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Case No. 10323-VCZ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SCHUFF INTERNATIONAL INC. STOCKHOLDERS LITIGATION	)	CONSOLIDATED C.A. No. 10323-VCZ

PLAINTIFF'S BRIEF IN SUPPORT OF FINAL APPROVAL OF THE PROPOSED SETTLEMENT AND APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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PLAINTIFF'S BRIEF IN SUPPORT OF FINAL APPROVAL OF THE PROPOSED SETTLEMENT AND APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

Plaintiff Mark Jacobs ("Plaintiff") respectfully submits this Brief in Support of his Application for Final Approval of the Proposed Settlement (the "Settlement") resolving all claims in the above-captioned action (the "Action") pursuant to terms set forth in the Stipulation and Agreement of Compromise and Settlement dated November 15, 2019 (the "Stipulation").[1]

PRELIMINARY STATEMENT

After more than five years of litigation and arduous, protracted and arm's-length negotiations, Plaintiff has achieved a resolution of the Action that more than doubles the price – from $31.50 to $67.45 per share – that the stockholders of Schuff International, Inc. ("Schuff" or the "Company")[2] received in the October 2014 cash tender offer (the "Tender Offer") from the Company's majority stockholder, HC2 Holdings, Inc. ("HC2). The $35.95 per share price bump for the stockholders who tendered their shares (the "Tendered Stockholders") is a premium of ***more than 114%*** over the October 2014 Tender Offer price ***representing, to Plaintiff's***

[1] Filed concomitantly herewith is the Affidavit of Seth D. Rigrodsky, Esquire, in Support of the Proposed Settlement and Application for an Award of Attorneys' Fees and Reimbursement of Expenses ("Rigrodsky Affidavit" or "Rigrodsky Aff.").

[2] Schuff is now known as "DBM Global, Inc." For purposes of clarity, Plaintiff will refer to the Company as "Schuff."

knowledge, the best recovery in Delaware shareholder class litigation to date.[3]

The Settlement also provides the Company's remaining minority stockholders who decided not to tender in the Tender Offer or otherwise sell their shares after the Tender Offer closed (the "Non-Tendered Stockholders")[4] with the opportunity to tender their Schuff common stock for $67.45 per share. The Settlement, therefore, provides the Non-Tendered Stockholders with a liquidity opportunity for the same consideration as the Tendered Stockholders, a price that is substantially higher than any at which Schuff common stock has traded in the five years prior to the Settlement.[5] Indeed, $67.45 per share represents a premium of ***more than 26%*** over the $49.28 30-day average closing price of the Company's common stock prior to the November 15, 2019 filing of the Stipulation. Moreover, the Non-Tendered Stockholders who wish to maintain their position in the Company may do so, and need not tender their Schuff common stock in the Settlement. As set forth in the

[3] In the aggregate, the Settlement provides an additional $20,439,588.20 to the stockholders who tendered in the October 2014 Tender Offer.

[4] HC2 failed to consummate a short-form merger pursuant to Section 253 of the Delaware General Corporation Laws ("DGCL"), despite repeatedly representing that it would do so. The Tender Offer and the unconsummated merger are collectively referred to herein as the "Buyout."

[5] The highest closing price for Schuff after the October 2014 Tender Offer and prior to the November 15, 2019 filing of the Stipulation, was $56.35 per share on November 11, 2019.

Stipulation, the Settlement neither impacts any appraisal claims the Non-Tendered Stockholders might have in any subsequent qualifying transaction, nor releases any claims not related to the Buyout or this Settlement.

The Settlement was reached only after Plaintiff had completed extensive fact discovery. While the litigation did not advance through summary judgment, Plaintiff is confident that he would have not only prevailed on that motion, but also at trial based on the evidence unearthed in discovery and incorporated into Plaintiff's Amended Complaint filed contemporaneously herewith. Moreover, the Settlement is the product of extensive, sometimes contentious, settlement negotiations. Indeed, after the Parties entered into a tentative framework for the potential settlement of the Action in 2017, evidence secured through continuing discovery caused Plaintiff to decide against proceeding with that settlement framework and advise Defendants[6] that prosecution of the claims in the Action would continue. The terms of the Settlement were reached only after discussions and negotiations were renewed, and the Parties agreed to a new framework to resolve the Action.

The Settlement's 114% premium to the Tender Offer price provides substantial relief to the Tendered Stockholders without the delay or uncertainty that would result from further litigation. In addition, it provides the Non-Tendered

[6] "Defendants" are HC2, Phillip A. Falcone ("Falcone"), Keith M. Hladek ("Hladek"), Paul Voigt ("Voigt"), Mike Hill ("Hill"), Rustin Roach ("Roach"), D. Ronald Yagoda ("Yagoda"), and Phillip O. Elbert ("Elbert").

Stockholders with an opportunity to obtain liquidity at the same consideration, which reflects a substantial premium over the market price of Schuff common stock, or retain their Company stock if they so choose.

Plaintiff respectfully submits that the Settlement, which is believed to provide the largest premium ever achieved in Delaware litigation, is an outstanding result for the Class (as defined below) and, therefore, should be approved.

STATEMENT OF FACTS

Schuff, a Delaware corporation with executive offices in Phoenix, Arizona, is one of the largest fabricators and erectors of steel in the United States. Defendant HC2 is a Delaware corporation with its executive offices located in New York, New York. HC2 operates as a holding company of operating subsidiaries that span across various reportable segments, including construction, marine services, energy, telecommunications, life sciences, and insurance.[7]

On May 12, 2014, HC2 purchased 2,500,000 shares of Schuff common stock, representing approximately 60% of Schuff's outstanding shares, from SAS Venture LLC, an entity owned by Scott Schuff, then-President and CEO of the Company, for an aggregate purchase price of $78,750,000, or $31.50 per share.[8] Between May and July 2014, HC2 purchased additional Schuff shares, increasing its stake in the

[7] Rigrodsky Aff., ¶ 5.

[8] Rigrodsky Aff., ¶ 15.

Company to approximately 70%.[9] On June 2, 2014, three directors designated by HC2, defendants Falcone[10], Hladek, and Voigt, joined the Schuff Board.[11]

On August 11, 2014, HC2 informed the Company that it intended to make a tender offer at $31.50 per share (the "Merger Consideration") for all outstanding shares of Schuff common stock that it did not already own.[12] HC2 also indicated that it had a "non-binding intent" to effect a short-form merger of Schuff into an HC2 subsidiary following the completion of the tender offer (the "Merger"), pursuant to Section 253 of the Delaware General Corporation Laws ("DGCL").[13]

On August 15, 2014, the Board formed the Special Committee, comprised of defendants Yagoda and Elbert, to evaluate the Tender Offer and communicate to Schuff's minority stockholders regarding the transaction.[14] However, the Special Committee did not: (i) engage an outside financial advisor to perform any valuation analyses; (ii) negotiate with HC2 over the Merger Consideration; (iii) consider or pursue any other strategic alternatives to the Tender Offer and Merger (collectively, the "Buyout"); or (iv) evaluate HC2's ability to obtain financing to consummate the

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[9] Stipulation, ¶ C.

[10] Falcone was, and is, the President and Chief Executive Officer ("CEO") of HC2 and Chairman of the HC2 Board of Directors

[11] Stipulation, ¶ D; Rigrodsky Aff., ¶ 23.

[12] Stipulation, ¶ E.

[13] Rigrodsky Aff., ¶ 29.

[14] Stipulation, ¶ F; Rigrodsky Aff., ¶ 32.

Buyout.[15]

On August 21, 2014, HC2 commenced the Tender Offer at $31.50 per share. The Tender Offer, which expired on September 19, 2014, was conditioned on: (i) the tender of a majority-of-the-minority of Schuff shares not held by HC2 or the Company's directors and officers; (ii) HC2 ownership of 90% of the Company's outstanding stock after the close of the Tender Offer; and (iii) HC2 closing financing terms, if necessary, to purchase the shares tendered in the Tender Offer. *Id*. HC2 also represented that upon attaining ownership of 90% of the Company, it would conduct the Merger pursuant to DGCL § 253, at the same price as the Tender Offer "as soon as practicable."[16]

In a Stockholder Letter, dated September 5, 2014, the Special Committee apprised stockholders that it was neutral and took no position with respect to the Tender Offer.[17] The Stockholder Letter apprised stockholders that they would be entitled to seek appraisal if the Merger was consummated following the Tender Offer.[18] In addition, the Stockholder Letter stated that if the Tender Offer was consummated, but the Merger was not, there would be fewer Schuff shares for sale

[15] Rigrodsky Aff., ¶¶ 40, 43-45.

[16] Rigrodsky Aff., ¶ 37.

[17] Rigrodsky Aff., ¶ 43.

