Is There Always Money in the Banana Stand? The Importance of Fee Awards to Vindicating Shareholder Voting Rights

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A recurring joke in the TV series *Arrested Development* is that a real estate mogul beset by hard financial times refrains to his son, "there's always money in the [family-owned] banana stand." Every time he does, the son—who has taken over the family real estate empire—expresses exasperation, as a boardwalk shop selling frozen bananas is obviously no cure for the family's financial woes. In an act of defiance, the son eventually burns the banana stand down. Enraged, the real estate mogul explains that there was literally $250,000 in cash lining its walls.

The stockholder franchise is Delaware's banana stand. Which is to say, it is quite valuable, yet some relatively recent signals from Delaware courts appear less than clear about where its value lies.[1] One Chancery decision declined to award fees in a successful Section 225 action that improved board appointment & election processes.[2] Elsewhere, the Delaware Supreme Court foreclosed a stockholder plaintiff from fee reimbursement after finding the directors had inequitably chilled the stockholder franchise through its advance notice bylaws.[3] At oral argument on another fee petition, the court extensively

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[1] By "franchise," I broadly mean stockholder votes & board selection processes.

[2] TS Falcon I, LLC v. Golden Mountain Fin. Hldgs. Corp., No. 2023-1247-LWW, 2024 WL 3942255, at *10–11 (Del. Ch. Aug. 27, 2024).

[3] *See* Kellner v. AIM ImmunoTech Inc., No. 2023-0879 (Del. July 29, 2024) (summary order denying motion for reargument en banc).

engaged counsel about why improving the electoral process is beneficial in-and-of-itself, perhaps suggesting reexamination is in the works.[4]

In this article, I offer my two cents: one cannot square the handful of decisions declining to award fees in this context with the great weight of Delaware law. If the stockholder franchise is to have value, fee awards are warranted in litigation that vindicates stockholder voting rights.

A contrary rule could have serious consequences. Delaware corporate law is privately enforced; absent financial incentives, enforcement will decrease. Thus, if fee denials proliferate, we can expect boards to take advantage by adopting stringent bylaws that tilt elections in favor of incumbents.[5] On the other hand, not every meritorious action deserves a windfall. Thus, the size of the fee award should vary across cases. But the court should award fees to recognize a benefit in the first instance. In other words, Delaware courts should clearly reiterate that there is always money in the banana stand.

I. The Stockholder Franchise In Delaware Corporate Benefit Jurisprudence

This section provides a rough sketch of the development of franchise issues within Delaware's corporate benefit doctrine. This discussion showcases why and how recent outliers cut against the long arc of Delaware common law.

A. The Corporate Benefit Doctrine Generally

Delaware follows the American Rule—that parties bear their own legal expenses— but also recognizes several exceptions. One is the common fund exception, where a plaintiff creates a "common fund" enjoyed by others. Another related exception is the corporate benefit doctrine, whereby a stockholder plaintiff creates an intangible benefit enjoyed by the rest of the stockholder base.

Why the exceptions? Delaware courts tend to find two reasons. The first is simple fairness: If a person creates a fund (or other benefit) enjoyed by others, the costs of creating it should not fall entirely on her.[6] Thus, courts

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[4] *See* Transcript of Oral Argument at 47–68, Driver Opportunity P'rs I LP v. Briggs et al., No. 2023-0287, 2023 Del. Ch. LEXUS 505 (Del. Ch. July 26, 2024).

[5] *Cf.* Ben Bates, *Rewriting the Rules for Corporate Elections*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 9, 2024) https://perma.cc/WL62-Y3T9 (observing that advance notice bylaw "disclosure provisions have increased significantly in length and complexity market wide over the past twenty years" and presenting empirical evidence of a recent wave of such amendments in 2022–23).

[6] Dover Historical Soc., Inc. v. City of Dover Planning Comm'n, 902 A.2d 1084, 1090 (Del. 2006) (The "purpose underlying" both common-fund and corporate benefit exceptions "is to balance the equities to prevent 'persons who obtain the benefit of a lawsuit without contributing to its cost [from being] unjustly enriched at the successful litigant's expense'") (quoting Goodrich v. E.F. Hutton Gp., Inc., 681 A.2d 1039, 1044 (Del. 1996)); *Goodrich*, 681 A.2d at 1044 ("The common fund doctrine is founded on the equitable principle that those who have profited from litigation should share its costs.").

often analogize the corporate benefit doctrine to an 'unjust enrichment' principle, as it effectively prevents non-litigant stockholders from free-riding on the benefits created by the litigation.[7] This basis for awarding fees appears to be traditional, in the sense that it has accompanied the common-fund doctrine for over a century.[8]

Second, Delaware courts encourage meritorious stockholder actions that facilitate wealth-creation and vindicate stockholders' legally protected interests.[9] Stockholders are often diffuse, and the costs of litigation can thus be unduly prohibitive to any individual stockholder absent a fee award.[10] Fee

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[7] *See, e.g.*, Martin v. Harbor Diversified, Inc., No. 2018-0762-SG, 2020 WL 568971, at *2 (Del. Ch. Feb. 5, 2020) ("The principle underlying the corporate benefit doctrine is that equity should not tolerate unjust enrichment and impoverishment"); Maurer v. Int'l Re-Ins. Corp., 95 A.2d 827, 833 (Del. 1953) ("[I]t is the very purpose of the rule to relieve a party of an unjustly heavy burden and compel a sharing of it by those benefited by his acts"); *see also* In re Dell Techs. Inc. Class V S'holders Litig., No. 349, 2024 WL 3811075, at *7 (Del. Aug. 14, 2024) ("Spreading the costs over all common fund beneficiaries eliminates the free-rider problem – reaping the gains without sharing the expenses that created the common fund"), R. H. McWilliams, Jr., Co. v. Missouri-Kansas Pipe Line Co., 190 A. 569, 576 (Del. Ch. 1936); Internal Imp. Fund Trustees v. Greenough, 105 U.S. 527, 532 (1881) (reflecting same idea in common fund context).

