EFiled: Oct 14 2026 06:43PM EDT
Transaction ID 81044131
Case No. 2023-1112-NAC



TAB 1

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DYLAN NEWMAN, Individually and on Behalf of All Others Similarly Situated,	:	
Plaintiff,	:	
v	:	C. A. No. 2023-0538-LWW
SPORTS ENTERTAINMENT ACQUISITION HOLDINGS LLC, JOHN COLLINS, ERIC GRUBMAN, NATARA HOLLOWAY BRANCH, and TIMOTHY GOODELL,	:	
Defendants.	:	

- - -

Chancery Courtroom No. 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Monday, September 15, 2025
11:00 a.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

ORAL ARGUMENT AND BENCH RULING ON PLAINTIFF'S MOTION TO APPROVE THE SETTLEMENT, CERTIFY THE CLASS, AND FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARD

APPEARANCES:

DAVID M. SBORZ, ESQ.
Andrews & Springer LLC
-and-
GREGORY E. DEL GAIZO, ESQ.
of the California Bar
Robbins LLP
-and-
ERIK W. LUEDEKE, ESQ.
of the California Bar
Robbins Geller Rudman & Dowd LLP
for Plaintiff

STEPHEN C. NORMAN, ESQ.
Potter, Anderson & Corroon LLP
-and-
DAVID B. HENNES, ESQ.
of the New York Bar
Ropes & Gray LLP
-and-
SARAH M. SAMAHA, ESQ.
of the District of Columbia Bar
Ropes & Gray LLP
for Defendants

- - -

THE COURT: Good morning. Good morning, Mr. Sborz.

ATTORNEY SBORZ: Good morning. May it please the Court. David Sborz of Andrews & Springer for the Plaintiff, Dylan Newman.

Your Honor, before we begin today, I'd like to start with introductions, if that's okay.

THE COURT: Of course.

ATTORNEY SBORZ: To my left is Greg Del Gaizo from Robbins LLP.

THE COURT: Welcome back.

ATTORNEY SBORZ: And to his left, Eric Luedeke from Robbins Geller Rudman & Dowd.

THE COURT: Welcome.

ATTORNEY SBORZ: Your Honor, with the Court's permission, Mr. Del Gaizo has previously been admitted in this case *pro hac vice*, and he'll present argument on behalf of Plaintiff Newman this morning.

THE COURT: That's fine. Thank you.

Good morning, Mr. Norman.

ATTORNEY NORMAN: Good morning, Your Honor. Steve Norman on behalf of defendant. I would like to introduce David Hennes.

ATTORNEY HENNES: Good to see you

again.

THE COURT: Good to see you, too.

ATTORNEY NORMAN: And Sarah Samaha.

THE COURT: Welcome.

ATTORNEY NORMAN: Thank you.

THE COURT: Thank you very much.

ATTORNEY DEL GAIZO: Greg Del Gaizo from Robbins LP on behalf of Plaintiff, Dylan Newman. Again, Your Honor, I'm happy to be back, happy to be back so soon. Wish I was coming back tomorrow.

So, we are here on plaintiff's motion to approve the settlement in the action captioned Newman v. Sports Entertainment Acquisition Holdings. That's 2023-0538-LWW.

It's been a little bit since we were here on this case, so my thought was that I would go over the facts of the case, the key facts of the case briefly and then move on to the class certification, the settlement, the plan of allocation, and then the request for attorneys' fees and incentive awards.

Of course, happy to go in any order that Your Honor wants.

THE COURT: That order sounds fine. Thank you.

ATTORNEY DEL GAIZO: The de-SPAC transaction at issue here was between Sports Entertainment Acquisition Corp., we call it SEAC, that's the SPAC, and two private companies, SGHC Ltd. and Super Group Ltd., and we are collectively calling those companies Legacy Super Group. Legacy Super Group was an online sports gambling operator.

And I know Your Honor is very familiar with the standard SPAC structure. This was, just like many of those cases, that standard structure. The SPAC was controlled by the sponsor. The sponsor had acquired a substantial amount of founder shares prior to going public, here 11.25 million shares. And it bought those shares for a nominal amount, $25,000. It also purchased 11 million private placement warrants at a price of $1 per warrant.

Something I do want to point out that's a little unique here is we do not have serial SPAC founders. Our controllers are Defendants Collins and Grubman, and they certainly knew each other from previous dealings; but as far as we could tell, this was their first and only foray into the SPAC world.

Now, the sponsor did give 25,000 founders shares to each of the outside directors, here

Defendants Holloway, Branch, and Goodell. And, again, it appears that the board members knew each other, but we do not have this long history of business dealings or multiple board memberships we've seen in some of the other cases like the *Gig* cases before Your Honor.

The control. The defendants took SEAC public on October 6, 2020, selling 45 million units at $10 a unit. The units consisted of one Class A common share and one half of one warrant. Importantly for this matter, those Class A common shares had a redemption right, and of course the founders shares did not.

Our theory, and one that this Court has agreed with, at least at the motion to dismiss stage, is that the founders shares and the private placement warrants, which would become worthless outside of a de-SPAC transaction, created divergent interests between defendants and the ordinary stockholders.

Almost immediately after going public, the controller set their focus on Legacy Super Group. About six months later, on April 20, 2021, the board approved the merger with the company.

Our allegations are that the board was

largely uninvolved in the merger process and, instead, deferred to the controllers. Again, this is -- our allegation is that if the board had done the type of due diligence you expect of directors of a Delaware company, they would have learned about change in gambling regulations in Germany and the Netherlands and that those changing regulations would effectively shut Super Group out of the market in those key countries.

On January 13, 2022, the board issued the proxy in support of the merger. The proxy contained projections for Legacy Super Group, but those projections did not take into account these change in gambling regulations and therefore were materially overstated.

In addition, the proxy did not contain a disclosure about the SPAC's net cash per share. As we discussed at the motion to dismiss hearing, the proxy at a minimum implied that SEAC's shares were worth $10 per share when in reality they were worth a little more than $6 per share.

On January 26, 2022, stockholders voted in favor of the merger. They closed the merger that same day.

There were, however, substantial redemptions, a little under 25 million shares were redeemed. That's over half of them. There was approximately 20.3 million shares unredeemed.

Four months later, the company has its first earnings announcement as a public company. The results were not positive. It disclosed the issues in Europe, withdrew its full year guidance. The next quarter was similarly negative. They actually ended up saying, projecting 2022 revenues, $600 million below what was stated in the proxy, and Super Group price fell as a result. By the time Plaintiff Newman filed his initial complaint on May 18, 2023, Super Group stock was just $3.72 per share.

Regarding procedural history, after we filed that complaint, defendants moved to dismiss and we amended. They moved again and the Court heard oral arguments on February 23, 2024. And on May 20, 2024, the Court denied the motion to dismiss in part.

Now, there were certain, I would say, nuances to defendant's arguments that I do not believe Your Honor had a chance to address before. I think the key one was that Super Group was a real company. It was profitable. It was producing a significant

amount of revenue. And defendant's theory was that then in light of this, you did not need to disclose net cash per share.

Our view, and consistent with what we thought Your Honor held in *Gig3*, was you're describing Super Group, you're describing the get; but you also have to describe the give, which in that case is the net cash per share. And thankfully Your Honor agreed with us, at least at the motion to dismiss stage.

Another piece of your Honor's holding was you distinguished what was then a very recent Delaware Supreme Court decision in the *Brookfield* matter about what needs to be disclosed in the proxy, distinguishing that case because the inputs for net cash per share were strewn throughout the proxy.

And, finally, your Honor's holding really focused on when we talk about net cash per share materiality, we're talking about the difference between the $10 per share and the actual net cash per share. I do think those three aspects of your Honor's holding continue to reverberate, especially in the SPAC world.

Now, after we survived the motion to dismiss, we served interrogatories and RFPs on

defendants as well as a subpoena on Goldman Sachs. We received and reviewed over 4600 documents, over 32,000 pages.

On November 20, 2024, the parties held a mediation session with Robert Meyer of JAMS. While we didn't settle, we did make some progress. And on December 6, 2024, the parties accepted the mediator's recommendation of $12 million.

Unless Your Honor has any questions about the facts, I'd like to move on to the class cert.

THE COURT: That's fine. Thank you.

ATTORNEY DEL GAIZO: The settlement contemplates certification of a non-opt-out class of holders of SEAC Class A common stock who did not redeem all their shares as of the closing of the merger. The class does include successors; but after your Honor's ruling in *TS Innovation*, we revised the stipulation to make it clear that it's only those that obtained their shares by operation of law. The definition excludes the defendants, their family members, the entities that have a controlling interest, heirs and successors. As a result, I view this class as very similar to the one that was

approved in *TS Innovation* and after that in *Avepoint* and *Eva*.

Your Honor entered the scheduling order on July 11th, 2025.

As Your Honor knows, under Rule 23, a class may be certified if the criteria of Rule 23(a) is met as well as one of the criteria of Rule 23(b). Here we have a -- we are seeking certification under (b)(1) or (b)(2).

I think all the criteria are easily met here. Rule 23(a) we have numerosity, commonality, typicality, and adequacy.

For numerosity, there were over 20 million unredeemed shares of SEAC Class A common stock. We also received a list from defendants of approximately 10,000 beneficial holders. We filed two affidavits on behalf of Jack R. Ewashko. Mr. Ewashko is the director of case management of our claims administrator, A.B. Data. As explained in those affidavits, A.B. Data mailed over 14,600 notice packets to potential class members, so we believe this sufficiently shows numerosity.

As to commonality, there were questions uniform throughout, including whether

defendants breached their fiduciary duty in agreeing to the unfair merger and issuing a misleading proxy.

The typicality criteria, the question is whether the claims or defenses of the representative party are typical of the claims and defenses of the class here. Plaintiffs' claims are the same as all those other classes.

For adequacy, Your Honor, there's no conflict between plaintiff and the class. Mr. Newman submitted the requisite affidavit. That confirms he was not offered any compensation and did not bring this case due to any decision to receive compensation.

Regarding Rule (b)(1), there is the risk of inconsistent or varying adjudications. And concerning the two defendants have acted on grounds that are generally applicable to the class, so consistent with other decisions of this court, including *AEVA* last week, we think this satisfies both 23(a), (b)(1), and (b)(2).

Concerning notice, Your Honor, the notice we submitted and sent out contains the location, date, and time of the hearing as well as its purpose with the details of the claims, the defenses, the relief sought, as well as the plan of allocation.

As I mentioned, we received from defendants a list of 10,000 names and addresses. After removing some duplicates, we had a list of approximately 9600 unique people. We have also received from the defendants a list of the record holders. A.B. Data sent notices out to each of them.

In addition, A.B. Data has a mailing procedure where it collects its known brokerages and custodial banks and other such entities that, in its experience, holds stock on behalf of the street name holders, and A.B. Data sent out notices to each of those.

In total, A.B. Data has sent out 14,675 notices as of last week. It also set up a toll-free hot line. It had a website set up. That website contains all the key documents. It has the proof of claim. You can submit your claim online. I played with it, that website. I found it pretty easy to find the information. So consistent with prior SPAC settlements, we do believe that notice was appropriate here.

Moving on to the heart of the settlement, we believe the settlement should be approved as fair and reasonable. We think it's a good

settlement here.

Looking at the Rule 23(f)(5) criteria, starting with whether the settlement was within the range of reasonableness, looking at traditionally the "give" versus the "get," here the "get" is $12 million. This is directly attributable to this action. On a per share basis, the $12 million equates to 59 cents per share. That's consistent with other *MultiPlan* settlements. Last week we had AEVA, which was 58 per share. *Lordstown*, another example is 57 cents per share.

The give here is the release. We modeled this on releases that have gone before us. Paraphrasing a bit, the releases claims that were brought in this action or could have been brought in this action that were based on or related to the conduct in our case. We do think this was a strong case on the merits. It's an entire fairness action. We felt good about showing the proxy was misleading.

But there were going to be interesting questions about materiality here. Over 50 percent of SEAC's shares were redeemed. What does that mean for this case? Well, no court has had to address that yet. But Vice Chancellor Glasscock did write in the

Solak decision that substantial degree of redemptions means maybe the proxy was not materially misleading.

Some of the red flags that we talked about in the case, such as the inability to file financial statements, were clearly disclosed to stockholders. None of the defendants sold their stock, so we have one-time SPAC people not looking for a quick exit. Just not optically ideal from a plaintiff's perspective when we're trying to try a case.

And, finally, what defendants have strenuously argued to us was that the European gambling issue was not really what was moving the stock. That dovetails a bit into some of the still unknowns within the SPAC world really regarding damages. What we heard from defendants is that there must be a link between the false statement and the proxy, the truth coming out, and a disclosure that moved the stock price altogether. Now to me, that's a 10(d) case, not a breach of fiduciary duty case. But that was an argument we were going to face, a concern we had.

If we look at net cash per share, Your Honor, thinking about maximum damages in that way, it

was about $78.5 million. That would make the recovery here about 15.3 percent of those damages. That's consistent with some other cases such as *AvePoint* was 14.2 percent of net-cash-per-share damages*; Finserve*, 15.7 percent net-cash-per-share damages.

If defendants were correct and we had to do, say, nominal damages, Your Honor, of course, would have wide latitude in deciding what to -- what damages were there. We've seen the case law. It's traditionally between 50 cents and $2 per share. So if you look at that range as your damages, we're over 100 percent at 12 million or as low as 30 percent at the 60 million. At $1 per share, we're at 60 percent of damages. On all, we think this is a good settlement for stockholders and consistent with previous recoveries.

Now, turning to the plan of allocation, our plan is one that we believe the Court is very familiar with now. It's the same style Your Honor approved in *AvePoint* and *AEVA*. It's a claims-made process, not a claims-made settlement. The fund will be paid out. Defendants have no reversionary interest in the fund.

My colleagues at Robbins Geller and I

came up with this type of plan about a year ago. We looked initially at the DTC method. And instead of just kind of going with that, we recognized in these SPACs, stocks trading often all over the place, many times above $10 per share, at least initially. Here we did have the stock trading around 10 for about four months before the pretty substantial stock drop and then it bounced around.

So we thought this claims-made process makes the most sense, recognizing that people are selling post-close at different prices. At the same time, we do believe there is an informational harm when people have to make a redemption decision without knowing full information, so we do have a 10-cent per share what we call the nominal damage taking into account this informational harm.

THE COURT: I'm just curious. How did you come up with the 10 cents?

ATTORNEY DEL GAIZO: We looked at what we thought would be a fair amount given the overall settlement amount of 12 million. There wasn't, honestly, a super scientific reason for 10 cents per share. We wanted to get something into everybody's hands and something that would be meaningful, but it's

still at the same time reward the people that lost the most money first.

As to the process I mentioned earlier, you can submit your forms right online, so we've made the process as easy as possible.

So I pause for a second to see if Your Honor has any questions.

THE COURT: No questions, thank you.

ATTORNEY DEL GAIZO: So moving on to the fee and expense award, plaintiff here requests 17 percent of the funds. It equates to $2.04 million. This is an all-in amount that includes plaintiffs' expenses of a little over 55,000. If you back that number out, we're a little under 2 million.

The Court, of course, has discretion to award the amount of attorneys' fees that I believe is appropriate guided by the *Sugarland* factors. The most important factor is the benefit achieved. Here again, the $12 million fund created solely by the efforts of the plaintiff.

Up until the settlement, I would say this was a pretty hard fought litigation. It's a 2 and a half year old case. Because Super Group was a foreign company, we had to craft a complaint that

could survive a motion to dismiss without the benefit of Section 220 docs. And then Your Honor, in your ruling, called the non-coordinate cash per share disclosure a close call. We did review over 4600 documents, over 32,000 pages.

So looking at the *America's Mining* brackets, I would call it meaningful litigation, would put us in the 15 to 25 percent bracket. But recognizing that we are relatively early within that meaningful litigation stage, we recognize we haven't done any depositions, we're requesting 17 percent.

Comparing this to other cases that you've had in front of Your Honor, in *AvePoint* there was no dispositive motion. 1700 pages were reviewed and Your Honor approved 14 percent there. Looking at AEVA last week, Your Honor approved 16 percent. There, we did have a very unique and very important remand motion, but no dispositive motion, no discovery. So we think we're entitled to a little bit of a premium to that case.

The most comparable case I found was the *Skills* matter from two weeks ago in front of Vice Chancellor Fioravanti. We sent that in on Friday. There, the plaintiffs survived a motion to dismiss.

At roughly 22,000 pages of discovery and no deposition, Vice Chancellor Fioravanti awarded 17.5 percent of the fund there. Here, we're a little bit below it asking for 17 percent.

Full disclosure, there was a 220 in *Stills*. There was not one here. Of course we would have loved to do it, but we weren't able to.

Concerning what I consider more the secondary factors, we did take this matter on a fully contingent basis. There was complexity in this case. We are trying to understand foreign law. My German and Dutch, I would say not great.

Concerning the standing and ability of counsel, I think my record, my firm's record, my co-counsel's record is well-known to the firm and of course we're up against well-respected, well-known opposing counsel.

Looking at the lodestar cross-check, this also supports the amount we requested. We spent 1400 hours on the case, roughly. About a million dollars in total time, stopping when we signed the SIP. It equates to an hourly rate under $1500 an hour. After taking out expenses, it's a multiplier of 1.96.

Again, I think we're similar to *AEVA* and *AvePoint*. *AEVA*, the lodestar, after expenses, was a 1.98 multiple. The hourly rate was 18.74 per hour, so actually quite a bit lower in an hourly rate there. In *AvePoint*, hourly rate was $1700 an hour, so it was again still below that, and the multiplier was 2.23.

I'll note that at note 120 of our brief, we have a long list of cases with higher multipliers and hourly rates.

And then the last issue, Your Honor, is the relatively modest incentive award of $2,000. It's the same amount the Court awarded in *AvePoint*, $500 less than the Court awarded last week in AEVA. Mr. Newman stepped up when no one else would. He stayed involved. He got updates on the case. Obviously, no major decisions occurred without his involvement. And if not for him, the class would be getting no recovery. So we do think he deserves this, again, relatively minor award.

Unless Your Honor has any questions?

THE COURT: No questions. Thank you very much.

ATTORNEY DEL GAIZO: Thank you.

THE COURT: Mr. Hennes, do you have

anything you'd like to add?

ATTORNEY HENNES: No, Your Honor. Nothing at this time. Appreciate it.

THE COURT: All right. Thank you very much.

Well, thank you, Mr. Del Gaizo, for your very helpful presentation and thank you for your brief, which I went through very carefully before the hearing.

I have a bench ruling prepared that I can read into the record now if you'll bear with me for a few minutes while I do that.

Before me this morning is the proposed settlement of Newman versus Sports Entertainment Acquisition Holdings LLC, which is Civil Action Number 2023-0538-LWW.

I'll start with a brief summary of the factual and procedural background in this case. And I'll note for the record that the events I'm describing have not been proven, and I'm not making any findings of fact today.

At a high-level, the case concerns a January 2022 de-SPAC merger between Sports Entertainment Acquisition Corp, or "SEAC," which was a

SPAC, and two private entities I'll refer to as Legacy Super Group.

Like many SPACs, the sponsor purchased a significant portion of shares for a nominal investment. Allegedly, the sponsor and those affiliated with it pushed forward with a rushed merger process without involving the SPAC's directors. The SPAC selected Legacy Super Group as a target. The defendants then issued a proxy statement that allegedly misstated the SPAC's net cash per share and the effect of changes in European gambling regulations on Legacy Super Group's business.

About 55 percent of the public stockholders elected to redeem their shares before the stockholder vote, and stockholders voted in favor of the merger.

This litigation was filed the next year, in May of 2023. The complaint asserts claims for breach of fiduciary duty and unjust enrichment. The plaintiff's core allegation is that the defendants hindered public stockholders' ability to exercise their redemption rights on an informed basis, prioritizing their own personal and financial interests to close the deal quickly. In particular,

the plaintiff argues that the defendants withheld material information about the effects of certain European gambling laws on Legacy Super Group's business.

The defendants then moved to dismiss in June of 2023. The plaintiff filed an amended complaint, which the defendants again moved to dismiss. I heard oral argument on the motion on February 23rd of 2024, and in May I denied the motion to dismiss in part.

Discovery then ensued on the remaining claims. The plaintiff served document requests, interrogatories, and a third-party subpoena. And they obtained about 4600 documents.

In November of 2024, the parties participated in a mediation before Robert Meyer of JAMS. On December 6th, pursuant to the mediator's proposal, they agreed to settle the class action and release claims in exchange for $12 million in cash. A stipulation of settlement was then filed with this court on July 11th of 2025.

I entered a scheduling order providing for notice on July 11th. Notice was disseminated in accordance with my order. No objections were filed,

and no objectors appeared at the hearing this morning.

So with that background, I'll turn to the matters on my agenda today, starting with notice under Rule 23.

First of all, the notice satisfies the Rule 23 requirements. I approved the form of notice on July 11th. And the affidavit of Mr. Ewashko filed on August 8th also shows that the provision of notice was adequate under Rule 23.

That brings me to class certification. The parties stipulated to a proposed settlement class, which is defined in paragraph 1(b) of their stipulation. Broadly speaking, it includes holders of Class A common stock at the time of the de-SPAC who did not redeem. It's limited to "heirs, successors, transferees, and assigns who obtained [their] shares by operation of law," which is consistent with my letter decision in *TS Innovation* from earlier this year, which is 2025 WL 1892466.

Under Rule 23, to be certified, the class must satisfy the four criteria of Rule 23(a) and fall within at least one subsection of Rule 23(b). Each of the Rule 23(a) requirements are met. As of the record date, there were about 20.2 million shares

of SEAC Class A common stock outstanding. That's numerosity.

The factual and legal issues are common among all members of the class and arise from the same alleged conduct. That's commonality and typicality.

And the plaintiff has fairly and adequately served the interests of the proposed class and filed the requisite Rule 23(a) affidavit. That satisfies adequacy.

Certification would also be appropriate under subsections (1) or (2) of Rule 23(b). Without a class, there could be numerous lawsuits risking inconsistent adjudications, and the plaintiff alleges that the defendants engaged in a single course of conduct generally applicable to the class members. And so I'm comfortable approving the proposed class as a non-opt-out class for settlement purposes only, as outlined in the stipulation of settlement.

The next item is to consider the merits of the settlement itself. My role in doing that is "to consider the nature of the claim, the possible defenses thereto, the legal and factual

circumstances of the case, and to apply [my] own business judgment in deciding whether the settlement is reasonable in light of those factors." That's from *In Re Philadelphia Stock Exchange*, 945 A.2d 1123, at pages 1137 to 38 from the Delaware Supreme Court in 2008.

I must compare the value of the benefits achieved by the settlement, which is the "get," against what the plaintiffs are giving up, or the "give," and those considerations are outlined in the newly amended Rule 23(f)(5).

The "get" consists of the $12 million cash payment to the class. The "give" is a release of claims, which is of claims brought in the complaint, or that the plaintiff could have brought based on the same set of operative facts. The release is consistent with releases this court has approved numerous times now, which I also think is appropriate.

As I recognized last May, the plaintiff brought reasonably conceivable claims that public stockholders' redemption rights were disloyally impaired, and it was reasonably conceivable that the entire fairness standard applied.

But the plaintiff acknowledges that

there were still a number of risks. For example, there was a high redemption rate, which cuts against the notion that the redemption rate was materially impaired. The defendants were not serial SPAC creators, and the directors lacked long-standing ties with the sponsor. The liability also turned on foreign gambling law changes, which are external and not a problem integral to the legacy company itself. And there's, as counsel noticed, the risk of proving damages in these cases.

So on balance, the cash recovery, which works out to about 59 cents per share, is a favorable outcome for the class. The settlement is fair, reasonable, and adequate, and I approve it on that basis.

I am also going to approve the proposed plan of allocation, which is consistent with those endorsed in this court in several similar settlements. The net settlement amount will be distributed directly to eligible class members on a pro rata basis, based upon the economic losses. The losses are of varying degrees, and the settlement, I believe, equitably accounts for that. I also believe the upsides to this approach overcome the costs of the

claims process.

What I am less confident in is the notion of a "nominal" payment on a per share basis for a stockholder that suffered no loss. But I understand that the goal is to make sure that something gets into the hands of every stockholder, though making sure that those who lost more recover more.

Comparing that to settlements where there was no accounting for the varying harms, I think that this approach versus a flat pro rata payment is preferable, and so I'll approve this plan of action allocation, as I have in prior cases.

That leaves the request for an award of attorneys' fees and expenses and the plaintiff's request for an incentive award.

Starting with the fee award, Counsel requests $2.04 million, inclusive of an expense reimbursement of just over $55,000. I reviewed the expenses outlined in counsel's affidavits, and they seem reasonable to me.

In setting fee awards, I "must make an independent determination of reasonableness." That's from *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039. To do that, I must apply my own business

judgment in determining whether the award is reasonable and appropriate in a given case. And the *Sugarland* factors guide that analysis.

I'll start with the benefit conferred, which is the most important *Sugarland* factor. The benefit here is the $12 million cash fund. That's a solid benefit.

In *Americas Mining*, the Delaware Supreme Court observed that, when a case settles early, fees are typically in the 10 to 15 percent range. And when a case settles after "meaningful litigation efforts," meaning "some level of motion practice" and discovery, fees are awarded in the 15 to 25 percent range.

Less expenses, which again appear reasonable, the net requested fee award is $1,984,821, which I calculate to be about 16.5 percent of the net fund. I think that's appropriate, given that the case involved substantive merits-based motion practice, and document discovery. It's not at the high end, or even midpoint, of the range, but it's above the baseline, and I think that that's right.

The other *Sugarland* factors which can moderate the percentage of recovery in one direction

or another also support the requested award. The case was taken on contingency. Counsel are highly experienced and skilled on both sides. But this case wasn't novel or particularly complex. There wasn't an overwhelming amount of time invested, but it didn't settle right out of the gate. There was a motion to dismiss, and some document discovery. And so these factors balance each other out, and none, in my view, require an adjustment to the fee.

As a cross-check, plaintiff's counsel collectively put in about 1,379 hours on the case from commencement through the date of stipulation of settlement. The implied hourly rate is about $1,479. The total lodestar is just over a million. Less expenses, the fee comes out to under a 2x multiplier. And so neither figure, the implied hourly rate or the multiplier, is so high that they're out of bounds or unsupported by precedent, and neither is anything approaching a windfall.

Given the cash benefit achieved and the other *Sugarland* factors, I'm comfortable with the fee and expense award and I approve the award requested.

That leaves the matter of Mr. Newman's

incentive award. He seeks a $2,000 payment. I'll award that, as well. He did not participate in discovery or do anything unusual that I'm aware of that would warrant a bigger incentive award, but I believe that his service as a class representative entitles him to this payment out of the fee and expense award.

So to recap, I will certify the class, approve the settlement, approve the proposed plan of allocation, and award the requested attorneys' fees and incentive award.

That's everything that I had on my agenda. Congratulations. This is a great settlement. And I really appreciate you coming in and seeing you all. So thank you very much.

Any other questions or anything we should talk about?

ATTORNEY SBORZ: No, Your Honor.

ATTORNEY HENNES: Looking forward to seeing you on Wednesday.

THE COURT: See you again soon. We're adjourned.

(Proceedings concluded at 11:38 a.m.)

- - -

CERTIFICATE

I, KATHY CORTOPASSI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 32 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 25th day of September, 2025.

/s/ Kathy Cortopassi

Kathy Cortopassi
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

TAB 2

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DEAN WILLIAM DRULIAS and MICHAEL FARZAD, individually and on behalf of all others similarly situated,	:	
Plaintiffs,	:	
v	:	C. A. No. 2024-0094-LWW
APEX TECHNOLOGY SPONSOR, LLC, JEFF EPSTEIN, BRAD KOENIG, DAVID CHAO, PETER BELL, DONNA WELLS, ALEX VIEUX and STEVEN FLETCHER,	:	
Defendants.	:	

- - -

Chancery Courtroom No. 8D
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, July 10, 2025
11:00 a.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

ORAL ARGUMENT AND BENCH RULING ON PLAINTIFFS' MOTION TO APPROVE THE SETTLEMENT, CERTIFY THE CLASS, AND FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND INCENTIVE AWARDS

APPEARANCES:

CHRISTINE M. MACKINTOSH, ESQ.
Grant & Eisenhofer P.A.
-and-
JASON M. AVELLINO, ESQ.
Robbins Geller Rudman & Dowd LLP
-and-
GREGORY E. DEL GAIZO, ESQ.
ERIK W. LUEDEKE, ESQ.
of the California Bar
Robbins Geller Rudman & Dowd LLP
for Plaintiffs

SUSAN W. WAESCO, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
MARIE C. BAFUS, ESQ.
of the California Bar
Fenwick & West LLP
for Defendants

- - -

THE COURT: Good morning. Good morning, Ms. Waesco.

ATTORNEY WAESCO: Good morning, Your Honor. I rise before I hand things over to Ms. Mackintosh just to do introduction.

For the record, Susan Waesco from Morris Nichols Arsht & Tunnel with my co-counsel, I have Marie Bafus from Fenwick & West. And to the extent Your Honor has any questions for defendants, Ms. Bafus will handle those.

THE COURT: Wonderful. Thank you. Welcome.

Good morning, Ms. Mackintosh.

ATTORNEY MACKINTOSH: Good morning, Vice Chancellor Will. Christine Mackintosh from Grant & Eisenhofer, joined by my colleagues Greg Del Gaizo from Robbins LLP, Erik Luedeke from Robbins Geller Rugman & Dowd, and Jason Avellino from Robbins Geller Rugman & Dowd.

THE COURT: Good morning. Nice to see you all.

ATTORNEY MACKINTOSH: So I don't know if Your Honor has had an opportunity to see the filings that we submitted this morning.

THE COURT: I have not.

ATTORNEY MACKINTOSH: Okay. So let's just tee it off. Yesterday morning, as Your Honor is well aware, you issued an order in the *Latch* case. You followed up with a minute order in our case at the end of the day asking us to be prepared to address it.

Before you even entered that minute order, we had reached out to defense counsel and said, hey, we respectfully agree with Vice Chancellor Will. We think the claims do not travel with the shares. We think that the changes to the class definition that she requested in latch makes sense, and we have followed suit here.

THE COURT: Great.

ATTORNEY MACKINTOSH: So I don't know if you want me to hand up the materials. We have a proposed -- revised proposed order for you that amends the class definition to use the same language you requested in latch. We have a redline comparing it to the original order that we filed with the Court some months ago so you could see what that is.

THE COURT: That would be fantastic. And thank you for being five steps ahead of me on that. That's wonderful.

Ms. Waesco, Ms. Bafus, I'm assuming that this is acceptable from your standpoint, as well?

ATTORNEY WAESCO: It is, Your Honor. We reviewed the draft. We just had to get sign-off from many constituents.

THE COURT: I understand. Thank you for doing that so quickly.

ATTORNEY MACKINTOSH: And while I'm at it, let me hand up the letter that we filed sort of explaining this; and in the letter, it indicates that the defendants are on board with this.

THE COURT: Wonderful. Thank you. I will take that. And I'm sorry I didn't have a chance to review that this morning. Thank you.

ATTORNEY MACKINTOSH: You know, we're frankly relieved that Your Honor has come to this conclusion. You might have read the transcript hearing from the *Sharecare* settlement. It was quite a kerfuffle, so we're very happy, and it appears that your colleagues are following suit. We know Vice Chancellor Cook has entered minute orders to this effect, and hopefully now this issue is sort of resolved.

THE COURT: I hope so. I spent more

time sorting through this than I care to admit. Hopefully we've come to a good place.

ATTORNEY MACKINTOSH: Fingers crossed. I mean, I will never forget the night at 3 o'clock in the morning I devised a plan of allocation for *Sharecare* to address Vice Chancellor Laster's concerns. And when I sent it in, he signed off on it, thank God.

Anyway, this is the time the Court has set down to consider the settlement reached in the Drulias versus Apex Sponsor LLC matter, or as we internally call it, AvePoint.

We're pleased to present this settlement, which offers a $14.4 million cash payment to former stockholders of Apex Technology Acquisition Corp, also known as Apex, who were deprived of their right to make a fully informed decision about whether to redeem their Apex shares or invest in New AvePoint, the company emerging from Apex's merger with Legacy AvePoint.

The settlement provides a gross recovery of approximately 41 cents per share, which compares favorably with the per share recoveries in similar SPAC settlements.

Our settlement administrator has provided notice that more than 15,000 potential class members, published notice to the DTC's legal notice system, and provided information about the settlement on a dedicated website.

We have not received a single objection to this settlement. We have, however, received two communiques from class members. One was a request from the class member asking that the settlement be expanded to include Apex warrants. We did send a copy of that along for Your Honor. We're prepared to address that later today. And another one requested to opt out of the settlement. I think Your Honor was made aware of that one, though.

THE COURT: Yes.

ATTORNEY MACKINTOSH: We will address those. I'm going to call them communications. I don't think they really qualify as objections, but I guess Your Honor may have a different view on that.

During the hearing, I plan to do the following: Provide a high-level overview of the case, address the terms of the settlement, including the proposed plan of allocation, address the motion for class certification, including our request to modify

the class definition to comport with your Honor's recent ruling in latch, to address these two class member communications, and to address our requests for attorneys' fees and expenses and a modest 2,000 incentive award for each of the plaintiffs.

I'm happy to discuss these in a different order, and I'm happy to skip over any in whole if you don't feel the need to hear from me on any of them.

THE COURT: Your order sounds great. If there's anything that we can skip, I'll let you know.

ATTORNEY MACKINTOSH: Okay. So, overview of the facts.

This case arises from a July 21, 2021, merger between Apex and Legacy AvePoint. Apex was incorporated in Delaware as a SPAC on April 5, 2019. Apex, like all SPACs, had no business operations and was formed for the sole purpose of combining with another company in a de-SPAC merger.

After Apex was incorporated, Mr. Vieux, Mr. Fletcher, and Mr. Koenig, who we refer to as the "Controller Defendants", created Apex Technology Sponsor, which we refer to as "The

Sponsor." And the Controller Defendants for the sponsor's managing members had full voting power and investment discretion with respect to the sponsor securities.

The Controller Defendants recruited individual people to serve as Apex's directors and officers and secured these individuals' loyalty by giving them membership interests in the sponsor. These membership interests were designed to ensure that the interests of Apex directors and officers were aligned with the Controller Defendants in seeing that Apex close the deal, any deal.

On June 30, 2020, Apex completed its IPO, selling 35 million units for $10 per share. Each one consisted of an Apex share and one half of an Apex warrant.

Immediately after the IPO, Apex began to search for a merger partner. And it quickly settled on Legacy AvePoint, which was a Software as a Service, or SaaS, company.

Beginning in late August of 2020, the Controller Defendants, together with Apex's CEO Jeff Epstein, began to discuss a potential business combination with Legacy AvePoint.

By late November 2020, Legacy AvePoint and Apex, unbeknownst to Apex's board, had effectively fully negotiated a merger.

On November 18, 2020, Apex's board was belatedly brought into the loop. On that day, the Apex board conducted a 90-minute video conference to review and consider the fully baked deal that Apex and Legacy AvePoint had negotiated.

Two days later, Apex's board reconvened and approved the merger during a cursory 15-minute meeting. The board never met again.

On May 27, 2021, the board, acting by written consent, authorized Apex's officers to prepare the proxy and give it to the stockholders.

Apex filed the merger on June 2, 2021. And as has frequently been the case in a de-SPAC merger role, the proxy was replete with false statements and material omissions. First, the proxy falsely claimed that the Apex stockholders who elected to rollover in the post-merger entity will receive stock that was worth $10 per share, when in reality Apex had less than $7.15 in net cash per share underlying each of those shares.

Second, the proxy failed to disclose

the exact interest that Apex directors and officers held in the Sponsor. They disclosed vaguely that each of the defendants was a member of the sponsor but did not disclose what interest these individual people actually had in the founder shares or in any other Apex securities.

Third, the proxy contained inflated financial projections for legacy AvePoint and failed to counterbalance those unreasonably optimistic projections with known facts that called their achievability into question.

Finally, the proxy failed to disclose material information about the economic interests that William Blair, Apex's financial adviser, had in the merger. The proxy didn't disclose that William Blair would receive only $25,000 in expense reimbursements unless a merger closed, and it also didn't disclose that William Blair stood to receive a portion of a $13.5 million deferred underwriting and capital assets markets advisory fee in the event a merger closed.

On June 30, 2021, Apex's stockholders approved the merger, and it closed the next day.

Of the 35 million shares entitled to redemption, only 17,372 opted to redeem, and the rest

rolled over into the New AvePoint.

On November 15, 2021, New AvePoint released its third quarter 2021 financial results. That was the first full quarter following the merger. And the results were very disappointing. After they were announced, New AvePoint stock dropped nearly 10 percent, and it remained depressed throughout 2022.

On October 18, 2022, plaintiff Julius served his Section 220 demand on AvePoint. Plaintiff Farzad followed suit in May of 2023.

The parties engaged in a protracted 220 negotiation process that spanned nearly a year. AvePoint twice certified substantial completion only to later be forced to turn over documents that were within the scope of agreed production after plaintiffs identified missing documents and pressed for more.

Plaintiffs also prevailed upon AvePoint to produce electronic documents to fill some gaps in the official board-level records and to remove questionable redactions.

In all, we received 6 separate 220 productions spanning more than 1700 pages. And we used a substantial 220 to draft the detailed complaint. Our complaint was so well pled that the

defendants forewent motion practice and opted to answer. After defendants answered, we immediately moved into document discovery. Plaintiff served document requests on all the defendants, and we served subpoenas on six third parties.

As we were in the process meeting and conferring and negotiating search parameters and the like on the discovery, the parties agreed to schedule a mediation. And on October 22, 2024, we participated in a full day mediation session with Robert Meyer of JAMS.

At the end of the session, the parties agreed to settle for a $14.4 million cash payment.

With that background we'll move on to the terms of the settlement.

As Your Honor knows, in assessing a settlement, the court compares the "get" to the "give." And the "get" here is substantial. We have negotiated a $14.4 million cash settlement. By any measure, this is a fantastic result for the class. This settlement provides a gross recovery of 41 cents per share, which compares favorably with what has been approved in a number of SPAC litigations. The settlement in *XL Fleet* was for 21 cents a share. The

settlement in *MultiPlan*, the one that sort of kicked this all off, was for 37 a share. The *View* settlement was 32 cents a share. The *FinServe* settlement was 38 cents per share. And the *GeneDX* settlement was 47 cents. So we think we're right in the heartland there.

In addition, the 14.4 million provides 14.2 percent of the class's net cash per share damages. And we think that compares favorably with the median 12.35 percent of potential damages recovered in the post-*Southern Peru* entire fairness settlement that Vice Chancellor Laster went through in his *Dell Class V* opinion.

And the "give" here is the standard release of claims. In addition, the settlement was approved following an arms length negotiation between experienced counsel and before an experienced and well-respected mediator, which further supports the reasonableness. We respectfully submit that the settlement should be approved as fair, reasonable, and adequate.

Moving on to the plan of allocation. The 14.4 will be distributed pro rata among class members who submit a valid proof of claim. And the

claim will include two forms. First, every class member who submits a valid claim will receive a nominal damages award in recognition that the impairment of the redemption decision caused harm, separate and apart from any economic harm that might have been sustained in connection with later sales of their shares.

Second, the class members who sold their New AvePoint stock for less than the redemption value will receive additional money based on their recognized economic loss. And we think this is fair because New AvePoint stock traded between $3.57 and $12 per share during the three-year period after the redemption deadline, so some class members might have sustained large economic losses and some might not have sustained any. So we think this is a fairer way to do it.

In addition, this is similar, if not identical, to plans of allocations approved in a number of other SPACs, including *GeneDX*, *View*, *RMG*, *Latch* and *QuantumScape*.

Accordingly, we respectfully submit that the plan of allocation should be approved.

Let's move on to the request for class

certification. As Your Honor has now seen, we have adopted your wisdom imparted in the *Latch* case, and we now propose to have a class that includes only heirs, successors in interest, successors, transferees, and assigns, who obtained their shares by operation of law. So anyone who bought those shares later, that claim doesn't travel.

And the usual suspects are excluded from the class.

We believe our class satisfies the requirements of 23(a), 23(b)(1), and 23(b)(2).

And certification of a non-opt-out class is appropriate under 23(b)(1) and 23(b)(2) because all class members suffered the same harm as a result of defendants' conduct, and defendants' actions impacted class members in a uniform fashion.

In terms of class member reactions, as I mentioned earlier, we received two communications. I don't think either constitutes an objection; but in interest of full disclosure and candor, we wanted to discuss them with the Court.

A putative class member Melody Fu requested to opt out. But as this Court knows, we are seeking certification of a non-opt-out class, as is

common in these types of actions; and, therefore, we're not able to accommodate Ms. Fu's request.

Another putative class member, Huseyin Cingir, requested that we expand the class to add warrants. We're not willing or able to accommodate that request. The action challenges the impairment of redemption rights. And as Your Honor knows, warrant holders don't have redemption rights. It also challenges breach of fiduciary duty and, again, fiduciary duties aren't owed to warrant holders. So for that reason, we are not able or willing to accommodate his request on that.

Unless Your Honor has further questions about the terms of the settlement, I'll move on to attorneys' fees and expenses.

THE COURT: No questions, thank you.

ATTORNEY MACKINTOSH: We are seeking an award of $2,060,000 which is 14 percent of the $14.4 million settlement, inclusive of a little under $50,000 of expenses reasonably incurred in litigating the action.

We're also asking for permission to pay $2,000 incentive awards to each of the plaintiffs out of any fees that Your Honor might award to us in

this case.

As Your Honor knows, the Court looks at the *Sugarland* factors in determining the appropriateness of the fees. And we respectfully submit that the *Sugarland* factors supported the requested fee.

As Your Honor knows, the Court affords the greatest weight to the benefits conferred on the class. As we discussed earlier, we believe the settlement confers substantial benefits on the class.

Under the *Americas Mining* scale, fees between 10 and 15 percent are typically awarded for early-achieved settlements, and then it moves to 15 to 25 percent for meaningful litigation effort settlements.

We think that this settlement falls towards the top end of the early litigation stage settlements. We secured over 1700 pages of 220 documents. These were not easily given over to us. There was a nearly one-year-long, protracted Section 220 negotiation, which included not one but two erroneous certifications of substantial completion. We had to push back and get more documents. They had to concede, yes, there's these

other documents that we should have given you.

We prevailed upon them to take the somewhat unusual step of giving us some electronic documents to fill gaps. We prevailed upon them to remove some improper redactions. We propounded document requests on defendants and served six subpoenas on third parties. Although we haven't gotten documents yet as a result of those. Because we had started the mediation process, those efforts were real, and we were prepared to move aggressively into discovery. We negotiated a favorable settlement following mediation before an experienced mediator. And we think that 14 percent is sort of in line with what's been approved in similar cases. So we think the time and effort here supports our requested ask.

We expended nearly 1,180 hours on a fully contingent basis with a lodestar value of $904,727.75. The requested fee implies an hourly rate of $1,709.63 and works out to a lodestar multiplier of 2.23. We think both of those are within the bounds of fees awarded in similar cases, and we respectfully submit that our request is reasonable and should be granted.

Finally, we request permission to make

$2,000 incentive award payments to both of the named plaintiffs to be paid from our attorneys fee award. These awards are modest and comparable to what has been awarded in similar cases, and we think that those should be approved, as well.

So, unless Your Honor has any further questions, that concludes our presentation.

THE COURT: All right. No questions. Thank you very much.

Ms. Waesco, is there anything that you'd like to add?

ATTORNEY WAESCO: Your Honor, if I may, just one point.

THE COURT: Sure.

ATTORNEY WAESCO: Obviously, defendants support the settlement here. Just for the record, these were allegations. A lot of this was presented as if it was findings of fact. We had a complaint here. And just to flag Section 13 of the stipulation of settlement contains the customary no admission of wrongdoing provisions. So I just flag that for Your Honor following Ms. Mackintosh's presentation.

THE COURT: I completely understand.

Thank you very much.

ATTORNEY WAESCO: Thank you.

THE COURT: All right. Well, thank you all very much for coming in today. I'm not normally thrilled to be on the eighth floor, but there's no air conditioning on the 12th floor today, and so we can all be happy that we're in 8D.

ATTORNEY WAESCO: Thank you.

THE COURT: It's nice to see you all. And I really appreciate you getting together to resolve the class issue so quickly. I know that that wasn't an easy lift since I dropped it on you at 5 p.m. yesterday. But thank you. I'm grateful for that.

I have a bench ruling prepared that I can deliver on the settlement now. If you'll bear with me, I'll work through it and then I'm happy to answer any questions at the end.

Before me this morning is the proposed settlement of Drulias versus Apex Technologies Sponsor LLC, which is Civil Action Number 2024-0094-LWW.

The case concerns the alleged impairment of redemption rights held by public stockholders of Apex Technology Acquisition

Corporation, which is a Delaware corporation originally formed to serve as a special purpose acquisition company.

The overarching facts alleged in the complaint -- and I'm not making any findings of fact today -- are similar to those found in other cases regarding alleged impairments of stockholder redemption rights.

The sponsor that allegedly controlled the SPAC purchased founder shares for a nominal price. If the SPAC entered into a business combination with a target, the founder shares would convert to Class A stock and become freely tradeable, reaping substantial rewards for the sponsor; but if the SPAC failed to complete a transaction within 24 months, the founder shares would have expired, worthless.

This interest on the part of the sponsor to consummate any deal allegedly stood in conflict with the interests of the SPAC's public stockholders, who held Class A shares with redemption and liquidation rights who would only benefit from the value accretive measure.

The SPAC settled on Legacy AvePoint, which was then a private Software as a Service

company. The SPAC board allegedly approved the merger after a single 15-minute meeting during the deal process. The company did not obtain a third party valuation or fairness opinion according to the complaint.

The proxy statement filed six months later in June of 2021 allegedly left out important details about the SPAC, including the value that each SPAC stockholder was investing in the combined company post-closing, referred to as the net cash per share in some other decisions of this court, as well as information about alleged conflicts and AvePoint's projections.

Apex stockholders approved the merger on June 30 of 2021 and the merger closed the next day. But after closing, what the plaintiffs describe as known issues disclosed in the proxy concerning AvePoint's ability to meet their projections began to adversely affect the combined company's revenue and gross profit. The stock point price then fell. And after 220 demand served by the plaintiffs, this suit was filed in February of 2024.

The defendants answered the complaint. The parties served document requests on one another.

And the plaintiffs served, I believe, six third-party subpoenas. There were no documents produced other than the significant number of documents produced under the 220 that I heard about from counsel today.

The parties then engaged in mediation before Robert Meyer of JAMS on October 22nd of 2024 and reached a settlement the same day.

A stipulation of settlement was filed in this court on February 7th of this year.

Notice was disseminated in accordance with my order to that effect. One individual sent an email to the plaintiffs' counsel raising a concern with the settlement and another asked to opt out of the settlement, but no objectors have appeared today, and no formal objections were filed.

With that background, I'll turn to the settlement and I'll start with the issue of class certification. A class must satisfy the four requirements of Rule 23(a) and fall within one of the three subsections of Rule 23(b).

The Rule 23(a) requirements are numerosity, commonality, typicality, and adequacy of representation. These requirements are easily met. As of the June 28, 2021, redemption deadline, there

were 35 million shares of common stock issued and outstanding, and just over 17,000 of those shares were redeemed. There are common questions of law and fact among the putative class members whose redemption rights were purportedly impaired. The named plaintiffs' claims are typical of the other class members who didn't redeem their shares. And they and their counsel are adequate class representatives and class counsel respectively.

The class is also appropriately certified under Rule 23(b)(1) or (b)(2). Prosecution of separate actions would risk inconsistent judgments, and the adjudication of one class member's claim would practically be dispositive of the others.

The only wrinkle on class certification is the one that I raised by minute order yesterday evening, which is the scope of the proposed class.

As I outlined in a letter decision filed yesterday in the *TS Innovation* matter, which is Civil Action Number 2023-0509-LWW, the central claim for impairment of the redemption right doesn't travel with the shares after the redemption choice is made; and so other than those upon whom the claim devolved

by operation of law, the class members successors of interest lacked the right to advance the claim after closing.

I believe that my reasoning applies with equal force here, and counsel has agreed to modify the class definition with the qualifier "who obtained shares by operation of law." I have a revised proposed final order to that effect. And, again, I thank counsel for making that happen with lightning speed.

I will approve the revised proposed class as outlined in the revised paper.

In terms of notice, I determined that the form of notice to absent class members was adequate under Rule 23 when I entered the scheduling order.

After reviewing the supplemental affidavit of notice at docket number 60, I conclude that the provision of notice was also adequate under Rule 23.

The next item on my agenda, the merits of the settlement, requires me to consider whether the terms of the proposed settlement are fair and reasonable and whether to approve it on that basis.

My function is to "consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and apply my own business judgment in deciding whether the settlement is reasonable in light of those factors." And that's from *In Re Philadelphia Stock Exchange*, 945 A.2d 1123 at pages 1137 to 38.

As we often describe it in this court, my job is to weigh the "give" and the "get" of the settlement. And that means that I must compare the value of the benefits achieved by the settlement to the strength of the claims being released.

I'll start with the "give."

The parties have agreed to a release of claims in the action and those related to the merger that could have been brought individually by the plaintiffs or on behalf of the class I outlined before. And that's from the stipulation's definition of "released plaintiffs claims." That release is fairly standard and appropriately tailored to the factual predicate in claims advanced in the complaint.

The plaintiffs' claims were arguably subject to the entire fairness standard of review, which placed the burden of proving fairness on the

defendants.

The plaintiffs had some fairly strong process-based allegations. But as they acknowledge in their papers, they face some risks given the price fluctuations in the stock that traded at or above the redemption price for periods after closing. And so there was a risk that the plaintiffs could have come away with nothing.

Compared to that, in terms of the "give," the plaintiffs secured a $14.4 million cash recovery for the class. This is a favorable outcome given the potential risks on fair price and damages that I just mentioned, and it provides a concrete and certain monetary recovery for the class members.

So on balance, the settlement is easily a fair and reasonable one for the class, and I'm going to approve it on that basis.

The fact that the settlement was reached through arm's length negotiations with a well-regarded mediator and that excellent counsel on both sides litigated the result further supports my conclusion that the settlement should be approved.

The plaintiffs' counsel received one "critique" of the settlement, and I will very loosely

consider that as a potential objection. On June 26th, a purported class member requested that counsel try to add warrant holders into the settlement. That's at docket 54, Exhibit A.

The claims, as I have explained, arose from an alleged impairment of Class A stockholders' redemption rights. Warrants lack any redemption rights. And as counsel points out in the papers, there's case law in this court stating that directors do not owe fiduciary duties to potential future stockholders, which warrant holders, of course, are. So that objection, to the extent it can be called that, is overruled.

Plaintiffs' counsel also received a request from a potential class member to opt out of the settlement, and that's docket number 58 at Exhibit A. This is, of course, a non-opt-out settlement. And I understand that after plaintiffs' counsel explained that, there were no further communications from the individual. So to the extent that could be considered an objection, it's also overruled.

In terms of the proposed plan of allocation, I'm going to approve that, as well. The

plan includes a claims process. The plaintiffs have explained the reasoning behind their implementation of a claims process in their March 28th letter at docket number 48. Since this was a fairly novel approach, as I noted when I entered the scheduling order and after reviewing similar plans of allocation in other cases, I found the plaintiffs' explanation for it to be very helpful.

They explain that the standard procedure by which a settlement administrator makes direct pro rata payments, known as the DTC method, would not account for the impact of post-merger trading in the case.

Here, Apex and post-merger AvePoint's stock, traded between $12.40 and $3.57 per share during the three-year period after the redemption deadline. And so class members who sold their stock at different points experienced significantly different alleged losses. The process here accounts for that in distributing the settlement proceeds. And as I explained before, though the claims process may increase settlement administration costs, I believe that it's justified in light of the more equitable allocation results. So I will approve that as well.

I'll next address the request for awards of fees and expenses for the plaintiffs' counsel and incentive awards for the two named plaintiffs.

The plaintiffs have moved for an all-in fee and expense award of $2,016,000 is inclusive of about $48,000 of litigation expenses. I've reviewed the explanation of the litigation expenses. They generally are mediation costs, some modest travel costs, document hosting fees, and I find them all to be reasonable and appropriate in this case.

In setting fee awards, the Court of Chancery must make an independent determination of reasonableness. That's from *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d, 1039. In doing so, the Court is guided by the *Sugarland* factors. I'll start with the benefit conferred in the litigation, which is the most important of the *Sugarland* factors.

As I mentioned before, the settlement provides the class with a $14.4 million fund to be equitably distributed to class members. This is a meaningful and a concrete benefit for the class.

The plaintiffs seek an award that

amounts to 14 percent of the fund, or 13 and a half percent of the fund when I subtract out the expenses.

In *Americas Mining*, the Delaware Supreme Court observed that when a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically substantive motions practice and discovery, fee awards will range from 15 to 25 percent of the benefits conferred; but for an early stage settlement, *Americas Mining* describes the typical range as 10 to 15 percent of the monetary benefit.

This is an early stage settlement. There was an answer but no motions practice. There were document requests and subpoenas, but no document production, although there was a hard-fought 220 production, which resulted in about 1700 pages of documents being produced.

And so given that, I don't think that the low end of the range is appropriate nor would the highest end of the range be appropriate. But the award is closer to the center, and I think appropriately so.

In terms of the other *Sugarland* factors, counsel is highly experienced and skilled. The case isn't especially novel, especially given the

many similar cases brought since the SPAC boom fizzled. The case was, however, taken on a contingent basis. And so these factors are largely a wash.

On time and effort expended, counsel spent about 1,709.2 hours litigating the case from inception through the signing of the stipulation of settlement. The plaintiffs' requested fee yields a lodestar of about $905,000, a multiplier of about 2.2, and implied hourly rate of about $1700.

This is a little high compared to some of the other SPAC settlements. But as I mentioned before, I believe that in viewing the *Americas Mining* range and the excellent benefit that was conveyed in this settlement, the 13.5 percent that I articulated before, which is again the fee requested less expenses, is appropriate and fair. I think it strikes the right balance in this case. It rewards counsel's good work in reaching a strong settlement, and it provides meaningful value to the class members.

I'm also going to approve the requested incentive awards of $2,000 to each plaintiff for stepping up as class representative. They did some good work in yielding this outcome, and the awards are relatively modest. The awards will also be

paid out of counsel's fee.

And so to recap, the revised settlement class is certified. The settlement is approved. The plan of allocation is approved. The fee and expense award is approved. And the incentive awards are approved.

Congratulations on this fine settlement. Thank you all for your hard work. It was great to see you all. Thank you for your patience as I worked through that. And I will enter the revised proposed final order shortly.

That's it. Any questions?

ATTORNEY MACKINTOSH: No, thank you so much.

ATTORNEY WAESCO: Thank you, Your Honor.

THE COURT: Nice to see you all. Thank you.

(Proceedings concluded at 11:35 a.m.)

- - -

CERTIFICATE

I, KATHY CORTOPASSI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 34 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 16th day of July, 2025.

/s/ Kathy Cortopassi

Kathy Cortopassi
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

TAB 3

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SHUHUAN YU, Individually and on Behalf of All Others Similarly Situated,	:	
Plaintiff,	:	
v	:	C. A. No. 2021-0932-NAC
RMG SPONSOR, LLC, MKC INVESTMENTS LLC, ROBERT S. MANCINI, PHILIP KASSIN, D. JAMES CARPENTER, W. GRANT GREGORY, CRAIG BRODERICK, W. THADDEUS MILLER, and STEVEN P. BUFFONE,	:	
Defendants.	:	

- - -

Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, October 18, 2024
1:30 p.m.

- - -

BEFORE: HON. NATHAN A. COOK, Vice Chancellor

- - -

SETTLEMENT HEARING and RULINGS OF THE COURT

APPEARANCES:

PETER B. ANDREWS, ESQ.
DAVID M. SBORZ, ESQ.
JACKSON E. WARREN, ESQ.
Andrews & Springer LLC
-and-
CHRISTOPHER H. LYONS, ESQ.
TAYLOR D. BOLTON, ESQ.
Robbins Geller Rudman & Dowd LLP
-and-
ERIK W. LUEDEKE, ESQ.
of the California Bar
Robbins Geller Rudman & Dowd LLP
-and-
GREGORY E. DEL GAIZO, ESQ.
of the California Bar
Robbins LLP
for Plaintiff

RYAN D. STOTTMANN, ESQ.
RACHEL R. TUNNEY, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
for Defendants

- - -

THE COURT: Good afternoon, everyone.

ATTORNEY STOTTMANN: Good afternoon, Your Honor.

THE COURT: Mr. Stottmann.

ATTORNEY STOTTMANN: Ryan Stottmann from Morris Nichols. I'm joined by my colleague Rachel Tunney.

ATTORNEY TUNNEY: Good afternoon.

ATTORNEY SBORZ: Good afternoon, Your Honor. May it please the Court. David Sborz of Andrews & Springer. I rise for a few introductions before we get started this afternoon.

To my left, Greg Del Gaizo from Robbins. To his left is Erik Luedeke and Chris Lyons from Robbins Geller. From my office, Peter Andrews and Jackson Warren. And Taylor Bolton from Robbins Geller.

Your Honor, Mr. Del Gaizo was previously admitted in this case ***pro hac vice*** and, with Your Honor's permission, he will present the settlement on behalf of Plaintiff Yu this afternoon.

THE COURT: All right. That sounds great. Thank you. Welcome to you all.

ATTORNEY DEL GAIZO: Good afternoon,

Your Honor. May it please the Court, Gregory Del Gaizo on behalf of Robbins LLP on behalf of Plaintiff Shuhuan Yu.

This is the time the Court has set aside to consider plaintiff's motion to approve the settlement in the action captioned Yu v. RMG Sponsor, LLC, et al., Civil Action 2021-0932.

We are asking the Court to do four things today: certify a class; approve the settlement, including the plan of allocation; approve plaintiff's requested award of attorneys' fees and expenses; and approve proposed plaintiff's incentive award.

This case arises out of a ***MultiPlan*** de-SPAC merger action. There have been recently, Your Honor, a number of ***MultiPlan*** settlements that have been approved. The two we mentioned in our brief are the ***MultiPlan*** settlement and the ***Lordstown*** settlement. Literally this morning, I received the transcript from Vice Chancellor Fioravanti's approval of the ***MultiPlan*** settlement in the case ***FinServ*** or ***Katapult***, depending on how you look at it. These settlements, including this one, for the most part follow a similar form.

The unique piece of our case is the plan of allocation. And I prepared saying this was a

unique piece, and then, of course, this has been a morning where I keep learning new things. I found out that yesterday Vice Chancellor Will approved a settlement in ***Delman v. Brian R. Riley***, which has a very similar plan of allocation as us. It's an allocation that we spent a lot of time thinking about, working on, and that we are really proud of. I just wanted to kind of give that heads-up at the beginning. But my plan was to briefly go over the case before talking about the class cert, settlement, plan of allocation, and then touching on the fees.

THE COURT: That sounds great.

ATTORNEY DEL GAIZO: Thank you, Your Honor.

As I said, this is an action concerning a de-SPAC merger. The merger between RMG Acquisition Corp -- that was the SPAC -- and a private company, Romeo Power Inc. Romeo Power was a company that was supposed to make battery packs for electric vehicles.

I know the Court is familiar with the SPAC structure. RMG followed this well-known pattern. It was created by serial SPAC creators. Along with the sponsor, we call these creators the controlling

defendants. That's Robert Mancini, Philip Kassin, and James Carpenter. The controlling defendants took RMG public on February 12, 2019. They sold 23 million units at $10 a unit if we include the underwriters' overallotment. The units consisted of one share of Class A stock and one-third of one warrant. That $230 million that was raised from the IPO was then placed in a trust.

Before the IPO occurred, the sponsor purchased 5.75 million founder shares, once we account for a reverse stock split, for just $25,000. Each defendant was a member of the sponsor. In addition, the sponsor gave Defendant Gregory 20,000 founder shares and Defendant Miller 10,000 founder shares. In addition, at the time of the IPO, the sponsor purchased over 3.7 million private placement warrants for $5.65 million.

Now, RMG, like most of these SPACs, has no true stand-alone business. Instead, it existed for the sole purpose to raise money and then enter into an initial business combination. Normally, and what happened here, is you look for -- the SPAC looks for a private company and then takes that private company public.

Once the company goes -- once the SPAC goes public -- and this one in particular -- it's on a clock. The defendants are on a clock. They had 24 months to find a deal. Otherwise, it would be wound up, and these initial investors, the stockholders at that time, would receive their $10 back.

The founder shares and the warrants were not freely tradable. They only became freely tradable after there was an initial business combination. So what we have, and what Vice Chancellor Will recognized in ***MultiPlan*** -- and there have been multiple decisions since -- is it incentivizes defendants to go find a deal -- any deal -- so they can unlock those founder shares and warrants.

I know Your Honor was considering ***ATI Physical Therapy***. That de-SPAC merger, it had a unique aspect in that case where there was a vesting based on stock prices. I have not seen that in any other of these SPAC deals, and there was none here. So instead, it really is there's a -- I believe it was a six-month vesting, but not a stock price vesting. So, basically, at any deal they are going to make money, when you just buy -- when you buy all millions

of shares for just $25,000.

And what we have is --

THE COURT: Any thoughts on the vesting feature, just to --

ATTORNEY DEL GAIZO: Sure. I believe --

THE COURT: We can talk hypotheticals. Because I thought that was a very interesting feature in that case, but then I never got to write about it.

ATTORNEY DEL GAIZO: On ***ATI***, I know. I read some of the briefing in there where they were discussing a Black-Scholes model where you could figure out some type of value for the shares. It's, I think, much tougher. It's much clearer in instances like this one. Vice Chancellor Will wrote about it, where as long as you don't go to zero, if you just have the shares, in general, there is that incentive to conduct a deal.

I would say with serial SPAC creators -- and I'm not sure if ***Fortress*** was one, but serial SPAC creators like you have here -- you still did have the incentive. I think it was in ***Gig2*** Vice Chancellor Will wrote about part of what these individuals do is go to deal, go to deal, go to deal,

and are just constantly looking to close a deal and move on to the next one, because the investment is so low that they only have to hit one to make a killing. Whereas people like my client are largely investing in just the SPAC. So you still have a bit of these misaligned incentives, even if there's a vesting, though I agree not quite as clear in ***Fortress*** or in ***ATI*** as it is here.

THE COURT: Just for record purposes, that was just for my own general edification. But there's no vesting provision here. Correct?

ATTORNEY DEL GAIZO: There is no vesting based on stock price. I believe, though, six months after the deal closes, they can then trade.

THE COURT: Got it.

ATTORNEY DEL GAIZO: And the warrants, I think, are 30 days, actually.

What we alleged, what we explained in the complaint is that for a long time these controllers, the SPAC creators were not able to find a deal. And it wasn't until October 5th, 2020, that the controllers finally announced that they have agreed to a deal with Legacy Romeo. This is with only three months left before that 24-month clock runs out. And

our allegations are that the board failed to do proper due diligence into Legacy Romeo.

After some motion to dismiss briefing and defendants withdrawing their motion to dismiss, we did get into discovery. We think it would have been borne out that there was this time pressure to get a deal done versus doing adequate due diligence. And that if the defendants had done the diligence that they should have done, and as Delaware expects a board to be doing, they would have known that at the time of the merger. And at the time that they issued the registration statement, Legacy Romeo was undergoing a severe shortage with its suppliers. In fact, it didn't have suppliers lined up. And what it needed to do was, to make these battery packs, is get certain types of cells, basically, from its suppliers. It couldn't get the cells. It couldn't get the product.

And we know, without -- in my view, without a doubt, that it was experiencing this shortage at the time of the merger, because just a few weeks ago the SEC turned around and sued Lionel Selwood, who is the former CEO of Romeo Power. And they point to the registration statement and said in that -- at that time of that registration statement

Romeo Power was already experiencing the cell shortage. It already couldn't make what it was saying it could.

The registration statement issued in connection with the deal, of course, doesn't mention the cell shortage. In fact, it basically ignores it, puts out revenue projections as if everything was fine, talks about $140 million in revenue in 2021. It sets the stockholder meeting for December 28th, 2020. Shareholders had two business days before that meeting to exercise their redemption rights.

As Your Honor is familiar, in these SPAC structures, shareholders, if they don't want to invest in the post-closing company, can go instead and seek to redeem their shares and get their $10 plus interest. Here, since it took so long to find a deal, there is a good amount of interest. It was $10.18 by the time of the merger. And they can go get that 10.18 back. But looking at this company that's going to be on the forefront, it looks like, of the EV revolution, it's going to make all these battery packs, there's not a single redemption. The shareholders vote overwhelmingly -- I think it's 98 percent -- in favor of the deal. And the deal

closes and the shares start trading.

Three months after that deal is done, on March 30th, the company announces its results. For the first time, it discloses that it's got a shortage in cell capacity and expects revenues between 18 and 40 million. Using that low end, we're talking about an 80 percent cut from what's in the revenue projections just three months later.

What I do think is kind of important, and what I will get into, and why, in more detail later, is between the merger closing and this what I would call maybe the truth is revealed, or the start of the truth is revealed, there is a substantial amount of trading in the company's stock. Between December 29th and March 5th, which is the last time the company stock traded over 10.18, over 300 million shares were traded. It's trading at 6.6 million shares a day. The Romeo stock price at this time, on average, is 17.87 per share. And the free float is substantially made up of the class -- the former RMG shareholders. There's only about a 27 million share float. Even though there's 100-some-odd million outstanding, they are subject to certain lockups. And as I said earlier, 23 million members in our class of

members who -- there's 23 million shares issued in the IPO.

So the stock drops below the 10.18 price. Additional bad news continues. The company actually reports revenue of less than 17 million for 2021. Again, in comparison to the 140 million projected.

We filed this action on October 28th, 2021. I know there's been a good amount of ***MultiPlan*** cases filed in this Court, but given that time, this is one of the first -- this is four months before Vice Chancellor Will issues her seminal decision in ***MultiPlan***. This is one of the initial cases.

We have amended our complaint twice in response to defendants' motions to dismiss. We opposed the motion to dismiss on December 1st, 2022. Other things were happening with Romeo during this same time period. In October of 2022, Romeo announced it was being acquired by Nikola in a stock-for-stock deal that valued it at just 74 cents per share.

Shortly thereafter, we talked with defendants about whether it made sense to consider a resolution. We spent a day in New York on March 23rd, 2023, with Judge Layn Phillips, and that mediation was

unsuccessful.

We filed our supplemental authorities. Defendants withdrew their motion to dismiss at that time. They also answered and filed a judgment on the pleadings or, in the alternative, a motion for class certification.

The judgment on the pleadings was basically based on those trading numbers that I mentioned earlier; that the company's stock was trading significantly above the redemption price, and there was a significant amount of overturn within the trade -- within the class. So in their view, in their motion for judgment on the pleadings, no one has been injured; there's zero damages. And you must have an injury in fact. We don't, of course, agree with that, but that was their motion. That was their argument.

We didn't let that motion hold us up. That's when we engaged in discovery. We served RFPs. We received roughly, I believe, 6700 documents, 47,000 pages. And then we went out and we hired our own damages expert. We hired our own valuation expert. And we tested some of defendants' theories.

We looked into whether the class actually experienced economic damages. Our expert did

a two-trader model. It's a very preliminary analysis. And what he came back to us and said is there's about 3.8 million shares that were actually damaged, shares that could have been redeemed and were held until some point where the stock fell below the redemption price. And using his numbers, he said you have damages, economic damages on those shares of about $12.5 million.

With that background, we reengaged with Judge Phillips. And after additional substantial negotiations, we accepted a mediator's recommendation to settle the action for $11.99 million. If you look at it compared to that $12.5 million damage number, we're talking about 96 percent recovery of the economic damages.

Unless Your Honor has any questions about kind of this background, I'm going to move on to the class cert.

THE COURT: That's fine.

ATTORNEY DEL GAIZO: Okay. The settlement contemplates certification of a nonopt-out class under Rules 23(a), 23(b)(1) or (b)(2). This consists of holders of RMG Class A stock at the time of the redemption deadline, which is December 23rd,

2020. The definition excludes defendants, their family members, their entities, et cetera.

As Your Honor knows -- excuse me. Your Honor entered the scheduling order that preliminarily certified this class on July 1st, 2024.

As Your Honor knows, Rule 23, the class may be certified if the criteria of 23(a) is met, as well as the criteria of either (b)(1) or (b)(2).

Rule 23(a) is that numerosity, commonality, typicality, and adequacy. I will walk through those in that order. I think they are relatively easily met here. In fact, defendants' own motion, when they filed their motion for judgment on the pleadings, effectively admitted that we met Rule 23(a) requirements.

For numerosity, we have 23 million shares of Class A common stock outstanding. As the affidavit of Mr. Murray, who is our representative from Gilardi, our settlement administrator, which we filled on September 11, 2024, notes, that he mailed out approximately 17,000 notices and was informed that one institution was sending out the email to another 37,000-plus notices. That's at paragraph 11 of his

affidavit. We believe that more than satisfies the numerosity component.

As to commonality, questions of both fact and law are unique -- sorry, not unique -- uniform throughout. We have whether defendants breached their fiduciary duties in connection with initiating, negotiating, and ultimately approving the de-SPAC transaction. They also issued what we consider the false and misleading registration statement. There's questions of whether the redemption decision was impaired as a result of these actions.

Regarding typicality, we look at the plaintiff and whether the plaintiff's claims are typical of the claims and defenses regarding the class. Here, there's nothing particularly unique about the plaintiff other than she was willing to step up and be plaintiff. There's no unique defenses. She doesn't have an axe to grind against any of the defendants. She is your ordinary shareholder that received the same registration statement, the same information as everybody else, and whose decision was impaired just like everyone else.

Regarding adequacy, Your Honor,

there's no conflicts between the plaintiff and the class. I think it's fair to say plaintiff and her class formed adequately here, Your Honor. As explained before, we're looking at a recovery, I think, of 96 percent of the economic damages. And then, in addition, as Ms. Yu explained in her affidavit, she suffered a $19,000 loss here, so she was certainly incentivized to watch us closely and make sure that we were out there acting adequately for the class.

Regarding Rule 23(b)(1), the question is, absent class certification, would there be risk of inconsistent or varying adjudications with respect to individual class members or adjudications of individual claims that would, as a practical matter, be dispositive of the interests of other parties that would otherwise be part of the class. The answer for both of those is yes. As to the former, it's possible that the same issues could be litigated before different judges. We would hope they would all find the same way, but it's certainly possible that different results could occur.

As for the second question, absent class treatment, one or more stockholders could be

precluded -- could have precluded the ability of others within the class to achieve relief, or at least severely prejudiced the rights of other class members.

Under Rule 23(b)(2), whether defendants have acted or refused to act on grounds that are generally applicable to the class, again, I think that's obviously a yes. The conduct that we identified had treated all class members identically. I would note the Delaware Supreme Court in ***Celera*** said that it's appropriate to certify a class when we're talking about director actions in a corporate transaction under subsections (b)(1) and (b)(2).

The last part I would talk about, at least at this point in this section, is our notice. Again, the Court entered the scheduling order on July 1 preliminarily approving the notice. The notice contains all the information Your Honor would expect: the location, the date, the time of this hearing, as well as its purpose. The notice also details the claims, defenses, and relief the action sought, as well as the plan of allocation.

Again, looking at the Murray affidavit, Gilardi followed this Court's direction on notice and mailed the notice to the names that we had

received, because we had to go subpoena American Stock Transfer & Trust. So it sent out the notices to those names that we found after the subpoena. Also, Gilardi keeps its own kind of internal list that it's made from its long history. It sent out notices to those. It looked at the active dealer list from the SEC -- it's 4400 institutions -- sent notices out to those. In addition, we published notice in ***The Wall Street Journal*** and transmitted it over business wire. Gilardi established a toll-free telephone help line.

We set up a website. The website has all the same information. It also attaches all the relevant documents, including the stipulation, the notice, the scheduling order. And it even has a FAQ there on the website. So we think notice here was adequate and proper.

Unless Your Honor has any questions, I'm going to move on to why we think the settlement should be approved.

THE COURT: That's fine.

ATTORNEY DEL GAIZO: Okay. So the settlement should be approved as fair and reasonable. Rule 23(f)(5) sets forth the list of factors the Court is supposed to consider. Those include whether the

counsel adequately represented the class, that notice was adequately provided, that the settlement was negotiated at arm's length, and the relief provided falls within the range of reasonableness. And when we look at range of reasonableness, we take into account the strength of the claims, the risk at trial and appeal, the scope of the release, and any objections.

Going kind of backwards, looking at the reasonableness of the settlement, I think the Court is well familiar. We look at the "give" versus the "get." The "get" here is pretty easy to value: $11.99 million. On a per-share basis, that's approximately 52 cents per share. That is consistent with the other ***MultiPlan*** settlements. In ***MultiPlan*** itself, it was 44 cents a share. In ***Lordstown***, it was 57 cents per share. In ***FinServ***, it was 38 cents per share. So towards the upper end of the middle of those three cases.

I think this result is noteworthy, in particular, in light of the damages calculation. We're coming in close to 100 percent of kind of these economic damages. In the ***Dell*** decision, Vice Chancellor Laster talked about what he saw as the mean and median, even in entire fairness cases. And he

said it's about 18 percent for the mean, 12.35 percent for the median. And here we are, again, in our view, close to 100 percent.

The "give" is the release. It is a common release you see in a lot of these cases. It is limited to what is being alleged in the action or could have been alleged in the action related to the facts in the complaint. Again, I think it's pretty consistent across all the ***MultiPlan*** actions. This deal happened now close to four years ago. The truth came out, say, three, three and a half years ago.

We have a specific carve-out, I should note, for the securities class action. So to the extent there's any valid claims, I don't think -- I should just say that I don't think there's any valid claims beyond this ***MultiPlan*** claim that is being released. So I don't think the "give" is very substantial in light of the "get" here.

As to the remaining factors in Rule 23(f)(5), there's been no objections. I looked around today. There's not very many people here today. So I don't think there's any objectors in the crowd.

The settlement was negotiated at arm's length. We had the assistance of a well-known

mediator in doing so.

And while we did believe we had very strong claims against defendants on the underlying merits, we had issues here, particularly regarding the damages. But to the extent we were trying to get beyond nominal damages, issues of whether we would be able to show reliance or causation beyond these ***MultiPlan*** cases are still relatively new. No one has had to write post motion to dismiss. There hasn't been a summary judgment. As far as I am aware, there's been no trials. So we did face some risk.

I think it's also probably worth noting that there wasn't some large deep pocket to go after. Romeo was sold at a fire-sale price to Nikola. And even then, Nikola couldn't turn it around, ends up carving out Romeo and liquidating it.

So unless Your Honor -- so we think the settlement is fair. I would like to talk about the plan of allocation a little bit, because I think that's probably the most unique piece about this case. Though, as I learned this morning, not super unique.

THE COURT: That's fine.

ATTORNEY DEL GAIZO: So as I explained earlier, Your Honor, it's really the trading of the

stock that drove the allocation decisions. I know the common step within cases is to just go through DTC. And here, we do have a claims-made process. We thought long and hard about this. It's one of the reasons it kind of took a little bit to paper the settlement. And what we couldn't get past is it seemed fundamentally unfair to give someone that sold their stock at, say, 17.87 a share the same amount of money as someone that held their stock until it was 78 cents a share.

And it's not -- I want to be clear, because we do think the impairment of a redemption decision itself is a harm. My friends and I were litigating a case called ***In re Kensing -- QuantumScape*** de-SPAC merger litigation. And during the motion to dismiss in that case, Vice Chancellor Laster talked quite a bit about how an informed vote itself is a damage, and there is ways to show that damage. And he discussed different ways. He said, you know, you could have studies come in. You could look at different options trading. And what he made clear is that even if someone engaged, in his words, in what he called self-help and sold post-merger at above the redemption price, he didn't believe in the idea of no

harm, no foul.

And we agree with that. So what we did is we created what we called our nominal damages amount, the amount that everyone that had their redemption decision impaired, you will get some amount of money. And in addition, we have this claims process where you can show how much your economic loss there is, the difference between your 10.18 redemption value and what you eventually sold at, or if you held until Nikola, how many Nikola shares you got.

And it's just subtraction there. You combine them into one claim. And then our settlement administrator, Gilardi, will pay out that amount. We tried to make the claims process as simple as possible. They can mail it in. You can do it right online. It's hard for me to imagine it any easier.

I do understand, you know, ***PLX***, the Court said it's more efficient to do it just through DTC. And it would have been a lot easier on us just to do it through DTC. But we couldn't figure out a way to do that and also be fair to these people that -- some that lost a substantial amount of money and some that effectively made money.

So unless Your Honor has any

questions, I was going to move on to the fee and expense award.

THE COURT: Just so I make sure I understand the plan of allocation, you mentioned folks who had their redemption decision impaired will get some amount of money, and then there's this economic loss component as well.

ATTORNEY DEL GAIZO: Correct.

THE COURT: Do you mind just elaborating on the first component a bit more.

ATTORNEY DEL GAIZO: Sure, Your Honor.

And, honestly, there's more art than science to it. We had to put a value to it. And it's not something I have seen in any of the court -- the courts have said a redemption decision is worth X or Y. We know it's worth something. We, of course, read ***Columbia Pipeline*** and ***Mindbody***. And the Court says, look, I will put nominal damages on something.

So what we did is we came up with an amount. In this case, it's a million and a half. So a million and a half out of the 11.9 million we earmarked for this, what we called, nominal damages amount. And it basically equates to 10 cents per share if you are a damaged shareholder. And then

there's an equation that goes in for the people that sold above 10.18. And it does decrease as the amount you made, basically, on the deal goes up. And, again, just the fundamental fairness is what was driving that decision.

In terms of kind of the actual allocation, it's based on the amount of claims that are submitted. So it is pro rata once that happens. So whatever the settlement fund ends up being, if there's some more claims than the settlement fund has, you will have your claim calculated and then, say, you have -- everyone gets paid out 75 percent of the claim. Or if there's less claims than the settlement fund, you will get more.

THE COURT: And so the $1.5 million, quote, unquote, nominal portion for impairment of redemption, that's available to all class members who submit a claim?

ATTORNEY DEL GAIZO: Correct, Your Honor.

THE COURT: And then there may be a modification so it works out to about 10 cents per share. But subject to modification, depending on if the individual sold above $10 and so forth.

ATTORNEY DEL GAIZO: Correct, Your Honor. And also, subject to modification based on the amount of claims.

THE COURT: All right. But let's say I sold well above $10. If I have submitted a claim and I'm a member of the class, I'm still going to get some amount of consideration out of the distribution. Right?

ATTORNEY DEL GAIZO: That's correct, Your Honor. We thought it was important to recognize that the redemption decision impairment itself is a damage that people suffered, even if there's not really what you would normally consider an economic damage.

THE COURT: Who will be running this analysis?

ATTORNEY DEL GAIZO: Gilardi will be running the analysis, our settlement administrator. You submit the forms. I would hope most people would just do it online. It's nice and easy. I clicked through it myself. You just -- you can upload your proof of it. If there's questions, Gilardi will reach back out to people, try to solve any issues. It wants to get out as much as possible to as many people as

possible.

THE COURT: Then if you could walk me through the calculation process for the other component.

ATTORNEY DEL GAIZO: Sure. So to make things easy, it's 10.18 a redemption share. If you sold your stock for 9.18, it's just simple subtraction, you get $1 a share. The nominal damage and what I will call the economic damage work together, or the economic claim and the nominal damage claim work together in that if I sold at 9.18, I would have $1.10 a share. And then you just multiply that by the amount of shares that I did that. And assuming we have an equal amount of claims as to the settlement fund, I would then get that $1.10 times the amount of shares. And that would just change based on the amount of claims that come in.

THE COURT: Okay. That analysis also will be performed in the first instance by the administrator?

ATTORNEY DEL GAIZO: Yes.

THE COURT: Okay.

ATTORNEY DEL GAIZO: And I guess, just to be clear, there's no reversion there. So it's all

going out. None of it goes back to defendants or insurers or anything.

THE COURT: Okay. That's very helpful. Thank you.

ATTORNEY DEL GAIZO: Thank you, Your Honor.

The last -- well, I guess two things: the fee and expense award and then the plaintiff -- the request for a plaintiff incentive award.

Here, Your Honor, we've asked for 18 percent of the fund. It equates to 2,158,200. This is an all-in amount that includes plaintiff's expense of a little over -- not a little over. About 70,500.

Your Honor, I am sure, is well familiar with the law set forth in ***Sugarland Industries v. Thomas***. Under ***Sugarland***, the Court considers the results achieved, the time and effort of counsel, the relative complexity of the litigation, the contingent nature of the litigation, the standing and ability of counsel, and the stage at which the case ended.

The most important factor, in our view, and I believe the Court's, is the benefit

achieved. Here, it is an $11.99 million fund, again created solely by the plaintiff. We have talked about it a bunch, but I think it's an excellent result when we take into account what the economic damages were here. And on the defendants' view, there was zero damages. So we have defendants coming in willing to have paid for the class $12 million when they're saying there's zero dollars in actual damages.

Using the brackets set forth in ***Americas Mining***, we are post motion to dismiss. We are into meaningful discovery. That would normally put us in the 15 to 25 percent bracket. Up to this settlement, our view is that this was pretty hard-fought litigation. It had some pretty unique attributes of it. I don't think I've seen a judgment on the pleadings/class certification from defendants before. Of course, we talked about how this was a relatively new area of the law. We opposed the motion to dismiss. We submitted our supplemental authority. We filed our own class cert. And we reviewed over 45,000 pages of discovery.

18 percent here, Your Honor, I think compares favorably to the other ***MultiPlan*** settlements. In ***MultiPlan*** itself, there was 20 percent. In

Lordstown, there was 22.5 percent. I will admit, there was more documents in those cases, but there's no depositions. And, of course, we're looking at a discount compared to those. ***FinServ***, which I just got this morning, was 17.5 percent, and they were not yet into discovery. So I think 18 percent compared to the other comparable settlements is fair.

Concerning what I consider to be the more secondary factors, we did take this case on a fully contingent basis. And the case law says you look at kind of this contingent risk factor at the time you take the case. Like I said earlier, we are four months -- we filed this case four months before ***MultiPlan*** was decided. So I think it's about as risky of a nature of a case as you can at that point.

Regarding the complexity, I think I've already kind of beat that to death, but I think it had some pretty unique things in this case and some undecided aspects.

Concerning the standing and ability of counsel, this is my first time being in front of Your Honor, but hopefully our track record speaks for itself. And Your Honor, I believe, is well aware of my co-counsel here, who also, in my view, have an

excellent track record. And then, of course, we are against the best of the best over there. In addition to Morris Nichols, Latham & Watkins, some of the most well-respected law firms that are out there.

The lodestar cross-check also supports the 18 percent. We spent over 2400 hours on this case. Over 2,000 of those occurred before the acceptance of the mediator's recommendation. After we deduct those expenses, we come out to roughly $1,000 an hour. I read an article the other day about how Big Law, that's what first year's are charging, and it made me question all my decisions in life. But the lodestar multipliers --

THE COURT: If you question your decisions, just think how I feel.

(Laughter.)

ATTORNEY DEL GAIZO: It's a multiplier of about 1.2, Your Honor.

Regarding the incentive fee, we think this is a relatively modest fee of $2500. Your Honor has the ability to do so -- award a fee under Rule 23(g)(4).

In ***EZCORP***, Vice Chancellor Laster talked about it actually does take some guts to stand

up and be a plaintiff, knowing that you're going to be against such great lawyers and they are going to be searching the world for everything you have ever said, and you might have to stand for a deposition and provide discovery. ***EZCORP*** was $5,000. Vice Chancellor Will, in ***Sciabacucchi v. Howley***, awarded $4,000, when she said the plaintiff's efforts were modest. Here, we are below those at 2500.

Unless Your Honor has any further questions, that's it.

THE COURT: I don't have any questions. Thank you very much.

ATTORNEY DEL GAIZO: Thank you, Your Honor.

THE COURT: Mr. Stottmann, anything on your end?

ATTORNEY STOTTMANN: Not unless Your Honor has questions.

THE COURT: I don't.

ATTORNEY STOTTMANN: Thank you.

THE COURT: All right. I want to make just one tweak. I have a bench ruling here. I think they may have updated our computers, and so my Office 365 is not synced in here. So I'm going to have to

run down and just make a tweak very quickly. I think I can probably do it in about five minutes and then pop back up.

So we will take a quick five-minute recess, and then I will give you my ruling. Thank you.

(Recess taken from 2:12 p.m. to 2:24 p.m.)

THE COURT: Please be seated.

Well, I'm at least consistent. I said five minutes, and it took ten or fifteen. That always happens.

All right. To confirm, today I heard from the parties regarding the proposed class action settlement in the matter captioned ***Yu v. RMG Sponsor, LLC***.

Plaintiff Yu, which I will refer to as "Plaintiff," brought this action on behalf of a putative class of Class A common stockholders of RMG Acquisition Corp., or "RMG," that did not redeem their shares of RMG stock in connection with the SPAC's merger with Romeo Systems, Inc.

I am approving the settlement and granting the fee application request and the request for an incentive fee. There have been no objections

to this settlement. I understand why. This is a good settlement, and folks are to be commended.

I have five tasks for purposes of the hearing today: class certification, determining the adequacy of the notice of settlement, approving the settlement, awarding attorneys' fees, and approving Plaintiff's incentive award.

Turning to class certification, the proposed settlement class is defined as follows: "All Persons who held RMG Class A common stock as of the [r]edemption [d]eadline, either of record or beneficially, and who did not redeem all of their shares, including their heirs, successors-in-interest, successors, transferees, and assigns[,]" but excluding the excluded persons. The definition of "Excluded Persons" encompasses defendants and their affiliates and Nikola Corporation, who acquired Romeo in a stock-for-stock transaction following the challenged transaction.

This Court finds the class to be a reasonable and adequately cohesive unit for purposes of litigation.

Under Court of Chancery Rule 23(a), there are four criteria that must be satisfied for

class certification: one, numerosity; two, commonality; three, typicality; and, four, adequacy of representation.

Turning to numerosity, Court of Chancery Rule 23(a)(1) requires "the class [to be] so numerous that joinder of all members is impracticable." "There is no bright-line cutoffs, but numbers in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement." That is from this Court's decision in ***In re Countrywide Corp. Shareholders Litigation.***

Here, Plaintiff notes "the 23 million shares of RMG Class A common stock outstanding on the redemption deadline were likely held by thousands of potential [c]lass [m]embers." The class administrator's affidavit indicates that as of the filing of the affidavit, notice of the settlement had been mailed or emailed to a total of nearly 17,000 potential class members; and the affidavit further provides that one institution anticipated sending email notice to an additional nearly 38,000 potential class members.

There's no question that joinder of the number of potential class members we're talking

about here would be impracticable, and the numerosity requirement is satisfied.

Rule 23(a)(2) requires there to be "questions of law or fact common to the class." The common issues of law and fact in this case are whether: one, the officer defendants and director defendants breached their fiduciary duties by impairing class members' right to redeem their RMG shares before the redemption deadline; two, RMG Sponsor, LLC and MKC Investments LLC aided and abetted these breaches of fiduciary duty and were unjustly enriched in connection with the merger; and, three, the extent of damages resulting from such alleged misconduct.

These questions are common to all class members because each of the members held RMG Class A common stock as of the redemption deadline. Accordingly, the commonality requirement of Rule 23(a)(2) is satisfied.

Rule 23(a)(3) requires that "the claims or defenses of the representative part[y] [be] typical of the claims or defenses of the class." Here, all class members, as stockholders, face the same injury from the same conduct. Because Plaintiff

is affected in the same way as the rest of the class, I conclude that the typicality requirement of Rule 23(a)(3) is satisfied.

Finally, Rule 23(a)(4) requires "that the representative part[y] will fairly and adequately protect the interests of the class." The Court must examine: one, whether the representative Plaintiff holds interests that are aligned with the class; and, two, whether Plaintiff is represented by competent and experienced counsel.

Here, Plaintiff's interests are aligned with those of the class. Plaintiff held RMG Class A shares on the redemption deadline, like all class members, and is a typical member of the class she seeks to represent.

Plaintiff's counsel has "significant experience in stockholder class actions." Indeed, Plaintiff's counsel here are well known to the Court, and I agree that counsel here have skillfully and vigorously litigated this action. Accordingly, I conclude that Plaintiff and Plaintiff's counsel have and will continue to adequately represent the class.

Court of Chancery Rule 23(aa) requires the lead plaintiff to file an affidavit stating "that

the person has not received, been promised, or been offered and will not accept any form of compensation ..." aside from any damages or compensation granted by the Court or reimbursement of expenses by their lawyer. Rule 23(f)(2)(a) requires a second such affidavit.

The lead plaintiff here filed her second affidavit on September 16, 2024, confirming she has not received improper compensation.

In addition to satisfying the requirements of Rule 23(a), a proposed class must fall within the parameters outlined by Court of Chancery Rule 23(b). Certification under Rule 23(b)(1) is appropriate if, one, the prosecution of separate actions by class members would risk inconsistent and varying results that would impose inconsistent obligations or, two, adjudication with respect to one class member would be dispositive of the class's interests.

I agree with plaintiff that here, "absent certification, multiple lawsuits by individual plaintiffs could follow, which would prejudice non-parties and substantially burden the Court with an inefficient means of resolving the Action." In this

case, the prosecution of lawsuits by separate class members would create a risk of inconsistent and varying results. Accordingly, certification under Rule 23(b)(1) is appropriate.

Court of Chancery Rule 23(b)(2) is satisfied if the defendants' conduct is "generally applicable to the class," making appropriate classwide declaratory or injunctive relief. This Court may certify a class under Rule 23(b)(2) where defendants are alleged to have engaged in a single course of conduct generally applicable to the class, even if there is a monetary recovery. That's paraphrasing this Court's oral ruling in ***In re Del Monte Foods Company Shareholders Litigation***.

As Plaintiff explains in her brief, Plaintiff has alleged that defendants breached their fiduciary duties to RMG stockholders and that all class members were harmed by the alleged misconduct. Accordingly, certification under Rule 23(b)(2) is appropriate here as well.

In sum, this Court certifies the class as a nonopt-out class.

The Court of Chancery rules require that stockholders receive notice of the proposed

settlement by mail, publication, or otherwise. A notice of settlement is sufficient if it "contains a description of the lawsuit, the consideration of the settlement, the location and time of the settlement hearing, and informs class members that additional information can be obtained by contacting class counsel." That is from the Delaware Supreme Court's decision in ***In re Philadelphia Stock Exchange, Inc***.

