



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AARON OFFRINGA AND MICHAEL
FARZAD, Individually and on Behalf of
All Others Similarly Situated,

Plaintiffs,

v.

DMY SPONSOR II, LLC, HARRY L.
YOU, NICCOLO DE MASI, DARLA K.
ANDERSON, FRANCESCA LUTHI, and
CHARLES E. WERT,

Defendants.

C.A. No. 2023-0929-LWW

**COMPENDIUM OF TRANSCRIPTS AND ORDERS CITED IN
PLAINTIFFS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO
CERTIFY THE CLASS, APPROVE THE SETTLEMENT, FOR
ATTORNEYS' FEES AND EXPENSES,
AND FOR SERVICE AWARDS**

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Dated: January 23, 2026

TAB	DESCRIPTION
1	<i>In re XL Fleet (Pivotal) S'holder Litig.</i> , C.A. No. 2021-0808-KSJM (Del. Ch. Mar. 21, 2025) (TRANSCRIPT)
2	<i>In re Multiplan Corp. S'holders Litig.</i> , Consol. C.A. No. 2021-0300-LWW (Del. Ch. Feb. 28, 2023) (TRANSCRIPT)
3	<i>Siseles v. Lutnick</i> , C.A. No. 2023-1152-JTL (Del. Ch. Dec. 6, 2024) (TRANSCRIPT)
4	<i>In re Finserv Acquisition Corp SPAC Litig.</i> , C.A. No. 2022-0755-PAF (Del. Ch. Oct. 10, 2024) (TRANSCRIPT)
5	<i>In re GeneDX De-SPAC Litig.</i> , C.A. No. 2023-0140-PAF (Del. Ch. Dec. 2, 2024) (TRANSCRIPT)
6	<i>In re Lordstown Motors Corp. S'holders Litig.</i> , C.A. No. 2021-1066-LWW (Del. Ch. June 25, 2024) (TRANSCRIPT)
7	<i>Yu v. RMG Sponsor, LLC</i> , C.A. No. 2021-0932-NAC (Del. Ch. Oct. 18, 2024) (TRANSCRIPT)
8	<i>Delman v. Riley</i> , C.A. No. 2023-0293-LWW (Del. Ch. Oct. 17, 2024) (TRANSCRIPT)
9	<i>Paul Berger Revocable Tr. v. Falcon Equity Invs., LLC</i> , C.A. No. 2023-0820-JTL (Del. Ch. Jan. 21, 2025) (TRANSCRIPT)
10	<i>In re TS Innovation Acquisitions Sponsor, LLC S'holder Litig.</i> , C.A. No. 2023-0509-LWW (Del. Ch. May 12, 2025) (TRANSCRIPT)
11	<i>In re Gores IV, Inc. S'holder Litig.</i> , No. 2023-0284-LWW (Del. Ch. July 15, 2025) (TRANSCRIPT)

12	<i>In re InterPrivate Acquisition Corp. S'holder Litig.</i> , Consol. C.A. No. 2024-0221-LWW (Del. Ch. Sept. 12, 2025) (TRANSCRIPT)
13	<i>Drulias v Apex Tech. Sponsor LLC</i> , C.A. No. 2024-0094-LWW (Del. Ch. July 10, 2025) (TRANSCRIPT)
14	<i>Newman v. Sports Entertainment Acquisition Holdings LLC</i> , C.A. No. 2023-0538-LWW (Del. Ch. Sept. 15, 2025) (TRANSCRIPT)
15	<i>Malork v. Anderson</i> , C.A. No. 2022-0260-PAF (Del. Ch. Oct. 21, 2025) (TRANSCRIPT)
16	<i>Haverhill Ret. Sys. v. Kerley</i> , C.A. No. 11149-VCL (Del. Ch. Sept. 28, 2017) (TRANSCRIPT)
17	<i>Martel v. Fusion Sponsor LLC</i> , C.A. No. 2024-0329-NAC (Del. Ch. July 24, 2025) (TRANSCRIPT)
18	<i>Jandreau v. Wallace</i> , C.A. No. 2024-0119-MTZ (Del. Ch. Nov. 20, 2025) (TRANSCRIPT)
19	<i>In re Kensington-QuantumScape de-SPAC Litig.</i> , C.A. No. 2022-0721-JTL (Del. Ch. Feb. 21, 2024) (TRANSCRIPT)
20	<i>In re El Paso Corp. S'holder Litig.</i> , Consol. C.A. No. 6949-CS (Del. Ch. Dec. 3, 2012) (ORDER)
21	<i>Laidlaw v. GigAcquisitions2, LLC</i> , C.A. No. 2021-0821-LWW (Del. Ch. Oct. 8, 2024) (TRANSCRIPT)
22	<i>Lien v. Eagle Equity Partners II</i> , C.A. No. 2022-0972-PAF (Del. Ch. Sept. 2, 2024) (TRANSCRIPT)
23	<i>In re Versum Materials, Inc. S'holder Litig.</i> , C.A. 2019-0206-JTL (Del. Ch. July 16, 2020) (TRANSCRIPT)

24	<i>In re Medley Cap. Corp. S'holders Litig.</i> , Consol. C.A. No. 2019-0100-KSJM (Del. Ch. Nov. 19, 2019) (TRANSCRIPT)
25	<i>In re Activision Blizzard Inc. S'holder Litig.</i> , Consol. C.A. No. 8885-VCL (Del. Ch. May 20, 2015) (ORDER)
26	<i>In re AVX Corp. S'holders Litig.</i> , Consol. C.A. No. 2020-1046-SG (Del. Ch. Dec. 27, 2022) (ORDER)
27	<i>In re EZCorp Inc. Consulting Agreement Deriv. Litig.</i> , C.A. No. 9962-VCL (Del. Ch. April 3, 2018) (TRANSCRIPT)
28	<i>Martel v. Fusion Sponsor LLC</i> , C.A. 2024-0329-NAC (Del. Ch. July 24, 2025) (ORDER AND FINAL JUDGMENT)
29	<i>In re InterPrivate Acquisition Corp. S'holder Litig.</i> , Consol. C.A. No. 2024-0221-LWW (Del. Ch. Sept. 16, 2025) (ORDER APPROVING PLAN OF ALLOCATION, AN AWARD OF ATTORNEYS' FEES AND EXPENSES, AND INCENTIVE AWARDS)

Tab 1

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: XL FLEET (PIVOTAL) STOCKHOLDER : C. A. No.
LITIGATION : 2021-0808-KSJM

- - -

Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, March 21, 2025
1:30 p.m.

- - -

BEFORE: HON. KATHALEEN St.J. McCORMICK, Chancellor

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

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-and-
5 RICHARD A. SPEIRS, ESQ.
6 of the New York Bar
Cohen Milstein Sellers & Toll PLLC
for Plaintiff

7 PATRICIA L. ENERIO, ESQ.
8 Heyman Enerio Gattuso & Hirzel LLP
-and-
9 JAY A. DUBOW, ESQ.
10 of the Pennsylvania Bar
Trout Pepper Locke LLP
for Defendant XL Fleet Corp

11
12 RACHEL TUNNEY, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
13 -and-
14 RICHARD LI, ESQ.
of the New York Bar
Willkie Farr & Gallagher LLP
15 for Defendant Pivotal

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1 ATTORNEY ENERIO: Good afternoon, Your
2 Honor. Patricia Enerio from Heyman Enerio Gattuso &
3 Hirzel on behalf of the defendant, XL Fleet Corp, or
4 formerly known as XL Fleet Corp. I just want to
5 introduce my co-counsel, Jay Dubow from Troutman
6 Pepper Locke.

7 ATTORNEY DUBOW: Good afternoon, Your
8 Honor.

9 ATTORNEY ENERIO: We're hoping to not
10 be presenting any argument today, but Mr. Dubow has
11 been presented as pro hac vice. Thank you, Your
12 Honor.

13 THE COURT: Thank you.

14 Mr. Barry, we have a few more intros.

15 ATTORNEY BARRY: Sorry.

16 THE COURT: No worries.

17 ATTORNEY TUNNEY: Good afternoon, Your
18 Honor. Rachael Tunney from Morris Nichols on behalf
19 of the Pivotal defendants, and with me today is my
20 co-counsel, Richard Li, from Willkie Farr & Gallagher.
21 And unless you have any questions for us, we are happy
22 to turn it over to the plaintiffs.

23 THE COURT: Thank you. No questions.

24 Mr. Barry, now it's your turn.

1 ATTORNEY BARRY: Now it's my turn.

2 Michael Barry from Grant & Eisenhofer.
3 With me is Richard Speirs from the Cohen Milstein firm
4 and Casimir Szustak and Demetrius Davis, both from
5 Grant & Eisenhofer.

6 THE COURT: Thank you.

7 ATTORNEY BARRY: We're here today on a
8 motion to approve the -- to certify the classes,
9 approve \$4.75 million settlement and enter an award of
10 attorneys' fees and expenses and approve the payment
11 of, requested payment of represented party awards to
12 the plaintiffs, Mr. Cody Laidlaw and Ifran Janmohamed.

13 As detailed in the affidavit of Jack
14 Ewashko regarding mailing, notice of publication, that
15 was filed on March 7th, 2025, over 24,000 copies of
16 the notice and revised notice and summary notice were
17 mailed and emailed to potential class members. The
18 parties have received no objections. I'm mainly here
19 to answer any questions that the Court may have.

20 THE COURT: Yeah, let me just correct
21 that. I think we received something that could be
22 construed as an objection that no one was able to
23 read.

24 ATTORNEY BARRY: Right. Oh, actually,

1 he did call me. I was able to get in touch with him.
2 And he just wanted to know what the schedule was. And
3 so it wasn't an objection.

4 THE COURT: Good. All right. Well,
5 you are correct, then.

6 ATTORNEY BARRY: I couldn't actually
7 read that.

8 THE COURT: I couldn't, either. We
9 tried.

10 ATTORNEY BARRY: In any case, I'll
11 assume the Court's general familiarity with the facts
12 and I'll only get to the facts to the extent they're
13 relevant for my presentation.

14 First I'll start with the settlement.
15 The settlement should be approved. The proposed
16 settlement provides a total fund of \$4.75 million to
17 be distributed after payment of fees and expenses pro
18 rata to the stockholders who held Pivotal II shares at
19 the time of the closing of the de-SPAC merger with
20 Legacy XL. This is far more than fair, reasonable,
21 and adequate for purposes of the settlement of the
22 claims in this case.

23 As the Court may recall, there were
24 two kinds of claims in this case, one is the claim

1 that is familiar to de-SPAC merger cases, breach of
2 fiduciary duty claim resulting from the frustration of
3 redemption rights resulting from the publication of a
4 false and misleading proxy statement.

5 And the second claim, which was kind
6 of unique to this case, was a charter violation claim,
7 that the merger itself violated the charter of Pivotal
8 II because it didn't meet the threshold requirement of
9 the 80 percent of the value of the Trust.

10 Going to trial -- and this case was
11 settled shortly before expert reports were to go in
12 and rapidly approaching the trial date -- we felt very
13 strongly, and still feel very strongly, that we had a
14 very good chance of prevailing on liability. Entire
15 fairness was going to be the governing standard. We
16 felt that it was pretty clear on the materialness
17 representations in the proxy, not just related to
18 Legacy XL's pipeline, rescinded CARP certification and
19 the 409(a) valuation that was not disclosed, not to
20 say -- even beyond the net-cash-per-share point.

21 And even on the charter violation
22 claim, we thought we had a good chance of proving that
23 the actual value of Legacy XL at the time of the
24 merger was less than \$178.4 million.

1 So the issues that informed our
2 judgment on settlement weren't liability-related, they
3 were damages-related.

4 Let's start with the redemption class.
5 The redemption class is premised on the idea that my
6 redemption right was frustrated.

7 THE COURT: Let me interrupt you. I
8 just wanted to make sure I understood why there were
9 two classes. I think it's obvious. You can explain
10 it to me on the record. And how they are being
11 treated with respect to the settlement consideration.

12 ATTORNEY BARRY: Sure. Okay. So
13 there's two different classes. One the redemption,
14 because the redemption is focused on the right to get
15 your claim, to tender your shares and get your cash
16 back out of the trust fund.

17 Those claims we viewed as personal to
18 the Pivotal II stockholder. And those claims would be
19 defined as the individuals' rights. Those claims
20 don't travel with the shares.

21 The second class, which is a charter
22 violation class, claims arising from a violation of a
23 corporate charter do travel with the shares, and
24 that's the *Urdan* case. So that's why there's two

1 different classes.

2 How are they being treated? In terms
3 of the distribution of the settlement, they're
4 actually being treated the same because of the way
5 we're defining the classes because of the tracing
6 issue that I'm going to get to in a moment.

7 So let me first start with the damages
8 problem that we faced on the redemption class.

9 As I said, the redemption class is
10 premised on the idea that you get your money, you get
11 your \$10.09 back out of the trust fund instead of
12 participating in the merger.

13 The problem that we had was there were
14 a huge number of shares that traded well over, well
15 over \$10.09 a share when all of the new shares were
16 locked up. Meaning, the shares that were publicly
17 traded were the Pivotal II shares.

18 And from December 17th, 2020, the
19 announcement of the merger, through March 24th, 2021,
20 734 million shares were sold at prices above \$10.09.

21 Compare that to the class of the
22 unredeemed Pivotal II shares of 22.9 million shares,
23 and the total number of shares that were trading at
24 the time of 58 million, this means that was a 12.6

1 turnover of all the eligible shares for trading. This
2 means it was highly likely that most of the Pivotal II
3 stockholders who didn't redeem, in fact, sold at
4 prices above \$10.09, which means the class claims, the
5 class damages could have been very low. And as I
6 disclosed in mediation, the defendants presented a
7 report that suggested the value of those claims would
8 be zero to \$739,000.

9 Our internal estimates were higher
10 than that. It was honestly between 1.4 and
11 14 million. But, realistically, it could have been
12 someplace in the 3 to \$4 million range.

13 So that's the damages we were looking
14 at on the redemption class.

15 The charter violation class presented
16 an entirely different hurdle. The charter violation
17 class was based on the assertion that the merger
18 should have never happened. And if the merger should
19 have never happened, that gives rise to a claim for
20 rescissory damages. Here's my share. Give me my \$10
21 back.

22 The problem that we faced in that
23 regard, however, is tracing. After the merger, as I
24 said, these shares traveled with the shares. After

1 the merger, there were -- we started off with
2 22.9 million Pivotal II shares; but after the merger,
3 there were 140.5 million shares outstanding. How were
4 we going to say which of those Pivotal II shares were
5 part of the original -- I'm sorry, which of those
6 XL shares were part of the original Pivotal II
7 22 million out of the 140.5 million that were out
8 there?

9 Now, we know that the plaintiffs,
10 Mr. Laidlaw and Mr. Janmohamed, those were the
11 original Pivotal II shares because they never sold
12 them. They continued to hold them. But for everyone
13 else, how was one to determine point two out of those
14 140 million shares which of the original 22 million?

15 And we were working with an expert.
16 We were working with an expert that says I have a
17 methodology that says I can apply traditional methods
18 of accounting practices to DTC records and I could
19 follow these serial numbers through and point to, and
20 those are the shares. We could have done -- we were
21 racing towards filing reports on that.

22 There's a couple problems with that.
23 First off, A, it's never been accepted in any Delaware
24 court. The idea that accounting tracing is the same

1 as you held those shares for purposes of traveling
2 with the shares, that's never been tested in Delaware
3 court; and then even assuming that I could have
4 convinced you that you should be using this new
5 methodology, the company did an 8:1 reverse stock
6 split in October 2023, which made that tracing even
7 more difficult because now I'm saying: Now it's not
8 just that share, it's a piece of that share. And then
9 how would rescission even work?

10 So -- and that's even talking about
11 the equities of someone who bought it for 32 cents on
12 the market and now, oh, you won the lottery, you
13 get \$10 a share. How would that work?

14 So that's the universe the plaintiffs
15 were facing heading into trial. Go to trial on the
16 redemption class and risk having the Court determine
17 that damages were nonexistent or low. And go to trial
18 on the charter violation class and risk that the Court
19 ruled that rescissory damages weren't available
20 because of this tracing issue, or settle
21 for \$4.75 million. We respectfully say that given the
22 risk of the litigation, the \$4.7 million recovery here
23 is, frankly, exceptional.

24 Which now gets to -- so I would say

1 the terms of the settlement should be approved.

2 Next one is class certification.

3 We've asked for certification of two different
4 classes, and this will address the question that
5 you've just asked.

6 For the redemption class, we've asked
7 all record and beneficial holders of Pivotal II
8 Class A common stock, whether held as separate shares
9 of common stock or as part of public units, directly
10 or indirectly, who held such stock between the close
11 of business on December 7, 2020, and December 21,
12 2020, and their successors in interest who were
13 injured by defendant's breaches of fiduciary duty and
14 other violations, excluding the excluded persons. So
15 that class are people who held from the moment the
16 merger was announced until the merger closed.

17 The second class is the charter
18 violation class. And that's everybody who held, as of
19 the close, on December 21, 2020, and who hold such
20 stock now as stockholders of Spruce as of the date of
21 this settlement is approved and becomes final.

22 So the definition that we're using for
23 the charter violation class certifies only traceable
24 shares, the shares that they actually own. It could

1 be a very small class. We know it's at least two.

2 But I don't know who else is out there, for purposes
3 of the settlement. But it could be very small based
4 on the turnover. But that's the basis of the
5 settlement.

6 THE COURT: So, tell me again how it's
7 going to be whacked up and what these class members,
8 the members of the class is, should expect given the
9 unknowns.

10 ATTORNEY BARRY: Sure. The settlement
11 will be distributed pro rata based on their holdings
12 as of the close of the merger.

13 And because the stockholders who fit
14 into the charter violation class are also part of the
15 redemption class, they're treated the same. So they
16 will all receive the same pro rata distribution based
17 on their holdings as of December 21, 2020.

18 THE COURT: Except they had to
19 continue to hold through the date of settlement?

20 ATTORNEY BARRY: In order to be part
21 of the charter violation class, they would have
22 continued to hold.

23 THE COURT: Okay. It's a little
24 tricky here. But so we don't know how many people

1 were actually -- so we know that all of the charter
2 violation class members who held as of December 21
3 were part of the redemption class.

4 ATTORNEY BARRY: Yes.

5 THE COURT: So we don't know if there
6 are any more than two charter violation class members
7 who will separately receive consideration.

8 ATTORNEY BARRY: Correct.

9 THE COURT: Okay. And they're not
10 going to get double consideration; right?

11 ATTORNEY BARRY: No, correct.

12 THE COURT: So the two plaintiffs who
13 are members of both classes will only get their pro
14 rata share of whatever the redemption class is.

15 ATTORNEY BARRY: Correct.

16 THE COURT: All right.

17 ATTORNEY BARRY: That just seemed the
18 most equitable way to distribute --

19 THE COURT: I hear you.

20 ATTORNEY BARRY: -- given the issues
21 that we faced in here.

22 Which gets to the class certification
23 issues.

24 There's nearly 23 million unredeemed

1 shares. We know those are still out there. The
2 numerosity should, that should be sufficient to
3 address the numerosity issue.

4 Commonality, the same claims exist
5 among the redemption class and the charter violation
6 class. The claims of these two plaintiffs are typical
7 of all of the various class members.

8 Adequacy, G&E and Cohen and Milstein
9 have been before the court dozens of times.

10 Finally, it satisfies (b)(1) and
11 (b)(2) in that all stockholders suffer the same harm
12 in both classes. And the defendants' actions impacted
13 class members in uniform fashion for each class.

14 THE COURT: And just to be clear,
15 commonality is the reason for the two different
16 classes; correct?

17 ATTORNEY BARRY: Yes.

18 THE COURT: But the plaintiffs are
19 typical of class members of each class; correct?

20 ATTORNEY BARRY: Yes.

21 THE COURT: Okay.

22 ATTORNEY BARRY: So what that gets to
23 the settlement, the class certification and, finally,
24 the fee and expense award.

1 The plaintiffs are requesting a fee
2 award of \$823,788.43. That represents 20 percent of
3 the net settlement amount after payment of our
4 requested expenses of \$631,057.84.

5 So let's go through the *Sugar Lane*
6 factors.

7 First, the benefits of the settlement.

8 As I explained, the 4.75 million is an
9 exceptional result given the hurdles that we faced
10 going to trial. In that regard, the fee range of
11 between 15 and 25 percent is appropriate. This Court
12 has recognized where meaningful litigation efforts
13 have occurred. Here, we defeated the motion to
14 dismiss. We engaged in extensive discovery of 125,000
15 documents covering 1.2 million pages. We took three
16 depositions and stipulated to the use of many others.
17 We had extensive work with experts whose reports were
18 due just two weeks after the settlement was reached.
19 And we were getting ready headstrong to trial in 2025.

20 In our brief, we list cases and a
21 chart from pages 38 to 40 demonstrating that the
22 requested percentage award is well within the range.
23 20 percent is well below certain of the cases cited.
24 And we think the fee request is reasonable.

1 The total amount -- the fee request
2 actually represents 17.3 percent of the total amount.
3 So it's a little less.

4 The contingent nature of the
5 representation, this has been fully contingent.

6 Time and effort of counsel. This is a
7 little outsized. We spent 4,438.55 hours with a
8 lodestar of \$3,334,173.75. Our request translates to
9 a fee request of about \$185 an hour and a negative
10 lodestar multiplier of .25. So with that, I would
11 rest on the papers for our expected fee and expense
12 award.

13 Which finally gets to the requested
14 awards to the representative party awards. We simply
15 ask the Court's permission to pay out of any fee award
16 that the Court deems appropriate \$10,000 each to
17 Mr. Laidlaw and Mr. Janmohamed for their work in this
18 case. They have not only maintained their standing,
19 they actually engaged, they were both deposed in this
20 case and engaged in discovery. We think that is
21 consistent with prior awards from this Court, as
22 indicated in the authorities cited in the Footnote 133
23 of our settlement brief.

24 Unless the Court has any other

1 questions.

2 THE COURT: I have no questions.

3 Thank you, Mr. Barry.

4 All right. Please be seated. I'm
5 prepared to deliver a bench ruling on the pending
6 motion. Everything is granted. Congratulations to
7 everyone on a clever and equitable resolution to this
8 matter.

9 So, I'll begin. I want to say great
10 job, Mr. Barry, in presenting this. It is a
11 complicated case and a complicated settlement. And so
12 people who are reading a transcript of my bench ruling
13 should go back and read your presentation, as well.

14 I'll begin. The plaintiffs, former
15 public stockholders of Pivotal Investment Corporation
16 II, Cory Laidlaw and Ifran Janmohamed, brought this
17 class action suit alleging that Pivotal II's directors
18 and controlling stockholders breached their fiduciary
19 duties in connection with Pivotal II's 2022 merger
20 with XL Hybrids, Inc. or Legacy XL.

21 The plaintiffs contend that the
22 defendants structured the transaction to benefit
23 insiders while depriving public stockholders of the
24 value of their rights by disseminating misleading

1 disclosures regarding Legacy XL's valuation and
2 business prospects, among other things.

3 The plaintiffs also pursue relatively
4 novel charter violation claims, which I'll discuss in
5 a little bit.

6 I note that after extensive
7 litigation, including partial denial of the
8 defendants' motion to dismiss, substantial discovery,
9 and mediation, the parties agreed to a settlement.
10 Through the settlement, the classes will
11 receive \$4.75 million in cash.

12 The plaintiffs have moved for class
13 certification; approval of the settlement; an award of
14 the attorneys' fees and expenses; and approval of an
15 incentive fee to be paid to each of the plaintiffs.

16 The defendants support the motions and
17 do not oppose the amount of fees or incentive fees
18 requested, so all of the motions are being granted.

19 I'll turn now to background, starting
20 with a brief description of the claims at issue and
21 the events leading to the settlement.

22 I'm drawing from the facts in the
23 pleadings, the parties' amended stipulation and
24 agreement of compromise and settlement dated

1 January 10, 2025, which I'll refer to as "the
2 Settlement Stipulation" and the affidavits
3 accompanying the parties' briefing in support of the
4 motions.

5 I provide a background description for
6 context only. I'm not making any factual findings. I
7 find that these statements of the background are
8 important for people trying to gauge fee requests in
9 future cases.

10 In March 2019, Pivotal II was
11 incorporated as a special purpose acquisition company,
12 or SPAC, to identify and complete a business
13 combination.

14 In July 2019, Pivotal II completed its
15 IPO, raising \$230 million through the sale of
16 23 million units at \$10 per unit. Each unit consisted
17 of one share of Class A common stock and one-third of
18 a warrant to purchase one share of common stock.
19 Public stockholders had the right to redeem their
20 shares rather than participate in the merger.

21 At formation, Pivotal II issued
22 Class B shares, which I'll refer to as "Founder
23 Shares." Pivotal II granted the Founder Shares to
24 Pivotal Investment Holdings II, LLC, which I'll refer

1 to as the "Sponsor," in amount equal to 20 percent of
2 the post-IPO equity for a nominal investment of less
3 than a cent per share. The Sponsor also purchased
4 over 4.2 million private placement warrants for \$6.35
5 million, exercisable only if a merger was completed.

6 In September 2020, Pivotal II entered
7 into a Merger Agreement with Legacy XL. Under it,
8 Legacy XL would merge into a wholly-owned subsidiary
9 of Pivotal II. Pivotal II issued its definitive proxy
10 statement in December 2020, notifying the
11 stockholders, among other things, of their right to
12 redeem their shares by December 17th. The
13 stockholders approved the merger at the December 21st
14 stockholder meeting, and the merger closed the same
15 day. Pivotal II was renamed XL Fleet Corporation.

16 Each of the plaintiffs here filed suit
17 in the fall of 2021, each with the benefit of books
18 and records obtained pursuant to pre-suit
19 investigations pursued under Section 220 of the
20 Delaware General Corporation Law. I consolidated the
21 actions in January of 2022.

22 The plaintiffs brought this action
23 against the defendants, and I'll refer to the
24 defendants' individuals by their last name: Ledecky,

1 Griffin, Sclarsic, Epstein, Adams, Brady, Hynes, and
2 Kazarinoff, as well as Nominal Defendant XL Fleet
3 Corp, again formerly Pivotal II. I'll refer to the
4 individuals, including the people who served on the
5 board, as the "Director Defendants," Ledecy and Brady
6 as the "Officer Defendants," and Ledecy, Griffin,
7 Brady, Sclarsic, Epstein, Adams, and the Sponsor as
8 the "Controller Defendants."

9 The plaintiffs allege that the SPAC
10 structure created conflicts between Pivotal II
11 insiders and public stockholders. Unlike public
12 stockholders, who could redeem their shares, insiders
13 benefited only if a merger occurred. The plaintiffs
14 allege that the proxy statement omitted material facts
15 about Legacy XL's valuation and financial condition,
16 depriving stockholders of the ability to make an
17 informed redemption decision.

18 The plaintiffs claim that the
19 Individual Defendants exercised significant control
20 over Pivotal II and used their positions to structure
21 the merger, or to pursue a merger, that enriched
22 themselves while depriving stockholders of material
23 information necessary for an informed redemption
24 decision.

1 Additionally, the plaintiffs allege
2 the Sponsor was controlled by Ironbound Partners Fund,
3 LLC and Pivotal SPAC Funding II LLC. The Sponsor held
4 the Founder Shares and was central to structuring the
5 merger, making it a Controller Defendant, as well,
6 according to the allegations.

7 The consolidated complaint asserts six
8 counts challenging the merger and the disclosures.
9 The first three counts assert claims for breach of
10 fiduciary duties against the Director Defendants,
11 Officer Defendants, and Controller Defendants.

12 In Count IV, the plaintiffs claim that
13 the CEO of XL Fleet, that's Kazarinoff, as well as
14 Thomas Hynes, that was President, aided and abetted
15 the fiduciary breaches.

16 The plaintiffs assert Count V against
17 all the defendants for unjust enrichment and Count Six
18 for breach of charter against XL Fleet Corp for
19 violating the Amended and Restated Certificate of
20 Incorporation, which required Pivotal II to merge with
21 a targeted value of at least 80 percent of the trust
22 assets.

23 The defendants moved to dismiss the
24 complaint, and I granted the motion in part through a

1 bench ruling on June 9, 2023. I dismissed Count II
2 against Brady; Count III against Sclarsic, Epstein,
3 Adams, Brady, and Griffin; Count IV in its entirety;
4 and Count V against Hynes and Kazarinoff.

5 The plaintiffs litigated the remaining
6 claims, and their efforts were extensive. In addition
7 to conducting a pre-suit investigation, drafting the
8 initial complaints, and defending against the motions
9 to dismiss, the plaintiffs propounded written
10 discovery, requested documents, and received and
11 reviewed over 1 million pages, took two depositions
12 and defended against three, and engaged in expert
13 discovery, including drafting expert reports. They
14 also participated in two rounds of mediation and
15 subsequent arm's length negotiations while discovery
16 was ongoing.

17 The parties reached an agreement in
18 principle on September 23, 2024, and submitted the
19 Settlement Stipulation on January 10th.

20 The defendants agreed to a settlement
21 payment of \$4.75 million to be distributed among the
22 eligible stockholders subject to a Plan of Allocation
23 that's set out in paragraphs 34 and 35 of the
24 Settlement Stipulation.

