2021 WL 4777830 (S.D.N.Y.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. New York.

Albert SERION, Plaintiff,

v.

NUANCE COMMUNICATIONS, INC., Lloyd Carney, Mark Benjamin, Daniel Brennan, Thomas Ebling, Bob Finocchio, Laura Kaiser, Michal Katz, Mark Laret, and Sanjay Vaswani, Defendants.

No. 1:21-cv-04701-JPO.
August 20, 2021.

Memorandum of Law in Support of Monteverde & Associates PC's Motion for an Award of Attorneys' Fees and Expenses

Monteverde & Associates PC, Juan E. Monteverde (JM-8169), the Empire State Building, 350 Fifth Avenue, Suite 4405, New York, NY 10118, Tel.: (212) 971-1341, Fax: (212) 202-7880, Email: jmonteverde@monteverdelaw.com, for plaintiff Albert Serion.

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I. PRELIMINARY STATEMENT

Plaintiff's counsel, Monteverde & Associates PC ("Monteverde"), respectfully requests an award of attorneys' fees and expenses of $250,000 ("Fee Award"). As a result of Monteverde's efforts, Defendants [1] disclosed additional material information to

the public shareholders of Nuance Communications, Inc. ("Nuance" or the "Company") regarding the acquisition of Nuance by Microsoft Corporation ("Microsoft") ("Transaction"), that was previously omitted from the Definitive Proxy Statement ("Proxy"). Specifically, the disclosures provided key details omitted from the summaries of the financial analyses performed by Nuance's financial advisor, Evercore Group L.L.C. ("Evercore") in connection with the Transaction. Armed with these disclosures, Nuance shareholders were able to properly assess the analyses, make their own conclusions as to the fairness of the Transaction, and cast an informed vote. Accordingly, Monteverde have conferred a substantial benefit on Nuance shareholders, thus entitling Monteverde to the requested Fee Award. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Cent. R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885).

II. RELEVANT FACTUAL BACKGROUND

On April 11, 2021, the Company entered into an Agreement and Plan of Merger with Microsoft ("Merger Agreement"), whereby Nuance shareholders would receive $56.00 in cash for each share of Nuance common stock they owned ("Merger Consideration").

On May 17, 2021, Defendants authorized the dissemination of a materially deficient Proxy, whereby Defendants recommended that Nuance shareholders vote in favor of the Transaction at the special shareholder meeting on June 15, 2021 ("Shareholder Vote").

On May 26, 2021, Plaintiff Albert Serion ("Plaintiff") filed this action in the United States District Court for the Southern District of New York ("Action"), alleging violations of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78n(a), 78t(a) respectively, and United States Securities and Exchange Commission ("SEC") Rule 14a-9, 17 C.F.R. § 240.14a-9, and seeking to enjoin the Shareholder Vote until Defendants disclosed the material information concerning Evercore's financial analyses.

That same day, Monteverde emailed Defendants' counsel a copy of Plaintiff's filed Complaint and Defendants, through their counsel, accepted service.

On June 8, 2021, Defendants filed a Schedule 14A with the SEC as a supplement to the Proxy ("Supplemental Disclosures"),[2] which mooted Plaintiff's disclosure claims regarding Evercore's financial analyses.

Then on June 15, 2021, Nuance shareholders approved the Transaction at the Shareholder Vote.

Thereafter, on several occasions in early July, Monteverde reached out to Defendants' counsel via email to discuss a mootness fee, but Defendants' counsel refused to engage in discussions.

Therefore, Monteverde now moves for this Court's approval of the requested Fee Award in connection with Defendants' issuance of the Supplemental Disclosures, which allowed Nuance shareholders to make an informed voting decision on the Transaction.