[18] Rigrodsky Aff., ¶ 46.

and the stockholder's ability to liquidate their shares "may be more restricted."[19]

On September 22, 2014, HC2 extended the Tender Offer from September 19 to September 29, 2014 and stated that it had "irrevocably waived the financing condition described in the Offer to Purchase."[20] On September 30, 2014, HC2 extended the expiration of the Tender Offer for a second time, to October 6, 2014. HC2 further announced that the majority-of-the-minority requirement had been satisfied, but that the 90% requirement was not. Therefore, HC2 announced that it was waiving the condition, and intended to acquire at least 90% of the unaffiliated shares in the Tender Offer or subsequent purchases and then complete the Merger.[21]

On October 6, 2014, the Tender Offer closed and HC2 accepted for purchase 721,124 shares at a price of $31.50 per share, increasing its ownership to 88.69% of the outstanding shares. Members of the Special Committee and Schuff senior management tendered their shares in the Tender Offer.[22] HC2 made additional market purchases after the Tender Offer closed, giving HC2 more than 90% of Schuff's outstanding shares. HC2, however, did not effect the Merger.[23]

On March 17, 2015, HC2 received a valuation analysis from a third party

[19] Rigrodsky Aff., ¶ 46.

[20] Rigrodsky Aff., ¶ 48.

[21] Rigrodsky Aff., ¶ 53.

[22] Stipulation, ¶ M.

[23] Rigrodsky Aff., ¶ 55.

advisor that implied a per-share value for Schuff of $68.99 per share as of December 31, 2014.[24]

PROCEDURAL BACKGROUND

Plaintiff Mark Jacobs filed his initial class action complaint in the Action (the "Complaint") on November 6, 2014.[25] On November 17, 2014, Arlen Diercks filed a substantially similar complaint, and following full briefing and oral argument, the two actions were consolidated and Plaintiff was appointed lead plaintiff and his counsel lead counsel in the Action on February 19, 2015.[26]

On July 30, 2015, Schuff moved to dismiss the Complaint and defendants Yagoda and Elbert filed their answer to the Complaint.[27] After entering into a tolling agreement with Schuff, Plaintiff agreed to voluntarily dismiss the Company from the Action on October 30, 2015.[28] On October 20, 2016, Plaintiff filed a motion for class certification.[29]

As part of the ongoing litigation efforts, Plaintiff aggressively pursued discovery in the Action. Plaintiff served a First Request for Production of

[24] Stipulation, ¶ S.

[25] Trans. ID 56301236.

[26] Trans. ID 56796473.

[27] Trans. ID 57632573.

[28] Trans. ID 58092640.

[29] Trans. ID 59723245.

Documents on All Defendants November 13, 2014 and a Second Request for Production of Documents on May 29, 2015.[30] During May 2015 through November 2016, Defendants and third parties produced more than 109,000 pages of documents.[31] On June 3, 2016, HC2 served a First Set of Requests for the Production of Documents on Plaintiff.[32]

On June 6, 2016, Plaintiff noticed the depositions of Elbert, Falcone, Hill, Hladek, Roach, Voigt, and Yagoda.[33] On June 13, 2016, Plaintiff served his First Request for Admissions on Defendants.[34]

On October 20, 2016, Plaintiff filed a motion for class certification.[35] On December 9, 2016, the HC2 Defendants deposed Plaintiff.[36]

Beginning in December 2016, counsel for the Parties engaged in extensive arms'-length discussions and negotiations regarding a potential resolution of the Action. In February 2017, the Parties agreed to a tentative framework for the potential settlement of the Action.[37]

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[30] Trans. ID 56335722; 57311626

[31] Stipulation, ¶ V.

[32] Trans. ID 59096056.

[33] Trans. ID 59103628.

[34] Trans. ID 59134788.

[35] Trans. ID 59723245.

[36] Trans. ID 59906551; Stipulation, ¶ HH.

[37] Stipulation, ¶ II; Rigrodsky Aff., ¶ 75.

Plaintiff deposed defendants Yagoda, Roach, and Hladek on March 27 through March 29, 2017.[38] Based on the evidence obtained from the merits depositions of these defendants, Plaintiff decided to withdraw from the previously agreed settlement framework and to proceed with the prosecution of the claims in the Action.[39] On July 11, 2017, Plaintiff provided Defendants with a draft of an amended complaint that incorporated additional facts learned through discovery.[40]

The Parties continued to pursue settlement discussions and negotiations for more than a year and, on August 6, 2018, agreed on a new framework for the settlement of the Action.[41] Even as negotiations continued, however, Plaintiff continued to pursue merits discovery. On September 21, 2018, Plaintiff served subpoenas on third parties Duff & Phelps, LLC and Deutsche Bank Securities, Inc., procuring more than 3,300 pages of additional documents, including, Schuff's periodic financial statements since the close of the Tender Offer; materials regarding a potential sale process for the Company; quarterly estimates of Schuff's value prepared by Duff & Phelps, LLC for HC2; one-year and five-year financial projections prepared by the Company's management; and documents regarding

[38] Stipulation, ¶ KK; Rigrodsky Aff., ¶ 76.

[39] Rigrodsky Aff., ¶ 76.

[40] Rigrodsky Aff., ¶ 76.

[41] Rigrodsky Aff., ¶ 77.

HC2's private agreements with certain third parties regarding the purchase of Schuff shares outside of the Tender Offer. Plaintiff also deposed Defendant Falcone, Chairman and Chief Executive Officer of HC2, on November 29, 2018 and Paul Voigt, HC2's former Managing Director of Investments, on February 20, 2019.[42]

On April 2, 2019, Plaintiff and Defendants agreed in principle to settle the Action, subject to agreement on definitive settlement documentation, which Defendants produced to Plaintiff. These documents included financial statements and valuation presentations prepared for HC2 relating to the Company between March 2015 and October 2019, and certain financial projections.[43] Negotiations continued between the parties for several months with regard to the specific terms of a settlement almost resulting in the termination of the agreement. Nonetheless, the parties were able to reach agreement on the settlement terms and executed the Stipulation of Settlement on November 15, 2019.[44]

ARGUMENT

I. THE SETTLEMENT SHOULD BE APPROVED AS FAIR, REASONABLE, AND ADEQUATE

The voluntary settlement of contested claims has long been favored under

[42] Rigrodsky Aff., ¶ 77.

[43] Rigrodsky Aff., ¶ 77.

[44] Rigrodsky Aff., ¶¶ 77-80.

Delaware law. *See Kahn v. Sullivan*, 594 A.2d 48 (Del. 1991). In reviewing a class action settlement, the Court '"consider[s] the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then . . . appl[ies] its own business judgment in deciding whether the settlement is reasonable in light of these factors." *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1284 (Del. 1989) (quoting *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986)). In evaluating the fairness of the settlement, the court must "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." *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, C.A. No. 1091-VCL, 2013 Del. Ch. LEXIS 37, at *4 (Del. Ch. Feb. 6, 2013).

Here, Plaintiff, his counsel, and their consultants have thoroughly examined the facts and applicable law relating to Plaintiff's claims, as well as the arguments Defendants could advance in defending against those claims at trial and appeal. It is their belief that Defendants would have been unable to show at trial that the Tender Offer price and process were entirely fair to the Class, and that Plaintiff would prevail on any appeal. However, having weighed the benefits secured by the Settlement against the substantial risks and delays associated with proceeding to trial and an inevitable appeal, Plaintiff respectfully submits that the Settlement is fair, reasonable, and adequate to the Class.

A. The Settlement Provides a 114% Premium Over The Tender Offer Price.

After more than 5 years of litigation, the completion of extensive fact discovery and protracted arms'-length negotiations, Plaintiff has secured a substantial settlement pursuant to which Defendants will pay a minimum of $20,439,588.20 in cash to the Tendered Stockholders.[45] The increase in consideration per share, from $31.50 per share to $67.45 per share, provides the Tendered Stockholders with an additional $35.95 per share, more than doubling the Tender Offer price in an unprecedented bump of more than 114%.

Plaintiff believes the Settlement provides the largest premium, as a percentage increase in consideration, ever achieved in Delaware litigation. For example, the settlement in *In re Chaparral Resources, Inc. S'holders Litig.*, Consol. C.A. No. 2001-VCL (Del. Ch. Mar. 6, 2008), which is believed to provide the next highest premium, provided for an increase of approximately 45% over the merger price.[46] The recently approved settlement in *In re Handy & Harman, Ltd. S'holders Litig*., Consol. C.A. No. 2017-0882-TMR (Del. Ch. Nov. 14, 2019), which also involved a controlling-stockholder tender offer, provided a premium of 33% over the tender

[45] The total aggregate value of the Settlement depends upon the number of Non-Tendered Stockholders who tender their Schuff shares in the Settlement.

[46] Ex. 34 (Plaintiff's Brief In Support of Proposed Settlement, *In re Chaparral Resources, Inc. S'holders Litig.*, Consol. C.A. No. 2001-VCL (Del. Ch.), at 8).

offer price.[47] The settlement achieved in *In re Cornerstone Therapeutics, Inc. S'holder Litig.*, C.A. No. 8922-VCG (Del. Ch. Jan. 26, 2017), another controlling stockholder case, provided a premium of approximately 25%.[48] Likewise, the Settlement provides a premium larger than the recoveries ***at trial*** in *In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205, 226 (Del. Ch. 2014) (24%)[49] and *In re Dole Food Co., Inc. Stockholder Litig.*, Consol. C.A. No. 8703-VCL, Consol. C.A. No. 9079-VCL, 2015 Del. Ch. LEXIS 223, at *6-*7 (Del. Ch. Aug. 27, 2015) (20%),[50] or settlements with larger recoveries approved in similar cases. *See In re Calamos Asset Mgmt., Inc. S'holder Litig.*, Consol. C.A. No. 2017-0058-JTL-KSJM (Del. Ch. Apr. 25, 2019) (23%).[51]

In addition, the Non-Tendered Stockholders are being provided with the opportunity to tender their shares for $67.45 per share, the same aggregate price

[47] Ex. 35 (Transcript of November 14, 2019 Hearing in *In re Handy & Harman, Ltd. Stockholders Litig*., Consol. C.A. No. 2017-0882-TMR (Del. Ch.), at 49).

[48] Ex. 32 (Transcript of January 26, 2017 Hearing in *In re Cornerstone Therapeutics, Inc. S'holder Litig.*, C.A. No. 8922-VCG (Del. Ch.) at 7, 18 ($2.40 per share price bump over $9.50 per share merger price that was "nearly all that could have been potentially achieved by litigation through final judgment.").

[49] *Rural/Metro Corp.*, 102 A.3d at 226 ("The members of the Class received $17.25 in the Merger and . . . suffered damages of $4.17 per share.").

[50] *Dole Food Co.*, 2015 Del. Ch. LEXIS 223, at *6-*7 (deal price of $13.50 with damages of $2.74 per share).

[51] Ex. 35 (Transcript of April 25, 2019 Hearing in *In re Calamos Asset Mgmt., Inc. S'holder Litig.*, Consol. C.A. No. 2017-0058-JTL-KSJM (Del. Ch. Apr. 25, 2019) at 3).

received by the Tendered Stockholders.[52] This all-cash payment significantly exceeds any market price paid for Schuff shares in the five years since the Tender Offer and provides the Non-Tendered Stockholders with a liquidity opportunity at a price unavailable in the market today. The Non-Tendered Stockholders have also received a total of $17.16 per share in dividends since October 2014.[53] Those dividends represent an approximate 25.4% yield on the $67.45 per share. This return exceeds the average and median compound annual growth rates (CAGRs) for the GPCs Plaintiff's consultant used for his valuation analysis and exceeds the rates of return on short-term debt investments (*e.g.*, money market funds). *See infra* fn. 66. Moreover, the Non-Tendered Stockholders may, at their election, retain their Schuff stock, affording them the opportunity to participate in the Company's upside potential or to sell the stock at a later date.

In addition to the premium provided to the Class, several other factors underscore the fairness of the Settlement:

First, the amount to be paid in the Settlement represents a significant premium to the price paid in various transactions, as well as the market price of Schuff stock, prior to the Tender Offer. For example, the amount to be paid in the settlement is a

[52] The aggregate amount to be paid to the Non-Tendered Stockholders cannot be ascertained until they have tendered their shares in the Settlement Tender Offer.

[53] Rigrodsky Aff., ¶ 94.

114% premium over the $31.50 per share that HC2 paid to SAS Venture LLC for a 60% controlling interest in the Company, 2,500,000 shares, just three months prior to the Tender Offer. The amount to be paid in the settlement also constitutes a premium of 114% over the $31.50 per share that HC2 paid for the 198,411 shares it purchased from Jefferies, LLC less than three months before the Tender Offer.[54]

In the year prior to the SAS Venture LLC transaction, Schuff's shares traded between a low of $11.50 and a high of $28.50 per share.[55] Using that range, the settlement value of $67.45 represents a premium ranging from 151% to 274%. The 30-day volume-weighted average price ("VWAP") as of May 12, 2014 was $26.93.[56] The amount to be paid in the settlement constitutes a premium of 151% over the 30-day VWAP.

Second, the Settlement provides the Class with consideration in line with various valuations performed by Schuff's consultants and others. For example, Ernst & Young ("E&Y"), which was retained by HC2 to perform a valuation of Schuff (on a consolidated basis) as of December 31, 2014, concluded that the Company's equity value was approximately $266 million, or about $68.99 per share,

[54] Rigrodsky Aff., ¶ 25.

[55] Rigrodsky Aff., ¶ 87.

[56] Rigrodsky Aff., ¶ 87.

a differential of approximately 2%.[57] In a second report, issued on May 27, 2015, E&Y concluded that Schuff's equity value was $262 million as of February 28, 2015, about $67.00 per share.[58]

After the Tender Offer was announced, Sententia, the beneficial owner of approximately 1,700 shares of Schuff stock, gave a presentation in which it opined that "Schuff's financials show a high return on capital with expanding backlogs primed to benefit from the continuation of a non-residual cyclical upturn." Valuing the Company, Sententia stated "[c]onservatively, a one-year base case is $57. The high case is $100, which should also be considered a 2 year price target."[59] The Settlement is well within the Sententia's valuation range, providing $10.45 per share more than its one-year base case, a premium of more than 118%.

The value per share provided in the Settlement is also consistent with the valuation analyses performed by Plaintiff's consultants.[60] Performing a DCF

[57] Rigrodsky Aff., ¶ 88. This is consistent with the contributions of 81,900 shares of Schuff common stock to two affiliates in December 2015 at an implied value of $74.48 per share. Stipulation, ¶ AA.

[58] Rigrodsky Aff., ¶ 89.

[59] CAC, ¶ 162.

[60] Rigrodsky Aff., ¶¶ 90-93.

analysis using contemporaneous financial projections[61], a discount rate of 13.3%[62], and a perpetuity growth rate of 3.5%, Plaintiff's consultants concluded that the value per share was $66.61, approximately 1% less than the Settlement value per share.

In addition, Plaintiff's consultants analyzed the implied multiples indicated by $67.45 per share compared to the multiples of GPCs as of October 2014.[63] Specifically, the implied enterprise value to LTM revenue from the $67.45 per share is 0.6x, and the implied enterprise value to LTM earnings before interest, tax, depreciation and amortization (EBITDA) is approximately 7.0x. Both valuation multiples were towards the low end of the range of the GPCs' multiples, but the GPCs themselves were generally entities that are much larger and less risky than Schuff.[64] As such, it would be expected for Schuff to have a multiple at the low end

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[61] Projections of revenue, EBITDA, capital expenditures, and depreciation and amortization, are from the September 30, 2014 projections sent from Michael Hill (Schuff CFO) to Ryan Willett at HC2. *See* Rigrodsky Aff., ¶ 90; Ex. 28. The same projected amounts appear in HC2's October 2014 presentation to ratings agencies. *See* Ex. 29 at HC2H00000467. Projections of working capital are from the balance sheet presented in the Schuff 2015 Financial Plan Overview, Board of Directors Meeting, Dec. 17, 2014. *See* Ex. 30 at SC01469-70.

[62] The discount rate was based on a weighted average cost of capital analysis using the CAPM. This discount rate was slightly lower than the WACC used by E&Y of 14.0%, which leads to a higher indication of value. *See* Ex. A in Virtual Data Room.

[63] The set of GPCs included Chicago Bridge & Iron Company N.V., Cornerstone Building Brands, Inc. (f/n/a NCI Building Systems, Inc.), Insteel Industries, Inc., Olympic Steel, Inc. Steel Dynamics, Inc., and Worthington Industries, Inc. Rigrodsky Aff., ¶ 92 n.10.

[64] The GPCs were on average approximately 9.0x's larger than Schuff.

of the range.

Balanced against the substantial benefit provided by the Settlement is the release of claims by the Class. The Stipulation at ¶ 1(w) provides, *inter alia*, for the release of all claims based on ownership of Schuff common stock during the Class Period[65] arising from the Action, including the process and price in the Tender Offer; the disclosures in connection with the Tender Offer; the legal and fiduciary duties of the Released Defendant Parties in the Tender Offer[66]; HC2's decision not to consummate a short-form merger after obtaining 90% ownership of the Company's common stock; the denial of liquidity opportunities for the Non-Tendered Stockholders in 2014 and after the Tender Offer; and claims arising from the Settlement, including financing for the Settlement. In addition, the Class is releasing unknown claims, including those encompassed by Cal. Civ. Code § 1542.[67]

The release is not global. The Stipulation specifically carves out of the release "appraisal claims in connection with a subsequent cash-out merger by Non-Tendered Stockholders who elect not to participate in the Settlement Tender Offer."[68] Therefore, Non-Tendered stockholders may elect to not participate in the Settlement,

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[65] "Class Period" means May 12, 2014 through and including the close of business on the date of this Stipulation" (November 15, 2019).

[66] As defined in the Stipulation, ¶ 1(u).

[67] Stipulation, ¶ 1(dd).

[68] Stipulation, ¶ 1(w).

and still exercise appraisal claims if HC2 conducts a cash-out merger following the Settlement Tender Offer. Further, as discussed herein, the release is cabined to the misconduct at issue in this Action and the implementation of the Settlement.

The release extends to the Settlement Tender Offer—a key aspect of the Settlement that provides the Non-Tendered Stockholders with the option to be treated like the Tendered Stockholders. The Settlement Tender Offer will not commence until after Final Approval of the Settlement but near-final drafts of the Settlement Tender Offer documents are attached as Exhibit D to the Stipulation.[69] The release also extends to the financing Schuff will draw down following Final Approval to fund certain aspects of the Settlement and Settlement Tender Offer. Under Delaware law, "policy and common sense considerations" support the principle that "defendants agree to a settlement in order to achieve finality in litigation. If implementing the settlement terms themselves gives rise to new claims, then . . . settlements requiring post-execution implementation would be impracticable." *See In re Medley Capital Corp. S'holders Litig.*, C.A. No. 2019-0100-KSJM, at 38 (Del. Ch. Nov. 19, 2019) (TRANSCRIPT). The Court has approved settlements that release claims related to actions that occur after the Court

[69] The only information expected to change in the Settlement Tender Offer documents are updates to certain categories of financial and dividend information that were not available when the Stipulation was filed but will become available before the offer to purchase for the Settlement Tender Offer is distributed. Exhibit D identifies the categories of information that will be updated.

approves the settlement where those actions are necessary to the implementation of the settlement. *See Marie Raymond Revocable Tr. v. MAT Five LLC*, 980 A.2d 388 (Del. Ch. 2008) (approving release covering revised tender offers that served as settlement consideration, where tender offers would not close until after Court approved settlement and offers to purchase for tender offers were attached as exhibits to settlement stipulation), *aff'd sub nom. Whitson v. Marie Raymond Revocable Tr.*, 976 A.2d 172 (Del. 2009); *Blank v. Belzberg*, 858 A.2d 336, 341–42 (Del. Ch. 2003) (approving release of disclosure claims related to Schedule 13e-3 that was not finalized or filed until after Court approved settlement, unless stockholders filed objections within 20 days of filing of Schedule 13e-3, "[b]ecause the Merger is a part of this Settlement").

Plaintiff respectfully submits that the release is appropriate under the circumstances. The Tender Offer occurred more than five years ago, and no one has sought to raise any claims not asserted in the Action. It is unlikely that any viable claims are being released, and possible future claims arising from a potential, subsequent cash-out merger are preserved under the Settlement. On balance, the substantial benefits conferred by the Settlement significantly outweigh what the Class must give up in the release.

B. The Strong Liability Claims And Potential Risks Regarding Damages

Because the Special Committee did not approve the Tender Offer, Plaintiff's

claims are subject to the entire fairness standard of review.[70] *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014). Defendants cannot meet that burden here.

1. Neither The Process Nor Price Were Fair

Defendant Yagoda, a member of the Special Committee, aided HC2's purchase of a majority interest in Schuff in May of 2014 with the understanding that HC2 intended to own 100% of the Company. According to HC2 insiders, Yagoda acted as a "point guard" for finding a buyer for Schuff and it was very clear to HC2 that Yagoda wanted financial compensation for "bringing [HC2] the company that was for sale."[71] In delivering HC2 a majority interest in Schuff, Yagoda had repeated conversations with representatives of HC2 about what role he would have with the Company and indicated that he "would like to get paid for helping them in terms of . . . management." Indeed, Yagoda testified that:

> I had a lot of conversations with them on different times in terms of, you know, I felt that they owed me and, you know, I wanted to know what kind of deal I was going to get going forward . . . .[72]

In a June 23, 2014 email to Falcone, Yagoda wrote: "You and I spoke about this two weeks ago. To reiterate, I would like an option package in HC2 for my work in

[70] The Special Committee provided no recommendation regarding the Tender Offer, and advised that it was "neutral" in the transaction. Rigrodsky Aff., ¶ 43.

[71] Rigrodsky Aff., 8, 19.

[72] Rigrodsky Aff., ¶ 21.

helping you acquire Shfk and a. Consulting [sic] contract over and above my board package at Schuff."[73]

Defendant Elbert, the other member of the Special Committee, was interested in obtaining a liquidity event so that he could completely exit Schuff as a director and a shareholder. Indeed, after HC2 acquired a majority interest in Schuff, Elbert sent an email to Schuff directors and officers indicating that he was resigning from the Board and requesting that the Board cause the Company to purchase his 13,000 shares of Schuff stock. The next day, however, Elbert rescinded his resignation in light of a phone call he received from HC2's Voigt, who presumably informed Elbert of the opportunity for liquidity in the contemplated tender offer.[74]

On August 13, 2014, two days after the Schuff Board received tender offer materials from HC2, Elbert sent an email to Yagoda that copied Falcone, stating:

> when you stated you thought HC2 might offer the same price per share as they paid Scott Schuff, that would greatly simplify our involvement, speed up the process and lower the cost. On that basis I can totally support the tender offer and it [sic] think it is definitely the right move.
>
> Think it would be a win win situation for all involved; shareholders, morale of Schuff employees and showing the "fairness" of HC2 with Schuff International - which could be important for future activities.[75]

[73] Ex. 1 at HC2H00030092.

[74] Rigrodsky Aff., ¶¶ 22-23.

[75] Rigrodsky Aff., ¶ 30.

In a reply to that email later that day, Falcone stated: "I guess that means 'no position' right now which is the preferred route." Replying only to Falcone, Elbert wrote: "Right 'no position.'"[76] True to his word, the Special Committee took no position with respect to the Tender Offer. Moreover, the Special Committee failed to negotiate with HC2 regarding the price offered in the Tender Offer, and never engaged outside financial advisor to assist in the review of the price being offered by HC2 in the proposed tender offer or to solicit interest from other third parties.

The foregoing shows that the Special Committee members, motivated by personal interests, completely acceded to defendant Falcone's "preferred route" to acquire Schuff. Far from engaging in an arms'-length process to protect the interests of the Company's minority stockholders, the Special Committee simply abdicated its responsibilities, seeking cover for its failings by expressing no opinion and avowing neutrality with respect to the Tender Offer.[77]

The Special Committee's purported neutrality was especially egregious because the Tender Offer price was based on the price HC2 paid to acquire Scott

[76] Rigrodsky Aff., ¶ 31.

[77] The flawed process also undermines the fairness of the price. *See ACP Master, Ltd. v. Sprint Corp.*, C.A. No. 8508-VCL, 9042-VCL, 2017 Del. Ch. LEXIS 125, *51-*52 (Del. Ch. July 21, 2017) ("Consistent with the unitary nature of the entire fairness test, the fair process and fair price aspects interact. . . . Factors such as . . . secret conflicts . . . could lead a court to hold that a transaction that fell within the range of fairness was nevertheless unfair compared to what faithful fiduciaries could have achieved.").

Schuff's Company stock from SAS Venture LLC. As defendant Yagoda was well aware, without engaging a financial advisor to perform any valuation analyses or appraisal of fair value, Scott Schuff and Yagoda simply picked a range of prices that reflected some premium to the market price of Schuff common stock.[78] Indeed, as later corroborated by a third party advisor to HC2 in March 2015 valuation analysis, Schuff common stock had an implied a per-share value of $68.99 as of December 31, 2014.[79]

The Company's minority stockholders were not informed of the communications between defendants Yagoda, Elbert and HC2 regarding the Tender Offer, or Yagoda's role in fixing the price of the SAS Venture LLC sale of 60% of Schuff's common stock to HC2. Therefore, they were not fully informed of material facts regarding the Tender Offer.

In addition, the September 5, 2014 Special Committee letter to the Company's minority stockholders warned that "[y]ou should be aware that if the Tender Offer is consummated, but the Merger is not, there will be fewer Shares available for sale and your ability to liquidate your Shares may be more restricted."[80] The plain intent

[78] Rigrodsky Aff., ¶ 16.

[79] Stipulation, ¶ S.

[80] Rigrodsky Aff., ¶ 46.

of that statement was to coerce the minority into tendering their shares out of fear that they would be left with illiquid stock.

Plaintiff believes that based on the foregoing, he could establish that Defendants cannot satisfy the requirements of *M&F Worldwide*, 88 A.3d at 644, and that Defendants could not establish the entire-fairness of the Tender Offer.

2. Potential Risks Regarding Damages

Even if Defendants bear the burden of establishing fair price, there is a risk that the Tender Offer price would be found to be fair. The Tender Offer price of $31.50 per share was the same price HC2 paid to SAS Venture LLC to purchase a 60% controlling interest in Schuff on May 12, 2014 and to Jefferies LLC on May 30, 2014 for 198,411 shares of Schuff common stock (approximately 5% of the Company's outstanding stock), only three months prior to the Tender Offer.[81]

In addition, in the year prior to HC2's acquisition of the 60% interest in Schuff from SAS Venture LLC, the Company's shares traded between a low of $11.50 and a high of $28.50. The Tender Offer price of $31.50 per share was a premium of $3.00 per share, more than 10%, over the stock's highest price in the prior year.[82]

Additionally, the E&Y valuation analysis was performed approximately three months after the transaction, when Schuff's LTM EBITDA had increased by

[81] Rigrodsky Aff., ¶ 25.

[82] Rigrodsky Aff., ¶ 87.

approximately 9%. Notably, the value potentially included synergies from the transaction. Without such synergies, the value may have been significantly lower.[83] Likewise, reliance on the DCF method bears risk. At trial, the Court could select a perpetuity growth rate below the 3.5% rate selected by Plaintiff's consultant, which would lower the indicated value. Further, the Court could select different inputs applied in the discount rate (*e.g.*, a higher beta) that would also lower the indicated value of Schuff common shares. Finally, the court could reject the normalizing adjustments made in the terminal period. For example, Plaintiff's consultant adjusted the working capital investment in the terminal period to levels more in-line with Schuff's historical working capital levels and industry benchmarks. Removal of this adjustments would result in a 6.4% decrease in the indicated value of Schuff shares.[84]

Furthermore, while Plaintiff's consultant relied on multiples from comparable companies or transactions, that also bears considerable risk. The Court has not put any explicit weight on either the Guideline Public Company method or the Precedent Transactions method in any appraisal matter involving a publicly-traded company in more than 13 years.[85]

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[83] Rigrodsky Aff., ¶ 88 n.8.

[84] Rigrodsky Aff., ¶ 91 n.9.

[85] Rigrodsky Aff., ¶ 93.

While Plaintiff is confident that he would have prevailed if establishing damages, there was a risk that the Court could have determined that the Tender Offer price was fair or below what Plaintiff believed to be a fair price. These risks strongly favor approval of the Settlement.

C. The Settlement Is The Product Of Protracted Arms'-Length Negotiations.

The arms'-length negotiations regarding the possible resolution of the Action began in December 2016. The parties agreed to a tentative framework for settlement of the Action on February 24, 2017. Based on evidence obtained during discovery, including the March 2017 depositions of defendants Yagoda, Roach and Hladek, however, Plaintiff notified Defendants that he had determined not to proceed with a settlement based on the prior framework reached by the Parties.[86]

Only after providing Defendants with a draft amended complaint in July 2017, did Plaintiff renew settlement negotiations with Defendants. Plaintiff continued to pursue discovery while those renewed discussions took place, including the depositions of defendants Falcone and Voight. On April 2, 2019, the Parties agreed in principle to a resolution of the Action, with Defendants agreeing to produce additional documents to Plaintiff.[87]

[86] Rigrodsky Aff., ¶¶ 76.

[87] Rigrodsky Aff., ¶ 77.

The hard-fought nature of the negotiations is exemplified by Plaintiff's withdrawal from the initial settlement framework reached in February 2017. The history of these negotiations clearly supports approval of the Settlement.

D. The Experience and Opinion of Plaintiffs' Counsel and Their Clients Favor Approving the Settlement

The opinion of experienced counsel is considered in determining a settlement's fairness. *See Polk*, 507 A.2d at 536 (the Court considers "the views of the parties involved" in determining "the overall reasonableness of the settlement"). Here, Plaintiff's counsel have extensive experience in Delaware transactional and corporate governance litigation.[88] Plaintiff and his counsel negotiated the Settlement, and they believe that it is fair and favorable to the Class.[89]

At the time the Settlement was reached, Plaintiff and his counsel had already completed discovery. Plaintiff was thus entirely familiar with the relative strengths and weaknesses of his claims and Defendants' potential defenses. In requesting that the Court approve the Settlement as fair, reasonable, and adequate, Plaintiff and his counsel have acted based on their extensive knowledge of the record and issues.

[88] *See* Exs. 23 and 24.

[89] Rigrodsky Aff., ¶¶ 86-96.

E. The Reaction of the Class Supports Approval of the Settlement

The reaction of the Class to the Settlement to date has been positive. On December 5, 2019, the Court approved the Settlement Notice. Beginning on or about December 20, 2019, the Settlement Notice were disseminated to the Class by Schuff.[90] The Settlement Notice advised Class members of their right to object to "the Stipulation, the Settlement, the class action determination, the Order and Final Judgment to be entered therein, and/or the Fee Application." The deadline to file objections is January 24, 2020. As of today's date, Plaintiff's counsel is not aware of any objections to the Settlement.[91] A positive reaction by the Class is a factor favoring its approval by the Court. *See Rome v. Archer*, 197 A.2d 49, 58 (Del. 1964).

[90] Rigrodsky Aff., ¶¶ 81-82. Between December 13 and 16, 2019, 1,042 Notices were sent to (i) record holders of Schuff during the Class Period, and (ii) brokers on a proprietary communications list maintained by Schuff's vendor. Since that time, 255 Notices have been sent to brokers to forward to beneficial holders. An additional 109 Notices have been sent directly to beneficial holders pursuant to broker request, and one broker was provided with an electronic version of the Notice to send to 153 beneficial owners that had requested email communications. Pursuant to the December 5, 2019 Scheduling Order, Schuff will cause to be filed an Affidavit of Mailing outlining the notice administration process on or before February 3, 2020. *Id*., ¶ 82 n.5.

[91] Rigrodsky Aff., ¶ 83.

II. THE CLASS SHOULD BE CERTIFIED

To approve a proposed settlement of a class action, the Court must first certify a class. *In re MCA, Inc. S'holder Litig.*, 785 A.2d 625, 636 (Del. 2001). Here, the proposed Class is a non-opt out class consisting of**:**

> any and all record and beneficial owners of outstanding shares of [Schuff] common stock who held such stock at any time during the Class Period, including, without limitation, any and all of their respective successors-in-interest, successors, predecessors-in-interest, predecessors, representatives, trustees, executors, administrators, estates, heirs, transferees, and assigns, immediate and remote, and any Person acting for or on behalf of, or claiming under, any of them, and each of them, together with their respective successors-in-interest, successors, predecessors-in-interest, predecessors, transferees, and assigns, but excluding the Excluded Persons."

Stipulation, ¶ 1(c). The Court conditionally certified this proposed Class for purposes of settlement only and pending the final Settlement Hearing, on February 13, 2020.[92]

A. Rule 23(a)

Court of Chancery Rule 23(a) provides four prerequisites to class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. If these prerequisites are met, the proposed class must satisfy at least one of the three alternative requirements of Rule 23(b). Here, each of the elements

[92] Trans. ID 64489579.

of Rule 23(a) is satisfied, and certification is proper under Rules 23(b)(1) and 23(b)(2).

1. The Class Is Sufficiently Numerous

Rule 23(a)(1) requires that a proposed Class be "so numerous that joinder of all members is impracticable." Ct. Ch. R. 23(a)(1). Impracticability does not mean impossibility, but only difficulty or inconvenience. *See Dubroff v. Wren Holdings, LLC*, C.A. No. 3940-VCN, 2010 Del. Ch. LEXIS 178, at *15 (Del. Ch. Aug. 20, 2010).

While the exact number of Class members is unknown to Plaintiff at this time, 721,124 shares of Schuff common stock were tendered in the Tender Offer and 289,902 shares of Schuff common stock are held by Non-Tendered Stockholders.[93] Plaintiff believes there are hundreds, if not thousands, of members in the Class. This Court has certified class actions in cases with far fewer class members than here. *See, e.g.*, *Leon N. Weiner & Assoc., Inc. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991). Accordingly, the Action satisfies the numerosity requirement of Rule 23(a)(1).

2. There Are Common Issues of Law and Fact

Rule 23(a)(2) requires that questions of law or fact be common to the class, but not identical. *Weiner*, 584 A.2d at 1225 (finding that commonality exists absent "significant factual diversity"). "The commonality requirement will be satisfied if

[93] Stipulation, ¶¶ M, 1(o).

the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). Claims involving a class of investors who are all affected similarly by the acts of directors provide a classic case for class certification. *See, e.g.*, *Nottingham P'rs v. Dana*, 564 A.2d 1089, 1089 (Del. 1989).

Here, all Class members were similarly injured by Defendants' breaches of fiduciary duties because, as a consequence of those breaches, they were denied a fair price for their shares through an unfair process. Therefore, because Plaintiff's claims arise out of the same nucleus of operative facts and are based on a common legal theory – breach of fiduciary duties in connection with the Tender Offer – the existence of common questions of fact and law cannot be doubted. The resolution of the Action for all proposed Class members rests upon the answers to the following common factual and/or legal questions, among others: (a) whether Defendants can meet their burden of demonstrating the Buyout was entirely fair to the Class; (b) whether the Individual Defendants breached their fiduciary duties of undivided loyalty or due care with respect to the Class in connection with the Buyout; (c) whether controlling stockholder HC2 breached its fiduciary duties of loyalty and care owed to the Class in connection with the Buyout; and whether the Class was damaged and/or is still being damaged by the Buyout.

The primary objective of both plaintiff and the Class is the favorable resolution of these and other common questions. Thus, "the Complaint alleges breaches of fiduciary duty that implicate the interests of all members of the proposed class of shareholders. [Consequently], there are questions of law and fact common to the class." *In re Lawson Software Inc. S'holder Litig.*, Consol. C.A. No. 6443-VCN, 2011 Del. Ch. LEXIS 81, at *5 (Del. Ch. May 27, 2011) (quotation omitted). Accordingly, the Action satisfies the requirements of Rule 23(a)(2).

3. Typicality

Rule 23(a)(3) requires that the claims of the representative party be typical of the claims of the class he seeks to represent. The threshold for satisfying the "typicality" requirement is not high. Typicality is satisfied where the named representative's injuries arise from the same event or course of conduct giving rise to claims of other class members, and his claims are based on the same legal theory as those of the class. *Weiner*, 584 A.2d at 1225 ("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.") (citation omitted).

Plaintiff is a current Schuff stockholder who held shares at the time of the Tender Offer. Plaintiff did not tender any shares in the Tender Offer and therefore is a Non-Tendered Stockholder. No Tendered Stockholders have challenged the Tender Offer or sought to intervene in the Action.

The Court has taken a "pragmatic approach" to the settlement of lawsuits where one lead plaintiff represents a proposed settlement class that includes stockholders who tendered their shares in the challenged tender offer and stockholders who did not. *See In re GFI Grp. Inc. S'holder Litig.*, C.A. No. 10136-VCL, at 120–22 (Del. Ch. Feb. 26, 2016) (TRANSCRIPT) (permitting tendering stockholder to represent class that included non-tendering stockholders based on "pragmatic approach" in settlement context). In these circumstances, the Court will approve a settlement that is fair to both tendering and non-tendering stockholders. *See Blank*, 858 A.2d at 340−41 (permitting non-tendering stockholder to serve as class representative for settlement class that included tendering stockholders because settlement terms were fair to both groups of stockholders).

Plaintiff's claims, like those of other Class members, arise out of the same course of misconduct by Defendants – their role in connection with the unfair Buyout and failing to ensure that it was entirely fair as to price and process. All their claims are based on the same legal theory – harm sustained as a result of Defendants' breaches of fiduciary duties in connection with the Buyout. *See N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, C.A. No. 5334-VCN, 2013 Del. Ch. LEXIS 43, at *12 (Del. Ch. Feb. 13, 2013).

Accordingly, Plaintiff and the Class suffered a common injury. Moreover, Plaintiff's claims are typical of the Class because they will "not require substantially

more or less proof than would be required by the claims of other members of the class." *Singer v. The Magnavox Co.*, C.A. No. 4929, 1978 Del. Ch. LEXIS 566, at *4 (Del. Ch. Dec. 14, 1978) (citation omitted).

Furthermore, no conflict exists between Plaintiff and the Class. Nothing in the nature of the injuries alleged by Plaintiff could conceivably set him at odds with any other Class members

4. Adequate Representation

Rule 23(a)(4) requires that representative parties will fairly and adequately protect the interests of the class. In order to satisfy Rule 23(a)(4), "a representative plaintiff must not hold interests antagonistic to the class, retain competent and experienced counsel to act on behalf of the class and, finally, possess a basic familiarity with the facts and issues involved in the lawsuit." *Oliver v. Boston Univ.*, C.A. No. 16570-NC, 2002 Del. Ch. LEXIS 21, at *26 (Del. Ch. Feb. 28, 2002) (quoting *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 127 (Del. Ch. 1999)).

Plaintiff is a member of the Class he seeks to represent. As such, Plaintiff "possess[es] the same interest and suffer[s] the same injury as the class members." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395 (1977)). As a stockholder at the time of the Tender Offer, Plaintiff's economic interests do not conflict with the interests

of the Class. *See Shingala v. Becor Western, Inc.*, C.A. Nos. 8858, 8859, 1988 Del. Ch. LEXIS 14 (Del. Ch. Feb. 3, 1988). In pursuing and establishing his own claims, Plaintiff necessarily protected and promoted the interests of the other Class members.

Furthermore, Plaintiff is represented by experienced practitioners in class action litigation who are well known to the Court, and whose accomplishments are summarized below. *See* firm résumés of Rigrodsky & Long and Levi & Korsinsky, attached hereto as Ex. 22 and Ex. 23, respectively. As previously described, Plaintiff's counsel have demonstrated their commitment to this case and their skill in prosecuting the claims on behalf of Plaintiff and the Class by pursuing the Action for more than five years and achieving a resolution that more than doubles the consideration paid in the Tender Offer. Accordingly, Plaintiff and his counsel have and will continue fairly and adequately protect the interests of the Class.

B. Rules 23(b)(1) and (b)(2)

Once the Court finds that the provisions of Rule 23(a) are satisfied, it must evaluate whether the action properly fits within the framework provided in subsection (b). *Nottingham Partners*, 564 A.2d at 1095. As discussed in more detail below, "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)." *In re Cox Radio, Inc. S'holders Litig.*,

C.A. No. 4461-VCP, 2010 Del. Ch. LEXIS 102, at *28 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010) (TABLE).

1. The Action Is Properly Certified Under Rule 23(b)(1)

This is a typical case where certification is appropriate under Rule 23(b)(1)(A) and (B). Defendants are alleged to have breached their fiduciary duties to all of the stockholders in the Class in connection with the Buyout, and any monetary remedy will be calculated on a per share basis. *Turner v. Bernstein*, 768 A.2d 24, 35 (Del. Ch. 2000). "Rule 23(b)(1) clearly embraces cases in which the party is obligated by law to treat the class members alike . . ., including claims seeking money damages." *Id*. at 32 (citation omitted). Here, Rules 23(b)(1)(A) and (B) are satisfied because if separate actions were commenced by members of the Class, Defendants would be subject to the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct and would, as a practical matter, be dispositive of the interests of other Class members. Thus, Rule 23(b)(1) certification is appropriate because multiple lawsuits could follow if certification were denied, which would be prejudicial to non-parties and inefficient. *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1095 (Del. Ch. 2001).

2. The Action Is Properly Certified Under Rule 23(b)(2)

Court of Chancery Rule 23(b)(2) provides for certification when "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the

class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]" Ch. Ct. R. 23(b)(2). Where, as here, the action involves breach of duty by corporate fiduciaries and the particular facts of any shareholder would have no bearing on the appropriate remedy, Rule 23(b)(2) certification is appropriate. *See Hynson v. Drummond Coal Co.*, 601 A.2d 570, 575-77 (Del. Ch. 1991).

Rule 23(b)(2) is satisfied in this case because, in undertaking the Buyout, Defendants engaged in a course of conduct that affected all members of the Class, and the damages flowing from those violations of fiduciary duties are owed equally to all Class members and are appropriate with respect to the entire Class. *See In re Celera Corp. S'holder Litig.*, C.A. No. 6304-VCP, 2012 Del. Ch. LEXIS 66, at *69 (Del. Ch. Mar. 23, 2012), *aff'd in relevant part*, 59 A.3d 418, 432-33 (Del. 2012).

III. PLAINTIFF'S PROPOSED PLAN OF ALLOCATION SHOULD BE APPROVED

In connection with Plaintiff's request for approval of the Settlement, Plaintiff respectfully requests that the Court approve the proposed plan by which the proceeds of the Settlement will be allocated among Class members. The Supreme Court of Delaware has held that "[a]n allocation plan must be fair, reasonable, and adequate." *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009). However, a plan of allocation "does not need to compensate Class members equally to be acceptable." *Id.*

As set forth in the Stipulation and Settlement Notice, the proposed plan of allocation for the Settlement Payment is summarized as follows:

> (a) [Schuff] shall pay the Net Tender Payment to the Tendered Stockholders within ten (10) business days of Final Approval, using cash from the DBMG Financing and the Insurers.[94]
>
> (b) Within thirty (30) calendar days of Final Approval, [Schuff] shall commence a tender offer at a price equal to the Net Settlement Tender Offer Payment for all of the Non-Tendered Stockholders Shares. Non-Tendered Stockholders may participate in the Settlement Tender Offer, or not, at their election. However, Plaintiff shall tender all of his shares of [Schuff] common stock in the Settlement Tender Offer. Once [Schuff] has commenced the Settlement Tender Offer, [Schuff] will not extend the Settlement Tender Offer if each of the conditions set forth in the "Conditions of the Offer" section of the Settlement Tender Offer Disclosures has been satisfied as of immediately prior to the expiration of the Settlement Tender Offer. If one or more of the conditions set forth in such section is not satisfied as of such time, [Schuff] reserves the right, in its sole discretion, to extend the period of time during which the Settlement Tender Offer remains open or to terminate the Settlement Tender Offer, as provided in the Settlement Tender Offer Disclosures. Within seven (7) calendar days of the close of the Settlement Tender Offer, [Schuff] shall pay the Net Settlement Tender Offer Payment to participating Non-Tendered Stockholders.
>
> (c) Any Class Member shall be treated as (i) a Tendered Stockholder with respect to the Tendered Stockholders Shares attributable to such Class Member, and (ii) a Non-Tendered Stockholder with respect to the Non-Tendered Stockholders Shares attributable to such Class Member.

