PUBLIC VERSION DATED
JUNE 9, 2020

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

PLAINTIFF'S BRIEF IN SUPPORT OF FINAL APPROVAL OF THE REVISED SETTLEMENT

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Plaintiff Mark Jacobs ("Plaintiff") respectfully submits this Brief in Support of his Application for Final Approval of the Revised Settlement (the "Revised Settlement") resolving all claims in the above-captioned action (the "Action") pursuant to terms set forth in the Stipulation and Agreement of Compromise and Settlement dated May 8, 2020 (the "Stipulation").[1]

PRELIMINARY STATEMENT

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

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

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

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

Additionally, after considering the Court's views, as well as those of certain objectors, the parties have revised the settlement to provide a cash payment to the Company's remaining minority stockholders (the "Non-Tendered Stockholders"). Specifically, the Revised Settlement now provides for a total payment to the Non-Tendered Stockholders of $1,016,060, or $3.51 per share. This payment compensates the Non-Tendered Stockholders for any potential indirect financial impact of the Revised Settlement payment to the Tendered Stockholders, and further compensates them for HC2's failure to consummate a short-form merger pursuant to 8 *Del. C.* § 253.[4] The Non-Tendered Stockholders will not bear any financial cost in connection with the Revised Settlement.

The Revised Settlement releases claims only relating to the Buyout and the Revised Settlement, and provides the Tendered Stockholders with a 114% premium to the Tender Offer price without the delay or uncertainty that would result from further litigation. In allocating $3.51 per share in cash to the Non-Tendered Stockholders, which will be paid entirely by HC2, the Revised Settlement ensures that they are made whole in connection with the Revised Settlement payment to the

[3] In the aggregate, the Revised Settlement provides an additional $20,439,588.20 to the Tendered Stockholders.

[4] The Tender Offer and the unconsummated short-form merger are collectively referred to herein as the "Buyout."

Tendered Stockholders. This represents an outstanding result for the Non-Tendered Stockholders, who will receive over $1 million in compensation despite never having been deprived of their Schuff shares, which have appreciated substantially and paid a total of $21.05 in dividends, including a $3.89 per share dividend paid on May 14, 2020.

Indeed, in recognition of the outstanding result Plaintiff has achieved for all class members, AB Value Partners, L.P. ("AB Value"), which is believed to be the largest remaining Non-Tendered Stockholder of Schuff shares, supports the Revised Settlement and has withdrawn its objection to the Original Settlement Agreement ("Original Settlement"). Plaintiff respectfully submits that the Revised Settlement, addresses all of the concerns raised by the Court in connection with the Original Settlement, and, therefore, should be approved.

STATEMENT OF FACTS

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

telecommunications, life sciences, and insurance.[5]

On May 12, 2014, HC2 purchased 2,500,000 shares of Schuff common stock, representing approximately 60% of Schuff's outstanding shares, from SAS Venture LLC, an entity owned by Scott Schuff, then-President and CEO of the Company, for an aggregate purchase price of $78,750,000, or $31.50 per share.[6] Between May and July 2014, HC2 purchased additional Schuff shares, increasing its stake in the Company to approximately 70%.[7] On June 2, 2014, three directors designated by HC2, defendants Falcone[8], Hladek, and Voigt, joined the Schuff Board.[9]

On August 11, 2014, HC2 informed the Company that it intended to make a tender offer at $31.50 per share (the "Merger Consideration") for all outstanding shares of Schuff common stock that it did not already own.[10] HC2 also indicated that it had a "non-binding intent" to effect a short-form merger of Schuff into an HC2 subsidiary following the completion of the Tender Offer.[11]

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[5] Rigrodsky Aff., ¶ 5.

[6] Rigrodsky Aff., ¶ 15.

[7] Stipulation, ¶ C.

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

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

[10] Stipulation, ¶ E.

[11] Rigrodsky Aff., ¶ 29.

On August 15, 2014, the Board formed the Special Committee, comprised of defendants Yagoda and Elbert, to evaluate the Tender Offer and communicate to Schuff's minority stockholders regarding the transaction.[12] However, the Special Committee did not: (i) engage an outside financial advisor to perform any valuation analyses; (ii) negotiate with HC2 over the Merger Consideration; (iii) consider or pursue any other strategic alternatives to the Tender Offer and Merger (collectively, the "Buyout"); or (iv) evaluate HC2's ability to obtain financing to consummate the Buyout.[13]

On August 21, 2014, HC2 commenced the Tender Offer at $31.50 per share. The Tender Offer, which expired on September 19, 2014, was conditioned on: (i) the tender of a majority-of-the-minority of Schuff shares not held by HC2 or the Company's directors and officers; (ii) HC2 ownership of 90% of the Company's outstanding stock after the close of the Tender Offer; and (iii) HC2 closing financing terms, if necessary, to purchase the shares tendered in the Tender Offer. *Id*. HC2 also represented that upon attaining ownership of 90% of the Company, it would conduct the Merger at the same price as the Tender Offer "as soon as practicable."[14]

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

[13] Rigrodsky Aff., ¶¶ 40, 43-45.

[14] Rigrodsky Aff., ¶ 37.

In a Stockholder Letter, dated September 5, 2014, the Special Committee apprised stockholders that it was neutral and took no position with respect to the Tender Offer.[15] The Stockholder Letter apprised stockholders that they would be entitled to seek appraisal if the Merger was consummated following the Tender Offer.[16] In addition, the Stockholder Letter stated that if the Tender Offer was consummated, but the Merger was not, there would be fewer Schuff shares for sale and the stockholder's ability to liquidate their shares "may be more restricted."[17]

On September 22, 2014, HC2 extended the Tender Offer from September 19 to September 29, 2014 and stated that it had "irrevocably waived the financing condition described in the Offer to Purchase."[18] On September 30, 2014, HC2 extended the expiration of the Tender Offer for a second time, to October 6, 2014. HC2 further announced that the majority-of-the-minority requirement had been satisfied, but that the 90% requirement was not. Therefore, HC2 announced that it was waiving the condition, and intended to acquire at least 90% of the unaffiliated shares in the Tender Offer or subsequent purchases and then complete the Merger.[19]

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[15] Rigrodsky Aff., ¶ 43.

[16] Rigrodsky Aff., ¶ 46.

[17] Rigrodsky Aff., ¶ 46.

[18] Rigrodsky Aff., ¶ 48.

[19] Rigrodsky Aff., ¶ 53.

On October 6, 2014, the Tender Offer closed and HC2 accepted for purchase 721,124 shares at a price of $31.50 per share, increasing its ownership to 88.69% of the outstanding shares. Members of the Special Committee and Schuff senior management tendered their shares in the Tender Offer.[20] HC2 made additional market purchases after the Tender Offer closed, giving HC2 more than 90% of Schuff's outstanding shares. HC2, however, never effectuated the Merger.[21]

On March 17, 2015, HC2 received a valuation analysis from a third party advisor that implied a per-share value for Schuff of $68.99 per share as of December 31, 2014.[22]

PROCEDURAL BACKGROUND

Plaintiff Mark Jacobs filed his initial class action complaint in the Action (the "Complaint") on November 6, 2014.[23] On November 17, 2014, Arlen Diercks filed a substantially similar complaint, and following full briefing and oral argument, the two actions were consolidated and Plaintiff was appointed lead plaintiff and his counsel lead counsel in the Action on February 19, 2015.[24]

[20] Stipulation, ¶ M.

[21] Rigrodsky Aff., ¶ 55.

[22] Stipulation, ¶ S.

[23] Trans. ID 56301236.

[24] Trans. ID 56796473.

On July 30, 2015, Schuff moved to dismiss the Complaint and defendants Yagoda and Elbert filed their answer to the Complaint.[25] After entering into a tolling agreement with Schuff, Plaintiff agreed to voluntarily dismiss the Company from the Action on October 30, 2015.[26] On October 20, 2016, Plaintiff filed a motion for class certification.[27]

As part of the ongoing litigation efforts, Plaintiff aggressively pursued discovery in the Action. Plaintiff served a First Request for Production of Documents on All Defendants November 13, 2014 and a Second Request for Production of Documents on May 29, 2015.[28] During May 2015 through November 2016, Defendants and third parties produced more than 109,000 pages of documents.[29] On June 3, 2016, HC2 served a First Set of Requests for the Production of Documents on Plaintiff.[30]

On June 6, 2016, Plaintiff noticed the depositions of Elbert, Falcone, Hill, Hladek, Roach, Voigt, and Yagoda.[31] On June 13, 2016, Plaintiff served his First

[25] Trans. ID 57632573.