III. MONTEVERDE IS ENTITLED TO THE FEE AWARD UNDER FEDERAL LAW

A. The Common Benefit Doctrine Supports Approval of the Fee Award

Courts have long permitted counsel who create a benefit for others to recover their expenses, including reasonable attorneys' fees, from those who enjoy the benefit conferred. *See, e.g., Boeing Co.*, 444 U.S. at 478; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Mills*, 396 U.S. at 394-95; *Comeaux v. Seventy Seven Energy, Inc.*, No. CIV-17-191-M, 2018 U.S. Dist. LEXIS 220373 (W.D. Okla. Feb. 26, 2018). An award of reasonable attorneys' fees and expenses is appropriate when counsel's efforts confer a "substantial" or "common" benefit upon the members of an ascertainable class, and where the court's

jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. *Mills*, 396 U.S. at 396; *Koppel v. Wien*, 743 F.2d 129, 135 (2d Cir. 1984). Although the beneficiaries must be an ascertainable class, the common benefit doctrine does not require the benefit to result from a class action. *Reiser v. Del Monte Properties Co.*, 605 F.2d 1135, 1140 (9th Cir. 1979); *accord Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1166 (Del. 1989) (upholding the award of attorneys' fees where "the shareholder commences an individual action with consequential benefit for all other members of a class, or for the corporation itself ...").

In *Mills*, the Supreme Court held that vindicating Section 14's statutory policy of "informed corporate suffrage" confers a substantial benefit upon stockholders sufficient to warrant awarding attorneys' fees:

> In many suits under § 14 (a) ... it may be impossible to assign monetary value to the benefit. Nevertheless, the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders ... [P]rivate stockholders' actions of this sort involve corporate therapeutics, and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute.

396 U.S. at 396. The *Mills* court further explained that requiring a corporation to pay plaintiffs attorneys' fees is the proper way to spread the costs proportionately among the benefitting shareholders. 396 U.S. at 396-97; *see also Lane v. Page*, 862 F. Supp. 2d 1182, 1255 (D.N.M. 2012) ("[C]ourts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in corporation's favor.").

Since *Mills*, it has become "well established that non-monetary benefits, such as promoting fair and informed corporate suffrage ... may support a fee award." *Koppel*, 743 F.2d at 134-135; *see Kopet v. Esquire Realty Co*, 523 F.2d 1005, 1008 (2d Cir. 1975). The Second Circuit has specifically held that procuring equitable relief under the Exchange Act serves as a basis for a fee request. *See Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 54 F.3d 69, 71 (2d Cir. 1995) (finding the "common-benefit rationale often is applied in suits by a group of shareholders against a corporation to vindicate some substantial right of all the shareholders of the company" and holding "that the promotion of corporate suffrage regarding a significant policy issue confers a substantial benefit regardless of the percentage of votes cast for or against the proposal at issue.").

Fee awards are granted based upon the relief achieved, and not by the state of the litigation or dependent upon the entering of a final judgment. Plaintiff's counsel are entitled to attorneys' fees when their complaint is dismissed as moot because the relief sought has been obtained. *Koppel*, 743 F.2d at 135; *Kahan v. Rosenstiel*, 424 F.2d 161, 164, 175 (3rd Cir. 1970). As explained in *Yablonski v. United Mine Workers*:

> The Supreme Court in Mills [] noted that the relevant inquiry is not into the technical posture of the litigation, but whether it has conferred a substantial benefit on the members of an ascertainable class.... As all lawyers know, a lawsuit does not always have to go to final adjudication on the merits in order to be effective. Assuming the effectiveness in terms of practical results, the litigating stage attained is relevant only to the amount of the fees to be allowed, and not to the issue of whether they should be awarded at all.

466 F.2d 424, 431 (D.C. Cir. 1972).

Therefore, when a suit has become moot, "the burden of proof as to causation - for purposes of determining the plaintiffs' eligibility for an award of attorneys' fees - shifts from the plaintiff to the corporation." *In re Citigroup S'holder Derivative Litig*., 2013 U.S. Dist. LEXIS 117741, at *11 (S.D.N.Y. Aug. 19, 2013) (citing *In re Pfizer S'holder Derivative Litig*., 780 F. Supp.2d 331, 335 (S.D.N.Y. 2011)). Indeed, where defendants have taken action to moot plaintiff's suit, "the burden properly shifts to defendants to establish the absence of a causal connection in order to defeat a claim for legal fees." *Koppel*, 743 F.2d at 135; *In re Citigroup S'holder Derivative Litig*., 2013 U.S. Dist. LEXIS 117741, at *11. Furthermore, the substantial benefit does not need to flow *solely* from the litigation in question for plaintiff's counsel to be entitled to recover an award of attorneys' fees and expenses. *Lewis v. Gen. Emp't Enters., Inc.*, No. 91 C 0291, 1992 U.S. Dist. LEXIS 5464, at *11 (N.D. Ill. Apr. 10, 1992) ("For a causal connection to be established, the lawsuit need not have been the only possible cause or even the primary cause of the corporation's actions."). For defendants to meet their burden on causation, they must persuade the court that the suit was not a consideration in their decision to issue disclosures. *Koppel*, 743 F.2d at 135.

