IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SCHUFF INTERNATIONAL, INC. : CONSOLIDATED
STOCKHOLDERS LITIGATION : C.A. No. 10323-VCZ

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Chancery Courtroom No. 12C
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, February 13, 2020
1:35 p.m.

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BEFORE: HON. MORGAN T. ZURN, Vice Chancellor.

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SETTLEMENT HEARING

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
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1 APPEARANCES:

2 SETH D. RIGRODSKY, ESQ.
Rigrodsky & Long, P.A.
3 -and-
TIMOTHY J. MACFALL, ESQ.
4 of the New York Bar
Rigrodsky & Long, P.A.
5 -and-
DONALD J. ENRIGHT, ESQ.
6 ELIZABETH K. TRIPODI, ESQ.
of the District of Columbia Bar
7 Levi & Korsinsky, LLP
for Plaintiff
8
J. PETER SHINDEL, JR., ESQ.
9 MATTHEW L. MILLER, ESQ.
STEPHEN C. CHILDS, ESQ.
10 Abrams & Bayliss LLP
for Defendants Philip A. Falcone, Keith M.
11 Hladek, and HC2 Holdings, Inc.

12 AARON M. NELSON, ESQ.
Heyman, Enerio, Gattuso & Hirzel LLP
13 for Defendant Paul Voigt

14 STEVEN T. MARGOLIN, ESQ.
Greenberg Traurig, LLP
15 for Defendant D. Ronald Yagoda

16 PETER B. LADIG, ESQ.
Bayard, P.A.
17 for Defendants James Rustin Roach and
Michael R. Hill
18
ROBERT J. KRINER, JR., ESQ.
19 TIFFANY J. CRAMER, ESQ.
Chimicles Schwartz Kriner & Donaldson-Smith LLP.
20 -and-
DANIEL W. KRASNER, ESQ.
21 of the New York Bar
Wolf Haldenstein Adler Freeman & Herz LLP
22 for Objector Fair Value Investments

23 Incorporated

24 ... (cont'd)

1 APPEARANCES (cont'd):

2 MARCUS E. MONTEJO, ESQ.
Prickett, Jones & Elliott, P.A.
3 for Interested Party AB Value Partners, L.P

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1 THE COURT: Good afternoon, everyone.
2 VARIOUS COUNSEL: Good afternoon, Your
3 Honor.
4 THE COURT: Lots of folks to introduce
5 me to. So whoever wants to start.
6 MR. RIGRODSKY: Good afternoon, Your
7 Honor. Seth Rigrodsky from Rigrodsky & Long,
8 co-counsel for plaintiff. I rise to introduce my
9 co-counsel, Don Enright of Levi & Korsinsky, who will
10 be presenting for the plaintiff today. With me at
11 counsel table is my partner, Timothy MacFall, and also
12 of Levi & Korsinsky, Elizabeth Tripodi.
13 THE COURT: Thank you. Welcome.
14 MR. SHINDEL: Good afternoon, Your
15 Honor. Pete Shindel from Abrams & Bayliss on behalf
16 of the HC2 defendants. I'm joined today at counsel
17 table by my colleagues Matt Miller and Stephen Childs.
18 THE COURT: Hello.
19 MR. KRINER: Good afternoon, Your
20 Honor. Robert Kriner on behalf of Fair Market
21 Investments, the objector. With me at counsel table
22 is my colleague, Tiffany Cramer, from my firm. Also
23 with me is Mr. Gary Lutin, my client, the chairman of
24 Fair Market, and my co-counsel, Mr. Dan Krasner from

1 Wolf Haldenstein.
2 THE COURT: Thank you.
3 MR. MONTEJO: Good afternoon, Your
4 Honor. Marcus Montejo, Prickett, Jones & Elliott, on
5 behalf of AB Value. I don't have anybody to
6 introduce, but I didn't want to be left out.
7 THE COURT: All right. Good to see
8 you.
9 And last, but not least.
10 MR. LADIG: Good afternoon, Your
11 Honor. Peter Ladig from Bayard on behalf of the
12 defendants Michael Hill and Rustin Roach.
13 THE COURT: Thank you.
14 MR. MARGOLIN: Continuing the parade,
15 Your Honor, Steven Margolin from Greenberg Traurig on
16 behalf of defendant Mr. Ron Yagoda.
17 THE COURT: Thank you.
18 MR. NELSON: Good afternoon, Your
19 Honor. Aaron Nelson of Heyman Enerio Gattuso & Hirzel
20 on behalf of Mr. Paul Voigt.
21 THE COURT: Thank you. Welcome,
22 everyone.
23 Plaintiff, did you want to go first?
24 MR. ENRIGHT: Please, Your Honor.

1 THE COURT: All right. Thank you.
2 You may proceed.
3 MR. ENRIGHT: Good afternoon, Your
4 Honor. Donald Enright of Levi & Korsinsky appearing
5 on behalf of plaintiff Mark Jacobs and the plaintiff
6 class. We are here today upon plaintiff's motion for
7 final approval of the proposed settlement of the
8 action that's before Your Honor.
9 I would like to note that since we are
10 doing introductions, Mark Jacobs, the plaintiff, is
11 here. Mr. Jacobs, do you want to say hello?
12 After five years of litigation,
13 involving the review of over 114,000 pages of
14 documents, adversarial depositions, and prolonged and
15 extremely contentious negotiations, plaintiff has
16 achieved a resolution of the action that more than
17 doubles the price of the original tender offer that
18 gave rise to this litigation.
19 The class members who tendered their
20 shares will receive an additional $35.95 per share,
21 less any fees and expenses that the Court awards. And
22 that's compared to the original tender offer price of
23 $31.50.
24 This price bump is a premium of more

1 than 114 percent over the October 2014 tender offer
2 price. And to my knowledge, that is the largest
3 percentage increase in a recovery in Delaware merger
4 class action history. We have been unable to locate
5 any settlements that achieved a better percentage
6 increase than this. And it is, candidly, a result
7 that I am enormously proud of. We have worked very
8 hard to try to get here.
9 The settlement also gives the
10 company's minority stockholders, those who did not
11 tender in the tender offer, the opportunity to tender
12 their common stock for $67.45 per share, again, before
13 the fees are subtracted.
14 From the outset, plaintiff contended
15 that the buyout was a unitary transaction under
16 well-established Delaware law, with all shareholders
17 of the company suffering the same injury and damages.
18 The buyout was supposed to have been comprised of a
19 tender offer and a subsequent cash-out short form
20 merger.
21 Plaintiff's claims asserted that HC2
22 was obligated to complete the short form merger when
23 it reached 90 percent ownership of Schuff stock,
24 shortly after the tender offer was completed, and that

1 it wrongly reneged on that obligation.
2 Accordingly, plaintiff litigated this
3 case to achieve the same result for both the tendered
4 and non-tendered stockholders, the fair value of
5 Schuff stock at the close of the tender offer and when
6 the short form merger was supposed to have been
7 effectuated. And I will note, Your Honor, that per
8 the discovery that we took, the -- as is publicly
9 known, the tender offer closed on October 6th of 2014.
10 They crossed that 90 percent ownership threshold on
11 October 29th of 2014. So you are talking about a
12 difference of just a couple weeks.
13 Consistent with these claims, the
14 settlement provides the non-tendered stockholders with
15 a liquidity opportunity for the same consideration,
16 the same aggregate consideration as the tendered
17 stockholders, at a price substantially higher than any
18 that Schuff's common stock had ever traded at in its
19 history before the announcement of the settlement.
20 THE COURT: Can you discuss the
21 relationship of that value to the purported fair value
22 that the objectors have raised.
23 MR. ENRIGHT: Okay. This is an
24 illiquid stock. Only 7.5 percent of it is in the

1 hands of anybody aside from HC2. Very, very few
2 shares trade. It will go weeks at a time without a
3 trade. It trades on the over-the-counter market when
4 it does trade. But it is clearly not an efficient
5 market. It's clearly not a liquid market.
6 The current fair value of these shares
7 today is subject to debate. However, the settlement
8 tender offer offer-to-purchase document, which was
9 submitted to Your Honor as Exhibit D to the
10 stipulation of settlement, contains a history of
11 valuations and intercompany transfers of Schuff stock
12 within the HC2 portfolio, which indicates that
13 valuations and intercompany transfers of the stock
14 took place in the range of over $100 a share at
15 various points over the last couple of years.
16 So the current fair value of the
17 shares, as indicated by the disclosures in the offer
18 to purchase, would appear, upon review of those
19 documents, to be higher than the settlement tender
20 offer price today.
21 I will get into why today's fair value
22 price of the stock is irrelevant to our claims. Our
23 claims stem from the value of Schuff stock at the time
24 of the buyout in 2014. That is what our claims have

1 always been directed at, what they have always
2 concerned, and what we've always been trying to
3 achieve. The fact that the company has prospered in
4 the interim, and its current fair value is higher,
5 does not change the measure of damages for those
6 claims. And that's well-established law under *Gesoff*
7 and *Americas Mining* and a host of other decisions, all
8 of which are set forth in our papers, as well as in
9 defendants' response to the objections.
10 So to be clear, Your Honor, the
11 settlement tender offer offer to purchase explicitly
12 disclaims that this is intended to reflect the current
13 fair value of the stock. It says very explicitly it
14 is not supposed to reflect the current fair value of
15 the stock. Rather, it is intended to provide minority
16 stockholders with the option to receive the same
17 aggregate consideration as the tendered stockholders
18 if they so choose.
19 Now, bear in mind, Your Honor, that
20 this is a highly illiquid stock. Since the filing of
21 the settlement with the Court, there has been a little
22 bit of an uptick in the trading volume of the stock.
23 And in that intervening three months, I believe
24 roughly 5,000 shares have changed hands. So -- and,

1 again, with days, and sometimes weeks at a time,
2 passing without a single trade.
3 So this provides the remaining
4 stockholders with the option, based on clear
5 disclosure of all the facts, with the option to take
6 this liquidity opportunity at a higher price than the
7 stock had ever traded, if they so choose, while
8 clearly disclosing this is not intended to be fair
9 value, the current fair value. And instead, it's
10 simply settlement consideration in this five-year-old
11 litigation. And disclosing all of the recent
12 valuations that would indicate that the price -- the
13 fair value of the stock may be higher.
14 THE COURT: Why is it not the case
15 that if the stock is so illiquid, that offering this
16 particular liquidity event invokes more pressure for
17 it to be fair consideration? There's no other way to
18 get rid of the stock.
19 MR. ENRIGHT: Well, Your Honor, it
20 doesn't -- it doesn't create any pressure because it
21 simply provides an option. If they decline to take
22 this option, then the minority stockholders remain in
23 exactly the position that they've been in for years,
24 which is as minority stockholders in a super majority