1 After accounting for any taxes,
2 administrative costs, attorneys' fees, and expenses,
3 the net settlement fund will be distributed on a pro
4 rata basis to eligible members of the classes. It
5 will be distributed by the settlement administrator.
6 Any settlement funds that remain unclaimed or
7 undeliverable after initial distributions, the
8 settlement administrator will conduct a pro rata
9 redistribution until the remaining balance falls below
10 \$50,000, at which point any leftover funds will be
11 donated to the charitable organization Combined
12 Campaign for Justice. Once payments are made, the
13 allocation will be considered final, and no class
14 member may challenge the settlement distribution.

15 I thought a lot about the plan of
16 distribution, and I believe it to be fair and
17 equitable.

18 I'll turn now to my analysis of the
19 pending motion, starting with class certification.

20 The plaintiffs have moved for
21 certification of two non-opt-out classes. The first
22 called the "Redemption Class" is defined as: "All
23 record and beneficial holders of Pivotal II Class A
24 Common Stock, whether held as separate shares of

1 Common Stock or as part of Public Units, directly or
2 indirectly, who held such stock between the close of
3 business on December 7, 2020 and December 21, 2020,
4 and their successors in interest, who were injured by
5 Defendants' breaches of fiduciary duties and other
6 violations of law, excluding the Excluded Persons."

7 The second proposed class is the
8 "Charter Violation Class," which is defined as: "All
9 record and beneficial holders of Pivotal II Class A
10 Common Stock, whether held as separate shares of
11 Common Stock or as part of Public Units, directly or
12 indirectly, who held such stock as of December 21,
13 2020, and who hold such stock (as stockholders of
14 Spruce) as of the date the Settlement is approved by
15 the Court and becomes Final, excluding the Excluded
16 Persons."

17 For both classes, the term "Excluded
18 Persons" refers to: "(i) stockholders who redeemed
19 100% of their shares in connection with the Merger;
20 (ii), holders of Pivotal II Class A Common Stock who
21 did not have the right to exercise redemption rights;
22 (iii)(a) Defendants; (b) members of the immediate
23 family of any Individual Defendant; (c) any person who
24 was a manager or managing member of any Defendant

1 during the Class Periods and any member of their
2 immediate family; (d) any parents, subsidiary, or
3 affiliate of Defendants; (e) any entity in which any
4 Defendant or any other excluded person or entity has,
5 or had during the Class Periods, a controlling
6 interest; and (f) the legal representatives, agents,
7 affiliates, heirs, estates, successors, or assigns of
8 any such excluded persons or entities; and (iv) (a) the
9 Company; and (b) any person who was an officer or
10 director of the Company during the Class Periods and
11 any members of their immediate family."

12 As the Delaware Supreme Court
13 explained in *Prezant v. De Angelis*, the certification
14 of a class action involves a two-step analysis.
15 First, the Court must determine that the action
16 satisfies the four prerequisites of Rule 23(a), which
17 are numerosity, commonality, typicality, and adequacy.
18 Then the Court must determine whether the suit
19 properly fits into one or more of the Rule 23(b)
20 categories.

21 So turning first to the prerequisites,
22 starting with numerosity, that's met. As the
23 plaintiffs state in their opening brief, as of
24 December 17, 2020, there were over 22 million eligible

1 shares outstanding. That covers numerosity.

2 Commonality, too, is satisfied. A
3 proposed class must meet the commonality requirement
4 where "the question of law linking the class members
5 is substantially related to the resolution of the
6 litigation even though the individuals might not be
7 identically situated." Within each class there is
8 commonality here; in fact, the commonality factor is
9 the reason for the two separate classes.

10 Turning to typicality, as the Supreme
11 Court observed in *Kapf*, "the test ... is that the
12 legal and factual position of the class representative
13 must not be markedly different from that of the
14 members of the class." It is not markedly different
15 here. The alleged harm to the representative
16 plaintiffs is the same as what other class members
17 have suffered.

18 Finally, there is adequacy. The
19 Supreme Court of the United States observed in
20 *Phillips Petroleum Co. v. Shutts* that the Due Process
21 Clause requires that "the named plaintiff at all times
22 represents the interests of the absent class members."

23 The Delaware Supreme Court has
24 expounded on this requirement when it stated "[I]n an

1 application of the fourth prerequisite of Rule 23(a),
2 the predominant considerations are due process
3 related: (i) that there is not conflict between the
4 named party and other class members; and (2) that the
5 named party may be expected to vigorously defend not
6 only themselves but the proposed class." And that's
7 from *Krapf*.

8 In this case, the classes collectively
9 own the stock relevant to this action. There's no
10 suggestion that the plaintiffs' interest or have ever
11 been in conflict with those classes. They retained
12 experienced counsel who are well known to this Court,
13 and the plaintiffs' advocacy in this case reflects the
14 vigorous prosecution of their claims, so the adequacy
15 requirement is met.

16 Having determined that the first step
17 is satisfied, I'll turn now to the second. The
18 Delaware Supreme Court has explained, again in *Krapf*,
19 that "Class suits are not necessarily mutually
20 exclusive; an action may be certified under more than
21 one subdivision of Rule 23(b)." Classes certified
22 under Rule 23(b)(1) typically satisfy both.

23 Rule 23.1 is satisfied here because
24 "adjudications with respect to individual class

1 members ... as a practical matter, would be
2 dispositive of the interests of the other class
3 members not parties to individual adjudications."

4 The conduct challenged by the
5 plaintiffs involved breaches of fiduciary duties and
6 charter violations. The merger sought stockholder
7 approval through redemption. These issues are common
8 to all the class members, and they fit the Rule
9 23(b)(1) description.

10 Rule 23(b)(2) is also satisfied on the
11 grounds that the issues applied generally to the
12 class. So final injunctive or declaratory relief is
13 appropriate with respect to all the class members.

14 Finally, it's appropriate to make this
15 a non-opt-out class. Former Chancellor Allen
16 explained why this is appropriate, in *Hynson v.*
17 *Drummond*, and the logic and ruling applies today, as
18 well. There's no reason to allow an opt-out class.
19 No one seeks to opt out. No one disputes the class
20 certification, including the question of whether
21 opt-out rights should be afforded.

22 All right. I'll turn now to the
23 Rule 23 analysis.

24 Rule 23 now provides a checklist of

1 tasks the Court must complete before approving a
2 settlement in a class action. And today those issues
3 call me to evaluate six aspects of the proposed
4 settlement: One, the adequacy of the plaintiff and
5 the plaintiff's counsel; two, the adequacy of the
6 notice of settlement; three, whether negotiations
7 leading to the settlement were at arm's length; four,
8 the merits of the settlement, taking into account a
9 variety of subfactors; five, the request for
10 attorneys' fees; and, six, the incentive fee request.

11 So I'll start with the adequacy of
12 plaintiffs. I'll discuss the adequacy of the
13 plaintiffs' counsel when I evaluate the fee request.

14 Adequacy here is largely satisfied by
15 an accurate affidavit submitted pursuant to Rule
16 23(aa). That rule requires that an affidavit stating
17 that "the person has not received, been promised, or
18 offered -- and will not accept -- any form of
19 compensation, directly or indirectly, for serving as a
20 representative party, except for: [] any damages or
21 other relief the Court may award the person as a class
22 member; [] any fees, costs, or other payments that the
23 Court expressly approves to be paid on behalf of the
24 person; or [] reimbursement from the person's

1 attorneys of actual and reasonable out-of-pocket
2 expenditures incurred in prosecuting the action."

3 Plaintiffs submitted their affidavits
4 on August 2nd and August 6th. I have reviewed them.
5 They satisfy Rule 23(a), and they demonstrate that the
6 plaintiffs were adequate.

7 Additionally, the plaintiffs did not
8 have personal interests that would render them
9 incapable of representing the classes. They proved
10 capable litigants. On these bases, I find that they
11 were adequate for all relevant purposes.

12 The notice, too, was effective.
13 Rule 23(f) requires the parties provide the Court with
14 information sufficient to rule on required notice and
15 the notice's form.

16 Subsection (D) also establishes the
17 default content of such notices. Notice of settlement
18 is sufficient if it contains a description of the
19 lawsuit, the "consideration for the settlement, the
20 location and time of the settlement hearing, and [it]
21 informs [the] class members that additional
22 information can be obtained by contacting class
23 counsel."

24 I initially approved the form of

1 notice when entering the proposed scheduling order on
2 November 13th. I then approved the revised form when
3 entering the revised scheduling order on January 16th.
4 In both instances, I concluded that the form of notice
5 constituted the best notice reasonably practicable
6 under the circumstances. I also authorized the
7 retention of a settlement administrator, and the
8 parties retained A.B. Data, Ltd.

9 The revised scheduling order required
10 the company to cause the form of notice to be mailed
11 to all members of each class no later than 60 days
12 before this hearing. The company was also required to
13 cause the publication of the revised notice in
14 *Investors Business Daily* and over the *PR Newswire*.

15 A.B. Data's Director of Case
16 Management, Jack Ewashko, submitted an affidavit on
17 March 7th describing A.B. Data's efforts to provide
18 notice. All told, A.B. Davis sent over 5,000 physical
19 copies of the initial notice, over 9,600 physical
20 copies of the revised notice, all by First Class mail,
21 and over 11,000 electronic copies of the revised
22 notice. In addition, A.B. Data published the revised
23 notice in *Investors Business* and over the *PR Newswire*
24 on February 3rd. And A.B. Data maintained a toll-free

1 hotline and settlement website for stockholders that
2 was updated on January 17th.

3 In all events, notice was adequate and
4 appropriate. The notice requirement is met.

5 The next factor is whether the
6 settlement was reached through arm's length
7 negotiations, and it was. It was reached with the
8 benefit of mediator Jed Melnick, who is with JAMS.
9 Although the two mediation sessions concluded without
10 agreement, the parties, with Melnick's continued
11 involvement, engaged in discussions while
12 simultaneously pursuing fact discovery and agreed to
13 the settlement terms after receiving a mediator's
14 proposal. So this reflects good faith conduct and
15 arm's length negotiations with each side vigorously
16 advocating for their respective positions.

17 All right. Now to the merits of the
18 settlement. I must ask whether they're fair and
19 reasonable, the settlement terms. The settlement
20 terms undoubtedly provide significant value to the
21 members of each of the classes. Under the terms of
22 the settlement stipulation, defendants agreed to
23 pay \$4.75 million to compensate stockholders for the
24 various harms alleged in the complaint. And this is a

1 decent cash bump.

2 As the Supreme Court held in
3 *Goodrich v. E.F. Hutton*, when reviewing proposed class
4 or derivative settlements, I have to exercise my own
5 business judgment to determine whether the settlement
6 is fair.

7 Case law describes the standard
8 extensively. It directs the Court to balance the
9 give -- the release -- versus the get, which are the
10 terms of the settlement.

11 As amended, Rule 23 breaks this down
12 into four considerations. And I think the breakdown
13 is quite helpful. It provides that the Court may
14 approve a proposed settlement only after a hearing and
15 only after finding that the relief falls within a
16 range of reasonable results, taking into account:
17 One, the strength of the claims; two, the costs, risks
18 and delay of trial and appeal; three, the scope of the
19 release; and four, any objections. Under these
20 factors, the proposed settlement's more than
21 reasonable.

22 The claims were strong. The
23 plaintiffs asserted claims for breach of fiduciary
24 duty and breach of charter. The second category was

1 quite novel. They survived a motion to dismiss. It
2 was concluded that it would be reasonably conceivable
3 that an entire fairness standard would apply going
4 forward.

5 But continued litigation carried
6 significant risks, particularly given the novelty of
7 aspects of the claims. At trial, the entire fairness
8 standard would have involved complex financial
9 analyses, expert testimony, expert discovery, all of
10 which would have resulted in substantial costs, and
11 victory was not certain. Plenty of defense teams have
12 prevailed under the entire fairness standard. So the
13 risk of continued litigation weigh in favor of
14 approving the settlement.

15 The scope of the release is
16 appropriately tailored to the claims at issue. I've
17 reviewed it and believe that it applies neatly to what
18 was at issue in this litigation.

19 We received a letter from Daniel P.
20 Hogan, which some of us thought was an objection,
21 turns out it's not. And so the lack of objections
22 also favors approval of the settlement.

23 Considering the benefits of the
24 settlement, the strength of the claims, the risks

1 associated with continued litigation, and the
2 propriety of the release, I find that the proposed
3 settlement falls within the range of reasonable
4 outcomes that a party acting voluntarily would accept,
5 and the settlement's approved.

6 Now for attorneys' fees. As the
7 Supreme Court held in *Goodrich* and more recently, in
8 *Dell*, the Court of Chancery must make an independent
9 determination of the reasonableness of fees requested
10 when awarding them.

11 The Court will craft an award using
12 the five factors identified in *Sugarland*. Those five
13 factors are: The results achieved, the time and
14 effort of counsel, the relative complexities of the
15 litigation, any contingency factor, and the standing
16 and ability of counsel.

17 Although there's no set formula for
18 attorneys' fees, the high court has endorsed a
19 stage-of-case approach that was established in
20 *Americas Mining*, and that approach appropriately
21 focuses on results and not hours. The stage-of-case
22 approach starts by calculating a fee as a percentage
23 of the benefit achieved, basing that percentage on the
24 stage of the case at which the litigation was

1 resolved. When a case resolves earlier, the
2 guidelines range is 10 to 15 percent; when a case
3 resolves after meaningful litigation efforts, the
4 guideline range is 15 to 25 percent. The highest
5 percentage is 33 percent, and that is reserved for
6 plaintiffs who prevail after trial.

7 Under this approach, other *Sugarland*
8 factors may cause the Court to adjust the fee award up
9 or down, but the starting point is the stage-of-case
10 analysis.

11 The plaintiffs' counsel seeks
12 \$823,788.43. That figure was reached by taking
13 20 percent of the 4.75 million after subtracting
14 \$631,057.84 in expenses. All told, the total request
15 is approximately 17.3 percent of the gross award and
16 20 percent of the net award settlement consideration.

17 The *Sugarland* factors all support this
18 fee request. The primary factor is the benefit
19 achieved. Here, it was 4.75 million. And the
20 plaintiffs seek 17.3 or 20 percent, depending upon how
21 you calculate it, which fits comfortably within the
22 range approved for meaningful litigation efforts.

23 It also lines up neatly with fee
24 awards in other SPAC cases. This Court awarded

1 20 percent in *Multiplan* and 22.5 percent in *Lordstown*.
2 Both of those cases were resolved prior to depositions
3 and expert discovery. Here, the plaintiffs were two
4 weeks away from submitting expert reports, so these
5 awards compare favorably.

6 The time and effort of plaintiffs'
7 counsel in this case was significant. In total,
8 counsel dedicated over 4.4 thousand hours to
9 litigating this action from its inception through
10 November 13th, the signing of the initial stipulation.
11 This amounts to a lodestar value of over \$3.3 million.
12 So the requested fee award implies a discount to the
13 hourly rate at .50 X multiple. It also implies an
14 hourly rate of \$185. The plaintiffs here worked hard,
15 and the stage of the case approach cuts in favor of
16 the fee award.

17 The next factor is complexity. The
18 case involved a high degree of complexity, including
19 novel claims. And this factor favors the fee
20 requested, as does the contingency nature of the
21 litigation. It is the public policy of Delaware to
22 award risk-taking. Here, as set forth in the
23 attorney's affidavit supported in the settlement and
24 the fee request, the plaintiffs' counsel pursued this

1 action on a fully contingent basis, so that more than
2 supports the reasonableness of the fee requested.

3 Last, there is the standing ability of
4 counsel. The plaintiffs' counsel is known to the
5 Court. They're experienced litigators in stockholder
6 class and derivative action as well as corporate
7 governance litigation generally. They have a proven
8 track record of securing recoveries in complex
9 litigation, and they went up against intense defense
10 counsel. So this factor supports the fee award.

11 Finally, the plaintiffs' counsel
12 requests approval and incentive fee award to be paid
13 from the fee awarded to the plaintiffs' counsel in the
14 amount of \$10,000 for each plaintiff. Now, this
15 amount is appropriate when compared to the incentive
16 of fees previously approved by this court in, for
17 example, *Forsythe, Oliver, and Raider*. So it is
18 approved here.

19 So in conclusion, the class is
20 certified. The settlement is approved. Counsel is
21 awarded its requested fees. The expenses are
22 approved. And plaintiffs may each receive \$10,000 in
23 incentive fees.

24 Are there any questions?

1 ATTORNEY BARRY: No, Your Honor.

2 Thank you.

3 THE COURT: Mr. Barry, did you bring a
4 form of the order filling in the blanks?

5 ATTORNEY BARRY: I brought a form of
6 the order. I have not filled in the blanks.

7 THE COURT: I don't trust myself to
8 fill in the blanks. Will you fill in the blanks and
9 submit it on the docket and I will approve it.

10 ATTORNEY BARRY: Yes, I will.

11 THE COURT: Thank you. We are
12 adjourned. It's good to see everyone.

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CERTIFICATE

I, KATHY CORTOPASSI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 41 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 26th day of March, 2025.

/s/ Kathy Cortopassi

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

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(302) 255-0526

Tab 2

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MULTIPLAN CORP. : CONSOLIDATED
STOCKHOLDERS LITIGATION : C.A. No. 2021-0300-LWW

- - -

Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, February 28, 2023
1:35 p.m.

- - -

BEFORE: HON. LORI WILL, Vice Chancellor

- - -

ORAL ARGUMENT AND THE COURT'S RULINGS RE PLAINTIFFS'
MOTIONS TO CERTIFY THE CLASS, APPROVE THE SETTLEMENT
AND PLAN OF ALLOCATION AND AWARD FEES AND EXPENSES
HELD VIA ZOOM

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street
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18 McDermid, Karen G. Mills, Michael
Eck, M. Klein and Company, LLC,
19 Churchill Sponsor III, LLC, and The
Klein Group, LLC

20

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1 THE COURT: Good afternoon.

2 ATTORNEY LEBOVITCH: Good afternoon
3 Your Honor.

4 THE COURT: Welcome. I see we have a
5 group with us this afternoon.

6 Mr. Lebovitch, I see you up on my
7 screen.

8 How about we start with appearances
9 for the record.

10 ATTORNEY MCGILLIVRAY: Good afternoon,
11 Your Honor. Glenn McGillivray from Bernstein Litowitz
12 Berger & Grossman on behalf of plaintiffs. I am
13 joined today by my colleagues, Mark Lebovitch, Thomas
14 James and Mae Oberste. And with Your Honor's
15 permission, Mr. Lebovitch, who is admitted *pro hac*
16 *vice*, will make the presentation today.

17 THE COURT: That's fine. Thank you
18 very much.

19 ATTORNEY ARONSTAM: Good afternoon,
20 Your Honor. Brad Aronstam on behalf of the individual
21 defendants and Churchill entities. With me today I
22 have co-counsel from Weil Gotshal: John Neuwirth,
23 Evert Christensen, and Josh Amsel; and my colleagues
24 here at RAM: Mike Sirkin and Roger Stronach. And to

1 the extent necessary, Mr. Neuwirth will be speaking
2 for our group today.

3 THE COURT: Thank you, Mr. Aronstam.

4 ATTORNEY GALLAGHER: Good afternoon,
5 Your Honor. Kevin Gallagher, Richards, Layton &
6 Finger, on behalf of MultiPlan Corporation; and with
7 me this afternoon is my colleague from Simpson
8 Thacher, Stephen Blake.

9 THE COURT: Thank you, Mr. Gallagher.

10 ATTORNEY LEBOVITCH: Anyone else?

11 THE COURT: Mr. Lebovitch, take us
12 away.

13 ATTORNEY LEBOVITCH: Okay. Thank you,
14 Your Honor.

15 Also for the record, Mark Lebovitch on
16 behalf of lead plaintiff Edgar Vaynshteyn and
17 additional plaintiff Anthony Franchi. Now is the time
18 for the Court's consideration of four motions. We're
19 seeking final approval of the proposed settlement,
20 certification of the settlement class, approval of the
21 plan of allocation, and an award of attorneys' fees
22 and expenses in connection with the settlement. So
23 unless Your Honor has questions, which, of course,
24 I'll take, I'll just proceed in that order.

1 I do want to start with setting the
2 stage with I guess a big-picture comment about this
3 case. This was novel, as Your Honor pointed out, I
4 think, in the first sentence of the motion to dismiss
5 opinion. And the way we look at this is this was an
6 honor for us to bring this case. Our job in every
7 case is to challenge what we believe is real fiduciary
8 wrongdoing and to bring benefits to the investors we
9 represent.

10 Sometimes that job becomes a
11 privilege, and that's where, when we do our job, we
12 sometimes get to engage with the Court regarding, you
13 know, very real and sometimes widespread corporate
14 governance problems that are not already the subject
15 of established precedent. And it makes an interesting
16 practice that's -- every day, it's interesting, but it
17 really makes things extra complex and we think
18 important, and so we feel very good about that.

19 And I want to start, actually, by
20 acknowledging and appreciating Your Honor's commitment
21 and approach in this case. I got the sense that -- we
22 have the sense that Your Honor kind of early on
23 recognized that this case was a meaningful one. And I
24 think that -- hopefully, I'm speaking for all counsel

1 involved, including defense counsel, on saying we
2 appreciate the deep thought and careful consideration
3 Your Honor gave to what really were hard issues. And
4 we think that the outcome of this case and Your
5 Honor's opinion in this case has already and will, for
6 a long time, positively affect corporate governance
7 within the SPAC industry. And so we're honored to
8 play a part in that.

9 Obviously, this case arose out of the
10 SPAC craze. I want to give a little bit of background
11 about how we got interested in this, because I
12 remember in the summer of 2020, starting to read about
13 some of these de-SPAC transactions that were just
14 embedded with conflicts. And we focus on it and then
15 we start seeing, you know, celebrities and athletes
16 getting involved in the space, and we said, what is
17 going on here?

18 And so we're, on the one hand, seeing
19 all these conflicts and thinking about where does
20 Delaware law fit in all of this, and then we're doing
21 our diligence, and we're speaking with industry
22 players at every aspect of the process that just we
23 know, friends and acquaintances and colleagues.

24 And there was like this universal

1 drumbeat about saying, well, because of the redemption
2 right, there is no role for Delaware law. And we
3 really grappled with that for quite a time because we
4 said, well, does the redemption right mean there's no
5 fiduciary duties, or does it mean that there would be
6 duties but they're not enforceable? And that was the
7 process we went through.

8 And eventually, the lightbulb went
9 off. And not to be cynical, but part of the nature of
10 securities markets over time is sometimes they do
11 create a product that generates a lot of fees for the
12 creators, creates a lot of profit opportunity for
13 intermediaries, but in the end, they really just
14 result in staggering losses for the individuals and
15 entities who are investing their savings in reliance
16 on the integrity of the product and the people
17 operating it. And so we came to understand that just
18 because everyone says there is no Delaware law claim
19 doesn't mean they're right.

20 And so we peeled back the layers, and
21 we saw that there was a complicated fact pattern that
22 does -- we think at the time, this 2019 to 2021 model
23 of the SPACs was really serving intermediaries, and
24 people were generating fees and profiting off of

1 founders shares but not really doing much for
2 investors.

3 We had to understand the complicated
4 facts, and we had to go back to fundamentals of
5 Delaware law, which is what translates into our
6 complaint in this case and, really, our legal
7 theories, which were then the subject of the oral
8 arguments that we all recall vividly.

9 And I will say, in addition to the
10 Court, I think, really admirably grappling with
11 applying these unique factual situations and corporate
12 structures to Delaware law, you know, kind of writ
13 broadly, what we had to contend with was our
14 adversaries, defense counsel who are really smart,
15 really sophisticated, raising every argument we
16 anticipated and a whole bunch of arguments that we
17 really wouldn't have anticipated.

18 And while we disagreed with their
19 arguments, it was really a challenge to kind of parse
20 it all out, because you can get tied up in knots on
21 all those arguments and thinking about the
22 implications of them. And so it was a challenge to
23 address it, frame it, and, you know, hopefully dispel
24 the concerns that the defendants were rightfully

1 raising -- "rightfully" in the sense that they were
2 doing it for their clients.

3 And I think that when Your Honor
4 issued the motion to dismiss opinion, it was just one
5 of those moments where the SPAC world immediately took
6 note. And all of a sudden, all these people who
7 wanted to pretend away Delaware law from having a role
8 in their great frenzy realized, wait a second. So
9 there's conflicts here, and there's a controller, and
10 it triggers an entire fairness claim. And we're not
11 doing the normal protections that would allow us to
12 argue for business judgment rule protection.

13 And so people said, oh, so if we do
14 these de-SPAC deals and we don't get it all right,
15 there is a risk that we're quick to have to take
16 discovery. And I think that's a good outcome and
17 totally fair. And I think you're seeing changes. I
18 think the future of the SPAC space will be different.

19 I want to just briefly cover some of
20 the facts, because I know Your Honor is very familiar.
21 This is just for the record. But the deal here that
22 was challenged is Churchill III's \$5.7 billion
23 acquisition of MultiPlan. It was one of the largest
24 de-SPAC mergers of the period. In terms of corporate

1 structure, it had a lot of similarities with a lot of
2 the other de-SPAC transactions that came about.
3 They're all bespoke in their own way, but the
4 fundamental structure was consistent here.

5 You had defendant Michael Klein, who
6 is a former head of Citigroup's global M&A practice, a
7 formidable business person and banker. He formed
8 seven different SPACs during the key time period.
9 This one is number three. It was formed in October of
10 2019. He paid 25,000 to receive all of the company's
11 Class B founders shares.

12 He was chairman of Churchill III,
13 named all seven directors of the board. And as we
14 present in our papers, basically, all the members of
15 the board had significant ties, either to him by
16 family relationship or sitting on other SPAC boards
17 that Mr. Klein had created.

18 He took some of the founders shares he
19 had gotten for \$25,000 and paid the directors with it.
20 That was, again, a common practice but one which we
21 believed and alleged that just misaligned the
22 incentives of SPAC directors from the stockholders
23 that they're supposed to have a fiduciary duty to.

24 In the IPO, they raised in

1 February 2020 \$1.1 billion, and that started a
2 24-month window in which Churchill III would have to
3 either close the deal or liquidate and give investors
4 back their money and leaving the founders shares and
5 any private placement units worthless.

6 Now, if the deal was completed, the
7 founders shares, bought for a small amount, would
8 convert into 20 percent of the company's equity.
9 Again, the IPO was a \$1.1 billion IPO.

10 I don't remember if we did it in this
11 argument, but given kind of the analogy of hedge fund
12 managers, they're capitalists. They can make a lot of
13 money, but their model is 2 and 20. They do get paid
14 a base rate, but in the end, for them to make that 20,
15 they have to create value. And that's how they
16 wealthy.

17 This SPAC model was very different. I
18 call it the 20 model. It was create it, close the
19 deal. Doesn't matter how good or bad it is; you're
20 getting 20 percent of the equity of the company, I
21 guess as long as you don't make it go to zero very
22 quickly.

23 So then five months later, you have
24 Churchill III enter into a merger agreement to acquire

1 MultiPlan. That was in July of 2020. And that merger
2 closed on October 8th of 2020.

3 Shortly -- just about five -- just
4 over four weeks after the merger, on November 11,
5 2020, there was an analyst's report that highlighted a
6 number of facts not disclosed in the merger proxy,
7 most important of which was that MultiPlan's largest
8 client, United Health, was forming an in-house
9 competitor of MultiPlan called Naviguard.

10 We investigated and came to the view
11 that -- an independent view that some of the
12 allegations in that report were reliable, including
13 our belief that not only was United Health going to
14 transition some or all of the key accounts they had
15 run through MultiPlan to its own Naviguard division,
16 but that Churchill, or the board, knew about this risk
17 when they were soliciting the vote, and it wasn't
18 detailed.

19 Like I said, we analyzed the law, and
20 when we finally had a good understanding of how we
21 would approach the Court with this, March 25th, we
22 filed a first complaint, and then on April 9th, we
23 filed a second. They were consolidated. That led to
24 the motion to dismiss briefing, the argument that it I

1 touched on, and the Court denying the motion to
2 dismiss on January 3, 2022.

3 Discovery was extremely hard-fought.
4 It was many months. And I think Your Honor,
5 blessedly, only saw a fraction of the debating,
6 disputing, negotiating that took place here over every
7 issue. Sometimes it was after motions to compel were
8 filed, but very often, it was at the last second,
9 before we had to file a motion that was already fully
10 briefed. But the result, we got 80,000 documents from
11 defendants and nonparties, and it amounted to about
12 734,000 pages of discovery.

13 The last kind of high-level comment I
14 would make is we did think that the discovery was
15 going to allow us to prove liability, right, under a
16 fairness standard. We don't believe the process was
17 fair, and so we would prove the process -- we thought
18 we would actually prove that the price was unfair as
19 well. The question would be damages. Once you get to
20 an unfair price, how do you do damages?

21 And quite frankly, if the claim was
22 settled, we were very well aware that further
23 discovery was not going to change the risks we faced
24 on damages. I'll touch on those a little bit more as

1 I get to the elements. But that's really what led to
2 our settlement, is appreciating that we believed we
3 were going to win on liability and that there was
4 uncertainty about how damages would play out and what
5 is a novel case from the beginning.

6 So with that, I would turn to the
7 settlement factors. Basically, the Court looks at the
8 nature of the claims, the defenses, the legal and
9 factual obstacles we would face at trial, and the
10 delay, expense, and complexity of the litigation.
11 That's *Kahn versus Sullivan*.

