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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LUIGI CRISPO, Plaintiff, v. ELON R. MUSK, X HOLDINGS I, INC. AND X HOLDINGS II, INC. Defendants.	)	C.A. No. 2022-0666-KSJM

OPENING BRIEF IN SUPPORT OF PLAINTIFF'S APPLICATION FOR MOOTNESS FEE

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NATURE AND STAGE OF PROCEEDINGS

Plaintiff Luigi Crispo seeks an award of $3 million in attorney's fees and expenses in this class action to enforce the rights of the stockholders of Twitter, Inc. ("Twitter") against Defendant Elon Musk and his acquisition vehicles ("Musk") under an April 25, 2022 Agreement and Plan of Merger (the "Merger Agreement").[1] This action was mooted on October 6, 2022 when Musk retracted his repudiation of the Merger Agreement and Twitter and Musk agreed to consummate Musk's acquisition of Twitter's shares by merger for $54.20 per share (the "Merger").

In addition to the usual mootness fee issues this opening brief addresses unique issues, including:

(a) the effect of the Court's October 11, 2022 opinion addressing Musk's motion to dismiss[2];

(b) whether estoppel bars Twitter from asserting that the Merger Agreement was not intended to benefit Twitter's stockholders; and

(c) whether Musk's anticipatory repudiation of the Merger Agreement created a ripe damages claim.

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[1] Twitter agreed to this fee request being determined in this action.

[2] *Crispo v. Musk*, 2022 WL 6693660 (Del. Ch. Oct. 11, 2022) ("Opinion, at *___").

STATEMENT OF FACTS

A. The Merger Agreement and Musk's Repudiation

Twitter and Musk entered into the Merger Agreement on April 25, 2022. Over the next two months, Musk indicated in a series of tweets, SEC filings and lawyers' letters that he did not intend to perform the Merger Agreement.[3] In a July 8, 2022, letter from his lawyers to Twitter, Musk unequivocally repudiated the Merger Agreement, purporting to terminate that agreement.[4]

B. The Litigation

On July 12, 2022 Twitter filed an action in this Court against Musk seeking specific performance of the Merger Agreement. In its complaint and its proxy statement for the Twitter stockholder vote on the Merger Agreement, Twitter acknowledged that the Merger Agreement was intended for the benefit of its stockholders.[5] Twitter sought expedited proceedings "to protect Twitter and its stockholders," asserting that "any delay harms Twitter stockholders" and "costs Twitter stockholders" and that Musk was "shifting the market risk he had assumed"

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[3] Verified Shareholder Class Action Complaint (Trans. Id 67859708) ("Compl.") ¶¶45-54.

[4] *Id.* ¶55.

[5] *Id.* ¶26.

to Twitter's stockholders.[6] On July 19, 2022, the Court granted expedition because the longer the Merger remained in limbo "the greater the risk of irreparable harm to the sellers and to the target itself."[7] Trial was scheduled to begin on October 17, 2022.

On July 29, 2022, Plaintiff filed his Complaint against Musk and his acquisition entities, seeking specific performance of the Merger Agreement or, in the alternative, damages for Musk's deliberate breach of his obligation under the Merger Agreement to purchase the shares of Twitter's stockholders for $54.20 per share. Musk moved to dismiss, there was rapid briefing and argument was held on September 19, 2022.

Twitter and Musk vigorously litigated the specific performance claim. In late September and early October, Musk and Twitter engaged in settlement discussions, which included negotiations for completion of the Merger at a price less than $54.20

[6] Twitter July 12, 2022 Motion to Expedite Proceedings (Trans. Id 67812653) ¶¶1, 37; July 19, 2022 Transcript and Rulings of the Court on Plaintiff's Motion to Expedite ("July 19, 2022 Transcript") (Trans. Id 67895572), p. 26.

[7] July 19, 2022 Transcript, p. 63. *See also id.* at 70 ("the reality is that delay threatens irreparable harm to the sellers and Twitter").

per share.[8] However, Twitter's Board and management sought conditions, including dismissal of Musk's counterclaims directed at their conduct.[9]

C. Musk Retracts His Repudiation and He and Twitter Agree to Consummate the Merger Agreement at $54.20 Per Share

On October 3, 2022, Musk's counsel delivered a letter to Twitter stating that Musk intended to close the Merger on the terms of the Merger Agreement at the $54.20 price.[10] The next day, Twitter responded, saying Twitter intended to close the Merger at $54.20 per share.[11]

On October 6, 2022, Musk moved to stay the Twitter litigation as moot because he had retracted his repudiation and the Merger would close by October 28, 2022.[12] Twitter opposed the stay, claiming the Merger should close on October 10,

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[8] Kali Hays, *Elon Musk and Twitter Came Close To A Deal At $50 Per Share. Here's Why It Didn't Work Out*, BUSINESS INSIDER (Oct. 10, 2022), https://www.businessinsider.com/elon-musk-twitter-discussed-deal-50-a-share-talks-ended-2022-10 ("Came Close"); Lauren Hirsch and Kate Conger, *Judge Grant's Elon Musk's Request to Delay Trial with Twitter*, N.Y. TIMES (Oct. 6, 2022) https://www.nytimes.com/2022/10/06/technology/elon-musk-twitter-trial.html ("Delay Trial"); Cara Lombardo and Alexa Corse, *Elon Musk and Twitter at Odds Over Terms of Agreement to Close Deal*, WALL STREET JOURNAL (Oct. 5, 2022) https://www.wsj.com/articles/elon-musk-and-twitter-discussed-price-cut-to-44-billion-takeover-in-recent-weeks-11665017788 ("Odds Over Terms").

[9] *Id.*

[10] Defendants and Counterclaim-Plaintiffs' Motion to Stay Pending Closing of the Transaction (Trans. Id 68223039) ("Musk Stay Motion") ¶12.

[11] *Id.* ¶13.

[12] *Id.* ¶¶1-4, 15-18, 26.

2022.[13] Later on October 6, 2022, the Court issued a letter ruling granting a stay until October 28, 2022 "to permit the parties to close on the transaction."[14] The Court issued the Opinion on October 11, 2022.

[13] October 6, 2022 Letter from Kevin R. Shannon, Esquire (Trans. Id 68223280), p. 3 ("Oct. 6 2022 Shannon Letter").

[14] October 6, 2022 Letter of Hon. Kathaleen St. Jude McCormick (Trans. Id 68224135) ("October 6 Letter Order").

ARGUMENT

A mootness fee is appropriate under the corporate benefit doctrine if (i) the suit was meritorious when filed, (2) an action producing a corporate benefit was taken before a judicial resolution, and (3) there was some causal connection between the suit and the corporate benefit.[15]

I. PLAINTIFF'S CLAIMS WERE MERITORIOUS WHEN FILED

A. Preliminary Note on Meritorious Claims

Plaintiff's Complaint asserted claims against Musk for (i) specific performance, (ii) contract damages, and (iii) breach of fiduciary duty, based on Musk's repeated and unequivocal statements to Twitter, to this Court and in multiple SEC filings that he did not intend to proceed with the Merger.

The Opinion said Plaintiff did not have third-party beneficiary standing for the specific performance claim and that Musk did not owe a fiduciary duty as a controlling stockholder of Twitter.[16] While Plaintiff respectfully disagrees with those rulings, it is unnecessary to revisit them directly, because the Court held in abeyance pending supplemental briefing whether Plaintiff had standing on the damages claim,[17] and that claim was meritorious when filed. Nonetheless, because

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[15] *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 432 (Del. 2012); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079-80 (Del. 1997).

[16] Opinion, at *11-12.

[17] *Id.* at *11.

determining whether Plaintiff's damages claim was meritorious may require some consideration of the status and applicability of the Opinion, and because Twitter will presumably rely heavily on the Opinion in its answering brief, Plaintiff will address it at the outset.

B. The Opinion Does Not Control Whether Plaintiff's Suit Was Meritorious When Filed

The Court devoted considerable time and effort to the Opinion. Yet the Opinion does not constitute a controlling determination that Plaintiff's suit was not meritorious when filed.

First, the Opinion was issued after the case had been mooted by Musk's retraction of his repudiation of the Merger Agreement and the determination by Musk and Twitter to close the Merger. Because there was no longer a live controversy, the Opinion was advisory.

Second, the Opinion was interlocutory, subject to revision or withdrawal, and not appealable. The Opinion was not "so ordered" and no implementing order was ever entered. It is not the law of the case because it was issued when the case was mooted and no longer proceeding to judgment.

Third, the Opinion did not fully resolve the motion to dismiss. It held the claim for damages and other issues in abeyance, pending further briefing.

Because Plaintiff's Suit Was Moot by October 6, 2022, the Opinion Was Advisory

On October 3, 2022 Musk notified Twitter that he intended to close the Merger. He confirmed his intention on October 4, 2022 in a 13D amendment and a letter to this Court. In an October 4, 2022 letter to the Court, Twitter stated that it intended to close the transaction. Musk's October 6, 2022 Motion to Stay stated that a trial on Twitter's claim for Musk to specifically perform under the Merger Agreement was unnecessary because "Defendants have agreed to do exactly that."

Because he was proceeding with the Merger, Musk stated that:

> As a result there is no need for an expedited trial to order Defendants to do what they are already doing and this action is now moot.[18]

Musk repeatedly acknowledged that there was no live controversy because the agreement of Musk and Twitter to close the Merger had mooted the specific performance claim.[19] On October 6, 2022 the Court granted Musk's Motion to Stay because Musk had "agreed to close on the Agreement and Plan of Merger dated

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[18] Musk Stay Motion ¶¶1, 16-17 citing *Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co. of Texas*, 962 A. 2d 205, 209 (Del. 2008) (quoting *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480 (Del. 1989) and *Supernus Pharms., Inc. v. Reich Consulting Grp., Inc.*, 2021 WL 5046713, at *4 (Del. Ch. Oct. 29, 2021) (specific performance claim is moot when party agrees to provide the demanded performance).

[19] Musk Stay Motion ¶¶15-17.

April 25, 2022."[20] Consequently, Plaintiff's suit was moot as of October 6, 2022, rendering the Opinion issued on October 11, 2022 advisory.

Delaware's Courts do not decide moot cases or render advisory opinions:[21]

> First, judicial resources are limited and must not be squandered on disagreements that have no significant current impact . . . Second, to the extent that the judicial branch contributes to law creation in our legal system, it legitimately does so interstitially and because it is required to do so by reason of specific facts that necessitate a judicial judgment. [Citation omitted] Whenever a court examines a matter where facts are not fully developed, it runs the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law.[22]

This Court should not be "inappropriately drawn . . . into the granting of an advisory opinion upon a significant question of corporation law[.]"[23] Such advisory opinions, instead of being precedent, may be withdrawn.[24]

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[20] October 6, 2022 Letter Order.