The unjust enrichment analogy is imperfect because unjust enrichment—at least in Delaware—requires a "relationship between the challenged enrichment and an invasion of the [injured person's] protected interests." Garfield ex rel. ODP Corp. v. Allen, 277 A.3d 296, 346 (Del. Ch. 2022). Thus, when a person is unjustly enriched, they have committed a wrong. But when awarding fees, a court need not find that the non-litigant stockholders are wrongdoers, even though they foot the bill. The analogy thus holds only insofar as a plaintiff should get her fees reimbursed when others collectively enjoy the fruits of her labor.

[8] *See Maurer*, 95 A.3d at 830 ("Successful minority stockholders' suits and creditors' bills" are "familiar illustrations" of the rule that the Chancellor has power "to allow counsel fees" from a common fund where it was created "by efforts of one member of a class of a fund that inures to the benefit of all members."); Perrine v. Pennroad Corp., 64 A.2d 412, 414 (Del. 1948) ("The principle seems to be generally recognized that in stockholders derivative actions, attorneys engaged in the litigation are entitled to be paid from the fund resulting therefrom, to the extent that their services were helpful in the creation of said fund, or in the preservation of an existing fund."), *overruled on other grounds by* Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Est. Fund, 68 A.3d 665 (Del. 2013); *Missouri-Kansas*, 190 A. at 576 ("It is a principle which courts of equity have long recognized, that a complainant in a creditors' bill who has caused a trust fund to be brought into the court for the benefit of himself and other creditors, should be allowed a reimbursement out of the fund of all his costs and expenses, including fees to his solicitors, on the principle that those who share with him in the benefits of the suit ought in justice to share with him the burden of its prosecution."); *Greenough*, 105 U.S. at 532 (failing to reimburse creditor for fees incurring working on behalf of others "would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage."). *Greenough*, although not a Delaware decision, has proven influential to Delaware courts' fee analyses. *See, e.g.*, *Missouri-Kansas*, 190 A. at 576 (citing *id.*).

[9] *See, e.g.*, Anderson v. Magellan Health, Inc., 298 A.3d 734, 754 (Del. Ch. 2023) ("the incentives set by mootness fees" are "intended to generate valuable benefits" to the corporation and/or its stockholders); Crothall v. Zimmerman, 94 A.3d 733, 738 (Del. 2014) (declining to award fees where the plaintiff "abandon[ed] his claim" because it would "create problematic incentives for representative plaintiffs"); Carlson v. Hallinan, 925 A.2d 506, 548 (Del. Ch. 2006) (Fee awards "provide an incentive to stockholders to bring a derivative suit to enforce the rights of the corporation as a whole under circumstances in which filing suit to enforce only their individual rights would be prohibitively costly or otherwise impracticable, thereby leaving unchallenged actionable wrongs against the corporation.") (cleaned up).

[10] Although the "incentives" rationale has a relatively modern feel—probably because of the Law and Economics influence—older fee decisions appear to incorporate it as well. *See, e.g.*, Chrysler Corp. v. Dann, 223 A.2d 384, 386–87 (Del. 1966) (plaintiff must demonstrate a benefit before seeking fees because otherwise, the "mere filing of a derivative action against a corporation" would "justify the award of fees to plaintiff's counsel" and thus "encourage the filing of many such actions wholly lacking merit for the sole purpose of obtaining counsel fees"); *see also Greenough*, 105 U.S. at 537–38 (an "allowance" to trustee for

awards thus help resolve a collective action problem by encouraging stockholder plaintiffs to bring meritorious litigation.

Inspired by these policy considerations, the corporate benefit doctrine appears to have emerged in Delaware in the middle of the 20th century. The Court of Chancery in *Rosenthal v. Burry Biscuit Corp.* awarded mootness fees to a stockholder plaintiff whose litigation efforts caused the corporation to cancel a self-dealing stock option entered into with the company's president and controlling stockholder.[11] And in *Kaufman v. Shoenberg*, the court reimbursed a pre-suit investigation brought before a successful litigation demand, to "encourage stockholder vigilance without unduly prejudicing the general corporate welfare."[12] In the seminal case of *Chrysler Corporation v. Dann*, the Delaware Supreme Court stated outright that a plaintiff may recoup fees over a "fund or property which is efforts have created," noting that "it is not an absolute necessity that monetary benefit be conferred upon the class as a whole provided the litigation, even though unsuccessful, has specifically and substantially benefited" the corporation or its stockholders.[13] Thus, by the 1960s, Delaware courts recognized that a plaintiff can create a shared benefit even if not monetary in nature.