12 And I would say that, taking it all
13 into account, we think this is a very good outcome for
14 the class. We start with the benefits. That's the
15 driving force. And that is a \$33.75 million
16 settlement amount. Dollars. There is no debate about
17 the value. It's a lot of money and appropriate.

18 And I think the objective "get" that
19 we got for the class is appropriate when you take a
20 look at what further litigation would have looked like
21 in this case.

22 Like I said, we actually were
23 confident in our liability case. It had a strange
24 path, Your Honor. I don't know if Your Honor ever had

1 reason to read it, but when the answer came in after
2 the motion to dismiss opinion, there was this
3 remarkable and, we thought, frustrating 16-page
4 prelude to the answer. We've never seen anything like
5 it. Hope never to see anything like it again.

6 Frankly, it just defiantly said our case is a fiction.

7 We think that -- we speculate that
8 there might have been reasons, like PR, marketing,
9 reputational, that really went beyond legal strategy,
10 because we didn't think it mattered for legal
11 strategy, but it sure told us, you have some targets
12 on your back, because the defendants are going to say
13 we're just flat-out wrong factually.

14 In the end, I think -- you know, we
15 right away said, okay. Show us. Show us we're wrong.
16 We don't have to waste anyone's time if we're really
17 wrong. It took a long time to get all that discovery
18 together, and our conclusion, which we presented to
19 defendants through the litigation, was we don't think
20 we're wrong about Naviguard, about a lot of things.
21 That said, there was going to be a hot contest.
22 Right? If they had a smoking gun proving we're wrong,
23 we have to respond to that.

24 And so we felt we could clearly refute

1 their allegations in that 16-page prelude, but
2 regardless of our view about what the record would
3 establish regarding unfairness, damages remained a
4 significant issue that we would have to grapple with
5 and the Court would have to grapple with.

6 Clearly, the liquidation price or, in
7 this case, more prominent, the redemption value, \$10
8 plus interest, it would represent, you know, a likely
9 ceiling for calculating damages. But then the
10 question is, okay, what's the base? What are you
11 subtracting from the \$10 to figure out damages? And
12 there were different ways that could play out.

13 The defendants previewed some of their
14 damages arguments by raising reliance as a basis to
15 oppose class certification. We thought, based on
16 Delaware law and how it was developing in other
17 pending cases and precedent, that there wasn't going
18 to be a real risk on class certification based on
19 reliance, but we understood that the underlying basis
20 for them to argue reliance would rear its head as we
21 got to damages.

22 Part of it is if we presented the
23 stock price, there is a question of what kind of
24 reliance should the Court have on the stock price as

1 an indicator of damages when what we have is a price
2 weeks or months after the closing of the deal, which
3 normally would be the operative time for calculating
4 value. And so the arguments raised in reliance that
5 we discounted heavily on class cert would have been a
6 factor on our ability to really hang our hat on the
7 stock price.

8 The alternative way to prove damages
9 would be valuation, you know, fundamental valuation.
10 And that's where -- that's the traditional, I think,
11 Delaware model. And that's where I think we
12 differentiate this case from other SPAC cases and the
13 real driver for why we value the settlement now rather
14 than making this the case that would go -- it's nice
15 that it was the first one to go to a motion to
16 dismiss, but we thought this may not be the first one
17 that should go to a trial.

18 Put simply, putting aside that, unlike
19 some sponsors of SPACs who, I guess, their backgrounds
20 are not as impressive as Michael Klein's, I mean here,
21 we had not only a fierce adversary but someone who is
22 clearly sophisticated. And there's all sorts of
23 aspects of the business, you know, of the value being
24 brought that would affect damages.

1 In particular, MultiPlan is not a
2 fictional business. Right? It's an actual business
3 with real operations. It has real revenues and real
4 earnings. And so while we alleged and believe that
5 the company was not worth \$10, and that if
6 shareholders really understood what's going on here,
7 they would have -- the SPAC would not have bought
8 MultiPlan and shareholders would have chosen to
9 redeem, if given enough choice, but this is a real
10 business, and so it's a lot harder when you get to
11 trial to prove the ultimate value of an actual
12 operating business.

13 Even though that's what we do before
14 Your Honor and you see it all the time, it is a bigger
15 challenge to do that, equate the value of a business
16 at a point in time when subsequent events have clearly
17 shown that it's trading much lower and it's not nearly
18 as valuable as \$10 per share. But how we go about it
19 would be a challenge.

20 And it's in contrast with,
21 unfortunately, a lot of the SPACs, a lot of private
22 companies that became public through a de-SPAC process
23 that, when you look at it, they don't have real
24 operations. They have a business model, a thesis, a

1 hypothesis of how they're going to create massive
2 amounts of value based on projections that don't pan
3 out.

4 And so, fundamentally, what we see is
5 this may be one of the harder cases to present to get
6 the real damages as opposed to a -- people could have
7 taken \$10, and what they were left with was some
8 tangible assets but no business to speak of. And I
9 think that's more common than it should have been in
10 the SPAC space.

11 And so that's why we said -- you know,
12 obviously, Your Honor knows we're not afraid to take a
13 case to trial. You know, we do what is necessary and
14 have a lot recently. But we felt that \$33.7 million
15 now is a tangible, very significant outcome in a world
16 where we could win liability and not know how damages
17 would play out.

18 Moving through the elements --

19 THE COURT: If I can ask you one
20 question about that. Is the entire --

21 ATTORNEY LEBOVITCH: Yeah.

22 (Overlapping speakers)

23 THE COURT: -- from D&O insurance?

24 ATTORNEY LEBOVITCH: The stip is

1 silent on it. And I have to say, Your Honor, I know
2 the insurance, and I know that this -- I think it's
3 possible that this is all insurance. I don't
4 recall -- normally, we would know. And I apologize.
5 I don't recall if, here, Mr. Klein or any other
6 entities, any of his entities, are funding portions of
7 this.

8 Based on the number and based on my
9 understanding of insurance, I wouldn't be surprised if
10 there's individual contributions or entity
11 contributions, but I actually don't know because we
12 didn't document it, and I don't recall learning it
13 otherwise.

14 THE COURT: Okay. Thank you.

15 ATTORNEY LEBOVITCH: Okay? All right.

16 So we were informed at the time we
17 reached the settlement -- again, there was a
18 significant documentary record. We actually engaged
19 with defendants through the fights in discovery, and
20 just processing the case, they understood some of what
21 we thought were hot documents that we had identified.
22 Some of them made their way to the Court. Some of
23 them didn't have to, but they knew that we had them
24 and understood them.

1 And at the same time, you know, while
2 we were educating defendants about the strengths of
3 our case, they were doing their best to pound away at
4 the perceived weaknesses in our case. So I think the
5 parties were well informed when we were valuing it. I
6 can assure you, when we read that prelude to the
7 complaint, you know, the premise then was, hey, look,
8 you prove it. And yeah, we probably don't even have a
9 case. And so, obviously, getting the defendants from
10 a world of this is, you know, all made up and a
11 fiction to paying 33.75 million is a significant move.

12 I will say, on the insurance, Your
13 Honor -- and again, I don't mean to dither, because I
14 gave you my best answer, I don't -- we negotiated
15 this -- I negotiated this settlement with
16 Mr. Neuwirth. There wasn't mediation. And so I
17 really -- I have reason to believe in other SPAC
18 cases, insurance disclaims any coverage, and so you do
19 have to get individuals. It's a real issue across the
20 board. And so, again, I negotiated this with
21 Mr. Neuwirth, and so they got the money. And I don't
22 want to presume that it was insurance or that it
23 wasn't, but we negotiated a number, and that was it.
24 It was kind of insurance was his problem, to be

1 honest.

2 THE COURT: I understand. Thank you
3 for that answer.

4 ATTORNEY LEBOVITCH: That's it.

5 Okay. And so then beyond our being
6 informed in this case, we have the experience of
7 counsel. And, you know, we're well known to the Court
8 and, hopefully, our work is respected. Obviously,
9 we've taken eight cases to trial in just over two
10 years. It's exhausting. We're past the days when
11 people can say plaintiffs' lawyers don't take cases to
12 trial. It's not our doing, but, obviously, if
13 defendants don't come with a reasonable number, we're
14 more than capable of answering the call to try the
15 case to prove what we have to do.

16 And here, there's something specific.
17 Like I said, there were no SPAC litigations in
18 Delaware before we filed this particular case. You
19 know, while people are kind of catching up, I do think
20 that at this point, you know, our team that was living
21 with MultiPlan from the beginning and putting it
22 together probably have given at least more thought --
23 I can't say we're smarter about it, because we may not
24 be that smart, but we've definitely given more thought

1 and effort to the issues than probably any lawyers out
2 there, forget plaintiffs' counsel. And so we
3 understand -- I think we understand the risks and
4 benefits of these cases.

5 And obviously, defense counsel were
6 vigorous. And I promised Mr. Neuwirth I wouldn't have
7 any other characterization of how vigorous they were.
8 But it was hard-fought, albeit respectfully.

9 The plaintiffs participated in and
10 approved the settlement.

11 And last, we don't have a single
12 objector here. And as Your Honor knows, there's
13 plenty of cases where people aren't shy to object.

14 So with that, unless Your Honor has
15 other questions, that's my presentation on the *bona*
16 *fides* of the settlement.

17 THE COURT: No questions. Thank you.

18 ATTORNEY LEBOVITCH: So on class cert,
19 I can go through the elements. I can do that. I
20 don't know -- a couple times, the courts have said to
21 just skip class cert.

22 THE COURT: I would love if you would
23 walk through the typicality and commonality elements.

24 ATTORNEY LEBOVITCH: Okay. So the --

1 that's interesting.

2 Okay. So the typicality -- I'll give
3 that the high-level, easy answer, but I think if
4 you're asking if there's deeper questions, then it's
5 so. We have common questions about whether defendants
6 breached their fiduciary duties, you know, in
7 connection with doing the de-SPAC and whether there
8 was harm. And there's no conflicts between lead
9 plaintiffs and the class.

10 And so on typicality, I -- feel free
11 to cut me off and reframe it, but I guess I'm assuming
12 Your Honor is asking whether there's some world of
13 subclasses, like some issue where portions of the
14 class have different interests, or is there something
15 specific that you're getting at with the focus on
16 commonality and typicality?

17 THE COURT: I saw the discussion in
18 your papers about the potential debate on reliance.
19 And that's something that I touched on in my decision
20 in this case and in the subsequent decision on similar
21 issues. I was just wondering if you could talk a
22 little bit more about that.

23 ATTORNEY LEBOVITCH: Yeah. If I
24 understand it -- and I'll say, I remember reading the

1 footnote in this opinion, and it was the only aspect
2 of the opinion that I kind of struggled with to
3 understand what was the Court getting at. And I saw
4 thought the more recent opinion in *Gig3*, I thought,
5 wow, the Court is way ahead of me and us on thinking
6 these things through. I thought it clarified itself.

7 Hopefully, what's responsive is this:
8 You have these transactions where, you know, people
9 have the choice about redeeming or not. It is a
10 safety valve from what I would consider damages in an
11 entire fairness case. And so the way I've come to
12 think of these, and I think it's consistent with what
13 you said in *Gig3*, is these are entire fairness cases,
14 and, you know, process and price.

15 But then the redemption right -- you
16 know, it's not a claim on redemption. People aren't
17 suing for the interference with the redemption right.
18 They're suing for an unfair deal that gives rise to a
19 direct claim. But to the extent people either
20 exercise the redemption right or potentially have the
21 absolute ability to exercise the redemption right,
22 like fully informed and all that, you would basically
23 mitigate damages based on the fact that, well, you had
24 an unfair deal, but you could have just taken the \$10.

1 For what it's worth, I mean, my
2 understanding of this has evolved a bit, because in
3 normal mergers, we look at the recommendation as
4 something that is a fiduciary act by the board. And I
5 think that, you know, one way to think about it is why
6 did the board recommend this deal in the first place.

7 And in a world where the vote is
8 empty -- for reasons I think you touched on in the
9 *Gig3* opinion, very often, it's an empty vote -- in a
10 world where you kind of do have a fiduciary duty to
11 all shareholders, and you know some shareholders
12 aren't -- that they're not going to be exercising
13 their redemption rights, for various reasons, and some
14 SPACs can't even exercise redemption if you didn't
15 hold it at a certain time period, I think here, what
16 you have here and in a lot of these cases, you have to
17 question, why did the board even recommend this deal
18 as opposed to just letting the thing liquidate and
19 letting everyone get their money back, and you don't
20 even put it on them to redeem.

21 But this was a case where there was a
22 recommendation. I think at the time the merger was
23 breached, the board maybe didn't even know everything
24 that it ultimately knew before the vote about the

1 problems with the company.

2 And I think reliance would play itself
3 into damages, you know, in the sense of, okay, what
4 would a reasonable investor have known and understood
5 they were getting when they were, you know, sticking
6 in with the deal. And I think it would raise some
7 questions about, you know, if you had good
8 disclosures, does it mean there's no claim. I
9 remember Your Honor asking that in a different
10 context. And I think that it didn't come up here. It
11 didn't come up in the other case.

12 But I think the Court would have to
13 actually think long and hard if you had really good
14 disclosures, like we took \$10 from you, we're buying
15 \$2 of coal with your money, you know, are there
16 reasons why the board shouldn't even be recommending
17 that deal in the first place, and is that a breach of
18 duty because it's facially destroying value, or can
19 you say that the board can recommend the deal because
20 they can cash in their founders shares and leave it to
21 the class of shareholders to, you know, read,
22 understand the proxy, and say, wait, why I would give
23 up \$10 to get \$2 of coal?

24 So it's a question that hasn't come up

1 yet, and I don't know if that's responsive to Your
2 Honor's questions now in a couple of cases, but I
3 think that's the best answer I can offer you today.

4 THE COURT: It is. I'll take it.
5 Thank you very much for indulging my question.

6 ATTORNEY LEBOVITCH: Okay. Yeah.
7 Absolutely.

8 So other than that, again, on class
9 cert, we have numerosity. I mean, it's a prototypical
10 numerosity, commonality, typicality, and hopefully
11 adequacy. And this is a prototype 23(b)(1) and
12 23(b)(2) class under Delaware law. So I don't think
13 there's any controversy that it's an appropriate class
14 action, you know, putting aside Your Honor's -- taking
15 into account Your Honor's question about how issues of
16 reliance might play in down the road, I think.

17 Can I move on?

18 THE COURT: You may.

19 ATTORNEY LEBOVITCH: Okay. So our
20 plan of allocation is, hopefully, really simple. We
21 tried to keep it simple. We thought about a lot of
22 different ways to do this. But Delaware has moved
23 away from the claims process. And, you know, I think
24 there could be cases where we would present the claims

1 process based on the facts of the case. Sometimes
2 appropriate. You know, here, you know, we are going
3 to distribute the *pro rata* share of the fund to the
4 people who held the shares as of I guess the closing
5 of the deal. And that's traditional. That's been
6 approved very often in the last I'd say seven or eight
7 years since I think Vice Chancellor Laster raised the
8 idea of avoiding a claims process and just having the
9 damage claim travel with the shares up until a point
10 in time. So that's what we did here, and we think it
11 is reasonable for this and similar cases. Okay?

12 THE COURT: No questions on that.
13 Thank you.

14 ATTORNEY LEBOVITCH: Great. So with
15 that, then, we get to the fourth and final motion, the
16 request for the fee award. It's the *Sugarland*
17 factors. The most important *Sugarland* factor is the
18 benefits achieved, and that's the \$33.75 million
19 payment.

20 Our request, I should say, is for
21 \$6.75 million, which, when you take out the expenses,
22 amounts to just under 20 percent. I mean, when you do
23 the math, it's like 19.8 percent of the settlement
24 fund. We cite at pages 47 to 49 of our brief many

1 precedents supporting a 20 percent or greater fee
2 award, even when cases do settle early.

3 Here, we settled on the eve of
4 depositions but, really, at the full end of document
5 discovery and in a situation where, I would say,
6 because of the interaction of the parties, both on the
7 litigation side and substantive interaction about the
8 merits, you know, in settlement talks, we were all
9 very informed. 734,000 pages of production. And so
10 there was really arm's-length, vigorous negotiation of
11 the settlement, and it was, you know, I think
12 informed.

13 We did not get to the point of
14 depositions, but I think in this case, considering the
15 complexity and novelty, it's well earned. You know,
16 this is not a routine case. And so I don't think the
17 absence of depositions should weigh significantly
18 here.

19 And in part, that's because of the
20 risks of the action. Again, they're exceptional. I
21 mean, we spent a lot of time thinking of, well, what
22 is the theory under Delaware law? And now, it could
23 seem obvious, but I assure you, from the summer of
24 2020 until when we filed the first case here in March,

1 it wasn't obvious to us to figure out the right way to
2 present on the right facts to the Court.

3 And so there was this risk that even
4 if we would prove an unfair process, which we thought
5 we would prove, we have this damages risk and
6 uncertainty, if you try a case and then the Court
7 says, no, I don't agree with the method you're
8 presenting in a world where damages in a SPAC case
9 would be novel. And so that was a real risk.

10 Again, standing of counsel, the Court
11 can decide if we have the right standing to warrant
12 the fee award, but we'd like to think that, you know,
13 we brought skill and, clearly, defense counsel are
14 some of the best in the business and brought their
15 best to this case, without a doubt.

16 The implied hourly rate multiplier is
17 a cross-check. We think that just supports the
18 reasonableness. This was very heavily fought. We had
19 almost 6,200 hours and a total lodestar of almost
20 3.3 million. So the implied hourly rate is under
21 1,100, it's \$1,079.71, and it amounts to just over a
22 2.05x multiplier. So again, page 55 cites implied
23 hourly rate precedents, the lodestar multipliers; well
24 within precedent.

1 So, obviously, it's a contingent case
2 and, more importantly, truly complex. I discussed
3 that, so I won't belabor it, but it's an upgrade. To
4 the extent there was a question about the fee, I do
5 think the complexity and novelty of the case is an
6 upgrade factor.

7 Imagine, we could have brought this
8 and misframed the whole issue, and all of a sudden,
9 the entire SPAC space is all in a frenzy, and all
10 these deals are happening, and no one is even
11 challenging that investors are losing money hand over
12 fist. So like I said, we're really proud of what we
13 did here, and I think it showed value-added
14 litigation.

15 And then, finally, there's been no
16 objections to the fee award, so that should give the
17 Court comfort as well.

18 So I don't know if Your Honor has any
19 questions. Otherwise, that's all I have.

20 THE COURT: I do have one final
21 question for you. And I could have asked it with my
22 question on class cert, but I'll ask it here.

23 How many shares are in the class that
24 the recovery is going to, *pro rata*? I'll tell you, I

1 estimate over 100 million shares, and that's based on
2 the fact that there were 110 million units sold in the
3 IPO, but I want to make sure that's consistent with
4 how you're thinking about it.

5 ATTORNEY LEBOVITCH: You know what? I
6 always have the number. I'm going to -- because I'm
7 here in this mediation, I don't have the number with
8 me, and so I'll ask if anyone has it.

9 THE COURT: That's okay.

10 ATTORNEY LEBOVITCH: Again,
11 conceptually, the way I would get to the number is
12 there was 110 million originally, and that's what was
13 sold to the public.

14 THE COURT: Right.

15 ATTORNEY LEBOVITCH: Here, yeah,
16 they're trading. You don't know how much the shares
17 have separated from the warrants. But I would assume
18 a fair amount of turnover because the stock traded
19 above 10 for a while, I think right before or even
20 after the announcement of the deal, so there was a lot
21 of turnover from the IPO investors. But I'm not aware
22 of any other event that would have reduced the share
23 counts. Sometimes that happens. You know, you seek
24 an extension; you have to give a redemption right.

1 I'm getting an email here that I guess
2 of the 110, a number went to insiders or affiliates,
3 the banks. I'm being told it's 92 million shares in
4 the float, because you're taking out -- oh,
5 redemptions. That's what I forgot. There's
6 redemptions and Treasury shares. There are people
7 excluded. That's it. If you take out the exclusions,
8 I think we get to 90 or 92 million.

9 THE COURT: Okay.

10 ATTORNEY LEBOVITCH: That would make
11 sense.

12 THE COURT: That's helpful. That's
13 not wildly out of line of what I was estimating.
14 Thank you very much.

15 ATTORNEY LEBOVITCH: Okay.

16 THE COURT: I have no further
17 questions for you, and I appreciate you doing this in
18 the midst of a mediation.

19 ATTORNEY LEBOVITCH: Okay. Thank you.
20 Happy to do it. Thank you for accommodating our
21 request to do it remotely.

22 THE COURT: No problem at all.

23 Mr. Lebovitch, anything further that
24 you'd like to add before I hear from Mr. Neuwirth?

1 ATTORNEY LEBOVITCH: No.

2 THE COURT: Okay.

3 ATTORNEY LEBOVITCH: Not from me.

4 Thank you.

5 THE COURT: Thank you.

6 Mr. Neuwirth, is there anything you
7 would like to add on behalf of your clients?

8 ATTORNEY NEUWIRTH: Just briefly, Your
9 Honor. And thank you for hearing us this afternoon.

10 I am John Neuwirth on behalf of
11 defendants. I certainly will not get into a
12 counter-recitation of the facts and the law from our
13 perspective. I appreciate that the plaintiffs'
14 counsel needed to do so for the record. But I do want
15 to reiterate what's in the settlement agreement, and
16 as also acknowledged in plaintiffs' moving settlement
17 brief, which is that we certainly deny all of the
18 allegations of wrongdoing and deny any liability
19 whatsoever. And we stand behind the answer that we
20 filed, including its preface. So that's all I'll add,
21 so as not to burden the record.

22 I also, to the extent it's helpful for
23 the Court, would point out on your question about
24 funding of the settlement, the settlement agreement,

1 Your Honor, at paragraph B(2)(a) provides some detail
2 as to where the funding for the settlement is coming
3 from, to the extent that Your Honor wants to take a
4 look at that.

5 That's all I have on behalf of
6 defendants, unless you have questions for me.

7 THE COURT: Thank you, Mr. Neuwirth.
8 I appreciate it. No questions for you.

9 ATTORNEY LEBOVITCH: Your Honor I
10 apologize. I missed B(2)(a) in preparing here.

11 Thank you, John.

12 ATTORNEY NEUWIRTH: You were speaking,
13 and I had the benefit of looking, so don't worry.

14 ATTORNEY LEBOVITCH: Thank you.

15 THE COURT: Thank you both very much.

16

17 Is there anyone else from the
18 defendants' side who would like to be heard before I
19 deliver my ruling?

20 Okay. Well, then I will proceed to
21 give you my ruling on the settlement now.

22 Thank you very much for your
23 presentation this afternoon and for your papers, which
24 I reviewed in advance of the hearing. Today I heard

1 from the parties regarding the proposed settlement of
2 the matter captioned *In re MultiPlan Corporation*
3 *Stockholders Litigation*, which is Civil Action No.
4 2021-0300-LWW.

5 I have several matters on the agenda
6 today. The first is to consider whether to certify
7 the class under Rule 23 for purposes of the
8 settlement; second is to determine whether to approve
9 the settlement and the proposed plan of allocation;
10 and finally, to assess whether the plaintiffs' counsel
11 is entitled to a fee award.

12 I am going to take the issues in a
13 slightly different order than Mr. Lebovitch presented
14 them, but before I do that, I'll start with a brief
15 summary of the factual allegations in the complaint
16 and the events leading up to the settlement, for the
17 sake of the record.

18 I note that the facts I'm about to
19 describe have not been proven. I'm not making any
20 findings of fact today. And the defendants, of
21 course, deny the allegations in the complaint and any
22 liability.

23 For a more detailed discussion of the
24 background of this matter, I refer any interested

1 listeners to my January 3, 2022, opinion on the
2 defendants' motion to dismiss.

3 In this action, the plaintiffs
4 challenge the \$5.7 million July 12, 2020, merger
5 between Churchill Capital Corp. III, a SPAC, and
6 MultiPlan, Incorporated, which was then a private
7 company.

8 Churchill was formed in October 2019
9 by Defendant Michael Klein through the SPAC sponsor,
10 Defendant Churchill Sponsor III, LLC. The business
11 combination or de-SPAC transaction between the SPAC
12 and MultiPlan was one of the largest de-SPAC
13 transactions in recent times.

14 A report by Muddy Waters, which
15 describes itself as a due diligence-based investment
16 firm, regarding MultiPlan came out on November 11,
17 2020. That report questioned MultiPlan's ongoing
18 commercial ties to its largest customer. The
19 plaintiffs subsequently brought suit in this court.

20 The plaintiffs alleged in their
21 complaint that the directors of the SPAC and the
22 sponsor, along with Klein and the SPAC's controllers,
23 breached their fiduciary duties in connection with the
24 de-SPAC merger.

1 The core allegation was that the
2 fiduciaries knew and intentionally withheld
3 unfavorable information about the target that public
4 stockholders would have considered material in
5 deciding whether to approve the deal and, more
6 critically, to decide whether to exercise their
7 redemption rights.

8 The plaintiffs also asserted that the
9 directors and controllers were conflicted in view of
10 the upside they stood to make in a value-decreasing
11 merger while public stockholders would have benefited
12 from a liquidation as opposed to a value-decreasing
13 merger because they would receive back their \$10 per
14 share investment plus interest.

15 The defendants moved to dismiss under
16 a variety of theories. They argued that the
17 plaintiffs' claims were derivative and that the demand
18 requirement had not been satisfied; that the claims
19 were incognizable holder claims; that the claims were
20 contractual rather than equitable; that stockholders
21 had consented to the conflicts raised in the
22 complaint; that the sponsor and directors were aligned
23 with public stockholders' interests; and so on.

24 My January 2020 opinion denied the

1 motions to dismiss except as to a claim against the
2 CFO, who I dismissed from the action. And in my
3 opinion, I determined that the plaintiffs had pleaded
4 direct claims; that the appropriate standard of review
5 was entire fairness; and that it was reasonably
6 conceivable under that standard of review that the
7 plaintiffs had pleaded viable, nonexculpated claims
8 against the defendants based on the alleged
9 impairments of public stockholders' redemption rights.

10 The parties subsequently commenced
11 discovery. The plaintiffs served 156 interrogatories,
12 64 document requests, and 34 subpoenas on nonparties.
13 Over 80,000 documents were produced to the plaintiffs,
14 totaling over 700,000 pages.

15 The plaintiffs also responded to 60
16 document requests themselves and 40 interrogatories,
17 producing about 4,000 documents to the defendants.
18 Multiple motions to compel were litigated, with fact
19 discovery scheduled to close on January 13, 2023.

20 Between February and October 2022,
21 while discovery was ongoing, the parties periodically
22 engaged in settlement discussions. On October 27th,
23 the parties entered into a memorandum of
24 understanding. A stipulation of settlement was

1 ultimately filed with the Court on November 17, 2022.
2 Notice of the settlement was disseminated on
3 December 30th pursuant to a scheduling order that I
4 entered on December 5th.

5 And I note that no objections to the
6 settlement have been received, no settlement objectors
7 have appeared on the Zoom today, and I can confirm
8 that none have appeared here at the courthouse.

9 With that background, I am going to
10 turn to the first item on my agenda, which is class
11 certification.

12 The plaintiffs seek to certify a class
13 of holders of Churchill's common stock between the
14 period when the SPAC completed its IPO, and when it
15 closed the merger with MultiPlan, excluding, of
16 course, the defendants. For the specifics of the
17 class definition, see Sections A(1)(b) and A(1)(f) of
18 the settlement stipulation.

19 The defendants intended at another
20 stage of the case to oppose class certification
21 because, according to the settlement brief, the
22 defendants intended to argue that the plaintiffs were
23 unable to establish reliance on a class-wide basis.
24 This is an interesting question to me but,

1 fortunately, it's not one that I need to resolve
2 today. The parties agree that a class should be
3 certified for purposes of the settlement only, and so
4 do I.

5 A class must satisfy Rule 23(a) and
6 fall within one of the three subsections of Rule 23(b)
7 for the Court to certify it. Court of Chancery Rule
8 23(a) has four requirements: numerosity, commonality,
9 typicality, and adequacy of representation. I believe
10 that each of those requirements are satisfied here for
11 purposes of the settlement. Although I appreciate
12 counsel indulging my questions on commonality and
13 typicality, the parties do not dispute that these
14 elements are met for today's purposes, and I have no
15 reason to conclude otherwise.

16 In terms of the Rule 23(b)
17 requirements, certification would be appropriate under
18 either subsections (1) or (2), as set forth in the
19 brief.

20 I am therefore going to certify a
21 non-opt-out class as defined in the stipulation of
22 settlement for purposes of the settlement only.

23 The other Rule 23 requirements have
24 also been met here. The two named plaintiffs filed

1 affidavits complying with Rule 23(e). In terms of
2 notice, I determined that the proposed form and manner
3 of notice was adequate under Rule 23 when I entered a
4 scheduling order to that effect on December 5, 2022.

5 The provision of notice was also
6 adequate. An affidavit from an employee of the
7 settlement administrator details that the notice was
8 mailed to class members and that notice was provided
9 through a settlement website. In addition, the
10 summary notice was published in *Investors Business*
11 *Daily*. And again, I note for the record that no
12 objections have been received to date.

13 Having certified the class for
14 purposes of this settlement and confirming that the
15 Rule 23 requirements are met, I next turn to analyzing
16 whether the proposed settlement should be approved as
17 fair, reasonable, and adequate.