[21] *Stroud*, 552 A.2d at 480.

[22] *Id.* at 480-81, quoting *Schick, Inc. v. Amalgamated Clothing and Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987).

[23] *Stroud*, 552 A.2d at 481.

[24] *Id.* at 482 (directing Court of Chancery to vacate advisory opinion).

The Opinion Was Partial, Interlocutory and Subject to Revision or Withdrawal

A Rule 12(b)(6) opinion, even if "so ordered," is an interlocutory ruling that can be reconsidered at any time and is subject to revision or withdrawal.[25] The Opinion was not so ordered. It was also interlocutory, not appealable, only partly granted a motion to dismiss, and did not reach certain issues.[26]

The Opinion is not "the law of the case." That doctrine "is little more than a management practice to permit logical progression toward judgment."[27] An interlocutory order can only be considered law of the case if it was rendered "in a procedurally appropriate way."[28] The Opinion was not issued in a procedurally appropriate way because the case was moot and, therefore, was not progressing toward judgment.

The agreement by Musk and Twitter to proceed with the Merger rendered Plaintiff unable to appeal the adverse portions of the Opinion. Vacatur is appropriate in the interest of justice when a party's right to appeal has been thwarted because his

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[25] *In re Mindbody, Inc.*, 2020 WL 5870084, at *34 n.309 (Del. Ch. Oct. 2, 2020); *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 2014 WL 5465535, at *5 (Del. Ch. Oct. 28, 2014); *Siegman v. Columbia Pictures Ent., Inc.*, 1993 WL 10969, at *3 (Del. Ch. Jan. 15, 1993); *In re CNX Gas. Corp. S'holders Litig*, 2010 WL 2705147, at *2 (Del. Ch. July 5, 2010).

[26] *Stroud*, 552 A.2d at 481-82.

[27] *CNX*, 2010 WL 2705147, at *2; *Siegman*, 1993 WL 10969, at *3.

[28] *Zirn v. VLI Corp.*, 1994 WL 548938, at *2 (Del. Ch. Sept. 23, 1994); *CNX*, 2010 WL 2705147, at *2; *Quadrant*, 2014 WL 5465535, at *5.

claims were mooted by the actions of others.[29] Vacatur prevents a non-appealable decision from having precedential or preclusive effect.[30]

C. It Is Reasonably Conceivable That Estoppel Bars Twitter From Asserting the Merger Agreement Was Not Intended For the Benefit of Its Stockholders

The Opinion was directed to the argument by Musk that Plaintiff lacked standing because the Merger Agreement was not intended to benefit the Twitter stockholders.[31] Plaintiff's claim for attorneys' fees is against Twitter not Musk. In public statements and statements to this Court in support of its specific performance claim and in obtaining expedited proceedings, Twitter, now controlled by Musk, repeatedly said that the Merger Agreement was intended to benefit the Twitter stockholders. Based on the allegations of the Complaint, it was reasonably conceivable that the doctrine of quasi-estoppel precludes Twitter from now changing its litigation position after gaining an advantage from its prior position that the

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[29] *Tyson Foods, Inc. v. Aetos Corp.*, 818 A.2d 145, 147-48 (Del. 2003); *Stearn v. Koch*, 628 A.2d 44, 46-47 (Del. 1993); *In re Appeal of Sun Life Assurance Co. of Canada*, 249 A. 3d 131, at *1 (Del. 2021) (TABLE).

[30] *Id.*

[31] In another example of shifting positions to serve changing litigation objectives, Musk is (ironically) now arguing in a California federal securities action that the forum selection clause in the Merger Agreement is binding on former Twitter stockholders. Defendant Elon Musk's Motion to Transfer or, In the Alternative to Dismiss at 11-14, *Pampena v. Musk*, N.D. Cal., Case No. 3:22-cv-05937-TLT.

Merger Agreement was for the benefit of stockholders.[32] It was also reasonably conceivable that judicial estoppel would prevent Twitter from asserting that the Merger Agreement was not intended to benefit Twitter stockholders because in persuading the Court to grant expedited proceedings in its specific performance action Twitter argued that the Merger Agreement was for the stockholders' benefit and specific performance was necessary to prevent irreparable harm to them from Musk's refusal to perform the agreement.[33]

As Plaintiff's Complaint alleged, Twitter's Complaint for specific performance of the Merger Agreement represented that Musk's refusal to honor "his obligations to Twitter and its stockholders" was harming the stockholders "and depriving them of their bargained for rights."[34] The Twitter Complaint also said that

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[32] *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008), *aff'd* 970 A.2d 252 (Del. 2009) (TABLE); *Henkel Corp. v. Innovative Brands Holdings, LLC*, 2013 WL 396245, at *9 (Del. Ch. Jan. 31, 2013); *Bank of N.Y. Mellon v. Commerzbank Capital Funding Tr. II*, 2012 WL2053299, at *1 (Del. Ch. May 31, 2012); *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 872-73 & n.241 (Del. 2015). Plaintiff does not need to show reliance for quasi-estoppel to apply. *RBC*, 129 A.3d at 873 n.241 (quoting *Barton v. Club Ventures Invs., LLC*, 2013 WL 6072249, at *6 (Del. Ch. Nov. 19, 2013)).

[33] *Motors Liquidation Co. DIP Lenders Tr. v. Allstate Ins. Co.*, 191 A.3d 1109, at *4 (Del. 2018) (TABLE) ("Judicial estoppel applies when a litigant's position 'contradicts another position that the litigant previously took and that the Court was successfully induced to adapt in a judicial ruling.'"); *In re Silver Leaf, L.L.C.*, 2004 WL 1517127, at *2 (Del. Ch. June 29, 2004).

[34] Compl. ¶26, 29; Twitter Complaint (Trans. ID 67812653) ¶¶1, 57, 146. *See also* Twitter Compl. ¶¶141-42 (citing the "interests of its stockholders").

the Merger Agreement's assurances that the "agreement would stick" were included "for the benefit of stockholders."[35] Twitter's irreparable harm allegations stated that Musk's refusal to consummate the Merger harmed "Twitter and its stockholders" and deprived them of "their bargained-for rights."[36] Twitter asserted Musk's breach "costs Twitter stockholders," whom he "owed $44 billion."[37] Twitter's merger proxy statement represented that the Merger Agreement was "for the benefit [of] our stockholders" and was to "protect their interest."[38]

Twitter relied on its assertions that Musk's failure to honor the Merger Agreement would harm Twitter's stockholders and deprive them of bargained for rights to convince the Court to grant expedited proceedings on its specific performance claim.[39] Having used such representations to its advantage in support of its specific performance claim, Twitter cannot now do a "self-interested 180 degree turn" by claiming the Merger Agreement was not intended to benefit the Twitter stockholders.[40] Therefore, it was reasonably conceivable that quasi-estoppel prevents Twitter from claiming it did not intend for the Merger Agreement to benefit

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[35] Compl. ¶26; Twitter Compl. ¶¶6, 38; July 19, 2022 Transcript, p. 26; Twitter Motion to Expedite Proceedings ¶1.

[36] Compl. ¶145.

[37] Twitter Motion to Expedite Proceedings ¶37; Oct. 6 2022 Shannon Letter at 3.

[38] Compl. ¶29.

[39] July 19, 2022 Transcript, pp. 63, 70.

[40] *Pers. Decision*, 2008 WL 1932404, at *7.

its stockholders.[41] Moreover, Twitter having obtained a favorable procedural ruling from this Court, it was reasonably conceivable that judicial estoppel precludes Twitter from now asserting that the Merger Agreement was not intended to benefit its stockholders.[42]

D. The Damages Claim Was Ripe When Filed Musk Had Repudiated the Merger Agreement

"Under Delaware law, repudiation is an outright refusal by a party to perform a contract[.]"[43] Undisputed facts in Plaintiff's Complaint establish that Musk had repudiated the Merger Agreement. He sought for months to undermine the Merger Agreement, asserting "[t]his deal cannot move forward" and having his counsel send letters indicating he did not intend to go through with the Merger.[44] On July 8, 2022,

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[41] *Barton*, 2013 WL 6072249, at *6-7 (denying summary judgment on quasi-estoppel claims); *Henkel*, 2013 WL 396245, at *9-10 (a better factual record or fact finding exercise required to determine quasi-estoppel claims).

[42] *Silver Leaf*, 2004 WL 1517127, at *2 (representation to New Jersey court that dispute could be litigated in this Court precluded assertion that this court lacked personal jurisdiction); *Houseman v. Sagerman*, 2015 WL 7307323, at *6 n.40 (Del. Ch. Nov. 19, 2015) (having represented that plaintiffs knew of quasi-appraisal remedy when merger closed to obtain denial of order to produce otherwise-privileged communications, plaintiffs were judicially estopped from later arguing one plaintiff was unaware of appraisal or quasi-appraisal rights when merger closed).

[43] *CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 758 A.2d 928, 931 (Del. 2000); *Neurvana Med., LLC v. Balt USA, LLC*, 2020 WL 949917, at *21 (Del. Ch. Feb. 27, 2020).

[44] Compl. ¶¶45-49, 51, 53, 55-58.

Musk purported to terminate the Merger Agreement.[45] Twitter advised Musk two days later that his purported termination was invalid and a repudiation of the Merger Agreement.[46] Musk continued his antics and Twitter filed suit to enforce the Merger Agreement on July 12, 2022.[47] Musk vehemently maintained he would not close the Merger.

Musk's Repudiation Created a Ripe Damages Claim

The undisputed facts make it far more than reasonably conceivable that Musk's unequivocal statements constituted an anticipatory repudiation of the Merger Agreement giving rise to a ripe claim for damages.[48] "If it is clear that the promisor intends not to perform his promise, there seems little reason to force the parties to wait to have their rights and obligations determined[.]"[49] An unequivocal statement that a promisor will not perform his promise makes a claim for damages ripe.[50] Musk's statements and conduct were a repudiation of the Merger Agreement

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[45] *Id*. ¶¶55-58; Opinion, at *2.

[46] Compl. ¶60. *See Dermatology Assocs. of San Antonio v. Oliver Street Dermatology Mgmt. LLC*, 2020 WL 4581674, at *19 (Del. Ch. Aug. 10, 2020) (Repudiation "is basically another word for wrongful termination").

[47] Compl. ¶¶61-64.

[48] *Carteret Bancorp, Inc. v. Home Grp., Inc.*, 1988 WL 3010, at *5 (Del. Ch. Jan. 13, 1988); *Veloric v. J.G. Wentworth, Inc.*, 2014 WL 4639217, at *15 (Del. Ch. Sept. 18, 2014).