The notice here is sufficient. The parties published summary notice in ***The Wall Street Journal*** and transmitted the notice over a national newswire service. Notice was also mailed to each class member who could be identified at their last known address. An affidavit more fully describing the steps taken to effectuate notice was filed by an employee of the settlement administrator on September 13, 2024.

As Plaintiff elaborates on in her brief, the notice adequately describes the lawsuit, including the claims asserted and the proceedings to date. The notice also sufficiently describes the consideration for the settlement, provides the location and time of the settlement hearing, and informs stockholders who to contact for further

information. Furthermore, I approved the notice and means of distribution of the notice in the scheduling order that I entered on July 1, 2024. The affidavit filed by Mr. Murray, an employee of the settlement administrator, on September 13, 2024, confirms the scheduling order was complied with.

I now turn, as I must under Rule 23(f)(5), to whether the terms of the proposed settlement are fair and reasonable, recognizing that "[t]his Court generally favors settlement of complicated litigation." That's from ***Gatz v. Ponsoldt***, a decision of this Court from 2009.

The Court's function is "to consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and to apply its own business judgment in deciding whether the settlement is reasonable in light of those factors." And that is from the Delaware Supreme Court's decision in ***In re Philadelphia Stock Exchange***.

In short, my task is to "evaluate[] the claims and defenses on the discovery record to achieve a sense of the relative strengths of the parties' positions." That is from this Court's

decision in ***In re Caremark International, Inc***.

Under the recently amended Court of Chancery Rule 23(f)(5), in deciding whether the relief falls within a range of reasonableness, I must take into account "(i) the strength of the claims; (ii) the costs, risks, and delay of trial and appeal; (iii) the scope of the release; and (iv) any objections to the proposed dismissal or settlement."

Here, as Plaintiff explains, Plaintiff asserted substantial process-based liability claims against defendants. However, the claims were not a slam-dunk. As Plaintiff further explains, the factual record would, in Plaintiff's view, have supported Plaintiff's assertion that defendants prioritized closing the merger over their fiduciary obligations. However, as also explained by Plaintiff, she faced significant challenges in demonstrating, among other things, that the members of the class experienced an injury-in-fact on account of defendants' alleged fiduciary duty breaches, and quantifying such harm, due to "the length of time Romeo's stock price traded above the redemption price following the Merger and the amount of trading that occurred in this period."

Defendants argued that Plaintiffs

incurred no harm because they could have sold their shares at prices at or above the redemption price. And because Romeo's stock traded above the redemption price, "[t]here was also the real possibility that the Court would limit Plaintiff's recovery on behalf of the Class to nominal damages."

Plaintiff explains that even her own expert acknowledged the complications arising from these issues. As Plaintiff explains, it is not clear how these arguments might actually play out if this matter went to trial. And thus, there was, at a minimum, very substantial uncertainty over any ultimate quantum of damages, even if Plaintiff proved breach and liability.

Plaintiff also recognized that any post-trial recovery would be subject to "meaningful appellate risk" and that "litigation is inherently uncertain." That is certainly true. The passage Plaintiff quotes from the ***Dell Class V*** decision certainly makes the point. Plaintiff has explained her analysis of potential damages, which I note she arrived at with the assistance of an expert valuation consultant, which is all extremely helpful and confidence-inspiring in terms of my analysis. Indeed,

I wish folks included that sort of analysis more in their settlement presentations. A lack of such information is often a source of frustration. In any event, I agree with Plaintiff that the $11.99 million recovery for the class compares quite favorably to an uncertain trial outcome.

Plaintiff asserts that the release is "reasonably and appropriately tailored to the claims asserted in the Action." I agree. I note that in other circumstances, where a proposed settlement has involved no monetary recovery or other substantial consideration, I have on occasion raised questions about the release terms and scope. But I have no such concerns here. The form of release here is, frankly, a fairly traditional one for this Court and, particularly given the very substantial monetary recovery here, I have no issue with it. Indeed, and importantly, the release expressly carves out the claims in the related federal securities action, as set forth in the settlement stipulation. That further confirms my conclusion that the release is appropriately tailored.

Turning to the plan of allocation, I discussed the plan of allocation with Plaintiff's

counsel at length today. And as Plaintiff notes, the plan of allocation is "unique" and reflects substantial consideration of what is a fair and equitable means of distributing the settlement fund here, given the particular circumstances presented. I appreciate that folks gave this careful consideration. I am satisfied that the plan of allocation and process for that is fair and reasonable.

Further, there are no objections to the proposed settlement, and that includes the releases, plan of allocation, and fee request after notice of these matters to the class members. The absence of objectors weighs in favor of approving the proposed settlement. And as previously mentioned, I think in this case the absence of objectors makes sense given that, in my view, this is a good settlement, and everyone involved should be commended.

Finally, before I conclude my analysis, I specifically want to note that the settlement is the result of the parties' acceptance of a mediator's proposal following extended mediation efforts before former United States District Court Judge Layn Phillips, a respected mediator well known to this Court. This all confirms to me that the

settlement is the product of arm's-length negotiations. And, frankly, to me, the involvement of the mediator here is strong support for approving the settlement.

Ultimately, having taken all of the foregoing into account, I conclude that the proposed settlement is fair and reasonable and should be approved.

I turn now to the Plaintiff's request for an award of attorneys' fees and expenses.

Delaware's policy is to ensure that "even without a favorable adjudication, counsel will be compensated for the beneficial results they produce, provided that the action was meritorious and had a causal connection to the conferred benefit." That is from the Delaware Supreme Court's decision in ***Allied Artists Pictures Corp. v. Baron***.

In setting fee awards, the Court of Chancery "must make an independent determination of reasonableness." That is from our Supreme Court's decision in ***Goodrich v. E.F. Hutton Group, Inc***.

Although there is no set formula for attorneys' fees, the Court will craft an award using the five factors identified in the Delaware Supreme

Court's ***Sugarland Industries, Inc. v. Thomas*** decision.

Delaware courts "loo[k] to five factors that are now the yardstick to measure whether a fee is 'reasonable': (1) the results achieved; (2) the time and effort of counsel; (3) the relative complexities of the litigation; (4) any contingency factor; and (5) the standing and ability of counsel involved." That is from the Delaware Supreme Court's decision in ***Dell Class V.***

In this action, Plaintiff requests, and the parties have stipulated and agreed to, a $2,158,200 fee award, which amounts to 18 percent of the settlement fund. The 18 percent fee award is inclusive of expenses.

I turn first to the results achieved. As Plaintiff notes, "[f]ee awards for monetary benefits are based on a sliding scale of increasing percentages based on the litigation effort that produced the benefit." Here, as discussed previously, and noted extensively during the hearing, the settlement is the result of significant efforts over the course of three years. Plaintiff puts forth a number of cases to support a conclusion that an 18 percent all-in fee award is reasonable and

appropriate. I agree.

Next, I will briefly address some of the other ***Sugarland*** factors. First, Plaintiff's counsel litigated this case on a fully contingent basis. And the time and effort of Plaintiff's counsel in this case was significant. Plaintiff's counsel invested approximately 2,048 hours into this case. The implied blended hourly rate is $1,019.36 per hour. Plaintiff's counsel incurred approximately $70,498.35 in expenses. These are quite reasonable in this day and age.

Further, this case involved complexity and, as Plaintiff notes, was "one of the first filed in a then-novel area of Delaware jurisprudence."

Finally, Plaintiff's counsel is experienced in the field of stockholder class and derivative litigation. And as I have previously noted, counsel and counsel's work are well known to this Court.

In light of the foregoing, I find that Plaintiff's fee and expense request in the amount of $2,158,200 is reasonable, and I grant the request.

Next, I turn to Plaintiff's request for a modest incentive award in the amount of $2,500.

As this Court noted in ***Dell***, "[p]ublic policy favors incentive awards in appropriate circumstances: 'Compensating the lead plaintiff for efforts expended is not only a rescissory measure in returning certain lead plaintiffs to their position before the case was initiated, but an incentive to proceed with costly litigation (especially costly for an actively participating plaintiff) with uncertain outcomes." As this Court noted in its oral ruling in ***Galena Biopharma***, the range of $1,000 to $5,000 for an incentive award is "understandable and appropriate, given the current litigation environment in which there's significant downside to serving as a named plaintiff."

I agree that an incentive award is warranted in these circumstances, and that an award of $2,500, to be paid out of Plaintiff's counsel's fee award, is appropriate here, and I grant that incentive award.

Accordingly, the settlement, fee application, and incentive award are all approved. I will enter the proposed final judgment on the docket shortly after we adjourn.

Congratulations, everyone.

Anything else before we adjourn?

ATTORNEY DEL GAIZO: I have a form here, Your Honor. I wanted to note something. I hesitate a little bit to do it because I enjoyed what you were reading so much. But in paragraph 12 of our form order, we do have two blanks in there, one for the attorneys' fees amount and one for the expenses. As I said earlier, we were seeking just an all-in amount. However Your Honor wants to do it. If you want to strike it, or if you want us to put in a new form that just has the one blank, we are happy to do it however you want.

THE COURT: I noticed that too. This is not the first time folks have presented this quandary to me. What I will probably do is strike the separate blank for expenses and just add in fees and expenses with the all-in number.

ATTORNEY DEL GAIZO: Thank you, Your Honor.

THE COURT: Okay. All right. Thank you all. Congratulations.

We are adjourned.

(Proceedings concluded at 2:46 p.m.)

-- -- --

CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 52 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings on pages 35 through 52, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 23rd day of October, 2024.

/s/ Debra A. Donnelly

Debra A. Donnelly
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
Delaware Notary Public

TAB 4

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN E. MALORK, Individually and on Behalf of All Others Similarly Situated,	:	
Plaintiff,	:	
v	:	C. A. No. 2022-0260-PAF
ERIK ANDERSON, JENNIFER AAKER, JANE KEARNS, PIERRE LAPEYRE, JR., DAVID LEUSCHEN, ROBERT TICHIO, JIM McDERMOTT, JEFFREY TEPPER, MICHAEL WARREN, RIVERSTONE INVESTMENT GROUP LLC, WRG DCRB INVESTORS, LLC, and DECARBONIZATION PLUS ACQUISITION SPONSOR, LLC,	:	
Defendants.	:	

- - -

Chancery Courtroom No. 12C
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, October 3, 2025
9:15 a.m.

- - -

BEFORE: HON. PAUL A. FIORAVANTI, JR., Vice Chancellor

- - -

ORAL ARGUMENT ON PLAINTIFF'S MOTION TO APPROVE THE PROPOSED SETTLEMENT, CERTIFY THE CLASS, AND FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND INCENTIVE AWARD

APPEARANCES:

DAVID M. SBORZ, ESQ.
Andrews & Springer LLC
-and-
CHRISTOPHER H. LYONS, ESQ.
JASON M. AVELLINO, ESQ.
Robbins Geller Rudman & Dowd LLP
-and-
GREGORY E. DEL GAIZO, ESQ.
of the California Bar
Robbins LLP
-and-
ERIK W. LUEDEKE, ESQ.
of the California Bar
Robbins Geller Rudman & Dowd LLP
for Plaintiff

JAMES M. YOCH, JR., ESQ.
Young Conaway Stargatt & Taylor, LLP
-and-
JEFFREY CROUGH, ESQ.
WILL STRIPLING, ESQ.
of the Texas Bar
Vinson & Elkins LLP
for Decarb Defendants

HERBERT W. MONDROS, ESQ.
Rigorsky Law P.A.
-and-
RAFFI MELANSON, ESQ.
of the Massachusetts Bar
Hagens Berman Sobol Shapiro LLP
for Objector Dr. Alfred Miller and the putative federal case

ALSO PRESENT:

RAYMOND J. DiCAMILLO, ESQ.
Richards, Layton & Finger, PA

- - -

THE COURT: Good morning, everyone.

Mr. Yoch, good morning.

ATTORNEY YOCH: Good morning, Your Honor. James Yoch, Young Conaway Stargatt & Taylor on behalf of the Decarb defendants. I rise to introduce my co-counsel from Vinson & Elkins, Jeffrey Crough and Will Stripling.

THE COURT: Welcome back.

ATTORNEY YOCH: Mr. Crough is admitted *pro hac vice* and, to the extent necessary, will be speaking on behalf of the Decarb defendants.

Also, the parties conferred a few moments ago, and unless Your Honor has a different preference, we're prepared to present argument in the following order: Beginning with plaintiffs, whose motion we are here today to hear, followed by objector's counsel, and then again from plaintiffs and defendants, if necessary.

THE COURT: Very well.

ATTORNEY YOCH: I cede the podium to Mr. Mondros. Thank you, Your Honor.

THE COURT: Good morning, Mr. Mondros. Good to see you again.

ATTORNEY MONDROS: Good morning, Vice

Chancellor Fioravanti. Nice to see you. Herb Mondros of Rigrodsky Law on behalf of Dr. Alfred Miller and the putative federal class.

With me at counsel table is Mr. Raffi Melanson. He's admitted *pro hac vice*. And with the Court's permission, he will present the argument for the objector. Thank you.

THE COURT: Welcome.

ATTORNEY SBORZ: Good morning, Your Honor. May it please the Court. David Sborz from Andrews & Springer. Before we get started this morning, I thought it made sense to do a couple of introductions for plaintiff.

So to my left is Greg Del Gaizo from Robbins LLP. To his left is Erik Luedeke from Robbins Geller, Chris Lyons from Robbins Geller, and Jason Avellino from Robbins Geller.

Your Honor, Mr. Del Gaizo has been previously admitted in this case *pro hac vice*, and with your Honor's permission, he'll be presenting argument on behalf of plaintiff this morning.

THE COURT: Very well, thank you.

I see Mr. DiCamillo in the background behind the bar.

ATTORNEY DiCAMILLO: Good morning, Your Honor.

THE COURT: I know you're not making an appearance, but I just want to acknowledge your presence and say welcome on a Friday morning, and you suited up on a Friday.

ATTORNEY DiCAMILLO: Yes. Happy to be here, Your Honor.

THE COURT: Mr. Del Gaizo, you may proceed.

ATTORNEY DEL GAIZO: Thank you, Your Honor. Good morning. May it please the Court. Greg Del Gaizo from Robbins LLP on behalf of plaintiff John Malork.

We are here today on plaintiff's motion to approve the settlement in the action captioned *Malork v. Anderson*, Civil Action 2022-0260-PAF.

This matter arose out of the de-SPAC transaction between a SPAC Decarbonization Acquisition Corp, what we call Decarb, and a former company, Hyzon Motors, Inc., what we've been calling Legacy Hyzon. Legacy Hyzon was effectively a development-stage company. It made vehicles that were supposed to use a

hydrogen fuel cell technology.

The fact pattern here is one that the Court is well familiar with. We alleged that the defendants pushed through a value-destructive merger and that, in the process, impaired the class's redemption decision.

The settlement is also one that the Court is very familiar with. It's similar to the other SPAC settlements the Court has approved. We've pointed out some of those cases in our opening brief.

Given that I know Your Honor is familiar with de-SPAC settlements and the SPAC case, my thought was to focus on what made this matter a bit unique in that we have an objector here, Dr. Miller.

Dr. Miller is the lead plaintiff in a securities fraud class action against the defendants as well as some of the executives at Hyzon. I think it's worth spending a few minutes to go through the history of the merger as well as this litigation and Dr. Miller's. Of course, Your Honor, I'm happy to address any of the matters you see fit first. Okay.

Regarding the underlying facts, Decarb followed that normal SPAC pattern that Your Honor is familiar with. We had controllers that were

associates -- we had controllers that were serial SPAC creators. They put their associates on the board. They served in a number of these controllers' SPACs prior to the IPO. The sponsor purchased 5.6 million and a little bit more founders share for just $25,000. It also purchased roughly 6.5 million private placement warrants at a price of $1 per warrant. The sponsor gave 22,000 founders shares to each of the outside directors except for Defendant McDermott, who received 331,000 founders shares.

Decarb went public on October 22, 2020, selling 22 million shares -- excuse me -- 22 million units at a price of $10 per unit. The unit consisted of one share of Class A common stock and one half of one warrant. Importantly for this matter, the Class A common stock had the right to redeem their stock; the founder shares, of course, did not.

Our theory, and one that the Court agreed with, at least at our motion to dismiss stage, is that the founders shares and the private warrants created divergent interests between the defendants and the ordinary outside stockholders like Mr. Malork.

About a week after the IPO, Defendants Anderson and Tichio met with Goldman Sachs, that's

Legacy Hyzon's financial adviser, about merging with Legacy Hyzon. Three and a half months later, the board approved the merger with Legacy Hyzon; and the company announced the merger the next day, February 9, 2021.

In the run-up to this de-SPAC transaction, Legacy Hyzon supposedly entered into contracts or MOUs with a number of big-name blue chip companies like IKEA, Coca-Cola, and Heineken. Among other things, defendants claim that Hyzon had 40 million in orders under contract or pursuant to an MOU. Supposedly, Hyzon would deliver 85 vehicles in 2021, which would increase to almost 10,000 by 2025. We'd also see the accompanying jump in revenue going from 37 million all the way to nearly 3.3 billion.

This was all repeated in investor presentations and the proxy that was issued on June 21, 2021. Defendants used these statements to solicit votes for the merger and to provide stockholders with information on whether to redeem their stock.

However, what's turned out is these orders were not a real thing. The technology behind Hyzon's trucks was not superior to its competitors.

And, in fact, post-merger, the special committee of Hyzon -- a special committee of the Hyzon board of directors conducted an investigation and found that Hyzon lacked the capability to produce the hydrogen-based working vehicles.

On July 15, 2021, stockholders voted in favor of the merger, and less than 10 percent of the outside stockholders redeemed their Class A shares. Decarb and Legacy Hyzon closed the merger the next day.

About two months later, a series of short seller reports started to emerge. They were issued by Blue Orca and Iceberg Research. And what these short seller reports stated is that these orders were not legitimate and that the technology behind Hyzon's trucks was also not as advanced and competitive as claimed. As you might imagine, Hyzon's stock fell as a result.

On November 15, 2021, Dr. Miller, the objector here, filed his first complaint in the Western District of New York alleging that Hyzon, Mr. Anderson, who was the CEO of Decarb, nondefendant here Haskopoulos, who was the CEO of Decarb, and nonsettling defendant at one point, Mr. Knight, who's

Hyzon's CEO, and Mr. Gordon, who was Hyzon's CFO, violated Sections 10(b) and 20(a) of the Exchange Act.

I note that there's no mention of any redemption rights in this initial complaint. There's no 14(a) claim in this initial complaint.

One other thing, Your Honor, Dr. Miller's objection says that he filed his first complaint in March 2022, building off -- quote, "building off the November 2021 federal complaints by the first federal filers." It's just an incorrect statement of the fact. Dr. Miller was one of those first initial filers back in November 2021. I point that out because the objection notes a number of times about the race to the courthouse when Dr. Miller himself was one of those first filers.

Plaintiff Malork, in contrast, did not file his initial complaint until March 18, 2022, about five months after Dr. Miller's. We, of course, filed it here in Chancery Court. The theory was and still is that defendants impaired the class and plaintiffs' redemption rights.

I note that this was very early, within the developing SPAC jurisprudence when we filed. The Court had relatively recently issued the

MultiPlan decision. But even the *Gig* decisions had not yet come out.

On January 12, 2022, Hyzon revealed that the SEC opened a formal investigation into its public statements leading up to the merger and thereafter.

Dr. Miller filed his consolidated amended complaint on March 21, 2022. He added Defendant Tichio and also nondefendant Gu, who was the executive chairman of Hyzon. Again, in this complaint, there is no mention of the redemption decision. There is no Section 14 claim.

We filed our own amended complaint in response to the defendants' motion to dismiss on August 15, 2022.

While we were doing that briefing, the Court came down with its *Gig* decisions regarding net cash per share. We noticed that the same failure to disclose net cash per share that occurred in that case also occurred here, so we thought to -- we asked supplement our complaint; however, the Court did deny that. The Court also issued a separate order that the parties provide supplemental briefing on the effect of the *Gig* decision.

While this was occurring, Dr. Miller filed yet another amended complaint, his second amended complaint, on September 16, 2022, same defendants as before, Your Honor, same causes of action. Again, no cause of action, no mention of the redemption -- actually, let me correct that. There was one -- I did a search. I found one mention of the redemption in the entire complaint. And, again, no Section 14 complaint.

The parties in Dr. Miller's case then stayed that matter while they held mediation and settlement talks. Plaintiff here, Mr. Malork, was not invited to participate in that mediation. We only know about it from Dr. Miller's case docket. And I'm assuming the mediation was unsuccessful because we're all here today.

Again, we move forward with our briefing on the motion to dismiss while this happened, and the Court heard oral argument.

After our oral argument, Dr. Miller filed his third amended complaint on June 23, 2023. This complaint is the one that for the first time asserts a Section 14 claim and alleges that the stockholder vote and redemption decision were

impaired. He actually said the misleading statements led for shareholders to vote in favor of the deal and led to stockholders not to exercise their redemption rights.

The parties there engaged in motion to dismiss briefing, which was completed in November of 2023. And then nothing happens in that case for two years.

In our action, Your Honor denied the motion to dismiss on July 17, 2023, and we engaged in discovery soon after.

On September 26, 2023, the SEC announced it was charging Hyzon, its former CEO Knight, and the former managing director of the European subsidiary with misleading investors. Hyzon agreed to pay 25 million; Mr. Knight, $100,000; and Mr. Holthausen, who is the managing director, $200,000.

In the investigation leading up to those charges, the SEC obviously got a bunch of documents from Hyzon, but it also had discovery from defendants. And in the course of our discovery, we went and got the discovery that the defendants produced to the SEC here.

In addition, we subpoenaed Hyzon. On December 1, 2023, we moved to compel Hyzon to produce the documents it produced to the SEC and the documents that were gathered by the special committee that I mentioned earlier.

On March 7, 2024, Your Honor granted that motion in part. We also subpoenaed eight of their third parties, including bankers like Credit Suisse as well as the alleged blue chip companies like Coca-Cola.

We received approximately 250,000 documents, over 800,000 pages of discovery. And some of the discovery we found we thought was very strong against Defendant Knight and Hyzon, but a number of the pieces of discovery cut against us in our allegations against defendants. For example, the discovery showed that Decarb was receiving diligence reports from Roland Berger and McKinsey.

Roland Berger put together I believe it was a 247-page slide deck. It had very detailed information about the quality of the technology underlying Hyzon, including that it was a competitive -- or better than some of its, Hyzon's, competitors. It also said there were guaranteed

sales, including by what I believe was a subsidiary of IKEA.

McKinsey was doing its own reports. It was giving weekly reports to Decarb, culminating in its own 167-page slide presentation. And it said, for example, that there was at least $40 million on their contract for 2021. It said the deals under contract were enough to meet 2021 estimates and that 2022 management estimates were achievable.

We also looked into defendants' trading in Hyzon. Probably more accurate to say lack thereof of trading. Most of the defendants didn't sell any stock. The few that did, Defendants Tyco and Tepper, sold for a de minimus amount. And effectively all the defendants rode Hyzon's stock all the way down.

There was also discovery on plaintiff. Plaintiff produced over 3600 pages and was deposed on April 3, 2024.

Based on what we found in our discovery, we moved leave to file a second amended complaint on July 15, 2024. The focus of that complaint was really on the Hyzon defendants who we thought were the primary wrongdoers here.

With about two months left in discovery, we mediated on July 31, 2024, in front of Mr. Myers at JAMS. We agreed to settle with the Decarb defendants on that day. It was an arm's length settlement with an experienced mediator; and even the objector here, Dr. Miller, does not claim otherwise.

We alerted the Court to that resolution on August 6, 2024. I just want to note that was public on the docket. We did not hear anything from Dr. Miller at that time.

We also began to focus our litigation efforts against Hyzon. However, the company's financial condition drastically deteriorated quickly, so we made the decision to dismiss the claims against the Hyzon defendants without prejudice and get the class the settlement amount as quickly as possible. Now, it had already been litigating for quite some time at that point.

We negotiated a stipulation of settlement that releases the Decarb defendants and explicitly carves out Hyzon people, including Knight, Gordon, and Gu, who are all defendants in Dr. Miller's action.

The release and the stipulation is

also specific as to what is getting released; and that is, claims regarding the redemption. In exchange for that narrow release, the class gets $8.8 million.

On June 25, 2025, the Court granted the scheduling order, which included our proposed notice. The notice is similar to the notice that the Court has approved numerous times, including *In Re GeneDX* and *Lien v. Equal Equity*. The notice contains the location, date, time of this hearing as well as its purpose. The notice also details the claims, defenses, the relief the action sought as well as the plan of allocation.

On September 26, 2025, Jack Ewashko, that's the director of case management of A.B. Data, our settlement administrator, submitted -- we filed his supplemental affidavit. It explained that he has sent out over 28,000 notices packages.

We also had a toll-free help line. We had a website that had copies of the settlement documents, the help line, and the email address. We even put on Dr. Miller's objection and our replies to that right on the website. Dr. Miller filed his objection the last day, so I recognize it probably didn't give stockholders much chance to review and see

if they wanted to apply, but it is there if anyone wanted to see it, and we have not received any responses.

We also put out a summary notice on PR Newswire, and it has the settlement amount, the class definition, the hearing information, as well directs people to the website and of course our phone number if they want more information. This is notice that the Court has held sufficient numerous times.

The only objector here is Dr. Miller. Dr. Miller says he invested $7 million into Decarb and Hyzon, a very substantial amount. We don't contest that. But I do want to note the overwhelming amount of that investment is into warrants. And those claims related to the purchase of warrants are not affected by this settlement.

Dr. Miller initially tried to stop this settlement through federal court. He filed a motion to enjoin the settlement and a motion to expedite the consideration of his injunction motion.

On June 30, 2025, the Court in the Western District of New York denied the motion to expedite.

On July 14, 2025, the Court dismissed

Dr. Miller's Section 14(a) claim in its entirety, holding that the challenged statements were forward-looking and protected by the bespeaks caution doctrine. The court also dismissed all the claims against the settling defendants here. The court did, "reluctantly" allowed Dr. Miller to move to leave to file a fourth amended complaint, which he has done.

On July 29, 2025, the Court there set a briefing schedule on Dr. Miller's motion for leave. In doing so, the Court noted that it was "cognizant of the hearing scheduled for October 3, 2025, in the Malork action."

As of late last night, there's been no movement from the court in the Western District of New York on that motion.

One second here. Sorry.

THE COURT: Counsel, has the court in the Western District of New York set a hearing date on that motion?

ATTORNEY DEL GAIZO: It did not set a hearing date. The last thing I saw, I believe, on the docket was that if it needed one, it would set one.

In fairness to Dr. Miller, it's not uncommon for federal courts not to have hearings on

motions. Though that being said, there was one on the motion to dismiss in this case, but there is no set hearing date as of right now.

THE COURT: Has the motion been fully briefed?

ATTORNEY DEL GAIZO: The motion is fully briefed, Your Honor.

THE COURT: And when was it fully briefed, do you know?

ATTORNEY DEL GAIZO: I do not remember off the top of my head.

THE COURT: I'm sure that someone on the other side or one of your friends will know.

ATTORNEY CROUGH: Yes. Thank you, your Honor.

ATTORNEY STRIPLING: If I may really briefly, August 29th is when it was fully briefed.

THE COURT: Thank you. You may proceed.

ATTORNEY DEL GAIZO: Thank you, Your Honor.

Dr. Miller's core objection here challenges whether the settlement is fair and reasonable, focusing on the value of the settlement

versus the relief given. This is what I consider the traditional "give" versus the "get", what we now know called Rule 23(f)(5)(D).

The "get" here is the $8.8 million fund. It equates to 43 cents per share. It is consistent with other SPAC settlements. *Finserve* and *Apex Technology*, for example, were both at 41 cents per share. *MultiPlan* was at 44 cents per share.

When we compare it to the net-cash-per-share damages, it's 15.8 percent of the net-cash-per-share damages, which, again, consistent with other SPAC settlements, for example, *Finserve* was 15.7 percent.

As Your Honor knows, there's some undecided issues within this SPAC jurisprudence regarding causation and reliance. We might have been stuck with nominal damages, and there we estimate between somewhere around 10 to $40 million -- with, of course, Your Honor having very wide latitude in what you decide there.

The "give" here is the release, which as I talked about earlier, we believe is narrowly tailored. It just applied to claims that are brought, or could have been brought, that were based on, arise

out of, or relate to "the impairment of the redemption rights of any Decarb Class A stockholder." And, again, it explicitly carves out those Hyzon defendants we talked to, which we view -- and I assume the SEC viewed since it did discovery and it didn't bring action against the other defendants here -- kind of the primary wrongdoers here.

Now, Dr. Miller says the release must be factually circumscribed to relinquish only causes of action arising from the core operative facts at issue in this action. That's at page 18 of his brief. We're fine with that because that is what we did.

As Your Honor explained in denying the motion to dismiss, "Here, the plaintiff alleges that defendants breached their fiduciary duties by, for self-interested purposes, impairing the Decarb stockholders' redemption right through false or misleading disclosure." That's on page 20 of your decision. And like I said, we've limited the release to just those impacting the redemption decision.

We can compare that to, for example, the release in *MultiPlan* where there, it was any claim related to the merger, the proxy, or any disclosures relating to the merger. In *GeneDX*, it was any

disclosure relating to or concerning the merger.

If we had a release similar to those, there's an argument that would have released Dr. Miller's entire claim. Here, all we're talking about is the Section 14 claim that specifically involves the redemption decision.

And I think that's important also because, in truth, we're just releasing part of that Section 14 claim that completely overlaps with this claim. It does not release any Section 10(b) claim, and it does not release, in my view, the Section 14 claim regarding stockholder votes.

And I think defendants agree with me on this because when I look at page 16 of their opposition to the injunction, they write: "More generally, to the extent Plaintiff's 14(a) claims are revived, nothing forecloses plaintiff from trying to demonstrate in due course how his Section 14(a) claims raise distinct, nonimpairment theories based on the alleged deficiencies in the proxy solicitation material."

So I know that's a lot more words than how I described it, but to me that means you have two pieces of the Section 14(a): You have the redemption

decision and you have the voting decision. And only the redemption decision is being affected by the release here. So in the event the Washington -- sorry, the Western District of New York allows Dr. Miller to revive his 14(a) claim, he still gets to pursue that claim over the voting impairment.

And so let's discuss what information Dr. Miller himself does not provide about his claimed viable 14(a) claims, which is how much Dr. Miller thinks they're worth. What are the damages for the Section 14(a) claim? Whether it's the damages for the claim in the entirety or just the damages for the claim that's being released?

And we don't know -- for example, he doesn't make any statements about, well, the voting claim is worth X and the redemption claim is worth some amount in addition to that voting claim. It seems to me that you'd be able to recover the same amount for the voting claim as you would for the redemption decision.

And what we see Dr. Miller do, instead, is adopt the damages amount that we put forward based on net cash per share. But, first, Dr. Miller doesn't have a net-cash-per-share damage in

his complaint and, second, we can think about the incongruity in Dr. Miller's argument that he seems to trust Mr. Malork to put forward a solid redemption right theory because it gets copied into his second or third amended complaint, and he seems to trust Dr. Miller's damages -- Dr. Miller seems to trust Mr. Malork's damages analysis because he seems to adopt that also in his objection, then feels the need to step in when it comes to the settlement of the claim. And we just think that is improper, Your Honor.

The thing is: We put in a lot of work here. And we understand the claims. We spent nearly 8,000 hours litigating this case. Our lodestar here is over $5 million. Again, 250,000 documents, 800,000 pages, nine third-party subpoenas. We know this case inside and out in a way that Dr. Miller, who has a dismissed claim and has not engaged in any discovery, cannot possibly know. And, unfortunately, that discovery showed we faced real risks, especially against the Decarb defendants.

I read Dr. Miller's complaint, his new complaint, very closely. I read his objection. And he keeps saying the settling defendants were at least

negligent. But of course he doesn't mention Roland Berger and McKinsey. But that makes sense. He hasn't done the discovery yet.

Something else Dr. Miller fails to mention is the SEC conducted discovery on the defendants and didn't take any action with them. Instead, the SEC's complaint is really about what the Hyzon defendants did.

So, Your Honor, looking at the totality of the facts here, we think there's just no basis for Dr. Miller's claim that the class could get more from his federal action than it was able to get here when we have a redemption claim that completely overlaps with that small piece of the 14(a) claim that is getting released.

If Your Honor has no questions, I'm going to --

THE COURT: I don't.

ATTORNEY DEL GAIZO: Thank you, Your Honor.

Dr. Miller also attacks the notice because he says it did not include the release, that release part of his Section 14 claim. Your Honor, we filed Rule 23(f) to the letter. Like I said earlier,

it's the same notice the Court has approved in now a double digit amount of the SPAC cases. In fact, we went above and beyond by manning that toll-free help line. And we had a dedicated email address.

There's simply no case law to support the argument that you have to include that a somewhat related case is -- that there's a release that releases part of a somewhat related case. There is nothing that -- Dr. Miller says it violates Rule 23 in due process. There is no support for that argument. I don't know how following the law here in Delaware could possibly violate that same law. Seeing as we complied with the law and we put out the same notice that the Court has approved many times, we believe notice is appropriate here.

Regarding class certification, Your Honor, the settlement contemplates certification of a nonopt-out class of holders of Decarb Class A common stock who did not redeem all of their shares. We exclude a defined excluded person. We revised the class after *TS Innovation* so that successors in interest are only those that are successors in interest by law. So we think as a result, the class is very similar to the one that was approved in *TS*

Innovations.

As Your Honor knows, Rule 23, a class may be certified if the criteria rule -- sorry. Yes. May be certified if the criteria Rule of 23(a) as well as one of the criteria of Rule 23(b)(1) or (b)(2) is satisfied. Dr. Miller does not challenge anything under Rule 23(b). Instead, he focuses on typicality or adequacy under Rule 23(a), and that's what I'd like to focus on here.

For typicality, the question is just whether the claims or defenses of the representative party are typical of the claims and defenses of the class. Here, plaintiffs' claims are identical to the class.

Dr. Miller's objection is that the plaintiffs do not disclose how many shares he held. But there's no requirement that he does so. And, in fact, no matter how many shares he holds, the claims and defenses would be the same.

The other nonexistent requirement that Dr. Miller complains about is that Mr. Malork did not move for an early class certification. But that is not how our matters are litigated here in Delaware. In all the SPAC *MultiPlan* cases I'm aware of, I've

only seen a single instance where a plaintiff moved for class certification before the close of discovery.

Typicality, in my mind, is a simple question: Is plaintiff affected the same way as the rest of the class? He was. And there's no unique defenses subject, that plaintiff is subject to.

For adequacy, Dr. Miller challenges Mr. Malork's adequacy on the basis that he's releasing the Section 14(a) claim -- but just that piece, Your Honor -- and that he did not involve Dr. Miller in settlement negotiation. We already talked about why I think it's appropriate for that small piece of the 14(a) to be released since it completely overlaps with our own redemption claim. And of course there's no requirement that we involve Dr. Miller in settlement discussions. We, instead, acted in what we thought was the best interest for the class as we're required to do so.

Dr. Miller also states that plaintiff has not shown how any amount to be distributed to DCRB investors under the proposed settlement in any way compensates investors for any additional recovery they could receive in the federal action.

I don't understand this objection.

There is no additional recovery in the federal action right now. In the event there's a settlement in the securities class action, the class would be paid based on however the plan of allocation works there.

So, again, I think here we've shown that both 23(a) and one of the requirements of 23(b)(1) or (b)(2) has been met.

Your Honor, absent any questions, I'll move on quickly to the plan of allocation.

THE COURT: You may.

ATTORNEY DEL GAIZO: Dr. Miller does not seem to object to the plan of allocation. It's one the Court is familiar with. It's a claims-made process, not a claims-made settlement. The fund will be paid down. The defendants will have no reversionary interest in the fund.

As to the process itself, we made it as easy as possible while also getting the required information. People can mail in their information. They can submit it online. There's even a place where if, for example, a class member messed up on their address, you can fix that. It's all available there online. And, of course we're -- and our settlement administrators are there to help out as

necessary.

The last matter that Dr. Miller mentions is he requests a stay. He calls it prudent. He claims that Judge Vacca is moving expeditiously and issuing timely rulings. This is meant as no disrespect to the federal judge, but Dr. Miller's case has been pending for four years, and they're not even past the pleading stage. It took two years to get a motion to dismiss ruling. Judge Vacca acknowledged this hearing and still has decided not to rule before it.

More fundamentally, Your Honor, there is no reason to wait. If Your Honor decides, as I think you should, that the settlement falls within the range of reasonableness, then there is nothing that happens in the federal court that will change that decision.

Unless Your Honor has any questions about Dr. Miller's objections or the settlement itself, I was going to move on to the fee and expense.

THE COURT: You may.

ATTORNEY DEL GAIZO: Okay. Your Honor, here, plaintiff requests 20 percent of the fund, which equates to 1.76 million. This is an

all-in amount. That includes plaintiff's expenses of roughly $100,000. If we were to take the expenses off the top, it would be a request of a little under 19 percent.

The Court, of course, has broad discretion in awarding the fees it believes is appropriate. The most important factor here is the benefit achieved, the $8.8 million fund.

Up until that settlement, Your Honor, it was hard-fought litigation. I went through a lot of the motion practice at the start. It was pretty substantial. There was a good amount of discovery, 250,000 documents, over 800,000 pages, plus plaintiff getting deposed.

This was one of the original *MultiPlan* cases brought before any of the *Gig* decisions, so I would call this meaningful litigation and put it within the 15 to 25 percent brackets in *Americas Mining*.

Looking at previous settlements, in *GeneDX*, Your Honor awarded 19.5 percent. There, defendants answered and plaintiffs reviewed over 100,000 pages of discovery.

In light of the additional motion work

and the larger production, we think that there should be a slight bump to *GeneDX*.

Similarly in *Skilz*, Your Honor awarded 17.5 percent. While there was motion work there, there wasn't close to the same amount of discovery, and no depositions.

If we look at some other early-filed *MultiPlan* cases, *MultiPlan* itself was 20 percent. *Lordstown*, another very early decision, the Court awarded 22.5 percent, plus reimbursement of expenses. Both of those cases settled before depositions.

Concerning what I consider the secondary factor is we took this matter on a fully contingent basis. It was a complex case, especially if we look at when we filed it, when there was very little *Multiplan* jurisprudence.

Concerning the standing and ability of counsel, Your Honor knows us by now. And of course we're up against very, very competent opposing counsel.

And the lodestar cross-check, boy does it support us. We spent 8,000 hours on this case. It equates to a lodestar of over $5 million. That's an hourly rate of $640 an hour.

And to be clear, Your Honor, we stopped counting in terms of this settlement in those hours that it goes from inception to July 31, 2024. That's when we agreed to the mediator's proposal for these defendants. That time that we spent litigating against Hyzon is not included in that massive $5 million lodestar 8,000 hours.

The last issue is the request for an incentive award of $10,000. We think it's well-deserved in this case. Plaintiff produced documents. He answered over 40 interrogatories and, perhaps more importantly, he prepared for and sat for a full-day deposition. On the other side, again, was very competent counsel. It's similar to the amount the court has awarded in other cases, such as *Morris v. Spectra*, *In Re Handy & Harman*.

I believe I've addressed everything, Your Honor. But happy to answer any questions.

THE COURT: I don't at this time. Thank you.

ATTORNEY DEL GAIZO: Thank you.

ATTORNEY MELANSON: Good morning, Your Honor. Raffi Melanson from the firm Hagens Berman Sobol Shapiro for the defendant, Dr. Alfred Miller.

I want to start off with some of the procedural elements that were touched upon by the plaintiff.

The plaintiff concedes that Dr. Miller was one of the first investors to file in this larger litigation against Hyzon and DCRB, or Decarb.

He concedes that in the initial complaint filed by Dr. Miller in 2022, Decarb defendants were listed in those complaints.

He also concedes that in 2022, the redemption rights were referenced in Dr. Miller's complaints and that ultimately the Section 14 claims became clear and apparent in Dr. Miller's complaints.

With that context in mind, we have to frame what Mr. Malork is asking this Court to do. Effectively, the request to enter into this settlement is to impose a dangerous settlement -- a dangerous precedent where in cases where there's ongoing federal and state securities actions going on at the same time based on similar, if not nearly identical, facts involving defendants that overlap substantially, whether one party in a jurisdiction should be allowed to rush to a court, their respective court, and try and get a settlement approved that extinguishes the

litigation going on in other jurisdictions, we think this is --

THE COURT: Counsel, you used the word "rush." What's your definition of "rush" in the context of this case?

ATTORNEY MELANSON: In the context of this case, rush entails reaching a settlement with defendants without -- reaching a settlement that touches upon these other litigations, in effect releases those claims in the other litigation without at least consulting with all the parties in that litigation in trying to reach a more global settlement in which the parties, working together, can reach a solution.

The rushing here refers to just one aspect of the litigation trying to reach an agreement that cuts out the other side. And we think allowing this practice to go forward is dangerous and intrudes upon the intent of Congress when it passed the PSLRA, the federal security statute that governs most federal litigation, in establishing a lead plaintiff process for guiding securities litigation.

Also, it generally intrudes upon norms of comity that are respected between federal courts

and state courts.

And in making this ask, a lot we hear from Mr. Malork is that "we did what was required in standard cases. We followed 23(f)(1) guidance in standard cases."

But this is not a standard case. This is not a standard matter where a litigant comes, presents a settlement which has no implication on other federal action.

And in our papers, we really raise three questions that are specific to this action that really don't get answered by Mr. Malork in his reply papers or in the argument we just heard. The first is: Why is there a need generally to settle the federal claims in the state court settlement?

Second, why is Mr. Malork properly situated to settle the federal claims through the state court vehicle?

And, three, why force this court now to make rulings that impact an exclusively federal claim, the Section 14(a) claim, over which the federal courts have exclusive jurisdiction, when the federal court has expressed an intent that -- has expressed that it's time to do so and has recognized that the

settlement hearing is going on on this specific date.

THE COURT: Counsel, hasn't that last question been answered by the *Matsushita* case?

ATTORNEY MELANSON: Excuse me, Your Honor?

THE COURT: Hasn't that last question been resolved in the Matsushita case long ago on whether this court, in a class action settlement, can release 14(a) claims?

ATTORNEY MELANSON: We're not disputing --

THE COURT: It was under the Exchange Act even though this court doesn't have jurisdiction? Maybe I have that wrong. But I always thought that was well-settled.

ATTORNEY MELANSON: Yes, Your Honor, we're not disputing that this court has authority to resolve Section 14(a) claims as sort of a general principle. But what we're discussing here is the more specific and limited issue of whether this court should settle those claims and resolve those claims when there is a pending federal putative class action case involving those claims that is still in motion, over which the federal court has before it a motion to

enjoin, is considering a motion to enjoin this very proceeding right here.

THE COURT: Counsel, my understanding is the federal court denied that application. Am I wrong?

ATTORNEY MELANSON: No, Your Honor. What happened was when plaintiffs moved in federal court to enjoin the state court settlement proceeding, they filed both that motion to enjoin and a motion to expedite. What was denied was the motion to expedite. And as part of that ruling, the Court recognized the date of the settlement and, in doing so, suggested it was going to start moving forward in order to get answers as promptly as possible.

To that end, we filed --

THE COURT: Did the court rule on the motion to enjoin proceeding with this settlement?

ATTORNEY MELANSON: No. The motion to enjoin is still pending and fully briefed before the federal court at this time.

THE COURT: So can I interpret that as meaning the Court denied it *sub silentio*?

ATTORNEY MELANSON: We would argue against that interpretation, Your Honor.

THE COURT: Well, the federal court knew that this settlement hearing was taking place today; right?

ATTORNEY MELANSON: Correct, Your Honor. We think the sticking point here has to deal with plaintiff's motion for leave to amend, which the court -- which plaintiff's counsel touched upon in his presentation, that that motion is currently pending before the federal court, as well as to whether the Section 14(a) claims in the federal case are going to be live or are going to be sort of, for all purposes, dismissed.

And that's really why we're asking this Court to wait for that ruling for as a matter of comity, as a matter of prudence, because the federal court has already expressed that it is trying to make progress on this motion. We don't know, for example, if the government shutdown is affecting the timeliness of that matter.

Ultimately, at the end of this presentation, we're not asking the Court to stay its ruling on this motion for preliminary approval of a settlement indefinitely. We think what would be reasonable is for this court to stay its decision for

at least 90 days, or three months, allow the parties after that time to submit a status report, to let it know what the federal court has done.

If it has not -- alternatively if the court acts, the federal court acts in that period between today and that three-month status report deadline, the parties will likely promptly inform the court of that ruling.

We think that allowing the federal court some additional time, not indefinite time, a reasonable amount of time to make its rulings and then to take those rulings into effect is a prudent course of action for this court to adopt.

So, returning to Mr. Malork's attempts to sort of cut the legs out of that federal litigation, we don't really hear any sort of discussion in the papers where, yes, a federal -- this court, this Chancery Court does have the authority to release Section 14(a) claims and has done so often when there is no contest, there is no dispute that by a federal objector that the granting of that settlement will affect a federal claim. Again, that is a sort of standard case.

Here, in a regular case -- Mr. Malork

and the defendants have known about Dr. Miller's Section 14 claims for at least two years. When they had their settlement discussions in 2014, again, Dr. Miller was not invited to those discussions. We don't hear a reason why, but we're not going to take issue with that.

But after that settlement in principle was reached in 2014, yes, the Malork parties and the Decarb defendants in this action did notify the court that a settlement in principle was reached, but they did not make the full disclosure that it would affect the federal claims. That disclosure was not made fully until the summer of this year.

Once that was made clear on the docket, Dr. Miller acted very promptly. He, within a day or two, notified the parties that he wanted to meet and confer. And when that meet-and-confer did not produce a result that was satisfactory to Dr. Miller, mainly that the settlement would be altered in a way, the release of claims would be altered in a way to not release the federal claims, he took action. He filed a motion to enjoin in federal court which, again, as we discussed earlier, is pending, and he filed this objection here.

We don't really know here a reason why we can't wait three months, or a reasonable amount of time, for the federal court to act when the parties already waited a year to bring their settlement papers to bear before this court. If anything, it suggests that the state court parties were waiting for the federal court sort of rulings and after a while just decided to act on their own.

Regarding the contention that deference to the federal court is foolish because it took four or five years for it to rule on a motion to dismiss, as our papers lay out more clearly than the presentation that was just made, Judge Vacca was -- newly took over this, the federal matter. She was not the judge for the past four or five years. She took over the matter in the spring of this year. And upon the matter becoming on her docket, she has acted expeditiously and, again, has expressed an intent to rule in a timely manner.

Yes, we do not have her opinion here today. And it would be clearly helpful to this Court, in its decision-making process, to know what her thoughts are on the Section 14(a) claim. All we're asking is for this Court to give her a reasonable

amount of more time before it makes its ruling. And that way it can avoid steeping into the Section 14(a) claim altogether. It can defer to the federal court on its ruling.

And in the scenario where the section of -- the federal court does rule that there is no Section 14(a) claim, that will be easy work for this court. Dr. Miller will promptly inform this court of his position, potentially withdrawing his objection. This becomes an unobjected-to settlement, and the court can rule on the remaining portions in the parties' papers, again the 23 certification issues, most of which Dr. Miller is not opposed, the motion for fees which Dr. Miller is not opposed, and the other remaining aspects.

The second question we asked is why is Mr. Malork properly situated to settle these, settle the federal claims, as an alternative to just carving a release and creating a release with the defendants that addresses just state law issues?

Again, we don't really hear a compelling answer to this from any party in their papers or in their presentations. What we do know and what Plaintiff Malork conceded in his presentation is

that Dr. Miller has lost substantially through his investments in Decarb. He spent over $7 million in his investments there. Admittedly, some of it was in warrants. But to date, despite Dr. Miller repeatedly raising the question, we hear nothing about Mr. Malork's stake in Decarb. What is his motivation for engaging in the settlement? Is it minimal investment? Minimal losses? Is he being compensated, through the incentive reward of $10,000, that request? We don't know.

THE COURT: He submitted a declaration that he will not accept anything other than what this court awards.

ATTORNEY MELANSON: Yes, Your Honor. But we don't know what exactly are his damages, sort of how much stock he invested in Decarb. So we don't know if what's motivating him -- if he has actually a strong compelling interest to follow this litigation, as opposed to in the federal court action under the PSLRA. Through that process, the most adequate plaintiff is selected, typically the investor who has lost the most in the shares.

THE COURT: We don't follow that standard here.

And you said you don't know how many shares Mr. Malork owns.

ATTORNEY MELANSON: In Decarb, correct, Your Honor. He's filed a declaration saying he's owned shares, but he's not submitted any testimony on the sort of amount of shares and potentially the amount of losses he suffered and the amount of recovery he will get under the settlement.

While we understand it's not a -- go ahead.

THE COURT: Counsel, did you ask to review his deposition transcript? Because I suspect learned counsel asked that question at his deposition.

ATTORNEY MELANSON: We did not ask that question, Your Honor. Part of the reason why for that is under the PSLRA, as a federal plaintiff, we are not entitled to discovery until after a motion to dismiss is sort of granted or denied. And we're in a sort of weird procedural posture right now where technically a motion to dismiss has been denied, but there's also a motion for leave to amend.

So in seeking that kind of request, it can potentially be construed as Dr. Miller seeking discovery in violation of the PSLRA. So it's kind of

tying our hands right now and our ability to seek the kind of due diligence we would normally ask in objecting to the settlement, sort of getting access to the deposition transcript, seeing a bit more about the discovery that the plaintiffs sort of touch upon in their preliminary approval papers but don't really substantively engage with.

We heard the presentation, a mention of a Roland Berger/McKinsey report. That's new information that was brought up during this presentation. It was not raised or discussed in the preliminary motion paper or the reply paper.

There really wasn't a strong showing again by Mr. Malork of why a settlement is appropriate. He was kind of going through the motions -- which, again, we -- sorry. I don't want to say going through the motions. Respectfully, they were sort of treating this as a standard case where they were trying -- we're just trying to comply with the law and not really dealing with the high burden of, okay, you know your settlement is being objected to. You should be putting in more effort into really sort of justify why the settlement is just, why it's reasonable, and engage with the specific litigation

facts.

We are past a motion to dismiss. Instead of focusing on the risks that were focused in the motion to dismiss, actually focus on the risks you saw in your discovery. We heard some of that now. It was new information. We would have liked to have seen more of that in the papers so that we could have had a more substantial engagement in our objection, and perhaps other members could have reviewed the actual litigation risks and rewards and made a fully informed decision.

THE COURT: Well, other class members could have objected and could have sought the discovery record.

Is your client a member of the class?

ATTORNEY MELANSON: I believe our client qualifies under the definition because he did have shares and at the time of the vote could have exercised his redemption right.

I don't know if either party's taken the position that because Dr. Miller is objecting to the settlement and because he has moved to enjoin the settlement that he is no longer allowed to recover under the class definition. But insofar as was

Dr. Miller in a position where he had shares in Decarb and his redemption rights were affected, the answer to that question is yes.

THE COURT: Did he redeem?

ATTORNEY MELANSON: He did not redeem. He believed in Hyzon's and Decarb's misrepresentations at the time and held his stock after that point.

THE COURT: So he's a member of the class, this class. If I approve this settlement, he would be within the definition of the class; is that correct? Or is it not correct?

ATTORNEY MELANSON: I believe so, Your Honor. I just don't have 100 percent certainty. But I believe you are correct there.

THE COURT: That might be an important fact.

But if he's a member of the class and certain of his claims are being released, why is it that your client could not file an objection and seek discovery regarding information that the plaintiff relied on in reaching this settlement?

ATTORNEY MELANSON: Again, your Honor, the motivation there was to not violate the PSLRA's stay against discovery in the federal action,

believing his hands were tied.

If that was error on Dr. Miller's part or Dr. Miller's counsel's part, it was inadvertent error. We're mainly engaging with what we were shown in the papers and the information available to us in the papers and raising our objection.

THE COURT: Your client could have picked up the phone from counsel and asked Mr. Malork's counsel how many shares he owned; right?

ATTORNEY MELANSON: Well, we did raise those points in our papers. I can't recall specifically whether those points were also made in our meet-and-confers. But Mr. Malork was certainly on notice that we were questioning his stake in DCRB as part of a potential challenge to his typicality or adequacy.

THE COURT: If it wasn't raised in the meet-and-confer, how important could it be?

ATTORNEY MELANSON: We've only -- maybe I am getting a little too much inside baseball here. In terms of meeting and conferring with the parties in this case, Dr. Malork's counsel -- I'm sorry, Mr. Malork's counsel and Dr. Miller's counsel then conferred a day or two after the full release of

claims in this action was published on the docket. We discussed about the sort of impact of that release, whether it was intended to impact the Section 10(b) claims that Dr. Miller was bringing in federal court, whether it was intended to impact -- not intended to impact but would, in its effect, impact the Section 14(a) claims brought in federal court.

That was the sort of primary thrust of the discussion. And after that, the parties have mostly been communicating its intent through the litigation papers as opposed to further meet-and-confers, realizing from that meet-and-confer, initial meet-and-confer, the parties were essentially at an impasse, that there would be no action in carving the scope of release further to just exclude the federal claims from the release and only settling the state court claims brought in this action.

THE COURT: Thank you.

ATTORNEY MELANSON: I wanted to touch briefly upon the notion that the Section 14(a) claims were dismissed in their entirety in the federal court's motion to dismiss papers and that the DCRB plaintiffs were dismissed in their entirety from the papers as well.

We don't agree. I think -- we think that's a mischaracterization of the federal court record. In the motion to dismiss order, the federal court did not address the specific statements and theories that are now being re-litigated through our amended complaint. Those are the same false statements at issue here, that in the presentations, the investor presentations that initially were published on February 29, 2021, and published thereafter by both the DCRB and Hyzon defendants, that there were misrepresentations about Hyzon's customer relationships with big, sort of name brand customers. And I think Mr. Malork's counsel identified some of them in his presentation: IKEA, Coca-Cola, Heineken, those customers are the primary customers identified, the primary false statements identified in our recent amended complaint. There is definitely overlap there.

The federal court did not touch upon those theories in its motion to dismiss. Upon review of the motion to dismiss order, the federal court focused on the projection aspect statements in those investor presentations, that collectively Hyzon was projecting it would generate 37 million or $40 million, or some variation of that, in 2021 from

sales generally. That's where the motion to dismiss focused. It paid no work to the theory currently being pled -- that was pled in the third amended complaint and now highlighted in the fourth amended complaint about the customer relationships.

That theory has been substantiated through the SEC's action brought in 2023 between sort of our most recent amended complaint and our last amended complaint in which the SEC's investigation showed that despite touting these customer relationships in investor presentations, that these customers had never expressed an interest to buy Hyzon vehicles. And before the dates of certain presentations, certain customers had actually told Hyzon that it was not going to be making purchases those years.

Those claims, given the SEC's substantiation, now have a lot of heft and weight to them. We think part of the reason why the federal court did not promptly see our motion for leave to amend and say nothing's changed and strike it immediately is because it is now giving consideration to those claims. There is merit there worth considering.

So we don't think it's accurate or fair to just boldly claim that those claims were dismissed outright and the federal court was not considering a leave to amend to allow them to be revived. There was no mention in the motion to dismiss order, and now they are under consideration. Again, we think it's reasonable to give the federal court some time. Those papers were fully briefed at the end of August. We are one month out for federal court. That is not an unusual amount of time on ruling on sort of a complex securities matter.

We think a three-month sort of stay in this court's ruling to allow the federal court to sort out these issues would be not only prudent but fair to the federal court to allow it to make its claim known and to prevent any sort of further issues that might arise. Were this court to go forward and approve the settlement and then the federal court wanted to take action and potentially now having to rule on the motion to enjoin, that creates an awkward scenario between federal and state courts. We think a much more reasonable and prudent course would be to, again, the state court wait to hear the federal court out. If the federal court denies the Section 14(a) claims,

this is an easy issue for this court to resolve.

If there is some -- if the federal court does sustain the Section 14(a) claims, that's obviously a more difficult scenario. But I think it's an important fact that this court should consider is that there are actually live 14 Section 14(a) claims out there that this settlement seeks to extinguish. And in its papers, really it does not explain what additional settlement value it's extracting in its $8.8 million settlement to resolve those federal claims. Is that value purely reflective of the state court, the value of the state court claims? Or is there some consideration in there of also the value of the federal court claims?

Should the federal court claims be sustained and should Dr. Miller be allowed to proceed in those claims, he intends to prosecute those claims zealously. He will take the same amount of discovery.

It is possible that -- sorry.

While we do understand that the plaintiff's counsel has put in substantial effort in their case, we don't want to dismiss that at all, and we do understand that aspect, that alone is not sort of the justification for sort of pushing through a

settlement.

It may be at the end of the day that the amount they've settled with the defendants isn't a reasonable amount. It may be that they are entitled to some compensation for their work. But we have to put this in the frame of an investor class. Investors who, by both parties' calculations, lost in the area of $70 million from sort of the misleading campaign in Hyzon here.

While the settlement amount that the plaintiffs are offering through the settlement is about 15 percent of that, potentially if this case is litigated further, investors in both the state court action and the federal court action could recover a greater amount. That is sort of the primary thrust why Dr. Miller is pursuing this, his federal action, and it's why he has so many questions about the showings in the state court filings.

We should not just take the state court counsel on their word. As reputable as they are, as they are good attorneys, we don't want to deny that at all; but we just don't have the assurances. We don't think this court has the assurances at this stage based on what's in the actual record to go

forward and approve the settlement.

THE COURT: What is the estimate of damages under your 14(a) claim in federal court?

ATTORNEY MELANSON: Our estimate of damages is essentially in the same ballpark as the estimate of damages in this action. We believe the area, by very preliminary estimates, is in the area of -- investors were harmed at a value of $70 million, I want to say, in that ballpark.

THE COURT: So it's essentially the same damages measurement that the plaintiffs here are using, the difference between net cash per share and the redemption price.

ATTORNEY MELANSON: That is correct, Your Honor. And it shouldn't be surprising, again, given the claims, the issues, the defendants, the false statements, the dates, they're all virtually the same.

We heard a little argument in the presentation by Mr. Malork's counsel about the Section 14 claims might be able to survive in some form after this settlement, some sort of distinction between the voting rights and the redemption rights. In Dr. Miller's view, kind of describing the same sort

of issue, you're just taking sort of the academic harm, the disclosure harm, versus the actual practical impact on investors.

When they were making that choice to vote for the merger in July of 2021, the practical choice was: Do you want to vote in support of this merger or do you just want to get out now? And getting out now is exercising your redemption rights. It's possibly an academic argument that someone would choose to not vote for the merger but also not want to vote -- exercise their redemption rights. This is really sort of a hypothetical issue. There is no evidence that any sort of actual investor kind of makes that decision when presented with this information.

THE COURT: Thank you.

ATTORNEY MELANSON: If the Court has no further questions, --

THE COURT: Not at this time. Thank you.

ATTORNEY MELANSON: Thank you.

ATTORNEY DEL GAIZO: Thank you, Your Honor. I'll be relatively brief, I hope. I think Your Honor pointed out a lot of the things I was going

to say. I don't think "rush to the Court" the way it's been described is what happened in this case. I think it was a pretty thought-out and heavily litigated matter.

Matsushita does say that this court can, of course, release federal claims. Not only that, but in that decision, the court cites to *Nottingham Partners* from the Delaware Supreme Court where there was a related case settling the court. The U.S. Supreme Court and the Delaware Supreme Court all seem to agree that whether there is a related federal case pending is not relevant as to whether Your Honor has the power to release the claims.

My friends there for Dr. Miller's counsel is correct that the court didn't have an order on the injunction motion, on the motion to enjoin yet. But like Your Honor said, the court specifically said it knew this hearing -- in its order on the scheduling, said it knew this hearing was happening, did not make an order. If anything, that implies it is waiting for your Honor's ruling.

We heard at the end there finally what Mr. -- Dr. Miller thinks the claim is actually worth and that it overlaps entirely with our claim. So if a

settlement is fair and reasonable as a percentage in our case, it should be the same that's fair and reasonable for the amount he's trying to recover.

He says that the Section 14 claim became apparent. What we don't hear is how it became apparent. All this information was already out there when he filed his first three complaints. The only thing that changed is we litigated it. We had our hearing. It was, I think, clear after the hearing that these claims -- our redemption theory had merit. It's weird to see the attack on Mr. Malork when you're copying his theory.

I don't think my friend, Counsel for Dr. Miller, is correct on the hypothetical or the academic nature on how voting in SPACs happened. Having dealt with SPACs quite a bit over the last two years, there is a lot of people that will vote in favor of the merger and then redeem. You don't get to redeem unless there's a deal.

And one of the reasons why you don't have any cleansing in these types of deals is that the vote and the redemption right are completely separate.

So it's -- I can't tell people how to litigate their cases, but if it was me, I most

definitely would be saying, yes, there is a clear distinction and you have a right to do a voting case that is different from a redemption case. I don't think it's correct to say the settlement in any way cuts the legs out of the federal case.

That case was always about a 10(b) claim. It really was. From the first complaint that was filed, it was always about the 10(b) action. This was tacked on. I don't know why. Probably -- I don't know why. I'll just leave it at that. But it was always about the 10(b) case.

It's completely different than, for example, the *Off* case that they cite where it was going to affect the entire case in that federal case and where the settlement was effectively window dressing.

Your Honor, I think that's it for me. Again, happy to answer any questions.

THE COURT: Thank you. I have no questions.

ATTORNEY CROUGH: Good morning, Your Honor. Jeff Crough with Vinson Elkins for the defendants. I'll aim to be even briefer. I know you've heard a lot of argument already. You got

extensive briefing.

I just wanted to touch on two points really quickly on the procedural history of the federal case. It is true that the federal case in the second amended complaint, there was a stray reference to redemption in the factual background section, noting that, you know, stockholders could redeem. There was no 14(a)claim. That was not the basis of any claim. That theory only emerged quite clearly after Mr. Malork had asserted it in this action. So I want to clear that up.

And I'm also, frankly, just quite puzzled by this kind of repeated suggestion that it's inaccurate for us to say that the federal court dismissed all claims against the DCRB defendants or didn't reach these arguments about the customer pipeline. The customer pipeline was front and center in the litigation throughout. It was argued -- it was raised in the third complaint, the complaints before that. It was argued at the motion to dismiss. The federal court notes it on page 52 of the motion to dismiss decision. And the federal court, plain as day, dismisses all claims against the DCRB defendants.

So that is not an overstatement to say

there are no live claims. And the theory that they've been asserting all along, at least at this stage, has been rejected by the federal court.

With that, Your Honor, unless you have any questions, I'll yield.

THE COURT: Two questions.

Was the motion to dismiss granted with prejudice or without prejudice? And then if it was with prejudice, is it just simply a question of the law of the case and the plaintiff has to overcome the law of the case? Or was it without prejudice with leave to file a motion to amend as opposed to leave to amend?

ATTORNEY CROUGH: Yes, Your Honor, it's the last that you just said. And the court really underlined the distinction here. It was not with prejudice, but it was also not, as you often get in these federal suits, just with outright leave to amend and try again. The court expressly noted, it says, "To be clear, the Court does not here grant plaintiff leave to amend."

What the Court said is, look, you've already had four complaints. This has been dragging on for years. I'm reluctant, in light of, you know,

all the chances you've already had, to give you any leave to amend.

But the procedure here might be worth dwelling on for just a second. After they filed the third amended complaint but before they filed their answering brief on the motion to dismiss, the SEC complaint and settlement comes down.

In their answering brief opposing the motion to dismiss, they cited to it a dozen times or so, block quoted portions of it, argued in their answering brief on the motion to dismiss; and then again at oral argument, you know, hey, this changes everything. It validates our claims. We could formally move to amend, but in light of how long this has been going on, you should just consider it now.

And, Your Honor, I argued that in the federal court for the DCRB defendants. We got a direct question: "Do you mind me considering this?" I said, Your Honor, I get, for efficiency sake, it's already before you.

What the Court says is, you know, if there had been subsequent developments in the SEC action that aren't noted in your complaint, I'm giving you leave -- or I'm allowing you to seek leave

to amend only to bolster your allegations in light of that complaint.

And so this was, first of all, not leave to amend and, second of all, not the kind of carte blanche just cure all the deficiencies. This was a very narrow carve-out for, like, could a subsequent development fix your deficiencies?

THE COURT: Thank you.

So it sounds to me like it's somewhere between dismissal with prejudice and dismissal without prejudice.

ATTORNEY CROUGH: I think that's a very fair way of thinking of it, Your Honor, yes.

THE COURT: All right. Last question. Is it in the record how many shares Mr. Malork owns?

ATTORNEY CROUGH: I do not believe it's in the record. And I'll let Mr. Malork's counsel confirm or speak to that.

I will say, Your Honor, as you suspected, that's something we developed in discovery. So we do know the number.

THE COURT: I'm sure that you got his account statement indicating the number of shares he owns.

ATTORNEY CROUGH: Yes. My able colleague, Will Stripling, just pulled it up on his computer right there, so, yes.

THE COURT: Not that it's case-dispositive because there are many class action settlements where stockholders obtained substantial victories and settlements in this court where they held a handful of shares.

ATTORNEY CROUGH: Yes, Your Honor.

If you'll indulge me. I will say at the risk of piling on, the point that Mr. Malork's counsel made about this being -- I think it might have been the third *MultiPlan* style case. I mean, you know, the ground was shifting as we litigated this. But, I mean, there were hard-fought motions to dismiss. You know, I thought we had a good argument this was a holder claim. I thought we had a good argument this was derivative. I mean, it is not -- this was not what's been, become like a bit of rinse-and-repeat cycle now with these SPAC cases when Mr. Malork brought his claim.

THE COURT: It wasn't at the time.

ATTORNEY CROUGH: Yes.

THE COURT: We would get there.

ATTORNEY CROUGH: Yes, Your Honor, yes.

THE COURT: Mr. Del Gaizo, you looked like you were about to get up.

ATTORNEY CROUGH: All right. Thank you, Your Honor.

THE COURT: Thank you.

ATTORNEY DEL GAIZO: It's not in the record, Your Honor, how many shares Mr. Malork has. It's 400 shares. We would have told them if anyone asked. We were not embarrassed by it. It's substantial to him. It matters to him. People don't sit for depositions because they have some weird curiosity to get engaged in litigation, so.

THE COURT: Thank you.

ATTORNEY MELANSON: If the Court would indulge me briefly.

THE COURT: Sure.

ATTORNEY MELANSON: I just want to clear up sort of the leave to amend issue on two fronts.

With regard to the sort of intent of the federal court in granting the plaintiffs leave to file motion to leave to amend, first we noted in our

papers to the federal court after the fact that its ruling there was based off a factual inaccuracy, and sort of having this conversation, the relevant conversations in page 61 to 62 of the motion to dismiss order by the federal court, the federal court noted that -- or it found erroneously that the plaintiff, lead plaintiff in the federal action had already had a chance at discovery, which was factually incorrect.

We don't blame the federal court for that. Again, we think it was really trying to get this decision out to help this court in its decision-making and help the parties in their decision-making. So that kind of underlined its sort of intent and its analysis whether to grant lead plaintiff, Dr. Miller, motion -- the opportunity to amend his complaint.

And, again, with respect to what the Court was envisioning in that amendment, the language kind of speaks for itself. I think the parties, in good faith, are trying to paraphrase it to make the issue simpler. We would just have the Court look to the exact language itself, it is on page 62 of the motion to dismiss order.

Dr. Miller believes a fair reading of that analysis was that though the parties thought the Court at that time, at the motion to dismiss hearing, should consider the SEC complaint because the way the procedural history played out is we would file a complaint, we'd be waiting. I'd be briefing a motion to dismiss or trying to brief a motion to dismiss. Then Hyzon or a news article would release more information about what we thought was sort of the violations at issue. And then we obviously wanted that in our complaint. We amended our complaint. The federal plaintiffs did that a few times. The state court plaintiffs also did that a few times.

By the time we got to the third amended complaint, the position of plaintiff, Dr. Miller at the time, was enough is enough. We need some sort of decision here. We filed that third amended complaint. Motion to dismiss was underway. The SEC then released revelations in this action. We, in our opposition to the motion to dismiss, we tried to make a procedural workaround to let the trial federal court know.

We also, while that brief was pending for the federal court for a year and a half, filed

status reports with the Court saying -- to the fact of we were wanting to sort of have a meet-and-confer with the court, to understand how we could sort of help the court make its ruling faster. Also, we understand there's a procedural issue out here. As a matter of procedure, you might want to consider these SEC allegations but just can't because your hands are tied. In that effect, just let us know now and we'll formally amend.

That was the sort of context underlying the court's decision in this motion, its denial -- its granting of the motion to dismiss on page 62. And in that context, that's where it sort of articulates that the SEC complaints' allegations, specifically about the customer relationships, were just not procedurally before the court even though it might have wanted to consider it.

Also not before the court were other allegations about scheme, liability. Those were Section 10(b) claims not really impacting this litigation. And that's why the court sort of granted plaintiffs leave to file a motion for leave to amend.

THE COURT: Thank you.

Counsel, thank you for your

presentations and your argument today. I will take this under advisement. You will hear from me in due course. It is likely to be a bench ruling. I'll get you all on the phone and I'll give you a bench ruling in due course.

With that, the court stands in recess. Have a good weekend.

(Court adjourned at 10:38 a.m.)

- - -

CERTIFICATE

I, KATHY CORTOPASSI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify the foregoing pages numbered 3 through 71, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 22nd day of October, 2025.

/s/ Kathy Cortopassi

Kathy Cortopassi
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter

TAB 5

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PAUL BERGER REVOCABLE TRUST,	:	
	:	
Plaintiff,	:	
	:	
v	:	C. A. No.
	:	2023-0820-JTL
FALCON EQUITY INVESTORS LLC, EAGLE FALCON JV CO LLC, ALAN G. MNUCHIN, JEFF SAGANSKY, EDGAR BRONFMAN, JR., KAREN FINERMAN, MICHAEL RONEN, and SAIF RAHMAN,	:	
	:	
Defendants.	:	

- - -

Chancery Courtroom No. 12C
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, January 21, 2025
9:15 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

SETTLEMENT HEARING AND PARTIAL RULING OF THE COURT

APPEARANCES:

CHRISTINE M. MACKINTOSH, ESQ.
JONATHAN C. MILLIS, ESQ.
Grant & Eisenhofer P.A.
for Plaintiff

KEVIN M. GALLAGHER, ESQ.
ANDREW L. MILAM, ESQ.
Richards, Layton & Finger, PA
-and-
GREGORY STARNER, ESQ.
of the New York Bar
White & Case LLP
for Defendants

- - -

THE COURT: Welcome, everyone.

ATTORNEY GALLAGHER: Good afternoon, Your Honor. Kevin Gallagher of Richards, Layton & Finger on behalf of the defendants.

Brief introductions, if permissible. From White & Case, Your Honor, Greg Starner. And from my office, Andrew Milam.

THE COURT: Thank you all for being here. I appreciate it.

ATTORNEY MACKINTOSH: Good morning, Vice Chancellor Laster. Christine Mackintosh from Grant & Eisenhofer. I'm joined by my colleague Jon Millis.

THE COURT: Thank you for being here as well.

ATTORNEY MACKINTOSH: This is the time the Court has set to consider the settlement reached in the matter of *Paul Berger Revocable Trust v. Falcon Equity Investors* matter or, as we like to call it, the Sharecare de-SPAC merger litigation.

THE COURT: It's much longer. Actually, maybe --

ATTORNEY MACKINTOSH: That word "revocable" is a tongue twister for me.

THE COURT: Okay.

ATTORNEY MACKINTOSH: We're pleased to present the settlement, which offers an $11.5 million cash payment to Falcon Capital Acquisition Corporation shareholders -- we'll call those "FCAC" -- who were deprived of their right to make a fully informed decision about whether to redeem their FCAC shares or invest in Sharecare, the company emerging from FCAC's merger with Legacy Sharecare. The settlement represents a gross recovery of approximately $1.10 per share, which compares highly favorably to the per-share recoveries in similar SPAC settlements.

THE COURT: I'm going to go ahead and ask you this. I like that stat. I wasn't sure about the aggregate number comparison.

So first you basically just said 11.5 million, this contrasts favorably with -- and then there was a string cite of other numbers. How do you think we should be looking at these?

It seems to me like the more credible way to look at it is as a per-share number. But since you led with the aggregate, it seemed like you liked the aggregate. So I wanted to understand why you liked the aggregate.

ATTORNEY MACKINTOSH: I don't like the aggregate better. Frankly, I don't recall what the thought process was for why it was written that way. I think clearly the most relevant is the aggregate per share. $1.10 per share is the highest, other than, I believe, *Romeo*. And I think if you look at the comparison of the damages -- I mean, none of these have gone to trial. Right? So no one is really sure how the damages are going to be measured.

We look at them two ways. One is comparing the $10 redemption value to the net cash per share. If we use that metric, this settlement is phenomenal. It's 55 percent of the net cash per share damages, which we think is an extraordinarily hefty percent.

Another way to look at it: This company, Sharecare, was actually acquired on October 24th, 2024. At that time, it was trading for $1.34 per share. So if you compare the $10 redemption value to sort of what somebody who rode it to the bottom got, it's about 12.9 percent of that. And we think that is above the median in your famous *Southern* -- the Dell Class V chart that you have in the *Southern Peru* opinion.

THE COURT: That all makes sense to me, and that's helpful. Part of me was thinking that some of the -- there's going to be other factors driving, like, the amount of the loss, including, I would assume, capitalization size and how the stock performed, et cetera. So I was dubious about the list of cases that just gave me the total. I like the other ones.

ATTORNEY MACKINTOSH: It's interesting. And in all candor -- and I know that you do look at all the papers -- if you look at the lodestar in this one, I'm in a very odd position of presenting a settlement on a case that I didn't meaningfully work on. My partner Kelly Tucker is out on maternity leave, and I am standing in for her. So hopefully I'll be able to answer questions. Why it was listed that way I don't know, but I'll certainly pass that note along to my brethren in future settlements, that that is not something that you personally consider persuasive.

THE COURT: I'm sorry I'm beating the dead horse, but I have the same feeling when you guys just do a string cite of the size of the fee awards. There's no contextualization. The numbers should be

tailored.

Anyway, we're on the same page on this, it sounds like, so why don't you keep going.

ATTORNEY MACKINTOSH: So are there particular things you'd like me to focus on, or should I just sort of go through my spiel and at any point if you are like, okay, I get it, I'll move on.

THE COURT: There could be another way that you probably don't want to or need -- don't have the ability to answer for, but twice in the complaint I have a little bit of a whiplash effect. So let me read this to you.

ATTORNEY MACKINTOSH: And Mr. Millis is on the hot seat here because, you'll note, my name is not on the complaint. So I told him if Vice Chancellor Laster has questions I can't answer, you are going to have to come in off the bench.

THE COURT: Just listen to this. "As a result of these efforts, Plaintiff obtained approximately 1,100 pages of documents. Armed with this extensive factual record ... Plaintiff filed a detailed complaint ...."

I'm glad you got 1,100 pages of documents, but is that really an extensive factual

record?

ATTORNEY MACKINTOSH: I think we can quibble about the word. Perhaps not the best word.

THE COURT: It shows up again on page 33. Again, I had this -- here we go. "[L]arge volume of documents" is what you called it there.

I had the -- people used to oversell vigor all the time during the --

ATTORNEY MACKINTOSH: Leadership fights.

THE COURT: -- leadership fights and also during the "sue on every deal" disclosure settlement era. I would have some of your brethren, who were more of the industrial filers, come in and tell me that they vigorously pursued the action. So for probably a year in my sense and decades probably in their sense, I would ask them to explain to me what they did that was so vigorous. And it would get painful because they really hadn't done anything vigorous. And then I think people finally got the message, like don't oversell that, and so I didn't have to ask that anymore. And I had that same reaction to the "extensive factual record."

ATTORNEY MACKINTOSH: Look, *mea culpa*.

It's 1,100 pages. It's probably about the size of *War and Peace*, which one would say is an extensive literary work. But your point is well-taken.

THE COURT: Thank you.

ATTORNEY MACKINTOSH: Returning to my presentation. Our settlement administrator, A.B. Data, provided notice to more than 5,000 potential class members by First-Class Mail, published a summary notice in *Investor's Business Daily*, transmitted the summary notice over the PR Newswire, and provided information about the settlement on a detailed website, and not a single class member has objected to any aspect of the settlement.

During today's hearing, I plan to do the following: First, I'll provide a brief high-level overview of the case. Second, I'll review the terms of the settlement and the proposed plan of allocation. Third, I'll address the motion for class certification. And finally, I'll address our motion for an attorneys' fees and expenses. I'm happy to discuss these topics in a different order. But if this is fine, perfect.

This case arises from a July 1st, 2021, merger between FCAC and Legacy Sharecare. On

June 5th, 2020, FCAC was incorporated in Delaware as a SPAC. Like all SPACs, FCAC had no business operations and was formed for the sole purpose of combining with another company and going public in a de-SPAC merger.

After FCAC was incorporated, its controllers filled its director seats with nominally independent directors who had deep financial ties to the controller defendants and who were incentivized by gifts of founder shares to see FCAC close the deal, any deal.

THE COURT: So that was another word that I didn't understand. What you guys say in your brief and in your complaint is that sponsor set this up, the sponsor of course gets the sponsor shares, and then you use the word "gifted." What does that mean?

It seems to say that -- it suggests that Mnuchin gifted these things in a direct transfer to the three insiders. But I would have expected this to be another situation in which the sponsor is issuing those shares. But can you just -- what is the deal there?

ATTORNEY MACKINTOSH: Perhaps Mr. Millis can fill in some more of the factual ...

ATTORNEY MILLIS: Your Honor, all we meant in the complaint was that the directors who received founder shares, they did not have to pay any cash for those shares. It was freely given to them.

THE COURT: But they were issued and awarded in return for no consideration; that's what you're saying?

ATTORNEY MILLIS: That's correct, Your Honor.

THE COURT: So when you say Mnuchin gifted, the subject there is Mnuchin and the verb is gifting in the sense that I am making a gift to you. Hearing that, do you understand why there's a disconnect between that description and what actually happened, which is Mnuchin caused an entity to issue? Does that make sense?

ATTORNEY MILLIS: I understand, Your Honor. And, yes, I would agree with you.

THE COURT: Great. Again, words matter. And that sent one of my clerks off on a little bit of a wild goose chase. So let's try to describe the transactions as they actually happen. And I get that "gifting" seems like a more powerful word, but it's actually sort of a misleading word.

ATTORNEY MILLIS: I understand, Your Honor, and I sincerely apologize.

THE COURT: It's all good. Again, these are things that sometimes get routinized. Just a public service announcement.

ATTORNEY MILLIS: I understand. Thank you, Your Honor.

THE COURT: Thank you.

ATTORNEY MACKINTOSH: We're working for it today. You know, it's funny, I envy Mr. Peach and the opportunity that he has been given here, and I think that it -- you know, with great whatever comes great responsibility. It seems like it's a pretty difficult, difficult gig.

THE COURT: I'll sign you up for a year. I'm filled out a couple years in advance. But if you want to come and labor in the salt mines, you are perfectly welcome to.

ATTORNEY MACKINTOSH: I think it would be a phenomenal experience. But based on this interaction today, I think it would be a lot harder than working for Jay Eisenhofer.

THE COURT: Mr. Gallagher, that goes for you too. If you ever want to make a short journey

into the salt mines, we'd love to have you.

ATTORNEY GALLAGHER: I appreciate the offer, Your Honor.

ATTORNEY MACKINTOSH: So on September 24th, 2020, FCAC completed its IPO, and it sold 34.5 million shares for $10 per share. Immediately after the IPO, FCAC began its search for a merger partner and eventually settled on Legacy Sharecare, a private digital health company. After allegedly meeting three times, the board approved the merger on February 12th, 2021.

The reason I say "allegedly" is in our 220 production we were not given a single set of board minutes, so we don't know what happened at these meetings.

On June 3rd, 2021, FCAC filed the merger proxy. That proxy, unfortunately, was replete with false statements and material omissions designed to minimize redemptions and ensure that FCAC's stockholders would approve the merger.

First, the proxy falsely claimed that the FCAC stockholders who opted to roll over into the post-merger entity would receive stock with a deemed value of $10 per share. That was simply not true

because, in reality, FCAC's net cash per share was less than $8 a share.

Second, the proxy failed to disclose that FCAC director Jeff Sagansky, who played a major role in negotiating the merger, had a substantial financial interest in FCAC's sponsor, which was Falcon Equity Investors LLC, and thus Mr. Sagansky had a personal interest in the sponsor's founder shares and private placement warrants.

Third, the proxy failed to disclose material information about the board's financial advisor, Goldman Sachs. First, the proxy did not disclose that Goldman Sachs had a $12 million contingent payment for services it had rendered in connection with FCAC's IPO that was riding on the merger closing. It didn't disclose that Goldman Sachs stood to receive compensation from the role as the placement agent for the PIPE that FCAC was undertaking in connection with the merger. And finally, it didn't disclose when and by whom Goldman Sachs was retained in connection with the merger or exactly what Goldman Sachs had been retained to do.

Fourth, the proxy made materially false and misleading statements about the extent of

due diligence the company had conducted into Legacy Sharecare and the efforts it had made to vet its financial projections.

On June 29th, 2021, FCAC approved the merger, and it closed on July 1st. Approximately 10,438,000 shares opted not to redeem and rolled over into in the proposed merger company.

On March 31st, 2022, Sharecare announced disappointing results for its 2021 fiscal year and it issued guidance for 2022, and that guidance was significantly lower than the proxy projections. The same day, Sharecare announced that it had decided to suspend certain key products. Its stock collapsed, falling 25 percent on heavy trading.

Moving into August of 2022, the company announced that it was spending guidance for the rest of 2022.

In March 2023, following months of silence, Sharecare finally announced its 2022 results, and they were dismal. By the time plaintiff filed its complaint in August of 2023, Sharecare stock had lost 88 percent of its value compared to the $10 per share redemption price.

Plaintiffs made a Section 220 demand.

We completed an investigation, and we received nearly 1,100 pages. After completing this investigation, plaintiffs filed its detailed complaint on August 11 of 2023. The parties fully briefed defendants' motion to dismiss and were proceeding towards an April 19th, 2024, argument date.

With the argument date fast approaching, on April 12th, 2024, the parties agreed to mediate before Greg Danilow of Phillips ADR and to stay the action pending the mediation. In advance of the mediation, defendants provided plaintiffs some additional documents, including documents relating to defendants' sales of Sharecare stock post-merger. Based on this information, plaintiffs learned that the defendants had not sold a material amount of their Sharecare stock after the merger closed.

On July 25th, 2024, the parties engaged in a full-day mediation with Mr. Danilow. At the conclusion of this mediation, the parties agreed to settle the action for $11.5 million, which was in excess of available insurance.

With that background, unless Your Honor has further questions about the facts, we can move to the terms of the settlement.

As Your Honor knows, in assessing a settlement, the Court compares the "get" to the "give."

The "get" here is substantial. It's an $11.5 million cash recovery. By any measure, this $11.5 million recovery is a fantastic result. As we mentioned earlier, it provides 55 percent of the class's net cash per share of damages, and it provides 12.9 percent of the damages measured by comparing the redemption value to where the stock was trading at the time the company was acquired by Altaris.

And the "give" here is a standard release of claims.

The settlement was approved following arm's-length negotiation between experienced counsel before an experienced and well-respected mediator, which further supports its reasonableness. And we respectfully submit that the settlement should be approved as fair, reasonable, and adequate.

Unless Your Honor has other questions about the terms, let's move to the plan of allocation.

THE COURT: So this is the one where you are going to have to explain to me why we're doing this because this looks to me like a federal

securities law-type structure. These claims, again, to my mind, travel with the shares. So if you sold your shares, you sold your shares. So why are we doing this multi-injured-person allocation as opposed to just looking at who held on the acquisition date since that gives us an end point for the stockholder profile?

ATTORNEY MACKINTOSH: On the acquisition date of the Altaris acquisition?

THE COURT: Isn't that when the shares are going to stop trading? I mean, they are done; right?

ATTORNEY MACKINTOSH: That's when the shares are going to stop trading. So our plan -- we were planning to distribute the $11.5 million pro rata -- so the class here is defined as the people who had the right to redeem and opted not to redeem. So those are the injured parties.

THE COURT: Right.

ATTORNEY MACKINTOSH: I hear your point about the claims traveling with the shares. Perhaps defense counsel can shed light on why we negotiated to do it this way. I'm really not trying to be difficult, Vice Chancellor Laster.

THE COURT: And I'm not suggesting you are being difficult.

Here is one of the other things I wondered, because I didn't go back and look at other allocation approaches in these cases. Is this basically how these SPAC settlements have been done, with this type of allocation methodology?

ATTORNEY MACKINTOSH: I know they've been done this way in some other ones because that's what we modeled it off of. I think Your Honor -- I was actually talking to my colleague about this earlier. Your Honor oversaw the *View* settlement. In that one, for some reason, we had managed to negotiate a 10-cent-per-share distribution for everyone who had the right to redeem but didn't as sort of a compensation for the impairment of the voting right. And on this one, this is how we negotiated it. It seemed to be the most fair and equitable way to divide the 11.5 million between --

THE COURT: At least as I understood your plan of allocation, if I didn't redeem, I held for a year, and then I sold, I still get something based on my demonstrable losses as opposed to my claims passing to the buyer of my shares and them

getting the benefit of the settlement.

ATTORNEY MACKINTOSH: Well, people here that sold, they are part of the class and they are recovering on their demonstrable losses.

THE COURT: I'm just, again, asking for Delaware law settlement. Like why? Isn't that basically giving people a freebie when they sold their claims along with selling their shares?

ATTORNEY MACKINTOSH: I don't know that I'd think of it as a freebie. And if you look at how these things traded -- I mean, this one traded over $10 for a brief moment in time, and then it kind of rode down. I guess I'm not sure who the class of people are that you are concerned are getting a freebie on this.

THE COURT: Again, it's the people who sell and -- again, my framework is that if I sell my shares, the claims I had go with my shares. So the person who is now the new owner of the shares gets to benefit from the value of those claims. And I, as the seller, like, I'm out, I'm done. I made a decision. The stock was going down. Yeah, I've suffered because the stock went down, but I made a decision, like, I'm done, I'm selling. And you, buyer, you not only get

my shares, but you get all the rights that come with the shares.

Again, this is not a good analogy by any means, but imagine a world where I own a car for three years and then I sell it to somebody else, and then the buyer comes in and buys it. Like, your allocation method is the equivalent of giving me part of the money for that sale because even though I sold the car and I don't have any rights in it anymore, I don't have anything, your allocation method, nevertheless, gives me something because during my ownership, the value of the car depreciated from whatever I bought it for down to here, and therefore, I had some "loss" in that regard.

And that's why I'm suggesting to you it's a "freebie," because the person has sold on their shares, including the claim, and they don't have any property right anymore that they are getting compensated for.

ATTORNEY MACKINTOSH: So the underlying injury is the right to have had the opportunity to make an informed investment decision. So that's why the class members are defined as the people who had that right.

So if I had that right and I sold the share for $7, I have $3 of damages. The person who then bought that share for $7, they're not getting anything because they are not part of the class. So I'm not sure where the "freebie" problem is coming in.

THE COURT: It comes back to the question of whether the injury happens to the holder of the shares, including as it follows along, or whether it happens to the human who then passes along the shares but keeps the injury.

So in your world, it sounds like there's a class of people who made the redemption decision, and then those people were injured. And so when they sell their shares, their damages are fixed, done. The person new buys them and, therefore, doesn't have any loss. That's one framework. I think that's a securities law framework. I think that's a securities fraud approach.

But if we believe *Urdan* and if we believe that the claim follows with the shares, then the seller actually doesn't have a separate injury. And what the seller has done is sold on both the shares and the attached claim. So they are basically saying, like, I'm out. I'm out. Maybe I've had some

losses, maybe I could sue on those losses, but I'm handing over the claim to you, buyer, and I'm done here.

And so that's where the disconnect is happening for me. I've passed on all the property rights for which I could be compensated and yet here I am in the settlement and I'm getting money as opposed to the new holder getting any money. Look, I agree with you that the new holder, by buying at 7, is in a different position. But the new holder also takes the claim based on the redemption.

ATTORNEY MACKINTOSH: I hear what you are saying, but the new holder wasn't the person that had the initial right to decide whether to redeem at $10 per share. And that's the underlying injury. When we're calculating the damages, we're trying to figure out how you quantify what that was worth. And the person who bought your share for $7, they never had the opportunity to redeem at $10 based on that proxy and they weren't the person that had their voting rights interfered with.

THE COURT: I understand the argument. How is that different from a merger settlement? When the proxy is wrong in some way, the people who were

injured were the people who held the vote; and yet what we do, because the claims travel with the shares, is we use the class as of the date of the merger because all of those shares, boom, boom, boom, all those claims, the decision to -- the claim for the uninformed decision to vote yes or no, they have all traveled to the end date, and you get the class as of the effective time. It seems to me it's the same issue.

ATTORNEY MACKINTOSH: I think it's slightly different because in a merger you are just voting on whether or not you are going to accept the merger up or down; yes or no. And in these fact situations, the money that the $10 per share represents is actually cash that's held in trust for your benefit as the SPAC holder. So we think this is the most fair way to allocate it, given the nuances of this type of claim and how it differs from a merger claim.

THE COURT: But again, what I don't understand is why you wouldn't simply pick a record date and distribute to everyone who held the shares as of that date. Here, you've got a sweet substitute for a record date, which is you know when these shares

stop trading. So you know as of that date who the owners were of all of the rights associated with the shares, including the claim back here for the disclosure violations in connection with the redemption.

ATTORNEY MACKINTOSH: I feel like that would be giving more of a freebie because, in your hypothetical, the person who actually had the redemption right, who the $345 million was held in trust for, who was duped into rolling over and they chose to sell for $5, they get bupkis. But the person who had nothing to do with that initial thing and they didn't have their rights interfered with, that person who buys for $5, they are the ones that are now recovering. I think that would be the more inequitable result.

THE COURT: Look, I understand that's a way to view it. And I don't argue with you that that is the functional outcome. It just seems to me that if the claims travel with the shares, like, that's the result.

