group, Inc. ("Arris") is long on mischaracterizations and personal aspersions directed to plaintiff appellant Fire and Police Pension Fund, San Antonio ("San Antonio" or "Plaintiff") and its counsel. For example:

1. Arris describes this case as "an effort to create a new industry for the Delaware plaintiff's bar." (AB at 1.) Not so. San Antonio filed this case and its counsel filed the companion test case, *Pontiac General Employees Retirement System v. Ballantine*, C.A. No. 9789-VCL ("*Healthways*"), because despite the teachings of *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*, 983 A.2d 304 (Del. Ch. 2009) ("*Amylin I*"), and *Kallick v. SandRidge Energy, Inc.*, 68 A.3d 242 (Del. Ch. 2013), corporate borrowers and bank lenders appeared to be adopting an unusual but proliferating entrenchment device, the Dead Hand Proxy Put, in circumstances where its presence cannot be justified as a

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[1] Secondary authorities attached to the compendium filed contemporaneously with Appellant's Opening Brief ("OB") are identified herein as "Tab __"; secondary authorities attached to the compendium filed contemporaneously herewith are identified herein as "Reply Tab __".

legitimate bargained-for exchange. No litigation would be needed if corporate borrowers and lenders had followed the guidance of *Amylin I* and *SandRidge*. Corporate borrowers and lenders can similarly avoid future lawsuits by resorting to these provisions only in exceptional circumstances, if ever.

2. Arris refers to its Dead Hand Proxy Put as a "dormant, innocuous provision" that no one expected "would come into play" because Arris "had never faced a proxy fight." (AB at 1, 2.) There is no basis to indulge the inference that Arris's side of the negotiating table was ignorant of how these provisions can provide protection from proxy contests. Arris's Dead Hand Proxy Put was first included in an Arris credit agreement signed on March 27, 2013 (A161), and approved by the Board on April 15, 2013 (A163), a time of rising and prevalent stockholder activism.[2] Practitioners

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[2] *See, e.g.*, Marc Weingarten and David Rosewater, *Shareholder Activism: 2013 and Beyond*, ACTIVIST INVESTING, 5 (2014) ("Over the past year, [a shareholder activist targeting a large-cap company with deep pockets] has become the norm rather than the exception.") (Tab 13); Martin Lipton, *Dealing with Activist Hedge Funds*, HARV. CORP. BLOG (Nov. 21, 2013) ("This year has seen a continuance of the high and increasing level of activist campaigns experienced during the last 14 years, from 27 in 2000 to more than 200 in 2013, in addition to numerous undisclosed behind-the-scenes situations.") (Reply Tab 7); Kai Haakon E. Liekefett *et al.*, *Poison Put Provisions in Debt Financing: Lessons on Enforceability from Recent Cases*, STRAFFORD, 13-21 (Feb. 4, 2015) [hereinafter "*Poison Put Provisions*

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long had been writing about the deterrent effect of proxy puts in debt agreements, and did so with clarity after *Amylin I* and *Sandridge*. *See, e.g.*, RICHARD WIGHT, THE LOANS SYNDICATION TRADING ASSOCIATION'S COMPLETE CREDIT AGREEMENT GUIDE § 4.7.7, at 156 (2009) ("Although the concept of change of control provision sounds entirely lender favorable (and borrower hostile), certain classes of borrowers may actually want a change of control provision to be included in a credit agreement, viewing it as a form of 'poison pill.'") (Reply Tab 9); WACHTELL, LIPTON, ROSEN & KATZ, TAKEOVER LAW AND PRACTICE 100 (2013) ("In recent years, Delaware courts have addressed so-called proxy puts and, in so doing, have provided cautionary guidance[.]") (Reply Tab 11.) As recently as March 2010, Shamrock Activist Value Fund, L.P. and its affiliates had filed a 13D amendment respecting their investment in Arris. (OB at 9-10.) Arris asks the Court to ignore these background facts (AB at 10), even though defendants chose to eliminate the Dead Hand Proxy Put rather than defend it in Court, and even though Arris's officers and counsel agreed to the Dead Hand Proxy Put without informing the Board of it. (A163-64.)