[49] *Id.*

[50] *Carteret*, 1988 WL 3010, at *5; *Wong v. USES Holding Corp.*, 2016 WL 769043, at *2 (Del. Ch. Feb. 26, 2016); 4 Corbin on Contracts § 959 (1951).

through an outright refusal to perform his promise to purchase the Twitter stockholders' shares for $54.20 per share.[51]

An anticipatory repudiation entitles the non-breaching party to choose several different remedies, including lobbying the repudiating party to perform (such as through a suit for specific performance), asserting a damages claim for anticipatory breach or waiting for the time of performance and asserting a damages claim for actual breach.[52] The effects of a repudiation do not change because the repudiator is urged to perform or retract his repudiation.[53] Specific performance (i) is a matter of grace and not of right, (ii) rests within the Court's discretion, (iii) is granted only when damages are an inadequate remedy, and (iv) requires clear and convincing evidence of willingness and ability to perform and a favorable balance of equities.[54]

Twitter filed a specific performance action against Musk. Plaintiff's Complaint, filed July 29, 2022, also asserted a specific performance claim, but, as

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[51] *West Willow-Bay Ct., LLC v. Robino-Bay Ct. Plaza, LLC*, 2009 WL 458779, at *5 (Del. Ch. Feb. 23, 2009); *CitiSteel USA*, 758 A.2d at 931.

[52] *West Willow-Bay Ct.*, 2009 WL 458779, at *5; *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 78-79 (Del. Ch. 2013); 6 *Del. C.* § 2-610 (upon an anticipatory repudiation, the aggrieved party may await performance or resort to any remedy for breach even if he said he would await performance or urged retraction); Restatement (Second) of Contracts §§ 250, 253 (repudiation alone gives rise to a claim for damages for total breach).

[53] Restatement (Second) of Contracts § 257.

[54] D. Wolfe & M. Pittenger, *2 Corporate and Commercial Practice in the Delaware Court of Chancery*, § 16.03 [a], [b][1]-[4] (2d ed. 2021).

permitted by Chancery Court Rule 8(e)(2), pleaded an alternative damages claim based on Musk's repudiation of the Merger Agreement.[55] The pursuit of specific performance does not preclude a claim for damages or vice versa; the remedies are not inconsistent because both are based upon an affirmance of the contract.[56] Indeed, it is standard practice for a complaint for specific performance to include an alternative claim for damages.[57] Any election of remedies can occur at a later stage of the litigation.[58]

Because Twitter did not terminate the Merger Agreement, Musk could nullify his repudiation by a retraction.[59] Musk retracted his repudiation in early October 2022 by announcing that he intended to consummate the Merger. He thereby mooted both the specific performance and damages claims.

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[55] Compl. ¶¶ 78-81.

[56] 25 Williston on Contracts § 67.34 (4th ed.).

[57] Jonathan Levy, *Against Supercompensation: A Proposed Limitation on the Land Buyer's Right to Elect Between Damages and Specific Performance as Remedy for Breach of Contract*, 35 LOY. U. CHI. L.J. 555, 561 (2004); Donald H. Clark, *Will That Be Performance . . . or Cash: Semelhago v. Paramadevan and the Notion of Equivalence*, 37 ALBERTA L. REV. 589, 603 (1999).

[58] *Clark*, 37 ALBERTA L. REV. at 603; *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1190-92 (Del. 1988); *Carlyle Inv. Mgmt., L.L.C. v. Moonmouth Co. S.A.*, 2018 WL 5045716, at *2 (Del. Ch. June 28, 2018).

[59] Restatement (Second) of Contracts § 256; 6 *Del. C.* § 2-611(i); *Carteret*, 1988 WL 3010, at *6; *Meso Scale*, 62 A.3d at 78-79; *BioVeris Corp. v. Meso Scale Diagnostics, LLC*, 2017 WL 5035530, at *8 (Del. Ch. Nov. 2, 2017).

Tooley Does Not Show That a Ripe Damages Claim Was Not Reasonably Conceivable

Musk's ripeness argument relied on an out-of-context statement in *Tooley* that "any contractual … right to payment of the merger consideration did not ripen until the conditions of the agreement were met."[60] Musk's reading of "blurb language" from *Tooley* in "a decontextualized manner" is factually inapposite and inconsistent with Delaware law.[61] In *Tooley*, the plaintiffs did "not assert contractual rights under the merger agreement" and there was no repudiation of the Merger Agreement and no claim for anticipatory breach.[62]

The *Tooley* plaintiffs' breach of fiduciary duty claim was that extensions of a first-step tender offer, which the merger agreement specifically authorized, had delayed payment of the tender consideration, not the second-step merger consideration, by 22 days.[63] By its terms the two-step merger agreement in *Tooley* "*only became binding and mutually enforceable at the time the tendered shares*

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[60] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A. 2d 1031, 1034-35 (Del. 2004), the Supreme Court was actually quoting the Court of Chancery opinion, *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 2003 WL 203060 at *3 (Del. Ch. Jan. 21, 2003).

[61] *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 (Del. 2015).

[62] *Id.*

[63] *Tooley*, 2003 WL 203060, at *1-2.

ultimately were accepted for payment."[64] Therefore, the "contractual shareholder right to payment of the merger consideration did not ripen" until the tender offer closed, so "plaintiffs had no such contractual right that had ripened at the time of the extensions were entered into[.]"[65] However, *Tooley* recognized that "when their tendered shares were accepted for payment," the stockholders then had an "individual contractual right to payment."[66]

Con. Edison[67] Is No Authority That Plaintiff's Damages Claim Was Not Ripe

In *Consolidated Edison, Inc. v. Northeast Utilities* the target company (NU), not the acquirer (CEI), terminated the merger agreement.[68] NU did not seek specific performance. NU and eventually an NU stockholder asserted damages claims for the lost premium caused by CEI's breach of the merger agreement.[69] The Second Circuit reversed the denial of CEI's summary judgment motion on NU's claim and the denial of NU's motion for summary judgment on the stockholder's claim.[70] It

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[64] *Tooley*, 845 A.2d at 1035 (quoting *Tooley*, 2003 WL 203060, at *3) (italics in original).

[65] *Tooley*, 845 A.2d at 1034.

[66] *Tooley*, 845 A.2d at 1035 (quoting *Tooley*, 2003 WL 203060, at *3).

[67] *Consol. Edison, Inc. v. NE Utils.*, 426 F.3d 524 (2d Cir. 2005) ("*Con. Edison*").

[68] *Con. Edison*, 426 F.3d at 525, 526-27 ("Undoubtedly, the merger agreement confers on NU's shareholders certain rights as third-party beneficiaries . . .").

[69] *Id.* at 526.

[70] *Id.* at 531.

held that under the particular terms of the merger agreement the contractual right to the premium would not arise until after the Effective Time of the merger, which never occurred because NU terminated the merger agreement.

Con. Edison provides no basis for concluding that Plaintiff's damages claim was not meritoriousness when filed.

First, *Con. Edison* is a seventeen year-old federal, summary judgment decision under New York law. The different jurisdiction, different controlling law and different procedural posture render *Con. Edison* inapt as precedent.

Second, *Con. Edison* did not address an anticipatory repudiation damages claim. The target, not the buyer, had terminated the merger agreement. Musk's repudiation of the Merger Agreement created a ripe damages claim.

Third, *Con. Edison* held that under the particular provisions of the particular New York law merger agreement, the stockholders' right to the merger consideration did not arise until the merger was completed.[71] As *Con. Edison* explained:

> At and after the NU Effective Time, NU would no longer exist as an independent entity, but CEI would not yet have established the fund from which NU's shareholders would be paid. See Agreement, art. II, § 2.04.[72]

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[71] *Con. Edison*, 426 F. 3d at 527-29 ("the parties to the Agreement clearly created a third-party right, but just as clearly they took pains to assure that right was limited to a right to collect the shareholder premium if and when the merger happened").

[72] *Id.* at *529. Section 2.04 of the merger agreement in *Con. Edison* provided for creating an exchange fund following the Effective Time.

Fourth, the Second Circuit summarily rejected the prevention doctrine.[73] In contrast, Delaware applies the prevention doctrine where a buyer acts to prevent a merger from occurring.[74] It is reasonably conceivable that under the prevention doctrine and anticipatory repudiation the Twitter stockholders could recover damages because Musk's repudiation would have caused the non-occurrence of the Effective Time.[75]

E. The Damages Claim Was Meritorious When Filed

The Opinion Recognized That Plaintiff's Interpretation of Section 8.2 Was Reasonable

The Opinion concluded that Section 8.2 did not create third-party beneficiary ("TPB") standing for a specific performance claim, but held the "thorny legal issue" of whether it was reasonably conceivable that Plaintiff had TPB status to assert a contract damages claim against Musk in abeyance pending further briefing.[76]

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[73] *Con. Edison*, 426 F.2d at 529.

[74] *Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc*., 2021 WL 1714202, at *52-55 (Del. Ch. Apr. 30, 2021). *See also Murphy Marine Servs. of Del., Inc. v. GT USA Wilmington LLC*, 2022 WL 4296495, at *12-13 (Del. Ch. Sept. 19, 2022); *WaveDivision Holdings, LLC v. Millennium Digit. Media Sys. LLC*, 2010 WL 3706624, at *14 & n.110-11 (Del. Ch. Sept. 17, 2010).

[75] *W.D.C. Holdings, LLC v. IPI Partners, LLC*, 2022 WL 2235005, at *13 (Del. Ch. June 22, 2022); *Snow Phipps*, 2021 WL 1714202, at *52; *Murphy Marine*, 2022 WL 4296495, at *12; *WaveDivision*, 2010 WL 3706624, at *14. *See also* Restatement (Second) of Contracts § 245.

[76] Opinion, at *9-11.

Section 8.2 makes it reasonably conceivable that Plaintiff had TPB standing to assert a damages claim based on Musk's repudiation of the Merger Agreement.

Section 8.2 is an "Effect-Of-Termination-Provision" making the Merger Agreement void and broadly eliminating liability with two exceptions: a "Specified-Provision Exception" and a "Bad Conduct Exception."[77] "The Bad-Conduct Exception preserves the full panoply of contract damages, including expectation damages in the event of a willful breach."[78]

The Bad Conduct Exception of Section 8.2 provides that Musk's liability and damages for any knowing and intentional breach of the Merger Agreement shall include "the benefits of the transactions contemplated by this Agreement lost by the Company's stockholders . . . including lost stockholder premium."[79] The Opinion noted that this language "suggests that the parties to the Merger Agreement intended that the stockholders be restored to the same position they would have been in had the Merger Agreement been fully performed."[80] The Opinion further found that:

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[77] *AB Stable VIII LLC v. Maps Hotels and Resorts One LLC*, 2020 WL 7024929, at *103-04 (Del. Ch. Nov. 30, 2020); *aff'd*, 268 A.3d 198 (Del. 2021).