18 The Court's function is to "consider
19 the nature of the claim, the possible defenses
20 thereto, the legal and factual circumstances of the
21 case, and to apply its own business judgment in
22 deciding whether the settlement is reasonable in light
23 of those factors." There, I'm quoting from *In re*
24 *Philadelphia Stock Exchange*, 945 A.2d 1123 at pages

1 1137 to 1138.

2 In short, my task is to evaluate
3 whether the settlement is fair and reasonable,
4 focusing on the "give" and the "get" of the
5 settlement. That means I must compare the value of
6 the benefits achieved by the settlement against the
7 strength of the claims that are being released.

8 The facts and circumstances that the
9 Court considers in assessing whether a proposed
10 settlement is fair and reasonable are described by the
11 Delaware Supreme Court in the *Polk v. Good* decision,
12 which is 507 A.2d 531.

13 I'll start by assessing the "give."

14 The plaintiffs have agreed to release
15 claims arising out of this action, the allegations in
16 this action, and ownership of Churchill common stock
17 or warrants. See Section A(1)(dd) of the settlement
18 stipulation for the definition of "Plaintiffs'
19 Released Claims."

20 That release is, in my view,
21 appropriately tailored to the factual predicate of and
22 the claims advanced in the complaint.

23 In terms of the strength of the
24 claims, certain of the released claims survived a

1 motion to dismiss, but the plaintiffs faced hurdles.
2 For example, much of the plaintiffs' case depended on
3 the entire fairness standard, which is an extremely
4 fact-intensive standard. The plaintiffs assert in
5 their brief that they believe there was a low
6 probability the defendants would prove the process
7 surrounding the transaction was entirely fair.

8 I am sure the defendants disagree with
9 that, given the positions set out in their answer that
10 disputes many of the allegations in the complaint, but
11 the plaintiffs acknowledge that they faced some
12 challenges when it came, ultimately, to the fair price
13 part of the analysis, more specifically damages, even
14 if they prevailed on liability.

15 For example, the \$10.03 redemption
16 price potentially represented a ceiling for
17 calculating damages. And since this was a novel
18 action, there were questions surrounding how the Court
19 would assess the base for calculating damages.

20 These are all very interesting
21 questions for me as well, but, again, fortunately,
22 ones that I need not resolve today. It suffices to
23 say, whether based on a valuation analysis or
24 considering the stock price, the measure of damages,

1 to the extent anywhere appropriate, was uncertain, and
2 as of yet, it's a question that's untested in these
3 types of cases, leaving some measure of risk for the
4 plaintiffs in terms of a recovery.

5 Finally, there were questions
6 regarding the need to prove causation to show an
7 entitlement to damages.

8 So against that uncertainty is the
9 "get" of the settlement, which is a certain recovery
10 for the class, a \$33.75 million fund. The cash
11 settlement is substantial, and it's a self-pricing
12 benefit to the class.

13 I note that the arm's-length
14 negotiations between counsel led to this settlement.
15 And the lack of objections as well supports my
16 conclusion that this cash settlement is fair and
17 reasonable, given the uncertainty and the risks facing
18 the plaintiffs if they pursued their claims.

19 So with all of that, weighing these
20 factors alongside the "give" and the "get," I believe
21 that the settlement is fair, reasonable, and adequate,
22 and I approve it on that basis.

23 I am also going to approve the
24 proposed plan of allocation.

1 As set forth in the plan of allocation
2 that was submitted to me, the net settlement amount
3 will be distributed directly to eligible class members
4 on a *pro rata*, per-share basis. The plan of
5 allocation is consistent with those endorsed by the
6 Court in other recent class action settlements. It
7 avoids the potentially high administrative costs of a
8 claims process that I don't think would be especially
9 appropriate here. And I agree with counsel that this
10 is the most reasonable and adequate plan of
11 allocation.

12 Finally I will address the request for
13 an award of attorneys' fees and expenses for
14 plaintiffs' counsel.

15 Plaintiffs' counsel requests a fee
16 award of \$6.75 million, which is inclusive of about
17 \$83,000 of expenses.

18 In setting fee awards, the Court of
19 Chancery "must make an independent determination of
20 reasonableness." That's from the *Goodrich v. E.F.*
21 *Hutton Group, Incorporated* case, which is 681 A.2d
22 1039.

23 The role of the Court in setting a fee
24 award is to exercise its own business judgment in

1 determining whether an award is reasonable and
2 appropriate. The *Sugarland* factors traditionally
3 guide this analysis.

4 I will begin by considering the
5 benefit conferred in the litigation, which is the most
6 important of the *Sugarland* factors. As I mentioned,
7 the settlement provides the eligible members of the
8 class with a \$33.75 million fund to be distributed *pro*
9 *rata*. This is a substantial and concrete benefit by
10 any measure.

11 Under the *Americas Mining* case, when a
12 case settles after the plaintiffs have engaged in
13 meaningful litigation efforts, typically including
14 discovery, likely multiple depositions, and some level
15 of motions practice, fee awards range from 15 percent
16 to 25 percent of the common benefit conferred.

17 This case underwent meaningful motions
18 practice, surviving a motion to dismiss. It settled
19 before depositions but after extensive document and
20 written discovery that I described earlier.

21 The fee sought is right in the middle
22 of the relevant range at 20 percent, which seems
23 appropriate to me, given the hard-fought litigation
24 that occurred before the settlement was reached.

1 Again, considering the complex motion
2 to dismiss that the parties litigated here and the
3 substantial document production and written discovery,
4 I agree that a 20 percent *Americas Mining* range is the
5 correct one.

6 After considering the *Americas Mining*
7 range in view of the quantifiable settlement value,
8 the Court typically evaluates the lodestar as a
9 cross-check.

10 Plaintiffs' counsel spent a total of
11 6,174 hours on this case from the commencement of the
12 action through the date the stipulation of settlement
13 was signed. After subtracting out expenses, the
14 implied hourly rate from the net requested fee award
15 comes out to about \$1,079. That's not out of the
16 realm of implied hourly rates routinely approved by
17 this Court for experienced counsel like the counsel
18 here.

19 The lodestar itself comes out to about
20 3.3 million. The requested fee of 6.75 is about 2.05
21 times the lodestar. That multiplier is within
22 precedent if not a bit high, but when I consider the
23 additional *Sugarland* factors, they further indicate to
24 me that the fee sought is ultimately appropriate.

1 For one, the case was complex and
2 involved a number of fact- and legal-intensive issues.
3 This was the first suit brought pressing breach of
4 fiduciary duty claims on behalf of a stockholder class
5 of SPAC stockholders concerning the alleged impairment
6 of the redemption right.

7 I, myself, can attest to the
8 complexity of resolving a number of the issues
9 presented in considering these claims under Delaware
10 law. It was no small feat, and it required a great
11 deal of work by all of the counsel involved.

12 The plaintiffs' counsel spent a
13 substantial amount of time and effort litigating this
14 case, which has been pending for more than two years
15 and involved meaningful motions practice and
16 discovery, as I mentioned earlier. This case was not
17 in its infancy when it settled.

18 Counsel is, of course, experienced and
19 extremely well-qualified. The case was brought on a
20 contingent basis. And as I mentioned before, there
21 were significant risks.

22 So, taken together, the fee falls
23 within the appropriate *Americas Mining* range, the
24 lodestar is not wildly out of line as a cross-check,

1 and the other *Sugarland* factors support the fee
2 requested.

3 I conclude, given that, that it is
4 appropriate, and I am going to award the full amount
5 of the fees requested.

6 To recap, since I have been talking
7 for quite a while, I am going to certify the class,
8 approve the settlement, approve the plan of
9 allocation, and award the full amount of the fee
10 requested.

11 I believe that there is a final order
12 on the docket, and I intend to grant it later today.

13 Thank you very much for your efforts
14 here. Congratulations to all of you for putting this
15 interesting and complicated case to rest. I think
16 this is a great outcome for everyone.

17 ATTORNEY LEBOVITCH: Thank you for
18 your efforts, Your Honor. Thank you very much.

19 THE COURT: Thank you very much. I
20 appreciate it.

21 ATTORNEY NEUWIRTH: Thank you.

22 THE COURT: Be well.

23 ATTORNEY NEUWIRTH: You too.

24 ATTORNEY LEBOVITCH: Bye-bye.

(Proceedings concluded at 2:30 p.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 52 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 27th day of March, 2023.

/s/ Jeanne Cahill

Jeanne Cahill, RDR, CRR
Official Chancery Court Reporter
Registered Diplomat Reporter
Certified Realtime Reporter

Tab 3

— — —

C. A. No.
2023-1152-JTL

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Page: 1

1 APPEARANCES:

2 RANDALL J. BARON, ESQUIRE
3 CHRISTOPHER LYONS, ESQUIRE
4 ERIK W. LUEDEKE, ESQUIRE
5 JASON M. AVELLINO, ESQUIRE
6 TAYLER D. BOLTON, ESQUIRE
7 Robbins, Geller, Rudman & Dowd, LLP
8 -and-

9 CHRISTINE M. MACKINTOSH, ESQUIRE
10 DAVID WISSBROECKER, ESQUIRE
11 Grant & Eisenhofer, PA
12 -and-

13 GREGORY E. DEL GAIZO, ESQUIRE
14 Robbins, LLP
15 For Plaintiffs

16 BLAIR CONNELLY, ESQUIRE
17 NATHAN TAYLOR, ESQUIRE
18 Latham & Watkins, LLP
19 -and-

20 PAUL J. LOUGHMAN, ESQUIRE
21 Young, Conaway, Stargatt & Taylor, LLP
22 For Defendants

23 SAMUEL L. CLOSIC, ESQUIRE
24 JOHN G. DAY, ESQUIRE
Prickett, Jones & Elliott, PA
-and-

JASON A. URIS, ESQUIRE
Kaplan, Fox & Kilsheimer, LLP
For Interested Parties/Objectors,
Stadium Capital, LLC and David Sherman

- - -

1 FRIDAY, DECEMBER 6, 2024, 1:30 P.M. ET

2 ---000---

3 THE COURT: Welcome everyone. Introductions
4 people want to make?

5 ATTORNEY MACKINTOSH: Good afternoon, Vice
6 Chancellor Laster. Christine Mackintosh from Grant &
7 Eisenhofer. With the court's permission, Mr. Baron
8 from Robbins Geller will be making the presentation.

9 THE COURT.

10 THE COURT: Mr. Baron, you know you have to
11 stand up, sir.

12 ATTORNEY BARON: Oh, yes, Your Honor.

13 THE COURT: All right. Thank you.

14 ATTORNEY MACKINTOSH: We are also joined by
15 Chris Lyons from Robbins Geller. Greg Del Gaizo from
16 Robbins, LLP. Erik Luedeke from Robbins Geller.
17 Jason Avellino from Robbins Geller. David
18 Wissbroecker from my firm. Tayler Bolton from Robbins
19 Geller.

20 Rest assured, this time is not being included
21 in our lodestar today.

22 THE COURT: Well, thank you very much. I
23 appreciate it.

24 From the defendants?

1 ATTORNEY LOUGHMAN: Good afternoon, Your
2 Honor. Paul Loughman from Young Conaway. On behalf
3 of defendants, with me is Blair Connelly from Latham &
4 Watkins, and also Nathan Taylor from Latham & Watkins.

5 Your Honor, with your permission, Mr. Connelly
6 will be presented on behalf of defendant.

7 THE COURT: Thank you for being here. See,
8 they know to stand up over here on this side.

9 ATTORNEY CLOSIC: Good afternoon, Your Honor.
10 Samuel Closic from Prickett, Jones on behalf of the
11 plaintiffs in the Mehedi action. With me from my firm
12 is John Day, and from the Kaplan Fox firm is Jason
13 Uris. With Your Honor's permission, Mr. Uris will be
14 making presentation today. Thank you.

15 THE COURT: Thank you all for being here as
16 well.

17 ATTORNEY BARON: May I approach the court,
18 Randall Baron. Again, I apologize for not standing.
19 I should know better.

20 THE COURT: If I had a quarter for every New
21 York, California lawyer who didn't stand up, you know,
22 I'd probably have to recuse myself.

23 ATTORNEY BARON: Your Honor, we're here today
24 for the argument on final approval of Siseles v.

1 Lutnick, the view matter.

2 As the court's well aware, we're here to look
3 at five issues. The approval of the settlement
4 itself, approval of the plan of allocation,
5 certification of a class pursuant to rule 23(a),
6 23(b)(1), and 23(b)(2). Award of attorney's fees and
7 reimbursement of expenses, and approval of the
8 incentive payments to the named plaintiff.

9 I will attempt not to simply repeat what's in
10 our papers, and I do wish to spend a little bit more
11 time on a couple of issues. In particular, the plan
12 of allocation and the attorney's fees, which I think
13 deserves a little extra discussion.

14 As to the first issue, settlement is fair,
15 reasonable, and adequate. As we note it's a \$12
16 million cash settlement. It's approximately 32 cents
17 per share. It's important that in this litigation
18 class members would not have gotten any additional
19 money, but for this litigation. The amount is
20 consistent with other cases and some were MultiPlan
21 cases. I think it's significant here given that the
22 stock price here never went above 10.

23 It dropped in value in months by half of the
24 value, and ultimately after the complaint was filed,

1 there was a 60 to one reverse split. The company went
2 into bankruptcy. The money that shareholders or class
3 members get is actually real money where they have
4 little value. And given the sources of recovery
5 issues challenging bankruptcy, I think that this is a
6 fair, reasonable, adequate settlement.

7 If I can move on to the plan of allocation.
8 The reason I want to spend a little bit more time on
9 the plan of allocation is that we -- in this plan of
10 allocation is a little different than in the MultiPlan
11 and some of the others.

12 It's different than I think the work that we
13 did in goal in PLX where we would just send the money
14 to shareholders. The reason for that is our view is
15 if you just sent it to the shareholders on a pro-rata
16 basis, there would be some people who sold at \$10,
17 some people who sold at \$9, some people who wrote it
18 all the way down to pennies. And our view was that
19 that doesn't seem like an equitable allocation at the
20 end of the day.

21 So what we have done is hired experts to build
22 a plan of allocation, in which that money would
23 primarily make all people even as much as they could
24 based upon the amount and that we would reserve, I

1 think, it was 10 cents per share for a nominal damages
2 amount. And since nobody was over 10, everybody would
3 get that nominal amount and we thought that was the
4 most equitable way of doing so.

5 I think it's interesting in doing that is
6 that, as the court noted in Quantum State, we don't
7 really know how damages work in one of these cases
8 yet. We don't know whether the, you know, what the
9 number is or whether that number is a 10(b)(5)
10 deflation measure. But I do think that in any of
11 those circumstances, in the plan of allocation, the
12 court would want us to allocate it so that the people
13 who were hurt the worst would get as -- the most and
14 the people who weren't, would not. To the extent in
15 those cases in which there was sales over 10, clearly,
16 those people shouldn't get that windfall.

17 I think that we're not going to run into the
18 -- we've started another one with these as the court
19 note, as we say in our papers. It doesn't look like
20 it's running into the Dole problem. I think it's much
21 easier. There's a smaller group of people they're
22 having to show that they held shares and they were
23 shareholders of record at the time of the shareholder
24 vote, basically, so I think that we're not getting

1 that same kind of problem that we got in Dole.

2 But if we do, I guess we'll be back, but I
3 don't think we're going to see that problem.

4 THE COURT: What is the incremental cost of
5 doing it this way? I just want to make sure that
6 we're not spending more to remedy a problem than we
7 would be if we just swallowed the problem.

8 ATTORNEY BARON: We don't think -- I think the
9 incremental cost of this is not going to be
10 substantially more than what we're seeing as the cost
11 in the transactional cases. We still -- in those
12 cases, we still have to have the claims administrator.
13 The claims administrator in those cases still needs to
14 contact DTC. DTC has to give them basically their
15 list. They have to then reach out, send those out to
16 the banks. They're dealing with, you know, lots of
17 calls from people that are not getting their money
18 from the banks as fast as they should be. So I think
19 that we're not going to have that much -- we have
20 fundamentally a one-day class period. So it's not
21 like a typical securities case where they are looking
22 at holdings from a number of different days. We don't
23 have a big sort of -- they're not having to decide ins
24 and outs and those kind of questions. It's really

1 just people that are there.

2 I think in Romeo, we're not hearing that
3 they're anything exceptional. I think it's a few
4 hundred thousand dollars, the most.

5 THE COURT: All right. And just walk me
6 through what I have to provide if I'm a class member
7 to validate my losses so that I can get the equitable
8 allocation under this.

9 ATTORNEY BARON: It's proof of ownership at
10 the time of the decision whether or not to redeem.
11 That's proof of ownership to common stock that will
12 typically be your stock statement. Right? It will be
13 a stock statement. It will be -- because very few
14 people, I think, own it in -- have actually stock
15 certificates. They almost all own it in street names.
16 I haven't heard that there's been any real problems
17 with that kind of proof, you're showing you held it
18 there at that time.

19 THE COURT: So I may not be understanding
20 then, what I thought you were saying is that if I --

21 ATTORNEY BARON: Oh, I'm sorry. You're right.
22 They would show that they got it at that time, and
23 then they would show whether at the time that they
24 sold it and what their return was.

1 So they would have to show both the holdings
2 and then the disposition of those holdings.

3 THE COURT: Yes. So they would've to send in
4 basically two pieces of paper to establish those two
5 things?

6 ATTORNEY BARON: Yeah. Or it could be
7 multiple. Assuming people sold out --

8 THE COURT: Gotcha.

9 ATTORNEY BARON: -- incrementally, it could be
10 a few more pieces of paper, but they would show what
11 they sold those at.

12 THE COURT: And you have or haven't done this
13 before?

14 ATTORNEY BARON: We are in the process of
15 doing it on one other or two other? Two other cases.

16 THE COURT: And how far along are you in that?

17 ATTORNEY BARON: I think Romeo is about four
18 months. I have to look over at my team. I'm sorry.

19 THE COURT: That's okay.

20 ATTORNEY DEL GAIZO: We're almost done with
21 the process here.

22 THE COURT: Come on up. Come on up. Say, and
23 remind me again who you are?

24 ATTORNEY DEL GAIZO: Greg Del Gaizo from

1 Robbins LLP.

2 THE COURT: Great. Thank you. So just what's
3 the overview of these other two?

4 ATTORNEY DEL GAIZO: So they've both been
5 approved. One in front of Vice Chancellor Cook, one
6 in front of Vice Chancellor Fioravanti.

7 The one we did on Monday just happened, so
8 it's still a few days left.

9 In Romeo, the claims deadline has passed and
10 the claims administrator's just calculating the number
11 to send out the checks. So that's taken about two to
12 three months to get done.

13 THE COURT: And what type of claim are you
14 getting out? What percentage of people that you think
15 are sending these things back in?

16 ATTORNEY DEL GAIZO: I think there's been
17 about 55,000 claims that have been made, so it's a
18 pretty substantial amount. One thing I would add to
19 what Mr. Baron said is that you can actually make the
20 claim online. And that is how most of the people are
21 doing it. They're just submitting it online.

22 The claims administrator is actually pretty
23 good here. Looks through what's been submitted and if
24 there's something missing, they'll actually reach out

1 and try to correct any missing errors. So we've had a
2 little bit of that back and forth where people have
3 maybe not included what they sold and so we reach back
4 out and get them to include that also.

5 THE COURT: So the numerator is about 55,000.
6 What's your estimate of what the denominator would be?

7 ATTORNEY DEL GAIZO: It's hard to know, Your
8 Honor, because it's 55,000 claims being made, and so
9 we don't know how many shares that is for each one.

10 The total amount of shares outstanding there,
11 I believe was 20 million, but again, that's not really
12 the right numerator because I don't know how many
13 shares that is.

14 THE COURT: No, I agree. I didn't know if you
15 had a sense though. All right, thank you. That's
16 helpful.

17 ATTORNEY DEL GAIZO: Thank you, Your Honor.

18 THE COURT: That's why you bring your team
19 along. Mr. Baron.

20 ATTORNEY BARON: It is. And they even
21 remembered to stand up, so they're better than I am.

22 If I can, I want to move on to the attorney's
23 fees issue. As the court knows, over the years, you
24 and I have had a lot of discussions over attorney's

1 fees. We are seeking \$2.1 million inclusive of
2 expenses. That comes up to 17.5%. We are well aware
3 that under a strict application of Americas Mining,
4 this would be outside the range that that would call
5 for. I'm going to, sort of, continue to push or at
6 least advocate that think Americas Mining is guidance
7 and I think that -- it should not necessarily be
8 viewed as a strict measure.

9 I was thinking about why that is, because I
10 think I've said before, there are cases in which you
11 can get all the way to trial and do virtually nothing.
12 Then there are cases in which you have to do a lot of
13 work or a significant amount of work just to be able
14 to bring the case.

15 In this -- I'd like to juxtapose a
16 hypothetical case with what we've done here to make
17 this point, because it is a MultiPlan case, the
18 standard is entire fairness. You know, many of these
19 cases are answered and without motions to dismiss,
20 particularly where there's a net cash per share
21 disclosure because once you have that number, there's
22 plenty of case law in the courts as to what is the
23 sufficient material non-disclosure as to that.

24 So in my hypothetical case, you have a de-SPAC

1 company that is not a Delaware corporation, so
2 therefore post de-SPAC. You don't have the right to
3 do 220. You still prepared the case. You have a net
4 cash per share issue, maybe some other disclosure, but
5 a net cash per share issue, defendants answer that
6 complaint. They then provide you with 60,000 pages of
7 documents. They provide you with the data room. You
8 have the chance to do that due diligence in terms of
9 settlement negotiation, maybe take a custodian of
10 records deposition. In that context, you would be
11 squarely within the second phase, so 15 to 20% in
12 Americas Mining.

13 In this case, we did a 220, we got 60,000
14 pages of documents. We got the entire data room from
15 the legacy company. We were able to put together a
16 complaint that had not only net cash per share and
17 that was in an amended complaint, but net cash per
18 share. And we also were able to establish other
19 disclosures based on projections and other things that
20 we got based upon the 220.

21 In this case, while the defendants did make
22 motions to dismiss, again, because the net cash per
23 share was just as likely to survive on a motion to
24 dismiss, and we went into a situation which we started

1 to negotiate settlement because we understood that the
2 company was going bankrupt.

3 We learned at that same time we were starting
4 to discuss settlement was that the bankruptcy
5 proceeding at the time had said that they were going
6 to release all the claims for all the defendants.
7 That presented a problem for us both, logistically and
8 potentially for this case.

9 What we ended up doing was bringing in counsel
10 who was Mrs. Mackintosh's firm, who was a bankruptcy
11 counsel. We negotiated for the carve out of the
12 insurance and got about 60% of the available
13 insurance.

14 All of that is not in my mind work; that is
15 work at what was the typical pre-filing stage under
16 Americas Mining. I think that if you had provided
17 that flexibility in Americas Mining, then we get to
18 look at Sugarland, and I think Sugarland allows that
19 flexibility to move between those ranges. And I think
20 it allows that based upon, again, those very same
21 aspects of this case.

22 That is fundamentally, I think, where the
23 court not only in this case, but I think in other
24 cases, I think that the court needs that flexibility

1 to really dive in a little bit more as to what people
2 did. I think it helps both on the bottom end in a
3 situation like us where we did work beyond what you
4 would typically do at a pre-filing stage, especially
5 on one of these cases. And a situation that's not us
6 but somebody who's coming in pre-trial, who's taken
7 one deposition and had an answer to the complaint.

8 I think that that flexibility goes both ways,
9 but here obviously, I've asked for it to go to my
10 benefit. I don't think I have more to say about this.
11 I know the court's thought about it a lot as I have.

12 The view that we are all trying to figure out
13 the best way to litigate these cases and really avoid
14 which we avoid and I don't think I would ever do, but
15 I think others do, which is just prolonged litigation
16 for the sake of getting further into a strict
17 compliance with Americas Mining. And I think that
18 that is a disincentive in this type of litigation.

19 Unless the court has any other issues, I'd
20 like to move on to the next issue.

21 The next issue that I have is the class
22 definition. Again, I'm happy to wait until after the
23 objection if the court wants me to speak more to that.
24 I will just simply say that the definition that we've

1 used to the definition of this court has adopted in, I
2 think, every settlement I've ever done in this court.
3 In our view, we should settle all the claims that
4 could be brought in this court. That is what we said.
5 That is what we are doing. I do say that
6 understanding -- if I understand the objector's case,
7 and it's hard, it's both a 14(a) and a 10(b)(5) case,
8 perhaps the 14(a), and I don't know exactly how you do
9 damages, but assuming that it is some sort of a
10 rescissory damages model under 14(a) claim, that would
11 mean that part of their class might overlap with this
12 class, but if it is true, it does not make sense that
13 those people should be able to recover twice for the
14 same conduct.

15 I don't think it's this court's decision. I
16 think that is the Federal Court's decision as to
17 whether that happens or not, but again, it doesn't
18 make sense. Again, because their class is both and
19 because their class is so large, under any
20 circumstance, I think our class members do far better
21 in this court, in this litigation where they are a
22 smaller group to share the spoils of the settlement
23 than in a much larger group involving both 10(b)(5)
24 and 14(a), to which those damages would be fractions

1 of pennies based on the amount of available insurance.
2 I don't think I have any more to say on the class
3 definition.

4 Finally, the last issue is the incentive
5 awards. We're asking for \$5,000. That is, again,
6 typical of what this court awards. Plaintiffs were
7 actively involved. They approved the actions, we took
8 the settlement. I think I have nothing more to say on
9 that. If the court has any other questions, I'm happy
10 to address this.

11 THE COURT: No, thank you.

12 ATTORNEY BARON: Thank you.

13 ATTORNEY CONNELLY: Good afternoon, Your
14 Honor. I will try even harder than my friend, Mr.
15 Baron, to not repeat what was in our papers. In fact,
16 I don't think I have anything to say beyond what was
17 in our papers. I only stand to note that we agree
18 with Mr. Baron that the fight, if there is one about
19 this subjection, and whether and to what extent the
20 release here facts in the Mehedi case is an issue for
21 the Mehedi case under the Philadelphia Stock Exchange
22 case. Unless the court has any questions.

23 THE COURT: I don't think. Thank you.

24 ATTORNEY CONNELLY: Thank you, Your Honor.

1 THE COURT: Mr. Uris?

2 ATTORNEY URIS: Thank you, Your Honor. Mr.
3 Uris -- sorry, Jason Uris from Kaplan Fox & Kilsheimer
4 on behalf of the Mehedi plaintiffs.

5 May it please the Court, we appreciate the
6 opportunity to be heard at today's settlement hearing.
7 We know the Court has read the papers and I would like
8 to briefly respond to the defendants' response to our
9 objection.

10 As set forth in our objection, the language is
11 clear that it releases two categories of claims. The
12 first category is all claims that were asserted in the
13 action, and the second category is all claims that
14 could have been asserted in the action.

15 The second category of claims that could have
16 been asserted in the action is further limited to only
17 such claims that are also based upon or arose out of
18 what the parties consider to be the operative facts in
19 this action.

20 Plaintiffs agree that this is the scope of the
21 release.

22 Defendants in their response avoid the
23 question altogether, but apparently do not disagree
24 either, and have vaguely acknowledged on the first

1 page of their response that the release here is "more
2 narrowly tailored than other releases this court has
3 approved in similar class action settlements."

4 The Exchange Act claims brought in the Mehedi
5 action could not have been brought in this action.
6 Plaintiffs in the Siseles' action agree. Defendants
7 again, avoid the question altogether, but apparently
8 do not disagree.

9 As such, given the lack of disagreement, I'm
10 not sure why the parties would not agree to our
11 requested clarification. We are simply asking the
12 court to clarify in its order and final judgment that
13 for the avoidance of doubt, that proposed release here
14 does not release the Exchange Act claims alleged in
15 Mehedi action.

16 The requested clarification does not change
17 the scope of the existing release. It is just that, a
18 clarification. It is fully consistent with the plain
19 terms of the release and is meant to ensure that class
20 members, the court, and all interested parties
21 understand the scope of the release that is subject to
22 approval. This request is fully consistent with the
23 role of the court in considering a proposed settlement
24 of a class action.

1 As Your Honor is aware and considering whether
2 a proposed class action settlement is reasonable, the
3 court must examine the give as compared to the get.
4 The give is the release of certain claims against the
5 defendants. The get is the consideration provided for
6 the release.

7 Of course, in order to conduct such an
8 examination, the court must first understand the scope
9 of the proposed release that it may approve. So,
10 again, while we believe that the release language is
11 clear, in order to ensure that the court, class
12 members, and all interested parties understand the
13 scope of the release that is subject to approval, we
14 asked the parties to agree to amend the proposed final
15 order to include our clarification.

16 Plaintiff's counsel agreed that the language,
17 by its plaintiff terms did not purport to release the
18 Exchange Act claims in the Mehedi action, but refused
19 to add our proposed clarifications.

20 Defense counsel also refused to include the
21 proposed clarifications, but further would not even
22 acknowledge or agree that the release does not purport
23 to release the Exchange Act claim to the Mehedi
24 action. This was certainly cause for concern and

1 defendants' refusal to acknowledge the scope of the
2 release demonstrates that the requested clarification
3 is needed.