B. 1960s: Valuable But Ambiguous Benefits

In the early 1960s, two decisions—*Mencher v. Sachs*[14] and *Richman v. DeVal Aerodynamics, Inc.*[15]—considered the corporate benefit conferred by stockholder franchise issues. That said, neither decision spoke firmly on where that value lay.[16]

Mencher featured a bitter fight for corporate control between stockholder insurgents and the incumbent management of Seminole Oil & Gas Corporation. A stockholder petitioned to compel a stockholders' meeting, as management had "failed to do so."[17] Presumably to consolidate the incumbents' control, the president of Seminole Oil & Gas Corporation had the Company issue shares to an incumbent-friendly third-party mere days before the "deadline" for the stockholders' meeting.[18]

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legal services is "made with a view to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee").

[11] Rosenthal v. Burry Biscuit Corp., 209 A.2d 459 (Del. Ch. 1949).

[12] Kaufman v. Shoenberg, 92 A.2d 295 (Del. Ch. 1952).

[13] *Dann*, 223 A.2d at 386.

[14] Mencher v. Sachs, 164 A.2d 320 (Del. 1960).

[15] Richman v. DeVal Aerodynamics, Inc., 185 A.2d 884 (Del. Ch. 1962) (fee decision); Richman v. DeVal Aerodynamics, Inc., 183 A.2d 569 (Del. Ch. 1962) (entering mandatory injunction).

[16] I hesitate to say the decisions were the *first* to address franchise issues in the fee context, simply because there may be older rulings unavailable on sources like Westlaw. Bench rulings come to mind. Legal historians may want to dig deeper. If they do, I would be curious about their findings.

[17] *Mencher,* 164 A.2d at 321.

[18] *Id.*

A stockholder insurgent challenged the issuance. The Court of Chancery cancelled the stock issuance for lack of consideration, as it was "solely for future services."[19] A Special Master administered the stockholder meeting and rejected the third party's incumbent-friendly votes. [20] As a result, "the opposition slate of directors was elected."[21] The Court of Chancery then awarded fees to the stockholder insurgent.

The Delaware Supreme Court affirmed. Notably, it declined to say whether stockholders should expect fees for ordinary-course litigation to compel stockholder meetings.[22] It nonetheless upheld a fee award because the "election proceeding" and "the cancellation suit" were "directly connected."[23] Thus, although there was no "dollar basis" to measure the size of the benefit, the high court held that "[c]ancellation of illegally issued stock is in itself a benefit" even if it is "difficult of evaluation in dollars and cents[.]"[24]

The Court of Chancery in *Richman* followed a similar tack. There, plaintiff stockholders in DeVal Aerodynamics, Inc. sought to enjoin the board from granting stock options to "key employees" or to lease or purchase "certain equipment then being used by" the company, which the plaintiff believed would "bind the corporation prejudicially."[25] The stockholders had also called a special stockholders' meeting to "enlarge the board and permit the stockholders to fill any seats thereby created[,]" but the board refused.[26] A stockholder sued, successfully receiving an order compelling a special meeting for that purpose.[27]

The court awarded fees for the stockholder. Citing *Mencher*, it observed that the plaintiff "embraced an attack on proposed action by the directors which at least a majority in interest of the stockholders considered to be detrimental to the corporation generally."[28] In other words, fees were warranted because "the final judgment enjoined DeVal's board of directors from carrying out the contemplated actions which might have proved binding on the corporation and which the holders of at least a majority of the stock apparently thought unwise."[29]

Mencher and *Richman* both awarded fees in situations implicating the stockholder franchise, but they do not dwell on the value of the franchise itself. For instance, neither decision was willing to say that compelling a stockholder

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[19] In re Seminole Oil & Gas Corp., 150 A.2d 20, 24 (Del. Ch. 1959).
[20] *Mencher*, 164 A.2d at 321.
[21] *Id.* at 322.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 323.
[25] Richman v. DeVal Aerodynamics, Inc., 185 A.2d 884, 885.
[26] *Id.*
[27] *See* Richman v. DeVal Aerodynamics, Inc., 183 A.2d 569 (compelling stockholder meeting).
[28] *Richman,* 185 A.2d at 886.
[29] *Id.*

vote is a benefit in-and-of-itself to the body corporate.[30] Furthermore, both leave questions open. In *Mencher*, was the benefit from the cancellation of the illegally issued shares the stockholders' increased share of the pie, their increased voting power, or both? Did the electoral outcome matter? And in *Richman*, what was the value to the stockholders—that they were able to reject potentially value-destructive employee stock options and equipment purchases? Or was it the vindication of their voting rights about those topics?

Mencher and *Richman* thus appear to recognize the value of the stockholder franchise but did not provide precise guidance on where that value lies. Later courts would need to fill in the gaps.

