IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

PLAINTIFF'S REPLY TO OBJECTORS AB VALUE PARTNERS, L.P. AND FAIR VALUE INVESTMENTS INC.

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PRELIMINARY STATEMENT

Plaintiff[1] respectfully submits this Reply to the objections filed by AB Value Partners, L.P. ("ABV") and Fair Value Investments Inc. ("FVI," together with ABV, the "Objectors") to the Settlement (the "Objections").[2]

From the litigation's outset, Plaintiff contended that the Buyout was a unitary transaction under well-established Delaware law with all shareholders of the Company suffering the same injury-in-fact and damages. Accordingly, Plaintiff litigated this case to achieve the same result for both Tendered and Non-Tendered Stockholders – the fair value of Schuff stock at the close of the Tender Offer. The Settlement achieves just that.

The Settlement provides the Tendered Stockholders with an additional $35.95 per share, representing a remarkable and unprecedented 114% percent price bump from the original Tender Offer price of $31.50. The Settlement similarly provides the Non-Tendered Stockholders with the opportunity to be treated on identical

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[1] Unless otherwise noted, capitalized terms have the same meaning as in Plaintiff's Brief in Support of Final Approval of the Settlement and Application for an Award of Attorneys' Fees and Reimbursement of Expenses ("FAB") filed on January 14, 2020.

[2] It is clear that FVI holds only 20 shares of Schuff stock, purchased at an unknown time and price. *See* FVI Notice of Intention to Appear and Exhibit A thereto. What is unexplained is the business/personal relationships and any potential conflicts existing between the shareholders who purportedly "support" FVI's objection and FVI, and FVI's spokesperson, Gary Lutin.

economic terms with the Tendered Stockholders by allowing them to tender their shares at $67.45, well above any market price Schuff ever achieved ***in its entire history, before or after the Tender Offer***. The Settlement also provides the Non-Tendered Stockholders with full disclosure concerning the current value of their Schuff shares, so they can make an informed decision whether to tender if the Settlement is approved. Indeed, as discussed below, it is this very information that the Objectors cite as the basis for their purported decision to retain their shares. Thus, the Settlement provides substantial value to the Non-Tendered Stockholders even if they decline to participate in the Settlement Tender Offer.

The Objections rely upon two primary premises that are demonstrably false and inconsistent with Delaware law. First, they argue that the Settlement is an impermissible wealth transfer, because Schuff is paying for it. In fact, approximately 97% of the Settlement paid to the Tendered Stockholders will be borne by Schuff's insurance carriers and, indirectly, HC2, the Company's majority stockholder. Moreover, Schuff is obligated to indemnify and pay the legal defense costs of the Individual Defendants and any judgment entered against them. Accordingly, the Settlement does not improperly fund the Tendered Stockholder Settlement payments at the expense of the Non-Tendered Stockholders.

Second, the Objectors contend that the Settlement release is overbroad and surrenders valuable claims held by the Non-Tendered Stockholders. The release, however, is appropriately limited to claims relating to the Buyout and to the Settlement itself, including its financing. Moreover, Objectors – who have not asserted any additional claim against Defendants in the more than five years since the close of the Tender Offer – fail to identify any viable Non-Tendered Stockholder claim that will actually be released in the Settlement. To the extent that Objectors complain about the Settlement's failure to account for the *present value* of their Schuff stock, such relief is beyond the scope of the claims that Plaintiff did, or could, assert, and, more significantly, is easily remedied by retention of their Schuff stock. The Settlement does not affect appraisal rights or any other claim that might arise from subsequent misconduct or a transaction, such as a short-form merger, that could later affect the Non-Tendered Stockholders who do not participate in the Settlement Tender Offer. In fact, such potential claims are specifically carved out of the release. Therefore, Non-Tendered Stockholders who retain their shares are not prejudiced by the release.

In short, the Settlement achieves an excellent result representing the best outcome for all stockholders had the case actually gone to trial and Plaintiff prevailed. The Objectors, like all Non-Tendered Stockholders, are free to participate in the Settlement and receive the same aggregate consideration as the Tendered Stockholders, or to retain their shares. That decision, informed by previously undisclosed, material information, may be made free of any coercive effect. Accordingly, the Objections should be overruled and the Settlement approved.

ARGUMENT

I. STANDARDS OF LAW

The voluntary settlement of contested claims has long been favored under Delaware law. *See Kahn v. Sullivan*, 594 A.2d 48 (Del. 1991). Of particular importance is "the balance of strength of the claims being compromised against the benefits secured for the class by the settlement." *Blank v. Belzberg*, 858 A.2d 336, 340 (Del. Ch. 2003). Here, the benefit secured for the Class, a recovery of 114% over the Tender Offer price, represents a near-complete recovery for the Class that plainly outweighs the Objectors' vague assertion that they will surrender some unidentified claim in the Settlement.

II. THE SETTLEMENT IS THE PRODUCT OF THOROUGH LITIGATION, DISCOVERY, AND NEGOTIATIONS

Over five years of litigation went into reaching the Settlement. Nevertheless, the Objectors snipe at Plaintiff's counsel's efforts and claim that discovery was "confirmatory." Objectors claim that they would do better but fail to say how. Tellingly, they ignore the massive factual record and the extensive, incriminating facts Plaintiff uncovered, which are set forth in his Amended Complaint and discussed in detail in the Fact Affidavit previously filed in support of the Settlement.[3] Those facts provided the leverage Plaintiff needed to achieve this exceptional result. Defendants, represented by four sets of experienced and aggressive counsel, did not agree to this Settlement out of the goodness of their hearts, but rather because they recognized the strength of the evidentiary record Plaintiff had developed. Thus, the record demonstrates that all discovery was adversarial, merits discovery conducted in anticipation of trial.

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Funding of the Settlement is Appropriate

As part of the Settlement negotiations, the parties explored the source of the Settlement Payment, and concluded that the Settlement-funding structure was the only workable approach due to specific contractual constraints on HC2. Contrary to Objectors' overheated rhetoric, the cost of almost all of the Settlement Payment to the Tendered Stockholders – roughly 97% – is being borne by insurance and, indirectly, HC2. It is Plaintiff's understanding that the directors' and officers' insurance, obtained and paid for solely by HC2, will pay the majority of the Settlement Payment to the Tendered Stockholders.

Since HC2 owns approximately 92.5% of Schuff, it will ultimately absorb 92.5% of the Settlement Payment in excess of the amount paid by the insurers. Thus,

[3] Rigrodsky Aff., ¶¶ 6-55.

the Non-Tendered Stockholders are only affected by 7.5% of the minority portion of the Settlement Payment not covered by insurance. The per share impact on the Non-Tendered Stockholders is thus *de minimis* and does not undermine the fairness of the Settlement to the Non-Tendered Stockholders.

With respect to the balance, Objectors ignore that, pursuant to its corporate charter, Schuff has indemnification and defense-cost advancement obligations to the Individual Defendants.[4] The Settlement will foreclose Schuff's obligation to make advancement or indemnification payments of potentially enormous litigation expenses and judgments on behalf of the multiple defendants who are represented by four separate law firms. These expenses could easily amount to many millions of dollars. Therefore, the funding of the Settlement is entirely appropriate.

The case law cited by ABV to support the assertion that this Court rejects

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[4] Article Nine, Section A of the Company's Certificate of Incorporation ("COI") specifically states, "the Corporation shall to the fullest extent authorized by Delaware General Corporation Law . . . indemnify and hold harmless any person who was or is a party. . . in any threatened, pending or completed action, suit or proceeding . . . by reason of the fact that such person is or was a director or officer of the Corporation . . . ." Moreover, Schuff owes advancement obligations to these same defendants in connection with their legal defense. Specifically, Article Nine, Section B of the COI explicitly states that the "right to indemnification conferred in this section shall include the right to be paid by the Corporation and the expenses (including attorneys' fees) incurred in defending any such proceeding in advance of its final disposition." *See* Transmittal Affidavit of Donald J. Enright, Esquire ("Enright Aff."), Ex. 1.

settlements where class members carry the financial burden of the settlement ***actually supports approval here***. In *Gatz v. Ponsoldt*, 2009 WL 1743760 (Del. Ch. June 12, 2009), the Court approved a settlement where 7% to 27% of the settlement cost would be borne by the class members due to an indemnification agreement. *Id*. Here, the Non-Tendered Stockholders will bear much less than 7% of the Settlement Payment.

The nominal impact of the Settlement Payment on the Non-Tendered Stockholders, therefore, does not negate the fairness, reasonability, and adequacy of this outstanding result. *See id.* at *4 (approving a settlement wherein "as much as 93%, and not less than 73% of the proposed settlement payment will be borne by non-class members"); *Schultz v. Ginsburg*, 965 A.2d 661, 665 (Del. 2009) (affirming approval of a settlement where company paid into settlement fund rather than the board).

B. The Settlement Provides the Opportunity for Equal Consideration to the Class

Plaintiff's claims hinged on the contention that the Tender Offer and the never-consummated short-form merger comprised a unitary Buyout transaction. *See Rosen v. Juniper Petrol. Corp.*, 1986 WL 4279, at *2 (Del. Ch. Apr. 11, 1986) (finding that both tenderers and merged out stockholders were part of the same unitary transaction); *Andra v. Blount*, 772 A.2d 183, 197 n.30 (Del. Ch. 2000) (distinguishing a case in which a majority stockholder owns 90% of the outstanding shares before any of the challenged conduct occurred from "an essentially unitary tender offer/back-end [Section 253] merger transaction").

The Settlement secured the exact consideration that Plaintiff sought: providing the Non-Tendered Stockholders with the option to receive ***the exact same aggregate consideration*** as the Tendered Stockholders. The Settlement Tender Offer is merely a vehicle for this consideration. If Plaintiff had succeeded at trial in this Action, damages would have been the same for the Tendered and Non-Tendered Stockholders – the fair value for the shares ***at the time of the Buyout***. *See Gesoff v. IIC Indus.,* 902 A.2d 1130, 1134 (Del. Ch. 2006) (following trial of entire fairness action, court awarded "fair value at the time of the merger," disregarding the decline in price occurring one day later on 9/11/01); *see also Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 175 (Del. 1990) (valuing shares "at the time of the merger" in majority holder buyout); *Ross Holding & Mgmt. Co. v. Advance Realty Group, LLC*, C.A. No. 4113-VCN, 2014 Del. Ch. LEXIS 173, *69 n.177 (Del. Ch. Sept. 4, 2014) ("Entire fairness inquiries often rely on quasi-appraisal remedies" where "the only litigable issue is . . . the value of the . . . shares on the date of the merger") (internal quotation and citation omitted); *cf. In re Panera Bread Co.*, C.A. No. 2017-0593-MTZ, 2020 Del. Ch. LEXIS 42, at *41 (Del. Ch. Jan. 31, 2020) ("Section 262(h) unambiguously calls upon the Court of Chancery to perform an independent evaluation of 'fair value' at the time of a transaction . . . .") (internal quotation and citation omitted).[5] The Non-Tendered Stockholders are not entitled to a recovery based on the current value of Schuff shares, and their arguments are thus illusory.[6]

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[5] Even if the Objectors could prove liability at trial, they would face substantial hurdles demonstrating that they suffered a compensable loss because they explicitly claim that the value of their shares now far exceeds the fair value of Schuff shares at the close of the Tender Offer. Implicitly conceding this point, FVI contends that it was damaged because it was denied the opportunity to seek appraisal in connection with any short-form merger and would have been entitled to $88.45 per share in an appraisal action. This is pure speculation. FVI Br. at 22 and n.14. First, as explained herein, FVI is assuming that it would have successfully *proved at trial* that Defendants were obligated to effectuate a short-form merger in 2014. That is far from certain. Second, FVI also assumes that it could have proved at trial that its shares were worth $68.99 per share. As explained herein and in Plaintiff's FAB, obtaining fair value in an appraisal proceeding is far from certain. *See, e.g., Panera Bread Co.*, 2020 Del. Ch. LEXIS 42, at *95-*103 (rejecting above market price as constituting fair value). Lastly, FVI claims that it was unique because it could have recovered pre-judgement interest. Of course, FVI ignores that the Tendered Stockholders could also have received interest as well had Plaintiff taken the case to trial and won. Plaintiff's counsel carefully considered all of these risks before they agreed to the Settlement. Wishful thinking and speculation about what FVI could have achieved, had it won on every possible disputed issue in an appraisal proceeding, do not make a valid objection.

[6] FVI claims that it lost appraisal rights in connection with the possible cash out merger following the Tender Offer, but provides no information as to the date of purchase of its 20 shares. Similarly, no purchase dates are provided for certain of FVI's supporters, including James Rivest (FVI Appendix, Ex. B), Cedar Creek Partners LLC (*id.* at Ex. D), Adam Gross (*id.* at Ex. F), and Robert Tera (*id.* at Ex. D). The two supporters who provided purchase dates in the exhibits to their affidavits purchased shares ***after the Tender Offer***, not only undercutting any claim for appraisal in connection with the Tender Offer but affirming, through their purchase of shares, their belief in the continued strong financial health and management of Schuff, even with HC2's 92.5% ownership stake. *See id*. at Ex. A (showing Schoenberg's purchase of 5,669 shares on October 6, 2014, the day the Tender Offer closed); Ex. C (showing Kaufman's purchase of over 10,000 more shares from May 2016 through as late as April 2018). How any of these stockholders

Moreover, Non-Tendered Stockholders have received two additional benefits. First, they have received previously undisclosed, material information concerning the Company and its current status and value,[7] a significant benefit under well-established Delaware law. *See In re Netsmart Technologies, Inc.,* 924 A.2d 171, 203 (Del. Ch. 2007) (management's inside view on the future value of the Company are "among the most highly-prized disclosures by investors."). Second, the Non-Tendered Stockholders retain, without off-set, the $17.16 per share in dividends they received following the Tender Offer, whether they tender in the Settlement Tender Offer or not.

The Settlement Tender Offer provides those who want it, a liquidity opportunity at a price that substantially exceeded Schuff's trading price prior to the Settlement and for the entire history of the Company.[8] Of course, had the value of

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can claim an entitlement to a cash-out at a price higher that the Settlement value based on the claims in this Action is not, and cannot be, explained.

[7] The Settlement Tender Offer documents include information regarding private purchases of Company stock by HC2 during while the litigation was pending, the prices for intercompany transfers of stock, and third party valuations of the Company for the last five years. *See generally* Stipulation, Ex. D, Offer to Purchase. The Virtual Data Room, created in connection with the Settlement, also includes the most recent one-and five-year projections for Schuff. *See id.*

[8] During the course of 2019, when the Settlement negotiations were in their final stages, Schuff's stock traded infrequently on the pink sheets, and was mostly priced in the mid-$40s.
See https://finance.yahoo.com/quote/DBMG/history?p=DBMG&guccounter=1.