See Stipulation, ¶ 2.

In determining whether a proposed plan of allocation is fair, reasonable, and

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[94] "'Net Tender Payment'" means $35.95 for each of the Tendered Stockholders Shares, less the per share amount of the Fee and Expense Award allocated to the Tendered Stockholders. Stipulation, ¶ 1(m).

adequate, courts have given weight to the opinion of class counsel. *See, e.g., CME Grp., Inc. v. Chi. Bd. Options Exch., Inc.*, C.A. No. 2369-VCN, 2009 Del. Ch. LEXIS 109, at *44 (Del. Ch. June 3, 2009) ("Class counsel, in the Court's judgment, came to a fair and reasonable balancing of the various interests of all class members."). Here, counsel considered various factors in reaching their plan for the distribution of the Settlement proceeds, including the nature of the claims made, the size of the recovery, and the number of potential claimants. The Tendered and Non-Tendered Stockholders have the opportunity to receive the same settlement consideration, an aggregate $67.45 per share, based on the value of their shares at the time of the Tender Offer. The Non-Tendered Stockholders, however, need not tender their Schuff stock if they do not wish to participate in the Settlement. Moreover, the Settlement neither impacts any appraisal claims the Non-Tendered Stockholders might have in any subsequent qualifying transaction, nor releases any claims not related to the Buyout or this Settlement.

Based on these factors, Plaintiff's counsel concluded that the proposed plan of allocation was fair and reasonable under the circumstances. Accordingly, Plaintiff respectfully requests that the Court approve the proposed plan of allocation.

IV. THE REQUESTED FEE AWARD IS FAIR AND SHOULD BE APPROVED

This Court awards attorneys' fees and expenses to counsel whose efforts have created a common fund. *See Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1255

(Del. 2012). In determining an appropriate award of attorneys' fees and expenses, Delaware courts look to the "*Sugarland*" factors, which are: "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." *Id*. at 1254 (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980)).

A. Plaintiff's Counsel Achieved An Unprecedented Benefit For The Class

Among the *Sugarland* factors, "Delaware courts have assigned the greatest weight to the benefit achieved in litigation." *Ams. Mining*, 51 A.3d at 1254 (citing *Sugarland*, 420 A.2d at 149).

Here, the Settlement – which provides for a 114% premium to the Tender Offer price – is believed to be ***the largest premium*** ever achieved in a merger class action.[95] Plaintiff's counsel respectfully submit that they should be compensated with a fee award that reasonably reflects this outstanding Class benefit.[96]

The fee request of $5,620,886.76, representing 27.5% of the Tendered Stockholder Payment before expenses, comports with the fees recently awarded in *In re Handy & Harman, Ltd. S'holders Litig*., Consol. C.A. No. 2017-0882-TMR

[95] As noted above, the second highest premium to price found by Plaintiff's counsel is the 45% increase in consideration achieved in *Chaparral Resources*.

[96] Additionally, Counsel should be awarded $9.89 (27.5% of the incremental $35.95 per share by which the Settlement Tender Offer price exceeds the 2014 Tender Offer price) for each share tendered in the Settlement Tender Offer.

(Del. Ch. Nov. 14, 2019). In *Handy & Harman*, the Court awarded attorneys' fees of 25% plus out-of-pocket expenses at an early stage in the litigation where the settlement provided a premium of 33% over the tender offer price. Here, Plaintiff's counsel seek an award of fees that is only 2.5% higher for achieving a premium that is more than three times greater on a percentage basis.

Likewise, the fee request is consistent with the attorneys' fees of 27.5% awarded in *Cornerstone Therapeutics*, which provided a premium of approximately 25%, where class counsel had taken four depositions; engaged in some motion practice; and briefed an (unsuccessful) interlocutory appeal.[97] Indeed, "[t]his court has often approved fee requests of 30% or more of the benefits where," as here, "the settlement benefits are attributable solely to the litigation." *Marie Raymond Revocable Tr. v. MAT Five LLC*, 980 A.2d 388, 410 & n.71 (Del. Ch. 2008) (collecting cases), *aff'd sub nom. Whitson v. Marie Raymond Revocable Tr.*, 976 A.2d 172 (Del. 2009).

In light of the outstanding – and unprecedented – result achieved here, the requested award of attorneys' fees of 27.5% of the benefit achieved is clearly reasonable.

[97] Ex. 32 (transcript of the January 26, 2017 Hearing in *In re Cornerstone Therapeutics, Inc. S'holder Litig.*, No. 8922-VCG (Del. Ch)).

B. The Contingency Risks Faced By Plaintiff's Counsel Support The Requested Fee

The contingent nature of the representation is the "second most important factor considered by this Court" in awarding attorneys' fees." *Dow Jones & Co. v. Shields*, No. 184, 1992 WL 44907, at *2 (Del. Ch. Mar. 4, 1992). Counsel are "entitled to a much larger fee" where, as here, "the compensation is contingent[.]" *Ryan v. Gifford*, C.A. No. 2213-CC, 2009 Del. Ch. LEXIS 1, at *40 (Del. Ch. Jan. 2, 2009). "It is consistent with the public policy of Delaware to reward risk-taking in the interests of shareholders." *In re Plains Res. Inc. S'holders Litig*., C.A. No. 071-N, 2005 Del. Ch. LEXIS 12 at *22 (Del. Ch. Feb. 4, 2005). Here, Plaintiff's counsel litigated this case on an entirely contingent basis. While Plaintiff is confident that he would have ultimately prevailed in demonstrating an unfair process and unfair price, there was a risk that the Court could have determined that the Tender Offer price was fair, leaving Class Members with no damages. *See* Section II.B.2, *supra*.

Moreover, Plaintiff's counsel could not have known the full extent of the strengths of the case when originally undertaking the representation. Merger-related class actions rarely present the opportunity for any monetary recovery, let alone one on this scale, and often are lost upon early motions. In fact, one national study on the disposition and settlement of merger litigation, conducted by Cornerstone Research, concluded that of 78 merger-related class actions settled in the United States in 2014 (the year in which the instant matter was filed), only six obtained a

monetary recovery for stockholders.[98] This demonstrates that less than eight percent of all shareholder litigation leads to monetary consideration. Thus, it is clear that Plaintiff's counsel undertook enormous contingency risk in taking on this case, and should be compensated accordingly.

C. The Complexity Of Issues Support The Requested Fee Award

Another of "the secondary *Sugarland* factors is the complexity of the litigation. All else being equal, litigation that is challenging and complex supports a higher fee award." *In re Activision Blizzard*, 124 A.3d 1025, 1072 (Del. Ch. 2015). This factor also supports the fee request. Developing the record and preparing this case for trial required, in addition to expertise in applicable Delaware case law, a significant amount of research into a novel issue – a tender offer in which the majority stockholder reneged on its obligation to conduct a second step short form merger. Plaintiff argued throughout the litigation and through the course of the lengthy settlement negotiations that the 2014 Tender Offer and the anticipated short-form merger to complete the Buyout formed a "unitary transaction." In so doing, Plaintiff relied upon representations HC2 made in connection with the 2014 Tender Offer in which Defendants had committed to squeeze out any remaining stockholders in a second-step short form merger for the same Merger Consideration.[99] Plaintiff asserts

[98] Ex. 36 (Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies, Review of 2014 M&A Litigation* at 4-5).

[99] CAC, ¶¶ 100, 105-108.

that HC2's only reason for refusing to complete the second-step merger was to attempt to thwart the successful prosecution of this Action and the attendant substantial personal liability that each of the Defendants faced as a result of the Action. Defendants would doubtlessly have argued to the contrary. This wrinkle added a unique dimension of complexity to the litigation.

This case also involved numerous complex issues of Delaware corporate law and valuation theory, including issues arising from the Special Committee's lack of any recommendation upon the Tender Offer, the illiquidity of the public market for Schuff's stock, a dearth of reliable financial projections, the background transactions between HC2 and purportedly sophisticated sellers in which HC2 purchased Schuff stock for prices in the low $30 range, and the dramatic gap between the Buyout price and the theoretical value of Schuff at the time of the Buyout. All of these issues raised tremendous complexity that required substantial time, effort and expertise to address.