C. 1970s-80s: Greater Clarity On The Stockholder Franchise

Courts began providing greater clarity by the late 1970s. In *Baron v. Allied Artists Pictures Corp.*, a stockholder plaintiff sought fees in connection with a Section 225 action challenging the 1973 and 1974 director elections for Allied Artists Pictures Corporation.[31] A provision in the company's charter entitled preferred stockholders to elect the board of directors so long as dividend or "sinking fund" payments to the preferred stockholders were delinquent.[32] The company had historically experienced hard times, thus causing a delinquency on the preferred stock payments that allowed the preferred stockholders to elect the board. After the company began performing better, however, the Board chose not to pay off the preferred stock arrearages. The plaintiff alleged that the Board's goal was to "fraudulently perpetuate[] itself in office" and sought an order compelling a new board election by the common—not preferred—stockholders.[33]

The Court of Chancery granted summary judgment in the defendants' favor, finding that the board exercised its business judgment in not paying off the dividend arrearages and finding nothing in the record indicating fraudulent intent.[34] While the decision was on appeal, however, Allied merged with Kalvix, Inc., the holder of a majority of the preferred shares. The merger had the effect of paying off all preferred equity arrearages, redeeming all preferred stock, and—importantly—returning "voting rights . . . to Allied's common stockholders."[35]

Even though the defendants had won, the Court of Chancery awarded fees to the plaintiff. The court held that litigation had created a positive result

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[30] *Id.* at 885–86 (stating that in *Mencher*, "the Supreme Court of Delaware expressed doubt whether counsel fees incurred in a summary election proceeding were recoverable by petitioner.").

[31] Baron v. Allied Artists Pictures Corp., 395 A.2d 375 (Del. Ch. 1978).

[32] Baron v. Allied Artists Pictures Corp., 337 A.2d 653, 655–57 (Del. Ch. 1975) (summary judgment decision).

[33] *Id.*

[34] *Id.* at 659–660.

[35] *Baron,* 395 A.2d at 378.

in the form of "the return of voting power in the new corporate entity to [Allied's] common shareholders as a result of the merger."[36] The Delaware Supreme Court affirmed.[37]

Baron did not dwell on its benefit analysis, instead dedicating more pages to causation issues. Still, *Baron*'s treatment of voting rights is telling: the act of returning voting rights to stockholders was in-and-of-itself beneficial. The court did not inquire into who the common stockholders would perpetuate in office or why. The fact that the *Baron* court treated these questions as irrelevant appears highly relevant.

Tandycrafts, Inc. v. Initio Partners continued this trend.[38] There, the Delaware Supreme Court affirmed a fee award for a plaintiff who had caused a company to issue corrective disclosures in advance of an upcoming proxy fight on charter amendments.[39] The charter amendments in question were effectively takeover defense mechanisms to rebuff Initio Partners' overtures to purchase a controlling interest.[40] Initio Partners sought a preliminary injunction and undertook a proxy campaign to correct perceived "distortions" in the company's proxy materials.[41] The company mooted the preliminary injunction by disclosing material information concerning management-owned and controlled shares.[42] The stockholders rejected the proposed charter amendments.

The Court of Chancery awarded Initio Partners $180,000 in fees for the corrective disclosures, which the Delaware Supreme Court affirmed.[43] The Delaware Supreme Court also held that a stockholder need not seek class certification or have derivative standing to seek a fee where his action seeks "to implement his right to informed participation in the corporate election process."[44]

In *Tandycrafts*, as in *Baron*, the court's statements on this point do not emphasize the *outcome* of the vote. The "informed participation" was the benefit. Thus, even though these decisions are relatively summary on the focal point of the "benefit" analysis, they introduce more clarity. The benefit of an improved voting process did not appear to be about the substantive outcome; the improvements *are* the benefit. As discussed below, more recent case law would make this point explicitly.

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[36] *Id.* at 381.
[37] Allied Artists Pictures Corp. v. Baron, 413 A.2d 876 (Del. 1980).
[38] Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162 (Del. 1989).
[39] *Id.* at 1164.
[40] *Id.* at 1163.
[41] *Id.*
[42] *Id.* at 1164.
[43] *Id.*
[44] *Id.* at 1166.

D. EMAK And The Modern Era: The Inherent Value Of The Stockholder Franchise

The Delaware Supreme Court's decision in *EMAK Worldwide, Inc. v. Kurz* tied the bow on fee awards in the franchise context.[45] That case concerned a control dispute between plaintiff Donald Kurz, a common stockholder of EMAK Worldwide, Inc. and former CEO, against the company's controller, Crown EMAK Partners, LLC ("Crown"). Crown held preferred shares with director appointment rights and voting rights over company affairs on an as-converted basis of 27.6% of the common stock on non-director election matters.[46] Crown and EMAK then negotiated an exchange transaction, which would give Crown voting rights over *all* matters, including Board elections, but rescind Crown's separate appointment rights.[47]

Kurz sought a preliminary injunction against the exchange transaction. Crown and EMAK mooted the issue by rescinding the transaction and filing corrective disclosures for a related ratification consent.[48] After Kurz filed an amended complaint, Crown started soliciting stockholder consents to reduce the EMAK Board from seven to three members, which would have given itself control over the company. The Court held that the latter consent violated the DGCL.[49] Nonetheless, Crown was apparently able to muster support for a second consent that validly shrunk EMAK's board to three members at the following annual meeting.[50]

