UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES D. WILLIAMS, Plaintiff, v. DST SYSTEMS, INC., STEPHEN C. HOOLEY, CHARLES E. HALDERMAN, SAMUEL G. LISS, LOWELL L. BRYAN, LYNN D. BLIEL, JEROME H. BAILEY, JOSEPH C. ANTONELLIS, and GARY D. FORSEE, Defendants.	Case No. 1:18-cv-00322-RGA
BRIAN SCOTT, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. DST SYSTEMS, INC., STEPHEN C. HOOLEY, CHARLES E. HALDERMAN, SAMUEL G. LISS, LOWELL L. BRYAN, LYNN D. BLIEL, JEROME H. BAILEY, JOSEPH C. ANTONELLIS, and GARY D. FORSEE, Defendants.	Case No. 1:18-cv-00286-RGA

DEFENDANT DST SYSTEMS, INC.'S
RESPONSE TO THE COURT'S APRIL 12, 2019 ORDER

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Defendant DST Systems, Inc. ("DST") respectfully submits this response to the Court's April 12, 2019 Order.

I. PLAINTIFFS HAVE A HIGH PROBABILITY OF OBTAINING NON-MATERIAL ADDITIONAL DISCLOSURES IN SECTION 14 LAWSUITS

As this Court observed in its Order in *Sehrgosha v. Kindred Healthcare, Inc.*, there has been a growing trend of plaintiffs using Section 14 cases as a means of trying to elicit additional disclosures prior to stockholder votes in merger transactions. *See* No. 18-cv-00230-RGA, D.I. 47 at 2 n.1 (the "*Sehrgosha* Order"). That trend has continued and, indeed, grown since the Court's initial inquiry in September 2018. DST utilized pacer.gov to collect those cases with codes 160 and 850 filed in the District of Delaware from September 6, 2018 (the date after the Court issued its Order in *Kindred Healthcare* requesting the parties to advise on the success of analogous cases in the District of Delaware) and April 12, 2019 (the date of the Court's Order in these actions). In that roughly seven month period, there have been 180 such cases filed in the District of Delaware alone. A chart identifying those 180 cases is attached to this response as Exhibit A. Of those 180 cases, 168 cases are analogous to the claims alleged in the separate complaints filed by James Williams, Brian Scott, and Dennis Pratt challenging the disclosures made in connection with the acquisition of DST in that they similarly allege violations of federal securities laws under Sections 14(a), 14(d), or 14(e) of the Securities Exchange Act of 1934. A chart identifying those 168 cases is attached to this response as Exhibit B. The 168 cases correspond to 84 transactions, as certain transactions were challenged by multiple lawsuits (both in this Court and in other federal district courts across the country).

To the best of DST's understanding, defendants made supplemental disclosures in 57 of these 84 transactions.[1]

A chart identifying the remaining 27 transactions, for which DST could not identify any supplemental disclosures, is attached as Exhibit C. Of these 27 remaining transactions, 18 involved plaintiffs filing, *inter alia*, a Section 14 claim subsequent to the closing of the challenged transaction.[2] These claims are not analogous to the claims asserted in the actions presently before this Court and should be excluded from the overall success rate calculation. *See Sehrgosha* Order at 2 n.1 (excluding post-closing cases from the success rate calculation because they "are not like this case where Plaintiffs challenged the proxy statement prior to a vote."). This leaves nine transactions in which DST has not been able to identify any supplemental disclosures made to address plaintiffs' claims asserted in analogous Section 14 lawsuits. Among these nine transactions are four that have not yet proceeded to a stockholder vote and five in which the stockholder vote occurred without any supplemental disclosures being made.

To calculate the success rate, DST has taken the 57 transactions for which DST has identified supplemental disclosures and divided that number by 66 transactions (the 57

1 Included in these 57 transactions are (i) transactions where defendants explicitly stated that they were making supplemental disclosures to moot lawsuits challenging the merger and (ii) transactions where defendants made supplemental disclosures that mooted at least some of the claims alleged in lawsuits challenging the merger.