It's analogous to, again, me selling my car. I'm done, I had depreciation, it stinks for me, I'm selling this. Maybe even I was defrauded and

paid too much for my car. I mean, once the defraud -- that's the difference between, I think -- why my hypothetical doesn't work well is because the car fraud is very similar to what the securities fraud is, where we view the human as being injured as opposed to the property carrying this right. But here, we're in a situation where the property is the part that matters because it carries its own rights with it.

ATTORNEY MACKINTOSH: I hear what you are saying. I'm just picturing -- going back to your car analogy, if I bought a Mercedes and I'm told that I'm going to have the right to either keep the Mercedes or roll over into the new car, and I'm told that the new car is a BMW and the new car ends up being a Hyundai, I think it's more equitable to give the money to the person that forwent the chance to trade their Mercedes for a BMW than the guy who purchased the Hyundai knowing full well that it was a Hyundai.

THE COURT: I hear you. I'm the guy who wrote *Activision*, where it basically dealt with the same issue in terms of the plan of allocation. And the argument that you are making to support your plan of allocation is exactly the argument that

Mr. Hanrahan and my now colleague Mr. Fioravanti came in with as to why some -- in their objection to the settlement as to why some of the settlement proceeds should be going to these earlier holders. And the ultimate result of *Activision* was, sorry, Prickett Jones, it's a nice argument, but that's not how the idea of the claims following with the shares works for a Delaware law settlement.

Why don't you keep going. I feel like we at least know where each of us is on this issue.

ATTORNEY MACKINTOSH: Yes. I mean, that's what I got on the plan of allocation. I imagine that you are okay with the rest; that if there's more, there's a second distribution. And if that's -- great.

THE COURT: It's just the "who is in the class" question that I --

ATTORNEY MACKINTOSH: Who is in the class. I hear you.

Let's move on to the request for class certification. I'm happy to march through these elements. But if not, we can rest on our brief here. I think we're okay with that.

Let's move to our award of fees and

expenses. We seek an award of 15 percent of the $11.5 million settlement, inclusive of expenses.

As Your Honor knows, the Court looks at the *Sugarland* factors in determining the appropriateness of the requested fee. And we respectfully submit that the *Sugarland* factors support the requested fee here.

The Court, as you know, affords the greatest weight to the benefits conferred. As we discussed earlier, we respectfully submit that the 11.5 million settlement confers substantial benefits on the class.

Under the *Americas Mining* scale, fees ranging between 10 and 15 percent are typically awarded for early-stage settlements. 15 to 25 percent is sort of the mid-stage. We respectfully submit that we are sort of right at the intersection of that.

We did do a thorough 220 investigation. We carefully analyzed the documents. We prepared a detailed pleading. We fully briefed a motion to dismiss. We negotiated for additional documents at the time of the mediation that would shed light on whether these people had had profits from selling later. And we think that 15 percent is in

line with similar matters, including the *EOS* settlement approved by Vice Chancellor Will in October.

THE COURT: What would be an example of a 10 percenter?

ATTORNEY MACKINTOSH: A 10 percenter would be you did no 220, you filed a 15-page complaint, no one did a motion to dismiss. They said *mea culpa*, we did bad, and we're settling. That's 10 percent.

15 percent is you did a 220, which is analogous to document discovery in some respects, you draft a very detailed complaint, you fully brief a motion to dismiss. They reach out to you on the eve of that motion because they recognize that they are probably not going to win. They actually end up withdrawing the motion, I believe. And then we mediate.

And there were expenses in this case. This wasn't something where there was no -- there was no money at risk. And we put in meaningful effort here. We have over 1,500 hours of lodestar, over 1.23 million on a fully contingent basis. So we think this is closer to 15 than to 10.

Do you want me to go through the rest of the *Sugarland* factors, or are we kind of --

THE COURT: I don't think you need to do that.

ATTORNEY MACKINTOSH: So with that, unless Your Honor has further questions, I will be concluding my presentation.

THE COURT: Thank you.

Defendants, I know you usually don't have anything to say, and that's fine. But talk to me a little bit about the allocation plan because, again, I do -- that's the issue where I have some misgivings. So tell me what you think about that.

ATTORNEY STARNER: I think, Your Honor, the short answer is I may have some views on that, but in terms of -- on behalf of my clients, I think we're agnostic. I don't necessarily take a position on allocation.

Obviously, we're interested in settling this. We've considered various considerations about the claims and the damages theories. I can certainly share my general view about why the claims we don't think actually stand up, the damages, et cetera, et cetera.

So the allocation is, by extension, not something we take a position on. We think taking into consideration all -- considerations that we, as the defendants took in, you know, we think this is a reasonable settlement is the short answer.

THE COURT: All right. Thank you.

ATTORNEY STARNER: Thank you, Your Honor.

THE COURT: Why don't we take until five of. So let's recess until the big hand is on the 11. We'll stand in recess until then.

(Recess taken from 9:47 a.m. to 9:58 a.m.)

THE COURT: Welcome back, everyone. Please be seated. Thanks for letting me think about this allocation issue for a moment. I appreciate it.

We're here today so that I can consider the proposed class settlement in *Paul Berger Revocable Trust v. Falcon Equity Investors LLC*, which is Civil Action No. 2023-0820-JTL.

This is basically a standard SPAC action primarily driven by disclosure violations in connection with the redemption election. There are other challenges to the SPAC as well that run along standard lines.

The SPAC in question is Falcon Capital Acquisition Corp, which I'll call the "Company." It went public through a standard SPAC process, in which significant amounts of equity were issued to the insiders affiliated with the sponsor. The SPAC eventually merged with a company called Sharecare to form an entity that I think of as New Sharecare.

The plaintiffs claim that in the proxy that was filed with the SEC for purposes of that merger there were material misstatements. The proxy implied that the shares had a value of $10 when, in fact, the amount in the trust could not support a $10 valuation. There are assertions that there were omissions about insider conflicts as well as omissions of information about the financial advisor and the extent of due diligence.

The deal was approved. There was a relatively high rate of redemption, but approximately 10 million company shares were not redeemed.

After the merger closed, New Sharecare performed poorly. The stock by March 2023 had fallen to $.46 per share, down 88 percent from the $10 per share redemption value.

The plaintiffs served a Section 220

demand. They obtained documents. The production did not contain any company board minutes, which for the plaintiffs reinforced their view that the deal had not been adequately diligenced or considered by the board and, in fact, was rushed through to secure the insider benefits that always accompany a successful de-SPAC merger under this type of structure.

The plaintiffs filed a complaint. In August 2023, the defendants moved to dismiss. That motion was fully briefed. Just before oral argument, the parties agreed to mediate with Greg Danilow. And later that month, they filed a stipulation and proposed order staying the action pending completion of the mediation, and the defendants withdrew their motion to dismiss. That mediation ultimately resulted in the settlement.

The first thing that I'm going to address is class certification. The class is defined as "All record and beneficial holders of [the Company's] Class A Common Stock, who held [the] stock immediately [after]" -- it says "following," but I never know why three syllables are better than two. So I just mentally substituted "after," which is what I would do if I were editing one of my clerk's drafts

in real time -- "following the Redemption Deadline ... and as of the Redemption Deadline, had the right to, but did not, exercise their right to redeem some or all [of the] shares of [] stock, excluding the Excluded Persons."

The "Excluded Persons" consist of the defendants and their affiliates.

I don't think that's the right class. It seems to me that, at a minimum, the class has to include the people who are successors and assigns of those individuals. We have successors and assigns for the excluded parties, but we don't have, at least in the portion of the definition that's in my notes here, successors and assigns for the class. And this is going to dovetail into the allocation issue that I have that I don't think was sufficiently vetted.

There's, at a minimum, two types of claims here. There's federal claims and state law claims. State law claims are appurtenant to the shares. So under the *Urdan* decision by the Delaware Supreme Court, those claims travel with the shares, which means if you have been injured by an event, for Delaware law purposes, and you then choose to sell your shares, you are choosing to sell not only your

shares, but also the right to recover that comes with those shares.

Now, a case like this is a little bit more tricky because one of the primary drivers is disclosure violations. The disclosure violations could be brought either here, as they were, under a breach of fiduciary duty theory or they could be brought under a federal securities law fraud theory. The federal securities laws treat the fraud action as personal. In other words, the injury is to the individual, and it stays with the individual. And so it fits with the parameters that plaintiff's counsel was suggesting.

The Delaware versions of those claims aren't personal. The Delaware versions of those claims are appurtenant to the shares, and they travel with the shares.

It seems to me like there needs to be a little bit more thinking about the definition of the class and a little bit more consideration given to the allocation plan in light of that. And I say that because I do think that the federal securities law claims here are theoretically meaningful to a similar degree as the state law claims, which I don't think

was true in the *Activision* situation.

I will tell you that however you structure the class, it's clearly sufficient in terms of the requirements of Rule 23. This is a classic type of situation for a Rule 23 certification.

I also think that adequate notice has been given in connection with this settlement. You-all have complied with all of that. And I think in the abstract, in terms of the amount of consideration you obtained for the settlement -- and by "you," I'm referring to the plaintiffs -- I do think that this is a result that easily falls within the range of reasonableness and, as counsel demonstrated, compares favorably with other cases on a per share basis and in terms of the total amount of the loss.

The plan of allocation is where I originally stumbled in terms of my review of this because I just didn't get why it was being handled as a federal securities law-type settlement rather than a Delaware settlement, where the claims travel with the shares under *Urdan*.

If we get to the point where we clean up the plan of allocation and the class definition,

then, again, I think the settlement is easy to approve. And I think that the award of attorneys' fees is also reasonable, given the amount of work that was done, the stage of the case, the nature of the settlement, et cetera. If I run through the *Sugarland* factors, then I think that it's a fee that I would approve.

I want you-all to think about the class definition and the plan of allocation. I also want you to think about whether we can do this simply by you-all submitting some form of amended order with a cover letter that explains these things to me so that I can enter it.

We may need further notice. Let's assume you changed the class definition to emphasize the Delaware claims. I can imagine a world where if you are a holder of claims and you receive notice of this settlement and you thought that Ms. Mackintosh's view of the world was right, you wouldn't object. But if you now heard that because the Delaware claims travel with the shares, that you were being treated differently, well, now you might object. I get that because of rational apathy, that's an unlikely scenario. But it does give me pause in terms of

whether we need to find some way to inform the stockholders if you-all decide to change the class.

I'm going to leave it there. What I'm really asking you-all to do is think about the class definition and the plan of allocation in light of *Activision* and *Urdan*. Send me some type of joint submission, and then also in that tell me whether you think we need to have some notice and how it can be done in a reasonable way that is cost effective and doesn't put too much of a drag on what the injured people are going to get.

But if we take care of that -- I hope you are hearing me say it because I'm trying to say it -- I do think the settlement overall is a good one. It's one that I approve in terms of the substantive amounts. And likewise, I don't have any trouble with the fee. It's just a matter of this allocation and definition that is giving me pause.

Let me stop there and see if anyone has any questions.

ATTORNEY MACKINTOSH: Just super quick. I want to make sure that we are as responsive as possible to all of Your Honor's concerns. Do you have a view on notice?

In other words, do you have a view that this requires a full-blown renotice, 60-day window opportunity to object, or is there something in between that might satisfy the Court?

THE COURT: I'm looking for something in between. It seems to me like everyone already knows that this settlement is happening. Again, I at least believe that most of the stockholders are rationally apathetic as to these settlement notices, which is why, contrary to some of the Delaware cases, I don't give a lot of weight to the lack of objections to a settlement. But let's envision that what we're really dealing with is a reasonable and vigilant stockholder who read all this and thought about it. It seems to me that person is already on the watch, and so they don't need a full renotice and all the costs associated with that.

It seems to me like you-all ought to think about whether we can do it without notice. But I am concerned that doing it without notice wouldn't be sufficient. So it seems to me like we need some mechanism to put out there in the world any change to the allocation plan, and then we need some amount of time where, theoretically, people could come in and

say, in substance, "Well, I was fine with the original allocation plan because I was getting something, but now I'm getting less or nothing, and that's just not something I can stand by, accept, and so I want to object." I think we need some amount of time that is a reasonable period for people to come in and make that objection, if anybody wants to do that.

ATTORNEY MACKINTOSH: Thank you.

THE COURT: Defendants, anything?

ATTORNEY STARNER: No, Your Honor. Thank you for that.

THE COURT: Well, thank you all for thinking about these issues further. I apologize for being, I guess, a stickler about this idea that the claims travel with the shares. But it's something that caught my eye, so I want a lit bit more comfort on it.

It's good to see you-all. Thank you for coming in. Thank you to *pro hac vice* counsel for coming in from out of town. I hope you have a safe trip back, and I hope that everyone stays warm.

We stand in recess.

(Court adjourned at 10:13 p.m.)

- - -

CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 40 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 31 through 40, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 23rd day of January, 2025.

/s/ Dennel Niezgoda

Dennel Niezgoda
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter

TAB 6

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SARAH KENVILLE, DYLAN NEWMAN, and MICHAEL FARZAD,	:	
Plaintiffs,	:	
v	:	C. A. No. 2024-0276-PAF
NORTHERN STAR SPONSOR LLC, JOANNA COLES, JONATHAN J. LEDECKY, JAMES H.R. BRADY, JONATHAN MILDENHALL, DEBORA SPAR, JUSTINE CHENG, BARKBOX, INC., BARK, INC., MATTHEW MEEKER, and HENRIK WERDELIN,	:	
Defendants.	:	

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, October 31, 2025
1:30 p.m.

- - -

BEFORE: HON. PAUL A. FIORAVANTI, JR., Vice Chancellor

- - -

TELEPHONIC BENCH RULING ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND THE NORTHERN STAR DEFENDANTS' MOTION TO STAY DISCOVERY

APPEARANCES:

JASON M. AVELLINO, ESQ.
Robbins Geller Rudman & Dowd LLP
-and-
ERIK W. LUEDEKE, ESQ.
of the California Bar
Robbins Geller Rudman & Dowd LLP
-and-
DAVID WISSBROECKER, ESQ.
of counsel
Grant & Eisenhofer P.A.
for Plaintiffs

SRINIVAS M. RAJU, ESQ.
MATTHEW D. PERRI, ESQ.
SANDY XU, ESQ.
BRENDAN W. CLARK, ESQ.
Richards, Layton & Finger, PA
for Defendants Northern Star Sponsor LLC, Joanna Coles, Jonathan J. Ledecky, James H.R. Brady, Jonathan Mildenhall, Debora Spar, and Justine Cheng

CASSANDRA BADDORF, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
BENJAMIN LEE, ESQ.
of the Georgia Bar
King & Spalding LLP
for Defendants Barkbox, Inc., BARK, Inc., Matthew Meeker, and Henrik Werdelin

- - -

THE COURT: Good afternoon, Counsel. Do we have counsel for the parties on the line?

ATTORNEY AVELLINO: We do, Your Honor.

THE COURT: Thank you. If you would kindly put your phones on mute, I will give you my bench ruling on the two pending motions. One is the motion to stay discovery, which is going to become moot, and the other is the motion for class certification.

This action involves a dispute arising out of the merger between Northern Star Acquisition Corp., a special purpose acquisition company, or "SPAC," to which I refer as "Northern Star" or the "Company," and Barkbox, Inc., to which I refer as "Legacy BARK." I assume the parties' familiarity with the facts, so I am not going to engage in a detailed recitation of the factual background, but I will refer to facts that are pertinent to the pending motions.

On July 8, 2020, Northern Star Sponsor LLC, or the "Sponsor," incorporated the Company in Delaware as a blank check company, the purpose of which was to effect a merger, capital stock exchange, asset acquisition, stock purchase, reorganization, or similar business combination effecting a de-SPAC

transaction. Defendants Joanna Coles and Jonathan Ledecky, whom I refer to collectively as the "Controller Defendants," were the managing members of the Sponsor with investment discretion over the stock held by the Sponsor. The Sponsor purchased from Northern Star 8,625,000 shares of Class B common stock, to which I refer as the "Founder Shares," for $25,000.

The Founder Shares gave the Sponsor the right to obtain 20 percent of the equity in the SPAC if a de-SPAC transaction occurred. The Sponsor also purchased 4,558,000 Private Placement Warrants at a price of $1.50 per warrant, each warrant exercisable to purchase one share of Northern Star Class A common stock at a price of $11.50. At all relevant times, the Sponsor controlled Northern Star, and the Controller Defendants controlled the Sponsor.

Defendants Coles, Ledecky, Jonathan, Mildenhall, Debora Spar, and Justine Cheng were the members of the Northern Star Board of Directors, and I refer to them as the "Director Defendants." Coles served as Northern Star's chief executive officer and chairperson of the board, Ledecky served as Northern Star's chief operating officer and president, and

James Brady served as Northern Star's chief financial officer. Each of the Director Defendants had an interest in the Sponsor. Coles and Ledecky together beneficially owned 6,937,500 Founder Shares. Mildenhall, Spar, and Cheng each owned 50,000 Founder Shares. I refer to Coles, Ledecky, and Brady as the "Officer Defendants." I refer to the Officer Defendants, Controller Defendants, and Director Defendants collectively as the "Northern Star Defendants."

On November 13, 2020, Northern Star completed its IPO of 23,435,000 units, those being "Public Units," raising approximately $254 million in proceeds from public investors who paid $10 per Public Unit. Each Public Unit consisted of one share of Class A common stock, "Public Shares," and one-third of a warrant, with each whole warrant, the "Public Warrants," exercisable to purchase one share of Class A common stock at exercise price of $11.50 per share, contingent upon the consummation of a business combination. The offering proceeds were deposited into a trust account established for the benefit of the public stockholders. Each Public Share was redeemable for $10 — the original offering price —

plus accrued interest.

Northern Star's IPO triggered a two-year period during which the Company could complete a de-SPAC transaction. If Northern Star did not complete a de-SPAC transaction by November 13, 2022, it would be dissolved, the proceeds of the IPO would be returned to public investors, and defendants' Founder Shares and the Sponsor's Private Placement Warrants would expire and be worthless.

The second amended complaint alleges that contrary to Northern Star's public statements, the Controller Defendants had already selected Legacy BARK prior to the IPO and had commenced negotiations at least one month before Northern Star filed its IPO registration statement.

Minutes from an October 18, 2020, Legacy BARK board meeting indicate that Meeker, Legacy BARK's co-founder, reported to the Board that the Company had received "an informal proposal from a well-known P[rivate] E[quity] investor and SPAC sponsor [Ledecky] for a $75 million investment at a $1.5 billion pre-money valuation of the Company to be followed by a SPAC transaction in 2021." The "well-known P[rivate] E[quity] investor" referred to

in the minutes of Legacy BARK was Magnetar Capital, a non-party to this action, which played a significant role in the events leading up to the challenged merger and with strong ties to Ledecky. According to the second amended complaint, there were pre-IPO negotiations that included specific deal terms and timelines, setting the stage for Legacy BARK's selection before any formal post-IPO target search occurred.

On December 2, 2020, Ledecky sent a draft of the merger agreement to Legacy BARK before conducting any due diligence or having data room access and without Board approval for this action. A nondisclosure agreement, or "NDA," between Northern Star and Legacy BARK was executed on December 8, 2020. Only after this NDA did Legacy BARK provide the Officer Defendants access to its data room. During the week following December 8, 2020, Northern Star states that it conducted due diligence on Legacy BARK.

On December 16, 2020, the Board met for the first and only time in the process, with the Officer Defendants presenting the merger for Board approval. No financial adviser was present at the meeting. The Board never sought a fairness opinion,

nor did it seek an independent valuation from a third party. Nevertheless, the Board approved the proposed merger. On December 16, 2020, the Company and Legacy BARK executed the Agreement and Plan of Reorganization. Northern Star announced the merger on December 17, 2020.

Following Board approval, Northern Star filed its Form S-4 Registration Statement on February 1, 2021, and an amended preliminary proxy on March 8, 2021. The preliminary proxy claimed that the Board based its decision on "Northern Star's due diligence," referencing meetings and calls with Legacy BARK management, review of financials, and examination of Legacy BARK's business. According to the preliminary proxy, the Board had also conducted significant due diligence. Despite the purported significant diligence, Northern Star failed to uncover or disclose critical third-party valuations showing substantially lower equity values for Legacy BARK and missed other material financial and operational risks.

The Company issued a definitive proxy statement on May 12, 2021. That proxy set the record date for the stockholder vote on the merger as April 5, 2021, and May 28, 2021, as the date of the

stockholder meeting. The proxy informed Northern Star stockholders of their redemption right and set a deadline of May 26, 2021, for submitting redemption requests. Only 11 percent of the Company's shares were redeemed.

The merger closed on June 1, 2021. The entity that resulted from the merger is BARK, Inc., which I refer to as "New BARK." New BARK initially traded above the $10 per-share valuation contemplated by the merger, but dropped considerably thereafter. Specifically, New BARK's stock price steadily declined from $11.15 on June 1, 2021, to $1.25 on March 1, 2024, a decline of $9.90 or more than 88 percent. On June 2, 2023, New BARK's stock price closed at $1.14. The stock has not traded above $2 since February 8, 2023.

Plaintiffs Sarah Kenville, Dylan Newman, and Michael Farzad, the "Plaintiffs," purchased Northern Star shares between April 20 and May 5, 2021, held them at the time of the merger, and are New BARK stockholders. On March 20, 2024, the Plaintiffs filed this class action complaint on behalf of themselves and other stockholders in the Company. On September 30, 2024, the Plaintiffs filed an amended

complaint.

The Northern Star Defendants filed an answer to the amended complaint on December 3, 2024. On January 23, 2025, the Northern Star Defendants filed a motion to stay discovery, requesting that class certification be decided promptly before any discovery is conducted.

On February 12, 2025, the Plaintiffs filed a motion for class certification. On February 21, 2025, the Plaintiffs filed a second amended complaint. The second amended complaint is the operative complaint. The second amended complaint contains five counts.

Count I is a direct claim against the Director Defendants for breach of their fiduciary duties by failing to adequately inform public stockholders, which allegedly impaired stockholders' redemption rights and led to an uninformed vote on the merger.

Count II is a direct claim against the Controller Defendants for breach of their fiduciary duties by impairing the stockholders' redemption rights and failing to provide necessary material information.

Count III is a direct claim against the Officer Defendants for breach of fiduciary duties by impairing stockholders' redemption rights and voting rights on the merger through misstatements and omissions in the proxy.

Count IV is a direct claim against the Legacy BARK Defendants and New BARK for aiding and abetting the Northern Star Defendants' breaches by failing to disclose material information about Legacy BARK.

And Count V is a direct claim for unjust enrichment against the Northern Star Defendants, who were allegedly unjustly enriched by prioritizing their financial interests over those of the public stockholders.

On March 7, 2025, Defendants Matthew Meeker, Henry Werdelin, Legacy BARK, and New BARK, collectively the "Bark Defendants," moved to dismiss the second amended complaint. The Northern Star Defendants filed an answer to the second amended complaint on March 7, 2025. On July 1, 2025, the court granted a stipulation and proposed order dismissing the Bark Defendants in the present action.

On July 17, the Plaintiffs filed a

letter which purported to align the definition of the "Class" in the proposed order for class certification to a recent letter opinion by Vice Chancellor Will in *TS Innovation Acquisitions Sponsor*, 2025 WL 1892466 from this court on July 9, 2025.

Before me are the Northern Star Defendants' motion to stay discovery and the Plaintiffs's motion for class certification. Following briefing by the parties, I heard argument on the motions on July 21.

I am going to start with the motion for class certification because the Defendants have already effectively obtained a stay pending a decision on class certification. And because I am now ruling on the class certification motion, the motion to stay is moot.

The Plaintiffs filed a motion to certify a class similar to those in which this court has certified in other *MultiPlan*-style cases challenging de-SPAC transactions. The Northern Star Defendants counter that certification of similar classes took place in the settlement context and, therefore, the Plaintiffs' reliance on those cases is misplaced.

"A plaintiff has the burden of satisfying the [c]ourt it has met the requirements of Rule 23." That's *Dieter v. Prime Computer, Inc.*, 681 A.2d 1068, at page 1071 from this court in 1996.

The Northern Star Defendants rely on *Dohmen v. Goodman*, 234 A.3d 1161 from the Delaware Supreme Court in 2020, and argue that "it is far from clear that any class can be certified on a disclosure claim here."

The Plaintiffs' allegations do not bear any resemblance to the circumstances at issue in *Dohmen*. There, an investor sued the general partner of a hedge fund, alleging that misrepresentations about other investors' interest in the fund materially influenced his decision to make two investments in the fund.

In responding to a certified question from the Ninth Circuit, the Delaware Supreme Court explained that "[the 'per se'] fiduciary's damages liability ... [occurs] when directors seek stockholder action, and the directors fail to disclose material facts bearing on the decision, [and] a beneficiary need not demonstrate other elements of proof — reliance, causation, or damages. ... [H]owever, the

per se damages rule presumes only nominal damages. It does not extend to compensatory damages." That's at page 1168 of the opinion.

In *MultiPlan*, this court explained that "Delaware law distinguishes between disclosures that require stockholder action and those that do not, with only the latter requiring proof of causation, reliance, and damages." That's *In re MultiPlan Corp. Stockholder Litigation*, 268 A.3d 784, at page 808 from this court in 2022.

This explains the difference between *Dohmen* and the present case, in which the stockholder action to vote on the de-SPAC transaction and the contemporaneous election whether to redeem were required. Specifically, purchasers of Public Units knew that there would have to be a vote on a business combination transaction within the defined two-year period for the Company to complete the de-SPAC transaction. The riskiness of their investment in a public company without an operating history was mitigated through the unique combination of rights that the holders of Public Units held.

Before the merger, holders of Northern Star Class A common stock had three sets of rights:

economic rights, voting rights, and the contractual right to redeem the trust amount. After the merger closed, the former stockholders of Northern Star Class A common stock became stockholders of New BARK, now bearing two types of rights: economic rights and voting rights. Thus, the decisions to vote in favor of the merger and not to redeem had the effect of canceling the unique right enjoined by the investors — that is, the redemption right.

Moreover, the SPAC structure creates incentives that can bias fiduciaries against redemption. Sponsors commonly hold a large promote acquired for nominal consideration that becomes valuable only if a deal closes; underwriters often have deferred fees payable at closing; SPAC boards can include sponsor affiliates; and many transactions feature minimum cash conditions or side financings that increase pressure to minimize redemptions to promote closings. These features can cause fiduciary incentives to diverge from those of public stockholders at the precise time stockholders are deciding whether to redeem. Thus, the plaintiffs' allegations of material omissions or materially misleading disclosures in connection with the de-SPAC

merger are "inextricably intertwined with issues of loyalty." That's from *Laidlaw v. GigAcquisitions2, LLC*, 2023 WL 2292488, at *13 from this court on March 1, 2023, quoting *Emerald Partners v. Berlin*, 787 A.2d 85, at page 93 from our Supreme Court in 2021. It is important to recognize, however, that the claim is not a "disclosure" claim; it is a duty of loyalty claim governed by the entire fairness standard.

Next, I address the defendants' argument that this court's prior class certification in numerous other analogous SPAC cases is irrelevant and that those orders are not precedential or even persuasive authority here. The Northern Star Defendants raised this argument to distance themselves from at least seven other cases in this court to certify a class in similar circumstances where their counsel here was counsel there. The Defendants insist that those cases should be ignored because they were settlements, not contested class certification motions. But the Defendants offer no persuasive argument that class certification decisions should be treated differently in settlements versus a contested class certification motion. *Prezant v. De Angelis* does not make any such distinction, nor does Rule 23.

For class certification purposes, I accept the Plaintiffs' framing of the claim as the uniform impairment of a one-time SPAC redemption right through a common proxy statement and the process leading to a vote. That framing, rooted in loyalty concerns recognized in *MultiPlan* and its progeny, guides the Rule 23 analysis and groups key questions that are common to the class.

To be certified, the class must satisfy the four prerequisites of Court of Chancery Rule 23(a): numerosity, commonality, typicality, and adequacy.

Under Court of Chancery Rule 23(c)(1), "[a] class action must be certified by order. The order must define the class and identify a representative party. The order may be altered or amended before final judgment."

Before I get into the specific factors under Rule 23, I note that the Defendants' argument that class certification must be decided early in the case lacks sufficient foundation. Although Rule 23 used to direct that a class should be certified "as soon as practicable," that language was removed in the 2023 amendment. As noted in the well-respected

treatise on Chancery Practice, the amendment "was intended to align the Court's rules with standard practice. Until a party moves for class certification and the motion is granted, the Court will not treat the matter as a class action." That's from Volume 2 of the Wolfe & Pittenger treatise, Section 12.02(a).

The Plaintiffs' proposed "Class" definition is as follows: "All persons who held shares of Northern Star Class A common stock as of the redemption deadline on May 26, 2021, either of record or beneficially, and who were entitled to, but did not, redeem all their shares, and their successors-in-interest who obtained their shares by operation of law."

This is consistent with the court's recent decision, as I noted, in *TS Innovation*, where Vice Chancellor Will specified that the scope of the class in these cases will be limited to stockholders who had a redemption right and "their successors-in-interest [who obtained shares by operation of law]."

Turning to the elements of the class so construed, I address each of them in turn.

First, numerosity requires that "the

class is so numerous that joinder of all members is impracticable." That's Rule 23(a)(1). In connection with the merger, Northern Star stockholders submitted 2,728,989 out of 25,435,000 Public Shares for redemption. This represents a redemption rate of approximately 11 percent. The holders of the remaining 22,706,011 non-redeemed Public Shares as of the date of the merger are potential class members. Joinder of so many stockholders is impracticable, and the numerosity requirement is satisfied.

Second, commonality requires "questions of fact or law common to the class." That's Court of Chancery Rule 23(a)(2). Here, the claims alleging that the Northern Star Defendants breached their fiduciary duties in connection with the de-SPAC transaction present common questions of law and fact pertaining to each member of the class. Accordingly, commonality is satisfied.

Third, Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Here, the Plaintiffs' claims for breach of fiduciary duty arise from the same course of conduct that would underlie the claims of all Class A common stockholders

related to the de-SPAC transaction, and the defenses against the claims asserted by Plaintiffs would be typical of the defenses asserted against the class. Thus, the Plaintiffs' claims are typical across the class.

The Northern Star Defendants argue that individualized questions of reliance and damages defeat commonality and typicality, relying on *Dubroff v. Wren Holdings, LLC*, 2010 WL 3294219 from this court on August 20, 2010, and *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, at page 473 from our Supreme Court in 1992. But *Dubroff* involved disclosure issues that arose outside the context of a merger or a request for stockholder action. See *9 of that opinion. And *Gaffin* dealt with a common law fraud allegation which presented individualized questions of law or fact, particularly concerning each stockholder's justifiable reliance on the corporation's representations. See *Gaffin* at page 475. Unlike in *Gaffin*, this is not a fraud case. It's a fiduciary duty case where all stockholders were presented with the same proxy and had the same redemption right, which they would exercise only once.

The Defendants' *Dohmen* argument that

compensatory damages require individualized reliance, causation, and damages does not defeat certification here. Whether any reliance inference or presumption applies to a single, common proxy sent to diffuse stockholders in connection with a vote and whether it is rebutted are themselves common issues suitable for uniform adjudication. *Dohmen* addresses damages standards, not questions on Rule 23. The question whether *Dohmen* ultimately limits recovery to nominal damages is reserved for the merits and the remedies phases.

The Defendants' also invoke *Dieter v. Prime Computer, Inc.* to suggest that unique defenses defeat typicality. But I am not persuaded. Later decisions have declined to extend *Dieter* beyond its narrow facts, and the defense posited here rises or falls on class-wide proof about a single proxy and the same redemption deadline. Typicality is satisfied.

As explained in *In re Columbia Pipeline Group, Inc. Merger Litigation*, 299 A.3d 393, at page 489 from this court in 2023, reversed on other grounds at 342 A.3d 324 from our Supreme Court in 2025, when fiduciaries distribute a disclosure document to diffuse stockholders in connection with a

request for stockholder action and the document contains a material misstatement or omission, a rebuttable presumption of reliance applies under Delaware Rule of Evidence 301. As articulated in *Columbia Pipeline*, individualized proof is unnecessary, and Defendants bear the burden to rebut the presumption of reliance. The Delaware Supreme Court did not criticize this portion of the opinion in its reversal. As a consequence, whether the presumption applies and whether it is rebutted are common questions that do not defeat certification at this stage.

Fourth, adequacy requires that "the representative parties will fairly and adequately protect the interests of the class." That's Rule 23(a)(4). This requirement will be satisfied when the class representative is represented by competent and experienced counsel and the representative's interests do not conflict with the class's interests. No one has challenged Plaintiffs' representation of the class or the quality of Plaintiffs' counsel, who are diligently pursuing this litigation. Plaintiffs have held Northern Star shares at all relevant times, exercised the tools at hand to obtain documents via

Section 220, and submitted affidavits that satisfy Rule 23(aa). Therefore, adequacy, like the rest of the Rule 23(a) requirements, is satisfied.

Having satisfied Rule 23(a), the class must now fall within one of the Rule 23(b) categories. The Plaintiffs assert that the class should be certified under both Rules 23(b)(1) and (b)(2). The Northern Star Defendants argue that a class seeking compensatory damages for a duty of disclosure claim cannot be certified under any rule. They further argue that the court should not certify a class for exclusively nominal damages.

Rule 23(b)(1) applies to class actions that are necessary to avoid harms that could arise from inconsistent adjudications of similar claims. Certification under Rule 23(b)(1) is appropriate where, as here, adjudication of the claims by one stockholder would, practically speaking, be dispositive of the interests of other stockholders as well. Certification under Rule 23(b)(2) is also appropriate here because the conduct at issue is generally applicable to all class members.

This is a quintessential class action certifiable under both rules. As our Supreme Court

observed in *In re Celera Corp. Shareholder Litigation*, 59 A.3d 413, at page 433 in 2012, Delaware courts "repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2)."

The same Rule 23 standards govern whether certification is sought for litigation or settlement. Therefore, the inquiry is whether the Rule 23(a) prerequisites and Rule 23(b) categories have been satisfied.

Finally, I note that class certification decisions rendered prior to a final adjudication are interlocutory and, therefore, subject to modification based on the development of the facts as the case proceeds to trial. "[A] class certification is always provisional; that is, the determination of the certified class can be revisited and modified in light of later developments in the case." That's from *Wit Capital Group, Inc. v. Benning*, 2005 WL 3754559, at *2 from this court on June 20, 2005. See also Rule 23(c), which itself provides that the order "may be altered or amended before final judgment." Therefore, should facts

develop that warrant revisiting or modifying the class certification order, we can address it at that time.

In conclusion, the motion for class certification is granted with the modifications indicated in this opinion. Because the court has granted the motion for class certification, the motion for a stay of discovery is moot.

Counsel, that is my ruling. I'm not asking for reargument. I will give the parties five business days from the date this transcript becomes available to move for reargument. But I am happy to answer any questions that you may have. And let me first start with counsel for the Plaintiffs.

(No response.)

THE COURT: Hearing nothing from the Plaintiffs, counsel for the Defendants.

ATTORNEY PERRI: Your Honor, this is Matthew Perri. I have no questions. Thank you.

THE COURT: Thank you, Counsel. I appreciate you getting on the line on a Friday afternoon.

With that, the court stands in recess. Have a good afternoon.

(Proceedings concluded at 2:00 p.m.)

CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 25 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except as revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 3rd day of November, 2025.

/s/ Dennel Niezgoda

Dennel Niezgoda
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter

TAB 7

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORTHERN STAR SPONSOR, LLC, JOANNA COLES, JONATHAN J. LEDECKY, JAMES H.R. BRADY, JONATHAN MILDENHALL, DEBORA SPAR, and JUSTINE CHENG,	§	No. 482, 2025
Defendants Below, Appellants,	§	Court Below—Court of Chancery of the State of Delaware
v.	§	C.A. No. 2024-0276
SARAH KENVILLE, DYLAN NEWMAN, and MICHAEL FARZAD,	§	
Plaintiffs Below, Appellees.	§	

Submitted: December 2, 2025
Decided: January 15, 2026

Before **SEITZ**, Chief Justice; **VALIHURA** and **TRAYNOR**, Justices.

ORDER

After consideration of the notice of interlocutory appeal, the supplemental notice, the exhibits, and the supplemental authority, it appears to the Court that:

(1) In March 2024, plaintiffs below-appellees, former stockholders of Northern Star Acquisition Corp. ("Northern Star"), filed a class action complaint asserting claims for breach of fiduciary duty and unjust enrichment against defendants below-appellants Northern Star Sponsor LLC, Joanna Coles, Jonathan J.

Ledecky, James H.R. Brady, Jonathan Mildenhall, Debora Spar, and Justine Cheng. The claims arose from a de-SPAC merger between Northern Star and Barkbox, Inc.

(2) In February 2025, the plaintiffs moved for certification of a class consisting of people who held shares of Northern Star Class A common stock as of the May 26, 2021 redemption deadline and who were entitled to, but did not, redeem all of their shares, and their successors-in-interest who obtained their shares by operation of law. After briefing and argument, the Court of Chancery granted the motion in a bench ruling ("Class Certification Ruling"). The court concluded that the proposed class satisfied the numerosity, commonality, typicality, and adequacy requirements of Court of Chancery Rules 23(a) and could be maintained under Rules 23(b)(1) (adjudication of one stockholder's claims would be dispositive of the interests of other stockholders) and (b)(2) (the conduct at issue was generally applicable to all class members). The court entered an order implementing the ruling on October 31, 2025.

(3) On November 10, 2025, the defendants filed a timely application for certification of the Class Certification Ruling under Supreme Court Rule 42. The plaintiffs opposed the application. The Court of Chancery denied the application for certification.

(4) In denying certification, the Court of Chancery first found that the Class Certification Ruling did not decide a substantial issue of material importance

because it decided a procedural issue, not a substantive one. The court next considered the Rule 42(b)(iii) criteria identified by the defendants as supporting certification. As to Rule 42(b)(iii)(A) (a question of law resolved for the first time in Delaware), the court found that it was well-settled that a class could be certified for claims alleging breaches of fiduciary duty. The court cited multiple cases asserting breaches of fiduciary duty in connection with de-SPAC mergers where stockholder classes were certified. The court also rejected the defendants' contention that the Class Certification Ruling created a matter of first impression by establishing a rebuttable presumption of reliance in class actions, stating that it had made no such determination.

(5) Turning to Rule 42(b)(iii)(E) (interlocutory order that reverses or sets aside a prior decision of the trial court), the court noted that the defendants did not actually argue that there was a reversal of a prior decision. The court disagreed with the defendants' characterization of the Class Certification Ruling as conflicting with holdings of this Court and the Court of Chancery. The court described the Class Certification Ruling as distinguishing previous cases, not rejecting or conflicting with those cases. The court also rejected the defendants' reliance on Rule 42(b)(iii)(G) (review of the interlocutory order may terminate the litigation) because the merits of the plaintiffs' claims would have to be litigated regardless of whether the Class Certification Ruling was reversed.

(6) As to Rule 42(b)(iii)(H) (review of the interlocutory order may serve considerations of justice), the court concluded that the defendants had not shown that interlocutory review would serve considerations of justice. The court found that the defendants' reliance on *Green v. GEICO Gen. Ins. Co*.[1] to argue otherwise was misplaced. *Green* involved the Superior Court's certification of a class in a case involving claims that an insurance company used computer models to deny valid claims of insureds, not claims for breach of fiduciary duty in the context of requested stockholder action in a de-SPAC transaction. And although the Superior Court had granted the application for certification of an interlocutory appeal, this Court refused the appeal, finding that the case was not exceptional and that interlocutory review would not terminate the litigation.[2] Finally, the court found that the benefits of interlocutory review would not outweigh the probable costs because such review would only further delay and disrupt the litigation.

(7) Applications for interlocutory review are addressed to the sound discretion of this Court.[3] In the exercise of our discretion and giving due weight to the Court of Chancery's view, we conclude that the application for interlocutory review does not meet the strict standards for certification under Rule 42(b). We

[1] *Green v. Geico Gen. Ins. Co.*, 2019 WL 4643937 (Del. Super. Ct. Sept. 23, 2019).

[2] *Geico Gen. Ins. Co. v. Green*, 219 A.3d 996, 2019 WL 5057862 (Del. Oct. 8, 2019) (TABLE).

[3] Supr. Ct. R. 42(d)(v).

agree with the Court of Chancery that the Rule 42(b)(iii) criteria do not weigh in favor of interlocutory review. Exceptional circumstances that would merit interlocutory review do not exist,[4] and the potential benefits of interlocutory review do not outweigh the inefficiency, disruption, and probable costs caused by an interlocutory appeal.[5]

NOW, THEREFORE, IT IS ORDERED that this interlocutory appeal is REFUSED.

BY THE COURT:

/s/Karen L. Valihura
Justice

[4] *Id.* 42(b)(ii).
[5] *Id.* 42(b)(iii).

TAB 8

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HAVERHILL RETIREMENT SYSTEM, on behalf of itself and all other similarly situated stockholders of THE PROVIDENCE SERVICE CORPORATION, and derivatively on behalf of THE PROVIDENCE SERVICE CORPORATION,	:	
Plaintiff,	:	
v	:	C. A. No. 11149-VCL
RICHARD A. KERLEY, KRISTI L. MEINTS, WARREN S. RUSTAND, CHRISTOPHER SHACKELTON, DAVID SHACKELTON, COLISEUM CAPITAL MANAGEMENT, LLC, COLISEUM CAPITAL PARTNERS, L.P., COLISEUM CAPITAL PARTNERS II, L.P., BLACKWELL PARTNERS LLC, COLISEUM CAPITAL CO-INVEST, L.P., PAUL HASTINGS LLP, RBC CAPITAL MARKETS, LLC, and BANK OF AMERICA, N.A.,	:	
Defendants,	:	
and	:	
THE PROVIDENCE SERVICE CORPORATION,	:	
Nominal Defendant.	:	

- - -

Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, September 28, 2017
10:00 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

SETTLEMENT HEARING and RULINGS OF THE COURT

APPEARANCES:

NED C. WEINBERGER, ESQ.
THOMAS CURRY, ESQ.
Labaton Sucharow LLP
-and-
DAVID F.E. TEJTEL, ESQ.
of the New York Bar
Friedman Oster & Tejtel PLLC
for Plaintiff

BRADLEY R. ARONSTAM, ESQ.
S. MICHAEL SIRKIN, ESQ.
NICHOLAS D. MOZAL, ESQ.
Ross Aronstam & Moritz, LLP
for The Special Litigation Committee

MICHAEL A. PITTENGER, ESQ.
MATTHEW A. GOLDEN, ESQ.
Potter, Anderson & Corroon LLP
for Defendants Coliseum Capital Management, LLC, Coliseum Capital Partners, L.P., Coliseum Capital Partners II, L.P., Blackwell Partners LLC, and Coliseum Capital Co-Invest, L.P.

ROBERT S. SAUNDERS, ESQ.
NICOLE A. DiSALVO, ESQ.
Skadden, Arps, Slate, Meagher & Flom LLP
for Defendant Christopher Shackelton

HENRY E. GALLAGHER, JR., ESQ.
Connolly Gallagher LLP
for Defendant David Shackelton

KATHALEEN S. McCORMICK, ESQ.
Young, Conaway, Stargatt & Taylor LLP
-and-
JACULIN AARON, ESQ.
of the New York Bar
Shearman & Sterling LLP
for Defendant Warren S. Rustand

Appearances Cont'd ...

... Appearances Cont'd

ALBERT H. MANWARING, IV, ESQ.
Morris James LLP
-and-
PAUL SPAGNOLETTI, ESQ.
ANDREW DITCHFIELD, ESQ.
of the New York Bar
Davis Polk & Wardwell LLP
for Defendant Paul Hastings LLP

BLAKE ROHRBACHER, ESQ.
Richards, Layton & Finger, P.A.
for Defendant RBC Capital Markets, LLC

PHILIP TRAINER, JR., ESQ.
Ashby & Geddes, P.A.
-and-
MEREDITH KOTLER, ESQ.
VANESSA C. RICHARDSON, ESQ.
of the New York Bar
Cleary, Gottlieb, Steen & Hamilton LLP
for Defendant Bank of America, N.A.

KURT M. HEYMAN, ESQ.
Heyman, Enerio, Gattuso & Hirzel LLP
-and-
ELLIOTT GREENFIELD, ESQ.
of the New York Bar
Debevoise & Plimpton LLP
for Nominal Defendant The Providence Service Corporation

- - -

THE COURT: Good morning, everyone.

MR. WEINBERGER: Good morning, Your Honor. Ned Weinberger on behalf of the plaintiff. Before I start, I'll just make a couple of introductions. Thomas Curry from my firm.

MR. CURRY: Good morning.

MR. WEINBERGER: David Tejtel from Friedman, Oster & Tejtel.

THE COURT: Good morning.

MR. WEINBERGER: We're here on motions for class certification, settlement approval, and an award of attorneys' fees and expenses.

We filed the affidavit of mailing a couple weeks ago regarding notice. We believe the notice is adequate, due process was satisfied. The settlement administrator mailed notice to each of the 29 record holders of the company. Also used reasonable efforts to send notice to other -- to beneficial holders and nominees, mailed another approximately 7500 notices to those folks. There have been no objections to class certification, settlement, or the proposed fee and expense award.

With respect to the specific motions, I guess I'll start with class certification, and I

guess I'll only spend a moment or two on this, unless Your Honor has specific questions. We believe the class period is appropriate. It consists of record and beneficial holders, the transferees of the shares that are outstanding from the time in September 2014, when there was an option award, to the record date of the vote on the proposal to lift the caps with respect to the shares of preferred stock. We go through, in our brief, Rule 23(a) and Rule 23(b), and so, for the reasons outlined in the brief, we'd ask that the class be permanently certified.

With respect to the settlement, it's a $10 million gross cash fund. We think it's a very good result. Certainly a result that falls within the range of reasonableness. We tried in our papers to sort of walk through our assessment of the claims, why we resolved those claims and resolved the claims for the amount we did.

I think it's fair to say that the claims here were ones that, following expedited discovery, we were very eager to continue litigating. The record generated in expedited discovery was very strong. I think, as Your Honor had accurately noted the last time we were in front of you, this was a

situation where every time we peeled back a layer of the onion, we did find things that were astonishing. Rampant conflicts, more conflicts than we probably would have imagined; conflicts that had not been disclosed to stockholders and conflicts that had not been managed by Providence's board of directors.

And so last year, when our friends Mr. Aronstam and Mr. Sirkin contacted us, told us an SLC had been formed, we thought this may be the somewhat unusual situation where an SLC ultimately sees things our way, either affirmatively supports the claims going forward or takes no position, and either way, we're back litigating the case.

And so with the SLC formed, we determined to engage the SLC. We presented to the SLC a couple of times in person. The second time we presented to the SLC, we did so with our financial expert, and their expert was at that meeting as well. And then, following that second meeting, there was a good bit of back and forth between us and Mr. Aronstam and Mr. Sirkin, because there was this apparent, you know, disconnect with the way we were looking at damages.

And as we talk about in the brief, we

did discover this take-out feature that we were not aware of. We did not have a fee letter. That was not produced to us in expedited discovery. Did not, you know, understand that the banks had the ability to issue a take-out demand and potentially cause the company to issue debt on potentially onerous terms.

And so we get to the end of the stay period last year. Counsel for the SLC all but tells us that they're going to move to dismiss. They're underscoring their view that the damages here would be very difficult to prove and de minimis.

So we ultimately make a determination. We get to the $10 million number. We determine that that's in the range of reasonableness. We have our -- sort of our max damages figure, discounting that pretty significantly, even without accounting for the risk of a potential motion to dismiss by the special litigation committee.

The fund here is -- it will be allocated to both the company and to current stockholders. 75 percent of the net fund goes to the company, 25 percent to stockholders, other than defendants. So stockholders get the pro rata indirect benefit. The company recovery, they get the direct

benefit of the distribution, which Coliseum and other defendants are not able to share in. We're going to distribute the funds in a cost-effective, efficient, we believe appropriate way. It recognizes that claims travel with shares. We're going to do a direct distribution with the assistance of our settlement administrator.

In terms of the fee application, Your Honor, we are seeking fees and expenses of $2.85 million. The fee is slightly under 17 1/2 percent of the net fund after you deduct expenses and if $1.275 million were awarded on the nonmonetary benefits. The fee would obviously go down if Your Honor believed that the nonmonetary benefits were worth more than $1.275 million.

In terms of the ranges, and sort of where this case falls within them, if we are in the 15 to 25 percent range, there were meaningful litigation efforts here. There were contested depositions taken. There was motion practice. We filed a brief in support of our motion for preliminary injunction, which we would submit is -- was probably a heavier lift than, say, an opposition to a motion to dismiss. We had discovery fights here. I know Your Honor

didn't see them. We challenged privileged designations. We had text messages produced. So we would submit that 17 1/2 percent would be reasonable.

With respect to the nonmonetary benefits, I guess primarily focusing on the disclosures, Your Honor has commented on the significance of the disclosures before. I think the magnitude of disclosure here could be accurately described as unprecedented. We looked at precedent cases and could not find one where disclosures had been as extensive, as plainly material.

This was a situation where stockholders really knew virtually nothing about the process. And as a result of the litigation, you learn, among other things about the advisors, the advisors have conflicts and that those conflicts were not managed. So I think the disclosures here could be valued more than the 800,000 awarded in Lear, more than the 750,000 to 1 million range in ArthroCare and, arguably, more than the 1.6 million from Del Monte.

I think we also caused meaningful reform at this company going forward. And I know defendants, you know, dispute that this board expansion had anything to do with this litigation, but

I think if you look at the timeline, the company had added a new director, Ms. Norwalk, and we don't take credit for that. The company had announced that they were going to appoint one additional director. But then, I guess it's spring of last year, the SLC's -- they formed the SLC. They formed this dividend committee with respect to the -- to dividends on the preferred stock, and then the board expands from five to eight members, with three additional putatively independent directors.

I know the defendants are not giving us credit for that. We could have taken discovery of this. I don't think that would have been a good use of the company's resources, or anybody's resources, frankly, particularly where defendants are not opposing our fee, the SLC is not opposing our fee, and I think the fee is otherwise supported by the other benefits.

The case was fully contingent. We devoted a little over 2,000 hours to the case. I know Your Honor always looks very closely at hours expended. We tried to be as sort of transparent and informative as possible, and the fee affidavits submitted show Your Honor what the time was that we

spent and why that time would be compensable. The implied hourly rate, at the fee we're seeking, would be a little over $1300 an hour, which I think is supported by other precedent.

Does Your Honor have any questions?

THE COURT: Yeah. I'm confused as to how you handled the expenses. On page 37 of your brief, you first say subtracting expenses of $63,296.99 from the $10 million fund, which is appropriate because the expenses were a cost that plaintiff had to bear to create the fund, leaves a net settlement fund of 9.9. But then elsewhere, and then this morning -- really, at the end of that paragraph -- you referred to a 2.85 million all-in award, which, at least in my parlance, would mean that you weren't taking out expenses separately. And I think today you referred to it as an all-in award.

So what are you doing? Which way are you doing this?

MR. WEINBERGER: So the 2 point -- we're sort of following the way Your Honor has calculated fees in the past, looking at the Court's precedents. From the top-line number, we do take out the fee -- or we take out our expenses, and then you

would reduce from that amount whatever Your Honor awards for the -- for the nonmonetary benefits.

THE COURT: When I've historically said "all-in," I think I've meant you don't get separately expenses. When you use the phrase "all-in," you just mean total; is that fair?

MR. WEINBERGER: That is fair, Your Honor.

THE COURT: Okay.

MR. WEINBERGER: Can I answer any other questions, Your Honor?

THE COURT: Yeah. I mean, can you give me a better sense? Because, frankly, I was thinking of "all-in" the way I use "all-in." It's not your fault. I'm sure it's my fault. Remind me or point me to where I look to see what you managed to spend $63,000 on.

MR. WEINBERGER: $63,000 -- it's in the affidavits. I believe above 40,000 of those expenses -- I'll have to look at the exact number -- are attributable to expert fees. Those are the majority of the fees expended in this case. And that's, you know, why we take the position that they are, you know, appropriately compensable here, given

that we had to have a financial expert and that was necessary to achieving this fund. But --

THE COURT: Yeah. The point of doing separate expenses was when people go deep into the case and when they really have a heavy load, and hence it's really going to undercut their hourly rate. This is the first time that I've had somebody backflow that idea, for me at least. Maybe other people are doing it all the time. Maybe it's, you know, the greatest thing in the world. But this is the first time I've had somebody in front of me backflow that into the idea that the work you do on the front really ought to be treated the same way.

I mean, I think the front was where -- and this is, again, the legacy of the litigation explosion. We were getting all these things, we were getting applications. And first our Chief Justice and then I, following in his footsteps, suggested, "Why are you guys not doing all-in awards?"

And so then we got to the practice in that world of doing all-in awards, and then that proved unfair when people went beyond that and really took a case far in, did a lot of depositions, you know, invested like a million bucks in an expert. So

I'm balking at the idea that we're now going to come full circle back to where we started and do separate expense awards in cases where that did not happen to the same degree.

MR. WEINBERGER: So, Your Honor, I guess two points on that. In terms of just, I guess, what our total ask is, I think you get to the $2.85 million -- and I can't do the math off the top of my head -- I think you get to the $2.85 million if more than the 1.275 million were awarded on the nonmonetary benefits, which is sort of the baseline we put in the chart at the end that shows the various calculations.

But in terms of -- yeah, absolutely, I understand that the Court had a practice, or has had a practice, of just doing all-in numbers to award efficiency. And we certainly endeavored here to keep down expert costs, although those were sort of a -- were the primary costs, and also a necessary cost here, Your Honor.

You know, without the expert, there's, I mean, no way to assess the expected value of this claim. I don't think we would have been able to engage with the SLC, you know, in a thoughtful manner

whatsoever with respect to what we viewed with respect to the damages, recoverable or proveable damages in this case.

THE COURT: Help me, because that was the other thing that I started to get disappointed in back in the days of the litigation epidemic, is it seemed like people would hire an expert just to be able to say they hired an expert, and they'd pay him $10,000 or $5,000 to take a quick look right around filing. It wasn't clear to me what the person was really doing of value. And then it would show up later, and I wouldn't know who these people were, whether they had any real credentials or not. And as I say, it wasn't really clear what these folks were adding, since it was quite often the same type of complaint every time.

So what did your guy do for his 40?

MR. WEINBERGER: What our expert did was basically come up with a potential damages model here and assessed whether -- assisted us with, okay, what are the other available alternatives here. And I know that we had -- before we were aware, even, of the availability of the bridge financing, we did have our experts assist in kind of telling us, all right, what

alternatives might have been available here.

And then, you know, when we identified the bridge financing, our expert basically did an assessment of what the savings would have been for the company, had the company taken the bridge financing and then paid off that bridge loan in the fourth quarter of 2015 with the proceeds of the sale of subsidiaries of Providence, and how that would have looked. The expert also assessed -- so our expert assessed what the difference in the cost of financing would be to the company, what the potential dilution was to stockholders as a result of having this convertible feature on the preferred stock.

As I also mentioned, our expert was with us -- or he was on the phone, but was with us to present to the SLC in September of last year. So, yeah, this was not like -- and I know exactly what Your Honor is saying, and this is not like a situation where we hired an expert to look at a proxy and say, hey, what are the financial disclosure claims here. This was someone who actually helped us assess, going forward, what is the potential value of this claim and helped -- and, you know, and ultimately -- which ultimately guided our decision to settle this case.

THE COURT: Who was this person?

MR. WEINBERGER: David Clarke from The Griffing Group.

THE COURT: All right. What else do you want to tell me?

MR. WEINBERGER: I have nothing else, Your Honor, unless Your Honor has any other questions.

MR. ARONSTAM: Good morning, Your Honor, and may it please the Court. Brad Aronstam on behalf of the special litigation committee in this action, along with my colleagues Mike Sirkin and Nick Mozal.

At the outset, I want to very briefly note for the record the members of the SLC, Leslie Norwalk and Frank Wright, as well as the significant amount of time and attention that they brought to bear throughout a very lengthy process.

We've submitted our brief. For the reasons set forth therein, we strongly believe that the proposed settlement is a highly favorable one that comfortably falls within a range of reasonableness and should be approved. I'm really here today to address any concerns or questions Your Honor may have regarding the settlement, but other than that, I'm

happy to rest on our thinking as set forth in the submission, rather than repeat what's already in there.

THE COURT: The only thing I wondered, can you give me a little bit more insight into the allocation between the two types of claims.

MR. ARONSTAM: Are you saying between the class and the direct -- the long and short of it, obviously, 75 percent is going to the company and 25 percent are going to the unaffiliated stockholders, lower case "u." From the SLC's perspective, that wasn't something that was negotiated until after January 20th, when we informed the Court of the settlement. And frankly, that was something that we left to the plaintiffs and the broader defendants to sort out.

From the SLC's perspective, we viewed it as essentially a dividend decision. The company was not cash poor. Any class component was going to go to current stockholders. Our primary concern, as we conveyed to plaintiffs' counsel and talked about with our committee members beforehand, was making sure that settlement consideration wasn't unnecessarily eaten up in distributing the shares if there was going

to be a class component.

We were ultimately given comfort -- and I think that Mr. Weinberger's submission corroborates this -- that it's a relatively modest settlement administrative expense, and therefore, the SLC, again, was ambivalent as to allocation.

THE COURT: Thank you.

MR. ARONSTAM: Thank you.

THE COURT: Anybody else want to add anything? All right.

We're here today so that I can consider the settlement of the proposed class and derivative claims in this action. It's a settlement that the special litigation committee brokered but, ultimately, was reached between the defendants and the plaintiffs. I am going to approve the settlement.

The settlement has both a class and derivative aspect, so I have a series of tasks to take care of. First, in terms of class certification, the parties stipulated to a non-opt-out class consisting of all record holders and beneficial owners of shares of Providence common stock that were issued and outstanding during the period beginning on September 11, 2014, through and including July 2015. In their

capacities as holders of class shares, the class extends to their successors and representatives, et cetera. It excludes the defendants in the action. This is a reasonable and appropriate class.

In terms of the 23(a) requirements, numerosity is met. There are approximately 2.4 million shares outstanding that have excluded shares during the class period. The class involved common questions of law and fact, including whether Coliseum owed fiduciary duties, whether members of the board wrongfully coerced stockholders and breached their duty of disclosure, whether there were aiding and abetting questions, and the relief to which the class might be entitled.

Typicality is also met. The plaintiffs were stockholders during the relevant period and would have suffered the same injury as all other stockholders.

Based on the plaintiff's affidavits, there's no evidence of any divergence of interest that would undermine adequacy of class representation. Given that I am approving the settlement as fair and adequate, it follows that I necessarily believe that the class representatives, as well as the derivative

action representatives, provided adequate representation in this matter.

The class is appropriately certified pursuant to Rule 23(b)(1) as a non-opt-out class, because had this action been prosecuted separately by individual class members, there would have been a risk of inconsistent or varying results, and effectively, adjudication with respect to one would have been dispositive of everyone's interests. So consequently, I am certifying this matter as a non-opt-out class pursuant to Rules 23(a) and 23(b)(1).

The procedural requirements for approval of a settlement are met. The Rule 23(aa) affidavit was filed by plaintiff Haverhill Retirement Systems. The Rule 23(e) affidavit was also filed, as well as the Rule 23.1(b) affidavit.

In terms of notice, notice is a constitutional requirement as well as something under our rules. Both Rule 23(e) and 23.1(c) require notice to the absent class members or beneficial owners of the claim. Notice of settlement is sufficient if it "contains a description of the lawsuit, the consideration for the settlement, the location and time of the settlement hearing, and informs class

members that additional information can be obtained by contacting class counsel." That's from the Philadelphia Stock Exchange case.

The notice here adequately describes the lawsuit, including the claims asserted and proceedings to date. That's at pages 3 through 8. It adequately describes the consideration for the settlement. That's at page 8 through 10. It provides the location and time of the settlement hearing at page 13, and it informs class members whom to contact for further information at page 15.

The notice was adequately delivered, as reflected by the affidavit of Steven J. Straub of A.B. Data. He attests that the notice was mailed to 29 unique record holders and further mailed to 4,200 institutions and 2,177 individuals identified as potential beneficial owners. An additional 1,152 notices were provided at the request of brokers or other nominees to be forwarded to their constituents.

And in terms of the merits of the settlement, the Court's function is to consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then apply its own business judgment in deciding

whether the settlement is reasonable in light of all those factors. That's a paraphrase of the Philadelphia Stock Exchange case. My sense of it has been that my job is to figure out whether the settlement falls within a range of reasonableness that parties acting with adequate information could reasonably accept. Here, I think the settlement does fall within a range of reasonableness.

The underlying transaction involved Providence Services Corporation, which was a holding company, still is a holding company. Its shares trade on NASDAQ. In 2012, an entity called Coliseum Capital Management acquired 12.5 percent of Providence's stock. As a result of that acquisition, the cofounder and comanaging partner of Coliseum, Chris Shackelton, became chairman of the Providence board. Shackleton had relationships with Providence's senior management, previously worked with Providence's then-CFO, as well as its then-treasurer and vice president, and his younger brother David served as vice president and head of corporate development for Providence.

In October 2014, Providence entered into an agreement to acquire a company that's known, shorthand, as Matrix, for approximately $400 million,

but Providence had difficulty financing this transaction. They had initially hoped to raise part of the funding from the high-yield market, but after a week-long roadshow, the rate it would have to pay climbed, and even at the revised price point, its book runners were unable to build out a full book and the offering failed.

At this point, Coliseum provided the financing for the acquisition. Through a series of transactions, Coliseum acquired stock with more than 19.99 percent of the voting rights, which triggered a listing rule requiring a stockholder vote. In terms of the transaction, there were limits on what Providence could do if it didn't get the vote, but there are also corresponding provisions that kicked in that would benefit Providence if the vote wasn't obtained.

In February 2015, Providence and Coliseum entered into an exchange agreement that further documented aspects of the transaction, including that Coliseum's preferred stock would be exchanged for a convertible preferred with a nearly 90 percent higher cash dividend.

On July 29, Providence issued a

definitive proxy statement soliciting stockholder approval. The proxy contained a single-page background section describing Coliseum's financing in the Matrix acquisition and a board recommendation section outlining that the board advised elimination of the caps, that the Coliseum financing was more favorable than other options, and that the removal of the caps did not have a dilutive effect on the company's stockholders.

This litigation ensued. The plaintiffs initially moved for expedited proceedings and sought injunctive relief. The parties engaged in expedited discovery through June, July, and August of 2015. The plaintiffs, in August, filed a lengthy opening brief in support of a preliminary injunction.

On September 2, Providence issued a proxy statement that contained approximately eight pages of supplemental disclosures. A number of those disclosures were striking in their significance in terms of the revelation of conflicts. These included that Shackelton and Coliseum enjoyed unfettered access to internal Providence information while negotiating the financing for the Matrix acquisition. That was at a time when Shackelton was across the table from the

company.

Before Shackelton proposed the Coliseum financing, he and his brother worked directly with Providence's financial advisors on alternative financing options. Shackelton used Providence resources to formulate the Coliseum financing, including its advisors, initially without approval from the Providence board. After proposing the Coliseum financing, Shackelton attended meetings of the Providence board and participated in their discussions about the financing.

Paul Hastings was the firm that represented Providence in the negotiations opposite Shackelton. They did so even though they had continuously represented Coliseum since 2010 and even though Paul Hastings became counsel to Providence as a result of Coliseum's original investment in Providence. But it was Paul Hastings who was ostensibly representing the company opposite its long-time client.

Shackelton's brother David assisted both Shackelton and the Providence board in connection with the financing, and it was he who advised the board that the Coliseum financing was preferable to

alternative financing options.

On September 25, 2015, the parties entered into a partial settlement that related only to the disclosure claims and a claim for coercion based on the provisions that would change if the vote wasn't obtained. I declined to approve that settlement because it was going to be difficult to surgically excise a small portion of the claims and then have this litigation proceed and then try to figure out what the implications of the settlement were later.

At that point, the board of Providence formed a special litigation committee. The SLC engaged Ross Aronstam & Moritz, which proceeded to conduct an investigation over a period of eight months. The SLC's investigation appears to have been extremely thorough. They engaged an expert. They reviewed over 71,000 documents. They interviewed 17 potential fact witnesses. They held 11 meetings to consider the investigation and discuss developments. They also met with and received a presentation from the plaintiffs. The plaintiff's counsel has not challenged the independence of the SLC.

At the conclusion of its investigation, the SLC sought to broker a settlement.

The good news is that the SLC's efforts were successful, leading to the settlement that's before me, and the SLC supports the proposed settlement.

In terms of weighing the claims that were brought, in my view, in terms of liability, there were potentially strong claims, both direct and derivatively, against the defendants. That doesn't mean the plaintiffs would have won, but that means for purposes of bargaining with the defendants and for purposes of my job in approving the settlement, I think that the conflicts were quite striking and could have led to the entire fairness standard applying and could have easily led to a finding that the process, at a minimum, was unfair.

The level of conflicts in the boardroom among the advisors and, perhaps most troublingly, among the lawyers was something that, as I said previously at the settlement, was really somewhat astounding. I mean, there is enough business in the world that you don't have to work both sides of a deal. And one of the actual good ways of getting more business is to refer an aspect of the deal that might give you a conflict to another reputable firm, recognizing that they might themselves be in the same

position some day and want to bring you in.

I really don't know what people were thinking here. I really don't. And this is, I think, the third one of these. I don't know whether it's plaintiffs have been focusing on law firms more, but I think this is the third one of these where I've had lawyers that seem to be ignoring pretty clear conflict calls, or at least being aggressive in wanting to take multiple roles in a deal.

As I say, I don't know whether it's a hunger for business or what, but I think the long-term consequences of putting yourselves in this position are potentially quite detrimental and, in this case, potentially problematic. Not only did these conflicts raise potential problems on the merits for the principals, but they also created potential aiding and abetting exposure for the third parties involved.

Now, where I thought the case was relatively weaker was on the question of damages. And because harm, damages, is, in fact, an element -- or at least an aspect -- of a fiduciary breach claim, you conceivably could have proven that there was no breach of duty, notwithstanding the absence of a fair process, because Providence's difficult financial

situation and its potential inability to secure financing on better terms meant that the price was fair.

Looking at these things, having a strong claim -- which you may lose on. Again, I'm not saying these claims would have prevailed -- but having a strong claim to get damages that might be nothing or very small is not the most appetizing position to be in. Not just for lawyers but, really, for the class and the company. There could have been a lot of money spent here for very little recovery.

So in evaluating all these issues, I do believe that the amount obtained falls within the range of reasonableness. The $10 million payment is real money. It's real money in a context where the plaintiffs conceivably could have gone to trial, shown that things were done in a manner that was not only not according to Hoyle, but perhaps even contrary to Hoyle, and yet not been able to obtain a meaningful damages award. So in my view, this is a settlement that falls within the range of reasonableness.

I also don't have any significant objection to the allocation plan. There are both class and derivative claims in the case. I frankly

don't have a better way to allocate them than what was done here. I don't think there's particular magic to the number. I do agree that the principal heft of the claims was derivative, and so I think it makes sense to put the bulk of the recovery there.

In short, I'm approving the settlement. In terms of the award of attorneys' fees, Delaware's policy is to ensure that even without a favorable adjudication, counsel will be adequately compensated for the beneficial results they produce, provided the action was meritorious when filed and had a causal connection to the benefit conferred. That's a paraphrase of the Allied Artists case.

In setting fee awards, the Court of Chancery must make an independent determination of reasonableness. That's from the Goodrich decision by the Delaware Supreme Court. The Court is guided by the Sugarland factors, which focus on primarily the amount of benefit conferred and then consider other factors in terms of cross-checks.

For purposes of the fee award, I think I can consider not only the $10 million that was obtained in this settlement, but also the earlier disclosure benefits that the plaintiffs obtained.

Those disclosures were quite substantial. They were eye-opening. They uncovered real conflicts that people needed to know about. I agree with the plaintiffs that, given our precedent, this was one of those rare situations where the disclosures, standing alone, would support a high 6, low-7-figure award. The plaintiffs have put it at 1.275. That sounds like the right ballpark.

Once I get beyond that, in terms of the amount that counsel has requested as a percentage of the monetary recovery, I agree that it falls within the appropriate range. It's ballpark 17, perhaps 18 percent, depending on how you value things. And we'd be in a range where, in my view, 15 to 25 percent of the monetary benefit is the right range to be looking at. I don't see any reason to depart upward or downward from this.

In terms of expenses, I am not going to do them separately here. I think the amount that I'm awarding, $2.85 million, is a big fee, given the potential of the litigation and the size of the monetary award. Yes, it includes an amount for the disclosures. But I am just not inclined to tack on another 65,000 in specific expenses for things that

were incurred relatively early in the case.

Perhaps I am wrong about this. I am happy to revise my views depending on how things unfold or if there's guidance from other sources. But I really have been thinking about the separate expense award as something that I do when people go deep in a case and incur substantial amounts that would undermine the compensatory effect of the fee award. So I've been doing this in cases where people have put out high six figures to an expert, or a lot of time, a lot of expenses, doing discovery and depositions and things like that, where it would really affect the compensatory function of the fee number.

You guys are getting $2.85 million, and it equates to an hourly rate of about $1,300, using your lodestar. I think that's already pretty generous. I am not going to do a separate expense award here. I'm going to treat it as an all-in award in the sense that I think our Chief Justice used "all-in," and I know that I was using "all-in," which means everything you get. Not all-in as in all the different components added up, but all-in as in everything you get. But I will certainly approve the $2.85 million that was requested.

MR. WEINBERGER: I have a copy of the order.

THE COURT: Thank you.

All right. So I've signed the order. I'm going to hand it to the court clerk.

I want to thank everybody for their hard work on the case. I particularly want to thank the special litigation committee and its counsel for becoming involved and doing the type of thing that the Court really can't do short of trial, which is coming in and taking a hard look at things and figuring out as best you can what's really going on, not only in terms of claims, but also in terms of potential damages.

Please pass on to your clients my appreciation not only for their hard work, but also for their decision to try to broker something that would resolve this, which I think really was the best outcome for everybody, as opposed to reflexively trying to dismiss their portion and then who knows what happens with any direct claims. I think it was very helpful to take that constructive approach and achieve something that, while everyone is probably somewhat unhappy with it, ultimately works out better

for all concerned.

Thank you, everyone, for your hard work on this case. I'm grateful for it.

(Court adjourned at 10:45 a.m.)

- - -

CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 4 through 35, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 29th day of September, 2017.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

TAB 9

GRANTED

EFiled: Jul 05 2024 09:52AM EDT
Transaction ID 73557248
Case No. 2021-1066-LWW

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE LORDSTOWN MOTORS CORP. STOCKHOLDERS LITIGATION	Consolidated C.A. No. 2021-1066-LWW

[PROPOSED] ORDER AND FINAL JUDGMENT

WHEREAS, a consolidated stockholder class action is pending in this Court captioned *In re Lordstown Motors Corp. Stockholders Litigation*, Consolidated C.A. No. 2021-1066-LWW (the "Action");

WHEREAS, (i) Co-Lead Plaintiffs Atri Amin and Benjamin Hebert (collectively, "Plaintiffs"), on behalf of themselves and the other members of the Settlement Class (as defined in Paragraph 4 below); and (ii) Defendants David Hamamoto, Mark Walsh, Andrew Richardson, Steven Hash, and Judith Hannaway (collectively, "Defendants") (Plaintiffs and Defendants, together, the "Parties") have entered into a Stipulation and Agreement of Settlement, Compromise, and Release dated March 4, 2024 (the "Stipulation"), that provides for a complete dismissal with prejudice of the claims asserted against Defendants in the Action on the terms and conditions set forth in the Stipulation, subject to the approval of this Court (the "Settlement");

WHEREAS, by Order dated March 12, 2024 (the "Scheduling Order"), this Court (i) ordered that notice of the proposed Settlement be provided to potential Settlement Class Members; (ii) provided Settlement Class Members with the opportunity to object to the proposed Settlement, the proposed Plan of Allocation, and/or Plaintiffs' Counsel's application for an award of attorneys' fees and Litigation Expenses (the "Fee and Expense Application"), including any application for incentive awards to Plaintiffs (the "Incentive Awards"); and (iii) scheduled a hearing regarding final approval of the Settlement;

WHEREAS, the Court conducted a hearing on June 25, 2024 (the "Settlement Hearing") to consider, among other things: (i) whether the terms and conditions of the Settlement are fair, reasonable, and adequate to Plaintiffs and the other members of the Settlement Class, and should therefore be approved; (ii) whether a Judgment should be entered dismissing the Action with prejudice as against Defendants; and (iii) whether Plaintiffs' Counsel's Fee and Expense Application, including Plaintiffs' application for Incentive Awards, should be approved; and

WHEREAS, due notice of the hearing has been given in accordance with the Scheduling Order; the Parties having appeared by their respective attorneys of

record; the Court having heard and considered evidence in support of the proposed Settlement; the attorneys for the respective Parties having been heard; an opportunity to be heard having been given to all other persons or entities requesting to be heard in accordance with the Scheduling Order; the Court having determined that notice to members of the Settlement Class was adequate and sufficient; and the entire matter of the proposed Settlement having been heard and considered by the Court;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, this __ day of July, 2024, as follows:

1. **Definitions:** Unless otherwise defined herein, capitalized terms used herein shall have the same meanings given to them in the Stipulation.

2. **Jurisdiction:** The Court has jurisdiction over the subject matter of the Action and all matters relating to the Settlement, as well as personal jurisdiction over the Parties and each of the Settlement Class Members for purposes of the Action.

3. **Notice:** The Court finds that the dissemination of the Notice and the publication of the Summary Notice: (i) were implemented in accordance with the Scheduling Order; (ii) constituted the best notice practicable under the

circumstances; (iii) constituted notice that was reasonably calculated, under the circumstances, to apprise Settlement Class Members of: the pendency of the Action; the effect of the proposed Settlement (including the Releases to be provided thereunder), the proposed Plan of Allocation, and Plaintiffs' Counsel's Fee and Expense Application, including Plaintiffs' application for Incentive Awards; their right to object to any aspect of the Settlement, the Plan of Allocation, and/or Plaintiffs' Counsel's Fee and Expense Application, including Plaintiffs' application for Incentive Awards; and their right to appear at the Settlement Hearing; (iv) constituted due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the proposed Settlement; and (v) satisfied the requirements of Court of Chancery Rule 23, the United States Constitution (including the Due Process Clause), and all other applicable law and rules.

4. **Class Certification:** The Action is finally certified as a non-opt-out class action, for settlement purposes only, pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2), on behalf of the Settlement Class consisting of all record and beneficial holders of DiamondPeak Holdings Corp. ("DiamondPeak") Class A common stock as of the effective time (the "Effective Time") of the

merger with Lordstown EV Corporation (f/k/a Lordstown Motors Corp.) on October 23, 2020. Excluded from the Settlement Class are (i) Defendants and DiamondPeak; (ii) the directors, officers, or partners of DiamondPeak as of the Effective Time on October 23, 2020; (iii) the members of the immediate families of Defendants or of any person who was a director, officer, or partner of DiamondPeak as of the Effective Time on October 23, 2020; (iv) the parents, subsidiaries, and affiliates of DiamondPeak; (v) any entity in which any Defendant or any other excluded party has, or had as of the Effective Time on October 23, 2020, a controlling interest; and (vi) the heirs, successors, or assigns of any such excluded person or entity and the legal representatives of Defendants. Plaintiffs Atri Amin and Benjamin Hebert are finally certified as the Class Representatives for the Settlement Class. The law firms of Bernstein Litowitz Berger & Grossmann LLP and Pomerantz LLP ("Plaintiffs' Co-Lead Counsel") are finally certified as Class Counsel for the Settlement Class.

5. Based on the record of the Action, the Court expressly and conclusively finds, solely for purposes of this Settlement, that: (i) the Settlement Class is so numerous that joinder of all members is impracticable, satisfying Court of Chancery Rule 23(a)(1); (ii) there are questions of law and fact common to the

Settlement Class, satisfying Court of Chancery Rule 23(a)(2); (iii) the claims of Plaintiffs are typical of the claims of absent Settlement Class Members in that they all arise from the same allegedly wrongful course of conduct and are based on the same legal theories, satisfying Court of Chancery Rule 23(a)(3); (iv) Plaintiffs and Plaintiffs' Co-Lead Counsel are fair and adequate representatives of the Settlement Class, satisfying Court of Chancery Rule 23(a)(4); (v) the prosecution of separate actions by individual Settlement Class Members would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for Defendants, and, as a practical matter, the disposition of the Action as against Defendants would influence the disposition of any pending or future identical suits, actions, or proceedings brought by other Settlement Class Members, satisfying Court of Chancery Rule 23(b)(1); and (vi) Defendants are alleged to have acted or refused to act on grounds generally applicable to the Settlement Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Settlement Class as a whole, satisfying Court of Chancery Rule 23(b)(2).

6. **Final Settlement Approval and Dismissal of Claims:** Pursuant to, and in accordance with, Court of Chancery Rule 23(e), this Court hereby fully and

finally approves the Settlement set forth in the Stipulation in all respects (including, without limitation: the Settlement consideration; the Released Claims; class certification; and the dismissal with prejudice of the claims asserted against Defendants in the Action), and finds that the Settlement is, in all respects, fair, reasonable, and adequate to Plaintiffs and the other members of the Settlement Class and in their best interests. The Parties are directed to implement, perform, and consummate the Settlement in accordance with the terms and provisions contained in the Stipulation, which this Judgment incorporates and makes a part hereof.

7. The Action and all of the claims asserted against Defendants in the Action are hereby dismissed with prejudice. The Parties shall bear their own fees, costs, and expenses, except as otherwise provided in the Stipulation and this Judgment.

8. **Binding Effect:** The terms of the Stipulation and of this Judgment shall be forever binding on the Parties and all Settlement Class Members, as well as their respective successors and assigns.

9. **Releases:** The Releases set forth in the Stipulation, together with the definitions contained in Paragraph 1 of the Stipulation relating thereto, are

expressly incorporated herein in all respects. The Releases are effective as of the Effective Date of the Settlement. Accordingly, this Court orders that:

(i) Upon the Effective Date of the Settlement, Plaintiffs and all other members of the Settlement Class, on behalf of themselves, and their respective heirs, executors, administrators, predecessors, successors, and assigns in their capacities as such, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged the Released Plaintiffs' Claims against the Released Defendants' Persons, and shall forever be barred and enjoined from prosecuting the Released Plaintiffs' Claims against the Released Defendants' Persons.

(ii) Upon the Effective Date of the Settlement, Defendants, on behalf of themselves, and their respective heirs, executors, administrators, predecessors, successors, and assigns in their capacities as such, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged the Released Defendants' Claims against the Released Plaintiffs'

Persons, and shall forever be barred and enjoined from prosecuting the Released Defendants' Claims against the Released Plaintiffs' Persons.

(iii) With respect to any and all Released Claims, upon the Effective Date of the Settlement, Plaintiffs and Defendants shall expressly waive, and each of the other Settlement Class Members shall be deemed to have waived, and by operation of this Judgment shall have expressly waived, any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States, or principle of common law or foreign law, which is similar, comparable, or equivalent to California Civil Code §1542, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

10. Notwithstanding Paragraph 9 above, nothing in the Stipulation or in this Judgment shall in any way impair or restrict the rights of the Parties to enforce the terms of the Settlement pursuant to the Stipulation.

11. **Award of Attorneys' Fees and Expenses:** Plaintiffs' Counsel are hereby awarded attorneys' fees in the amount of $3,390,829.42 or 22.5% of the

Settlement Fund, net of Court-awarded Litigation Expenses, which sum the Court finds to be fair and reasonable. Plaintiff's Counsel are also hereby awarded $429,647.01 in payment of Litigation Expenses to be paid from the Settlement Fund, which sum the Court finds to be fair and reasonable. The Court-awarded attorneys' fees and Litigation Expenses (the "Fee and Expense Award") shall be paid out of the Settlement Fund in accordance with the terms of the Stipulation.

12. Plaintiff Atri Amin is hereby awarded an incentive award in the amount of $5,000 and Plaintiff Benjamin Hebert is hereby awarded an incentive award in the amount of $5,000 (together, the "Incentive Awards"). The Incentive Awards shall be paid to Plaintiffs from the Fee and Expense Award awarded under Paragraph 11 above.

13. No proceedings or court order with respect to the Fee and Expense Award to Plaintiffs or Plaintiffs' Counsel shall in any way affect or delay the finality of this Judgment (or otherwise preclude this Judgment from being entitled to preclusive effect), and shall not affect or delay the Effective Date of the Settlement.

14. **Plan of Allocation of Net Settlement Fund:** The Court hereby finds and concludes that the formula for the calculation of payments from the Net

Settlement Fund to eligible Settlement Class Members as set forth in the Plan of Allocation stated in the Notice provides a fair and reasonable basis upon which to allocate the proceeds of the Net Settlement Fund with due consideration having been given to administrative convenience and necessity. No proceedings or court order with respect to approval of the Plan of Allocation shall in any way affect or delay the finality of this Judgment (or otherwise preclude this Judgment from being entitled to preclusive effect), and shall not affect or delay the Effective Date of the Settlement.

15. **Modification of the Stipulation:** Without further approval from the Court, the Parties are hereby authorized to agree to and adopt such amendments or modifications of the Stipulation or any Exhibits attached thereto to effectuate the Settlement that: (i) are not materially inconsistent with this Judgment; and (ii) do not materially limit the rights of Settlement Class Members in connection with the Settlement. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any provisions of the Settlement.

16. **Termination of Settlement:** If the Settlement is terminated as provided in the Stipulation or the Effective Date of the Settlement otherwise fails to occur, this Judgment shall be vacated, rendered null and void, and be of no

further force and effect, except as otherwise provided by the Stipulation; this Judgment shall be without prejudice to the rights of the Parties or the Settlement Class; and the Parties shall revert to their respective positions in the Action as of immediately prior to the execution of the Term Sheet on October 31, 2023, as provided under the Stipulation.

17. **Retention of Jurisdiction:** Without affecting the finality of this Judgment in any way, this Court retains continuing and exclusive jurisdiction over the Parties and all Settlement Class Members for purposes of the administration, interpretation, implementation, and enforcement of the Settlement, and all other matters relating to the Action and the Settlement.

18. **Entry of Final Judgment:** There is no just reason to delay the entry of this Judgment as a final judgment in the Action. Accordingly, the Register in Chancery is expressly directed to immediately enter this final Judgment in the Action.

_____

Vice Chancellor Lori W. Will

This document constitutes a ruling of the court and should be treated as such.

Court: DE Court of Chancery Civil Action

Judge: Lori W. Will

File & Serve Transaction ID: 73553058

Current Date: Jul 05, 2024

Case Number: 2021-1066-LWW

Case Name: CONS W/ 2021-1085-LWW - CONF ORD - IN RE LORDSTOWN MOTORS CORP. STOCKHOLDERS LITIGATION

Court Authorizer Comments:

See transcript of June 25, 2024 settlement hearing.

/s/ Judge Lori W. Will

TAB 10

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GORES HOLDINGS IV, INC. STOCKHOLDER LITIGATION	:C.A. No. :2023-0284-LWW

- - -

Chancery Courtroom No. 12C
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, July 15, 2025
1:30 p.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT

APPEARANCES:

KELLY L. TUCKER, ESQ.
Grant & Eisenhofer P.A.
-and-
TAYLER D. BOLTON, ESQ.
JASON M. AVELLINO, ESQ.
Robbins Geller Rudman & Dowd LLP
-and-
GREGORY E. DEL GAIZO, ESQ.
of the California Bar
Robbins LLP
for Plaintiffs

BRADLEY R. ARONSTAM, ESQ.
Ross Aronstam & Moritz LLP
-and-
JOHN A. NEUWIRTH, ESQ.
EVERT J. CHRISTENSEN, JR., ESQ.
of the New York Bar
Weil, Gotshal & Manges LLP
for Defendants

- - -

THE COURT: Good afternoon.

ATTORNEY ARONSTAM: Good afternoon, Your Honor. Very brief introductions on behalf of the Gores defendants. My co-counsel from Weil Gotshal, John Neuwirth and Evert Christensen.

THE COURT: Welcome. Thank you very much.

ATTORNEY TUCKER: Good afternoon, Your Honor. I'm joined today by Gregory Del Gaizo from Robbins LLP, Jason Avellino and Tayler Bolton from Robbins Geller.

THE COURT: Nice to see you.

ATTORNEY TUCKER: May it please the Court, Your Honor, I'm pleased today to be presenting for the Court's consideration our settlement in the Gores Holdings IV stockholder litigation. I'll briefly go through the background, explain why the class should be certified, and address fees and the service awards.

On June 12, 2019, the alleged controller defendants in this case, who also had formed 12 other SPACs, formed Gores Holdings IV, which I'll refer to as Gores IV. That company is now renamed UWM Holdings Corp. Gores IV was a typical

SPAC. The controllers granted themselves 20 percent interest in post-IPO equity in exchange for $25,000, and then promptly granted 25,000 Founder Shares to each of the SPAC's outside directors. Those outside directors also served on many of Gores' other SPAC boards, and they had long-standing personal and professional relationships.

As we were well into discovery in this case when the settlement was reached and as the Court's well familiar with SPACs and the unique issues that come up in these cases, I'll focus on the things we discovered in discovery and issues that make this case unique and make this settlement unique.

Following its IPO, Gores IV zeroed in on the deal with Legacy UWM. It was a private residential wholesale mortgage lender. At the time the merger was being discussed Legacy UWM was an established company. It had $3.5 billion in revenue, in annual revenue, and adjusted EBITDA of $472 million the year before the merger closed.

After zeroing in on the merger, the principals at Gores IV, who were Alec Gores and Mark Stone and Legacy UWM, which is Matt Ishbia, began what defendants themselves called not a negotiation to

hammer out the terms of the merger and the PIPE agreements.

As part of that process Mr. Ishbia, who now owns the Phoenix Suns, and Mr. Gores, whose family owns the Detroit Pistons, discussed a side deal by which Mr. Ishbia would potentially invest in the Pistons at the same time they were discussing the deal between Gores IV and UWM. This sidebar wasn't disclosed to the board or stockholders. Ultimately that deal didn't come to fruition.

Due diligence in this case was expedited, advisor advice was ignored, and important questions remained unanswered when on September 23, 2020 Gores IV and Legacy UWM announced the merger which valued the combined company at an equity value of approximately $16.1 billion or $10 per share.

Gores IV issued a proxy statement that informed stockholders of the redemption rights, and that proxy omitted material information and included false and misleading statements concerning the reliability of projections for UWM, including by failing to adequately account for what was then a historically low interest rate for mortgages which inflated refinancing and originations at a level

unlikely to continue should these rates rise. The proxy also omitted information about regulatory risk, net cash per share, which, assuming no redemptions in this case, was $8.25 per share.

Concurrently with the merger agreement, Gores IV entered into subscription agreements in connection with a $500 million PIPE transaction. Those PIPE shares were offered at $10 per share. Discovery revealed that the large majority of PIPE investors were Gores and Legacy UWM friends and family. In fact, Gores Group itself had committed to purchase hundreds of million of dollars of PIPE shares.

It then syndicated those shares and sold them to other investors, presumably to de-risk their position. It did so at a price of $9 per share for at least a hundred million dollars of those PIPE shares, so 20 percent. This sweetheart deal wasn't disclosed to stockholders in the proxy, and the offer was not extended to stockholders who are foregoing $10.01, the redemption value, by not redeeming those shares and investing in the merger.

Ultimately stockholders voted in favor of the merger, there were minimal redemptions, and on

January 21, 2021 the merger closed. Defendants later would refer to this merger as a nightmare or the worst case scenario, but it wasn't as bad as some of the other SPAC cases. After the merger the New UWM stock price rose as high as $11.50 per share, and during that period when it was trading above 10.01 there was 2.4 times churn.

Following an investigation by Mr. Delman initiated on August 24, 2022, he filed his complaint on March 7, 2023. Mr. Farzad filed his complaint on March 31, 2023. The Court subsequently consolidated the actions and appointed plaintiffs lead plaintiffs and counsel lead counsel. Defendants then answered the complaint, and the parties engaged in discovery, including the production of over 77,000 documents comprising 400,000 pages. The parties -- plaintiffs took two depositions of defendants the week the settlement was agreed to in principal. Two other depositions of defendants had been scheduled, and depositions of plaintiffs were also scheduled to take place. The parties engaged in some discovery motion practice and retained experts to address valuation, whose work was well under way.

As discovery was unfolding, the

parties engaged in informal settlement discussions that spanned months, but we were unable to reach an agreement on our own. The parties decided to engage Robert Meyer of JAMS to mediate. On June 1, 2024, the parties participated in a voluntary mediation. We didn't reach agreement as to terms on that date, but on June 11, 2024, Mr. Meyer made a double blind mediator's recommendation that the parties settle the action for $17.5 million, which the parties subsequently agreed.

Notice was provided to class members in this case in accordance with the scheduling order previously entered by this Court. No class member has objected to the settlement, the plan of allocation, the attorneys' fees, or service awards.

Plaintiffs believed and continue to believe that their claims in this case were strong and the settlement reflects that, but this case isn't without challenges. Legacy UWM was not a typical de-SPAC merger target. It was a legitimate company owned and founded by a now billionaire that operates in a highly regulated industry. In 2020, the year prior to the merger, UWM earned $3.5 billion in revenue and was extremely profitable.

On the day the complaint was filed, New UWM stock was trading at $4.59 per share, and trended upward from then until the date the parties reached agreement in principle to settle the claims, on which date it was trading at $7.20 per share. Thereafter it traded as high as over $9.30 per share in 2024. That makes it very distinguishable from other SPAC settlements where the stock was trading below $1 and continued to trade below $1 throughout the duration of the case.

Legacy UWM was not teetering on the edge of bankruptcy, and it was not pre profit. It wasn't even pre revenue. We discussed some of these cases in note 2 of our brief. If Your Honor would like to see the comparisons, that's where you could find it.

During the period between the merger and the settlement, New UWM stock traded above $5 per share 80 percent of the time and above $8 per share 32 percent of the time based on volume. The challenge that this market-based evidence presented was acknowledged by the Court in ***Hennessy*** in which it observed that a finding of unfair price, not to mention damages, may prove unattainable when the stock

price of the post-merger company traded above $10 per share per month. That didn't happen over an extended period here, but the volume was high in the period when it did and the stock traded at a high price thereafter.

With the benefit of discovery, likely damages measures were converging in the area of $1.00 to $1.75 per share, assuming that we were to be successful in our claims at trial. Taking these factors into consideration, combined with the benefit of substantial document and deposition discovery and expert advice and given the strength of the settlement here, plaintiffs and their counsel believe that this settlement provides fair, reasonable, and adequate relief to class members in exchange for the release of their claims.