[26] Trans. ID 58092640.

[27] Trans. ID 59723245

[28] Trans. ID 56335722; 57311626

[29] Stipulation, ¶ V.

[30] Trans. ID 59096056.

[31] Trans. ID 59103628.

Request for Admissions on Defendants.[32]

On October 20, 2016, Plaintiff filed a motion for class certification.[33] On December 9, 2016, the HC2 Defendants deposed Plaintiff.[34]

Beginning in December 2016, counsel for the Parties engaged in extensive arms'-length discussions and negotiations regarding a potential resolution of the Action. In February 2017, the Parties agreed to a tentative framework for the potential settlement of the Action.[35]

Plaintiff deposed defendants Yagoda, Roach, and Hladek on March 27 through March 29, 2017.[36] Based on the evidence obtained from the merits depositions of these defendants, Plaintiff decided to withdraw from the previously agreed settlement framework and to proceed with the prosecution of the claims in the Action.[37] On July 11, 2017, Plaintiff provided Defendants with a draft of an amended complaint that incorporated additional facts learned through discovery.[38]

The Parties continued to pursue settlement discussions and negotiations for

[32] Trans. ID 59134788.

[33] Trans. ID 59723245.

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

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

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

[37] Rigrodsky Aff., ¶ 76.

[38] Rigrodsky Aff., ¶ 76.

more than a year and, on August 6, 2018, agreed on a new framework for the settlement of the Action.[39] Even as negotiations continued, however, Plaintiff continued to pursue merits discovery. On September 21, 2018, Plaintiff served subpoenas on third parties Duff & Phelps, LLC and Deutsche Bank Securities, Inc., procuring more than 3,300 pages of additional documents, including, Schuff's periodic financial statements since the close of the Tender Offer; materials regarding a potential sale process for the Company; quarterly estimates of Schuff's value prepared by Duff & Phelps, LLC for HC2; one-year and five-year financial projections prepared by the Company's management; and documents regarding HC2's private agreements with certain third parties regarding the purchase of Schuff shares outside of the Tender Offer. Plaintiff also deposed Defendant Falcone, Chairman and Chief Executive Officer of HC2, on November 29, 2018 and Paul Voigt, HC2's former Managing Director of Investments, on February 20, 2019.[40]

On April 2, 2019, Plaintiff and Defendants agreed in principle to settle the Action, subject to agreement on definitive settlement documentation, which Defendants produced to Plaintiff. These documents included financial statements and valuation presentations prepared for HC2 relating to the Company between

[39] Rigrodsky Aff., ¶ 77.

[40] Rigrodsky Aff., ¶ 77.

March 2015 and October 2019, and certain financial projections.[41] Negotiations continued between the parties for several months with regard to the specific terms of a settlement almost resulting in the termination of the agreement. Nonetheless, the parties were able to reach agreement on the settlement terms and executed the Original Settlement on November 15, 2019.[42]

On January 14, 2020, Plaintiff filed a brief in support of the Original Settlement and an Amended Complaint reflecting Plaintiff's then-current allegations in the Action.[43] On January 24, 2020, two Non-Tendered Stockholders, Fair Value Investments, Inc. (the holder of 10 Schuff shares) and AB Value (collectively, "Objectors"), served objections to the Original Settlement.[44] Objectors claimed to represent 71.5% of the Non-Tendered Stockholders Shares in the aggregate.[45]

Objectors asserted, among other things, that the release was improperly broad, that Schuff was improperly paying for the Original Settlement rather than HC2 and other Defendants, and the Original Settlement did not provide adequate compensation to the Non-Tendered Stockholders through the proposed Settlement

[41] Rigrodsky Aff., ¶ 77.

[42] Rigrodsky Aff., ¶¶ 77-80.

[43] Trans. ID.64620156; Trans. ID. 64615870.

[44] Trans. ID. 64655731; Trans. ID. 64660194.

[45] *Id*.

Tender Offer.[46]

On February 3, 2020, Plaintiff and three of the HC2 Defendants filed briefs addressing the Objectors' claims.[47] Among other things, these briefs argued that the Original Settlement gave the Non-Tendered Stockholders the opportunity to liquidate their shares of Schuff common stock for the same exact aggregate value[48] to be received by the Tendered Stockholders, that HC2, through its insurance and indirectly through its 92.5% equity ownership of Schuff, would bear nearly all of the payment to the Tendered Stockholders, and that the scope of the proposed settlement release was customary and proper.[49]

On February 13, 2020, at the hearing on the Original Settlement, the Court raised concerns regarding the proposed class period, questioned why Schuff was directly funding directly the Settlement Tender Offer and a portion of the payment to the Tendered Stockholders, and whether the Non-Tendered Stockholders were receiving sufficient consideration for their releases in light of the increase in Schuff's

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[46] *Id*.

[47] Trans. ID. 64683677; Trans. ID. 64684024..

[48] Plaintiff's goal with regard to the Original Settlement had always been to obtain identical treatment for the Tendered Stockholders and Non-Tendered Stockholders, and thereby ensure that all Class members would be treated fairly, equitably and equally.

[49] Trans. ID. 64683677; Trans. ID. 64684024.

public stock price relative to the Settlement Tender Offer price.[50]

In light of the Court's stated concerns, the Parties requested additional time to consider a revised settlement framework. After the hearing, the parties discussed options to address the issues raised by the Court, and ultimately negotiated, at length, potential revisions to the Original Settlement. Plaintiff and Plaintiff's counsel also consulted extensively with their financial expert.

On May 8, 2020, the parties entered into the Revised Settlement. That same day, the Schuff Board (consisting of defendants Falcone, Yagoda, Roach and Hill, and non-parties A.J. Stahl (Vice President-Investments of HC2), Michael Sena (Chief Financial Officer of HC2) and Paul J. Hurley) approved the payment by Schuff of approximately $8.055 million of the total payment to be made to the Tendered Stockholders.[51] According to minutes produced to Plaintiff's Counsel, this approval was based upon an analysis of Schuff's interests and circumstances, including the Company's indemnification and defense cost advancement obligations under its corporate charter.[52] The board of directors of HC2 (consisting of defendant

[50] Supplemental Rigrodsky Aff., ¶ 6, Ex. A, Settlement Hearing Tr.

[51] Supplemental Rigrodsky Aff., ¶ 8.

[52] *Id.* At their insistence and as part of the Revised Settlement, Plaintiff's Counsel have received and reviewed the Schuff Board minutes associated with the May 8 approval of the Settlement and the Revised Settlement Framework. Furthermore, Article Nine, Section A of the Company's Certificate of Incorporation ("COI") specifically states, "the Corporation shall to the fullest extent authorized by

Falcone and nonparties Warren H. Gfeller, Wayne Barr, Jr., Robert V. Leffler, Jr., Lee S. Hillman and Julie Totman Springer) also approved the Revised Settlement on May 8, 2020.

The terms of this Revised Settlement maintain the same Gross Tender Payment of $35.95 per share to the Tendered Stockholders—for a total payment of approximately $20.44 million—of which approximately $12.39 million will be funded by HC2's Insurers (and thereby indirectly by HC2). Approximately $8.055 million of the Gross Tender Payment will be funded by Schuff (and thereby 92.5% indirectly funded by HC2 through its equity ownership of Schuff).[53]

In the event the Revised Settlement receives Final Approval, HC2 will transfer approximately $12.39 million that it receives from HC2's Insurers to Schuff's paying agent for payment to the Tendered Stockholders and Plaintiff's

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Delaware General Corporation Law . . . indemnify and hold harmless any person who was or is a party. . . in any threatened, pending or completed action, suit or proceeding . . . by reason of the fact that such person is or was a director or officer of the Corporation . . . ." Moreover, Schuff owes advancement obligations to these same defendants in connection with their legal defense. Specifically, Article Nine, Section B of the COI explicitly states that the "right to indemnification conferred in this section shall include the right to be paid by the Corporation and the expenses (including attorneys' fees) incurred in defending any such proceeding in advance of its final disposition."

[53] Supplemental Rigrodsky Aff., ¶ 11.

Counsel.[54] HC2 expects that Schuff will borrow and transfer approximately $8.055 million for payment to the Tendered Stockholders and Plaintiff's Counsel.[55] HC2 will itself transfer directly $1,016,060 to Schuff's paying agent for payment to the Non-Tendered Stockholders.[56]

With this $1,016,060, HC2 will fund two payments to the Non-Tendered Stockholders. First, HC2 will fund one payment to offset the potential indirect financial impact on the Non-Tendered Stockholders of Schuff's funding obligations in the Settlement in light of the Non-Tendered Stockholders' 7.52% ownership of Schuff (the "HC2 Offset Payments"). The Non-Tendered Stockholders arguably would indirectly be potentially impacted by as much as $726,158 of principal, fees, and interest in connection with those funding obligations.[57] To eliminate any potential indirect financial impact upon the Non-Tendered Stockholders, HC2 will

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[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Given the Non-Tendered Stockholders' 7.52% ownership of Schuff (*i.e.*, 289,902 Non-Tendered Stockholders Shares divided by 3,855,721 Schuff shares outstanding), the Non-Tendered Stockholders arguably have an indirect financial interest of $605,648 in the approximately $8.055 million to be paid by Schuff. This 7.52% ownership also arguably gives the Non-Tendered Stockholders an indirect financial interest of $120,510 in the fees and interest Schuff is expected to pay prior to the October 1, 2021 maturity date for the DBMG Financing. Accordingly, the total amount of the HC2 Offset Payments is $726,158.

pay the $726,158 total amount of the HC2 Offset Payments to the Non-Tendered Stockholders—or $2.51 per share.[58]

Beyond the HC2 Offset Payments, HC2 will fund $289,902 in release payments to the Non-Tendered Stockholders—or $1.00 per share (the "HC2 Release Payment").[59] As discussed herein, Plaintiff believes that this represents a fair resolution of the Non-Tendered Stockholders' claims arising in connection with the Buyout.

In sum, HC2 and HC2's Insurers are bearing, directly and indirectly, the entirety of the approximately $21.36 million to be paid as settlement consideration in the Revised Settlement.

ARGUMENT

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

The voluntary settlement of contested claims has long been favored under Delaware law. *See Kahn v. Sullivan*, 594 A.2d 48 (Del. 1991). In reviewing a class action settlement, the Court '"consider[s] the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then . . . appl[ies] its own business judgment in deciding whether the settlement is reasonable

[58] Supplemental Rigrodsky Aff., ¶ 12.

[59] Supplemental Rigrodsky Aff., ¶ 13.

in light of these factors." *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1284 (Del. 1989) (quoting *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986)). In evaluating the fairness of the settlement, the court must "determine whether the settlement falls within a range of results that a reasonable party in the position of the plaintiff, not under any compulsion to settle and with the benefit of the information then available, reasonably could accept." *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, C.A. No. 1091-VCL, 2013 Del. Ch. LEXIS 37, at *4 (Del. Ch. Feb. 6, 2013).

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

A. The Revised Settlement Provides a 114% Premium to the Tendered Stockholders Over The Tender Offer Price

The payment to the Tendered Stockholders has not changed with the Revised Settlement. Defendants will pay a minimum of $20,439,588.20 in cash to the

Tendered Stockholders. The increase in aggregate consideration per share, from $31.50 per share to $67.45 per share, provides the Tendered Stockholders with an additional $35.95 per share, more than doubling the Tender Offer price in an unprecedented bump of more than 114%.

Plaintiff believes this will provide the Tendered Stockholders with the largest premium, as a percentage increase in consideration, ever achieved in Delaware litigation. Plaintiff's brief in support of the Original Settlement provides greater detail regarding the fairness and adequacy of this outstanding result for the Tendered Stockholders.[60]

B. The Revised Settlement Makes the Non-Tendering Stockholders Whole and Fairly Compensates Them for HC2's Failure to Consummate the Buyout

First, the HC2 Offset Payments provide the Non-Tendered Stockholders with full recompense for any potential indirect impact they would absorb as a result of the Schuff's partial payment of the consideration to the Tender Stockholders. Indeed, it is quite possible that they will enjoy a windfall from the HC2 Offset Payments, if Schuff does not borrow the full amount, or pays it back before full term, and thereby avoids the full anticipated financing cost.

Moreover, since the time of the Tender Offer, it is undisputed that the value

[60] Trans. ID. 64620156.

of Schuff's stock has substantially increased. The Non-Tendered Stockholders have also received a total of $21.05 per share in dividends since October 2014, including a dividend of $3.89 per share distributed on May 14, 2020.[61] Those dividends represent an approximate 31% yield on the $67.45 per share that Plaintiff believes Schuff's stock was worth at the time of the Tender Offer. This return exceeds the average and median compound annual growth rates (CAGRs) for the GPCs Plaintiff's consultant used for his valuation analysis and exceeds the rates of return on short-term debt investments (*e.g.*, money market funds).

Given the fact that the Non-Tendering shareholders are in possession of shares that have significantly appreciated in value and have paid substantial dividends, it is difficult to assert that the Non-Tendering Stockholders suffered any damages. Fair Value recognized this at the settlement hearing, acknowledging that the value of the Non-Tendered Stockholders' shares had substantially appreciated in the interim, stating "that current fair value is much higher, we believe, than it was and would have been back at that time, yes. I think that's true today."[62]

Thus, during the negotiations following the Settlement Hearing, Defendants continued to take the position that the Non-Tendering Shareholders have suffered no

[61] Rigrodsky Aff., ¶ 94.

[62] Supplemental Rigrodsky Aff., Ex. A, Tr. at 63.

damages.[63] Counsel for Plaintiff disagreed based on the claim that, by not consummating the back-end merger, Defendants deprived the Non-Tendering Shareholders of the right to seek appraisal. In consultation with their financial expert, Counsel for Plaintiff thus developed an analysis using a Black-Scholes-Merton Put Option ("BSM Put Option") model that attempted to quantify the financial damages resulting from that misconduct.[64]

The Non-Tendered Stockholders essentially lost their ability to "put" their shares back to the Company for fair value at that time. The BSM Put Option model indicates a value for this right of $4.56 attributable to each share held by the Non-Tendered Shareholders.[65] However, while the hypothesized appraisal put had an estimated value of $4.56 per share, in order to realize that value by exercising the right to seek appraisal at the end of a 120-day period, the Non-Tendered Shareholders also would have faced significant expense in the form of expert fees and other direct litigation expenses.[66] Further, the Non-Tendered Shareholders would have had to retain counsel and pay them either hourly rates or, and more

[63] *See* Trans. ID. 64684024 at 22.

[64] *See* Supplemental Rigrodsky Aff., Ex. C, Affidavit of David G. Clarke, ASA, In Support of the Proposed Revised Settlement ("Clarke Aff.").

[65] Supplemental Rigrodsky Aff., ¶ 19; Clarke Aff., ¶ 15.

[66] *Id*. at ¶ 17, Clarke Aff., ¶ 16.

likely, a contingency fee that would be based on the outcome of the appraisal proceedings.[67] Assuming $500,000 in litigation expenses (most notably including expert fees) and a conservative 27.5% contingency fee arrangement to ultimately enforce those appraisal rights, the BSM Put Option value is reduced to $1.59 per share ($4.56 less $1.72 for expenses, less $1.25 for attorneys' fees).[68]

Plaintiff's calculated damages must also be risk-adjusted based on the difficulty of proving the underlying merits of this claim, including, *inter alia*, the claim that Defendants were obligated to conduct a short-form merger following completion of the Tender Offer, and disputes as to the measure of damages, if any, to the Non-Tendered Stockholders. As discussed in their prior submissions, Defendants vehemently claimed that there was no guarantee of a back-end merger prompting a right for the Non-Tendered Stockholders to seek appraisal, that the fair value of Schuff stock was far lower in October 2014 than Plaintiff asserts, and that the Non-Tendered stockholders have suffered no damages. While Plaintiff had a sound basis to contend that HC2 was equitably obligated to conduct the short-form merger, there is a significant risk that the Court might side with HC2. If that occurred, the Non-Tendered Stockholders would be denied *any* relief. The Revised Settlement Framework reflects this risk in accord with well-established Delaware

[67] *Id*. at ¶ 18, Clarke Aff., ¶ 16.

[68] *Id*., Clarke Aff., ¶ 17.

law. *See, e.g.*, *Seinfeld v. Coker*, 847 A.2d 330, 332 (Del. Ch. 2000) (rejecting objection that the settlement of an alleged $5.7 million loss for $2.5 million was unfair, because it ignored the risk and costs of litigation that "operate as a discount against full recovery").

Accordingly, the hard-fought negotiations leading to the achievement of the $1.00 per share payment, representing 63% of the value of the $1.59 put value, constitutes an excellent recovery for the Non-Tendered Shareholders, meriting Court approval of the Revised Settlement. *See, e.g.*, *id.* (approving settlement amount equal to roughly 44% of the alleged loss).

C. The Class Release is Properly Confined to the Scope of the Litigation

Balanced against the substantial benefit provided by the Revised Settlement is the release of claims by the Class. The Revised Stipulation at ¶ 1(aa) provides for a Release limited to claims based on ownership of Schuff common stock during the Class Period arising from the Action, including the process and price in the Tender Offer, the disclosures in connection with the Tender Offer, the legal and fiduciary duties of the Released Defendant Parties in the Tender Offer, HC2's decision not to consummate a short-form merger after obtaining 90% ownership of the Company's common stock, the lack of liquidity resulting from the Tender Offer or HC2's decision not to consummate a short-form merger, and claims arising from the Revised Settlement, including financing for the Revised Settlement. Thus, the

Release is carefully cabined to the misconduct at issue in this Action and the implementation of the Revised Settlement. The Release's wording is also limited to claims based on "ownership of Schuff common stock," meaning that any securities claims based on purchases or sales of securities (as, for example, a Rule 10b-5 claim) may be preserved.

The release is not global. As discussed herein, the release is carefully limited to the misconduct at issue in this Action and the implementation of the Revised Settlement. No potential claims arising from any mismanagement or other malfeasance by HC2 or anyone else in the operations of Schuff over the past five years (other than those arising from the Tender Offer and abortive Buyout itself) are being released. Thus, the Non-Tendered Stockholders would remain free to pursue any derivative claims or any other feuds that they may have with HC2 arising from the management of Schuff over the last several years. This is fully appropriate under well-established Delaware law. *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 433 (Del. 2012) (holding that "[s]ettlement agreements almost invariably include general release provisions that bind the class and release all liability claims associated with the challenged transaction to the broadest extent allowable under law."); *In re AXA Fin., Inc.*, 2002 WL 1283674, at *3, *5 (Del. Ch. May 22, 2002) (approving settlement releasing all claims by class members under federal or state law "'relating to the Proposed Transaction, the Revised Transaction, the discussions and

negotiations pertaining thereto, the actions of the Special Committee, the tender offer and subsequent merger and any public filings or statements' made in connection therewith"); *Coleman Co. Inc. S'holders Litig.*, 750 A.2d 1202, 1210-12 (Del. Ch. 1999) (approving "universal release of all claims relating to the transaction and later events").

The release does include the financing Schuff will use to fund certain aspects of the Revised Settlement. Under Delaware law, "policy and common sense considerations" support the principle that "defendants agree to a settlement in order to achieve finality in litigation. If implementing the settlement terms themselves gives rise to new claims, then . . . settlements requiring post-execution implementation would be impracticable." *In re Medley Capital Corp. S'holders Litig.*, C.A. No. 2019-0100-KSJM, at 38 (Del. Ch. Nov. 19, 2019) (TRANSCRIPT); *see also Coleman*, 750 A.2d at 1210-12 (approving release including claims challenging allegedly coercive settlement); *see also Marie Raymond Revocable Tr. v. MAT Five LLC*, 980 A.2d 388 (Del. Ch. 2008) (approving release covering implementation of settlement); *Blank v. Belzberg*, 858 A.2d at 339-341 (Del. Ch. 2003) (same).

The release is appropriate under these circumstances. The Tender Offer occurred more than five years ago, and no one has sought to raise any claims not asserted in the Action. On balance, the substantial benefits conferred by the Revised

Settlement significantly outweigh what the Class must give up in the release.

D. The Revised Settlement Fully Addresses The Court's Concerns

The Original Settlement included a Settlement Tender Offer that the Court appeared to view as potentially coercive, and involved a release of post-Settlement conduct relating to the Settlement Tender Offer.[69] The Settlement Tender Offer was at net price that the Court appeared to view unfavorably relative to the prevailing market price of Schuff stock.[70] It also involved a Virtual Data Room (and a release in connection therewith), to which Fair Value Investments, Inc. ("Fair Value") objected.

Additionally, the Court echoed Fair Value's concerns that Schuff itself was paying for a portion of the Original Settlement, that HC2 was not bearing the full brunt of the Original Settlement, and that the Non-Tendered Stockholders themselves would be indirectly disadvantaged by Schuff's payment of the Original Settlement payment to the Tendered Stockholders.[71]

The Revised Settlement addresses all of these concerns. The parties have eliminated the Settlement Tender Offer and, with it, the Virtual Data Room. HC2 is

[69] Supplemental Rigrodsky Aff., Ex. A. Tr. at 44.

[70] *Id*. at 78-79.

[71] *Id*.

now, through its insurance policy (for which it paid all premiums), its ownership of 92.5% of Schuff, the HC2 Offset Payments and HC2 Release Payment, directly or indirectly bearing 100% of the cost of the Settlement.[72] And the Non-Tendered Stockholders, as a result of the HC2 Offset Payments, are fully made whole from any potential indirect impact of any expenses to Schuff as a result of the Settlement.[73]

Under the Revised Settlement, Schuff will substantially benefit from the elimination of any potential indemnification costs and from the overhang of the distraction, doubt and risk associated with this litigation. The Non-Tendered Stockholders will indirectly benefit from this as well. Indeed, the resolution of this litigation will substantially improve the prospects of a sale of Schuff, which HC2 has publicly announced it is exploring.[74] Such a sale would ultimately provide the Non-Tendered Stockholders with a liquidity opportunity – and likely with the appraisal remedy they have long sought. This is a win-win. In short, the Revised Settlement has addressed the Court's stated concerns with the Original Settlement, and should be approved.

[72] Stipulation, ¶ DD.

[73] Stipulation, ¶ BBB.

[74] Supplemental Rigrodsky Aff. ¶ 5.

E. The Strong Liability Claims And Potential Risks Regarding Damages

Because the Special Committee did not approve the Tender Offer, Plaintiff's claims are subject to the entire fairness standard of review.[75] *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014). Defendants cannot meet that burden here.

1. Neither The Process Nor Price Were Fair

Defendant Yagoda, a member of the Special Committee, aided HC2's purchase of a majority interest in Schuff in May of 2014 with the understanding that HC2 intended to own 100% of the Company. According to HC2 insiders, Yagoda acted as a "point guard" for finding a buyer for Schuff and it was very clear to HC2 that Yagoda wanted financial compensation for "bringing [HC2] the company that was for sale."[76] In delivering HC2 a majority interest in Schuff, Yagoda had repeated conversations with representatives of HC2 about what role he would have with the Company and indicated that he "would like to get paid for helping them in terms of . . . management." Indeed, Yagoda testified that:

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

[76] Rigrodsky Aff., ¶¶ 8, 19.

> I had a lot of conversations with them on different times in terms of, you know, I felt that they owed me and, you know, I wanted to know what kind of deal I was going to get going forward . . . .[77]

In a June 23, 2014 email to Falcone, Yagoda wrote: "You and I spoke about this two weeks ago. To reiterate, I would like an option package in HC2 for my work in helping you acquire Shfk and a. Consulting [sic] contract over and above my board package at Schuff."[78]

Defendant Elbert, the other member of the Special Committee, was interested in obtaining a liquidity event so that he could completely exit Schuff as a director and a shareholder. Indeed, after HC2 acquired a majority interest in Schuff, Elbert sent an email to Schuff directors and officers indicating that he was resigning from the Board and requesting that the Board cause the Company to purchase his 13,000 shares of Schuff stock. The next day, however, Elbert rescinded his resignation in light of a phone call he received from HC2's Voigt, who presumably informed Elbert of the opportunity for liquidity in the contemplated tender offer.[79]

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

> when you stated you thought HC2 might offer the same price per share as they paid Scott Schuff, that would greatly simplify our involvement,

[77] Rigrodsky Aff., ¶ 21.

[78] Rigrodsky Aff., Ex. 1 at HC2H00030092.

[79] Rigrodsky Aff., ¶¶ 22-23.

> speed up the process and lower the cost. On that basis I can totally support the tender offer and it [sic] think it is definitely the right move.
>
> Think it would be a win win situation for all involved; shareholders, morale of Schuff employees and showing the "fairness" of HC2 with Schuff International - which could be important for future activities.[80]

In a reply to that email later that day, Falcone stated: "I guess that means 'no position' right now which is the preferred route." Replying only to Falcone, Elbert wrote: "Right 'no position.'"[81] True to his word, the Special Committee took no position with respect to the Tender Offer. Moreover, the Special Committee failed to negotiate with HC2 regarding the price offered in the Tender Offer, and never engaged outside financial advisor to assist in the review of the price being offered by HC2 in the proposed tender offer or to solicit interest from other third parties.

The foregoing shows that the Special Committee members, motivated by personal interests, completely acceded to defendant Falcone's "preferred route" to acquire Schuff. Far from engaging in an arms'-length process to protect the interests of the Company's minority stockholders, the Special Committee simply abdicated its responsibilities, seeking cover for its failings by expressing no opinion and avowing neutrality with respect to the Tender Offer.[82]

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[80] Rigrodsky Aff., ¶ 30.

[81] Rigrodsky Aff., ¶ 31.

[82] The flawed process also undermines the fairness of the price. *See ACP Master, Ltd. v. Sprint Corp.*, C.A. No. 8508-VCL, 9042-VCL, 2017 Del. Ch. LEXIS 125,

The Special Committee's purported neutrality was especially egregious because the Tender Offer price was based on the price HC2 paid to acquire Scott Schuff's Company stock from SAS Venture LLC. As defendant Yagoda was well aware, without engaging a financial advisor to perform any valuation analyses or appraisal of fair value, Scott Schuff and Yagoda simply picked a range of prices that reflected some premium to the market price of Schuff common stock.[83] Indeed, as later corroborated by a third party advisor to HC2 in March 2015 valuation analysis, Schuff common stock had an implied a per-share value of $68.99 as of December 31, 2014.[84]

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

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*51-*52 (Del. Ch. July 21, 2017) ("Consistent with the unitary nature of the entire fairness test, the fair process and fair price aspects interact. . . . Factors such as . . . secret conflicts . . . could lead a court to hold that a transaction that fell within the range of fairness was nevertheless unfair compared to what faithful fiduciaries could have achieved.").

[83] Rigrodsky Aff., ¶ 16.

[84] Stipulation, ¶ S.

In addition, the September 5, 2014 Special Committee letter to the Company's minority stockholders warned that "[y]ou should be aware that if the Tender Offer is consummated, but the Merger is not, there will be fewer Shares available for sale and your ability to liquidate your Shares may be more restricted."[85] The plain intent of that statement was to coerce the minority into tendering their shares out of fear that they would be left with illiquid stock.

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

2. Potential Risks Regarding Damages to the Tendered Stockholders

Even if Defendants bear the burden of establishing fair price, there is a risk that the Tender Offer price would be found to be fair. The Tender Offer price of $31.50 per share was the same price HC2 paid to SAS Venture LLC to purchase a 60% controlling interest in Schuff on May 12, 2014 and to Jefferies LLC on May 30, 2014 for 198,411 shares of Schuff common stock (approximately 5% of the Company's outstanding stock), only three months prior to the Tender Offer.[86]

[85] Rigrodsky Aff., ¶ 46.

[86] Rigrodsky Aff., ¶ 25.

In addition, in the year prior to HC2's acquisition of the 60% interest in Schuff from SAS Venture LLC, the Company's shares traded between a low of $11.50 and a high of $28.50. The Tender Offer price of $31.50 per share was a premium of $3.00 per share, more than 10%, over the stock's highest price in the prior year.[87]

Additionally, the E&Y valuation analysis was performed approximately three months after the transaction, when Schuff's LTM EBITDA had increased by approximately 9%. Notably, the value potentially included synergies from the transaction. Without such synergies, the value may have been significantly lower.[88] Likewise, reliance on the DCF method bears risk. At trial, the Court could select a perpetuity growth rate below the 3.5% rate selected by Plaintiff's consultant, which would lower the indicated value. Further, the Court could select different inputs applied in the discount rate (*e.g.*, a higher beta) that would also lower the indicated value of Schuff common shares. Finally, the court could reject the normalizing adjustments made in the terminal period. For example, Plaintiff's consultant adjusted the working capital investment in the terminal period to levels more in-line with Schuff's historical working capital levels and industry benchmarks. Removal

[87] Rigrodsky Aff., ¶ 87.

[88] Rigrodsky Aff., ¶ 88 n.8.

of this adjustments would result in a 6.4% decrease in the indicated value of Schuff shares.[89]

Furthermore, while Plaintiff's consultant relied on multiples from comparable companies or transactions, that also bears considerable risk. The Court has not put any explicit weight on either the Guideline Public Company method or the Precedent Transactions method in any appraisal matter involving a publicly-traded company in more than 13 years.[90]

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

3. Potential Risks Regarding the Non-Tendered Stockholder Claims

As discussed in Section I.B, *supra*, there are substantial risks attendant to Plaintiff's claims on behalf of the Non-Tendered stockholders. It is, and has been, Plaintiff's contention that the Buyout consisted of a unitary transaction that harmed all stockholders, including those who did not tender. For example, in *In re GFI Group Inc. Stockholder Litig.*, the Court treated a third-party tender offer and back-

[89] Rigrodsky Aff., ¶ 91 n.9.

[90] Rigrodsky Aff., ¶ 93.

end merger as a "unitary transaction" and permitted tendering stockholders to represent a settlement class that included non-tendering stockholders. C.A. No. 10136-VCL, Tr. at 120:12−21 (Del. Ch. Feb. 26, 2016) (TRANSCRIPT). If the Settlement is not approved, Defendants will likely attack this theory of the case.

Moreover, as also noted above, the Non-Tendered Stockholders still own their Schuff shares. Defendants could and would argue that, because they were never deprived of those shares at an unfair price, the Non-Tendered Stockholders have suffered no harm. Similarly, the Non-Tendered Stockholders have received substantial dividends, totaling $21.05 per share, since October of 2014, a total yield of approximately 31% on an assumed value of $67.45 per share at the time of the Tender Offer, including a $3.89 per share dividend paid on May 14, 2020. Defendants would argue that these dividends, along with the appreciation in the value of Schuff shares, neutralize any argument that the Non-Tendered Stockholders have suffered any cognizable damages.

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

The arms'-length negotiations regarding the possible resolution of the Action began in December 2016. The parties agreed to a tentative framework for settlement of the Action on February 24, 2017. Based on evidence obtained during discovery, including the March 2017 depositions of defendants Yagoda, Roach and Hladek,

however, Plaintiff notified Defendants that he had determined not to proceed with a settlement based on the prior framework reached by the Parties.[91]

Only after providing Defendants with a draft amended complaint in July 2017, did Plaintiff renew settlement negotiations with Defendants. Plaintiff continued to pursue discovery while those renewed discussions took place, including the depositions of defendants Falcone and Voight. On April 2, 2019, the Parties agreed in principle to a resolution of the Action, with Defendants agreeing to produce additional documents to Plaintiff.[92]

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

Then, after the settlement hearing on February 13, 2020, the parties engaged in even more laborious and contentious negotiations to attempt to address the Court's concerns. These negotiations took nearly three months to complete, and involved repeated exchanges of financial analyses and ultimatums. The full extent of these negotiations clearly establishes that this was a hard-fought outcome.

G. The Experience and Opinion of Plaintiff and Plaintiffs' Counsel Favor Approving the Settlement

[91] Rigrodsky Aff., ¶¶ 76.

[92] Rigrodsky Aff., ¶ 77.

The opinion of experienced counsel is considered in determining a settlement's fairness. *See Polk v. Good*, 507 A.2d 531, 536 (Del. 1986) (the Court considers "the views of the parties involved" in determining "the overall reasonableness of the settlement"). Here, Plaintiff's counsel have extensive experience in Delaware transactional and corporate governance litigation.[93] Plaintiff and his counsel negotiated the Settlement, and they believe that it is fair and favorable to the Class.[94]

Plaintiff and Plaintiff's Counsel were entirely familiar with the relative strengths and weaknesses of his claims and Defendants' potential defenses. In requesting that the Court approve the Revised Settlement as fair, reasonable, and adequate, Plaintiff and his counsel have acted based on their extensive knowledge of the record and issues.

H. The Reaction of the Class Supports Approval of the Revised Settlement

Not a single Tendered Stockholder objected to the Original Settlement, and no objections from Tendered Stockholders are expected in connection with the Revised Settlement. Rather the reactions of the Tender Stockholders to the Original Settlement and the Revised Settlement has been universally positive..

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[93] *See* Rigrodsky Aff., Exs. 23 and 24.

[94] Rigrodsky Aff., ¶¶ 86-96.

While there were substantial objections to the Original Settlement, AB Value the single largest remaining Non-Tendered Stockholder which is represented by extremely capable counsel at Prickett, Jones & Elliott, notified the Court in writing on May 8, 2020 that it was withdrawing its objections in light of the new terms reflected in the Revised Settlement. This reversal of AB Value's position weighs heavily in favor of the approval of the Revised Settlement.

II. THE CLASS SHOULD BE CERTIFIED

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

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

Stipulation, ¶ 1(c). On May 12, 2020, the Court conditionally certified this proposed Class for purposes of settlement only and pending final approval.

A. Rule 23(a)

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

1. The Class Is Sufficiently Numerous

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

While the exact number of Class members is unknown to Plaintiff at this time, 721,124 shares of Schuff common stock were tendered in the Tender Offer and 289,902 shares of Schuff common stock are held by Non-Tendered Stockholders.[95] Plaintiff believes there are hundreds, if not thousands, of members in the Class. This Court has certified class actions in cases with far fewer class members than here.

[95] Stipulation, ¶¶ M, 1(r).

See, e.g., *Leon N. Weiner & Assoc., Inc. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991). Accordingly, the Action satisfies the numerosity requirement of Rule 23(a)(1).

2. There Are Common Issues of Law and Fact

Rule 23(a)(2) requires that questions of law or fact be common to the class, but not identical. *Weiner*, 584 A.2d at 1225 (finding that commonality exists absent "significant factual diversity"). "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). Claims involving a class of investors who are all affected similarly by the acts of directors provide a classic case for class certification. *See, e.g.*, *Nottingham P'rs v. Dana*, 564 A.2d 1089, 1089 (Del. 1989).

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

the Class; (b) whether the Individual Defendants breached their fiduciary duties of undivided loyalty or due care with respect to the Class in connection with the Buyout; (c) whether controlling stockholder HC2 breached its fiduciary duties of loyalty and care owed to the Class in connection with the Buyout; and (d) whether the Class was damaged and/or is still being damaged by the Buyout.

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

3. Typicality

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

legal and factual position of the class representative must not be markedly different from that of the members of the class.") (citation omitted).

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

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

Rule 23 does not require a class representative to be identically situated with the class. In *Wiegand v. Berry Petroleum Co.*, 1989 WL 146235 (Del. Ch. Mar. 27, 1991), the Court certified a single representative to represent a class consisting of

stockholders who sold their stock prior to a merger, as well as stockholders who continued to hold their shares and were subsequently "frozen out" in the merger, finding that "a class representative may not be identically situated in all respects to other members of the class does not mean that his personal interests necessarily conflict with those of the class." *Id*. at *3.

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

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

4. Adequate Representation

Rule 23(a)(4) requires that representative parties will fairly and adequately protect the interests of the class. In order to satisfy Rule 23(a)(4), "a representative plaintiff must not hold interests antagonistic to the class, retain competent and experienced counsel to act on behalf of the class and, finally, possess a basic

familiarity with the facts and issues involved in the lawsuit." *Oliver v. Boston Univ.*, C.A. No. 16570-NC, 2002 Del. Ch. LEXIS 21, at *26 (Del. Ch. Feb. 28, 2002) (quoting *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 127 (Del. Ch. 1999)).

Plaintiff is a member of the Class he seeks to represent. As such, Plaintiff "possess[es] the same interest and suffer[s] the same injury as the class members." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395 (1977)). As a stockholder at the time of the Tender Offer, Plaintiff's economic interests do not conflict with the interests of the Class. *See Shingala v. Becor Western, Inc.*, C.A. Nos. 8858, 8859, 1988 Del. Ch. LEXIS 14 (Del. Ch. Feb. 3, 1988). In pursuing and establishing his own claims, Plaintiff necessarily protected and promoted the interests of the other Class members.

Furthermore, Plaintiff is represented by experienced practitioners in class action litigation who are well known to the Court, and whose accomplishments are summarized below.[96] As previously described, Plaintiff's counsel have demonstrated their commitment to this case and their skill in prosecuting the claims on behalf of Plaintiff and the Class by pursuing the Action for more than five years

[96] *See* Rigrodsky Aff., Exs. 23 and 24.

and achieving a resolution that more than doubles the consideration paid in the Tender Offer. Accordingly, Plaintiff and his counsel have and will continue fairly and adequately protect the interests of the Class.

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

Once the Court finds that the provisions of Rule 23(a) are satisfied, it must evaluate whether the action properly fits within the framework provided in subsection (b). *Nottingham Partners*, 564 A.2d at 1095. As discussed in more detail below, "Delaware courts repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2)." *In re Cox Radio, Inc. S'holders Litig*., C.A. No. 4461-VCP, 2010 Del. Ch. LEXIS 102, at *28 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010) (TABLE).

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

This is a typical case where certification is appropriate under Rule 23(b)(1)(A) and (B). Defendants are alleged to have breached their fiduciary duties to all of the stockholders in the Class in connection with the Buyout, and any monetary remedy will be calculated on a per share basis. *Turner v. Bernstein*, 768 A.2d 24, 35 (Del. Ch. 2000). "Rule 23(b)(1) clearly embraces cases in which the party is obligated by law to treat the class members alike . . ., including claims seeking money damages." *Id*. at 32 (citation omitted). Here, Rules 23(b)(1)(A) and (B) are satisfied because if

separate actions were commenced by members of the Class, Defendants would be subject to the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct and would, as a practical matter, be dispositive of the interests of other Class members. Thus, Rule 23(b)(1) certification is appropriate because multiple lawsuits could follow if certification were denied, which would be prejudicial to non-parties and inefficient. *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1095 (Del. Ch. 2001).

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

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

Rule 23(b)(2) is satisfied in this case because, in undertaking the Buyout, Defendants engaged in a course of conduct that affected all members of the Class, and the damages flowing from those violations of fiduciary duties are owed equally to all Class members and are appropriate with respect to the entire Class. *See In re*

Celera Corp. S'holder Litig., C.A. No. 6304-VCP, 2012 Del. Ch. LEXIS 66, at *69 (Del. Ch. Mar. 23, 2012), *aff'd in relevant part*, 59 A.3d 418, 432-33 (Del. 2012).

3. A Non-Opt-Out Class is Appropriate

"Delaware courts have traditionally viewed actions challenging the propriety of director conduct in carrying out corporate transactions [as] properly certifiable under both subdivisions (b)(1) and (b)(2)." *In re Lawson Software, Inc*., 2011 WL 2185613, at *1 (Del. Ch. May 27, 2011) (quotation marks omitted). "An action . . . which consists primarily of equitable claims with an ancillary request for monetary damages[] will not require a provision for opting out." *In re MCA, Inc*., 598 A.2d 687, 692 (Del. Ch. 1991); *accord Nottingham Partners v. Dana*, 564 A.2d 1089, 1101 (Del. 1989) ("[W]hen a portion of the relief which is sought is monetary, a member of a class certified under Rule 23(b)(2) has a Constitutional due process right to notification but not a right to opt out of the class.").