The Court of Chancery gave Kurz an interim fee award. That broke out into (1) $1.7 million for rescinding the exchange transaction, (2) $400,000 for the corrective disclosures concerning the related ratification consent, and (3) $400,000 for invalidating the first change-in-control consent.[51] The Court of Chancery held that the ultimate outcome—that Crown won control—did not matter, because the litigation afforded a "direct and obvious benefit to all stockholders" in the form of an "opportunity to change the direction of the company."[52] The court took pains to emphasize that even the preferred holders benefited from the litigation in this respect, as the "election itself is a good" that was "free and unaffected by a 28 percent thumb on the scales[.]"[53] After the court issued its fee decision, EMAK petitioned for bankruptcy, after which

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[45] EMAK Worldwide, Inc. v. Kurz, 50 A.3d 429 (Del. 2012).
[46] *Id.* at 430.
[47] *Id.* at 431.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Transcript of Oral Argument at 21, Kurz v. Holbrook, et al., No. 5019, 2010 WL 451029 (Del. Ch. July 19, 2010).
[53] *Id.* at 27.

EMAK issued Crown "all the common and preferred shares in the reorganized company."[54]

Even though Crown ultimately won the control contest, the Delaware Supreme Court upheld the fee award based on the importance of the litigation to the stockholder franchise:

> Shareholder voting rights are sacrosanct. The fundamental governance right possessed by shareholders is the ability to vote for the directors the shareholder wants to oversee the firm. Without that right, a shareholder would more closely resemble a creditor than an owner. Shareholders have limited opportunities to exercise their right to vote. When plaintiff's counsel obtains a corporate benefit by protecting shareholder voting rights, the benefit's size does not depend on the corporation's monetary value. ***The Vice Chancellor correctly found that the* Kurz *and* Crown *litigation produced a corporate benefit by preserving the EMAK shareholders' voting rights***.[55]

The court also more broadly stated that "[p]reserving shareholder voting rights produces a fundamental corporate benefit. Public policy supports discouraging director and officer manipulation by encouraging plaintiffs to challenge actions that frustrate the shareholder voting franchise."[56]

The journey from *Baron* and *Tandycrafts* to *EMAK* unequivocally resolved the "benefit" questions raised by *Mencher* and *Richman*: The *right* to vote, and the vindication of a free and fair vote, is an inherently valuable accomplishment under Delaware law. Fee awards may vary in amount depending on the circumstances, but the fact that a benefit is achieved does not.

Most modern Court of Chancery fee decisions follow *EMAK* and its mandate about the franchise. To name a few examples:

- An investment fund seeking control of a bank through a Section 225 action received fees for successful litigation replacing an incumbent board with insurgents.[57] The court there found that the board breached the company's charter and fiduciary duties by limiting the stockholder plaintiff's voting power.[58] The cleaned-up voting process was a benefit.
- An investment fund received fees by effectively nullifying a "country knowledge requirement" within the corporation's advance notice bylaws for director nominations, which required nominees to have at least five

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[54] *EMAK*, 50 A.3d at 432.

[55] *Id.* at 433 (emphasis added).

[56] *Id.*

[57] Totta v. CCSB Fin. Corp., No. 2021-0173, 2022 WL 16647972 (Del. Ch. Nov. 3, 2022) (fee letter).

[58] Totta v. CCSB Fin. Corp., No. 2021-0173, 2022 WL 1751741 (Del. Ch. May 31, 2022) (post-trial decision).

years of executive-level experience "in business, investment and economic matters in Europe, the United States, or Switzerland or political matters of Switzerland[.]"[59] The court rejected the defendants' argument that the stockholder plaintiff was selfishly motivated by trying to put up its own nominee. The court reasoned that under *EMAK*, the disinterested stockholders were benefited by "enabling" them "to vote for and ultimately elect" the stockholder's nominee.[60]

- A holder of Class A stock in a SPAC conferred a corporate benefit by vindicating the rights of Class A holders to a "standalone" vote in support of a de-SPAC transaction under Section 242(b) of the Delaware General Corporation Law.[61] The alternative was to hold a single vote that incorporated the SPAC's sponsors as Class B stockholders. The court held the results "achieved statutory compliance and vindicated the stockholder franchise" for the Class A holders.[62]
- A stockholder of Ameritrade, Inc. conferred a benefit by causing the company to solicit the approval of two-thirds of the unaffiliated shares in an allegedly conflicted-controller transaction, in conformity with Section 203 of the Delaware General Corporation Law.[63] By altering the voting threshold from a simple majority-of-the-minority threshold to two-thirds, the plaintiff created a "material enhancement to the stockholder franchise" because the "unaffiliated stockholders' vote mattered more, and they knew it."[64] The court described "vindicat[ing] the stockholder franchise" as one of "the most important benefits that can be achieved through stockholder litigation[.]"[65]
- A stockholder conferred a benefit through a settlement that required a company to provide a ratifying stockholder vote on a previously flawed director election and two years of insider incentives plans (among other things).[66] The court held that the clarifying effect of the settlement prevented potentially "devastating ripple effects" on the company's business, thus, "preventing the seeds of a future legal crisis from germinating."[67] Using a stockholder vote to effect legal compliance

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[59] Full Value P'rs, L.P. v. Swiss Helvetia Fund, Inc., No. 2017-0303, 2018 WL 2748261, at *1, *5 (Del. Ch. June 7, 2018).

[60] *Id.* at *17.

[61] Garfield v. Boxed, Inc., No. 2022-0132, 2022 WL 17959766 (Del. Ch. Dec. 27, 2022).