I note that the class definition in this case does not have the issue identified by the Court in other cases. So that issue does not need to be addressed for the court to approve the settlement.

There's substantial benefits provided to the class as a result of this settlement because the stock traded above redemption price for a significant period on high trading volume and because

the stock price did not drop as low as it has in some other cases for any extended period of time. Class members' actual economic losses are likely less than they are in a lot of other cases and those damages are mitigated.

Looking on a per-share basis, the settlement is a little over 41 cents per share. This compares favorably with ***MultiPlan*** and other SPAC settlements and exceeds what was recovered in ***XL Fleet***, ***View***, and ***Finserv*** and as comparable to the recovery in Avepoint and ***QuantumScape***, which this Court approved last week.

On a gross basis the total settlement value is the fourth largest settlement presented to the court for approval. The settlement here also represents a recovery on a net cash per share damages theory of nearly 23 percent, which compares favorable or in line with other SPAC cases on this metric. Importantly, the 41-cent-per-share recovery reflects 41 percent recovery of what was likely to be -- the most likely damages award, which is the delta between $10.01 and the $9 per share that Blackrock negotiated for themselves.

The remaining ***Activision*** factors, like

why support settlement approval and approval of the plan of allocation, the plan of allocation contemplates a pro rata distribution of nominal damages to class members who submit a claim in addition to a pro rata distribution of actual damages, the plan of allocation similar to what Your Honor approved in ***Eos*** and ***Latch*** and what's been approved in other de-SPAC merger cases to date.

The elements of class certification of a non-opt out class of Gores IV stockholders is likewise satisfied. There are thousands of class members. Questions of law, in fact, are common to all class members. Plaintiffs' claims are typical of the class, and the class's interests were fairly and adequately protected throughout this process. We discuss those factors in more detail in our brief at pages 29 to 33.

Does Your Honor have any questions about class certification?

THE COURT: No questions.

ATTORNEY TUCKER: Plaintiffs' counsel in this case seeks an award of $3,937,500 in attorneys' fees and expenses. Expenses were $364,502.21. After taking out expenses, the fee award

is approximately 20.4 percent of the total settlement.

The Court looks at the ***Sugarland*** factors in determining the appropriateness of the fee award and grants the greatest weight to the benefits conveyed. As discussed, we believe the benefits conveyed here are substantial when you look at all the factors that go into this consideration.

The Court can also look to the guidelines set forth in ***Southern Peru*** in determining an appropriate fee range, in light of the meaningful litigation efforts that have occurred here, there was some motion practice, there was a 220 process, there was substantial document production and depositions taken and underway.

THE COURT: The only motion was the discovery motion?

ATTORNEY TUCKER: That's correct.

THE COURT: Okay.

ATTORNEY TUCKER: Defendants answered the complaint, which I would say speaks to the strength of the complaint when we filed it. This puts this case in the 15 to 25 percent fee range. Our requested fee award is right above the median there.

In other de-SPAC merger cases the

courts awarded similar fees. In ***GeneDX*** the Court awarded a 19.5 percent fee. There were no depositions, there was some motion practice. ***MultiPlan***, the Court awarded 20 percent. There were no depositions, there was motion practice. ***Lordstown Motors*** the Court ordered a 22.5 percent fee. Again, no depositions, some motion practice. And cases in other contexts, as we set forth in our brief, support the requested fee award.

Plaintiffs' counsel took this litigation on a contingency basis and took on substantial risk. This case was filed after Gig II and Gig III, but in those cases the Court made clear and has made clear since that a disclosure based on net cash per share must demonstrate a material difference between the redemption value and the net cash per share. 8.25 is far from what the Court found material in Gig II and Gig III, and that presented a significant risk and hadn't been decided. No cases even close to that had been decided at the time this case was filed.

Time and efforts of counsel also support the requested fee award. In total, counsel spent 5,297.65 hours litigating this action through

the signing of the settlement stipulation. The requested fee award amounts to a lodestar multiple of approximately one times an hourly rate of $674.45, both of which fall on the lower end of multiples and rates this Court has found to be reasonable where a monetary benefit was conferred. In ***MultiPlan*** the hourly rate awarded in that case was $1,079. So it falls well below the implied hourly rate there.

This case also presented novel legal and factual issues. I discussed the issue related to net cash per share. That issue, the net cash per share disclosure theory, has not yet been tested by the Delaware Supreme Court. None of these cases have gone to trial to date. We don't know how the Court will determine damages. Those are all risks that we took into account and presented novel issues in this case as in other SPAC cases.

Legacy UWM was a real, operating, profitable company prior to the merger and was trading above $7 per share at the time that the settlement was reached. That also is a unique factor in this case.

Finally on these factors, counsel has a long-standing practice before the Delaware Court of Chancery and a lengthy track record of success in

de-SPAC merger cases and others.

Does Your Honor have any questions about fees before I move on?

THE COURT: No questions.

ATTORNEY TUCKER: We've also asked the Court to award incentive awards to the named plaintiff in the amount of $5,000 to be paid out of the fee award. Plaintiff Delman served and verified a 220 demand. Both plaintiffs verified the complaint and conducted related diligence, reviewed pleadings, searched for and produced over 6,000 pages of documents, provided verified responses to extensive interrogatories, and as I mentioned previously, were on the eve of depositions when the case settled. A service fee award of $5,000 is well supported. The Court recently awarded $5,000 service awards in ***Latch***. Similarly in ***Lordstown Motors***, ***GeneDX***, and ***Finserv*** the plaintiff were all awarded $5,000 per plaintiff on similar circumstances.

Unless Your Honor has any questions, we'll rest on our papers as to the remaining issues that I haven't addressed.

THE COURT: Thank you very much for the thorough presentation, Ms. Tucker. I have no

questions.

Mr. Aronstam, is there anything that you or your colleagues would like to say?

ATTORNEY ARONSTAM: Nothing today, Your Honor.

THE COURT: Thank you very much, and thank you for being here.

Counsel, I appreciate you coming in. Thank you for your very thorough settlement papers, and Ms. Tucker, thank you again for your presentation this afternoon.

I have a bench ruling prepared that I can read into the record now if you'll be patient with me while I do that. Then I'm happy to answer any questions at the end.

Before me this afternoon is the proposed settlement of In re Gores Holdings IV, Inc., Stockholder Litigation, which is Civil Action No. 2023-0284-LWW. I'll start with the background as set out in the complaint. I note that I haven't made any findings of fact in this case, and I'm not making any findings of fact today.

At a high level, the case concerns the January 21, 2021 merger of a special purpose

acquisition company called Gores Holdings IV, Inc., or Gores IV, with a private entity that I'll call Legacy UWM. Gores IV was incorporated in 2019 by Gores Sponsor IV, LLC for the purpose of combining with another company through a de-SPAC merger within 24 months of an IPO.

The SPAC Sponsor and the Sponsor's appointed directors held "Founder Shares" which were purchased for a nominal price that would become worthless if a business combination was not timely consummated. The members of Gores IV's board were also given 25,000 Founders Shares in exchange for a nominal price of $50.

In January 2020 Gores IV completed its IPO. Funds raised were placed into a trust for public stockholders who had the option to redeem their shares for $10 plus interest if a merger were announced and stood to receive back their investment if Gores IV liquidated.

Gores IV began discussions with Legacy UWM in April of 2020, and the Gores IV Board approved the merger on September 22 of 2020, publicly announcing it the next day.

The merger was contingent on Gores IV

contributing a minimum of $712.5 million in cash, meaning that, inclusive of PIPE funds, redemptions could not exceed 50 percent of public shares.

On December 16 of 2020, Gores IV disseminated a proxy statement, which the plaintiffs allege contained a series of material misstatements and omissions. I won't list them all today, but they include the allegation that the net cash per share that stockholders would be contributing to the combined entity was significantly less than the amount disclosed in the proxy; that there was an inflated value disclosed for Legacy UWM; that there are potential regulatory compliance issues; that there was an undisclosed discounted PIPE deal; that the defendants had negative views of the merger. Again, these are all allegations which are laid out in the complaint.

Gores IV stockholders approved the merger with less than 1 percent of public shares redeemed. The merger closed on January 21 of 2021, at which point in time what I'll call New UWM stock traded at $11.54 per share making the Founder Shares worth over $112 million.

The last date that New UWM stock

traded over $10 per share was February 5, 2021, but before that time, the New UWM stock traded over the redemption price of $10.01 and it traded at a significant volume during the course of that period.

On August 24, 2022, plaintiff Richard Delman served a Section 220 Demand on New UWM, seeking company books and records about the IPO, the merger process, and the relationships among the defendants. After reviewing those documents, Delman filed this lawsuit on March 7, 2023. He alleged breach of fiduciary duty and unjust enrichment against the defendants for impairing public stockholders' redemption rights through materially false and misleading disclosures in the proxy. Plaintiff Michael Farzad filed his complaint the same month, and I consolidated the cases in April.

The defendants answered the operative complaint in June 2023 and discovery ensued. Discovery included the production of 77,000 documents by the parties and five nonparties; successful discovery motions practice on one motion to compel; and two depositions of certain defendants with other depositions scheduled.

The parties began mediating in June

2024 and the mediator, Robert Meyer of JAMS, made a double blind recommendation of a $17.5 million cash settlement, to which the parties ultimately agreed. The Stipulation of Settlement was signed on February 7, 2025, and that's the settlement that was presented before me today.

With that background, I'll start with the first item on my agenda, which is class certification. A class must satisfy the four requirements of Rule 23(a) and fall within one of the three subsections of Rule 23(b). The Rule 23(a) requirements are numerosity, commonality, typicality, and adequacy of representation. All four of those requirements are easily met here.

As of the redemption deadline, there were over 40 million public stockholders who had not redeemed their shares. There are common questions of law and fact among the putative class members whose redemption rates were allegedly impaired by the defendants' actions. The named plaintiffs are similarly situated to other nonredeeming stockholders. The named plaintiffs' claims are typical of other class members who did not receive their shares, and both the named plaintiffs and their counsel are

suitable class representatives.

The class could be certified under either Rule 23(b)(1) or (b)(2). Separate actions risk inconsistent judgments, and the adjudication of one class member's claim would effectively resolve the others.

The class is also appropriately limited to "record and beneficial holders of Gores IV Class A Common Stock ... who purchased, acquired, or held those securities at any time during the period from September 22, 2020, the date of the announcement of the Merger, through and including January 21, 2021, the date of the Closing" of the merger, excluding related parties.

There I'm quoting from the class definition in the Stipulation of Settlement, and I note that this definition does not expand the class to successors in interest, which is an issue that I've dealt with recently in other matters. The class here is appropriate, and I will certify it as a nonopt out class for settlement purposes only under Rule 23.

Next up, keeping with Rule 23, is the question of notice. I determined that the form of notice to putative class members was adequate when I

entered the scheduling order to that effect on April 25, 2025. Now, I've reviewed the supplemental affidavit of notice that was filed, and I conclude that the provision of notice was adequate as well. So all of the relevant Rule 23 requirements are met.

The third item on my agenda is to determine whether to approve the proposed settlement as fair and reasonable. My role in doing that is "to consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and to apply my own business judgment in deciding whether the settlement is reasonable in light of those factors." There I'm quoting from ***In re Philadelphia Stock Exchange***, which is 945 A.2d 1123, at pages 1137 to 38 from the Delaware Supreme Court in 2008.

As we often put it in this Court, my job is to balance the "give" and the "get" of the settlement and see how they compare. This entails looking to the value of the benefits obtained through the settlement against the strength of the claims that are being relinquished.

Starting with the "give," the plaintiffs have agreed to release the claims in this

action and those related to the merger that could have been brought individually or on behalf of the class. That's from the Stipulation's definition of "Plaintiffs' Released Claims."

I viewed the release. I believe it's appropriately tailored to the factual predicate of the case and the claims that were advanced. The defendants arguably bore the burden of proving entire fairness, as the plaintiffs' claims were likely subject to that standard of review. Nevertheless, as the plaintiffs acknowledge, they faced meaningful risk that they might not be able to show economic harm or prove damages, particularly since the stock traded above the $10.01 redemption price at a high volume for a period after closing.

In terms of net cash per share, as counsel also acknowledged, the delta between that figure and the redemption price was relatively small compared to some of the other cases that I've heard in this case or in this similar type of suit, which also created risk of potential nonrecovery on that theory as well.

Balanced against the "get," which is a $17.5 million cash recovery for the class that is

certain, I believe that the settlement shows a meaningful recovery for the class and is fair and reasonable on balance in view of the claims that were pleaded. So for all of the reasons, I will approve the settlement, and that conclusion is supported by the absence of objections -- there are no objectors here today -- and the involvement of a skilled mediator in reaching a settlement of this case.

I'll also approve the proposed plan of allocation. That includes a claims process. The plaintiffs explained the reasoning behind the implementation of that process in their March 13 letter to me. I found the explanation to be helpful and persuasive, as I have in other similar cases.

The claims process accounts for the fact that in distributing the settlement proceeds there are different prices at which class members sold their stock, and there was quite a swing in difference between the trading prices during the relevant period. The claims process that counsel has outlined is an equitable approach, and I think that it outweighs the extra cost and burdens of a claims process. So I'll approve that as well.

The next item on my agenda is the

plaintiffs' request for attorneys' fees and expenses, as well as incentive awards for the two named plaintiffs. The plaintiffs seek an all-in fee and expense award of $3,937,500, which is inclusive of $364,502.21 in litigation expenses. Noting that the expenses were laid out in counsel's papers, I've reviewed them. There was an expert expense that was the bulk of the total expenses; it was a little over six figures. But I see nothing in the expenses that concern me or that was in any way unreasonable.

In terms of the overall fee request, I "must make an independent determination of reasonableness." That's laid out in ***Goodrich v. E.F. Hutton Group, Inc.***, 681 A.2d 1039, 1045 (Del. 1996) and my analysis of the request is guided by the ***Sugarland*** factors. The most important ***Sugarland*** factor is often described as the benefit conferred, and here, as I mentioned before, that benefit is a $17.5 million cash fund to be equitably distributed to class members.

In ***Americas Mining*** the Delaware Supreme Court observed that "[w]hen a case settles after the plaintiffs have engaged in meaningful litigation efforts" -- typically substantive motions

practice and discovery -- fee awards will typically "range from 15 to 25% of the [] benefit[s] conferred."

Here, there was some discovery, there was the production of a significant number of documents, and two depositions. There was also a Section 220 process that I discussed earlier. There were no substantive motions that were filed. There was, however, a discovery motion. That makes this a midstage settlement, but not at the high end of the midstage.

The fee sought is about 22.5 percent of the fund. Less expenses, the fee is 22.98 percent of the fund. But, given the absence of substantive motions practice, an award at the high end of the applicable range is too great here. The ***MultiPlan*** case that the plaintiffs cited in their papers is a useful precedent and guidepost.

In that case I awarded 20 percent of the total settlement fund. It presented a completely novel legal argument and followed a complex and very hard-fought motion to dismiss as well as some discovery. I believe there weren't any depositions, but there was, again, very substantive motions practice.

I don't see why this case warrants a higher fee percentage than in ***MultiPlan***. The midpoint of 20 percent seems fitting here since, again, I have depositions but no substantive motions. That range gives me a starting point of $3.5 million, which I'll consider under the remaining ***Sugarland*** factors.

Counsel is highly skilled on both sides. Plaintiffs' counsel took the case on a contingency basis, but the case itself isn't particularly novel at this point in time, and it wasn't an especially risky case to pursue. So the ***Sugarland*** factors largely balance each other out.

On the time and effort expended, counsel spent about 5,300 hours litigating the case from inception through the signing of the Stipulation of Settlement with a lodestar of $3,242,773. A 20 percent award implies a lodestar multiplier of 1.08 and an implied hourly rate of $660.67. The hourly rate is on the lower end based on my review of precedent, but the lodestar is more than being recovered by the fee that I've calculated. So taking all of the ***Sugarland*** factors into account, I conclude that the 20 percent fee of $3.5 million is appropriate.

I will also approve the requested incentive awards of $5,000 to each plaintiff for stepping up as class representatives. In each case the plaintiffs not only reviewed filings, but they also engaged in some discovery themselves, and they were preparing for depositions before settlement. I wouldn't be comfortable awarding a higher incentive award than this, but I think that the $5,000 sought is reasonable.

So to recap, the settlement class is certified, the settlement is approved, the plan of allocation is approved, a fee and expense award of $3.5 million is approved, and incentive award of $5,000 paid to each of the named plaintiffs out of the fee award is approved.

That is the conclusion of my ruling. Congratulations on bringing this case to a close, well done.

Are there any questions for me while we're all together?

ATTORNEY TUCKER: No questions from the plaintiffs, Your Honor.

THE COURT: Thank you very much.

ATTORNEY ARONSTAM: None here. Thank

you, Your Honor.

THE COURT: Thank you. I know that I have a final order on the docket. So I will get to entering that shortly. Thank you again for coming in. It was nice to see you all. We're adjourned.

(Court adjourned at 2:05 p.m.)

- - -

CERTIFICATE

I, TINA M. ALFARO, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 31 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 24th day of July, 2025.

/s/ Tina M. Alfaro

Tina M. Alfaro
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
Delaware Notary Public

TAB 11

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GENEDX DE-SPAC LITIGATION	:	C.A. No. 2023-0140-PAF

- - -

Chancery Courtroom No. 12C
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Monday, December 2, 2024
11:00 a.m.

- - -

BEFORE: HON. PAUL A. FIORAVANTI, JR., Vice Chancellor

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT

APPEARANCES:

PETER B. ANDREWS, ESQ.
DAVID M. SBORZ, ESQ.
Andrews & Springer LLC
-and-
CHRISTOPHER H. LYONS, ESQ.
JASON M. AVELLINO, ESQ.
Robbins Geller Rudman & Dowd LLP
-and-
CHRISTINE M. MACKINTOSH, ESQ.
Grant & Eisenhofer, P.A.
-and-
GREGORY E. DEL GAIZO, ESQ.
of the California Bar
Robbins LLP
-and-
ERIK W. LUEDEKE, ESQ.
of the California Bar
Robbins Geller Rudman & Dowd LLP
for Plaintiffs

SUSAN W. WAESCO, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
GREGORY STARNER, ESQ.
of the New York Bar
White & Case LLP
for Defendants

- - -

THE COURT: Good morning, everyone.

ATTORNEY LYONS: Good morning, Your Honor. Christopher Lyons from Robbins Geller Rudman & Dowd on behalf of the plaintiffs. I rise to introduce Greg Del Gaizo from Robbins LLP. He's been admitted *pro hac vice* and he'll be making the presentation this morning. Ms. Mackintosh from Grant & Eisenhofer; Mr. Luedeke from my firm, Robbins Geller; Jason Avellino from Robbins Geller; Mr. Sborz from Andrews & Springer, and Mr. Andrews from Andrews & Springer.

Thank you, Your Honor.

THE COURT: Mr. Baron didn't make it from California?

ATTORNEY LYONS: He didn't make it today, Your Honor. I think maybe the turkey.

THE COURT: The weather.

ATTORNEY WAESCO: Good morning, Your Honor. Susan Waesco from Morris, Nichols, Arsht & Tunnell on behalf of the defendants.

I have to say, I'm glad Mr. Baron is not here because I am clearly outnumbered today in this courtroom.

I believe Your Honor has already been apprised, but my co-counsel, Greg Starner, from White

& Case, is delayed on a train. He may be coming in during the hearing. My apologies for the interruption.

THE COURT: No apologies needed.

ATTORNEY WAESCO: If there are any questions in his absence, I will handle them today on behalf of defendants.

THE COURT: Thank you.

Counsel, you may proceed.

ATTORNEY DEL GAIZO: Good morning, Your Honor. Gregory Del Gaizo from Robbins LLP on behalf of plaintiffs. I will be standing in as a poor substitute for Mr. Baron as the lawyer from California.

But this is the time the Court has set to consider plaintiffs' motion to approve the settlement, the plan of allocation, class certification, award of attorneys' fees, and incentive fees in the action captioned *In re GeneDx De-SPAC Litigation*. That's Civil Action No. 2022-0140.

This action concerns what has become known as a *MultiPlan* claim arising out of a de-SPAC transaction. We, of course, know Your Honor is very familiar with these actions. We've had a couple

before you. In fact, I was here in January on a motion to dismiss, and now we have a settlement here in December. So we've gotten to open the year and close the year on SPAC litigation.

Most importantly, a little over -- or actually a little less, I should say, than two months ago Your Honor approved the settlement in the matter *In re Finserv Acquisition Corp.*, what I'll call *Finserv*. This settlement has a lot of similarities with that one; some notable differences. The most being -- the most probably prominent being how we did the plan of allocation.

I'm happy to address any of these number of matters before the Court in any order it prefers. But otherwise, my thought was to first give a brief overview of the facts before going into the notice, the settlement, the plan of allocation, and then the attorney fee issues.

THE COURT: That is acceptable.

ATTORNEY DEL GAIZO: Great.

So the de-SPAC merger at issue here is between the SPAC CM Life Sciences, what I refer to as CMLS, and then-private company Sema4. CMLS was set up to follow the normal SPAC pattern that Your Honor is

familiar. Defendants Casdin and Meister, the "CM" of CMLS, took the company public on September 4, 2020, selling 44.275 million units at $10 per unit.

That money raised from the IPO was placed in a trust. The units consisted of one share of Class A common stock and one-third of one warrant. Importantly, for this matter, the common stock came with a redemption right, the right to ask for that initial $10 per-share investment back in the event the stockholders did not want to invest in the post-merger company.

Before CMLS went public, the sponsor purchased a little over 11 million founder shares for the nominal price of $25,000. The sponsor then allocated 25,000 founder shares each to defendants Islam, Leproust, and Turner. At the same time as the IPO, the defendants purchased 7.2-and-change million private placement warrants for a little under $11 million.

This is a bit unique in that also the number of the, what we would call independent directors, defendants Islam, Leproust, and Turner also purchased some of these warrants. They purchased about $250,000 worth of the private placement warrants

also.

Our theory, Your Honor, and one that the Court has agreed with in other SPAC cases, is that the founder shares and private warrants create a divergent interest between defendants and the ordinary outside stockholders. In particular, that nominal purchase price, combined with the founder shares only becoming freely tradable after initial business combination completely incentivizes defendants to pursue and close any deal, even a value-destructive one.

Meanwhile, if CMLS did not enter into an initial business transaction, the founder shares and warrants would become worthless, and stockholders would get their initial $10 per-share investment back.

About five months after that IPO, on February 9, 2021, defendants announced the merger.

On July 2nd, 2021, defendants issued the proxy. Our allegations are that defendants knew or should have known that Legacy Sema4 was overstating its average selling price of its services, what we call the ASP. This is a key metric for the company. What we saw in discovery was that there was a sharp decline in what key customers were willing to pay for

these services in the lead-up to the merger. And that would, in turn, drive down that ASP.

In addition, at least one key customer was demanding reimbursements of amounts that it was charged through the years by Legacy Sema4.

So if the proxy is overstating ASP and is not counting for those chargebacks, it means its projections are incorrect. Also, since expected revenue was used to derive the enterprise value of Legacy Sema4 of $2 billion, the company itself was overvalued.

Again, these are our allegations, is that no one should have been surprised that there was an overstatement of the company's value because CMLS, in turn, was overstating what the value was that it was bringing to the merger, and that's the net cash per share.

We cite in the complaint net cash per share was less than $8 per share. The proxy did not disclose net cash per share. It did not disclose the issues with the chargebacks. It did not disclose the declining ASP. Also, importantly, the proxy did not provide the disinterested analysis of what stockholders could expect post-close of the merger.

Stockholders voted in favor of the merger, and they elected in large part not to redeem their stock. 99.98 percent of CMLS's stock was not redeemed.

The merger closed on July 22, 2021. Almost immediately, the company starts walking back these projections.

The first quarter of Sema4, it's three weeks later, on August 16, Sema4 announces that it would not provide any guidance for 2022. The stock falls on that date 17 percent, dropping it under $10 per share, and it keeps sliding from that point forward.

March 14, 2022, Sema4 files its annual report and discloses that it missed the proxy projections by $53 million, coming in at just $212 million. At this point, the stock is trading a little bit above $2.50 per share.

Soon after, May 16, 2022, plaintiff Katz sent his inspection demand. I do want to put that in context to kind of SPAC litigation in general. *MultiPlan* at this point was decided earlier that year, but the Court had yet to decide either of the *Gig* decisions, *Gig2* or *Gig3*, so there's not any decisions

on net cash per share at this point.

Again, looking at *Finserv*, we can see *in Finserv* the inspection demand was sent on February -- in February 2022, so about three months earlier. So we're all within kind of the same time frame.

After receiving the 220 documents, plaintiff Katz filed his complaint on February 6, 2023. Again, I think at that time we're pretty early in the SPAC litigation. The Court had decided *Gig3*, but not yet *Gig2*. And we can kind of see the uncertainty in the law at that point because defendants do file a motion to dismiss. They make a number of arguments that are dealt with in later decisions that have been rejected, but at that time not yet, including -- or at least not clearly yet -- including that stockholders only really care about the post-merger value, not net cash per share.

We filed our amended complaint, adding Mr. Zhou as a plaintiff, on July 6, 2023. Defendants answered the complaint. And after a brief detour when defendants filed their motion for a protective order, we were off and running after resolving that on discovery. We served interrogatories and RFPs, as

well as subpoenas on 30 key parties including Sema4, Jeffries, and Goldman Sachs.

Defendants answered 43 interrogatories. And between defendants and third parties, we received over 21,000 documents, over 100,000 pages. There was also a good amount of plaintiff discovery. Each plaintiff answered 41 interrogatories, and combined they produced 11,000 pages in 282 documents.

On May 8, 2024, the parties held a mediation session with Mr. Greg Danilow. A week later, on May 15th, the parties accepted the mediator's recommendation to settle this action for $21 million. I'll note that is the second-biggest *MultiPlan* settlement to date.

Unless Your Honor has any questions, I'll turn first to the class certification issue.

THE COURT: Very well.

ATTORNEY DEL GAIZO: The settlement contemplates a certification of a non-opt-out class of holders of CMLS, the Class A common stock at the time of the redemption deadline through the closing of the merger.

The definition excludes defendants,

their family members, the entities they have controlling interest in, their heirs and successors. This is similar to the class the Court had certified for settlement purposes in a number of similar SPAC cases, including *Finserv*, *Romeo Power*, and *Lordstown*.

Your Honor entered the scheduling order on August 23, 2024, that preliminarily certified this class. As Your Honor knows, under Rule 23, the class may be certified if the criteria of 23(a) are met, as well as the criteria of either 23(b)(1) or (b)(2). I think all these criteria are rather easily met here, Your Honor. I'm happy to address each in turn, but given *Finserv* and these other cases, I'm also happy to defer on the papers, however you prefer.

THE COURT: I've read the brief. You don't need to address it any further, unless you want to.

ATTORNEY DEL GAIZO: Great, Your Honor. Then I will skip just quickly to the notice.

As I said, the Court entered the scheduling order on August 23rd approving notice. The notice contains the location, date, and time of this hearing, as well as its purposes. It includes details on the claims, the defenses, the relief the action

sought, as well as the plan of allocation and the definition of the class.

We have two settlement affidavits that have been filed by our settlement administrator, Gilardi. It followed the Court's direction on notice, including mailing the notices to the unique names we received from CMLS. And Gilardi has a mailing procedure where it sends claims packages to brokerages, custodial banks, and other institutions, including a number of entities that Gilardi has collected through its long history that it finds holds these stocks, and most people do hold them in their street name.

Altogether, Gilardi has sent out over 8,300 claims packages. It established a toll-free telephone helpline. It also has a website that contains all the key documents. There's an FAQ on that website.

We've received just one contact from a client -- from a class member. There have been no objections. Accordingly, we think notice is also satisfied here.

Your Honor, turning to the settlement itself, we think it should be approved as fair and

reasonable. Rule 23(f)(5) sets forth a list of factors the Court has to find in order to approve a settlement.

As Your Honor pointed out in *Finserv*, those are the representative party and class counsel have adequately represented the class, adequate notice of the hearing was provided, the proposed dismissal or settlement was negotiated at arm's length, and the relief provided for the class falls within the range of reasonableness.

Going backwards, Your Honor, starting at that last point, what we traditionally call the "get," which we think is the most important piece, is the $21 million recovery. This "get" is, of course, directly and wholly attributable to this action. On a per-share basis, $21 million is approximately $0.47 per share. That is consistent with other *MultiPlan* settlements that have been approved. Most notably, *MultiPlan* was $0.44 per share, *Finserv* was $0.38 per share.

And as I said, this is the second-largest SPAC settlement to date. The only bigger one was *MultiPlan*. And I would note that *MultiPlan*, there was a $1.1 billion IPO versus here

we're at 442 million. So *MultiPlan* was twice as big, and that helps explain a little bit about why it might be bigger.

The "give" here is the release. This is a fairly standard release, and we modeled it on the other releases in *MultiPlan* settlements. It's nearly identical to *MultiPlan* and nearly identical to *Finserv*.

We do think this was a strong case on the merits. It's an entire fairness action. We felt good about showing that the proxy was misleading. The problem, as it is with a lot of these cases, comes with the next step: damages, causation, and reliance.

Concerning damages, as Your Honor noted in *Finserv*, there have not been any trials or judicial assessments on how damages work in these cases. We do know the general framework from *MultiPlan* and its progeny; it's the redemption value versus the value of the stock received. What we have not heard from any court is how it's going to measure the stock received, the value of the company.

We do know Sema4 was still a relatively new company. When its acquisition occurred, it was advancing cutting-edge technology

involving AI and machine learning to help diagnose patients. And what we would have had is a battle of the experts, probably with those experts not even agreeing on the methodology of how you value the stock.

For instance, defendants consistently argued that to get anything more than nominal damages we'd have to show a connection between the false statements in the proxy and some corresponding stock drop. They've argued that CMLS and Sema4 do not trade in efficient markets, and the drop in Sema4 stock is not related to some false proxy statement.

I should be clear, that's not how we agree damages are done. That to me sounds like a 10(b) action, but I'm not always right, and defendants seem convinced that we would certainly have a lot of problems proving damages.

I think the more appropriate way to calculate damages is instead of looking at the stock movement is, as Your Honor mentioned in *Finserv*, to look at net cash per share. Using the roughly $2 per-share damage we identified in the complaint, that would give us total damages of around $89 million. That puts in the 23 percent to 24 percent range of

damages in the settlement. *Finserv*, in comparison, was about 15.7 percent of net cash per share damages.

If we cannot show damages this way and we are stuck with nominal damages, Your Honor, of course, would have wide latitude in assigning an award. In *Columbia Pipeline*, Vice Chancellor Laster wrote that nominal damages are normally between $0.50 and $2 per share. At $0.50, we're at nearly 100 percent of the recovery. At $2 per share, somewhere around the 25 percent. Either way is consistent with other settlements that have been approved in this case -- in these cases.

In *Dell Class V*, Vice Chancellor Laster noted that the mean recovery in an entire fairness case when we remove outliers was 20.9 percent and the median is 16.5 percent. We're above both those numbers.

We also, Your Honor, in reaching this settlement, had to deal with the reality of what would normally be the biggest pocket, the company here, was not very deep, especially at the time of the mediation.

At the time we went to that mediation, Sema4, which was then called GeneDx, was only trading

around $0.40 a share. According to its 10-Q around that time, it only had about $80 million in cash and cash equivalents and was losing money. Now, the company seems to have turned it around since then, and that's great because our clients are still holders. But it certainly looked like it was going the other way, at least to plaintiffs at the time of the mediation.

On top of that, Your Honor, from what we can tell in the discovery, the defendants rode the stock all the way down. Only one of the defendants sold their shares, and even then it was after the reverse stock split so their 25,000 shares turned into 766.

And as I mentioned earlier, even the outside directors for the most part kicked in money to buy these private warrants. All the private warrants were basically worthless, so the $11 million spent on warrants are, again, now worthless.

In addition, Casdin and Meister's entities accounted for 27 percent of the PIPE, $95 million. Again, appearing to us from the discovery they rode that all the way down. So defendants could certainly argue that they lost more

money than most on this deal, and they believed in the company based on how much they investigated. At a minimum, it shows that our unjust enrichment claim is not going to be worth much.

So we think the "give" versus the "get" supports approval here.

As to the remaining Rule 23(f)(5) factors, there have been no objections. The settlement was negotiated at arm's length with assistance of a mediator. We talked a little bit about notice already. And we believe we adequately represented the class.

On adequate representation, the Court looks at whether the client hired qualified, competent, and experienced counsel. We hope the Court is familiar with mine and my co-counsel's history of bringing meritorious cases. In addition, we brought in Professor Klausner from Stanford, who's probably written the most -- or at least has written the most impactful scholarly work on SPACs here. So we believe the adequacy of counsel is also met.

I want to stop, just give a pause, see if Your Honor has any questions about the settlement before I turn to the plan of allocation.

THE COURT: No. At some point you indicated that there was contact from one class member. Do you have any background on that?

ATTORNEY DEL GAIZO: Sure, Your Honor. It was just the client -- the class member reached out just confirming that his stock was indeed part of the class. He was an owner of CMLS shares. The ticker symbol is technically CMLF, I believe. And so he said "I just want to make sure these are the same thing," so we said yes.

THE COURT: Thank you.

ATTORNEY DEL GAIZO: So now turning to the plan of allocation, Your Honor. This is the one area that we deviated from some of our friends in other *MultiPlan* case settlements. But we believe the process that we put together is the most equitable one and will become the new norm.

This is essentially the same plan of allocation that was recently approved by Vice Chancellor Cook in *Yu v. RMG Sponsor*, and very similar to the one that was approved by Vice Chancellor Will in *Delman v. Riley*, that's the Eos case.

It is a process that involves submitting a claim. It is a claims-made process, but

it is not a claims-made settlement. The fund will be paid out in its entirety, and defendants have no reversionary interest in the fund at all.

We understand the Court has a general preference for settlement funds to be distributed on a *pro rata* basis in accordance with *PLX*. But we believe that having a claims process, again, is the most equitable way to distribute settlement funds to the class.

We talked a little bit earlier about the stock falling soon after the merger closed. And then, by the time it issued its annual statement, the stock had dropped to 250. Now, obviously, we have our class members are selling all along the way. And in fact, some of them might have even sold their stock when the stock was above $10 per share.

So we recognize it's probably not equitable to have someone that sold stock above $10 per share getting the same amount of money as someone that sold their stock at $2.50 a share. So we try to take that into account with our claims process.

At the same time, Your Honor, our allegation, and what we believe, is that the proxy did impair a person's redemption right, even if they are

one of the few that were able to sell above $10 per share, what Vice Chancellor Laster called in *QuantumScape* "self-help." In that same decision, Vice Chancellor Laster explained that he did not think "there should be a rule that effectively amounted to "no harm, no foul," and that having a fully informed vote in and of itself has value, and I equate making a fully informed redemption decision with having a fully informed vote in that way.

So what we did in this plan of allocation is come up with what we called a nominal damage amount. It's a recognition that there was a harm in not having a fully informed vote. Again, it's our way of equitably distributing the class the settlement fund. So what we had is a baseline of $0.08 per share, and it does decrease a little bit for those people that sold above $10 per share.

What we did is we hired an expert to help us trying to come up with damages. When we reached a settlement, we had him switch his focus and we said: We think this nominal amount should be about 10 percent of the settlement amount. So that's how we came up with this calculation of the $0.08 per share, in using our trading analysis to come up with about

$0.08 per share.

Again, Your Honor, to us, that was the most equitable way to do it, and the only way to do it was to do the claims process. We made it as easy as possible. People can mail in their claims or they can even do it online. Again, we have the toll-free number available to help anyone that needs it. And the actual process of calculating the claims is thankfully not being left to me. We have our claims administrator collecting and doing the math itself.

Your Honor, with no questions on that, I'll turn to the fee and expense award. Plaintiff here requests 19 1/2 percent, which equates to $4,095,000. This is an all-in amount that includes plaintiffs' expenses of $76,000 and change. The Court, of course, has discretion to award the amount of attorneys' fees it believes is appropriate guided by the factors set forth in *Sugarland*.

The Court considers the results achieved, the time and effort of counsel, the relative complexity of the litigation, the contingent nature of the litigation, the standing and ability of counsel, and the stage at which the case ended.

The most important factor is the

benefit achieved. Here, it's the $21 million fund created solely by the effort of plaintiffs; again, the second largest *MultiPlan* settlement to date.

Up to the settlement, Your Honor, we would say this was pretty hard-fought litigation. We did our Section 220, filed our complaint. Defendants moved to dismiss. We amended, and then they answered.

And when they answered, I talked to my friends there on the other side here, and I said, "Well, you guys must realize how strong our case is. You answered." And as maybe you expect, they said, "No, your case is worthless." And we decided it's time to go to discovery and prove it. And we set up a schedule that had us aggressively litigating this case. After defendants answered, the schedule set for trial 21 months after that answer.

Defendants produced 100,000 pages to us. We produced 11,000 pages to them. Both sides answered over 40 rogs. At the time of the settlement, we were about three months away from the close of fact discovery. The next step was depositions. So I would call that meaningful litigation under the bracket set forth in *Americas Mining*. That puts us in the 15 to 25 percent bracket.

In *Finserv*, Your Honor awarded 17 1/2 percent, but that settlement was reached prior to the discovery. The Court awarded 22 1/2 percent in *Lordstown*. There is no depositions there, but admittedly there were more documents produced in that action.

So if Your Honor was to look at the midpoint between *Lordstown* and *Finserv*, it would be 20 percent, and we went a bit below that.

In your *Finserv* ruling, Your Honor mentioned *Gig2* and *Gig4*. I think the rulings there are consistent with our request here. As you pointed out, the Court awarded 18 percent in *Gig2*. There, the settlement discussion occurred prior to discovery and there was only limited confirmatory discovery.

In *Gig4*, that action was filed well after the other *Gig* cases. And, therefore, as Your Honor explained, there was a clear framework for SPAC cases at that point, and it settled without substantial litigation efforts.

Concerning what I'd consider the secondary factors, we took this matter on a fully contingent basis. In *Sauer Danfoss*, the Court looked at the contingent risk at the time counsel took on the

case.

At the time we initiated this representation, when we sent our inspection demand, Vice Chancellor Will had just decided *MultiPlan*. There were substantial questions still, even after *MultiPlan*. No court had considered net cash per share. Even now, as we just discussed, there's still substantial unresolved issues about the measure of damages, reliance, and causation. Despite these risks, we came out of pocket over $75,000.

Regarding the complexity, I think it's similar to the risk issues I discussed. This is and was a fairly new area of Delaware law, and I do believe it's fairly complex.

Concerning the standing and ability of counsel, I discussed it a little bit earlier.

And then as to the lodestar cross-check, we think this also supports the amount requested. We spent over 2,000 hours on this case before accepting the mediator's recommendation, and then about 140 hours after that. That is over 1.5 million times in lodestar. Again, stopping that clock when we signed the stip of settlement.

After deducting our expenses, our

requested fee would equate to a lodestar of roughly $1860 an hour, a 2.6 multiplier. Note 148 of our brief contains a long list of cases with higher multipliers and hourly rates.

I pause again to see if Your Honor has any questions.

THE COURT: I do not.

ATTORNEY DEL GAIZO: The last issue then, Your Honor, is the incentive award. Again, using *Finserv* as our guide, the Court awarded $5,000 there when the plaintiff participated in the 220 process, cooperated with counsel, and maintained his holdings.

Here, the plaintiffs did all that plus participated in discovery. Going through over 40 interrogatories takes a lot of time, as does having someone's computer searched for relevant documents. So we believe the $5,000 requested for each plaintiff is well-deserved here.

Unless Your Honor has any further questions, that's my presentation.

THE COURT: I do not. Thank you.

ATTORNEY DEL GAIZO: Thank you, Your Honor.

THE COURT: Ms. Waesco?

ATTORNEY WAESCO: Your Honor, if I may just very briefly.

THE COURT: Sure.

ATTORNEY WAESCO: Just for the record, obviously the damages theories are contested. And just to be clear, as kind of noted in the stipulation, we take no position on the plan of allocation and any damages theory that might be encompassed or reflected in that plan. So I just wanted to make that clear.

THE COURT: Understood.

ATTORNEY WAESCO: Thank you.

THE COURT: Duly noted.

Just for the record, there is no one in the courtroom here today other than counsel to speak on behalf of or in opposition to the proposed settlement today.

Before the Court today is a proposed class action settlement. The settlement involves claims asserted in connection with the merger of CM Life Sciences, Inc., or "CMLS," and Sema4 Holdings Corp., or "Legacy Sema4," the resulting entity being GeneDx. In exchange for the release of claims, the settlement provides for a $21 million cash fund that

will be distributed to eligible class members after deduction for the fee and expense award and administrative expenses.

The plaintiffs brought this action on behalf of CMLS's Class A common stockholders, alleging that defendants Eli Casdin and Keith Meister controlled CMLS, and that together with the director defendants Sean George, Munib Islam, Emily Leproust,Leproust and Nat Turner, and officer defendants Brian Emes and Shaun Rodriguez, each of the defendants breached their fiduciary duties by pushing through a flawed transaction with Legacy Sema4 and failing to disclose material information to stockholders of the Class A stock, so as to induce them not to exercise their redemption right in advance of the merger.

The plaintiffs' operative complaint asserted claims against the defendants for breaches of their fiduciary duties as directors and/or officers and/or controllers, and a fourth count for aiding and abetting breaches of fiduciary duty against Casdin Capital, LLC and Corvex Management LP, and then a fifth count for unjust enrichment against all the defendants. The defendants answered the complaint and

then the case proceeded through written discovery.

The settlement is the product of a meditator's proposal to settle the action. The parties filed the settlement stipulation on August 16 of this year. On August 23rd, the Court entered a scheduling order providing for today's settlement hearing. In their opening brief, filed on October 28, the plaintiffs stated that there had been no objections to the proposed settlement, and as I've indicated, no one has appeared to object today.

I have four issues to address: class certification, the proposed settlement, the application for attorneys' fees and expenses, and the proposed incentive awards.

The class is generally defined as a non-opt-out class "of all Persons who held shares of CMLS Class A common stock as of the Redemption Deadline through the closing of the Merger," excluding the defendants, and the families of, entities controlled by, and the legal representatives, heirs, successors, and assignees of any excluded party. Any trusts, estates, entities, or accounts that held shares of CMLS Class A or Class B common stock for the benefit of any excluded party are also not included in

the class.

The settlement agreement provides for certification of the plaintiffs as the class representatives, and Robbins Geller Rudman & Dowd, LLP, Robbins LLP, Grant & Eisenhofer P.A., and Andrews & Springer LLC as class counsel.

Court of Chancery Rule 23(c)(1) requires the Court to certify a class prior to disposition of a class action. To be certified, the class must satisfy the four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy. If the class meets the requirements of Section (a), this Court must then find that the suit properly fits into one of the 23(b) categories.

The Court must make explicit findings on the record that these requirements are satisfied under the Delaware Supreme Court's decision in *Prezant v. De Angelis* in 1994.

First, numerosity requires that "the class is so numerous that joinder of all members is impracticable." That's Rule 23(a)(1). CMLS was publicly traded, and there were over 44 million Class A shares outstanding at the time of the de-SPAC transaction. The affidavit submitted by Ross D.

Murray regarding notice indicates that there are thousands of potential class members. Joinder of so many stockholders is impractical, and the numerosity requirement is satisfied.

Second, commonality requires "questions of fact or law common to the class." That's Rule 23(a)(2). Here, the claim alleging that the defendants breached their fiduciary duties and were unjustly enriched in connection with the de-SPAC transaction present common questions of law and fact pertaining to each member of the class. Accordingly, commonality is satisfied.

Third, typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." That's Rule 23(a)(3). Here, the plaintiffs' claims for breach of fiduciary duty and unjust enrichment arise from the same course of conduct that would underlie the claims of all Class A stockholders related to the de-SPAC transaction, and that plaintiffs were allegedly harmed in the same manner. Thus, the plaintiffs' claims are typical across the class.

Fourth, adequacy requires that "the

representative parties will fairly and adequately protect the interests of the class." That's Rule 23(a)(4). This requirement will be satisfied when the class representative is represented by competent and experienced counsel and the representative's interests do not conflict with the class's interests. No one has challenged plaintiffs' representation of the class or the quality of plaintiffs' counsel, who have diligently pursued this action and are well known to the Court.

The plaintiffs have held CMLS shares at all relevant times, submitted a presuit Section 220 demand, and submitted an affidavit that satisfies Rule 23(f)(2)(A). Therefore, adequacy, like the remainder of the 23(a) requirements, is satisfied.

Having satisfied Rule 23(a), the class must now fall within one of the 23(b) categories. This is a quintessential class action certifiable under Rule 23(b)(1) and Rule 23(b)(2). As our Supreme Court observed in *Celera* in 2012, Delaware courts "repeatedly have held that actions challenging the proprietary of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2)." That is 59 A.3d

418 at page 433.

Certification under subsection (b)(1) is appropriate because adjudication of the claims by any one stockholder would, practically speaking, be dispositive of the interests of the other stockholders as well. Certification under subsection (b)(2) is also appropriate here because the conduct at issue is generally applicable to all class members.

Finally, finding that the requirements of Rules 23(a) and (b) are satisfied, the Court must also determine that notice of resolution of the claims was provided to all class members under Rule 23(f)(3). The finalized notice, found at Exhibit A to the affidavit of Ross D. Murray, complies with the requirements of Rule 23(f)(3). The Court entered a scheduling order on August 23rd which required dissemination of notice via First Class Mail to all class members who may be identified through "reasonable efforts," and by posting the notice on a website established for the settlement.

According to the affidavits of Ross D. Murray of Gilardi & Co, Gilardi has mailed more than 8,000 claim packages to potential class members and nominees, and was informed by one institution that it

anticipated sending claim packages via email to more than 12,000. Gilardi also set up a telephone hotline for class members with questions.

The Court finds that notice was provided in compliance with the Court's order, was fair and adequate, and satisfies Rule 23 and due process. Therefore, the Court will certify the class.

Next, I turn to the substance of the settlement. "The Court must act as a fiduciary on behalf of the class to ensure that the outcome falls within a range of reasonable outcomes that a disinterested decision-maker, acting on behalf of the class and with the benefit of the information available, could accept." That's from the *AMC Entertainment Holdings* decision from this Court in 2023.

Rule 23(f)(5) requires the Court to consider whether "the representative party and class counsel have adequately represented the class; [] adequate notice of the hearing was provided; [] the proposed dismissal or settlement was negotiated at arm's-length; and [] the relief provided for the class falls within a range of reasonableness ...."

As I've already discussed, the

plaintiffs and their counsel have adequately represented the class, they've provided adequate notice of the settlement, and the proposed settlement was negotiated at arm's length.

To determine whether the settlement falls within a range of reasonableness, the Court "looks to the facts and circumstances upon which the claim is based, the possible defenses thereto, and then exercises a form of business judgment to determine the overall reasonableness of the settlement." That is from *Polk v. Good* from our Supreme Court in 1986.

This approach is codified in Court of Chancery Rule 23(f)(5)(D), which directs the Court to consider "the strength of the claims; [] the costs, risks, and delay of trial and appeal; [] the scope of the release; and [] any objections to the proposed dismissal or settlement."

As presented, this was an entire fairness case, in which conflicted controllers and a conflicted board are alleged to have conducted a flawed process that resulted in their receiving nonratable benefits, and that the stockholders were deprived of material information in deciding whether

to exercise their right to redeem.

The plaintiffs' disclosure theories were of varying strength, but some appeared reasonably likely to have supported a finding of an unfair process. The headwinds for the plaintiffs, of course, came with respect to damages, as was discussed today in the plaintiffs' presentation.

This Court has posited that a measure of damages in similar circumstances might be the difference between the value of the redemption right and the value of the shares received in the de-SPAC transaction. That's from *Lordstown*. Another potential of damages may be the difference between the $10 per share redemption value and the less than $8 net cash per share value.

There has not been, as has been mentioned, a post-trial decision endorsing any particular damages theory, and that must await another day.

As a benchmark for the award, the plaintiffs compare the settlement here to that in *MultiPlan*. The plaintiffs state that the settlement here provides a $0.47 per share recovery, versus *MultiPlan*'s $0.33 per share recovery. The plaintiffs

also point out that the $21 million settlement amount is the second largest *MultiPlan* settlement, behind only the $33.75 million in *MultiPlan* itself. In my view, this is a reasonable recovery, given the difficulties the plaintiffs would have faced in establishing damages at higher ranges.

In exchange for this "get," the settlement provides the defendants with a global release of possible claims that may have arisen under the allegations in the operative complaint. Under the circumstances and weighing the "give" and the "get," they are reasonable.

I also find the proposed plan of allocation, which provides for the settlement amount to first pay administrative costs, attorneys' fees and expenses, service awards to plaintiffs, any taxes and tax expenses, and will be distributed *pro rata* to the Class A stockholders pursuant to a claims process. The plan of distribution is not opposed, and seems reasonable to the Court.

The Court, therefore, concludes, applying its own business judgment, that the settlement is fair, reasonable, and adequate, and the Court will approve it, along with the proposed plan of

allocation.

Finally, with respect to the Court's retention of jurisdiction in this case, as outlined in the settlement, you'll be able to pursue any enforcement here, but I'm not going to keep the case open on my docket.

Next, I turn to the proposed attorneys' fee award. The amount of an attorneys' fee award in class and derivative litigation is within the discretion of the Court. The Court, of course, is guided by the *Sugarland* factors, including the results achieved, the time and effort of counsel, the relative complexities of the litigation, any contingency factor, and the standing and ability of counsel involved. This Court has placed the greatest weight upon the benefits achieved. The Court may also consider the stage at which the litigation settled.

Here, plaintiffs' counsel seeks an award of 19.5 percent of the settlement amount, inclusive of over $76,000 in expenses. The requested fee and expense award amounts to a $4,095,000 cash payment. No objection to the fee has been lodged with the Court.

For the result achieved, the benefit

of the settlement is easy to measure. It's cash.

Plaintiffs' counsel recorded over 2,000 hours from the inception of this action until May 15, 2024, when the parties accepted the mediator's proposal, for a total lodestar of just north of $1.4 million. Plaintiffs' counsel recorded another 140 hours between accepting the mediator's proposal and the filing of the stipulation of settlement with the Court. I appreciate that counsel provided that breakdown in their affidavits.

Net of expenses, the requested fee amount equates to an effective hourly rate of just under $2,000, and a multiplier of less than three times the lodestar. These all suggest that the fee request falls within a reasonable range.

The claims here fit the mold of the now common SPAC suit, and while other complaints asserting similar theories have been previously filed, some of the theories asserted in this action remained untested at the time of filing. I do not find that the complexity factor weighs against the fee request.

Plaintiffs' counsel litigated this case on an entirely contingent basis. They are regular practitioners in this Court, and they have

achieved very strong results for clients over many years.

I also consider the stage at which the case settled. In the *Americas Mining* case, our Supreme Court noted that a fee in the range from 15 to 25 percent is appropriate where the "plaintiffs have engaged in meaningful litigation efforts, typically including multiple depositions and some level of motion practice."

As noted recently in the *Dell Technologies* case, a fee award in the 25 to 30 percent range is reserved for "late-stage settlements" arising once trial preparation, beginning with the pretrial briefing, has begun. By contrast, "[w]hen a case settles early, the Court of Chancery tends to award 10-15% of the monetary benefit conferred."

Here, this case seems to have progressed out of the "early stage." The parties settled before pretrial preparation began, and in my view, it falls within the 15 to 25 percent range for meaningful litigation efforts. Prior to the settlement, plaintiffs obtained 450 pages of documents through a Section 220 demand and engaged in substantial written discovery, including production of

over 11,300 pages and review of nearly 100,000 pages produced by the defendants. The plaintiffs' counsel contends that a 19.5 percent fee award is appropriate given the Court's precedents.

When considering the appropriate award, I look to recent awards in other SPAC cases. At the higher end of the range, we have 22.5 percent, plus expenses, in *Lordstown*, and 20 percent, which was inclusive of expenses, in *MultiPlan*. Each case came earlier in the SPAC wave and proceeded further than this case did. In *Lordstown*, the parties fully briefed two motions to dismiss, counsel reviewed 360,000 pages of documents, and counsel had to grapple with the added complexity of a contemporaneous bankruptcy filing.

In *MultiPlan*, the case survived a motion to dismiss, and the Court observed the parties had engaged in "substantial" discovery practice.

In the middle range there is the 18 percent award in *Gig2*. There, the plaintiff began settlement discussions prior to commencing discovery, and engaged in only limited confirmatory discovery, which counsels towards the lower end of the 15 to 25 percent range. But the motion to dismiss in that

case paved new ground, and the opinion resolving it is generally regarded as one of the three seminal SPAC opinions, along with *MultiPlan* and *Gig3*.

The 18 percent award reasonably balanced the complexity and novelty of the issues in that case against the relatively early stage in which it was settled.

Also in that middle range is the 17.5 percent awarded in *Finserv*. In that case, it progressed out of the early stage but settled before pretrial preparation began. The parties engaged in motion practice and some discovery, although the action settled before document discovery.

On the low end of the range, there's the 13 percent in *Gig4*. There, the plaintiff began settlement negotiations prior to substantial discovery and did not engage in confirmatory discovery. The case was settled prior to motion practice. Counsel in *Gig4* sought an award equaling 18 percent of the financial benefit achieved — the same as in *Gig2*. But recognizing that the *Gig4* case settled without substantial litigation efforts by counsel and was filed after the *MultiPlan*, *Gig3*, and *Gig2* opinions had provided a clear framework for SPAC cases, the court

reduced the award to 13 percent.

The parties engaged in more discovery in this case than in either *Gig2* and *Finserv*, and plaintiffs' counsel also obtained books and records through a Section 220 demand. Altogether, considering all of the *Sugarland* factors, I believe that 19.5 percent, although on the high end, falls within a range of reasonableness, and I will approve it.

Finally, I turn to the request for the plaintiff incentive awards to the lead plaintiffs, Todd Katz and Xianming Zhou. Counsel seeks approval for an incentive award for $5,000 to each of them to be paid out of the award of attorneys' fees. The settlement notice disclosed that plaintiffs may seek an incentive award of up to $10,000, in compliance with the updated Court of Chancery rules.

Rule 23 prohibits a representative plaintiff in a class action from receiving "any form of compensation," unless expressly approved by the court, or where payment is made by counsel to reimburse the plaintiff for "actual and reasonable out-of-pocket expenditures incurred in prosecuting the action." That's Rule 23(aa)(2).

These plaintiff incentive awards

function as risk-based compensation that work to motivate the named plaintiffs to work collaboratively and efficiently with counsel and to pursue meritorious suits. See *Chen v. Howard-Anderson* from this Court in 2017.

This Court awarded a $5,000 incentive award to each of the plaintiffs in *Lordstown*, where the plaintiffs' phones were imaged, their emails were searched by a third-party vendor, and they were named as parties in a separate bankruptcy proceeding.

This Court also awarded $5,000 in *In re FAST*, where the plaintiff moved with alacrity to bring the case quickly, including a motion to expedite and a TRO to preserve benefits for the class, and was also subject to interrogatories.

As I've said before, in the current litigation environment, a stockholder who signs up to send a books and records demand, possibly institute a Section 220 action, and then file a derivative or class action complaint is faced with a real possibility of having their computer and other electronic devices imaged and searched, having to sit for a deposition, perhaps more than one if they file a Section 220 action, then perhaps having to testify at

trial.

The typical service award, where warranted, runs in the range from 5,000 to $10,000. The Court has awarded higher amounts where the plaintiffs' efforts were significant and worthy of a higher amount.

On balance, the award of $5,000 is appropriate under the facts of this case. The plaintiffs stepped forward as class representatives, at least one of them participated in the Section 220 process, and cooperated with plaintiffs' counsel throughout the case, and they maintained their holdings of CMLS throughout the proceedings. Therefore, in the exercise of my discretion, I will grant the request for the two $5,000 service awards to the two named plaintiffs.

Counsel, I have a proposed form of order that was submitted late last week. I will review it when I get back to chambers, and I will enter it later today.

Are there any questions about my ruling?

ATTORNEY DEL GAIZO: No, Your Honor.

THE COURT: Thank you, counsel. Have

a good day.

(Court in recess at 11:52 a.m.)

- - -

CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 47 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 28 through 46, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington this 10th day of December, 2024.

/s/Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter

TAB 12

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CITY OF MIAMI GENERAL EMPLOYEES' AND SANITATION EMPLOYEES' RETIREMENT TRUST, Derivatively on Behalf of Nominal Defendant FIDELITY NATIONAL FINANCIAL, INC.,	:	
Plaintiff,	:	
v	:	C. A. No. 2020-0650-KSJM
WILLIAM P. FOLEY, II, DOUGLAS K. AMMERMAN, THOMAS M. HAGERTY, DANIEL D. LANE, RICHARD N. MASSEY, HEATHER H. MURREN, RAYMOND R. QUIRK, JOHN D. ROOD, PETER O. SHEA, JR., CARY H. THOMPSON, MVB MANAGEMENT, LLC, and TRASIMENE CAPITAL MANAGEMENT, LLC,	:	
Defendants,	:	
and	:	
FIDELITY NATIONAL FINANCIAL, INC., a Delaware corporation,	:	
Nominal Defendant.	:	

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, June 21, 2022
1:33 p.m.

- - -

BEFORE: HON. KATHALEEN St.J. McCORMICK, Chancellor

- - -

SETTLEMENT CONFERENCE AND RULINGS OF THE COURT
HELD VIA ZOOM

APPEARANCES:

GREGORY V. VARALLO, ESQ.
MAE OBERSTE, ESQ.
Bernstein, Litowitz, Berger & Grossmann LLP
-and-
MARK LEBOVITCH, ESQ.
of the New York Bar
Bernstein, Litowitz, Berger & Grossmann LLP
-and-
PETER B. ANDREWS, ESQ.
CRAIG J. SPRINGER, ESQ.
DAVID M. SBORZ, ESQ.
Andrews & Springer LLC
for Plaintiff

PETER J. WALSH, JR., ESQ.
MICHAEL A. PITTENGER, ESQ.
ABRAHAM C. SCHNEIDER, ESQ.
Potter, Anderson & Corroon LLP
for Special Litigation Committee of The Board of Directors for Fidelity National Financial, Inc.

BRADLEY R. ARONSTAM, ESQ.
Ross Aronstam & Moritz, LLP
-and-
JOHN A. NEUWIRTH, ESQ.
EVERT J. CHRISTENSEN, JR., ESQ.
of the New York Bar
Weil, Gotshal & Manges, LLP
for Defendants Douglas K. Ammerman, Thomas M. Hagerty, Daniel D. Lane, Heather H. Murren, Raymond R. Quirk, John D. Rood, and Peter O. Shea, Jr.

DOUGLAS D. HERRMANN, ESQ.
Troutman Pepper Hamilton Sanders LLP
-and-
J. TIMOTHY MAST, ESQ.
of the Georgia Bar
Troutman Pepper Hamilton Sanders LLP
for Defendant MVB Management, LLC

THE COURT: Good afternoon, everyone.

VARIOUS COUNSEL: Good afternoon, Your Honor.

THE COURT: Nice to see you all.

I'd like to start by confirming that our court reporter can hear me?

THE COURT REPORTER: I can, Your Honor. Thank you.

THE COURT: Great. Thank you.

Let's have appearances for the record.

ATTORNEY VARALLO: Good afternoon, Your Honor. Greg Varallo from Bernstein Litowitz for the plaintiffs. With me today are Mark Lebovitch and Mae Oberste from my office. Also from co-counsel at Andrews & Springer, David Sborz, Peter Andrews, and Craig Springer.

With Your Honor's permission, Mr. Lebovitch will make the presentation for us today.

ATTORNEY WALSH: Good afternoon, Your Honor. Pete Walsh of Potter, Anderson & Corroon. Also on the line with me are Mike Pittenger and Abe Schneider on behalf of the special litigation committee, and I'll be making remarks on behalf of the SLC. Thank you.

ATTORNEY ARONSTAM: Good afternoon, Your Honor. Brad Aronstam on behalf of Fidelity National and the individual defendants. With me are my co-counsel from Weil Gotshal, John Neuwirth and Evert Christensen.

ATTORNEY HERRMANN: Good afternoon, Your Honor. Doug Herrmann from Troutman Pepper on behalf of MVB Management, as well as my partner, Tim Mast.

ATTORNEY MAST: Good afternoon, Your Honor.

THE COURT: All right. I think that's everyone. Please proceed.

ATTORNEY WALSH: Good afternoon, Your Honor. Pete Walsh again on behalf of the SLC. Mr. Lebovitch and I conferred, and if it's okay with Your Honor, I was going to spend just about ten minutes giving you the perspective of the SLC in support of the settlement this afternoon, and then I would turn it over to Mr. Lebovitch.

THE COURT: Of course. Thank you.

ATTORNEY WALSH: Thank you, Your Honor.

In terms of my remarks, I thought it

would be helpful to the Court to spend a few minutes describing the claims, the work of the special litigation committee, what was really a hard-fought negotiation to bring us to the settlement, and then, finally, very briefly, I was going to touch upon the terms of the settlement. And needless to say, we believe it is a very beneficial settlement and one that merits the Court's approval.

So let me start with the complaint and the underlying transaction.

The underlying transaction challenged in this derivative action is the acquisition of FGL Holdings, Inc. by Fidelity National Financial. I'll refer to Fidelity as Fidelity or FNF. It's a leading provider in this country of title insurance and settlement services.

Bill Foley, one of the defendants, is the founder of FNF and chairman of the board. At the time of the deal, Mr. Foley owned 3.2 percent of the Fidelity shares.

He had been involved in a prior acquisition of FGL Holdings by a SPAC sponsored by him and, as a result, owned 6.7 percent of the FGL shares and was also on the FGL board at the time of the

FNF/FGL transaction.

Another defendant, Rick Massey, was similarly situated in that he was also on the FGL board and owned shares in FGL, although his economic interest was greater on the Fidelity side than in FGL.

But given these potential conflicts, a special committee was formed to consider -- and, if appropriate, recommend -- the acquisition of FGL. Negotiations commenced in the early fall of 2019, a deal was announced in February 2020, and the transaction closed in June of 2020.

The derivative action was filed in August 2020 and challenged the deal in numerous respects. Let me just recite some of those.

Plaintiff asserted that the members of the special committee were compromised or lacked independence from Mr. Foley. It alleged that Fidelity overpaid for FGL as reflected by post-announcement drop in the stock price. Plaintiff also challenged the independence of the financial advisors, specifically Bank of America, as well as defendant Trasimene Capital Management, Trasimene being a fully controlled entity formed shortly before the FGL negotiation started. And as to Trasimene, the

complaint challenged the amount of the fee paid in connection with the transaction.

The complaint also challenged an arrangement involving defendant MVB Management. MVB is an entity in which Mr. Foley indirectly owned 50 percent. And in the transaction and on the FGL side, that entity received a 50 percent subadvise -- or, excuse me, a subadvisory fee in connection with advisory services that BlackRock provided to FGL Holdings. So this arrangement was subsumed in connection with the FNF/FGL acquisition, although the subadvisory fee was reduced in connection with the FGL deal.

And finally, the complaint challenged FGL's preclosing retention of an entity called Qomplx. For the benefit of the court reporter, that's Q-O-M-P-L-X. Qomplx was retained to look into and address cybersecurity issues at FGL prior to the closing.

Counsel for the plaintiff did their homework in preparing the complaint, 85-page complaint. They had first made a books and records demand and utilized publicly available information to detail and document potential overlaps in relations

and business relations that Mr. Foley had with certain members of the board. As to the specific causes of action, the complaint contained essentially four, each centered around the FGL transaction.

Count I asserted breach of fiduciary duty claims against Mr. Foley, Mr. Massey, and a defendant, a gentleman by the name of Cary Thompson, those gentlemen being the nonmembers of the special committee. I mentioned Mr. Foley and Mr. Massey. Mr. Thompson was employed by Bank of America, one of the two financial advisors to the special committee, and it was therefore determined that he should not sit on the special committee.

Count III [sic] asserted breach of fiduciary duty claims against the members of the special committee.

Count III is an aiding and abetting claim against defendants Trasimene and MVB.

And Count IV is an unjust enrichment claim against Trasimene and MVB relating to the FLG [sic] transaction.

Let me say a little bit about the SLC. In October 2020, the Fidelity board appointed the special litigation committee, and in doing so gave it

full authority to investigate the allegations of the complaint and to determine what actions the company should take in response to the complaint. At that time the committee was composed of Sandra Morgan and Heather Murren. A third member was added in May 2021, when Justice Dhanidina joined the FNF board. He is a retired justice of the California Court of Appeals.

The SLC's credentials and a little bit about them are set forth in our brief and in their declarations, but let me just mention a couple things which I think are important for the Court's consideration.

First, Sandra Morgan, she chaired the SLC. She joined the FNF board after the events challenged in the complaint. She had no prior business or personal relationships with Mr. Foley or any other board member. So in Ms. Morgan, we had an unquestionably independent director who also was an accomplished lawyer by background.

With respect to Heather Murren, she was a member of the special committee that considered the FGL transaction, so naturally, early in the process, we took a very hard look at her independence to serve as a member of the SLC. We twice interviewed

her, once at the outset and once later as we were into the process, solely to probe her independence and to make sure that, in light of certain issues raised by the plaintiff, that she was, in fact, an appropriate member of the SLC.

We considered Delaware law, obviously, and under the precedent of this court and the Supreme Court, we felt very confident that Ms. Murren was an appropriate member of the SLC. She was also very beneficial to the process because she had been involved in the transaction, and given her background as a retired managing director and group head of global securities at Merrill Lynch, she knew business valuation very well and, therefore, was very helpful to the committee.

And lastly, I mentioned Justice Dhanidina, who joined later in the process. He, too, is a very accomplished lawyer, and so with him and Sandra Morgan, we had two very accomplished lawyers and another member who was well-skilled in business valuation, and that proved, I think, very helpful to the process as we got into the interviews and working with our expert.

Just a little bit about the process we

employed in this case. As an initial matter, we felt that it was important, given the direct challenge to the price paid by Fidelity for FGL, that we retain a valuation expert. And after interviewing several candidates, the committee selected Charles River Associates, whose team was led by Craig Elson, who has appeared in this court on a number of occasions as a valuation expert.

The committee made document requests of the defendants, all of whom, I should emphasize, cooperated fully in providing the committee documents. They amounted to almost 40,000 documents from 13 custodians.

We then proceeded to conduct 14 interviews. In some cases we interviewed members of the financial advisors, representatives of the financial advisors twice, so that Charles River could feel confident that it fully understood the processes and valuations that resulted in the transaction.

So with that information in hand, I should also note, there was tremendous participation in this process by the members of the special litigation committee. As I have noted in the brief, one or more members of the SLC participated in nearly

all of the interviews. And, similarly, a representative of Charles River participated in most of the interviews. And, of course, as we completed interviews, we would periodically meet with the SLC to confer about what we had heard, provide advice and guidance, and so, in that respect, I believe it was a very sound process employed.

The conclusions ultimately reached by the committee are set forth at pages 19 to 22 of our brief. I don't think it's necessary to go into each of those, but let me make a couple observations which I think are helpful or should be helpful to the Court.

First of all, with respect to the FGL transaction, having interviewed all the members of the special committee that considered the transaction and assessed carefully each of their ties or potential ties to Mr. Foley, the committee concluded that the FGL transaction would likely merit business judgment review.

Looking at the established precedent from this court and the Supreme Court, we didn't think that Mr. Foley could realistically be deemed a controller, holding just 3.2 percent of FNF. And so then we spent a lot of time in interviews looking

carefully at the question of beholdenness; that is, whether any given member of the special committee could be found to be beholden to Mr. Foley and therefore lack independence.

And while that -- those interviews and the information presented a lot of factual issues, we found that the special committee, the members of the special committee, were extremely -- and I emphasize the word "extremely" -- accomplished businesspersons in their own right. Their successes, many of which were extraordinary, were self-made.

And more importantly, few, if any, had any meaningful personal relationships with Mr. Foley. And as importantly, we felt their holdings in Fidelity clearly aligned them with the interests of the stockholders in connection with the FGL transaction.

So at bottom, we felt pretty confident that the record would show that the special committee was independent and supported the deal, not because Mr. Foley wanted it, but because they believed it was in the best interest of the FNF stockholders.

That said, we also considered the what-ifs, and what I mean by that is, the committee considered what if the Court elected to apply entire

fairness, and in that respect, we dug deep as well and concluded, with the assistance of Charles River, that there was a high probability that the Court would find that the price that was paid for FGL was within a range of fair value.

We also, of course, looked at the other aspects of the transaction challenged in the complaint. The Trasimene fee, for example, as we set forth in the brief, we believe that fee, in particular, presented potentially a litigable issue, but, to be clear, we felt it was also very clear that Trasimene added substantial value as an advisor.

As I said, we looked at some of the other claims to evaluate them, and there clearly were procedural challenges to the plaintiffs pursuing some of those claims. But at the end of the day, the committee's view with respect to all of this was there were risks to both sides, and we felt it was in the interests of the company to see whether a settlement of the case could be achieved.

And so with that, let me speak very, very briefly to the settlement negotiations. Having gotten our arms around the facts and potential litigation outcomes, the committee recognized, with

the authority granted to it, that it could and should exercise the leverage available to it to see whether a settlement could be achieved.

As for plaintiff's counsel, they, of course, recognized that the SLC could move to dismiss all or part of the complaint under *Zapata*, as often happens in these types of cases.

As for defendants' counsel, they certainly recognized, although they were adamant that their clients had acted entirely appropriately, and we believe they did, they were zealous in their defense of the case, but they, too, recognized ultimately that there were potential risks to any ongoing litigation, as did the SLC, of course. We certainly were carefully considering the *Zapata* test and fully appreciated that that, too, presented risk to the SLC.

Accordingly, with the committee's blessing, we engaged both sides in a settlement discussion over the course of several months. It was essentially a three-way negotiation in which the SLC -- and we, as counsel, engaged in very frank and open discussions with both the plaintiff's counsel and the defendants' counsel. And at one point, we even had a face-to-face meeting with Mr. Lebovitch and

Mr. Springer in our office. The two members of the special committee listened in by phone. We discussed each and every claim. We debated each and every claim. To their credit, they came with very constructive approaches to a potential settlement, and ultimately we were able to get a settlement done.

I will say there were times when I think all parties were very frustrated by the slow progress, but ultimately all parties in good faith hung in there and we eventually got it done.

So with that, let me speak very briefly to the settlement. I think what the negotiations ultimately yielded is a proposed settlement that plainly benefits the company and, as importantly, I think it squarely addresses the plaintiff's primary grievance in the case.

Again, they complained and challenged certain incidental related-party transactions that they contended allowed Mr. Foley and others to extract nonratable benefits. So, in that regard, one of the things achieved in the settlement are the related-person transaction committee charter and policies, and, specifically, the defendants cooperated fully in negotiating two documents.

As I mentioned, the first is a related-person transaction committee charter. The charter provides for an independent committee of board members to, among other things, review and consider proposed transactions under a separately negotiated related-person transaction policy. Those two documents can be found at Exhibits 6 and 7 of our brief, and, essentially, going forward, any proposed transaction between the company and a related party -- and that term, "related party," is broadly defined to include significant stockholders, directors, officers, and family members, and in an amount exceeding 120,000 in value must go through a multi-step process. Ultimately, it can be approved, modified, or rejected by this independent related-person transaction committee.

So that, in my view, is sort of the centerpiece. It achieves exactly what plaintiffs complained about. And as we both, I think, noted in the briefs, the charter and policy working in tandem present a benefit to the company that would not have been achieved if there had been further litigation.

Then, of course, the settlement also provides for a $20 million payment to FNF funded by

the defendants and the insurance carriers. And finally, the settlement credits plaintiff with having caused, in part, the addition of Ms. Morgan and Justice Dhanidina to the FNF board. All agree that they are truly independent directors. And I can say, having worked with both of them, they are excellent additions to the FNF board.

So let me conclude where I started, which is to say that the SLC believes that the proposed settlement is extremely beneficial to the company, it is the product of a hard-fought three-way negotiation by all the parties, and it is, most importantly, presented without objectors or objection of any kind, and therefore we respectfully request that it be approved.

Unless Your Honor has any questions, I'll turn it over to Mr. Lebovitch.

THE COURT: No questions. Thank you, Mr. Walsh.

ATTORNEY WALSH: Thank you, Your Honor.

ATTORNEY LEBOVITCH: I have to unmute first. Thank you, Your Honor.

I just want to start by acknowledging

my colleague, Tom James. I called him into the office. He's not on the camera, but I'd be remiss to not acknowledge his presence here for the Court's sake and also his material presence and contributions throughout the case.

So first, it's really great to see Mr. Walsh make such an effective presentation of -- in support of a derivative suit settlement.

I think, Your Honor, when -- I knew that partnering with Mr. Varallo could open a Pandora's box. I didn't really realize what that meant until Mr. Walsh called me last week and said he wanted to go first today and he wanted to present. So we appreciate that. And looking forward to, you know, the next step in evolution. Maybe Your Honor will be applying the *Hirt* factors to -- you know, like a leadership dispute amongst Bills Lafferty, Chandler, and Savitt, something like that.

But I'm not going to repeat what Mr. Walsh presented. I actually want to kind of use this to make one big-picture comment about SLC practice, which I think Your Honor and the other judges on the court have seen more often, make a discrete point about the case we filed beyond that.

Mr. Walsh said -- and I'll turn to answer any questions you may have about the settlement and then address some fee requests.

Focusing first on the SLC practice, you know, truth is, what we saw from this SLC, even advised by Messrs. Walsh and Pittenger, really does stand out from the norm of what we've seen, you know. And, like I said, we are seeing more SLCs recently, and, you know, it's -- I think this court has been living with and understands the logic behind *Zapata* and has for decades, but I will say, practicing across the country, it's a concept that is challenging for judges in other jurisdictions, and I think it's because even when a court has to learn the demand futility standards at bottom, they still make the final choice and make judgments to ensure that they're comfortable justice is being done.

And, you know, the idea that a case that typically has survived a motion to dismiss can be, you know, not only stayed, but essentially dismissed forcibly by what are often, you know, compatriots of the defendants is something that I think jurists outside of Delaware often find foreign, if not counterintuitive. I don't know that there's

another analogue to the SLC in any other aspect of our judicial system, where you can have a viable claim that someone other than the judge or the parties can put an end to.

And I think that, you know, the reality is that, because of the powers that *Zapata* gives SLCs and whatnot, we approach an SLC with a fair amount of skepticism. It's from experience. You know, we -- if you've represented investors -- and I'm sure every other lawyer on this call has experienced situations where, you know, the plaintiffs' counsel are invited to, you know, make an early presentation, and, you know, they do so in good faith and they walk out of that meeting with a clear sense that they were kind of just part of a box-checking exercise and the SLC and its counsel have already decided to move to dismiss all claims, and I think it's unfortunate, but that is a reality because of the power that Mr. Walsh touched on that *Zapata* can give SLCs. So we're always ready to kind of trust but fight if we have to.

This really was different. It's hard to describe, but from the first communication, this SLC and their counsel set a different tone and I think did earn a certain amount of trust.

Mr. Walsh, Mr. Pittenger, they didn't call us and ask us to just present the results of our investigation and make our arguments to them. They didn't forbid their clients from, you know, doing anything other than just sitting there and listening quietly during the meeting and the presentation. They asked for a meeting to make clear it was going to be so that they could update us, we're going to have an exchange of ideas and we're going to discuss the strengths and weaknesses of the case and explore what would be a beneficial outcome.

In fact, the SLC participated directly. There was no objection, and we spoke directly with them and they, in turn, responded and they spoke directly with us. I can assure you, we did not always agree. In fact, early on, I think there was a lot of areas of disagreement, but it did become, you know, clear early on that everyone was focused on the company's best interests and were approaching with an open mind.

You know, it was arm's length, it was adversarial you know, I don't agree with everything Mr. Walsh just said about the nature of the claims. You know, they told us the aspects of our case that

they thought we could not prove and would not hold up at trial, but we respected their presentation because they were I don't think trying to win an argument for the sake of doing so. They weren't being needlessly adversarial. They were, I think, being frank with us about points they thought maybe we didn't take into account. We listened to some, and when we disagree, we did so on points that we genuinely thought they should miss-- you know, they might have miscalculated, they should try to reassess.

But ultimately, it was all parties focusing on the issues that, you know, were arguably, if not clearly, present at the company and that warranted at least the forward-looking relief, and that's how these meetings evolved. And so what you had was an SLC and plaintiffs' lawyers who, I guess, metaphorically, we always kept one hand on the sword and were ready to go do battle, but over time and over a frank and merits-driven exchange, were able to close the gap and come to something that we do think is very beneficial to the -- to this company in particular.

With that, I mean, I want to -- before I go too far in praise for our friends on the SLC side here, I want to also recognize, you know, how they

were created and what's, I think, atypical in the practice. You know, normally Your Honor's only going to see an SLC created, I think, in two instances, right. There's a Rule 23.1 motion that was already denied, or you have a case that's entire fairness *ab initio*. I don't think it's often you have a case like ours where, you know, there's not a controlling shareholder on the face of the -- Bill Foley owned, you know, under 5 percent of the shares, so we could allege he was conflicted because of various side payments, the Trasimene payments, you know, his marginally larger FGL stake, but, actually, when we started the case assessment here, we absolutely anticipated a motion to dismiss. Who wouldn't?

And I think that just touches on what I think I want to add to Mr. Walsh's comments. The work that, you know, my colleagues here did to make these defendants choose to go the SLC route rather than even making a motion to dismiss I think is a credit to them. I think that the complaint in this action did get around the business judgment rule, and it did so by presenting such exceptional detail, some of which came through a 220, a lot of it came through old-school "roll up your sleeves" investigation.

To show that, despite Mr. Foley's fairly low equity stake, a majority of the board was allegedly beholden to Bill Foley. These are allegations that I think would have held up. We showed the complex relationships with respect to FNF and in other transactions where directors who seem nominally independent were benefiting through their Foley relationship.

We talked about other related-party transactions involving Foley and his entities, and, you know, again, I guess one area of disagreement is there were a lot of points that were well-taken from Mr. Walsh. We sure never agreed that down the road this would become a business judgment rule case. I think that our complaint showed that, sure, people were very successful on their own, but they made a lot of money through their relationship with Mr. Foley. And last I checked, even rich people care about money. And so I think we would have -- might have had a tough time getting around the business judgment rule.

You know, that said, our reward for hopefully pleading the claim that made a motion to dismiss futile was not plenary discovery, it was an SLC, and that led to the process that I think we both

discussed, and, you know, really in a world where we understood some of the points that Mr. Walsh and Mr. Pittenger and the SLC made about where we should reconsider. We also disputed some. I'll just give one example, from our perspective. I don't want to violate any confidence.

You know, the Trasimene payments, right, that was 27 million. I mean, in a world where there was Citigroup there, we've had this in some other cases with controlling shareholders, it just seemed like it was problematic. And so if you look at how this case could play out, we felt very strongly that the Trasimene fee, it was hard to believe they would really justify getting paid that much money where it's basically Bill Foley just doing his thing anyway.

That said, the other aspects of the transaction, if we tried it, even if there's never a business judgment rule problem, these were complex transactions and showing damages on a transaction that, you know, in a lot of ways was about side payments that were convoluted. You know, there would be complexities, you know. And, again, Blackstone, you know, we had to confront the reality that, you

know, Blackstone is a big advisor. They don't need to be paying off Bill Foley to get business.

So when we're challenging the management agreement, we call it a side payment, I think we had a good basis to do so, but ultimately I'm sure defendants would have come in and said, are you really going to believe Blackstone would kind of look the other way at, you know, skimming for the benefit of Foley? And that is something we would have litigated if we had to, but obviously a harder claim to win over than something like the Trasimene fee.

With that, I don't want to repeat the terms of the settlement. Unless the Court has a question about the settlement, I would just turn to the fee application.

THE COURT: No questions. Thank you.

ATTORNEY LEBOVITCH: Thank you, Your Honor.

So with that, our fee request is for a $4.4 million fee award, and that includes expenses of approximately $9,000.

Before I get into the *Sugarland* factors, I just want to comment on, I guess, the pertinence of this being a negotiated fee request. So

we obviously acknowledge that, you know, the negotiated amounts is hardly binding and the Court has to at least be comfortable that any fee that's negotiated is in a range of reasonableness.

I just want to touch on, if it's okay, I guess maybe policy reasons why I think the Court, you know, should trust a fee that appears to be negotiated by adversarial parties acting at arm's length.

You know, I want to highlight not only where we are in the settlement with the SLC. Notwithstanding all of the kind words being shared today, we -- our relationship with the defendants here, again, people we have great respect for, you know, at least their counsel, but it was somewhere between cold war and simmering hostilities, right, so this was a three-way, complex negotiation. This wasn't, you know, easy Kumbaya.

I think that, you know, the deference the Court gives to a negotiated fee to me is almost a corollary to the very wise policy the Court seems to have adopted, the verse and concept of baseball arbitration. I think, fundamentally, that's the best way to get parties to not present needless fee

disputes or other disputes to the Court, because, you know, when people know that they're going to be taken to task for being unreasonable in their offers and demands, they get reasonable, and then it's more likely you're going to have agreements.

And I think that, you know, the corollary of that is, hey, we have a law -- a rule that makes you get reasonable, and so within that, once you are being reasonable, the Court, you know, I think typically would have some deference for the agreements that are reached.

Real quickly, you know, I started out by thinking about the plight of defense counsel when they're negotiating a fee and deciding whether to put it to a fight or a negotiated outcome. You know, frankly, it's a bit of a leap of faith when defense counsel who think, you know, hey, this is not an unreasonable fee to pay, they have to recommend it to a client.

And in the end, if the Court imposes a fee on the defendants, you know, the defense counsel can always say, yeah, the judge got it wrong, the defense counsel don't have to own it. I think in a negotiated context, defense counsel run the risk of

recommending a fee and then having the Court say, God, you did a terrible job negotiating. That's too high.

You know, I think -- and so I think that, again, unless there's a sign of something wrong, you know, I wouldn't want my counterparty in negotiations to lose credibility with their client. At the same time, plaintiffs, in a *Versum* world, have an even stronger incentive to compromise their own positions, and I think that translates itself here.

Just speaking for my firm -- and I think this applies for Mr. Springer as well -- you know, we kind of want the Court to know that if we are presenting a fee fight, it's really because we think the other side was unreasonable. They didn't get in a range of reasonableness.

And so I think, you know, at the margins, we'll always compromise more than what we think we can justify in the briefing, you know, and, frankly, we have a stronger incentive. We know some people will be unreasonable, not only on fees, but in litigation.

And, you know, part of what we have going for us is letting people know if you're professional and you're just engaging on the merits

the way Mr. Walsh and Mr. Pittenger did, we are going to compromise, we're not going to be too stubborn. And the corollary is if people just don't engage, they should know that we could be as hard as we have to be.

And so, you know, I think that here what we have, if the analysis is range of reasonableness, if we didn't have a negotiated outcome, you know, if we had a hypothetical defendant just say, oh, this was just a garbage complaint, we set up an SLC to shut this down and the settlement's worth nothing, and we knew they were coming in with like a pittance of an offer on a fee and the settlement here, I hope the Court, you know, agrees and wouldn't be offended by it, but I actually think we would come in, under a *Versum* world, with a higher number. We wouldn't be unreasonable. I think there's plenty of room for us to justify a higher fee within the range. And I think I want to prove that by now applying the *Sugarland* factors, because I think, under current law, I don't know if I can stop that this is in a range of reasonableness.

So with that, *Sugarland* factors, you know, focus first on the benefits achieved. I won't repeat Mr. Walsh's analysis, but I will note there's

multiple ways to add to a fee, and I don't think the Court, whether this was contested or not, has to actually pin down the answer to every single item. $20 million is $20 million. That's something, you know -- you know, that we brought to the table here. It's a benefit warranting a fee, and the Court would have some range of a percentage that it could award, you know, the higher that percentage, the less gap there is between that and $4.4 million.

The next, you know, kind of element is the independent directors. There's case law on what adding the independent director is worth, you know, 1 to 2 million for an independent director. Here we have two. At the same time we acknowledged that this was not part of the negotiation *per se*, this was something the company was doing and it was part of the consideration, but it's part of a mootness type thing.

You know, again, I think that where our requests after negotiation is 4.4 million, it just gives plenty of room for the Court to essentially discount to the value of the two independent directors based on whatever factors the Court thought was reasonable. And then, to borrow Mr. Walsh's word, the centerpiece of the settlement is the related-person

transaction committee and the complementary, you know, amendments to the related-person policy. An implementation of really a new policy.

So that is the cornerstone. And, you know, I think that the heart of this case, again, it's not *de jure* control, it's not *de facto* control, it's really, this is a company with such a history of related-person transactions that it led to the rebutting of the business judgment rule, and there's this common pattern of deals that, you know, are probably, you know, arguable, but there's always something off the top. I mean, that was our pitch in the complaint. There's always something off the top for Foley, affiliated entities, and possibly other directors, either of the company at issue or even directors of other Foley entities.

And so I think that's what triggered the suit and that's really what's being targeted here. I can't say there's not going to be other related-person transactions because I think that would be naive.

When you look at the history of these companies, the idea of the committee that we, together with the SLC, negotiated and structured and the policy

was that, you know, we're not just limiting the amount of money that is, you know, making its way, you know, into Mr. Foley's pocket, but the transactions really should be more fair, meaningfully more fair, and so I think that's very helpful, and even after the fact there's this annual review of all related-party transactions. I think that's valuable. It makes directors sit down and look in the mirror and say, are we fighting hard enough for the other shareholders?

So, you know, again, in many a context, I would be arguing what is that worth, and I think I would -- could easily argue for significant numbers just for the committee and the policy and, you know, that would make the fee on the 20 million and two independent directors perhaps irrelevant, but here we negotiated, and I think that the reality is because the SLC and defendants, you know, got into the range of reasonableness appropriately and in a fair way, we did too, and so we got to a number that I hope is very easy for the Court to approve.

Moving on to the other elements, the supporting elements, there were risks that were real. Obviously, it's a complaint that we could not take for granted would face a motion to dismiss, but we got

over it. And then once an SLC is created, we not only have to survive a partial or complete dismissal motion from an SLC under *Zapata*, we then potentially have to survive summary judgment post-discovery from all defendants. We have to prove liability at trial, prove damages, and, again, like I mentioned, while some aspects, you know, we really have a lot of confidence would have held up, there's others that would be very hard-fought and challenging.

So I think settlement now makes sense. Standing of counsel, you know, that Your Honor is familiar with folks, Mr. Harrison's firm and Weil and the SLC counsel and hopefully trust that we try to do the right thing.

And then there's the lodestar cross-check. Again, we acknowledge that, you know, there was -- when SLC is created, we're not going to go run the hours, you know, run the clock. The hours here are not large. The implied hourly rate comes to about $8,500 an hour. That is a lot. As defense firm rates go higher and higher, that's, I guess, becoming less eye-popping, but that said, it's a big implied hourly rate. You know, we list examples of implied hourlies being approved at higher levels, that's

note 176 on page 53 of our settlement brief.

But, again, I think it's well-earned. And Your Honor knows all too well that for every case that's like this, we seem to find ourselves in cases that are the impossible-to-extract-yourself, it's just headed to trial, and we could win everything and the implied hourly rate is not going to be $8,500 an hour. So we think that that's fair.

This was contingent, and as Mr. Walsh said, there has been no objection, I'll verify. We've checked our mail, our emails, everything, we're not aware of any objections from anyone.

So with that, hopefully the settlement and the fee can be approved. And just thank Your Honor for your time and consideration.

THE COURT: Thank you, Mr. Lebovitch.

Does anyone else wish to speak for or against the pending motions?

(No response.)

THE COURT: All right. Hearing no one, I will turn now to my bench ruling. Give me one moment.

I'll note for the record that no one has appeared today to object to any portion of the

pending motions. No one has submitted anything in writing to the Court or, to my knowledge, to any of the parties involved opposing the pending motions, and that weighs heavily in favor of approving the motions here. And to spare you the suspense, I am granting both motions.

I'll begin with a summary of the factual background as alleged, which I draw from the stockholder derivative complaint dated August 4th, 2020, and also from the stipulation and agreement of settlement, compromise, and release dated April 1st, 2022.

Fidelity National Financial, Inc. which I'll refer to as "FNF," is a title insurance and settlement services business. In September 2019, FNF's founder and board chairman raised the possibility of a potential acquisition of FGL Holdings, Inc., which I'll refer to as "FGL," a Cayman Islands entity. At the time, the founder and board chairman, Mr. Foley, owned 6.7 percent of the outstanding ordinary shares of FGL and approximately 3.2 percent of the outstanding shares of FNF.

The FNF board established a special committee to evaluate the potential transaction. The

committee retained Bank of America Securities and Trasimene Capital Management, LLC as its financial advisors. The special committee oversaw negotiations and approved a deal to acquire FGL at a value of 12.50 per FGL share, and the FNF board approved the transaction. The market reacted poorly to the deal announcement, causing FNF's market cap to decrease by $843 million.

The transaction closed on June 1st, 2020, with FNF issuing 27 million shares of FNF common stock and paying approximately $1.8 billion in cash to former holders of FGL ordinary and preferred shares.

The plaintiff, City of Miami General Employees' and Sanitation Employees' Retirement Trust, who I'll refer to as "plaintiff," made a demand on FNF under Section 220 of the Delaware General Corporation Law on April 17th, 2020, to inspect books and records to investigate possible wrongdoing in connection with the FGL acquisition.

FNF produced records in response to the demand, and plaintiff's counsel reviewed those documents to identify business dealings and connections between Mr. Foley or Foley-related entities and some of the members of the special

committee.

Plaintiff then filed an 85-page complaint on August 4th, 2020. The complaint named Mr. Foley and all other board members of FNF, and two Foley-affiliated entities as defendants. The complaint alleged four derivative counts: Count I for breach of fiduciary duty against Mr. Foley and two other FNF directors; Count II for breach of fiduciary duty against seven FNF directors on the special committee; Count III for aiding and abetting against Trasimene and the other Foley-affiliated entity named as a defendant; and Count IV for unjust enrichment against the two Foley-affiliated entities.

The complaint alleges that Mr. Foley engineered the transaction before the special committee was formed, that the special committee was conflicted from the start, and that the special committee abdicated its role by rubber-stamping the transaction. According to the plaintiff, this resulted in an unfair transaction process where Mr. Foley was able to extract a nonratable benefit in a number of ways.