[78] *Id.* at 104.

[79] Musk repeatedly expressed refusal to perform would plainly be a "knowing and intentional" (i.e. deliberate) breach. *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 748 (Del. Ch. 2008).

[80] Opinion, at *9.

> The reference to "lost stockholder premium," therefore, provides Plaintiff's strongest argument that the parties to the Merger Agreement intended to confer some form of third-party beneficiary status to Twitter stockholders.[81]

Thus, the Opinion recognized that Plaintiff's interpretation of Section 8.2 was reasonable.

If there is more than one reasonable interpretation of a disputed agreement, consideration of extrinsic evidence is required to determine the parties' intended meaning.[82] A motion to dismiss the damages claim could be granted only if Defendant's interpretation of Section 8.2 was the only reasonable construction.[83] Given the Opinion's analysis, and the provisions of Sections 3.1 and 3.2, Section 8.2, at a minimum, rendered the Merger Agreement ambiguous as to whether, and makes it reasonably conceivable that, the stockholders were intended third-party beneficiaries as to the damages claim. Because Plaintiff offered a reasonable construction of Section 8.2 that supported the allegations of the Complaint, a motion to dismiss the damages claim could not be granted.[84] Therefore, the damages claim was meritorious when filed.

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[81] *Id.*

[82] *Airgas, Inc. v. Air Prods. and Chems., Inc.*, 8 A.3d 1182, 1190 (Del. 2010); *AT&T Corp. v. Lillis*, 953 A.2d 241, 253 (Del. 2008).

[83] *EMSI Acquisition, Inc. v. Contrarian Funds, LLC*, 2017 WL 1732369, at *7 (Del. Ch. May 3, 2017).

[84] *Id.*

The Opinion's Reliance on Extrinsic Evidence Confirms That the Damages Claim Could Not Be Dismissed

In considering the intent of Section 8.2, the Opinion posited that the language of Section 8.2 "appears to have emerged in response to" *Con. Edison*.[85] In suggesting Section 8.2 may have evolved from reactions by New York lawyers to *Con. Edison*, the Opinion said a 2007 article by two "transactional lawyers" and a reference in the Fleischer treatise to that article,[86] indicated the views of "one set of practitioners and one leading treatise" as to the origin and meaning of language "like" Section 8.2 "weighs against Plaintiff's construction of Section 8.2."

The Opinion said that "the parties have not had an opportunity to respond to the points raised (*sua sponte*) in this decision concerning Section 8.2 based on *Con. Edison*, Lewkow and Whoriskey or Fleischer."[87] This statement was only true as to Plaintiff, who had not had an opportunity to respond to these points because in two

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[85] Opinion, at *10.

[86] Opinion, at *10-11 & nn.77-83, citing Victor I. Lewkow and Neil Whoriskey, *Left at the Altar: Creating Meaningful Remedies for Target Companies*, The M&A Lawyer (Oct. 2007) ("Lewkow"); Arthur Fleischer et al., *Takeover Defense: Mergers and Acquisitions*, §19.06(c) (9th ed. 2022) ("Fleischer"). Other practitioners, however, have opined that *Con. Edison* should be confined to its facts and the specific language of the New York merger agreement in that case. Ryan D. Thomas and Russell E. Stair, *Revisiting Consolidated Edison—A Second Look at the Case that Has Many Questioning the Assumptions Regarding the Availability of Shareholder Damages in Public Company Mergers*, 64 Bus. L. 329, 332-33, 337-41 (2009).

[87] Opinion, at *11.

briefs and an oral argument, Defendants had never cited Lewkow and Whoriskey or Fleischer. If the intent of the parties to the Merger Agreement in Section 8.2 had been to adopt "provisions described by Lewkow and Whoriskey as 'anti-*Con. Edison*' damages-definition provisions that are not intended to grant third-party beneficiary status to stockholders," Defendants presumably would have cited the article and treatises.[88] Their failure to reference the article or the treatises creates an inference that Section 8.2 was not intended to adopt the views expressed in those extrinsic documents.

The Lewkow article and treatises are extrinsic evidence that cannot be relied upon in determining a motion to dismiss. Industry practice and understanding, model forms and commentary, opinions of purported experts on custom and usage reflected in contract provisions, and drafting history and treatises are all extrinsic evidence.[89]

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[88] *Id.* The Opinion, at *10-11 nn.77, 79, also cited a second treatise, Jon R. Kling and Eileen T. Nugent, *Negotiated Acquisitions of Companies Subsidiaries and Divisions* § 15A.03 (2022). Defendants at page 24 of their reply brief only cited a different section of this treatise (§13.03) on a different issue (i.e. ordinary course provisions) related to a different claim (i.e. the fiduciary duty claim).

[89] *Airgas*, 8 A.3d at 1191-92; *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2015 WL 5829461, at *6-7 (Del. Super., Aug. 10, 2015); *Seaford Golf and Country Club v. E.I. duPont de Nemours and Co.*, 2006 WL 2666215, at *5 (Del. Super. Aug. 23, 2006).

Even as extrinsic evidence, the views of two New York practitioners from 15 years ago on different terms in different merger agreements under a different state's laws would not meet the criteria for permissible expert testimony under Delaware Rule of Evidence 702. Their dated opinions are not based on knowledge of the facts of this case and do not apply reliable principles and methods to the facts of this case.[90]

The Opinion's Potential Alternative Interpretation of Section 8.2 Is Not Reasonable

The underlying premise of Lewkow's alternative interpretation that a provision like Section 8.2 precludes stockholders from recovering damages is that a corporation can, through a contract with an acquirer, decide that damages suffered by its stockholders belong to the corporation. Even Lewkow questions "whether target, without the consent of each shareholder, could simply appoint itself as the agent of the stockholders."[91] Kling and Nugent state the shareholders would be "out of luck" on a claim for lost premium if they are not third-party beneficiaries, "although it is difficult to argue that the parties ever intended that this result (Buyer being able to breach with virtual impunity) would obtain."[92]

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[90] D.R.E. 702 (b)-(d).

[91] Lewkow.

[92] Kling & Nugent at §15.03.

The proposition that the corporation can expropriate for itself damages the acquirer causes to the stockholders is contrary to Delaware law, which recognizes that a damages claim resulting from a corporate transaction belongs to who suffered the harm and is entitled to the damages: the corporation or the stockholders.[93] Only where the harm is solely to the corporation would the recovery go to the corporation.[94] "[A] stockholder who is directly injured retains the right to bring an individual action for those injuries affecting his or her legal rights as a stockholder" because the "individual injury is distinct from an injury to the corporation alone" and "the recovery or other relief flows directly to the stockholders, not to the corporation."[95]

Under Section 3.2(a) of the Merger Agreement, the merger consideration was to be deposited and held for the benefit of the Twitter stockholders and paid to them when under Section 3.1(c) their Twitter shares were converted into "the right to receive" the merger consideration. Musk's refusal to perform would harm the stockholders' right to the merger consideration, the loss of the merger consideration would be their loss and, consequently, the damages from the failure to pay them the merger consideration should be paid to them. The stockholders' claim for breach of

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[93] *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1265 (Del. 2012) (Berger, J., concurring and dissenting in part) (citing *Tooley*, 845 A.2d 1031 at 1033).

[94] *Ams. Mining*, 51 A.3d at 1264-65.

[95] *Id.* at 1264 (citing and quoting *Tooley*, 845 A.2d at 1036).

their contractual right to the merger consideration was a direct claim in their own right, not a claim belonging to the corporation.[96]

As the Opinion noted,[97] Lewkow's theory that the target corporation should control the claim for the stockholders' lost premium would include "the right to settle such litigation."[98] Under Delaware law, however, a corporation may not expropriate for itself and settle claims that belong to its stockholders.[99] Moreover, damages received by the corporation cannot be attributed to stockholders by a "look through" theory because:

> No stockholder . . . has a claim to any particular assets of the corporation.[100]

The purpose of breach of contract damages is to restore the party to the position it would have been in had the other party performed the contract.[101] Indeed, the Opinion found that Section 8.02 "suggests that the parties … intended that the stockholder be restored to the same position they would have been in had the Merger

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[96] *Citigroup Inc. v. AHW P'ship*, 140 A.3d 1125, 1139-40 (Del. 2016); *NAF Holdings*, 118 A.3d at 179-80.

[97] Opinion, at *10 n.79.

[98] Lewkow.

[99] *In re Ebix, Inc. S'holder Litig.*, 2016 WL 208402, at *10-11 (Del. Ch. Jan. 15, 2016); *In re Louisiana-Pacific Corp. Derivative Litig.*, 705 A.2d 238, 239-41 (Del. Ch. 1997).

[100] *Ams. Mining*, 51 A.3d at 1265.

[101] *Ainslie v. Cantor Fitzgerald, L.P.*, 2023 WL 106924, at *9 (Del. Ch. Jan. 4, 2023); *Frontier Oil v. Holly Corp.*, 2005 WL 1039027, at *39 (Del. Ch. Apr. 29, 2005).

Agreement been fully performed."[102] If the Merger Agreement was performed, Twitter would not have received $44 billion in cash. When the Merger Agreement was in fact performed, the stockholders, not Twitter, received the $44 billion. Interpreting Section 8.2 as providing for Twitter to recover the stockholders' loss from Musk's refusal to perform the Merger Agreement would violate a fundamental tenet of contract law remedies because it would put Twitter in "a better position than had the contract been performed," and the Twitter stockholders in a worse position.[103]

In sum, the interpretation of Section 8.2 as entitling Twitter to recover damages suffered by its stockholders is unreasonable because it is contrary to Delaware corporate and contract law.

F. The Interpretation of Section 9.7 Should Be Reconsidered

1. The Interpretation of Section 9.7 According to Standard Rules of Contract Construction

Section 9.7 of the Merger Agreement provided:

> Subject to Section 9.13, this Agreement is not intended to and shall not confer upon any Person other than the parties hereto any rights or remedies hereunder, provided, however, that it is specifically intended that (A) the D&O Indemnified Parties (with respect to Section 6.6 from and after the Effective Time), (B) the Company Related Parties (with respect to Section 8.3) are third-party beneficiaries

[102] Opinion, at *9.