[62] *Id.* at *11.

[63] Transcript of Oral Argument at 87-88, Brett Hawkes v. Larry Bettino, et al., No. 2020-0360 (Del. Ch. Apr. 1, 2021) .

[64] *Id.* at 102–03.

[65] *Id.* at 103.

[66] Transcript of Settlement Hearing at 13, De Felice v. Kidron, et al., No. 2021-0255 (Del. Ch. Apr. 27, 2022); *see also Boxed*, 2022 WL 17959766, at *12 (discussing *id.*).

[67] *Kidron*, No. 2021-0255, at 17–18.

"vindicated the stockholder franchise and ensured that the company's shareholders' voices were correctly heard."[68]

The above are illustrative examples. Fee awards abound in Delaware with similar language. The point is that, from *Baron* to *EMAK* and thereafter, modern Delaware law affords inherent value to stockholder franchise issues when awarding fees in this arena. Thus, they squarely resolve the issues raised by *Mencher* and *Richman*.

Affording inherent value to stockholder votes also makes sense when considering the basic principles underlying the corporate benefit doctrine. Fairness mandates that the costs be shared evenly when a stockholder benefits the rest of the stockholders. The same logic applies when that benefit comes in the form of increased voting power. Furthermore, attaching incentives to improvements of this kind allows for the plaintiffs' bar to privately enforce the voting provisions of the Delaware General Corporation Law. It also deters boards from implementing franchise-harming measures in the first instance, thus properly aligning incentives.

II. WHY THE MINORITY OF OUTLIERS ARE WRONG

Two relatively recent cases, however, appear not to conform with the great weight of authority. Although scrupulous and well-reasoned on the merits, I submit their fee analyses should not become a burgeoning trend.

A. Keyser v. Curtis

In *Keyser v. Curtis*, stockholder plaintiffs affiliated with Robert D. Keyser, Jr. brought a Section 225 action to challenge the results of a board election.[69] Keyser and his allies had executed a written consent to replace the incumbent directors with themselves. The defendant directors attempted to nullify the consent by issuing themselves Series B preferred shares.

The court held that the Series B preferred share issuance failed entire fairness review. Accordingly, it was unenforceable and could not nullify the stockholders' consent.[70] With a valid consent in hand, the plaintiff stockholders made themselves the proper directors.

Even though the plaintiffs won, the court denied their fee petition. It noted that the litigation created certain corporate benefits by clarifying that "the Series B Issuance no longer dilutes the rights of [the Company's] common stockholders, which presumably is a benefit to those stockholders[.]"[71] But because the "ultimate effect of this action may merely be to substitute one

[68] *Id.* at 19.
[69] Keyser v. Curtis, 2012 WL 3115453 (Del. Ch. July 31, 2012).
[70] *Id.* at *12–15.
[71] *Id.* at *19.

controller for another" it was "hardly a thrilling victory from the point of view of the [company] stockholders who are not Keyser's allies."[72]

The court also noted that Keyser was "principally motivated by a desire to benefit himself, not a desire to benefit" the Company because he wanted to "gain control of the Company."[73] Although there is "nothing wrong with that," the court held it "does not present the type of situation that calls out for an award of attorneys' fees."[74]

After canvassing Delaware authority in this area, it appears hard to square this holding with the long arc of the law. First, the court's statement that the result of the litigation was "hardly thrilling" appears to misstate the "benefit" analysis. The issue is not whether the substantive outcome of a proper board selection process is economically valuable ("thrilling," even)—it is whether the *act of curing* a defective process is in-and-of-itself beneficial. The court itself appears to have recognized that there was value to correcting a deficient director appointment process.[75] By removing the dilutive Series B Issuance, the plaintiff had restored voting and economic power to the disinterested stockholder base. The stockholder franchise was thus vindicated, creating a benefit.

Second, there also appear to be franchise benefits the court did not consider: The disinterested stockholders learned from the litigation who controls the corporation in which they are invested. That informs their decision of whether to hold their shares or sell, and whom they should engage with any concerns about the company. True, unaffiliated stockholders may have been indifferent as between the incumbent group and the Keyser insurgents from a value-maximization perspective, as the court implied.[76] But the litigation put that information—and resulting choice—into the hands of the unaffiliated stockholders. Under *EMAK*, *Baron*, and *Tandycrafts*, that result is a benefit.

Third, the court appears to have viewed Keyser's motives as inherently selfish, such that his interests diverged from the unaffiliated stockholders.[77] It is true that "selfishness" in the sense of conflicts of interest between a litigant and the unaffiliated stockholders can provide a basis to deny fee petitions.[78]

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[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *See id.* ("[T]hrough this case, the Plaintiffs have benefitted Ark—Ark now knows who owns its shares and that the Series B Issuance was invalid"; "the Series B issuance no longer dilutes the rights of Ark's common stockholders").

[76] *Id.* ("[T]he ultimate effect of this action may merely be to substitute one controller for another").

[77] *Id.* (stating that there is "nothing wrong with" Keyser's "efforts to gain control of the Company" but that he was "principally motivated by a desire to benefit himself, not a desire to benefit Ark.").