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in Debt Financing"] (providing comparative annual data on shareholder activism) (Tab 10).

3. Arris mischaracterizes a challenge to a Dead Hand Proxy Put in the absence of a pending proxy fight as both "replowing old ground" and "tilting at windmills." (AB at 5.) Neither characterization is accurate. There is no replowing of old ground because no prior case ruled on the validity of a Dead Hand Proxy Put. *Amylin I* and *Sandridge* discussed director obligations after the adoption of an Approvable Proxy Put, while *San Antonio Fire & Police Pension Fund v. Bradbury*, 2010 WL 4273171, at *10 (Del. Ch. Oct. 28, 2010) ("*Amylin II*") (Reply Tab 3), merely held for purposes of a fee application that the challenge to the Dead Hand Proxy Put in that case was meritorious when filed. Challenging a $1.6 billion Dead Hand Proxy Put is hardly tilting at windmills. Plaintiff eliminated a potent entrenchment device. Arris has not appealed the Court of Chancery's ruling that Plaintiff "raised a sufficient, reasonable allegation of entrenchment supporting a claim of a breach of the duty of loyalty at the motion to dismiss stage." (OB Ex. A at 6.)

4. Arris writes that "this litigation is noteworthy only because the plaintiffs' bar is intensely interested to know how large of a fee award they might receive ...." (AB at 24.) This appeal's outcome will be noteworthy because of its impact on the future of Dead Hand Proxy Puts. The two

transcript rulings in *Healthways* have led to substantial practitioner comment about the potential for director and/or lender liability for approving a Dead Hand Proxy Put and the continued viability of retaining a Dead Hand Proxy Put.[3] The filing of this case and *Healthways* initiated that debate. The outcome of this appeal will necessarily influence that debate, because it will affect the incentives of potential future litigants, including stockholders, fiduciaries, borrowers, and lenders.

5. Arris relegates to a footnote (in violation of Delaware Supreme Court Rule 14(d)) its argument respecting Vice Chancellor Laster's recent fee award of $1.2 million in *Pontiac General Employees Retirement System v. Ballantine*, C.A. No. 9789-VCL, tr. (Del. Ch. May 8, 2015) ("*Healthways II*"). Arris mischaracterizes that fee award by attributing it to the board having adopted a Dead Hand Proxy Put "in the shadow of a proxy contest."

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[3] *See, e.g.*, *Poison Put Provisions in Debt Financing*, at 52-53 (Tab 10); Kevin Miller, *Food for Thought: Conflicting Views on the "Knowing Participation" Element of Aiding & Abetting Claims*, DEAL LAWYERS 3-4 (Mar.-Apr. 2015) (Tab 9); Craig Eastland, *Siege Mentality: Proxy Puts in S&P 100 Credit Agreements in the Wake of Healthways* (Apr. 21, 2015) (Tab 7); Kevin M. LaCroix, *Corporate Loan Provisions Aimed at Proxy Campaigns Trigger D&O Litigation*, THE D&O DIARY (Apr. 29, 2015) (Reply Tab 6); WACHTELL, LIPTON, ROSEN & KATZ, *Anticipating Proxy Put Litigation* (June 1, 2015) (Reply Tab 10); P. Clarkson Collins, Jr., *Proxy Puts: Consider with Caution*, DEL. BUS. CT. INSIDER (June 3, 2015) (Reply Tab 8); FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, *"Dead Hand Proxy Puts" – What You Need to Know* (June 5, 2015) (Reply Tab 4).

(AB at 37-38 n.17.) In fact, the key bases for the fee award in *Healthways II* are as follows, and they stand in stark contrast to the ruling and reasoning below: (i) the "significant benefit" of eliminating the Dead Hand Proxy Put; (ii) the "real contingency risk" associated with litigating the "novel issue" of challenging a Dead Hand Proxy Put when "the matter was in [the] shadow, rather than in the actual context of a live contest"; (iii) the time and effort of counsel is "truly secondary, if not tertiary," because plaintiff's counsel obtained "pretty much everything that could have been achieved in the litigation"; and (iv) plaintiff's counsel "brought a particular expertise to bear." *Healthways II*, at 39-41.

There is one statement in the Answering Brief with which we agree: "This litigation is all about incentives." (AB at 50.) At issue in this appeal is whether a fee award of $128,000 properly incentivizes counsel to assert on a contingent basis a meritorious entrenchment claim that challenges and eliminates a contractual provision that deters a proxy contest at a multi-billion dollar company. Affirmance of the decision below would incentivize corporate fiduciaries and corporate lenders to maintain and implement Dead Hand Proxy Puts, regardless of the circumstances, knowing that stockholders are disincentivized to sue. An appropriate fee here should reflect that

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plaintiff achieved complete success in a novel challenge to a $1.6 billion Dead Hand Proxy Put. (A163-64.) Any future case will involve different facts.

APPEAL ARGUMENT

I. THE COURT OF CHANCERY ERRED IN CLASSIFYING THE BENEFIT AS "MODEST"

In the Opening Brief, Plaintiff explained how the Court of Chancery's determination that eliminating a $1.6 billion Dead Hand Proxy Put for a company with a market capitalization of over $4 billion was a "modest benefit" rested on three separate legal errors: (i) case law consistently classifies the elimination of a deterrent to a proxy contest as a substantial benefit, not a modest benefit (OB at 17-21); (ii) no case or statute supports the notion that "much of the stockholders' franchise [remains] intact" if stockholders are deterred from electing a majority of a board of directors at an annual meeting (*id.* at 22-26); and (iii) no evolution of the law has diminished the value of eliminating a Dead Hand Proxy Put (*id.* at 26-29).

Vice Chancellor Laster's subsequent decision in *Healthways II* supports Plaintiff's arguments. At issue in *Healthways II* was the value of a settlement, the key term of which was the elimination of a Dead Hand Proxy Put at a company with a market capitalization of less than $700 million. Vice Chancellor Laster approved a negotiated fee award of $1.2 million, reasoning that the fee award was "well grounded" in precedent and "intuitively" consistent with a finding that the economic value of eliminating

the Dead Hand Proxy Put was $8-15 million. *Healthways II*, at 26-29. Focusing on "the size of the benefit [as] the most important factor," Vice Chancellor Laster referred to the elimination of the Dead Hand Proxy Put as a "significant benefit." *Id.* at 39. He noted that a $1.2 million fee was "at the low end" of a range based on the economic value of the settlement, "at the moderate end" of the precedents, and "within the type of range that I think is pretty acceptable." *Id.* at 39-40. Vice Chancellor Laster further observed that "challenging a proxy put at the time when the matter was in [the] shadow, rather than in the actual context of a live contest … was a novel issue that had carried contingency risk." *Id.* at 41. Vice Chancellor Laster also made clear that the validity of Dead Hand Proxy Puts turns on factual questions. *Id.* at 34-36.

In response to Plaintiff's articulation of the trial court's legal errors, Arris makes two arguments. Arris argues that the size of the benefit is a factual question subject to abuse of discretion review. (AB at 17-21, 32-37.) Arris also disputes the relevance of the voting rights precedents and disclosure settlements cited by Plaintiff. (*Id.* at 21-32.) Neither argument negates the Court of Chancery's legally erroneous rationale for classifying the benefit as "modest."

A. Classifying the Benefit as "Modest" Rested on Legal Errors

Arris argues that any appeal from an attorneys' fee decision is subject to review for abuse of discretion. Arris points to this Court's affirmance in *Thorpe v. CERBCO, Inc.*, 703 A.2d 645, 1997 WL 776169 (Del. Dec. 3, 1997) (Order), of a decision by the Court of Chancery that no fees were warranted for certain non-pecuniary benefits because they "were highly speculative." *Id.* at *2.