[103] *Ainslie*, 2023 WL 106924, at *9 & n.84 (citing 3 E. Allan Farnsworth, *Farnsworth on Contract*s § 12.08 at 12-68-69 (4th ed. 2019)).

> and (C) the Parent Related Parties (with respect to Section 8.3) are third-party beneficiaries. [104]

The Opinion stated that the blanket prohibition of Section 9.7, combined with the "No Third-Party Beneficiaries" ("No TPB") title of the section, "signals an intent to disclaim stockholders as third-party beneficiaries."[105] However, as the Opinion recognized, No TPB provisions are merely "a helpful starting point for a court's consideration of the contracting parties' intent as to third-parties."[106] Moreover, No TPB provisions may "yield to other contrary language consistent with standard rules of contract interpretation."[107] No TPB provisions "are not entitled to any special deference."[108]

Intent Must Be Based on the Merger Agreement as a Whole

The parties' intent cannot be determined from Section 9.7 alone, rather than from the terms of the Merger Agreement as a whole.

> "A Court determines the parties' intent from the overall language of the document."[109]

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[104] Opinion, at *4-5.

[105] *Id.* at *4.

[106] *Id.*

[107] *Id.* at *5.

[108] *Id.*

[109] *Deuley v. DynCorp Intern., Inc.*, 8 A.3d 1156, 1163 (Del. 2010).

Therefore, the Merger Agreement must be "read as a whole, giving meaning to each term."[110] Because the Court must give credit to each term of the Merger Agreement, it cannot rule out the possible reading of the text as conferring third party beneficiary status.[111] Because construing Section 9.7 as determining TPB status would be inconsistent with the substantive merger terms of Sections 3.1 and 3.2, the Merger Agreement is at least ambiguous as to whether the Twitter stockholders are third party beneficiaries of the contracts.[112]

In arguing for TPB rights, Plaintiff primarily relied on "§3.1(c) ('provid[ing] for Defendants' purchase of the shares of the Twitter stockholders for $54.20 per share') and §3.2(a) ('requir[ing] Musk's acquisition entity . . . to deposit the Aggregate Merger Consideration into an Exchange Fund and . . . cause the Exchange Fund . . . to be held <u>for the benefit of the holders of Company Common Stock</u>'))."[113] These provisions "require Defendants to" place the merger consideration in a fund for the benefit of Twitter stockholders and to use the fund to pay $54.20 per share to

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[110] *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019).

[111] *Id.* at 848.

[112] *Id.* at 847.

[113] Opinion, at *8 & n.64. (emphasis added). Plaintiff did not merely rely on the "mechanics provisions" of Sections 2.1-2.3 of the Merger Agreement. *See also* Sept. 19, 2022 Transcript at 27-28 (explaining that Sections 3.1(c) and 3.2(a) are not merely mechanics of the merger).

Twitter's stockholders."[114] Where promised performance is to be rendered directly to the beneficiary, it is presumed that the contract was for the beneficiary's benefit.[115]

The General Provision of Section 9.7 Must Yield to the Substantive Terms and Purpose of the Merger Agreement

> "[G]eneral terms of the contract must yield to more specific terms."[116]

Where specific and general provisions are inconsistent, the specific provisions qualify the meaning of the general provisions.[117] Section 9.7 of the Merger Agreement is among the general provisions found in Article IX. Thus, while the Opinion states that "Section 9.7 is specific rather than general,"[118] the Merger Agreement places it among its general provisions. In contrast, the provisions that conferred benefits on the Twitter stockholders are substantive provisions of ARTICLE III.

Section 9.7 cannot control the meaning of the entire Merger Agreement because it conflicts with the agreement's overall purpose and scheme.

> "The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an

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[114] *Id.* at *8.

[115] *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 271 (Del. 2022); *Comrie v. Enterasys Networks, Inc.*, 2004 WL 293337, at *3 (Del. Ch. Feb. 17, 2004).

[116] *Sunline*, 206 A.2d at 846 & n.65; *DCV Holdings, Inc. v. ConAgra Inc.*, 889 A.2d 954, 961 (Del. 2005).

[117] *Id.*; *see also* Restatement (Second) of Contracts § 236(c).

[118] Opinion, at *7.

> inference conflicts with the agreement's overall scheme or plan."[119]

As the Opinion recognized:

> [T]he argument for granting third-party beneficiary status to stockholders is stronger in the case of a merger agreements, because merger agreements involve the payment of consideration directly to stockholders. Indeed, delivering this benefit to stockholders is the target corporation's purpose for entering in most merger agreements.[120]

Section 9.7 conflicts with what the Court acknowledged was the purpose of the Merger Agreement's overall scheme: the payment of $44 billion for the benefit of the Twitter stockholders.

The Heading of Section 9.7 Is Irrelevant

Construing Section 9.7, the Opinion said that:

> Combined with the title of the section the blanket prohibition signals an intent to disclaim stockholders as third-party beneficiaries.[121]

However, Section 9.3(c) of the Merger Agreement provides that "the table of contents and headings in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement." Thus, the Merger Agreement itself said the title of Section 9.7 should not be relied upon over

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[119] *Parker v. Barley Mill House Assocs. L.P.*, 38 A.3d 1255 ¶10 (Del. 2012) (Order).

[120] Opinion, at *4 (emphasis added).

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

substantive provisions that directly indicated that the Merger Agreement intended to confer substantial benefits to the stockholders - - $44 billion worth.

Musk's Intent Contentions Do Not Control

The Opinion discussed Musk's contentions as to the purported intent of the Merger Agreement, but not Twitter's statements, cited in Plaintiff's Complaint and brief, that the Merger Agreement was intended to benefit the stockholders. An inquiry into what the parties intended serves no purpose where it "would yield information about the views and positions of only one side."[122]

The Opinion noted "the Board exercised its contractual freedom to disclaim third-party beneficiary status under the Merger Agreement."[123] The Twitter Board, however, was not before the Court in this case, and its statements made in its action against Musk, and publicly, all point toward the Board's intent to make Twitter stockholders the beneficiaries of the Merger Agreement.[124] This is far more probative than what Musk said the Twitter Board intended.

Intent Is Not Established by the Parties' Say So in One Clause of a Contract

Whether a merger agreement confers TPB rights is not controlled by whether and how the parties say there are no such rights. Contractual intent is not what the

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[122] *Bank of N.Y. Mellon,* 65 A.3d at 551.

[123] Opinion, at *4.

[124] *See* Section I.C., *supra.*

parties to the contract say it meant "but what a reasonable person in the position of the parties would have thought it meant."[125] The determination of TBP rights must be based on an objective reading of the entire merger agreement, not on the subjective view that there were no TPB rights for stockholders because Musk and Twitter said so in Section 9.7. *Amirsaleh*[126] recognized that just because the parties say there are no TPB rights, that is not controlling where other provisions of the merger agreement belie that disclaimer.

The Opinion said Plaintiff's interpretation of Section 9.7 was "problematic" "[b]ecause almost all merger agreements require direct payments of consideration to stockholders and are subject to stockholder approval" and, therefore, stockholders would be TPBs under almost all merger agreements.[127] However, the Twitter Merger Agreement was not like "almost all merger agreements" because specific provisions (*e.g.* Section 3.2(a) and 8.2) acknowledged the agreement was for the benefit of the Twitter stockholders and Twitter had publicly so stated, including in its specific performance action.[128]

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[125] *Bank of N.Y. Mellon*, 65 A.3d at 551.

[126] *Amirsaleh v. Bd. of Trade of the City of New York, Inc.*, 2008 WL 4182998, at *5 (Del. Ch. Sept. 11, 2008).

[127] Opinion, at *7.

[128] *Id.*

2. There Is More Than One Reasonable Interpretation of Section 9.7

Even if interpreting Section 9.7 as barring stockholder TPB rights was reasonable, Plaintiff's interpretation of the Merger Agreement, including Sections 3.1, 3.2 and 8.2, is also reasonable, so the Merger Agreement is ambiguous as to the parties' intent.[129]

> "Contract terms themselves will only be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectation inconsistent with the contract language."[130]

3. A Per Se Carve-Out Rule Is Not Appropriate

a. The Per Se Carve-Out Rule

The Opinion appeared to adopt a per se rule that there can be no other third-party beneficiaries if a No TPB provision contains carve-outs conferring TPB rights on anybody.[131] The Opinion said Section 9.7 of the Merger Agreement contained three carve-outs: (A) the D&O indemnification carve-out found in many merger agreements, (B) the Company Related Parties carve-out, and (C) the Parent Related

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[129] *See GMG Cap. Invs., LLC v. Athenian Ventures Partners I, L.P.*, 36 A.3d 776, 782 (Del. 2012).

[130] *Id*. at 780 (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.,* 702 A.2d 1228, 1232 (Del. 1997)).

[131] Opinion, at *4-5.

Parties carve-out.[132] It said that these carve-outs create a "negative implication" of no TPB rights and that the inclusion of stockholder as TPBs under Section 9.7(B) in particular created a negative inference that stockholders had no other TPB rights.[133]

b. A Per Se Carve-Out Rule Conflicts With Delaware Law

The Opinion's per se carve-out rule is contrary to Delaware contract law that the agreement must be interpreted as a whole and that general provisions may not be given precedence over the agreement's purpose and substantive terms. It is also inconsistent with the motion to dismiss standard, where inferences are to be drawn in Plaintiff's favor and Defendant's interpretation must be the only reasonable interpretation.

c. *Fortis* Does Not Support a Per Se Carve-Out Rule

The per se carve-out rule is derived from *Fortis*.[134] There, a stockholder representative of former Rempex stockholders asserted third party beneficiary status, not under the 2013 merger agreement through which MedCo acquired their shares of Rempex, but under a 2017 purchase and sale agreement where MedCo sold one

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[132] *Id.* Section 9.7 also carves out Section 9.13, which in subsection (g) contains the provision frequently included in merger agreements that the financing sources will be third-party beneficiaries of the company's agreements and waivers contained in that section.

[133] *Id*.

[134] *Fortis Advisors LLC v. Medicine Comp.*, 2019 WL 7290945, at *3-4 (Del. Ch. Dec. 18, 2019).

of the drug candidates it had acquired in the Rempex merger to Melinta.[135] Thus, the *Fortis* plaintiff was claiming third party beneficiary status as to a milestone payments obligation that ran from Melinta to MedCo, not the former Rempex stockholder who were not, and never had been, Melinta stockholders.[136] Unsurprisingly, the Court found that the MedCo-Melinta agreement, entered into four years after the Rempex stockholders sold their shares to MedCo, was not made for their benefit and did not confer any benefit on them. The No-TPB exclusion in the MedCo/Melinta agreement contained a typical financing sources carve-out. The carve-out discussion in *Fortis* was *dicta*.

d. *Amirsaleh* and *Dolan* Are Inconsistent With a No Carve-Out Rule

Amirsaleh and other cases hold that a No TPB provision does not require the Court to ignore specific rights granted to stockholders in other sections of the merger agreement which belie the disclaimer of TPB rights.[137] *Amirsaleh* was an opinion on defendants' motion for summary judgement, not a motion to dismiss. In *Amirsaleh* the Court found that the No TPB provision was belied by the merger agreement's specific grant of a right to the merger consideration.[138]

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[135] *Id*. at *1.