4 Shortly after we retained local counsel in
5 this action, our local counsel, Prickett, shared with
6 us a similar experience they had in a case before Your
7 Honor, the Presidio Inc. case. My understanding is
8 that a similar issue regarding the scope of the
9 release there was raised. Specifically, the question
10 was whether or not to the extent a release may be
11 ambiguous that there's a risk that a party could then
12 go before another court in which claims are pending
13 and make arguments based on what might be an ambiguous
14 release. I would suggest to Your Honor that we want
15 to avoid that same risk here.

16 In fact, defendants' refusal to address this
17 question now suggests that they do intend to argue to
18 the Mehedi Court that the Exchange Act claims and that
19 action do fall within the scope of the release here.

20 Defendants make two primary arguments for why
21 they believe the court should reject our requested
22 clarification, both of which missed the point.

23 First citing Philadelphia Stock Exchange and
24 Countrywide, defendants argue that the proposed

1 release complies with Delaware Law because Delaware
2 Law is clear that parties to a Delaware class action
3 can release both claims that were asserted in action
4 as well as claims that were not specifically asserted
5 in a settled action.

6 They further argued that the release of
7 unasserted claims may include claims arising solely
8 under federal law as long as those claims are based on
9 the identical factual predicate or the same set of
10 operative facts as the underlying action.

11 The defendants' entire argument on this point
12 fails to address the actual scope of the proposed
13 release at issue in this case. The Mehedi plaintiffs
14 do not dispute that the parties here could have agreed
15 under Delaware Law to release claims arising under
16 federal law, such as the Exchange Act claims in the
17 Mehedi action if the claims were based on an identical
18 factual predicate. But the release at issue here is
19 clear that it only purports to release claims that
20 were either asserted in the action or could have been
21 asserted in the action.

22 Defendants don't dispute that the Exchange Act
23 claims in the Mehedi action could not have been
24 asserted in this action. Thus, by the plain terms of

1 the release, they fall outside the scope of the
2 release. In fact, in defendants' primary cases,
3 Philadelphia Stock Exchange and Countrywide, there was
4 no dispute that the releases in those cases did
5 purport to release the federal claims at issue. They
6 were far broader than the proposed release here in
7 that those releases of unasserted claims in those
8 cases were not limited to only those claims that could
9 have been brought in those actions.

10 The release in MultiPlan, which defendants
11 have set forth in page 7 of their response is yet
12 another example of a release of unasserted claims that
13 was not limited to only those claims that could have
14 been brought in that action. As we can see in that
15 chart whereas the settlement here limits the
16 categories, the category of unasserted claims to only
17 those that could have been brought -- to only those
18 that could have been alleged asserted, set forth, or
19 claimed in the action. The release in MultiPlan did
20 not limit the category of unasserted claims in that
21 way, but rather included all claims "that plaintiffs
22 or any other class member ever had, now have or
23 hereafter can, shall or may have," and I'll paraphrase
24 a bit, but effectively all claims that in any way

1 related to the subject matter of that action.

2 Similarly, in FinServ Acquisition Corp. SPAC
3 litigation, the category of unasserted claims in the
4 release included all claims that could have been
5 asserted in the complaint or in any other court
6 tribunal proceeding or other forum.

7 Similarly, in the remaining cases cited by
8 defendants, the Activision Blizzard case and the
9 Riverbed case, there was no dispute that the release
10 in those cases did purport to release the federal
11 claims at issue.

12 Regarding defendants' second argument, they
13 again cite Philadelphia Stock Exchange, and defendants
14 argued that the Mehedi plaintiff's request is improper
15 because it asked this court to opine on the impact of
16 a release on a case proceeding in a different court.
17 And more specifically, they argued that whether and to
18 what extent the release here will have preclusive
19 effect in the Mehedi action is for the Mehedi Court to
20 decide not this court.

21 This argument also misses the point. Again,
22 in Philadelphia Stock Exchange, there was no dispute
23 that the federal claims at issue fell within the scope
24 of the proposed release in that case. Within that

1 context, the Philadelphia Stock Exchange Court found
2 that "whether or not releasing the demutualization
3 claims will have preclusive effect in the federal
4 litigation is not an issue for this court or the court
5 of Chancery to decide, but rather by the Federal
6 Courts where those actions are pending." I'll note
7 for the record that that quote is slightly cleaned up.

8 The court there acknowledged that the scope of
9 the release included the federal claims at issue, but
10 recognized that even so it would be up for the federal
11 courts where those actions were pending to determine
12 whether the release approved in Delaware would have
13 preclusive effect in federal litigation.

14 The Mehedi plaintiffs don't disagree with that
15 proposition. Rather, while it may be for a Federal
16 Court to determine how a release approved by another
17 court, which does purport to release claims pending
18 before the Federal Court, what we're saying is that it
19 certainly is for this court and any court overseeing a
20 class action for that matter to understand in the
21 first instance the scope of the release that is
22 subject to approval.

23 Again, defendants are completely glossing over
24 the fact that unlike any of the cases they cite, the

1 release of unasserted claims at issue here is limited
2 only to those that could have been brought in this
3 action. As such, Mehedi plaintiffs are simply asking
4 that the court clarify that the scope of the
5 agreed-upon release in its final order. We just want
6 to make sure that the court as well as class members
7 understand the scope of the release. This is
8 especially important here because defendants in both
9 our discussions with them and in their filing appear
10 to be creating ambiguity where none exists.

11 I'd just like to briefly address some of the
12 comments made by Mr. Baron earlier. I believe Mr.
13 Baron, you know, while he acknowledged that the scope
14 of the release does not extend to the claims in the
15 Mehedi action, he made some comments that the classes
16 may overlap and that class members should not recover
17 twice for the same conduct. While he did, I guess,
18 concede that that was an issue for the Mehedi court,
19 I'd just like to address that briefly.

20 I'd like to note that in our objection, we did
21 state that in the event a settlement were to be
22 reached in the Mehedi action, there would be a plan of
23 allocation that took into account any amount already
24 recovered by class members in this action, and that

1 certainly any plan of allocation would be subject to
2 approval by the Mehedi court.

3 Beyond that, I guess I would just note that as
4 a general matter, certainly many different causes of
5 action, including causes of action under both federal
6 and state laws, can arise from the same or similar
7 conduct. And the fact that the parties here have
8 settled causes of action that could have been asserted
9 in this action and that further arise from the conduct
10 alleged here, that does not mean that proposed class
11 members in the Mehedi action cannot recover for
12 alleged violations of the Exchange Act. There are
13 different causes of action.

14 That said, we're not suggesting that any class
15 members receive more than they could under applicable
16 law. We're just trying to make clear that the release
17 in this case does not release the Federal Exchange Act
18 claims pending the Mehedi action.

19 In terms of the specific damages, as they
20 relate to either the 14(a) or 10(b) claims in the
21 Mehedi action, I would just say that questions related
22 to damages and to what extent damages might be set off
23 or could be considered a double recovery, I think
24 that's just entirely premature. I think damages in

1 the Mehedi action will be subject of expert discovery,
2 and we're just not at that stage of the litigation
3 yet. I think, unless Your Honor has any questions, I
4 have nothing further.

5 THE COURT: So it may well be that damages are
6 subject to expert discovery, but what is your concept?
7 What is your theory of what you're going to compare to
8 what for purposes of damages?

9 ATTORNEY URIS: I think that's a good
10 question. I think we haven't set forth specific
11 damage theories yet in that case, so I kind of -- I
12 hate to get into hypotheticals, but certainly, Your
13 Honor, regarding if the question were whether the
14 settlement here fully compensates class members in the
15 Mehedi action for their damages, I would certainly say
16 that it does not.

17 THE COURT: How do you know that if you don't
18 have any clue on what your damages are based on out in
19 your other action?

20 ATTORNEY URIS: That's a good question.
21 Certainly, we've thought about the damages theories.
22 We haven't reached the stage where we set those forth.

23 But as Mr. Baron mentioned, 14(a) does allow
24 for rescissory damages. So I think given the fact

1 that shareholders had a redemption right for \$10 per
2 share, that fact certainly might be relevant to a
3 damages calculation, but to say whether or not the
4 recovery here would amount to a double recovery, I
5 think it's premature. Especially in the context of
6 the release here, which carves out claims that
7 couldn't have been brought. I just don't see how we
8 can make that assessment at this stage.

9 THE COURT: If you don't have an idea of how
10 much the case is worth, how do you know whether to
11 file it or not?

12 ATTORNEY URIS: Certainly, in assessing
13 whether to file the case, we did a preliminary
14 assessment of what we thought the recoverable damages
15 might be under various scenarios. All I'm saying here
16 is that to assess the question of whether or not you
17 have a double recovery or there should be some offset
18 is something for the later stage in the Mehedi action.
19 And I think as all parties agree, that's going to be a
20 question for the Mehedi court.

21 I'm not suggesting that those aren't going to
22 be complicated questions or that there aren't
23 similarities between the cases, but I do believe all
24 parties are in agreement that to the extent those

1 issues arise, they're properly addressed by the court
2 in the Mehedi action.

3 THE COURT: I mean, that sounds like a nice
4 way of saying, "I'm not going to answer your question
5 because I think it's for another court to think
6 about." Am I reading you correctly?

7 ATTORNEY URIS: Partially. I wouldn't
8 characterize it as not answering your question. I
9 don't think --

10 THE COURT: Well, I asked what your damages
11 theories was. You said you wouldn't give me a damage
12 theory. First, you said you didn't know one. Then,
13 when we pushed on a little bit, you said you had some
14 ideas, but you still wouldn't say one. So why isn't
15 it a proper characterization to say that you wouldn't
16 answer my question?

17 ATTORNEY URIS: I think my answer is that I
18 don't have an answer. If you want me to speculate as
19 to what damages theories we might put forward.

20 THE COURT: You've said now two contradictory
21 things. One is that you didn't know, and you've now
22 reinforced that by saying you don't have an answer.
23 You've also said that you had some analysis under
24 various methodologies that you used to decide whether

1 to file the case. So you either had some damages
2 theory or you didn't have some damages theory. And
3 maybe you had multiple damages theories, but which is
4 it?

5 ATTORNEY URIS: We have multiple damages
6 theories that we have been considering internally, but
7 none that have been specifically set forth yet in the
8 Mehedi case, given that we're not at that stage. As I
9 mentioned earlier, those theories are going to be the
10 subject of expert discovery. So my only hesitancy is
11 to start getting into the details of what our damages
12 theories might ultimately look like at a later stage
13 in the Mehedi action.

14 THE COURT: I mean, you use hesitancy. I use,
15 won't answer. Aren't we at the same place?

16 ATTORNEY URIS: I'm not sure how to answer
17 that.

18 THE COURT: I mean, look, it's bizarre to me
19 that you can't even answer whether you're not
20 answering. It seems to me like it's a pretty easy
21 thing to recognize that you're not answering. So can
22 we at least get an answer on the question of whether
23 you're answering?

24 ATTORNEY URIS: Yes. I would say I'm not

1 answering the question of what our specific damages
2 theory are, although --

3 THE COURT: I actually thought I just asked
4 you about the general concept.

5 ATTORNEY URIS: I -- I understand now. Yes, I
6 can agree. As a general concept, I'm not answering.
7 But I guess I would note, which I tried to allude to
8 earlier. I do think that there are a potential theory
9 of damages, given that that rescission is provided for
10 under Section 14(a) would certainly take into account
11 the \$10 rate of redemption per share.

12 THE COURT: And what is the basis for seeking
13 rescission?

14 ATTORNEY URIS: There are various -- goes back
15 to the Supreme Court. I believe the Supreme Court in
16 the Mills case may have been where the Supreme Court
17 first referenced the ability to pursue rescissory
18 damages with respect to 14(a) claim. I believe that
19 was clarified by the Supreme Court again in the Borak
20 case.

21 THE COURT: I'm asking a different question.
22 I'm not asking for the Federal authorities that say
23 you can seek rescission. I'm asking for the concept.
24 What is it, as a concept, that makes rescission an

1 appropriate remedy?

2 ATTORNEY URIS: Well, I believe that the
3 concept is that, as a general matter, 14(a) prohibits
4 the use of misleading statements in a Proxy statement,
5 so the general concept is that, you know, this
6 misleading Proxy statement was issued. And as we
7 allege in our complaint, the misleading statements
8 that we complain of are misleading statements
9 concerning legacy views, warranty obligations.

10 The concept is that, through the issuance of
11 that misleading Proxy statement, class members in the
12 Mehedi case were not provided fulsome information with
13 which to make a decision as to whether or not to vote
14 in favor or against the merger.

15 Then once the truth was eventually revealed
16 some time later, the value of the shares that they
17 were holding declined in value. And so the residuary
18 theory would be, to summarize, it is that had they
19 been given fulsome information as of the time that
20 they were required to vote for or against the merger,
21 had they known the truth as to the alleged
22 misstatements, they would have either voted against
23 the merger or sold their shares.

24 THE COURT: All right. Thank you.

1 ATTORNEY URIS: Thank you, Your Honor.

2 ATTORNEY BARON: Your Honor, I have --

3 THE COURT: I thought that we'd hear from
4 defense counsel first because I think it's really
5 their water to carry. But then we'll have you after
6 that, Mr. Baron.

7 ATTORNEY CONNELLY: Thank you, Your Honor. I
8 will agree with one thing that counsel said, which is
9 that the language that they're asking the court to add
10 to the release is not language that we agreed to or
11 that these plaintiffs agreed to. It's not the deal we
12 made.

13 I will say the Federal case is not one we're
14 counseling. It's not my fight. I'm not here to argue
15 about the extent to which it does or doesn't apply. I
16 think, candidly, the wisdom of the Philadelphia Stock
17 Exchange decision was on full display here. Those
18 questions are best addressed in that context before a
19 court that's fully immersed in the facts, and counsel
20 were fully immersed in the facts, which I am not. I'm
21 blissfully, but not willfully ignorant in that
22 respect.

23 No one here is claiming that the release is
24 improperly overbroad within the context of Delaware

1 Law, as it has looked at that issue in these cases.

2 We think that that should begin and end the inquiry.

3 Unless the court has questions, I have nothing
4 else to add.

5 THE COURT: Thank you.

6 ATTORNEY CONNELLY: Thank you.

7 ATTORNEY BARON: Your Honor, I hesitate
8 because it's a little bit like piling on, but I do
9 want to say that when counsel called me, I asked him
10 the same two questions about three weeks ago. I asked
11 him, "What are your damages? How do you figure out
12 your damages?" And I went so far as to say, "What do
13 you mean you don't know because why would you file a
14 case without knowing your damages?" None of which he
15 had an answer to. I was actually surprised that he
16 came in here and still didn't have an answer to it.
17 It's just, sort of, shocking.

18 While he was doing this, I pulled out our
19 chart. And we have five measures of damages for this
20 case. We have calculated in five different ways to
21 determine what our measure of damages are, and we did
22 that before we filed the case.

23 So again, I don't know what he thinks we're
24 releasing because he doesn't know what his own case

1 is. He doesn't know what his damages are. Again, I
2 think that the release that we set forth is
3 appropriately narrowly tailored. In fact, more
4 narrowly tailored than all of these cases that he said
5 had broader releases.

6 I have nothing further, Your Honor, unless you
7 have some questions.

8 THE COURT: All right. Thank you all. I
9 appreciate your time today. I'm going to go ahead and
10 give you a ruling now.

11 We're here in the Siseles versus Lutnick case,
12 which is civil action number 2023-1152-JTL, so I can
13 consider the settlement and related issues.

14 There is an objection in this case from
15 Stadium Capital, LLC and David Sherman. They object
16 to the release in the proposed settlement.

17 To give you the answers up front, I'm going to
18 approve the \$12 million settlement as fair and
19 adequate. I'm going to certify the class. I'm going
20 to determine the notice to be adequate. I'm going to
21 award attorney's fees, but I'm going to stick to my
22 percentage of 15%, and I'm going to approve the
23 incentive award.

24 I guess, that's slightly out of order. I'm

1 going to certify the class first, then determine the
2 notice to be adequate, and then approve the
3 settlement.

4 In terms of factual background, in 2019,
5 Howard Lutnick formed CF Acquisition Corp Two, which
6 I'll call the "company". It's a Delaware corporation
7 that was a SPAC.

8 In August 2020, the company went public
9 through an IPO, selling 50 million units at \$10 a
10 unit. Under the company's charter, the company had
11 two years to close a business combination.

12 The company named View, Inc., or Legacy View,
13 produced and sold Smart Windows on the same day as the
14 company's IPO. One of its representatives reached out
15 to Legacy View. Due diligence followed. The
16 company's board met and unanimously approved a letter
17 of intent.

18 Then in October 2020, McKinsey & Company
19 reported on headwinds in the smart glass industry and
20 highlighted risks associated with the high costs and
21 uncertainty in the market due to the pandemic.

22 In November 2020, after completing due
23 diligence, the board met and unanimously approved the
24 merger. Proxy was sent out to stockholders in

1 February 2021. The Proxy explained that stockholders
2 could invest in the new post-merger company, or
3 otherwise exercise a redemption right, in which they
4 would receive \$10 per share.

5 The Proxy disclosed that company stockholders
6 who opted in favor of the merger would receive stock
7 valued at \$10 per share. In reality, at the time, the
8 company was able to contribute only, at most, \$8.25
9 per share to the merger. Consistent with that number,
10 the company shares never traded above \$10 per share.
11 The Proxy also included projections that differed from
12 board meeting presentations and the report from
13 McKinsey in the sense that they were rosier.

14 The stockholders did approve the merger.
15 Stockholders redeemed approximately 25% of their
16 shares, totaling approximately 12.6 million shares.
17 Three days later, the merger closed.

18 A couple of months later, in June 2021, a
19 research company published a report that identified
20 problems with the post-merger company and its business
21 model. The report posited that the company's stock
22 was intrinsically worthless because the company had no
23 path to profitability, and it made other negative
24 statements about the company's future. In fact, the

1 post-merger company performed quite poorly. It failed
2 to meet any of the projections, and the stock price
3 continually fell.

4 In February 2022 and 2023, plaintiffs served
5 Section 220 demands on the post-merger company
6 concerning the IPO, the merger, and various
7 relationships among the defendants. The plaintiffs
8 obtained nearly 60,000 pages of documents, including
9 the entire Legacy View data room.

10 In November 2023, the plaintiffs filed their
11 complaint.

12 In April 2024, the post-merger company filed
13 for bankruptcy and sought approval for a pre-packaged
14 bankruptcy plan. The plan, as proposed, would release
15 all of the plaintiff's claims in their entirety.
16 Plaintiff's counsel consulted with bankruptcy counsel
17 and obtained a carve-out for the bankruptcy claim that
18 would allow the plaintiffs to pursue their claims up
19 to the amount of available insurance.

20 In May 2024, the parties agreed to mediation
21 before Greg Danilo, who is a very skilled mediator.
22 By the end of the mediation, the parties had agreed to
23 settle the action for \$12 million in cash.

24 The first issue is class certification. The

1 class is defined. I'm not going to read it to you,
2 but it's effectively the folks who held shares of
3 stock on the redemption deadline, and then it excludes
4 the defendants and their affiliates. That class is
5 reasonable and adequately cohesive for this
6 litigation, and I use it.

7 In terms of the 23(a) requirements, they're
8 all easily ticked off. The class is sufficiently
9 numerous, there being approximately 37 million
10 non-redeemed shares at the time of the redemption
11 deadline. Another indication of numerosity is the
12 number of packets of notice that were mailed out.
13 They went to 9,335 potential class members.

14 Commonality is also met. Common questions
15 included potential breaches of fiduciary duty, failure
16 to disclose material information in the Proxy,
17 affirmatively misleading statements in the Proxy, as
18 well as merits claims based on an unfair merger
19 process and unjust enrichment.

20 Typicality is also easily met. All the class
21 members and stockholders face the same injury from the
22 same conduct, and the plaintiffs were affected the
23 same way as everyone else.

24 The plaintiffs in this action adequately

1 represented the class, which is the fourth element.
2 Not only did they have the same interest as the rest
3 of the class, but plaintiff's counsel achieved a
4 result, which as I will get to, fell within a range of
5 reasonableness.

6 All of the recordkeeping requirements in terms
7 of the filing of the Rule 23(a)(A) affidavit and other
8 affidavits are also met.

9 In terms of certification, I'm first
10 certifying the class under Rule 23(b)(1). Rule
11 23(b)(1) certification is appropriate. If prosecution
12 of separate actions by individual class members would
13 risk inconsistent or varying results that would impose
14 inconsistent obligations.

15 It's also appropriate where adjudication with
16 respect to one class member would be dispositive of
17 class's interests. This is a method we frequently use
18 for certifying cases involving corporate fiduciary
19 duties.

20 Certification is also appropriate under (b)(2)
21 because the defendant's conduct is generally
22 applicable to class, making declaratory judgment
23 relief appropriate on a class-wide basis.

24 I am able to certify these class under Rule

1 23(b) for state law purposes. Even though the remedy
2 may involve money, one can cite the CME Group for that
3 proposition. So, therefore, I'm certifying this class
4 as a non-op-out class under those two definitions.

5 By rule -- our Chancery Court Rule 23(e),
6 notice by mail publication or otherwise, the proposed
7 dismissal or compromise must be given. We specify the
8 requirements for what a notice must contain. Here, I
9 found preliminarily, the notice is sufficient. This
10 phase, I can also say, that it was adequately
11 delivered.

12 Gilardi and Company, LLC, acted as the
13 settlement administrator. According to the affidavit,
14 as I already noted, 9,335 claims packages were sent
15 out. Then there was an additional representation that
16 the institutions who held shares were going to forward
17 packets on to 6,837 class members. There was also a
18 case-specific help line and a settlement-specific
19 website, so adequacy in terms of notice was satisfied.

20 The next issue is the merits of the
21 settlement. My job in a class-action settlement where
22 that's brought on a representative basis is to
23 exercise independent judgment over the outcome to make
24 sure that it falls within a range of reasonableness.

1 You can read the Philadelphia Stock Exchange
2 case for that or Ram v. Archer. I have to basically
3 assess the give-and-the get and determine whether it's
4 within a range that reasonable parties could accept.

5 Here, the claims were of a nature that were
6 first described in MultiPlan, and have been relatively
7 well-established since then. The main theory or one
8 of the main theories would have been breach of
9 fiduciary duty, where the entire fairness standard
10 almost certainly would have applied. There were also
11 disclosure claims. There was some risk on appeal.
12 MultiPlan is a Court of Chancery decision, but a
13 well-reasoned one.

14 In terms of the amount that the plaintiffs
15 ultimately obtained, the \$12 million is in line with
16 amounts achieved and other MultiPlan-style
17 settlements. There have been at least eight of them
18 that the defendants -- I'm sorry, the plaintiffs
19 identified for me, and one can see something of a
20 pattern in terms of the amounts. This one would be
21 right in the middle of that. That's the get.

22 Then the question is, what's the give? The
23 give takes the form of the release. As a threshold
24 matter, it's a relatively standard Court of Chancery

1 release. There is an objection, as I noted at the
2 outset, from Stadium Capital and David Sherman, who
3 assert that they have filed and are maintaining a
4 securities action titled Mehedi v. View out in the
5 Northern District of California that's been pending
6 since August of 2021.

7 The Mehedi plaintiffs have asserted claims
8 under Section 14(a), 10(b), and 20(a) of the Exchange
9 Act. It sounds like their -- I think their main
10 theory is 14(a) based on disclosures. The Mehedi
11 plaintiffs object to the settlement to the extent it
12 would release the Exchange Act claims.

13 The parties here do not want to modify the
14 standard language of the settlement. The plaintiffs,
15 at least, are of the view that the settlement does not
16 exclude -- I'm sorry, does not include. It, in fact,
17 excludes the Mehedi action.

18 So the real question that the objector wants
19 to know is: Why can't we add the clarifying language.
20 Again, it seems to me, consistent with what
21 plaintiff's counsel was saying, the clarifying
22 language is unnecessary. There's no reason to send
23 the parties back to modify a release at this time.
24 Whether that release has any effect on anything in the

1 federal action is ultimately an issue for the federal
2 court to decide as the defendants point out, and
3 that's correct. But I do think that it's important
4 for me, in terms of evaluating the give, to know what
5 I think is being released. At least based on the
6 representations of plaintiff's counsel, this release
7 is not encompassing the Mehedi action. Whether this
8 action has any other effect on a lawsuit that seems to
9 proceed, if not on parallel basis, at least on
10 overlapping theories, is something that I don't need
11 to weigh in on. So I'm approving the settlement as
12 fair and reasonable.

13 Next, I'm going to turn to the award of
14 attorney's fees. Delaware's policy as to ensure that
15 even without a favorable adjudication, counsel can be
16 compensated for the beneficial results they've
17 produced, provided the action was meritorious and had
18 a causal connection to the conferred benefit. That's
19 from the Allied Artists case.

20 Plaintiff's counsel can obtain fees and
21 expenses under the Common Fund Doctrine for a monetary
22 benefit conferred. In this case, there's an obvious
23 monetary benefit insert. In setting fee awards, the
24 court has to make an independent determination of

1 reasonable because of the obvious conflict that class
2 counsel faces. When examining the fairness of a fee,
3 the court looks at the issues through the prism of the
4 sugar land factors. This court starts with the
5 benefit conferred, which is the most important factor.
6 Here, that factor is self-pricing. It's a
7 \$12-million-cash recovery.

8 The next most important factor, at least in my
9 view of the world, is the stage of the litigation, and
10 where it settled. This is an early-stage settlement.
11 Mr. Baron made two very good points that I've
12 considered, although I ultimately don't find
13 persuasive.

14 The first is that there was a detour into the
15 bankruptcy court and an effort that was necessary to
16 secure access to the policy for purposes of
17 settlement. I've thought about whether that should
18 merit a significant increase. The individual who
19 mainly handled that billed for about \$50,000 in terms
20 of time, he had about \$40,000; and then other folks, I
21 assume, interacted with him to some degree, so I
22 assume it's about \$50,000. It doesn't seem to me like
23 that's a big basis for altering a fee calculation.

24 The other factor that Mr. Baron raised, which

1 is something that I am mindful of, is that it's harder
2 to get meaningful fees from smaller issuers. I'm
3 actually not sure this is a smaller issuer.

4 Certainly, as it was going downhill, it was a smaller
5 issuer, but at least at the time of the transaction,
6 and in terms of the numbers that we'd be pricing
7 damages off of, I have to disagree that it's a small
8 issuer. What it seems to have had is a small level of
9 insurance coverage, which I'm not sure is the same
10 thing as a small issuer for purposes of the pricing
11 that I have to do.

12 So I'm going to view this as an early-stage
13 case rather than a mid-stage case, but I am going to
14 put it at the top of the level for an early-stage
15 case. To the early-stage range is 10 to 15%.

16 In terms of the other factors, the case was
17 normally complex for a matter in this court. In fact,
18 it was potentially less complex because it generally
19 followed the MultiPlan pattern. The plaintiffs
20 litigated fully on contingency, which is why they're
21 getting a fee award instead of just their loadstar.
22 Counsel's standing is well known and isn't a reason to
23 depart upward or downward. The plaintiff's loadstar
24 in terms of time and effort supports the amount

1 provided and doesn't suggest either too hard or too
2 high or too low an amount. So for those reasons, I'm
3 granting an award of \$1.8 million, which is 15% of the
4 settlement proceeds.

5 The last issue is the incentive award for the
6 plaintiffs. I am going to approve the request for a
7 \$5,000 incentive fee for each plaintiff. Court of
8 Chancery Rule 23(G4) acknowledges the court can
9 authorize class counsel to pay a reasonable award to a
10 representative party.

11 In this case, the plaintiffs came forward.
12 They were willing to pursue this litigation
13 notwithstanding the fact that they would be on the
14 front lines in terms of facing a potential deposition
15 by highly skilled defense counsel, as well as having
16 to gather their documents and emails and other
17 communications, and do all the types of things that
18 certainly lawyers would hate to do because we know how
19 deeply uncomfortable it is.

20 The plaintiff then engaged in monitoring,
21 reviewed pleadings, and communicated with counsel.
22 Given those factors, a request for an incentive fee of
23 \$5,000 is appropriate compensation to offset the
24 additional costs that the plaintiffs inherently bore

1 by virtue of taking on the named plaintiff.

2 So I think that covers everything we've got to
3 do today. I don't know if counsel came with an
4 updated order or if I should just use one on -- see
5 what's back downstairs on file and serve.

6 This many folks and nobody came with an order.
7 Oh, man. All right. So Mr. Lyons is a former clerk
8 of mine. So Mr. Lyons, you in particular, I'm holding
9 you at fault for this, although I know Ms. Bolton is
10 well-versed in these processes as well. So maybe I
11 can hold you both accountable for your failures. No,
12 I'm joking about that. I don't want anybody to be
13 depressed as they head into the weekend.

14 All right. Well, look, thank you all for your
15 presentations. I appreciate particularly those of you
16 who came in from out of town to be here. I hope you
17 have safe travels back. And it's always nice when
18 counsel can work together to get something resolved
19 and move on to whatever the next case may be. With
20 that, we're in recess.

21 (Proceedings adjourned at 2:34 p.m.)

22 - - -

1 CERTIFICATE

2
3
4 I HEREBY CERTIFY that the Witness was duly
5 sworn by me and that the deposition is a true record
6 of the testimony given by the Witness.
7

8
9  _____

10 Jennifer Brennan,
11 a Court Reporter and Notary Public
12 Dated: December 12, 2024
13
14
15

16 (The foregoing certification of this
17 transcript does not apply to any reproduction of the
18 same by any means, unless under the direct control
19 and/or supervision of the certifying reporter.)
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Tab 4

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE FINSERV ACQUISITION CORP. : C.A. No.
SPAC LITIGATION : 2022-0755-PAF

- - -

Chancery Courtroom 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, October 10, 2024
3:15 p.m.

- - -

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

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

2 PETER B. ANDREWS, ESQ.

3 DAVID M. SBORZ, ESQ.

4 Andrews & Springer LLC

5 -and-

6 MAE OBERSTE, ESQ.

7 Bernstein Litowitz Berger & Grossman LLP

8 -and-

9 THOMAS G. JAMES, ESQ.

10 of the New York Bar

11 Bernstein Litowitz Berger & Grossmann LLP

12 -and-

13 D. SEAMUS KASKELA, ESQ.

14 of the Pennsylvania Bar

15 Kaskela Law LLC

16 for Plaintiff

17 D. McKINLEY MEASLEY, ESQ.

18 Morris, Nichols, Arsht & Tunnell LLP

19 for Defendants

20 - - -

21 CHANCERY COURT REPORTERS

22 500 N. King Street, Ste 11400, Wilmington, DE

23 (302) 255-0526
24

1 THE COURT: Good afternoon, everyone.

2 Mr. Measly, how are you?

3 ATTORNEY MEASLEY: Mac Measley from
4 Morris, Nichols, Arsht & Tunnell on behalf of
5 defendants.

6 ATTORNEY SBORZ: Good afternoon, Your
7 Honor. David Sborz, Andrews & Springer, on behalf of
8 plaintiff Andrew Saunders. Your Honor, before I get
9 started this afternoon, let me introduce my
10 colleagues. To my left is Tom James and Mae Oberste
11 from Bernstein Litowitz; from my firm, Peter Andrews;
12 and from Kaskela Law, Seamus Kaskela.

13 Your Honor, with the Court's
14 permission, I'll present the settlement this
15 afternoon.

16 THE COURT: Very well.

17 ATTORNEY SBORZ: So, Your Honor, this
18 is the time that has been set to hear plaintiff's
19 motion for approval of the settlement, the plan of
20 allocation, class certification, and an award of
21 attorneys' fees and expenses and the incentive fee
22 award.

23 And before I just dive into it, a
24 brief word on class notice and objections. An

1 affidavit of mailing was filed by Mr. Segura on
2 October 3rd of this year. As set forth in that
3 affidavit, a settlement administration website was
4 established on August 9th, which remains active, and
5 provides class members information on this action and
6 the proposed settlement. And all the settlement
7 documentation is contained therein.

8 That same day, notice was sent to all
9 beneficial and record holders of FinServ Acquisition
10 Corp. Class A stockholders by First-Class U.S. Mail as
11 required by the Court's scheduling order.

12 Through October 2nd of this year, JND
13 caused to be mailed a total of 12,198 notices to
14 potential class members. And that can be found at
15 paragraph 8 of Mr. Segura's affidavit, which is Docket
16 No. 92. In addition, summary notice was provided by
17 PR Newswire on August 23rd of 2024, and that's
18 Exhibit B to Mr. Segura's affidavit. On August 19th
19 of 2024, the summary notice was published on Investors
20 Business Daily.

21 And I pause there for a moment to say
22 that that was not part of the Court's scheduling
23 order. And as a result of that, the cost of the IBD
24 publication will not be deducted from the settlement

1 fund, but I wanted to make you aware of that.

2 To date, I'm pleased to report to the
3 Court that we have received no objections, and no
4 objections have been filed with the Court.

5 Turning now to our motion, unless Your
6 Honor has a different preference or preferred order, I
7 intend to address the following topics in the
8 following order. First, I'll address the proposed
9 settlement. Next, I'll address class certification.
10 Third, I'll address the plan of allocation, the
11 application for an award of attorneys' fees and
12 expenses. And then, finally, the incentive fee award.

13 THE COURT: Very well.

14 ATTORNEY SBORZ: But before I do that,
15 let me pause. I know Your Honor had the opportunity
16 to hear motion to dismiss briefing in this case. But
17 for the benefit of the record, let me provide some
18 factual background about this case.

19 This is an entire fairness action that
20 was brought to challenge the fairness of the merger
21 between FinServ Acquisition Corp. -- which I'll refer
22 to this afternoon as FinServ; it was a special purpose
23 acquisition company -- and Legacy Katapult, a
24 point-of-sale, lease-to-own company in the durable

1 consumer goods space.

2 In November of 2019, FinServ went
3 public. It bore many of the hallmarks of other SPACs
4 familiar to Your Honor and this Court. At the time,
5 FinServ issued 25 million units for \$10 per unit. It
6 resulted in proceeds of \$250 million that was then
7 escrowed for the identification of a potential target.

8 As is customary in SPACs, those units
9 entitled each stockholder to one FinServ Class A share
10 and a fraction of a unit. Each Class A share
11 possessed redemption rights, exercisable upon the
12 announcement of a de-SPAC transaction, to redeem their
13 shares for \$10 plus some nominal rate of interest.

14 At the same time, FinServ also issued
15 Class B shares for nominal consideration to FinServ
16 Holding LLC. That is the sponsor. The Class B
17 shares, unlike the Class A shares, possess no
18 redemption rights and would become profitable if and
19 only if the SPAC merged with a legacy company. That
20 was true regardless of whether the transaction was
21 value destructive. And as Your Honor saw in the
22 operative complaints, we allege that it was.

23 Upon closing, those Class B shares
24 would convert to approximately 20 percent of the

1 post-close entity. The sponsor was controlled by
2 defendants Lee Einbinder and Howard Kurz, which,
3 through their control over the Class B shares,
4 controlled FinServ.

5 FinServ at the time was composed of
6 five directors: defendant Einbinder, defendant Kurz,
7 Diana Glossman, Robert Matza, and Aris Kekedjian.
8 Despite contrary representations in the proxy, each of
9 these directors lacked independence and were
10 interested in the challenged transaction by virtue of
11 receiving the founder shares.

12 Now, as I alluded to a moment ago,
13 FinServ completed its IPO in November of 2019. That
14 IPO triggered a two-year deadline for FinServ to
15 complete the SPAC transaction. If a transaction
16 wasn't completed by then, the Class A shares would be
17 canceled, their proceeds would be returned to
18 stockholders, plus some nominal rate of interest.
19 Class B shares, on the other hand, would be canceled
20 and expire worthless, and so would the private
21 placement units.

22 As Your Honor may recall,
23 Mr. Einbinder and Mr. Kurz began due diligence on
24 approximately 100 companies. 32 NDAs were entered

1 into. But, ultimately, their efforts were stymied by
2 COVID-19.

3 Fast forward in time now to September
4 of 2020. PJT Partners LP, who is a frequent advisor
5 in the SPAC space, pitched Legacy Katapult to FinServ.
6 Recall Legacy Katapult's business involved financing
7 purchases for consumers who could not afford them up
8 front and lease those items back to them.

9 Legacy Katapult's lease originations
10 were heavily dependent on a waterfall arrangement with
11 prime lenders. Thus, Legacy Katapult's success was
12 dependent on lease originations and the number of
13 denials by prime lenders.

14 In October of 2020, FinServ submitted
15 an indication of interest for Legacy Katapult of
16 \$833 million. That bid was not approved by the
17 FinServ board and was submitted without formal
18 retention of any legal or financial advisors.

19 However, I must say, so we have a
20 clear record, Einbinder and Kurz did appear to be
21 receiving informal advice from Barclays, as well as a
22 consultant named Steven Handwerker who was hired to
23 identify a transaction and ultimately perform due
24 diligence.

1 The board convened its first meeting
2 to discuss Legacy Katapult in November of 2020.
3 Einbinder told the board that they were aiming to
4 finalize a transaction by mid-December of 2020.

5 Importantly for each of the three
6 meetings held in November, corporate formalities were
7 not followed. Board minutes were not recorded for
8 those minutes. So we were reliant, as you may recall,
9 on Einbinder's notes from those meetings.

10 A term sheet was ultimately executed
11 on November 13th. Following execution of the term
12 sheet, the board did ultimately retain Barclays and
13 PJT Partners as co-placement agents for a PIPE
14 financing concurrently with the closing of the
15 transaction.

16 In December of 2020, without a
17 fairness opinion, the board approved the merger with
18 Legacy Katapult. Later that month, defendants
19 Einbinder and Kurz discouraged stockholders from
20 redeeming by hosting an investors call and releasing a
21 presentation highlighting hockey-stick growth
22 projections for Legacy Katapult that ultimately were
23 presented and replicated in FinServ's proxy.

24 Fast forward now in time to spring of

1 2021. Legacy Katapult began copying FinServ on
2 biweekly reports which were required pursuant to the
3 terms of the merger agreement.

4 Upon receiving the March 5th biweekly
5 report, Einbinder sent an email back to Legacy
6 Katapult's management noting "origination growth from
7 January 23rd to February 20th year over year seemed to
8 drop off a little." Shortly thereafter, in April and
9 May, Legacy Katapult's lease originations began a
10 dramatic decline. Rather than halt the merger, the
11 defendants proceeded ahead.

12 On May 18 of 2021, FinServ mailed a
13 proxy, a final proxy to stockholders. As the Court
14 found in its bench ruling denying the motion to
15 dismiss, it was reasonably conceivable that the proxy
16 was materially false or misleading on several grounds,
17 all to minimize redemptions to ensure the deal closed
18 and defendants could profit from the founder shares.

19 To summarize, the proxy failed to
20 disclose the financial interests of the supposed
21 independent directors and their beneficial interest in
22 the founder shares. The proxy failed to disclose that
23 Handwerker had a contingent compensation arrangement
24 where he too would receive founder shares in the event

1 that the transaction closed.

2 The proxy failed to disclose the net
3 cash per share, namely that the value of Katapult
4 stock was no more than \$7.58 per share. The proxy
5 misleadingly disclosed the company's financial
6 projections and deteriorating financial condition
7 after signing of the merger agreement. And, finally,
8 the proxy failed to disclose the known risk that
9 Katapult's prime lenders might cannibalize its lease
10 originations, resulting in a decline of Katapult's
11 primary source of revenue.

12 On June 7th of 2021, the FinServ
13 stockholders approved the Legacy Katapult merger with
14 less than one-tenth of 1 percent of all stockholders
15 seeking to redeem their shares. Just 12 days later,
16 on June 19th, Einbinder formally notified the Katapult
17 board, which he joined upon closing, of what he
18 already knew: that Katapult would miss the low end of
19 its financial projections for gross originations by 50
20 to 150 million and 25 to \$125 million in revenue.

21 On August 10th, Katapult publicly
22 disclosed that its gross originations in Q2 had
23 declined by 64.1 million, down 17 percent from the
24 previous year and, ultimately, withdrew its guidance.

1 Thereafter, Katapult's stock price nosedived, dropping
2 from 9.73 per share to below \$1, forcing Katapult to
3 effect a 25-for-1 reverse stock split in December of
4 2023.

5 So, Your Honor, with that background,
6 that brings us to this transaction -- or this
7 litigation.

8 In February of 2022, plaintiff
9 Saunders served a 220 demand. In response, Katapult
10 produced more than 1,000 pages of documents. In
11 August of 2022, plaintiff filed a 51-page initial
12 complaint incorporating documents produced pursuant to
13 that Section 220 demand.

14 In response to the initial motion to
15 dismiss by defendants, plaintiff filed a 79-page
16 amended complaint in January 2023. Defendants then
17 ultimately moved to dismiss that amended complaint.
18 The parties fully briefed the motion. And on July 17,
19 2023, Your Honor heard oral argument. And on
20 November 1, the Court rendered its bench ruling which
21 largely denied the motion to dismiss.

22 Thereafter, the parties proceeded to
23 discovery. Plaintiff issued 49 requests for
24 production, 19 interrogatories, to which defendants

1 responded, and the parties began the meet-and-confer
2 process.

3 In addition, plaintiff served
4 subpoenas on two nonparties: Barclays Bank PLC, and
5 Katapult Holdings, Inc. In December 2023, the parties
6 held a full-day mediation before mediator Michelle
7 Yoshida of Phillips ADR. That mediation was also
8 attended by the New York plaintiffs in the New York
9 action. That mediation ended without a resolution.

10 Between December of 2023 and
11 February 2024, Ms. Yoshida -- or the parties continued
12 the negotiations of a potential settlement which
13 resulted on February 21st of 2024 with Ms. Yoshida
14 making a final mediator's recommendation to settle
15 this action for \$9,500,000.

16 The parties agreed to that term the
17 following day. A settlement term sheet was executed
18 on May 20th. The parties filed a stipulation and
19 agreement of settlement, compromise, and release on
20 July 3rd. And Your Honor entered the scheduling order
21 on July 17th.

22 With that background, let me turn to
23 the proposed settlement.

24 Your Honor, to determine the fairness,

1 reasonableness, and adequacy of the settlement, the
2 Court considers a number of factors, including the
3 probability of the claim; the apparent difficulty in
4 enforcing the claim through the court; the
5 collectibility of any judgment recovered; the delay,
6 expense, and burden of the litigation; the amount
7 compromised compared to the collectibility of
8 judgment; and the views of the parties involved. And
9 that comes from the *Polk* case.

10 This analysis really boils down to the
11 "give" and the "get." Let me begin with the "give."

12 Here, the "give" is a standard release
13 of claims that were asserted in the complaints or
14 could have been alleged in the action, or relate to
15 the ownership of FinServ Class A shares as of the
16 effective time. Importantly, the New York settlement
17 and enforcement of this settlement have been carved
18 out as excluded claims.

19 Let me turn to the "get." The "get"
20 is a common fund composed of 9,500,000 of cash and
21 stock. And although no SPAC case that we are aware of
22 has gone to trial and judgment entered, guidance from
23 Vice Chancellor Will indicates that one method of
24 calculating potential damages in these de-SPAC cases

1 is the difference between the redemption price on the
2 one hand, \$10 per share, and the target company's
3 value as of the de-SPAC transaction.

4 Without reliable projections for
5 Katapult, we looked at FinServ's net cash per share.
6 And as alleged in the complaint, we allege that it was
7 \$7.58 as a proxy for the second input. Net cash per
8 share, you'll recall, is related to the value
9 stockholders can expect to reap by choosing not to
10 redeem their shares instead of investing in the
11 de-SPAC transaction.

12 With approximately 25 million shares
13 outstanding, that equates to potential damages --
14 recoverable damages of \$60,484,662.04. The
15 \$9.5 million common fund represents a strong
16 15.7 percent recovery, representing a liberally
17 calculated post-trial and presumably post-appeal
18 damages number.

19 Your Honor, that figure aligns with
20 settlements approved by this Court. I'll just mention
21 two of them: *R1 RCM Inc.* and *Jefferies*. And in
22 preparing for this hearing, I also went back and
23 reviewed Vice Chancellor Laster's memorandum opinion
24 permitting fees in the *Dell Techs. Inc. Class V* case.

1 And there, Vice Chancellor Laster performs an analysis
2 of entire fairness cases and determines that the mean
3 recovery in an entire fairness case in Delaware was
4 17.95 percent, and the median was 12.35 percent. So I
5 submit that that 15.7 percent recovery fits neatly
6 within that range.

7 As to the strengths of our case, we
8 continue to believe that defendants would have
9 struggled to prove fair dealing. And a few points to
10 highlight why the process was unfair. Negotiations
11 and due diligence were led by defendants Einbinder and
12 Kurz to individuals who had the most to gain from a
13 transaction closing. Einbinder and Kurz dictated the
14 timing and pressured the board to complete the deal by
15 year's end.

16 The board received no unconflicted
17 advice. Barclays and PJT were retained far too late
18 to perform proper due diligence, were hired primarily
19 to lead the PIPE investment in connection with the
20 SPAC transaction, and the board did not request and
21 neither advisor rendered a fairness opinion.

22 The controller defendants ultimately
23 acquired founder shares and private placement units
24 worth in excess of \$78 million. And the defendants

1 issued a materially false and misleading proxy.

2 Unfair price. Although defendants
3 would have borne the burden, there were risks to the
4 plaintiff. This Court previously indicated in a SPAC
5 transaction damages could be the difference between
6 the target company's value at the time of the de-SPAC
7 transaction and the redemption price. Again, however,
8 we're unaware of a decision by this Court employing
9 this method in a post-trial damages judgment.

10 But the guidance we have from Vice
11 Chancellors Laster and Will indicate that this is a
12 potential method of damages. But the point still
13 stands, Your Honor, that calculating damages in this
14 particular context remains unknown.

15 Moreover, we submit that traditional
16 valuation methods would not have been reliable here as
17 a result of this company being pre-revenue, with no
18 history of also preparing or beating projections in
19 the ordinary course.

20 In fact, as Your Honor may recall,
21 guidance was withdrawn ultimately in August of 2021
22 because the company was not confident that it could
23 meet and beat its projections.

24 Thus, we don't think that a DCF

1 analysis would have replicated a reliable value. We
2 think that Katapult serves in a niche business, so
3 comparables would have been very difficult to identify
4 in a comparable companies analysis. And for the same
5 reason, we don't think that a precedents transactions
6 analysis would have been a reliable method in this
7 particular case.

8 Thus, proving damages would have been
9 challenging with trial evidence heavily reliant on a
10 battle of the experts. And whenever we go to trial
11 and there's a battle of the experts, there is immense
12 risk on both sides.

13 Let me turn for a few moments on the
14 settlement -- talking about the settlement shares. As
15 noted, the settlement consideration is \$9,500,000:
16 \$6,725,000 in cash, 2,775,000 in freely tradable
17 Katapult shares.

18 Now, upon the issuance of those
19 shares, plaintiff's counsel has the sole discretion to
20 sell all or a portion thereof and distribute the net
21 cash proceeds to eligible settlement class members.
22 And we wanted to apprise Your Honor that plaintiff's
23 counsel has retained Citi to oversee the Delaware
24 escrow account, and they will facilitate the sale of

1 the shares. So we'll be reliant on them in
2 determining when to sell the shares to maximize the
3 recovery for the class.

4 Now, the decision to accept as a
5 component of the settlement consideration shares was
6 made after considering both the indemnification
7 obligations to FinServ's directors and officers that
8 extended post-close and the company's cash and debt
9 capacity to fund a settlement.

10 Now, the number of Delaware settlement
11 shares is calculated by dividing 2,775,000 by the
12 volume weighted average share price for the 10
13 consecutive days, trading days, before the settlement
14 hearing. And that can be found at paragraph 7(b)(i)
15 and (ii).

16 As of yesterday's close, the VWAP was
17 \$10.06 per share. Thus, the company is required to
18 issue 275,845 settlement shares. 167,797 of those
19 shares must be issued within 10 days of the date of
20 the Court's entry of the order and final judgment.

21 With respect to the excess shares, or
22 the 108,048, the company has the obligation to issue
23 those shares in two equal installments at six months
24 and 12 months from entry date of the order and final

1 judgment, respectively.

2 The company also, in its sole
3 discretion, has the right to pass the equivalent value
4 of those shares, the excess shares, in cash. And how
5 that's calculated is you would take the 108,048 shares
6 times the VWAP of \$10.06, and that would result in a
7 cash payment of \$1,086,962.88; equal installments of
8 543,481.44.

9 Barring any unexpected developments,
10 Your Honor, the New York settlement provision
11 contained in the stipulation will not apply because
12 the New York settlement will proceed after our
13 settlement. And that is slated to be heard on
14 January 23rd of 2025.

15 Lastly, it's defendants' obligation to
16 ensure that the Delaware settlement shares are duly
17 and validly issued. We understand that the settlement
18 shares will be issued pursuant to an exemption under
19 Section 3(a)10 of the Securities Act. Katapult filed
20 a memorandum on this issue on September 18th that can
21 be found at Docket No. 90. And I understand that
22 defendants' counsel will address any questions the
23 Court may have respecting the 3(a)10 exemption.

24 Now, a couple final points for your

1 consideration on the settlement. This settlement was
2 achieved after extensive mediation and arm's-length
3 negotiation facilitated by an experienced mediator,
4 Ms. Yoshida. In addition, plaintiff's counsel engaged
5 a valuation consultant before and during the mediation
6 process to perform preliminary damages analyses and
7 provide their professional expertise in determining
8 what an ultimate damages award could be in this case.

9 Plaintiff only agreed to the
10 settlement after receiving a final mediator's
11 recommendation. And we submit these facts support the
12 fairness of the settlement.

13 The Court has also recognized the
14 opinions of representative plaintiffs and their
15 experienced counsel is a significant consideration in
16 weighing the approval of the settlement.

17 And as for the views of counsel,
18 plaintiff's counsel are seasoned litigators,
19 well-known to this Court, with a strong record of
20 securing recoveries for stockholders, including with
21 respect to SPAC litigation.

22 And it goes without saying, Your
23 Honor, but we fully support this settlement and
24 believe it's quite strong in light of the attendant

1 risks we faced here.

2 Plaintiff's counsel has also received
3 no objections, and none have been filed with the
4 Court. So unless Your Honor has any questions, we
5 submit that the proposed settlement should be
6 approved.

7 THE COURT: I have no questions.

8 ATTORNEY SBORZ: Let me move to class
9 certification.

10 This settlement contemplates
11 certification of a non-opt-out class under Rule 23(a),
12 23(b)(1), or (b)(2) which consists of holders of
13 Class A common stock as of the closing of the de-SPAC
14 merger on June 9, 2021. Excluded from the class are
15 defendants, their affiliates, their immediate family
16 members, or any entities that held FinServ or Katapult
17 stock on behalf of any of the foregoing, and any
18 FinServ stockholder who redeemed their shares or
19 lacked a Class A redemption right.

20 Your Honor entered the scheduling
21 order preliminarily certifying the class on July 17th.
22 And as Your Honor knows, certification under Rule 23
23 is a two-step process requiring the class to meet the
24 four criteria within Court of Chancery Rule 23(a):

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1 numerosity, commonality, typicality, and adequacy of
2 representation, and at least one of the criteria under
3 Chancery court Rule 23(b).

4 Your Honor, I'm happy to defer to the
5 papers on this issue. I'm also happy to briefly
6 address the factors under Rule 23(a) and (b)(1) and
7 (b)(2).

8 THE COURT: Counsel, I think they're
9 addressed in your brief.

10 ATTORNEY SBORZ: Okay. With that,
11 Your Honor, we ask that the class be finally
12 certified.

13 Let me move to the plan of allocation.
14 The plan of allocation proposes distributing the
15 Delaware Net Settlement Fund on a pro rata basis
16 directly to stockholders who were beneficial or record
17 holders of FinServ Class A common stock as of the
18 close of business on the date of the merger, June 9,
19 2021, except the excluded persons I mentioned just a
20 moment ago.

21 By avoiding a claims-made process,
22 this plan avoids high administrative cost and unknown
23 distributional effects. Instead, this settlement will
24 be distributed directly through DTC participants, a

1 method previously endorsed by this Court in both the
2 *Dole* case and the *PLX* case. And similar plans of
3 allocation have been approved in other SPAC cases.
4 And I'd just refer Your Honor to page 40 of the
5 opening brief at note 162.

6 So unless Your Honor has any
7 questions, let me move to the fee and expense award.

8 The determination of attorneys' fees
9 and reimbursement of expenses is left to the Court's
10 sound discretion. In deciding fees and expenses, the
11 Court considers the well-known *Sugarland* factors,
12 including the results achieved, counsel's time and
13 effort, the relative complexities of this litigation,
14 the standing and ability of counsel, the contingent
15 nature of the litigation, the stage at which the
16 litigation ended, and whether the plaintiff can claim
17 full credit for the benefit.

18 Here, plaintiff's counsel seeks a fee
19 representing 17.5 percent of the settlement amount, or
20 \$1,662,500, which is inclusive of expenses totaling
21 slightly more than \$50,000.

22 I will say, Your Honor, that most of
23 the expenses arose from our work with our consulting
24 expert or in connection with the mediation, both of

1 which I submit were necessary to achieve this strong
2 result.

3 The fee and expense award will also be
4 paid in the same cash-to-stock ratio as the Delaware
5 cash settlement amount and the Delaware settlement
6 shares. So how that would work is taking the
7 6,725,000 in cash, multiplying that by 17 1/2 percent
8 equals \$1,176,875. Doing the same with the stock
9 portion, 2,775,000 multiplied by 17 1/2 percent equals
10 \$485,625, or 48,273 shares. And how I calculate that
11 number is taking that 485,625 figure and multiplying
12 that by the 10-day VWAP of \$10.06, which equals
13 \$1,662,500.

14 Now, the primary consideration under
15 *Sugarland* is the benefit conferred. Here, we have a
16 concrete benefit in the form of a \$9.5 million common
17 fund. In our case, we settled after engaging in
18 meaningful litigation efforts. And paraphrasing *Dell*
19 *Class V* and *Americas Mining*, the appropriate bracket
20 for consideration is 15 to 25 percent.

21 Now, as discussed in briefing, we
22 litigated this case for nearly three years, including
23 serving and negotiating the Section 220 demand,
24 receiving and analyzing the over 1,000 pages of

1 documents, drafting an initial complaint, drafting an
2 amended complaint, opposing the defendants' motion to
3 dismiss, engaging in written discovery, consulting
4 with our damages expert, and ultimately drafting
5 mediation statements and ultimately negotiating the
6 terms of the settlement.

7 We mentioned a number of authorities
8 in our brief on pages 42 and 43. And I'll note that
9 we filed a corrected brief on October 8th that updated
10 some of the data to be more precise and to correct a
11 few errors that I caught in preparation for this
12 hearing.

13 I'll note that the authorities we cite
14 in our brief approved fees and expense awards ranging
15 between 17 percent on the low end to 26 percent at
16 equivalent procedural postures. The requested fee and
17 expense award of 17 1/2 percent fits comfortably
18 within the reasonable range established by that
19 precedent.

20 One final data point, Your Honor. I
21 had noticed that Vice Chancellor Will on Tuesday had
22 approved the settlement in *Laidlaw v. Gig*
23 *Acquisitions*², Case No. 2021-0821-LWW. And the Court
24 approved an 18 percent fee in that particular case.

1 And that was around the same procedural posture as
2 this except for they did not serve a 220 demand and
3 did not file an amended complaint. So I think that
4 data point further supports the fairness,
5 reasonableness, and adequacy of the fee and expense
6 award requested here.

7 Now, with respect to the lodestar
8 cross-check, under Delaware law more important than
9 the hours worked is plaintiff's effort. Plaintiff's
10 counsel devoted 1,875.25 hours litigating this action
11 from inception to July 3rd, 2024, which is the date
12 that the stipulation was filed. And Your Honor can
13 find that in the James, Kaskela, and Sborz affidavits
14 at paragraph 4.

15 Now, subtracting expenses of
16 \$50,786.61, the net requested fee award is
17 \$1,611,713.39. That represents an effective hourly
18 rate of \$859.47 per hour. And the fee and expense
19 award represents a multiplier of 1.4 times. And we
20 submit that both are in line with precedent and
21 reasonable under the circumstances.

22 Finally, Your Honor, I'll note that in
23 preparation for any settlement hearing, I always look
24 back at what the literature says that our colleagues

1 on the defense side are charging on an hourly rate.
2 And the most recent data that I found that they are
3 charging -- some partners are charging upwards of
4 \$2,600 an hour now, and senior associates are being
5 billed out at a rate of \$1,125 an hour. And I submit
6 that, again, is a good data point demonstrating that
7 the effective hourly rate here is reasonable and
8 arguably conservative.

9 With respect to the other secondary
10 factors, plaintiff pursued this litigation on an
11 entirely contingent basis. At the time this action
12 was commenced, recall that we were only seven months
13 removed from Vice Chancellor Will's decision in
14 *MultiPlan*, and the SPAC legal landscape was still
15 evolving in real-time.

16 This case did not present a ready-made
17 exit or obvious settlement opportunity like the
18 disclosure-only settlements did. No prior case has
19 successfully tried a SPAC case to trial and recovered
20 funds post-trial.

21 As to the complexity, plaintiff
22 brought this action in the relatively early stages of
23 SPAC litigation, and presented a series of then-novel
24 arguments, including damages.

1 As to the standing and ability of
2 counsel, plaintiff is represented by counsel who in
3 this Court have litigated 11 cases to trial in the
4 past five years. And defendants were represented by
5 experienced law firms Morris, Nichols, Arsht & Tunnell
6 and Cooley LLP. Finally, credit for this common fund
7 rests solely with plaintiff and counsel, and that is
8 not something the company disputes.

9 So for all of those reasons, we think
10 that the requested fee and expense award is fair and
11 reasonable and should be approved.

12 So unless Your Honor has any questions
13 about that, let me move to the incentive fee award.

14 Plaintiff's counsel here is requesting
15 an incentive fee of \$5,000 for Mr. Saunders' time and
16 effort, beginning with his pursuit of a Section 220
17 demand through settlement of this action.

18 Your Honor, Mr. Saunders understood
19 that there was a "very real possibility of having
20 [his] computer and other electronic devices ...
21 searched, sitting for a deposition -- perhaps more
22 than one if [he] instituted a Section 220
23 litigation -- and then perhaps testify[ing] at trial."
24 Despite all of this, Mr. Saunders was prepared to take

1 on these not-so-trivial tasks. And that comes out of
2 Your Honor's settlement hearing transcript in *Twitter*.