[78] *See, e.g.*, Martin v. Harbor Diversified, Inc., No. 2018-0762, 2020 WL 568971, at *3 (declining to award fees where the plaintiff "apparently advocated a buyout of other unaffiliated stockholders"); In re Orchard Enterprises, Inc. S'holder Litig., No. 7840, 2014 WL 4181912, at *9–13 (Del. Ch. 2014) (declining to award appraisal petitioner fees in connection with fiduciary duty settlement because, among other things, "the interests of appraisal claimants may diverge from those of the class"); In re Dunkin' Donuts S'holders Litig.,

But Keyser shared an interest with the unaffiliated stockholders in a legally compliant process for selecting management—which, as explained above, was a benefit resulting from the litigation. Thus, the court should have reimbursed the portion of Keyser's fees associated with producing these collectively enjoyed benefits. To the extent "selfishness" is a concern—and I submit, below, that it is not—the *Curtis* court could have discounted time spent on "selfish" legal work rather than reject the fee application altogether.

Even so, broadening the definition of "selfishness" to include rational self-interest like Keyser's does not appear to align with Delaware law generally. Rational economic actors are expected to be self-interested; the issue is whether that self-interest produces collectively beneficial outcomes.[79] It would thus appear that Keyser's motives being less than altruistic should not have barred a fee award, as his actions were legal and equitable under the circumstances.

In sum, it is hard to discern an enduring role for *Curtis*'s fee analysis in the grand scheme of Delaware law. Its "benefit" analysis appears to conflate substantive board selection outcomes with a fair process for selection, despite *EMAK* and its predecessors. Having departed from Delaware law in that respect, the "intent" analysis that followed appears likewise off-kilter.

B. TS Falcon I LLC v. Golden Mountain Financial Holdings Corp.

The more recent decision in *TS Falcon I LLC v. Golden Mountain Financial Holdings Corp.* appears to take *Curtis* a step further.[80] *Falcon* was a Section 225 action in which stockholder plaintiffs challenged the defendants' choice of a "retroactive record date for the annual meeting—an undisputed violation of 8 *Del. C.* § 213(a)."[81] One of the defendants attempted to fix the defect through a petition for judicial validation under Section 205, which the court denied on the basis that there was a "deliberate violation of an explicit statutory prohibition."[82] Namely, the court found that the defendants had retroactively fixed the record date for the election. The defendant directors moved the record date to before the stockholder plaintiff, TS Falcon, I, LLC ("Falcon"), had exercised an option that would increase its stake from 35% to 44.9% of the company's outstanding stock.[83]

No. 10825, 1990 WL 189120, at *9 (Del. Ch. Nov. 27, 1990) (declining to award fees to unsuccessful stockholder-bidder in contest for corporate control in connection with loosened deal protections because its incentives were to acquire the company "at the lowest price possible" rather than seek "maximization of shareholder value").

[79] *Cf.* In re Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1035–36 (Del. Ch. 2012) (discussing policy considerations why alignment of controlling stockholders with the disinterested stockholders is good).

[80] TS Falcon I LLC v. Golden Mountain Financial Holdings Corp, 2024 WL 3942255 (Del. Ch. Aug. 27, 2024).

[81] *Id.* at *1.

[82] *Id.*

[83] *Id.* at *2.

In other words, the defendants rigged the election—in knowing violation of the law—to prevent the stockholder from exercising its voting rights.[84] The court noted that the validity of Falcon's option itself was the subject of ongoing arbitration, however, so the ultimate effect of the rigging was unclear.[85]

Still, the court denied the plaintiff's request for a fee award, largely based on *Curtis*. The *Falcon* court recognized that the company "will benefit from a legally complaint election process[,]" but added that "absent a resolution of the arbitration" over Falcon's option, "the next director election might not yield a different result."[86] Quoting *Curtis*, it stated that the "main beneficiary" of the action was Falcon itself, "hardly a thrilling victory" for the rest of the stockholder base.[87] The court also stated that "[a]lthough invalidating the retroactive record date promotes the stockholder franchise, the benefit to stockholders other than Falcon is comparatively slight."[88]

This analysis appears at odds with the long arc of Delaware law in a few respects. First, by tracing *Curtis*, a similar issue arises. The first portion of the court's analysis—that the "next director election might not yield a different result"—again appears to conflate a substantive electoral outcome with the inherent value of a fair electoral process. Only by endorsing the fee analysis in *Curtis* could the benefit of a proper electoral process be considered "comparatively slight" to the unaffiliated stockholders.

Indeed, *Falcon*'s concern that the "next director election" might yield the same result appears at odds with *EMAK*. In *EMAK*, the net result was *no* substantive change in management. Yet the Delaware Supreme Court recognized the "sacrosanct" import of voting rights, holding that the benefit of a free and fair election was meaningful.[89] The analysis in *Falcon* does not appear to grapple with this authority, leaving an open question of how to distinguish the two decisions.

Second, the facts of *Falcon* furthermore reveal an apparent downside of the non-precedential "thrilling victory" concept from *Curtis*: It is susceptible to gamesmanship. The board in *Falcon* had manipulated the record date to stop insurgents from winning an election. Clarifying that such action is barred would have sent the clear message that the board cannot toy with the company's electoral machinery with impunity.[90] Rather, the incumbents must

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[84] *Id.* at *6.
[85] *Id.* at *10.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] EMAK Worldwide, Inc. v. Kurz, 50 A.3d 429, 433–34.
[90] *See id.* at 433 ("Public policy supports discouraging director and officer manipulation by encouraging plaintiffs to challenge actions that frustrate the shareholder voting franchise.").

play fair and win reelection by showing the unaffiliated stockholders why they are suited to manage the firm.