[136] *Id.* at *3-4 (italics in original).

[137] Opinion, at *6-8.

[138] *Amirsaleh*, 2008 WL 4182998, at *4-5.

The Opinion conceded that excerpts of *Amirsaleh* support Plaintiff's interpretation that Twitter's stockholders were intended beneficiaries of the Merger Agreement.[139] However, the Opinion distinguished *Amirsaleh* as involving a "generalized" NTB provision that did not have carve-outs.[140] That is incorrect. The merger agreement in *Amirsaleh* contained a D&O indemnification carve-out.[141] Thus, *Amirsaleh* was not "a context-specific application of the general/specific canon."[142] Moreover, the stockholders right to the merger consideration under Sections 3.1 and 3.2 is specific, while Section 9.7 is not "specific rather than general,"[143] - - it is general rather than specific.[144]

The Opinion said *Amirsaleh* was limited to the "unique" right to elect between forms of merger consideration.[145] However, a right to elect is meaningless if there is no underlying right to the merger consideration in the first place. In *Amirsaleh*

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[139] Opinion, at *6-7.

[140] *Id*.

[141] September 14, 2006 Agreement and Plan of Merger by and between Intercontinental Exchange, Inc. Board of Trade of New York Inc. and CFC Acquisition Co., Section 9.8 (Ex. A).

[142] Opinion, at *7.

[143] *Id.*

[144] The Opinion was incorrect in stating: "The rights vested to stockholders are not unique vis-à-vis the contracting party, Twitter." *Id.* In Twitter, as in *Amirsaleh*, the rights vested to stockholders (i.e. the right to merger consideration) were against the acquirer (Musk), not the target (Twitter).

[145] Opinion, at *6-7.

plaintiff's right to elect was premised on the right under the merger agreement to have his interest "automatically be converted into and constitute the right to receive" the merger consideration.[146] The election just gave the stockholder the further right to the form of consideration of his choice.

The merger agreement in *Dolan*[147] contained three carve-outs: D&O indemnification, financing sources and the right of stockholders to receive the merger consideration after the Effective Time.[148] Under a per se carve-out rule the three carve-outs, and particularly the express TPB carve-out for stockholders, should have precluded the Court's ruling that plaintiffs could have TPB rights with respect to a provision concerning operating a station after closing.

In short, under a per se carve-out rule, *Amirsaleh* and *Dolan* were wrongly decided because the negative inference from the carve-outs would preclude any other TPB rights.

e. A Per Se Carve-Out Rule Will Essentially Eliminate Stockholder TPB Rights

A per se carve-out rule will mean there will almost never be any stockholder TPB rights because almost all merger agreements contain carve-outs for D&O

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[146] *Amirsaleh*, 2008 WL 4182998, at *4.

[147] *Dolan v. Altice USA, Inc.*, 2019 WL 2711280 (Del. Ch. June 27, 2019).

[148] September 16, 2015 Agreement and Plan of Merger among Cablevision Systems Corporation, Altice N.V. and Neptune Merger Sub. Corp. Sections 9.8, 9.15 (Ex. B).

indemnification, financing sources and other subjects. Indeed, the Opinion provides advisory "guidance" that practitioners can preclude those pesky stockholders from having any rights under an agreement for the sale of their shares by just throwing a couple of carve-outs into a No TPB provision.

A per se carve-out rule would tell corporations and practitioners they can be certain of leaving stockholders out in the cold if they include a carve-out giving stockholders meaningless third-party beneficiary rights.[149] For example, Section 9.7(B) of the Twitter Merger Agreement conferred TPB rights under Section 8.3(c)(i) "to protect Twitter stockholders from liability in the event of a failure to consummate the Merger Agreement by limiting the buyer's remedy."[150] The Opinion noted that "Defendants are not seeking damages from Twitter stockholders."[151] Of course not! What claim could Defendants have against Twitter's stockholders?

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[149] The carve-out really does not give the stockholders any affirmative rights but only a potential defense in a suit against them that will never be filed.

[150] Opinion, at *5.

[151] *Id.*

G. Concerns About a Proliferation of Stockholder Suits Do Not Justify Finding Plaintiff's Claims Were Not Meritorious

The Opinion expressed concern that allowing Plaintiff's claim would "lead to proliferation of stockholder suits in commonplace scenarios."[152] However, this case was not a commonplace scenario.

First, the argument for TPB status for stockholders is stronger for merger agreements than other corporate contracts because "merger agreements involve payment of consideration directly to stockholders."[153] Stockholders generally will not have TPB status for other corporate contracts.

Second, the concern about TPB claims "under almost all merger agreements"[154] is unfounded. TPB claims would arise only in the relatively few broken deal merger cases where the stockholders' right to merger consideration was implicated.[155]

Orban v. Field[156] which held that a 90% vote condition for the buyer to close was for the buyer's benefit, not the benefit of the stockholders illustrates that

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[152] *Id*. at *3.

[153] *Id.* at *4.

[154] *Id*. at *7.

[155] Many broken deal cases do not involve merger agreements where the shares of public stockholders are being purchased. *E.g. Snow Phipps*, 2021 WL 1714202, at *4 (Purchase and Sale Agreement); *AB Stable*, 2020 WL 7024929, at *1 (Sale and Purchase Agreement).

[156] 1993 WL 547187, at *9 (Del. Ch. Dec. 30, 1993).

stockholders are unlikely to have TPB rights as to merger agreement provisions other than those relating to the purchase of their stock. *Amirsaleh* distinguished *Orban* because the stockholders claimed an incidental benefit, rather than TPB rights to receive merger consideration.[157]

Third, this was the only broken deal TPB case filed in Twitter and Plaintiff is not aware of similar stockholder cases with respect to other mergers.

Fourth, this was an unusual broken merger case. There was no financial meltdown or pandemic that led to a buyer wanting out of a merger agreement.[158] Musk almost immediately began indicating he was not proceeding with the Merger and flat-out repudiated the Merger Agreement about two and a half months after signing it.

Fifth, the Merger Agreement contained provisions outside the No TPB section that specifically refer to benefits for the stockholders and Twitter repeatedly stated publicly, including in Court, that the Merger Agreement was for the stockholders' benefit.

The "board-centric model" and "contractual freedom of the board of directors"[159] do not mean the stockholders have no interest in an agreement whose

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[157] *Amirsaleh*, 2008 WL 4182998, at *4-5.

[158] *See, e.g., Hexion*, 965 A.2d at 720-21 (financial crisis); *Yatra Online, Inc. v. Ebix, Inc.*, 2021 WL 3855514, at *1 (Del. Ch. Aug. 30, 2021) (pandemic).

[159] Opinion, at *3-4.

purpose is the sale of their shares. "[T]he board's authority over litigation assets" and "ability to control any litigation"[160] applies to rights of the corporation and does not give the board the right to control or settle claims of the stockholders or decide that damages to the stockholders belong to the corporation.

There is no basis to assume allowing a stockholder to maintain litigation alongside the corporation "would no doubt give rise to considerable inefficiencies."[161] For example, in the *IBP* litigation,[162] the target corporation (IBP) sought specific performance by an acquirer (Tyson) who purported to terminate a merger agreement as a cross-claim in a stockholder class action. The stockholder plaintiffs joined in the specific performance claim but "let IBP take the lead on behalf of the company and its stockholders" including at trial.[163] The Court granted specific performance as the best method "to adequately redress the harm threatened to IBP and its stockholders"[164] and within a day Tyson, IBP and the IBP stockholders reached a settlement.[165]

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[160] *Id.*

[161] *Id*. at *3.

[162] *In re IBP S'holders Litig.*, 789 A.2d 14, 23 & n.1 (Del. Ch. 2001).

[163] *Id.* Plaintiff made it clear he would follow the *IBP* approach and let Twitter take the lead, including at trial.

[164] *Id.* at 23.

[165] *In re IPB S'holders Litig.*, 793 A.2d 396, 399-401 (Del. Ch. 2002), *appeal partially dismissed sub nom. Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575 (Del.

II. LARGE CORPORATE BENEFITS OCCURRED BEFORE JUDICIAL RESOLUTION

A. The Consummation of the Merger on the Original Terms Produced Benefits Sought by Plaintiff's Litigation

A mootness fee is appropriate where the action mooting the litigation produces the same or similar benefits sought by the litigation.[166] The determination of Musk and Twitter by October 6, 2022 to consummate the Merger provided the preferred result Plaintiff sought in his litigation: Musk purchasing the stockholders' shares pursuant to the Merger Agreement.[167] The decision by Musk and Twitter to proceed with the Merger at the original $54.20 per share price, after they had discussions of settlement at a lower price, was precisely the result Plaintiff pursued. The stockholders' receipt of $54.20 approximated the alternative result Plaintiff sought: $54.20 in total value, consisting of the market value of the Twitter shares absent the Merger plus damages for the lost premium.

2002), *aff'd sub nom. Tyson Foods, Inc. v. Aetos Corp.*, 818 A.2d 145, 147 (Del. 2003).

[166] *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980); *Dover Hist. Soc., Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006).

[167] *Allied Artists*, 413 A.2d at 877-78 (merger provided the same or similar result sought by litigation); *Palley v. McDonnell Co.*, 295 A.2d 762, 763-64 (Del. Ch. 1972); *aff'd* 310 A.2d 635 (Del. 1973) (same).

B. The Benefits Were Quantifiable

1. The Benefits

The primary relief Plaintiff sought was to cause Musk to proceed with the Merger. He did so by withdrawing his repudiation and refusal to perform and agreeing with Twitter to close the Merger.

Under Sections 3.1 and 3.2 of the Merger Agreement, the stockholders' benefits included the right to receive $54.20 per share in cash for their shares - - $44 billion. Under Section 8.4, the Merger Agreement could be amended. As discussed below, Musk and Twitter engaged in negotiations to complete the Merger at a price below $54.20 per share, including at $50 per share. Plaintiff stood ready to specifically enforce Musk's obligation to pay $54.20 per share and to challenge any decision of the Twitter directors to accept less. Consummation of the Merger at the original $54.20 price was the exact result sought by Plaintiff's litigation.