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

> Importantly, any settlement of this litigation would have to afford the defendants "complete peace," that would include "a release to the broadest extent possible under law." Granting an opt-out right would leave the Objectors, who appear to hold over 40% of the Exchange's Class A shares, free to assert, against the defendants, the identical

> claims being settled in a different forum. That almost certain outcome would utterly defeat the purpose of the settlement, and was a risk that the defendants were not willing to take. Thus, ***the settlement must either be as broad in scope as the law would allow and bind all class members, or there would be no settlement.*** Given the economic benefits afforded by the settlement in relation to the perceived minimal value of the claims being surrendered, the Chancellor determined not to grant opt-out rights. The Objectors have not shown that decision to be other than a sound exercise of judicial discretion.

Id. (Emphasis added).

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

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

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

> a. HC2 shall transfer (1) approximately $12.39 million that it receives from HC2's Insurers to DBMG's paying agent for payment to the Tendered Stockholders and Plaintiff's Counsel, and (2) $1,016,060 (the aggregate amount of the HC2 Offset Payment, the HC2 Interest Offset Payment, and the HC2 Release Payment) to DBMG's paying

> agent for payment to the Non-Tendered Stockholders, in each case, within a number of business days sufficient to allow the payments described in paragraphs (b) and (c) below.
>
> b. HC2 shall cause DBMG's paying agent to pay the per share amount of the HC2 Offset Payment, the per share amount of the HC2 Interest Offset Payment, and the per share amount of the HC2 Release Payment (an aggregate of $1,016,060]) to the Non-Tendered Stockholders within ten (10) business days of Final Approval.
>
> c. HC2 shall cause DBMG to transfer approximately $8.055 million to DBMG's paying agent within a number of business days sufficient to allow DBMG's paying agent to pay the per share amount of the Net Tender Payment to the Tendered Stockholders within ten (10) business days of Final Approval.
>
> d. Any Class Member shall be treated as (1) a Tendered Stockholder with respect to the Tendered Stockholders Shares attributable to such Class Member, and (2) a Non-Tendered Stockholder with respect to the Non-Tendered Stockholders Shares attributable to such Class Member.[97]

In determining whether a proposed plan of allocation is fair, reasonable, and adequate, courts have given weight to the opinion of class counsel. *See, e.g.*, *CME Grp., Inc. v. Chi. Bd. Options Exch., Inc.*, C.A. No. 2369-VCN, 2009 Del. Ch. LEXIS 109, at *44 (Del. Ch. June 3, 2009) ("Class counsel, in the Court's judgment, came to a fair and reasonable balancing of the various interests of all class members.").

Here, counsel considered all of the relevant circumstances in reaching their

[97] *See* Stipulation ¶ 2.

plan for the distribution of the Revised Settlement proceeds, including the nature of the claims made, the potential damages for the underlying claims, the Defendants' ability to pay, and the risks attendant to litigating the claims further. Based on these factors, Plaintiff's counsel concluded that the proposed plan of allocation was fair and reasonable under the circumstances. Accordingly, Plaintiff respectfully requests that the Court approve the proposed plan of allocation.

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

This Court awards attorneys' fees and expenses to counsel whose efforts have created a common fund. *See Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1255 (Del. 2012). In determining an appropriate award of attorneys' fees and expenses, Delaware courts look to the "*Sugarland*" factors, which are: "1) the results achieved; 2) the time and effort of counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved." *Id*. at 1254 (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980)).

Here, Plaintiff's Counsel are requesting an award of attorneys' fees and expenses in the amount of $5,795,886, comprised of 27.5% of the Gross Tender Payment (or $5,620,886 in the aggregate), plus $175,000 in out of pocket expenses incurred by Plaintiff's Counsel in prosecuting the Action. No fee award is being sought from the HC2 Offset Payments or from the HC2 Release Payment so at to reduce those amounts.

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

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

Here, the Gross Tender Payment – which provides for a 114% premium to the Tender Offer price – is believed to be ***the largest premium*** ever achieved in a merger class action.[98] Plaintiff's counsel respectfully submit that they should be compensated with a fee award that reasonably reflects this outstanding benefit.

The fee request of $5,620,886.76, representing 27.5% of the Gross Tender Payment before expenses, comports with the fees recently awarded in *In re Handy & Harman, Ltd. S'holders Litig*., Consol. C.A. No. 2017-0882-TMR (Del. Ch. Nov. 14, 2019). In *Handy & Harman*, the Court awarded attorneys' fees of 25% plus out-of-pocket expenses at an early stage in the litigation where the settlement provided a premium of 33% over the tender offer price. Here, Plaintiff's counsel seek an award of fees that is only 2.5% higher for achieving a premium that is more than three times greater on a percentage basis.

Likewise, the fee request is consistent with the attorneys' fees of 27.5%

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

awarded in *Cornerstone Therapeutics*, which provided a premium of approximately 25%, where class counsel had taken four depositions; engaged in some motion practice; and briefed an (unsuccessful) interlocutory appeal.[99] Indeed, "[t]his court has often approved fee requests of 30% or more of the benefits where," as here, "the settlement benefits are attributable solely to the litigation." *Marie Raymond Revocable Tr. v. MAT Five LLC*, 980 A.2d 388, 410 & n.71 (Del. Ch. 2008) (collecting cases), *aff'd sub nom. Whitson v. Marie Raymond Revocable Tr.*, 976 A.2d 172 (Del. 2009).

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

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

The contingent nature of the representation is the "second most important factor considered by this Court" in awarding attorneys' fees." *Dow Jones & Co. v. Shields*, No. 184, 1992 WL 44907, at *2 (Del. Ch. Mar. 4, 1992). Counsel are "entitled to a much larger fee" where, as here, "the compensation is contingent[.]" *Ryan v. Gifford*, C.A. No. 2213-CC, 2009 Del. Ch. LEXIS 1, at *40 (Del. Ch. Jan. 2, 2009). "It is

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

consistent with the public policy of Delaware to reward risk-taking in the interests of shareholders." *In re Plains Res. Inc. S'holders Litig*., C.A. No. 071-N, 2005 Del. Ch. LEXIS 12 at *22 (Del. Ch. Feb. 4, 2005). Here, Plaintiff's counsel litigated this case on an entirely contingent basis. While Plaintiff is confident that he would have ultimately prevailed in demonstrating an unfair process and unfair price, there was substantial risk in litigating these claims, as set forth *supra* herein.

Moreover, Plaintiff's counsel could not have known the full extent of the strengths of the case when originally undertaking the representation. Merger-related class actions rarely present the opportunity for any monetary recovery, let alone one on this scale, and often are lost upon early motions. In fact, one national study on the disposition and settlement of merger litigation, conducted by Cornerstone Research, concluded that of 78 merger-related class actions settled in the United States in 2014 (the year in which the instant matter was filed), only six obtained a monetary recovery for stockholders.[100] This demonstrates that less than eight percent of all shareholder litigation leads to monetary consideration. Thus, it is clear that Plaintiff's counsel undertook enormous contingency risk in taking on this case, and should be compensated accordingly.

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

C. The Complexity Of Issues Support The Requested Fee Award

Another of "the secondary *Sugarland* factors is the complexity of the litigation. All else being equal, litigation that is challenging and complex supports a higher fee award." *In re Activision Blizzard*, 124 A.3d 1025, 1072 (Del. Ch. 2015). This factor also supports the fee request. Developing the record and preparing this case for trial required, in addition to expertise in applicable Delaware case law, a significant amount of research into a novel issue – a tender offer in which the majority stockholder reneged on its obligation to conduct a second step short form merger. Plaintiff argued throughout the litigation and through the course of the lengthy settlement negotiations that the 2014 Tender Offer and the anticipated short-form merger to complete the Buyout formed a "unitary transaction." In so doing, Plaintiff relied upon representations HC2 made in connection with the 2014 Tender Offer in which Defendants had committed to squeeze out any remaining stockholders in a second-step short form merger for the same Merger Consideration.[101] Plaintiff asserts that HC2's only reason for refusing to complete the second-step merger was to attempt to thwart the successful prosecution of this Action and the attendant substantial personal liability that each of the Defendants faced as a result of the Action. Defendants would doubtlessly have argued to the contrary. This wrinkle added a

[101] Trans. ID. 64615870, ¶¶ 100, 105-108.

unique dimension of complexity to the litigation.