1 owned corporation. In fact, the objectors themselves
2 have been buying shares during this period of time
3 while it was a super majority owned company. So they
4 were comfortable getting into this position. There's
5 no indicator that that was something that they were
6 unwilling to take on. So all the settlement tender
7 offer does is provide an option.
8 Moreover, Your Honor, there is the
9 possibility of a -- of another liquidity opportunity
10 on the horizon. It's a possibility at this point.
11 But on February 10th, HC2 announced that they are --
12 that they had engaged Jefferies to seek buyers for
13 DBMG.
14 Your Honor, just to be clear, I'm
15 going to be using Schuff and DBMG sort of
16 interchangeably today. If that ever becomes confusing
17 to you, please let me know. It's the same company.
18 They just changed their name in 2016.
19 So there's a possibility that there is
20 another liquidity opportunity on the horizon. And
21 that has now been widely proclaimed and disclosed to
22 the world. The stockholders know this. So there's no
23 danger here of this settlement tender offer being
24 coercive because all it would be doing is providing

1 equal treatment for the non-tendered stockholders as
2 the tendered stockholders, with an option to take it
3 or not, at their election. And if they want to, they
4 can just remain, as they've been for years, as
5 minority stockholders in this company, receiving their
6 dividends at a very pleasant clip.
7 I would note that $17.16 in dividends
8 have been distributed since the 2014 tender offer.
9 That's a very nice return. So I don't think that
10 there's any hardship here on the minority, either in
11 terms of coercion in connection with the settlement
12 tender offer or in remaining as current shareholders
13 who are receiving very nice dividends.
14 THE COURT: So on the point of
15 coercion, what, if anything, is the effect that the
16 objectors comprise the majority of the minority here,
17 and that if the company were to try and execute this,
18 or if HC2 were to try to execute this out in the real
19 world, they would need their buy-in and some other
20 measures in order to pull this off without judicial
21 scrutiny?
22 MR. ENRIGHT: Sure. There is no --
23 there is no majority of the minority requirement.
24 There is no majority of the minority requirement in

1 the settlement tender offer. So if they don't tender,
2 that's fine.
3 Again, this is intended only to
4 provide the stockholders with an opportunity to take
5 or leave this settlement consideration, at the Court's
6 election. And at the end of the day, Your Honor, what
7 this really is is a distribution mechanism for a
8 settlement, not a tender offer of the kind that was at
9 issue in *Pure Resources*. It's under court
10 supervision, and it's been negotiated by counsel who
11 are representing the interests of these stockholders.
12 So it's radically different from a normal self-tender
13 of the kind that would require a majority of the
14 minority condition.
15 THE COURT: And I'm not supposing that
16 it's required. What I'm wondering is, it just strikes
17 me that those who are objecting to this are the ones
18 who would have a fairly significant voice in the real
19 world if this were happening outside this courtroom.
20 And I'm just wondering if that comes into this at all.
21 MR. ENRIGHT: And they are free to
22 give voice to their position by not tendering. I
23 think -- frankly, I think HC2 and the defendants are
24 essentially agnostic as far as whether or not the

1 objectors or any other minority stockholders tender
2 here. Because the whole point here is simply to
3 provide equal treatment for all of the class members.
4 That's the whole point here, okay. That's the entire
5 purpose of this exercise. Because we viewed this,
6 again, as a unitary transaction where all the
7 stockholders were affected by the same treatment.
8 The measure of damages is what a fair
9 value of Schuff was in October of 2014. We have no
10 ability whatsoever, in connection with this
11 litigation, to make HC2 do a cash-out merger or do a
12 tender offer at the current value because the current
13 value isn't the subject of our litigation. They never
14 undertook to take -- to do a cash-out merger or a
15 short form merger in 2020.
16 What they did undertake to do, and
17 what we contended that they were obligated to do, was
18 to do that short form merger as soon as practicable
19 after they reached that 90 percent threshold, which
20 they did on October 29th of 2014. So because we don't
21 have any mechanism to try to compel them to do
22 anything today, what we have done is compel them to do
23 what -- to provide the minority stockholders with the
24 option to take what they should have received in 2014.

1 If the stockholders, in light of the
2 appreciation in the company's value in the interim,
3 elect not to take that, that's fine. That is --
4 that's their option. That's their choice. And
5 there's nothing coercing them to do otherwise.
6 There's nothing pressuring them. They remain in the
7 same exact position whether or not -- if they don't
8 tender, they would remain in the same exact position
9 whether or not this settlement tender offer goes
10 forward.
11 THE COURT: Except they have now
12 released all of their claims.
13 MR. ENRIGHT: What claims, Your Honor?
14 The claims that they are -- that they are releasing
15 are claims in connection with this 2014 tender offer.
16 We are achieving full value for them on any claims
17 that they had in connection with that 2014
18 transaction.
19 The papers are extraordinarily clear
20 that the value of the stock at the time, in October of
21 2014, was, according to our experts, our consultant,
22 was $66 and, I want to say, 61 cents. According to a
23 valuation that HC2 had done as of December 31, 2014,
24 it was $68.99. And what we obtained for them here is

1 $67.45, 2 percent less than that December 31, 2014,
2 valuation, and about 1 percent more than our own
3 expert's valuation.
4 So we have obtained for them
5 everything that they could have obtained as a
6 result -- in terms of obtaining fair value for their
7 stock at that 2014 time point. And that's -- and
8 those are the only claims that are being released
9 here, the claims arising from the 2014 transaction and
10 claims that directly impact the settlement -- to
11 claims arising from the settlement.
12 So there's -- any other claims that
13 they might have for minority shareholder oppression,
14 or anything like that, in the interim, those aren't
15 being released because they don't arise from the facts
16 and circumstances of this action, and they would be
17 outside the scope of the release.
18 THE COURT: What about the fact that
19 the stockholder class includes stockholders who
20 actually didn't own stock back in 2014?
21 MR. ENRIGHT: They are successors in
22 interest. Delaware law is perfectly clear that the
23 claims pass with the shares.
24 THE COURT: What else?

1 MR. ENRIGHT: I'm happy to go on, Your
2 Honor.
3 I do appreciate the colloquy because
4 it helps focus me. I hadn't even gotten out of my
5 introduction yet when we started. So I'll skip a lot
6 of that.
7 In return for this extraordinary
8 result, which provides a value that very closely
9 approximates the fair value of Schuff at the time of
10 the buyout, the defendants receive a release, as you
11 just noted. In return, the stipulation provides, at
12 paragraph 1(w), for the release of all claims,
13 including unknown claims, to be candid, that any class
14 member asserted or could have asserted based on
15 ownership of Schuff stock during the class period that
16 arises from the action, including the process and
17 price and the tender offer; the disclosures in
18 connection with the tender offer; legal and fiduciary
19 duties of the released defendant parties in the tender
20 offer; HC2's decision not to consummate a short form
21 merger after obtaining 90 percent ownership of the
22 company's common stock; any lack of liquidity
23 following the non-tender -- following the tender offer
24 in 2014; and claims arising from the settlement,

1 including the settlement tender offer and the
2 financing of the settlement.
3 So the release is carefully limited to
4 claims which were squarely at issue in this action
5 when you look at the claims. What's being released is
6 on all four corners with what was alleged and what is
7 at issue in the action. And, again, for claims that
8 were asserted or could have been asserted based on
9 class members' ownership of Schuff shares during the
10 class period.
11 And I note, Your Honor, just for -- to
12 refresh your recollection, if you need it, that the
13 class period commenced on May 12th, 2014, and ended on
14 November 15, 2019, the date of the stipulation.
15 So what we're asking from Your Honor
16 today is for three things: class certification,
17 settlement approval, and an award of fees and expenses
18 for the attorneys, as well as a small incentive award
19 to plaintiff. Or I shouldn't say small. An incentive
20 award to plaintiff.
21 In opposition to plaintiff's motion,
22 two objectors have opposed class certification and
23 approval of the settlement.
24 With regard to class certification,

1 Your Honor, the -- I'm sure Your Honor is fully
2 familiar with Rule 23(a) and Rule 23(b) and what it
3 requires.
4 Numerosity and commonality are not
5 disputed here.
6 The objectors did take issue with
7 adequacy and typicality. The objectors are wrong.
8 Typicality requires that the class cert
9 representative's claims fairly presents the issues on
10 behalf of the represented class. So "[a]
11 representative's claim ... will suffice if it 'arises
12 from the same event or course of conduct that gives
13 rise to the claims ... of other class members and is
14 based on the same legal theory." And that's from the
15 *Leon Weiner* case, which I believe Your Honor cited in
16 your recent *Medley* decision.
17 Here, plaintiff is a current Schuff
18 stockholder who held shares continuously since before
19 the tender offer. He did not tender any shares in the
20 tender offer and is therefore a non-tendered
21 stockholder. And I note that no tendered stockholders
22 have filed any challenge to the tender offer or sought
23 to intervene in the action, and certainly none of them
24 have objected here. Candidly, they are over-the-moon

1 thrilled with this result based on the calls that
2 we've received.
3 Plaintiff's claims, like those of
4 other class members, arise out of the same course of
5 misconduct by defendants, their role in connection
6 with the unfair buyout and failing to ensure that it
7 was entirely fair as to price and process. All their
8 claims are based on the same legal theory. And that
9 is the harm sustained as a result of defendants'
10 breaches of fiduciary duties in connection with the
11 buyout in 2014.
12 Where one lead plaintiff represents a
13 proposed settlement class that includes stockholders
14 who tendered their shares in the challenged tender
15 offer and stockholders who did not tender, the Court
16 has taken a "pragmatic approach" in certifying the
17 class. That's from Vice Chancellor Laster's decision
18 in the *GFI* case. In *GFI*, the Court treated a
19 third-party tender offer and back-end merger as a
20 unitary transaction, as we have contended here, and
21 permitted tendering stockholders to represent a
22 settlement class that included non-tendering
23 stockholders.
24 And in *Blank* v. *Belzberg*, Vice

1 Chancellor Lamb certified the class and permitted a
2 non-tendering stockholder to serve as a class
3 representative for a settlement class that included
4 tendering stockholders because settlement terms were
5 fair to both groups of stockholders.
6 Even outside of the settlement
7 context, the Court has taken, again, a practical
8 approach to determining whether or not claims are
9 typical. In the *Wiegand v. Berry Petroleum* case, the
10 Court certified a class consisting both of
11 stockholders who sold their stock prior to a merger as
12 well as stockholders who continued to hold their
13 shares and were subsequently frozen out in the merger,
14 finding "a class representative may not be identically
15 situated in all respects to other members of the
16 class, [but that] does not mean that his personal
17 interests necessarily conflict with those of the
18 class."
19 And, again, in the *Leon Weiner* case,
20 the Court explained that "the question of law linking
21 the class members is substantially related to the
22 resolution of the litigation even though the
23 individuals are not identically situated." And if
24 that's the case, typicality is satisfied.