First, by causing FNF to overpay for FGL, which Foley owned a larger stake in, relatively

speaking.

Second, through various side deals that supposedly benefited Mr. Foley.

And third, through fee arrangements with advisors to the special committee that indirectly benefited Mr. Foley, including $57.5 million in fees to MVB and $27 million in fees to Trasimene.

On October 27th, 2020, the FNF board established a special litigation committee to investigate the plaintiff's claims and determine how to best proceed in the interest of FNF and its stockholders. Mr. Walsh gave a detailed presentation today concerning the special litigation committee process, and many of the details that Mr. Walsh highlighted today really reflect best practices in terms of a special litigation committee representation.

The SLC, as I'll call it, was comprised of two independent directors: Sandra Morgan, an attorney at Covington & Burling and a former chair of the Nevada Gaming Control Board, and Heather Murren, a private investor and former managing director at Merrill Lynch.

The SLC later expanded to add a newly

appointed independent director, a retired California appeals justice, Justice Dhanidina. The SLC was advised throughout by independent legal and financial advisors.

On December 15th, 2020, I stayed the action pending the SLC's investigation. Between March 2021 and November 2021, I extended the stay a number of times and received a number of status reports from the SLC.

The SLC investigation was extensive. Again, I refer persons reviewing a transcript of this bench ruling to Mr. Walsh's presentation. The SLC investigation encompassed over 37,000 documents, 14 witnesses, and 17 formal SLC meetings. The SLC issued its findings as to the viability of plaintiff's claims and ultimately concluded that exploring a possible settlement was in the best interests of FNF stockholders.

Between August 2021 and January 2022, the SLC engaged in an extensive and hard-fought three-way settlement negotiation with parties to the litigation. On January 24th, 2022, the parties reached terms of an agreement to settle this action and executed a memorandum of understanding

memorializing those terms.

On April 1st, 2022, the parties submitted the terms of settlement to me by filing a stipulation and agreement of compromise, settlement, and release for the Court's review and consideration.

In exchange for dismissal of this action and a release of the plaintiff's claims, the defendants agreed to pay a monetary settlement of $20 million and adopt two corporate governance measures, which the stipulation of settlement refers to as the related-party transaction committee and the related-person transaction policy. The committee will include at least two independent directors who will review and approve related-party transactions. The policy will involve providing a clear definition of "related-person" and "related-party transaction," as well as a process for the submission, review, and approval of the related-party transactions by independent directors.

Also, the decision to add two independent directors to FNF's board can be attributed, at least in part, everyone agrees, to this litigation. The committee and the policy will remain in place for no less than three years.

On April 4th, 2022, I entered a scheduling order that had the effect of approving the form, mailing, and publication of the notice to stockholders of the pending settlement.

On June 7th, 2022, plaintiff submitted a declaration of Lance Cavallo, detailing the efforts of his company, Kurtzman Carson Consultants, LLC, to administer notice to stockholders. Notice involved mailing 187,789 notices to record and beneficial owners, remailing 36 returned notices, publishing a notice in the Depository Trust Company's Legal Notice System, and maintaining a toll-free hotline to provide stockholders with information. I've reviewed the details of the declaration, and I'm satisfied that notice was effective.

I'll turn now to my legal analysis of the pending motions.

The parties have asked me to decide whether the terms of the proposed settlement are fair and reasonable and also whether the requested attorneys' fees are fair and reasonable and should be granted.

The Delaware Supreme Court explained in *Barkan v. Amsted Industries*, "The Court of Chancery

plays a special role when asked to approve the settlement of a class or derivative action. It must balance the policy preference for settlement against the need to insure that the interests of [those not present in the litigation] have been fairly represented." In approving a settlement, the Court's function is to make an independent determination through the exercise of its own business judgment that the settlement is intrinsically fair and reasonable.

As Vice Chancellor Laster explained in *Activision*, the Court must ultimately "determine whether the settlement falls within a range of results, that a reasonable party in the position of the plaintiff, not under any compulsion to settle and with the benefit of the information then available, reasonably could accept." To make this determination, the Court considers a variety of factors, including, but not limited to, the nature of the claims, the risks of continued litigation, the circumstances through which the settlement was achieved, and other legal and factual circumstances of the case.

In evaluating these considerations, the Court frequently focuses on the "give" and the "get," comparing the value of the benefits achieved

against the strength of the claims being released.

Here, the give is the release of plaintiff's claims, and I reviewed the release, and I view it to be customary and not overly broad in scope.

The get is substantial, in my view. It includes a $20 million payment, appointment of two independent directors, and I'll note that those were achieved through a mootness process, but I'll address that later, and implementation of two corporate governance measures.

We need not dilate too extensively on the nature of the settlement because it should be obvious to all that it is an excellent settlement for the company. The independent directors and committee will improve the integrity of the board process. The policy will impose beneficial standards and processes for reporting, reviewing, and approving or ratifying transactions with related persons, including a multi-step process for transactions within the policy will first be reviewed by the chief legal officer or general counsel who will then report to the committee.

And the power to approve these sorts of transactions can only be delegated in narrow circumstances. So the policies collectively impose a

robust and beneficial system of checks and balances to monitor for the precise sort of risks and problems identified by plaintiff in the complaint. This is all great. Plus, the settlement secured $20 million in cash.

The process by which the settlement terms were negotiated further confirms the fairness of the result. The settlement was achieved through extensive arm's-length negotiations with the SLC and the parties with experienced counsel on all sides. The involvement and approval of the SLC as well as the opinion of both parties as to the fairness of the settlement are all indicia of fairness, in my opinion.

The settlement is particularly beneficial when considered in light of the continued risks of litigation. There are risks on all sides, of course. To highlight those to plaintiff, the SLC conducted a thorough investigation. The SLC comprised independent directors, capable advisors. There was a meaningful risk that the SLC would recommend dismissal and that I would review that motion under *Zapata*.

Plaintiff would also face risks in defending against the SLC's motion to dismiss or motion for summary judgment, proving the aiding and

abetting claims against various parties, and being unable to prove potentially the full extent of damages sought. Plaintiff would have incurred significant costs from continued litigation which could have eaten into any value that the company recovered in an ultimate fee award. This litigation would also impose costs on a nominal defendant for whom the litigation was being pursued.

So for all of these reasons, I view the settlement as more than reasonable and fair, and it is approved.

Let's turn now to evaluating the application for attorneys' fees and expenses.

Plaintiff's counsel has requested a fee award of $4.4 million, including expenses for monetary and therapeutic benefits conferred in connection with this litigation. Plaintiff advances two distinct bases to support the fee award. First, they point to the mootness doctrine for the appointment of the two directors, and second, they look to the monetary and therapeutic benefits obtained by the settlement to justify the award. And I'll discuss those standards briefly separately.

Under the mootness doctrine, the

plaintiff's counsel is entitled to mootness fees when (1) the suit is meritorious when filed; (2) the action producing the benefit to the corporation was taken by the defendants before judicial resolution was achieved; and (3) the resulting corporate benefit was causally related to the lawsuit.

In determining an appropriate award of attorneys' fees and expenses generally for a common benefit, Delaware looks to the *Sugarland* factors which are (1) the results achieved; (2) the time and efforts of counsel; (3) the relative complexities of litigation; (4) the contingency factor; and (5) the standing and ability of counsel. Of these factors, the results achieved, the benefit achieved, is given the most weight.

I'll clear some of the clutter here first. The elements of the mootness fee request are met, the complaint was meritorious when filed, FNF acted by appointing two new independent directors before I resolved this case, and FNF acknowledged that the pendency of this action was a consideration in appointing the two independent directors. So those elements are met here.

The question of how to value the

benefit provided by the appointment of two independent directors is slightly more nettlesome, as decisions of this court reflects the extreme swings in values ascribed to this benefit. In *EMAK Worldwide v. Kurz*, for example, this court awarded $400,000 for retaining independent board members by invalidating a consent that would have reduced a board from seven members to three members, thereby allowing a controller to control the board. And in *Liberty Tax*, Chancellor Bouchard found it reasonable to award 350,000 to $500,000 to ensure board independence by eliminating a controller for the company, and I view those as somewhat comparable benefits.

By contrast, in the context of a much larger cap company, in *Google*, then-Chancellor Strine awarded 8.5 million in fees for a similar benefit, a corporate governance settlement that resolved a challenge to a stock plan that plaintiffs alleged would allow the controller to issue new classes of stock but maintain control without paying for it. The primary benefit of the settlement was that each time the controller sought to issue nonvoting stock, they would need approval of every independent director on Google's board.

And in discussing the significance of this result, Chancellor Strine suggested that there are a network of facts that make independent directors conscious of their reputations, not only in this court, but in their professional circles, and then the Chancellor awarded 8.5 million in fees.

So I discussed these cases solely to illustrate the swings in value previously ascribed to similar benefits presented to this court. Plaintiff contends that the addition of two independent directors here confers a minimum benefit of $2 million, and plaintiffs hone in on briefing on two decisions of this court approving settlement and fees. That's *Tile Shop* and *Activision*.

In *Tile Shop*, Vice Chancellor Glasscock stated that a million dollars was an appropriate fee for the appointment of an independent director.

And in *Activision*, this court views fees in the realm of 5 to 10 million as reasonable for the installation of two independent directors and the reduction of a controller's controlling stake in a large cap company.

In *FrontFour*, I concluded that an

appropriate fee award for the appointment of two independent directors after surveying these precedents aside from *Tile Shop* and numerous others was approximately $1 million.

So putting it all together, as we have to do in these scenarios, we look really to precedent to inform the value of the benefits conferred, and for good reason. I think the appropriate ballpark here is 1 to $2 million for the appointment of independent directors, and so for the present purposes, just to move on, to evaluate the fairness of the overall fee requested, I'll call it a million.

That's lower than the value plaintiff counsel ascribes to this benefit, but I haven't reduced the value of the overall amount requested. So I'll move on to explain my thinking concerning the value of the cash component and the fees that it should generate.

Obviously, the value of the cash components is quantifiable, and in these sorts of circumstances, the Court will often gauge reasonableness of the fee award with reference to the percentage of the amount achieved.

As the Delaware Supreme Court

explained in *Americas Mining*, this court considers the stage of litigation when gauging the reasonableness of the requested fee. In that range, "33% is the very top." "When a case settles early, the Court of Chancery tends to award 10-15% of the monetary benefit conferred. When a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically" the percentage conferred will be somewhere in between. "Higher percentages are warranted when cases progress to a post-trial adjudication," generally. The benefit again is quantifiable, $20 million, and the case settled early in the litigation process, which typically would put us in the 10 to 15 percent range.

So you can do the math. 15 percent, I think, of 20 is short of what the plaintiffs ascribed to it. This case was stayed before any motion practice or answer to the complaint, and ultimately the case was settled while the stay was in effect. So based on the limited involvement of counsel, I think, again, an award of 10 to 15 percent would ordinarily be appropriate here based solely on the cash component.

I will say that plaintiffs point to a

number of precedent rulings granting larger percentage of cash benefits for comparable efforts to argue that their efforts justify a fee award of up to 25 percent. I acknowledge that the greater percentages have been granted by this court in comparable circumstances or where -- I think the traditional ballpark is appropriate here, again, 15 percent or 3 million, approximately, for this portion of the benefit makes sense. But that brings us to 4 million total in fees so far, and I'll address now the last component of the settlement, which is the governance measures achieved.

Mr. Walsh earlier called these the centerpiece of the settlement terms because they strike at exactly the sort of harm that the plaintiffs identified in their complaint. I'd note that they're only in place for a period of three years. That's not uncommon in these sorts of settlements. It doesn't mean that the board can't extend these measures to benefit the corporation.

But I do view these sorts of corporate governance benefits as meaningful. I think the process that's been imposed is likely to improve the integrity of board processes for the benefit of the company. And I think it's obvious that the value of

fees connected to this particular benefit achieved is at least $400,000, and probably more.

And I'll point to established precedent, including *Ebix*, *Liberty Tax*, and *Ledger* as helpful benchmarks in valuing this component of the settlement.

So for these reasons, I think the value of the benefits conferred justify the $4.4 million requested in fees.

And for completeness, I'll just address the remaining *Sugarland* factors, all of which confirm the propriety of the amount requested.

This case was litigated on a fully contingent basis. Delaware public policy supports rewarding that risk-taking behavior. The ability of counsel weighs in favor of approving the fee award, and that's the ability of all counsel involved. Plaintiff, the defendants, and the SLC were all represented by experienced advocates who hold the esteem of this court.

The time and effort of counsel weighs in favor of approving the fee award, but that does require some explanation because the lodestar is a bit high. Plaintiff invested over 500 hours into the

abbreviated litigation before the SLC swooped in. Throughout the investigation and early stages of the litigation, plaintiff's counsel showed skill and positioned themselves to achieve substantial benefits that were ultimately obtained in the settlement.

The fee, of course, represents a 14X multiple on plaintiff's counsel's hourly rate. The total lodestar, $313,654 total lodestar amount and effective hourly rate and expenses of $8,748 per hour. That's high. That would be a high hourly rate. Although high, this hourly rate is within the realm of hourly rates approved by this court when a plaintiff attains a substantial benefit along the lines achieved in this settlement. I'll point to *Sciabacucchi v. Salzberg* as one example where the court approved and awarded fees with an implied hourly rate of much more.

Generally, this court is reticent to punish plaintiff for achieving an exceptional result without extensive litigation efforts, and we always favor litigants working with special litigation committees to resolve claims efficiently and, as Mr. Lebovitch argued in his presentation today, the $4.4 million fee was negotiated. This was not opposed by the parties that have to pay it, and that does

counsel heavily in favor of approving it and does speak to the indicia of fairness and the appropriateness of the fee and the value that the parties themselves placed on it.

Of course, the complexity of litigation supports approving the fee as well. In sum, the fee requested is reasonable and the motions are all granted in their entirety.

Mr. Lebovitch, I'll look to you to submit a form of order that fills in the blanks, the kind you would normally hand up at a settlement hearing, and I will grant it on the docket.

With that, are there any questions?

ATTORNEY WALSH: No, Your Honor. Thank you.

ATTORNEY LEBOVITCH: Thank you very much, Your Honor. We'll get the order in promptly.

THE COURT: Thank you all very much, and congratulations on this outcome. We are adjourned.

(Proceedings concluded at 2:37 p.m.)

- - -

CERTIFICATE

I, DOUGLAS J. ZWEIZIG, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 56 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 1st day of July, 2022.

/s/ Douglas J. Zweizig

Douglas J. Zweizig
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter

TAB 13

EFiled: Jul 12 2024 11:32AM EDT
Transaction ID 73640786
Case No. 2021-1066-LWW

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE LORDSTOWN MOTORS CORP. : Civil Action
STOCKHOLDER LITIGATION : No. 2021-1066-LWW

- - -

Chancery Courtroom No. 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, June 24, 2024
11:00 a.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

SETTLEMENT HEARING and RULINGS OF THE COURT

APPEARANCES:

GREGORY V. VARALLO, ESQ.
Bernstein, Litowitz, Berger & Grossmann LLP
-and-
THOMAS JAMES, ESQ.
of the New York Bar
Bernstein, Litowitz, Berger & Grossmann LLP
-and-
GUSTAVO F. BRUCKNER, ESQ.
ANKITA SANGWAN,ESQ.
of the New York Bar
Pomerantz LLP
-and-
ADRIENNE BELL, ESQ.
of the New York Bar
Kaskela Law
for Plaintiffs

RAYMOND J. DiCAMILLO, ESQ.
KEVIN M. GALLAGHER, ESQ.
NICHOLAS F. MASTRIA, ESQ.
Richards, Layton & Finger, PA
for Defendants David Hamamoto, Mark Walsh, Andrew Richardson, Steven Hash, Judith Hannaway, and DiamondPeak Sponsor LLC

- - -

THE COURT: Good morning.

ATTORNEY DiCAMILLO: Good morning, Your Honor. Ray DiCamillo for the defendants. Here with me this morning from my firm, Kevin Gallagher and Nick Mastria.

THE COURT: Good morning.

ATTORNEY DiCAMILLO: We also have in the back of the courtroom, Your Honor, one of our summer associates from Temple Law School, Andrew Rosen.

THE COURT: Glad to have you here.

MR. ROSEN: Thank you.

THE COURT: Good morning, Mr. Varallo.

ATTORNEY VARALLO: Good morning, Your Honor. Greg Varallo from BLBG for the plaintiffs. I rise to introduce our table. This morning, with Your Honor's permission, my partner Mr. Thomas James will be making the argument.

THE COURT: Of course.

ATTORNEY VARALLO: With us today are co-counsel Gustavo Bruckner --

ATTORNEY BRUCKNER: Good morning, Your Honor.

ATTORNEY VARALLO: -- and Ankita

Sangwan from the Pomerantz firm, and Adrienne Bell from the Kaskela Law firm.

THE COURT: Welcome.

Mr. James, glad to hear from you.

ATTORNEY JAMES: Thank you, Your Honor. Always a pleasure to be here.

May it please the Court. Tom James, Bernstein Litowitz Berger & Grossmann, on behalf of plaintiffs, Benjamin Hebert and Autry Amin.

This is the time the Court has set for plaintiffs' motion to approve the settlement in this action, the allocation, award of attorneys' fees and expenses, as well as an incentive award, and to certify the class.

Unless Your Honor has a different preference, I'll plan to give a brief overview of the proposed settlement. I'll then address class certification and then turn to the merits of the settlement itself and the plan of allocation, and finally, the fee and expense request and the incentive award request.

THE COURT: That's fine, thank you.

ATTORNEY JAMES: And of course if Your Honor feels we've exhausted a topic in the briefs, you

can waive me off and I'll happily concede.

At the outset I'll note, as we represented last week in our letter to the Court, we have not received any objections to the proposed settlement or any of the issues today. I do not believe there are any objectors present here today, so I think we can move past that.

But turning to the facts of this case, I'll try and be brief, given the comprehensive briefing that we've submitted.

Our case begins back in 2019, when DiamondPeak was first taken public. DiamondPeak was a SPAC, and of course it bore many similarities to other SPACs that Your Honor and others have had occasion to consider over the past couple of years. DiamondPeak issued 28 million units for $10 a unit. As is customary, those units contained one Class A public share as well as a fraction of warrants. Those Class A shares had redemption rights, meaning that stockholders could choose to recoup their initial $10 per share investment plus interest rather than roll their shares into the ***pro forma*** entity that DiamondPeak ultimately identified and merged with.

Like many other SPACs, DiamondPeak

also issued Class B founder shares, including to defendants here, for nominal consideration that would allow those insiders the ability to own a substantial piece of the ***pro forma*** entity with a relatively low up-front cost. And of course those founder shares lack redemption rights, and Your Honor has written extensively about the potential conflicts that dynamic creates, so I won't retread that ground.

When DiamondPeak first identified Legacy LMC as a merger target in June of 2020, it had about nine months left of its 24-month window to complete a de-SPAC transaction. Legacy LMC was an electric vehicle manufacturer. Its flagship vehicle was an electric pickup truck called the Endurance. I'll note that in the registration materials, DiamondPeak identified that it would be seeking to merge with a targeted real estate business.

To their credit, defendants must have realized that they needed to do some up-front diligence, and they retained McKinsey for that purpose. And perhaps to McKinsey's credit, as well, they identified in the diligence they conducted what we would submit were significant problems with Legacy LMC's business plans and future prospects.

And chief among those issues that McKinsey identified were the production start date, to actually complete -- begin completing production of the Endurance, which they felt was way too aggressive. It would be eight or more months in the future; issues that then flowed into Lordstown's projections, and the issue that many of the preorders that Lordstown -- or I guess at the time Legacy LMC had booked were unreliable, potentially fraudulent.

We alleged in our complaint and what we would submit the document discovery showed was that defendants chose to press on, including by issuing a false and misleading proxy statement that was designed to encourage stockholders not to redeem their shares. And we would submit the defendants in this case fell prey to the very same incentives that Your Honor and others have identified.

Plaintiffs have proceeded as Delaware courts have come to expect. We made Section 220 demands, we incorporated those 1400 or so pages of documents from those demands into plenary complaints, which were later consolidated.

I think Your Honor will recall that there was more prediscovery activity in this case than

is typical. There was an initial motion to dismiss filed by defendants, as well as a motion to stay. My colleague Dan Meyer argued that motion to stay, which Your Honor denied. And after it was fully briefed, defendants withdrew their initial motion to dismiss -- their initial motion to dismiss, excuse me.

We amended the complaint, at which point defendants renewed their motion to dismiss, which was subsequently briefed again. And then I believe after Your Honor issued the ***Gig3*** opinion, that subsequent motion to dismiss was withdrawn as well and we moved straight into plenary discovery.

I'll say that litigating this action was, you know, intense, and uniquely so in ways that we don't often experience. We served extensive discovery. We ultimately ingested and reviewed over a quarter of a million documents from both defendants and third parties. We also litigated one largely -- a motion to compel before Your Honor to compel document production from Lordstown.

And what made this case unique and uniquely difficult, I'd submit, was the fact that we spent a significant amount of time litigating basically a parallel bankruptcy action while this case

was proceeding. And we did so in order to preserve the class's claims in this action.

Initially, Lordstown filed an adversarial action in the bankruptcy court and named co-lead plaintiffs in this case defendants in that action and sought to stay this action in favor of the bankruptcy action.

We retained bankruptcy counsel. We opposed that action. That was a fairly intensive effort that involved one of my colleagues, Glenn McGillivray, deposing -- I believe it was Lordstown's CFO and then cross-examining him on the stand during the bankruptcy proceeding. That also involved one of our colleagues, Ms. Sangwan, providing testimony in the bankruptcy action and also submitting herself to cross-examination there as well.

So it was a significant lift. And that continued when Lordstown prepared a plan of bankruptcy. And, you know, thankfully we had engaged very good bankruptcy lawyers who identified that there was language in that plan that may have actually operated to release our claims. And we were able to negotiate and make sure that there were no claims that were released in that action as well.

You know, all in, those efforts, I think, were fairly extensive. It would be represented in our time charts; and it's also represented in our expense application. Retaining our own bankruptcy counsel was quite expensive.

THE COURT: I saw that. It was about $271,000, I believe.

ATTORNEY JAMES: That's correct.

THE COURT: Do I have any underlying information about what that expense represents in terms of the hourly rate that was charged or the time that was incurred?

ATTORNEY JAMES: You know, we were given bills regularly, obviously, by bankruptcy counsel, which we reviewed and would have discussed with them as they came in. They are not in the record before Your Honor. If Your Honor would like a supplemental submission, I'm sure we can arrange for that.

THE COURT: Okay. Thank you.

ATTORNEY JAMES: What I will say, though -- and Your Honor didn't ask it directly -- but that effort was quite extensive, and you know, we considered before retaining bankruptcy counsel certain

others. They came highly recommended to us. We thought that they did a great job and were very reasonable under the circumstances.

And, again, I think most obviously from the initial adversarial action that was filed, and then I think more subtly through the language in the plan of bankruptcy itself, there was a real concern on our end that the class claims would be released and the class would be left with nothing.

So from our perspective these were obviously significant costs, but highly necessary costs and costs that we felt, as fiduciaries of the class, that were necessary to incur.

So by the time that the parties reached mediation in this case, I think it's fair to say that we were all very knowledgeable about the strengths and weaknesses of our respective claims. I'll note further that we also retained a valuation expert, both in the case itself, but also to help us sharpen our damages and valuations theories going into the mediation.

We attended a full-day mediation session that was overseen by Miles Ruthberg from Philips ADR. We continued to negotiate the settlement

under the auspices of Mr. Ruthberg for, I believe, several weeks thereafter before entering into a term sheet, and then it took another several weeks after that to iron out all the fine points of the stipulation itself.

So I think it's fair to characterize the negotiation in this process as extensive and arm's length. We submit the result ultimately obtained for the class, which is a $15.5 million cash payment, is a very good one — I would say a great one under the circumstances.

So unless Your Honor has any questions about the background and the lead-up, I'll happily move on to class certification.

THE COURT: No questions. Thank you.

ATTORNEY JAMES: Sure.

So the settlement contemplates certification of a non-opt-out class under Rules 23(a), 23(b)(1), and (b)(2), which consists of holders of DiamondPeak Class A common stock as of the time of the de-SPAC merger, which is October 23, 2020. And that class would exclude defendants, DiamondPeak directors and officers, their immediate family members, any DiamondPeak affiliates, and any entities

in which defendants or any of those excluded parties had a controlling interest in as of the effective date.

And Your Honor entered the scheduling order in this matter and preliminarily certified the class on March 12 of this year.

As Your Honor knows, under Rule 23, a class may be certified if the criteria of Rule 23(a) are met, as well as the criteria of Rule 23(b)(1) or (b)(2). The Rule 23(a) criteria are numerosity, commonality, typicality and adequacy. I'll walk through those in order. I think they're all relatively easily met here.

There were 28 million DiamondPeak Class A shares outstanding. And as the affidavit of Luiggy Segura from our settlement administrator, JND, establishes, there were at least 32,551 notices mailed to potential class members and their nominees. That's at paragraph 8 of the affidavit which was filed separately, I believe last week. This more than satisfies the numerosity requirement.

As to commonality, I think it's fair to say that the questions were uniform throughout. And the issues here included whether defendants

breached their fiduciary duties in connection with initiating, negotiating, and ultimately approving the de-SPAC transaction at issue, as well as issuing the false and misleading proxy statement. So commonality is satisfied.

Similarly, the representative parties' claims are not only typical, but I would say identical to those asserted on behalf of the class. Our clients were DiamondPeak Class A stockholders who owned as of the effective time, as were all other class members, so typicality is satisfied.

And, finally, the question of whether the representative parties will fairly represent the class's interest. I think the answer here is, again, yes. We submitted affidavits required by Rule 23(f)(2)(A), which detailed the involvement from Mr. Amin and Mr. Hebert, their involvement in this action, which I believe more than demonstrates their adequacy. And again, those affidavits were included with our opening brief.

Turning to Rule 23(b)(1), the question for the Court today is whether, absent class certification, there would be a risk of inconsistent or varying adjudications with respect to individual

class members or adjudications of individual claims that would, as a practical matter, be dispositive of the interests of other parties that would otherwise be part of the class.

And, again, I think the answer to both of those questions is pretty clearly yes. As to the former, it's possible that these same issues could have been litigated before different judges, ultimately resulting in different answers. And as for the second question, I believe that, absent class treatment, one or more stockholders could have precluded the ability of others within the class to achieve relief, or at least very possibly severely prejudiced the rights of other class members.

And to wrap it up, I think this court has repeatedly ruled that fiduciary duty cases such as this one are well-suited to class treatment under Rule 23(b)(1).

Turning briefly to 23(b)(2), the question is whether defendants have acted or refused to act on grounds that are generally applicable to the class. Again, I think the answer to that question is a simple yes. The conduct here, we allege, identified -- the conduct here that we identified

treated all class members identically.

Turning to the notice, the Court, again, entered an order on March 12 directing notice to be mailed. As I mentioned earlier, we filed Mr. Segura's affidavit on July 17 describing the mailing of notice, the publication of the summary notice, and the establishment of a telephone helpline and website for the settlement.

I think I mentioned earlier that 35,551 copies of the notice were mailed to potential class members and their nominees. That's paragraph 8 of the Segura affidavit.

The summary notice was also published in ***Investors Business Daily*** and transmitted over ***PR Newswire*** on May 6. That's in paragraph 9 of the affidavit.

Additionally, JND, the settlement administrator, established on April 26 of this year and continued to maintain a settlement website that includes information on this action and the proposed settlement. It also includes copies of the notice, the scheduling order, and the stipulation that are available for download. That's at paragraph 11 of the Segura affidavit.

Turning briefly to the contents of the notice, which are set forth in the new Rule 23(f)(3)(D). I'll run through this briefly. The notice sets forth the location, date, and time of this hearing. That's at paragraph 60.

The notice describes the nature of the action in paragraphs 4 to 36. It contains the class definition in paragraph 37. It contains a summary of the claims, issues, defenses, and relief that the action sought in paragraph 17 to 21.

The notice contains a description of the terms of the proposed settlement at paragraph 38. It describes the attorneys' fee and expense award and incentive awards in paragraphs 55 through 57. It includes instructions for objectors in paragraphs 61 through 67. It identifies class counsel and how to contact class counsel in paragraphs 68 and 69. And it includes the disclaimer not to contact the Court, but rather, class counsel, also in paragraph 69.

So I think, wrapping that all up, the record amply demonstrates that the notice requirements in the scheduling order have been fully met. Notice was given in conformity with the means approved by the Court under Rule 23(f)(3)(C), and the content and

substance of the notice met the requirements of Rule 23(f)(3)(D), as well as due process.

So unless Your Honor has any questions regarding class certification, I'll move on to the settlement itself.

THE COURT: No questions. Thank you.

ATTORNEY JAMES: Sure.

So turning to the settlement approval, I think this Court's task has been fairly described as bringing the Court's own business judgment to bear to ensure that the class receives fair consideration in exchange for the releases granted. It's been colloquially referred to in ***Activision*** and other cases as comparing the "give" and the "get." And that's meant to ensure the basic fairness, reasonableness, and adequacy of the compromise.

I'll note further that the recently adopted Rule 23(f)(5) further informs that analysis and sets forth a list of factors that the Court has to find in order to approve a settlement. And those include that counsel adequately represented the class, that notice was adequately provided, that the settlement was negotiated at arm's length, and that the relief provided falls within a range of

reasonableness, taking into account the strength of the claims, the risks at trial and the appeal, the scope of the release, and any objections.

I think I've covered a number of them, but just to sort of wrap it up into one package, as I mentioned earlier, we're not aware of any objections to the settlement or the proposed fee. I just discussed the notice, which was adequate and constitutional in our view.

I mentioned previously that the settlement was negotiated over several weeks under the auspices of a neutral third-party mediator, and I think that the strength of the outcome attests to the adequacy of the representation here.

And so that leaves us with the more traditional factors, such as the terms of the settlement itself and how they were arrived at.

So turning first to the "give," the scope of the release, I think that Your Honor will find the release is relatively typical and similar to ones that Your Honor has approved in other cases. The release is limited to claims that plaintiffs asserted in the complaint or claims based on the same set of operating facts that relate to the ownership of

DiamondPeak Class A stock as of the effective time. I'll note further that the release carved out the claims that were, at that point, pending in the federal securities action in the Northern District of Ohio.

So measuring this release against the "get," the $15.5 million cash payment to the class, I think, is substantial. I think the nice thing about cash is that its value is self-evident, and I think the settlement here is particularly reasonable given the very real risks that plaintiffs had faced up to that point and I think would continue to face going forward.

THE COURT: Question for you about the $15.5 million payment. I saw in the stipulation that there was 12 million coming from insurance.

ATTORNEY JAMES: Yes.

THE COURT: And 3.5 million that would be in some form of a security from the defendants themselves. Is that a bond? Has it been posted?

ATTORNEY JAMES: That's correct, Your Honor. So, you know, we've discussed this extensively with defendants' counsel. It is in the form of a security agreement that we are in the process of

finalizing with defendants. The security is coming from both Mr. Hamamoto and Mr. Walsh. I believe that they're -- and Mr. DiCamillo can correct me if I'm mistaken. I believe that they are currently litigating their entitlement to indemnification in the parallel bankruptcy action. The security arrangement allows us to execute on that money in the event that those claims aren't successful.

Let me know if I've misdescribed.

ATTORNEY DiCAMILLO: That accurately describes it, Your Honor. I'm happy to answer any questions.

An indemnification claim has been made in the bankruptcy matter, and a hearing on that is scheduled for sometime in July. If the bankruptcy court tells the entity that they have to honor the indemnification obligation, then that would be paid over to the class.

In the event that it does not, then Mr. James has security from Mr. Walsh and Mr. Hamamoto for that 3.5 million.

THE COURT: Either way, the 3.5 million will be paid into the escrow account?

ATTORNEY DiCAMILLO: Correct.

THE COURT: Okay. Thank you very much.

ATTORNEY JAMES: Thank you, Your Honor.

So taking a step back, I think the settlement here, as I mentioned, is reasonable, given the risks that we had faced and would continue to face.

I touched previously on Lordstown's bankruptcy. Obviously, that had diverted significant resources in the past. I think it would also -- it had been and would continue to be difficult to get discovery out of Lordstown. Your Honor saw firsthand how vehemently they opposed our motion to compel.

I think it's fair to say that deposing Lordstown witnesses would have been further difficult because many of their officers and employees had left the company by that point. Other of their officers and employees were, you know, currently working and tied up in the bankruptcy action itself. So that was one practical difficulty that we faced.

Another practical difficulty that we faced is, as we outlined in the brief, how either party, really, could arrive at damages in this case.

I believe this can still be fairly described as an open issue, even though a lot of the issues at the motion to dismiss phase had been exhaustively ironed through.

I'm unaware of a case going the full distance and being tested at trial. You know, we gave this a lot of thought. Lordstown is not unlike many companies that are acquired in a de-SPAC transaction — a private company in a somewhat novel industry that doesn't have a history of building and beating projections and not a lot of true comparables to speak of. So, you know, applying a traditional income or market approach to valuation would be quite difficult. Doable, certainly, but very difficult.

And there was also the fact that Lordstown's shares traded at or above the redemption price for a period of time after the closing. Again, I think we would have had strong arguments rebutting that point, but it was a point of risk that we would have had to face nonetheless.

I think, simply put, damages would have been a very interesting but difficult question for everybody involved; including Your Honor, I expect.

As for the views of counsel, plaintiffs' counsel strongly supports the settlement. We believe the settlement is quite strong, particularly given the risks that were faced here. We think that we got a great result and the "get" far outweighs the "give" in the settlement, and we would respectfully submit that Your Honor approve the settlement.

And unless Your Honor has any questions, I'm happy to touch very briefly on the plan of allocation and then move on to the fee and expense award.

THE COURT: No questions, thank you.

ATTORNEY JAMES: Sure.

So the plan of allocation, which Your Honor will find at paragraphs 47 through 52 of the notice, is consistent with what this court has previously approved. It provides for a direct distribution to class members through the Depository Trust Company, the DTC, which this court certified and endorsed in other actions.

I'll note that the plan of allocation here, in addition to withholding payment from excluded parties, also would withhold payment from anybody who

redeemed their shares. Here, there are, I think, 970 shares that were redeemed; so a relatively small number, but nonetheless, shares that would be excluded from the plan of allocation.

Turning now to the fee and expense award. We are seeking an award of 22.5 percent of the settlement amount net of fees -- that equals $3,390,829.42 -- as well as reimbursement of litigation expenses of $429,647.01.

The applicable law is well known. It's set forth in ***Sugarland***. The Court examines the results achieved, the time and effort applied, the relative complexity of the litigation, the standing and ability of counsel, the contingent nature of the litigation, the stage at which the case ended, and whether plaintiff can rightly claim credit for the benefit conferred or only a portion of that benefit.

Again, we've discussed the benefit, which is the predominant factor in the ***Sugarland*** analysis. That is a $15.5 million cash settlement, a self-pricing "get." Under ***Americas Mining*** and subsequent cases, the fee sought is often expressed as a percentage of that benefit, and Delaware courts have helpfully provided brackets where that award might

fall based on the relative stage of the case.

In our case, we settled after we engaged in meaningful litigation efforts, and paraphrasing from the ***Dell Class V*** case, which itself cites to ***Americas Mining***, the appropriate bracket is 15 to 25 percent.

And I think our papers make pretty clear that we engaged in substantial and, as I mentioned earlier, uniquely difficult litigation efforts here. We litigated this case for close to three years. That included three prediscovery motions, including two motions to dismiss that were all fully briefed. We obtained and reviewed a substantial amount of document discovery and won a motion to compel in the process.

We expended substantial time and resources into the various issues relating to the bankruptcy proceedings, including both eliciting and giving testimony in the bankruptcy proceedings. And, again, I would submit that it was our efforts and diligence in those bankruptcy proceedings that prevented the class's claims from being wiped out in their entirety.

I think the 22.5 percent fee award

sought here is comparable to the precedents that we identified in our papers.

Now, you know, you would typically consider the time and effort of counsel as a cross-check after running through the traditional ***Sugarland*** factors. I thought it actually is a little bit more helpful to consider them up front in connection with the stage of the case, which I think supports the reasonableness of the fee request sought here.

As Your Honor saw from the affidavits that were submitted by counsel, we spent 7600 hours litigating this action, which works out to an effective hourly rate of $446.07.

I was never directly privy to this, but I suspect that when I was a second-year associate at a large defense firm, I was probably billed out at a rate that was a little bit higher than that.

The remaining ***Sugarland*** factors I think all weigh in favor of approval here. Again, we took this action on an entirely contingent basis. We faced real risk of being zeroed out; and we cited precedent -- I believe it's from the ***Sauer-Danfoss*** case -- that when you think about contingency risk,

you think about it ***ex-ante*** when you start the case.

And when we brought this case originally, even Your Honor and your colleagues have had occasion to rule on many, many SPAC motions to dismiss at this point, I believe this was one of the earlier cases. I believe in the motion to stay decision, Your Honor made that point as well.

So I think that factor weighs in favor of the real contingency risk that we faced here.

The litigation, I think, was fairly complex. I think the additional bankruptcy layer added another layer of complexity that we don't otherwise face frequently.

Concerning the standing and ability of counsel, we would like to think that our track record of litigating meritorious cases before Your Honor and others speaks for itself. And likewise, our adversaries at Richards, Layton & Finger and Sullivan Cromwell are fine advocates and well known to the Court too.

And, finally, I don't believe that there's any claim here that the credit here rests anywhere but with plaintiffs and their counsel.

I want to spend a moment talking about

expenses. We have asked for expenses to be deducted from the fee award and then the fee award to be expressed as a percentage of the net fee award.

Again, I think that method is supported in cases like ***Dell Class V*** and, more recently, in the ***Fishel*** litigation before Chancellor McCormick. And I think in addition to being supported by precedent, it's supported by principles of fairness. As Your Honor asked before, we absorbed what I think are significant and necessary expenses here, including the roughly $270,000 to hourly bankruptcy counsel and a substantial amount of other fees that went into the bankruptcy proceeding -- deposition costs and the like -- as well as another 70,000 or so dollars in expert fees.

And those are fees, I think, that one would typically expect to incur much later in a case once you get deeper into expert discovery, perhaps even closer to trial.

We rarely, if ever, expect to incur the hourly fees of a bankruptcy firm. But, again, we would submit that those fees were fair and necessary and consistent with our fiduciary duties to incur in order to protect the claims for the class.

And I'll note that -- I went back and I looked at the papers from ***MultiPlan*** just to get a sense of what their expenses were in that case. Those expenses were roughly $83,000. And if you take our total expenses here and you back out those expenses that I just mentioned, you get roughly in the same ballpark. It ends up around $87,000.

As I mentioned earlier, I think ***Dell Class V*** and ***Fishel*** support deducting the expenses first, in the manner we propose, and then applying the fee percentage from the net settlement fund.

And I'll note further, as we spelled out in our papers on page 44, the discrepancy between the gross and the net fund expressed as just a pure percentage identifies, I think, why applying the net fund method is much fairer in these circumstances.

And so concluding that segment of this presentation, we would respectfully submit that Your Honor, in exercising your discretion and as informed by precedent, ***Sugarland***, award the fee request as fair and reasonable, as well as reimbursement of expenses.

Unless Your Honor has any questions, I'll spend just a moment on the incentive award request.

THE COURT: No questions. Thank you.

ATTORNEY JAMES: Sure.

So as Your Honor noted from our papers, we are seeking an additional, I'd say relatively modest, incentive award of $5,000 for each of the named plaintiffs, Mr. Hebert and Mr. Amin, in this action. And I think Your Honor put it best, and very succinctly, in the ***HomeFed*** case, when Your Honor said "it's important to incentivize stockholders to serve as engaged representatives." I think it's particularly important in SPAC cases where, in our experience, many of the people who are members of the class that we've spoken to and that we've seen in other cases tend to be smaller retail investors.

As their affidavits demonstrate, both of our clients, Mr. Amin and Mr. Hebert, were actively involved in this action, including by participating in discovery, having their devices and documents imaged and collected.

As Vice Chancellor Laster noted in the ***Voigt v. Metcalf*** case, that's not something that many people would willingly agree to. Certainly not something that I would feel super comfortable agreeing to. But Mr. Hebert and Mr. Amin stepped up to the

plate in this action; and they were also named as defendants in the bankruptcy action, which isn't something that typically happens, I think, in the ordinary course of serving as a class representative.

I think the request here is supported by Your Honor's ***HomeFed*** decision and the logic in that case, as well, and so we would respectfully submit that the incentive fee application be approved too.

And unless Your Honor has any other questions for me, I have nothing to add.

THE COURT: No questions. Thank you very much. I appreciate it.

ATTORNEY JAMES: Thank you.

THE COURT: Mr. DiCamillo, anything from you?

ATTORNEY DiCAMILLO: Nothing from defendants, Your Honor. Thank you.

THE COURT: Okay. Thank you very much.

Well, thank you for your time and for being here today and for your briefs, which were extraordinarily helpful to me in preparing.

I have a bench ruling ready that I can deliver to you now, if you'll bear with me.

Before me this morning is the proposed settlement of the matter captioned ***In re Lordstown Motors Corporation Stockholders Litigation***, which is Civil Action No. 2021-1066-LWW. The matter concerns an October 2020 de-SPAC merger between DiamondPeak Holding Corporation, which is a SPAC, and Lordstown EV Corporation, which was then a private electric truck startup company.

An October 8, 2020, proxy statement filed in connection with the merger stated that the production of a truck called the Endurance was expected to occur in the second half of 2021. The proxy also reported preorders for about 38,000 trucks, yielding an estimated total purchase price of $1.65 billion.

The proxy purportedly did not disclose that 26,000 of the preorders were placed by a single person who allegedly could not feasibly purchase this volume of trucks.

In advance of the de-SPAC merger, the board of the SPAC retained a consultant to engage in due diligence. The consultant's work allegedly cast doubt on the production timeline and the anticipated purchase orders that were described in the proxy.

After the de-SPAC merger closed, a group called Hindenburg Research published a report with similar findings regarding the Endurance's production. An SEC inquiry into Lordstown was announced soon after that. I note that I'm not making any findings of fact today in reciting the background; I am simply reporting what was discussed in the complaint.

This action was then filed on December 8 of 2021 after Section 220 demands, and an amended complaint was filed on July 22 of 2022. The amended complaint followed a motion to stay, which I denied in a March 2022 decision, and a fully briefed motion to dismiss that the defendants withdrew.

The plaintiffs alleged in their amended complaint that the directors of the SPAC and the SPAC's sponsor breached their fiduciary duties to the SPAC's public stockholders. The core allegation was that the fiduciaries knew or should have known, based on the consultant's advice, that the proxy misrepresented the timing of the Endurance's production and the expected number of purchase orders, which was purportedly material information that deterred stockholders from exercising their redemption

rights.

The defendants moved to dismiss the amended complaint in October of 2022. The motion was fully briefed in December and was subsequently withdrawn after my ***Delman v. GigAcquisitions3*** decision was issued in January of 2023.

The case then proceeded into discovery. The plaintiffs served 48 interrogatories, 70 document requests, and 12 subpoenas on nonparties, including Lordstown. Over 360,000 pages of documents were produced. The plaintiffs also responded to over 52 document requests and 52 interrogatories and produced just under 700 documents to the defendants.

I resolved one motion to compel in the summer of 2023, and fact discovery was set to close that September.

In June of 2023, Lordstown declared bankruptcy, which resulted in parallel bankruptcy litigation that the plaintiffs became involved in to contest the extension of the automatic stay to this proceeding.

The automatic stay ultimately did not extend to this case, and on September 27, the parties attended an in-person mediation before Philips ADR.

An agreement on a term sheet was reached on October 31, and a formal stipulation of settlement was filed with the Court in March of this year.

Notice was disseminated. No objections to the settlement were received, and I heard argument on the settlement this morning. No objectors appeared at this hearing.

With that background, I'll turn to the matters for resolution today, and I'll start with the requirements of Rule 23.

First of all, the notice satisfies the requirements of Rule 23. I provided some limited comments on the proposed notice on March 12, 2024, consistent with the newly amended version of the rule. A revised form of notice was filed on April 16, and I approved the form of notice on April 18.

The provision of notice was also adequate, as I tentatively found on March 12 and can confirm today after reviewing the affidavit of notice that was filed, I believe, on June 17.

I also note that the co-lead plaintiffs appropriately filed affidavits complying with Rule 23(f), which were attached to the plaintiffs' opening brief in support of the

settlement.

Turning next to class certification. The parties ask that I approve a class for purposes of the settlement. The parties stipulated to a proposed settlement class, which is defined in paragraph 1(z) of the settlement stipulation. Broadly speaking, it includes holders of DiamondPeak's Class A common stock at the time of the October 23, 2020, merger, excluding the defendants and certain of their affiliates.

Rule 23 governs class certification in this court, and certification is a two-step process. The class must satisfy the four criteria of Rule 23(a) and fall within at least one of the subsections of Rule 23(b). The four requirements of Rule 23(a) are numerosity, commonality, typicality, and adequacy of representation.

The first criteria, numerosity, is easily met, since, as of the September 23 record date, there were 35 million shares of DiamondPeak common stock outstanding and 28 million public shares.

The fourth criteria of adequacy is also quite easily met. The plaintiffs have fairly and adequately served the interests of the proposed class.

The second and third criteria are

arguably more interesting. The defendants initially opposed the plaintiffs' motion for class certification and argued that there were questions of individual reliance and causation that made class certification problematic.

The issues discussed in the papers stem from the fact that Lordstown stock traded above the redemption price for about a month after the Hindenburg report that I mentioned before, and some members of the proposed class might have sold at a gain.

But this motion was never resolved; it was never presented to me for decision since the parties reached a settlement. So I will put aside my academic interest and consider that the parties have now joined issue on class certification and these questions are no longer being contested.

For my purposes today, I accept that there are common factual and legal questions in the complaint, including whether the director-defendants breached their fiduciary duties. The class representatives' claims arise from the same events that give rise to claims or defenses that are typical among the class members.

And so I find for purposes of approving the settlement class that the elements of commonality and typicality are met.

In terms of Rule 23(b)'s requirements, certification would be appropriate under either subsection (1) or (2). Absent certification, there would be potentially numerous lawsuits, risking inconsistent judgments. The plaintiffs also allege that the defendants engaged in a single course of conduct generally applicable to the class.

And so I am comfortable approving the class as a non-opt-out class for purposes of the settlement only and will do that in the final order.

Next up I'll consider the merits of the settlement itself. "'[T]he court's function is to consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then to apply its own business judgment in deciding whether the settlement is reasonable in light of those factors.'" That's from ***In re Philadelphia Stock Exchange***, 945 A.2d 1123, from the Delaware Supreme Court in 2008 at pages 1137 to 38.

In short, I must evaluate whether the

settlement is fair and reasonable, focusing on the "give" and the "get." That means that I must compare the value of the benefits achieved by the settlement against the strength of the claims that are being released.

The facts and circumstances that the Court considers in assessing a proposed settlement are described by the Delaware Supreme Court in the ***Polk v. Good*** decision at 507 A.2d 531 and in the newly amended version of Rule 23.

I'll start with the "get," which consists of a common fund of $15.5 million which will be held in escrow until the effective date of the settlement. The common fund includes $12 million from insurance, and there's also $3.5 million which I understand is subject to an indemnification dispute in bankruptcy court or will be paid directly by the individual defendants; but either way, the $15.5 million is certain.

This cash recovery for the class is particularly notable given the backdrop of Lordstown's bankruptcy.

I compare this to the "give," which is a release of claims. The release is appropriately

limited to claims asserted in the complaint or that the plaintiffs could have asserted based on the same set of operative facts relating to the ownership of DiamondPeak Class A common stock as of the date of the de-SPAC.

The release carves out claims that were asserted in the SEC's inquiry. The claims released, I believe, are appropriately released when I consider the strength of the recovery.

The claims arguably fell under the entire fairness standard of review. The defendants would likely have had the burden of proving fair price and fair process. There were some bad facts that were alleged in the complaint.

The plaintiffs point out, however, that their success was also not without risks. I identified some potential challenges before, when I talked about class certification. There were also some potential challenges to proving damages, since Lordstown's stock traded above $10 per share for some time.

Lordstown's bankruptcy, again, added an additional layer of risk. So on balance, I believe that the certain monetary recovery for the class

outweighs the claims being released.

The arm's length negotiations before a skilled mediator and the lack of objections further support this view. The settlement is fair, adequate, and reasonable, and I approve it on that basis.

I'm also going to approve the proposed plan of allocation, which is consistent with those endorsed by the court in other class action settlements. The net settlement amount will be distributed directly to eligible class members ***pro rata***. It avoids the costs and the unknowns of a claims process and is also fair, reasonable, and adequate.

That leaves the plaintiffs' request for award of attorneys' fees and expenses and the plaintiffs' request for incentive awards.

I'll start with the fee award. Counsel requests $3,390,829.42, and reimbursement of $429,647.01.

In setting fee awards, the Court must make an independent determination of reasonableness. That's from ***Goodrich v. EF Hutton Group, Inc.***, 681 A.2d 1039. To do that, I must exercise my own business judgment in assessing whether an award is

reasonable and appropriate. The ***Sugarland*** factors traditionally guide that analysis.

I'll begin with the benefit conferred in the litigation, which is the most important of the ***Sugarland*** factors. The benefit here is self-pricing and certain. It's the $15.5 million fund that I described before. This is substantial. And under the Delaware Supreme Court's ***Americas Mining*** decision, when a case settles after the plaintiffs have engaged in meaningful litigation efforts, fee awards generally range from 15 to 25 percent of the benefit conferred.

I believe that that range is appropriate here. There were two rounds of fully briefed motions to dismiss, a complicated motion to stay, and a contested motion for class certification. There was also the complexity of the bankruptcy proceeding, which I heard quite a bit about today.

These motions came early on in the SPAC litigation wave, and there was the added layer of Lordstown potentially going bankrupt. So the bottom of the range certainly seems too low to me. I don't think the 25 percent upper end of the range is warranted either, given the lack of depositions. But on balance, the 22.5 percent range that the plaintiffs

seek seems perfectly fair to me and appropriate.

Before I apply the range, I am going to start by subtracting out expenses. The expenses here are relatively high for a case at this stage, but that's largely because of an approximately $271,000 expense for bankruptcy counsel. The fees were to defend against Lordstown's efforts to extend the automatic stay to this action. The plaintiffs retained bankruptcy counsel, which was involved in opposing the effort to extend the stay. A Lordstown witness was deposed, and there was a hearing that occurred with live testimony.

This seems like a very fair expense to reimburse, from my standpoint, given that it allowed the plaintiffs to secure this settlement, but I don't have specifics on what the $271,000 expense represents. I don't have affidavits of time from bankruptcy counsel, I don't know what rate they charged.

Given the size of the expense, I'd prefer to have some sense of that information. I don't know that I need the time sheets, but a high-level understanding of the rates, the hours, and the tasks would be very helpful to me. I'm going to

ask that counsel provide that to me before I enter the final order.

But assuming that information checks out -- and I imagine that it will -- and the expense is reasonable, I will be willing to approve it since, again, it was an important piece of counsel being able to secure this settlement at all.

The other expenses seem perfectly appropriate to me. The biggest expense other than the one I mentioned is for the standard costs like experts and reasonable mediation expenses. So assuming that I get the information that will give me comfort on the bankruptcy counsel expense, I will approve the expenses in full, and that leaves just over $15 million in the fund.

The fee award sought is 22.5 percent of the net settlement fund, which, as I said before, I think is appropriate here. And that gets us to the $3,390,829.42 fee that counsel seeks.

Looking to the other ***Sugarland*** factors, they support awarding that fee. This case was brought, again, before SPAC litigation began to verge on strike suits. It was a complex case. It presented a series of then-novel arguments. The case

was taken on contingency, and counsel on both sides is excellent. So I believe that the ***Sugarland*** factors also support the fee that's sought.

Looking to the time and expense that was incurred by counsel as a cross-check, plaintiffs' counsel put in collectively about 7600 hours in the case from the commencement of litigation through the signing of settlement stipulation. The implied hourly rate from the net requested fee award comes out to about $446, which is more than reasonable. The total lodestar is about $4.2 million, with the requested fee representing a 0.79x multiplier, also very reasonable.

Taking all of that together, assuming that I get the information that I requested on bankruptcy counsel expense, I will approve the fee and expense award as fair and reasonable.

That leaves only the matter of incentive fees. The two plaintiffs each request $5,000 incentive awards to be paid from the fee award to counsel.

I don't reflexively approve incentive awards, but I think they're fair and warranted in this case. The plaintiffs not only invested time in preparing the complaint and reviewing briefing, but

they meaningfully participated in discovery. Their phones were imaged, their emails were searched by a third-party vendor, and they were even named as defendants in the bankruptcy action.

So that, coupled with the goal of incentivizing people to serve as class representatives, supports incentive awards of $5,000 each here.

I believe that's everything I had on my agenda for today. To recap, I'll certify the class. I'll approve the settlement and the proposed plan of allocation. I need a bit more information on the bankruptcy counsel expense, so I'd like to see that first. Assuming that I get it, barring any issues, I'll also approve the fee and expense award sought and enter the final judgment that was presented to me. And the incentive fees are also approved to the class representatives.

I'll be ready to enter the final order promptly after I receive the information, so I'll keep an eye on the docket for that.

Thank you very much for your time today. Congratulations on a really fine settlement. It's well done and you should be commended for it.

Unless you have any questions for me, we're adjourned.

(Court adjourned at 11:52 a.m.)

- - -

CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 48, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 9th day of July, 2024.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

TAB 14

EFiled: Jan 25 2011 3:36PM EST
Transaction ID 35568523
Case No. 769-VCS

IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

AMERICAN INTERNATIONAL GROUP, INC. CONSOLIDATED DERIVATIVE LITIGATION	Civil Action No. 769-VCS

ORDER AND FINAL JUDGMENT

A hearing having been held before this Court on January 25, 2011, pursuant to the Court's Order of November 16, 2010 (the "Scheduling Order"), upon a proposed settlement ("Settlement") of the above-captioned action (the "Derivative Action") against defendants Bernard Aidinoff, Eli Broad, Michael Castelli, Vincent Cantwell, Pei-Yuan Chia, Carlos Coello, Marshall Cohen, William Cohen, Barber Conable, Jr., Robert Crandall, Martin Feldstein, Ellen Futter, John Graf, Evan Greenberg, Maurice Greenberg, Carla Hills, Frank Hoenemeyer, Richard Holbrooke, Robert Jacobson, Donald Kanak, Edward Matthews, Christian Milton, John Mohs, Kristian Moor, L. Michael Murphy, Karen Radke, John Roberts, Howard Smith, Martin Sullivan, Jean-Baptist Tateossian, Thomas Tizzio, Edmund Tse, Joseph Umansky, Jay Wintrob, Frank Wisner, and Frank Zarb in accordance with the Agreement entered into by the parties and filed as Exhibit 99.2 to a Form 8-K filing by American International Group, Inc. ("AIG") on December 13, 2010 (the "Agreement"), which Agreement is incorporated herein by reference; it appearing that due notice of the hearing has been given in accordance with the Scheduling Order; the respective parties having appeared by their attorneys of record; the Court having heard and considered evidence in support of the proposed Settlement; an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the Scheduling Order; the Court having determined that notice to AIG's shareholders was adequate and sufficient; and the entire matter of the proposed Settlement having been heard and considered by the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED this 25th day of January, 2011, that:

A. Unless otherwise defined herein, all defined terms shall have the meaning set forth in the Agreement and the Scheduling Order.

B. The Notice Of Pendency And Proposed Settlement Of Derivative Action, And Of Settlement Hearing (the "Notice") and the Summary Notice Of Pendency And Proposed Settlement Of Derivative Action, And Of Settlement Hearing ("Summary Notice") have been disseminated to stockholders of AIG pursuant to and in the manner directed by the Scheduling Order, and proof thereof has been filed with the Court. The form and manner of such notice is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with each of the requirements of Rule 23.1 and due process, and it is further determined that all persons who were shareholders of AIG on the date of the Scheduling Order are bound by this Order and Final Judgment.

C. Based on the record in the Derivative Action, each of the provisions of Court of Chancery Rule 23.1 has been satisfied and the Derivative Action has been properly maintained according to the provisions of Court of Chancery Rule 23.1. Plaintiffs and their counsel have at all times adequately represented the interests of AIG and its shareholders with respect to this Derivative Action and the claims asserted therein.

D. The Agreement and the Settlement are found to be fair, reasonable, adequate, and in the best interests of AIG and its shareholders, and are hereby approved pursuant to Rule 23.1. The parties to the Agreement are hereby authorized and directed to comply with and to consummate the Settlement in accordance with its terms and provisions, and the Register in Chancery is directed to enter and docket this Order and Final Judgment.

E. The Derivative Action is hereby dismissed with prejudice as against defendants Bernard Aidinoff, Eli Broad, Michael Castelli, Vincent Cantwell, Pei-Yuan Chia, Carlos Coello, Marshall Cohen, William Cohen, Barber Conable, Jr., Robert Crandall, Martin Feldstein, Ellen Futter, John Graf, Evan Greenberg, Maurice Greenberg, Carla Hills, Frank Hoenemeyer, Richard Holbrooke, Robert Jacobson, Donald Kanak, Edward Matthews, Christian Milton, John Mohs, Kristian Moor, L. Michael Murphy, Karen Radke, John Roberts, Howard Smith, Martin Sullivan, Jean-Baptist Tateossian, Thomas Tizzio, Edmund Tse, Joseph Umansky, Jay Wintrob, Frank Wisner, and Frank Zarb, without fees, costs and/or expenses to any party except as provided in Paragraph L below.

F. Upon the Final Settlement Date, the plaintiffs in the Derivative Action (not to include AIG), derivatively on behalf of AIG, shall release and be deemed to have released and forever discharged C.V. Starr & Co., Inc., Starr International Company, Inc., Vincent Cantwell, Michael Castelli, Carlos Coello, Maurice Greenberg, Robert Jacobson, Edward Matthews, Christian Milton, John Mohs, L. Michael Murphy, Karen Radke, Howard Smith, Martin Sullivan, Jean-Baptist Tateossian, Thomas Tizzio and Joseph Umansky (the "D&O Beneficiaries), and all other current and former AIG officers, directors and employees, including Bernard Aidinoff, Eli Broad, Steven Bensinger, Pei-Yuan Chia, Marshall Cohen, William Cohen, Barber Conable, Jr., Robert Crandall, William Dooley, Martin Feldstein, Ellen Futter, Leslie Gonda, John Graf, Evan Greenberg, Stephen Hammerman, Carla Hills, Frank Hoenemeyer, Richard Holbrooke, Donald Kanak, George Miles, Kristian Moor, Win Neuger, Frank Petralito, Dean Phypers, John Roberts, Ernest Stempel, Edmund Tse, Jay Wintrob, Frank Wisner, and Frank Zarb, from any and all claims, debts, demands, rights or causes of action or liabilities whatsoever, known or unknown, that were brought, could have been brought, or should

have been brought in a derivative capacity at any point from the beginning of time through the date of the Agreement on behalf of AIG, and that arise out of or relate in any way to the allegations made in the First Amended Combined Complaint, the complaint filed in the New York State Derivative Action, the complaint filed in the New York Federal Consolidated Derivative Action, the complaints filed in *Bassman v. Greenberg*, No. 05-CV-7022 (S.D.N.Y.) ("*Bassman*"), and *Kleinhandler v. Greenberg*, No. 05-CV-6417 (S.D.N.Y.) ("*Kleinhandler*"), or to any of the events or transactions that were the subject of the First Amended Combined Complaint, the complaint filed in the New York State Derivative Action, the complaint filed in the New York Federal Consolidated Derivative Action, or the complaints filed in *Bassman* and *Kleinhandler*. Nothing herein shall be construed as a release of any claims against any persons other than the D&O Beneficiaries and other current and former AIG officers, directors and employees. Nothing herein shall be construed as a release by the plaintiffs of any claims they may have as members of the class in *In re AIG Securities Litigation*, No. 04-CV-8141 (S.D.N.Y.) ("the Securities Litigation"). In addition, for the avoidance of doubt, the released claims do not include any claims that have been asserted in the complaints that were pending as of August 24, 2010 or that arise from any appeals stemming therefrom in *Bible v. Liddy, et al.*, C.A. No. BC410879 (pending in California Superior Court, Los Angeles County); *City of New Orleans Employees' Retirement System v. Bensinger, et al.*, C.A. No. 4042-VCS (pending in the Delaware Court of Chancery, New Castle County); *Grill v. Bollenbach, et al.*, C.A. No. 650150 (pending in New York Supreme Court, New York County); *Hauber v. Sullivan, et al.*, C.A. No. 08-003951 (pending in New York Supreme Court, Nassau County); *In re American International Group, Inc. 2007 Derivative Litigation*, Lead Case No. 07-CV-10464 (S.D.N.Y.) (LAP) (previously pending in the United States District Court for the Southern District of New York

and currently on appeal before the United States Court of Appeals for the Second Circuit); *John Paul Fulco, Trustee f/b/o Lucia Forastiere Irrevocable June Forastiere Backe Children's Trust v. Cassano, et al.*, C.A. No. 4290-VCS (pending in the Delaware Court of Chancery, New Castle County); or *Pride Invs., Inc. v. Bensinger, et al.*, C.A. No. BC426595 (pending in California Superior Court, Los Angeles County).

G. Upon the Final Settlement Date, the D&O Beneficiaries shall release and be deemed to have released and forever discharged each other and the plaintiffs in the Derivative Action (not to include AIG) from any and all claims, debts, demands, rights or causes of action or liabilities whatsoever, known or unknown, that were brought, could have been brought, or should have been brought at any point from the beginning of time through the date of the Agreement, and that arise out of or relate in any way to the allegations made in the First Amended Combined Complaint, the complaint filed in the New York State Derivative Action, the complaint filed in the New York Federal Consolidated Derivative Action, the complaints filed in *Bassman* and *Kleinhandler*, or to any of the events or transactions that were the subject of the First Amended Combined Complaint, the complaint filed in the New York State Derivative Action, the complaint filed in the New York Federal Consolidated Derivative Action, or the complaints filed in *Bassman* and *Kleinhandler*, including claims brought derivatively on behalf of AIG. This release shall not affect any rights or obligations between or among the D&O Beneficiaries under other agreements between or among them, including, but not limited to, employment separation agreements and pension or investment rights and obligations.

H. Upon the Final Settlement Date, the D&O Beneficiaries, on the one hand, and Thomas Tizzio, Bernard Aidinoff, Steven Bensinger, Marshall Cohen, William Dooley, Martin Feldstein, Ellen Futter, Stephen Hammerman, Richard Holbrooke, George Miles, Kristian

Moor, Win Neuger, Martin Sullivan, Edmund Tse, Jay Wintrob, and Frank Zarb (collectively, the "AIG Cross-Claim/Third Party Defendants"), on the other hand, shall release and be deemed to have released and forever discharged each other from any and all claims, debts, demands, rights or causes of action or liabilities whatsoever, known or unknown, that were brought, could have been brought, or should have been brought at any point from the beginning of time through the date of the Agreement, and that arise out of or relate in any way to the allegations made in the First Amended Combined Complaint, the complaint filed in the New York State Derivative Action, the complaint filed in the New York Federal Consolidated Derivative Action, the complaints filed in *Bassman* and *Kleinhandler*, or to any of the events or transactions that were the subject of the First Amended Combined Complaint, the complaint filed in the New York State Derivative Action, the complaint filed in the New York Federal Consolidated Derivative Action, or the complaints filed in *Bassman* and *Kleinhandler*, including claims brought derivatively on behalf of AIG and third party and cross claims brought by Maurice Greenberg and/or Howard Smith. This release shall not affect any rights or obligations between or among the D&O Beneficiaries and the AIG Cross-Claim/Third Party Defendants under other agreements between or among them, including, but not limited to, employment separation agreements and pension or investment rights and obligations.

I. Nothing herein shall be construed to release any claims by the D&O Beneficiaries against any insurance coverage to which they may be entitled, or to affect any rights that the D&O Beneficiaries, the AIG Cross-Claim/Third Party Defendants, Eli Broad, Pei-Yuan Chia, William Cohen, Barber Conable, Jr., Robert Crandall, Leslie Gonda, John Graf, Evan Greenberg, Carla Hills, Frank Hoenemeyer, Donald Kanak, Frank Petralito, Dean Phypers, John Roberts, Ernest Stempel, or Frank Wisner may have to indemnification or advancement.

J. The parties to the Agreement are hereby authorized, without further approval from the Court, to agree to adopt such amendments, modifications, and expansions of the Agreement that are consistent with this Order and Final Judgment and the Agreement and that do not limit the rights of AIG or AIG's shareholders under the Agreement.

K. This Order and Final Judgment shall not constitute any evidence, or an admission by any party, that any acts of wrongdoing have been committed by any of the parties to the Derivative Action and shall not be deemed to create any inference that there is any liability therefor.

L. Plaintiffs' counsel are awarded attorneys' fees in the amount of $20,250,000 and expenses in the amount of $815,617.74 which sums the Court finds to be fair and reasonable, and which shall be paid in accordance with the Agreement.

Vice Chancellor

TAB 15

PUBLIC VERSION
FILED ON: DECEMBER 1, 2022

EFiled: Dec 01 2022 03:31PM EST
Transaction ID 68485105
Case No. 2020-1046-SG



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE AVX CORPORATION STOCKHOLDERS LITIGATION	Consolidated C.A. No. 2020-1046-SG

PLAINTIFFS' APPLICATION FOR SETTLEMENT APPROVAL AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES

FRIEDLANDER & GORRIS, P.A.
Joel E. Friedlander (Bar No. 3163)
Jeffrey M. Gorris (Bar No. 5012)
David Hahn (Bar No. 6417)
1201 N. Market Street, Suite 2200
Wilmington, DE 19801
(302) 573-3500

OF COUNSEL:

Mark Lebovitch
Jeroen van Kwawegen
Thomas G. James
Margaret Sanborn-Lowing
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Gregory V. Varallo (Bar No. 2242)
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3601

Co-Lead Counsel for Plaintiffs

Co-Lead Counsel for Plaintiffs

Jeremy Friedman
David Tejtel
Lindsay LaMarca
FRIEDMAN OSTER & TEJTEL PLLC
493 Bedford Center Road
Suite 2D
Bedford Hills, NY 10507
(888) 529-1108

ANDREWS & SPRINGER LLC
Peter B. Andrews (Bar No. 4623)
Craig J. Springer (Bar No. 5529)
David M. Sborz (Bar No. 6203)
Jackson E. Warren (Bar No. 6957)
4001 Kennett Pike, Suite 250
Wilmington, DE 19807
(302) 504-4957

Additional Counsel for Plaintiffs

D. Seamus Kaskela
KASKELA LAW LLC
Campus Boulevard, Suite 100
Newtown Square, PA 19073
(484) 258-1585

Additional Counsel for Plaintiffs

DATED: November 22, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

BACKGROUND 5

A. The Parties and Relevant Non-Parties 5

B. AVX is Poised for Exponential Growth Before the Squeeze-Out 6

C. Kyocera Opportunistically Initiates the Squeeze-Out to Capture for Itself AVX's Future Growth 8

D. The Public Story of the Squeeze-Out 11

E. Litigation Commences and the Parties Engage in Extensive Discovery 17

F. The Parties Agree to Settle on the Eve of Depositions 24

ARGUMENT 25

I. THE PROPOSED SETTLEMENT SHOULD BE APPROVED AS FAIR, REASONABLE, AND ADEQUATE 25

A. Delaware Law Strongly Favors Settlement 25

B. Plaintiffs Achieved a Significant Benefit for the Class, Fully Reflecting the Strength of Plaintiffs' Claims Weighed Against the Risks and Costs of Continued Litigation 27

1. The $49.9 Million Settlement Amount Represents a Significant Recovery for the Class 27

2. Plaintiffs Had Strong Liability Claims But Establishing Damages Would Have Been Difficult 28

C. The Proposed Settlement Was Reached Through Arm's-Length Negotiations 40

D. The Experience and Opinion of Plaintiffs' Counsel—and the Absence of Any Objection—Favor Approval of the Proposed Settlement 41

II. THE CLASS SHOULD BE PERMANENTLY CERTIFIED 42

III. PLAINTIFFS' APPLICATION FOR A FEE AND EXPENSE AWARD SHOULD BE GRANTED 44

A. Counsel Achieved a Substantial Monetary Benefit 45

B. The Remaining *Sugarland* Factors Also Support the Requested Fee and Expense Award 50

1. The Contingent Nature of the Litigation Supports the Requested Fee and Expense Award 50

2. The Significant Efforts of Plaintiffs' Counsel Support the Requested Fee and Expense Award 51

3. The Litigation was Relatively Challenging and Complex 56

4. The Standing and Ability of the Parties' Counsel Affirms the Reasonableness of the Fee Award 57

CONCLUSION 59

TABLE OF AUTHORITIES

CASES **PAGE(S)**

In re Activision Blizzard, Inc. S'holder Litig.,
124 A.3d 1025 (Del. Ch. 2015) .....*passim*

Ams. Mining Corp. v. Theriault,
51 A.3d 1213 (Del. 2012) 29, 32

In re Amtrust Fin. Servs., Inc. S'holder Litig.,
C.A. No. 2018-0396-LWW (Del. Ch. Nov. 22, 2021)
(TRANSCRIPT) 57

Asbestos Workers' Phila. Pension Fund v. Avril,
C.A. No. 2019-0633-SG (Del. Ch. Apr. 16, 2021) (TRANSCRIPT) 48

In re BGC P'rs, Inc. Deriv. Litig.,
2022 WL 3581641 (Del. Ch. Aug. 19, 2022) 37

Calamos Asset Mgmt., Inc. S'holder Litig.,
Consol. C.A. No. 2017-0058-JTL (Del. Ch. Apr. 25, 2019)
(TRANSCRIPT) 27

Chrysler Corp. v. Dann,
223 A.2d 384 (Del. 1966) 50

In re Cox Radio, Inc. S'holders Litig.,
2010 WL 1806616 (Del. Ch. May 6, 2010).....45

De Angelis v. Salton/Maxim Housewares, Inc.,
641 A.2d 834 (Del. Ch. 1993), *rev'd on other grounds sub nom.*
Prezant v. De Angelis, 636 A.2d 915 (Del. 1994) 40

In re Del Monte Foods Co. S'holders Litig.,
2010 WL 5550677 (Del. Ch. Dec. 31, 2010).....58

In re Del Monte Foods Co. S'holders Litig.,
2011 WL 2535256 (Del. Ch. June 27, 2011).....51

In re Dole Food Co., Inc. S'holder Litig.,
2015 WL 5052214 (Del. Ch. Aug. 27, 2015) 29

Dow Jones & Co. v. Shields,
1992 WL 44907 (Del. Ch. Jan. 10, 1992).....50

Franklin Balance Sheet Inv. Fund v. Crowley,
2007 WL 2495018 (Del. Ch. Aug. 30, 2017).....45, 55

Hawkes v. Bettino,
C.A. No. 2020-0360-PAF (Del. Ch. Apr. 1, 2021) (TRANSCRIPT).....55

Jane Doe 30's Mother v. Bradley,
64 A.3d 379 (Del. Super. 2012).....41

Johnson v. Arbitrium (Cayman Islands) Handels AG,
720 A.2d 542 (Del. 1998).....44

Joseph v. Shell Oil Co.,
1985 WL 150466 (Del. Ch. Apr. 22, 1985).....58

Kahn v. Sullivan,
594 A.2d 48 (Del. 1991).....25

Neponsit Inv. Co. v. Abramson,
405 A.2d 97 (Del. 1979).....42

In re Orchard Enters., Inc. S'holder Litig.,
2014 WL 4181912 (Del. Ch. Aug. 22, 2014).....51

In re Palantir Techs. Inc. Class F Stock Litig.,
C.A. No. 2021-0275-SG (Del. Ch. Sept. 13, 2022)
(TRANSCRIPT).....41, 55

In re Pivotal Software, Inc. S'holders Litig.,
C.A. No. 2020-0440-KSJM (Del. Ch.) (Trans. ID 68005930).....*passim*

In re Plains Res. Inc.,
2005 WL 332811 (Del. Ch. Feb. 4, 2005).....50

Polk v. Good,
507 A.2d 531 (Del. 1986).....26, 41

Prezant v. De Angelis,
636 A.2d 915 (Del. 1994).....25

In re Resorts Int'l S'holders Litig. Appeals,
570 A.2d 259 (Del. 1990) 25

In re Revlon, Inc. S'holders Litig.,
990 A.2d 940 (Del. Ch. 2010) 58

Rome v. Archer,
197 A.2d 49 (Del. 1964) 26

Ryan v. Gifford,
2009 WL 18143 (Del. Ch. Jan. 2, 2009).....40, 50

In re S. Peru Copper Corp. S'holder Deriv. Litig.,
52 A.3d 761 (Del. Ch. 2011), *aff'd sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012) 32

Sciabacucchi v. Salzberg,
2019 WL 2913272 (Del. Ch. July 8, 2019), *vacated on unrelated grounds sub nom. Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020) 50

Seinfeld v. Coker,
847 A.2d 330 (Del. Ch. 2000) 44, 45

Spen v. Andrews Gp., Inc.,
1992 WL 127512 (Del. Ch. June 5, 1992).....42

Sugarland Industries v. Thomas,
420 A. 2d 142 (Del. 1980) .....*passim*

In re Tesla Motors, Inc. S'holder Litig.,
2022 WL 1237185 (Del. Ch. Apr. 27, 2022).....37

In re Topps Co. S'holders Litig.,
924 A.2d 951 (Del. Ch. 2007) 44

STATUTES & OTHER AUTHORITIES

8 *Del. C.* § 220 17

Rule 23 43

PRELIMINARY STATEMENT

Co-Lead Plaintiffs seek approval of a $49.9 million cash settlement (the "Settlement") of claims challenging the 2020 squeeze-out of the minority stockholders of AVX Corporation ("AVX" or the "Company") for $21.75 per share by AVX's controlling stockholder, Kyocera Corporation ("Kyocera") (the "Squeeze-Out").

Co-Lead Plaintiffs immediately suspected that the Squeeze-Out was unfair and began investigating their suspicions. They litigated aggressively for two-plus years to prove the unfairness of the Squeeze-Out and build a record supporting a meaningful recovery for AVX's minority stockholders. Before the Squeeze-Out, AVX's CEO John Sarvis ("Sarvis") had publicly touted AVX's growth prospects in the exploding global market for advanced electronic components. To satisfy the increasing, long-term demand for its products, AVX recently had made substantial acquisitions and invested heavily to expand its manufacturing facilities. Kyocera appeared to opportunistically time the Squeeze-Out to seize the upside from AVX's expanding market and recent investments.

The Company's SEC filings furthered Co-Lead Plaintiffs' suspicions. The public filings revealed that the AVX special committee (the "Special Committee") was "surprised and disappointed" by Kyocera's $19.50 opening offer, which in the Special Committee's view "significantly undervalue[d] AVX and its prospects."

Plaintiffs also learned that the Special Committee demanded a price range of $23 to $25 and a majority-of-the-minority ("MOTM") voting condition. Kyocera refused both demands.

Powerless to vote down the transaction, AVX's minority stockholders' only hope to obtain fair value for their shares was through this litigation. Co-Lead Plaintiffs promptly served books and records demands on AVX, consulted with an expert to assess the Company's fair value, and conducted extensive public research into the macroeconomic factors driving the Squeeze-Out's opportunistic timing. Those efforts resulted in a detailed, well-researched complaint (the "Complaint") that the Court described as a "strong narrative" setting forth "why this transaction might be unfair."

The Complaint alleged in detail how and why Kyocera opportunistically timed the Squeeze-Out to close *before* AVX could realize its future growth prospects and *while* AVX's stock price and sales revenues were mired in a slump that Defendants knew was temporary.

Discovery in this action (the "Action") was hard-fought and complex. Plaintiffs' counsel aggressively negotiated for appropriately broad discovery given the Complaint's allegations regarding AVX's business, the growing market for AVX's products, and Kyocera's actions in the months and years leading up to the

Squeeze-Out. Plaintiffs' counsel negotiated detailed discovery protocols in English and Japanese and secured documents from thirty of Defendants' custodians.

After securing the approximately ***1.35 million*** pages of documents produced in this Action, Plaintiffs' counsel faced two key challenges. First, Plaintiffs' counsel needed to review and understand the over 15,000 Japanese-language documents that were critical to uncovering Kyocera's motivations and actions. Doing so required considerable time, resources, and ingenuity. Plaintiffs deployed computer-assisted technology to provide initial translations, then isolated probative evidence and worked with human translators to tease out the nuances of the documents.

Second, Plaintiffs needed to carefully and comprehensively analyze the vast documentary record to ensure its completeness and prepare for depositions. That exercise uncovered evidence of deal negotiations between Kyocera and AVX executives that were never disclosed publicly or even known by the Special Committee and, despite Defendants' contrary assertions, demonstrated that key custodians appeared to communicate by text message. Plaintiffs' counsel knew they had to obtain discovery into text messages and phone records from both American and Japanese cell phone carriers. Defendants steadfastly refused. Plaintiffs moved to compel and won substantially all the relief they requested.

As the document discovery phase concluded, Plaintiffs scheduled or planned

for the depositions of twenty-one witnesses, at least eight of whom reside in Japan. In preparation for the depositions and expert reports, Plaintiffs again consulted with an expert to help evaluate the trove of financial information that Plaintiffs obtained. Plaintiffs secured the proposed Settlement on the eve of depositions.

The $49.9 million recovery reflects a substantial benefit for the class of AVX's minority stockholders (the "Class"). The proposed Settlement represents an approximately 5% premium to the roughly $1 billion Squeeze-Out consideration. When added to the $21.75 per share Squeeze-Out price, the increase of $1.05 per Class share puts the proposed Settlement within spitting distance of the price range that the Special Committee demanded but failed to obtain.

Plaintiffs' counsel respectfully submit that the recovery is an excellent result, particularly given the complexities and challenges inherent in this Action. While discovery uncovered evidence of unfair dealing, significant challenges remained, particularly with respect to establishing unfair price at trial. Defendants had reasonably strong market evidence at their disposal to argue that the Squeeze-Out price was fair. The deal was struck at a 44.6% premium over AVX's unaffected stock price, which had been declining in the year before the Squeeze-Out. The 44.6% premium appears to have been the highest among precedent transactions and dwarfs the 16% premium paid to acquire one of AVX's closest peers only months

earlier. When weighed against the certainty of the $49.9 million Settlement, the risk of winning at trial on process but losing on price was meaningful.

Plaintiffs respectfully request that the Court approve the Settlement and an all-in award of $10,728,500 in attorneys' fees and expenses (the "Fee and Expense Award"). The requested Fee and Expense Award represents 21.5% of the cash Settlement amount, inclusive of expenses. The Fee and Expense Award is consistent with this Court's precedents in view of the significant benefits conferred by the Settlement, and the extensive litigation required to achieve it.

The Class was certified on April 26, 2022. The Class was provided with notice of the Settlement in accordance with the scheduling order entered on September 23, 2022 (the "Scheduling Order"). To date, Plaintiffs' counsel has not received any objection to the Settlement. A settlement hearing is scheduled for December 22, 2022.

BACKGROUND

A. The Parties and Relevant Non-Parties

Non-party AVX, a Delaware corporation based in South Carolina, is a leading international manufacturer and supplier of a vast portfolio of advanced electronic components.

Defendant Kyocera is a global electronics and ceramics manufacturing giant headquartered in Japan. Kyocera has controlled AVX since the Company's

inception. At the time of the Squeeze-Out, Kyocera owned approximately 72% of AVX. Six of the nine members of AVX's board of directors (the "Board") were also Kyocera directors. Those six directors are individual defendants in this Action (the "Individual Defendants," and, together with Kyocera, "Defendants").

B. AVX is Poised for Exponential Growth Before the Squeeze-Out

Kyocera recognized "the unprecedented growth of demand . . . expected over the next 10 years due to the electrification of automotive, spread of IoT [internet of things] devices, start of 5G commercial service, and increase in server/storage demand[.]"[1]

AVX's largest market segment is automotive, where AVX is a leader in manufacturing capacitors, circuit protection devices, sensors and controls and interconnect solutions.[2] Automotive vehicles are increasingly electrified as the market shifts to driver-assisted vehicles, EVs, and autonomous vehicles.[3] A single Tesla, for example, requires 10,000 multi-layer ceramic capacitors ("MLCCs").[4]

Since at least 2017, AVX has continuously highlighted the substantial long-term growth potential from the increasing electronic content of cars and other

---

[1] Ex. 1 at -268.

[2] Compl. ¶29.

[3] *Id.*

[4] *Id.*

vehicles.[5] As Sarvis summarized: "In 2000, roughly 20% of the vehicle cost was electronic systems. Today, that percentage is more than 35%, though they're forecast to be 50% by 2030."[6] Sarvis repeatedly touted the "ongoing demand increases [in] virtually all AVX products in automotive applications" as "the electronic content in these vehicles continues to grow at double-digit rates."[7]

Beginning in 2017, AVX made significant investments to grow its business to meet growing demand.[8] AVX acquired AB Electronics' sensing and control business for approximately $162 million in October 2017, a deal that positioned AVX for future growth in the automotive market.[9] AVX also acquired Ethertronics, an antenna business, for approximately $150 million in January 2018, an acquisition that positioned AVX for future growth in the 5G market.[10] AVX management viewed these and other significant acquisitions as long-term plays.[11]

AVX invested heavily to expand its manufacturing capacity in order to satisfy the exponential growth in demand for its products. This, too, was a long-term play.

---

[5] *Id.* ¶31.

[6] *Id.* ¶3.

[7] *Id.* ¶31.

[8] *Id.* ¶34.

[9] *Id.* ¶35.

[10] *Id.* ¶36.

[11] *Id.* ¶37.

In October 2018, CEO Sarvis explained that AVX had a "2-year, 3-year plan" to continue "spending and investing in additional capacity in several product areas as well as new facilities" in South Carolina and Malaysia.[12] By July 2019, AVX completed a major, $150 million expansion of its flagship MLCC manufacturing facility in Penang, Malaysia.[13] AVX planned to build another "mega plant" thereafter.[14]

C. Kyocera Opportunistically Initiates the Squeeze-Out to Capture for Itself AVX's Future Growth

While AVX's long-term prospects were bright, its revenues and stock price were temporarily depressed in the year prior to the Squeeze-Out. Two market conditions laid the groundwork for Kyocera to buy AVX at an opportunistic time.

The first drag on AVX's performance was directly caused by Kyocera. In addition to selling its own electronic components, since 1996, AVX had a non-exclusive license to distribute and re-sell components for Kyocera electronic devices to AVX customers in certain regions outside of Japan (the "KED Resale Agreement").[15] In December 2016, Kyocera made the "bold move" of notifying

[12] *Id.* ¶38.

[13] *Id.* ¶39.

[14] *Id.* ¶38.

[15] *Id.* ¶24.

AVX that Kyocera was terminating the KED Resale Agreement effective January 1, 2018.[16]

Sarvis understood that Kyocera's termination of the KED Resale Agreement was "not good news" for AVX.[17] Indeed, the KED Resale Agreement had accounted for approximately $600 million in total revenue for AVX in the last two years prior to its termination.[18] AVX's independent directors questioned the motives behind Kyocera's decision, which appeared to be another example of Kyocera "chipping away at AVX" for Kyocera's own benefit.[19]

Kyocera's termination of the KED Resale Agreement materially diminished AVX's revenues and established the groundwork for a material post-Squeeze-Out accretion of value when Kyocera resumed using AVX to sell Kyocera products outside of Japan.[20] Further, in response to the termination of the KED Resale Agreement, AVX pivoted to "acquisitions to drive our growth."[21] Those acquisitions were long-term plays that would not pay dividends for years to come.

---

[16] Ex. 2.

[17] *Id*.

[18] Ex. 3 at -452.

[19] Ex. 2.

[20] Compl. ¶25.

[21] Ex. 2.

The second market force depressing AVX's revenues and stock price was the global supply of MLCCs.[22] In 2017, Sarvis warned the purchasers of AVX products that demand would rise sharply while supply would tighten. Device and automobile makers dependent on AVX's components took notice and began stockpiling inventory in response.[23] Having prepared for the worst, purchasers of AVX's products had to draw down their stockpiles of AVX components before purchasing more products.[24] That dynamic of "[e]levated distributor inventory levels" contributed to a 16% decrease in AVX's sales revenue for AVX's fiscal year 2020 (*i.e.*, March 2019 to March 2020).[25] Nonetheless, the short-term distribution issue was expected to promptly resolve itself, particularly given the uptick of demand for AVX's products in the automotive and other industries.[26]

Kyocera began to lay the groundwork for the Squeeze-Out against this backdrop of AVX's temporary decline in performance. In 2018, Kyocera's former Chairman, Tetsuo Kuba, began touring AVX's manufacturing plants across the

[22] Compl. ¶45; *see also, e.g.,* Ex. 4 at -459.

[23] Compl. ¶41.

[24] *Id.* ¶44.

[25] Ex. 4 at -459.

[26] Compl. ¶47.

world.[27] Sarvis began "to get concerned about all these visits" and suspected that Kyocera was "looking at maybe buying us back and looking at what all the factories are doing."[28] Sarvis made a "[p]lan to discuss with [Kyocera executive and AVX director Koichi] Kano[.]"[29] By no later than February 2019, Sarvis and Kano were engaged in discussions about a potential Squeeze-Out.[30]

D. The Public Story of the Squeeze-Out

According to AVX's Schedule 14D-9, on May 23, 2019, AVX's then-CFO, Michael Hufnagel ("Hufnagel"), met with members of Kyocera management and "generally discussed matters relating to potential timing and logistics of a potential transaction" but purportedly "did not discuss pricing or other terms of a potential transaction."[31] Sarvis informed AVX senior management and the Company's independent directors that Kyocera was considering making a proposal in 2019 to acquire the outstanding shares of AVX that it did not already own.[32]

On October 2, 2019, Hufnagel and members of Kyocera's senior management

---

[27] Ex. 5.

[28] *Id*.

[29] *Id*.

[30] AVX Schedule 14D-9, dated March 2, 2020 (the "14D-9"), at 11.

[31] *Id*. at 12.

[32] *Id.*

(Messrs. Kenji Kodomari ("Kodomari") and Korehito Yamamura ("Yamamura")) discussed the potential timing and logistics of the Squeeze-Out, but purportedly did not discuss price.[33] The next day, Kodomari emailed AVX's three outside directors, Donald Christiansen ("Christiansen"), John Ballato ("Ballato"), and David DeCenzo ("DeCenzo"), to indicate Kyocera's interest in the Squeeze-Out and to request that AVX form a Special Committee to assess the offer.[34] Kodomari then spoke telephonically with Christiansen, Ballato, and DeCenzo on the same topic.[35]

On October 8, 2019, Sarvis emailed Kano requesting that all subsequent communications regarding the Squeeze-Out be sent directly to Christiansen, Ballato, and DeCenzo, who together would comprise the Special Committee.[36] Nevertheless, "[t]he . . . special committee [members] were not informed of and did not participate in" a meeting about the Squeeze-Out held on October 10 in South Carolina between Hufnagel, Kodomari, and Yamamura.[37]

On November 15, 2019, Kodomari informed Christiansen, Ballato, and DeCenzo that Kyocera expected to make an offer to acquire all of the AVX shares

---

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

that Kyocera did not already own.[38] The Special Committee was formed belatedly on November 26.[39] The initial draft of the resolutions respecting the formation of the Special Committee included a condition that any transaction proposed by Kyocera be approved by a majority of the Company's shares not already owned by Kyocera (*i.e.*, the MOTM).[40] Kyocera immediately indicated that it was not willing to proceed with a deal subject to a MOTM condition.[41]

On November 27, 2019, Kodomari sent the Special Committee a proposal to acquire all of the remaining shares of AVX that Kyocera did not already own for $19.50 per share in cash. The proposal indicated that Kyocera had no interest in selling any of its AVX shares, and that Kyocera would not vote in favor of or otherwise support any alternative sale, merger, or transaction.[42]

On December 10, 2019, the Special Committee responded in part to Kyocera's first offer.[43] The Special Committee wrote that it was "surprised and disappointed by the suggested purchase of $19.50 per share of AVX, which in our individual

---

[38] *Id.* at 13.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 14.

[43] *Id.*

views significantly undervalues AVX and its prospects."[44] The Special Committee indicated that it would be in a position to make a formal response respecting Kyocera's offer after consultation with the Special Committee's advisors.[45]

On January 9, 2020, the Special Committee indicated to Kyocera that the Special Committee believed a purchase price of $23.00 to $25.00 per share reflected an appropriate value range.[46] The Special Committee also demanded a MOTM voting condition.[47]

On January 15, 2020, Kyocera indicated to the Special Committee that it was willing to raise its offer price to $20.50 per share, but was unlikely to make a proposal in the range communicated by the Special Committee.[48] Kyocera re-emphasized that it was "unwilling to agree to include [the MOTM] Condition in any potential transaction."[49]

On January 17, 2020, the Special Committee communicated to Kyocera that the Special Committee had not changed its views on the inclusion of the MOTM

---

[44] *Id.* at 14-15.

[45] *Id.* at 15.

[46] *Id.* at 16.

[47] *Id.*

[48] *Id.*

[49] *Id.*

condition and the $23.00 to $25.00 per share price range.[50] On January 21, Kyocera informed the Special Committee that Kyocera was willing to raise its offer price to $21.00 per share, which purportedly "represented the top of the valuation range that [Kyocera] was willing to consider."[51] But Kyocera still refused to include a MOTM voting condition.[52]

The Special Committee then discussed the possibility of Christiansen speaking directly to Kyocera.[53] On January 25, 2020, the Special Committee directed Christiansen to communicate to Kyocera that the Special Committee would accept $21.75 per share.[54] "The Special Committee decided that, given [Kyocera's] continued stated unwillingness to agree to a [MOTM] Condition and the belief that [Kyocera] would not change that position, a price of $21.75 per Share (which the Special Committee believed was the maximum amount that [Kyocera] would be willing to offer) offered sufficiently attractive value for the Special Committee to recommend" the Squeeze-Out.[55]

---

[50] *Id.* at 17.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

On January 27, 2020, Christiansen spoke telephonically with AVX director and Kyocera Chairman Goro Yamaguchi ("Yamaguchi").[56] The 14D-9 states that "because of his serving in overlapping positions at [Kyocera] and as a director of the Company," Chairman Yamaguchi "would not engage with the Special Committee regarding [Kyocera's] offer, but that he would hear what Mr. Christiansen had to say and would convey it to the appropriate persons at [Kyocera]."[57] Christiansen informed Yamaguchi that the Special Committee could recommend a transaction price of $21.75 per share without a MOTM condition.[58]

On January 28, 2020, Kodomari informed Christiansen that Kyocera was willing to proceed with the Special Committee's proposed purchase price of $21.75 per share, without a MOTM condition.[59]

On February 19, 2020, Centerview—the Special Committee's financial advisor—rendered its oral opinion, subsequently confirmed in writing, that the $21.75 per share offer price was purportedly fair.[60] That same day, the Special

[56] *Id.*

[57] *Id.* at 17-18.

