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February 19, 2016

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Re: *Louisiana Municipal Police Employees' Retirement System v. Black*
C.A. No. 9410-VCN
Date Submitted: December 14, 2015

Dear Counsel:

Plaintiff Louisiana Municipal Police Employees' Retirement System ("Plaintiff" or "LAMPERS") has moved for an award of fees and expenses to its attorneys for their efforts in challenging Defendant Comcast Corp.'s attempt to acquire Defendant Time Warner Cable Inc. ("TWC"). LAMPERS accused TWC's board of directors (the "Board") of breaches of fiduciary duty based on the potential merger between Comcast and TWC that ultimately failed (the "Comcast Deal"); other defendants were sued for aiding and abetting those breaches. Before

the Comcast Deal fell apart, the parties had negotiated a Stipulation and Agreement of Compromise, Settlement, and Release (the "Proposed Settlement"), conditioned on the deal's consummation, that purported to resolve, to some extent, the issue of attorney's fees.[1] Because the Comcast Deal never happened and the Proposed Settlement does not control, Plaintiff now requests a "mootness" fee award to its attorneys for securing some benefits of disputed value for the putative class of TWC shareholders before the deal collapsed under the weight of regulatory concerns.

Between May 2013 and May 2015, Comcast and Charter Communications, Inc. ("Charter") both sought to acquire TWC. About midway through that saga, Comcast appeared to emerge as the successful acquirer when Comcast and TWC entered into an Agreement and Plan of Merger dated February 12, 2014 (the "Merger Agreement").[2] The Merger Agreement contained a number of deal protection devices, including a no-solicitation provision,[3] a force-the-vote

[1] The Proposed Settlement is attached to the Letter of Blake A. Bennett, Esq., dated November 14, 2014.
[2] Verified Am. Class Action Compl. ¶ 2.
[3] *Id.* ¶¶ 72–73.

provision,[4] and a matching rights provision.[5] The latter provided that if the Board decided to change its recommendation in response to a superior offer, the Board could not communicate with TWC's shareholders for five business days, during which time Comcast could amend its offer.[6] On March 20, 2014, Comcast filed a preliminary Form S-4 Registration Statement (the "Preliminary Proxy") detailing the Comcast Deal and setting forth the Board's unanimous recommendation that TWC stockholders vote in its favor.[7] The prospective Comcast Deal attracted a number of lawsuits in New York and Delaware, including this one.[8]

Eventually, the litigants agreed to a single forum and, after some amount of discovery, began moving toward settlement. The parties agreed to coordinate all proceedings through a determination on a motion for preliminary injunction in the Supreme Court of New York, New York County.[9] Subsequent settlement talks resulted in the parties' entry into two agreements: a Memorandum of

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[4] *Id.* ¶ 174.
[5] *Id.* ¶ 177.
[6] *Id.*
[7] Aff. of Jason M. Leviton in Supp. of Pl.'s Mot. for an Award of Att'ys' Fees and Expenses ("Leviton Aff.") Ex. D (Preliminary Proxy).
[8] LAMPERS filed its initial Complaint on March 4, 2014 and an Amended Complaint on March 28, 2014.
[9] Letter of Blake A. Bennett, Esq., dated May 19, 2014.

Understanding ("MOU"), dated July 22, 2014,[10] and the Proposed Settlement, which is dated November 12, 2014.[11] In connection with these negotiations, Defendants (1) filed an amended proxy statement containing a number of supplemental disclosures and (2) agreed to reduce Comcast's matching rights period from five days to three (the "Matching Rights Reduction").

Two supplemental disclosures are noteworthy. First, TWC disclosed that it had compared Charter's offer to, among other comparable transactions, a 2005 transaction with a one-year forward estimated EBITDA multiple of 13.5x and a 2001 transaction with one of 20.8x. In the same disclosure, TWC noted that the 2001 transaction, which was between AT&T Broadband ("AT&T") and Comcast, "was the only true comparable deal from a scale perspective."[12] Second, TWC disclosed that Comcast had declined TWC's request to see forecasts and projections of future performance prepared by Comcast's management because

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[10] The MOU is attached to the Letter of Blake A. Bennett, Esq., dated July 24, 2014.