Schuff stock declined since the Tender Offer, the Objectors doubtlessly would be thrilled with this outcome. But the Company's success since the Tender Offer does not change the claims (or the available remedies) arising from the Buyout. *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1249 (Del. 2012) (rejecting argument that post-merger performance eliminated need for damages).

C. The Settlement Consideration Reflects the Risks of Continued Litigation

1. The Settlement Consideration Provides a Recovery of 114% Over the Tender Offer Price

The Settlement consideration provides a significant premium to the price paid in various private transactions, as well as to the market price of Schuff stock, prior to the 2014 Tender Offer.[9] Similarly, the Settlement provides the Class with consideration in line with various contemporaneous valuations. For example, 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, a mere 2% more than the aggregate value provided by the Settlement.[10] In a similar report issued on May 27, 2015, E&Y concluded that Schuff's equity value was $262 million as of February

[9] FAB at 26.

[10] Stipulation, ¶ S.

28, 2015, or about $67.00 per share.[11] The value per share provided in the Settlement is also consistent with the valuation analyses performed by Plaintiff's consultants; Plaintiff's consultants concluded that Schuff's value was $66.61 per share at the time of the Buyout – approximately 1% *less than* the aggregate consideration provided by the Settlement.[12]

The Settlement Tender Offer thus provides Non-Tendered Stockholders with the option to receive a recovery of 114% over the Tender Offer price. And notably, this recovery does not net out the amount of dividend payments that the Non-Tendered Stockholders have received in the interim – $17.16 per share.

This provides the Class – Tendered and Non-Tendered Stockholders alike – with the opportunity to receive a payment that closely approximates what the evidentiary record indicates was the fair value of Schuff stock at the time of the Buyout. Such an outcome is obviously fair to the Class. *See In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1068 (Del. 2015) (approving settlement that provided consideration within the range that reasonable parties on plaintiffs' side would reasonably accept if not under any compulsion to settle).

2. The Risks from Further Litigation Favor Approval of the Settlement

[11] Rigrodsky Aff., ¶ 89.

[12] Rigrodsky Aff., ¶ 90-93.

It is, and has been, Plaintiff's contention that the Buyout consisted of a unitary transaction that harmed all stockholders, including those who did not tender.[13] For example, in *In re GFI Group Inc. Stockholder Litig.*, the Court treated a third-party tender offer and back-end merger as a "unitary transaction" and permitted tendering stockholders to represent a settlement class that included non-tendering stockholders. C.A. No. 10136-VCL, Tr. at 120:12–21 (Del. Ch. Feb. 26, 2016) (TRANSCRIPT).[14]

If the Settlement is not approved, Defendants will likely attack this theory of the case. They could argue that HC2 never committed to complete a short-form merger if it had to resort to open-market purchases to exceed the 90% ownership threshold; the Tender Offer documents specifically reserved the right not to proceed with a short form merger if the 90% threshold was not reached in the Tender Offer;[15] and the waiver of the 90% condition was strictly as to the closing of the Tender Offer and not as to any commitment to conduct a short-form merger.

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[13] FAB at 45.

[14] Enright Aff., Ex. 2.

[15] *See* Ex. 10 at SC00582 ("If the 90% Condition has not been met [as it was not here], we will, in our sole discretion either elect not to consummate the Offer or . . . waive the 90% condition and acquire the shares.").

HC2 did publicly state its intent to execute a short-form merger if HC2 was able to acquire more than 90% of Schuff's outstanding shares after the Tender Offer was consummated.[16] HC2 similarly disclosed on November 3, 2014 that it had acquired more than 90% of Schuff's outstanding shares through an open-market transaction and intended to execute a short-form merger.[17] However, HC2 later publicly stated that a short-form merger "has never been formally proposed or acted upon" and that HC2 cannot assure stockholders that HC2 "will complete such merger in the near term or at all."[18]

While Plaintiff had a sound basis to contend that HC2 was equitably obligated to conduct the short-form merger,[19] there is a risk that the Court might side with HC2. If that occurred, the Non-Tendered Stockholders would be denied *any* relief. The Settlement reflects this risk. To blithely assume that the Court would rule in

[16] Amended Complaint at ¶¶ 89 and 107 ("HC2 intends that when its ownership in Schuff reaches 90% of Schuff's outstanding shares, as a result of the tender offer or subsequent purchases following completion of the Offer, it will complete the short-form merger described in the Offer to Purchase at no less than the Offer Price in accordance with applicable law.").

[17] Amended Complaint at ¶ 108 ("On October 29, 2014, we entered into an open-market transaction to increase our ownership of Schuff to 90.6%, and we intend to execute a short-form merger as soon as practicable.").

[18] Amended Complaint at ¶ 126.

[19] FAB at 45-46.

Plaintiff's favor on this point simply ignores the complex factual and legal background against which the Settlement was negotiated.

Moreover, the Non-Tendered Stockholders still own their Schuff shares. Defendants could argue that, because they were never deprived of those shares at an unfair price, the Non-Tendered Stockholders have suffered no harm. Moreover, the Non-Tendered Stockholders have received substantial dividends, totaling $17.16 per share, since October of 2014, a total yield of approximately 25.4% on an assumed value of $67.45 per share at the time of the Tender Offer. Defendants could argue that these dividends neutralize any argument that the Non-Tendered Stockholders should receive interest on the fair value of their shares as of October 2014, because they essentially have already received that value in the form of the dividend payments. Because the Settlement reflects this risk, it is fair and reasonable.

D. The Settlement Tender Offer is Not Coercive

Objectors' argument that the Settlement Tender Offer is "unfairly coercive" is a red herring. The Settlement Tender Offer is not a tender offer in the traditional sense where a controlling stockholder seeks "to acquire the balance of the company's shares by acquisition." *In re Pure Res. S'holders Litig.*, 808 A.2d 421, 445 (Del. Ch. 2002). Rather, the Settlement Tender Offer is merely the vehicle for making settlement consideration available to the Non-Tendered Stockholders under the Court's supervision.

Objectors' efforts to cast the Settlement Tender Offer in more nefarious terms are disingenuous. Indeed, the Offer to Purchase explicitly states that the Settlement Tender Offer provides the Non-Tendered Stockholders with the opportunity to: "(i) receive the Net Offer Price, which is equal to the aggregate per Share consideration received by the Tendered Stockholders through the 2014 Tender Offer and the Final Settlement; and (ii) obtain liquidity for their Shares at a price well above the pre-settlement market value of the Shares."[20] Moreover, the notion that the Settlement Tender Offer could be coercive when it is subject to the Court's approval and supervision strains credulity, and is not supported by law.

Under Delaware law, a coercive transaction is one in which a party takes "actions that operate inequitably to induce [shareholders] to tender their shares for reasons unrelated to the economic merits of the offer." *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1148 (Del. Ch. 1987). Here, there can be no reasonable inference that the Settlement Tender Offer, negotiated by counsel for stockholders and subject to the Court's supervision, is inequitably inducing anyone to tender their shares.

Indeed, Objectors identify no purported retribution or adverse change of circumstances for the Non-Tendered Stockholders who decline to tender their shares in the Settlement Tender Offer. Far from attempting to compel their participation in

[20] Stipulation, Ex. D, Offer to Purchase at 2.

the Settlement Tender Offer, the Settlement provides the Non-Tendered Stockholders with information that shows recent Schuff stock transactions and valuations at prices higher than the Settlement Tender Offer price.[21]

Similarly, Objectors' claims of coercion ignore the fact that Schuff has been a super-majority controlled Company since 2014. The Objectors opted not to tender their shares in the Tender Offer knowing that their already-minority interest in the Company would be further diminished. Moreover, Objectors purchased shares in the controlled Company *after* the close of the Tender Offer. The notion that investors purportedly worried about coercive behavior by a controlling stockholder would purchase more shares in the Company undercuts their assertion of unfair coercion in the Settlement Tender Offer.

Similarly, ABV's repeated characterization of the Settlement Tender Offer as coercive because it "makes no representation that any later cash-out of stockholders that do not participate in the Settlement Tender Offer would not be at a lesser price"[22] is meritless. If the Non-Tendered Stockholders do not participate in the Settlement Tender Offer, they will be in precisely the same position they were prior to the Settlement. Namely, with no assurance of a later cash-out, let alone a cash-out at

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[21] Stipulation, Ex. D, Offer to Purchase at 26-30.

[22] ABV Br. at 9.

$67.45 per share or higher. If a subsequent cash-out merger or other transaction should take place, ABV will still have its right to challenge the fairness of such a transaction or to seek appraisal.[23] This is exactly the situation ABV faced when it decided to purchase most of its shares ***after the close of the Tender Offer***. Notably, all but 6,461 of the 34,394 shares of Schuff stock ABV owns were purchased *after* the 2014 Tender Offer.[24] Indeed, ABV continued to purchase Schuff stock through 2019, while on notice of Plaintiff's claims and Schuff's controlled-company status.[25]

Thus, Objectors' cursory and baseless assertions that the Settlement Tender Offer is coercive should be rejected.

E. The Release is Properly Tailored, and is Neither Overbroad Nor "Intergalactic"

1. The Release is Limited to Claims Arising from the Tender Offer and from the Settlement Itself

The Release is limited to claims based on ownership of Schuff common stock during the Class Period 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; HC2's decision not to consummate a short-form merger after obtaining 90% ownership of

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[23] Stipulation, ¶ 1(w).

[24] *See* ABV Objection, Ex. A at 2.

[25] *Id*. at 1-2.

the Company's common stock; the lack of liquidity opportunities after the Tender Offer; and claims arising from the Settlement, including financing for the Settlement. Thus, the Release is carefully cabined to the misconduct at issue in this Action and the implementation of the Settlement. The Release's wording is also limited to claims based on "ownership of Schuff common stock," meaning that any securities claims based on purchases or sales of securities (as, for example, a Rule 10b-5 claim) may be preserved.

The Tender Offer occurred more than five years ago, and no one has sought to raise any new claims. While FVI asserts that "Defendants are released from claims that currently exist but were not part of the operative facts," it does not specify what these claims could possibly be.[26] FVI has had over five years to intervene in the Action or file its own action if it believed that there were viable claims arising out of the Buyout that were not encompassed by Plaintiff's action. Thus, FVI's unspecified issue with the Release does not rebut the Settlement's fairness. *In re Coleman Co. Inc. S'holders Litig.*, 750 A.2d 1202, 1211-12 (Del. Ch. 1999) ("Here, the objector would have the Court reject a settlement that offers something of real value to class members on the strength of what?—a highly speculative, potential claim against M & F that would be litigated for years. This is surely not the outcome the shareholder class (including [the objector]) seeks.").

[26] FVI Br. at 15.

The Release also extends to the Settlement Tender Offer, which will commence upon Final Approval of the Settlement, and to the financing used to fund certain aspects of the Settlement and Settlement Tender Offer. The terms of the Settlement Tender Offer have been fully disclosed in the near-final drafts of the Settlement Tender Offer documents which were attached as Exhibit D to the Stipulation. Given that the terms of the Settlement Tender Offer were negotiated by the parties, and the information regarding the Settlement Tender Offer has been fully disclosed, it is unclear what facts might "be discovered in the future" that could possibly require the Court to find the Release is overbroad.[27]

Objectors raise no legal basis for contradicting precedent where "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).[28]

Objectors also ignore the fact that the Court has approved settlements that release claims related to acts that occur after the Court approves the settlement where

[27] FVI Br. at 17.

[28] Enright Aff., Ex. 3.

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); *see also Coleman*, 750 A.2d at 1210-12 (approving "universal release of all claims relating to the transaction and later events" including claims challenging allegedly coercive settlement); *In re AXA Fin., Inc.*, 2002 WL 1283674, at *3, *5 (Del. Ch. May 22, 2002) (approving settlement releasing all claims by class members under federal or state law "'relating to the Proposed Transaction, the Revised Transaction, the discussions and negotiations pertaining thereto, the actions of the Special Committee, the tender offer and subsequent merger and any public filings or statements' made in connection therewith"); *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL, at ¶ 5 (Del. Ch. Sept. 16, 2011) (ORDER) (approving settlement releasing all claims relating to the challenged merger and agreed-upon merger agreement amendments implemented pursuant to the settlement MOU).[29]

Defendants agreed to these terms on condition that the Settlement (including the Settlement Tender Offer) would extinguish all litigation related to Plaintiff's

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[29] Enright Aff., Ex. 4.

claims for relief. *Cf. Coleman*, 750 A.2d at 1210-12 ("If dissenters participate in the settlement consideration and also pursue [claims released by accepting the settlement], the value of the settlement is significantly diminished from defendants' perspective. The outcome urged by [the objector] would cut against the policy of this State favoring the reasonable and fair settlement of claims."). Such claims must be released if Defendants are to make good on their undertakings. In short, Class members cannot reasonably expect to receive the benefits delivered by the Settlement without releasing the ability to challenge the Settlement. *See Marie Raymond*, 980 A.2d at 408 ("The short answer is that [an objector] cannot have it both ways.").

Finally, it is important to note again that 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."[30] Therefore, remaining minority stockholders could still assert appraisal claims (or any other claims for that matter) if HC2 were to sell Schuff or conduct a cash-out merger in the future. Simply stated, Objectors have identified no valuable unasserted claims will be released as a result of the Settlement.

2. The Waiver of Claims Relating to the Data Room is Appropriate

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[30] Stipulation, ¶ 1(w).

The Confidentiality Agreement that a Class Member must sign before accessing the Virtual Data Room is narrowly tailored to prevent proprietary financial information of the Company from being shared by a Class Member. Class Members are encouraged to use the confidential materials in evaluating the Settlement. The Settlement Tender Offer documents describe and summarize the pertinent details, including per share valuations, of the material contained in the Virtual Data Room, as well as list *all* of the documents contained in the Virtual Data Room. Tellingly, FVI does not provide any legal basis for asserting that the Confidentiality Agreement is overbroad or impermissible.

Nevertheless, FVI contends that a waiver of claims in the Confidentiality Agreement is unfairly overbroad.[31] This contention must fail because: a) Schuff is not a reporting company, and Schuff's minority stockholders are not otherwise entitled to these documents; and b) this information being made available only in connection with the Settlement. Thus, this narrowly tailored release is appropriate. *Medley*, C.A. No. 2019-0100-KSJM, at 38.

Moreover, the Confidentiality Agreement's waiver does not release any claims other than those arising from the contents of the Virtual Data Room. It is Plaintiff's understanding that this waiver was required by Schuff's outside consultants who prepared these documents as a condition of making them publicly

[31] FVI Br. at 23-25.

available. And these documents are expressly intended for one purpose only: to allow Non-Tendered Stockholders to assess the Settlement Tender Offer. Inasmuch as Objectors have already indicated that, based on publicly available information, that they will not participate in the Settlement Tender Offer, they can simply decline to enter into the Confidentiality Agreement and preserve whatever claims they believe might arise in connection with the information disclosed in the Virtual Data Room.