[58] *Id.* at 18.

[59] *Id.*

[60] *Id.* at 19.

Committee recommended accepting the offer.[61] On February 20, the full Board met and unanimously approved the Squeeze-Out, with only CEO Sarvis abstaining from the Board vote.[62] On February 21, the parties executed a merger agreement and AVX publicly announced the Squeeze-Out that same day.[63]

The Squeeze-Out closed on March 30, 2020 at $21.75 per share.[64] Kyocera paid approximately $1.03 billion in aggregate consideration for all outstanding shares of AVX that Kyocera did not already own.[65]

E. Litigation Commences and the Parties Engage in Extensive Discovery

The Squeeze-Out triggered a flurry of litigation activity. Before the Squeeze-Out closed, Plaintiffs served upon AVX demands to inspect books and records pursuant to 8 *Del. C.* § 220.[66] The demands explained that Plaintiffs had a credible basis to suspect breaches of fiduciary duty against Kyocera and the conflicted members of the Board. Plaintiffs expressed serious concerns regarding several

---

[61] *Id.*

[62] *Id.*

[63] Compl. ¶94.

[64] *Id.* ¶95.

[65] *Id.* ¶1.

[66] Plaintiff Robert Reese served his demand on AVX on March 5, 2020. Plaintiff Lamborn served her demand on AVX on March 10, 2020. Plaintiffs Harriet and Albert Herman served their demand on AVX on March 17, 2020.

aspects of the Squeeze-Out, including the conflicts among AVX and Kyocera, the lack of a MOTM condition, and the Special Committee's expression of surprise and disappointment at Kyocera's $19.50 initial offer, which the Special Committee felt "significantly undervalue[d] AVX and its prospects."[67]

Plaintiffs obtained access to Board and Special Committee minutes and materials related to the Squeeze-Out, including presentations prepared by Centerview. Plaintiffs' counsel consulted with an expert to assist in developing various theories respecting AVX's value and the broader market trends.

On December 10, 2020, Plaintiffs Amy Stone Lamborn, Robert Reese, Harriet Herman, and Albert Herman filed a verified class action complaint (the "Complaint" or "Compl.") captioned *Lamborn, et al. v. Kyocera Corporation, et al.*, C.A. No. 2020-1047-SG (the "Lamborn Action").[68] The Complaint made extensive use of the Section 220 documents, counsel's research into the MLCC market and AVX's business segments, and counsel's preliminary work with their consulting expert. The central theory of Plaintiffs' case was (and continues to be) that Defendants opportunistically timed the Squeeze-Out to buy AVX at an unfairly low price and thus capture for itself the upside of AVX's future growth prospects.

---

[67] 14D-9 at 14.

[68] Stip. ¶B.

Also on December 10, 2020, Alan Kahn filed a verified stockholder class action complaint captioned *Kahn v. Christiansen, et al.*, C.A. No. 2020-1046-SG (the "Kahn Action").[69] A contest for leadership ensued between Plaintiffs, Kahn, and their respective counsels.

On December 29, 2020, the Kahn Action and the Lamborn Action were consolidated in the above-captioned action (previously defined herein as the "Action").[70] On January 15, 2021, Plaintiffs and Kahn each filed a Motion for Appointment of Lead Plaintiffs and Co-Lead Counsel.[71]

On February 9, 2021, the Court, *inter alia*: (i) appointed Plaintiffs as Lead Plaintiffs; (ii) appointed Bernstein Litowitz Berger & Grossmann LLP and Friedlander & Gorris, P.A. as co-lead counsel ("Co-Lead Counsel"); (iii) appointed Andrews & Springer LLC and Friedman Oster & Tejtel PLLC as additional counsel ("Additional Counsel"); and (iv) designated Plaintiffs' Verified Class Action Complaint in the Lamborn Action (previously defined herein as the "Complaint") as operative.[72] In support of its leadership decision, the Court noted that:

> The [Lamborn] complaint . . . has a theory of the case that involves pipeline stuffing that is a strong narrative and, I think, helpful, at least

[69] Stip. ¶A.

[70] *Id.* ¶C.

[71] *Id.* ¶E.

[72] *Id.*

> to the Court, in understanding the theory of why this transaction might be unfair.[73]

Defendants answered the Complaint on July 15, 2022.[74] The Parties had previously proceeded to fact discovery, which was extensive. Plaintiffs served thirty-two interrogatories and fifty-four requests for production of documents on Defendants as well as seven subpoenas on third parties.[75]

Plaintiffs' counsel fought hard to secure approximately 1.35 million pages of document discovery.[76] Defendants attempted to narrow discovery both topically and temporally. Plaintiffs adamantly believed they needed the full breadth of topics and time periods reflected in their document requests to substantiate the far-ranging allegations in the Complaint, which stretched back to 2016 and included multiple dimensions of AVX's business. Defendants ultimately agreed to collect documents stretching back to 2016 from approximately thirty custodians across both AVX and Kyocera.

Approximately half of Defendants' document custodians speak Japanese as their first language. Accordingly, the Parties negotiated two parallel sets of search

---

[73] Leadership Hearing Tr. at 6.

[74] Stip. ¶I.

[75] *Id.* ¶G.

[76] *Id.*

terms: one in Japanese and one in English. Plaintiffs' counsel worked closely with a third-party translation vendor throughout this process to ensure that appropriate search terms were applied to capture what would ultimately prove to be some of the most probative documents in the record.

After months of negotiations, Plaintiffs obtained nearly all of what they initially requested. Plaintiffs secured over 216,000 documents, totaling over 1.26 million pages, from Defendants.[77] Plaintiffs secured another 13,000 documents, totaling over 83,000 pages, from third parties.[78] Over 15,000 documents in this case were produced in Japanese in whole or in part.[79]

To review the Japanese documents efficiently, Plaintiffs retained another third-party vendor to provide first-level machine-translations of Japanese documents. Plaintiffs then retained a separate third-party vendor to provide second-level human translations of selected documents in preparation for depositions and, ultimately, for trial. The translation process was iterative, costly, and time-consuming.[80]

By early April 2022, the Parties began negotiating a stipulation of class

---

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *See* Affidavit of Jeroen van Kwawegen, ¶4.

certification, which they jointly filed on April 21.[81] The Court granted a Stipulation and Order Regarding Class Certification on April 26.[82] Defendants nonetheless served document requests and interrogatories on Plaintiffs on April 18.[83] Plaintiffs served responses and objections thereto on May 18.[84]

Document discovery was substantially completed on May 13, 2022.[85] Plaintiffs continued aggressively litigating to fill apparent holes in the documentary record that became apparent only upon close inspection. By way of example, two former chairmen of Kyocera, Dr. Kazuo Inamori and Mr. Kuba, were never identified as participants in, or persons with knowledge of, the Squeeze-Out. Plaintiffs found evidence suggesting that those two individuals were intimately involved in the Squeeze-Out's genesis. Plaintiffs fought hard to secure their documents, which Plaintiffs were in the process of doing on the eve of the Settlement.

Plaintiffs also discovered evidence suggesting that several undisclosed meetings took place between Kyocera and AVX in which the price and rationale for

[81] Trans. ID 67496182.

[82] Stip. ¶F.

[83] Trans. ID 67484018.

[84] Trans. IDs 67632464, 67636502.

[85] Stip. ¶G.

the Squeeze-Out were discussed. Plaintiffs sought discovery into text messages and phone records to investigate those meetings and additional communications involving Defendants' document custodians. Defendants steadfastly refused to produce any text messages or phone records.

On June 24, 2022, Plaintiffs moved to compel Defendants to review and produce text messages and provide logs of their custodians' phone calls and text messages.[86] Defendants opposed vociferously but unsuccessfully.[87] The Court granted Plaintiffs' motion in large part on July 13 and, on July 26, entered an order requiring Defendants to, *inter alia*: (i) review and produce all responsive, non-privileged text messages from eight document custodians; (ii) produce phone and text logs as soon as practicable from all of their custodians (including Dr. Inamori and Mr. Kuba); and (iii) identify information sought related to their custodians' mobile devices by July 29.[88] That was a significant victory for Plaintiffs, both in terms of substance and timing.

Plaintiffs had noticed the depositions of eighteen witnesses and were in the process of scheduling the depositions of an additional three non-parties.[89] At least

---

[86] Stip. ¶H.

[87] *Id.*

[88] Trans. ID 67858970, ¶2.

[89] Stip. ¶J.

eight of the witnesses reside in Japan and speak Japanese as their first language. The first deposition was scheduled for August 16, 2022.[90] As part of their preparation for depositions, Plaintiffs had begun the process of engaging vendors to work on translating documents and providing interpretation services. Fact discovery was scheduled to close on October 14, 2022.[91]

F. The Parties Agree to Settle on the Eve of Depositions

Shortly after Plaintiffs' successful motion to compel and weeks before depositions were scheduled to commence, settlement negotiations between the Parties picked up in earnest. After several weeks of negotiations, on or around August 10, 2022, the Parties reached an agreement in principle to settle the Action. The first deposition was scheduled for August 16.[92]

Defendants agreed to settle the Action for $49.9 million in cash pursuant to the terms of the proposed Settlement.[93] The Parties notified the Court of the proposed Settlement on August 11, 2022[94] and thereafter proceeded to negotiate the terms of the settlement Stipulation, which was filed with the Court on

---

[90] Trans. IDs 67762814, 67803927, 67869323, 67909984.

[91] Stip. ¶J.

[92] Stip. ¶¶J-K.

[93] Stip. ¶7.

[94] Stip. ¶L.

September 21.[95]

Notice of the Settlement was issued to the Class consistent with the Court's Scheduling Order entered on September 23, 2022. To date, Plaintiffs and their counsel have received no objections to the proposed Settlement or Fee and Expense Award.

ARGUMENT

I. THE PROPOSED SETTLEMENT SHOULD BE APPROVED AS FAIR, REASONABLE, AND ADEQUATE

A. Delaware Law Strongly Favors Settlement

"The settlement of a class . . . action requires court approval."[96] Delaware law strongly favors the voluntary settlement of contested claims, particularly in complex representative actions like this one.[97] When deciding whether to approve a proposed settlement, the Court looks to the facts and circumstances underlying the claims and exercises its informed judgment as to whether the proposed settlement is fair and reasonable.[98] The "facts and circumstances" considered by the Court include: (i) the

[95] Trans. ID 67921623.

[96] *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1042 (Del. Ch. 2015).

[97] *See, e.g.*, *Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991); *In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 265-66 (Del. 1990).

[98] *Prezant v. De Angelis*, 636 A.2d 915, 921 (Del. 1994).

probable validity of the claims; (ii) the apparent difficulties in enforcing the claims through the courts; (iii) the collectability of any judgment recovered; (iv) the delay, expense and trouble of litigation; (v) the amount of the compromise as compared with the amount of any collectible judgment; and (vi) the views of the parties involved.[99]

In evaluating the fairness of a settlement, the Court weighs the "give" (*i.e.*, the value of the claims released) against the "get" (*i.e.*, the value of the consideration obtained) to "determine whether the settlement falls within a range of results that a reasonable party in the position of the plaintiff, not under any compulsion to settle and with the benefit of the information then available, reasonably could accept."[100] Plaintiffs respectfully submit that a comparison of the give (the claims released) and the get (a $49.9 million cash payment to the Class) demonstrates that the proposed Settlement is fair, reasonable, adequate, and should be approved.

[99] *Polk v. Good*, 507 A.2d 531, 535-36 (Del. 1986) (citing *Rome v. Archer*, 197 A.2d 49, 53-54 (Del. 1964)).

[100] *Activision*, 124 A.3d at 1043 (citation omitted).

B. Plaintiffs Achieved a Significant Benefit for the Class, Fully Reflecting the Strength of Plaintiffs' Claims Weighed Against the Risks and Costs of Continued Litigation

1. *The $49.9 Million Settlement Amount Represents a Significant Recovery for the Class*

The amount recovered—$49.9 million in cash—is substantial and represents an excellent result for the Class, particularly when compared to the risks of continued litigation. Stockholder settlements often fall in the range of 1% to 2% of the deal price.[101] Here, the Settlement represents an approximately 4.8% premium to the $1.03 billion aggregate Squeeze-Out price and a recovery of approximately $1.05 per Class share.[102] Those results compare favorably with other recent, large settlements of entire fairness actions, including:

Case	Settlement Consideration	Premium to Deal Price
In re Pilgrim's Pride Corp. Deriv. Litig.[103]	$42.5 million	3.2%

[101] *In re Calamos Asset Mgmt., Inc. S'holder Litig.*, Consol. C.A. No. 2017-0058-JTL, at 4-5 (Del. Ch. Apr. 25, 2019) (TRANSCRIPT) (Plaintiff's counsel: "I recalled the *ExamWorks* argument where Mr. Hanrahan was presenting to Vice Chancellor Laster . . . . And what Mr. Hanrahan said was, 'Look, I've been practicing a long time. My sense is most stockholder settlements are under 5 percent [of the deal price] and often in the 1 to 2 percent range.'").

[102] ($49.9 million / $1.03 billion); (49,900,000 / 47,416,825 Class shares).

[103] Consol. C.A. No. 2018-0058-JTL (Del. Ch.) (Trans. ID 64576742) (BRIEF); ($42.5 million derivative settlement of action challenging $1.3 billion transaction).

Case	Settlement Consideration	Premium to Deal Price
In re Pivotal Software, Inc. S'holders Litig.[104]	$42.5 million	3%
In re Starz S'holder Litig.[105]	$92.5 million	2.3%
Hollywood Firefighters' Pension Fund v. Malone[106]	$110 million	1.5%

Plaintiffs submit that the substantial cash payment constitutes an extremely favorable "get" for the Class and is more than sufficient to warrant the release provided for in the Stipulation.

2. *Plaintiffs Had Strong Liability Claims But Establishing Damages Would Have Been Difficult*

After reviewing a substantial quantity of documents and working with an expert, Plaintiffs were reasonably confident in their liability claims but recognized that they faced an uphill battle on damages.

As an initial matter, entire fairness would have applied to the Squeeze-Out.

[104] C.A. No. 2020-0440-KSJM (Del. Ch.) (Trans. ID 68005930) (BRIEF); ($42.5 million recovery for 95 million class shares (*i.e.*, $0.45 per share); implied per-share deal price of $15.45 per share).

[105] Consol. C.A. No. 12584-VCG (Del. Ch.) (Trans. ID 62702942) (BRIEF); (recovery of $0.75 per class share; implied merger price of $32.17 per share).

[106] C.A. No. 2020-0880-SG (Del. Ch.) (Trans. ID 66951808) (plaintiffs' final approval brief; $110 million recovery for 99 million class shares (*i.e.*, $1.11 per share); implied per-share deal price of $72.49 per share).

Kyocera undisputedly controlled AVX and stood on both sides of the Squeeze-Out. "When a transaction involving self-dealing by a controlling shareholder is challenged, the applicable standard of judicial review is entire fairness, with the defendants having the burden of persuasion" as to both "fair dealing and fair price."[107] Defendants could not de-escalate the standard of review from entire fairness to business judgment under *Kahn v. M&F Worldwide Corp.* because, among other reasons, Kyocera refused to condition the Squeeze-Out *ab initio* on a MOTM vote and Special Committee approval.[108]

The documentary record strongly suggests that Defendants would not have been able to carry their burden to demonstrate fair dealing. "Under *Weinberger*, the concept of fair dealing encompasses an evaluation of how the transaction was timed and initiated" and "encompasses actions taken by the controller in the period leading up to the formal proposal."[109]

Here, the process was flawed from the beginning. The Special Committee was formed in November 2019, at least six months *after* deal negotiations commenced. Discovery revealed that substantive negotiations—including with

---

[107] *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1239 (Del. 2012).

[108] 88 A.3d 635, 644 (Del. 2014); *see also* Background § D, *supra*.

[109] *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *26 (Del. Ch. Aug. 27, 2015).

respect to price—took place between the dual fiduciaries who led both companies. The existence and substance of these negotiations were not disclosed publicly and appear never to have been communicated to the Special Committee.

Specifically, on May 22, 2019, Kodomari (Kyocera's lead negotiator for the Squeeze-Out), sent an email addressed to Individual Defendant Sarvis (AVX's Chairman/CEO and Kyocera director), and Hufnagel (AVX's then-CFO) attaching "a soft copy of the report which I delivered to you [that] morning."[110] The Report explained Kyocera's rationale for the Squeeze-Out and its expectations of "exponential growth" in AVX's target markets for the "electronic component business of Kyocera Group[.]"[111] The Report appears to have been authored by Individual Defendant Kano and addressed to two other Individual Defendants (Chairman Yamaguchi and President Hideo Tanimoto ("Tanimoto")) as well as Dr. Inamori, the visionary founder of Kyocera whose influence on both companies was immense.

The Report stated that Kyocera expected to pay "$1,120M," *i.e.*, $1.12 billion,

[110] Ex. 1 (the "Report"). Defendant Kano (AVX director, Kyocera director, and Kyocera's General Manager of Corporate Development) was also copied on the email transmitting the Report to Sarvis and Hufnagel. *Id.*

[111] *Id*. at -273-74.

for the remaining shares of AVX that Kyocera did not already own.[112] Kyocera eventually paid approximately $1.03 billion roughly one year later. To date, Plaintiffs have found no evidence in the extensive documentary record indicating that the Special Committee was ever informed of the Report or of Kyocera's apparent willingness at one time to pay nearly $120 million more than it did.[113] Instead, the Special Committee operated under the apparently mistaken belief that $1.03 billion represented "the maximum amount that Parent would be willing to offer."[114] Had the Special Committee been armed with the same information as Sarvis and Hufnagel, it could have potentially obtained more consideration for minority stockholders in connection with the Squeeze-Out.

Plaintiffs discovered additional evidence that AVX fiduciaries undercut the negotiating leverage of the Special Committee. The Report references prior undisclosed negotiations between AVX and Kyocera in which, "[a]ccording to AVX," Kyocera could "expect that the institutional investors will also agree with

---

[112] *Id*. at -274-75.

[113] By way of contrast, the 14D-9 simply stated that on May 23, 2019, only Hufnagel, AVX's then-CFO, met with members of Kyocera management and "generally discussed matters relating to potential timing and logistics of a potential transaction . . . but did not discuss pricing or other terms of a potential transaction." 14D-9 at 12.

[114] 14D-9 at 17.

the [Squeeze-Out] since the price of AVX share[s] is less fluctuating in the market due to the current Kyocera's ownership [of] more than 70%."[115] In other words, minority stockholders would not pose an impediment to the Squeeze-Out because of the overhang resulting from Kyocera's controlling stake.

Plaintiffs also discovered evidence suggesting that the Special Committee members operated with a "controlled mindset"[116] and may have lacked independence and experience for the following reasons:

- **DeCenzo**. Kyocera was one of the largest donors to Coastal Carolina University ("CCU") when DeCenzo served as CCU's President and launched the first "endowment campaign" in CCU's history in 2016.[117] Kyocera's multi-million donations were essential to CCU growing its endowment,[118] and were material given CCU's "relatively small" endowment of $32.7 million as of 2016.[119]

---

[115] Ex. 1 at -275.

[116] *In re S. Peru Copper Corp. S'holder Deriv. Litig*., 52 A.3d 761, 800 (Del. Ch. 2011), *aff'd sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

[117] *Coastal Carolina University launches $20 million endowment campaign*, GEORGETOWN TIMES (last updated Aug. 20, 2020) (hereinafter, "*CCU Endowment Campaign*") https://www.postandcourier.com/georgetown/news/coastal-carolina-university-launches-20-million-endowment-campaign/article_80f12072-d261-551e-83af-6b81d6fadb4e.html

[118] For example, the "AVX/Kyocera Foundation" donated between $1,000,000 and $2,499,999 to CCU in 2017. Lifetime Giving Recognition Society Levels, Coastal Carolina University, https://www.coastal.edu/ccustories/publicationstvshows/ccumagaziness2018/departments/giving/lifetimegivingrecognitionsocietylevels/

[119] *CCU Endowment Campaign*.

- **Christiansen**. The Special Committee's Chair, Christiansen was a longstanding director and former CFO of AVX, during which time he owed his livelihood to Kyocera.[120]

- **Ballato**. Before joining AVX in February 2019, Ballato, a Professor at Clemson University, appears never to have served on the board of a publicly traded company, much less on a special committee in the context of a controller squeeze-out.

Tellingly, on October 23, 2019—weeks after being notified directly of Kyocera's offer and their anticipated roles on the Special Committee—Ballato and DeCenzo prepared a presentation (with CCU and Clemson logos) for Chairman Yamaguchi regarding "present and future innovation and work-force relationships between industry and Universities."[121]

Kyocera exerted pressure on the Special Committee by refusing to condition the deal on a MOTM vote and ignoring other procedural safeguards. For example, Kyocera flaunted Sarvis's request to Kano, made on October 8, 2019, that all subsequent communications regarding the Squeeze-Out must be sent directly to Christiansen, Ballato, and DeCenzo.[122] Just two days later, the Special Committee members "were not informed of and did not participate in" a meeting about the Squeeze-Out held in South Carolina between Kodomari, Yamamura, and

[120] Compl. ¶21.

[121] Ex. 6 at -526.

[122] 14D-9 at 12.

Hufnagel.[123] Further, when deal negotiations reached an impasse over the MOTM condition, Yamaguchi, the Chairman of Kyocera and an AVX director, spoke directly to Christiansen by telephone, during which Christiansen predictably caved on the MOTM condition.[124]

The Special Committee knew what happened to independent board members who stood up to Kyocera in defense of minority stockholders. Kyocera had recently advocated for the resignation of a prior nominally independent AVX director, Joseph Stach, who had written "a memo to [Kyocera] that Kyocera is just a major shareholder of AVX," and that AVX is "not [a] Kyocera subsidiary."[125] Stach had voiced his suspicion to Sarvis, DeCenzo, and Christiansen, among others, that Kyocera planned to eliminate AVX as a potential competitor and simultaneously capture for itself the upside of AVX's future growth potential just as "we enter the IOT, Internet of Things" phase of the "new 'INDUSTRIAL REVOLUTION.'"[126]

Indeed, Kyocera also saw the Squeeze-Out as a way to capitalize on the potential for "exponential growth" as the world entered the next "industrial

---

[123] *Id.*

[124] *Id.* at 17-18.

[125] Ex. 7.

[126] Ex. 8.

revolution."[127] Kyocera anticipated doubling its sales revenue in the electronic components sector by eliminating competition through the deal.[128] Indeed, in May 2019, Kano urged Dr. Inamori, President Tanimoto, and Yamaguchi to greenlight the Squeeze-Out "at this point in time while the market size is expanding" and AVX's market share "remains low."[129] Now was the time for Kyocera to acquire AVX before AVX grew too large and costly.

Kyocera also appears to have timed the acquisition to take full advantage of an artificial dip in AVX's stock price that Kyocera had helped to cause. Discovery appeared to corroborate Plaintiffs' theories at the pleadings stage regarding several significant market factors surrounding the suspicious timing of the Squeeze-Out.

First, AVX's revenues were temporarily depressed due to anomalous disruptions in the supply chain that accounted for a 16% decrease in AVX's revenues in AVX's fiscal year 2020 (March 2019 to March 2020).[130]

Second, AVX's recent string of major acquisitions had not yet reached their full potential. AVX viewed these acquisitions as long-term plays.[131] So did Stifel,

---

[127] Ex. 1 at -268, -273-74.

[128] *Id.* at -268.

[129] *Id.* at -271.

[130] *See, e.g.*, Ex. 4 at -459.

[131] Compl. ¶37.

the only sell-side analyst covering AVX,[132] observing that the Ethertronics acquisition was "a step in the right direction," allowing AVX to "gain strong IP in active IMD antenna technology" which was expected to "see significant growth."[133] Stifel similarly noted that the S&C acquisition "should replace most of the lost revenue from the [KED Resale] business[.]"[134]

Third, AVX had not yet dug itself out from the financial hole created by Kyocera's recent termination of the KED Resale Agreement, which had accounted for approximately $600 million in total revenue for AVX in the two years before its termination.[135] The Special Committee's financial advisor flagged the KED Resale termination as an "Additional Value Driver[]" that potentially could support "value creation beyond management's forecast."[136]

Given the developing discovery record, Plaintiffs believed that there was a reasonably strong chance that Defendants could not have carried their burden of proving fair process. But process is only half the battle. Defendants could ultimately persuade the Court that the price was fair. Recent post-trial decisions where the

---

[132] Ex. 9.

[133] Ex. 10.

[134] Ex. 11.

[135] *See, e.g.,* Ex. 3 at -452.

[136] *Id.*

standard of review was entire fairness have declined to find unfair price even in the face of process issues.[137]

Plaintiffs' analysis of the documentary record and work with consulting experts suggested there was a real risk that Defendants would ultimately be able to prove the Squeeze-Out price was fair.

First, the Special Committee, advised by respected financial and legal advisors (Centerview and Wachtell Lipton), negotiated several material price increases from Kyocera's original offer of $19.50 per share and ultimately secured a final price of $21.75 per share.

Second, Kyocera paid a 44.6% premium over the closing stock price as of November 26, 2019, the last trading day before Kyocera publicly announced its first proposal.[138] That 44.6% premium appears to have been the highest among precedent transactions identified by Centerview, the average premium for which was just

---

[137] *See, e.g.*, *In re BGC P'rs, Inc. Deriv. Litig.*, 2022 WL 3581641, at *18-19 (Del. Ch. Aug. 19, 2022) (finding challenged transaction was entirely fair notwithstanding having found "defects in the process," including where controller "initiated" the deal and "sought to drive the timeline"); *In re Tesla Motors, Inc. S'holder Litig.*, 2022 WL 1237185, at *33-34 (Del. Ch. Apr. 27, 2022) (finding challenged transaction was entirely fair notwithstanding "Elon [Musk]'s apparent inability to acknowledge his clear conflict of interest and separate himself from Tesla's consideration of the Acquisition" including his "participat[ion] in the deal process to a degree greater than he should have been").

[138] 14D-9 at 20.

28%.[139] At the same time, AVX was trading below its peers, and its stock price had been declining in the year before the Squeeze-Out.[140]

Third, the May 2019 Report suggesting Kyocera was potentially willing to pay $120 million more calculated that amount by applying a 30% premium to AVX's then-current stock price—far less than the 44.6% premium AVX ultimately paid in the Squeeze-Out.[141]

Fourth, Stifel—the only sell-side analyst that covered AVX[142]—had a $15.00 per share price target for AVX prior to announcement of the Squeeze-Out and believed that Kyocera's first offer of $19.50 per share—reflecting a premium of just 29.7%—"puts the valuation in the range of ~6x peak EV/EBITDA (FY19) and ~9.5x FY21 EV/EBITDA," which is "in line with Yageo's offer to acquire Kemet," one of AVX's few peers.[143]

---

[139] Ex. 12 at -642.

[140] *Id.* at -640.

[141] Ex. 1 at -274-75. In addition to pointing to the premium, Defendants likely would have argued that the $1.12 billion deal price set forth in the May 2019 Report reflected a preliminary, back-of-the-envelope calculation based on AVX's average stock price over the then-past three months (*i.e.*, $17.63 per share). *Id.* By the time Kyocera made its first official public offer in November 2019, AVX's stock price had declined further to approximately $15.00 per share. Ex. 12 at -640.

[142] Ex. 9.

[143] Ex. 13. Yageo acquired Kemet for a premium of just 16% to its unaffected stock price. Ex. 12 at -642.

Fifth, a discounted cash flow ("DCF") analysis would have been complicated by the fact that the documentary record suggested AVX did not regularly prepare long-term projections in the ordinary course.[144] Accordingly, Plaintiffs' expert would likely have needed to create its own set of projections and/or adjust the projections used by Centerview. Such an exercise is challenging and often unsuccessful in meaningfully moving the needle on valuation.

Sixth, the Defendants would have argued the Squeeze-Out was an outstanding deal for AVX's minority stockholders in light of COVID-19 and its effects on AVX's business. The merger agreement was entered into on February 21, 2020, after the World Health Organization (WHO) had declared a Global Health Emergency on January 31, 2020. The Squeeze-Out did not close until March 30, 2020, well after the WHO declared COVID-19 a pandemic on March 11, 2020. COVID-19 caused substantial disruptions of AVX's business and its largest target market, the automotive industry. The impact of COVID-19 likely would complicate Plaintiffs' arguments regarding AVX's growth prospects and the temporary nature of the supply chain disruptions that depressed AVX's revenues in 2019 and 2020.

Considering the foregoing, Plaintiffs believe that the certainty of the $49.9

---

[144] *See* Response No. 11 to Defendant John Sarvis's Responses and Objections to Lead Plaintiffs' First Set of Interrogatories Directed to All Defendants (Trans. ID 66718195).

million Settlement Amount compares favorably to the uncertainty of establishing damages in excess of that amount at trial.[145] Indeed, the Settlement is substantial using any metric. The Settlement represents a healthy 4.8% premium to the $1.03 billion deal price. The per Class share increase of approximately $1.05, when added to the actual $21.75 per share price, puts the Settlement near the price range demanded by the Special Committee. Additionally, the Settlement Amount represents over 40% of the nearly $120 million of potential damages under one of Plaintiffs' more promising, but challenging, theories of the case.

C. The Proposed Settlement Was Reached Through Arm's-Length Negotiations

In assessing whether a settlement is fair, Delaware courts place considerable weight on whether it was reached through arm's-length negotiations between informed counsel, following diligent litigation efforts.[146] That is the case here.

The massive documentary record and hard-fought disputes meant the Parties and their counsel were well-informed about the strengths and weaknesses of their

---

[145] *See De Angelis v. Salton/Maxim Housewares, Inc.*, 641 A.2d 834, 839 (Del. Ch. 1993) (difficulty proving damages a factor in settlement fairness), *rev'd on other grounds sub nom. Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994); *see also Ryan v. Gifford*, 2009 WL 18143, at *8 (Del. Ch. Jan. 2, 2009) (approving settlement as fair where "the calculation of damages [was] particularly difficult to predict").

[146] *See, e.g.*, *Activision*, 124 A.3d at 1067 ("The diligence with which plaintiffs' counsel pursued the claims and the hard fought negotiation process weigh in favor of approval of the Settlement.").

respective claims and defenses. For example, in connection with Plaintiffs' motion practice and fight for text messages as well as documents from Dr. Inamori and Mr. Kuba, Plaintiffs featured the "hot" documents from discovery—including the Report. Plaintiffs' aggressive strategy helped to secure additional valuable discovery and educated Defendants about the strengths of Plaintiffs' case. That ensured the Settlement discussions were informed and helped secure a significant $49.9 million cash recovery, providing the Class with substantial benefits.

D. The Experience and Opinion of Plaintiffs' Counsel—and the Absence of Any Objection—Favor Approval of the Proposed Settlement

Delaware courts also recognize that the opinion of representative plaintiffs and their experienced counsel is entitled to weight in determining the fairness of a settlement.[147] Plaintiffs' counsel are experienced stockholder advocates who are well known to the Court and have significant experience prosecuting fiduciary duty claims under Delaware law.[148] As discussed above, given the breadth of document discovery, Plaintiffs' counsel were aware of the strengths and weaknesses of their

[147] *See, e.g.*, *Polk*, 507 A.2d at 536 (noting the court's consideration of "the views of the parties involved" when determining the "overall reasonableness of the settlement"); *Jane Doe 30's Mother v. Bradley*, 64 A.3d 379, 396 (Del. Super. 2012) ("It is appropriate for the Court to consider the opinions of experienced counsel when determining the fairness of a proposed class action.").

[148] *In re Palantir Techs. Inc. Class F Stock Litig.*, C.A. No. 2021-0275-SG (Del. Ch. Sept. 13, 2022) (TRANSCRIPT).

claims throughout settlement negotiations. The informed view of Plaintiffs' counsel that the proposed Settlement is in the best interests of the Class provides additional support for final approval.[149]

To date, no AVX stockholder has lodged an objection to the proposed Settlement. This fact also weighs in favor of approval.[150] To the extent any objection arises after submission of this brief, Plaintiffs will address any such objection in their reply pursuant to with the Scheduling Order.

II. THE CLASS SHOULD BE PERMANENTLY CERTIFIED

The Parties previously stipulated to class certification and, on April 21, 2022, this Court certified a class pursuant to Rules 23(a), 23(b)(1), and 23(b)(2), without opt-out rights, consisting of the following:

> All former record holders and/or beneficial owners of common stock of AVX Corporation ("AVX") who received $21.75 per share in cash in exchange for their shares of AVX common stock in connection with the acquisition of the outstanding shares of AVX stock not already owned by Kyocera Corporation, in their capacities as record holders and/or beneficial owners of such stock (the "Class Shares"), together with their heirs, assigns, transferees, and successors-in-interest, in each case in their capacity as holders of Class Shares (the "Class"). Excluded from the Class are (i) Defendants and their heirs,

[149] *See Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 99 (Del. 1979) (approving settlement based, in part, on plaintiff's counsel's conclusion that the settlement was fair and in the best interests of the class).

[150] *Spen v. Andrews Gp., Inc.*, 1992 WL 127512, at *1 (Del. Ch. June 5, 1992)

> trusts, estates, successors, and assigns; (ii) the immediate family members of the Individual Defendants; (iii) the senior officers and directors of AVX and Kyocera at the time of the closing of the acquisition of AVX by Kyocera and their immediate family members; (iv) any parent, subsidiary, or affiliate of AVX or Kyocera; and (v) all entities in which any Defendant or any other excluded person or entity has, or had at the time of the closing of the acquisition of AVX by Kyocera, a direct or indirect controlling interest.[151]

The Class for purposes of the proposed Settlement is the same class that the Court previously certified with the only difference being the addition of three additional "Excluded Stockholders"[152]—Arbitrage Fund, Water Island Merger Arbitrage Institutional Commingled Fund LP, and Morningstar Alternatives Fund A Series of Morningstar Funds Trust—appraisal petitioners who had separately settled their appraisal claims.[153] Accordingly, the Class should be permanently certified.

Plaintiffs have filed affidavits complying with Rule 23(e) stating their support for the proposed Settlement.[154] In accordance with the Scheduling Order, the Notice was mailed to potential Class Members beginning on or about October 14, 2022.

---

[151] Trans. ID 67508034, ¶1.

[152] *Compare id.* ¶1 *with* Stip. ¶1(e).

[153] Trans. ID 66291316.

[154] *See* Affidavits of Amy Stone Lamborn, Robert Reese, and Harriet Herman in Support of Settlement of Class Action and Award of Attorneys' Fees and Expenses. Albert Herman, Harriet Herman's then-husband, passed away on October 30, 2022.

The Settlement Agreement, which includes the Notice, was also posted on the website established for the Settlement on October 14, 2022. The summary Notice was published once in *Investor's Business Daily* and transmitted once over the *PR Newswire* on October 24, 2022. To date, although the objection deadline has not passed, no objections have been received by Plaintiffs' counsel or filed with the Court.

III. PLAINTIFFS' APPLICATION FOR A FEE AND EXPENSE AWARD SHOULD BE GRANTED

The amount of a fee award is committed to the sound discretion of the Court.[155] Fee awards should reflect the goal of "maximiz[ing] future plaintiffs' incentives to bring meritorious cases and to litigate them efficiently."[156] This Court considers fee applications under the well-known factors established in *Sugarland Industries v. Thomas*.[157] Under the *Sugarland* factors, the Court considers: (i) the amount of time and effort applied to the case by counsel for the plaintiff; (ii) the

[155] *Ams. Mining*, 51 A.3d at 1255 (citing *Johnson v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 547 (Del. 1998)).

[156] *Seinfeld v. Coker*, 847 A.2d 330, 338 (Del. Ch. 2000); *see also In re Topps Co. S'holders Litig.*, 924 A.2d 951, 962 n.39 (Del. Ch. 2007) ("Nor can stockholder-plaintiffs believe that their lawyers will not receive appropriate remuneration in this court for achieving an important benefit for the corporation or a class of stockholders.").

[157] 420 A. 2d 142 (Del. 1980).

relative complexities of the litigation; (iii) the standing and ability of counsel; (iv) the contingent nature of the litigation; (v) the stage at which the litigation ended; (vi) whether the plaintiff can rightly receive all the credit for the benefit conferred or only a portion thereof; and (vii) the size of the benefit conferred.[158]

Plaintiffs respectfully request an all-in Fee and Expense Award of $10,728,500, inclusive of expenses, for the benefits Plaintiffs' counsel conferred in this Action. As explained below, the requested Fee and Expense Award is supported by all of the *Sugarland* factors and consistent with applicable precedent.

A. Counsel Achieved a Substantial Monetary Benefit

The benefits achieved through litigation are accorded the greatest weight in determining an appropriate fee award.[159] This Court recognizes that "the dollar amount of the [settlement payment]" is the "heart of the *Sugarland* analysis."[160] The monetary benefit achieved in this Action is concrete and substantial: a $49.9 million

---

[158] *Id.* at 149.

[159] *Ams. Mining*, 51 A.3d at 1254 ("Delaware courts have assigned the greatest weight to the benefit achieved in litigation."); *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *20 (Del. Ch. May 6, 2010) ("the size of the benefit being of paramount importance"); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *8 (Del. Ch. Aug. 30, 2017) ("courts assign the greatest weight to the benefit achieved by the litigation"); *Seinfeld*, 847 A.2d at 336 ("*Sugarland's* first factor is indeed its most important").

[160] *Seinfeld*, 847 A.2d at 336.

cash payment. As our Supreme Court has held: "When a case settles after the plaintiffs have engaged in meaningful litigation efforts . . . fee awards in the Court of Chancery range from 15-25% of the monetary benefits conferred."[161]

The requested Fee and Expense Award represents 21.5% of the cash Settlement amount, inclusive of expenses. The all-in $10,728,500 Fee and Expense Award is warranted when compared to precedents involving comparable litigation activity, including the following:

Case	Cash Settlement Amount	Awarded Fee Percentage	Stage of Litigation
Lacey v. Larrea Mota-Velasco, C.A. No 11779 (Del. Ch. Jan. 4, 2019) (ORDER)[162]	$50,000,000	26.5% (27% all-in)	Reviewed over 1 million pages of documents, including 200,000 pages of documents produced in Spanish; took four depositions; engaged in some discovery motion practice

[161] *Ams. Mining*, 51 A.3d at 1259-60.

[162] (ORDER) (Trans. ID 62820928; 2019 WL 109460); (Del. Ch. Nov. 5, 2018) (BRIEF) (Trans. ID 62628884; 2018 WL 5879554).

Case	Cash Settlement Amount	Awarded Fee Percentage	Stage of Litigation
In re Towers Watson & Co. S'holder Litig., C.A. No. 2018-0132-KSJM (Del. Ch. June 8, 2021)[163]	$15,000,000	25% (26.5% all-in)	Filed complaint; reviewed approximately 1 million pages of documents; took no depositions; engaged in motion practice, including appeal
Morrison v. Berry, C.A. No. 12808-VCG (Del. Ch. July 7, 2021)[164]	$27,500,000	25% (26.4% all-in)	Filed complaint incorporating 220 documents; reviewed approximately 1.5 million pages of documents; took one deposition; engaged in motion practice, including appeal
Weinstein v. RMG Networks Holdings Corp. et al., C.A. No. 2018-0210-AGB (July 10, 2020)[165]	$1,500,000	25.0% (29.1% all-in)	Reviewed 8,600 pages of documents; filed two complaints; fully briefed defendants' motion to dismiss

[163] (ORDER) (Trans. ID 66666351; 2021 WL 2354964); (Del. Ch. May 4, 2021) (BRIEF) (Trans. ID 66571300; 2021 WL 1831987).

[164] (ORDER) (Trans. ID 66746704; 2021 WL 2826974); (Del. Ch. June 17, 2021) (BRIEF) (Trans. ID 66693615; 2021 WL 2551194).

[165] (ORDER) (Trans. ID 65677457; 2020 WL 3961265); (Del. Ch. Jun. 26, 2020) (BRIEF) (Trans. ID 65727467; 2020 WL 3577472).

Case	Cash Settlement Amount	Awarded Fee Percentage	Stage of Litigation
Asbestos Workers' Phila. Pension Fund v. Avril, C.A. No. 2019-0633-SG (Del. Ch. Apr. 16, 2021)[166]	$5,600,000	23.5%[167] (24.4% all-in)	Filed complaint and amended complaint; took no depositions; engaged in some motion practice
In re Tangoe, Inc. S'holder Litig., Consol. C.A. No. 2017-0650-JRS (Del. Ch. Jan. 29, 2020)[168]	$12,500,000	22.6% (23% all-in)	Filed complaint incorporating 220 documents; reviewed approximately 250,000 pages of documents; took no depositions; engaged in some motion practice

[166] (ORDER) (Trans. ID 66521247; 2021 WL 1534832); (Del. Ch. Apr. 2, 2021) (BRIEF) (Trans. ID 66479190; 2021 WL 1295200).

[167] The total fee and expense award of $1.85 million included a mootness fee of $750,000. The remaining $1.1 million awarded to plaintiffs' counsel was awarded out of a $4.5 million common fund (*i.e.*, 24.4%). *Asbestos Workers' Phila. Pension Fund v. Avril*, C.A. No. 2019-0633-SG, Tr. at 24:12-18 (Del. Ch. Apr. 16, 2021) (TRANSCRIPT).

[168] (ORDER) (Trans. ID 64670833; 2020 WL 507523); (Del. Ch. Jan. 9, 2020) (BRIEF) (Trans. ID 64598442; 2020 WL 136813).

Case	Cash Settlement Amount	Awarded Fee Percentage	Stage of Litigation
In re Am. Int'l Group, Inc. Consol. Deriv. Litig., C.A. No. 769-VCS (Jan. 25, 2011)[169]	$90,000,000	22.5% (23.4% all-in)	Filed complaint and amended complaint; met with counsel for SLC; reviewed discovery in the securities action; fully briefed motion to dismiss
Garfield v. Blackrock Mortg. Ventures, LLC, C.A. No. 2018-0917-KSJM (Del. Ch. Feb. 26, 2021)[170]	$6,850,000	22.4% (23% all-in)	Filed complaint incorporating 220 documents; reviewed over 38,000 pages of documents; took no depositions; engaged in some motion practice
Lee v. Pincus, C.A. No. 8458-CB (Mar. 27, 2017)[171]	$10,000,000	22.4% (23.5% all-in)	Reviewed approximately 105,000 pages of documents, conducted no depositions; engaged in motion practice

[169] (ORDER) (Trans. ID 35568523; 2011 WL 244179); (Del. Ch. Dec. 17, 2020) (BRIEF) (Trans. ID 34926521; 2010 WL 5180305).

[170] (ORDER) (Trans. ID 66373272; 2021 WL 763744); (Del. Ch. Jan. 22, 2021) (BRIEF) (Trans. ID 66277791; 2021 WL 274491).

[171] (ORDER) (Trans. ID 60390451); (BRIEF) (Trans. ID 60276882).

B. The Remaining *Sugarland* Factors Also Support the Requested Fee and Expense Award

1. *The Contingent Nature of the Litigation Supports the Requested Fee and Expense Award*

The contingent nature of the representation is the "second most important factor considered by this Court" in awarding attorneys' fees.[172] "It is the 'public policy of Delaware to reward risk-taking in the interests of [stock]holders.'"[173] Delaware courts have repeatedly recognized that an attorney may be entitled to a much larger fee when the compensation is contingent rather than paid on an hourly or contractual basis.[174]

For the reasons discussed above, this case presented "true contingency risk"[175] to counsel, who litigated on an entirely contingent basis. "Counsel did not enter the case with a ready-made exit or obvious settlement opportunity."[176] From inception, this was a post-closing damages case where "[c]ounsel faced . . . the realistic

---

[172] *Dow Jones & Co. v. Shields*, 1992 WL 44907, at *2 (Del. Ch. Jan. 10, 1992).

[173] *Activision*, 124 A.3d at 1073 (quoting *In re Plains Res.*, 2005 WL 332811, at *6 (Del. Ch. Feb. 4, 2005)).

[174] *Chrysler Corp. v. Dann*, 223 A.2d 384, 389-90 (Del. 1966); *accord Ryan*, 2009 WL 18143, at *13.

[175] *Activision*, 124 A.3d at 1074.

[176] *Sciabacucchi v. Salzberg*, 2019 WL 2913272, at *8 (Del. Ch. July 8, 2019), *vacated on unrelated grounds sub nom. Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

possibility that [they] would receive nothing for their time and effort."[177] The risk was particularly heightened in this case, where the 44.6% premium following several negotiated increases in price by a Special Committee with high-powered advisors meant that proving damages would be challenging.

2. *The Significant Efforts of Plaintiffs' Counsel Support the Requested Fee and Expense Award*

In applying *Sugarland*, Delaware courts look at the hours and efforts expended as a cross-check.[178] "More important than hours is 'effort, as in what plaintiffs' counsel actually did.'"[179] Here, Plaintiffs' counsel did "'quite a bit.'"[180]

The proposed Settlement is the result of Plaintiffs' counsel's multi-year efforts litigating this Action, which began with counsel's Section 220 investigation in early 2020 and lasted through the eve of depositions in the summer of 2022. The following summarizes Plaintiffs' counsel's efforts at a high-level:

- Served multiple Section 220 demands;
- Negotiated for and reviewed probative Section 220 productions;
- Consulted with an expert to evaluate the merits of the case and

[177] *In re Orchard Enters., Inc. S'holder Litig.*, 2014 WL 4181912, at *9 (Del. Ch. Aug. 22, 2014).

[178] *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *12 (Del. Ch. June 27, 2011) (citations omitted).

[179] *Id.* at *13 (citations omitted).

[180] *See id.*

Plaintiffs' theories before filing the Complaint;

- Researched extensively into the underlying market and business dynamics that formed the heart of the Complaint's allegations;

- Filed a detailed Complaint setting forth a novel theory of the case regarding the opportunistic timing of the Squeeze-Out against the backdrop of AVX's temporary revenue decline and exponential growth prospects;

- Served comprehensive document requests and interrogatories upon seven Defendants requesting discovery stretching back to 2016;

- Served seven subpoenas upon non-parties and negotiated discovery from non-parties located in Japan;

- Negotiated multiple search protocols in Japanese and English with the aid of a third-party translator;

- Engaged in months-long, hard-fought negotiations to obtain approximately 1.35 million total pages of documents;

- Secured documents from thirty custodians from Defendants alone;

- Retained third-party vendor to aid with first-level machine translation of Japanese documents;

- Retained separate third-party vendor to provide human translations of Japanese documents;

- Analyzed a substantial quantity of the approximately 230,000 total documents produced in this litigation, 15,000 of which were in Japanese;

- Uncovered gaps in the discovery record and engaged in protracted negotiations for additional discovery, including additional custodians at the highest levels of Kyocera;

- Filed a successful motion to compel to obtain text messages, call logs,

and text message logs from cell phone carriers located in the United States and Japan;

- Consulted with an expert to assess Plaintiffs' damages theories with the benefit of the documentary record;

- Noticed or scheduled the depositions of twenty-one witnesses, at least eight of whom reside in Japan;

- Negotiated the Settlement; and

- Prepared for depositions, including work with a third-party translator.

Plaintiffs' counsel's affidavits submitted herewith contain a breakdown of Plaintiffs' counsel's time and expenses in this Action. From inception through September 21, 2022, the date of the Stipulation, Plaintiffs' counsel and support staff devoted a total of 8,451.16 hours to this litigation, with a total lodestar of $4,094,863.60 at their currently applicable hourly rates, as set forth in the chart below.[181]

[181] *See* Affidavits of Jeroen van Kwawegen, Jeffrey M. Gorris, Jeremy Friedman, Peter B. Andrews, D. Seamus Kaskela, and Alfred G. Yates.

Firm	Hours	Lodestar	Expenses
Bernstein Litowitz Berger & Grossmann LLP	3,305.75	$1,614,187.50	$92,540.17
Friedlander & Gorris, P.A.	1,049.81	$635,078.60	$6,178.27
Friedman Oster & Tejtel PLLC	1,831.75	$1,004,000.00	$2,254.84
Andrews & Springer LLC	2,031.85	$673,315.00	$4,398.71
Kaskela Law LLC	96.5	$74,787.50	$243.44
Law Office of Alfred G. Yates	135.5	$93,495.00	—
Totals	8,451.16	$4,094,863.60	$105,615.43
Grand Total: $4,200,479.03			

Plaintiffs' counsel incurred total expenses of $105,615.43. After subtracting Plaintiffs' counsel's expenses, the net requested fee award is $10,622,884.57. The effective hourly rate of the net fee award is $1,256.97 per hour. That rate is reasonable in comparison to the non-contingent hourly rates of experienced and

qualified counsel who practice before this Court,[182] and is significantly lower than the effective hourly rates approved by this Court in comparable cases:

Case	Lodestar Multiplier	Effective Hourly Rate
In re Activision Blizzard, Inc. S'holder Litig., 124 A.3d 1025 (Del. Ch. 2015)		$9,685.00
City of Miami Gen. Emps.' and Sanitation Emps.' Ret. Tr. v. Foley, C.A. No. 2020-0650-KSJM (Del. Ch. June 21, 2022) (TRANSCRIPT)	14x	$8,748.00
In re Medley Cap. Corp. S'holders Litig., Consol. C.A. No. 2019-0100-KSJM (Del. Ch. Nov. 19, 2019) (TRANSCRIPT)		$5,989
In re Pilgrim' Pride Corp. Deriv. Litig., C.A. No. 2018-0058-JTL (Del. Ch. Jan. 28, 2020)	7.0x	$4,511.09
Hawkes v. Bettino, C.A. No. 2020-0360-PAF (Del. Ch. Apr. 1, 2021) (TRANSCRIPT)		$4,093.16
City of Monroe Emps.' Ret. Sys. v. Murdoch, C.A. No. 2017-0833-AGB (Del. Ch. Feb. 9, 2018)		$3,979.15
In re Palantir Techs. Inc. Class F Stock Litig., C.A. No. 2021-0275-SG (Del. Ch. Sept. 13, 2022) (TRANSCRIPT)	4.67x	$3,574.00

[182] *See, e.g.*, *Franklin Balance Sheet*, 2007 WL 2495018, at *14 ("As a 'backstop check,' this Court also considers whether a contemplated fee award translates into an exorbitant hourly rate.").

Case	Lodestar Multiplier	Effective Hourly Rate
Vero Beach Police Officers' Ret. Fund v. Bettino, C.A. No. 2017-0264-JRS (Del. Ch. Dec. 3, 2018)	5.3x	$3,165.00
Searles v. Demartini, C.A. No. 2020-0136-KSJM (Del. Ch. Nov. 17, 2021)		$3,069.99

The Fee and Expense Award requested here represents a 2.61x multiplier on Plaintiffs' counsel's $4,094,863.60 total lodestar amount.

3. *The Litigation was Relatively Challenging and Complex*

In determining an award of fees and expenses, the Court also will consider the relative complexities of the litigation. "All else equal, litigation that is challenging and complex supports a higher fee award."[183]

This case was challenging and complex on multiple layers. It was not the garden-variety controller squeeze-out case challenging a brief transaction process with routine valuation issues. Instead, the Complaint alleged that Kyocera took advantage of temporary market forces to buy AVX on the cheap at an opportunistic time right before AVX could realize its future growth prospects due to complicated issues in the global MLCC industry. This required understanding AVX's highly

[183] *Activision*, 124 A.3d at 1072.

complicated business and industry, both of which were comparatively underfollowed by equity analysts and the financial community, particularly in view of AVX's "low float."[184] It also meant understanding AVX's business and prospects over a multi-year period to untangle the temporary challenges facing AVX and prove its long-term prospects.

Moreover, Japanese foreign-language issues made this litigation challenging and complex at every stage, from the negotiation of search protocols in Japanese, to multiple layers of translation during document review, and to engaging interpreters for the eventual depositions and trial. This was costly and time-consuming, and involved careful scrutiny of both the meaning and nuance of key documents. The Court has previously recognized that the "additional complexity [of] . . . extensive foreign language discovery" weighs in favor of a higher percentage fee award.[185]

4. *The Standing and Ability of the Parties' Counsel Affirms the Reasonableness of the Fee Award*

The "standing and ability of counsel involved" also favors granting the requested fee. "Law firms establish a track record over time, and they 'build (and

[184] Ex. 9. Before the Squeeze-Out, AVX was covered by only one sell-side equity analyst (Stifel), which made it difficult for a firm even with Centerview's level of knowledge and experience to gather information to assess the Squeeze-Out. *Id*.

[185] *See In re Amtrust Fin. Servs., Inc. S'holder Litig.*, C.A. No. 2018-0396-LWW, at 42 (Del. Ch. Nov. 22, 2021) (TRANSCRIPT).

sometimes burn) reputational capital.'"[186] Plaintiffs' counsel have built reputational capital with the Court and defense counsel by demonstrating a willingness and ability to litigate cases aggressively to obtain substantial recoveries for their clients. Litigating this Action required mastery of a complex record and a further willingness to litigate a case as long as necessary to extract its value. Counsel's track record of doing that, both in this case and in previous cases, gave it the credibility necessary to extract the favorable result that it did.

The Court may also consider "the diligence and zealousness of the defense" and the experience of opposing counsel in determining any award of attorneys' fees.[187] Defendants were and are represented by experienced counsel from two high-profile international law firms—Davis Polk & Wardwell LLP and Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.—as well as two of Delaware's preeminent defense firms—Morris, Nichols, Arsht & Tunnell LLP and Richards, Layton & Finger, PA. Defendants' counsel litigated this case diligently and capably on behalf of their clients.

---

[186] *In re Del Monte Foods Co. S'holders Litig.*, 2010 WL 5550677, at *9 (Del. Ch. Dec. 31, 2010) (quoting *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 956 (Del. Ch. 2010)).

[187] *Joseph v. Shell Oil Co.*, 1985 WL 150466, at *5 (Del. Ch. Apr. 22, 1985).

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court approve the $49.9 million proposed Settlement, certify the Class, and approve the Fee and Expense Award.

FRIEDLANDER & GORRIS, P.A.

/s/ Jeffrey M. Gorris
Joel E. Friedlander (Bar No. 3163)
Jeffrey M. Gorris (Bar No. 5012)
David Hahn (Bar No. 6417)
1201 N. Market Street, Suite 2200
Wilmington, DE 19801
(302) 573-3500

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ Gregory V. Varallo
Gregory V. Varallo (Bar No. 2242)
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3601

Co-Lead Counsel for Plaintiffs

ANDREWS & SPRINGER LLC
Peter B. Andrews (Bar No. 4623)
Craig J. Springer (Bar No. 5529)
David M. Sborz (Bar No. 6203)
Jackson E. Warren (Bar No. 6957)
4001 Kennett Pike, Suite 250
Wilmington, DE 19807
(302) 504-4957

Additional Counsel for Plaintiffs

Words: 11,205

OF COUNSEL:

Mark Lebovitch
Jeroen van Kwawegen
Thomas G. James
Margaret Sanborn-Lowing
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

Co-Lead Counsel for Plaintiffs

Jeremy Friedman
David Tejtel
Lindsay LaMarca
FRIEDMAN OSTER & TEJTEL PLLC
493 Bedford Center Road
Suite 2D
Bedford Hills, NY 10507
(888) 529-1108

D. Seamus Kaskela
KASKELA LAW LLC
Campus Boulevard, Suite 100
Newtown Square, PA 19073
(484) 258-1585

Additional Counsel for Plaintiffs

DATED: November 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on December 1, 2022, I caused a true and correct copy of the foregoing **Public Version of Plaintiffs' Application for Settlement Approval and an Award of Attorneys' Fees and Expenses** to be served upon the following counsel of record by File&Serve*Xpress*:

Robert W. Whetzel, Esquire
Kevin M. Gallagher, Esquire
RICHARDS, LAYTON
& FINGER, P.A.
One Rodney Square
Wilmington, DE 19801

Kevin Coen, Esquire
Sara Toscano, Esquire
MORRIS, NICHOLS, ARSHT
& TUNNELL LLP
1201 N. Market Street, Suite 2200
Wilmington, DE 19801

/s/ David Hahn
David Hahn (Bar No. 6417)

TAB 16

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE WEBER, INC. STOCKHOLDER LITIGATION : CONSOLIDATED
: C.A. No. 2023-0993-KSJM

- - -

Chancery Courtroom No. 12C
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Monday, June 30, 2025
11:00 a.m.

- - -

BEFORE: HON. KATHALEEN St.J. McCORMICK, Chancellor

- - -

SETTLEMENT HEARING AND RULING OF THE COURT

APPEARANCES:

ERIC J. JURAY, ESQ.
STACEY A. GREENSPAN, ESQ.
KIRSTEN M. VALANIA, ESQ.
Prickett, Jones & Elliott, P.A.
-and-
ERIC ZAGAR, ESQ.
NAKIB KABIR, ESQ.
of the Pennsylvania Bar
Kessler Topaz Meltzer & Check, LLP
for Plaintiff Richard J. Bishop

REBECCA A. MUSARRA, ESQ.
Grant & Eisenhofer P.A.
-and-
W. SCOTT HOLLEMAN, ESQ.
of the New York Bar
Julie & Holleman LLP
for Plaintiff Micah Marshall II

RYAN D. STOTTMANN, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
BRITTANY L. SUKIENNIK, ESQ.
of the New York Bar
Cravath, Swaine & Moore LLP
for Defendants Kelly D. Rainko, BDT Capital Partners, LLC, and Byron D. Trott

R. GARRETT RICE, ESQ.
Ross Aronstam & Moritz LLP
-and-
BRIAN M. BURNOVSKI, ESQ.
of the New York Bar
Davis Polk & Wardwell LLP
for Defendants Susan T. Congalton, Magesvaran Suranjan, Elliott Hill, Martin McCourt, Melinda R. Rich, and James C. Stephen

- - -

ATTORNEY STOTTMANN: Good morning, Your Honor. Ryan Stottmann of Morris, Nichols on behalf of the BDT defendants. I am joined by my co-counsel from Cravath, Brittany Sukiennik.

ATTORNEY SUKIENNIK: Good morning, Your Honor.

THE COURT: Good morning.

ATTORNEY STOTTMANN: And I believe Mr. Rice also has some introductions.

ATTORNEY RICE: Good morning, Your Honor. Garrett Rice from Ross Aronstam & Moritz on behalf of the Weber defendants. My co-counsel Brian Burnovski from Davis Polk is with me as well.

THE COURT: Thank you.

ATTORNEY JURAY: Good morning, Your Honor. Eric Juray from Prickett, Jones & Elliott. I'm joined by Stacey Greenspan. From Kessler Topaz we have Eric Zagar and Nakib Kabir. From Grant & Eisenhofer, Rebecca Musarra. And Scott Holleman from Julie & Holleman.

THE COURT: Thank you.

ATTORNEY JURAY: Your Honor, by way of housekeeping, I introduced myself to the judicial interns in the back. They are not here to object.

But I wanted to make sure there were no objectors in the courtroom. I am not aware of any, and no objections have been received.

May I proceed, Your Honor?

THE COURT: Please.

ATTORNEY JURAY: We're here this morning for a settlement hearing in the *In re Weber* matter, which is Case No. 2023-0993, which is a consolidated class action challenging the take-private of Weber, Inc., by its controlling stockholder. The settlement is straightforward. It's a cash fund of 19.25 million. While I'm happy to answer any questions the Court may have or discuss any issues the Court would like to, my remarks will be summary in nature given the absence of objections to the settlement.

I'll start with notice. The record establishes that proper notice has been given to the class. We filed Mr. Ewashko's affidavit on June 20th from A.B. Data. A.B. Data has mailed more than 28,000 notices, and the notice and the settlement materials were also published on a settlement-dedicated website.

Class certification, Your Honor. Our brief establishes that the Rule 23 requirements for

class certification have been satisfied, and we ask that a traditional merger class be certified consisting of all former holders of Weber Class A common stock from announcement of the merger through its closing. And, of course, the defendants and related parties are excluded.

Briefly on allocation. Pages 20 to 28 of the settlement stipulation lay out the general terms of the distribution. It's one that is typical in merger-related settlements. The distribution will be a pro rata payment to the class members who held eligible shares.

I'll turn now to the settlement, Your Honor. A substantial cash fund was the most compelling reason for approval of the settlement. As I mentioned earlier, it's 19.25 million. We estimate that to be about a 10.8 percent bump to the value of the merger consideration, which will be based on a final class share count which I'll discuss briefly, Your Honor, to give you an update on where we stand on excluded shares in other similar matters.

On reasonableness, the stage at which the case settled confirms the reasonableness of the settlement, Your Honor. It was reached after document

production from defendants and third parties on the eve of depositions and through vigorous mediation and negotiation. We had a fulsome record and understood the strengths and weaknesses of the case. There was a full-day mediation, some additional correspondence and discussion, and then ultimately David Murphy made a double-blind mediator proposal. The parties accepted it and then documented the settlement.

The settlement is also reasonable in light of the liability and damages risks, which are set out in the brief, but I'll touch on a few briefly.

This was an entire fairness case. And plaintiffs had good liability arguments, including that BDT was responsible for Weber's cash crunch that precipitated the merger. But based on significant document production and arguments made at mediation, plaintiffs understood defendants had reasonable arguments about Weber's performance, the independence of the special committee, and the negotiation by the special committee that led to multiple price bumps.

But damages, as is typically the case, would have been more difficult. The deal price was a significant 60 percent premium to the trading price right before BDT's first offer.

So we would have needed to grapple with the trading price and the premium paid at trial. And if we ever came to market evidence at trial, there were still real damages risks. There were multiple sets of projections to fight about in the DCF. Plaintiffs would have argued that the higher set of projections that were created during the deal price were the appropriate set to use. Defendants would have pushed for the lower set and pointed to Weber's post-merger performance and justifying the use of the lower projections. And if plaintiffs lost on the projections issue, the prospect of damages was slim.

And even if the Court relied on the higher set of projections, plaintiffs still would have had to convince the Court that upward adjustments were necessary to those management projections, otherwise, again, there was not a high likelihood of damages.

So overall there were liability and damages risks that demonstrated the settlement was priced correctly, Your Honor. And as I mentioned a few moments ago, we're still diligently working to finalize the share count. And I wanted to provide the Court an update on that process, including now a recent issue that I've raised with defendants.

In our brief, we noted that the 10.8 premium -- that there was about a 10.8 percent premium to the $8.05 per share deal price that was based on 22.15 million shares in the class, Your Honor. So the settlement would be about 87 cents per share before attorneys' fees. This was the estimated class size plaintiffs used. It was based on Centerview's work products, the proxy, and the merger agreement. They all mentioned about 53 million total Class A shares outstanding or share equivalents outstanding. It's not clear that it was actually 53 million. Probably backed out the controller independent shares and came to a class size of about 22 million shares.

As we've been working through notice and excluded stockholder issues, we determined that while we thought there were 53 million Class A shares outstanding, there's a later document that now says 58 million shares. So there's a 5 million share difference.

These types of discrepancies aren't uncommon. We've already worked out what the issue was. Some insiders held these special profits unit interests and rather than roll over, which they were supposed to in the merger agreement, they elected to

convert and cash them out. It's not even clear to me at this time if Class A shares were even issued in the cash-out or if they were just cashed out at the time of the merger.

Even if Class A shares were created, which, again, is not clear, I don't think any of these folks would be in the class because they weren't similarly situated and other reasons. But I wanted to let the Court know that I've been working with defendants on this issue to understand what happened mechanically with those people who didn't roll over. I candidly raised this recently, said defendants haven't been delaying or uncooperative; we just hadn't fully rounded it out yet.

So again, if shares were created, which is not clear to me if they are in the class, which I doubt, that would simply change the class size from 22 million to closer to 26 million, and the settlement would still be 73 cents per share. It doesn't change our view on the reasonableness of the settlement. We think the right number is still going to ultimately be 22.15 million, approximately, shares in the class. But that will just require further finalizing with defendants.

And, Your Honor, you'll see this set forth -- if the settlement is approved, you'll see this set forth in the plan of allocation explaining why certain folks who may have held Class A shares late either are or aren't in the class. We'll continue to diligently work through that issue, Your Honor, but I wanted to make the Court aware now.

Unless the Court has any questions, I'll turn to the attorneys' fee request.

THE COURT: No questions. Thank you.

ATTORNEY JURAY: Finally, Your Honor, the request for attorneys' fees and expenses is also straightforward and reasonable — reimbursement of expenses and 20 percent of the net settlement fund. The expenses were $99,606.30. Most were for mediation, experts, and a document review platform. We'd ask that the Court approve this expense reimbursement as reasonable.

The 20 percent fee request is also reasonable, in our view, Your Honor. This was a mid-stage case. We noted in the settlement brief that the 20 percent fee request is squarely in line with two recent precedents — *HomeFed* and *Convey*. We believe this supports the reasonableness of the ask as

well. The time spent litigating the case is worth the reasonableness of the fee. 20 percent of the net settlement fund represents a lodestar multiplier of just 1.18x, Your Honor.

I don't intend to repeat the material on the secondary *Sugarland* factors, but I'll note that we reached a very good settlement with defendants, who were represented by high-caliber lawyers that litigated vigorously for their clients.

So, Your Honor, we ask that the Court approve the settlement and approve the requested fee and expense award.

Unless the Court has any questions, that's all I have, Your Honor.

THE COURT: No questions.

ATTORNEY JURAY: Thank you, Your Honor.

ATTORNEY STOTTMANN: I don't believe the defendants have anything, Your Honor, unless you have any questions for us.

THE COURT: No questions.

ATTORNEY STOTTMANN: Thank you, Your Honor.

THE COURT: Please be seated. I'll

deliver a bench ruling on the motions pending.

This class action arises from Weber, Inc.'s take-private transaction by BDT Capital Partners, LLC, and Byron D. Trott. It was for $8.05 per share. The plaintiffs owned Weber stock before the transaction. They brought this action claiming that the BDT defendants, who are BDT and Trott, and Weber's board breached their fiduciary duties in connection with the transaction to take the company private.

The defendants answered the complaint and engaged in document discovery. After, through mediation efforts, the parties agreed to settle this dispute for $19.25 million in cash payment to the class. The plaintiffs have presented the proposed settlement to the Court. They have moved for class certification, approval of the settlement, and an award of attorneys' fees and expenses.

Defendants support the motion to approve the settlement. They do not oppose the amount of fees requested, and no one has come forward to object. I am prepared to deliver a bench ruling approving all of the requests.

I'll start with the description of the

claims at issue and events leading to the settlement. These are not factual findings. I recite them for the purpose of context for persons trying to understand the nature of this case and the settlement reached.

The Stephen family founded Weber, the world's leading manufacturer of grills and grilling accessories, in the 1950s. They sold their controlling interest in Weber to the BDT defendants in 2010. The BDT defendants took Weber public in 2021 for $14 per share. The BDT defendants maintained control over Weber post IPO.

According to the complaint, the BDT defendants stacked Weber's seven-member board with BDT partners, advisors, and persons with whom they have long-term relationships.

By late 2021, Weber faced an international supply chain crisis, rising inflation, surging freight and transportation prices, and material foreign exchange rate movements, which negatively affected consumer spending and Weber's 2022 financial performance. Weber's stock price closed below the IPO price by the end of 2021.

In July of 2022, Weber announced preliminary financial results, the replacement of the

company's CEO, a dividend suspension, and other cost-cutting measures, after which Weber's stock price dropped by about 13 percent to around $6.56 per share.

By early August, the company was cash strapped.

According to plaintiffs, the BDT defendants decided to capitalize on Weber's low trading prices by taking Weber private. Weber's board formed a special committee in August of 2022. The committee was tasked with evaluating any transaction with the BDT defendants. The committee retained Centerview as its financial advisor. While the company considered a potential transaction, the special committee also began to look for funding sources to address the company's cash concerns.

The plaintiffs allege that the committee process was flawed for many reasons; namely, members lacked independence, the transaction with BDT was predestined because BDT objected to financing transactions that would create liquidity for the company and also refused to give Weber cash to operate its business, and BDT exploited confidential company information in negotiations to its advantage.

In October of 2022, BDT delivered its

proposal to take the company private. It based the proposal on October projections and proposed a price of $6.25 per share. The parties countered back and forth. Ultimately, they moved on the deal consideration that I described.

Plaintiffs brought this lawsuit with the aid of documents obtained pursuant to Section 220 of the DGCL in October of 2023. Again, the defendants answered the complaint. The parties moved forward with document discovery. Plaintiffs reviewed approximately 86,000 documents or 540,000 pages.

During fact discovery, the parties agreed to engage in mediation. In January of 2025, the parties attended a full-day mediation in front of David Murphy, which did not immediately result in a settlement. The parties continued working with the mediator. However, they ultimately accepted a double-blind mediator's recommendation to resolve the action for settlement consideration for $19.25 million.

In March of 2025, the parties executed and submitted a stipulation of settlement. I approved a scheduling order that approved that form a notice, after which the settlement administrator mailed notice

to the class and caused the notice and stipulation to be posted on a dedicated website.

I'll turn now to the analysis of the pending motions. I'll start with class certification.

Plaintiffs have moved for certification of a non-opt-out class. The class is defined as "All former holders of Weber Class A common stock at any time between announcement of the Merger Agreement through the closing of the Transaction, together with their successors and assigns."

The term "Excluded Persons" refers to the defendants, members of the immediate family of any of the Individual Defendants, any entity in which any of them has a controlling interest, and their heirs, successors, or assignees of any excluded party. "Excluded Persons" also include any trusts, estates, entities, or accounts that held Company shares for the benefit of any Excluded Persons.

As the Delaware Supreme Court explained in *Prezant v. De Angelis*, the certification of a lawsuit as a class action involves a two-step process. The first step requires that the action satisfy the four prerequisites of Rule 23(a), which are numerosity, commonality, typicality, and adequacy.

If that step is satisfied, the Court must then determine whether the suit properly fits into one or more of the Rule 23(b) categories.

The four prerequisites are satisfied. As plaintiffs stated in their brief in support of settlement, in January of 2023, there were more than 22 million shares of Weber common stock issued and outstanding that were not owned by BDT, Trott, or the Company's officers or directors. That figure is sufficient to satisfy numerosity.

The question of law linking class members is substantially related to the resolution of litigation, even though the individuals may not be identically situated. So commonality too is satisfied.

The legal and factual positions of the class representative are not different from that of the other members, satisfying typicality.

And the class representatives are adequate. There are no conflicts between plaintiffs' interests and those of the class. Plaintiffs retained experienced counsel with significant experience litigating stockholder class actions, as demonstrated by their efforts in this action. So adequacy is met.

Turning to the second step of the analysis. As explained by the Delaware Supreme Court in *Krapf*, "Class suits are not necessarily mutually exclusive; an action may be certified under more than one subdivision of Rule 23(b)."

Rule 23(b)(1) is satisfied because "adjudications with respect to individual class members ... would be dispositive of the interests of the other [class] members ...."

The conduct challenged by plaintiffs involved breaches of fiduciary duties. The alleged conduct would create harm to all class members equally.

Rule 23(b)(2) is also satisfied because defendants in this action acted on grounds that apply generally to the class, so that final injunctive or declaratory relief is appropriate with respect to the class as a whole. This is true for substantially the same reasons I have already discussed with respect to Rule 23(b)(1).

So it's appropriate to certify the class. It's also appropriate to make this a non-opt-out class, as is typical in these situations. No one disputes class certification, including the

question of whether the class members may opt out. And no class member has sought to opt out of the settlement. So the class is certified.

Turning to the settlement. Rule 23 provides a checklist of tasks that the Court must complete before approving a proposed settlement. That list calls for me to evaluate six aspects: One, the adequacy of the plaintiff and plaintiff's counsel; two, the adequacy of the notice of settlement; three, whether negotiations leading to the settlement were at arm's length; four, the merits of the settlement, taking into account a variety of factors; five, the attorneys' fees requested; and six, the incentive fee request, if any.

Starting with the adequacy of the plaintiffs. And I'll discuss the adequacy of plaintiffs' counsel when I turn to the fees.

Rule 23(aa) requires that each class representative submit an affidavit stating the contents that are set forth in the rule.

Plaintiffs here submitted their affidavits on May 30, 2025. I have reviewed them, and they satisfy Rule 23 (aa).

Additionally, plaintiffs did not have

personal interests that would render them incapable of representing the class. They proved capable litigants, as evident by the active litigation and participation in their active mediation. And on these bases, I find that plaintiffs were adequate for all relevant purposes.

Notice too was effective. Rule 23(f) requires the parties to provide the Court with information sufficient to rule on whether to require notice and in what form. Subsection (D) establishes the default content of such notices.

I approved the parties' form of notice when I entered the scheduling order on April 21, 2025. I concluded then that the form of notice constituted the best notice reasonably practicable under the circumstances and met the requirements of Rule 23(f). I also authorized the retention of the settlement administrator, A.B. Data, Ltd. The scheduling order required the Company to cause the form of notice to be mailed to all members of the class no later than 60 days before the settlement hearing.

A.B. Data's director of case management, Jack Ewashko, submitted an affidavit on June 20, 2025, describing A.B. Data's efforts. Notice

was mailed to potential class members on May 1, 2025, and posted to the settlement website, as directed. So the notice requirement is met.

The next factor is whether the settlement was reached through arm's-length negotiation. And it was. It was reached through mediation efforts by David Murphy.

Turning to meat of the analysis. I must ask whether the terms of the proposed settlement are fair and reasonable. The settlement terms undoubtedly provide significant value to class members.

Defendants agreed to pay $19.25 million to compensate the class for breaches of fiduciary duty in connection with the take-private transaction. Assuming a class size of just over 22 million shares, this value constitutes approximately 87 cents per share for each class member, and that's before administrative costs and attorneys' fees. That represents a 10.8 percent premium to the $8.05 merger consideration. When compared to the other recent settlements, that premium is more than an exceptional result.

Today, counsel reported that there may

be additional members in the class, and I would direct persons to Mr. Juray's explanation of that fact. If we add in the additional members, I believe the settlement consideration amounts to around 73 cents per share. That too is an exceptional result, and it does not change the analysis if we add those class members.

When reviewing the proposed class settlement, I have to use my business judgment to determine whether the terms of the settlement are fair, reasonable, and adequate. Typically, that analysis requires that I balance the "give," the release, against the "get", which is the settlement terms. As amended, Rule 23 breaks that common law analysis down into four considerations. It provides that the Court may approve the settlement after a hearing and only on finding that the relief falls within a range of reasonable results, taking into account, first, the strength of the claims; second, the cost, risks, and delay of trial; third, the scope of the release; and fourth, any objections.

So I'll start with the strength of the claims. Plaintiffs asserted claims for breach of fiduciary duty. The defendants answered those claims,

assessing for themselves the risk of continued litigation and the viability of those allegations. The risk of continued litigation, however, was apparent. For reasons Mr. Juray explained today, victory was not certain, and there were many hurdles that plaintiffs faced in order to prevail on their various claims.

I reviewed the scope of the release. It's appropriately tailored to the claims at issue. It covers all claims against the defendants that arise out of, are based on, or relate in any way to the transaction at issue. And that is appropriate.

There were no objections.

So putting it all together, considering the benefits of the settlement, the strength of the claims, the risks associated with continued litigation, and the appropriateness of the scope of the release, I find that the proposed settlement falls within the range of reasonable outcomes that a party acting voluntarily would accept. The settlement is approved.

Turning now to attorneys' fees. This court will craft an award using the five factors identified by the Delaware Supreme Court in *Sugarland*

Industries. Those factors are: the results achieved; the time and effort of counsel; the relative complexities of the litigation; any contingency factor; and the standing and ability of counsel.

Although there's no set formula for awarding attorneys' fees, the high court has endorsed the stage-of-case approach that was established in *Americas Mining*. That approach appropriately focuses on results and not hours. The stage-of-case approach starts by calculating a fee as a percentage of the benefit achieved, basing that percentage on the stage of the case at which the litigation is resolved. When a case resolves early, the guideline range is 10 to 15 percent. When a case resolves after meaningful litigation efforts, including multiple depositions and some level of motion practice, the guideline range is 15 to 25 percent. The highest percentage of 33 percent is reserved for plaintiffs who prevail after trial. Under this approach, other *Sugarland* factors may cause the court to adjust the fee up or down, but the starting point is a percentage of the benefit achieved.

Plaintiffs' counsel seeks $3,830,000 after reimbursement of out-of-pocket expenses in the

amount of $99,606.30. That's about 20 percent of the settlement consideration.

Turning to the *Sugarland* analysis. The first factor, the primary factor, is results achieved. For the reasons I stated earlier, the settlement confers substantial financial benefits on the class. The case settled after significant document discovery on the eve of fact depositions. The applicable guideline range, therefore, is 15 to 25 percent. And a fee award of 20 percent is appropriate and supported by recent awards of this Court.

I'll turn to the remaining *Sugarland* factors. The time and effort of plaintiffs' counsel was significant. In total, they dedicated 5,059 hours to litigating this action from its inception to the date the parties agreed to the Mediator's proposal with a lodestar value of about $3,247,000 and an implied multiplier of 1.18. So this factor supports plaintiffs' fee request.

This litigation is complex, as fiduciary disputes in this Court often are. It was factually and legally complicated. Plaintiffs' claims were grounded in well-established fiduciary duty principles, but they required detailed analysis of the

relationships among defendants, the process and structure of the transaction, the projections at issue, and the alleged conflicts, among other things. So the complexity of this litigation supports plaintiffs' requested fee award.

As to the contingency factor, this case was taken on a contingent basis. It is the public policy of Delaware to reward risk-taking of this nature.

And last, the requested fee is supported by the standing and ability of plaintiffs' counsel and all counsel involved. All are experienced in stockholder litigation and well-known by this Court as excellent attorneys.

So for all of these reasons, the fee requested is reasonable and appropriate, and it is approved.

In conclusion, the class is certified, the settlement is approved, and plaintiffs are entitled to their requested fee award.

Do you have a proposed form of order that you can hand up with the blanks filled in?

ATTORNEY JURAY: Yes, Your Honor. We sent in a form on Friday. It's what we submitted to

the Court. We added in the number, if that's helpful, or I have a proposed form that's blank for you to totally fill in. What's your preference, Your Honor?

THE COURT: Why don't you fill in the blanks and pass it up.

ATTORNEY JURAY: This has everything, except date and signature, Your Honor.

THE COURT: I can put that in.

All right. I will make sure this hits the docket.

I just want to congratulate everyone on this excellent settlement. Safe travels if you are traveling home.

We are adjourned.

(Court adjourned at 11:38 a.m.)

- - -

CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 27 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 11 through 27, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 9th day of July, 2025.

/s/ Dennel Niezgoda

Dennel Niezgoda
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter

TAB 17

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE HOMEFED CORPORATION STOCKHOLDER LITIGATION	: C.A. No. 2019-0592-LWW

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, February 15, 2022
11:22 a.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

SETTLEMENT HEARING and RULINGS OF THE COURT
HELD VIA ZOOM

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

APPEARANCES:

NED C. WEINBERGER, ESQ.
MARK RICHARDSON, ESQ.
JIAHUI (ROSE) WANG, ESQ.
Labaton Sucharow LLP
-and-
PETER B. ANDREWS, ESQ.
CRAIG J. SPRINGER, ESQ.
DAVID M. SBORZ, ESQ.
Andrews & Springer LLC
-and-
JEREMY FRIEDMAN, ESQ.
DAVID F.E. TEJTEL, ESQ.
of the New York Bar
Friedman Oster & Tejtel PLLC
-and-
CARL L. STINE, ESQ.
of the New York Bar
Wolf Popper LLP
for Plaintiffs

S. MARK HURD, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
JOHN P. STIGI III, ESQ.
MELISSA MIKAIL, ESQ.
of the California Bar
Sheppard, Mullin, Richter & Hampton LLP
for Defendants Patrick Bienvenue, Paul Bordon, Timothy Considine and Michael Lobatz

BRADLEY R. ARONSTAM, ESQ.
Ross Aronstam & Moritz LLP
-and-
EVERT J. CHRISTENSEN, JR., ESQ.
of the New York Bar
Weil, Gotshal & Manges LLP
for Defendants Joseph Steinberg, Brian Friedman, Jimmy Hallac, and Jefferies Financial Group Inc.

- - -

THE COURT: Good morning.

ATTORNEY WEINBERGER: Good morning, Your Honor.

THE COURT: Counsel, I want to say at the outset that I am horribly sorry that I'm so late. I had a TRO at 9:00 this morning and it turned out to be a long one. So thank you for your patience and waiting for me while I got here.

The poor people in my prior ruling, I had to talk a mile a minute. But I'm still 20 minutes late, and I'm sorry about that.

ATTORNEY WEINBERGER: No problem at all.

THE COURT: Mr. Weinberger, would you like to make introductions before we get started.

ATTORNEY WEINBERGER: Sure. For the record, Ned Weinberger from Labaton Sucharow on behalf of the plaintiffs. I'm going to scroll through the top of my Zoom. I see Peter Andrews from Andrews & Springer; Craig Springer, also from Andrews & Springer; and David Sborz. From my firm, on the line with me are Mark Richardson and Rose Wang; and from Friedman Oster & Tejtel, David Tejtel and Jeremy Friedman. Last, but not least, I see Carl Stine from

Wolf Popper on the line.

THE COURT: Great. Thank you very much.

ATTORNEY ARONSTAM: And good morning, Your Honor. Brad Aronstam on behalf of --

THE COURT: Good morning.

ATTORNEY ARONSTAM: -- Jefferies Financial, as well as Messrs. Steinberg, Friedman, and Hallac. With me today is my co-counsel from Weil Gotshal, Evert Christensen.

ATTORNEY CHRISTENSEN: Good morning, Your Honor.

THE COURT: Welcome.

ATTORNEY HURD: Good morning, Your Honor. Mark Hurd at Morris Nichols on behalf of defendants Bienvenue and Borden. Also on the line today are John Stigi and Melissa Mikhail of Sheppard Mullin.

THE COURT: Thank you. Welcome.

ATTORNEY STIGI: Good morning, Your Honor.

THE COURT: Is there anyone else who wishes to make an appearance?

Okay. Hearing no one, Mr. Weinberger,

I'll turn it over to you.

ATTORNEY WEINBERGER: Your Honor, we are here this morning on, I guess, technically, four motions or applications. The first is the motion for final settlement approval, second is our motion to permanently certify the class, third is an application for an award of attorneys' fees and expenses, and fourth is the request for an incentive fee award for the two lead plaintiffs, Mr. Rose and Mr. Murray.

I want to respect the Court's time. I'm going to try to be very brief. I'll largely rely on our papers. If Your Honor has any questions, of course, I will be happy to answer any of those.

Starting with the settlement, I think the result here largely speaks for itself: $15 million in cash, almost $4 per share. It's a nearly 10 percent premium to the implied merger price.

I know counsel in this setting often come before the Court highlighting all the risks and the obstacles that militated in favor of a settlement; and no doubt we faced plenty of risks and obstacles in this case. But I think the headline here is that, even leaving aside those risks, this is an objectively excellent result for the class, and risk-adjusted, we

think, realistically in line with what we would have expected to recover at trial.

As we lay out in our papers, in the course of discovery, we had uncovered what we expected the Court would deem credible evidence of HomeFed's value at the time of the merger; specifically, a sum-of-the-parts valuation of HomeFed that Jimmy Hallac, managing director of Jefferies, had prepared and presented to the Jefferies board in February 2019 in connection with seeking authorization to make an offer for HomeFed, which Jefferies made just a few days later.

Jefferies' base-case valuation of HomeFed was $46.53 per share. That implies a value shortfall of $5.39 per share based on the implied merger price. The settlement here is $3.96 per share, so we've effectively recovered three-quarters of the difference between Jefferies' assessment of HomeFed's value and what Jefferies ultimately paid for HomeFed.

As we lay out in the papers, the settlement was mediated. Following several months of settlement discussions, we had a one-day mediation session over Zoom with Bob Meyer from JAMS. Mr. Meyer's involvement was essential in getting the

parties to a resolution in this case. And as we note in the papers, the $15 million settlement was a product -- was the mediator's recommendation for a settlement of this case.

There have been no objections from any class members. Exhibit 7 to my declaration is the declaration from our settlement administrator concerning notice, which was mailed to stockholders beginning in November of last year. We've not been contacted by a single stockholder expressing any reservation whatsoever of any sort with the proposed settlement.

And to the contrary. Following the stipulation of settlement in October, when it was filed with the Court and became public, I spoke with Lyman Delano, who features prominently in this case, who represents BMO, which held 1.36 million shares and comprises more than a third of the class. I also spoke separately with Mr. Greene, who is the former RBC representative, RBC with approximately 20 percent of the shares in the class. Both Mr. Delano and Mr. Greene were fully supportive of the proposed settlement of this case.

Unless Your Honor has any questions,

I'll turn to class certification. And on class cert, I am, frankly, content to rely on the papers. I think this is a standard (b)(1), (b)(2) class, defined as, essentially, everyone who held at close. If the settlement is approved, we'll do a direct distribution to all the shares that were outstanding, leaving aside shares held by defendants, special committee members, and those individuals' and entities' affiliates.

Unless Your Honor has any questions on class cert, I'll move to the fee and expense application.

THE COURT: Thank you, Mr. Weinberger. No questions on class cert.

ATTORNEY WEINBERGER: On fees and expenses, we are seeking an all-in award of $3.45 million. That's 23 percent of the gross settlement fund.

I'd really make two primary points on the fee application. The first is about what we did in this case to secure the $15 million cash recovery. The second point would be about precedent. For fee awarding purposes, like cases are supposed to be treated alike. I'm paraphrasing Vice Chancellor Laster in *Olson v. ev3* and in other cases.

In *Sauer-Danfoss* Vice Chancellor Laster said "Consistency promotes fairness by treating like cases alike and rewarding similarly situated plaintiffs equally." We would submit, as I'll briefly go through in a minute, that under the applicable precedents, 23 percent is within the range of reasonableness here.

In terms of what we did, after we did the 220 investigation, after filing the complaint, we briefed and argued a motion to dismiss that, I think it's fair to say, resulted in a very legally significant ruling from our Chancellor concerning the applicability of *MFW*; in particular, on what it means to have an effective special committee or effective bargaining agent for minority stockholders.

And what we principally argued, in opposing the motion to dismiss, was that *MFW* should not apply in this case because Jefferies had undermined the effectiveness of HomeFed's special committee by delaying the start of a formal sale process, delaying engagement with the special committee, waiting to make a formal offer for HomeFed while it engaged directly with HomeFed's largest minority stockholders to secure their buy-in on price.

And despite the absence of any squarely on point authority, Chancellor Bouchard agreed with us, found that *MFW* did not apply, permitted us to take discovery.

And I would note that, you know, when we filed the case, all we had were the 220 materials. So we had board-level materials. We did not yet know, at the pleadings -- we didn't learn until discovery -- that Jefferies had, in fact, we contend, engaged in actual coercion of Beck Mack and Oliver and RBC in the lead-up to the sale process.

I mentioned discovery. In terms of discovery, we effectively completed document discovery in this case, party, third-party discovery. I think we had one or two followup items outstanding at the time of settlement, but we effectively completed all document discovery.

We didn't take any depositions. We agreed, as parties often do, when we agreed to go to mediation, that we would not proceed with depositions; we'd take a run at whether we could settle the case. But we took the functional equivalent of depositions, I would submit, and two of them. In May of last year, Mr. Tejtel and myself went up to New York, we went to

BMO's offices in Midtown. We sat down with Lyman Delano, got his side of the story concerning what occurred in the lead-up to the merger.

A week or two after that, we had a telephone interview with John Greene, who is located in California. We weren't able to go to California, given COVID restrictions. Interviewed him for a couple hours. We treated these like depositions, prepared for them, went through documents with both Mr. Delano and Mr. Greene, took what we would expect to be, or what we would have expected to be, their sworn testimony, had this case proceeded.

We memorialized those interviews. We were able to use them in connection with mediation, attached them to our submissions. It was evidence that we had in hand. And I think they were extremely helpful and undermined, really, any argument that RBC and BMO had willingly supported the merger.

THE COURT: Mr. Weinberger, if I can ask you about those a little bit. Were they on-the-record interviews?

ATTORNEY WEINBERGER: They were on-the-record. Mr. Delano and Mr. Greene both understood that we would be recording the interviews.

We didn't have a court reporter present. We didn't record it by audio either. We had Rose Wang, my associate, took notes of each of the interviews, memorialized them accurately in the memos, which are attached as Exhibits 41 and 42 to my declaration.

THE COURT: And in terms of the timing of when you started to think about mediation, maybe having settlement talks, when did the interviews occur?

ATTORNEY WEINBERGER: So my best recollection is in April of last year is when we agreed -- I think April is when we agreed to mediate the case. We had sort of a short list of mediators. Took a while, in terms of just getting a mediation scheduled, just because it had to be done over Zoom and, you know, quality mediators have very busy schedules.

So when we agreed in April, sort of strategized and say, okay, rationally it makes sense for us to agree with defense counsel to put a pause on discovery by not proceeding with the depositions. But what can we do to basically put ourselves in the best situation going into mediation, have the most leverage; basically, be able to present to a mediator

the strongest case possible.

And we determined, given that Mr. Delano had expressed a willingness to sit down with us, answer any questions we had, go through the documents he had produced in the case; Mr. Greene likewise had expressed a willingness to sit down with us. We, you know, conducted those interviews, I'd say, within 30, 45 days of agreeing to mediation.

THE COURT: That's helpful. Thank you.

ATTORNEY WEINBERGER: And just briefly on precedent. We provided the Court a chart, as we often do, of applicable fee precedents. It's at page 49 -- pages 49 and 50 of our brief.

And in preparing for today, I apologize, I realized we only cited orders in the brief. So last week, we had submitted a letter to the Court that hopefully you received that attached a few of those transcripts of a few of those precedents, what we think are the most relevant precedents.

First is *Garfield v. BlackRock*, February of last year, Chancellor McCormick. That was a $6.85 million cash settlement. The plaintiffs there withstood a motion to dismiss. Document discovery was

far along but not complete. No depositions were taken. Chancellor McCormick awarded 23 percent of the fund. Page 27 of the transcript, the Court said: "The percentage is a little high, but I view it as reasonable and appropriate in this case."