Arris acknowledges, however (AB at 46, 48), that in *Alaska Electrical Pension Fund v. Brown*, 988 A.2d 412 (Del. 2010), this Court explained that it reviews "*de novo* the legal principles applied" by the Court of Chancery when denying a fee award. *Id.* at 417. *See also id.* at 418 ("The Court of Chancery applied the proper legal precepts on remand.... So long as the Court of Chancery has committed no legal error, its factual findings will not be set aside on appeal unless they are clearly wrong and the doing of justice requires their overturn."). A threshold question is whether the Court of Chancery's decision contains any "legal error" or misapplies "legal principles" or "legal precepts."

The Court of Chancery's determination that eliminating the Dead Hand Proxy Put is a "modest benefit" rests on the following three propositions:

- the Dead Hand Proxy Put "did infringe on the stockholders' franchise by potentially discouraging the stockholders from bringing a dissident slate of directors";

- the "harmful effect" of the Dead Hand Proxy Put was "dilute[d]" and the Dead Hand Proxy Put left "much of the stockholders' franchise intact" because it "reset[] every year and require[ed] a majority of dissident directors [to] be elected to take effect";

- the value of removing the Dead Hand Proxy Put "decreases" "as our case law describing the use of similar proxy puts as problematic becomes more developed."

(OB Ex. A at 7-8.) Plaintiff agrees with the first bullet point. The second and third bullet points reflect legal errors.

The Court of Chancery ruled that "much of the stockholders' franchise [remains] intact" when stockholders are discouraged from nominating a majority slate of directors in a given year. Arris devotes a single sentence in its 50-page answering brief to asserting that this ruling reflects "practical—and ***factual***—realities." (AB at 20 (emphasis in original).) Arris's contention is unexplained. The Court of Chancery's short transcript ruling contains no mention of any such practical or factual

realities. Moreover, the Court of Chancery expressly found that stockholders are "potentially discourag[ed] … from bringing a dissident slate of directors." (OB Ex. A at 7.) Arris cannot dispute that finding on appeal by pretending that a $1.6 billion dollar Dead Hand Proxy Put has no deterrent effect. (*See* AB at 32-36.)

Arris says nothing to rebut the legal argument set forth at pages 22-26 of Plaintiff's Opening Brief. As a matter of statute, stockholders are entitled to nominate and elect a majority slate of directors to a non-classified board at any annual meeting. 8 *Del. C.* § 211(b). As a matter of statute, directors cannot unilaterally classify a board. 8 *Del. C.* § 141(d). Landmark decisions by this Court recognize that "the power of corporate democracy is available to the stockholders to replace the incumbent directors when they stand for re-election." *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003) (citing *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)). No law supports the Court of Chancery's ruling that deterring a proxy contest to remove a majority of the board at an annual meeting leaves "much of the stockholder franchise intact."

The third bullet point above reflects the Court of Chancery's perception of the case law. The import of developing case law necessarily involves "legal precepts." The Court of Chancery's failure to explain what case law developments it was referring to, or how such case law developments reduced the significance of eliminating the Dead Hand Proxy Put, does not convert a legal discussion into a factual finding. (AB at 20.)

The Court of Chancery may have been referring to *Amylin I* and *SandRidge* and the legal standards governing fiduciaries when a debt instrument contains an Approvable Proxy Put. Those fiduciary constraints on a board's decision to approve or not approve a dissident slate for purposes of an Approvable Proxy Put have nothing to do with the legal validity of a Dead Hand Proxy Put. Moreover, rulings that weakened the effectiveness of Approvable Proxy Puts as a defense to a proxy contest may have actually motivated borrowers and lenders to adopt Dead Hand Proxy Puts, because Dead Hand Proxy Puts actually deter proxy contests and no case law gave stockholders a clear path around them. If so, then *Amylin I* and *SandRidge* ***magnified*** the value of eliminating a Dead Hand Proxy Put. (*See* OB at 27-29.)