IV. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

A. Lead Plaintiff Satisfies Rule 23(a)

ABV argues that there is "no commonality and typicality among the class."[32] Similarly, FVI argues that Plaintiff inadequately represented the interests of the Non-Tendered Stockholders. Both arguments are wholly devoid of merit.

As noted in the FAB, 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, the Court has taken a "pragmatic approach." *See In re GFI Grp. Inc. S'holder Litig.*, C.A. No. 10136-VCL, at 120–22 (Del. Ch. Feb. 26, 2016) (TRANSCRIPT); *see also Blank*, 858 A.2d at 341–42 (permitting non-tendering stockholder to serve as class representative for settlement class that

[32] ABV Br. at 14.

included tendering stockholders because settlement terms were fair to both groups of stockholders).

Even outside of the settlement context, Rule 23 does not require a class representative to be identically situated with the class. In *Wiegand v. Berry Petroleum Co.*, C.A. No. 9316, 1989 Del. Ch. LEXIS 161, at *2, *10 (Del. Ch. Dec. 4, 1989), the Court certified a single representative to represent a class consisting of stockholders who sold their stock prior to a merger, as well as stockholders who continued to hold their shares and were subsequently "frozen out" in the merger, finding that "a class representative may not be identically situated in all respects to other members of the class does not mean that his personal interests necessarily conflict with those of the class."

Similarly, in *Leon N. Weiner & Associates v. Krapf,* 584 A.2d 1220, 1225 (Del. 1991), the court explained that Rule 23(a)(2) is satisfied where, as here, "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." (internal quotation and citation omitted).

Likewise, the typicality requirement of Rule 23(a)(3) "focuses on whether the class representative claim . . . fairly presents the issues on behalf of the represented class." *Id.* at 1225 (citation omitted). Thus, "[a] representative's claim . . . will suffice if it arises from the same event or course of conduct that gives rise to the claims . . . of other class members and is based on the same legal theory." *Id*. at 1226 (internal quotation and citation omitted).

Here, Plaintiff's claim, like that of all other Class members, arises from Defendants' breaches of fiduciary duties in connection with the Buyout, under the same legal theories applicable to the Class claims. Moreover**,** Plaintiff is a Non-Tendered Stockholder and, therefore, identically situated to both ABV and FVI. The arguments concerning the purportedly differing interests of Tendered Stockholders[33] are not only incorrect,[34] but irrelevant to the typicality of Plaintiff's claims vis-à-vis the Non-Tendered Stockholders such as ABV and FVI.

The Objectors, nonetheless, argue that Plaintiff's interests are purportedly antagonistic to the Non-Tendered Stockholders because he has requested an incentive fee award in this case.[35] While Plaintiff respectfully submits that he is entitled to the requested incentive fee based on the extensive time and effort he has expended on this litigation,[36] he understands that any such award is entirely within the Court's discretion, even if the Settlement is approved.

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[33] ABV Br. at 15-16.

[34] ABV's assertion that the Settlement is a "windfall" for the Tendered Stockholders (ABV Br. at 16) is meritless, inasmuch as the Non-Tendered Stockholders are entitled to the same consideration in the Settlement Tender Offer based on the fair value of the shares at the time of the Tender Offer.

[35] ABV Br. at 4-5, 16; FVI Br. at 10.

[36] *See* Affidavit of Marc Jacobs, dated January 9, 2020, ¶¶ 5, 8.

The Objectors' arguments improperly conflate what Plaintiff is entitled to receive under the Settlement – which is the same as all other Non-Tendered Stockholders, including ABV and FVI – and what *may* be awarded to him by the Court for his litigation efforts in the Action. Plaintiff has agreed to support the Settlement knowing full well that his request for an incentive award might be partially or entirely denied by this Court. Accordingly, the possibility of the award of an incentive fee does not give rise to antagonism between Plaintiff and the Class, or affect Plaintiff's adequacy under Rule 23(a). *See, e.g., In re Physicians Formula Holdings, Inc. Stockholder Litig.*, Cons. C.A. No. 7794-VCL, 2017 Del. Ch. LEXIS 746, *3, *13 (Del. Ch. Jan. 20, 2017) (finding plaintiffs satisfied typicality and adequacy requirements of Rule 23(a) and awarding incentive fees of $25,000 and $5,000 payable from attorneys' fees award); *Lewis v. Aimco Props., L.P.*, Case No. 9934-VCMR, 2017 Del. Ch. LEXIS 751, *3, *13 (Del. Ch. Jan. 17, 2017) (finding plaintiffs satisfied typicality and adequacy requirements of Rule 23(a) and awarding incentive fees from settlement fund).

B. Non-Tendered Stockholders Have Been Well Represented

The Objectors also erroneously assert that Plaintiff and his counsel have not fairly and adequately protected the interests of the Class as required by Rule

23(a)(4).[37] As shown above, to the extent that these arguments are predicated on their flawed contention that the Settlement constitutes a "wealth transfer," or provides for an unfair allocation of value, these erroneous arguments should be rejected. Likewise, as discussed above, the argument that Plaintiff's request for an incentive award undermines his adequacy as a class representative is devoid of merit. Indeed, the Objectors' adequacy arguments are belied by the unprecedented result achieved in this litigation – a 114% premium over the Tender Offer price – and the evidentiary record developed through the efforts of Plaintiff's counsel.

Ironically, both Objectors point to the recent valuations and sales of Schuff stock as the basis for their decisions not to participate in the Settlement Tender Offer.[38] ***Such information would not have been available to them, however, but for the efforts of Plaintiff's counsel***. Specifically, the financial analyses of Duff & Phelps, cited by both ABV and FVI[39], were obtained by Plaintiff's counsel during discovery. Likewise, it was Plaintiff's counsel that obtained evidence concerning the intra-Company sales of Schuff stock at $132.32 per share,[40] and negotiated for the disclosure of such non-public transactions in the Settlement Notice. Objectors,

[37] ABV Br. at 17-18; FVI Br. at 9-11.

[38] ABV Br. at 6-7; FVI Br. at 2.

[39] ABV Br. at 8; FVI Br. at 21

[40] ABV Br. at 2, 8, 12; FVI Br. at 6

who cite no other basis for their valuation of their Schuff stock, are now able to make fully informed decisions about the Settlement Tender Offer based upon information obtained by Plaintiff's counsel.[41]

Moreover, ABV's assertion that more time and effort was devoted to settlement efforts than to litigation[42] is patently untrue.[43] Indeed, the lengthy settlement negotiations were primarily the result of Plaintiff's unflagging effort to obtain the same treatment for the Non-Tendered Stockholders (of which he is one) as for the Tendered Stockholders. Far from somehow selling out the Non-Tendered Stockholders, Plaintiff has fought tirelessly for them throughout the course of this litigation.

The record Plaintiff created here led to this exceptional Settlement and counsel for Plaintiff are proud of their efforts in achieving it. Accordingly, the outstanding result achieved in the Settlement, the Objectors' decision to retain their Schuff stock informed by facts and data only available to them because of the efforts of Plaintiff's counsel, and the extensive record developed by Plaintiff's counsel, all demonstrate that the Objections to the adequacy of Plaintiff and his counsel are

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[41] As noted in the FAB, 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. *See* FAB at 2 n.5.

[42] ABV Br. at 5-7, 18

[43] *See* Rigrodsky Aff., ¶¶ 6-55.

completely lacking in merit.[44]

C. A Non-Opt-Out Class Is Appropriate Under Well Established Delaware Law

The Objectors argue that the Non-Tendered Stockholders should be permitted to opt-out of the class pursuant to Rule 23(b)(3).[45] As FVI acknowledges, however, certification of a class under Rules 23(b)(1) and (2) is appropriate where, as here, the operative complaint seeks injunctive relief.[46] Likewise, ABV concedes that "that breach of fiduciary duty actions recovering money damages are regularly certified in this Court under Rule 23(b)(1) and (2) . . . ."[47]

First, it should be noted that the remedy to the Non-Tendered Stockholders here is itself injunctive in nature. That is, the Settlement requires Schuff to take specific action – the Settlement Tender Offer, including the dissemination of the information in connection therewith. Thus, this Action clearly remains substantially injunctive in nature. *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 433 (Del.

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[44] ABV's pejorative innuendo that "the docket and the qualifications, experience, and general ability of the Plaintiffs' attorneys" (ABV Br. at 18) undermine their adequacy, is baseless. To the contrary, these factors militate strongly in favor of finding Plaintiff's counsel adequate under Rule 23(a)(4).

[45] *See* ABV Br. at 19-20; FVI Br. at 26-27.

[46] FVI Br. at 27. While FVI notes that no motion for injunctive relief was made (FV Br. at 27), they cite no authority – because there is none – that such motion is a prerequisite for certification under Rule 23(b)(1) and (2).

[47] ABV Br. at 19.

2012) (reaffirming that certification under Rule 23(b)(2) does not require that an action seek injunctive or declaratory relief as an exclusive remedy); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1096-97 (Del. 1989) (holding 23(b)(2) satisfied where primary relief obtained is declaratory, injunctive, and rescissory).

Nevertheless, ABV argues that an exception should be made here because "the parties concede that the Settlement Tender Offer is not fair."[48] This absurd assertion is simply false. The Parties do not concede the unfairness of any part of the Settlement and, to the contrary, maintain that it represents an outstanding result for the Class. ABV, apparently, makes this claim because the value of the Settlement (both to Tendered and Non-Tendered Stockholders) is premised upon Schuff's value at the time of the Buyout in 2014 – not today.[49] In so doing, ABV misses the point.

Plaintiff's claim has always been that the Buyout was the product of an unfair process resulting in an unfair price in Tender Offer. Plaintiff's claim is properly predicated on the fair value of Schuff stock at the time of the Buyout. The proper relief is to provide the Non-Tendered Stockholders with the opportunity to receive that price – and that is what has been achieved here. Plaintiff did not – and could not – claim that Defendants were somehow obligated to cash out the Non-Tendered Stockholders at the present value of their Schuff shares. *See Gesoff,* 902 A.2d at

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[48] ABV Br. at 19.

[49] ABV Br. at 19-20.

1134; *see also Household Acquisition Corp.*, 591 A.2d at 175; *Ross Holding & Mgmt. Co.*, 2014 Del. Ch. LEXIS 173, at *69 n.177; *cf. Panera Bread Co.*, 2020 Del. Ch. LEXIS 42, at *41. Nor do Objectors posit any viable claims giving rise to such a remedy.

The Objectors also argue that the Non-Tendered Stockholders should be permitted to opt-out because they are being required to release claims even if they do not participate in the Settlement Tender Offer.[50] Neither ABV nor FVI, however, identify any viable unasserted claims that they will relinquish if the Settlement is approved. A vague reference to the surrender of some ephemeral, hypothetical claim is an inadequate basis to disrupt the Settlement or provide the Non-Tendered Stockholders with the right to opt-out of it.

In *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123 (Del. 2007), the Delaware Supreme Court affirmed the approval of a class action settlement, including the denial of an objection seeking an opt-out right under Rule 23(b)(2). *Id*. at 1137. In affirming the denial of the opt-out right, the court explained:

> Importantly, any settlement of this litigation would have to afford the defendants "complete peace," that would include "a release to the broadest extent possible under law." Granting an opt-out right would leave the Objectors, who appear to hold over 40% of the Exchange's Class A shares, free to assert, against the defendants, the identical claims being settled in a different forum. That almost certain outcome would utterly defeat the purpose of the settlement, and was a risk that the defendants were not willing to take. Thus, *the settlement must either*

[50] ABV Br. at 20; FVI Br. at 27-28.

> *be as broad in scope as the law would allow and bind all class members, or there would be no settlement.* Given the economic benefits afforded by the settlement in relation to the perceived *minimal value of the claims being surrendered*, the Chancellor determined not to grant opt-out rights. The Objectors have not shown that decision to be other than a sound exercise of judicial discretion.

Id. (Emphases added). The same holds true here.

Moreover, it is impossible to determine the value of the claims the Objectors purport to surrender because the Objectors – who have pursued no action or claims in the five years since the Tender Offer – have not identified them. As noted above, all but 6,461 of the 34,394 shares of Schuff stock ABV owns were purchased *after* the close of the 2014 Tender Offer.[51] Indeed, ABV continued to purchase Schuff stock through 2019, while on notice of Plaintiff's claims and that Schuff had not conducted a short-form merger.[52] Despite this, ABV failed to assert any claims against Defendants. Similarly, as evidenced by their transaction histories, many of the shares held by FVI's so-called supporters were purchased after the Tender Offer.

In sum, balanced against the substantial benefits provided by the Settlement, the Objectors' vague assertions about the claims being released do not support the grant of opt-out rights. The Objections should be overruled.

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[51] *See* ABV's Objection, Ex. A at 2. 1,746 shares were purchased on October 6, 2014.

[52] *Id*. at 1-2.

CONCLUSION

For the foregoing reasons, the Objections should be rejected and the Settlement should be approved.

Dated: February 3, 2020

RIGRODSKY & LONG, P.A.

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(Word count: 7883)

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

TRANSMITTAL AFFIDAVIT OF DONALD J. ENRIGHT, ESQUIRE IN SUPPORT OF PLAINTIFF'S REPLY TO OBJECTORS AB VALUE PARTNERS, L.P. AND FAIR VALUE INVESTMENTS INC.

DISTRICT OF COLUMBIA) ss:

I, DONALD J. ENRIGHT, being duly sworn, do hereby state as follow:

1. I am a partner with the law firm Levi & Korsinksy, LLP ("LK") and am admitted to practice law in the States of Maryland and New Jersey, and the District of Columbia. I have been admitted *pro hac vice* in this Action. LK is Co-Lead Counsel for Plaintiff in the above-captioned class action (the "Action").

2. I respectfully submit this Transmittal Affidavit in support of Plaintiff's Reply to Objectors AB Value Partners, L.P. and Fair Value Investments Inc.

3. Attached hereto as Exhibit 1 is a true and correct copy of the Certificate of Incorporation of Schuff International, Inc.

4. Attached hereto as Exhibit 2 is a true and correct copy of the February 26, 2016 settlement hearing in *In re GFI Group Inc. Stockholder Litig.* C.A. No. 10136-VCL, (Del. Ch.).

5. Attached hereto as Exhibit 3 is a true and correct copy of the November 19, 2019 hearing transcript in *In re Medley Capital Corp. S'holders*

Litig., C.A. No. 2019-0100-KSJM, at 38 (Del. Ch.).

6. Attached hereto as Exhibit 4 is a true and correct copy of the September 16, 2011 order in *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch.).

7. I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 3rd day of February, 2020 in Washington, D.C.

LEVI & KORSINSKY, LLP

Donald J. Enright
1101 30th Street, NW
Suite 115
Washington, DC 20007
(202) 524-4291

Co-Lead Counsel

BIANCA N. BUDHAI
NOTARY PUBLIC
EXP. 2-14-24
DISTRICT OF COLUMBIA

SWORN AND SUBSCRIBED
Before me this 3 day of February, 2020

Notary Public

2/14/2024

My Commission Expires

BIANCA N. BUDHAI
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires February 14, 2024

Delaware

The First State

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED ARE TRUE AND CORRECT COPIES OF ALL DOCUMENTS ON FILE OF "DBM GLOBAL INC." AS RECEIVED AND FILED IN THIS OFFICE.

THE FOLLOWING DOCUMENTS HAVE BEEN CERTIFIED:

CERTIFICATE OF INCORPORATION, FILED THE TWENTY-NINTH DAY OF JUNE, A.D. 2001, AT 8:30 O`CLOCK A.M.

CERTIFICATE OF AMENDMENT, CHANGING ITS NAME FROM "SCHUFF INTERNATIONAL, INC." TO "DBM GLOBAL INC.", FILED THE TWENTY-FOURTH DAY OF AUGUST, A.D. 2016, AT 10:37 O`CLOCK A.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE EFFECTIVE DATE OF THE AFORESAID CERTIFICATE OF AMENDMENT IS THE FIRST DAY OF SEPTEMBER, A.D. 2016.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CERTIFICATES ARE THE ONLY CERTIFICATES ON RECORD OF THE AFORESAID CORPORATION, "DBM GLOBAL INC.".

Jeffrey W. Bullock, Secretary of State

SECRETARY'S OFFICE 1793 DELAWARE 1855

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Authentication: 203692542
Date: 10-26-18

STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
FILED 08:30 AM 06/29/2001
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CERTIFICATE OF INCORPORATION
OF
SCHUFF INTERNATIONAL, INC.

ARTICLE ONE

The name of the Corporation is SCHUFF INTERNATIONAL, INC.

ARTICLE TWO

The address of the Corporation's registered office in the State of Delaware is 1209 Orange Street, in the City of Wilmington, County of New Castle. The name of its registered agent at such address is Corporation Trust Company.

ARTICLE THREE

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware.

ARTICLE FOUR

The Corporation shall have perpetual existence.

ARTICLE FIVE

The total number of shares of stock which the Corporation shall have authority to issue is Twenty-One Million (21,000,000), consisting of One Million (1,000,000) shares of Preferred Stock, par value $0.001 per share (hereinafter referred to as "Preferred Stock"), and Twenty Million (20,000,000) shares of Common Stock, par value $0.001 per share (hereinafter referred to as "Common Stock").

The Preferred Stock may be issued from time to time in one or more series. The Board of Directors is hereby authorized to provide for the issuance of shares of Preferred Stock in series and, by filing a certificate pursuant to the applicable law of the State of Delaware (hereinafter referred to as a "Preferred Stock Designation"), to establish from time to time the number of shares to be included in each such series, and to fix the designation, powers, preferences and rights of the shares of each such series and the qualifications, limitations and restrictions thereof. The authority of the Board of Directors with respect to each series shall include, but not be limited to, determination of the following:

A. The designation of the series, which may be by distinguishing number, letter or title.

B. The number of shares of the series, which number the Board of Directors may thereafter (except where otherwise provided in the Preferred Stock Designation) increase or decrease (but not below the number of shares thereof then outstanding).

C. The amounts payable on, and the preferences, if any, of shares of the series in respect of dividends, and whether such dividends, if any, shall be cumulative or noncumulative.

D. Dates at which dividends, if any, shall be payable.

E. The redemption rights and price or prices, if any, for shares of the series.

F. The terms and amount of any sinking fund provided for the purchase or redemption of shares of the series.

G. The amounts payable on, and the preferences, if any, of shares of the series in the event of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Corporation.

H. Whether the shares of the series shall be convertible into or exchangeable for shares of any other class or series, or any other security, of the Corporation or any other corporation, and, if so, the specification of such other class or series of such other security, the conversion or exchange price or prices or rate or rates, any adjustments thereof, the date or dates at which such shares shall be convertible or exchangeable and all other terms and conditions upon which such conversion or exchange may be made.

I. Restrictions on the issuance of shares of the same series or of any other class or series.

J. The voting rights, if any, of the holders of shares of the series.

The Common Stock shall be subject to the express terms of the Preferred Stock and any series thereof. Except as may be provided in this Certificate of Incorporation or in a Preferred Stock Designation, the holders of shares of Common Stock shall be entitled to one vote for each such share upon all questions presented to the stockholders. Except as may be provided in this Certificate of Incorporation or in a Preferred Stock Designation, the Common Stock shall have the exclusive right to vote for the election of directors and for all other purposes, and holders of Preferred Stock shall not be entitled to receive notice of any meeting of stockholders at which they are not entitled to vote.

The Corporation shall be entitled to treat the person in whose name any share of its stock is registered as the owner thereof for all purposes and shall not be bound to recognize any equitable or other claim to, or interest in, such share on the part of any other person, whether or not the Corporation shall have notice thereof, except as expressly provided by applicable law.

ARTICLE SIX

Except as otherwise provided in this Certificate of Incorporation, the Board of Directors of the Corporation shall have the power to make, alter or repeal the Bylaws of the Corporation. With respect to the power of the stockholders of the Corporation to make, alter or repeal the Bylaws of the Corporation, notwithstanding anything contained in this Certificate of Incorporation or any provision of law that might otherwise require a lessor vote, the Bylaws may not be made, altered or repealed by the stockholders, and no provision inconsistent therewith shall be adopted by the stockholders, without the affirmative vote of the holders of at least seventy-five percent (75%) of the voting power of all of the shares of the Corporation entitled to vote generally in the election of directors, voting together as a single class.

ARTICLE SEVEN

Election of members to the Board of Directors need not be by written ballot unless the Bylaws of the Corporation shall so provide.

Meetings of the stockholders of the Corporation may be held within or without the State of Delaware, as the Bylaws may provide. The books of the Corporation may be kept (subject to any provision contained in the Delaware General Corporation Law) outside the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the Bylaws of the Corporation.

ARTICLE EIGHT

A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under Section 174 of the Delaware General Corporation Law; or (iv) for any transaction from which the director derived an improper personal benefit. If the Delaware General Corporation Law is amended to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended. Any repeal or modification of this provision shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification. The limitation of liability provided herein shall continue after a director has ceased to occupy such position as to acts or omissions occurring during such director's term of terms of office.

ARTICLE NINE

A. The Corporation shall to the fullest extent authorized by the Delaware General Corporation Law, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the Corporation to provide broader indemnification rights than such law permitted the Corporation to provide prior to such amendment), indemnify and hold harmless any person who was or is a party, or is threatened to be made a party to or is otherwise involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative by reason of the fact that such person is or was a director or officer of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, including service with respect to an employee benefit plan (hereinafter an "Indemnitee") against expenses, liabilities and losses (including attorneys' fees, judgments, fines, excise taxes or penalties paid in connection with the Employee Retirement Income Security Act of 1974, as amended, and amounts paid in settlement) reasonably incurred or suffered by such Indemnitee in connection therewith; provided, however, that except as provided in this section with respect to proceedings to enforce rights to indemnification, the Corporation shall indemnify any such Indemnitee in connection with a proceeding (or part thereof) initiated by such Indemnitee only if such proceeding or part thereof was authorized by the Board of Directors of this Corporation.

B. The right to indemnification conferred in this section shall include the right to be paid by the Corporation the expenses (including attorneys' fees) incurred in defending any such proceeding in advance of its final disposition; provided, however, that, if the Delaware General Corporation Law requires, an advancement of expenses incurred by an Indemnitee in his capacity as a director or officer (and not in any other capacity in which service was or is rendered by such Indemnitee, including, without limitation, service to an employee benefit plan) shall be made only upon delivery to the Corporation of an undertaking, by or on behalf of such Indemnitee, to repay all amounts so advanced if it shall ultimately be determined by final judicial decision from which there is not further right to appeal that such Indemnitee is not entitled to be indemnified for such expenses under this section or otherwise. The rights to indemnification and to the advancement of expenses conferred in this section shall be contract rights and such rights shall continue as to an Indemnitee who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the Indemnitee's heirs, executors and administrators.

C. If a claim under the two preceding paragraphs of this section is not paid in full by the Corporation within sixty (60) days after a written claim has been received by the Corporation, except in the case of a claim for an advancement of expenses, in which case the applicable period shall be twenty (20) days, the Indemnitee may at any time thereafter bring suit against the Corporation to recover the unpaid amount of the claim. If successful in whole or in part in any such suit, or in a suit brought by the Corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the Indemnitee shall be entitled to be paid also the expense of prosecuting or defending such suit. In (i) any suit brought by the Indemnitee to enforce a right to indemnification hereunder (but not in a suit brought by the Indemnitee to enforce a right to an advancement of expenses) and (ii) in any suit brought by the Corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the Corporation shall be entitled to recover such expenses upon a final adjudication that the Indemnitee has not met any applicable standard for indemnification set forth in the Delaware General Corporation Law. Neither the failure of the Corporation (including its Board of Directors, independent legal counsel, or its stockholders) to have made a determination prior to the commencement of such suit that indemnification of the Indemnitee is proper in the circumstances because the Indemnitee has met the applicable standard of conduct set forth in the Delaware General Corporation Law, nor an actual determination by the Corporation (including its Board of Directors, independent legal counsel, or its stockholders) that the Indemnitee has not met such applicable standard of conduct, shall create a presumption that the Indemnitee has not met the applicable standard of conduct or, in the case of such a suit brought by the Indemnitee, be a defense to such suit. In any suit brought by the Indemnitee to enforce a right to indemnification or to an advancement of expenses hereunder, or brought by the Corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the burden of proving that the Indemnitee is not entitled to be indemnified, or to such advancement of expenses under this section or otherwise, shall be on the Corporation.

D. The rights to indemnification and advancement of expenses conferred in this section shall not be exclusive of any other rights which any person may have or hereafter acquire under any statute, this Corporation's Certificate of Incorporation, as it may be amended or restated from time-to-time, any agreement, vote of stockholders or disinterested directors, or otherwise. No amendment or repeal of this Article Nine shall apply to or have any effect on any right to indemnification provided hereunder with respect to any acts or omissions occurring prior to such amendment or repeal.

E. The Corporation shall have the power to purchase and maintain insurance, at its expense, to protect itself and any director, officer, employee or agent of the Corporation or another corporation, partnership, joint venture, trust or other enterprise (including an employee benefit plan) against any expense, liability or loss, whether or not the Corporation would have the power to indemnify such person against such expense, liability or loss under the Delaware General Corporation Law. The Corporation may also create a trust fund, grant a security interest and/or use other means (including, but not limited to, letters of credit, surety bonds and/or similar arrangements), as well as enter into contracts providing indemnification to the full extent authorized or permitted by law and including as part thereof provisions with respect to any or all of the foregoing, to ensure the payment of such amounts as may become necessary to effect indemnification as provided therein, or elsewhere.

F. For purposes of this section, references to the "Corporation" shall include any subsidiary of this Corporation from and after the acquisition thereof by this Corporation, so that any person who is a director, officer, employee or agent of such subsidiary after the acquisition thereof by this Corporation shall stand in the same position under the provisions of this section as such person would have had had such person served in such position for this Corporation.

G. The Corporation may, to the extent authorized from time to time by the Board of Directors, grant rights to indemnification and to the advancement of expenses to any employee or agent of the Corporation to the fullest extent of the provisions of this section with respect to the indemnification and advancement of expenses of directors and officers of the Corporation.

ARTICLE TEN

The name and mailing address of the incorporator is Michael R. Hill, 1841 West Buchanan Street, Phoenix, Arizona 85009.

ARTICLE ELEVEN

The number of directors constituting the initial Board of Directors of the Corporation is six (6). The size of the Board of Directors may be increased or decreased in the manner provided in the Bylaws of the Corporation. All corporate powers of the Corporation shall be exercised by or under the direction of the Board of Directors except as otherwise provided herein or by law. The name and address of the persons who are to serve as directors until the first annual meeting of stockholders or until their successors are elected and qualified are:

Name	Address
Scott A. Schuff	1841 West Buchanan Street Phoenix, Arizona 85009
David A. Schuff	1841 West Buchanan Street Phoenix, Arizona 85009
Edward M. Carson	1841 West Buchanan Street Phoenix, Arizona 85009
Dennis DeConcini	1841 West Buchanan Street Phoenix, Arizona 85009
H. Wilson Sundt	1841 West Buchanan Street Phoenix, Arizona 85009
Michael R. Hill	1841 West Buchanan Street Phoenix, Arizona 85009

ARTICLE TWELVE

A director may only be removed by the stockholders for cause at a special meeting of stockholders duly called for such purpose and only by the affirmative vote of at least two-thirds (2/3) of the stock of this Corporation issued and outstanding and entitled to vote thereon, notwithstanding that a lesser percentage may be specified by law. As used herein, "cause" for the removal of a director shall be deemed to exist (i) if there has been a finding by not less than a majority of the disinterested directors not subject to the action that cause exists and such disinterested directors have recommended removal to the stockholders, or (ii) as otherwise provided by law. A director may not be removed from office prior to the expiration of his term except as provided herein.

ARTICLE THIRTEEN

Special meetings of the stockholders of the Corporation, for any lawful purpose or purposes, may be called only by the Chairman of the Board or the President, and shall be called by the Chairman of the Board or the President at the written request, or by resolution adopted by the affirmative vote of a majority of the Board of Directors. Such request shall state the purpose or purposes of the proposed meeting. Stockholders of the Corporation shall not be entitled to request a special meeting of the stockholders.

ARTICLE FOURTEEN

Subject to any conditions imposed by law, the Corporation expressly denies the application of the Arizona Corporate Takeover Laws, Arizona Revised Statutes §§ 10-2701 et seq., or any successor thereto.

ARTICLE FIFTEEN

The Corporation reserves the right to amend, alter, change, or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by the Delaware General Corporation Law.

I, THE UNDERSIGNED, for the purposes of forming a Corporation under the laws of the State of Delaware, do make, file and record this Certificate, and do certify that the facts herein stated are true.

DATED this 28th day of June, 2001.

Michael R. Hill, Incorporator

State of Delaware
Secretary of State
Division of Corporations
Delivered 10:37 AM 08/24/2016
FILED 10:37 AM 08/24/2016
SR 20165497215 - File Number 3399749

STATE OF DELAWARE
CERTIFICATE OF AMENDMENT
OF
CERTIFICATE OF INCORPORATION

* * * * *

SCHUFF INTERNATIONAL, INC. a corporation organized and existing under and by virtue of the General Corporation Law of the State of Delaware,

DOES HEREBY CERTIFY:

FIRST: That the Board of Directors of said corporation, at a meeting duly held on August 2, 1016, filed with the minutes of the Board, adopted a resolution proposing and declaring advisable the following amendment to the Certificate of Incorporation of said corporation:

> ***RESOLVED***, that the Certificate of Incorporation of Schuff International, Inc. be amended by changing the Article One thereof so that, as amended, said Article shall be and read as follows:
>
> "The name of the corporation is DBM Global Inc."