Here, as further explained below, Monteverde conferred a substantial benefit on Nuance shareholders by commencing the Action, because it caused Defendants to issue the Supplemental Disclosures that mooted Plaintiff's claims regarding Evercore's financial analyses. Armed with the Supplemental Disclosures, the Company's shareholders were then able to make an informed voting decision on the Transaction. Defendants clearly took action to moot Plaintiff's suit, as they named the Action in the Supplemental Disclosures, and stated that the Supplemental Disclosures were meant to address the claims put forth by the named suits. *See* Exhibit A. Accordingly, the burden shifts to Defendants to establish the absence of a causal connection between the Action and the Supplemental Disclosures, which in this case is impossible, given that the Supplemental Disclosures specifically name Plaintiff's suit. As such, Monteverde is entitled to the requested Fee Award under the common benefit doctrine.

B. The Supplemental Disclosures Provide a Substantial Benefit for Shareholders

Courts have long recognized the value of corrective disclosures, like those at issue here. *See Cooperstock v. Pennwalt Corp.*, 820 F. Supp. 921, 924 (E.D. Pa. 1993) (citing *Mills*, 396 U.S. at 394-96) ("The 'substantial benefit' requirement [] has been interpreted broadly and has been held to include pecuniary as well as nonpecuniary gains."). Indeed, disclosures like the Supplemental Disclosures in this case are "presumably of greater value to the class than any potential award of damages ... as such information is of the greatest utility when it is available in a timely manner to inform the stockholders' decision making process." *In re Talley Indus., Inc. S'holders Litig*, No. 15961, 1998 Del. Ch. LEXIS 53, at *46 (Del. Ch. Apr. 9, 1998).

Here, the Supplemental Disclosures mooted Plaintiff's claims regarding Evercore's financial analyses by providing crucial information concerning the inputs and multiples used - information that Nuance shareholders were entitled to know prior to the Shareholder Vote, because shareholders are entitled to a fair summary of a banker's financial analyses. The financial analyses typically "address the most important issue to stockholders - the sufficiency of the consideration being offered to them for their shares." *In re Pure Res. S'Holders Litig*, 808 A.2d 421, 449 (Del. Ch. 2002). Indeed, the Company's shareholders must evaluate for themselves whether the Board appropriately relied upon Evercore's calculations. *See David P. Simonetti Rollover IRA v. Margolis*, 2008 Del. Ch. LEXIS 78, *30, 2008 WL 2588577 (Del. Ch. June 27, 2008) ("The real informative value of the banker's work is not in its bottom-line conclusion, but in the valuation analysis that buttresses that result.").

"When a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed." *In re Netsmart Techs., Inc. S'holders Litig*., 924 A.2d 171, 203-04 (Del. Ch. 2007). Thus, omission of these inputs and multiples, like in this case, leaves stockholders in an "informational vacuum," unable to make an informed voting decision. *Sealy Mattress Co. v. Sealy, Inc.*, 532 A.2d 1324, 1340-41 (Del. Ch. 1987) (granting an injunction for failing to disclose valuation information and analysis). Accordingly, as outlined in greater detail below, the Supplemental Disclosures conferred a substantial benefit on Nuance shareholders prior to the Shareholder Vote.

1. Evercore's Selected Public Company Trading Analysis

First, the Supplemental Disclosures provide Nuance shareholders with the previously withheld revenue multiples (TEV/CY21E Revenue), EBITDA multiples (TEV/CY21E Adjusted EBITDA), and cash flow multiples (MEV/CY21E LFCF) Evercore calculated for each of the 35 peer companies they selected to perform their *Selected Public Company Trading Analysis*, revealing that Evercore disregarded the higher values that caused a misleading valuation range.