By declining to award fees, however, *Falcon* may have introduced an inadvertent signal—that a board looking to beat an insurgent might as well try to manipulate the electoral process and draw out litigation.[91] Of course, a board choosing to draw out litigation must accept costs in the form of legal fees and time spent fighting the insurgent. Still, the fact that a board may have to pay a fee at the end of that litigation sets an important calculus in litigation strategy, and *Falcon* appears to offer boards a cost reduction relative to *EMAK* and its progeny. If knowing violations of law do not come with a fee award to the stockholder plaintiff who counters it, one might reasonably expect more aggressive—and legally infirm—efforts by boards to entrench themselves.

Finally, it appears *Falcon* also introduced mixed signals into the electoral context by contrast with the Court of Chancery's decision in *Totta v. CCSB Financial Corp.*[92] There, the court considered a Section 225 action brought by a stockholder plaintiff that sought to displace an incumbent board. The board had improperly applied a "Voting Limitation" mechanism in the company's charter that allowed it to prohibit a stockholder from exercising more than 10% of the company's voting power in an election, the implementation of which had the effect of throwing the election for the incumbents and against the insurgents.[93] The court also found that the use of the Voting Limitation Provision was inequitable under *Blasius*'s "compelling justification" standard.[94] It found that the board's sole articulated purpose—to prevent an amorphously defined "corporate raider" from controlling the company—ran afoul of the Board's "affirmative obligation not to interference with the stockholder franchise[.]"[95]

In a post-trial letter decision, the court granted the plaintiff's fee application under the corporate benefit doctrine. The corporation advanced a similar argument to that of the defendants in *Curtis*—that the stockholder litigant was self-motivated, and the benefits of the change in control were thus non-existent for the unaffiliated stockholders. But the court distinguished *Curtis* on the basis that the benefits were substantial and widely shared by the company stockholders:

> While in a strict sense the Post-Trial Opinion only affected Plaintiffs' votes, the judgment fortifies the Company's stockholder franchise generally. ***By bringing this litigation, Plaintiffs vindicated not***

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[91] Assuming their own legal fees are indemnified, that is.

[92] Totta v. CCSB Fin. Corp., No. 2021-0173, 2022 WL 1751741 (Del. Ch. May 31, 2022) (post-trial decision).

[93] *Id.* at *1; *see also id* at *22–25 (holding that the company improperly applied the Voting Limitation Provision's "Acting in Concert" provision).

[94] *Id.* at *28–29.

[95] *Id.* at *27–29.

> ***only their own votes, but also the majority vote of the unaffiliated stockholders who properly elected the insurgent nominees.*** The result obtained by this litigation prevents future stockholders from being similarly harmed by an erroneous application of the Voting Limitation. Plaintiffs' success in this case confers a substantial benefit on CCSB by retroactively correcting the incumbent board's interpretation of the Voting Limitation and, in effect, proactively setting the interpretation for future elections. ***The corporation is better off for a rectified election process***.[96]

It is hard to square the fee decision in *Falcon* with the result of *CCSB* just two years prior. In both cases, a stockholder insurgent corrected a defective shareholder voting process and vindicates the franchise as a result. Both plaintiffs had "selfish" motives in the narrow sense that they were private investment funds seeking to maximize returns on their investment and put up board nominees through a proxy challenge. But they part ways in their fee analysis. *CCSB* explained that the franchise correction was beneficial and awarded fees on that basis, following suit with *EMAK* and its predecessors. *Falcon* did not, drawing instead upon the holding in *Curtis*.

In sum, it appears that *Falcon* is problematic insofar as it follow *Curtis*, creating a new trend within the law. The stockholder franchise landscape will change substantially if Delaware fee award decisions continue in this direction. It is unclear what is gained by this approach over the long run, and one can discern several drawbacks.

III. CONCLUSION: KEEPING THE MONEY IN THE BANANA STAND

The stockholder franchise has inherent value in Delaware corporate law. Most modern Delaware decisions recognize this principle and award fees based on franchise improvements. But a few outliers appear to conflate franchise benefits with substantive director election outcomes, thus, offering an overly narrow view of what a corporate benefit is. Future courts should recognize these decisions as outliers, so as not to inadvertently signal to the market that practices harmful to the stockholder franchise—which were once considered off-limits—are now acceptable. Hewing to Delaware's traditional approach is a better bet.

To be sure, if courts are concerned about excess litigation, they can and should recognize low-value claims as such. But a more proper path to steer incentives is to cut excessive fee requests, rather than ignoring the benefits

[96] Totta v. CCSB Fin. Corp., 2022 WL 16647972, at *2 (fee letter) (cleaned up) (emphasis added). The Delaware Supreme Court affirmed. *See* CCSB Fin. Corp. v. Totta, 302 A.3d 387 (Del. 2023).

created by franchise-related litigation wholesale. Reaffirming that the banana stand is valuable may just prevent practitioners from burning it down.