D. The Standing Of Counsel Supports The Requested Fee

The "standing and ability of counsel involved" also favors granting the requested fee. *See Ams. Mining*, 51 A.3d at 1254. "Law firms establish a track record over time, and they 'build (and sometimes burn) reputational capital.'" *In re Del Monte Foods Co. S'holders Litig.*, Consol. C.A. No. 6027-VCL, 2010 Del. Ch. LEXIS 255, at *27 (Del. Ch. Dec. 31, 2010) (quoting *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 956 (Del. Ch. 2010)). Plaintiff's counsel are nationally recognized firms

that have a track record of obtaining outstanding results for stockholder plaintiffs in merger-related litigation in this Court and elsewhere.[100] Further, Plaintiff's counsel in this action demonstrated that they were prepared and willing to litigate this case as long as necessary to extract its full value, which gave them the credibility necessary to achieve this unprecedented result. This standing supports the requested Fee Award.

E. The Time And Effort Expended By Plaintiff's Counsel Serves As A Cross Check And Supports The Requested Fee

"The time and effort expended by counsel serves [as] a cross-check on the reasonableness of a fee award. This factor has two separate but related components: (i) time and (ii) effort." *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1138 (Del. Ch. 2011) (citation omitted). "'More important than hours is 'effort, as in what Plaintiffs' counsel actually did.'" *Del Monte*, 2010 Del. Ch. LEXIS 255, at *38 (citing *Sauer-Danfoss*, 65 A.3d at 1139).

Here, Plaintiff's counsel expended 3,370.50 hours on this litigation from

[100] *See, e.g.*, *In re CNX Gas Corporation Shareholders Litigation*, Consol. C.A. No. 5377-VCL (Del. Ch.) ($42.7 million common fund settlement); *In re Sauer-Danfoss Stockholder Litig.*, C.A. No. 8396 (Del. Ch.) ($10 million settlement); *In re Bluegreen Corp. Shareholder Litigation*, Case No. 502011CA018111 (Cir. Ct. for Palm Beach Cnty., Fla.) ($36.5 million common fund settlement); *In re Yongye International, Inc. Shareholders' Litigation*, Consolidated Case No.: A-12-670468-B (District Court, Clark County, Nevada) ($6 million common fund settlement); *In re Metrologic Instruments, Inc. S'holders Litig.*, Dkt. No. L-6430-06 (N.J. Super. Ct.) ($21.7 million aggregate common fund settlement); *Dannis v. Nichols*, Case No. 13-CI-00452 (Ky. Cir. Ct.) ($7.4 million common fund settlement); *Minerva Group LP v. Keane*, Index No. 800621/2013 (Sup. Ct., N.Y. County) ($2.4 million common fund settlement).

inception through January 14, 2020. In expending this time, Plaintiff's counsel conducted substantial pre-filing investigation, prepared an excellent initial complaint, fought a contested leadership motion, pursued extensive discovery, took five depositions, reviewed over 114,000 pages of documents, prepared several motions (including a motion for class certification, a motion to compel discovery, and a motion for leave to amend), prepared a comprehensive amended complaint, negotiated with Defendants for – literally – years, and finally managed to craft and negotiate a settlement structure that would be suitable to the unique circumstances of this Action.

Given this large expenditure of time, the requested award reflects an implied blended hourly rate of $1,677.00 per hour – generous but reasonable compensation under the circumstances, including the contingency risk faced, the length of litigation, and the unprecedented result achieved. Indeed, the implied blended rate in a recent fee awards in this Court make this request appear modest by comparison. *See, e.g.*, *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2019 Del. Ch. LEXIS 250, at *19 (Del. Ch. July 8, 2019) ($11,262.26 per hour); Exs. 35-36 (Plaintiff's Brief in *City of Monroe Employees Ret. Sys. V. Murdoch*, C.A. No. 2017-0833-AGB (Del. Ch. Jan. 19, 2018) at 65 ($4,015.96 per hour) and Final Order, dated February 9, 2018, approving award of attorneys' fees); *see also* Ex. 37 (Plaintiff's Brief in *In re Handy & Harmon, Ltd. Stockholders Litig*., Consol. C.A. No. 2017-0882-TMR

(Del. Ch. Oct. 23, 2019) at 40 (requesting $2,263.52 per hour) and Ex. 33 (transcript of November 14, 2019 Hearing in *Handy & Harmon*) at 55 (awarding fees amounting to approximately $2,133.00 per hour).

F. The Requested Expense Reimbursement Is Reasonable And Should Be Granted

Where, as here, counsel litigate for years and obtain a large common-fund recovery, the Court will typically calculate the fee as a percentage of the gross common fund, and award expenses separately. *See, e.g.*, *Handy & Harmon*, Consol. C.A. No. 2017-0882-TMR (Del. Ch. Nov. 14, 2019) (Ex. 33 at 55) (awarding 25% of the recovery in fees plus out-of-pocket expenses of $280,239.08); *Ryan*, 2009 Del. Ch. LEXIS 1 at *12, *44 (awarding one-third of the monetary portion of the settlement in fees plus $398,100.79 in expenses); *In re TD Banknorth S'holders Litig*., Consol. C.A. No. 2557-VCL, 2009 Del. Ch. LEXIS 347, at *8 (Del.Ch. June 24, 2009) (approving fees of 27.5% of the gross common fund, plus expenses of $964,086.61).

Here, Plaintiff's counsel expended $145,586.77. These expenses were primarily associated with expert fees, e-discovery document management fees, process servers, court-reporting services and other third-party service providers whose efforts were necessary to the litigation. *See* Affidavit of Seth D. Rigrodsky, Esquire on Behalf of Rigrodsky & Long, P.A. in Support of Plaintiff's Application for an Award of Attorneys' Fees and Reimbursement of Expenses, ¶¶ 4-5; Affidavit

of Donald J. Enright, Esquire on Behalf of Levi & Korsinsky, LLP in Support of Plaintiff's Application for an Award of Attorneys' Fees and Reimbursement of Expenses, ¶¶ 4-5. Plaintiff's counsel advanced these considerable expenses and carried them for several years. Accordingly, reimbursement of these expenses should be granted.

V. THE COURT SHOULD GRANT A REASONABLE INCENTIVE AWARD TO PLAINTIFF

Plaintiff also requests an incentive award in the amount of $25,000 (which counsel for Plaintiff will pay from any funds the Court awards to them) to compensate him for his time, effort and expertise applied in achieving the unprecedented outcome in this litigation. In evaluating such a request, the Court must consider the factors enumerated in *Raider v. Sunderland*, C.A. No. 19357 NC, 2006 Del. Ch. LEXIS 4, at *4 (Del. Ch. Jan. 4, 2006), including the "time, effort and expertise expended by the class representative, and a significant benefit to the class." *Id*. at *8; *see Isaacson v. Niedermayer*, 200 A.3d 1205, 1205 n.1 (Del. 2018).

Plaintiff's background and efforts in this litigation support the grant of the requested award. Plaintiff has a background in finance, and worked in the financial industry for over 40 years, earning annual compensation as high as approximately $700,000 per year. He identified the case and initiated the retention of counsel. *See* Affidavit of Mark Jacobs, dated January 9, 2020 ("Jacobs Aff.), ¶ 4. Plaintiff provided counsel with relevant documents and worked with counsel to develop the

allegations in the complaint. *Id.*, ¶ 5. Throughout the litigation, Plaintiff was actively involved. *Id.*, ¶¶ 4-5, 7. He reviewed all of the pleadings and motions, including multiple drafts of the amended complaint, spoke with counsel regularly regarding updates, produced voluminous documents, sat for a lengthy deposition, and actively consulted with counsel on a frequent basis throughout the pendency of the case and ultimately agreed to the Settlement. *Id.*, ¶ 8. In doing so, Plaintiff expended at least 130 hours of his time amounting to $192.00 an hour – a rate far less than what he formerly earned as a Vice President with Vreeland Asset Management. *Id.*, ¶ 3. Given these facts, the requested fee of $25,000 is well in line with other precedents of this Court and should be approved. *See Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, C.A. No. 1091-VCL, 2012 Del. Ch. LEXIS 98, at *22 (Del. Ch. May 9, 2012) (awarding $20,000 to a class representative who "traveled to New Jersey to meet with counsel and to Wilmington to be deposed."); *In re Saba Software, Inc. S'holder Litig*., C.A. No. 10697-VCS, 2018 Del. Ch. LEXIS 702, at *13-*14 (Del. Ch. Sep. 26, 2018) ($100,000 award to lead plaintiff); *Doppelt v. Windstream Hldgs., Inc*., C.A. No. 10629-VCN, 2018 WL 3069771, at *3 (Del. Ch. June 20, 2018) (awards of $15,000 and $7,500 to lead plaintiffs); *In re Physicians Formula Hldgs., Inc*., Consol. C.A. No. 7794-VCL, 2017 Del. Ch. LEXIS 746, at *13 (Del. Ch. Jan. 20, 2017) ($25,000 award to one lead plaintiff; $5,000 to the other).

CONCLUSION

For the reasons and upon the authorities set forth above, Plaintiff respectfully request that the Court: (i) approve the Settlement as fair, reasonable, and adequate; (ii) certify the Class pursuant to Rules 23(b)(1) and (b)(2); and (iii) approve the proposed plan of allocation.

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