Total enterprise value (TEV) is a measure of the company's total value, accounting for the company's market capitalization, long and short-term debt, and the cash on its balance sheet. [3] As done by Evercore in this analysis, enterprise values often serve as the first half of a financial ratio, in conjunction with financial metrics like Revenue, Adjusted EBITDA, and Levered Free Cash Flow (LFCF), that compares companies to their peers via the calculation of each financial metric as a multiple of the enterprise value for each company (*e.g.*, TEV/CY21E LFCF). *See id*. These enterprise multiples are then aggregated by bankers and used as a tool to value a subject company by comparing the relative enterprise multiples of each peer company to find the appropriate multiples for the industry, known as the reference range. *See id*. Next, the banker multiplies the financial metric (e.g., LFCF) of the subject company it is valuing (e.g., Nuance) by the selected multiple reference range (e.g., 40.0x - 50.0x) to calculate that company's enterprise value. Finally, the banker adjusts the calculated enterprise value to account for the company's net debt [4] and divides that number by the company's total shares to calculate the implied equity value per share (e.g., $33.83 to $42.29).

Here, Evercore did just that in its *Selected Public Company Trading Analysis*. Evercore compared the different enterprise multiples of the selected peer companies to Nuance using three different financial metrics: revenue multiples (TEV/CY21E Revenue) - 2021 revenue as a multiple of enterprise value; EBITDA multiples (TEV/CY21E Adjusted EBITDA) - 2021 EBITDA as a multiple of enterprise value; and cash flow multiples (MEV/CY21E LFCF) - 2021 LFCF as a multiple of enterprise value. From the comparison of these multiples for each of the peer companies, Evercore then selected a reference range for each of the three multiples.

Prior to the Supplemental Disclosures, the Proxy only provided the mean and median multiples for each of TEV/CY21E Revenue, TEV/CY21E Adjusted EBITDA, and MEV/CY21E LFCF. However, as courts have recognized, the disclosure of the individual multiples for each of the selected companies is important for shareholders to assess the comparative value of these expert selected companies and to understand how the financial advisor derived its ranges of fairness used to evaluate the Merger Consideration—including whether the financial advisor made flawed decisions that affected the outcome of the analysis. *See Smith v. Robbins & Myers*, 969 F. Supp. 2d 850, 873 (S.D. Ohio 2013) (finding that the omitted multiples constituted "critical financial" information, necessary for the company's shareholders to make an informed decision in connection with an all-cash merger, and to determine whether the financial advisor's analyses contained flaws, such as applying the lowest multiples from the range of multiples observed); *In re Celera Corp. S'holder Litig*, No. 6034-VCP, 2012 WL 1020471, at *32 (Del. Ch. Mar. 23, 2012), *aff'd in part & rev'd in part*, 59 A.3d 418 (Del. 2012) ("[A] fair summary of a comparable companies ... analysis probably should disclose the market multiples derived for the comparable companies"). As the Delaware Court of Chancery explained in *Turberg v. ArcSight, Inc.*, background multiples should be included in statements to stockholders recommending a merger transaction because such information is material to the stockholders' decision:

In terms of the... disclosures... there are things that I think are very helpful... *if you were to consider what really constitutes a fair summary, then the background multiples should be in there, just like they're in there when you give them to the board*.... [y]ou would never see a board book that would go to the board without the background multiples. You would never expect the board to simply hear from the banker, "Oh, well, we selected the range." And one would not want to defend the due care injunction case where that was the situation.

C.A. No. 5821-VCL (Del. Ch. Sept. 20, 2011) (Settlement Hr'g Tr. at 43:4-15) **(Monteverde Decl., Exhibit B)**.

The Supplemental Disclosures offer a perfect example of why this is true. Here, the Supplemental Disclosures revealed that Evercore omitted numerous multiples that were above 75.0x, which resulted in artificially low reference ranges and implied per share equity values:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
Exhibit A at 5.

Evercore selected these comparable companies because they are publicly traded companies that Evercore, in its professional judgment and experience, considered relevant to Nuance for purposes of its financial analyses. However, 15 of the 35 selected companies had TEV/CY21E Adjusted EBITDA multiples above 75.0x that were discarded by Evercore as "Not Meaningful" (NM) and 18 of the 35 selected companies (more than half) had TEV/CY21E LFCF multiples above 75.0x that were discarded by Evercore as "Not Meaningful" (NM). The disclosure of Evercore's decision to ignore and discard the data points that would show Nuance to be worth significantly more than the implied equity range serves as critical qualifying information [5] to Nuance shareholders. It alerted them to the fact that Evercore effectively skewed the valuation analysis downward yielding lower ranges of "fairness" than otherwise would have resulted using the full set of data that they determined was relevant to the financial analysis of Nuance.

These ranges of fairness are an easy, numerical reference point used by shareholders to determine whether the merger consideration is fair - if the merger consideration falls within the ranges of fairness, then it is perceived to be fair. Had the *Selected Public Company Trading Analysis* utilized all the 75.0x+ multiples discarded as NM, it is likely that the low end of the valuation range would have exceeded $56. Without the disclosure of the individual multiples, the Company's shareholders would have been unaware that Evercore derived ranges of fairness using inappropriate, downward skewed multiples.

Accordingly, the Supplemental Disclosures provided a substantial benefit to Nuance shareholders by correcting the misleading summary from the Proxy and allowing them to accurately assess the valuation of the Company and the fairness of the Transaction.

2. Equity Research Analyst Price Targets

Second, the Supplemental Disclosures provide Nuance shareholders with the previously withheld research analysts' price targets for Nuance as of April 8, 2021 (three days prior to execution of the Merger Agreement) showing that wall street experts predicted the value of Nuance to greatly exceed the $56 Merger Consideration.

A price target is the price at which a wall street analyst believes the stock to be fairly- valued relative to its projected and historical earnings and represents an analyst's valuation of the company's future stock price. [6] The value of the Company as determined by industry experts is obviously important for shareholders for their evaluation of the fairness of the Merger Consideration. As such, price targets should be presented to shareholders in a fair, and non- misleading fashion. *See Robbins & Myers*, 969 F. Supp. 2d at 874 ("[I]f a Proxy discloses valuation information, it must be complete and accurate."). Yet, the Proxy failed to provide a fair summary of the price targets Evercore observed in rendering its fairness opinion.

The Proxy summarily stated that the range of price targets for Nuance was $45.00 to $65.00. Although literally true, as the Supplemental Disclosures reveal, this summary misleadingly omits the fact that seven of the eight price targets exceeded the value of the Merger Consideration:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
Exhibit A at 8.

The logical inference from the summary range provided in the Proxy is that the Merger Consideration falls squarely in line with the expectations of wall street experts, and, thus, represents fair consideration for their shares. However, as evident from this more fulsome disclosure, this is not true. The overwhelming majority of wall street experts predicted Nuance to substantially outperform the valuation implied by the Merger Consideration. This critical qualifying information, *infra*, was important for shareholders in evaluating the fairness of the Transaction.

Accordingly, the Supplemental Disclosures provided a substantial benefit to Nuance shareholders by correcting the misleading summary from the Proxy and allowing them to accurately assess the valuation of the Company and the fairness of the Transaction.

C. The Requested Fee Award is Reasonable

In this case, the Fee Award is reasonable under the *Johnson* factors adopted by the Second Circuit. *See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 493 F.3d 110, 114 n.3 (2d Cir. 2007) (citing the twelve factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)); *In re AOL Time Warner S'holder Derivative Litig.*, No. 02 Civ. 6302 (CM), 2009 U.S. Dist. LEXIS 124372, at *22-*23 (S.D.N.Y. Nov. 9, 2009). The twelve *Johnson* factors are as follows: (i) the time and labor required; (ii) the novelty and difficulty of the question presented by the case; (iii) the skill requisite to perform the legal service properly; (iv) the preclusion of other employment by the attorneys due to acceptance of the case; (v) the customary fee; (vi) whether the fee is fixed or contingent; (vii) any time limitations imposed by the client or the circumstances; (viii) the amount involved and the results obtained; (ix) the experience, reputation and ability of the attorneys; (x) the undesirability of the case; (xi) the nature and length of the professional relationship with the client; and (xii) awards in similar cases. *AOL Time Warner*, 2009 U.S. Dist. LEXIS 124372, at *23. As shown below, application of the relevant *Johnson* factors demonstrates that the requested Fee Award should be granted to Monteverde.

1. The Time and Labor Required, and Time Limitations Imposed by the Circumstances

Monteverde diligently worked to ensure that the Supplemental Disclosures were made sufficiently in advance of the Shareholder Vote, which is difficult given the "fast-moving process typical in the merger context." *In re Xoom Corp. Stockholder Litig.*, No. 11263-VCG, 2016 Del. Ch. LEXIS 117, *9-10 (Del. Ch. Aug. 4, 2016). Monteverde succeeded, as the Defendants issued the Supplemental Disclosures one week prior to the Shareholder Vote, which gave Nuance shareholders time to review the Supplemental Disclosures and make an informed voting decision. Monteverde reviewed SEC filings, including the Proxy; drafted the Complaint; communicated with Defendants' counsel regarding service; evaluated moving for a preliminary injunction; reviewed the Supplemental Disclosures; and pursued this Fee Award.

In addition, the Shareholder Vote placed time limitations on Monteverde, as Monteverde needed to cause issuance of the Supplemental Disclosures sufficiently in advance of the Shareholder Vote, to allow shareholders time to make an informed voting decision. Accordingly, although Monteverde's time did not exceed 100 hours,[7] Monteverde should not receive a lesser fee for resolving the Action quickly because, as in this case, "it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2002); *Olson v. ev3, Inc.*, 2011 Del. Ch. LEXIS 34, at *49 (Del. Ch. Feb. 21, 2011) ("Counsel should not be penalized for achieving complete victory quickly.").

2. The Skill Requisite to Perform the Legal Service Properly, the Experience, Reputation and Ability of the Attorneys, and the Preclusion of Other Employment

Given the "complexity and societal importance of stockholder and derivative litigation," skilled counsel is required to represent shareholders in these actions. *Cohn v. Nelson*, 375 F. Supp. 2d 844, 866 (E.D. Mo. 2005); *see In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 172 (S.D.N.Y. 2007) ("[s]ecurities class litigation is notably difficult and notoriously

uncertain."). Fortunately, Monteverde are experienced securities litigators that regularly protect stockholder rights in this Court and nationally. [8] Indeed, Monteverde has been listed in the Top 50 in the 2018 through 2020 ISS Securities Class Action Services Reports. *Id.* Most notably, Monteverde has changed the law in a significant victory in *Varjabedian v. Emulex Corp.*, 888 F.3d 399 (9th Cir. 2018), creating a 5 to 1 circuit split that lowered the standard of liability under Section 14(e) of the Exchange Act in the Ninth Circuit. Monteverde then successfully preserved this victory by obtaining dismissal of a writ of certiorari as improvidently granted at the United States Supreme Court. *Emulex Corp. v. Varjabedian*, 139 S. Ct. 1407 (2019). Therefore, Monteverde's experience and results demonstrate their standing and ability.

Finally, Monteverde is a small law firm, and acceptance of this Action necessarily precluded them from devoting resources to other cases. *See Denton v. Pennymac Loan Servs., LLC*, 252 F. Supp. 3d 504, 518 (E.D. Va. 2017) (accounting for the fact that counsel "is a small law firm and thus representing a client on a contingent fee ... basis necessarily involved loss of other opportunities.").

3. The Contingent Fee and the Undesirability of the Case

Courts recognize "that an attorney may be entitled to a much larger fee when the compensation is contingent," in order to compensate counsel for undertaking litigation with the risk of non-payment and to encourage future meritorious suits. *Xoom*, 2016 Del. Ch. LEXIS 117 at *13-14; *City of Providence v. Aeropostale, Inc.*, 2014 U.S. Dist. LEXIS 64517, at *39 (S.D.N.Y May 9, 2014) (holding the risk associated with undertaking a case on a contingent basis is an important factor when determining a fee award). Indeed, this Court should consider that Monteverde undertook representation of a small shareholder on a contingent basis, who otherwise likely would have been unable to pay for counsel to protect his corporate suffrage rights. Further, the Fourth Circuit has long recognized that:

> The contingency of compensation ... is highly relevant in the appraisal of the reasonableness of any fee claim. The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

McKittrick v. Gardner, 378 F.2d 872, 875 (4th Cir. 1967). Accordingly, Monteverde litigated this Action entirely on a contingent fee basis with the risk of non-payment, which makes this case highly undesirable for most other attorneys to undertake. As such, Monteverde's compensation should reflect a premium for this risk.

4. Awards in Similar Cases

The Supplemental Disclosures provided the type of disclosures that have supported fee awards in federal courts consistent with the requested Fee Award here. In Ohio federal court, Monteverde was awarded $425,000 in attorneys' fees for obtaining key inputs related to the banker analysis in support of its fairness opinion. *Solak v. Consolino*, C.A. No. 5:16-cv-02470- SL (N.D. Ohio May 31, 2017). [9] Although it was in the context of a settlement, the scope of release was narrow and limited to disclosures, and thus more similar to a mootness fee scenario like here. Similarly, in the District of Delaware, Monteverde received a $280,000 mootness fee for obtaining additional material information regarding the financial advisor's analysis. *Sehrgosha v. Kindred Healthcare, Inc., et al.*, Case No. 1:18-cv-00230-RGA (D. Del. Feb. 14, 2019) (note other cases were on file and obtained a separate fee). [10] In the context of pure mootness fee cases, federal courts have awarded fees for supplemental disclosures consistent with or greater than the requested Fee Award:

Case	Fee Awarded
Rice v. Genworth Financial Incorporated, 3:17-cv-00059- REP, (E.D. Va. June 1, 2018) (Final Order and J.) **(Monteverde Decl., Exhibit F)**	$625,000
In re Gigamon Stockholder Litig., C.A. No. 2017-0854-KSJM, 2019 Del. Ch. LEXIS 969 (Del. Ch. Apr. 12, 2019)	$500,000
Hamil v. Ambry Genetics Corp., C.A. No. 2017-0587-AGB, 2019 Del. Ch. LEXIS 584, at *1 (Del. Ch. Jan. 8, 2019)	$450,000
Uzun v. Arris Int. Inc., Case No. 18-CV-05555-WMR (N.D. Ga. May 27, 2020) **(Monteverde Decl., Exhibit G)**	$437,500
Kim v. BATS Global Markets, Inc., No. 2:16-cv-02817 (D. Kan. Jan 13, 2017) **(Monteverde Decl., Exhibit H)**	$350,000
Garcia v. Kate Spade & Co, No. 17-cv-4177 (S.D.N.Y. Aug. 28, 2017) **(Monteverde Decl., Exhibit I)**	$320,000
JoelRosenfeldIRA v. Cynosure, Inc., et al., Civ. Action No. 17-10309 (D. Mass. Feb. 5, 2018) **(Monteverde Decl., Exhibit J)**	$300,000

5. The Nature and Length of the Professional Relationship with the Client

This is the first case Monteverde is representing Plaintiff in, and as mentioned above, Monteverde is doing so on a contingent fee basis. Monteverde's professional relationship with Plaintiff has spanned the duration of this Action, which up until this point has been approximately three months.

6. The Results Obtained

The results obtained by Monteverde - namely causing issuance of the Supplemental Disclosures, was discussed in great detail above. *See supra* § III(B).

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In sum, Monteverde have conferred a substantial benefit on Nuance shareholders by causing issuance of the Supplement Disclosures that cured the materially misleading defects of the Proxy and allowed shareholders to make an informed voting decision. Accordingly, Monteverde is entitled to the requested Fee Award.

IV. THE FEE AWARD IS ALSO SUPPORTED UNDER STATE LAW

Since Nuance is incorporated in Delaware, Monteverde is entitled to a Fee Award under Delaware's mootness doctrine as well, for conferring a benefit on Nuance shareholders. Under the mootness doctrine, Monteverde is entitled to recover attorneys' fees and expenses when: "(1) the suit was meritorious when filed; (2) the action producing [a] benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and (3) the resulting corporate benefit was causally [sic] related to the lawsuit." *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 850 (Del. Ch. 1998). As discussed in detail above, Monteverde has met these three requirements. Moreover, in determining the appropriate fee award, Delaware courts apply the *Sugarland* factors, [11] which are parallel to the *Johnson* factors and thus addressed above.

"A mootness fee can be awarded if the disclosure provides some benefit to stockholders, whether or not material to the vote," because a plaintiff is dismissing only his interests and not the interests of a class. *Xoom*, 2016 Del. Ch. LEXIS 117 at *9-10; *In re Del Monte Foods Co. S'holders Litig*., No. 6027-VCL, 2011 Del. Ch. LEXIS 94, at *26, *35-36 (Del. Ch. June 27, 2011) (stating when a plaintiff "generates benefits for the corporation or its stockholders, Delaware law calls for an award of attorneys' fees and expenses ....").

In Delaware, fee awards for supplemental disclosures regarding banker analyses and relationships cluster around $400,000-$500,000. *In re Del Monte Foods Co. S'holders Litig*., No. 6027-VCL, 2011 Del. Ch. LEXIS 94, at *33; *In re Wyeth Sholders Litig*, C.A. 4329-VCN, at 37-38, 2010 Del. Ch. LEXIS 261, at *9 (Del. Ch. June 29, 2010) (awarding $460,100); *In re Sepracor Inc. S'holders Litig*., C.A. 4871-VCS, at 19-21, 2010 Del. Ch. LEXIS 260, at *10 (Del. Ch. May 21, 2010) (awarding $550,000). Further, Monteverde have also recently obtained several mootness fee awards in Delaware. *See, e.g., Bachmeier v. Tansey, et al*., C.A. 2020-0812- SG (Del. Ch. 2020) ($240,000 fee award); [12] *Doaty v. Breslow, et al*., C.A. 0763-MTZ (Del. Ch. 2020) ($275,000 fee award). [13]

As discussed above, Monteverde secured the disclosure of beneficial Supplemental Disclosures that cured the materially misleading defects of the Proxy and enabled Nuance stockholders to cast an informed vote on the Transaction. Accordingly, Monteverde is entitled to the requested Fee Award under Delaware law as well.

V. CONCLUSION

For these reasons, Monteverde respectfully requests that the Court grant this Fee Award.

Dated: August 20, 2021
Respectfully submitted,

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Footnotes

1 All capitalized terms that are not defined herein have the same meanings as set forth in the Complaint.

2 The Supplemental Disclosures are attached as Exhibit A to the Declaration of Juan E. Monteverde in Support of Monteverde & Associates PC's Motion for an Award of Attorneys' Fees and Expenses ("Monteverde Decl.").

3 Jason Fernando, *Enterprise Value - EV*(Feb. 20, 2021), Enterprise Value (EV) Definition, Formula, & Examples (investopedia.com).

4 The amount of net debt utilized by Evercore was also omitted from the Proxy and obtained in the Supplemental Disclosures.

5 It is well-established that the federal securities laws prohibit misleading "half-truths"— representations that state the truth so far as it goes, while omitting critical qualifying information. *E.g.,* *Campbell v. Transgenomic, Inc.*, 916 F.3d 1121, 1125 (8th Cir. 2019) (citing *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2000, 2000 n.3 (2016) and *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 239-40 (2d Cir. 2016)).

6 Carla Tardi, *Price Target* (Feb. 16, 2021), https://www.investopedia.com/terms/p/pricetarget.asp

7 Lodestar review or cross check does not seem appropriate here because Defendants mooted the claims to avoid litigation. However, Monteverde will make billing records available in camera if the Court wishes to consider its lodestar.

8 *See* Monteverde Firm Resume is attached as Exhibit C to the Monteverde Decl.

9 Attached as Exhibit D to the Monteverde Decl.

10 Attached as Exhibit E to the Monteverde Decl.

11 The *Sugarland* factors consist of: (i) the amount of time and effort applied to the case by counsel for the plaintiff; (ii) the relative complexities of the litigation; (iii) the standing and ability of petitioning counsel; (iv) the contingent nature of the litigation; (v) the stage at which the litigation ended; (vi) whether the plaintiff can rightly receive all the credit for the benefit conferred or only a portion thereof; and (vii) the size of the benefit conferred. *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).

12 Attached as Exhibit K to the Monteverde Decl.

13 Attached as Exhibit L to the Monteverde Decl.