[11] Memorandum of Understanding ("MOU") at 13; Proposed Settlement at 2. The Proposed Settlement contemplated that the Defendants would pay, subject to court approval, an attorneys' fee award up to $1,850,000. Proposed Settlement ¶ 15. It was conditioned on, *inter alia*, consummation of the Comcast Deal. *Id.* ¶ 13.

[12] MOU Ex. A at 100.

Comcast "does not, as a matter of course, publicly disclose forecasts or projections as to its potential future performance."[13] Presumably, these disclosures were sought to give TWC's stockholders a more accurate understanding of the Comcast Deal—which, in Plaintiff's view, was not in the best interests of TWC's shareholders. The parties debate the importance of the supplemental disclosures which did provide TWC stockholders information about TWC's due diligence—which LAMPERS suggests was demonstrably inadequate—in the context of an all-stock transaction. Learning more about Comcast's projections which had not been shared allowed TWC shareholders to assess the importance, if any, of their own inability to review those projections. Also, significant disclosures have been made about the AT&T-Comcast deal from 2001, but that information was not part of the precedent transaction analysis in the Preliminary Proxy. By assuring that this information was provided contemporaneously, LAMPERS made certain that the information was readily available to the stockholders. There is, however, room for significant debate about the continuing usefulness of such financial information more than a decade old.

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[13] *Id.* at 149.

On April 24, 2015, TWC and Comcast, primarily because of regulatory considerations, announced a mutual agreement to terminate the Comcast Deal.[14] Roughly one month later, on May 26, 2015, Charter announced that it had reached an agreement to merge with TWC (the "TWC-Charter Transaction").[15]

After the Comcast Deal was terminated, LAMPERS' counsel, primarily, Block & Leviton, LLP, sought a mootness fee for the supplemental disclosures and Matching Rights Reduction[16] and commenced discussions with Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss"), counsel for TWC, to that end. Jason Leviton, Esq. negotiated on behalf of Block & Leviton and Jay Cohen, Esq. negotiated on behalf of Paul Weiss. Between June and August, 2015, Leviton and Cohen exchanged a number of emails chronicling an initial harmony that later devolved into the present dispute. In particular, discussions broke down after

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[14] Transmittal Aff. of Daniel A. Mason in Supp. of the TWC Defs.' Answering Br. in Opp'n to Pl.'s Mot. for an Award of Att'ys' Fees and Expenses ("Mason Aff.") Ex. D. Plaintiff represents that the termination announcement came "following reports that antitrust regulators were unlikely to grant approval." Pl.'s Br. in Supp. of Appl. for an Award of Att'ys' Fees and Expenses ("Pl.'s Opening Br.") 12.
[15] Mason Aff. Ex. E. It has been suggested that Charter had been waiting as an alternate bidder.
[16] Counsel for plaintiffs in the related New York proceedings did not seek a mootness fee. Instead, they amended their complaint to challenge the conduct of TWC's directors with respect to the TWC-Charter Transaction.

August 21, 2015, when Block & Leviton, on behalf of a different plaintiff, participated in the filing of an action naming Charter's board of directors as defendants and seeking in part to enjoin the stockholder vote on the TWC-Charter Transaction.[17] The following relevant email excerpts capture the fee negotiations' trajectory:

- June 10 (Leviton): "Jay – Now that **I have confirmed that we will not be suing TWC regarding the new deal**, can we finalize the fee dispute?"[18]
- August 18 (Leviton): "Jay, I wanted to memorialize our conversation regarding finalizing the mootness application Block & Leviton will be filing in Delaware in order to resolve the outstanding fee dispute in [the present lawsuit]. This is a DRAFT email, so please let me know if anything is incorrect. It is my understanding that our resolution includes exactly the following: [bulleted list of terms including, most notably, that Block & Leviton would be paid $475,000 as a mootness fee]."[19]
- August 22 at 3:13PM (Cohen): "Jason, **our discussions were always premised on your promise not to file an action with respect to the new transaction**. I understand you have now filed against Charter. Is that correct? If so, that is directly contrary to my understanding for the discussions we have had."[20]

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[17] *Sciabacucchi v. Liberty Broadband Corp., et al.*, C.A. No. 11418–VCG (Del. Ch.).
[18] Leviton Aff. Ex. B (emphasis added).
[19] Leviton Aff. Ex. G. This email does not mention any prior understanding(s) regarding Block & Leviton's commencement of, or participation in, other lawsuits related to the TWC-Charter Transaction.
[20] *Id.* (emphasis added).

- August 22 at 3:28 PM (Leviton): "**Our discussions were always premised on us not suing TWC or its officers and directors**. . . . Our plaintiff, and the class he seeks to represent, relates to Charter, not TWC."[21]
- August 22 at 3:29 PM (Cohen): "I am sorry. I see it differently."

LAMPERS filed this Motion for an Award of Attorneys' Fees and Expenses on October 9, 2015.

LAMPERS' motion rests on two theories: (1) that an oral agreement between the parties entitles Block & Leviton to a fee award of $475,000, and (2) in the alternative, that the benefits counsel achieved for the putative class justify a fee award of $647,500. Analysis proceeds in that order.

A. *Contract*

Plaintiff's first theory fails for two independent reasons. First, no contract was formed because the parties did not intend to be bound and failed to mutually assent to an essential term. Second, even if there was a meeting of the minds, the agreed-upon term is void for public policy reasons, a circumstance that renders any agreement that did exist unenforceable.

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[21] *Id.* (emphasis added).

1. Mutual Assent

Where the parties' "agreement in principle" expressly manifests an intention not to be bound, no binding contract results.[22] Further, one party's statement that it will not be bound until a formal document is executed may preclude contract formation until that condition is met.[23] That said, the parties' "manifest[ed] intention to prepare and adopt a written memorial" will not necessarily prevent contract formation where the evidence reveals "[m]anifestations of assent that are in themselves sufficient to conclude a contract" has been formed.[24] In order to form a contract, the parties must negotiate all terms they deem important *and* intend to be bound.[25] "If there has been any misunderstanding between the parties,

[22] *See Sussex Equip. Co. v. Burke Equip. Co.*, 2004 WL 2423841, at *1–2 (Del. Oct. 26, 2004) (TABLE); *see also Universal Products Co. v. Emerson*, 179 A. 387, 394 (Del. 1935) ("Where it is clearly understood that the terms of a proposed contract, though tentatively agreed on, shall be reduced to writing and signed before it shall be considered as complete and binding on the parties, there is no final contract until that is done.").
[23] *Schwartz v. Chase*, 2010 WL 2601608, at *8 (Del. Ch. June 29, 2010).
[24] *Loppert v. WindsorTech, Inc.*, 865 A.2d 1282, 1288 (Del. Ch. 2004), *aff'd*, 867 A.2d 903 (Del. 2005) (internal quotation marks omitted) (quoting Restatement (Second) of Contracts § 27 (1981)).
[25] *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1101 (Del. Ch. 1986); *see also Schwartz*, 2010 WL 2601608, at *8 ("A settlement agreement will only

or a misapprehension by one or both, so that there is no mutuality of assent, then the parties have not made a contract, and neither will the court do so for them."[26] Here, the parties neither intended to be bound nor mutually assented to all key terms.

The parties' communications indicate discussions were ongoing and no contemporaneous, binding resolution had been formed. Leviton's August 18 email bears objective indicia that it was not intended as a final expression of the parties' agreement—it is clearly marked "DRAFT" in two places and the drafter invites the recipient to reply "if anything [was] incorrect." Further, the drafter proclaims an intention to "memorialize" a prior conversation between Cohen and Leviton "regarding finalizing the mootness application," a characterization that, although susceptible to diverging interpretations, indicates no finality had been achieved when considered alongside the email's clear demarcation as a draft. Finally, the email is missing a key term—the disputed term concerning Block & Leviton's

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become binding if all material terms have been negotiated and all parties intend to be bound by them." (emphasis omitted)).

[26] *In re TIBOCO Software Inc. S'holders Litig.*, 2014 WL 6674444, at *14 (Del. Ch. Nov. 25, 2014) (quoting 27 *Williston on Contracts* § 70:19).

participation in certain lawsuits (the "Lawsuit Term"). The best inference from these textual cues is that the parties did not intend to be bound.

The disputed term concerning Block & Leviton's participation in certain lawsuits (the "Lawsuit Term") was certainly regarded as important. Both sides understood that Lawsuit Term was a precondition to any contract that might have been reached. Leviton and Cohen explicitly acknowledged that fee discussions were "always premised" on some form of the Lawsuit Term. Although no Lawsuit Term appears in Leviton's itemized list of terms in the August 18 email, the parties' back-and-forth reflects a mutual understanding that the Lawsuit Term was foundational.

Objective manifestations of the parties' intent evidence diverging understandings of the Lawsuit Term. Two months before the August 18 email, on June 10, Leviton sent Cohen an email "confirm[ing] that [Block & Leviton] will not be suing TWC regarding the new deal . . . ."[27] In the action filed shortly after Leviton sent the August 18 email, TWC and its directors were not named as defendants. Leviton believed that he had made it clear that Block & Leviton would

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[27] Leviton Aff. Ex. B.

not sue TWC or its directors and that his commitment had gone no further; he thus believed he was free to sue Charter and its board. Although the June 10 email can be read as narrowly focused, the understanding between counsel involved some sort of challenge to the TWC-Charter Transaction. A commitment—the breadth of which is now disputed—that LAMPERS' law firm would not be challenging the TWC-Charter Transaction was a precondition to negotiations and negotiating the mootness fee arrangement was dependent on that commitment.[28] Cohen believed he had Leviton's commitment that Block & Leviton would not challenge the TWC-Charter Transaction.[29] In short, although Leviton and Cohen were very

[28] Counsel for LAMPERS argues that he could not share information with TWC's counsel of an intention to (or a change in intent to) file an action involving the TWC-Charter Transaction because it would have required disclosure of attorney-client privileged material. Perhaps it would have been awkward, but withdrawing the commitment (if one can call it that) not to file could have been done without disclosing privileged information. It is a narrow distinction, but erasing a commitment is different from reporting that an action would follow or what the nature of that action would be.

[29] Cohen described his understanding of the arrangement that he reached with Leviton as follows: "I told Mr. Leviton that TWC would be willing to discuss an agreed-upon mootness fee award only if Mr. Leviton did not intend to file a new action to challenge TWC's proposed merger with [Charter.] My clear understanding of our discussions was that Mr. Leviton would not initiate litigation to challenge the TWC-Charter Transaction. On that basis, I began to negotiate with Mr. Leviton concerning a potential agreed-upon mootness fee." Aff. Of Jay

close to agreeing, a gap remained. Therefore, the best inference from available facts is that there was no meeting of the minds on all important terms and therefore no enforceable contract was formed.

2. Public Policy

Generally speaking, Delaware courts will not enforce agreed-upon terms that violate public policy.[30] "When finding a contract provision violative of public policy, [Delaware courts] follow the well-established rule of contract construction that if the offending provision is separable, it should be stricken, while the remaining contract provisions should be enforced."[31] In deciding whether a

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Cohen in Supp. of the TWC Defs.' Answering Br. In Opp'n to Pl.'s Mot. for an Award of Att'ys' Fees and Expenses ("Cohen Aff.") ¶ 3. Cohen further reported: "During the course of our discussions, Mr. Leviton never disclosed that he had intended to file an action challenging the TWC-Charter Transaction. Had he done so, I would have terminated and not proceeded further without discussions regarding a potential agreed-upon mootness fee and would have told Mr. Leviton to pursue a mootness fee, if any, from [the Court of Chancery]." *Id.* ¶ 5.

[30] *Capital Bakers, Inc. v. Leahy*, 178 A. 648 (Del. Ch. 1935); *accord In re Fuqua Indus., Inc. S'holder Litig.*, 2006 WL 2640967, at *7–8 (Del. Ch. Sept. 7, 2006).

[31] *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557, 561 (Del. 1988).

contract is severable, "the essential question is to ascertain the intention of the parties."[32]

Under Delaware Rule of Professional Conduct ("DRPC") 5.6(b), "[a] lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."[33] The comment to DRPC 5.6(b) clarifies that it "prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client."[34] This Court has found past occasion to declare a contract that conflicts with Delaware professional ethics rules void and unenforceable in its entirety.[35]

Assuming *arguendo* that a contract for a mootnees fee existed, it violates Rule 5.6(b). In the series of emails exchanged between June and August, 2015, both parties characterized their mootness fee agreement as "premised" on either

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[32] R.*S.M. Inc. v. Alliance Capital Mgmt. Hldgs. L.P.*, 790 A.2d 478, 479 n.20 (Del. Ch. 2001) (quoting *Orenstein v. Kahn*, 119 A. 444, 445 (Del. 1922)); *Equitable Trust Co. v. Del. Trust Co.*, 54 A.2d 733, 738 (Del. Ch. 1947) ("Whether a contract is divisible or entire is a question of intent which must be determined from the terms and subject matter of the contract, together with any pertinent explanatory circumstances.").
[33] Del. Lawyers' R. Prof'l Conduct 5.6(b).
[34] Del. Lawyers' R. Prof'l Conduct 5.6(b) cmt.
[35] *Fuqua Indus.*, 2006 WL 2640967, at *8.

(1) Block & Leviton's representation that it would "not be suing" or (2) Block & Leviton's promise "not to file an action." Any conceptual distinction that might exist between those two premises is irrelevant for purposes of Rule 5.6(b) since both restrict Block & Leviton's right to practice; the former's prospective guarantee functions the same as the latter's promise because in both cases, Block & Leviton's initiation of some sort of litigation would prevent or terminate the mootness fee arrangement. For that reason, the parties' purported contract is void and unenforceable.[36]

The parties' suggestion that this contractual premise is permissible since it reflected Block & Leviton's then-present intent not to bring suit,[37] not a promise

[36] *See id.*; *see also Cardillo v. Bloomfield*, 988 A.2d 136, 140 (N.J. Super. Ct. App. Div. 2010) (affirming a lower court's holding that a settlement agreement that violated a rule substantially similar to DRPC 5.6(b) was void and unenforceable in its entirety).

[37] LAMPERS cites *Desantis v. Snap-On Tools Co., LLC*, 2006 WL 3068584, at *12 (D.N.J. Oct. 27, 2006), in support of this claim. In *Desantis*, the United States District Court for the District of New Jersey held that a settlement agreement stating that class counsel had "no present intention of representing any persons who are not Class Members with respect to defendants" was not "an agreement but merely an attempt by one negotiating party to achieve finality through the settlement" and did not "restrict Class Counsel's right to represent any future clients." *Id.* The case at bar is distinguishable because it involves a prospective

not to sue in the future, is unavailing. Although both Cohen and Leviton submitted affidavits alleging that Leviton instead conveyed that he or his firm "did not intend"[38] to bring suit, that after-the-fact characterization conflicts with evidence of the parties' substantive negotiations contained in the June–August emails. Further, later in Cohen's own affidavit (indeed, the very next sentence), he recharacterizes the key premise as an "understanding . . . that Mr. Leviton would not initiate litigation."[39] The latter statement, which better aligns with the content of negotiations—*i.e.*, that Block & Leviton's fee depended on their prospective agreement not to sue—provides the better factual picture.

There would have been no negotiations—and thus no hope for any agreement—about a mootness fee without an understanding about Block & Leviton's intentions with respect to additional litigation. Because of its foundational nature, an agreement of that nature could not be severed from a mootness fee agreement, if one had been reached. Thus, the public policy issues

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guarantee not to represent future clients, the violation of which would (and in some sense did) terminate the deal.

[38] Reply Aff. of Jason M. Leviton in Further Supp. of Pl.'s Mot. for an Award of Att'ys' Fees and Expenses ("Leviton Reply Aff.") ¶ 4; Cohen Aff. ¶ 3.

[39] Cohen Aff. ¶ 3.

surrounding the agreement not to sue would preclude enforcement of any such agreement.