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

Finally, Plaintiff's counsel were forced to address the Objectors' objections, and ultimately to revise the Settlement accordingly. This was a time consuming and arduous task in and of itself, requiring substantial additional complex financial and legal analysis, involving additional complicated negotiations.

For these reasons, the requested fees are well supported.

D. The Standing Of Counsel Supports The Requested Fee

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

A.2d 940, 956 (Del. Ch. 2010)). Plaintiff's counsel are nationally recognized firms that have a track record of obtaining outstanding results for stockholder plaintiffs in merger-related litigation in this Court and elsewhere.[102] Further, Plaintiff's counsel in this action demonstrated that they were prepared and willing to litigate this case as long as necessary to extract its full value, which gave them the credibility necessary to achieve this unprecedented result. This standing supports the requested Fee Award.

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

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

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

*38 (citing *Sauer-Danfoss*, 65 A.3d at 1139).

Here, Plaintiff's counsel expended 3,795.00 hours on this litigation from inception through June 4, 2020.[103] In expending this time, Plaintiff's counsel conducted substantial pre-filing investigation, prepared an excellent initial complaint, fought a contested leadership motion, pursued extensive discovery, took five depositions, reviewed over 114,000 pages of documents, prepared several motions (including a motion for class certification, a motion to compel discovery, and a motion for leave to amend), prepared a comprehensive amended complaint, negotiated with Defendants for – literally – years, and finally managed to craft, and then re-craft a settlement structure that would be suitable to the unique circumstances of this Action.

Given this large expenditure of time, the requested award reflects an implied blended hourly rate of $1,481.13 per hour – generous but reasonable compensation under the circumstances, including the contingency risk faced, the length of litigation, and the unprecedented result achieved. Indeed, the implied blended rate in recent fee awards in this Court make this request appear modest by comparison. *See, e.g.*, *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2019 Del. Ch. LEXIS 250, at *19 (Del. Ch. July 8, 2019) ($11,262.26 per hour); Rigrodsky Aff.,Exs. 35-

[103] Supplemental Rigrodsky Aff., ¶ 23, Exs. D &E.

36 (Plaintiff's Brief in *City of Monroe Employees Ret. Sys. V. Murdoch*, C.A. No. 2017-0833-AGB (Del. Ch. Jan. 19, 2018) at 65 ($4,015.96 per hour) and Final Order, dated February 9, 2018, approving award of attorneys' fees); *see also id*., Ex. 37 (Plaintiff's Brief in *In re Handy & Harmon, Ltd. Stockholders Litig*., Consol. C.A. No. 2017-0882-TMR (Del. Ch. Oct. 23, 2019) at 40 (requesting $2,263.52 per hour) and *id.*, Ex. 33 (transcript of November 14, 2019 Hearing in *Handy & Harmon*) at 55 (awarding fees amounting to approximately $2,133.00 per hour).

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

Where, as here, counsel litigate for years and obtain a large common-fund recovery, the Court will typically calculate the fee as a percentage of the gross common fund, and award expenses separately. *See, e.g., Handy & Harmon,* Consol. C.A. No. 2017-0882-TMR (Del. Ch. Nov. 14, 2019) (Ex. 33 at 55) (awarding 25% of the recovery in fees plus out-of-pocket expenses of $280,239.08); *Ryan v. Gifford*, C.A. No. 2213-CC, 2009 Del. Ch. LEXIS 1, *12, *44 (Del. Ch. Jan. 2, 2009) (awarding one-third of the monetary portion of the settlement in fees plus $398,100.79 in expenses); *In re TD Banknorth S'holders Litig*., Consol. C.A. No. 2557-VCL, 2009 Del. Ch. LEXIS 347, at *8 (Del.Ch. June 24, 2009) (approving fees of 27.5% of the gross common fund, plus expenses of $964,086.61).

Here, Plaintiff's counsel expended $189,738.72, but agreed to cap their expenses at $175,000, and as such will avoid shifting any burden for the expenses

from the Non-Tendered Stockholders (from whom no reimbursement is being sought) to the Tendered Stockholders.[104] These expenses were primarily associated with expert fees, e-discovery document management fees, process servers, court-reporting services and other third-party service providers whose efforts were necessary to the litigation.[105] Plaintiff's counsel advanced these considerable expenses and carried them for several years. Accordingly, reimbursement of these expenses should be granted.

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

Plaintiff also requests an incentive award in an amount to be determined by the Court[106] (which counsel for Plaintiff will pay from any funds the Court awards to them) to compensate him for his time, effort and expertise applied in achieving the unprecedented outcome in this litigation. In evaluating such a request, the Court must consider the factors enumerated in *Raider v. Sunderland*, C.A. No. 19357 NC,

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[104] Supplemental Rigrodsky Aff., ¶ 24, Exs. D &E.

[105] *See id*.

[106] The Stipulation allows Plaintiff to seek an incentive award of up to $25,000. Plaintiff asks only that the Court consider all of the circumstances and award Plaintiff an incentive award in an amount that would fairly compensate him for his time and effort expended in securing this exceptional outcome, not to exceed $25,000. Supplemental Rigrodsky Aff. Ex. F. The Plaintiff's participation in this Action and his support of the Original and Revised Settlements were not and are not contingent upon his receipt of any award from the Court. *Id.* at ¶ 10.

2006 Del. Ch. LEXIS 4, at *4 (Del. Ch. Jan. 4, 2006), including the "time, effort and expertise expended by the class representative, and a significant benefit to the class." *Id.* at *8; *see Isaacson v. Niedermayer*, 200 A.3d 1205, 1205 n.1 (Del. 2018).

Plaintiff's background and efforts in this litigation support the grant of the requested award. Plaintiff has a background in finance, and worked in the financial industry for over 40 years.[107]

Throughout the litigation, Plaintiff was actively involved.[108] Plaintiff provided counsel with relevant documents and worked with counsel to develop the allegations in the complaint.[109] He reviewed all of the pleadings and motions, including multiple drafts of the amended complaint, spoke with counsel regularly regarding updates, produced voluminous documents, sat for a lengthy deposition, and actively consulted with counsel on a frequent basis throughout the pendency of the case and ultimately agreed to the Settlement.[110] In doing so, Plaintiff expended at least 140 hours.[111] A reasonable incentive award would thus be fully appropriate. *See Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, C.A. No. 1091-VCL, 2012 Del. Ch.

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[107] Supplemental Rigrodsky Aff. Ex. F, at ¶ 3.

[108] *Id.*, at ¶¶ 4-5, 7.

[109] *Id.*, at ¶ 5.

[110] *Id.*, at ¶ 8.

[111] *Id.*, at ¶ 5.

LEXIS 98, at *22 (Del. Ch. May 9, 2012) (awarding $20,000 to a class representative who "traveled to New Jersey to meet with counsel and to Wilmington to be deposed."); *In re Saba Software, Inc. S'holder Litig.*, C.A. No. 10697-VCS, 2018 Del. Ch. LEXIS 702, at *13-*14 (Del. Ch. Sep. 26, 2018) ($100,000 award to lead plaintiff); *Doppelt v. Windstream Hldgs., Inc.*, C.A. No. 10629-VCN, 2018 WL 3069771, at *3 (Del. Ch. June 20, 2018) (awards of $15,000 and $7,500 to lead plaintiffs); *In re Physicians Formula Hldgs., Inc.*, Consol. C.A. No. 7794-VCL, 2017 Del. Ch. LEXIS 746, at *13 (Del. Ch. Jan. 20, 2017) ($25,000 award to one lead plaintiff; $5,000 to the other).

CONCLUSION

For the reasons and upon the authorities set forth above, Plaintiff respectfully request that the Court: (i) approve the Revised Settlement as fair, reasonable, and adequate; (ii) certify the Class pursuant to Rules 23(b)(1) and (b)(2); (iii) approve the proposed plan of allocation; and approve the requested fees and expenses award; and (iv) grant Plaintiff an incentive award, to be paid out of Plaintiff's Counsel's attorneys' fees, in an amount to be determined by the Court.

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