1 THE COURT: How many shares does
2 Mr. Jacobs hold?
3 MR. ENRIGHT: 300.
4 THE COURT: So I'm open to taking a
5 pragmatic approach with regard to the distinction
6 between the tenderers and the non-tenderers. What
7 strikes me is that perhaps we have a *Celera* problem,
8 where within the non-tendering class Mr. Jacobs has
9 different aims than the objectors who hold a larger
10 block of stock.
11 MR. ENRIGHT: Well, Your Honor, there
12 is no -- there is no distinction among shareholders in
13 terms of typicality for their claims based on their
14 investment objectives, okay. The question is whether
15 or not their claims are the same. And here, Mr. --
16 THE COURT: Drifting us into adequacy
17 a little bit.
18 MR. ENRIGHT: Sure, perhaps. And if
19 you would like, I will move into adequacy, if you
20 like. But Mr. Jacobs' goal here, and at all times,
21 was to obtain fair value for all the stockholders at
22 the time that is defined by the claims, which is as of
23 the 2014, October 2014 time frame. That is the only
24 claims that could be asserted here. There is no

1 inference, and objectors have pointed to none, that
2 there is some sort of obligation today for HC2 to cash
3 out the minority stockholders at the current value.
4 That is not an option. It's not something that
5 anybody has indicated that there's any claim that we
6 could point to that could conceivably force that on
7 them.
8 What Mr. Jacobs' whole point here has
9 been to achieve is equal treatment based on the wrongs
10 that were actually committed that we have actual
11 claims on. And that is to obtain fair value at that
12 time.
13 Now, given that the share price has
14 potentially, and maybe, even, you could say
15 apparently -- or the share value, it's not the share
16 price, has appreciated in the interim, that's why the
17 structure that we chose for the settlement here is a
18 settlement tender offer. So it gives the remaining
19 stockholders the option to tender or not. If they
20 don't like it, they just don't tender. And, again,
21 the only claims they are giving up are claims in
22 connection with this 2014 tender offer which AB
23 explicitly said they don't think that they were harmed
24 by.

1 Now, that may be because they mostly
2 bought their shares after that. But the point is that
3 all it does is provide the optionality. Therefore,
4 that puts Mr. Jacobs and all of the stockholders, not
5 just the non-tendering stockholders -- and all of the
6 stockholders in the same position -- that is,
7 achieving a resolution of this litigation that
8 provides the best outcome in achieving fair value for
9 these shares at the time that's dictated by these
10 claims, which, again, is October 2014.
11 There are not claims that we could
12 possibly -- that I am aware that we could possibly
13 point to, and none of the objectors have pointed to,
14 that indicates that there's some claim that we could
15 use to compel them to pay fair value as of 2020. It's
16 just not there.
17 THE COURT: I'm just struggling a
18 little bit with the fact that Mr. Jacobs apparently
19 wants a liquidity event. I imagine HC2 and the
20 company want a liquidity event for Mr. Jacobs. But
21 the objectors appear not to want this liquidity event.
22 MR. ENRIGHT: So they don't have to
23 take it.
24 THE COURT: But there's collateral

1 consequences to them, for reasons that we haven't
2 quite gotten into yet -- namely, the source of the
3 payment.
4 MR. ENRIGHT: Sure. Which is just
5 De minimis, Your Honor. But that money is going to be
6 coming one way or another. And the collateral
7 consequences to them are so de minimis as to be
8 immaterial. But we will get to that.
9 THE COURT: Well, can you address just
10 the fundamental tension between the plaintiff
11 representative and the majority of the non-tenderers
12 with whom he is most aligned as to whether or not this
13 liquidity event is something that they even want.
14 MR. ENRIGHT: Your Honor, I think
15 having a liquidity event is something that, because
16 it's an option, whether they want it or not is sort of
17 immaterial. If they don't want it, they can just
18 decline it.
19 Mr. Jacobs, candidly, I think he was
20 agnostic as far as whether or not he wanted to
21 liquidate. He wanted to just obtain an availability
22 of fair value for everybody. He agreed to tender his
23 shares here in order to facilitate the settlement.
24 But he is not -- he's not itching to cash out his

1 shares. It's more a matter of he simply wants to
2 obtain the best outcome for everybody. And if him
3 being -- tendering in the settlement tender offer is a
4 requirement for that, then so be it.
5 THE COURT: As to Mr. Jacobs
6 specifically, to what extent is the second tender
7 offer an essential part of this settlement?
8 MR. ENRIGHT: Pursuant to the
9 stipulation of settlement, this is all a single
10 agreement, okay. If any part -- if the settlement is
11 not approved or any material part of it is not
12 approved, then we don't have a settlement. That's not
13 just Mr. Jacobs' position; that's what the stipulation
14 of settlement says.
15 THE COURT: Well, I asked what his
16 position is.
17 MR. ENRIGHT: Oh. We're speaking on
18 behalf of -- Your Honor, we're bound by the
19 stipulation of settlement. So he's certainly
20 required, as part of our litigation tactics and our
21 theory of the case that all of the shareholders were
22 in the same position in that they were all harmed in
23 the same way from the same course of conduct in 2014,
24 so we have required that all the stockholders be

1 treated equally. And the only way that we could
2 structure a settlement that would provide for
3 everybody to be treated equally was to get the money
4 for the tendered stockholders and give the
5 non-tendered stockholders the option to take this
6 money. If they don't want to, if they want to just
7 sit tight, they could do it. So this takes really
8 nothing of value from them. Again, it's just a
9 release of these 2014 claims. And at least it gives
10 them the opportunity to take the liquidity if they
11 want it.
12 Now, Your Honor, I would note that
13 given that there is this strong perception that the
14 current value of these shares is higher now than it
15 was then, it makes perfect sense for them to sit tight
16 and keep their shares, if they so choose. But not
17 everybody has that same eventual horizon. And some
18 stockholders may want to take it. And this
19 optionality has a real value to them. It's a
20 guaranteed concrete payment for these illiquid shares
21 that they can take if they so choose. That has a
22 substantial value. And if they choose not to, that's
23 fine too. But what they are giving up is so
24 De minimis in value that -- in relation to what's

1 achieved that it is a no-brainer that they should have
2 that option.
3 Again, Your Honor, we have achieved
4 everything that could potentially be achieved in
5 connection with these 2014 claims. There's no
6 inference that we could have gotten, and none of the
7 objectors argue that we could have gotten, a better
8 result with regard to our claims arising from the 2014
9 buyout.
10 What they say, instead, is, well, the
11 shares are worth more now. But there's no claim here
12 that we could assert to get them that current value.
13 So it's illusory. The claim that -- the argument that
14 they somehow should have gotten more is illusory
15 because we have no mechanism and no claim to get that
16 for them.
17 All the wrongs here, based on our
18 claims, took place in that 2014 time frame. And this
19 is what the stock was worth then. And we've gotten,
20 essentially, a hundred percent value return for them.
21 Plus the non-tendered stockholders get to keep the
22 $17.16 per share in dividends that they have received
23 in the interim, which would offset any prejudgment
24 interest almost entirely, if not entirely.

1 Does that make sense?
2 THE COURT: Yes. Why don't we turn to
3 the source of payment.
4 MR. ENRIGHT: Okay. If you will bear
5 with me, Your Honor. We're kind of jumping around a
6 bit. I need to take a moment to get organized.
7 THE COURT: No problem.
8 MR. ENRIGHT: Okay, Your Honor. With
9 regard to the settlement funding, as part of the
10 settlement negotiations, the parties explored the
11 source of the settlement payment and concluded that
12 the structure was the only workable approach due to
13 specific contractual constraints on HC2, debt
14 covenants. And it's crucial to note that the cost of
15 almost all of the settlement payment will be borne by
16 insurance and indirectly by HC2: 97 percent.
17 60 percent of the settlement payment to the tendered
18 stockholders is coming from insurance. And the
19 minority stockholders own 7.5 percent of the company,
20 with HC2 owning the other 92 1/2. So that works out,
21 just doing the math, that 7.5 percent of the
22 40 percent of the settlement payment not coming from
23 insurance, that would, at least theoretically, filter
24 down to the minority stockholders. Simple

1 multiplication, 7.5 percent times 40 percent is
2 3 percent. It's an immaterial, de minimis amount.
3 THE COURT: It may be that when we run
4 the filters and run the math, that the number gets
5 small. But I have a problem with sort of the
6 fundamental almost morality of it, that in an even
7 exchange of consideration between adversaries -- the
8 company is not an adversary here -- the adversaries
9 are obtaining releases at no cost, other than through
10 HC2's indirect ownership. That's my issue.
11 MR. ENRIGHT: Well, number one, HC2
12 paid for the insurance policy, okay. That's
13 60 percent of it right there. 92 1/2 percent of
14 anything, any cost borne by Schuff will filter down to
15 HC2. And the other 7.5 percent comes out to $600,000
16 to the minority stockholders, okay. That's $2 per
17 share on a stock that the objectors say is worth $132
18 based on an intercompany transfer of the stock from
19 2018. That's like 1.5 percent of the value of the
20 stock. It's immaterial, Your Honor.
21 THE COURT: Again, I understand the
22 math.
23 MR. ENRIGHT: Okay. I will move on,
24 then. So --

1 THE COURT: But I'm struggling with --
2 MR. ENRIGHT: Sure. With the equity
3 of it.
4 THE COURT: With the principle.
5 MR. ENRIGHT: Your Honor, the amount
6 is perfectly reasonable when one considers that Schuff
7 has indemnification and defense cost advancement
8 obligations to the individual defendants under Section
9 Nine of their charter. Those obligations could easily
10 eclipse the amount that Schuff is paying into the
11 settlement here, okay. The defendants are represented
12 by no fewer than four very capable law firms. The
13 legal expenses alone, and the advancement of those
14 legal expenses, could alone exceed the amount that
15 Schuff would contribute to this litigation.
16 THE COURT: But that's a separate
17 bargain that the company strikes with its directors in
18 choosing who is going to be a director and all these
19 policy reasons of why we have advancement and
20 indemnification. I see that there's money that comes
21 off the top, as far as the overall resources that the
22 company would have to pump in to keep this litigation
23 going. But, again, as a matter of principle, it seems
24 that that's kind of apples and oranges a little bit.