Thus, LAMPERS' contract-based theory of recovery whether because no final agreement was reached or because the agreement's foundation is mired in a lawyer's commitment about subsequent litigation fails.

B. *A Fee Award Based on LAMPERS' Litigation Efforts and Benefits Conferred*

Thus, the Court turns to the question of an appropriate mootness fee.[40] The Court's discretion in awarding attorneys' fees in these circumstances is guided by the familiar *Sugarland* factors: benefits achieved by the plaintiff, complexities of the issues, the contingent nature of the fee, the time and effort of counsel, and the

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[40] Plaintiff's counsel will be awarded a fee when its claims are mooted by the defendants' actions during the course of litigation if: the litigation was meritorious when filed, the action mooting the litigation produced a similar benefit sought by the litigation, and there was a causal relationship between the litigation and the action taken producing the benefit. *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006).

TWC has not argued that the collapse of the Comcast Deal (for reasons unrelated to anything LAMPERS did) should obviate the entitlement to a fee. If the Plaintiff achieved material benefits for the putative class, a fee award would be appropriate even if, for other reasons, the transaction did not close and, thus, the settlement was not implemented. *See, e.g.*, *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1119 (Del. Ch. 2011). The Court accepts the parties' conclusion that a mootness fee is owed.

standing and ability of counsel.[41] The benefits achieved here are not strictly limited to additional disclosures. In addition to disclosures, LAMPERS is entitled to credit for achieving a relaxation of a deal protection measure. Comcast had matching rights; in the event another suitor for TWC appeared, the time within which Comcast had to assert its matching rights was reduced from five days to three days. That provided some benefit to TWC's shareholders, but it is a benefit that is difficult to quantify and LAMPERS has offered no principled basis for assigning a number to this benefit, such as by providing expert opinion.[42] Reducing the duration of matching rights after another offer is received limits, to an extent, the risk a superior competitive bid will be discouraged, but the benefit—that a topping bid will be forthcoming with three days of matching rights but not five days—is speculative at best.[43] This is not an instance where matching rights were eliminated and, thus, no longer could deter a superior bid.

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[41] *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149–50 (Del. 1980).

[42] *Cf. In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *16, 21–22 (Del. Ch. Dec. 9, 2011).

[43] Indeed, this Court has observed, based on available context, that a reduction of the duration of a matching rights provision may have minimal value. *Acevedo v. Aeroflex Hldg. Corp.*, C.A. No. 7930-VCL, at 71–72 (Del. Ch. July 8, 2015)

LAMPERS can also properly claim shared credit for extracting additional disclosures. Assessing and valuing disclosures such as these are not easy tasks.[44] The two supplemental disclosures which LAMPERS has emphasized[45] have been summarized.[46] LAMPERS' brief in support of an award of a mootness fee only discusses these two supplemental disclosures in any detail.[47] Other supplemental disclosures were achieved but were of no more than nominal value; LAMPERS' decision not to address them in any detail tends to confirm the Court's perception of their relative benefit to the stockholders.[48]

As noted, companion cases were filed in New York, which became the *de facto* primary location for resolving the Comcast Deal merger litigation. There

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(TRANSCRIPT); *Duva v. GLG P'rs, Inc.*, C.A. No. 5512-VCS, at 45 (Del. Ch. Jan. 24, 2011) (TRANSCRIPT).

[44] *Cf. In re Trulia, Inc. S'holder Litig.*,—A.3d—, 2016 WL 325008, at *7 (Del. Ch. Jan. 22, 2016).

[45] Pl.'s Opening Br. 11; Pl.'s Reply Br. in Supp. of Application for an Award of Att'ys' Fees and Expenses 8–10.

[46] *See* text accompanying notes 12 & 13 *supra*.

[47] *See* Pl.'s Opening Br. 8, 26–27.

[48] Examples of other disclosures include information regarding discussions about the possibility that Comcast would invest in the debt or other securities of TWC and additional background to the decision by TWC's independent directors to retain separate counsel and financial advisors. Leviton Aff. Ex. A (demonstrating supplemental disclosures obtained by Plaintiffs); MOU Ex. A (same).

also were other cases filed in Delaware.[49] LAMPERS claims, and TWC does not seriously dispute, that an allocation to LAMPERS of 35% of the overall fee for the efforts of all the plaintiffs' would be appropriate.[50] LAMPERS maintains that the overall fee award should be $1.85 million,[51] which would yield a fee to its counsel of $647,500.

The benefits of the litigation have been identified. LAMPERS' counsel worked on an entirely contingent basis. The experience and ability of LAMPERS' counsel cannot be questioned. The litigation was not especially difficult, although the mere size of the transaction is noteworthy. That it was litigated, to an extent, in two courts added to the complexity. Both deal protection measures and disclosures required multi-faceted negotiating efforts. The case moved along at a relatively

[49] Plaintiffs in both Delaware and New York are collectively entitled to full credit for the benefits upon which the mootness fee would be based. Credit for obtaining the benefit must be shared between plaintiffs in New York and Plaintiffs in Delaware.
[50] This percentage traces back to an understanding reached by counsel for plaintiffs in both the Delaware and New York actions before the Comcast Deal was terminated. Pl.'s Opening Br. 10, 18.
[51] This number may be found in the Proposed Settlement, at ¶ 15, as the maximum amount of fees and expenses which Defendants would pay, subject to Court approval.

rapid pace. Several thousand pages of discovery were reviewed and four depositions were taken. Block & Leviton's lodestar was $267,123.75.[52]

In light of the small tweaking of the deal protection measures and the providing of some additional disclosures, which the Court accepts as material, even if not much more than material,[53] the Court is persuaded that a fair and reasonable fee for this kind of effort to moot the litigation would be, especially at the time the mootness was achieved, a comprehensive fee in the range of $325,000 to $500,000.[54] The award which LAMPERS seeks ($647,500) is beyond the upper end of the range in which fees for benefits such as those obtained for TWC stockholders typically and currently fall. An award like that, however, would

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[52] This is based on 569.45 hours (440.85 hours before signing the MOU). Also, Block & Leviton incurred $11,276.13 in expenses. Leviton Aff. ¶¶ 4, 6.

[53] As noted in *Trulia*, mootness dismissals do not pose the same sorts of systemic concerns as court-approved disclosure settlements. *Trulia*, 2016 WL 325008, at *9–10. Accordingly, *Trulia* does not require a "plainly material" inquiry in the mootness fee award context. *See id.* at *10.

[54] New York counsel and Block & Leviton worked together to advance the interests of the TWC shareholders in the face of the Comcast Deal. There may have been some overlap with the initial efforts on behalf of the shareholders. When the Court assesses the benefits achieved, there is only one set of benefits. The allocation of fees for achieving the benefits for which counsel in both New York and Delaware collectively earned credit is based on the agreement of plaintiffs' counsel which reflects a reasonable allocation.

require LAMPERS to demonstrate that it is entitled to full credit for the benefits achieved, but LAMPERS, quite properly, does not stake out that position. It acknowledges that 35% as a shared credit is appropriate.

The fundamental difficulty is that the Court does not accept that the $1,850,000 fee award, specified in the now superseded Proposed Settlement, is appropriate for all plaintiffs' counsel, collectively. The Court, as it understands its function, must determine a fair fee for a mootness settlement incorporating the full range of benefits obtained and then allocate a reasonable percentage of the fee award to LAMPERS for its efforts here. Taking the mid-point of that range ($412,500) and multiplying by the 0.35 share yields a fee, inclusive of expenses, of $144,375.[55] That, accordingly, is the amount that the Court awards LAMPERS for the efforts of its counsel regarding the mootness resolution of the challenge to the Comcast Deal.

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[55] The equivalent hourly rate, after deducting expenses and considering pre-MOU hours, is $302. If post-MOU hours are factored in, the hourly rate is even lower. For a case like this and for a firm like LAMPERS' counsel, the number is low. That may be a consequence of the less-than-spectacular benefits achieved and the impact of several firms involved in two-state litigation. Nonetheless, it is a fair and reasonable fee in these circumstances.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K