If the Court of Chancery was suggesting that *Pontiac General Employees Retirement System v. Ballantine*, C.A. No. 9789-VCL, tr. at 74 (Del. Ch. Oct. 14, 2014) ("*Healthways I*"), rendered all Dead Hand Proxy Puts toothless bulldogs, that statement was in error. Vice Chancellor Laster took pains to emphasize in *Healthways II* that *Healthways I* was a fact-specific denial of two motions to dismiss. *Healthways*, *II* at 34-37. Arris argued below that *Healthways I* was "easily distinguishable" and a "fact-bound result." (B35, 37.) If Arris believes that its Dead Hand Proxy Put could both survive judicial scrutiny and could validly prevent the election of a new board majority at an annual meeting, then Arris cannot concurrently argue that the same Dead Hand Proxy Put was a "toothless bulldog." Moreover, Plaintiff sent its Section 220 demands and filed this lawsuit before the motion to dismiss rulings in *Healthways I*.

B. Prior Fee Rulings Respecting Voting Rights Undercut the Court of Chancery's Determination that the Benefit Obtained Here Was "Modest"

Arris acknowledges that "like cases should be treated alike." (AB at 21 (quoting *Olson v. EV3, Inc.*, 2011 WL 704409, at *8 (Del. Ch. Feb. 21, 2011)).) Arris concedes that in each of the five cases Plaintiff cited in the Opening Brief, counsel "actually achieved a substantial benefit for company

stockholders." (AB at 28.) Arris attempts to distinguish the five cases, but does not explain how any of them support the ruling below that the benefit of eliminating a $1.6 billion Dead Hand Proxy Put for a company with a market capitalization of over $4 billion is "modest," as opposed to "substantial" or "significant." Arris does not identify a single case that is more like this one than any of the cases cited by Plaintiff.

This Court has stated that "[p]reserving shareholder voting rights produces a fundamental corporate benefit." *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012). That is what happened here. A deterrent to nominating or electing a majority slate at an annual meeting was eliminated, thereby restoring voting rights and fiduciary accountability.

Arris protests that *In re Yahoo! Shareholders Litigation*, C.A. No. 3561-CC, let. op. (Del. Ch. Mar. 6, 2009) (Tab 3), is "not a stockholder voting rights decision." (AB at 29.) As explained in the Opening Brief (OB at 18 & n.4) and in the *Yahoo* opinion itself, and as acknowledged by Arris in the Answering Brief (AB at 30), a critical aspect of the settlement in *Yahoo* was eliminating a "dead-hand" feature from an employee severance plan that would have been triggered by a successful proxy contest, thereby "prevent[ing] a new slate of directors from changing the severance plan[.]"

Yahoo, let op. at 2. That provision operated identically to a Dead Hand Proxy Put. It deterred a proxy contest by imposing large potential future costs on the company if a new board majority was elected.

Arris's discussion of *Amylin II* says nothing about the future-oriented relief obtained in that case. (AB at 23-24.) Eliminating the deterrent effect of Amylin's proxy puts on a potential future proxy contest is no different than eliminating the deterrent effect of Arris's Dead Hand Proxy Put on a potential future proxy contest. The Court of Chancery explained in *Amylin II* that "influences on the voting calculus of Amylin's stockholders resulting from the continuing directors provisions of the Credit Agreement and the Indenture have been removed or, at least, limited." *Amylin II*, at *7.

Healthways is similarly on point. In *Healthways I*, Vice Chancellor Laster explained that "the effect … of the dead hand proxy put in this case" is that "potential proxy contests … would be deterred," as stockholders "would have the sword of Damocles hanging over them, when they were deciding what to do with respect to a proxy contest." *Id*. at 74. *See also id.* at 73 ("A truly effective deterrent is never triggered. A really truly effective deterrent is one you don't even have to point the other side to because they

know it's there."). That deterrent to a potential future proxy contest was removed here, as in *Amylin II* and *Healthways II*.

Arris's discussion of *Minneapolis Firefighters' Relief Association v. Ceridian Corp.*, C.A. No. 2996-CC (Del. Ch. Feb. 25, 2008) (AB at 24-26), omits reference to the relief highlighted by Chancellor Chandler in *Yahoo* – "eliminating a termination right for the merger partner in the event a new slate of directors was elected before the merger closed." *Yahoo*, let. op. at 2. That termination right operates identically to the Arris $1.6 billion Dead Hand Proxy Put. It deters nominating or electing a new board majority by threatening stockholders with substantial harm if a new board majority is elected.

Deterring a proxy contest is analogous to stripping stockholders of voting rights, as in *Forsta AP-Fonden v. News Corp.*, C.A. No. 7580-CS, tr. (Del. Ch. Apr. 26, 2013). Stockholders cannot vote for a new slate of directors if potential dissidents are deterred from nominating a majority slate.

Finally, Arris embraces the implicit analogy drawn by the Court of Chancery between the elimination of Arris's $1.6 billion Dead Hand Proxy Put and the M&A cases in which immaterial supplemental disclosures are

found to warrant a comparably small fee award. (AB at 31-32.) A large Dead Hand Proxy Put deters proxy contests. By way of contrast, the immaterial supplemental disclosures in "disclosure-only settlements do not appear to affect shareholder voting in any way." Jill E. Fisch *et al.*, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 561 (2015) (Reply Tab 5). The fee award here is less than one-third the size of many fee awards for a single material supplemental disclosure. (AB at 32.) Why the removal of a deterrent to a proxy contest for a multi-billion dollar company should be treated as equivalent to putative corporate benefits that have no effect on stockholder voting is unexplained by the Court below or by Arris.

II. THE MECHANICAL APPLICATION OF AN IMPLIED HOURLY RATE FROM A HEAVILY LITIGATED CASE IS CONTRARY TO LAW

The Answering Brief ignores authoritative precedent from this Court that is cited in the Opening Brief: "[T]he general principle from *Sugarland* [is] that the hours that counsel worked is of secondary importance to the benefit achieved." *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1258 (Del. 2012) (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 147 (Del. 1980)). Arris relies wholly on authorities discussing *quantum meruit* that pre-date *Americas Mining*. (AB at 40-44.) The Court of Chancery made the same error below by mechanically awarding the same implied hourly rate here as was awarded in *Amylin II*, and thus awarding a fee ($128,000) that is a tiny fraction of the fee award in *Amylin II* ($2.9 million), even though the benefits in the two cases were quite similar – eliminating the deterrent effect of proxy puts on a potential future proxy contest for a majority of the board at a multi-billion dollar company.

Vice Chancellor Laster followed the correct approach in *Healthways II*, explaining:

> In evaluating the fee amount, this Court applies the factors set forth in the *Sugarland* decision and recently reformulated by the Delaware Supreme Court in the *Americas Mining* decision.

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> Particularly under *Americas Mining*, it's clear that the size of the benefit is the most important factor.
>
> In my view this was a significant benefit.... [W]hen I think about the right [economic] neighborhoods, the right neighborhoods are probably north of where this fee comes out in terms of the benefit. I think that, if anything, this fee [$1.2 million] is at the low end and, hence, I am not at all troubled by the lack of a good economic proxy.

Healthways II, at 38-39. Vice Chancellor Laster further explained, consistent with *Americas Mining*, that a cross-check based on the time and effort expended by counsel is "truly secondary, if not tertiary, in this case." *Id.* at 40. After all, Plaintiff's counsel achieved "pretty much everything that could have been achieved in the litigation," took on "real contingency risk" litigating "new and novel issues," and "brought a particular expertise to bear." *Id.* at 40-41. The same is true here.

Focusing on the size of the benefit means that the fee award in absolute terms should reflect the significance of the benefit. In *Amylin II*, the fee award of $2.9 million properly reflected "the central importance of considering the benefits created by the litigation" and the "very real" benefit of eliminating the deterrent effect of proxy puts that "no longer frustrate the stockholders' ability to elect a new majority of directors to the Company's board." *Amylin II*, at *12, *13. Arris is a larger company than Amylin or Healthways. The economic effect of restoring fiduciary accountability at the

ballot box is greater at Arris. By ignoring the central importance of the benefit achieved in the *Sugarland* analysis, by ignoring the absolute fee award in *Amylin II*, and by misclassifying the benefit here as "modest" rather than "substantial," the Court of Chancery erroneously awarded a fee that is a tiny fraction of the fee awards in *Amylin II* and *Healthways II*.

Arris raises the specter of "windfall" fee awards in an "explosion of suits" challenging Dead Hand Proxy Puts. (AB at 44-45.) That concern is not properly addressed by affirming a legally flawed *Sugarland* analysis that fails to accord primary importance to the substantial benefit of eliminating a powerful deterrent to a proxy contest for a majority of board seats at a multi-billion company with widely dispersed stock ownership. The Court of Chancery is well-suited to evaluating the merits of each case and conducting proper *Sugarland* analyses, as necessary, that give appropriate weight to each factor, as occurred in *Healthways II*. Of the other pending cases cited by Arris (AB at 44), we note that two of them have been resolved by the payment of negotiated mootness fees, *In re MGM Resorts International Litigation*, Cons. C.A. No. 10290-VCG (Del. Ch. May 28, 2015) (Order) ($500,000 mootness fee) (Reply Tab 2), and *Ironworkers Local No. 25*

Pension Fund v. Doheny, C.A. No. 10341-VCP (Del. Ch. June 5, 2015) (Order) ($300,000 mootness fee) (Reply Tab 1).

Mechanically applying an implied hourly rate from a case, *Amylin II*, that entailed 3,338.55 compensable hours of work is an improper *Sugarland* analysis. It yields in this case a fee award that does not appropriately incentivize and compensate counsel. Arris's bluster about unmeritorious "strike suits" (AB at 50) cannot be reconciled with the ruling below that Plaintiff stated a meritorious entrenchment claim. (OB Ex. A at 6.) Arris's fiduciaries and outside counsel ignored the clear warnings laid down in *Amylin* and *SandRidge* and approved a multi-billion dollar Dead Hand Proxy Put without negotiation or deliberation. (A163-64.) The fee award should reflect the magnitude of the benefit of Plaintiff's meritorious claim.

Plaintiff's counsel followed the guidance of *Amylin* and *SandRidge*, made a Section 220 demand, filed a Section 220 action, and assumed the risk of pursuing a breach of fiduciary duty lawsuit that sought to invalidate the Dead Hand Proxy Put. (A45.) That lawsuit unexpectedly met with complete, quick success. (A45-46.) A proper fee award would compensate Plaintiff's counsel for that socially beneficial undertaking, and not disincentivize any similar meritorious challenges to potent deterrents to

proxy contests. The Court of Chancery is well suited to undertake *Sugarland* analyses that take into account the factual circumstances of similar or dissimilar cases, including the benefit achieved and the risk undertaken.

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SUMMARY OF CROSS-APPEAL ARGUMENT

1. DENIED. The Court of Chancery did not commit any error or abuse its discretion by considering the hours submitted by Plaintiff's counsel through December 8, 2014, the date of filing the Stipulation and Order Establishing the Procedure for Considering the Dismissal of the Litigation and Plaintiff's Fee Application (the "Stipulation for Considering Dismissal"). The Stipulation for Considering Dismissal provided for the prompt filing of a Form 8-K by which the public stockholders of Arris were informed that the Dead Hand Proxy Put had been eliminated. That public notice was itself a benefit to the stockholders of Arris. There exists no legal impediment to awarding a fee for time spent providing for public notice of the elimination of a deterrent to a proxy contest. Additionally, Arris did not timely seek discovery of time records. Arris has no basis for suggesting that Plaintiff's counsel devoted significant attention to non-compensable matters prior to the filing of the Stipulation for Consideration Dismissal.