SECOND: That in accordance with the provisions of Section 242(a)(i) of the General Corporation Law of the State of Delaware stockholder approval is not required.

THIRD: That the aforesaid amendment was duly adopted in accordance with the applicable provisions of Sections 242 and 228 of the General Corporation Law of the State of Delaware.

FOURTH: That this Certificate of Amendment of the Certificate of Incorporation shall be effective on September 1, 2016.

IN WITNESS WHEREOF, said Board of Directors has caused this certificate to be signed by Scott D. Sherman, its Vice President and General Counsel, this 19 day of August, 2016.

By: Scott D. Sherman
Vice President and General Counsel

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GFI GROUP INC. : CONSOLIDATED
STOCKHOLDERS LITIGATION : C.A. No. 10136-VCL

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Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Friday, February 26, 2016
10:01 a.m.

\- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

\- - -

CONTINUED SETTLEMENT HEARING and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0522

APPEARANCES:

STUART M. GRANT, ESQ.
MARY S. THOMAS, ESQ.
Grant & Eisenhofer, P.A.
-and-
MARK LEBOVITCH, ESQ.
of the New York Bar
Bernstein, Litowitz, Berger & Grossmann LLP
-and-
MICHAEL C. WAGNER, ESQ.
of the Pennsylvania Bar
Kessler Topaz Meltzer & Check, LLP
-and-
MICHAEL HANRAHAN, ESQ.
KEVIN H. DAVENPORT, ESQ.
Prickett, Jones & Elliott, P.A.
Co-Lead Counsel for Plaintiffs

KEVIN R. SHANNON, ESQ.
Potter, Anderson & Corroon LLP
-and-
PAUL K. ROWE, ESQ.
of the New York Bar
Wachtell, Lipton, Rosen & Katz LLP
for Defendants GFI Group, Inc. and
BGC Partners, Inc.

WILLIAM M. LAFFERTY, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
TARIQ MUNDIYA, ESQ.
of the New York Bar.
Willkie Farr & Gallagher LLP
for Defendants Michael Gooch, Colin Heffron,
Nick Brown, Jersey Partners Inc., New JPI Inc.,
and GFI Brokers Holdco Ltd.

SAMUEL A. NOLEN, ESQ.
Richards, Layton & Finger, P.A.
-and-
GLENN M. KURTZ, ESQ.
of the New York Bar
White & Case LLP
for Defendants Frank Fanzilli, Jr. and
Richard Magee

(Continued) ...

APPEARANCES: (Continued)

C. BARR FLINN, ESQ.
Young, Conaway, Stargatt & Taylor LLP
for Defendant Marisa Cassoni

EDWARD B. MICHELETTI, ESQ.
JENNESS E. PARKER, ESQ.
Skadden, Arps, Slate, Meagher & Flom LLP
for Defendant CME Group Inc.

DAVID J. MARGULES, ESQ.
Ballard Spahr LLP
for Hilary Shane, Hilary Shane Revocable Trust UAD 11-28-2007 and ODS Capital, LLC

ERIC M. ANDERSEN, ESQ.
Andersen Sleater LLC
for Objector Quaker Investment Trust

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THE COURT: Good morning, everyone.

MS. THOMAS: Good morning, Your Honor. Mary Thomas from Grant & Eisenhofer on behalf of plaintiffs.

I think Your Honor is familiar with most of the people at counsel table. With your permission, Your Honor, Mr. Lebovitch will speak on behalf of plaintiffs.

THE COURT: That's fine. Thank you.

MR. LEBOVITCH: Thank you, Your Honor.

Thank you for hearing us a second time, Your Honor. We are here for final approval of a proposed settlement, certification of the settlement class, and counsel's request for an award of attorneys' fees and expenses in connection with the settlement.

Your Honor, I want to start by acknowledging that our submissions before the prior hearing did not answer some of the questions that Your Honor had. We tried hard to rectify that. We have made two submissions since then, and we hope we have done a better job of explaining our analysis of the employment agreement claims.

I'm going to be brief so I can really

focus on whatever questions Your Honor may have. But I do want to start with explaining why that error that we had in November was so personally frustrating.

Your Honor, we really all like to say every case is special and we remember every case at the end of our careers. But the reality is there are some cases that take on a different importance. And that's not because of the size of the case, it's not because of the size of the recovery or media coverage, or anything like that. Often, there's just something unique. It could be the characters involved. It could be that you brought novel claims. It could be the judgments that you made in pursuing the case. And, you know, for me, Your Honor, two smaller cases that I know will always be special to me are Amylin and Landry's. Those are cases that were unusual.

This case, I think, for a lot of us, really has that. And I think it's because we do believe that if we weren't so aggressive and creative in prosecuting this case and making the judgments we made, GFI stockholders really wouldn't be getting $6.27 per share, whether they tendered in a tender offer or were squeezed out in the back-end merger. So we are very proud of the result.

Your Honor is familiar with the facts behind the case. I got started on that at the last hearing, so I'm really going to pick up with, very briefly, what we did from the shareholders' rejection of the CME deal.

You know, it's important, because up until then, the case had a, what I would say, a more predictable path. We believed in the claims. The defendants were fighting them. They were kind of more typical.

But when shareholders vote down a deal where there's a controller who is self-interested, you would think, at that point, the wheels of governance flow in a certain way to get the alternative deal. That obviously did not happen here, and we really think that the litigation was central.

We were preparing to come to court, and then we started to realize that the special committee was derailed by Gooch and Heffron and Ms. Cassoni. We then learned about how the special committee had been marginalized, and we came in for that emergency motion. And I really do believe, Your Honor, that if not for our request and Your Honor's decision to set a very short timeline to have a trial here, I think Gooch and Heffron and Cassoni would have kept on fighting it. We cut off their options. That's what led to the deal.

At that point, I do think a lot of people really would have stopped litigating. I mean, you have got 60 million shares out there. There is, we thought, a pretty clear 10-cent claim. But is it really -- can you justify pursuing that to trial? What we did is we found ways to create other leverage, and we made clear to the defendants, rational or not, we are going to just keep pursuing this and get a liability verdict. And, you know, if we don't get all the damages that we are pursuing, fine, but we're going to take this to trial.

And we really projected and genuinely felt that we were licking our chops to get Mickey under oath and Colin Heffron under oath and Howard Lutnick under oath. And that's ultimately what I think brought us to the settlement events.

We did raise the employment agreement claims. I hope our briefs laid out our thinking, the economic analysis.

I will answer any questions Your Honor has, but I want to highlight -- and I think Your Honor knows -- the way settlements happen, it's not all objective. It's not all valuation. There is the real human dynamic. And here, you know, I can't quantify how much of the additional money BGC and, well, really, Gooch and Heffron agreed to pay is because of their valuation of the claims. I just know that our position was "Your conduct was egregious and we're just dying to try this."

And I think that, in the end, they made the settlement offer that made it, if not irrational, I mean, it wasn't a reasonable decision to just continue full steam towards trial, because we felt we were getting so much for the class. It was a really good outcome.

And I think that Your Honor's role in these settlements is Your Honor should worry when you think the plaintiffs lost in the negotiation and are coming here to try to spin it as a victory. And I hope Your Honor doesn't think that here. I think -- if anything, I mean, I have the utmost respect for all of the counsel here. Clients have to make decisions. And ultimately, you know, I don't want to sound like bragging, but I think it's a good thing if the Court looks at a settlement and says "You know what?

Sometimes the plaintiffs can win a negotiation, too."

And that really is how we felt here, you know, the night before Mr. Gooch's deposition, second deposition, days before everyone else was going to be deposed, we really had the first step towards the settlement in our playground. Until then, people were, like, "You guys are crazy." Then we got a settlement. We did, as we wrote, we rejected it out of hand. We said, "We are going to see Mickey under oath tomorrow morning." Then it was a marathon session when, all of a sudden, people got really serious. And we were negotiating an arrangement no one ever projected that they thought we could be in, at least from the defense side.

But I do think those were factors that drove the outcome as much as the economic analysis. And that's what led to the settlement where, again, there was the $6 million on the 10 cents. Every penny of that Your Honor can consider being repaid essentially to the shareholders. On top of that is the 4.75, which is going to every GFI shareholder, whether they tendered or were squeezed out in the back-end merger. And then there is -- whatever fee is awarded, that's coming out separately.

So we think that, you know, the settlement should be approved as more than fair, reasonable, and adequate.

In addition to the cash recovery and the payment of fees on top of the cash recovery, there was the waiver of the dead hand tail. Just one nuance to that. We told CME they have to waive it immediately. They didn't even have a release in exchange for waiving the dead hand tail. That was so the ball can get rolling in locking in the back-end merger. And as Your Honor, I think, knows, the back-end merger has now closed at 6.10.

The market had questions. The market had questions about timing and whatnot. And if you look at the stock prices of GFI stock, it was well below $6 for, I think, every day except for one until our MOU was signed. And with the MOU, the stock traded up above 6 and then stayed in what you would consider a more normal arbitrage range of a merger once the MOU was out there. So it did give assurance that this deal was going to close and we had a date certain for it to close.

So I think, as far as the settlement goes, you have able counsel, very aggressive. You have parties who were -- you saw the way they acted in the tender offer. Maniacal is one way to describe it. But in the litigation, it was hard. People were not giving an inch. It was completely arm's length. And we fully support the settlement and think it's a good outcome for the class.

THE COURT: Can you explain to me how the distributable earning bonus fund pool works?

MR. LEBOVITCH: Yes, I can. I can -- at whatever level, it's a complicated fund. But I believe what happens -- and this is -- the distributable earnings pool is independent of the regular cash compensation. At the end of three years, anyone eligible for the distributable earnings bonus pool will be paid the equivalent of one times the three years' average of GFI's distributable earnings, which is an internal GFI term. It's not a GAAP term.

We looked at it -- well, so they will be eligible for that. 70 percent of that is going to go to Gooch and Heffron, 30 percent is going to go to what I will call line employees. I don't know exactly who the participants are.

As we tried to lay out, we pointed to the projections used at different parts of the process by the bankers. There was, I guess, the levered case and the unlevered case. This is just an upside in a base case. Through that, applying, I believe, the discount rate that had been applied to GFI by the bankers, we came up with a present value of the payment stream of 22 to 25 million. I think it's because the expected earnings, based on projections, had a range of 45 to 64 million, without looking at my notes. And so the amount that would be paid to -- actually, the total amount that would be paid, we said, you know, could be 22 to 25 million.

And to be totally frank, Your Honor -- and that's why you can't have a scientific analysis of it -- I don't know what the earnings are going to be in three years. Maybe it will be a lot better. I don't know if this volatility is the greatest thing to happen to GFI's business or it's crushing it because they are focused on the bond market.

But we used the projections that the bankers used, and these were the bankers that we gave at least some credence to. So we came up with a 22 to 25 range. Of that, like I said, 70 percent can go to Gooch and Heffron; 30 percent is going to other people. We, you know, putting aside what people say in negotiation and argument, articulate, as the defendants would point out and as we, frankly, don't have great arguments against, it's hard to get the other 30 percent. I mean, those aren't Gooch and Heffron. There are other brokers that have value and presumably are still working in large numbers for the company. So you discount by another 30 percent off of that. You get to a value. That's assuming we can get liability and then prove the damages.

We had consultants talk to us, and part of the problem is because of the formula for the DE bonus pool, there is a lot of variables. So there would be a big range presented to Your Honor if we brought this through experts.

There's also the retention bonus pool, which we never raised; we never pursued it. You know, I guess this is jumping ahead to the argument that we had from the objector. We never raised it because not only do the wrongdoers, Gooch and Heffron, never touch that retention bonus pool, the amounts that GFI pays out for that retention bonus pool we believe actually will lower the calculation of the DE bonus pool. So I know that the objector raised that as something we had missed. I just want to be clear, we didn't miss it.

We thought, frankly, it was almost absurd to challenge that. BGC is allowed to pay the line workers. We just didn't want them overpaying bad guys.

I am sure I haven't gotten every detail of the DE bonus pool -- it's complicated -- but does Your Honor have any other questions about that?

THE COURT: So once you discount it down, give me the range that you were using before you risk-adjusted it for likelihood of success.

MR. LEBOVITCH: I think what we wrote is the 15 to 18. You know, like I said -- yeah, that was when you took the 30 percent -- 30 percent off the top of 22 to 25. I believe it was 15 to 19.

THE COURT: And same question for the Gooch and Heffron compensation range.

MR. LEBOVITCH: They were lower than their prior contracts. The compensation --

THE COURT: They weren't going to be working.

MR. LEBOVITCH: Oh, Heffron is -- my understanding is Heffron is working. He is the COO or president, I think. Maybe Mr. Rowe can answer that. And everything I have heard, because I've asked this, he's working seven days a week.

Gooch is -- I don't think, after everything that happened, I don't think Howard Lutnick and Mickey Gooch love each other. But, yeah, I mean, if we went to trial, I'm sure we would have been asking Mickey Gooch -- if we hadn't settled when we did, the next morning I would have asked Mickey, "How many days have you shown up for work?" But it's a million dollars he's getting paid per year. So that's --

THE COURT: But there's bonus provisions under those. How do the bonus provisions under those interact with the other bonus pool you were discussing?

MR. LEBOVITCH: I will look at what we have. I don't think they overlap, if that's what Your Honor is asking. I think there is bonuses that can be paid.

Really, our focus was to compare what these guys were getting with what they had been paid previously. And to be frank, Your Honor, I think the only blemish in it -- I mean, the amounts went down. Right? I mean, Heffron probably is working more, but his base salary was lower. He may be eligible for bigger bonuses, but maybe it's because of the work he is doing. I don't even know if he is eligible for bigger bonuses. Mickey is not. I mean, their payout is going to be through the DE bonus pool.

I want to also point out -- maybe this is a bit offensive, but, I mean, there is a securities case going forward against -- well, for which Mickey and Colin are going to indemnify. So just as in this case, we highlighted that this is actually wrongdoer money. And that's pretty rare. I will talk about that in a little bit. But, I mean, Mickey and Colin are paying.

And, actually, the way the DE bonus pool works, if, in fact, the amounts that are awarded here, if Your Honor approves the settlement, awards a fee, and whatever is paid in the securities case, if it -- Gooch and Heffron are indemnifying that, and that's going to come out of their ultimate DE bonus payments. So if they are eligible for 15 million down the road, it may be that some portion of that, if not all of it, is used to cover their indemnification to everyone else. Because they are paying out-of-pocket. And so --

THE COURT: Yes. I am not really looking at it in terms of -- I guess I could be looking at it that way. But I was trying to figure out if the ranges you gave me for the compensation agreements were additive with the DE bonus pool or if there was some overlap between them such that, assuming you had an amazing, amazing day and got everything beyond your wildest dreams, whether the total number was the sum of those or whether there was some overlap between them such that it would be basically double-counting to add both of them together.