2. Quantification of the Benefits

a. The Merger Consideration and Premium

The Twitter stockholders received $44 billion as a result of Musk complying with his obligations under the Merger Agreement. Section 8.2 of the Merger Agreement recognized that damages resulting from Musk's willful and intentional breach in refusing to perform the Merger Agreement would include the benefits the stockholders would receive under that agreement, particularly the lost premium. The lost premium portion of the $44 billion is easily calculated. Twitter's July 26, 2022

merger proxy statement said that the $54.20 merger price represented a 38% premium ($14.89 per share) over the $39.31 closing price on April 1, 2022, the last trading day before Musk filed his Schedule 13G disclosing his ownership of Twitter stock.[168] Thus, the potential lost premium based on the unaffected market price was approximately $16.72 billion.

While Twitter's stock traded close to $50 per share after the Merger Agreement was announced on April 25, 2022, it sank to under $40 in May, 2022, as Musk began suggesting he might not proceed with the Merger. It dropped to $32.55 on July 11, 2022, the first trading day after Musk purported to terminate the Merger Agreement. The stock generally traded in the $40 range during July – September 2022 as Musk continued to insist he would not perform the Merger Agreement. The stock closed at $42.55 on October 4, 2022, the last trading day before it was known that Musk had retracted his repudiation. The trading price of Twitter's stock after Musk repudiated the Merger Agreement is further evidence that closing the Merger at $54.20 conferred a benefit of approximately $11.65 to $21.65 per share ($9.46 to $17.58 billion). This range confirms that quantifying the lost premium at $16.72 billion, as described in Twitter's merger proxy statement, is reasonable.

[168] Twitter Merger Proxy at 21, 91.

b. The Potential Decreased Merger Consideration

The $54.20 merger price was also $4.20 per share (approximately $3.5 billion) above the $50 per share price at which Twitter and Musk came close to settling.[169]

C. The Benefit Occurred Before Judicial Resolution

Plaintiff's claims became moot by October 6, 2022, five days before the Opinion was issued. Moreover, the Opinion did not resolve the damages claim. Therefore, the agreement of Musk and Twitter to proceed with the Merger mooted Plaintiff's claims before judicial resolution.[170]

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[169] Kali Hays, *Elon Musk and Twitter Came Close To A Deal At $50 Per Share. Here's Why It Didn't Work Out*, BUSINESS INSIDER (Oct. 10, 2022), https://www.businessinsider.com/elon-musk-twitter-discussed-deal-50-a-share-talks-ended-2022-10.

[170] *See In re Quest Software Inc. S'holders Litig.*, 2013 WL 5978900, at *7 (Del. Ch. Nov. 12, 2013).

III. TWITTER CANNOT PROVE THERE WAS NO CASUAL CONNECTION

A. The Presumption of Causation and Twitter's Burden

Twitter has the burden of demonstrating that Plaintiff's lawsuit in no way contributed to the Merger occurring on the originally negotiated terms.[171] Because Twitter, not Plaintiff, is in a position to know the reasons, events and decisions leading up to the Merger proceeding as agreed in the Merger Agreement, Twitter must rebut the presumption of causation.[172] This heavy burden of showing the complete absence of any casual connection between the litigation and the actions mooting plaintiff's claims will rarely be satisfied.[173]

B. There is Substantial Evidence Supporting Causation

Delaware Courts have found causation when a merger produces the result sought in stockholder litigation, even where the merger itself was not the specific relief sought.[174] Here the Merger at $54.20 per share was the exact result Plaintiff

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[171] *United Vanguard*, 693 A.2d at 1080; 2 D. Wolfe & M. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery, § 17.03[f][5][iii] (2d ed. 2022).

[172] *Id.*

[173] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 852 (Del. Ch. 1998) ("This is a heavy burden and it is to be expected that a defendant will not often be able to satisfy it.").

[174] *Allied Artists*, 413 A.2d at 877-80 (merger resulted in removal of old board of directors); *Palley v. McDonald*, 295 A.2d at 763-68 (merger resulted in cancellation of challenged shares).

sought in his suit. Thus, Twitter's burden of overcoming the presumption of causation is even more difficult.

Twitter's specific performance claim plainly was a cause of Musk's decision to withdraw his repudiation and perform the Merger Agreement. Plaintiff asserted the same claim, but Plaintiff was not subject to issues raised by Musk, including those based on a whistleblower's complaint. Plaintiff also raised a damages claim which would remain even if specific performance was denied. Under these circumstances, it is not credible to assert that Plaintiff's claims did not have some incremental impact on Musk's decision to proceed with the Merger.

Causation has been found where the stockholder suit sought elimination of an obstacle to a merger.[175] Here, the obstacle to the Merger was Musk's refusal to perform the Merger Agreement. That obstacle was removed in response to the specific performance claim raised by Plaintiff and Twitter and the damages claim raised only by Plaintiff.

Plaintiff's suit was also important to ensure that the Twitter Board would not settle with Musk at a reduced merger price on some basis that benefitted the directors

[175] *United Vanguard*, 727 A.2d at 852-53 (elimination of impediments posed by letter of intent to an auction); *In re Versum Materials, Inc. S'holder Litig.*, Del. Ch., Cons. C.A. No. 2019-0206-JTL, at 63-72 (July 16, 2020) (TRANSCRIPT) *aff'd*, 248 A.3d 105 (Del. 2021) (removal of poison pill).

and management, but not the stockholders.[176] The market recognized that one potential outcome of Twitter's litigation was a settlement with Musk at a reduced merger price.[177] Many broken-deal cases result in settlements at a discount to the original merger consideration.[178]

While the Opinion said concerns about Twitter settling were speculative and premature,[179] sources familiar with settlement discussions between Twitter and Musk, including Musk's attorney Alex Spiro, revealed there was discussion of a reduced merger price, including specifically $50 per share, and terms that would be beneficial to the Twitter directors, such as Musk dropping his claims that Twitter had committed fraud.[180] According to people familiar with the discussions, in September and early October, 2022 Musk and Twitter conducted negotiations concerning a reduced Merger price in a series of conference calls between their lawyers.[181] Musk initially sought a 30% discount, but by early October, Musk and

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[176] Sept. 19, 2022 Tr. at 40-41.

[177] Stefan Modrich, *Odds Increasingly Favor Settlement Between Musk, Twitter, Analyst Say*, SPG GLOBAL (Aug. 22, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/odds-increasingly-favor-settlement-between-elon-musk-twitter-analysts-say-71798744.

[178] Odds Over Terms.

[179] Opinion, at *7 n.54.

[180] Came Close; Delay Trial; Odds Over Terms.

[181] Odds Over Terms; Kate Conger and Michael S. Schmidt, *Elon Musk Offered to Buy Twitter at a Lower Price in Recent Talks*, NEW YORK TIMES (Oct. 5, 2022),

Twitter were discussing a 10% discount, which would reduce the merger consideration to approximately $40 billion or $48.78 per share.[182] According to multiple reporters, the existence of such discussions were confirmed by two, three or four people familiar with the negotiations, including Sprio, Musk's lawyer.[183] Sprio told the New York Times that Twitter was willing to negotiate price.[184] He said:

> Twitter offered Mr. Musk billions off the transaction price. Mr. Musk refused because Twitter attempted to put certain self-serving conditions on the deal.[185]

Indeed, Musk and Twitter were close to a deal at $50 per share, an 8% discount which would have saved Musk $3.3 billion.[186] However, Twitter's Board and management demanded "all kinds of things" be included in a renegotiated deal.[187]

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https://www.nytimes.com/2022/10/05/technology/elon-musk-twitter-discount.html ("Lower Price"); Came Close; Cara Lombardo and Alexa Corse, *Twitter, Elon Musk Trial Postponed as Deal Talks Stall*, WALL STREET JOURNAL (Oct. 6, 2022), https://www.wsj.com/articles/twitter-musk-talks-continue-focus-on-financing-litigation-11665082947 ("Trial Postponed").

[182] Lower Price; Delay Trial.

[183] Came Close; Delay Trial; Lower Price.

[184] Delay Trial.

[185] *Id.*

[186] Came Close.

[187] Came Close.

The Opinion stated that "Twitter is well situated to enforce the Merger Agreement."[188] However, circumstances indicate that Twitter was not well situated to protect the stockholders' interests. Twitter's Board and management were defending themselves from claims of improper conduct by Musk and a whistleblower. The conflicting interests of the directors and management in protecting their reputations and avoiding claims by Musk, the whistleblower and investors meant Twitter could not be counted on to protect the stockholders.

The Court acknowledged that if Twitter settled with Musk, the stockholders might have a breach of fiduciary duty claim against the Twitter Board.[189] Reaching a settlement with Twitter at a reduced price would not have eliminated Plaintiff's specific performance and damages claims. Bringing his claims after Musk renounced the Merger Agreement, rather than waiting to see what Musk and Twitter ended up doing, was the appropriate strategy. Thus, Plaintiff was not a premature intermeddler but a necessary goad to pressure Musk to complete the Merger and the Twitter Board not to waiver from insisting on the full $54.20 per share payment to the stockholders.[190]

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[188] Opinion, at *7 & n.54.

[189] Sept. 19, 2022 Transcript at 41.

[190] *Quest*, 2013 WL 5978900, at *1.

> As with burglary, so with merger litigation; the greatest utility comes from the watchdog biting the burglar on the way *in* not the way out.[191]

C. This Is a Shared Credit Case

Plaintiff does not claim to be the primary cause of Musk and Twitter consummating the Merger on the original terms, but he was a contributing cause to that result.[192] As Twitter and Plaintiff agreed, Twitter did the heavy lifting on the specific performance claim, while Plaintiff played a monitoring and support role. Even where another actor is principally responsible for the benefit, "Delaware courts nevertheless consistently have awarded fees in these situations to the stockholder plaintiffs for their contributory role in generating the result."[193] Awarding attorneys' fees provides the incentive for stockholders and their attorneys to take on the opportunity costs, expenses and risk of pursuing litigation to protect the interests of a collective group of stockholders.[194]

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[191] *Id.*

[192] *Versum* Tr. at 63-64.

[193] *Smith, Katzenstein & Jenkins LLP v. Fid. Mgmt. & Rsch. Co.*, 2014 WL 1599935, at *11 (Del. Ch. Apr. 16, 2014).

[194] *In re Activision Blizzard, Inc.*, 86 A.3d 531, 548 (Del. Ch. 2014); *Louisiana Municipal Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 336-37 (Del. Ch. 2012); *Seinfeld v. Coker*, 847 A.2d 330, 333-34 (Del. Ch. 2000); *Versum* Tr. at 72.