2 These cases involved Assertio Therapeutics, Inc.; Celgene Corporation; Forterra, Inc.; Impinj, Inc.; Micron Technology, Inc.; NantHealth, Inc.; National Beverage Corp.; Nektar Therapeutics; Newell Brands Inc.; REV Group, Inc.; Skechers U.S.A., Inc.; Symantec Corporation; Synacor, Inc.; Tesla, Inc.; Trevena, Inc.; Unum Group; Welbilt, Inc.; and Zion Oil & Gas, Inc. DST notes that the 84 transactions include two separate transactions for the Celgene Corporation: one lawsuit (*Fisher*) was filed claiming there were insufficient disclosures relating to transactions that had already occurred at the time of filing, while the other five lawsuits (*Gerold*, *Grayson*, *LR Trust*, *Rowinski*, and *Sbriglio*) challenged a pending transaction for which Celgene made mooting disclosures.

transactions in which supplemental disclosures were made *plus* the nine analogous transactions in which DST was not able to identify any supplemental disclosures). This equates to a success rate of 86.4% (57 out of 66), meaning that plaintiffs have been able to obtain supplemental disclosures in 86.4% of the transactions they have challenged in the District of Delaware between September 6, 2018 and April 12, 2019. If DST omitted the four transactions in which the stockholder vote has not yet occurred (because it remains possible that supplemental disclosures could still be made in connection with those transactions), plaintiffs' success rate would be 91.9% (57 out of 62 eligible transactions).

Taking a broader view based on the Court's prior findings in the *Sehrgosha* Order, plaintiffs have obtained supplemental disclosures in at least 134 of 150 transactions they have challenged in the District of Delaware between January 1, 2016 and April 12, 2019, for an aggregate success rate of 89.3%.[3]

The success rate over the last seven months is in line with the Court's calculated success rate of 91.7% in the *Sehrgosha* Order. *Sehrgosha* Order at 2 n.1. This is the case even where the transaction parties in five transactions opted to make no supplemental disclosures prior to the stockholder votes relating to those transactions.[4] Notably, in each instance where a vote occurred without supplemental disclosures, the plaintiffs that filed the lawsuits have, to date, either made no attempt to litigate their claims post-vote or voluntarily dismissed their lawsuits after the stockholder vote occurred.

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3 If those transactions in which a stockholder vote has not yet taken place are removed from the analysis, the aggregate success rate would increase to 91.8% (134 out of 146 transactions).

4 These cases involved Datawatch Corporation; National Commerce Corporation; TESARO, Inc.; WildHorse Resource Development Corporation; and Black Box Corporation.

II. SECTION 14 IS NOT MEANT TO INCENTIVIZE IDENTICAL LAWSUITS THAT OBTAIN THE SAME SUPPLEMENTAL DISCLOSURES

The Court's observation that the three complaints currently before the Court are "virtually identical" identifies one of the many problems associated with this type of abusive merger litigation. What has happened in this case is not uncommon. To the contrary, it is commonplace for multiple virtually identical lawsuits to be filed challenging the same disclosures in a single transaction. Plaintiffs' counsel sometimes coordinate among themselves and speak with a unified voice. But sometimes, plaintiffs proceed on separate (yet parallel) tracks, leading to the circumstances presently before this Court where multiple plaintiffs' counsel seek "credit" in the form of a fee award for obtaining the same supplemental disclosures that moot the same claims in multiple "virtually identical" complaints.

These circumstances are antithetical to the Private Securities Litigation Reform Act ("PSLRA"), which is meant to provide safeguards against the very type of abusive litigation that has emerged in Section 14 litigation in the last three years. One such safeguard against abuse of the federal securities laws is the lead plaintiff appointment process, in which those attorneys who file class action securities lawsuits are required to publish notice and bring attention to their lawsuits in order for suitable plaintiffs to come forward. *See* 15 U.S.C. § 78u–4(a)(3)(A). Once notified, prospective plaintiffs may seek to be appointed as lead plaintiff, and the Court is statutorily empowered to determine the lead plaintiff based, in large part, on which potential plaintiff has the greatest financial stake in the matter. *See OFI Risk Arbitrages v. Cooper Tire & Rubber Co.*, 63 F. Supp. 3d 394, 399 (D. Del. 2014). This safeguard gets circumvented in these types of cases, however, as the three complaints before the Court plainly demonstrate. One plaintiff (Williams) brought his lawsuit on an individual, non-class basis. The other two plaintiffs sought to proceed on behalf of the same putative class of DST stockholders (which would include Williams). Those plaintiffs collectively held 462 shares of DST stock out of nearly 60 million shares outstanding—substantially less than 1% of the total shares outstanding. (Certificate of Proposed Lead Plaintiff Scott, *Scott v. DST Sys., Inc.*, No. 1:18-cv-00286-RGA, D.I. 1–1 at 2; Certificate of Pratt, D.I. 1–1 at 1; Declaration of Andrew Ditchfield, No. 1:18-cv-00286-RGA, D.I. 26, Ex. 2.). This is exactly the type of lawyer-driven securities litigation that the PSLRA was enacted to prevent.

But as the District Court for the Southern District of New York explained in *Rosenfeld v. Time Inc.*, even though this type of merger litigation is abusive and the standard for succeeding on a Rule 14a-9 material omission claim is high, transaction parties are discouraged from litigating these cases on the merits, including pushing for adherence to the lead plaintiff appointment process, given the time frames in which merger transactions must close. *See Rosenfeld*, No. 17cv9886 (DLC), 2018 WL 4177938, at *4 (S.D.N.Y. Aug. 30, 2018). One solution for transaction parties to employ is the approach followed by DST here: issue supplemental disclosures to moot plaintiffs' claims, even though the claims are meritless, thereby eliminating distraction and even negligible potential risk to the transaction, and then oppose any application for a fee award. This gives federal courts an opportunity to focus on these types of lawsuits in a way that they otherwise are prevented from doing if parties resolve these cases voluntarily. The Court, now faced with this opportunity, should not reward plaintiffs for having identified a litigation tack that oftentimes requires little more than filing a complaint that, in many respects, is simply recycled from use in earlier similar lawsuits and that results in disclosures that provide no benefit (much less a substantial benefit) to stockholders.

But even if the Court were to entertain granting a fee award here, in no circumstances should it grant the multiple fee awards requested by each separate plaintiff's counsel. Otherwise, the "value" of these cases is dependent solely on the number of lawsuits filed. The Court should view the lowest fee award requested by a single plaintiff (here, that would be some portion of the aggregate $115,000 fee award collectively requested by Plaintiff Scott and Mr. Pratt) as placing a ceiling on any potential fee award in this case, as that amount presumably reflects each plaintiff's counsel's view of the value of the supposed benefit obtained on behalf of DST stockholders. (For example, if each of Plaintiff Scott and Mr. Pratt believed they were entitled to half of the requested fee award, then the *maximum* fee award that could be granted in this case would be $57,500. To be clear, DST believes that no fee award is justified here.) The Court can then evaluate what a reasonable fee award would actually be within a range of $0 (DST's position) and $57,500 (plaintiff's maximum self-imposed ceiling) for the "benefit" obtained for DST stockholders.

III. FEDERAL LAW SHOULD DICTATE THE COURT'S ANALYSIS

Delaware law provides for the same general standard of materiality as does federal law. *Compare EP Medsystems, Inc. v. EchoCath, Inc.*, 235 F.3d 865, 872 (3d Cir. 2000) (explaining that an omission of fact is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable shareholder as having significantly altered the 'total mix' of information made available." (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988))), *with In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 899 (Del. Ch. 2016) ("[I]nformation is material if, from the perspective of a reasonable stockholder, there is a substantial likelihood that it 'significantly alters the "total mix" of information made available.'" (quoting *Arnold v. Soc'y for Sav. Bancorp,* 650 A.2d 1270, 1277 (Del. 1994))). Accordingly, Delaware state court decisions addressing materiality may, in certain instances, provide insight as to that court's view on whether particular omitted facts satisfy this standard. This is why DST included references to various Delaware state court cases in its Opposition.

But as DST also explained in its Opposition, federal securities law requires more than Delaware law when evaluating the viability of a disclosure claim. The PSLRA has a heightened pleading standard that requires plaintiffs to "specify each statement alleged to have been misleading" and the reason or reasons why that statement is misleading. 15 U.S.C. § 78u–4(b)(1)(B). Delaware law does not contain this requirement. Moreover, the supplemental disclosures must correct the alleged misrepresentation or omission rather than simply make more information available to stockholders. *See In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016) ("And we add that it's not enough that the disclosures address the misrepresentation or omissions: they must correct them."). Again, the Delaware decisions cited by plaintiffs do not appear to contain this requirement. Plaintiffs' approach of merely identifying Delaware cases in which certain pieces of information were found to be material under the specific facts and circumstances of those particular cases and that State's law does not address these heightened requirements imposed by federal law.

Further, federal law requires the plaintiffs seeking a fee award here to demonstrate that they conferred a "substantial benefit" on DST stockholders. *See Cooperstock v. Pennwalt Corp.*, 820 F. Supp. 921, 923 (E.D. Pa. 1993) (citing *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970)). According to Plaintiff Scott's own submission, this "substantial benefit" requirement is not the standard that applies under Delaware state law. *See* Scott Opening Br., No. 1:18-cv-00286-RGA, D.I. 19 at 20 (citing Delaware Chancery Court cases awarding "mootness fees" where disclosures provided "some benefit," or "meager" benefits, or where disclosures were "of some interest"); *see also In re Dr. Pepper/Seven Up Cos., Inc. S'holders*

Litig., C.A. No. 13109, 1996 WL 74214, at *4 (Del. Ch. Feb. 9, 1996) (approving settlement and awarding fees for supplemental disclosures that conferred only "some benefit" for stockholders). None of these cases satisfies the standard applicable under federal law. Accordingly, plaintiffs cannot simply point to Delaware state court cases where fees were awarded for obtaining supplemental disclosures and argue that this Court should follow the same approach under federal law.

Plaintiffs' reliance on pre-*Trulia* cases to justify the amount of their requested fee awards here is also misplaced. *Trulia* represented a dramatic shift away from the types of negotiated fee awards that plaintiffs were obtaining in connection with "disclosure only" settlements, rendering those pre-*Trulia* fee awards irrelevant. In its place, the Court of Chancery advocated for a process, like the one DST has taken here, where transaction parties could issue supplemental disclosures to moot claims if they wanted to eliminate the risk of a strike suit and then oppose any fee requests made by the plaintiffs who filed those suits. *See Trulia*, 129 A.3d at 896-97. Plaintiffs' lack of reliance on post-*Trulia* fee awards in Delaware state court cases is telling. Indeed, just as telling is the fact that, even though the Chancery Court left this approach as an option in that court, plaintiffs who file these types of disclosure claims now turn to the federal courts rather than pursue their claims in Chancery Court post-*Trulia*. *See* DST Systems, Inc.'s Memorandum of Law in Opposition, No. 1:18-cv-00286-RGA, D.I. 25 at 20-21 (explaining that "in 2015 (the year before the *In re Trulia* decision), there were 34 total lawsuits filed in federal courts relating to mergers; in 2017 (the year after the *In re Trulia* decision), there were ***198***, and in 2018, there were ***182***.").[5] That shift in approach speaks volumes over how

5 These merger lawsuit numbers, which were taken from Cornerstone Research's *Securities Class Action Filings: 2018 Year in Review* (2019), *available at* https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2018-

unsuccessful plaintiffs expect to be if they bring these claims in the court that issued the *Trulia* decision.

IV. THIS COURT LACKS JURISDICTION OVER MR. PRATT'S FEE REQUEST

It is common for plaintiffs challenging merger transactions in federal court to file multiple identical lawsuits seeking identical disclosures but in different federal districts. Indeed, in reviewing the data described in Section I above, DST determined that 41 of the 84 transactions challenged by Section 14 claims in the District of Delaware were also subject to Section 14 claims filed in other federal courts. A chart identifying the 41 transactions is attached as Exhibit D. As Exhibit D demonstrates, these 41 transactions were challenged by 85 lawsuits in other federal courts. The PSLRA's lead plaintiff appointment process, and the Judicial Panel on Multi-District Litigation, are two mechanisms that can blunt the impact of multi-jurisdictional filings in federal securities litigations. But in cases like these, as described above, these processes are very likely not to come into play.

The fee application made by Plaintiff Scott and joined by Mr. Pratt presents in a stark way the quandary that these types of cases present to transaction parties. DST can either (1) accede to Mr. Pratt's "voluntary" submission to this Court's jurisdiction, even though he did not file a lawsuit in this District and has never filed a notice of appearance, in which case Mr. Pratt can tack his fee request onto the other Plaintiffs' fee requests, or (2) resist that voluntary

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Year-in-Review.pdf, include claims under Section 11 of the Securities Act of 1933 as well as claims under Section 10(b) and 12(a) of the Exchange Act. *Id.* at 47. But given the growth in Section 14 claims, it appears that the Cornerstone figures may significantly *understate* the number of Section 14 lawsuits filed in the last three years. According to Cornerstone's methodology, its merger lawsuit figures do not count (1) Section 14(d) or 14(e) claims; (2) non-class action lawsuits (like Plaintiff Williams' action here) asserting Section 14 claims; or (3) all lawsuits relating to a specific transaction, as Cornerstone indicates that "[m]ultiple filings related to the same allegations are consolidated . . . through a unique record indexed to the first identified complaint." *Id.*

submission to this Court's jurisdiction and run the risk that Mr. Pratt will simply file a fee application in the Western District of Missouri where he filed his complaint (although never entered a notice of appearance), which will further increase DST's costs in dealing with these lawsuits.

DST is not aware of any authority that supports this Court's exercise of jurisdiction over Mr. Pratt. But DST should not be put to the choice it now faces. Indeed, that choice is contrary to the PSLRA and further demonstrates the myriad problems presented by this type of litigation.

V. THE PROJECTED UNLEVERED FREE CASH FLOWS WERE NOT MATERIAL

Plaintiff Scott raises a new contention in his reply brief that the unlevered free cash flow projections included in the supplemental disclosures were "all the more material" because "the other financial projections that were disclosed were of misleading non-GAAP financial measures that appear to be inconsistently reported by DST." Reply Brief of Plaintiff Scott, No. 1:18-cv-00286-RGA, D.I. 28, at 4 (the "Scott Reply"). This argument does nothing to rehabilitate Plaintiff's materiality argument.

As a threshold matter, Plaintiff's argument is, in essence, that DST was required to reconcile its non-GAAP financial projections to GAAP metrics that DST previously reported. This was an argument that was repeatedly raised in these types of cases until the SEC issued a Compliance and Disclosure Interpretation in 2018 that stated clearly that merger parties do not need to conduct such a reconciliation in proxy disclosure materials where, as here, the non-GAAP financial projections were provided to a financial advisor and used in connection with a business combination transaction. *See* Securities and Exchange Commission Division of Corporation Finance Compliance & Disclosure Interpretations (last updated Apr. 4, 2018) at

Question 101.01, *available at* https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm; *see also Bushansky v. Remy Int'l, Inc.*, 262 F. Supp. 3d 742, 748 (S.D. Ind. 2017) (rejecting argument that the failure to reconcile non-GAAP projections to GAAP measures was a material omission).

Moreover, Plaintiff's argument fails to show that the non-GAAP projections disclosed in the Proxy were, in fact, misleading. Plaintiff states that DST did not historically report "Total EBITDA" (one of the projections included in the Proxy) but, after the Proxy was filed, reported "a form of EBITDA as a metric to determine stock-based compensation per the Performance Share Plan." Scott Reply at 4. Plaintiff offers no explanation as to why stockholders would be misled because the Proxy accurately disclosed forward-looking projections of Total EBITDA and not some other unspecified "form of EBITDA" that plaintiff plucked out of DST's Form 10-K used for an entirely different purpose. Likewise, Plaintiff complains that DST stockholders would be misled because accurate Adjusted Earnings Per Share (Not Reflective of TCJA) and Adjusted Net Income projections were not comparable to other financial measures available in DST's historical filings. *Id.* But DST's Form 10-K did disclose non-GAAP diluted earnings per share and net income, which were readily available for comparison purposes. DST Sys., Inc. February 28, 2017 Annual Report (Form 10-K), at 19, *available at* https://www.sec.gov/Archives/edgar/data/714603/000071460317000006/dst10k20161.htm. Plaintiff's criticism that DST did not historically disclose Adjusted Earnings Per Share that reflected the impact of federal tax reform seemingly forgets that the tax reform legislation did not go into effect until after DST published the Form 10-K that Plaintiff cites.

Lastly, entirely absent from Plaintiff Scott's argument is any explanation as to how the various supposed problems associated with DST's disclosure of financial projections were corrected by the supplemental disclosure of the unlevered free cash flow projections calculated by DST's financial advisor. Plaintiff also overlooks the fact that additional information must *significantly* alter the total mix of information available to stockholders in order to be material. *See EP Medsystems, Inc.*, 235 F.3d at 872. He simply offers the *ipse dixit* that the information was material. Nor does Plaintiff's new argument distinguish the federal cases cited by DST in its Opposition brief that held, in the face of the same argument, that unlevered free cash flow projections were not material given all the other information available to the stockholders in those cases. *See Bushansky*, 262 F. Supp. 3d at 749–50 (concluding that unlevered free cash flow projections were not material in light of disclosures of estimated revenue, adjusted EBITDA, depreciation and amortization expenses, and capital expenditures); *In re Hot Topic, Inc. Sec. Litig.*, No. CV 13-02939 SJO (JCx), 2014 WL 7499375, at *9 (C.D. Cal. May 2, 2014) (holding that "accounting details" like unlevered free cash flow projections were not material where company had already disclosed projections of total revenue, EBITDA, capital expenditures, and other financial information). The Court should follow these other cases and likewise conclude that the unlevered free cash flow figures included in the supplemental disclosures issued by DST were not material and did not correct any other disclosures that Plaintiff Scott claims were misleading.

CONCLUSION

For the reasons set forth above and the reasons advanced in DST's Opposition, the Court should deny Plaintiffs' Applications for an Award of Attorneys' Fees and Expenses.

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