MR. LEBOVITCH: No; we would add them together. We would add them together, Your Honor. And we -- you know, look, if we hadn't settled, we would be here at trial trying -- you know, we think the risk was the speculative nature, but we would be trying to lay out the highest amount they could get. And we would clearly be saying that the employment contract is compensation, and then there's the DE bonus pool. They don't offset each other.

THE COURT: Okay.

MR. LEBOVITCH: So I guess, before I get to the objection issues, the class, as Your Honor knows, after the last hearing, we altered the class so that the class is defined as ending on the date of the

MOU. We felt that was consistent with Delaware precedent. The effective date for the settlement was cause to post-date the closing of the back-end merger, and we had the clarifying language, which I guess was -- we felt the most important is to avoid any doubt. The only conduct post-dating August 24th that would be released was the consummation of the back-end merger.

So if yesterday, you know, Howard Lutnick did something awful, people can sue for that. It's just the closing of the back-end merger that was included. And we felt we had to do that.

You know, the employment agreement claims, I mean, we briefed out on the Thorpe issue, which really is a traditional derivative claim. And I can get to that very briefly. But the employment agreement claims, there would be a fight about whether it's derivative or direct. I mean, we would say the employment agreement claim -- and we did plead it as there was money that otherwise would have gone to the shareholders in the deal that was being diverted. But as my co-counsel points out, there would be arguments that employment agreements are traditional derivative claims.

But we tried to fix the class, fix the effective date to very directly address the issues that Your Honor raised. I hope that was sufficient. And if the class definition is sufficient, I don't think there's a question about the other Rule 23 elements. You have the numerosity and commonality. It all fits here.

I guess the only one that's being challenged is typicality, which I can address as part of dealing with the objection, if it's all right with Your Honor if I move on to that.

We love all stockholders, Your Honor, including merger arbs. And there's nothing wrong with it. I think there is a lot of value to be provided by merger arbs. Economically, the deal, the way it was put together, created an unusual merger arb opportunity. We were litigating this case and we were trying to get the best possible price for all the shareholders. That necessarily entailed getting the tender offer accepted -- that was step one -- and ensuring that anyone who wasn't going to tender -- because some people just are asleep, or whatever, don't tender -- that they are going to get the same money. I mean, we had to do that.

The GFI board, once they finally found their fiduciary duties, they recognized as much. They had to lock in the back-end merger, and it was locked in, Your Honor. But what happened is, because of all the uncertainty and turbulence, the stock was trading well below 6.10. And so there was an opportunity for people to buy in, even after the tender offer was announced, at prices that are well below 6.10, knowing that within some window of time you should be getting the 6.10 in the back-end merger.

Our clients, being long-term investors who are already in and not looking to buy more shares, told the Court with a letter, we said, "Look, you know, we're going to tender, but we want everyone to know we are doing it, and we think it's effectively the rational thing for everyone to do at this point." People agreed, because there was a very small stub that remained.

And what we learned afterwards, once our objectors showed up, is that small stub wasn't really people who didn't tender because they just wanted to wait for the 6.10 at a later date; it was people who, for whatever reason, didn't tender and then sold to merger arbs, who saw a pretty juicy opportunity to buy a stock at below the price you know it's going to be taken out at soon, have a litigation where there's a good chance you can get something if we can do our job well, and if you don't like the 6.10, you can seek appraisal.

And so our clients made clear that they were going to do what most -- the overwhelming majority of public shareholders, in fact, did. You know, again, we have no problem with the merger. Our play here was a profitable one.

It just doesn't seem like a very attractive objection, from our perspective, because we feel like, you know, as Ms. Shane ultimately did, and Mr. Fishbein, people say "You know what? I want to take the money, the 6.10. I want to take the other 17 cents. And if I want to seek appraisal, I can do that."

And so the only question, I guess, was these dilution claims. We were very open. You know, we pressed every angle we thought was a nonfrivolous or credible angle. Our credibility matters to us. We didn't pursue the dilution claim in the litigation because we knew, A, the back-end merger was going to be at 6.10 regardless of how many shares GFI issued.

That was it. It was locked in. And it was issued at the market price, and the market price was below 6.10. It closely followed a heated bidding war that led to a 6.10 or 6.20 victorious price. So there is a spread of 5.85 to 6.10 that maybe there was a discount for a controlling shareholder, if you want to do that.

Our ultimate view is rather than have to do a valuation of the company as of last April, as well as damages, there's an appraisal to be had. We preserved that. We always knew we were going to preserve that.

Your Honor has seen that Ms. Shane, after objecting, hired experienced and sophisticated counsel, Mr. Margules, who is here somewhere in the room, my friend Mr. Margules. And he came in, and, quite frankly, we spoke and I said, "You know, David, we always thought this was available. If you want to argue dilution, we don't think anyone has articulated a reason why you can't argue it."

And lo and behold, there is a confirmation of our interpretation. I won't speak for the defendants, but they kind of gave Mr. Margules and Ms. Shane what I thought those people had anyway. And it was, "Yeah, if you want to argue dilution, if you think that that has value, go for it."

I have no doubt that Your Honor can hear the competing arguments and decide to do an appraisal that just disregards those shares that were issued as if it was a top-up option. And so I don't think that dilution is really an issue. If anything, if you are a merger arb like Quaker and you see that offering, again, I don't think it was dilutive, but if you thought it was a dilutive issuance and you know you are getting the 6.10 anyway, it just increases your opportunity to buy more shares. That's actually what Quaker did. If you thought value was eliminated so the stock is going to go down, well, you buy at a lower price and you are still getting your 6.10.

So we never really understood the dilution argument. But Mr. Margules can answer -- I can speak for him. He's here to answer any questions Your Honor may have about that.

You know, obviously, Quaker adopted the employment agreement claim. We have discussed that. It wasn't their argument. They never really raised it until Your Honor did for them. So hopefully we have addressed that.

Similarly, they tried to adopt the

Thorpe vs. CERBCO claim. That is a traditional derivative claim. And, really, we look at Thorpe as a policy case, the policy being we have to hold someone who is disloyal accountable for their misconduct.

Your Honor has seen a lot of settlements, different sizes, different terms. We have all dealt with a lot of them. I don't know if we've ever presented or Your Honor has ever seen a case where, in a settlement, particularly, short of trial, we can say with near certainty that the wrongdoers are actually going to be paying for their conduct. And that's because there isn't another source for them. So in that sense, the Thorpe vs. CERBCO concern, I hope, is resolved, because these people really are being held accountable in a way I'm sure they never thought would happen when they were in the fight.

You know, again, I think I addressed the typicality. I mean, our standing to represent the class here, we are typical of the vast majority of the class. And if you had a back-end merger where the price was unknown, that's one thing. But these were all one deal. And, yeah, it was separated by a lot of time because of the dead hand tail, but it's all one deal as far as the price goes. So I don't think there should be any claim about our standing.

And, you know, the scope of the release, again, as we said in the last brief, we understand and have always kind of lived by the Trulia model. Right? We have never presented to the Court disclosure-only settlements or something that was really truly immaterial. But I sure don't understand Trulia to say that even if you get a really good outcome where people are paying out-of-pocket more than a lot of objective people would think is a logical outcome of the litigation, that you can't have a release that covers those claims, particularly where we have a carve-out for appraisal and the securities claim, which is now going forward past the motion to dismiss in the Southern District.

I don't have any other comments on the objection. I don't know if I should move on to our request for attorneys' fees in connection with the settlement or if Your Honor has any other issues on the class or the objections.

THE COURT: Is the objector here?

MR. ANDERSEN: Yes, Your Honor.

THE COURT: Would you like to say

anything?

MR. ANDERSEN: Yes, Your Honor.

THE COURT: Why don't you come on down.

MR. ANDERSEN: Good morning, Your Honor. My name is Eric Andersen on behalf of Quaker Investment Trust.

The one thing I just want to add is Your Honor clarified the appraisal rights, and so we just have a limited objection at this point. We just request, because the time has passed, we just request that everyone who was not aware of this clarification be given an opportunity to opt in to this new, revised settlement based on the clarification, given about 30 days to opt in if they want to participate in our appraisal action. And that's the limited scope of our objection at this point.

THE COURT: So I get that that's what you're asking for. But help me understand it as an objection.

I mean, I get that it would be a nice thing to have. So I get that it's something to ask for. But frame it in terms of why it's a -- why there is currently a problem with the settlement that that solution would remedy.

MR. ANDERSEN: Well, Your Honor, to be honest, no one -- myself and some other folks who are not here today never anticipated or knew that there was a remote possibility that other claims other than determining fair value could be jammed into an appraisal proceeding. In fact, it's one of the main reasons why my client hired me, is to file the class action so that we could get these other claims involved that Mr. Lebovitch's clients could not pursue.

And so at this point -- we have a clarification that was entered on the 22nd. And so at this point, all of the shareholders -- none of the shareholders that have not tendered and have not demanded appraisal have no notice of this. And so I think it would be fair for the -- to just tweak the settlement a little bit to allow them to opt in, because Your Honor is not going to allow them to opt out because this is a nonopt-out settlement.

And also, the Cede & Co. case vs. Technicolor specifically says that in appraisal proceedings, claims related to breaches of fiduciary duties are not appropriate. So I think the market and everyone was anticipating that appraisal was not going to be the appropriate time or the place to challenge the dilution. And so because of this newly created clarification, I think it would be appropriate to allow other folks to opt in.

THE COURT: Can you walk me through the magnitude of the appraisal implications of including the calculations, the number of shares.

MR. ANDERSEN: I'm sorry. I don't understand the question. Can you say it a different way?

THE COURT: Sure. How much do you think this matters? How much do you think it changes the likely ranges that are to be generated in the appraisal?

MR. ANDERSEN: I have no idea, if Your Honor were to grant this opt-in procedure, how many other people would opt in.

THE COURT: I'm asking a slightly different question. I'm asking what monetary impact you think it is on the fair value determination. In other words, presumably you think that this dilutive transaction actually caused harm that one would then take into account. And I'm trying to figure out what that delta is.

MR. ANDERSEN: You mean just forgetting the appraisal claim for a moment, just purely the dilutive component, what possible damages Your Honor could possibly award? Is that the question?

THE COURT: It's one way of getting at the question, but, I mean -- sure. Let's start there.

MR. ANDERSEN: Well, Your Honor, the original stipulation that was circulated, the option of getting damages was not provided. And so what I did is I contacted Mr. Margules when I got a draft of the stipulation, and I asked him, I said, "Hey, you're really cutting our knees off by not allowing us to at least get rescission or rescissory damages."

And so he went back, and it looks like he did revise the stipulation and then submitted it to Your Honor. So we have both you can rescind the share count or have access to damages.

And Mr. Lebovitch makes a plausible argument or a plausible defense in terms of the damages could be the difference between the 5.85 and the 6.10. That could be some damages that are awarded to us.

What would be even more valuable to us is if Your Honor were to actually rescind and actually grant us the original share count. That would be huge for us.

THE COURT: In terms of what? In terms of your appraisal case?

MR. ANDERSEN: My appraisal case, Mr. Margules' appraisal case, and anyone else who dissented but hasn't made themselves known yet.

THE COURT: But basically what we're talking about is roughly 8-ish million, 8 to 10-ish million?

MR. ANDERSEN: I would agree with that, yes.

THE COURT: That's really what I was asking.

All right. What else do you want me to know?

MR. ANDERSEN: That's it, Your Honor. Thank you.

MR. LEBOVITCH: Your Honor, I would have a slightly different answer on the dilution claim. I think it's easy. You just look at the share count and the change in the share count. And if someone owned 1 percent of the company beforehand, you then look at the new share count, and if you wanted to look through it, you would say, "Well, the dilution means you now own .7 percent of the company." So you are either going to look through it and say "I'm going to give you 1 percent of the appraised value of the company or you're going to be stuck with your .7 percent."

But there's a candor issue that I just want to raise, because I feel compelled to. February 22nd, or whatever date the clarification was filed, is -- it can't be the first day that my colleague learned that in the appraisal you could pursue these claims. I mean, maybe that's the first day the stip was filed. But last fall -- last fall Ms. Shane was going back and forth between myself and our team and Mr. Andersen. And we articulated this and Ms. Shane understood it last fall. I have a high level of confidence that our position was communicated over to Mr. Andersen and Quaker.

And then on January 6, I believe it was, we had a meet and confer about the discovery fight that Your Honor answered. Again, Ms. Thomas and I were upfront. We could not have been clearer that anyone can pursue -- we believe anyone can pursue these dilution claims in the appraisal context.

So maybe Mr. Andersen meant to say he thought I was wrong, but it cannot be that February the 22nd is the first that he heard of the possibility that these dilution claims could be in the appraisal.

Again, I am all for shareholders getting every benefit they can, but I was a part of those conversations, and so I do have to correct if Mr. Andersen misremembered the prior communications. With that, unless Your Honor has questions, I will move on to the fee issue. Our position on this appraisal has always been consistent and unambiguous.

Your Honor, on the settlement, on the $10.75 million net that's going to be paid to the class, hopefully, as soon as we can get it administered, we request a $3.6 million fee award, including expenses. We -- you know, it's a net settlement fund. And the debate, at least as of last fall, that we had with the defendants was not what percentage should be awarded, although I will speak to that; it was really over whether you award that percentage. Because there was no debate about -- we asked for 25 percent, and they didn't challenge that.

It was whether you treat a net settlement fund as a net or whether you award a fee based on 10.75.

And we think the law on that was clear. It makes economic sense. I mean, you can look at any gross settlement and figure out what shareholders got by taking out the expenses and the fees. That's what matters to shareholders. I think Chancellor Bouchard, having seen it in Jefferies, has encouraged the use of the net settlement fund. I think Your Honor has seen it before. It seems to be, you know, a good development. Shareholders sure love it.

In this case, when we announced it, people called and said, "So let me get this straight. I'm going to get 17 cents a share?" And we were able to say, "Yeah, give or take a few sub-pennies, that's right."

So people like it. I don't know why we would punish anyone by saying "We're going to just give you a fee based on the net fund." So the math is basically if you -- to get a 25 percent fee that nets you at 10.75, it's a $14.35 million gross recovery.

The reasons here why we think the 25 percent is appropriate, because Your Honor has to independently make that judgment, putting aside all the litigation and how hard-fought this was and our sense and everything articulated about that, really we do feel like it was our creativity and ingenuity that created a benefit here for these shareholders. It was good legal work, I think.

We were getting closer to trial. We had been through a lot of depositions. And, again, the case settled on the eve of Mickey, Colin, and Howard a few days later being deposed. So I think that drove the settlement. And, also, the personal accountability.

So I don't know what factors Your Honor would look at to figure out where in a range, you know, you would award a percentage, but I think that, you know, one that almost -- it's so rare that it's never discussed is the personal accountability factor. And I think that, in thinking about a fee, it's fair to say, "Well, wait a second. Here" -- I mean, everyone can go to sleep at night -- I guess except maybe for Mickey -- knowing that if, in fact, these guys acted the way we said, they are being made to pay for it. That's a good thing and that, I think, should make it easier to support the fee award.