Plaintiff also contributed by increasing the likelihood that the stockholders would actually receive $54.20 per share for their stock.[195] In many instances, a stockholder suit contributes to an increase in the merger price.[196] Here, Plaintiff helped prevent a decrease in the $54.20 merger price.

For over 60 years this Court has awarded fees in shared credit cases.[197] It is not necessary to identify precisely the degree to which the litigation contributed to the benefit.[198] In joint causation cases, stockholder litigation is often assigned 20 to 20% causation.[199] As in *Versum*, Plaintiff seeks far less than that level of credit.[200]

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[195] *Versum* Tr. at 74.

[196] *E.g. United Vanguard*, 727 A.2d at 852-54; *Versum* Tr. at 73-74.

[197] *Smith, Katzenstein & Jenkins LLP*, 2014 WL 1599935, at *11 (citing *Aaron v. Parsons*, 139 A.2d 365 (Del. Ch. 1958), *aff'd* 144 A.2d 155 (Del. 1958)); *see also Sugarland Indus. v. Thomas*, 420 A.2d 142, 150-51 (Del. 1980) (awarding fees based on partial credit to litigation for price increase).

[198] *United Vanguard*, 727 A.2d at 854.

[199] *Smith, Katzenstein*, 2014 WL1599935 at *14; *Versum* Tr. at 78.

[200] *Versum* Tr. at 78-79.

IV. PLAINTIFF'S FEE REQUEST IS REASONABLE

Attorneys' fees are awarded based on the results achieved, the time and effort of counsel, the complexity of the litigation, the contingent nature of the representation and the standing and ability of counsel.[201]

A. The Fee Is Reasonable as a Percentage of the Benefits

Where the benefits are quantifiable, *Sugarland*[202] calls for an award of fees based on a percentage of the benefit.[203] Scientific precision is not required; if the benefit is capable of some realistic valuation, the Court can base the award on rough calculations.[204]

Plaintiff's request for $3 million in fees is reasonable under the percentage of the benefits approach favored in Delaware. However measured, the benefits conferred because Musk and Twitter completed the Merger at the $54.20 cash merger price were enormous and Plaintiff's requested fee is a small portion of the benefit. Charts reflecting the benefits, degree of causation and percentage fees at various levels illustrate the reasonableness of the requested fee.[205]

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[201] *Ams. Mining*, 51 A.3d at 1254.

[202] *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).

[203] *Ams. Mining*, 51 A.3d at 1255; *Versum* Tr. at 73, *aff'd* 248 A.3d 105 (Del. 2021).

[204] *Id.*

[205] *Versum* Tr. at 70 (noting that such tables are helpful to the Court).

The measure of litigation related benefits at various low levels of causation for the several approaches to quantifying monetary benefits are summarized below:

TABLE 1

	Monetary Benefits (millions)	Causation %	Litigation Benefit (millions)
Merger Price	$44,000	10%	$4,400
		5%	$2,200
		2%	$880
Premium	$16,720	10%	$1,672
		5%	$836
		2%	$334
Potential Settlement	$3,500	10%	$350
		5%	$175
		2%	$70

The requested $3 million fee as a percentage of the litigation benefit at the various causation levels calculated above is summarized below.

TABLE 2

	Litigation Benefit (millions)	$3 million Fee as % of Litigation Benefit
Merger Price	$4,400 (10% causation)	.07%
	$2,200 (5% causation)	.14%
	$880 (2% causation)	.7%
Premium	$1,672 (10% causation)	.18%
	$836 (5% causation)	.36%
	$334 (2% causation)	.9%
Potential Settlement	$350 (10% causation)	.86%
	$175 (5% causation)	1.71%
	$70 (2% causation)	2.8%

The Court may assign different levels of causation for different benefits or phases.[206] The Court may conclude that the level of causation should be lower if viewed in terms of the overall merger consideration or the premium, but higher with respect avoiding a discount in the merger consideration. As Table 2 illustrates, the $3 million fee is a very small percentage even at very low levels of causation with respect to the merger consideration and premium. For the potential discount, the fee percentage is also very small at 10% and 5% causation levels and still modest even at 1% causation.

In *Quest*, this Court found the litigation contributed 5% to the benefit achieved and awarded 7.5% of that litigation-related benefit.[207] The award in *Versum* was $12 million, which implied 10 to 15% causation of the price increase and a fee of 10 to 15% of the litigation caused benefit.[208]

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[206] *See, e.g., Sugarland*, 420 A.2d at 151 (20% and 5%); *Franklin Balance Sheet Inc. Fund v. Crowley*, 2007 WL 2495018, at *13 (Del. Ch. Aug. 30, 2007) (15% and 5%); *In re NCS Healthcare, Inc. S'holder Litig.*, 2003 WL 21384633, at *3 (Del. Ch. May 28, 2003) (15% and 5%).

[207] *Quest*, 2013 WL 5978900, at *8. Unlike in *Quest* and other cases, there was no overlap in work performed by counsel for the stockholders. Only one stockholder, Plaintiff, with a single set of counsel pursued the litigation.

[208] *Versum* Tr. at 77-78.

B. The Fee Is Reasonable by Analogy to Price-Bump Monitoring Cases

The requested $3 million fee is also consistent with fees awarded in monitoring cases where there was an increase in the merger price.[209] The Court has awarded 1.25 to 1.5% of the total consideration increase even where the stockholder plaintiffs had done little or nothing.[210] A $3 million fee is less than one percent of the $3.5 billion potential discount.

C. The Fee Is Reasonable Based on the Time and Effort of Counsel

"[W]here a litigation had achieved a substantial benefit, it is the measure of that benefit, not the amount of time it took to achieve it, that is of primary importance

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[209] *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *22 (Del. Ch. May 6, 2010), *aff'd* 9 A.3d 475 (Del. 2010) (TABLE), and *aff'd*, 9 A.3d 475 (Del. 2010) (TABLE) (noting that "fee awards in cases involving a bump in the consideration paid to shareholders are usually based on a percentage of the increased consideration"); *In re Genentech, Inc. S'holders Litig.*, Cons. C.A. No. 3911-VCS (Del. Ch. July 9, 2009) (TRANSCRIPT) (awarding fee of $24.5 million, which equated to approximately 2.26% of increased tender offer price); *In re Plains Res.*, 2005 WL 332811, at *6 (approving 1.6% fee award of $1.1 million on $67 million price increase); *In re Prodigy Commc'ns Corp. S'holders Litig.*, 2002 WL 1767543, at *6 (Del. Ch. July 26, 2002) (approving a 2% fee award of $650,000 on a $32.8 million price increase).

[210] *Versum* Tr. at 78. One percent by the overall consideration increase is roughly equivalent to 10% causation with a fee of 10% of the litigation benefit.

in determining the reasonableness of a fee award."[211] The Court reviews counsel's time and effort only as a "backstop check" in assessing the fee's reasonableness.[212]

Plaintiff's counsel expended 1,474.20 hours, with a time value of $993,376.50, and $13,245.14 in expenses. There was substantial research and effort in formulating claims and expedited briefing and argument on the standing issue. Because of the extremely rapid pace and the scope of the discovery and motion practice in the Twitter litigation, which was headed to trial within a three-month period, concentrated work within a condensed time frame was necessary. The requested fee represents a 3x multiple of counsel's time and reflects an average hourly rate of $2,026. These are reasonable in light of precedents.

D. Contingent Risk and Counsel's Standing.

Counsel is typically "entitled to a much larger fee when compensation is contingent than when it is fixed on an hourly or contractual basis."[213] Plaintiff was represented by experienced firms well-known to this Court.

E. The Requested Compensatory Award Is Reasonable

Plaintiff and his counsel respectfully submit that a $5,000 compensatory award to Plaintiff, which would be paid out of his counsel's attorneys' fees, is

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[211] *NCS Healthcare*, 2003 WL 21384633, at *3.

[212] *In re Abercrombie & Fitch Co. S'holders Derivative Litig.*, 886 A.2d 1271, 1273-74 (Del. 2005).

[213] *Ryan v. Gifford*, 2009 WL 18143, at *13 (Del. Ch. Jan. 2, 2009).

warranted. Plaintiff played an important role in the action. Plaintiff was actively involved in this expedited litigation, having reviewed pleadings and other filings, responded to Defendants' discovery requests, conferred with counsel on strategy, and participated in eight virtual and one telephonic meetings with members of his litigation team (in addition to regular written communications). Plaintiff was the only Twitter stockholder who filed suit. But for Plaintiff's active involvement, the Class would not have been represented and protected. He took on the substantial responsibility of serving as a class representative even though he held only 5,500 shares of Twitter stock, a de minimis portion of the shares represented in the Class. He retained his shares until the Merger closed, while the price for Twitter stock fluctuated as the market tried to determine whether the Merger would occur. The $5,000 award Plaintiff seeks in this Action is within the range of compensatory

awards this Court has granted.[214] Such awards are noncontroversial and increasingly common.[215]

[214] *See, e.g., In re HomeFed Corp. S'holder Litig.*, 2022 WL 489484, at *4 (Del. Ch. Feb. 15, 2022) ($5,000); *Ryan v. Mindbody, Inc.*, Del. Ch. C.A. No. 2019-0061-KSJM (Dec. 4, 2020) at 23-25 ($5,000) (TRANSCRIPT); *In re Galena Biopharma, Inc*., C.A. No. 2017-0423-JTL (Del. Ch. June 15, 2018) (ORDER) ¶ 12 ($5,000); *In re EZCORP Inc.*, 2018 WL 1627226, at *4 (Del. Ch. Apr. 3, 2018) (approving $5,000 incentive award); *In re Tibco Software Inc. S'holder Litig*., Consol. C.A. No. 10319-CB (Del. Ch. Sept. 7, 2016) (ORDER) ¶ 18 ($10,000); *Flax v. Pet360, Inc*., C.A. No. 10123-VCL (Del. Ch. Aug. 1, 2016) (ORDER) ($10,000); *Strougo v. Hollander,* C.A. No. 9770-CB (Del. Ch. Feb. 3, 2016) (ORDER) ($10,000); *In re Orchard Enters. Inc. S'holder Litig*., 2014 WL 4181912, at *7, *13 (Del. Ch. Aug. 22, 2014) ($12,500).

[215] *Ryan* Transcript at 24.

CONCLUSION

For the reasons set for herein, the Court should award the requested fee and compensatory award.

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CERTIFICATE OF SERVICE

I, Michael Hanrahan, do hereby certify on this 21st day of March, 2023, that I caused a copy of the foregoing ***Opening Brief in Support of Plaintiff's Application for Mootness Fee*** to be served via File & Serve*Xpress* on the following counsel of record:

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