3 During the nearly three-year duration
4 of this litigation, he invested time in pursuing a
5 books and records investigation, and regularly
6 monitoring the work of counsel from the initial
7 complaint through the stipulation of settlement. Most
8 importantly, he maintained his FinServ-Katapult stock
9 for over three years, despite the company's tumultuous
10 performance.

11 Lastly, the notice provided that we
12 would seek this incentive fee award, and we have
13 received no objections to it.

14 Finally, Your Honor, we submit that
15 this award is sufficiently modest in size, that it
16 doesn't raise the specter of a conflict of interest,
17 and will be paid from plaintiff counsel's fee and
18 expense award, so it will not diminish the class's
19 recovery.

20 With that, unless Your Honor has any
21 questions, that concludes my presentation.

22 THE COURT: I do not. Thank you.

23 ATTORNEY SBORZ: Thank you.

24 THE COURT: Mr. Measly?

1 ATTORNEY MEASLEY: Nothing for me,
2 Your Honor, unless you have any questions for me.

3 THE COURT: I do not. Thank you.

4 ATTORNEY MEASLEY: Thank you.

5 THE COURT: Is there anyone in the
6 chamber here to speak on the settlement other than
7 counsel? None.

8 I see some people in the back. I know
9 one from the Fourth Estate back in the corner. We've
10 got some folks in the back.

11 I assume that you are here satisfying
12 clerkship requirements. Welcome and congratulations.

13 I'm going to give you a ruling on the
14 proposed settlement.

15 By way of background, the plaintiff,
16 Andrew Saunders, seeks approval of a class action
17 settlement of claims arising out of the merger of
18 FinServ Acquisition Corp., a special purpose
19 acquisition company or "SPAC," and Katapult Holdings,
20 Inc., or "Legacy Katapult," that resulted in an entity
21 referred to as Katapult.

22 In exchange for a release of claims,
23 the settlement consideration to the class is valued at
24 \$9.5 million, consisting of \$6,725,000 in cash and

1 \$2,775,000 to be paid in either freely tradable
2 Katapult common stock or cash at Katapult's election.

3 For the benefits conferred in this
4 settlement, plaintiff's counsel seeks an all-in fee
5 and expense award of \$1,662,500, representing 17 1/2
6 percent of the settlement amount, in the same cash and
7 stock ratio as the class. Plaintiff's counsel also
8 seeks approval of a \$5,000 incentive award to the lead
9 plaintiff to be paid out of any fee award.

10 To date, no stockholder has objected
11 to the settlement or the fee request, and there is no
12 one here in court today raising any objection.

13 The plaintiff brought this action on
14 behalf of holders of FinServ's Class A common
15 stockholders, alleging that the defendants Lee
16 Einbinder, Howard Kurz, and FinServ Holdings LLC
17 controlled FinServ, and that together with director
18 defendants Robert Matza, Diane Glossman, and Aris
19 Kekedjian, each of the defendants breached their
20 fiduciary duties by hastily pushing through a flawed
21 transaction with Legacy Katapult and failing to
22 disclose material information so as to induce holders
23 of the Class A not to exercise their redemption right
24 in advance of the merger.

1 The plaintiff's operative complaint
2 asserted claims against the defendants for breaches of
3 their fiduciary duties as directors, officers, and/or
4 controllers, and a fourth count against all of the
5 defendants for unjust enrichment.

6 The defendants filed a motion to
7 dismiss, which the Court largely denied. And then the
8 case proceeded toward discovery.

9 The settlement is the product of a
10 mediator's proposal to settle this action and a
11 parallel action in federal court in New York where a
12 separate class asserted similar claims under the
13 Securities Exchange Act against largely overlapping
14 defendants.

15 The parties entered into a settlement
16 term sheet on May 20 of this year, and filed the
17 settlement stipulation on July 3rd. On July 17, the
18 Court entered a scheduling order providing for an
19 October 10, 2024, settlement hearing. On October 3rd,
20 2024, the plaintiff submitted a letter stating that
21 there had been no objections to the proposed
22 settlement by the deadline set forth in the scheduling
23 order.

24 I have four issues to address today:

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1 Class certification, the proposed settlement, the
2 application for attorneys' fees and expenses, and the
3 proposed plaintiff incentive award.

4 Turning first to class certification,
5 the class is generally defined as a non-opt-out class
6 of all record and beneficial holders of Class A common
7 stock of FinServ as of the closing of the de-SPAC
8 transaction on June 9, 2021, excluding the defendants,
9 former officers and directors of FinServ or defendant
10 FinServ Holdings, any officer or director of Katapult
11 in the months surrounding the transaction, and the
12 families, entities and accounts and heirs and assigns
13 of any such person.

14 The settlement agreement provides for
15 certification of the plaintiff as the class
16 representative, and Bernstein Litowitz Berger &
17 Grossmann LLP and Andrews & Springers LLC as class
18 counsel.

19 Court of Chancery Rule 23(c)(1)
20 requires the Court to certify a class prior to
21 disposition of a class action. To be certified, the
22 class must satisfy the four prerequisites of 23(a):
23 numerosity, commonality, typicality, and adequacy. If
24 the class meets the requirements of 23(a), the Court

1 must then find that the suit fits properly into one of
2 the 23(b) categories. The Court must make explicit
3 findings on the record that these requirements are
4 satisfied under the Delaware Supreme Court's decision
5 in *Prezant v. De Angelis*, 636 A.2d 915, in 1994.

6 First, numerosity requires that "the
7 class is so numerous that joinder of all members is
8 impracticable." FinServ was publicly traded and there
9 were millions of Class A shares outstanding at the
10 time of the de-SPAC transaction. And the affidavit
11 submitted by Luiggy Segura regarding notice indicates
12 that there are thousands of potential class members.
13 Joinder of so many stockholders is impracticable, and
14 the numerosity requirement is thereby satisfied.

15 Second, commonality requires
16 "questions of law or fact common to the class." Here,
17 the claims alleging that the defendants breached their
18 fiduciary duties in connection with the de-SPAC
19 transaction present common questions of law and fact
20 pertaining to each member of the class. Accordingly,
21 commonality is satisfied.

22 Rule 23(a)(3) requires that "the
23 claims or defenses of the representative parties are
24 typical of the claims or defenses of the class."

1 Here, the plaintiff's claims for breach of fiduciary
2 duty arise out of the same course of conduct that
3 would underlie all of the claims of the Class A
4 stockholders related to the de-SPAC transaction, and
5 the defenses against the claims asserted by the
6 plaintiff would be typical of the defenses asserted
7 against the class. Thus, the plaintiff's claims are
8 typical across the class.

9 Fourth, adequacy requires that "the
10 representative parties will fairly and adequately
11 protect the interests of the class." This requirement
12 will be satisfied when the class representative is
13 represented by competent and experienced counsel, and
14 the representative party's interests do not conflict
15 with the class's interests.

16 No one has challenged the plaintiff's
17 representation of the class, or the quality of
18 plaintiff's counsel, who have diligently pursued this
19 litigation. The plaintiff has held FinServ shares at
20 all relevant times, submitted a presuit Section 220
21 demand, and submitted an affidavit that satisfies
22 Rule 23(f)(2)(A). Therefore, adequacy, like the rest
23 of the 23(a) requirements, is satisfied.

24 Having satisfied Rule 23(a), the Court

1 must now determine whether this case falls within one
2 of the 23(b) categories. The parties assert that the
3 class should be certified under both Rules 23(b)(1)
4 and (b)(2). This is a quintessential class action
5 certifiable under both rules.

6 As our Supreme Court observed in the
7 *Celera* case, 59 A.3d 418, at 433 in 2012, Delaware
8 courts "repeatedly have held that actions challenging
9 the propriety of director conduct in carrying out
10 corporate transactions are properly certifiable under
11 both subdivisions (b)(1) and (b)(2)."

12 Rule 23 (b)(1) applies to class
13 actions that are necessary to avoid harms that could
14 arise from inconsistent adjudications of similar
15 claims. Certification under (b)(1) is appropriate
16 here, as adjudication of the claims by any one
17 stockholder would, practically speaking, be
18 dispositive of the interest of other stockholders as
19 well. Certification under Rule 23(b)(2) is also
20 appropriate here because the conduct at issue is
21 generally applicable to all class members.

22 Finally, finding that the requirements
23 of Rules 23(a) and (b) are satisfied, the Court must
24 determine whether notice of the resolution of the

1 claims was provided to all class members as set forth
2 in Rule 23(f)(3).

3 The finalized notice of settlement,
4 found as Exhibit A to the affidavit of Luiggy Segura
5 complies with the requirements of Rule 23(f)(3).

6 The Court entered a scheduling order
7 on July 17 of this year, which required dissemination
8 of the notice via First-Class Mail to all class
9 members who may be identified through reasonable
10 effort, posting the notice on a website established
11 for the settlement, and publication of the notice over
12 PR Newswire. Plaintiff submitted the Segura
13 affidavit, which attested that JND Legal
14 Administration on August 9 of this year caused notice
15 to be mailed via First-Class Mail to the 194 record
16 holders identified by the defendants' counsel, an
17 additional 231 record holders identified by JND, and
18 the 4,079 addresses in JND's proprietary broker
19 database.

20 JND also caused the notice to be
21 posted on the Depository Trust Company's Legal Notice
22 System on August 8. Through October 2nd, JND received
23 204 direct requests for notice and mailed those, and
24 another 7,580 notices to nominees requesting

1 forwarding to their customers.

2 Altogether, JND has mailed a total of
3 over 12,000 notices to potential class members. JND
4 also set up a telephone helpline for class members
5 with any questions.

6 Plaintiff's counsel has represented
7 that there have been no objections to the proposed
8 settlement that they are aware of. None have been
9 filed on the docket. And, as I said, there was no one
10 here today registering any objection.

11 Finding that the requirements of
12 Rule 23 and due process have been satisfied, the Court
13 will certify the class.

14 Next, I turn to the substance of the
15 settlement.

16 "The Court must act as a fiduciary on
17 behalf of the class to ensure that the outcome falls
18 within a range of reasonable outcomes that a
19 disinterested decision-maker, acting on behalf of the
20 class and with the benefit of the information
21 available, could accept." That's from *In re AMC*
22 *Entertainment Holdings*, 299 A.3d 501, at 523, from
23 2023 in this Court.

24 Court of Chancery Rule 23(f)(5)

1 requires the Court to consider whether "(A) the
2 representative party and class counsel have adequately
3 represented the class; (B) adequate notice of the
4 hearing was provided; (C) the proposed dismissal or
5 settlement was negotiated at arm's length; and (d) the
6 relief provided for the class falls within a range of
7 reasonableness"

8 As I've already discussed, the
9 plaintiff and his counsel have adequately represented
10 the class and provided adequate notice of the
11 settlement. And it is clear that the settlement was
12 negotiated at arm's length and is the product of a
13 mediator's proposal.

14 To determine whether the settlement
15 falls within a range of reasonableness, the Court
16 looks to the facts and circumstances upon which the
17 claim is based, the possible defenses thereto, and
18 then exercises a form of business judgment to
19 determine the overall reasonableness of the
20 settlement.

21 This approach is codified in
22 Rule 23(f)(5)(D) which directs the Court to consider
23 "(i) the strength of the claims; (ii) the costs,
24 risks, and delay of trial and appeal; (iii) the scope

1 of the release; and (iv) any objections to the
2 proposed dismissal or settlement."

3 The plaintiff here had seemingly
4 strong claims with respect to liability. This was an
5 entire fairness case in which an alleged conflicted
6 controller and conflicted board conducted what
7 appeared to be a flawed process that resulted in their
8 receiving nonratable benefits.

9 Now, it's difficult to gauge the
10 strength of the claim beyond what was presented at the
11 motion to dismiss stage because there was no document
12 production or depositions as of the time of settlement
13 other than the document production in the books and
14 records demand.

15 Although the plaintiff's disclosure
16 theories were of varying strength, some seemed to
17 support a finding of unfair process.

18 The headwinds for the plaintiff,
19 however, came with respect to damages. This Court has
20 posited that a measure of damages in similar
21 circumstances might be the difference between the
22 value of the redemption right and the value of the
23 shares received in the de-SPAC transaction. That's
24 from the *Lordstown Motors Decision*, 2022 WL 678597, on

1 March 7, 2022, by my colleague Vice Chancellor Will.

2 The plaintiff also proffers a
3 potential measure of damages as the difference between
4 the \$10 per-share redemption value and the \$7.58 net
5 cash per-share value. There's not, however, a
6 post-trial decision endorsing either method of
7 calculating damages in the SPAC litigation context.

8 As plaintiff identifies, valuing
9 legacy Katapult, a pre-revenue company, would have
10 been difficult and likely come down to a battle of
11 experts.

12 As a benchmark for this award, the
13 plaintiff proffers the difference between the \$10
14 per-share redemption value and \$7.58 net cash per
15 share. Under that calculation, a little over
16 \$60 million in potential damages would exist, of which
17 the \$9.5 million settlement would be a recovery of
18 about 15.7 percent.

19 The plaintiff also highlights that the
20 controller defendants received over \$78 million from
21 their founder shares and private placement units at
22 the closing of the de-SPAC transaction, a figure for
23 which the \$9.5 million proposed settlement would be a
24 12.2 percent recovery.

1 Under either computation in my view
2 this is a reasonable recovery, particularly given the
3 difficulties the plaintiff would have faced in
4 establishing damages in higher ranges.

5 In exchange for this "get," the
6 settlement provides the defendants with a global
7 release of claims that may have arisen under the
8 allegations in the amended complaint. Under the
9 circumstances, I believe that the "give" and the "get"
10 are reasonable.

11 I also find that the plan of
12 allocation, which provides for *pro rata* distribution
13 to the Class A stockholders at the time of the merger
14 in accordance with the guidance articulated in the *PLX*
15 *Technology* case to be reasonable.

16 With respect to the settlement shares,
17 the parties informed me in advance of the hearing of
18 Katapult's intent to rely on the exemption from
19 registration under Section 3(a)(10) of the Securities
20 Act of 1933, and Katapult has filed a memorandum of
21 law in support of the necessary findings.

22 I find, for the record, that the
23 settlement shares are to be issued solely for bona
24 fide outstanding claims. All class members had the

1 right to appear today. This hearing was open to all
2 persons to whom the settlement shares will be issued.
3 Adequate notice has been provided. And the terms of
4 the settlement are fair to the recipients of the
5 settlement shares.

6 The Court concludes, applying its own
7 business judgment, that the settlement is fair,
8 reasonable, and adequate, and the Court will approve
9 it.

10 With respect to the Court's retention
11 of jurisdiction of the case, as outlined in the
12 settlement, you will be able to pursue any enforcement
13 here. However, I will be closing the case on the
14 Court's docket after the entry of final order. If,
15 for some reason, you need to file an administrative
16 motion for distribution, you may do so and I will
17 consider it accordingly.

18 Next, I turn to the fee application.
19 The amount of an attorneys' fee award in
20 representative litigation is within the discretion of
21 the Court. The Court's discretion is guided by the
22 well-known *Sugarland* factors, which are the results
23 achieved, the time and effort of counsel, the relative
24 complexities of the litigation, any contingency

1 factor, and the standing and ability of counsel
2 involved.

3 The Court has traditionally placed the
4 greatest weight on the benefit conferred. The Court
5 may also, and usually does, consider the stage at
6 which the case settled.

7 Here, plaintiff's counsel seeks an
8 award of 17 1/2 percent of the settlement amount,
9 inclusive of their expenses of \$50,786.61. In dollar
10 terms, the all-in request is for \$1,662,500.
11 Plaintiff's counsel proposes that their fee be paid in
12 the same cash-to-stock ratio as the class recovery.
13 No objection to this fee has been lodged with the
14 Court.

15 For the result achieved, the benefit
16 of the settlement is easy to measure. As I've already
17 said, it's cash. The plaintiff's counsel recorded
18 1,812.7 hours from the inception of this action until
19 their execution of the settlement term sheet, with a
20 total lodestar of a little over \$1.1 million. Adding
21 the hours plaintiff's counsel recorded between the
22 execution of the term sheet and the filing of the
23 stipulation of settlement with the Court, plaintiff's
24 counsel had recorded a total of 1,875.25 hours for a

1 total lodestar of about \$1.16 million.

2 As I have mentioned in past cases, I
3 expect to receive this breakdown from counsel. And I
4 do appreciate that counsel provided it in their
5 affidavits in this case.

6 As I said, plaintiff's counsel also
7 incurred expenses of about \$51,000.

8 Subtracting the expenses from the
9 award that's requested, the net award sought would be
10 about \$1.6 million, which yields an effective hourly
11 rate of about \$890 and a multiplier of 1.45 against
12 the pre-execution lodestar. They all fall within a
13 range of reasonableness, in my view.

14 The claims here fit the mold of the
15 now common SPAC suit, although some of the theories
16 asserted in this action remained untested at the time
17 of filing. SPAC cases are reasonably complex, and
18 none have gone to trial and judgment. This factor
19 supports the fee request.

20 Counsel litigated this case on an
21 entirely contingent basis. Plaintiff's counsel are
22 regular practitioners in this Court and have achieved
23 strong results for their clients over the years.

24 I also consider the stage at which the

1 parties settled the case. Here, the litigation
2 progressed out of the early stage, but the parties
3 settled before pretrial preparation began, placing
4 this case at the lower end of the 15 to 25 percent
5 range for meaningful litigation efforts as noted by
6 our Supreme Court in the *Americas Mining* case.

7 Prior to the settlement, the plaintiff
8 obtained over 1,000 pages of documents through a
9 Section 220 demand, largely prevailed against the
10 motion to dismiss the amended complaint, and began
11 discovery, though the plaintiff concedes that the
12 action settled before document discovery.

13 In fact, there was no post complaint
14 document production or depositions, at least not that
15 I'm aware of and it's not reflected in the settlement
16 papers or in the briefing. Recognizing that this
17 action has not proceeded very far past the motion to
18 dismiss stage, plaintiff's counsel seek a 17 1/2
19 percent fee award.

20 This request is also reasonable when
21 measured against recent awards in other SPAC cases.
22 At the higher range, we have the award of 22.5 percent
23 plus expenses in *Lordstown*, and the 20 percent award
24 which was inclusive of expenses in *MultiPlan*. Each

1 case came earlier in the SPAC wave, and both proceeded
2 further than this case did.

3 In the middle of the range is the
4 18 percent award in *Gig2*. There, the plaintiff began
5 settlement discussions prior to commencing discovery
6 and engaged in only limited confirmatory discovery.

7 At the low end of the range is the
8 13 percent award in *Gig4*. There, the plaintiff began
9 settlement negotiations prior to substantial discovery
10 and did not engage in confirmatory discovery. The
11 case was settled prior to motion practice.

12 Counsel in *Gig4* sought an award
13 equaling 18 percent of the financial benefit achieved,
14 the same percentage as in *Gig2*. But recognizing that
15 the *Gig4* case was settled without substantial
16 litigation efforts by counsel and was filed after the
17 *MultiPlan*, *Gig3*, and *Gig2* opinions had provided a
18 clear framework for SPAC cases, the Court reduced the
19 award to 13 percent.

20 This case falls between *Gig2* and *Gig4*.
21 And considering all of the *Sugarland* factors and the
22 fee awards in similarly situated cases, I conclude
23 that the requested fee of 17 1/2 percent of the
24 recovery falls within a range of reasonableness and is

1 fair under the circumstances.

2 Therefore, I will approve the award of
3 \$1,662,500 for plaintiff's counsel's fees and expenses
4 in the aggregate in this action.

5 Finally, I turn to the request for a
6 plaintiff incentive fee award for the lead plaintiff,
7 Andrew Saunders. Counsel seeks approval of an
8 incentive award of \$5,000 for the plaintiff to be paid
9 out of the award of attorneys' fees. I note that the
10 notice stated that the plaintiff may seek an incentive
11 award up to that amount in compliance with the updated
12 Court of Chancery rules.

13 Rule 23 prohibits a representative
14 plaintiff in a class action from receiving any form of
15 compensation, unless expressly approved by the Court,
16 or where payment is made by counsel to reimburse the
17 plaintiff for "actual and reasonable out-of-pocket
18 expenditures incurred in prosecuting the action."

19 The decision of whether to grant an
20 incentive award to a named plaintiff in a class action
21 following conclusion of the litigation is within the
22 Court's discretion. Incentive awards may be warranted
23 where the named plaintiffs have incurred a significant
24 amount of time and effort, provided meaningful

1 expertise, or generated significant benefits for the
2 class.

3 The plaintiff here stepped forward as
4 a class representative, participated in the Section
5 220 process, cooperated with plaintiff's counsel
6 throughout the case, and maintained his holdings in
7 Katapult throughout the proceedings. These efforts,
8 though not exceptional, were valuable. On the other
9 hand, the plaintiff was not subjected to any
10 discovery, and it does not appear that the plaintiff
11 provided any unique expertise to this case.

12 Nevertheless, in the exercise of my
13 discretion, I will approve the requested incentive
14 award of \$5,000.

15 Counsel, that's my ruling. I'm not
16 asking for reargument -- not that anybody is
17 interested in doing so. But if you have any
18 questions, let me know.

19 And if you have a form of order you'd
20 like to hand up, you may do so. And if not, I'll just
21 enter the one that's on the File & Serve system.

22 ATTORNEY SBORZ: Your Honor, I do have
23 a form of order that was entered on the docket. And
24 I'm happy to --

1 THE COURT: You want to hand them up,
2 I'll take a look at them really quickly, and I'll get
3 it scanned and uploaded today.

4 ATTORNEY SBORZ: Thank you.

5 THE COURT: Mr. Measly, I am making
6 sure that the decimal points are going to be in the
7 right places, and they'll be very pronounced.

8 ATTORNEY MEASLEY: Thank you.

9 THE COURT: All right. I have signed
10 it, given it to the clerk. It will get uploaded
11 today.

12 Counsel, thank you for your
13 presentation. And with that, the Court stands in
14 recess. Have a good afternoon.

15 (Court in recess at 4:16 p.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomat Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 51 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 31 through 50, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington this 18th day of October, 2024.

/s/ Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomat Reporter
Certified Realtime Reporter

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

Tab 5

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GENEDX DE-SPAC : C.A. No.
LITIGATION : 2023-0140-PAF

- - -

Chancery Courtroom No. 12C
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Monday, December 2, 2024
11:00 a.m.

- - -

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

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

2 PETER B. ANDREWS, ESQ.

3 DAVID M. SBORZ, ESQ.

4 Andrews & Springer LLC

5 -and-

6 CHRISTOPHER H. LYONS, ESQ.

7 JASON M. AVELLINO, ESQ.

8 Robbins Geller Rudman & Dowd LLP

9 -and-

10 CHRISTINE M. MACKINTOSH, ESQ.

11 Grant & Eisenhofer, P.A.

12 -and-

13 GREGORY E. DEL GAIZO, ESQ.

14 of the California Bar

15 Robbins LLP

16 -and-

17 ERIK W. LUEDEKE, ESQ.

18 of the California Bar

19 Robbins Geller Rudman & Dowd LLP

20 for Plaintiffs

21 SUSAN W. WAESCO, ESQ.

22 Morris, Nichols, Arsht & Tunnell LLP

23 -and-

24 GREGORY STARNER, ESQ.

of the New York Bar

White & Case LLP

for Defendants

- - -

1 THE COURT: Good morning, everyone.

2 ATTORNEY LYONS: Good morning, Your
3 Honor. Christopher Lyons from Robbins Geller Rudman &
4 Dowd on behalf of the plaintiffs. I rise to introduce
5 Greg Del Gaizo from Robbins LLP. He's been admitted
6 *pro hac vice* and he'll be making the presentation this
7 morning. Ms. Mackintosh from Grant & Eisenhofer;
8 Mr. Luedeke from my firm, Robbins Geller; Jason
9 Avellino from Robbins Geller; Mr. Sborz from Andrews &
10 Springer, and Mr. Andrews from Andrews & Springer.

11 Thank you, Your Honor.

12 THE COURT: Mr. Baron didn't make it
13 from California?

14 ATTORNEY LYONS: He didn't make it
15 today, Your Honor. I think maybe the turkey.

16 THE COURT: The weather.

17 ATTORNEY WAESCO: Good morning, Your
18 Honor. Susan Waesco from Morris, Nichols, Arsht &
19 Tunnell on behalf of the defendants.

20 I have to say, I'm glad Mr. Baron is
21 not here because I am clearly outnumbered today in
22 this courtroom.

23 I believe Your Honor has already been
24 apprised, but my co-counsel, Greg Starner, from White

1 & Case, is delayed on a train. He may be coming in
2 during the hearing. My apologies for the
3 interruption.

4 THE COURT: No apologies needed.

5 ATTORNEY WAESCO: If there are any
6 questions in his absence, I will handle them today on
7 behalf of defendants.

8 THE COURT: Thank you.

9 Counsel, you may proceed.

10 ATTORNEY DEL GAIZO: Good morning,
11 Your Honor. Gregory Del Gaizo from Robbins LLP on
12 behalf of plaintiffs. I will be standing in as a poor
13 substitute for Mr. Baron as the lawyer from
14 California.

15 But this is the time the Court has set
16 to consider plaintiffs' motion to approve the
17 settlement, the plan of allocation, class
18 certification, award of attorneys' fees, and incentive
19 fees in the action captioned *In re GeneDx De-SPAC*
20 *Litigation*. That's Civil Action No. 2022-0140.

21 This action concerns what has become
22 known as a *MultiPlan* claim arising out of a de-SPAC
23 transaction. We, of course, know Your Honor is very
24 familiar with these actions. We've had a couple

1 before you. In fact, I was here in January on a
2 motion to dismiss, and now we have a settlement here
3 in December. So we've gotten to open the year and
4 close the year on SPAC litigation.

5 Most importantly, a little over -- or
6 actually a little less, I should say, than two months
7 ago Your Honor approved the settlement in the matter
8 *In re Finserv Acquisition Corp.*, what I'll call
9 *Finserv*. This settlement has a lot of similarities
10 with that one; some notable differences. The most
11 being -- the most probably prominent being how we did
12 the plan of allocation.

13 I'm happy to address any of these
14 number of matters before the Court in any order it
15 prefers. But otherwise, my thought was to first give
16 a brief overview of the facts before going into the
17 notice, the settlement, the plan of allocation, and
18 then the attorney fee issues.

19 THE COURT: That is acceptable.

20 ATTORNEY DEL GAIZO: Great.

21 So the de-SPAC merger at issue here is
22 between the SPAC CM Life Sciences, what I refer to as
23 CMLS, and then-private company Sema4. CMLS was set up
24 to follow the normal SPAC pattern that Your Honor is

1 familiar. Defendants Casdin and Meister, the "CM" of
2 CMLS, took the company public on September 4, 2020,
3 selling 44.275 million units at \$10 per unit.

4 That money raised from the IPO was
5 placed in a trust. The units consisted of one share
6 of Class A common stock and one-third of one warrant.
7 Importantly, for this matter, the common stock came
8 with a redemption right, the right to ask for that
9 initial \$10 per-share investment back in the event the
10 stockholders did not want to invest in the post-merger
11 company.

12 Before CMLS went public, the sponsor
13 purchased a little over 11 million founder shares for
14 the nominal price of \$25,000. The sponsor then
15 allocated 25,000 founder shares each to defendants
16 Islam, Leproust, and Turner. At the same time as the
17 IPO, the defendants purchased 7.2-and-change million
18 private placement warrants for a little under
19 \$11 million.

20 This is a bit unique in that also the
21 number of the, what we would call independent
22 directors, defendants Islam, Leproust, and Turner also
23 purchased some of these warrants. They purchased
24 about \$250,000 worth of the private placement warrants

1 also.

2 Our theory, Your Honor, and one that
3 the Court has agreed with in other SPAC cases, is that
4 the founder shares and private warrants create a
5 divergent interest between defendants and the ordinary
6 outside stockholders. In particular, that nominal
7 purchase price, combined with the founder shares only
8 becoming freely tradable after initial business
9 combination completely incentivizes defendants to
10 pursue and close any deal, even a value-destructive
11 one.

12 Meanwhile, if CMLS did not enter into
13 an initial business transaction, the founder shares
14 and warrants would become worthless, and stockholders
15 would get their initial \$10 per-share investment back.

16 About five months after that IPO, on
17 February 9, 2021, defendants announced the merger.

18 On July 2nd, 2021, defendants issued
19 the proxy. Our allegations are that defendants knew
20 or should have known that Legacy Sema4 was overstating
21 its average selling price of its services, what we
22 call the ASP. This is a key metric for the company.
23 What we saw in discovery was that there was a sharp
24 decline in what key customers were willing to pay for

1 these services in the lead-up to the merger. And that
2 would, in turn, drive down that ASP.

3 In addition, at least one key customer
4 was demanding reimbursements of amounts that it was
5 charged through the years by Legacy Sema4.

6 So if the proxy is overstating ASP and
7 is not counting for those chargebacks, it means its
8 projections are incorrect. Also, since expected
9 revenue was used to derive the enterprise value of
10 Legacy Sema4 of \$2 billion, the company itself was
11 overvalued.

12 Again, these are our allegations, is
13 that no one should have been surprised that there was
14 an overstatement of the company's value because CMLS,
15 in turn, was overstating what the value was that it
16 was bringing to the merger, and that's the net cash
17 per share.