Tab 2 to the letter was *Tangoe*, Vice Chancellor Slights, January 2020, $12 1/2 million cash settlement. There, plaintiffs withstood a motion to dismiss, took document discovery, I believe reviewed a little over 200,000 -- 250,000, actually, pages of documents. Again, no depositions taken.

Vice Chancellor Slights held: "The percentage of the common fund that would be paid as fees and expenses - here, 23 percent - is comparable to other fee awards granted in similar cases where a settlement was reached after a motion to dismiss was denied and discovery was pursued." That's at page 21 of the transcript.

And there, Vice Chancellor Slights cited his earlier decision from September 2018 in *Saba*, which we attached as Tab 3 to the letter. There, $19 1/2 million cash settlement. Plaintiffs withstood a motion to dismiss, reviewed a couple hundred thousand pages of documents. A few

depositions were taken in that case, which, admittedly, is a distinction between *Saba* and this case. But there, again, the Court awarded 23 percent.

We would submit, under those precedents, *Garfield*, *Tangoe*, and *Saba*, 23 percent is within the range.

And, separately, I think to the extent the Court feels that 23 percent is toward the higher end or is at the high end of the range, the Court can look at the implied hourly as a cross-check. We're just a hair above $1,000 an hour, which I think has been endorsed by the Court as a reasonable rate; certainly well below some other rates that the Court has endorsed as reasonable, including in cases where cash has not even been recovered for stockholders, as it was here.

Last, just briefly on the incentive awards. We're asking for $5,000 for each of the two co-lead plaintiffs, Mr. Murray and Mr. Rose. If approved, those incentive awards would be paid out of any fee and expense amount awarded by the Court. I'm hopeful these are not controversial. I think $5,000, in the scheme of things, is a modest amount. Mr. Rose and Mr. Murray stepped up to the plate here. No other

stockholders stepped forward to be lead plaintiffs. They had to submit to discovery and all the burdens that entails, have their documents collected and reviewed.

Unless Your Honor has any questions, that's all I have this morning.

THE COURT: Thank you so much, Mr. Weinberger.

I have just one question for you. In terms of the $15 million payment that's being made to the class, can you explain to me how and who specifically is making that payment? It wasn't clear to me from the papers.

ATTORNEY WEINBERGER: Sure. So the way it will work is A.B. Data, which is our settlement administrator, will make the payment based on information provided both by, I guess, the former issuer -- HomeFed -- and DTC.

So as we -- we've sort of been through this process a number of times. We've been through this process with A.B. Data in a number of cases where we're making a direct distribution to all the shares other than those held by defendants and a few other individuals and entities at close. So, you know, that

is the process that we propose to follow in this case, similar to the process that Your Honor approved in *AmTrust*, and I believe in other cases as well.

THE COURT: All right. That's helpful.

Thank you so much.

And in terms of who is funding the payment, it says defendants are funding the payment. But can you explain a little bit about how that's working as well.

ATTORNEY WEINBERGER: I can't speak to, I guess, precisely how it's being funded. If the question is about sort of allocation of payment from defendants, our understanding, just generally, or to our knowledge, it's defendants and their insurers.

I'm not sure if Mr. Aronstam or Mr. Christensen might be able to provide some color on precisely who the payment is coming from. But to our current understanding, it's defendants and their insurers.

THE COURT: Okay. That's helpful.

Thank you so much. I have no further questions for you.

Mr. Aronstam, Mr. Hurd, is there

anything that you would like to add?

ATTORNEY ARONSTAM: Nothing additional, Your Honor.

THE COURT: Thank you.

ATTORNEY HURD: Nothing from me, Your Honor.

THE COURT: All right. Thank you very much.

I've reviewed the papers that were submitted to me closely in advance of this hearing today, and I'm prepared to deliver my ruling to you now, if you'll bear with me as I work through it.

Today I heard from the parties regarding the proposed settlement of the matter captioned *In re HomeFed Corporation Stockholder Litigation*, which is Civil Action No. 2019-0592-LWW. I'll note at the outset that there were no objectors to the proposed settlement. No objections were filed, and no one has appeared today to object.

There are several matters that I must address this morning. The first is whether to certify the settlement class, the second is whether the settlement itself should be approved, and the third is whether the plaintiffs' counsel is entitled to an

award of fees and expenses and the representative plaintiffs each to an incentive award.

I'll begin with some relevant background for the sake of the record. If anything I say is inconsistent with the prior rulings of this Court or the case record, I assure you that it was inadvertent.

On April 12, 2019, defendant Jefferies Financial Group Incorporated and nonparty HomeFed Corporation entered into a merger agreement pursuant to which Jefferies, HomeFed's controlling stockholder, would acquire all of the publicly traded shares of HomeFed.

On July 1, 2019, the merger closed.

On August 1, following a books and records investigation, plaintiffs Richard Rose and Dennis Murray commenced this action against Jefferies and certain members of HomeFed's board of directors, asserting claims for breach of fiduciary duty in connection with the merger.

Plaintiff Louis Geser commenced a separate action in this Court asserting similar claims on August 27, 2019.

Then-Chancellor Bouchard entered an

order that consolidated the two cases on September 3, 2019. Plaintiffs Rose and Murray were appointed as the co-lead plaintiffs for the consolidated action.

On September 16, 2019, co-lead plaintiffs designated the verified class action complaint filed in this action as the operative complaint.

On November 4, 2019, the defendants filed motions to dismiss under Court of Chancery 12(b)(6).

On December 17, 2019, the co-lead plaintiffs voluntarily dismissed their claims against two of the director defendants without prejudice.

Then-Chancellor Bouchard heard argument on the motions to dismiss on April 3, 2020, and he issued a memorandum opinion denying the motions on July 13, 2020.

On September 3, 2021, the parties engaged in a full-day mediation session where they reached an agreement to settle the claims for a $15 million payment.

With that background in mind, I'll return to the matters that I have on the agenda for today.

I'll start with class certification. On October 13, 2021, pursuant to Court of Chancery Rule 23 and for settlement purposes pending this hearing, I conditionally certified a non-opt-out class "consisting of any record holders and beneficial holders of HomeFed common stock whose shares ... were exchanged for Jefferies shares in connection with the Merger." For further details on the scope of that class, see the scheduling order that was entered in this matter.

Now I must walk through the final class certification analysis. First I must determine whether the four prerequisites of Court of Chancery Rule 23(a) are satisfied. Those are numerosity, commonality, typicality, and adequacy. Second, I must determine whether the action satisfies at least one of Rule 23(b)'s subsections which relate to the alleged wrongs, the relief sought, or a combination of the two.

I'll start with the Rule 23(a) analysis. The first requirement is numerosity, meaning that the proposed class is so numerous that joinder of all members is impracticable. Generally, this Court has found that the numerosity requirement

is satisfied if the number of class members exceeds 40, and especially if it exceeds 100. The proposed class here consists of at least hundreds of potential class members, and so the first requirement is met.

The second requirement is commonality. That means that there be at least one question of law or fact common to the members of the class. Factual and legal issues such as whether the defendants breached their fiduciary duties and whether the potential class members were injured by the defendants' alleged conduct are common to all of the proposed class members. And because these issues implicate the interests of all members of the proposed class, the commonality element is satisfied.

The third element is typicality. That is, for the class members, are their claims typical of the representatives and the other members of the class. Here, all of the class members, as stockholders, faced the same alleged injury from the same alleged conduct, and the plaintiffs would be affected in the same way as the rest of the class. And so the typicality element is met.

The final element is adequacy, which considers whether the representative plaintiff

adequately protected the interests of the class. There is no antagonism between the representative plaintiffs and the rest of the proposed class in this case, and plaintiffs' counsel are certainly capable of prosecuting this action on behalf of the class. So the adequacy element has also been met.

Given that all of the Rule 23(a) requirements are satisfied, the proposed class can be certified if any of Rule 23(b)'s criteria are met.

Under Rule 23(b)(1), certification is appropriate if prosecution of separate actions by individual class members would risk inconsistent and varying results. I believe that that is met in this case.

I also find that certification under Rule 23(b)(2) would be appropriate. Rule 23(b)(2) provides for certification where the party opposing the class has acted or refused to act on grounds generally applicable to the class. Here, the alleged wrongdoing applies equally to all proposed class members and the relief is applicable to the class as a whole. And so Rule 23 has been satisfied, Rule 23(a) as well as Rule 23(b)(1) and (b)(2).

Rule 23's notice requirements have

also been met. On October 20, 2021, I determined that the proposed form of order was sufficient when I entered the scheduling order to that effect. And having reviewed the declaration that was filed in connection with the settlement, I also find that the provision of the notice was adequate.

I should also note that the co-lead plaintiffs have filed affidavits stating their support for the proposed settlement and that they weren't promised compensation, which is in line with Rule 23(aa).

Given all of the above, I am permanently certifying the proposed class as a non-opt-out class pursuant to Rule 23.

That brings me to the merits of the settlement and whether to approve it. "The Court's function is to consider the nature of the claims, the possible defenses thereto, the legal and factual circumstances of the case, and then apply its own business judgment in deciding whether the settlement is reasonable in light of those factors." And that's from the *Polk v. Good* decision from the Delaware Supreme Court.

In short, my task is to evaluate the

"give" and the "get" of the settlement. That means that I must compare the value of the benefits achieved by the settlement against the strength of the claims that are being released.

In terms of the claims being released, the breach of fiduciary duty claims against the defendants survived motions to dismiss, but the co-plaintiffs' success in this action was, of course, not assured. They may have been able to prove certain liability or not. They may have been able to prove damages or not. There are certainly uncertainties that were unknown to all parties and potential defenses.

The release is in line with those previously approved by this Court. It includes claims known or unknown brought on behalf of a class, individual or derivatively, that would involve "any claims ... against ... the [] Released Parties by virtue of having owned HomeFed or Jefferies common stock ..." relating to the specific facts alleged in this action.

The settlement itself contemplates that a $15 million payment will be made available to the class at a per-share amount of about $3.85. Given

the $41.14 per-share deal price, the recovery is about 9.4 percent of the total price. In my view, that's a good result for the class, and it's certainly within the range of reasonableness and in line with other similar settlements that have been recently approved.

The fact that the proposed settlement was reached through an arm's length negotiation process overseen by a mediator further demonstrates the reasonableness of the settlement. And, again, I note that there have been no objections to the settlement.

On balance, the settlement is fair and reasonable, and I approve it on that basis. Substantial, tangible benefits are flowing to the class as a result of the settlement.

That leaves the matter of counsel's request for an award of attorneys' fees and expenses. Plaintiffs' counsel requests an all-in fee award of $3.45 million. Included within that is expenses of about $30,000, which would be paid from the $15 million settlement amount.

In setting fee awards, the Court of Chancery "must make an independent determination of reasonableness." That's from *Goodrich v. E.P. Hutton*

Group, Incorporated.

The role of the Court in setting a fee award is to exercise the Court's own business judgment. And typically, to do so, the Court will apply the *Sugarland* factors. Of those factors, the most important is the benefit conferred in the litigation. The other factors include the amount of time and effort expended by counsel, the relative complexities of the litigation, counsel's standing and ability, the contingent nature of the case, the stage at which the litigation ended, and whether the plaintiff can receive all of the credit for the benefit conferred.

The benefit conferred in this case is straightforward. It's a $15 million cash payment that's for the benefit of the class.

The requested $3.45 million in fees would amount to 23 percent of that amount. Under *Americas Mining*, when a case settles after the plaintiffs have engaged in meaningful litigation efforts, fee awards should range from 15 to 25 percent of the common benefit conferred. The fee sought here is towards the top end of that range.

Fee awards towards the top end of the

range are typically granted in cases where meaningful motions practice and discovery has occurred, including considerable document production or multiple depositions. Here, the settled claims survived motions to dismiss and the parties engaged in some discovery. It wasn't the sort of extensive discovery or motions practice that would generally support a fee at the top end of the range. For example, discovery here included the production of about 170,000 pages of documents. Counsel did interview two representatives from HomeFed's largest minority stockholder, which were memorialized in memos, but there were no depositions taken in this case.

And so, on balance, I believe this calls for a fee in the middle of the applicable *Americas Mining* range. That means a fee award amounting to 20 percent of the value of the benefit, or $3 million. And in addition to that, I am going to award the plaintiffs their total expenses, which are just shy of $30,000.

I have reviewed the precedent that was provided by plaintiffs' counsel, which have fee award percentages ranging from about 22.6 percent to 26 percent. Some of those cases are not great

comparisons. Settlement amounts are for the most part much lower than the settlement amount here, so it's difficult to scale; and, in the case provided with the closest comparable settlement amount, the *Towers Watson* case, counsel conducted much more extensive discovery produced.

To cover the other factors, plaintiffs' counsel undertook the case on a contingent basis. The case was complex. Plaintiffs' counsel is highly experienced and litigated through a motion to dismiss and engaged in some discovery efforts.

So after applying the *Americas Mining* ranges and determining that 20 percent, in the middle of the applicable range, is appropriate here, I will conduct a cross-check by evaluating the lodestar.

Plaintiffs' counsel claims a total of about 3300 hours of professional time from the beginning of the litigation through the submission of the stipulation and agreement of settlement. With the lodestar coming out to about $1.7 million, the fee award represents a multiplier of about 1.77, as I calculate it. That multiplier is not out of line with cases and fees awarded by the Court at this stage of the litigation, and I believe it supports the fee

amount that I previously discussed.

So I am granting a fee award of $3 million. I am also going to award the plaintiffs the full amount of their expenses on top of that. I believe that is a fair award for plaintiffs' counsel's efforts here, and I view the settlement, again, as a very good result for the class.

Briefly, to conclude, on the topic of the incentive fee, counsel requests that the Court grant each co-lead plaintiff $5,000 for their services and efforts.

In determining whether to grant an incentive fee, the Court considers the time and effort expended by the lead plaintiffs and the benefit to the class -- which, as I've just said, I think was a good one. A $5,000 incentive fee seems a bit on the high end under some of the precedent that I looked at, but I believe it's appropriate here, and I also believe that it's important to incentivize stockholders to serve as engaged representatives.

Here, the plaintiffs filed complaints and invested time in connection with discovery. Given all of that, I am going to conclude that the incentive fees sought are appropriate here for the named

representatives.

To recap, since I've been talking for a while, the settlement is approved. The class is certified. A fee and expense award will be paid to plaintiffs' counsel from the $15 million payment, and I will also award the full amount of the plaintiffs' expenses.

I believe there's a final order on the docket. I checked last night, and I'm fairly certain it's there. If there is, I'll modify it with this information and I'll grant it later today.

I do want to congratulate you for this fantastic result for the class and all of your hard work. It really shows. And thank you for your papers, which were extraordinarily helpful.

Finally, and critically, again, thank you for bearing with me, since I was so late this morning from a TRO hearing. I am grateful for your patience.

With that, I'll ask if you have any questions for me, starting with you, Mr. Weinberger?

ATTORNEY WEINBERGER: No questions. Thank you very much, Your Honor. We really appreciate your time.

THE COURT: Thank you.

Any other questions from the defendants' counsel? Mr. Aronstam? Mr. Hurd?

ATTORNEY ARONSTAM: Nothing here, Your Honor. Thanks again for your time.

THE COURT: Absolutely.

ATTORNEY HURD: No, Your Honor. Thank you.

THE COURT: Okay. Well, thank you very much. Again, you'll see the order entered on the docket later today. And congratulations on your settlement.

Thank you.

(Proceedings concluded at 11:58 a.m.)

- - -

CERTIFICATE

I, JULIANNE LABADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 32 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 22nd day of February, 2022.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

TAB 18

EFiled: Aug 03 2020 12:45PM EDT
Transaction ID 65817799
Case No. 2019-0206-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE VERSUM MATERIALS, INC. STOCKHOLDER LITIGATION	: CONSOLIDATED : C.A. No. 2019-0206-JTL

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, July 16, 2020
9:16 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

ORAL ARGUMENT and RULINGS OF THE COURT HELD VIA ZOOM ON PLAINTIFFS' PETITION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

APPEARANCES:

MICHAEL HANRAHAN, ESQ.
ELIZABETH M. McGEEVER, ESQ.
KEVIN H. DAVENPORT, ESQ.
Prickett, Jones & Elliott, P.A.
-and-
DERRICK FARRELL, ESQ.
Labaton Sucharow LLP
-and-
LEE D. RUDY, ESQ.
GRANT D. GOODHART III, ESQ.
of the Pennsylvania Bar
Kessler Topaz Meltzer & Check, LLP
for Plaintiffs

WILLIAM M. LAFFERTY, ESQ.
RYAN D. STOTTMANN, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
CRAIG S. WALDMAN, ESQ.
DAVID ELBAUM, ESQ.
of the New York Bar
Simpson, Thacher & Bartlett LLP
for Defendants

- - -

THE COURT: Good morning, everyone. Welcome. I see a lot of people on the screen. Who is going to be speaking today for plaintiffs?

MR. HANRAHAN: I will, Your Honor. It's Mike Hanrahan.

THE COURT: All right. Great, Mr. Hanrahan. You look well-poised there at the podium.

And how about for the defendants?

MR. WALDMAN: Good morning, Your Honor --

MR. STOTTMANN: Good morning, Your Honor. Mr. Waldman will be speaking today.

THE COURT: All right. Great. Thank you very much. That's helpful.

Mr. Hanrahan, why don't you go ahead.

MR. HANRAHAN: Thank you, Your Honor. Good morning. This is the hearing on plaintiffs' application for an award of attorneys' fees and expenses. Plaintiffs' claims challenging a stock-for-stock merger between Versum and Entegris with a value of about $41 per share, and then Versum's use of a poison pill rights plan to deter a competing $48 per share all-cash offer from Merck, were mooted

by defendants.

First, Versum removed the acting-in-concert provision of the rights plan. Second, in exchange for plaintiffs' foregoing expedited depositions and withdrawing their motion for a preliminary injunction, Versum terminated the rights plan. Third, Versum engaged with Merck, which raised its offer from $48 to $53. And ultimately, Versum terminated the Entegris merger and entered into and consummated a $53 per share merger with Merck. Thus plaintiffs achieved the full relief they sought: Versum's elimination of the preclusive rights plan and acceptance of a higher offer from Merck.

Plaintiffs satisfy the three established elements for a mootness fee. Their claims were meritorious when filed, defendants took action producing a corporate benefit while the litigation was pending, and finally, there was a causal connection between the benefits and the litigation.

Defendants first assert that plaintiffs' claims were not meritorious. And then their next argument they attempt to frame as a lack of corporate benefit, but they actually concede there were corporate benefits. Defendants cannot deny that

the AIC provision was removed from the rights plan, nor can they disown the March 31, 2019, stipulation with plaintiffs providing for withdrawal of the preliminary injunction motion if the rights plan was terminated.

Versum terminated the rights plan, which would have precluded a deal with Merck had it remained in place. There also can be no dispute that Versum ultimately ended the Entegris merger agreement and effected a $53 merger with Merck. So it is a mathematical and financial fact that as a result of the elimination of what Merck called the "egregious AIC provision," the termination of the rights plan -- which defendants, their expert, and Merck admit would have precluded Merck's acquisition of Versum -- and the substitution of the $53 Merck merger for the Entegris merger with a value in the low 40s, as a result of those, the Versum stockholders received nearly $1.2 billion in additional merger consideration.

So there really is no issue as to whether there were corporate benefits. Defendants' real argument is that the litigation did not cause those benefits. They have just attempted to disguise

their causation argument as a no-benefit argument in an unsuccessful effort to avoid the presumption of causation.

In the end, the issue here is shared credit as to the success of the $53 Merck merger. The litigation's causation of the removal of the AIC and termination of the rights plan is clear. The questions are how much of the approximately $1.2 billion benefit from the Merck merger should be attributed to the litigation, and what percentage of that attributable benefit the Court should award as fees and expenses. Even attributing around 10 percent of the total benefit to the litigation, and even awarding only about 10 percent of that attributable benefit as a fee, the fee request of $12 million is reasonable.

Let me turn first to the meritoriousness of the claims. First off, defendants rely on materials outside the complaints. That amounts to a forfeit on the issue of whether plaintiffs' claims were meritorious when filed. The meritorious claims element of the mootness fee test, as defendants acknowledge, is based on a motion to dismiss standard. So when you start relying on things

outside of the complaint, you've now departed from the standard.

The Court cannot consider matters outside the complaint, nor, in these circumstances, can the Court convert the matter into a summary judgment proceeding, because that would require discovery into the underlying claims. And it would defeat the whole purpose of having a motion to dismiss standard govern a mootness fee, because the Court is trying to avoid turning the procedure on a fee application into a mini-trial on the merits of the mooted claims.

Now, if the Court disregards the Werth declaration, the 56-page Subramanian report, and all these other materials that are outside the complaint, defendants really have no argument that the claims were not meritorious when filed. Moreover, defendants also rely on events after the complaints were filed, such as Merck's subsequent actions. That's inconsistent with the standard that the Court must evaluate the merits of the complaint when filed, not in light of subsequent events. So we think that defendants' meritoriousness argument fails at the outset because they basically have not complied with

the standard that governs the determination of the merit of the claims.

Now, if the Court is going to consider the meritoriousness issue despite the fact that defendants have lobbed in matters outside the complaint, it's a very difficult standard to meet in this context. Defendants admit that their use of the AIC and the poison pill is subject to enhanced scrutiny under *Unocal*. *Unocal* holds that the board has the burden of showing both reasonable grounds for believing there was a threat to corporate policy and that the defense was reasonable in relation to that threat. As the *Carmody* case recognized, enhanced scrutiny is inherently fact-driven and requires a factual record. Therefore, that test is rarely satisfied on a motion to dismiss unless the complaint attacking the pill is wholly conclusory.

Plaintiffs' complaints were not conclusory. The cases defendants rely on, such as *Unocal*, *Unitrin*, *Third Point*, *Yucaipa*, and *Selectica*, all involve factual records, many of them preliminary injunction records. But nonetheless, these decisions that sustain the use of a pill, they were in a context where the Court was relying on a factual record.

That can't be done here. And in part it can't be done because defendants folded up their tent while expedited discovery was going on. And so there never was a sort of merits hearing. But that's because they granted, actually, more relief than we could have gotten if we had won the preliminary injunction motion.

A case like *Gaylord*, they cite the summary judgment opinion, but they don't discuss the opinion in *Gaylord* and the opinion in other cases, like *Ebix*, where the Court denied motions to dismiss claims challenging a poison pill. So by submitting a purported factual record, defendants have conceded that they cannot satisfy their burden of showing that the allegations of the complaint did not state a claim when filed.

With respect to the AIC claim, the initial complaint filed by Plumbers and Steamfitters alleged that the causal provisions of the AIC, the Versum rights plan, would inhibit stockholders from sharing information, consulting with each other, or expressing views on Merck's offer and the Entegris merger. That's at paragraphs 4 to 6 and 31 to 38. Based on the terms of the AIC that the complaint

alleged, the rights plan impermissibly interfered with voting rights and was unreasonable in relation to any potential threat.

Now, defendants' response to the meritoriousness of the AIC claim was to ignore the allegations of the complaint and to lob in the Subramanian report, which cannot be considered because it's outside the complaint. Moreover, some Harvard professor's speculation about why some companies adopt AIC provisions is no evidence of what the Versum board was thinking, if anything, when the AIC was placed into the rights plan.

Indeed, if the Court considers the minutes and other documents outside the complaint, those documents, as we indicate in our brief, would show that it's not clear that the board considered the AIC at all, much less focused on a specific threat that it concluded justified the AIC. Defendants also rely on the Werth declaration, which, too, is outside the complaint and purports to reflect what Merck, not the Versum board, was thinking.

Defendants' other argument on the AIC claim is that the definition of "Beneficial Ownership" in the rights plan provides that the AIC does not

apply to tender offers and proxy contests. As our briefs show, the plain language of the definitions of "Acting in Concert" and "Beneficial Ownership" establish that defendants' interpretation is wrong. But even if defendants' construction was reasonable, a motion to dismiss would be denied because the provisions demonstrate that plaintiffs' construction, at the very least, is a reasonable alternative reading.

The rights plan claim also had merit when filed. Defendants' attack on the rights plan suffers from the same defects as their argument against the AIC claim. They rely on matters outside the operative complaint, and they rely on speculation from Subramanian about what he says is modern practice regarding rights plans.

Defendants do not address the detailed allegations of the operative complaint that was filed by Providence. For example, they ignore the multiple allegations concerning the interplay of stacking the poison pill on top of the numerous defensive provisions of the merger agreement. Defendants also do not respond to plaintiffs' allegations that even after rejection of the Entegris merger, the rights

plan would preclude Merck from acquiring Versum.

The facts are those that are alleged in the complaint. In the circumstances here, it's not just a matter of a rights plan adopted on a clear day. It's a right plan adopted in specific response to Merck's offer in the context of a merger agreement with numerous defensive and protective provisions and a pending stock-for-stock merger. And the complaint certainly makes out a claim for the pill not being -- being a breach of fiduciary duty, as applied in this circumstance.

The Providence complaint alleges specific facts demonstrating that the all-cash, all-shares Merck offer at a price that was above Lazard's fairness range posed no legitimate threat, and certainly did not make a preclusive pill reasonable. While offering weak evidence that comes from Harvard and from Germany, defendants do not offer any direct evidence from the Versum directors themselves regarding the threat they perceived that they claim justified their adoption and maintenance of the pill, despite the numerous protective provisions already in the Entegris merger agreement.

Evidence extrinsic to the complaint

should not be considered at all. But if such evidence was permissible, what would be relevant is evidence from the Versum directors. Not a report from an expert or a declaration from some Merck official, when both of them lacked any firsthand knowledge of what threat, if any, the Versum board perceived and what analysis, if any, the board performed of the reasonableness of adding a preclusive pill to the already formidable defenses for the Entegris merger.

Let me turn to causation. Defendants have not attempted to overcome the presumption that the litigation caused the Versum board to remove the AIC and the rights plan. There are no affidavits from any of the directors, and no minutes or other documents showing that the board's action in removing the AIC and later terminating the rights plan were unrelated to the litigation. The presumption is that causation exists precisely because defendants possess the evidence of what motivated their actions. Their failure to produce evidence amounts to a default that concedes causation.

The causal connection between the litigation and the removal of the AIC is shown by several factors. First, defendants do not even

attempt to show the AIC was removed for a reason independent of the litigation.

Second, the timing of the AIC removal, just a few days after the filing of the litigation challenging the AIC and just hours after the Court agreed to schedule a preliminary injunction hearing, establishes a causal connection.

Third, Versum's privilege log shows consideration of the rights plan "in anticipation of litigation" in the days between the filing of the litigation and the removal of the AIC. So the only evidence there is about what was being considered shows that the litigation was a factor during that time period.

Defendants also cannot show a lack of causal connection between the elimination of the rights plan and the litigation. First, defendants, again, have produced no director affidavits or minutes or other evidence that the rights plan was terminated for some independent reason. Defendants cannot rebut the presumption when they failed to provide rebuttal evidence from the board itself.

Second, defendants agreed that removal of the poison pill would be in consideration of

plaintiffs' withdrawal of expedited depositions and their preliminary injunction motion. The negotiation and execution of the March 31, 2019, stipulation is conclusive evidence of causation. In fact, defendants admitted in an 8-K that they were resolving plaintiffs' injunction motion by terminating the rights plan.

Third, contemporaneous documents, such as the agenda for the March 22, 2019, board meeting and Versum's privilege log, reflect that there was consideration of the litigation in connection with the rights plan during the second half of May, just before the rights plan was terminated.

Now, defendants' purported evidence of lack of causation is irrelevant, and it's weak. Instead of offering evidence from the Versum directors concerning what caused them to remove the AIC and later abandon the entire rights plan, defendants offer the 56-page Subramanian report and the 16-page declaration from Mr. Werth of Merck. A professor's theory on what M&A practitioners think and Merck's story of what it supposedly was thinking are no evidence whatsoever of why the Versum board took out the AIC and ended the rights plan.

With respect to Subramanian, Delaware law on causation is not based on the efficient capital markets hypothesis. That may have use in other contexts, but that's not the standard here. And the issue is what caused the board to act, not what a professor says his theory is about market reaction.

Merck's tender offer was conditioned on elimination of the poison pill. Merck, Subramanian, and cases the defendants cite like *Gaylord*, all recognize that Merck could not close an acquisition of Versum while the rights plan was in effect.

Defendants claim that the rights plan was irrelevant to Merck and the success of its offer. That's refuted by Merck's contemporaneous words and actions attacking the rights plan. It's refuted by the fact that they conditioned their tender offer on the elimination of the rights plan. Merck thought the rights plan was highly relevant in March 2019, when it issued various proxy materials attacking the poison pill as an entrenchment tool that would preclude its purchase of stock from Versum stockholders and prevent any deal but the Entegris merger. That's what Merck said at the time.

Now they come in with this declaration and try to tell a different story more than a year later. Merck even admitted that litigation was an effective means of pressuring the Versum board to pursue Merck's offer. So the different story that Merck tells now has zero credibility, because the Court ought to look at what they said at the time.

Over 30 years of Delaware law establishes that revision and removal of defensive measures is a corporate benefit. Defendants' argument that removal of the AIC and rights plan were not corporate benefits is contrary to decades of Delaware law. From *Roizen* in the 1980s to *Chalfin* in the 1990s through *Boilermakers* this past decade, this Court has repeatedly held that defendants cannot withdraw a challenged action in the face of litigation and then claim the withdrawal was not a benefit.

Chancellor Brown rejected that long ago in *Roizen*. Vice Chancellor Jacobs, in *Chalfin*, and Chief Justice Strine in *Boilermakers*, all recognized, as the Chief Justice put it, you can't "punk out" and then say, oh, well, getting rid of the transaction that was challenged isn't a benefit. Delaware law recognizes that it is. And, again,

decades of Delaware law establish that when you cause the revision or removal of defensive measures, that's a benefit that warrants an award of attorneys' fees.

Back in the 1980s, in the *Edelman v. Phillips* settlement, the major benefit was revision to the rights plan, which was then a -- you know, the rights plan was a fairly recent phenomenon. And I remember that settlement because in the negotiations, Ted Mirvis taught me a lot about rights plans, back when we were both young lawyers. That's how far back it goes, to where changing a rights plan -- and there, it wasn't removed, but it was revised -- is a benefit that justifies an award of attorneys' fees.

And through the years, there have been modification of other defensive devices, whether it's topping fees or no-shops or whatever; and more recently, *Compellent*, which found the removal of a rights plan was a substantial benefit even when there was no actual competing bid and no such bid ever emerged.

Finally, let me turn to why the $12 million fee request is reasonable under the circumstances here. There is a quantifiable benefit. The Merck merger represented approximately

$1.2 billion in increased merger consideration over the Entegris merger. That benefit is far easier to quantify than in *Compellent*, where there wasn't an actual offer. The Court had to try to determine, well, what are the odds an offer will emerge, and if it did, what would the offer look like.

Here, those facts are known. The amount of the fee, really, turns on how much of the $1.2 billion financial benefit can be attributed to the litigation and what percentage of the benefit attributable to the litigation should be awarded as attorneys' fees. And I know the Court frequently gets lawyers coming in and they would claim a huge credit and they would seek a high percentage fee. We've taken a very conservative approach here. Essentially, if you take 10 percent of the benefit and attribute it to the litigation, approximately 120 million, and then if you awarded a 10 percent fee from that, that gives you a $12 million fee.

We could certainly make arguments about why our causation was greater than 10 percent and why the fee should be greater than 10 percent, but we're also, Your Honor, trying to limit ourselves to what we regard as a reasonable fee. And we think

that's our obligation. You don't go ask for, you know, the maximum you think you can get.

But we've already taken into account things like -- with joint causation, we recognize it's hard to precisely quantify what percentage to attribute to the litigation. We recognize that this is -- was an early-stage case. Although it wasn't a case where we just filed the complaint and didn't do anything and then had a settlement or something, and we said, oh, well, give us -- these old monitoring cases, where people would file a bunch of complaints, there would be a competing bidder, a higher deal would be announced, and they said, oh, well, see, we should get a fee. That's not this case. While the litigation was only active for about a month, we were very busy in that time pursuing expedited proceedings.

And I think another factor that's extremely important is look at the relief we got. We achieved a complete victory that actually probably went beyond what we could have gotten if we won a preliminary injunction, which would just temporarily restrain the transaction from going forward. It wouldn't necessarily compel the removal of the rights plan, wouldn't necessarily compel a pursuit of a deal

with Merck. But we got those things.

The rights plan was completely eliminated. And as Your Honor commented in *Compellent*, that doesn't happen very often. That's a considerable victory. And we didn't agree to dismiss our case, like the defendants asked. We said, "No. We'll withdraw the motion for a preliminary injunction, but we're keeping our claims. There's no release here, and we're going to see what you do." And what they did was, eventually, they did the $53 deal with Merck.

So I think, in considering what the fee award ought to be, the Court ought to consider the degree of success that was achieved. Even if it was achieved quickly, you know, it involved substantial effort. We recognize it's an early-stage resolution, but it's a very favorable resolution.

And now, the connection to Merck's offer. Elimination of the rights plan was a prerequisite for Merck's offer to succeed. The stipulation and other evidence confirm that the litigation was the cause of the removal of the AIC and poison pill, which would have precluded the closing of Merck's offer. So the litigation had some causal role

in the success of the higher Merck offer that provided the stockholders with substantially more consideration.

We presented the Beach report, which supports attributing at least 10 percent of the total increased merger consideration to the litigation. Now, we did not submit the Beach report in support of whether our claims were meritorious or whether the elimination of the AIC and poison pill were legally cognizable benefits. Those are Delaware law issues for the Court.

And what we got in response was the Subramanian report, which, first, offers opinions on the merits of plaintiffs' claims and on causation, mostly citing Professor Subramanian's own Law Review articles and his Casebook. But these are Delaware law issues for the Court. And it doesn't matter how many schools at Harvard you have degrees from or teach in; you cannot give a Delaware judge opinions on Delaware law. And Subramanian repeatedly does that.

Now, Your Honor, we've discussed in some detail -- and particularly in the Beach reply report -- why Mr. Subramanian's opinions are not valid, stray into subjects that are legal issues, into

subjects where he has no firsthand knowledge. And I can go through those if the Court would like, but I think we've covered them adequately, though I do want to raise it because I suspect my friends may have something to say about it on their answering argument, and I'll respond.

So, Your Honor, ultimately, we think that, based on Mr. Beach's analysis, based on *Compellent*, and then based on the other case law, including *Sugarland*, where the Court used 20 percent and 5 percent of the benefit for two phases -- you know, the initial offer and then the ultimate hire offer. In *NCS*, the Court used 15 percent and 5 percent. In *GFI*, the Court used 20 percent. And so based on these precedents, we think they also support a fee of at least 10 percent of the approximately $120 million benefit attributable to the litigation.

And I had mentioned earlier the monitoring cases. The fees there were sometimes 1.25 percent to 1.5 percent of the total increase in merger consideration. Well, that's actually a little more than the equivalent of attributing 10 percent of the benefit to the litigation and then awarding 10 percent of that attributable benefit as a fee.

And those are cases where people just were monitoring and where, often, the bidder was doing the heavy lifting, in terms of the litigation. Here, we were the ones who did the litigation, the only ones who did it. And so I think those cases, as well, would support the fee we asked for here.

Finally, benefit conferred, not hours, is a primary determinant of the amount of the fee. We did -- it's not a case where we just filed the complaint and then settled it. Instead, we got -- and we didn't settle for modest relief. We didn't settle at all. We didn't give a release. But we got all the relief you could possibly hope for, and we did it quickly and efficiently. And so while we could ask for more, we think that what we've asked for is reasonable, and it certainly is a lot more reasonable than defendants' position, who come in and say the Court should award no fee at all.

So we think that the $12 million fee request is reasonable, and we would ask the Court to grant it in full. Thank you, Your Honor.

THE COURT: Thank you very much. I appreciate it.

Mr. Waldman, would you like to

proceed?

MR. WALDMAN: Yes. Thank you very much, Your Honor.

There's been a lot of ink dedicated to this issue -- briefs, affidavits, and expert reports -- as well as the argument by counsel this morning. I want to start with a quick observation that the fundamental difference between the parties is pretty simple. Plaintiffs -- the defendants believe plaintiffs did not cause the board to take any action that benefited the corporation, whether that benefit is defined as increasing the likelihood of the original Merck Darmstadt, Germany, bid or the difference between that $48 bid and the $53 ultimate offer.

Fundamentally, this is because Merck made its initial bid a full week before any litigation was filed. Plaintiffs almost completely ignore this critical point. And the fact is, they cannot claim any causal benefit for Merck Germany showing up as a bidder.

Instead, defendants believe, at most, plaintiffs had some influence over the timing of when the AIC provision was removed and when the pill was

ultimately withdrawn, actions that were going to happen regardless of whether or not plaintiffs filed or pursued this litigation, and actions that had no impact on the bidding dynamics. I'll go into a little more detail on that in a minute, but before I do that, I want to address one more point head on, which we saw in both the reply brief and in argument by counsel before.

Plaintiffs fault the defendants for purportedly not offering reasons for the deletion of the AIC and, in their words, ignoring the stipulation where plaintiffs agreed to withdraw the preliminary injunction motion when defendants terminated the rights plan. The answers to both of those are readily apparent in the record.

Defendants deleted the AIC because the facts developed in such a way as to make that provision irrelevant. By March 14, the situation had become clear. This was a battle between Entegris and Merck Germany. There was no wolf pack emerging. As Your Honor noted during the scheduling conference that day, expedited proceedings impose substantial burdens on the Court and the parties, and there was no need to go through all of that litigation over a provision

that was no longer relevant. This was now a fight between Entegris and Merck, and Merck only.

Likewise, on April 2, Versum filed an 8-K stating that the board removed the pill to, quote, "avoid the expense and distraction of litigating the motion and to instead focus" on the transaction. That's Exhibit 31 to plaintiffs' opening brief, and Versum is not walking away from it now.

As I will discuss momentarily, the pill had already worked to give the board additional leverage and flexibility to maximize value for the shareholders. In other words, the pill had its intended effect. It caused Merck to deal with the board and helped get it to raise its $48 offer to $53.

Defendants do not dispute, as plaintiffs suggest, that the litigation was a factor in defendants' decision on when to amend the pill. But defendants do dispute that there was any benefit from the litigation in this connection with either Merck's bids or the price ultimately received by the shareholders.

With those fundamental disputes in mind, the issue we believe that is before the Court is whether the plaintiffs' counsel is entitled to a fee

award where the record shows that they did not obtain any benefit for the Versum stockholders. The answer is no, for a couple of reasons. Versum's board acted appropriately throughout the process. After Merck Germany sought to jump Versum's merger of equals with Entegris, Versum's -- excuse me, the board adopted proportional defensive measures to maintain control of the process and extract the best deal available from either suitor for the company's stockholders.

To be clear, the pill was put in for business reasons, the pill was pulled for business reasons. Plaintiffs' lawsuit was a distraction that the company did not need to fight. Yes, Versum modified its pill at the time that it modified it in order to get rid of plaintiffs' litigation. But that alone is not a benefit to the stockholders. The pill would have been modified with or without the litigation.

As shown in contemporaneous documents, Mr. Werth's affidavit, and Professor Subramanian's report, this lawsuit had no impact on the outcome of the sales process or the price ultimately received by stockholders. Plaintiffs' counsel are not entitled, on those facts, to a large reward at a rate of nearly

$11,000 per hour simply for inserting themselves into that process. That is not the policy that the corporate benefit doctrine was developed to advance.

If, Your Honor, the Court nonetheless finds that there has been a benefit and is inclined to award a fee, where, as here, any benefit achieved through litigation is not clear or quantifiable, quantum meruit is the appropriate measure. Plaintiffs concede that, using their own rates, that would lead to a quantum meruit award of about $680,000.

I'll just go into a little bit more detail on the couple of stages of the sales process and defendants' view that plaintiffs' fee petition fails at each step of that process.

First, Merck Germany offered a cash buyout at $48 per share on February 27, 2019, more than a week before the lawsuit was filed. At that time, Merck Germany's management was authorized to bid up to $50 per share. This offer was driven entirely by Merck Germany. Plaintiffs' counsel had nothing to do with it, and they are not entitled to any award based on it. Nonetheless, more than 50 percent of the plaintiffs' fee demand is based on this posted increase from Entegris's merger of equals price --

today said to be about $41 -- to the $48 share price. That amount should come off the top.

In addition, following Merck Germany's initial offer and adoption of the pill, Versum's stock traded consistently above $48. The market recognized that a higher bid was likely, with or without the pill. The public analyst reports and Lazard's private analysis for Versum's board all said the same thing: An offer in the low to mid 50s was going to be necessary to complete the transaction; again, with or without an AIC, with or without any type of pill.

Second, the record shows that the AIC provision had no impact on Merck Germany's conduct and did not prevent any communication with Versum stockholders. Accordingly, removing the AIC provision had no impact and provided no benefit to the stockholders. Merck Germany is a large, multi-national strategic buyer. It was not acting in concert with anyone. So the AIC provision was simply irrelevant to the bidding dynamics.

On March 1, Merck Germany reported internally that the pill would not change its plans. That's evidenced by a presentation that Merck Germany's internal team delivered to its management.

In that declaration, Merck Germany told its management that the pill does not preclude any of our currently contemplated actions or mutually agreed deal. However, it can be used for counter-messaging in the media.

On March 12, Merck filed a proxy statement -- Merck Germany filed a proxy statement with the SEC communicating directly with Versum shareholders. On March 14, before the removal of the AIC provision had been publicly announced, Merck Germany held a roadshow presentation for Versum shareholders which was then filed publicly with the SEC.

In addition, no one reacted to Versum's announcement that the AIC provision had been removed. Analysts ignored it, trading volumes weren't changed, and the stock price barely moved. And Mr. Werth's affidavit merely confirms the obvious point, that Merck Germany did not care about the AIC provision. Retaining or deleting the AIC provision was meaningless to Merck Germany and its plans. Versum's decision to modify the pill had no impact at all on Merck Germany's bidding strategy and therefore provided no benefit to the stockholders.

Plaintiffs contend that Versum pulled the AIC language because of their litigation, establishing causation sufficient for them to earn a fee. But the early removal of the AIC provision and the rights plan played no causal role in Merck's successful $53 per share offer. It is true that Versum pulled the AIC in part to avoid litigation over it. But only because it did not matter. Merck Germany was not a wolf pack, and the concerns that had been expressed by Lazard in late February, prior to any litigation, over unusual trading had subsided.

Turning now to the redemption of the pill entirely, as opposed to the modifications of the AIC, neither Versum's decision to redeem the pill entirely nor plaintiffs' counsel's efforts were responsible in any way for Merck Germany's decision to increase its bid from $48 to $53. Once the AIC provision was removed, the pill was plain vanilla, with a relatively high trigger point of 12.5 percent. But everyone in the market knew it would never be triggered. That's what the analyst reports show, that's what the stock price shows, that's what Merck Germany's internal analyses show, and that's the basic point of Professor Subramanian's analysis. Merck

Germany and Entegris were in a bidding contest for Versum, and the bidder that offered the most economic value would succeed, regardless of the pill or when the pill was redeemed.

On March 26, Merck Germany launched a public tender offer at $48 per share. Under SEC rules, Merck Germany could not purchase any shares outside of that tender offer. Accordingly, as of March 26, there was no risk of a creeping takeover from Merck Germany. At that point, the pill had done its job, and Versum's board could proceed with an informal, and then a formal, discussion with Merck Germany about an increased offer.

Rather than spend time on the litigation, meeting with lawyers, and getting deposed, Versum's board decided to redeem the pill and focus on the sales process. That is what Versum told the market in its April press release was the reason it was redeeming the pill.

Merck Germany ultimately decided to increase its offer to $53 per share, and Entegris declined to match it. As confirmed by Mr. Werth, the litigation played no role in that bid. Indeed, Merck Germany's supervisory board had not even been informed

about the pill or the litigation.

Finally, Your Honor, turning to the calculation of any fee, in its initial papers, plaintiffs sought to have the Court look to *Compellent* as the most relevant authority. We believe, rather than *Compellent*, the most relevant authority here is *Dunkin' Donuts*. Whatever impact plaintiffs' counsel may have had is too speculative, uncertain, and unquantifiable to justify a large fee award. Plaintiffs' counsel set their own hourly rates, though they concede that using them, as I said before, would lead to a quantum meruit award of about $680,000. As in *Dunkin' Donuts*, that is the maximum that plaintiffs should receive here.

Indeed, even *Compellent* suggests a far lower award than plaintiffs' counsel requested. In *Compellent*, the plaintiffs' counsel challenged more defensive measures, conducted more discovery proceedings, including, in that case, depositions, spent close to twice as many hours on the case, and were awarded fees at a rate of about $1,000 per hour. That's in contrast to here, where plaintiffs' counsel is seeking an award at a rate of approximately $11,000 per hour.

For those reasons, Your Honor, we believe the fee petition should be denied. Thank you.

THE COURT: Why do you think 12.5 percent is a relatively low pill trigger? I'm sorry. Relatively high pill trigger was your claim.

MR. WALDMAN: Yeah. Yes, Your Honor. It's a high pill trigger because no one, including Merck, had anywhere near that amount of stock, and there was no effort by Merck -- and certainly by no one else -- to even try to accumulate that kind of number.

THE COURT: All right. Thank you.

MR. WALDMAN: Thank you, Your Honor.

THE COURT: Mr. Hanrahan, would you like to reply?

MR. HANRAHAN: Yes, please, Your Honor.

Mr. Waldman's presentation never answered the question of why are there no director affidavits, minutes, or other evidence establishing why the board removed the AIC, why it eliminated the rights plan. You get all this "defendants believe this, defendants" -- essentially, that's Mr. Waldman testifying. But those aren't facts. That's not

evidence. There's no evidence from the board. The consent removing the AIC doesn't give any reason.

On causation, it's their burden. They control the evidence. What did they do? They don't present anything from the directors. You have only a consent with respect to the removal of the AIC. With respect to the termination of the rights plan, they never produced any minutes after about early March.

So there's a description of March 22 and March 26 board meetings in the proxy. It doesn't mention anything about the rights plan. And they don't produce the minutes. They don't produce any director affidavits. So they have failed. They have the burden of producing evidence showing a complete lack of a causal connection. They haven't offered any evidence of an independent -- we may have Mr. Waldman's arguments, we may have Professor Subramanian's speculation about what M&A practitioners do, blah, blah, blah, but where is the evidence?

They say that the Merck $48 offer was before the lawsuit. But remember, the Merck $48 offer was rejected. The benefit here, the causal benefit, is the removal of defensive measures that would have dimmed the prospect for success of that offer.

Everybody concedes, Merck's $48 offer could not have closed if the poison pill remained in place.

They say they deleted the AIC because, oh, it developed there was no wolf pack. Well, where's the record on that? There's no board minutes. The consent doesn't say that. And, in fact, there's no discussion of a wolf pack. There never was any wolf pack. And there's no discussion, in these minutes when the rights plan was adopted, there's no discussion of the AIC at all.

In fact, as we pointed out, the -- there's a version of the AIC late on February 27th -- I mean, a version of the rights plan. It doesn't have the AIC in it. It's not even clear when that got put in, whether the board ever saw it. But one thing's clear. They do have minutes from those meetings, and there's no reference to the AIC in those minutes.

So, you know, you cannot meet your burden of proving absolute lack of causal connection when you don't produce any evidence, when the evidence that there is, including their privilege log and the timing of it, shows that there was a causal connection. And, indeed, it's the only cause that's established by the record.

They say, oh, well, it was just too -- we terminated the rights plan to avoid expense and so we could focus on the transaction. The transaction they were focused on was the Entegris merger. Mr. Waldman seems to forget that when they announced the removal of the rights plan, the Versum board also reconfirmed support for the Entegris merger and reconfirmed its recommendation that the stockholders reject the Merck offer.

So, you know, again, we get into this issue of, oh, they take positions now, but when you look at what they said at the time, it's not consistent. Merck has a lot to say about, oh, the pill wouldn't -- Mr. Waldman said, oh, Merck believed the pill wouldn't preclude their offer. That's not what they said at the time. They conditioned their tender offer on removal of the pill. They said to the stockholders in proxy materials, "This poison pill is an entrenchment device which will preclude you from receiving our offer."

You can't go back and rewrite history. The contemporaneous documents show what happened. And they haven't even bothered to put in affidavits from the directors to try to rewrite the story. They're

trying to have Professor Subramanian -- he may be a brilliant guy, but he can't rewrite history. And Merck can't rewrite history, particularly when you point to words and actions by Merck itself at the time that are inconsistent with the story it now tells.

Mr. Waldman kept saying that they modified the rights plan. They didn't modify it, they terminated it. It wasn't like -- they modified it when they took out the AIC provision, but then they ultimately took the whole thing out. And what you end up with is that, you know, there's all this talk about, oh, everyone knew this, and what the market knew and what the analysts said and what Merck thought. Where is the board?

The issue is what caused the board to act. The people in the best position to give evidence on that are the directors themselves. And they're entirely absent. In fact, there's one declaration from a board member, and what's really interesting about it is it doesn't give any information on why the AIC was removed, why the rights plan was terminated. So I think that's a conspicuous omission.

And as we point out, when you produce weak evidence from a Harvard professor, a Merck

official who has no firsthand knowledge, when strong evidence should be available in the form of statements from the directors themselves and minutes and contemporaneous documents, the Court can only conclude that the strong evidence would not support defendants' position. And therefore, we think the Court ought to ignore that. There is a quantifiable benefit.

And, you know, *Dunkin' Donuts,* there was no specific achievement in *Dunkin' Donuts*. Here, specific things happened that the lawsuit sought. The AIC was eliminated. The rights plan was eliminated. And ultimately, Versum considered and accepted the higher offer from Merck. That was the goal of the litigation, and we accomplished all those goals. That's a far cry from being sort of on the sidelines and just vaguely there was litigation out there. No. We litigated specific issues and we won those issues. So we think the fee we request is well supported as a modest percentage of a modest attributable benefit.

Thank you, Your Honor.

THE COURT: Can you speak a little bit more to the implied hourly rate. I think it's one of those issues where someone perhaps not versed in our benefit law would look at it and think it was an

eyebrow-raising number that should be taken more into account.

MR. HANRAHAN: Certainly, Your Honor. And, of course, we've had hourly rates, as in *Southern Peru*, as high as $35,000 an hour. And the reason for that is because, again, this goes back all the way to *Sugarland*. The primary factor is benefit conferred, and the Court sometimes uses hours as a cross check. But frequently the Court says, look, here's a massive benefit.

And what we've done, by basically saying attribute 10 percent of the benefit to the litigation and award a 10 percent fee, we've already taken into account that there were a limited number of hours spent. But Your Honor in *Olson*, and this Court in other cases, has observed that you don't penalize people because they achieve success early on.

And what's very important is this is not some marginal success. This is complete success in eliminating the AIC, eliminating the rights plan, and getting additional consideration for the stockholders. And we think that ought to be the primary focus. And we believe, by not asking for 20 percent of the benefit, not asking for a 15 or

20 percent fee, we think we've already accounted for the fact that the Court can look at it and say, yes, this would be a high hourly rate. On the other hand, the success was great.

And so we're entitled to a reasonable portion of that benefit and shouldn't be -- you know, Mr. Waldman says, oh, well, they had $600,000 worth of time in it. Yeah, well, I don't know how much time the defendants had, and I bet it was more than that. And they were guaranteed of getting paid. We took on what is a very tough case. As the Court observed in *Compellent*, it doesn't happen very often. Pill cases don't usually succeed. And we succeeded. We have hard evidence, in terms of the stipulation, that we did have a causative effect. And we think that we should be awarded an appropriate fee.

We didn't ask -- you know, we could have come in asking for 25 million or 50 million, or whatever. But we took into account the situation, including the limited number of hours. So we think, in light of the overall factors, with benefit conferred being the primary factor, that the $12 million is reasonable here, regardless of the fact that it may seem like a high hourly rate.

Let's keep in mind also that, you know, Versum didn't mind paying its investment bankers huge fees. As we point out in our reply brief, it was okay then. They didn't say, oh, Citibank came in late and really didn't -- you know, went to a few meetings and really didn't do much. They thought that their input was so valuable they paid them a huge fee for very little work.

And, you know, Citibank was brought in to try to fend off Merck. They didn't succeed in that. We did succeed. And now they say, ah, you should just get your hourly rate. We don't think that's a reasonable result here, Your Honor.

Thank you.

THE COURT: One of the other things that I've mentioned before, and still think, is that, as you point out, the 1.25 percent or 1.75 percent numbers that were being given out in these monitoring award cases were probably a little high, I guess is a fair way to put it, a generous way to put it.

When you're ending up in the same ballpark -- and I recognize that you end up at about 1 percent, as opposed to 1.25 to 1.75 -- but why isn't that some indication that your ask is towards the

higher end of what you really ought to be getting on this?

MR. HANRAHAN: Because this was not a monitoring case, Your Honor. These older cases -- and, you know, I was practicing back then, and things worked a little differently and people filed a whole bunch of cases. And oftentimes, if there was litigation, it was really the bidder who was -- and there was no specific accomplishment that this litigation -- the lawyers who litigated the case could point to. Nothing specific happened that was related to the litigation. It was kind of, well, we were here monitoring, and then the deal price got raised, and therefore, we should get a fee.

And for doing that, Your Honor, I'd agree that 1.25 percent, 1.5 percent, is high. But that's not our case. We were the only ones to challenge the pill, and we achieved specific results attributable to the litigation -- elimination of the AIC, termination of the rights plan, and ultimately, the higher offer occurs.

In the earlier cases, those first two steps are missing. They didn't get any kind of relief related to the litigation. It was just that it

happened at the end that there was a higher price. They didn't eliminate an obstacle that would have precluded the higher price. We did. And that's why we think, you know, our ask is really not so great in relation to what happened in this particular case. And we, frankly, refer to those earlier cases to say, you know, maybe it was a little high. Maybe it should have been 1 percent. Maybe it should have been less than 1 percent. But it certainly indicates that, for what we accomplished here, 1 percent is a reasonable result in terms of a fee.

THE COURT: All right. Thank you very much.

Let's go ahead and take a little break until 10:30. I'll ask Mr. Houchens to put everyone back in the waiting room, and then we'll resume then.

(A recess was taken, 10:21 to 10:30 a.m.)

THE COURT: All right. Welcome back, everyone. Thank you very much.

I was trying to decide whether I should take this matter under advisement or go ahead and give you a ruling now, but I think, in the interests of efficiency, I am going to go ahead and give you a ruling now.

This litigation challenged the deployment and maintenance of a stockholder rights plan adopted by Versum Materials, Inc. to protect its stock-for-stock merger with Entegris, Inc. from an all-cash topping bid by Merck KGaA. The rights plan included an acting-in-concert provision where the rights plan could be triggered by stockholders discussing the Merck offer, exchanging information regarding the Merck offer, holding a meeting concerning the Merck offer, or taking other minimal steps that are customary in contested transactions.

After one of the plaintiffs filed a complaint challenging the acting-in-concert provision, the Versum board removed it. The plaintiffs moved forward towards a preliminary injunction hearing, with depositions set to begin. The parties negotiated a stipulation on March 31 in which the plaintiffs agreed to withdraw their application if Versum withdrew the rights plan. Two days later, on April 2, Versum withdrew the rights plan.

For these benefits, plaintiffs seek an award of $12 million in fees and expenses. They cite the withdrawal of the acting-in-concert provision and the complete elimination of the rights plan. Merck

ultimately acquired Versum, and the merger has closed.

The defendants now argue that no fee should be awarded whatsoever. To the extent a fee is awarded, they claim that the total amount of the fee should be the base lodestar without any type of multiplier or any consideration for a risk premium. That would be a fee of around $680,000, which is roughly in the same ballpark for what might be obtained for significant supplemental disclosures.

The posture of this case is thus reminiscent of *Solomon v. Take Two Software*, where Vice Chancellor Lamb took into account that the defendants had taken aggressive positions on whether any fee was due and also had taken an unreasonable position on the amount. As in that case, I'm confronted with a situation where I think, all things considered, the plaintiffs' ask is probably a little high. I think it's at the upper end of reasonable. They have justified it, but it's the type of situation where, had I had help from the defendants in terms of engaging on matters responsibly, then I might well have reached a different determination. But as it is, I am going to award the full amount of the request.

The factual background, in summary, is

as follows: On January 27, 2019, Versum and Entegris entered into a merger agreement. It provided for Versum's stockholders to receive 1.12 shares of Entegris's common stock for each share of Versum that they owned. The transaction was billed as a "merger of equals," and Versum's stockholders would own 47.5 percent of the combined company. The merger implied a value for Versum of approximately $35.08 per share based on Entegris's closing price of $31.12 per share on January 25. The implied deal price thus reflected a 10.8 percent premium to Versum's closing price on that same day.

At the time of the deal, Versum and Entegris estimated that the merger would result in approximately $75 million in cost synergies, and they announced that figure at the time of the merger. After the announcement of the deal, including those synergies estimates, Versum's stock price closed at $36.67 per share.

The defendants argue that the combination had much greater long-term value. To the extent that one wants to strongly embrace the efficient capital markets hypothesis, as the defendants seemed to do at various points during their

briefing, that price of $36.67 per share was the market's estimate of the long-term value of the deal as discounted by its likelihood of completion.

I've reviewed the Entegris merger agreement. It contained a relatively standard package of deal-protection provisions. There was a no-shop with a superior-proposal out. There was a no-change-of-recommendation provision that was subject to both the superior-proposal out and an intervening-event out. Nothing jumped out at me as exceptional in terms of the deal protection measures in the agreement, and the plaintiffs haven't really cited anything.

Now, approximately one month later, on February 27, 2019, Merck announced and delivered a fully financed, all-cash acquisition proposal to acquire Versum for $48 per share. Based on Entegris's closing price the prior day, the merger consideration at that point was worth $42.26 per share. The very next day, the board adopted a rights plan with a 12.5 percent ownership trigger.

As I may come back to later, I don't endorse the view that the trigger is measured based on existing levels of stock ownership in the market, as

counsel suggested today. The trigger is designed to cap maximum ownership at a level that's believed to be able to influence a possible control outcome.

The original pills focused on 20 percent as the trigger. That generally creeped down to a market standard of 15 percent. That's also reflected in Section 203 of the Delaware General Corporation Law. It's only with the recent spate of NOL pills that people really have gone far below that, and they've tied that to the 5 percent ownership limitation that's related to NOLs. 12.5 percent, thus, wasn't a relatively high threshold. If anything, it was on the lower side. I wouldn't say it was extremely low, but it was not by any means relatively high.

More importantly, when measuring ownership, the rights plan's definition of "Acquiring Person" used the concept of acting in concert. It started with the basic definition of "Beneficial Ownership" under Rule 13d-3, and it included in that definition anyone who had the right to acquire or vote securities pursuant to an agreement, arrangement or understanding. That aspect of the pill is quite customary.

But it then added the concept of "Acting in Concert," and that definition is truly expansive and worth quoting in full. So a person could have beneficial ownership attributed to them if they were acting in concert with another person, defined as follows: "if such Person knowingly acts (whether or not pursuant to an express agreement, arrangement or understanding, whether oral or in writing) in concert with such other Person in, or towards a common goal relating to, changing or influencing the control of the Company or" -- so disjunctive -- "in connection with or" -- again disjunctive -- "as a participant in any transaction having that purpose or effect, in parallel with such other Person ...."

I'm going to pause there. That's the baseline concept. You don't have to have any type of agreement, arrangement, or understanding of any type, oral or in writing. All you have to do is simply knowingly act. And we know from the *Hexion* case that knowing action simply means to take an action knowingly, as opposed to inadvertently. Instead of bumping into someone, you're actually knowing that you're going to, for example, a meeting. That's all

you have to do.

And then you have to also -- and I'm going to continue the definition now -- "where at least one additional factor supports a determination by the Board of Directors that such Person intended to act in concert or in parallel with the other Person, which such additional factors may include exchanging information, attending meetings, conducting discussions or making or soliciting invitations to act in concert or in parallel."

So again, you have to knowingly do something, which simply means you have to not inadvertently do it, and then you have to do one other thing, which can simply be going to a meeting or exchanging information or conducting discussions. In other words, the types of things that invariably happen in a proxy solicitation, in a vote-no campaign, in a roadshow. And I'll come back to this.

Finally, the provision states that "A Person who or which is Acting in Concert with another Person shall also be deemed to be Acting in Concert with any third person who is also Acting in Concert with such other Person."

That is a daisy-chain provision, where

any one person who went to a meeting with someone else in connection with an effort to affect control could be treated as acting in concert with another person. And if that person who also attended the meeting then went and had a separate meeting with a third person, all of them could be added up for purposes of beneficial ownership. So what this all means is that anyone acting in parallel, for purposes of this definition, with Merck could have had their shares aggregated for purposes of the ownership threshold, as long as there was only one of these minimal factors present -- again, exchanging information, attending meetings, conducting discussions, or making or soliciting information.

The definition of the "Acquiring Person" had the traditional exception for making a revocable tender or giving a revocable proxy. Those have been customary since *Moran*. The original *Moran* pill didn't have one for an irrevocable proxy, and it was mooted out.

What the action-in-concert provision attempts to cut off, or at least threaten, is all of the activities that lead up to the giving of the revocable proxy or the making of the revocable tender.

So it nominally preserves the end product, the revocable tender or giving of the revocable proxy, but it interdicts all of the preliminary steps that lead to the customary rendering of that proxy or the making of the tender.

The definition excluded Entegris and the Entegris merger and also the company. It was thus asymmetrical. The incumbents could solicit freely in favor of their chosen transaction, but anyone else, including Merck -- and I'm going to come back to this later, but including Merck -- faced risk that, simply by virtue of attending meetings with stockholders in connection with their offer, that anyone attending those meetings, or daisy-chained with other people attending those meetings, could be treated as an acquiring person.

On the same day that Versum adopted this rights plan, February 28, 2019, Entegris filed a registration statement on Form S-4 that included a preliminary proxy statement. And it was a joint preliminary proxy statement, so I guess it's fair to say that it was both Entegris and Versum. That document contained Lazard's analyses of the value of the merger using synergies of $75 million. To

shorthand it, they supported the superiority of the Merck offer or, at a minimum, that it was reasonably likely that the Merck offer would lead to a superior proposal. But on March 1, 2019, the Versum board rejected the Merck offer, declined to treat it as a superior proposal, and reaffirmed Versum's commitment to the merger of equals.

Versum then hired a second financial advisor, Citigroup Global Markets. Citigroup ran analyses on newly increased cost synergies of $125 million, as well as new revenue synergies of $100 million. Those synergies could well have been legitimate. Their discovery is also legitimately questionable, given their timing relative to Merck's offer.

Not only that, but the midpoint of Citi's pro forma discounted cash flow analysis remained right around $47.85. Thus even with these newly found synergies, it wasn't clear -- again, to put it neutrally -- that the Merck offer wasn't one that could reasonably lead to a superior proposal. But on March 8, 2019, Versum reaffirmed its commitment to the merger of equals and Versum and Entegris announced another $50 million in projected synergies.

That same day, Plumbers and Steamfitters Local 60 Pension Trust filed its complaint and moved to expedite. The parties agreed to expedition, but on March 13, 2019, I held a telephone conference because I wanted to make sure that, depending on how this contest transpired, that I would have time to write, if necessary, and the parties would also have time to seek review. After that conference, the board acted by written consent to remove the acting-in-concert provision.

The next day, March 14, a second suit was filed by the City of Providence. The focus of that complaint was on the retention of the rights plan in the face of Merck's offer and the Versum board's ongoing refusal to engage with Merck. The cases were consolidated, and the parties moved forward towards a hearing on a preliminary injunction.

On March 22, Merck issued a proxy statement and began soliciting proxies against the Entegris merger. On March 25, Merck supported its proxy solicitation with a tender offer at $48 per share. That tender offer was conditioned on -- and again, this is customary -- the redemption, invalidation, or inapplicability of the rights plan.

Why is that done? Because the rights plan effectively prevents the tender offer from closing unless it's redeemed or eliminated.

Around March 26, Versum's counsel asked plaintiffs' counsel to reschedule certain depositions so that Versum's board could consider its options. On March 28, Versum determined that the $48 Merck offer could lead to a superior proposal and, therefore, began discussions.

On March 31, the plaintiffs entered into a stipulation agreeing that the preliminary injunction motion would be withdrawn if the rights plan was withdrawn. And shortly after the market closed on April 2, Versum announced that it had terminated the rights plan, triggering the stipulation and mooting the plaintiffs' injunction motion.

A bidding contest, somewhat limited, then ensued. On April 6, Merck increased its offer to $53 in cash. On April 7, Entegris increased its offer to 1.236 shares of Entegris stock plus $5 in cash. This increased consideration was worth approximately $51.82 at then-current market prices.

On April 7, 2019, the Versum board determined that the $53 in cash was the superior

proposal. On April 12, they terminated the Entegris merger agreement and entered into a merger agreement with Merck at that $53 per share price. Versum's stockholders approved the merger on June 17 and it closed on October 7. It's against that factual background that the plaintiffs are here seeking a mootness fee.

Under the *United Vanguard v. TakeCare* case from the Delaware Supreme Court, a plaintiff is entitled to a mootness fee if three conditions are met. First, the suit was meritorious when filed. Second, the action producing the corporate benefit was taken by the defendants before judicial resolution was achieved. And, third, the resulting corporate benefit was causally related to the lawsuit.

First, in terms of whether the plaintiffs' claims were meritorious when filed, here, they undoubtedly were. A claim is meritorious when filed if it would survive a motion to dismiss. That's from the *Allied Artists* case from 1980. One can also consider the defendants' actions in response to the claims when evaluating its strength, and that's from the *TakeCare* decision, although at the Chancery level.

The challenge to the rights plan in

general, and the action-in-concert provision in particular, would be reviewed under enhanced scrutiny under *Unocal*. The challenge to the action-in-concert provision was relatively strong.

The first prong of *Unocal* is whether the board was responding in good faith to a threat. It is certainly possible, as the good Professor Subramanian notes, that an action-in-concert provision in a rights plan can be used to limit creeping takeovers and potential wolf pack activity by hedge funds. But Professor Subramanian doesn't cite any evidence of that in this case.

The plaintiffs' expert, Mr. Beach, says he sees no evidence of that. That's in his rebuttal affidavit. The record on the existence of wolf pack activity, at least as provided to me, is quite skimpy. There's, at most, an oblique reference to it in some minutes.

But assuming that, nevertheless, there was a valid threat to which the board could respond in good faith after reasonable investigations, the second prong of *Unocal* is proportionality. And here, we have an expansive provision that goes beyond traditional concepts of beneficial ownership to include, as I've

already discussed, any type of parallel action in the context of a control contest, regardless of the existence of any type of arrangement, agreement, or understanding, and with the indicative events being, really, customary activities, such as exchanging information, attending meetings, or conducting discussions.

Again, to use an example the plaintiffs used, if Merck talked to Boston Partners at one meeting and then Merck talked to Iridian at another meeting and then Iridian talked to State Farm at a third meeting, all four of them could be deemed to be acting in concert. If Merck met or had discussions with Vanguard and then Merck subsequently met with Black Rock, all three of them could be deemed to be acting in concert.

Merck seems to have been oblivious to this fact. But what this provision did was to put at risk their roadshows, their solicitation calls, their meetings with stockholders. The provision, as I've also noted, was asymmetric in that the incumbents and their deal were not similarly constrained.

The more general suit against the rights plan was also meritorious when filed. At that

point, it was reasonably conceivable, to use the standard on a motion to dismiss, that the Versum board could be using the rights plan to block a higher-valued cash deal and protect its merger of equals. Supporting evidence at that time included the board's persistent refusal to engage with Merck, its failure to determine that the Merck bid was reasonably likely to lead to a superior proposal, despite ample indications of that, the adoption of a rights plan with a 12.5 percent trigger, and the locating of new synergies. And I would also say, as to this, it's not just the 12.5 percent trigger, but it's the original adoption of an aggressive plan that includes the acting-in-concert provision.

None of this means that the board was necessarily breaching its fiduciary duties. It's, as in most of these cases, ambiguous conduct. But all of this conduct supports a reasonably conceivable inference that the board was seeking to protect the lower-valued merger-of-equals transaction against the higher-valued Merck offer and, therefore, would support a claim on which relief can be granted.

In that regard, it is certainly true, as Professor Subramanian notes, that a rights plan can

be used positively. It's a tool, like anything else. It can be used well or it can be used poorly. Even though he only mentions this in passing, Professor Subramanian does premise his entire report on the assumption of loyal fiduciaries. He notes that in a parenthetical on perhaps the second page of his analysis.

Unocal is intended to suss out when fiduciaries aren't being loyal or when fiduciaries who subjectively believe themselves to be acting loyally are, in fact, given the circumstances they face, not acting loyally. Here, there were litigable questions about whether the Versum board could maintain the rights plan in the face of Merck's tender offer.

It's thus quite clear, at least to me, that the complaints were meritorious when filed. To return to the observation I made at the outset about reasonable positions in terms of opposition, this is one where it's disappointing to me that the defendants chose to fight on that front.

Now let's move to TakeCare's second element, which is whether the defendants took mooting action without judicial resolution. Clearly they did. The defendants removed the acting-in-concert provision

after Plumbers filed its complaint and after the scheduling conference on March 13, 2019. Two weeks later, the defendants addressed the rights plan, after entering into the stipulation and to avoid the April 17 injunction hearing. There hadn't been a judicial ruling on either of those things. Both of those things were the subject matter of the litigation. Both were rendered moot by the defendants' action.

Those are the first two elements of the *TakeCare* analysis. The third element, causation, is also, in my view, easily met. Under *TakeCare*, the plaintiffs are entitled to a presumption that there was a causal connection between the lawsuit and the benefits that resulted from mooting their claims. The defendants only removed the acting-in-concert provision after Plumbers filed its complaint. It really appears to be the sole cause. There is no evidence to the contrary from any defense witness, really, with personal knowledge about some other reason that could have been cited. The same is true for the rights plan.

Those, in turn, have a causal linkage to the success of the Merck offer. Here, I think the plaintiffs cast it entirely correctly. They weren't

the sole cause. They're not claiming to be the sole cause of success of the Merck offer. But they were a contributing cause. This is straight out of *TakeCare*. The litigation was a causal factor in the eventual final agreement, and that agreement was higher than it would have been in the case where there had been no lawsuit.

Here we have a basic situation where Merck's offer could not proceed in the face of the rights plan. There are three ways to get rid of a rights plan so that your offer can proceed. One is negotiation, but that means the other side has to agree. If the other side is not willing to agree, then you have two options. One is litigation. The other is a full-blown vote-no campaign followed by a hostile proxy solicitation to replace the board at the next annual meeting. As long as the rights plan was in place, if the incumbents wanted to stick with their MOE or stand-alone, the only other options were litigation or a hostile proxy contest.

Let's start first with the action-in-concert provision. That necessarily had some limiting effect on Merck's ability to pursue its offer, to solicit against the merger of equals, and,

had they eventually been willing to take the step -- and there's evidence in the record that they weren't -- to pursue a hostile proxy contest.

Mr. Roman Werth claims that Merck did not pay any attention to the action-in-concert provision. In paragraph 19 of his affidavit, he says, "The existence, nuances, and details of the poison pill were of no consequence to [Merck]."

In paragraph 28, he saw the pill as "of no relevance." That is said with admirable directness and certainty. But his subjective intent or lack of appreciation for the implications of the action-in-concert provision is not dispositive.

Taking his affidavit as true, Merck well could have blundered into a situation where Versum could wield the action-in-concert provision against various combinations of stockholders or as a trigger eventually for the flipover. The fact that they didn't appreciate that doesn't mean it wasn't an impediment. It means they could have blundered into it.

And again, he doesn't seem to have understood this. He seems to have viewed the rights plan as simply a plain-vanilla pill. And to that

effect, Merck went forward with having investor meetings, meeting with significant Versum investors on a roadshow and giving presentations. These were precisely the kind of conduct that, had the action-in-concert provision remained in place, Versum could have cited to invoke its effects against the Versum investors who were thereby deemed to be acting in concert, and the Merck offer or a Merck transaction.

It's also important to remember that Merck isn't the only party making decisions in the face of the action-in-concert provision. Even if Merck didn't appreciate the implications of this broad definition and thought it was just dealing with a plain-vanilla pill, institutional investors could well have been affected by it. An institutional investor could well have not wanted to risk an action-in-concert determination and, therefore, have declined to meet or declined to otherwise engage in a manner that they would have been willing to do had the action-in-concert provision not been present.

That also takes care of this idea that just because Merck is a strategic bidder, it's not acting in concert with anyone. It is acting in

concert. It's acting in concert within the broad definition of this term because Merck is trying to get its deal done. And to get its deal done, it is holding meetings, it is engaging in discussions, it is providing information, it is going on roadshows. And those are things that the action-in-concert provision makes problematic because of the risk of a pill trigger.

So, yes, it is true that Merck itself is not a hedge fund acting as a wolf pack. But the deployment of this pill with that provision in it had effects, or would have had effects on folks focused on it, that were problematic. If anything, it shows the misfit between the pill and the situation. And it would have strengthened the challenge on the merits to the action-in-concert provision.

I also don't find credible this factual argument that the board pulled the action-in-concert provision because no wolf pack had emerged. The point of these things is prophylactic. They're deterrents. You're putting these things in place so as to avoid the emergence of a wolf pack and to signal that you are on guard against them. To the extent that concern was valid on pill adoption, it

remained valid at the time of pill redemption.

It seems to me that the action-in-concert provision and its redemption necessarily had some effect on the likelihood of success of the Merck offer. The same is true for the rights plan itself. As I've said, there were three basic options: negotiate, litigate, or defeat the merger at the ballot box and elect a new slate in 2020.

The Werth affidavit suggests that Merck was only prepared to negotiate and that they actually weren't prepared to pursue either of the other options. Paragraph 5. "[Merck's] strategy in pursuing the Versum acquisition was always to reach a negotiated merger agreement with Versum's management and board of directors."

Paragraph 6. "It was always [Merck's] understanding that any Versum acquisition would proceed only through a consensually negotiated transaction."

Paragraph 10. "Any deal [Merck] contemplated would require the cooperation of the Versum board." And I should say I'm substituting there "Merck" for the relatively cumbersome

abbreviation that the defendants used.

If all you're willing to do is negotiate and enter into a negotiated deal, then the rights plan is an effective deterrent, because you don't have a meaningful way to eliminate it. And in real time, this is how Merck described the rights plan. They described it as an obstacle. The March 26 press release described the rights plan as an attempt to preclude the completion of a purchase of stock directly from the shareholders. An April 2 presentation described it as an aggressive adoption of a poison pill to the detriment of shareholder value and an example of Versum putting up barriers to any deal apart from the one they are intent on. It also described the rights plan as adopted to preclude shareholders from accepting a tender offer. The litigation took care of the rights plan problem.

Professor Subramanian posits that a rights plan could not have been used for any type of just-say-no defense because the company didn't have an effective staggered board and Merck might have run a proxy contest at the February 2020 meeting.

I'm going to quibble with his timeline. That's when the 13 months were up and the

possibility of a Section 211 suit ripens. It's unlikely that you could have gotten to a meeting until 60 to 90 days later, so let's put the meeting in April or May. There's no indication from the Werth affidavit that Merck had any intention of going the distance and running that type of hostile proxy contest.

You also have the problem of time, which is the real implication of Professor Subramanian's research on the effective staggered board, which is that time is the enemy of deals, and particularly the enemy of hostile deals. You just don't know what's going to happen. On the timeline that Professor Subramanian plots out and I have moderately modified, by the time you get to soliciting for a meeting, you're in the pandemic.

I think that there was, in fact, potential for the rights plan to be used as a just-say-no defense. That doesn't mean that it was inevitably going to be preclusive and successful, but it means that removing the rights plan had a material effect on the likelihood of the offer being completed.

Moving off of the specific facts and into the world of theory, Professor Subramanian posits

a regime in which the high bid always wins. As he says, once the high bidder appears, M&A practitioners know how the chess game plays out. And he later modifies that to say a high bid usually wins. But in this hypothetical world, causation never exists for any defensive measure, and litigation never has any effect because the high bidder always triumphs.

This is, frankly, a simplistic analysis. Usually what I like about Professor Subramanian's work is that he appreciates small nuances that affect the overall chances of success, pro and con. For example, he has demonstrated that all go-shops are not equal. It matters how long the headline number of days is, but more importantly, it matters how the go-shop is put together, in terms of what you have to do to qualify, what you have to do to be able to continue due diligence after the headline period ends. Likewise, in terms of other defensive measures, he's engaged in similarly nuanced analysis.

You have nothing approaching that level of subtlety here. It's just a flat claim that the high bid always wins, which I don't think is credible in terms of defensive measures that need to be litigated.

Ultimately, the standard for defeating causation is the defendants have to establish the complete absence of any causal relationship between the litigation and their actions which rendered moot the plaintiffs' claims. That's from the *TakeCare* decision. Defendants didn't do that.

Now I get to the key issue -- or what should have been the key issue -- which is the amount of the award. The Court has to make a discretionary decision. Each case stands on its own. The Court is called upon, in the exercise of its discretion, to make an award that furthers the policy objectives of encouraging monitoring behavior by stockholders and protecting the interests and the assets of Delaware corporations from unreasonable opportunistic demands. That's from the *James* case. I put it slightly differently. We want to incentivize positive value litigation, meaningful litigation. We want to avoid and disincentivize free-riding, and we can do that by not handing out windfalls.

In determining the fee to grant, the Court considers the *Sugarland* factors. They are familiar, I won't recite them. The Court also, following *Americas Mining*, considers the point at

which the litigation was resolved.

Of these factors, the greatest weight is given to the benefit achieved by the litigation. That's from the *Americas Mining* case. Where, here, the benefit is quantifiable, *Sugarland* calls for an award of attorneys' fees based on the percentage of benefit. Again, that's from the *Americas Mining* case. And the benefit here is substantial. As I noted in *Compellent*, eliminating a rights plan or a feature of a rights plan is a really rare result in Delaware corporate litigation. It's a significant thing.

Ultimately, the plaintiff in this case ties the benefit it claims to the bump in the merger consideration. The *Cox Radio* case explains that fee awards in cases involving a bump in the consideration paid to shareholders are usually based on percentage of the increased consideration. This Court has been entrusted with discretion in the methods it uses and the evidence it relies upon when pricing the benefit and the resulting fee. A fee can be awarded on a percentage basis if the benefit is capable of some realistic valuation. The Court does not require scientific precision. The Court can base its judgment on rough calculations. Those are paraphrases of

precedent.

Here, we have two real events. We have the Merck first proposal at $48, which is a bump of about $625,000 over the existing deal consideration. And for the existing deal consideration I'm valuing is it at $42.26, which was the price on the day before the Merck offer. I'm not going back in time to the price at announcement. We then have the second Merck bump to $53.

The plaintiffs can't, and don't, claim credit for delivering that Merck offer. What they claim is credit for increasing the likelihood that stockholders would actually receive that offer. Value isn't value if it's not received. It's just potential in the ether. And so what the plaintiffs are claiming credit for is increasing the chances of receiving that offer. Similarly, they don't claim credit for the bump to $53. That was a result of decisions Merck made and market forces. But they do claim credit for increasing the likelihood that stockholders would receive that value.

Ideally, what I would like to do is I'd like to have a control world where I could run the likelihood of the Merck bid succeeding without

litigation, and I'd like to then compare that to what happened in our world, where we had litigation. By comparing those two worlds, you could discount each offer for the likelihood of success. You could then subtract them and get an example of the net benefit. We can't do that, so we have to look at precedent and other indicators.

I do think *Compellent* provides some insight. It's not a direct precedent, by any means, but what it was was an effort to price the benefits of litigation as litigation, independent of the specific actions that a bidder took, such as actually deciding to make an offer or deciding to make a bump, et cetera. *Compellent* was a pure litigation case. There wasn't a topping bid to anchor off of or skew the analysis.

But I do think it can be instructive to look at what the value of this type of relief might have been under the *Compellent* framework. If you imagine a hypothetical where Versum adopted the rights plan at the outset, at the same time of the Entegris merger, before the emergence of the Merck bid, and that the plaintiffs, in the absence of the Merck bid, get the rights plan withdrawn, and you run the same

type of percentages as in *Compellent*, you get to a value of about $40 million in terms of benefit.

You'd then have to apply a percentage to that based on the stage of the litigation. This is an early-stage case, so 10 to 15 percent. That gets me to an award of about $4 to $6 million. And that's part of the reason why I feel like the plaintiffs are at the higher range of what I would have thought, in the abstract, the case was worth.

But that's only one marker on the chessboard. Another place to look is the stock price reaction. Professor Subramanian said there was no value there, but his analysis seemed a little skimpy to me. And on rebuttal, the plaintiffs' expert, Mr. Beach, had persuasive criticisms. Mr. Beach looked at the one-day and two-day windows around the changes to the rights plan. For the one-day window, there's a total benefit of $75 million. For the two-day window, there's a total benefit of $142 million.

I would have liked to know if any of this was tied to some type of news about Entegris. One can imagine that Versum is trading in rough lockstep with Entegris at the time, and that's part of

the reason why Beach and Subramanian both don't look at broader market metrics. Nobody told me whether something happened with Entegris on those days, but I'm going with what I have.

If one uses the one-day window, which Beach appears to prefer, and you assume the litigation was the sole cause of the market price changes, you get a litigation benefit of about $75 million. At a 10 to 15 percent figure, you get 7 1/2 million to $11.25 million, a bit less than what the plaintiffs are asking for. But if you use the two-day figure of $142 million, you'd basically get double that, $15 to $22.5 million.

Another way that I've thought about this is what does a $12 million award imply about the value of the litigation. And this is a point that Mr. Hanrahan made a couple times this morning. If you assume it's derived using a stage of litigation benefit of 10 to 15 percent, that means the litigation had an implied value of about $120 million to $180 million. And that's approximately 10 to 15 percent of the total bump. What that means, as Mr. Hanrahan suggested this morning, is it's suggesting that the litigation had a causal role of about 10 to 15

percent, in terms of improving the chances of the Merck bid.

Another comparator which was in the briefing, and I've thought about, is with the fees in monitoring litigation. As I discussed with Mr. Hanrahan, historically, the Court was awarding 1.25 to 1.5 percent of the consideration increase. And that was in cases where the stockholder plaintiffs really hadn't done anything at all. They were, if anything, just tagging along with a bidder lawsuit. But often it was just file and then settle.

Here, a fee of 1.25 to 1.5 gets you to $14.6 million to $17.5 million, with a midpoint of $16 million. That makes the approximately 1 percent of $12 million that the plaintiffs are considering seem fairly realistic.

I also thought about the precedents addressing the level of causal credit that the plaintiffs should receive. I gathered and discussed them in the *Smith Katzenstein v. Fidelity* case. The general approach, you can see it in *Sugarland* itself, but in joint causation cases, there's often an anchoring around 20 to 25 percent causation for the litigation. If you use that rough measure, you're

well above what the plaintiffs are asking. You're basically at double that.

The plaintiffs' briefs showed other, I think, insightful ways to look at this. They provided some helpful tables. There's no magic to this. It's ultimately a discretionary issue.

As I said at the outset, I do think, just from my own reaction, the plaintiffs are at the higher end of the range. I think they've done a decent job justifying it, but if you asked me to price this on a clear day without any input from the parties, they're higher than I probably would have thought in the abstract. But they've done a good job supporting their analysis.

The defendants haven't given me anything. As in *Take Two*, the defendants came in and said, "No causation, no claim, and all you ought to get is your lodestar," not even recognizing that in a contingent fee case, where people actually litigate and get things, even if you do the lodestar method -- which this Court generally doesn't use -- you get some type of risk multiplier. And what the defendants are arguing is really an amount that, certainly pre-*Trulia*, was what people were handing out for

disclosures. And even today, for good disclosures in a litigated scenario, it's the same order of magnitude.

The plaintiffs got the defendants to redeem a pill, and they got the defendants to take out an action-in-concert provision. I really am struck, and like Vice Chancellor Lamb, am influenced by the fact that the defendants' position is just unhelpful and a nonstarter. It's difficult not to take that into account when you have one side that has engaged meaningfully with the precedents and the concepts, and you have the other side that is taking an extreme position about what the level of compensation ought to be.

I'm going to run through the other *Sugarland* factors. The first is the complexity of the case. I think this was a normal level of complexity for expedited deal litigation. The reason why folks like Mr. Hanrahan can claim high hourly rates, and that folks on the other side of the case do the same, is that deal litigation is important. It's complex. Here, the action-in-concert provision was interesting and a neat twist, but I don't think this gives me any reason to depart up or down.

On standing and ability of plaintiffs' counsel, I have the same reaction. No reason to depart up or down.

The case was contingent, and it's the contingent nature of the case that gets the plaintiff a percentage of the benefit award. If the plaintiff had come in with a stockholder who was paying their freight, so that there was no risk, then they would have just gotten their hourly rates.

Then we get to the time and effort of counsel. This is the other factor that I have pondered and thought about at some length. Because in addition to my feel that the $12 million is within a range, but at the upper end and probably a little bit higher than if I would have just called this without any briefing from the parties, the amount of work that the plaintiffs did does result in a number for an hourly rate that is quite high. Let's say $10,000 and change. That's substantial. And I don't like the idea of creating an impression that we're granting windfalls.

That said, the defendants' cases about rates exceeding $1,000, or around $1,000, you'd now have to introduce inflation. A lot of those

precedents are from the 2000s. I ran some quick CPI inflation calculations on them, and you see a big change. And I bet lawyer rates have inflated at well beyond the CPI. Not only would you have to inflate those numbers, you'd also have to do some type of risk-based multiplier to the lodestar. That still doesn't get you as far as $12 million, but it makes the $10,000 and change not seem as extreme.

Ultimately, we have a core question of how we compensate for these types of cases. Do we compensate based off of benefit conferred and an effort to price off the economic metrics that are out there, such as the change in market price or the total deal bump? Or do we do some type of lodestar methodology as in *Dunkin' Donuts*? I do agree with Mr. Hanrahan, *Dunkin' Donuts* is a distinguishable case. *Dunkin' Donuts* was a monitoring case. The plaintiffs didn't do anything real. The bidder's counsel did all the work, and the plaintiffs didn't achieve anything.

Here, you've got the plaintiffs as the sole cause of knocking out an action-in-concert provision and then getting the pill redeemed. And it seems to me that in that setting, under *Americas*

Mining and cases like *Cox Radio*, you measure based on benefit conferred.

It's not without some misgivings that I award the fee that the plaintiffs have requested. I've told you this a couple of times now. If you had just come to me cold about this case, not given me any briefing whatsoever, and asked me to ballpark a number of what I would award, the plaintiffs are above that. I also do think that the implied hourly rate is high, and I paused over that.

But ultimately, I'm in a situation where I think the plaintiffs have done a good job dealing with the applicable precedents and given me ways to think about the relief and the award that is consistent with our law, and I think that, as in *Take Two*, the defendants have given me a really aggressive response that is, at least under current law, a nonstarter. I'm in the same situation that Vice Chancellor Lamb was. Had I had help from the defendants, I might have been able to reach a different conclusion. But on the record that I have, I believe that the plaintiffs have supported their application for the full amount of the fee, and I am going to award it.

I know that was a lengthy discourse. I apologize for keeping you-all here while you had to listen to me go through it, but that is the answer, or at least the answer at my level.

I hope everyone has a good day. I hope you-all stay safe in what has been a troubling time and seems to be increasingly becoming a more troubling time. Please do stay healthy and take care of your loved ones and spend time with them.

Everyone have a good rest of the day.

(Hearing concluded at 11:30 a.m.)

- - -

CERTIFICATE

I, JULIANNE LABADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 84 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 17th day of July, 2020.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

TAB 19

EFiled: Dec 10 2019 03:42PM EST
Transaction ID 64511321
Case No. 2019-0100-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MEDLEY CAPITAL CORP. SHAREHOLDERS LITIGATION : CONSOLIDATED
: C.A. No. 2019-0100-KSJM

- - -

Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, November 19, 2019
11:00 a.m.

- - -

BEFORE HON. KATHALEEN ST.J. McCORMICK, Vice Chancellor

- - -

THE COURT'S RULING ON PLAINTIFFS' MOTION TO APPROVE SETTLEMENT AND FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware 19801
(302) 255-0521

APPEARANCES: (via telephone)

A. THOMPSON BAYLISS, ESQ.
ERIC A. VERES, ESQ.
JOSEPH A. SPARCO, ESQ.
Abrams & Bayliss LLP
-and-
LORI MARKS-ESTERMAN, ESQ.
ADRIENNE M. WARD, ESQ.
of the New York Bar
Olshan Frome Wolosky LLP
for Plaintiffs FrontFour Capital Group LLC and FrontFour Master Fund, Ltd.

JOHN P. DITOMO, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
NATHAN BULL, ESQ.
of the New York Bar
Cadwalader, Wickersham & Taft LLP
for Defendants Brook Taube, Seth Taube, Jeff Tonkel, Medley Management Inc., MCC Advisors LLC, Medley Group LLC, Medley LLC, and Medley Capital Corporation

CORINNE ELISE AMATO, ESQ.
JOHN G. DAY, ESQ.
Prickett, Jones & Elliott, P.A.
for Interested Party Stephen Altman

GARRETT B. MORITZ, ESQ.
S. MICHAEL SIRKIN, ESQ.
Ross Aronstam & Moritz LLP
-and-
ALAN R. FRIEDMAN, ESQ.
of the New York Bar
Kramer, Levin, Naftalis & Frankel LLP
for Defendants Mark Lerdal, Karin Hirtler-Garvey, John Mack, and Arthur S. Ainsberg

Continued ...

APPEARANCES CONTINUED:

BLAKE K. ROHRBACHER, ESQ.
KEVIN M. GALLAGHER, ESQ.
Richards, Layton & Finger, P.A.
-and-
MATTHEW L. LARRABEE, ESQ.
PAUL CURRAN KINGSBERY, ESQ.
of the New York Bar
Dechert LLP
for Defendant Sierra Income Corporation

- - -

THE COURT: Good morning, counsel. Who do we have on the line?

MR. BAYLISS: Good morning, Your Honor. It's Tom Bayliss on behalf of the FrontFour plaintiffs. David Lorber from FrontFour is on. So are Lori Marks-Esterman and Adrienne Ward of Olshan Frome Wolosky; and Eric Veres and Joe Sparco are on from my office as well.