You know, on the time, we did have the prior mootness award that I haven't discussed today, and there was a lot of other benefits of our efforts. But if you add up all the time together and add up what would be the 3.6 million to the mootness award Your Honor provided, the multiplier was a 1.81. And it was an effective hourly rate of $975 per hour if you add it all up together.

You know, we could focus on the fee -- we could assume all the hours are done for the settlement and just assume the mootness fee was based on no hours and no effort, and you still have a 3.2 multiplier and an hourly rate of $1700 an hour. Even that's within the range of what the Court has awarded in other cases. But, again, that would -- it would be a little strange. The only way I know how to do it is to add it all up together and add up all the fees. It's well within any range.

So I think that's it. I don't know if Your Honor has any other questions?

THE COURT: I don't. Thank you.

Anything from this side of the room? You guys were braver in your seating this time around.

MR. LAFFERTY: Nothing, Your Honor.

MR. SHANNON: Nothing, Your Honor.

MR. NOLEN: Nothing, Your Honor.

THE COURT: Great. Thank you, everyone.

Today's hearing is so that I can consider the proposed settlement and award of attorneys' fees in GFI Group Inc. stockholder litigation. This litigation concerns claims that defendants breached their fiduciary duties in connection with what was ultimately a two-step acquisition by BGC Partners.

The two steps were more distant than usual in time. The first step tender offer closed on February 27th, 2015, and the second step back-end merger closed on January 12th, 2016. Both, however, were governed by a transaction agreement dated as of July 30, 2014, that detailed the consideration that BGC would be providing. It's consequently, in my view, best judged, for settlement purposes, as a unitary transaction, which affects the analysis of the claims and the objections and the outcome.

The first issue that I'm going to deal with is class certification. I previously had concerns about the definition of the class. They have been addressed through a combination of changes made by the parties, as well as the passage of time. The class definition runs basically from June 30, 2014, through and including August 24th, 2015. There's a long list of exclusions that I won't go through. The short answer is I do think that this is an appropriate date range for a settlement at this point.

Using that date range and analyzing the Rule 23(a) requirements, (a)(1), numerosity, is easily met. At the time of the settlement, there were more than 170 million shares of common stock outstanding and nearly 61 million shares belonging to members of the class. Indicating the number of individual holders, or at least approximate number, perhaps, of first- and second-level holders, the claims administrator's affidavit of mailing states that the administrator mailed claim packets to 3,268 potential class members. So these are strong indications of numerosity, and it is satisfied.

Commonality is also satisfied. The common questions of law and fact included whether the human fiduciaries breached their fiduciary duties in their actions leading up to the ultimate transaction, whether CME aided and abetted those individuals in their breaches of duty, and the extent of harm and likely remedy.

In my view, given the nature of the transaction, typicality is also satisfied. There was an objection made to typicality that has technically been withdrawn, but I think, given the unitary nature of the transaction, the fact that the plaintiffs held shares at the time of the original transaction gave them standing to challenge the components of the transaction and made them sufficiently typical to support the settlement.

I will say that it is a problem when people sell out, not in the pejorative sense, but sell in the sense of selling their shares during the pendency of the litigation period. I don't think Celera can or should be viewed as a wholesale validation of that practice. I think Celera was a case where the settlement was sufficient so that it made sense to the Court and the Court didn't want to hold up the works by getting into standing questions.

Here, I am taking a similarly pragmatic approach. But it does create unnecessary complications when your client sells its shares before the settlement closes. And at some point, the good offices of the Court, in trying to look beyond those things to the real viability of the settlement, is going to run into a time when really you do have, through that, a plaintiff that no longer can validly support the settlement.

You can argue whether -- and I'm going to blank on the name of the case, Mr. Grant, where you basically - it was just you by the time of the settlement hearing. Was it Western Union? Anyway, it's come up before, I think. And as I say, I think that your clients need to think hard about it. And if the issue is that, as here, where it's a unitary transaction and they want to sell for time-value-of-money purposes, again, from a pragmatic standpoint, I get it, but it does create conceptual difficulties, and I think at some point they are really going to trip somebody up.

Regardless, for present purposes, I think that the class representatives' claims are sufficiently typical for class certification purposes.

Finally, in terms of adequacy of representation, I think the representation has been adequate. Counsel have done their best to press this case forward in a way that I think is reasonable.

There was a challenge to that by Mr. Fishbein, but it's been withdrawn. And I would not have sustained the objection, regardless.

From a procedural standpoint, class certification requires a filing of affidavits pursuant to Rule 23(aa). The lead plaintiffs here, Maurene Al-Ammary and Robert Michocki, filed their first affidavits on September 11 and September 25th, 2014. Ms. Al-Ammary filed her second affidavit on July 13, 2015. The record does not reflect a second affidavit from Mr. Michocki, so he is no longer a class rep. That would be a problem if we didn't have Ms. Al-Ammary, but we have Ms. Al-Ammary. So we will go forward with her as the sole class representative for purposes of this settlement. So Rule 23(a) requirements are met.

The next issue is certification under one of the elements of Rule 23(b). Here, certification is appropriate under (b)(1) because the prosecution of separate actions by individual class members would risk inconsistent and varying results that would impose inconsistent obligations and because, as a practical matter, adjudication with respect to one class member would be dispositive of the rest of the class's interests.

This is what typically happens when you have stockholder litigation where fiduciaries acted in a manner that affects the corporation and all of its stockholders proportionately to their interest, and that's why actions challenging the exercise of corporate fiduciary duties are frequently certified under Rule 23(b)(1). And I am certifying it under 23(b)(1) as a nonopt-out class.

The next issue is adequacy of notice, which, by rule, has to be provided and, I think, is also a due process issue. Here, the notice itself was sufficient, has already been approved by me once, and I have confirmed again that it contains all the required elements, including an adequate description of the lawsuit, the consideration for the settlement, the location and time of this hearing, and the identities of whom to contact for further information.

The notice was adequately delivered. There was an objection to this by Mr. Fishbein. He has withdrawn it. But regardless, I would not sustain it. Notice has to be reasonable. And in any human endeavor, perfection is impossible. Notice doesn't have to be perfect. The record reflects that reasonable steps were taken to provide notice to class members. The affidavit of Stephanie A. Thurin reflects those efforts. I won't go through them more than to cite them, but they are certainly adequate to try to get notice to all of the actual class members.

There was also a publication done, and the affidavit of Ryan Kao describes the publication of the notice that supplemented the mailing. And as I say, in my view, notice was adequately provided.

In terms of the merits of the settlement, as I understand it, my task is to consider the nature of the claims, the possible defenses thereto, the legal and factual circumstances of the case, and then to determine whether the outcome falls within a range of reasonableness that the parties, acting with full information and not under any compulsion to settle, could reasonably accept.

The settlement of a class action is unique because the fiduciary nature of the class action requires the Court of Chancery to participate in the consummation of the settlement to the extent of determining whether it should proceed.

Here, in terms of the claim, the plaintiffs had what I regard as quite strong claims for breach of the duty of loyalty. The suit, as it moved forward, focused on the conduct of three of GFI's directors: Gooch, Heffron, and Cassoni. Gooch was the chairman. Heffron was the CEO and the director. They also owned 38 percent of the common stock through an entity called Jersey Partners and had a veto right as to any sale because any extraordinary corporate act required a two-thirds vote.

The complaint alleged that Gooch and Heffron attempted to cause GFI to sell itself in a transaction that would have benefited themselves and that Cassoni was engaged in doing Gooch's bidding.

There were allegations regarding side agreements that would have protected and locked in the transaction that was favorable to the insiders.

Once BGC launched a hostile tender offer, the complaint alleged that Gooch and Heffron took a number of actions to thwart the BGC tender offer and protect their own economic interests and the transaction they favored, including refusing to negotiate with BGC; refusing to call a full board meeting, despite the request of GFI's special committee to do so for the purpose of considering the offer; threatening BGC with multiple lawsuits; and threatening to diminish the value of GFI to make it less appealing to GFI.

There were allegations that ultimately, even after the original deal was suspended, that Gooch and Heffron continued to frustrate a BGC deal until they received what amounted to side benefits in the form of employment agreements and buyout terms for their shares.

Those weren't just allegations. I don't know how it would have come out at trial, but there was a lot of evidence to support a belief that there was bad behavior going on here. There were particularly strong indications that self-interested management was attempting to run over a special committee comprised of independent directors that was trying to do its best for the stockholders, as well as trying to run over respected counsel, who was likewise trying to do the best for the stockholders.

Particularly telling in this matter were the representations to the Court by respected counsel and the special committee about the serious problems that were occurring, and one could anticipate highly credible testimony by special committee members about what had gone on in this situation.

So I have to, when I look at this settlement, view these claims as ones that were quite strong and likely not limited in the potential outcome to simply contract-style reliance damages, but which could have implicated a full panoply of equitable remedies, including rescissionary damages, and likely some form of disgorgement.

But that doesn't mean that the plaintiffs were guaranteed to win. Nor does it mean that the plaintiffs were guaranteed to get a lot of money. The real question is one of weighing what the plaintiffs got, in terms of $10.75 million, against what they potentially could have gotten had they gone to trial and pursued these claims.

The defendants would have had arguments on the merits. They would have responded as to the conduct of their clients, which I'm sure would have painted a different story than what the disinterested directors and their independent counsel was saying. So that would have presented a fact issue between interested parties on the one hand and disinterested parties on the other.

There also would have been causation issues as to how things would have transpired had events unfolded differently without the actions of the insiders. And there also would have been questions about the ability of the insiders to act in personal capacities and how much consideration should have gone to them and how much negotiating leverage they legitimately had in nonfiduciary capacities, as opposed to as directors and officers.

So all of this would have been quite interesting and ultimately probably quite messy.

The plaintiffs ultimately obtained a settlement payment of $10.75 million from Gooch and Jersey Partners. Gooch and Jersey Partners also will pay all of the attorneys' fees and expenses awarded to plaintiffs' counsel, which will not come from the fund. When I balance all this out, it's a tough call, but I do think that the settlement falls within the range of reasonableness. I don't know where in that range it falls, but it falls within it.

Had somebody come in and bonded this, I would have let them go forward. In other words, had somebody come in and said, "We will bond the $10.75 million recovery and we want to keep litigating," I would have let them do that. Really, had somebody come in and pushed hard, like in a Rural/Metro-type situation, had somebody come in and pushed hard and said, "We think we can get more," then that would have been a tougher call, because then you wouldn't have had the floor, but I would have thought hard about that. That's because I'm not sure -- I think that as to the compensation arrangement part, it's in the range of reasonableness, but it seems to me to be middle to low. It's not like a wowing range-of-reasonableness result. So I would have thought hard about that.

But what gives me the most comfort is that we don't have anybody who is doing that. We have objectors, but we have objectors who are just playing around the edges. We have objectors who are just coming in and making little tweaks here and there and who ultimately have dropped most of their objections. And the remaining one has really changed his story both times we have been together, as well as a couple of times intervening. So it's not somebody who has come in with a great deal of conviction and sticks to its guns and essentially said, "Not only do we think that this is bad, but we think it's so bad that we want to take it over and litigate it."

So I hesitate to put too much weight

on that because it's not a true market process. But I think it's some indication that if there really was a gross valuation disparity here, given the amount of attention the case seems to have received, that likely if there was somebody who could come in, either on their own or with a litigation financing outfit, make something of it that is more than what the plaintiffs got here, I think it's fair to think that there is a likelihood that I would have heard from them. And they're not here. So that reinforces my belief in this context.

And I would say in a normal, run-of-the-mill or less high-profile settlement with less high-profile facts, with less type of media coverage, that type of thing, I'm not sure I would necessarily have the same view. But here, I think this is one where if somebody legitimate thought they could get more than the very able lawyers to my right, I think they might have shown up. And so that reinforces my preliminary view that this falls within the range of reasonableness and is confirmatory in that regard.

The last issue that I will touch on before getting to the fee is specifically I want to comment on the one remaining objection. Two of the objectors, the Shane group and Mr. Fishbein, have withdrawn their objections.

Quaker Investment Trust, as I said, its objections have morphed. They have morphed repeatedly. It's been sort of like a rolling buffet of objections. But the current objection is simply for affirmative relief that I would grant a new appraisal opt-in period based on what is said to be the clarified scope of the appraisal rights.

What I think that would require me to do is reject the settlement and tell the fine counsel in the room, "Come back, and I will only accept the settlement if it includes this type of procedure." And I don't know what the defendants would say to that. It would put the settlement at risk, and it would put the settlement at risk for something that I am not sure is a terribly meaningful add.

Maybe I'm wrong about this, but I don't find compelling the idea that people made their appraisal elections based on this share-count issue. Maybe they did, but Quaker hasn't spelled it out enough for me as to why somebody really would do that. I think if people thought that this company really had colossal value warranting going forward with an appraisal, they probably thought that for reasons unrelated to the share count and are already in.

What I don't fault Quaker for is having uncertainty as to whether I can do this share-count revision in an appraisal. I don't know if I can do this share-count revision in an appraisal. I hope I can, and I suggested in Olson v. ev3 why, when a transaction is closely related to a back-end merger such that it's part of that operative reality, one might be able to do it. But we've got cases. And it's not just the split at the Supreme Court level you-all have talked about. But when Vice Chancellor Noble confronted this in Gentile, he said, "You know what? I can't do the share-count change. You-all have to go challenge that in a plenary proceeding and then come back." And that's how we got the Gentile vs. Rossette decision. Now, Gentile didn't deal with something that was as closely connected to the merger. It dealt with something from well before.

So what I don't fault is Quaker from having uncertainty about this. And with due respect to Mr. Lebovitch, I don't think it's your concession to make as to whether this can be something that's litigated in an appraisal or not. If Mr. Lafferty was saying, "Yeah, we won't" -- or whoever represents the company was saying, "Yeah, we will do this in an appraisal," that's a different story. Your reassurance has probably had a lot of weight in a lot of areas, but I don't think it's binding on the company for appraisal purposes. So I don't fault Quaker at all for not taking comfort in that, but I'm ultimately not persuaded that Quaker's argument is enough to risk the settlement.

And, look, if it really turns out that this one aspect of it is a horrible injustice and we can't do it in the appraisal, I would consider -- and I'm not telling you how I would rule on it, but I would consider some type of motion to modify solely as to this aspect, motion to modify the final order solely as to this aspect. I would consider it. I wouldn't say it was crazy. I don't know how I would rule. The defendants, I'm sure, would have lots of arguments why I shouldn't reopen it. But if I can't do it in the appraisal and if it really does cause serious injustice, I would at least think about it. But for purposes of today, I'm not going to credit the objection and I'm not going to reject the settlement on that basis.

Overall, I think $10.75 million falls within the range of reasonableness, and so I'm approving the settlement on that basis.

Now I'm going to turn to attorneys' fees. The goal here is to ensure that, even without a favorable adjudication, counsel will be compensated for the beneficial results they produced, provided that the action was meritorious and had a causal connection to the conferred benefit.

Plaintiffs' counsel is entitled to fees and expenses under the common fund doctrine for the monetary benefit conferred on the class.

In setting fee awards, the Court of Chancery must make an independent determination of reasonableness.

I'm going to start with the size of the benefit conferred, which is a $10.75 million net settlement fund, as well as some other aspects: elimination of the dead hand tail and acceleration of the back-end merger. Really, it's the $10.75 million in cash that matters.

The stage of the litigation. There was a good bit done, a lot of discovery, but there was still significant discovery to go. The plaintiffs didn't ever have to brief any motions, not even a motion to dismiss, and so I think it was a middle-of-the-case type thing.

The plaintiffs have asked for $3.6 million, which would equal 33.4 percent of the $10,750,000 fund. But because certain of the defendants are paying the fee, that's not really a fair comparison. It really works out, once you gross it up, to 25 percent of the fund.

But then I have to remember that I already gave you-all $4 million for the mootness fees. Maybe I'm just too mean-spirited and cheap, but it seems to me that $7.6 million for this is excessive. So what I'm going to do is I'm going to start with 20 percent of the aggregate fees and cash rather than 25 percent. That puts me at a ceiling of $2.75 million and reflects the stage of this litigation when it settled.

I'm going to recognize that I think some of the work and effort had dual purposes. In other words, you learned about the case, you did some work that generated the mootness benefits, and there was at least some overlap between that and the current common fund. You didn't have to redo certain things or review certain things, et cetera. So I'm going to take you down to 2 million, which is 20 percent of the actual cash.

What this means is that for doing all your work in this case, you end up with a fee of $6 million. I know, Mr. Lebovitch. You give me a face every time, and it's just life. So that's where I'm going to end up.

Does anybody have a form of order that I can write in?

MR. MARGULES: Your Honor, may I be heard for a question?

THE COURT: Sure. Come on up.

MR. MARGULES: Thank you, Your Honor. David Margules from Ballard Spahr representing the Shane parties.

I just was a little uncertain about Your Honor's comments about the scope of appraisal. Given the stipulation that we understand to clarify the settlement terms -- or the defendants have characterized it that way -- does Your Honor have the same question about this particular appraisal, whether claims related to the validity of the dilutive transaction can be resolved in the appraisal, or was that just a general comment dealing with what the circumstances would have been without the stipulation?

THE COURT: So it's more of an "I don't know." I think the stipulation solves it as to your folks. I think it's probably better to view it as a general comment and simply a holding out that because things are uncertain -- and if there's one thing I've learned, it's that I don't know what I don't know -- I at least want to signal that if this does prove to be some larger problem, if, like -- I just don't know. I might be happy with your stipulation. Then somebody might appeal and we find out that, no, appraisal is statutory. It's statutory and you just can't agree to do that. In that case, I would think about it. I would wonder, should we go back and undo this thing?

So I think it's more a bit of risk aversion on my part than anything else, and that's all I can really tell you at this point.

MR. MARGULES: Thank you, Your Honor.

THE COURT: Sure.

All right. I guess we don't have an order, so I will enter it via Lexis.

MR. LEBOVITCH: We do have one, Your Honor.

THE COURT: We do? Awesome. Thank you.

MR. LEBOVITCH: I just want to point out, Your Honor, this listed both plaintiffs.

THE COURT: I will just scratch it out.

MR. LEBOVITCH: We thought we had made the submission.

THE COURT: We couldn't find it. We looked for it. We couldn't find it. And it's ultimately a nonissue because you have Ms. Al-Ammary.

All right. Thank you, all. And I particularly appreciate the parties going back and providing me with additional information about the issues that I asked for. That really was helpful. I didn't feel like I had enough information the first time, but when you went through the information about those other claims, it really was appreciated. So thank you for taking care of that.

All right. Good to see everyone.

(Court adjourned at 11:12 a.m.)

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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 140 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 120 through 140, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 1st day of March, 2016.

/s/ Debra A. Donnelly

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

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MEDLEY CAPITAL CORP. : CONSOLIDATED
SHAREHOLDERS LITIGATION : C.A. No. 2019-0100-KSJM

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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

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THE COURT'S RULING ON PLAINTIFFS' MOTION TO APPROVE SETTLEMENT AND FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

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Continued ...

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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

EXHIBIT C

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

	)	
IN RE: COMPELLENT TECHNOLOGIES,	)	CONSOLIDATED
INC. SHAREHOLDERS LITIGATION	)	C.A. No. 6084-VCL
	)	

[PROPOSED] ORDER AND FINAL JUDGMENT

A hearing having been held before this Court (the "Court") on ____________, 2011, pursuant to this Court's Order dated _______________, 2011 (the "Scheduling Order"), upon a Stipulation and Agreement of Compromise, Settlement, and Release (the "Stipulation") filed in the above-captioned consolidated action (the "Delaware Action"), which (along with the Scheduling Order) is incorporated herein by reference; it appearing that due notice of said hearing has been given in accordance with the aforesaid 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 (the "Settlement") set forth in the Stipulation; the attorneys for the respective parties having been heard; 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 the Class (as defined herein) was adequate and sufficient; and the entire matter of the Settlement having been heard and considered by the Court:

IT IS ORDERED, ADJUDGED AND DECREED THIS _____ DAY OF _______________, 2011 AS FOLLOWS:

1. Unless otherwise defined herein, all defined terms shall have the meanings as set forth in the Stipulation.

2. The Notice of Pendency of Class Action, Proposed Settlement of Class Action, Settlement Hearing and Right to Appear (the "Notice") has been provided to the Class pursuant to and in the manner directed by the Scheduling Order; proof of the mailing of the Notice has been filed with the Court; and full opportunity to be heard has been offered to all parties and members of the Class. The form and manner of the 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 Chancery Court Rule 23, due process and applicable law, and it is further determined that all members of the Class are bound by the Order and Final Judgment herein.

Based on the existing record, this Court previously certified the Delaware Action as a class action pursuant to Chancery Court Rules 23(a), (b)(1) and (b)(2), without the right to opt-out, on behalf of a class defined as all record and beneficial holders of the common stock of Compellent Technologies, Inc. ("Compellent") at any time between December 9, 2010 through and including February 22, 2011, the effective date of Merger, and their successors in interest, transferees and assigns, immediate and remote (excluding Defendants named in the Delaware Action and any person, firm, trust, corporation or any other entity related to or affiliated with any of the Defendants) (the "Class"). For purposes of this Settlement, the Delaware Action shall continue to be maintained as the already certified non-opt out class action pursuant to Chancery Court Rules 23(a), (b)(1) and (b)(2), consistent with the Court's Order of January 19, 2011, which is incorporated herein by reference.

3. The Stipulation and the terms of the Settlement as described in the Stipulation and the Notice are hereby approved pursuant to Chancery Court Rule 23(e) and confirmed as being fair, reasonable, adequate, and in the best interests of the Class; the parties to the Stipulation are directed hereby to consummate the Settlement in accordance

with the terms and conditions set forth in the Stipulation; and the Register in Chancery is directed to enter and docket this Order and Final Judgment in the Delaware Action.

4. The Delaware Action and the claims asserted therein are hereby dismissed on the merits with prejudice, without costs, except as provided herein.

5. In addition to the foregoing, any and all claims, demands, rights, actions, causes of action, liabilities, damages, losses, obligations, judgments, duties, suits, debts, costs, expenses, matters and issues known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, discoverable or undiscoverable, liquidated or unliquidated, matured or unmatured, accrued or unaccrued, apparent or unapparent, of every nature and description whatsoever that have been, could have been, or in the future may have been asserted in the Delaware Action or in any other action, court, tribunal, proceeding, or forum (including but not limited to any claims under the federal, state, local, statutory, foreign or common law, including the federal securities laws or any state disclosure law) by or on behalf of Plaintiffs or any member of the Class (collectively, the "Releasing Persons"), whether individual, direct, class, derivative, representative, legal, equitable, or any other type or in any other capacity against any of the Defendants or any of their families, parent entities, controlling persons, associates, affiliates, divisions, assigns, privies, predecessors, successors, subsidiaries, or related or affiliated corporations or entities, and each and all of their respective past, present or future officers, directors, stockholders, partners, members, principals, representatives, employees, attorneys, financial or investment advisors, insurers, co-insurers, reinsurers, consultants, accountants, auditors, investment bankers, commercial bankers, entities providing fairness opinions, underwriters, brokers, dealers, advisors or agents, heirs, spouses, executors, trustees, general or limited partners or partnerships, limited liability companies, members, joint ventures, personal or legal representatives, estates, administrators, predecessors,

successors and assigns (collectively, the "Released Persons") which have arisen, could have arisen, arise now or hereafter may arise out of or relate in any manner to the acts, events, facts, matters, transactions, occurrences, statements, representations, misrepresentations or omissions or any other matter whatsoever set forth in or otherwise related, directly or indirectly, to the allegations in the Delaware Action, the Merger, the Merger Agreement, the Preliminary Proxy Statement, the Definitive Proxy Statement, the First and Second Supplemental Proxy Statements, and the transactions contemplated therein, or disclosures made in connection therewith (including all claims related to the adequacy and completeness of such disclosures) (collectively, the "Settled Claims"), shall be fully, finally and forever compromised, settled, released, extinguished and dismissed with prejudice; provided, however, that the Settled Claims shall not be understood to include (1) any claims to enforce the Settlement, (2) any claims properly asserted by Compellent stockholders for appraisal pursuant to Section 262 of the General Corporation Law of the State of Delaware, and (3) any claims that were or could have been raised in *Scull v. Compellent Technologies, Inc., et al.*, Case No. 10-cv-01525-PJS-SER (D. Minn.), and *McDonald v. Compellent Technologies, Inc., et al.,* Case No. 10-cv-01566-PJS-SER (D. Minn.).

6. The Release of Settled Claims extends to claims that the Releasing Persons do not know or suspect to exist at the time of the Release, which if known, might have affected the Releasing Persons' decision to enter into the Release or whether or how to object to the Court's approval of the Settlement. This Settlement is intended to extinguish all Settled Claims and Plaintiffs, along with each member of the Class, shall be deemed to waive any and all provisions, rights and benefits conferred by any law of the United States, any state or territory of the United States, foreign law or any principle of common law that may have the effect of limiting the release set forth above. Plaintiffs, and each member of

the Class, shall be deemed to relinquish, to the full extent permitted by law, the provisions, rights and benefits of § 1542 of the California Civil Code, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

In addition, Plaintiffs and each member of the Class also shall be deemed to have waived any and all provisions, rights and benefits conferred by any law of the United States, a state or territory of the United States, foreign law or principle of common law, which is similar, comparable or equivalent to California Civil Code § 1542. The Releasing Persons acknowledge that they may discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of this Settlement, but that it is their intention to fully, finally, and forever settle and release any and all claims released hereby, whether known or unknown, suspected or unsuspected, which now exist or heretofore existed or may hereafter exist and without regard to the subsequent discovery or existence of such additional or different facts.

7. Plaintiffs and the members of the Class, and any of their respective representatives, trustees, successors, heirs and assigns, are hereby individually and severally permanently barred and enjoined from instituting, commencing, prosecuting, participating in or continuing any action or other proceeding in any court or tribunal of this or any other jurisdiction, either directly, representatively, derivatively or in any other capacity, against any of the Released Persons, based upon, arising out of, or in any way related to or for the purpose of enforcing any Settled Claim, all of which Settled Claims are hereby declared to be compromised, settled, released, dismissed with prejudice and

extinguished by virtue of the proceedings in the Delaware Action and this Order and Final Judgment.

8. Each of the Released Persons shall be deemed to have fully, finally, and forever released, relinquished, and discharged Plaintiffs, each and all members of the Class and Plaintiffs' Counsel from all claims arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the Delaware Action or the Settled Claims; provided, however, this release shall not include the right to enforce in the Court this Stipulation or the Settlement.

9. Plaintiffs' Counsel is awarded attorneys' fees, costs, and expenses in the amount of $____________, which sum the Court finds to be fair and reasonable. The Company, its successors in interest, or its insurers shall cause such amounts to be paid on behalf of the Individual Defendants in accordance with the terms of the Stipulation. In the event that the Effective Date does not occur or if this award to Plaintiffs' Counsel of attorneys' fees, costs, and expenses is reversed or modified on appeal, then the award of fees, costs, and expenses (or any portion disallowed) shall be refunded to the Company, its successors in interest, or its insurers by Plaintiffs' Counsel with interest earned thereon from the date of payment. The refund shall be made within five (5) business days after written notification of such event is sent from Defendants' Counsel or from a court of appropriate jurisdiction. Each firm that receives a portion of the award of fees, costs, and expenses prior to the Effective Date shall be jointly and severally liable for such repayment should the award need to be refunded as set forth herein. In the event the refund is not made in a timely manner after written notification, Defendants shall be entitled to an award of all reasonable fees, costs, and expenses incurred by them in pursuing legal action to collect the refund. Each such Plaintiffs' Counsel's law firm that receives a portion of the

award of fees, costs, and expenses prior to the Effective Date, as a condition of receiving a portion of the award of fees, costs, and expenses, on behalf of itself and each partner, shareholder, and/or member agrees that the law firm and its partners, shareholders and/or members are subject to the jurisdiction of this Court for the purpose of enforcing this provision.

10. This Order and Final Judgment shall not constitute any evidence or admission by any of the Defendants hereto or any other person that any acts of negligence or wrongdoing of any nature have been committed and shall not be deemed to create any inference that there is any liability therefor.

11. The effectiveness of the provisions of this Order and Final Judgment and the obligations of the parties under the Settlement shall not be conditioned upon or subject to the resolution of any appeal from this Order and Final Judgment that relates solely to the issue of Plaintiffs' Counsel's application for an award of attorneys' fees, costs, and expenses.

12. Without affecting the finality of this Order and Final Judgment, jurisdiction is hereby retained by this Court for the purpose of protecting and implementing the Stipulation and the terms of this Order and Final Judgment, including the resolution of any disputes that may arise with respect to the effectuation of any of the provisions of the Stipulation, and for the entry of such further orders as may be necessary or appropriate in administering and implementing the terms and provisions of the Settlement and this Order and Final Judgment.

____
The Honorable J. Travis Laster
Vice Chancellor

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	J Travis Laster
File & Serve Transaction ID:	37412776
Current Date:	Sep 16, 2011
Case Number:	6084-VCL
Case Name:	CONF ORD ON DISC - CONS W/ 6085, 6087, 6090, 6093, 6100-VCL IN RE COMPELLENT TECHNOLOGIES, INC., SHAREHOLDER LITIGATION

Court Authorizer Comments:

The Court has reserved decision on the award of attorneys' fees and costs. Otherwise the settlement is approved and the order entered.

/s/ Judge J Travis Laster