2. DENIED. The Court of Chancery did not abuse its discretion by awarding an implied hourly rate that exceeded the implied hourly rate in *Amylin II*. The implied hourly here should have been significantly higher than the implied hourly rate in *Amylin II* considering the comparability of

the significant benefits achieved in both cases and the far greater number of compensable hours in *Amylin II*.

CROSS-APPEAL ARGUMENT

I. THE COURT OF CHANCERY PROPERLY CONSIDERED HOURS EXPENDED THROUGH THE FILING OF THE STIPULATION PROVIDING FOR PROMPT PUBLIC NOTICE OF THE ELIMINATION OF THE DEAD HAND PROXY PUT

A. Question Presented

Did the Court of Chancery err by considering the hours expended by counsel until the filing of the Stipulation for Considering Dismissal, which provided for prompt public notice of the elimination of the Dead Hand Proxy Put? (OB Ex. A at 9; A46-47.)

B. Scope of Review

This Court reviews awards of attorneys' fees for abuse of discretion, but reviews *de novo* the legal principles the Court of Chancery applied in reaching its decision. *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417-18 (Del. 2010).

C. Merits of Argument

The Court of Chancery did not commit any error or abuse its discretion by considering the hours submitted by Plaintiff's counsel through December 8, 2014, the date of filing of the Stipulation for Considering Dismissal, because that filing publicly informed the Court about the elimination of the Dead Hand Proxy Put and it provided for prompt filing of

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a Form 8-K by which the public stockholders of Arris were informed that the Dead Hand Proxy Put had been eliminated. Public notice was itself an important benefit to the stockholders of Arris, by creating fiduciary accountability at the ballot box, since otherwise stockholders may not have realized that they were no longer deterred from nominating or electing a majority slate of directors at an annual meeting.

Moreover, Arris sought no timely discovery for Plaintiff's counsel's time records. (A174 n.2.) Arris has no basis for suggesting that Plaintiff's counsel devoted significant attention to non-compensable matters prior to the filing of the Stipulation for Consideration Dismissal. This is not a case in which any time was devoted to leadership challenges. The December 8, 2014 cutoff date for attorney time used by the Court of Chancery did not include the time spent drafting the fee application filed on January 14, 2015, or otherwise preparing for the dismissal and fee hearing held on February 11, 2015. In the absence of a timely discovery request by Arris, this Court should not credit Arris's speculation that any hours devoted to this matter in the pertinent window of time are not compensable.

II. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN AWARDING A FEE AT AN IMPLIED HOURLY RATE HIGHER THAN IN *AMYLIN II*

A. Question Presented

Did the Court of Chancery err in awarding an implied hourly rate higher than that in *Amylin II*? (OB Ex. A at 9; A33-37, 47.)

B. Scope of Review

This Court reviews awards of attorneys' fees for abuse of discretion, but reviews *de novo* the legal principles the Court of Chancery applied in reaching its decision. *Alaska Elec.*, 988 A.2d at 417-18.

C. Merits of Argument

The fee award here is a tiny fraction of the fee award in *Amylin II*. As described above, an appropriate fee award would imply a much higher hourly rate, given the priority accorded to the benefits achieved, the similarly substantial benefits here and in *Amylin II*, the far fewer hours expended here, and the contingency risk associated with seeking novel relief – the invalidation of a Dead Hand Proxy Put, especially when a proxy contest is not pending. *See supra* Appeal Argument Section II.

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CONCLUSION

For all the foregoing reasons, Appellant Plaintiff-Below San Antonio respectfully requests reversal of the decision of the Court of Chancery and a remand for purposes of undertaking a proper *Sugarland* analysis that gives primary weight to the substantial benefits of eliminating a $1.6 billion Dead Hand Proxy Put at a company with a market capitalization of over $4 billion, and takes into account the risk of seeking novel relief and the achievement of complete success on a meritorious entrenchment claim.

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Dated: July 2, 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2015, I caused a copy of the **Appellant's Reply Brief and Cross Appellee's Answering Brief on Cross-Appeal** to be served upon the following counsel by File & ServeXpress:

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