MR. DITOMO: Good morning, Your Honor. This is John DiTomo, Morris Nichols Arsht & Tunnell on behalf of the Medley defendants. With me on the line is my colleague from Cadwalader, Nathan Bull.

MR. MORITZ: Good morning, Your Honor. This is Garrett Moritz from Ross Aronstam on behalf of the Defendants Mark Lerdal, Karin Hirtler-Garvey, John Mack, and Arthur Ainsberg. I'm joined by my partner, Mike Sirkin. I'm also joined on the line by co-counsel from Kramer Levin, Alan Freedman.

MR. ROHRBACHER: Your Honor, Blake Rohrbacher and Kevin Gallagher from Richards, Layton & Finger for Defendants Sierra Income Corporation, and with us on the line are Matthew Larrabee and Paul Kingsbery from Dechert.

MS. AMATO: Good morning, Your Honor.

Christine Amato, Prickett Jones, also joined by John Day, on behalf of Stephen Altman.

THE COURT: Do we have any persons from the public who have dialed in to today's call or anyone else on the line who has not announced him or herself, aside from our esteemed court reporter?

MR. BAYLISS: Your Honor it's Tom Bayliss. Dan McBride just joined us in my office.

THE COURT: Excellent. Thank you.

All right, folks. I hope you have a glass of water. This will be a long bench ruling. And I ask you to bear with me. If you can't hear me at any point in time, please let me know. Of course, there will also be a transcript of this ruling.

On October 24, 2019, I heard argument regarding the proposed settlement of claims and petitions for fees in In re Medley Capital Corporation Stockholder Litigation, Civil Action No. 2019-0100.

This is my ruling on the matter. To save you the suspense, I am certifying the class, approving the settlement, and I'm also awarding fees. I am going to approve a fee award today of $3,075,000 for various noncontingent therapeutic benefits attained in the settlement. I am also approving a fee

contingent on the amended transaction which shall equal 26 percent of the grossed-up settlement fund, as modified by a partial look-through that I will explain. I further approve a fee contingent on the closing of the transaction for $100,000 for the agreement to appoint an independent director on the board of the post-merger entity.

I will now describe the background and my reasoning behind these rulings.

Plaintiffs in this case are FrontFour Capital Croup LLC and FrontFour Master Fund, Ltd. Plaintiffs beneficially own 1,674,946 shares of Medley Capital common stock, approximately 3.1 percent of Medley Capital's outstanding shares.

Plaintiffs filed this lawsuit on behalf of themselves and similarly situated stockholders of Medley Capital Corporation. There are a number of defendants in this case. The director defendants are Brook Taube, Seth Taube, Jeff Tonkel, Mark Lerdal, Karin Hirtler-Garvey, John E. Mack, and Arthur S. Ainsberg. Medley Capital Corporation, which I will refer to as "Medley Capital," as well as its affiliates, Medley Management, Inc., MCC Advisors LLC, Medley Group LLC, and Medley LLC, are also named

defendants. Finally, Sierra Income Corporation, which I will refer to as "Sierra," is also a named defendant. Sierra is not a party to the stipulation of settlement that was presented to the Court, and in light of this, I will refer today to the defendants other than Sierra as the "Settling Defendants."

As set forth in the scheduling order entered on August 12, 2019, and the notice dated August 30, 2019, I must rule on essentially three issues.

First, I must determine whether to certify the settlement class preliminarily certified for settlement purposes on August 12, 2019, as a non-opt-out class pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2).

Second, I must determine whether the settlement is fair, reasonable, and adequate. In connection with this second task, I must determine whether final judgment should be entered dismissing the action and approving the release as it is drafted in the Stipulation of settlement.

Further, I must determine whether plaintiffs and plaintiffs' counsel have adequately represented the interests of the settlement class in

the action.

Third, I must consider the application by plaintiffs' counsel for attorneys' fees and reimbursement of expenses. I will also consider the petition of counsel to Mr. Altman for fees and reimbursement of expenses, as well as the defendants' and Mr. Altman's objections to plaintiffs' counsel's fee petition.

Further, I received letters from two Medley Capital stockholders, Doug Getter and Kevin McCallum, objecting to plaintiffs' counsel's fee request. I will address both of those as well.

The settlement class, which I preliminarily certified in the August 12, 2019, scheduling order, includes: "Any and all record holders and beneficial owners of MCC common stock at any time during the Settlement Class Period, together with their successors and assigns, but excluding Stipulating Defendants, their Immediate Family, SIC and any person, firm, trust, corporation, joint venture, partnership, foundation or other entity related to or affiliated with any of the Stipulating Defendants, members of their Immediate Families or SIC." And I refer the parties to the stipulation of

settlement itself for the cipher of the defined terms in this proposed class.

As the Delaware Supreme Court explained in *Prezant v. De Angelis*, the certification of a lawsuit as a class action involves a two-step analysis. The first step requires that the action satisfy the four prerequisites of Rule 23(a), which are numerosity, commonality, typicality, and adequacy.

If the Rule 23(a) prerequisites are established, the second step is to determine whether the suit properly fits into one or more of the three Rule 23(b) categories based on the alleged wrongs, the relief sought, or a combination of the two.

I turn first to the four prerequisites of Rule 23(a), starting with numerosity, which requires that a proposed class be so numerous that joinder of all members is impracticable.

The Delaware Supreme Court observed in its 1991 decision, *Leon N. Weiner & Associates, Inc. v. Krapf*, that "Numbers in the proposed class in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement"

According to public filings, as of August 30, 2019, Medley Capital had approximately 55

million shares outstanding, held by hundreds and potentially thousands of persons or entities throughout the world. Individual joinder of all of those persons would be highly impracticable. Accordingly, the proposed class satisfies the numerosity requirement.

Next, Rule 23(a)(2) requires that a question of law or fact be common to the class. A proposed class meets the commonality requirement where "the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." And that quote, again, is from the *Weiner v. Krapf* case.

Linking the class members in this case are common questions of law, including whether defendants breached their fiduciary duties and whether the class was harmed by those breaches. Those questions of law stem from the same factual underpinnings: the sales process, the merger agreement, and the allegedly false statements and omissions issued in connection with the merger agreement. Thus, the commonality requirement is satisfied.

Third, Rule 23(a)(3) requires a class representative's claim to be typical of those of the class. As the Delaware Supreme Court observed in *Weiner v. Krapf*, "The test of typicality is that the legal and factual position of the class representative must not be markedly different from that of the members of the class."

The *Krapf* Court explained that "A representative's claim or defense will suffice if it arises from the same event or course of conduct that gives rise to the claims or defenses of other class members and is based on the same legal theory."

In this case, plaintiffs were threatened by the same harm other Medley Capital stockholders faced flowing from the allegedly flawed process, inadequate merger consideration, and misleading or incomplete disclosures. Plaintiffs filed this action to seek relief from that harm and their claims are therefore typical of those of the class.

Finally, Rule 23(a)(4) requires that a representative plaintiff fairly and adequately protect the interests of the class. The Supreme Court of the United States observed in *Phillips Petroleum Company*

v. Shutts that the due process clause of the United States Constitution requires "that the named plaintiff at all times represent the interests of the absent class members."

The Delaware Supreme Court expounded on these due process requirements in *Krapf*, stating, "In an application of the fourth prerequisite of Rule 23(a), the predominant considerations are due process related: that there be no conflict between the named party and the other class members; and that the named party may be expected to vigorously defend not only themselves but the proposed class."

In this case, plaintiffs collectively own the largest non-management block of Medley Capital common stock. Incentives created by plaintiffs' stock ownership caused plaintiffs to publicly oppose the challenged transactions, seek and then sue for books and records, prosecute the litigation through an expedited trial, and secure this proposed settlement for the class.

There is no suggestion from the record that plaintiffs' interests are, or have ever been, in conflict with those of the class. Plaintiffs retained experienced counsel who are well known to this Court,

and plaintiffs' counsel vigorously prosecuted plaintiffs' claims. The adequacy requirement is therefore met.

Having determined that the settlement class satisfies the requirements of Rule 23(a), my next task is to determine whether the putative class properly qualifies as a non-opt-out class under Rules 23(b)(1) or 23(b)(2). The plaintiffs do not seek certification as a so-called "damages class" under Rule 23(b)(3).

As the Delaware Supreme Court explained in *Krapf*, "Class suits are not necessarily mutually exclusive; an action may be certified under more than one subdivision of Rule 23(b) in appropriate circumstances."

The Delaware Supreme Court has also remarked in *In re Celera Corp. Shareholder Litigation* that "Delaware courts repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2)."

Former Chancellor Allen explained in *In re Mobile Communications Corp. of America, Inc.*,

Consolidated Litigation that "Typically an action challenging the propriety of director action in connection with a merger transaction is certified as a (b)(1) or (b)(2) class because plaintiff seeks equitable relief in the form of the injunction; because all members of the stockholder class are situated precisely similarly with respect to every issue of liability and damages; and because to litigate the matters separately would subject the defendant to the risk of different standards of conduct with respect to the same action."

Those observations of Chancellor Allen are true in this case. The conduct the plaintiffs challenged involved breaches of fiduciary duties in connection with the negotiations and sales processes leading up to two cross-conditioned merger transaction. The merger transactions were subject to stockholder approval.

And deficient disclosures concerning the directors in entering the deal create the very real potential for an uninformed stockholder vote, which would have harmed all members of the settlement class equally. Individual prosecutions of these claims could have led to incompatible determinations

and injunctive relief which would have created varying and conflicting standards of conduct for the defense.

Further, the homogeneity of the class members' grievances concerning the defendants' self-dealing and other conduct in connection with the merger agreement is apparent. Accordingly, certification is appropriate under Rules 23(b)(1) and (b)(2).

In addition, no class member has sought to opt out of the settlement or argued that the settlement should be an opt-out settlement. I find it appropriate to certify this class as a non-opt-out class under Rules 23(b)(1) and (b)(2).

Although Rule 23 requires some form of notice to the class as a matter of due process, as the Delaware Supreme Court noted in *Nottingham*, the form of notice is largely discretionary.

When entering the August 12, 2019, scheduling order, I reviewed and approved, in form and substance, the Notice of Pendency of Proposed Settlement of Class Action and the Summary Notice of Pendency of Proposed Settlement of Class Action. I also approved a form of notice as the best notice practicable under the circumstances, requiring

plaintiffs' counsel to cause the approved forms to be mailed by U.S. mail, first class, postage pre-paid, no later than thirty days from the date of the scheduling order and at least forty-five days before the settlement hearing, to each person shown to be a record owner of shares of common stock of Medley Capital Corporation at any time between and including August 9, 2018, and August 12, 2019, which was the date of entry of the scheduling order.

Paragraphs 7, 8, and 9 of the scheduling order address the form, adequacy, and instructions. Subsequently, I reviewed the affidavit of mailing and publication dated September 23, 2019, submitted by Eric Schachter, Vice President of A.B. Data Limited.'s Class Action Administrative Company, which was the settlement administrator in this case. That affidavit detailed the efforts of counsel and plaintiffs in distributing the notice and I view those efforts as more than adequate.

So, to sum it up, the requirements of Rule 23(a), 23(b)(1), 23(b)(2) have been satisfied, and the form of notice to the class is adequate. I therefore certify the class as a non-opt-out class pursuant to these provisions.

I will turn now to the merits of the settlement.

As the Delaware Supreme Court explained in *Barkan v. Amsted Industries*, "The Court of Chancery plays a special role when asked to approve the settlement of a class or derivative action. It must balance the policy preference for settlement against the need to insure that the interests of the class have been fairly represented."

In approving a settlement, the Court's function is to make an independent determination, through the exercise of its own business judgment, that the settlement is intrinsically fair and reasonable.

As Vice Chancellor Laster explained in *Acitivsion Blizzard*, the Court must ultimately "determine whether the settlement falls within a range of results that a reasonable party in the position of the plaintiff, not under any compulsion to settle and with the benefit of the information then available, reasonably could accept."

To make this determination, the Court considers certain factors, including the nature of the claims, the possible defenses thereto, and the legal

and factual circumstances of the case. I turn now to an overview of these factors.

By way of a brief background, as set forth in greater detail in my March post-trial opinion, this case arose from an Agreement and Plan of Merger, dated as of August 9, 2018, by and between Medley Capital and Sierra, through which defendants sought to combine Medley Capital and Sierra, two business development corporations, with their affiliate Medley Management, an asset management firm founded and majority owned by brothers Brook and Seth Taube.

The proxy was filed on December 21, 2018, more than four months after announcing the transactions. Within a week, plaintiffs served a Section 220 demand and, on January 11, 2019, commenced a books and records action. Using documents produced by Medley Capital, plaintiffs filed this plenary action and moved to expedite on February 11, 2019.

In view of the special meeting schedule for March 8, 2019, and a March 30, 2019, drop-dead date under the merger agreement, I accommodated the parties' request for an early March trial. The parties then compressed a year's worth of

discovery into three weeks. This is to the parties' credit, and their efforts are truly admirable, so I'll describe them in some detail.

In the course of discovery, defendants produced and plaintiffs reviewed more than 12,000 documents. That's in addition to those produced in the 220 action. Plaintiffs also sought third-party discovery and reviewed over 12,400 documents produced by the merging entities' financial advisors, Goldman Sachs and Co., LLC; Barclays Capital Inc; Sandler O'Neill and Partners, L.P.; Broadhaven Capital Partners, LLC, as well as five potential alternative transaction partners: ZAIS Group, LLC; Lantern Capital Partners; NexPoint Advisors, L.P.; Origami Capital Partners, LLC; and Marathon Asset Management L.P.

Defendants sought, and plaintiffs produced, substantial documents as well. The parties conducted thirteen depositions: five representatives of defendants, the plaintiffs' representative, representatives of the three financial advisors, each side's expert witness, and representatives of two of the five potential alternative transaction partners. So the amount accomplished in this time period was truly impressive, and the time constraints did not

seem to diminish the quality of advocacy on both sides.

I held a trial on March 6 and 7, 2019. On March 8, 2019, each of the special meetings of stockholders of Sierra, Medley Capital, and Medley Management was convened and adjourned until March 15, 2019. On March 11, 2019, I issued a post-trial memorandum opinion that enjoined a stockholder vote on the transactions pending curative disclosures. I will not repeat the holdings of that post-trial memorandum opinion. It was long. I direct interested persons to the opinion itself.

Touching on the highlights only, the opinion found that the transactions were subject to entire fairness review because the Taube brothers were controllers, at least two members of the special committee who had approved the transactions were beholden to the Taubes, and the special committee allowed the Taube brothers to dominate its process.

I further held that the transactions were the product of an unfair process and resulted in an unfair price to Medley Capital's unaffiliated stockholders, and that the deal protections in the merger agreements could not withstand enhanced

scrutiny.

I enjoined a vote by Medley Capital's stockholders until defendants made disclosures consistent with the opinion. However, I declined plaintiffs' request to rewrite aspects of the merger agreement by ordering a curative sale process because plaintiffs failed to prove their claim for aiding and abetting against Sierra.

As I expressed in the opinion, *C&J Energy* prevented this Court from ordering what I believed would be the most equitable relief for the Medley Capital stockholders: a curative sales process. Relevant to the issues before the Court today, a number of events transpired following my post-trial decision.

First, each special meeting was adjourned to accommodate post-trial settlement negotiations.

On March 18, 2019, one week after I issued the opinion, the two directors and the special committee who were found to be conflicted with respect to the transactions resigned from the board. Also around that time, plaintiffs and the settling defendants began settlement discussions, which

continued through mid-April 2019. In briefing, plaintiffs' counsel describes these discussions as "intense, adversarial negotiations."

Judging from the conduct of the parties during litigation and the tone of briefing concerning the fee requests, I have no doubt that this description is accurate, and perhaps even understated. As I noted at the outset, Sierra is not a party to the stipulation of settlement. Sierra also did not participate in the settlement negotiations.

For the record, I will provide an overview of the negotiations that have led to the amended merger agreement and settlement agreement that are now before me, which is drawn largely from the amended proxy issued on August 30, 2019.

You'll recall that the drop-dead date for the original transaction was March 30, 2019. On March 28, 2019, the Sierra special committee determined that "changed circumstances" since August 2018 warranted renegotiating the original transaction. According to the Sierra special committee members and their advisor, these "changed circumstances" included Medley's failure to meet its own EBITDA forecasts for 2018 and its likely EBITDA shortcomings for 2019. At

the same meeting, the full Sierra board discussed the "desirability for [Medley Capital] to be given a go-shop opportunity."

On April 15, 2019, Plaintiffs and the Settling Defendants executed a term sheet, which Medley Management disclosed publicly on April 16, 2019.

Consistent with the term sheet, on the day the term sheet was executed, the board appointed plaintiffs' corporate representative, David A. Lorber, as well as non-party Lowell W. Robinson, who was independent of plaintiffs and defendants, to the board seats formerly occupied by the two special committee members who were found to lack independence from the Taube brothers.

Those seats would not otherwise have been open until 2020 and 2021, respectively. The board also reconstituted the special committee to add Lorber and Robinson, with Lorber appointed as chair of the committee.

In a letter to the Court on April 18, 2019, plaintiffs noted that any proposed merger agreement amendments would require Sierra's agreement. That same day, Medley Capital requested Sierra's

consent to the amendments to the Medley Capital merger agreement contemplated by the term sheet.

Sierra declined to give its consent on April 23, 2019.

On April 24, 2019, I entered a stay of all proceedings except as necessary to implement the settlement contemplated by the term sheet.

In May 2019, Medley Capital's newly reconstituted special committee hired a new financial advisor, Houlihan Lokey, to conduct a go-shop process.

On May 10, 2019, Broadhaven advised Sierra on possible terms that might be renegotiated, including the exchange ratio and the structure and duration of any go-shop provision.

On May 15, 2019, Sierra conveyed an offer to Medley Capital concerning a new transaction. The offer included a proposed exchange ratio of .65, which took into account Medley Capital's decline in net asset value, a 30-day go-shop period for each of Sierra and Medley Capital with a $6 million termination fee if a new deal emerged, and a price adjustment arising from any settlement liabilities.

Sierra took a hard line in negotiations, insisting on a revised exchange ratio

despite some pushback to the proposed exchange ratio from Medley Capital, who insisted on maintaining the original .8050 exchange ratio. Medley Capital ultimately countered with a .77 proposed ratio.

On May 30, 2019, Sierra responded with a .70 exchange ratio, a 60-day go-shop that was reciprocal for Sierra and Medley Capital, and an expense reimbursement fee capped at $4 million, in lieu of a termination fee. Sierra also conveyed that it would not agree to assume Medley Capital's liability arising from this litigation.

On June 5, 2019, Sierra discussed the possibility of establishing a range for the exchange ratio that varied depending on the amount of legal expenses incurred by Medley Capital.

On June 7, 2019, Sierra revised its outstanding offer with an exchange ratio of .68 after better understanding the possible range of attorneys' fees and defendants' insurance coverage.

On June 11, 2019, Medley Capital rejected this offer, evidencing particular concern with the $4 million expense reimbursement/termination fee, and countering with an exchange ratio of .70 and a 60-day go-shop with a $1 million expense

reimbursement cap. Sierra rejected this proposal the next day.

On June 19, 2019, Sierra countered with a .70 exchange ratio if attorneys' fees were $10 million or less, a .69 exchange ratio if the fees were between 10 and $12.5 million, and a .68 exchange ratio if the fees exceeded $12.5 million. This proposal also included a 60-day go-shop with no termination fee or expense reimbursement if a superior proposal emerged.

In considering this proposal, the Medley Capital special committee was most concerned with Medley Capital's significant trading discount to its net asset value and its deterioration in value since August 2018.

Then, in view of Medley Capital's late June preliminary projected financial results, Sierra again revised its offer. Using the same staggered declining exchange ratio structure as the previous offer, Sierra proposed lowering the range to 0.66-0.68, which was the range ultimately agreed upon.

The parties continued to negotiate aspects of the go-shop and Sierra's matching rights through July 2019.

On July 29, 2019, Sierra and Medley Capital issued a joint press release to announce the execution of the Amended and Restated Agreement and Plan of Merger, "Amended Merger Agreement."

On that same day, the Settling Defendants and Plaintiffs executed the Stipulation and Agreement of Compromise and Settlement, "Stipulation of Settlement." So that is how the stipulation of settlement and the amended merger agreement came to be.

In determining whether to approve this settlement, I must weigh the "give" and the "get" obtained in the settlement. Again, to quote *Activision*, the goal is to "determine whether the settlement falls within a range of results that a reasonable party in the position of the plaintiff, not under any compulsion to settlement and with the benefit of the information then available, reasonably could accept."

To aid in this analysis, I'll put a fine point on the "gives" and the "gets," starting with what the class is getting from the proposed settlement.

First, the settlement called for the

appointment of two independent directors at Medley Capital. As I noted earlier, these directors, Lorber and Lowell, were installed almost immediately upon execution of the settlement term sheet.

Second, the Medley Capital special committee was empowered to conduct a go-shop process. As part of that process, defendants agreed to waive any standstill or similar agreement that would prevent third parties from engaging with Medley Capital during the go-shop.

By way of background, during the original process that occurred before the challenged transaction was conceived, Medley Management required that any interested parties enter into standstill agreements.

Those standstill agreements prevented interested parties from negotiating the transaction with funds managed by Medley Management, including Medley Capital, for anywhere between 12 and 24 months, depending on the agreement.

When the term of the Medley Management-Medley Capital deal were announced, the standstills on their face prevented 30 previously interested third parties from making a superior

proposal.

By the time of the go-shop for the amended merger, only two of the original 30 standstills were in effect. Both of those two standstills were waived under the terms of the settlement.

The 60-day go-shop period began on July 29, 2019. During the go-shop, the special committee and Houlihan Lokey contacted 194 potential interested parties. Twenty-seven of these parties executed nondisclosure agreements. Seven of these submitted a total of 12 proposals.

When the go-shop was due to expire in September 2019, the special committee exercised its contractual right under the amended merger agreement to continue negotiating for an additional 14 days with two potentially interested parties.

Though the special committee believed that these two parties might submit proposals superior to the Sierra merger, in the end, the special committee determined after consultation with independent legal and financial advisors that neither proposal was more favorable than the Sierra amended merger agreement.

The go-shop ended on October 12, 2019.

Third, the settlement called for the parties to work together in good faith to agree on the content of supplemental disclosures consistent with my post-trial decision. Medley Capital filed an amended proxy containing these corrective disclosures on August 30, 2019.

In relevant part, the amended proxy contained and disclosed:

One, the existence of proposals for an alternative transaction with Medley Capital from ZAIS, Origami, NexPoint and Lantern.

Two, that the special committee had not been made aware of the existence of the standstills prior to the execution of the original merger agreement.

Three, that plaintiffs proved "that half of the Special Committee was beholden to the Taube brothers."

Four, that plaintiffs proved the Taube brothers dominated and controlled the board.

Five, that I found that the enjoined transactions were not entirely fair to Medley Capital's stockholders.

And six -- and the sixth was negotiated by counsel for Altman -- the correct formula used to calculate how management shares were being "echo voted" for or against the transaction.

Fourth, the settlement includes provisions concerning the governance of the post-merger entity. The original merger agreement provided that two Medley Capital directors would serve on the post-merger board.

The amended merger agreement provides that the board of the combined entity will include one independent director of Medley Capital, and for the chairman of the board of the combined entity to be one of the current independent directors of Sierra.

Fifth, the settlement calls for the settling defendants to contribute to a settlement fund in the event the go-shop does not lead to a superior proposal and the revised merger actually closes. The fund will not be created if the revised merger does not close.

If the merger does close, the fund is to consist $17 million in cash and of $30 million in stock in the combined company. I note that the real-world value of the stock component of the

consideration might not actually be $30 million.

The total settlement fund was negotiated with a $1 per share benefit to the Class in mind, if the combined company's stock trades at net asset value. However, Sierra, MC and Medley Management's financial advisors expect that the Sierra common stock will trade below its net asset value after the completion of the merger, resulting in a discount to the value of the stock component of the settlement fund.

In exchange for these therapeutic and potential monetary benefits, the class is giving the settling defendants a release of claims. The defined term "Released Plaintiffs' Claims" in Paragraph 1(jj) means "all claims arising out of or relating to: (1) alleged mismanagement of [Medley Capital]; (2) the Transactions," which is a capital "T" defined term that refers to the transactions contemplated in the original merger agreements, and which includes any actions, deliberations and negotiations relating thereto; (3) the original and amended merger agreements (including any actions, deliberations and negotiations relating thereto); (4) the disclosures regarding the original transactions; (5) the fiduciary

duties of the Stipulating Defendants in connection with the review of strategic alternatives available to Medley Capital; (6) the vote or any adjournment of the vote of Medley Capital stockholders on the Medley Capital Merger; and (7) proxy solicitation efforts in connection with the votes of Medley Capital stockholders on the original merger.

I note that the stipulation of settlement originally proposed the release of claims arising through the date of the closing of the amended merger. After execution of the settlement, the parties agreed to amend the release to limit its scope to claims that were or could have been asserted through the date of the settlement hearing.

Still, this release is somewhat unusual because it releases claims, albeit historical claims, as to the amended merger, which was not the subject of the litigation.

Because none of the parties' initial settlement briefs addressed the propriety of the scope of the release, and given its unusual nature, at the October 24, 2019 settlement hearing, I afforded the parties the opportunity to submit supplemental briefs on this issue, which were filed on October 31, 2019.

I turn now to the critical task at hand, and that's evaluating the give in light of the get to determine whether the settlement is fair and reasonable.

As a threshold matter, I note that most of the settlement consideration has already been implemented. As a general rule, settlements of class actions must be supported by present consideration. That general rule, attributed to this Court's 1970 *Chickering* decision, serves to guard against surreptitious buyouts of representative plaintiffs, which would leave other class members without plaintiffs. At the same time, Delaware law recognizes that implementing component parts of a settlement timely can benefit a class.

In *Polk v. Gold*, the Delaware Supreme Court clarified that "[v]alidity of a settlement does not depend on every compromised claim in a lawsuit being supported by independent consideration" and that "there may be cases where action is compelled before a court can give notice of or hold a hearing on a settlement petition."

In *Barkan*, the Delaware Supreme Court affirmed approval of a class action settlement in the

face of a *Chickering* challenge, where the parties were acting on a "relatively expedited schedule."

In this case, it was also critical that the therapeutic terms agreed upon be implemented promptly for them to benefit the class, and thus I find that this case too falls within the exception to the general rule set forth in *Chickering*.

Turning now to the meat of the analysis, this litigation is the product of merger negotiations gone wrong. At a simplistic level, the terms of the settlement collectively aimed to address the precise wrongs in the sales process I identified in my post-trial opinion.

Potentially, it also provides direct monetary compensation for the harms suffered by Medley Capital stockholders, should the amended mergers close. These measures will improve the precise corporate vulnerabilities that have been revealed throughout this litigation and are in that sense beneficial.

As I mentioned, the release of claims is slightly atypical in that it releases claims as to the amended agreement, which was not the subject of the litigation. The parties' supplemental briefing

helped me reason through this issue.

Delaware law does not require that claims be actually litigated in order to be released. Rather, in *Nottingham Partners*, the Delaware Supreme Court held that a court may permit the release of a claim based on the "identical factual predicate as that underlying the claims ...."

That phrase, "identical factual predicate," was later interpreted by the Delaware Supreme Court in *In Re Philadelphia Stock Exchange, Inc.*, to mean "same set of operative facts." In *In re Philadelphia Stock Exchange*, a stockholder objected to the release of claims to the extent it released claims concerning a demutualization of the exchange.

Rejecting this argument, the Supreme Court articulated a pro-settlement standard, reasoning that the demutualization was not "a transaction that was 'unrelated' or 'tangential' or 'remote' from the conduct that formed the basis of the specific claims" that were litigated.

In this case, the plaintiff litigated breaches of fiduciary duty by settling defendants. Aspects of the amended merger agreements and the curative sale process arose from the operative facts

challenged in litigation. For example, relaxation of the deal protections, the go-shop, and sales process, and other aspects of the settlement in the amended merger agreement were a direct effort to correct breaches found in my post-trial opinion.

Other aspects of the amended merger agreement, including negotiations with Sierra regarding the exchange ratio, did not arise from the litigation but, rather, were prompted by Sierra's demands and Medley Capital's declining net asset value.

The question is whether the parties should be permitted to release claims as to all historical aspects of the amended agreement despite the fact that certain terms are unrelated to the litigated issues and, indeed, certain of the economic terms to the amended agreement have been described by the parties in the context of settlement briefing as less beneficial to the class than the original agreement.

Having mulled this over quite a bit, I conclude that a release of the nature proposed is appropriate. This conclusion is guided mostly by one policy and common sense considerations, and that's the

fact that, generally, defendants agree to a settlement in order to achieve finality in litigation. If implementing the settlement terms themselves gives rise to new claims, then therapeutic settlements requiring post-execution implementation would be impracticable.

The plaintiffs made this point in their supplemental briefing. And further, sometimes implementing settlement terms requires papering a new transaction or deal terms, and sometimes those negotiations might take place in a different economic climate warranting new economic terms.

Adequate class representatives know best how to manage these risks in a way that promotes beneficial settlements in light of all the circumstances. And the standard for determining whether a new transaction that results from settlement negotiations relates to core facts must favor approval of a settlement.

Thus, I conclude that the language in *Philadelphia Stock Exchange* supplies the appropriate standard I must apply considering the release of claims concerning a new deal that was not totally the subject of litigation. That is, I must approve the

scope of release as to the new transaction unless the transaction is unrelated or tangential to or removed from the conduct that forms the basis for the specific claims for relief asserted in the complaint.

Implicit in the standard and in the settlement approval process generally is the notion that the terms achieved were negotiated by adequate class representatives, a conclusion I have already reached.

This approach is generally consistent with settlements that involve implementation of therapeutic benefits concerning a sale process. And for a sampling of those cases, I direct interested persons to the parties' supplemental briefing concerning the scope of the release.

Applying this standard to this case I conclude that the amended merger agreement is not unrelated, tangential to, or removed from the conduct that formed the basis for the specific claims in the complaint. To the contrary, there is a direct reaction to findings in the post-trial opinion, although aspects of it resulted from other forces and causes.

As comfort, I repeat that no

stockholder objected to the terms of the settlement, which included this release. I note that the settlement was negotiated by board members and adequate class representatives fully incentivized to achieve the greatest consideration possible for the class, and that there was a great deal of transparency concerning post-litigation events.

Thus, I approve the settlement.

I will turn now to the difficult task of explaining the fee award.

The role of the Court in setting a fee award is to exercise its own "sound business judgment," and the Court has "substantial discretion in the methods it uses and the evidence it relies upon" to quantify the benefits obtained by counsel. And that's a quote from the *Compellent Shareholder Litigation* decision.

Scientific precision is not required, nor is scientific precision really possible in this exercise. As much as I would appreciate the ability to pinpoint precise values with "mathematical exactitude," my colleagues have recognized that the best a person in my position can do is "rough calculations." That's another quote from *Compellent*.

Nevertheless, our calculations must be "supported by the record" and the "product of a logical deductive process," as the Delaware Supreme Court instructed in *Goodrich v. E.F. Hutton Group*.

Traditionally, the *Sugarland* factors have guided the Court's analysis of these sorts of petitions. Of those factors, the most important in quantifying an appropriate fee award is the benefit conferred in the litigation. I'll focus my efforts on the analysis of those benefits.

The other factors used to assess the propriety of a fee award are the standing and ability of counsel, the complexity of the litigation, the time and effort of counsel, and the contingent nature of the representation.

As I have discussed, the settlement included both monetary and non-monetary benefits.

Plaintiffs' counsel seeks fees in the amount of $22 million total, not including their out-of-pocket expenses. They believe the therapeutic benefits of the settlement are worth $3.1- to $6.55 million and the settlement fund is worth $16.7- to $20.2 million. They say that $22 million, then, is conservative, and they seek the entirety of this

amount now even though the settlement fund might not be created.

Medley Capital opposes any fee award exceeding $3.1 million. They arrive at this position by valuing therapeutic benefits and adding a modest risk premium to account for the contingent nature of the case. They say that the Court should apply this quantum meruit method rather than the percentage-of-the-fund method because the class achieved results that were not economically beneficial.

Sierra, too, objects to the fee request. Sierra does not dispute that some amount is appropriate but says that the settlement fund is worth nothing, even if it is created.

I'll start with the last point by addressing the value of the settlement fund.

Again, the defendants contend that the class is worse off than they were before the litigation because the new deal provides Medley Capital stockholders less consideration than the original deal.

I have not been presented with evidence that would allow me to value the amended merger, but I do note that Sierra negotiated for an

exchange ratio more beneficial to Sierra in light of Medley Capital's net asset value, such that it seems likely that defendants are correct, and the new transaction is less beneficial than the last, even with the cash bump and stock consideration component.

From this premise, that the new transaction is less beneficial to the class than the original transaction, defendants make the logical leap that the settlement confers no benefit whatsoever upon the class. This conclusion rests on a series of faulty suppositions.

First, fundamentally, defendants wrongly seek to hold plaintiffs accountable for a change in market conditions. Multiple decisions of this Court stand for the proposition that plaintiffs cannot take credit for benefits that were not a result of their litigation.

Chancellor Allen's decision in *In re Anderson Clayton Shareholders Litigation* recognized that what is relevant is the benefit achieved by the litigation, not a benefit that is otherwise conferred after the litigation commences.

In *Dann v. Chrysler Corp.*, this Court held that plaintiffs could not take credit for any

benefits flowing not from their litigation, but from the general resurgence of the automobile industry.

Just as plaintiffs cannot take credit for benefits not achieved from litigation, plaintiffs should not be blamed for detriments not caused by the litigation.

In this case, any decrease in the benefit to the class in the form of the amended exchange ratio appears attributable to market conditions or management decisions or both. Nothing in the record ties the alleged diminution of deal value to this litigation.

Because plaintiffs did not cause any detriment, they cannot suffer for it, as this Court recognized in *In re Loral Space and Communications Inc.* when it declined to reduce plaintiff counsels' fees after the 2008 financial crisis depressed the corporation's stock price.

I also note that, implicitly, defendants' argument assumes that the original transaction would have closed but for the disclosure injunction. But this assumption does not resonate with representations made at trial. Specifically, Sierra pushed the Court to issue the opinion on a

timeline that would have permitted the transaction to close by the original drop-dead date, regardless of the outcome of the trial.

In an alternate universe, the parties to the original agreement could have issued corrective disclosures and tried to go through with the original deal. So, the litigation cannot be determined as the sole causal factor behind terminating the original transaction.

Moreover, the logical corollary to defendants' argument that the litigation conferred a detriment is the supposition that plaintiffs should not have pressed the litigation, regardless of defendants' breaches of fiduciary duty. This foolhardy position is deeply inconsistent with every tenet this Court stands for, and I just don't buy it.

Defendants' second line of defense is to argue that the settlement fund is too speculative to support a fee. I also reject this argument. Put succinctly, if the settlement fund is sufficient to support the settlement and the release of claims, then it is sufficient to support a fee.

Defendants cannot have it both ways. Also, the settlement fund provides the class with a

guaranteed floor in terms of consideration stockholders will receive if the amended merger closes, and that benefit is not speculative.

That said, there, the contingent nature of the settlement fund does raise a host of issues. For one, the fund can't be precisely quantified prior to closing due to the nature of the consideration. Both parties expect the stock to trade at a discount to net asset value, so the stock portion of the fund might actually be worth less than the nominal $30 million. Further, the deal might not close, so the fund might never be created. Thus, awarding fees on the fund now would create a windfall to plaintiffs' counsel.

Accordingly, my award of fees on the settlement fund is contingent on the creation of the settlement fund.

As plaintiffs pointed out at the settlement hearing, approval of this type of contingent fee award is not unprecedented. Former Chancellor Chandler approved a similar request in the *Digex* case, where he approved a fee award fixed at a percentage of a settlement fund that would be valued according to the corporation's stock price upon the

consummation of the contemplated transaction. As in this case, the award was made contingent on the consummation of the merger.

Turning now to the value of the benefit, in *Americas Mining*, the Delaware Supreme Court stated that "when the benefit is quantifiable ... by the creation of a common fund, Sugarland calls for an award of attorneys' fees based upon a percentage of the benefit." Thus, the inputs for calculating fee awards based on a quantifiable benefit are the appropriate percentage and the amount of the benefit.

As I mentioned, there are complications in applying this formula in this case because the value of the stock component of the settlement fund is not fixed. So, rather than award a lump sum today, I'm going to assign a percentage that is linked to the settlement fund and provide direction on whether and how to gross up the fund amount when applying that percentage.

Turning to the percentage, this Court has explained in cases that settle close to trial, "a typical fee award ... ranges from 22.5% to 25%." And that's from the *In re Orchard Enterprises Incorporated*

Shareholders Litigation.

This Court has explained that "higher percentages are warranted when cases progress to a post-trial adjudication." And that's from *Americas Mining*.

The Delaware Supreme Court has made it clear that 33 percent is the upper bound for reasonableness of plaintiffs' fees. This case proceeded to a post-trial adjudication, warranting a fee north of 25 percent. But I do not believe this case hits the 33 percent mark, in part because the contingency risk was cabined by the highly compressed time frame, and in part because the case warranting that type of award is rare.

In my view, 26 percent is the appropriate percentage. We searched for a case procedurally analogous to this one. It appears that no one has ever had to experience litigation quite like this, which is probably a good thing. But this percentage compares favorably with other cases that bear some similarities to this litigation, including *Talecris Biotherapeutics*, where the Court awarded a 25 percent award for a four-month litigation that involved fewer depositions and settled pre-trial; and

In re Orchard Enterprises, where the Court awarded 24 percent of the benefit conferred after counsel took or defended eight depositions, engaged in discovery and related motion practice, and briefed and argued summary judgment before settling.

The 26 percent award in this case rewards plaintiffs for their "herculean efforts" to litigate, and litigate adeptly, what is at least a year's worth of litigation in just a few weeks while also being cognizant that such a compressed time frame does merit some degree of discounting.

Turning to the next issue, when the common fund represents a net amount, it has been the practice of this Court, at least since the 2011 Atlas Energy settlement by my memory, to "gross up" the common fund to account for the fee award.

The settling defendants argue against this approach. Citing to Vice Chancellor Glasscock's transcript ruling in *In re Globe Specialty Metals*, defendants argue that the gross-up method should be used only if the attorneys' fees are "not going to come from the class." They contend that if the settlement fund is not inclusive of the fee award, then Medley Capital or the post-merger entity will be

required to pay the fee, which would indirectly harm the class members.

Plaintiffs in turn say that there is a likelihood that any such funds would come from insurance carriers, and the parties disputed this point through supplemental submissions and affidavits. In the end, I'm not convinced by the look-through method, at least not applied in this manner.

I do believe that *Globe Specialty* directs that defendants bear the burden of convincing me that the approach set forth is most equitable. The affidavits submitted by settling defendants do not meet that burden. And at least two stockholders have submitted letters objecting to the net fund approach, as I'll discuss later. So, with one caveat that I'll explain next, we're grossing up.

Here's the caveat. Plaintiffs described the fund as a "net" fund in that any award of attorneys' fees will be in addition to the fund amount, so it will not come from the fund. In reality, however, the fund is a hybrid of a net/gross fund, due to what plaintiffs have described as the "look-through" component of any fee award, which alters the exchange ratio in the amended merger

agreement if costs and attorneys' fees exceed $10 million, as I previously explained.

Plaintiffs estimate that the merger consideration received by the class would decrease by between $4.1 and $5.9 million correlating to any fee award ranging from $10 million to $15 million.

So, when grossing up the fund, the parties shall account for this look-through amount, applying what I will call the "modified gross-up formula." And that formula is found in footnote 17 of plaintiffs' reply brief in support of settlement and fee awards, which accounts for the look-through component.

So to sum up my analysis concerning the settlement fund, if the settlement fund is created, Plaintiffs' counsel is entitled to payment in the amount of 26 percent of the value of the fund, grossed up using the modified gross-up formula that accounts for the look-through component.

I'll turn now to address fees attributable to the benefits conferred by the therapeutics. On this issue, defendants also raise two threshold objections. First, Sierra seeks to delay a fee award on the therapeutics by pointing to

decisions of this Court that describe "interim fee" awards as "disfavored."

Sierra specifically cites to *Frank v. Elgamal* and *In re Novell, Inc.* for this proposition, but neither case is on point. Both *Frank* and *Novell* involved fee applications for pre-merger disclosure claims where post-merger damages claims were still being litigated. Those applications were interim in nature because the litigation was ongoing. By contrast, in this case, the litigation has concluded, and thus the requested fees are not interim. So now I'll turn to addressing the benefits conferred by the therapeutics.

The settling defendants argue that when valuing therapeutic benefits, this Court should adopt a quantum meruit approach, calculating a fee award by adding a premium to the hours billed by the plaintiffs' counsel. But that is not the typical approach of this Court. Rather, this Court looks to precedent awards from similar cases in matters where the value of the benefit is not easily quantified.

Vice Chancellor Laster recently repeated the good reasons for this approach when resolving the fee petition in the *Sciabacucchi* action,

explaining that "Like the use of guideline ranges, reliance on precedent promotes fairness and fulfills the equitable principle that 'like cases should be treated alike.'" I agree with that proposition, and will look to the hours worked and implied billable rate only as a cross-check on the precedent approach.

I'll turn now to valuing the five categories of therapeutic benefits in this case.

The parties agree that benefits are conferred by the appointment of independent directors and disagree as to the value of the benefit. Plaintiff's counsel seek an award in the range of $1.1 to $2.1 million. The settling defendants counter that benefit is worth no more than $200- to $300,000.

The parties' positions reflect the extreme swings in values decisions of this Court have ascribed to this sort of benefit. In *EMAK Worldwide v. Kurz*, the Supreme Court affirmed an award of $400,000 for a benefit that invalidated a consent that would have reduced the board from seven members to three members, allowing a controller to control the board.

And in *Liberty Tax*, Chancellor Bouchard found it reasonable to award $350,000 to

$500,000 for the elimination of a controller's influence from a company and the company's board.

In *Mudrick*, the Court approved a corporate governance settlement that, in part, achieved board representation, and granted a fee award of $3 million. That settlement involved other therapeutic benefits, but certainly board representation for the minority was a critical component.

In *Google*, then-Chancellor Strine awarded $8.5 million in fees for a corporate governance settlement that resolved a challenge to a stock plan. The primary benefit of the settlement was that each time the controllers sought to issue new non-voting stock, they would need the approval of every independent director on Google's board.

The then-Chancellor awarded $8.5 million in fees on a $7 million lodestar, noting that the benefits of the settlement were not a "home run" but "somewhere between a solid single and a double."

In *Activision*, this Court mused that fees in the realm of $5- to $10 million were reasonable for the installation of two independent directors and the reduction of a controller's

controlling stake in a large-cap company.

So, taking a step back, of course, *Google* and *Activision* are both large-cap companies. The market capitalization of *Activision*, for instance, was $15 billion, nearly 100 times the size of Medley Capital. And the governance terms affected the controllers' stock holdings or control over stock issuances in those two cases.

And so it makes sense, in some instances, to scale for market capitalization if the value ascribed to the independent director hews on the expected increase in value an independent director will provide to the company's market capitalization.

In any event, given the unhelpful range offered by precedent concerning the value of therapeutic benefits of appointing independent directors to a board, I was intrigued by plaintiffs' preferred alternative valuation methodology.

Plaintiffs analogize the value of the benefit to the cost of running a proxy contest by an activist stockholder, which they say is the rough equivalent of what the class would have paid to achieve the placement of independent directors on the board.

Plaintiffs' counsel points to a 2011 doctoral dissertation by Nickolay M. Grantchev, which I believe was published in 2013, which reports the average cost of an activist campaign that ends in a proxy contest, with no guarantee of success, at $10.71 million.

I was a little skeptical of this number. My gut questions why an activist would pay $10 million to obtain board representation on a company of this size. Only interests not comparable to those of the class, like reputation value or other assets, would lead to this business decision. But I was still intrigued by the idea that we can value independent board representation by what it would cost to obtain that representation through a proxy contest, so I found the dissertation online and I read it. And I view the $10.71 number as really not applicable.

For one, the dissertation defines activist campaigns as a "sequence of escalating decision steps, in which an activist chooses a more hostile tactic only after less confrontational approaches have failed." In the escalating decision steps, the decision to wage a proxy contest is the last and combines the costs of all prior steps, which

might have been successful in achieving the board representation. And only 7 percent of activist campaigns result in this end-game number, according to the author. So it's a good thought, but it is poorly supported here and does not provide a reliable benchmark for me to value this therapeutic benefit.

So all that said, in the end, I think the appropriate fee award, based on the precedent I've been provided for the appointment of the two independent directors in this case, is $1 million.

This is on the high side of fees granted for the appointment of independent directors in companies of comparable size. I erred on the high side because of the unique circumstances of this case. It's tempting to view the appointment of independent directors in terms of a ratio, like 2 of 5, or 3 or 6, or, in this case, 2 of 7. When a person's job is to quantify something, we gravitate toward any available numbers. But these ratios do not tell the entire story.

Recall that plaintiffs proved at trial the key source of control exercised by the Taube brothers was their influence over two of the independent directors on the special committee. By

replacing those directors, plaintiffs neutralized this concern at the board and special committee level at a critical time in the life of this company. That is, these two directors punched above their weight, so to speak, because they effectively neutralized the control concerns identified in the post-trial opinion, which poses greater significance here than the numerator and denominator of the board would otherwise suggest.

Defendants claim that the benefit of the independent directors is duplicative of other therapeutic benefits, because the primary value of these independent directors was, to paraphrase a statement from page 46 of plaintiffs' opening brief, these directors' service "as stewards of the curative sales process."

But the fact that the independent directors were placed on the special committee at a critical juncture does not diminish their value. To the contrary, that has inherent, distinct value from the go-shop process, and would have been compensable even outside of the sales process.

Further, the methodology for valuing modifications of deal protections presumes that

fiduciaries are doing their jobs by acting in an independent and disinterested manner, a presumption we could not have made but for the appointment of the independent directors through the settlement. So I do not discount the value of the appointment of the independent directors based on the theory that it is duplicative of other benefits, such as the go-shop, and analysis of which I turn to next.

Let's start with the premise that go-shops confer a benefit to a class of stockholders even if an alternative bidder does not materialize. This is well established under precedent decisions valuing this therapeutic, and even defendants concede this point. The go-shop essentially delivers option value to shareholders.

In *Del Monte* and *Compellent*, Vice Chancellor Laster derived a methodology for quantifying the value of relaxed deal protections. That methodology quantified the option value by determining, one, the likelihood of the emergence of a competing bid, and, two, the incremental increase of such a bid.

Now, this methodology is not intended to impose mathematical certainty where none has

previously existed. It creates, to quote *Compellent*, "an order of magnitude within which this Court can craft an appropriate award." Exactitude is not the aim of this exercise, and I don't pretend that it is.

The parties do not offer independent research concerning the propriety of the two inputs, that is, one, the likelihood of the emergence of a competing bid, and, two, the incremental increase of such a bid. Rather, the parties analogize to the circumstances of the cases in which the Vice Chancellor applied this methodology.

Plaintiffs point to *Del Monte*, in which the Vice Chancellor explained that the termination fee of the original deal is a reasonable "lower bound for the incremental value of a topping bid." He also summarized academic research, explaining that the likelihood of a topping bid depends on the type of go-shop. A pure go-shop, where a single bidder negotiation is follow by a post-signing go-shop, "generate[d] a higher offer 23% of the time," he summarized.

The settling defendants point to *Compellent Technologies*. There, rather than gaging the premium of a topping bid on a range bookended at

lower end by the value of the termination fee, the Vice Chancellor cited to research supporting the conclusion that topping bids were a certain percentage greater than the original deal value.

And in that case, he adopted a premium of 11.37 percent because the deal protection measures left in place were restrictive. He also determined that in light of the deal protection devices, there was an 8 percent chance that the deal at issue would be topped.

Concerning the first input, the settling defendants have conceded that this was a "pure go-shop" and that it is reasonable to conclude there was a 23 percent chance of a topping bid. Given that this is an adversarial proceeding, I'm granting substantial weight to that concession, which is consistent with the evidence at trial that numerous competing bidders had expressed interest in an alternative transaction.

Now I must determine the incremental value of such a topping bid. I can use either the original transaction or the new transaction as benchmarks for calculating the incremental value.

Looking at the original transaction,

using the original termination fee of $6 million as a lower bound and the 23 percent likelihood as an upper bound, I derive a range of $372,000 to $3.5 million.

Looking at the new transaction, there are various inputs that determine the value of the amended merger for the class. I'll cut through it. The range I derive is $1.2 million to $1.9 million.

Countervailing considerations pull toward opposite ends of the ranges. Counseling in favor of the lower end of the ranges is the fact that the probability of a topping bid was lessened somewhat by the projected decline in Medley Capital's net asset value coupled by the passage of time.

Counseling in favor of the higher end of the range is the fact that the go-shop best embodies the equitable relief that I felt would address the harms to the class, as I explained in the opinion. Given the competing considerations, a mid-range number is appropriate, and I grant $1.5 million in fees for the go-shop, which is in the middle of both ranges generated by the two relevant benchmarks.

Next, we come to the waiver of the standstills. I view the waiver of the standstills as

an input in determining the probability of a topping bid relevant to valuing the go-shop. I do not view them as having independent value, and so I do not award a fee on that basis.

Turning now to the corrective disclosures, the parties seem to be in agreement that $500,000 is reasonable for the corrective disclosures negotiated by plaintiffs' counsel, and I agree. This Court has found that number to be reasonable when new material conflicts of interests are brought to the attention of shareholders through supplemental disclosures. I do not see a reason to disturb such a consensus in an otherwise adversarial proceeding.

Last, I'll turn to valuing the post-merger board members.

If the transactions contemplated by the amended merger agreement are consummated, than the class will have an additional benefit in the form of board representation. I view this benefit as worth $100,000.

In *Baupost v. Providential Corp.*, this Court awarded fees of $326,000 for installing three new independent directors to constitute a majority on the new board. Plaintiffs in *Baupost* based this

request on an hourly rate and did not seek a risk premium.

In *CytRx*, the Court considered the fees to award on a monetary benefit of approximately $100,000 and nonmonetary benefits that included bylaw amendments, the appointment of an independent director, and other governance improvements. The Court awarded $220,000 in fees.

I find that these precedents indicate that the board representation guaranteed by the one independent director would support a fee award of $100,000. However, like the fees attributed to the settlement fund, payment of this $100,000 is contingent on the transaction closing.

So for completeness, I turn now to the remaining Sugarland factors, all of which confirm the propriety of a fee award. Defendants do not dispute that the issues in this case were complex. Plaintiffs started out with a 220 action and discovered the worst. The attorneys on the case were forced to quickly digest the Medley entity structure and business relationships to present them in an orderly fashion to the Court.

Plaintiffs' counsel is experienced in

the field of stockholder litigation and well-known to the Court. Their efforts this time did not disappoint. And the plaintiffs' counsel undertook representation in this case on a wholly contingent basis.

The time and effort of counsel warrants slightly greater pause, as defendants have argued that it requires a discount. I have already accounted, to some extent, for the duration of the litigation in determining the percentage appropriately applied to the settlement fund.

Defendants effectively argue that the time and consideration of counsel should be considered twice, and that plaintiffs' counsel should take a haircut on their fees because the case was highly expedited. Defendants go as far as to refer to plaintiffs' time and effort as "relatively modest."

I do not agree with that characterization. To be sure, the lion's share of this litigation occurred over the course of a month, but it was the sort of month that takes years off of a person's life. In my view, this fact does not warrant a haircut.

In fact, I recall that when expedited

deal litigation was at its zenith in this court in recent decades, defense attorneys charged a premium on their billable hours to drop everything and handle those matters. So, I am definitely not granting a haircut based on this factor. Moreover, the compressed timeframe did not negatively affect plaintiffs' counsel's work product. They are entitled to the entirety of the fee attributable to the benefits achieved.

As a cross-check on the fee award, I note that plaintiffs invested 3,672.8 hours, according to their submissions, of which 3,241.9 hours related to the prosecution of this case through the execution of the term sheet. I have reviewed counsel's affidavits, which reflect that the hours multiplied by counsel's ordinary billable rates generate a value of approximately $1.2 million in work performed by Olshan, $1 million in work performed by Abrams & Bayliss, and approximately $100,000 in work performed by Bernstein Litowitz.

The hours expended in the 220 phase by Bernstein Litowitz and others are appropriate to include in the lodestar because those efforts were part of the continuous litigation strategy for a

continuum of work.

All told, the lodestar is at $2.3 million. This means that the fee award of $3 million awarded for therapeutics is a slight premium to the lodestar. And if the settlement fund comes through, plaintiffs' counsel will be compensated handsomely. And that risk/reward makes sense to me.

As another cross-check, if I had awarded the full amount requested by plaintiffs of $22 million, the implied hourly rate would have been $5,989.

This is not beyond the bounds of reasonableness. It is not practical to calculate the implied hourly rate I am awarding today given the contingent nature of a portion of the award. But the implied rate will almost certainly be less than what I just recounted. Because the upper bound is reasonable, anything lower would be more so.

If the settlement fund is created, the resulting fee would be approximately 6X or 7X plaintiffs' counsel's normal hourly rate, by my estimation. While this implied rate might strike a casual observer as high at first glance, it is well within the range that this Court has awarded over the

years. And a sampling of the relevant cases can be found in Exhibit 7 to plaintiffs' reply brief in support of the settlement.

Plaintiffs have also requested reasonable costs in the amount of $420,334 associated with this litigation. I approve reimbursement of those costs and expenses. They were out of pocket, and there is no principled reason for making plaintiffs wait until the amended merger agreement closes for reimbursement, so that amount shall be paid at the same time as the $3 million awarded in connection with the therapeutics.

I'll now address a series of other requests.

Counsel to Mr. Altman, who pursued a parallel claim concerning the challenged transaction, also requested fees associated with the filing of their 220 action and subsequent monitoring of the proceedings in this case.

It is conceded that these attorneys obtained for the class is an additional disclosure regarding the "echo voting" issue. I am going to grant a nominal amount based on what I think this specific disclosure is worth, and that's $75,000.

In determining appropriate fees for these more modest types of disclosures, this Court has weighed the materiality of the disclosures attained, and awarding lesser fees for disclosures that "approach the limits of materiality."

In *Pace v. Arbitron*, for example, the Court found the disclosures might be interesting to stockholders but did not alter the total mix of information and awarded $100,000 in fees for two minimally additive disclosures.

In *BEA Systems*, the Court found two disclosures to be "meritorious" yet "modest." There, the Court chose to award one-quarter of the plaintiffs' requested costs and fees, plus a risk premium.

In this case, the disclosure achieved by Mr. Altman's counsel can't be said to have moved the needle all that much. The thrust of the justification is that the proxy overstated the amount of echo votes in favor of the transaction as "just over 50%" instead of "just barely over 50%" or "approximately 49%". Either way, the vote was hotly contested, and a stockholder with knowledge of that slim margin would go to the polls or be incentivized

to do so.

Therefore, Altman's corrective disclosures were "interesting" and even "meritorious," but for all intents and purposes, they were relatively modest. Thus, I find an amount of $75,000 in this case is consistent with precedent and appropriate.

That said, I do have reservations about this aspect of the fee award. Generally speaking, I do not want to incentivize a free-rider phenomenon where plaintiffs' counsel can sit back, merely monitor a case, make suggestions here or there, and then rush in to claim fees in the end. That practice would be bad for our system. It would create inefficiencies for plaintiffs and plaintiffs' counsel who are trying to do things the right way. It would also burden the Court with unnecessary fee petitions.

I am granting fees despite these general concerns because I do not believe that Mr. Altman or his counsel engaged in such gamesmanship here. And that's clear from a cursory review of his team's actions.

Mr. Altman commenced separate litigation on March 20, 2019 against the settling defendants. The complaint alleged that the defendants

breached their fiduciary duties to stockholders of Medley Capital in connection with the adjournments of the vote of Medley Capital Stockholders on the proposed mergers. These were valid concerns that prompted me to schedule hearing on Mr. Altman's motion for expedition.

In response, FrontFour moved to consolidate these actions. I delayed a hearing on the motion to expedite, and the parties ultimately agreed to consolidation.

There was a critical time there when I had some questions similar to what Mr. Altman raised, and so, again, I do not think that his team's actions were an effort at gamesmanship or otherwise triggering any of the policy concerns I just described. So a modest award for the disclosure achieved is appropriate.

Finally, I turn to the objections of Doug Getter and Kevin McCallum, both of whom received the notice and submitted letters opposing the fees requested in connection with the settlement.

Mr. Getter's letter was dated October 1, 2019, and received by the Court on October 15, 2019. Mr. Getter has been a shareholder of Medley

Capital dating back to 2009 or 2010. He objected to an award of attorneys' fees in the amount of $22 million because he feared that it would leave very little remaining from the $30 million settlement fund. Mr. Getter requested that the fee award not exceed $3 million.

Mr. McCallum expressed similar concerns that plaintiffs' counsel would be compensated in a way "punitive to shareholders" despite the subsequent loss of market value of the merging entities.

The fact that the fees are not actually diminishing the $30 million settlement fund should allay these stockholders' concerns. I have already explained in great detail why I find the amount of fees I have awarded to be reasonable. Thus, I decline to otherwise adopt the objectors' suggestions.

So to recap, the class is certified. The settlement is approved. On the question of fees, I grant a total of $3,075,000 in fees relating to the therapeutic benefits implemented to date, broken down as follows: $1 million for the independent directors; $1.5 million for the go-shop; and $500,000 for the

corrective disclosures achieved by Front Four, plus $75,000 for Mr. Altman's corrective disclosure.

On top of that, I approve reimbursement of $420,334 to plaintiffs' counsel. I further grant, contingent on closing of the amended transaction, 26 percent of the settlement fund, and $100,000 for the post-merger director.

I ask that plaintiffs' counsel prepare a form of order that memorializes this lengthy bench ruling, conferring with defendants concerning the propriety of that form, and submit it to the Court for my review.

That concludes my bench ruling.

I'd, of course, be remiss if I did not again say that the actions and efforts of all counsel involved in this litigation have been truly commendable. The advocacy throughout was exemplary and reminds me of how lucky I am to serve as a member of this Court, so I thank you.

With that, are there any questions?

MR. BAYLISS: Your Honor, Tom Bayliss on behalf of the FrontFour plaintiffs. No questions here. Thank you very much.

MR. DITOMO: Your Honor, this is John

DiTomo on behalf of Medley. I was writing copious notes, so I apologize for missing this, but with respect to the gross-up, the stock contingent, was that being valued at the .7 or 1 percent of NAV?

THE COURT: I don't have an answer for you on that. And so if it needs further clarification, you can write to me and I will have a round four.

The formula used in the footnote in the reply brief, and I'll find it specifically for you --

MR. DITOMO: I believe you said Footnote 17 of the plaintiff's reply.

THE COURT: That's correct, and I believe they used the higher NAV.

Just give me one moment.

MR. DITOMO: Thank you, Your Honor, I appreciate it.

THE COURT: So Footnote 17 of the reply brief says it's going to be at one times NAV. And it says a 33 percent fee award, but, again, I've altered that to be a 26 percent fee award. And it provides the formula for the look-through amount, and that's what I've adopted.

MR. DITOMO: Thank you, Your Honor.

THE COURT: Any further questions?

All right. Well, we are adjourned. Thank you.

MR. BAYLISS: Thank you, Your Honor.

(Conference adjourned at 12:23 p.m.)

- - -

CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 75 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 27th day of November, 2019.

/s/ Jeanne Cahill

Jeanne Cahill, RDR, CRR
Official Chancery Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter

TAB 20

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE EZCORP INC. CONSULTING :
AGREEMENT DERIVATIVE LITIGATION : C.A. No. 9962-VCL

- - -

Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, April 3, 2018
10:00 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

PLAINTIFF'S MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT, AN AWARD OF ATTORNEYS' FEES AND EXPENSES, AND AN INCENTIVE AWARD, AND THE COURT'S RULINGS

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware 19801
(302) 255-0521

APPEARANCES:

ANDREW S. DUPRE, ESQ.
McCarter & English, LLP
-and-
NICHOLAS I. PORRITT, ESQ.
of the District of Columbia Bar
Levi & Korsinsky, LLP
for Plaintiff Lawrence Treppel

EDWARD P. WELCH, ESQ.
CLIFF C. GARDNER, ESQ.
VERONICA B. BARTHOLOMEW, ESQ.
Skadden, Arps, Slate, Meagher & Flom LLP
for Defendants Philip Ean Cohen, MS Pawn Corp., MS Pawn L.P., and Madison Park, LLC

SRINIVAS M. RAJU, ESQ.
Richards, Layton & Finger, P.A.
-and-
JENNIFER B. POPPE, ESQ.
of the Texas Bar
Vinson & Elkins LLP
for Nominal Defendant EZCORP, Inc.

ELENA C. NORMAN, ESQ.
Young, Conaway, Stargatt & Taylor LLP
for Defendant Thomas C. Roberts

- - -

THE COURT: Welcome, everyone.

MR. WELCH: Good morning, Your Honor.

MR. DUPRE: Hello, Your Honor. Andrew Dupre, McCarter & English. I'm serving as local counsel for the plaintiffs.

THE COURT: Don't use that term in my courtroom, please.

MR. DUPRE: Delaware counsel.

THE COURT: Thank you.

MR. DUPRE: Well said, sir.

With your permission, Mr. Porritt will be making the argument today. He is admitted pro hac vice.

MR. GARDNER: Your Honor, briefly, Cliff Gardner of Skadden Arps on behalf of the Cohen defendants. After Mr. Porritt's presentation, if you have questions about the substance of the settlement, I'll be happy to field those. I want to introduce at counsel table Mr. Welch, whom you know.

MR. WELCH: Good morning, Your Honor.

MR. GARDNER: My colleague, Veronica Bartholomew, will be making the presentation on the incentive fee award issue.

THE COURT: Thank you all for being

here.

MR. WELCH: Thank you, Your Honor.

MR. PORRITT: Thank you very much, Your Honor.

We're here on the settlement in the EZCORP consulting contract matter. Three matters here are: one, just to confirm notice has been properly given; second, to approve the overall settlement and then to final judgment; and thirdly, the attorney fee and incentive award matters.

So the notice can be easily handled, Your Honor. I think there is an affidavit of service filed by the defendants showing that notice has been mailed out in accordance with the terms of this Court's preliminary scheduling order. Over 5,000 notices have been mailed out. The form of the notice was as approved by the Court.

Secondly, moving on to the settlement, this is a cash settlement of a $6.45 million payment to the company from a combination of insurers and individual contributions by the defendants. I don't need to belabor the points about what the factors the Court considers on what is fair, reasonable and adequate.

Here, the first question is the viability of the claims. Obviously, the claims were upheld by Your Honor's motion to dismiss opinion. This is a case where the theory, as pleaded, did not necessarily survive contact with the evidence.

As Your Honor may recall, the initial theory of the complaint was that these consulting agreements were essentially a device to extract rent or special dividend on behalf of the controller.

When we got into evidence, it turns out that there was substantial work done, and so the case changed into a debate as to whether those services were really worth 18.4 million or not. There was obviously a difference of opinion on that. We could have come here and presented experts, and the Court could have determined one way or the other.

We resolved that dispute by reaching the amount of 6.45 million. Due to the application of the statute of limitations, there was approximately 18.4 million in payments that was in dispute in this case. So the settlement represents approximately one-third, in fact just over one-third, of the amount in dispute, which we would submit was an excellent result on behalf of the company in this particular

case.

There have been no objections, obviously, pursuant to the notice. And actually, it was also disclosed by the company in a 10-K, so it's been widely disseminated. And the result was also a result of arm's-length mediation with the assistance of a very experienced mediator, Mr. Robert Meyer, at JAMS.

So we would submit that the settlement is fair, reasonable and adequate. The final judgment should be entered in the terms proposed. The releases are suitable and appropriately tailored to the claims asserted in this case.

Unless Your Honor has any questions about the substance, I'll move on to the attorneys' fees, Your Honor.

THE COURT: Please do.

MR. PORRITT: We are seeking here an attorneys' fee award $1,290,000. That's also to cover approximately $19,000 in expenses that have been accrued. Once again, I don't mean to belabor the point, the factors that the Court needs to consider. The Court is well familiar with the Sugarland factors, the most important of which, of course, is the benefit

obtained through the litigation.

Here, we would submit the benefit is substantial. Again, this is not a corporate governance settlement, so no -- this is a cash settlement, so the benefit is readily apparent.

I think there are some also benefits from the case that are, if you like, noncash in the sense of, through Your Honor's opinion, through the motion practice, we did establish the standard, suitable review standard, for other contracts between Mr. Cohen, if he remains a controller of the company, and the company, and EZCORP, which was a matter in dispute.

As I said at the beginning, the defendants maintained that was subject to business judgment evaluation. Your Honor found that it was to the entire fairness standard. So that is, if you like, a therapeutic benefit that was achieved that was not in a sense of -- an attachment to the stipulation of settlement.

We would submit this is not an early -- this case was -- although it settled before trial, it settled in the middle of discovery. There obviously was substantial briefing on the motion to

dismiss and then also on an interlocutory appeal. Substantial document discovery was done, which was really, in particular, the company prepared or, rather, the Madison Park defendants prepared a very detailed 277-page spreadsheet detailing the work, with references to emails and so on, on a month-by-month basis, which was really the key element, if you like, of the discovery that enabled us to sort of try and assess the work that was done.

So we would submit that it falls fairly in the 15 to 25 percent appropriate bracket for awarding a fee as a percentage to the benefit, and we've asked for a benefit in the middle of that range at 20 percent.

THE COURT: You didn't take any merits depositions. You just took the two confirmatory depositions. Is that right?

MR. PORRITT: That is correct, Your Honor. Yes. So we were at that stage, really, in discovery that we would've -- we had more or less finished document discovery, and we would have been at the stage of scheduling the deposition when it was decided that we would attempt to mediate the dispute. And then we subsequently went on and took fairly

lengthy confirmatory depositions that both went for well over half a day. Both of them went through into the middle, mid to late afternoon.

The time and effort of counsel. Your Honor, I submitted my affidavit showing the time spent. It comes up to a lodestar of approximately $485,000. That's not a padded lodestar. I think we've litigated this case very efficiently. It implies a multiplier of about 2.6 times, which I think, again, is well within the range allowed by this Court.

We cited a number of cases, both of this Court and other Vice Chancellors and Chancellors of this Court, which has awarded fees in similar circumstances of the same amount. We refer to the Sanchez case, which in many ways is very similar of our larger case where the recovery was almost exactly, again, about a third of the amount in dispute in that case, and the Court awarded them a fee of 20 percent.

We cited the China Agritech and China Integrated cases, decisions, again, awarding fees of 20.7 percent and 26 percent, again, prior to depositions. I think both of those cases, they settled after getting books and records discovery

rather than the detailed discovery obtained in this case. So we would submit that the 20 percent fee request, again, is entirely reasonable, consistent with practice here.

I would also recognize this was an entirely contingent case. So to date, obviously, plaintiff's counsel has not received any fee and undertook the entire risk of not succeeding in this case.

On the incentive award, we are seeking a very modest incentive award of $5,000 for Mr. Treppel, the representative plaintiff. Awards of this amount are routinely granted, we would submit, in this Court. There is no prejudice to defendants or the company. The amount will be paid entirely out of whatever attorney fee award the Court awards us.

We think Mr. Treppel has provided a benefit here by standing up and enabling this case to be brought and enabling the benefit to be obtained. And we don't think an award of this size is likely to raise policy considerations or concerns about either creating a conflict between the representative plaintiff and the company in this instance or increasing dramatically the risk of vexatious

litigation in terms of the modest amount of size.

Mr. Treppel did spend approximately 20 hours in assisting us in prosecuting this matter. That equates to an hourly rate of approximately 250 per hour, which is far from excessive in our submission.

Unless Your Honor has any questions, that concludes my presentation.

THE COURT: Thank you.

MR. GARDNER: Good morning again, Your Honor.

Unless you have further questions, I thought I would just very quickly walk through those factors that are set forth in Activision that support -- that you would apply in deciding whether or not to approve the settlement.

THE COURT: I don't think you need to.

MR. GARDNER: Okay. Well, thank you, Your Honor. I'd like to turn it over to Ms. Bartholomew.

THE COURT: Great. Thank you very much.

MS. BARTHOLOMEW: Good morning, Your Honor. Veronica Bartholomew from Skadden Arps on

behalf of Phillip Ean Cohen, MS Pawn Limited Partnership, MS Pawn Corporation, and Madison Park, LLC, collectively referred to as the Cohen defendants in this action.

As set forth in our opposition to plaintiff's motion for an award of attorneys' fees and for an incentive award, we oppose the fee award because it includes a request for an incentive award in the amount of $5,000 to the plaintiff in this action, Mr. Treppel. We oppose the incentive award because this Court recognizes a presumption against granting incentive awards, and Mr. Treppel has not demonstrated any special circumstances to overcome that presumption.

The Court recognizes a presumption against paying incentive awards to plaintiffs for serving in a representative capacity. The Court of Chancery Rule 23.1 prohibits a representative plaintiff in a derivative action from receiving any form of compensation, directly or indirectly, unless it is either reimbursement of expenses incurred, which is not what is requested here, or fees costs or other payments expressly approved by the Court.

As the Court stated in Fuqua, "In

Delaware, representative plaintiffs typically receive no compensation for their services other than their pro-rata share of the class recovery and their reasonable out-of-pocket costs and expenses. A 'plaintiff's award' is an additional sum intended to reward and incentivize extraordinary service to the class performed by the class representative."

The Court similarly recognized in Oliver v. Boston University that "awards to representative plaintiffs should be rare" and it is only in the exceptional case that an application should be granted.

The Court is reluctant to award lead plaintiffs anything other than reasonable out-of-pocket costs and expenses. The Court should only grant incentive awards to plaintiffs when there is a significant amount of time, effort and expertise expended by the plaintiff. That is not the case here.

An overview of the case law shows the level of participation and types of contributions required by a plaintiff to constitute that significant amount of time and effort to deserve an incentive award.

For example, in Activision, Your Honor

found that the plaintiff, who participated meaningfully in the case was deposed, attended the hearings and mediation, and survived contentious leadership and class certification stages deserved an incentive award.

In Oliver v. Boston University, the Court found that the plaintiff, who dedicated 2,000 hours of time to the litigation, was deposed, attended every day of trial, assisted with document review and identifying key documents, and brought certain knowledge and expertise to the litigation deserved an incentive award.

And in Raider v. Sunderland, the Court found that the plaintiff, who spent over 200 hours on the matter, did his own independent investigation and analysis, reviewed documents, was deposed, and negotiated with the settlement and class counsel's fee, deserved an incentive award.

Here, the burden was on Mr. Treppel to prove that he is entitled to any incentive award, but his actions in this litigation fall short. In his affidavit, he states the following reasons for his request of incentive award: spending approximately 20 hours in serving in connection as lead plaintiff,

reviewing documents filed in the action, responding to requests for documents and interrogatories, and discussing the progress of the action with his attorneys.

Mr. Treppel believes that in exchange for that level of participation, he should receive an incentive award. However, those actions, reviewing file documents, responding to document requests, and being updated by your counsel on the progress of the litigation is the absolutely bare minimum that's required of any representative plaintiff.

Mr. Treppel's actions are not beyond those provided by a typical plaintiff. He did not travel to Delaware for any of the hearings. He was not deposed. He did not attend the mediation session. He did not provide any special knowledge or expertise. He did not conduct any independent analysis. And he did not contribute to the settlement negotiations.

The record and Mr. Treppel's own affidavit make it very clear that his efforts are not in line with those of plaintiffs to whom this Court has granted incentive awards.

In plaintiff's reply to our opposition, nor here today, counsel, again, does not

indicate that anything more was done here by Mr. Treppel than what was stated in his affidavit. Instead, counsel claims that because there have been no objections, that the fee award, including the incentive award, should be approved. But there is an opposition here by the Cohen defendants, and perhaps there are no objectors because the Cohen defendants are already opposing the incentive award.

Nevertheless, the lack of objections has no implication on whether Mr. Treppel has met the standard set by this Court. Plaintiff discusses and cites a series of cases to assert that incentive awards are routinely granted and so that one should be granted here.

What counsel fails to address is the disparity between the efforts made by plaintiffs in those cases compared to Mr. Treppel, even if the requested incentive awards in those matters was also $5,000. Further, counsel ignores that out of the 18 cases cited in their reply, only five of those cases included an opposition to the incentive award and only two of those were in the Court of Chancery.

Plaintiff criticizes the Cohen defendants for failing to cite any Delaware cases in

which an incentive award is denied and further claims that incentive awards are granted all the time in federal court, but that does not mean that there is not a standard to be met either in federal court or in this Court.

There is a far smaller sample set in Delaware than in federal courts where you see incentive awards requested. And for counsel to argue that these are granted in federal court and even in this court, I do agree, but what is also true is that most people do not oppose the incentive awards. But that doesn't mean that we don't have a right to oppose or that Mr. Treppel is excused from the standard. Regardless of whether this case is before this Court or a federal court, there is still a standard that must be met.

Perhaps in circumstances where plaintiffs do very little, their counsel does not actually request an incentive award. I do understand that I am contesting an incentive award here today, which often does not happen, but that does not mean that Mr. Treppel has met the standard and deserves an incentive award.

To briefly address some of the cases

that plaintiff cited in their reply, as I just mentioned, out of the 18 cases cited, only five of those contained oppositions to the incentive award. In addition, unlike Mr. Treppel here, in plaintiff's cited cases, half of those plaintiffs were also deposed. Plaintiff fails to note in their reply the important factors that distinguish the plaintiffs in their cited cases from Mr. Treppel.

For example, in Nitsche, the incentive award was unopposed. The plaintiff was a Delaware lawyer who in court requested a $5,000 incentive award after spending nearly $2800 in expenses in the litigation, routinely engaging in strategy discussions with his counsel, and contributing to settlement negotiations.

In Physicians, the incentive award was unopposed. The plaintiffs were both deposed and attended two mediation sessions.

And in Ryan, the fee awards to two named plaintiffs of $5,000 each were both unopposed. One plaintiff there spent 50 hours on the litigation, was deposed, analyzed information, reviewed documents, and provided counsel with useful insights on complex factual matters. The other plaintiff to whom counsel

points in their reply brief also spent 20 to 25 hours on the litigation but was also deposed in addition to reviewing documents.

And to briefly address Raider, which counsel gives a lot of attention in their reply brief, in Raider, the incentive award was unopposed. The plaintiff was an attorney, an accountant, and a manager who dedicated 205 hours to the litigation, was in constant communication with counsel, was an expert in tax and financial analysis, conducted his own independent analysis, contributed expertise to the litigation, reviewed documents, was deposed, negotiated the settlement, and negotiated counsel's fee. And after all of that, the Court found that only a $200 hourly rate was appropriate. And as counsel recognized today, Mr. Treppel is requesting an incentive award that equates to a $250 hourly rate.

One additional point is that if a plaintiff who has done as little as Mr. Treppel here is found to deserve an incentive award, then what plaintiff wouldn't receive an incentive award? These incentive awards are intended to serve as a benefit for a representative plaintiff whose actions have furthered and supported the litigation in a beneficial

and meaningful way.

I think that there is a spectrum of potential named plaintiffs and a level of involvement that they may have in a litigation. But here, Mr. Treppel is an example of a plaintiff who has done nothing more than what was absolutely required of him. Therefore, on behalf of the Cohen defendants, we respectfully request that the Court deny plaintiff's motion for an incentive award to Mr. Treppel and that the Court make the fee award to plaintiff's counsel that Your Honor finds appropriate but that the fee award should not include or permit the incentive award to Mr. Treppel.

Unless Your Honor has any questions, I have nothing further.

THE COURT: Why do you think this expectation has developed that the named plaintiff is the one representative person in the litigation that's expected to work for free?

MS. BARTHOLOMEW: I think that the Court is hesitant to freely grant incentive awards because of the incentives that that may create for a plaintiff. If these incentive awards are freely given, you may have plaintiffs who seek to prolong

litigation longer than necessary in seeking an incentive award, or they may accept a quick settlement hoping to receive an incentive award. I think that there are concerns with the incentives of named plaintiffs.

The Court will grant reasonable out-of-pocket costs and expenses to reimburse a plaintiff for those out-of-pocket costs that they expend on the litigation, but the Court has recognized that it will look to the size of the benefit and also the significant amount of time and effort that the plaintiff put forth to actually contribute to that benefit in order no grant the incentive award.

THE COURT: Yeah. I mean, as I think through these things, I'm usually less -- I know that the cases talk about the size of the benefit. And to the extent that you're awarding somebody for doing a good job where they wouldn't otherwise have a claim to the benefit, like counsel, that makes sense to me. But for the named plaintiff, they're getting their reward of the size of the benefit in the form of essentially their pro rata participation and whatever the damages would be, so they're already incentivized there.

What I worry about with the named plaintiff is we're not exactly a culture anymore where people do things for the benefit of others. Like, we are truly independent homo economicus where if you don't get compensated for doing something, then you're likely to walk out the door.

So you've got people representing the plaintiffs. They're going to get paid. You've got people representing the defendants. You guys are going to get paid. I certainly hope you're going to get paid. I think you deserve to get paid. And then you've got this party, this individual, who is really representing, at least theoretically, the company, and we're expecting him or her to basically do stuff for free.

Why doesn't that count the balance too far against the representative plaintiff, that they have to be the charitable person to come in and do this?

MS. BARTHOLOMEW: I mean, in some of the cases, the plaintiffs aren't necessarily -- you know, I gave you some examples where the plaintiffs had significant knowledge and expertise to contribute to the litigation. I mean, but there are matters

where the plaintiff, you know, takes a deposition and produces documents and will receive an incentive award.

In the Atlas Energy matter, Your Honor found that $5,000 and $10,000 incentive awards were appropriate, and you indicated that what swayed you there was that both plaintiffs had been deposed. We don't have those circumstances here.

So I don't think that it's that, you know, representative plaintiffs are being asked to, you know, do so many things that it becomes so prohibitive for them to get involved in the litigation. If they do become very involved, then the incentive award is one avenue to also compensate them, but I don't think the Court requires them to do so much that it should inhibit them.

THE COURT: That's one of the other things I wonder about, is whether there's been a sufficient change in the practice. So it used to be -- and perhaps I am remembering a fictitious Halcyon time when, like, people didn't just routinely beat up the named plaintiff. They didn't routinely test the stockholder's standing in terms of equity ownership. They didn't necessarily go after the guy

for purposes of documents. They didn't necessarily take the person's deposition. Really, we thought of these more as counsel-driven lawsuits, and this person really was just along for the ride.

And I feel like now, at least based on just -- and I'm not as directly involved as you all are. I just see these things from my position. It is now pretty much routine to -- obviously, it didn't happen here -- depose the named plaintiff, get documents from them.

I had this one case that Mr. Porritt will remember well where, essentially, part of the defense strategy was just to go after the named plaintiffs. And I actually had a sanctions hearing, and I sanctioned one of the fellows, one of the named plaintiffs.

And so this is all a long-winded windup. But some of the cases that have said we really don't need to do this, do you think they have at all been influenced by those perhaps gentler days where you really could mail it in as a named plaintiff, as opposed to now, where you're more likely to be stepping up, signing on for a little bit of brass-knuckles treatment by a fine firm like your own?

MS. BARTHOLOMEW: Yes, I agree with that, Your Honor. I think that that's possibly one explanation for why the genesis of these incentive awards and the goal, then, to compensate named plaintiffs for bringing the litigation and being put through the paces.

THE COURT: But you would say what? So if that is the world now and people need to step up, doesn't that counsel in favor of me saying to someone like Mr. Treppel, Here, look, you were -- I wouldn't want to say courageous, that implies a little bit more -- but you took on the mantle and, therefore, you should be recognized for having done that?

MS. BARTHOLOMEW: But I think, then, that would be true of any named plaintiff. Because as I've indicated, Mr. Treppel didn't do more here than was really absolutely required of him, you know, reviewing the Court filings, responding to one document request.

And as counsel recognized in their reply, there was an error in his affidavit. Nobody served interrogatories on him. And then just being updated by counsel.

And so I think if you grant an

incentive award to Mr. Treppel, I think any named plaintiff has the right to then come forward and say, you know, I should receive an incentive award because I brought the litigation.

And for those incentives that I -- you know, those adverse incentives that I spoke about earlier, in bringing the litigation and requiring them to actually put forth time and effort in the litigation, I think if you grant one here, you know, there is nothing that would require a plaintiff to really do much more.

THE COURT: So if I synthesize the two main points that we've talked about, what I'm hearing you say is that the world may have changed in terms of plaintiffs' expectations, but it hasn't changed so much that we ought to be compensating folks in every case.

MS. BARTHOLOMEW: Absolutely.

THE COURT: So what's the line you would draw? It seems like you talk about depositions. If the person gets deposed, you're more inclined? Where would you -- what would you tell me to do?

MS. BARTHOLOMEW: I think in every example that I've seen, the representative plaintiff

had at least been deposed. The purpose of the award is to compensate the plaintiff for the time and effort they expended. And so in a deposition, a plaintiff has to travel to the deposition. They have to prepare for it with counsel, spend a day, and testify at the deposition. And so the incentive award is compensation after the fact for that time and effort.

THE COURT: All right. Thank you.

MS. BARTHOLOMEW: Thank you, Your Honor.

THE COURT: Reply?

You know I was thinking about Mr. Chen and Mr. Steinhardt. I mean, that's --

MR. PORRITT: I started having shudders sitting there, Your Honor.

THE COURT: I imagine you had a little posttraumatic stress disorder from that. And that's just an example of how you can walk into what is truly bare-knuckles back-and-forth even though you're ostensibly there in a "representative capacity."

MR. PORRITT: Very much so, Your Honor. I think your observations are well-taken.

THE COURT: Engage, if you would, on this idea that although that means you award people

who actually get caught up in that, that here, Mr. Treppel was almost a throwback. He really did get to mail it in and let you take the laboring oar.

MR. PORRITT: So I think I would say two things. One, I mean, that is just -- first of all, he took the risk of -- he understood -- I'll advise the Court he was willing to sit for a deposition. He's actually done a books and records case in another matter in Delaware where he appeared and testified at trial, at a 220 trial. So he was willing and able to do it. So it was just the circumstances of when we settled.

If you create a bright-line rule, there's costs and benefits for every bright-line rule, as the Court is aware. If you create a bright-line rule that you need to have a deposition taken before you get an incentive award, then you can guarantee the lead plaintiff will sit for a deposition in more or less every case. Or the representative plaintiff. I apologize.

THE COURT: What if they don't want to? What are you going to do, beg them to sit for a deposition?

MR. PORRITT: Well, then, I guess if

they don't want to -- but if they don't want to, they're probably not a proper representative plaintiff.

So I think it's a mistake to create a sort of minimum set of requirements, if you like. I think if you have really done nothing, it really depends upon the case. I mean, unfortunately it ends up being a facts and circumstances inquiry, which I know isn't helpful for the Court, but nonetheless, you can establish standards that way.

Mr. Treppel did more than -- there's simply putting a name on a complaint, and then some cases settle at that early stage. I think it would be hard for -- I don't think I would stand up here and ask for an incentive award where a plaintiff, literally all they've done is reviewed a complaint and authorized its filing.

But to the extent of where you're getting into actually responding to discovery, I think that is -- and I think 20 hours is not an insignificant amount of time. That's half a week.

So then I think the Court is well able to assess whether sort of some of the bad incentives that Ms. Bartholomew raised about an incentive on

behalf of representative plaintiffs to bring litigation or prolong litigation, I think the Court is well able to assess whether there's been any divergence of interests when you're assisting a settlement and seeing what happens there.

I would say the cases she talked about where -- typically, where the plaintiff has done their own analysis -- as you know, there was a lengthy discussion about those contributions later on in the Chen v. Howard-Anderson matter. We had the whole trial, sitting here, on that issue. And so the incentive fees awards in those cases are much, much greater, obviously, than the very modest amount here.

So I would say here that this is a recognizing of the risk and inconvenience that plaintiffs now take on as a routine matter. Representative derivative litigation is essential to the corporate governance structure in Delaware here with the common law assessment and application and expansion and explanation of the relevant standards, and that requires plaintiffs to be willing to take on the risk and bring cases so that issues can be challenged in this Court. So I would submit that here, it's entirely reasonable.

THE COURT: Who did -- there was a books and records demand that preceded the suit here. Was that Treppel, too?

MR. PORRITT: Yes, it was, Your Honor.

THE COURT: All right. Thank you.

MR. PORRITT: Thank you.

THE COURT: I appreciate everyone coming in today. The reason we're here is so that I can consider the proposed settlement in the EZCORP derivative litigation. I am going to approve the settlement.

In terms of the procedural requirements, we have confirmed, "we" being the intrepid brain trust of my clerks and I, not the royal "We," that the requisite affidavits have been filed, and the notice, as Mr. Porritt has described it, was adequately delivered and sufficient in terms of its detail.

In terms of the merits, I, of course, have to consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then apply my own judgment in deciding whether the settlement is reasonable in light of those factors.

I issued an opinion in this case on the motion to dismiss that allowed the case to go forward, so I have determined at least in my own view that the case was sufficiently meritorious in terms of being fairly litigable.

Picking up after that fact, discovery proceeded. And as summarized in the papers and by Mr. Porritt this morning, discovery, as it will, not infrequently, produced documents that were inconsistent with the more aggressive characterization of events in the complaint in which the payments to Madison Park really had no benefit whatsoever or no underlying reason.

There was a substantial number of documents showing that Madison Park was performing some work for EZCORP. And then the question in terms of the litigation was going to be what those services were worth and was the amount that Madison Park was paid for its services entirely fair to EZCORP.

That would have been a contested issue. There would have been experts involved. There would have been weighing of a lot of different factors, and ultimately, I would have had to make credibility determinations and assess weight and all

those factors that make trial inherently difficult and uncertain.

In the face of that, the parties reached a settlement of $6.45 million that EZCORP will receive. In terms of assessing that claim, I think that outcome falls within a range of reasonableness, given the likely difficulties in proof, the uncertainty of the outcome, and the amount of the total potential damages that the settlement reflects.

I have done things like look at the form of the release, and I think that it is not excessive. It contains the usual amazing list of thesaurus-derived nouns, but it's appropriately tailored to the matters at issue in this litigation.

The next issue that I have to deal with is attorneys' fees and the award for the representative plaintiff. I'm a little bit on the fence in terms of attorneys' fees. Our general policy is to ensure that without a favorable adjudication, "... counsel will be compensated for the beneficial results they produced, providing the action was meritorious when filed and had a causal connection to the conferred benefit." That's the Allied Artist case.

This action was meritorious when filed. It was the sole cause of the benefit. The question is pricing it.

The benefit is easily priced at $6.45 million. You could wonder what the noncontroller share of that benefit is, given the fact that this is an interested transaction, but people haven't really gone into that. And this is a situation where there was high-vote stock involved, which makes that analysis more complex.

The real problem for me is how early things happened. In other words, documents were produced and reviewed, but there weren't any merits depositions taken. So I'm really on the fence as to whether this is a 20 percenter or more like a 15 percenter.

But it may be because Villanova won last night -- there's certainly ample empirical studies that show that judges are not immune to external influences like that. There is a lot of data that shows that if you're going before an immigration judge, you want to be the first petition of the day. You don't want to be the petition that happens around 11:00 or 11:30 in the morning where the judge gets

hungry. Statistically comparable applicants get rejected much more often if they come in at 11:00 or 11:30 than if they come in at 9:00 in the morning. So while I do have misgivings, I am going to go ahead and award the agreed-upon amount rather than blue-pencil it to some other number.

I'm also going to do the same thing for the incentive award. I very much appreciate the arguments that Ms. Bartholomew made this morning. I understand the precedents that you've cited.

My personal view is that because of the direction in which representative litigation has moved, where we want and expect representative litigation clients to take a more active role in the dispute, the old learning about people just being along for the ride, at least in my view, has less purchase.

I also do think that in this new, or not perhaps new but more contemporary, brass-knuckles age, it is I think understandable and important to give some compensation to people who step forward and take the risk of having outstanding defense lawyers go through publicly available information about them and then potentially take an intrusive deposition or ask

for documents or things like that.

I think that, from my standpoint, the potential problems which Ms. Bartholomew cited, which I think were very well put in terms of the things that we need to be concerned about, are best addressed through the requirement that any type of payment be requested, disclosed, and receive Court approval.

Here, I personally do not believe that a $5,000 payment risks creating malincentives. I thought about reducing it. I thought about saying, "I'm only going to give $1,000 or $2,000," but I'm in a non-second-guessing mood today. I didn't second-guess Mr. Porritt in terms of his fee application, and so I'm also not going to second-guess the amount that he wants to allocate out of his fee to the plaintiff.

I think if it were much bigger than the 5K, at least at this stage of the development of the law, I would be more receptive to what Ms. Bartholomew has said, but it is tough for me to get excited about a payment of $5,000 to a named plaintiff when I am now seeing pretty much typical partner hourly rates over $1,000.

I remember when breaking the $1,000

barrier was a big deal. I think the last three fee applications we've seen, basically, if you are a big-firm partner now, you are billing at over $1,000.

And so with that being the type of norm that we're compensating for, for involvement -- and obviously, there's lots of distinctions between partners and named plaintiffs. We can go through the litany. I get all of that. But I have a lot of trouble having personal agita about $5,000 to the named plaintiff, even for the relatively minor involvement that happened here. So that's why I'm coming out where I am.

Mr. Porritt, do you have a form of order that you'd like me to sign, or should I just take care of it on the docket?

MR. PORRITT: I think we --

THE COURT: You've got to stand up, man.

MR. PORRITT: I'm sorry, Your Honor. I beg your pardon.

THE COURT: That's all right. We're crazy Delawareans down here. We don't do the New York thing. It's no worries.

MR. PORRITT: I don't have a form with

me, Your Honor, but we can submit one.

THE COURT: No need. We'll take care of it in terms of the LexisNexis e-file.

MR. PORRITT: Thank you, Your Honor.

THE COURT: Thank you all for coming in. I appreciate all the work that went into resolving this case. It would have been an interesting one to try, but at the same time, it would have involved a lot of time for everybody. So I commend you all on reaching what seems to me to be a result that falls within the range of fairness.

Thank you, everyone, for your time today.

MR. GARDNER: Thank you, Your Honor.

MR. WELCH: Thank you, Your Honor.

(Court adjourned at 10:43 a.m.)

- - -

CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 38 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 13th day of April, 2018.

/s/ Jeanne Cahill

Jeanne Cahill, RDR, CRR
Official Chancery Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter