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# Firms Seeking Mootness Fees for Supplemental Disclosures Suffer Another Blow

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In a recent order, the U.S. District Court for the Southern District of New York denied a $250,000 “mootness fee” request by a stockholder plaintiff’s counsel, arising out of an investor challenge to Microsoft’s $19.7 billion acquisition of Nuance Communications, Inc.[1] The plaintiff’s counsel, after challenging the disclosures in Nuance’s proxy statement and after Nuance made certain supplemental disclosures, requested a “mootness fee” in the form of attorneys’ fees and expenses for its efforts in forcing Nuance to disclose additional information about the merger. District Judge Oetken held that the plaintiff’s counsel failed to justify the sought-after award because it could not show that its efforts conferred “a substantial benefit” on Nuance’s shareholders. While such fee awards were once customary, rulings like this one demonstrate that some courts will not approve such fee requests unless the supplemental disclosures obtained are of actual and material value to a company’s stockholders.

**Background**

This case arose from an April 2021 merger agreement between Nuance and Microsoft. In May 2021, ahead of the merger, Nuance filed a proxy statement with the SEC. Plaintiff Albert Serion, then filed a complaint against Nuance, alleging violations of federal law and asserting that the proxy statement omitted material information. Thereafter, Nuance filed additional disclosures as a supplement to the challenged proxy statement, in effect “mooting” Serion’s claims.

The plaintiff’s counsel then proceeded to file a motion for attorney’s fees and expenses, claiming that it had conferred a substantial benefit on Nuance’s shareholders by prompting Nuance to disclose certain previously withheld financial metrics, such as previously withheld revenue multiples, EBITDA multiples, cash flow multiples, and research analysts’ price targets. The plaintiff’s counsel asserted that it deserved $250,000 for its efforts to bring suit and cause Nuance to supplement its disclosures.

Unfortunately for the plaintiff’s counsel, the legal landscape has steadily moved away from acceptance of such fee award requests unless the supplemental disclosures are clearly material to stockholders approving the transaction. But, when demand or lawsuits result in supplemental disclosure of financial minutiae not material to stockholders, then any ensuing requests for a fee award should be rejected. As Judge Oetken articulated, “Numerous courts have concluded that prompting disclosure of underlying valuation metrics does not confer a substantial benefit on shareholders … .” In particular, the court found that where, as here, a proxy statement provides a fair summary and analysis of the work done by a banker in formulating its fairness opinion, a disclosure claim does not exist and therefore no fee award is warranted for supplemental disclosures of details that go beyond a fair summary. Indeed, because no additional information was legally required to be disclosed, the plaintiff's counsel did not convey a substantial benefit on the stockholders of Nuance. Thus, the plaintiff's counsel could not recover its attorneys' fees and expenses.

**Takeaways**

For years, companies have found themselves the victims of a so-called transaction tax. A transaction, such as a merger, is proposed to stockholders, then the plaintiffs' attorneys immediately make demands to the companies and/or file strike suits, asserting that certain immaterial financial metrics (and other immaterial information) was not disclosed in the proxy or information statement provided to stockholders. Thereafter, many companies decide to moot these immaterial disclosure issues by providing supplemental disclosures, and then the plaintiffs' attorneys request a fee as a result, under the premise that they conferred a material benefit upon stockholders. In many cases, the companies agree to pay this "tax." However, rulings like in *Nuance Communications* show that courts may no longer rubber stamp these fee requests, and companies may rightfully decide to reject any demands for such fee awards as they may be able to convince a court that there is no legal basis for such claims.

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[1] *Serion v. Nuance Communications, Inc*., 21-CV-4701 (JPO), 2022 WL 356695 [SDNY Feb. 7, 2022].

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