1 MR. ENRIGHT: I disagree, Your Honor.
2 Schuff has to exercise its business judgment in
3 determining what is in its best interest in terms of
4 conserving its resources and applying them most
5 effectively for the success of the company. And the
6 Schuff board of directors has decided that this
7 settlement is in Schuff's best interest based on
8 balancing the amount that it would have to pay under
9 this settlement versus the exposure that it bears as a
10 result of the indemnification and defense cost
11 advancement obligations that it has.
12 THE COURT: Has the board changed from
13 the directors --
14 MR. ENRIGHT: It's mostly the same. I
15 think there's been some minimal change. But I think
16 most of the members are the same.
17 THE COURT: That's something that
18 struck me about this, is that Schuff isn't here. They
19 are not at the table for the settlement. I don't
20 actually know, other than your representation just
21 now, that the board did approve this.
22 MR. ENRIGHT: Well, they did. And I
23 believe that's clearly disclosed in the -- well,
24 number one, they wouldn't have signed off on this if

1 not for the fact that they had board approval. But,
2 number two, I think that's disclosed in the
3 offer-to-purchase document. But I'm sure some of the
4 defense counsel here who represent some of the
5 directors, as well as HC2 and -- I'm sure they will be
6 able to speak directly to the mechanism of approval
7 that was followed here. But Schuff certainly did
8 approve this.
9 THE COURT: I would be curious to
10 know. We've got directors that are named in this
11 litigation. Was there a special committee of people
12 who weren't named who approved this?
13 MR. ENRIGHT: I don't know, Your
14 Honor. But, again, I'm sure that they would be able
15 to address that. But --
16 THE COURT: Because going back, that's
17 another pot of folks who are getting releases that
18 didn't put anything in.
19 MR. ENRIGHT: Sure. But I think the
20 point is, Your Honor, that -- I don't think there was
21 a special committee. But the point is, Schuff has --
22 it's not a question of anybody's business judgment
23 that Schuff has these indemnification and advancement
24 obligations. And clearing the decks of those will

1 inevitably provide an enormous benefit to Schuff.
2 There's no question about that, okay. That doesn't
3 take any kind of guesswork. Clearing the decks of
4 this enormous potential liability --
5 THE COURT: How does the D&O insurance
6 play into that particular risk?
7 MR. ENRIGHT: Well, Your Honor, the --
8 there are innumerable potential outcomes as far as how
9 the D&O policy could factor into this. But it's
10 possible that the D&O policy could be exhausted
11 through litigation. It's possible that the D&O
12 policy -- and that ultimately the full brunt of this
13 would fall on Schuff for its indemnification of the
14 defendants and, thus, far, far exceed the very limited
15 payment that it's making here, which is 40 percent of
16 the settlement fund.
17 Moreover, Your Honor, this isn't a
18 matter of choice or some sort of scheme. The simple
19 reality is this is the only structure that could get
20 this case resolved. HC2 is bound by debt covenants
21 that prevent it from making a payment along these
22 lines.
23 THE COURT: I'm wondering how to
24 process that. Because if this went to trial, I'm

1 assuming that a judgment against HC2, they would have
2 to make good on it. So --
3 MR. ENRIGHT: If we took it to trial
4 and got a judgment, I don't think that would be
5 something that would violate their debt covenants
6 because there would be an order of the Court. I don't
7 think they are allowed to make any kind of
8 discretionary payments like this under their debt
9 covenants. So if it went to trial and there was a
10 judgment, I think that would be reversed.
11 But in terms of, from the plaintiff's
12 perspective, weighing and balancing those risks, we
13 literally obtained a number here that's higher than
14 our own expert's DCF indicated. Why would we risk
15 that when we can take it and -- with no further risk
16 and just give it to our stockholders, give it to our
17 class members? There's no reasonable reason why we
18 would defer that.
19 THE COURT: What else?
20 MR. ENRIGHT: Okay. So, as I noted,
21 Your Honor, clearing the decks of these contingent
22 liabilities arising from the company's indemnification
23 and defense cost advancement obligations is an
24 enormous benefit to Schuff. And there's really no way

1 to avoid that.
2 Moreover, eliminating this potential
3 risk and liability makes it all the more likely that
4 the minority stockholders will ultimately get an
5 opportunity to realize the current value of their
6 Schuff stock through a sale. Clearing the decks of
7 this contingent liability will make Schuff much more
8 likely to actually be purchased in an upcoming
9 transaction. Again, in light of the fact that on
10 February 10th HC2 announced that they were placing
11 Schuff on the auction block. And I would note, Your
12 Honor, that this is part of sort of a cleaning-house
13 process that's going on right now at HC2. They are
14 liquidating other companies in their portfolio. This
15 is, I think, something that's just going on inside at
16 HC2 in terms of their internal finances, et cetera.
17 Frankly, I was not thrilled to learn
18 about this three days before the hearing, but the
19 facts are what they are. And by saying I wasn't
20 thrilled to learn about it, I don't mean that it's bad
21 for us. I mean it just required me to do a lot of
22 additional work to figure out what this all means.
23 But, ultimately, where I land on this is what this
24 means is that the minority stockholders have the

1 prospect of a potential liquidity event on the
2 horizon -- potential, nothing certain, certainly --
3 but reaching that point on the horizon is much more
4 likely if the risk and potential liability from this
5 litigation is cleared and they can sell Schuff free of
6 any potential liabilities that any buyer would have to
7 worry about.
8 And I think, ultimately, that would
9 serve the objectors' best interests more than anything
10 else, to get this resolved and let this company move
11 on. And if they can be sold, great.
12 I would note, Your Honor, that -- and
13 this is disclosed in the offer to purchase -- a couple
14 years ago HC2 engaged Deutsche Bank to try to sell
15 DBMG at that time. And they found no takers. It is
16 my impression that one of the main reasons why they
17 were unable to find a buyer for the company at that
18 time, despite its outstanding cash flows, is because
19 of the contingent risks that this litigation poses to
20 them. I think clearing the decks of this litigation
21 will serve everybody's interest, the tendered
22 stockholders, the non -- any non-tendered stockholders
23 who wish to tender in the settlement tender offer and
24 the non-tendered stockholders who decline to settle --

1 to tender in the settlement tender offer. Clearing
2 the decks of this litigation serves the best interests
3 of Schuff and its stockholders. I don't think there's
4 any way around that.
5 And, Your Honor, just in terms of this
6 circular transfer payment issue, the case that the
7 objectors point to as saying that it's somehow
8 improper is *Gatz v. Ponsoldt*. In that case, the
9 company was paying the settlement -- for the
10 settlement, and objectors came along, sort of similar
11 to here, and said, hey, we're just paying ourselves.
12 This is just a circular transfer. The Court approved
13 the settlement because -- after being able to show
14 that only between 7 and 27 percent of the settlement
15 payment was actually being ultimately borne by class
16 members. 3 percent is obviously a lot less than 7 to
17 27 percent. So I think when you look at *Gatz*, it's
18 clear that this is not a circular transfer payment.
19 It's a de minimis economic burden on Schuff. And it
20 provides tremendous value and benefit to Schuff. It's
21 in their interest, and all of the stockholders'
22 interest, regardless of what classification you put
23 them in, to allow this to move forward.
24 Similarly, Your Honor, in *Schultz v.*

1 *Ginsburg*, the Delaware Supreme Court affirmed the
2 approval of a settlement where the company paid into
3 the settlement rather than the board.
4 So, again, Your Honor, while I
5 understand the sort of gut feeling of saying, hey, why
6 is Schuff paying this and not HC2, the reality is
7 because HC2 literally cannot settle this case and make
8 the payment itself because 60 percent of the money is
9 coming from insurance, which, again, HC2 paid for, and
10 because, ultimately, 92 1/2 percent of any payment
11 made by Schuff will ultimately be borne by HC2.
12 The idea that this somehow allows
13 Schuff to -- I'm sorry, HC2 to escape the consequences
14 of this, it's just not correct, Your Honor. 92 1/2
15 percent of it would filter down to them in the end.
16 So in terms of the equities, they are
17 not getting away with something here. They are
18 ultimately paying for this. And that 3 percent left
19 to the minority stockholders, they benefit from the
20 insurance covering a huge portion of this, 60 percent
21 of it, and they benefit from Schuff being freed of
22 those liabilities and being free to move into the
23 future with a clean slate.
24 So, Your Honor, one thing that Fair

1 Value noted in their papers was they said, well, look,
2 we would have gotten $68.99 per share if we had been
3 allowed to do appraisal back in 2014, or if we were
4 allowed to do appraisal now based on the fair value in
5 2014, and we would get interest, and it would all come
6 out to $88 and some-odd cents per share.
7 All those assumptions, frankly, are
8 dubious or just unrealistic. So -- because that
9 assumes that they would have established that they
10 were entitled to appraisal of their shares as of that
11 time as a legal right. A questionable assumption. It
12 assumes that they would have established $68.99 a
13 share as the fair value at that time. Again, a
14 questionable assumption. And it assumes that they
15 would have borne no costs or legal fees in getting
16 there, which is a completely unrealistic assumption.
17 So when you look at the net tender
18 offer price here that would be offered if the Court
19 awarded the full fee that we would ask for, which
20 comes out to $56.56, add the dividends that they
21 received in the interim, which they concede would be
22 an offset, because if they had been liquidated out of
23 the stock five years ago, they wouldn't have gotten
24 all those dividends in the interim, and you add those

1 together and then you subtract a reasonable amount of
2 attorneys' fees out of the $88 that they say that they
3 would have gotten had this been fully successful, it
4 ends up working out to almost exactly the same thing.
5 There is no economic disadvantage to any of the
6 objectors here from allowing this opportunity because,
7 again, Your Honor, we have obtained essentially the
8 fair value of what our claims would allow.
9 THE COURT: Thank you. I think I will
10 hear from Mr. Shindel.
11 MR. ENRIGHT: Your Honor, if I could
12 just address -- do you want to hear from me at all
13 about the release?
14 THE COURT: I think we've touched on
15 it already.
16 MR. ENRIGHT: Okay. And in terms of
17 fees and expenses, Your Honor, we believe that this is
18 an outstanding outcome, one of the best in the history
19 of this Court. I think when you look at the
20 *Cornerstone Therapeutics* case, our result here
21 compares very favorably to it, and the 27 1/2 percent
22 that was awarded there would be appropriate here as
23 well.
24 THE COURT: Thank you.

1 MR. ENRIGHT: Thank you.
2 MR. SHINDEL: Good afternoon, Your
3 Honor.
4 THE COURT: Good afternoon.
5 MR. SHINDEL: I will try to be brief
6 and address the areas where Your Honor seemed to have
7 questions for Mr. Enright. I'm not going to retread
8 the ground that he did.
9 With respect to this issue of
10 coercion, a couple of points. The first is, as
11 Mr. Enright did point out, Schuff stock is very thinly
12 traded. I think, just to get some numbers on the
13 record, between January 1st, 2017, and March 31st,
14 2019, Schuff stock traded between $32.10 a share and
15 $45.15 per share, which means that the settlement
16 tender offer payment, even net of the requested fee
17 award, represents a premium between 27 percent and
18 79 percent of the trading price. And the notion that
19 the objectors, or any other non-tendering
20 stockholders, can be coerced by being given an option
21 is one that's just hard for me to parse. If they
22 don't take the option, you know, they are in the same
23 position they are now.
24 I think particularly in light of the

1 announced sale process, the notion of coercion really
2 goes out the window. For those stockholders who want
3 to stay in the stock, collect whatever dividends might
4 be forthcoming, and take the risk of what the outcome
5 of the sale process is, that option is there for them.
6 For those stockholders that would prefer the certainty
7 of the settlement tender offer price and want to take
8 the bird in hand, that option is there for them.
9 THE COURT: We have a whole body of
10 law on coercive tender offers. What I'm hearing you
11 to say is that that's not a thing. What am I
12 misunderstanding?
13 MR. SHINDEL: Well, I think the body
14 of law about coercive tender offers in *Pure Resources*
15 and *CNX Gas*, for one thing, they frequently require
16 some type of retributive threat. You know, you're
17 going to be stuck in here no matter what. And that's
18 sort of the exact opposite of what we have in light of
19 the announced strategic alternatives process.
20 THE COURT: Just something that struck
21 me as being different about -- I mean, the 2014 tender
22 offer was allegedly introduced in connection with a
23 short form merger that was to follow. And there isn't
24 one of those here. And now we've got some other,

1 perhaps, news on the horizon. We'll see. But it
2 seems that there's fewer options now in connection
3 with the second tender offer.
4 MR. SHINDEL: Well, I think the -- I
5 don't know that it's true that there are fewer
6 options. I think it's disputed as to whether there
7 was an announced short form merger that was
8 necessarily going to follow. I think there was,
9 perhaps, an intent to do so. But that -- you know,
10 and that would have been part of the litigation here.
11 We're talking about now a company in
12 which only -- in which HC2 owns 92 1/2 percent of the
13 stock already. The notion that -- the idea of
14 coercive tender offers is you have this prisoner's
15 dilemma problem, where if you don't tender, then you
16 are going to be stuck in the company where there's
17 only 2 or 3 percent in the public float, all right.
18 We are already -- the public float is 7 1/2 percent.
19 So the idea that folks are being coerced because now
20 the public float will only be 5 percent or 4 percent,
21 there's no adverse change in position. When you have
22 a successful coercive tender offer claim, it's
23 because, you know, it's majority public and now it's
24 going to be minority public, and you have introduced a

1 controller and you are coerced because the controller
2 then can do what he or she or it wants.
3 That's not the situation here. It's
4 providing them an option. They can take the liquidity
5 event in hand or they can wait. Like I said, if they
6 prefer to get their dividends, if they prefer to wait
7 for the sale process, then great.
8 So I don't think the structural
9 coercion that those cases talk about is at issue here.
10 You know, I think part of the proof of that, as Your
11 Honor pointed out, the majority of the minority issue.
12 I mean, clearly, these objectors haven't been coerced
13 and cowed and have their hands tied and being forced
14 to take it. They are here objecting. Apparently they
15 don't want to take the option.
16 THE COURT: I think that's a different
17 calculus. Right now we are at do they want this
18 imposed on the company. I don't think we've gotten to
19 the point of do they actually want to take the tender
20 offer. That's perhaps down the road.
21 MR. SHINDEL: Well, certainly it's
22 down the road. And they are not foreclosed from
23 taking it just because they are here objecting. But,
24 you know, again, I think it's a perfectly free choice.

1 There have been ample disclosures around it through
2 the virtual data room. The stockholders are armed
3 with as much information as they could possibly have
4 about whether they want to take that or not. You
5 know, and, again, I think with the potential sale, you
6 know, that's certainly another option. If they prefer
7 to stay in the stock, that's up to them.
8 But to the point of -- to the point of
9 coercive tenders, I think it's apples and oranges
10 between this situation. There's no change in position
11 if they stay in the stock. And none of the objectors
12 point to any reason why they are allegedly going to be
13 worse off if some proportion of the non-tendering
14 stockholders tender and they choose not to. What the
15 objectors are really attempting to get at is the idea
16 that they want to be bought out for what they believe
17 is, quote/unquote, current fair value.
18 And as Mr. Enright pointed out, there
19 is no claim in the case for that. There's no
20 precedent for it. The objectors have not tried to
21 intervene to go pursue that claim. And Your Honor
22 raised the question of the alignment of interest. I
23 mean, the named plaintiff, Mr. Jacobs, his interest
24 here is in vindicating the claims that he brought,

1 which, by and large, this settlement does. It
2 provides equal treatment to the two subclasses. It
3 pays a robust amount. We can debate. I don't have a
4 position on whether it's fair value as of 2014. But
5 that's what it's focused on.
6 I don't think there's any claim here
7 that HC2 or anyone else can be forced to buy out the
8 existing stockholders now for any particular price,
9 fair value or anything. And, again, in terms of the
10 alignment of interests, I think at least one of the
11 objectors has pursued a course of action over a period
12 of years that demonstrates that his interest is not
13 aligned with the other objectors and his interest is
14 in some type of exchange offer or other buyout whereby
15 his 10 shares and the shares of others that he
16 purports to be able to speak for, who are stockholders
17 of Schuff, can be exchanged into HC2 stock.
18 Now, he's free to pursue that
19 objective, and serve ten 220 demands, and can monitor
20 this litigation and engage in communications with
21 HC2's counsel, et cetera and so forth. But that is
22 not an interest that's aligned with other objectors or
23 the stockholder class at large.
24 The issue of round-tripping the

1 payment and the source of the funding, again, I think
2 it's largely -- it's largely a misnomer because,
3 again, as Mr. Enright pointed out, the amount that's
4 actually borne by class members is de minimis here.
5 You do have 60 percent that's coming from insurance.
6 Of the other 40 percent, HC2 owns 92 1/2 percent of
7 this company. There are ample benefits for Schuff
8 through the settlement. I think Mr. Enright covered
9 them. I'm not going to reiterate them. The only
10 point I'm going to make is the concern, I think Your
11 Honor at one point phrased it as almost one of
12 morality.
13 The fact of the matter is that in
14 almost every fiduciary case, the company is either not
15 a party or is, at most, a nominal defendant. Right?
16 The defendants are the directors, potentially the
17 officers who are accused of breaching their fiduciary
18 duties for whatever reason.
19 It is frequently the case that the
20 company contributes to a settlement payment in order
21 to get a settlement done. It's almost always the case
22 that if there's insurance available, insurance is also
23 kicking in. And, you know, in *Gatz*, in *Schwartz*, I
24 think in the *Zynga* settlement, concerns were raised

1 about round-tripping, and the Court has always, at
2 least in those cases, has rejected that as being a
3 reason to quash the settlement. And the fact of the
4 matter is that the Court, as a policy matter,
5 encourages settlement, certainly encourages settlement
6 for monetary value. You know, in the last few years,
7 I'm sure Your Honor is well aware there's been a
8 movement in the Court to really hyperscrutinize
9 disclosure-only settlements and encourage settlements
10 that provide real cash value and real value, monetary
11 value to stockholders.
12 You know, adopting a position that
13 whenever a corporation that is a nonparty or only a
14 nominal defendant funds some portion of a settlement
15 is a reason to reject the settlement is going to make
16 it very difficult, in many cases, to get settlements
17 providing monetary value to the class done.
18 THE COURT: And I appreciate that.
19 And I appreciate that oftentimes the pot that's
20 available to wrap things up and to satisfy plaintiffs
21 comes from the company, it comes from D&O insurance.
22 But it just strikes me as particularly difficult here,
23 where HC2 seems to be gaining the most, particularly
24 in light of this acquisition or sale process that's on

1 the horizon, that HC2 is able to wrap this up with a
2 bow and then go out and realize more value as a result
3 and get this off the books.
4 I'm struggling with the give-get, as
5 opposed to the -- I mean, there's some concerns about,
6 as you call it, round-tripping. But I'm more
7 concerned about the duality of the give-get.
8 MR. SHINDEL: Well, I understand, Your
9 Honor. I guess what I would say, the sale process, I
10 would submit, should not be a concern, I think. We'll
11 hear from the objectors. I mean, they are focused on
12 getting cashed out for present value. I mean, the
13 sale process, if successful, will accomplish that. Or
14 to the extent it doesn't, you know, they can litigate
15 that in that context, and their voice can be heard in
16 that context if they think that Schuff is being sold
17 for less than its fair value at the time. But
18 presumably that is what they want. So the notion that
19 the sale process in connection with the settlement is
20 providing a windfall for HC2 I don't think is
21 accurate.
22 THE COURT: That's not quite how I
23 meant it. I meant more that it demonstrates to me or
24 provides context for the significance of this

1 settlement and the releases that come with it to HC2
2 in comparison to what HC2 is, out of its own pockets,
3 putting on the table.
4 MR. SHINDEL: Well, understood, Your
5 Honor. I would say that, you know, I think in the
6 context of the sale process, again, everybody is
7 aligned there, I would think. You know, in terms of
8 stockholders who continue on, who don't tender,
9 everybody at that point will be aligned in achieving
10 the highest price possible. And although it's not
11 certain, I think it's logical that, absent this
12 settlement, the sale process is not going to achieve
13 what it otherwise would achieve. Does HC2 own the
14 vast majority of Schuff? Yes. I mean, I can't
15 dispute that.
16 You know, in terms of the give-get
17 here, I don't think -- and I think the *Zynga*
18 settlement is a good example. You know, the
19 plaintiffs in that settlement focused on my client in
20 that case, Mark Pincus. And there were points in the
21 negotiation where the issue was they wanted Pincus to
22 personally come out of pocket, and he did not. And
23 that was a topic of discussion at the settlement
24 hearing.

1 The fact of the matter is that the
2 goal of the settlement is not to punish a particular
3 defendant, make them pay what someone, whether it's an
4 objector or otherwise, thinks they, quote/unquote,
5 ought to be paying. The give-get is, is the class
6 receiving sufficient value by virtue of the releases
7 that are being given. And I don't think anybody here
8 seriously disputes that that give-get passes with
9 flying colors.
10 THE COURT: I think the objectors are
11 disputing just that.
12 MR. SHINDEL: No, I don't think they
13 really are, Your Honor. I think what the objectors
14 are saying is we should be bought out, you know, for
15 current value. This settlement should somehow involve
16 us being bought out for current value. But, again,
17 there's no legal basis to pursue a claim that would
18 have that result.
19 So it's all well and good to say that,
20 but, you know, again, they haven't tried to intervene.
21 They are not trying to pursue that claim. I don't
22 think there would be any basis to pursue that claim.
23 And they have issues with the releases that I think,
24 by and large, are easily dealt with. I mean, the

1 notion that a part of the release operates
2 prospectively to the implementation of the settlement,
3 that happened in *Medley Capital*, that happened in
4 other cases. It has to happen for any case where the
5 implementation of the settlement is prospective. No
6 defendant is going to settle and leave themselves open
7 to further litigation based on the implementation of
8 the very settlement that is supposed to provide
9 complete peace.
10 The objectors raise complaints about
11 settling unknown claims. That is de rigueur in
12 settlements, happens all the time.
13 The objectors quibble with the scope
14 of the release and point to *UniSuper*. I think the
15 fact of the matter is the actual release that was
16 ultimately approved in *UniSuper* is materially
17 indistinguishable from the release here.
18 So, you know, I understand the
19 objectors are here objecting, but when you cut through
20 it, I think fundamentally the objection is about they
21 want what they view as current value and current fair
22 value, and that's what the complaint is. There's no
23 way to get there from the claims in this case. And
24 what the release is covering are the claims related to

1 the 2014 tender offer and the implementation of the
2 settlement.
3 So from a traditional perspective, in
4 terms of the give and get, I may stand corrected when
5 they speak, but I really don't think that that is what
6 they are objecting to. Fundamentally, they are
7 complaining about they want current value, and they
8 are raising this round-tripping problem. I certainly
9 understand that, and I know why they are focused on
10 that, but I think upon analysis -- and when
11 Mr. Enright and Your Honor were having a colloquy, you
12 sort of put aside the math issue. And I understand
13 why, and I understand what Your Honor was getting at.
14 But I don't think we can put that to the side and
15 ignore it completely. The fact of the matter is that
16 when it all filters down, the non-tendering
17 stockholders are indirectly bearing a de minimis
18 portion of this. And that's important. And that is
19 basically the *Gatz* case, that, you know, there is no
20 round-tripping issue at these numbers. The number
21 that's being borne here is smaller than what was at
22 issue in *Gatz*.
23 THE COURT: And I appreciate your
24 position on that. Is there anything else that you

1 wanted to add to what Mr. Enright said that's unique
2 to your client?
3 MR. SHINDEL: No, Your Honor, not
4 unless you have other questions for me at this point.
5 THE COURT: I don't think so.
6 MR. SHINDEL: Thank you.
7 THE COURT: Why don't we take a
8 15-minute recess, and then I will hear from the
9 objectors.
10 (A brief recess was taken from 2:44 to
11 2:57 p.m.)
12 THE COURT: Thank you. Please be
13 seated. I will hear from counsel for the objectors.
14 MR. KRINER: Good afternoon, Your
15 Honor. Robert Kriner on behalf of Fair Market
16 Investments. By the way, thank you very much for that
17 recess.
18 Your Honor has Fair Market's objection
19 submissions. I don't intend to -- and the replies.
20 And I don't intend to go through them again for Your
21 Honor. I know Your Honor has probably read them.
22 The objection is based on many points,
23 but all of the points come back to the same essential
24 hub. This action challenged a controller acquisition

1 of DBM Global -- and I will use the DBM Global
2 nomenclature because that's the name of the company
3 now and that's the name of the new transaction --
4 challenged the controller acquisition in 2014, which
5 was never consummated with a back-end merger. So the
6 notion that a unitary transaction was challenged is a
7 myth. There was never a back-end merger consummated.
8 And the current transaction is not a unitary
9 transaction because there's not an acquisition
10 involved in this.
11 The action challenged the controller's
12 acquisition. The controller was alleged to be
13 self-dealing and paying an unfair price, in breach of
14 its fiduciary duties as the controller. The DBM
15 directors were alleged to have been enabling the
16 self-dealing by the controller.
17 But in the proposed settlement of this
18 controller breach case, it includes a DBM Global
19 tender offer, funded at least in part with new DBM
20 Global debt, and it includes no back-end merger and
21 requires all stockholders to release all class and
22 derivative claims, whether they tender or not, and the
23 stockholders can't opt out.
24 So this is a new controller

1 transaction, self-dealing, at the behest of the
2 controller with an interested board, and for which
3 these parties, the controller and the interested
4 directors, seek this Court's blessing for, with full
5 releases and no scrutiny under the entire fairness
6 test or none of the traditional protections of an
7 independent committee or anything else at play here.
8 Neither plaintiff nor defendants --
9 and in addition to that, Your Honor, the plaintiff and
10 defendants want Your Honor to flash back to fair
11 market value, on this new transaction, back to 2014.
12 And that's the standard for why this new transaction
13 is something the claims should be released against,
14 with no protections.
15 Neither plaintiff nor defendants have
16 cited any precedent for this structure of a settlement
17 with a new transaction funded by the company, at least
18 in part, under these circumstances. None of the cases
19 do. It's not a merger case with a bump. It's not a
20 controller tender offer that ends up with a
21 renegotiated tender offer. In fact, the *MAT Five*
22 case, which defendants cite, was a controller tender
23 offer case by Citibank, and the settlement involved an
24 opt-out class. And the non-tendering stockholders

1 were not required to sign the release that the others
2 did when they tendered their stock.
3 So none of the cases cited before Your
4 Honor are anything like this. And I'm not aware of
5 any precedent. I'm happy to hear from my friends if
6 there is one. And we're told just recently that this
7 entire structure is because the controller can't pay.
8 That's why it's structured this way. But they could
9 if you went to judgment after trial. And that's the
10 reason why this structure is here.
11 And meanwhile, the representative
12 plaintiff here will tender and wants a $25,000 special
13 incentive award. He's not adequate to represent the
14 class here and all of the releases. He's going to
15 tender; he's getting out. He's getting $25,000. He
16 has no stake aligned with plaintiffs who don't tender
17 into this new tender offer. He just doesn't. He's
18 not adequate. And I don't think I heard my friends
19 explain how he really was.
20 Now, my friends, plaintiffs and the
21 defendants, they don't really challenge the basic
22 points of the objection. They say, yeah, DBM is
23 paying something, maybe $20 million, maybe $2 per
24 share, but that's a small price to pay here. Well,

1 why is that fair? Why is the structure fair at all
2 with all of these releases? There's no explanation
3 for that. There's no precedent for it.
4 Indemnification cases, in deal cases where the
5 company's insurance pays, that's completely different.
6 They say, well, the company is now
7 looking for buyers. Well, hiring Jefferies, or
8 whomever it is, to start conducting exploration,
9 that's not a buyer by any stretch that I've ever seen.
10 The timing is interesting, that somehow this is
11 providing some certainty of a back end, but none of my
12 friends have said anything like that. There's not a
13 unitary transaction involved in this new transaction.
14 And, really, this only makes the issue
15 more palatable about the stockholders who don't tender
16 or are left in the company. It brings all of these
17 issues to the fore if they really are conducting a
18 sale process.
19 Oh, they also say there are plenty of
20 benefits to the company, DBM Global. I don't see
21 anyone here representing the company. No one even
22 knows about who approved the thing on behalf of the
23 board, or really whether it was approved.
24 I was surprised to hear Mr. Enright

1 say a couple of things today. One was, well, I only
2 just learned about the sale process. I didn't know it
3 before. And he was unhappy about it, had to do some
4 rethinking. And he said, well, there are a lot of
5 benefits to the company. I don't know who approved
6 it. I don't know if it was the interested board
7 that's still interested in the releases. I don't know
8 if they did. Well, yeah, of course they did. I'm
9 sure we would have heard already if there had been a
10 special committee of some sort, and Your Honor would
11 have been told that, I'm sure.
12 So who said it was evaluated in any
13 independent way by the company? All we're hearing is
14 the parties who want to settle this case and get out
15 from under the case, and they're speaking for the
16 company and the board here. And the board, by the
17 way, is not independent.
18 So that just brings me to summary,
19 Your Honor. And Your Honor can give me questions.
20 Fair Market submits that this is a grossly
21 overreaching settlement of a self-dealing controller
22 case, and the objection should be sustained and the
23 release should be modified or an opt-out provided
24 here.

1 Fair Market has had discussions with
2 the parties to try to work out something. Those
3 discussions could continue if Your Honor withholds a
4 decision today, gives some time to see if we can come
5 to a mutual understanding about how to restructure
6 this.
7 But that's all I had prepared for Your
8 Honor. And I can answer your questions.
9 THE COURT: Sure. Thank you.
10 What is your understanding of the
11 measure of damages or other relief that could have
12 been obtained had this gone to trial, just on the 2014
13 tender offer?
14 MR. KRINER: That's -- I think it
15 would have been -- if the action had gone to trial on
16 those original claims, it would have been a coercive
17 tender offer case, and the fact that they had made
18 some promises about a back-end merger that never came
19 to light, and apparently they knew quickly after that
20 they couldn't come to light because -- or couldn't
21 come to fruition because the controller couldn't do a
22 back-end merger.
23 So I think the damages would be
24 related to tendering stockholders who were damaged by

1 tendering for something less than fair value; and then
2 for people who didn't tender, there would have been
3 some damages resulting from the fact that you ended up
4 in a company that was under the control of the
5 majority and your value was diminished thereby. I
6 think that's what the damages on those original claims
7 would be.
8 THE COURT: So does it strike you that
9 2020 fair value is generous, in light of that?
10 MR. KRINER: Oh, that current fair
11 value is much higher, we believe, than it was and
12 would have been back at that time, yes. I think
13 that's true today.
14 THE COURT: Comparing the two metrics.
15 So I heard you say that you believe that had we gone
16 to trial back when this was brought, that the
17 non-tenderers would have received some measure of
18 damages for remaining in the company in a diluted
19 manner.
20 MR. KRINER: I think that's right.
21 And I, frankly, don't know, Your Honor, if -- what the
22 value of that claim would be based on anything I've
23 ever done. It seems like the case was going to come
24 down to a tender offer claim and it having been

1 coercive from the start for the *Pure Resources*-type
2 reasons. I think that's what -- that ultimately would
3 have been litigated.
4 THE COURT: I'm trying to evaluate
5 what the objectors are asking for in light of what
6 they could have obtained at trial. That seems to be
7 the best metric that I can identify.
8 MR. KRINER: Back at that time, on
9 those claims -- Your Honor, we're not criticizing that
10 the -- that settlement of the tender offer claim
11 without a release of everything else, and without the
12 new transaction and the burdens on the company, maybe
13 that's a good result for that, flashing back to the
14 value then. We're not challenging that.
15 We're talking about here's a new
16 transaction. It's another self-dealing transaction.
17 It's not unitary. So -- and the company is bearing
18 the cost of it, yet we all have to release it, and
19 release claims relating to it, and we can't challenge
20 the new transaction, and the parties want Your Honor
21 to basically say I'm blessing this over entire
22 fairness. You don't have to jump through the hoops
23 here.
24 THE COURT: I see. So your foothold

1 for today's fair value is not in the claims that were
2 originally brought?
3 MR. KRINER: No.
4 THE COURT: But it's in the scope of
5 the releases with regard to the second tender offer.
6 MR. KRINER: Correct.
7 THE COURT: I understand. Thank you.
8 MR. KRINER: Does Your Honor have
9 anything else?
10 THE COURT: I don't believe so.
11 MR. KRINER: Thank you.
12 THE COURT: Thank you.
13 MR. MONTEJO: Good afternoon, Your
14 Honor.
15 THE COURT: Good afternoon.
16 MR. MONTEJO: I don't want to beat a
17 dead horse on these issues, but I do think my client
18 sits a little differently than a lot of others.
19 Number one, as far as I know, my client may be the
20 largest minority stockholder that remains with the
21 company today. My client's a value investor, believes
22 that this company is worth significantly more today
23 than it was back when this 2014 transaction first
24 occurred.

1 So there's a couple of things that
2 have been said today that I think it just fits right
3 into this Court's standard of review here. It's the
4 Court's obligation to exercise its independent
5 business judgment. Is this fair and reasonable? Does
6 this make sense; right?
7 And, you know, when you look at it
8 from that perspective, I would like to start with the
9 tender offer first. What purpose does it serve? Why
10 is it there? It's an offer that nobody contends is a
11 good deal for anybody. It's -- the plaintiffs
12 expressly disclaim the fairness of it. Defendants
13 don't even suggest that it's fair. And now the
14 defendants are even issuing a press release to suggest
15 to everybody that, hey, you would be a fool to take
16 this tender offer now. So who is it that this tender
17 offer is directed at? Who's to be participating in
18 it? Anybody informed? No. Mom and pop out there
19 just looking for liquidity because they want to pass
20 on to the next generation sooner, maybe.
21 But why should that type of structure,
22 a transaction that would not go unchallenged if it was
23 offered on its own in the marketplace today, would not
24 go unchallenged, why should something like that be

1 structured as part of a settlement in this Court?
2 THE COURT: Is your read on the
3 situation that the tender offer is primarily targeted
4 at Mr. Jacobs?
5 MR. MONTEJO: It can't be -- if all
6 they wanted was Mr. Jacobs' shares, part of the
7 stipulation of settlement would have been Mr. Jacobs
8 is bought out at -- you know, his 300 shares are
9 bought out at the same price as the 2014 payment.
10 THE COURT: Isn't that part of it?
11 Hasn't he committed to --
12 MR. MONTEJO: He's committed to
13 participate in a tender offer. But you don't need a
14 tender offer to do that. I mean, that could have just
15 been him selling his shares, could have just been part
16 of the settlement. And that would have been reviewed,
17 and the Court would have blessed it, and that's it.
18 Mr. Jacobs is out. Why does -- why did we need to
19 bring in a public tender offer by the company?
20 THE COURT: I think that would
21 introduce -- then we would have a bespoke one-person
22 tender offer in the context of a class action. I
23 think that might be problematic.
24 MR. MONTEJO: Well, no. I think that

1 what would have been presented to the Court was, as
2 part of this, you know, he's committed to sell his
3 shares to the company. And the Court can decide
4 whether or not it's fair and reasonable, right.
5 But this is a situation where you've
6 got 80 percent of the minority stockholders don't want
7 this tender offer to go forward. And, again, it's
8 structured in a way that if the company was to have
9 attempted to do this outside of these walls, it would
10 be challenged. There's no question about it. It
11 would be challenged.
12 So I just -- I struggle, just from a
13 common-sense perspective, why are we wrapping this
14 structure into a settlement, and why are we obligating
15 anybody to release it.
16 So, you know, the other thing that's
17 funny about all of this is that the releases they are
18 asking for in the settlement are redundant to the
19 releases that they're asking for in the transmittal
20 letters of the self-tender, right.
21 So you don't even -- people are
22 discussing whether this should be opt in or -- you
23 don't even need to think about it. If the company
24 wants to go do a self-tender, they can go do that.

1 And they will get the same releases in the transmittal
2 letters, presumably. And, of course, you have got
3 case law out there on transmittal letter releases.
4 But beyond that, the company can go do that. It
5 doesn't need a forced, imposed release relating to the
6 tender offer.
7 And they say, oh, you know, we're
8 releasing claims related to prospective action that
9 the defendants have to take. But this is a very
10 unusual prospective action to be taken as part of the
11 settlement. This is -- it's a coercive tender offer.
12 There's no -- there's no question about it that
13 they're using the fact that this company is illiquid
14 to try to get more people to cash out so that, you
15 know, hopefully some day they can reap the benefits of
16 the full fair value of those shares for themselves.
17 That's what this is all about.
18 And I don't know why Mr. Jacobs
19 pressed this issue, because the papers -- defendants
20 say in the papers that this tender offer, Mr. Jacobs
21 was insistent on it, suggesting that they would have
22 been willing to do the settlement without the tender
23 offer in place, but apparently it was Mr. Jacobs that
24 refused. That's odd to me. That's strange. I don't

1 understand it, and my client doesn't understand it,
2 which is why we're here.
3 And I do think it's important, the
4 fact that originally what was being complained about
5 was a controlling stockholder doing a tender offer for
6 shares it didn't hold. Now, the way the settlement is
7 structured, the settlement tender offer is being
8 funded by the company. The company is going into debt
9 for that. Can the company burden that debt
10 financially? Sure. But should it right now? Why is
11 it doing it right now?
12 And this goes back to the fact that --
13 it's been mentioned that there's no independent board.
14 I'm not even sure that the company has counsel. It's
15 unclear to me whether the company is even separately
16 represented in this. So, I mean, whose business
17 judgment is being exercised here to decide that this
18 is the best use of money that the company may borrow
19 to do a self-tender?
20 Does anybody participate in the
21 tender? If they're informed, the answer is no. So
22 what does that mean? That means that there's no
23 attorney fees that are going to be accumulating on
24 this self-tender if nobody participates.

1 That raises another problem, because
2 it's been touted that, look, you know, this payment
3 with respect to the 2014 transaction, right, this is
4 114 percent of what was paid in that transaction, the
5 best recovery in the history of this Court on a
6 percentage basis.
7 But, you know, there's -- the other
8 thing that was said today that I think is important is
9 that, at least Mr. Enright mentioned, this is kind of
10 like a distribution of the settlement funds. So where
11 you've set this up in a way where you've got a
12 self-tender, which probably is not going to elicit any
13 participation, right. So the non-tendered
14 stockholders get zero, right. But then the tendered
15 stockholders are going to get $20.4 million.
16 Now, is it, at least based on -- I
17 don't know the discovery record. What I know is what
18 was in the papers. Based on what's in the papers, the
19 briefing, does that seem fair? I mean, it's more
20 money than their own expert said the -- said was fair
21 value back in 2014. But what I didn't see from
22 Mr. Clarke was any opinion on what the damage should
23 be, or the measure of damage should be for this other
24 piece of the class that they are trying to shoehorn

1 into this case. The non-tendered stockholders, what
2 is their measure of damages? How should it be
3 determined? Is there any precedent on it?
4 I'm not aware of any case from this
5 Court that's gone to trial and the Court has
6 determined what the appropriate measure of damages are
7 for a missed opportunity in liquidity. Is it a viable
8 claim? Maybe. You know, maybe it posed some risk.
9 But how do you measure those damages? What should --
10 so there's no information about that. And it's almost
11 as if there's just -- and they say, well, we're
12 treating everybody equally because they're getting the
13 same amount of money. I mean, that would make sense
14 if we stood at the same point in time. But we don't.
15 There's 500-some thousand shares that's standstill in
16 2014. And then there's 289,000 shares that have moved
17 forward to today.
18 And it's not the same company as it
19 was back in 2014. The defendants point out, they're
20 doing better because they have implemented a better
21 business plan. This is *Technicolor* all over again,
22 the Perelman plan. When those minority stockholders
23 that aren't cashed out immediately in the second step,
24 right, the value from the date of the first step until

1 the second step, whenever that occurs, accrues to the
2 benefit of the minority too. They share pro rata in
3 that.
4 So to say that the 2014 aspect of the
5 class stands equally in terms of value with the 2020
6 stockholders of the company is ridiculous. It's
7 absurd. But that's what they're doing. They -- so
8 from a logical perspective, this settlement, and the
9 approach to it, is just fundamentally unsound. It has
10 no rational basis.
11 It would be one thing if they came in
12 to the Court and said, look, we got $68 per share for
13 the 2014 stockholders. We're going to pay that out.
14 Yada yada yada. And we're going to release the claims
15 for the lack of liquidity aspect of the case dating
16 back to 2014 because we can't justify an allocation,
17 an appropriate allocation between those two parts of
18 the class, right. That would be a reasoned and
19 rational way to come about it. They've got
20 Mr. Clarke, who says this about one aspect. They will
21 have Mr. Clarke say this about the other aspect. And
22 they would say, Your Honor, this is why our allocation
23 of these proceeds is fair and reasonable.
24 But that's not what's happening here.

1 There's no effort to try to rationalize how the funds
2 are being allocated, and it's hard not to lose sight
3 of the fact that the way that the funds are being
4 allocated maximizes the attorney fees that are being
5 awarded.
6 So adequacy and typicality of the
7 class, I don't think you can get there. The current
8 stockholders stand in a very different place. They
9 don't have claims relating to being unfairly cashed
10 out. They never had those claims, right. They had
11 maybe some other claims, some derivative aspect of
12 that of not being entitled to a liquidity event. And,
13 you know, that's a tough -- this is a tough claim to
14 row, right. I mean, that's not a -- that's not an
15 easy -- at least as far as I'm aware, it's not like
16 you've got a 30-page footnote of cases that you can
17 point to to support that claim.
18 So it's you are trying to shoehorn in
19 the current stockholders into a class that -- look, I
20 mean, if -- it's a recovery. If it's appropriate and
21 fair for the 2014, it's a fantastic result for them,
22 right. I mean, sure. That's great. Well done.
23 But -- and then the only question my
24 client has about that is the circularity of it, right.

1 And the points have been made today -- and this wasn't
2 clear in the stipulation of settlement as it was
3 originally put forth as to where the funds were coming
4 from. That was a big concern for my client.
5 So it's been represented now that most
6 of the funds are either coming from insurance proceeds
7 or, arguably, indirectly from the controlling
8 stockholder because of his 92 percent holdings in the
9 company, which leaves us, and I think Mr. Enright
10 said, about $608,000. Which the problem with that --
11 and this is where we get into the *Gatz* case. I mean,
12 I think it was Chancellor Chandler. Off the top of my
13 head, I can't remember, Your Honor. I apologize. But
14 he didn't say that circularity isn't a problem because
15 here it's de minimis. After supplemental briefing, he
16 determined that, well, the circularity is okay here
17 because there were viable advancement and
18 indemnification claims, up to $3 million, I think, in
19 that case, against the company. So exercising my
20 independent business judgment, I think it's fair and
21 reasonable for the company to contribute to just end
22 this, right.
23 But, you know, what's very unclear --
24 and it's a very short opinion. It's off of

1 supplemental briefing on a settlement hearing. Very
2 unclear in that case, as opposed to here. I mean,
3 here, it doesn't seem like we have got company's
4 counsel present. We certainly don't have an
5 independent board. Is it okay -- and I don't even
6 know who owns the D&O policy. They say that HC2 paid
7 the premiums on it. But it's the policy and asset of
8 the company? I have no idea. It's unclear from the
9 papers.
10 If it's an asset of the company just
11 because HC2 paid the premiums on it, is it appropriate
12 for that asset to fund the settlement? That seems
13 like a different question than if it's HC2's asset
14 under its own parent company, right. That would be a
15 different animal.
16 So there's $13.7 million coming from
17 the insurance policy that's going towards the
18 settlement payment. And if that actually is an asset
19 of the company's insurance policy, you know, is it
20 appropriate for the company to be carrying the full
21 burden? Whether it's insurance money or not, it would
22 be carrying the full burden of this settlement
23 payment. And why would that be, when presumably the
24 defendants -- I mean, the plaintiffs claim it was a

1 slam-dunk case for them, that the arguments made in
2 the briefs are very compelling. And why would HC2 not
3 fund the settlement or any aspect of the settlement?
4 And, again, maybe that's answered with
5 a simple question to Mr. Shindel. Maybe it's HC2's
6 insurance policy, and that's -- maybe -- perhaps you
7 can answer that right now. I don't know. The point
8 is that it was after supplemental briefing on all of
9 these points that ultimately this circular issue was
10 resolved. It wasn't because it was de minimis. It
11 was because after the briefing the Court determined
12 that it was appropriate in that circumstance for the
13 company to contribute towards the settlement funding.
14 Finally, Your Honor, just on the
15 opt-out, I think it's been at least 50 times today
16 that both plaintiff and defense counsel has mentioned
17 options, right. This is just optionality for the
18 minority stockholders. If they don't want it, who
19 cares? I mean, isn't that what opt-out class
20 definitions are all about?
21 And the only case, the only case that
22 has been cited that is remotely similar, where a
23 settlement structure that's proposed here is even
24 remotely similar, involved a certification under an

1 opt-out class. So I'm not aware of any instance where
2 a non-opt-out class was certified that forced minority
3 stockholders to release claims associated with a
4 tender offer being driven by a controlling
5 stockholder. I'm not aware of any structure like
6 that. And if I'm wrong, I apologize to the Court.
7 That's all I have, unless the Court
8 has any questions, Your Honor.
9 THE COURT: No, I don't. Thank you.
10 MR. MONTEJO: Great.
11 THE COURT: Would counsel for the
12 individual defendants like to say anything? You don't
13 have to.
14 MR. LADIG: No.
15 THE COURT: All right. Thank you.
16 Well, I think it's probably clear that
17 I have some concerns about all of this. I have
18 concerns about the date span. I have concerns about
19 the plaintiff's adequacy to represent everyone -- in
20 particular, the non-tendering stockholders. I have
21 concerns about the give-get in light of where the
22 funds are coming from. I have concerns about the fact
23 that the company is not here, nor do I know the terms
24 under which the company has approved the settlement.

1 And I am concerned about the non-tendering
2 stockholders receiving fair consideration for their
3 releases.
4 It seemed to me that Mr. Kriner raised
5 the possibility that perhaps further discussions could
6 take place now that the objectors are here in the
7 room. And so I'm wondering if that is something that
8 you would all like to engage in -- it would make me
9 more comfortable if there was some form of independent
10 representation from the company, as well, in those
11 conversations -- or if you would like to stick to your
12 guns and submit this as presented?
13 So I don't know if you want me to take
14 a recess and you can talk about it. Do you want to do
15 that?
16 All right. Just let Mr. Barnaba know
17 when you are ready for me to come back.
18 (A brief recess was taken from 3:28 to
19 3:45 p.m.)
20 THE COURT: Please be seated.
21 Who would like to share with the class
22 what you have all been discussing?
23 MR. ENRIGHT: Your Honor, Donald
24 Enright again.

1 First, objectors' counsel and counsel
2 for the parties have discussed in the hall, and we
3 agree that it makes a sense for us to at least take a
4 period of time to confer amongst ourselves, see if
5 there's something that can be done to satisfy the
6 concerns of the Court as enunciated, see if the
7 objectors' concerns can be allayed somehow, and then
8 come back to Your Honor with an update in two weeks,
9 if that's acceptable to Your Honor.
10 THE COURT: That sounds great.
11 MR. ENRIGHT: And I don't know if
12 you -- a lot was said by the objectors here today that
13 I disagree with vehemently. If Your Honor would give
14 me a couple of minutes to preserve the record on those
15 points --
16 THE COURT: Sure.
17 MR. ENRIGHT: -- I would like to. But
18 at the same time, I don't want to belabor anything if
19 we're going to just be back here in another hearing
20 anyway.
21 THE COURT: I understand that there
22 may be things you feel you need to say.
23 MR. ENRIGHT: Okay. As a first
24 measure, Your Honor, there is no reasonably

1 conceivable outcome here that could have been achieved
2 on these claims that's significantly better than what
3 we achieved here. I firmly believe that. We fought
4 tooth and nail over this for years. And I cannot
5 conceive of an outcome of the claims that were
6 actually asserted on behalf of the class here where a
7 better outcome can be obtained. Based on the
8 contemporaneous valuations of the company and our own
9 expert, we've obtained full value for these claims at
10 that time, or the closest thing to it.
11 That is an enormous value to this
12 class, both the tendered and non-tendered. And to
13 hear this -- that we've worked on very hard. To hear
14 this denigrated here today has been very difficult for
15 me to endure, candidly.
16 Mr. Jacobs was exceptionally attentive
17 to this case and exceptionally devoted to this case,
18 with one principle in mind. And that is getting fair
19 treatment and equal treatment for all of the
20 stockholders, those who tendered and those who didn't.
21 To hear him called an inadequate plaintiff, after the
22 amount of time and attention and effort he's put into
23 this case, is offensive to me. He has tried very hard
24 to reach the best outcome imaginable, or at least

1 available for the class, as have we.
2 And the reality is, Your Honor, the
3 fact that this short form merger never happened, even
4 though HC2 undertook repeatedly to do it, it threw the
5 monkey wrench into this case that has made structuring
6 a settlement really difficult. This is not a
7 run-of-the-mill case. It has this weird wrinkle in
8 the facts that makes structuring any resolution for it
9 very unusually difficult. And that's why we've had to
10 try to be innovative in trying to come up with a
11 structure that can provide the optionality to the
12 non-tendered stockholders, while at the same time
13 we're not pushing them out of the stock that they
14 might want to remain in, and providing equal treatment
15 for all of the stockholders, while at the same time
16 obtaining, as I said, outstanding value for them based
17 on the claims that we actually have.
18 And, Your Honor, the issue of coercion
19 here, as I stated before, the minority stockholders
20 will be in no different position before and after this
21 settlement tender offer if it goes forward. And
22 because it's been -- the -- there has been no
23 criticism about the quality of the disclosure in
24 connection with the proposed settlement tender offer.

1 It is extremely candid about the valuation --
2 valuations of the company and about the fact that it's
3 not intended to represent the current full value of
4 the company.
5 Given the candid disclosure that's
6 provided, and the fact that they have announced that
7 there is a possible other transaction on the
8 horizon -- possible, no promises -- I don't see how
9 anybody could call that coercive.
10 And, Your Honor, you've expressed some
11 concerns about the give and the get here. The give
12 and the get, in looking at a -- the fairness of a
13 settlement from the Court's perspective is the give
14 and the get from the plaintiff -- from the plaintiff
15 class. What is the plaintiff class giving and what
16 are they getting.
17 And, Your Honor, you seem to be
18 focused on the give and the get for HC2. Candidly,
19 Your Honor, that's not the question before the Court
20 today. The question, in determining if the settlement
21 is fair and reasonable and adequate, is whether the
22 give and the get for the class is fair to the class.
23 We're not here to punish HC2. We're here to obtain a
24 fair outcome for the class. And as I said, Your

1 Honor, I cannot conceive of a significantly better
2 outcome that could be obtained here than what we've
3 achieved.
4 Mr. Kriner said that the unitary
5 transaction is a myth and it's not a thing in this
6 case. That's wrong. And the reason for that is, as
7 laid out very, very exhaustively in our amended
8 complaint, we strenuously contend that HC2 had an
9 obligation to complete the short form merger based on
10 the circumstances at the time and all of the
11 undertakings and promises it made to the stockholders.
12 So it is, essentially, a constructive unitary
13 transaction.
14 But if it wasn't, and Mr. Kriner was
15 right, then the value of the release that they're
16 giving up in connection with this 2014 transaction is
17 zero. So the give and the get cannot possibly favor
18 the objectors' position because the release that
19 they're giving up in connection with that 2014
20 transaction is valueless. Any value in the settlement
21 that surpasses that zero would make it fair.
22 And, Your Honor, something that I
23 haven't had a chance to emphasize is that, if nothing
24 else, the non-tendered stockholders have gained

1 tremendous information about the company's current
2 status that they simply did not have before. All of
3 their objections are based on information gleaned from
4 the offer to purchase. They didn't know anything
5 about any of these valuations of the company or these
6 intercompany transfers or what this company was worth
7 at any point before this information was made
8 available to them by our efforts. That is a
9 substantial value, particularly if this company is on
10 the auction block, as HC2 said on February 10th.
11 Being forearmed with that information about the recent
12 valuations of the company, that is invaluable to them.
13 And that should be taken into consideration as part of
14 the value proposition here.
15 And then with regard to this notion
16 that this settlement tender offer should be subject to
17 the *Pure Resources/CNX* course of tender offer
18 analysis, Your Honor, the whole point here is that
19 this is simply a mechanism to make settlement
20 consideration available to these people on an optional
21 basis.
22 If there's no actual coercion, and the
23 Court reviews it and determines that this is a fair
24 settlement -- the Court doesn't have to determine that

1 this is a fair value for the stock today. All the
2 Court has to conclude is that this is a fair
3 settlement to allow this full disclosure to be made so
4 that the non-tendered stockholders can accept or
5 reject the consideration at their option.
6 And I note further, Your Honor, that,
7 once again, the objectors here continue to buy the
8 stock. AB was continuing to buy the stock in 2019.
9 The notion that they're not comfortable being a
10 minority stockholder in this company is simply not
11 credible given the fact that the whole time that
12 they've been buying it they have been a minority
13 stockholder in a super majority controlled company.
14 THE COURT: Is there anything else in
15 particular that was raised in your friends'
16 presentation that you didn't get a chance to address
17 the first time?
18 MR. ENRIGHT: With regard to the
19 release, Your Honor, I would just note that it is
20 carefully confined to the facts and allegations and
21 claims in the action. This is not like *UniSuper*,
22 where any tangential, conceivably, imaginably attached
23 or connected items are being released here.
24 If you review the release here, Your

1 Honor, it's very clear that it's confined in scope in
2 terms of it's limited to claims that the class members
3 asserted, or could have asserted, based on ownership
4 of Schuff common stock during the class period, which
5 ended on November 15th, arising from allegations at
6 issue in the action, including the specific points
7 that were at issue in the action. It doesn't give
8 some intergalactic release. It very carefully
9 enumerates the different issues that were at issue in
10 this action and releases claims based on it.
11 I think that's it. Thank you, Your
12 Honor.
13 THE COURT: Thank you.
14 I appreciate you all being open to
15 tinkering with this further, and I will look forward
16 to getting a status update in two weeks.
17 We're adjourned.
18 (Court adjourned at 3:56 p.m.)
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CERTIFICATE

I, DEBRA A. DONNELLY, RMR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 87 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 17th day of February, 2020.

/s/ Debra A. Donnelly

Debra A. Donnelly, RMR, CRR
Official Chancery Court Reporter
Registered Merit Reporter
Certified Realtime Reporter