18 We cite in the complaint net cash per
19 share was less than \$8 per share. The proxy did not
20 disclose net cash per share. It did not disclose the
21 issues with the chargebacks. It did not disclose the
22 declining ASP. Also, importantly, the proxy did not
23 provide the disinterested analysis of what
24 stockholders could expect post-close of the merger.

1 Stockholders voted in favor of the
2 merger, and they elected in large part not to redeem
3 their stock. 99.98 percent of CMLS's stock was not
4 redeemed.

5 The merger closed on July 22, 2021.
6 Almost immediately, the company starts walking back
7 these projections.

8 The first quarter of Sema4, it's three
9 weeks later, on August 16, Sema4 announces that it
10 would not provide any guidance for 2022. The stock
11 falls on that date 17 percent, dropping it under \$10
12 per share, and it keeps sliding from that point
13 forward.

14 March 14, 2022, Sema4 files its annual
15 report and discloses that it missed the proxy
16 projections by \$53 million, coming in at just
17 \$212 million. At this point, the stock is trading a
18 little bit above \$2.50 per share.

19 Soon after, May 16, 2022, plaintiff
20 Katz sent his inspection demand. I do want to put
21 that in context to kind of SPAC litigation in general.
22 *MultiPlan* at this point was decided earlier that year,
23 but the Court had yet to decide either of the *Gig*
24 decisions, *Gig2* or *Gig3*, so there's not any decisions

1 on net cash per share at this point.

2 Again, looking at *Finserv*, we can see
3 in *Finserv* the inspection demand was sent on
4 February -- in February 2022, so about three months
5 earlier. So we're all within kind of the same time
6 frame.

7 After receiving the 220 documents,
8 plaintiff Katz filed his complaint on February 6,
9 2023. Again, I think at that time we're pretty early
10 in the SPAC litigation. The Court had decided *Gig3*,
11 but not yet *Gig2*. And we can kind of see the
12 uncertainty in the law at that point because
13 defendants do file a motion to dismiss. They make a
14 number of arguments that are dealt with in later
15 decisions that have been rejected, but at that time
16 not yet, including -- or at least not clearly yet --
17 including that stockholders only really care about the
18 post-merger value, not net cash per share.

19 We filed our amended complaint, adding
20 Mr. Zhou as a plaintiff, on July 6, 2023. Defendants
21 answered the complaint. And after a brief detour when
22 defendants filed their motion for a protective order,
23 we were off and running after resolving that on
24 discovery. We served interrogatories and RFPs, as

1 well as subpoenas on 30 key parties including Sema4,
2 Jeffries, and Goldman Sachs.

3 Defendants answered 43
4 interrogatories. And between defendants and third
5 parties, we received over 21,000 documents, over
6 100,000 pages. There was also a good amount of
7 plaintiff discovery. Each plaintiff answered 41
8 interrogatories, and combined they produced 11,000
9 pages in 282 documents.

10 On May 8, 2024, the parties held a
11 mediation session with Mr. Greg Danilow. A week
12 later, on May 15th, the parties accepted the
13 mediator's recommendation to settle this action for
14 \$21 million. I'll note that is the second-biggest
15 *MultiPlan* settlement to date.

16 Unless Your Honor has any questions,
17 I'll turn first to the class certification issue.

18 THE COURT: Very well.

19 ATTORNEY DEL GAIZO: The settlement
20 contemplates a certification of a non-opt-out class of
21 holders of CMLS, the Class A common stock at the time
22 of the redemption deadline through the closing of the
23 merger.

24 The definition excludes defendants,

1 their family members, the entities they have
2 controlling interest in, their heirs and successors.
3 This is similar to the class the Court had certified
4 for settlement purposes in a number of similar SPAC
5 cases, including *Finserv*, *Romeo Power*, and *Lordstown*.

6 Your Honor entered the scheduling
7 order on August 23, 2024, that preliminarily certified
8 this class. As Your Honor knows, under Rule 23, the
9 class may be certified if the criteria of 23(a) are
10 met, as well as the criteria of either 23(b)(1) or
11 (b)(2). I think all these criteria are rather easily
12 met here, Your Honor. I'm happy to address each in
13 turn, but given *Finserv* and these other cases, I'm
14 also happy to defer on the papers, however you prefer.

15 THE COURT: I've read the brief. You
16 don't need to address it any further, unless you want
17 to.

18 ATTORNEY DEL GAIZO: Great, Your
19 Honor. Then I will skip just quickly to the notice.

20 As I said, the Court entered the
21 scheduling order on August 23rd approving notice. The
22 notice contains the location, date, and time of this
23 hearing, as well as its purposes. It includes details
24 on the claims, the defenses, the relief the action

1 sought, as well as the plan of allocation and the
2 definition of the class.

3 We have two settlement affidavits that
4 have been filed by our settlement administrator,
5 Gilardi. It followed the Court's direction on notice,
6 including mailing the notices to the unique names we
7 received from CMLS. And Gilardi has a mailing
8 procedure where it sends claims packages to
9 brokerages, custodial banks, and other institutions,
10 including a number of entities that Gilardi has
11 collected through its long history that it finds holds
12 these stocks, and most people do hold them in their
13 street name.

14 Altogether, Gilardi has sent out over
15 8,300 claims packages. It established a toll-free
16 telephone helpline. It also has a website that
17 contains all the key documents. There's an FAQ on
18 that website.

19 We've received just one contact from a
20 client -- from a class member. There have been no
21 objections. Accordingly, we think notice is also
22 satisfied here.

23 Your Honor, turning to the settlement
24 itself, we think it should be approved as fair and

1 reasonable. Rule 23(f)(5) sets forth a list of
2 factors the Court has to find in order to approve a
3 settlement.

4 As Your Honor pointed out in *Finserve*,
5 those are the representative party and class counsel
6 have adequately represented the class, adequate notice
7 of the hearing was provided, the proposed dismissal or
8 settlement was negotiated at arm's length, and the
9 relief provided for the class falls within the range
10 of reasonableness.

11 Going backwards, Your Honor, starting
12 at that last point, what we traditionally call the
13 "get," which we think is the most important piece, is
14 the \$21 million recovery. This "get" is, of course,
15 directly and wholly attributable to this action. On a
16 per-share basis, \$21 million is approximately \$0.47
17 per share. That is consistent with other *MultiPlan*
18 settlements that have been approved. Most notably,
19 *MultiPlan* was \$0.44 per share, *Finserve* was \$0.38 per
20 share.

21 And as I said, this is the
22 second-largest SPAC settlement to date. The only
23 bigger one was *MultiPlan*. And I would note that
24 *MultiPlan*, there was a \$1.1 billion IPO versus here

1 we're at 442 million. So *MultiPlan* was twice as big,
2 and that helps explain a little bit about why it might
3 be bigger.

4 The "give" here is the release. This
5 is a fairly standard release, and we modeled it on the
6 other releases in *MultiPlan* settlements. It's nearly
7 identical to *MultiPlan* and nearly identical to
8 *Finserv*.

9 We do think this was a strong case on
10 the merits. It's an entire fairness action. We felt
11 good about showing that the proxy was misleading. The
12 problem, as it is with a lot of these cases, comes
13 with the next step: damages, causation, and reliance.

14 Concerning damages, as Your Honor
15 noted in *Finserv*, there have not been any trials or
16 judicial assessments on how damages work in these
17 cases. We do know the general framework from
18 *MultiPlan* and its progeny; it's the redemption value
19 versus the value of the stock received. What we have
20 not heard from any court is how it's going to measure
21 the stock received, the value of the company.

22 We do know Sema4 was still a
23 relatively new company. When its acquisition
24 occurred, it was advancing cutting-edge technology

1 involving AI and machine learning to help diagnose
2 patients. And what we would have had is a battle of
3 the experts, probably with those experts not even
4 agreeing on the methodology of how you value the
5 stock.

6 For instance, defendants consistently
7 argued that to get anything more than nominal damages
8 we'd have to show a connection between the false
9 statements in the proxy and some corresponding stock
10 drop. They've argued that CMLS and Sema4 do not trade
11 in efficient markets, and the drop in Sema4 stock is
12 not related to some false proxy statement.

13 I should be clear, that's not how we
14 agree damages are done. That to me sounds like a
15 10(b) action, but I'm not always right, and defendants
16 seem convinced that we would certainly have a lot of
17 problems proving damages.

18 I think the more appropriate way to
19 calculate damages is instead of looking at the stock
20 movement is, as Your Honor mentioned in *Finserve*, to
21 look at net cash per share. Using the roughly \$2
22 per-share damage we identified in the complaint, that
23 would give us total damages of around \$89 million.
24 That puts in the 23 percent to 24 percent range of

1 damages in the settlement. *Finserv*, in comparison,
2 was about 15.7 percent of net cash per share damages.

3 If we cannot show damages this way and
4 we are stuck with nominal damages, Your Honor, of
5 course, would have wide latitude in assigning an
6 award. In *Columbia Pipeline*, Vice Chancellor Laster
7 wrote that nominal damages are normally between \$0.50
8 and \$2 per share. At \$0.50, we're at nearly
9 100 percent of the recovery. At \$2 per share,
10 somewhere around the 25 percent. Either way is
11 consistent with other settlements that have been
12 approved in this case -- in these cases.

13 In *Dell Class V*, Vice Chancellor
14 Laster noted that the mean recovery in an entire
15 fairness case when we remove outliers was 20.9 percent
16 and the median is 16.5 percent. We're above both
17 those numbers.

18 We also, Your Honor, in reaching this
19 settlement, had to deal with the reality of what would
20 normally be the biggest pocket, the company here, was
21 not very deep, especially at the time of the
22 mediation.

23 At the time we went to that mediation,
24 Sema4, which was then called GeneDx, was only trading

1 around \$0.40 a share. According to its 10-Q around
2 that time, it only had about \$80 million in cash and
3 cash equivalents and was losing money. Now, the
4 company seems to have turned it around since then, and
5 that's great because our clients are still holders.
6 But it certainly looked like it was going the other
7 way, at least to plaintiffs at the time of the
8 mediation.

9 On top of that, Your Honor, from what
10 we can tell in the discovery, the defendants rode the
11 stock all the way down. Only one of the defendants
12 sold their shares, and even then it was after the
13 reverse stock split so their 25,000 shares turned into
14 766.

15 And as I mentioned earlier, even the
16 outside directors for the most part kicked in money to
17 buy these private warrants. All the private warrants
18 were basically worthless, so the \$11 million spent on
19 warrants are, again, now worthless.

20 In addition, Casdin and Meister's
21 entities accounted for 27 percent of the PIPE,
22 \$95 million. Again, appearing to us from the
23 discovery they rode that all the way down. So
24 defendants could certainly argue that they lost more

1 money than most on this deal, and they believed in the
2 company based on how much they investigated. At a
3 minimum, it shows that our unjust enrichment claim is
4 not going to be worth much.

5 So we think the "give" versus the
6 "get" supports approval here.

7 As to the remaining Rule 23(f)(5)
8 factors, there have been no objections. The
9 settlement was negotiated at arm's length with
10 assistance of a mediator. We talked a little bit
11 about notice already. And we believe we adequately
12 represented the class.

13 On adequate representation, the Court
14 looks at whether the client hired qualified,
15 competent, and experienced counsel. We hope the Court
16 is familiar with mine and my co-counsel's history of
17 bringing meritorious cases. In addition, we brought
18 in Professor Klausner from Stanford, who's probably
19 written the most -- or at least has written the most
20 impactful scholarly work on SPACs here. So we believe
21 the adequacy of counsel is also met.

22 I want to stop, just give a pause, see
23 if Your Honor has any questions about the settlement
24 before I turn to the plan of allocation.

1 THE COURT: No. At some point you
2 indicated that there was contact from one class
3 member. Do you have any background on that?

4 ATTORNEY DEL GAIZO: Sure, Your Honor.
5 It was just the client -- the class member reached out
6 just confirming that his stock was indeed part of the
7 class. He was an owner of CMLS shares. The ticker
8 symbol is technically CMLF, I believe. And so he said
9 "I just want to make sure these are the same thing,"
10 so we said yes.

11 THE COURT: Thank you.

12 ATTORNEY DEL GAIZO: So now turning to
13 the plan of allocation, Your Honor. This is the one
14 area that we deviated from some of our friends in
15 other *MultiPlan* case settlements. But we believe the
16 process that we put together is the most equitable one
17 and will become the new norm.

18 This is essentially the same plan of
19 allocation that was recently approved by Vice
20 Chancellor Cook in *Yu v. RMG Sponsor*, and very similar
21 to the one that was approved by Vice Chancellor Will
22 in *Delman v. Riley*, that's the Eos case.

23 It is a process that involves
24 submitting a claim. It is a claims-made process, but

1 it is not a claims-made settlement. The fund will be
2 paid out in its entirety, and defendants have no
3 reversionary interest in the fund at all.

4 We understand the Court has a general
5 preference for settlement funds to be distributed on a
6 *pro rata* basis in accordance with *PLX*. But we believe
7 that having a claims process, again, is the most
8 equitable way to distribute settlement funds to the
9 class.

10 We talked a little bit earlier about
11 the stock falling soon after the merger closed. And
12 then, by the time it issued its annual statement, the
13 stock had dropped to 250. Now, obviously, we have our
14 class members are selling all along the way. And in
15 fact, some of them might have even sold their stock
16 when the stock was above \$10 per share.

17 So we recognize it's probably not
18 equitable to have someone that sold stock above \$10
19 per share getting the same amount of money as someone
20 that sold their stock at \$2.50 a share. So we try to
21 take that into account with our claims process.

22 At the same time, Your Honor, our
23 allegation, and what we believe, is that the proxy did
24 impair a person's redemption right, even if they are

1 one of the few that were able to sell above \$10 per
2 share, what Vice Chancellor Laster called in
3 *QuantumScape* "self-help." In that same decision, Vice
4 Chancellor Laster explained that he did not think
5 "there should be a rule that effectively amounted to
6 "no harm, no foul," and that having a fully informed
7 vote in and of itself has value, and I equate making a
8 fully informed redemption decision with having a fully
9 informed vote in that way.

10 So what we did in this plan of
11 allocation is come up with what we called a nominal
12 damage amount. It's a recognition that there was a
13 harm in not having a fully informed vote. Again, it's
14 our way of equitably distributing the class the
15 settlement fund. So what we had is a baseline of
16 \$0.08 per share, and it does decrease a little bit for
17 those people that sold above \$10 per share.

18 What we did is we hired an expert to
19 help us trying to come up with damages. When we
20 reached a settlement, we had him switch his focus and
21 we said: We think this nominal amount should be about
22 10 percent of the settlement amount. So that's how we
23 came up with this calculation of the \$0.08 per share,
24 in using our trading analysis to come up with about

1 \$0.08 per share.

2 Again, Your Honor, to us, that was the
3 most equitable way to do it, and the only way to do it
4 was to do the claims process. We made it as easy as
5 possible. People can mail in their claims or they can
6 even do it online. Again, we have the toll-free
7 number available to help anyone that needs it. And
8 the actual process of calculating the claims is
9 thankfully not being left to me. We have our claims
10 administrator collecting and doing the math itself.

11 Your Honor, with no questions on that,
12 I'll turn to the fee and expense award. Plaintiff
13 here requests 19 1/2 percent, which equates to
14 \$4,095,000. This is an all-in amount that includes
15 plaintiffs' expenses of \$76,000 and change. The
16 Court, of course, has discretion to award the amount
17 of attorneys' fees it believes is appropriate guided
18 by the factors set forth in *Sugarland*.

19 The Court considers the results
20 achieved, the time and effort of counsel, the relative
21 complexity of the litigation, the contingent nature of
22 the litigation, the standing and ability of counsel,
23 and the stage at which the case ended.

24 The most important factor is the

1 benefit achieved. Here, it's the \$21 million fund
2 created solely by the effort of plaintiffs; again, the
3 second largest *MultiPlan* settlement to date.

4 Up to the settlement, Your Honor, we
5 would say this was pretty hard-fought litigation. We
6 did our Section 220, filed our complaint. Defendants
7 moved to dismiss. We amended, and then they answered.

8 And when they answered, I talked to my
9 friends there on the other side here, and I said,
10 "Well, you guys must realize how strong our case is.
11 You answered." And as maybe you expect, they said,
12 "No, your case is worthless." And we decided it's
13 time to go to discovery and prove it. And we set up a
14 schedule that had us aggressively litigating this
15 case. After defendants answered, the schedule set for
16 trial 21 months after that answer.

17 Defendants produced 100,000 pages to
18 us. We produced 11,000 pages to them. Both sides
19 answered over 40 rogs. At the time of the settlement,
20 we were about three months away from the close of fact
21 discovery. The next step was depositions. So I would
22 call that meaningful litigation under the bracket set
23 forth in *Americas Mining*. That puts us in the 15 to
24 25 percent bracket.

1 In *Finserv*, Your Honor awarded 17 1/2
2 percent, but that settlement was reached prior to the
3 discovery. The Court awarded 22 1/2 percent in
4 *Lordstown*. There is no depositions there, but
5 admittedly there were more documents produced in that
6 action.

7 So if Your Honor was to look at the
8 midpoint between *Lordstown* and *Finserv*, it would be
9 20 percent, and we went a bit below that.

10 In your *Finserv* ruling, Your Honor
11 mentioned *Gig2* and *Gig4*. I think the rulings there
12 are consistent with our request here. As you pointed
13 out, the Court awarded 18 percent in *Gig2*. There, the
14 settlement discussion occurred prior to discovery and
15 there was only limited confirmatory discovery.

16 In *Gig4*, that action was filed well
17 after the other *Gig* cases. And, therefore, as Your
18 Honor explained, there was a clear framework for SPAC
19 cases at that point, and it settled without
20 substantial litigation efforts.

21 Concerning what I'd consider the
22 secondary factors, we took this matter on a fully
23 contingent basis. In *Sauer Danfoss*, the Court looked
24 at the contingent risk at the time counsel took on the

1 case.

2 At the time we initiated this
3 representation, when we sent our inspection demand,
4 Vice Chancellor Will had just decided *MultiPlan*.
5 There were substantial questions still, even after
6 *MultiPlan*. No court had considered net cash per
7 share. Even now, as we just discussed, there's still
8 substantial unresolved issues about the measure of
9 damages, reliance, and causation. Despite these
10 risks, we came out of pocket over \$75,000.

11 Regarding the complexity, I think it's
12 similar to the risk issues I discussed. This is and
13 was a fairly new area of Delaware law, and I do
14 believe it's fairly complex.

15 Concerning the standing and ability of
16 counsel, I discussed it a little bit earlier.

17 And then as to the lodestar
18 cross-check, we think this also supports the amount
19 requested. We spent over 2,000 hours on this case
20 before accepting the mediator's recommendation, and
21 then about 140 hours after that. That is over
22 1.5 million times in lodestar. Again, stopping that
23 clock when we signed the stip of settlement.

24 After deducting our expenses, our

1 requested fee would equate to a lodestar of roughly
2 \$1860 an hour, a 2.6 multiplier. Note 148 of our
3 brief contains a long list of cases with higher
4 multipliers and hourly rates.

5 I pause again to see if Your Honor has
6 any questions.

7 THE COURT: I do not.

8 ATTORNEY DEL GAIZO: The last issue
9 then, Your Honor, is the incentive award. Again,
10 using *Finserve* as our guide, the Court awarded \$5,000
11 there when the plaintiff participated in the 220
12 process, cooperated with counsel, and maintained his
13 holdings.

14 Here, the plaintiffs did all that plus
15 participated in discovery. Going through over 40
16 interrogatories takes a lot of time, as does having
17 someone's computer searched for relevant documents.
18 So we believe the \$5,000 requested for each plaintiff
19 is well-deserved here.

20 Unless Your Honor has any further
21 questions, that's my presentation.

22 THE COURT: I do not. Thank you.

23 ATTORNEY DEL GAIZO: Thank you, Your
24 Honor.

1 THE COURT: Ms. Waesco?

2 ATTORNEY WAESCO: Your Honor, if I may
3 just very briefly.

4 THE COURT: Sure.

5 ATTORNEY WAESCO: Just for the record,
6 obviously the damages theories are contested. And
7 just to be clear, as kind of noted in the stipulation,
8 we take no position on the plan of allocation and any
9 damages theory that might be encompassed or reflected
10 in that plan. So I just wanted to make that clear.

11 THE COURT: Understood.

12 ATTORNEY WAESCO: Thank you.

13 THE COURT: Duly noted.

14 Just for the record, there is no one
15 in the courtroom here today other than counsel to
16 speak on behalf of or in opposition to the proposed
17 settlement today.

18 Before the Court today is a proposed
19 class action settlement. The settlement involves
20 claims asserted in connection with the merger of CM
21 Life Sciences, Inc., or "CMLS," and Sema4 Holdings
22 Corp., or "Legacy Sema4," the resulting entity being
23 GeneDx. In exchange for the release of claims, the
24 settlement provides for a \$21 million cash fund that

1 will be distributed to eligible class members after
2 deduction for the fee and expense award and
3 administrative expenses.

4 The plaintiffs brought this action on
5 behalf of CMLS's Class A common stockholders, alleging
6 that defendants Eli Casdin and Keith Meister
7 controlled CMLS, and that together with the director
8 defendants Sean George, Munib Islam, Emily
9 Leproust, Leproust and Nat Turner, and officer
10 defendants Brian Emes and Shaun Rodriguez, each of the
11 defendants breached their fiduciary duties by pushing
12 through a flawed transaction with Legacy Sema4 and
13 failing to disclose material information to
14 stockholders of the Class A stock, so as to induce
15 them not to exercise their redemption right in advance
16 of the merger.

17 The plaintiffs' operative complaint
18 asserted claims against the defendants for breaches of
19 their fiduciary duties as directors and/or officers
20 and/or controllers, and a fourth count for aiding and
21 abetting breaches of fiduciary duty against Casdin
22 Capital, LLC and Corvex Management LP, and then a
23 fifth count for unjust enrichment against all the
24 defendants. The defendants answered the complaint and

1 then the case proceeded through written discovery.

2 The settlement is the product of a
3 mediator's proposal to settle the action. The
4 parties filed the settlement stipulation on August 16
5 of this year. On August 23rd, the Court entered a
6 scheduling order providing for today's settlement
7 hearing. In their opening brief, filed on October 28,
8 the plaintiffs stated that there had been no
9 objections to the proposed settlement, and as I've
10 indicated, no one has appeared to object today.

11 I have four issues to address: class
12 certification, the proposed settlement, the
13 application for attorneys' fees and expenses, and the
14 proposed incentive awards.

15 The class is generally defined as a
16 non-opt-out class "of all Persons who held shares of
17 CMLS Class A common stock as of the Redemption
18 Deadline through the closing of the Merger," excluding
19 the defendants, and the families of, entities
20 controlled by, and the legal representatives, heirs,
21 successors, and assignees of any excluded party. Any
22 trusts, estates, entities, or accounts that held
23 shares of CMLS Class A or Class B common stock for the
24 benefit of any excluded party are also not included in

1 the class.

2 The settlement agreement provides for
3 certification of the plaintiffs as the class
4 representatives, and Robbins Geller Rudman & Dowd,
5 LLP, Robbins LLP, Grant & Eisenhofer P.A., and Andrews
6 & Springer LLC as class counsel.

7 Court of Chancery Rule 23(c)(1)
8 requires the Court to certify a class prior to
9 disposition of a class action. To be certified, the
10 class must satisfy the four prerequisites of
11 Rule 23(a): numerosity, commonality, typicality, and
12 adequacy. If the class meets the requirements of
13 Section (a), this Court must then find that the suit
14 properly fits into one of the 23(b) categories.

15 The Court must make explicit findings
16 on the record that these requirements are satisfied
17 under the Delaware Supreme Court's decision in *Prezant*
18 *v. De Angelis* in 1994.

19 First, numerosity requires that "the
20 class is so numerous that joinder of all members is
21 impracticable." That's Rule 23(a)(1). CMLS was
22 publicly traded, and there were over 44 million
23 Class A shares outstanding at the time of the de-SPAC
24 transaction. The affidavit submitted by Ross D.

1 Murray regarding notice indicates that there are
2 thousands of potential class members. Joinder of so
3 many stockholders is impractical, and the numerosity
4 requirement is satisfied.

5 Second, commonality requires
6 "questions of fact or law common to the class."
7 That's Rule 23(a)(2). Here, the claim alleging that
8 the defendants breached their fiduciary duties and
9 were unjustly enriched in connection with the de-SPAC
10 transaction present common questions of law and fact
11 pertaining to each member of the class. Accordingly,
12 commonality is satisfied.

13 Third, typicality requires that "the
14 claims or defenses of the representative parties are
15 typical of the claims or defenses of the class."
16 That's Rule 23(a)(3). Here, the plaintiffs' claims
17 for breach of fiduciary duty and unjust enrichment
18 arise from the same course of conduct that would
19 underlie the claims of all Class A stockholders
20 related to the de-SPAC transaction, and that
21 plaintiffs were allegedly harmed in the same manner.
22 Thus, the plaintiffs' claims are typical across the
23 class.

24 Fourth, adequacy requires that "the

1 representative parties will fairly and adequately
2 protect the interests of the class." That's
3 Rule 23(a)(4). This requirement will be satisfied
4 when the class representative is represented by
5 competent and experienced counsel and the
6 representative's interests do not conflict with the
7 class's interests. No one has challenged plaintiffs'
8 representation of the class or the quality of
9 plaintiffs' counsel, who have diligently pursued this
10 action and are well known to the Court.

11 The plaintiffs have held CMLS shares
12 at all relevant times, submitted a presuit Section 220
13 demand, and submitted an affidavit that satisfies
14 Rule 23(f)(2)(A). Therefore, adequacy, like the
15 remainder of the 23(a) requirements, is satisfied.

16 Having satisfied Rule 23(a), the class
17 must now fall within one of the 23(b) categories.
18 This is a quintessential class action certifiable
19 under Rule 23(b)(1) and Rule 23(b)(2). As our Supreme
20 Court observed in *Celera* in 2012, Delaware courts
21 "repeatedly have held that actions challenging the
22 proprietary of director conduct in carrying out
23 corporate transactions are properly certifiable under
24 both subdivisions (b)(1) and (b)(2)." That is 59 A.3d

1 418 at page 433.

2 Certification under subsection (b)(1)
3 is appropriate because adjudication of the claims by
4 any one stockholder would, practically speaking, be
5 dispositive of the interests of the other stockholders
6 as well. Certification under subsection (b)(2) is
7 also appropriate here because the conduct at issue is
8 generally applicable to all class members.

9 Finally, finding that the requirements
10 of Rules 23(a) and (b) are satisfied, the Court must
11 also determine that notice of resolution of the claims
12 was provided to all class members under Rule 23(f)(3).
13 The finalized notice, found at Exhibit A to the
14 affidavit of Ross D. Murray, complies with the
15 requirements of Rule 23(f)(3). The Court entered a
16 scheduling order on August 23rd which required
17 dissemination of notice via First Class Mail to all
18 class members who may be identified through
19 "reasonable efforts," and by posting the notice on a
20 website established for the settlement.

21 According to the affidavits of Ross D.
22 Murray of Gilardi & Co, Gilardi has mailed more than
23 8,000 claim packages to potential class members and
24 nominees, and was informed by one institution that it

1 anticipated sending claim packages via email to more
2 than 12,000. Gilardi also set up a telephone hotline
3 for class members with questions.

4 The Court finds that notice was
5 provided in compliance with the Court's order, was
6 fair and adequate, and satisfies Rule 23 and due
7 process. Therefore, the Court will certify the class.

8 Next, I turn to the substance of the
9 settlement. "The Court must act as a fiduciary on
10 behalf of the class to ensure that the outcome falls
11 within a range of reasonable outcomes that a
12 disinterested decision-maker, acting on behalf of the
13 class and with the benefit of the information
14 available, could accept." That's from the *AMC*
15 *Entertainment Holdings* decision from this Court in
16 2023.

17 Rule 23(f)(5) requires the Court to
18 consider whether "the representative party and class
19 counsel have adequately represented the class; []
20 adequate notice of the hearing was provided; [] the
21 proposed dismissal or settlement was negotiated at
22 arm's-length; and [] the relief provided for the class
23 falls within a range of reasonableness"

24 As I've already discussed, the

1 plaintiffs and their counsel have adequately
2 represented the class, they've provided adequate
3 notice of the settlement, and the proposed settlement
4 was negotiated at arm's length.

5 To determine whether the settlement
6 falls within a range of reasonableness, the Court
7 "looks to the facts and circumstances upon which the
8 claim is based, the possible defenses thereto, and
9 then exercises a form of business judgment to
10 determine the overall reasonableness of the
11 settlement." That is from *Polk v. Good* from our
12 Supreme Court in 1986.

13 This approach is codified in Court of
14 Chancery Rule 23(f)(5)(D), which directs the Court to
15 consider "the strength of the claims; [] the costs,
16 risks, and delay of trial and appeal; [] the scope of
17 the release; and [] any objections to the proposed
18 dismissal or settlement."

19 As presented, this was an entire
20 fairness case, in which conflicted controllers and a
21 conflicted board are alleged to have conducted a
22 flawed process that resulted in their receiving
23 nonratable benefits, and that the stockholders were
24 deprived of material information in deciding whether

1 to exercise their right to redeem.

2 The plaintiffs' disclosure theories
3 were of varying strength, but some appeared reasonably
4 likely to have supported a finding of an unfair
5 process. The headwinds for the plaintiffs, of course,
6 came with respect to damages, as was discussed today
7 in the plaintiffs' presentation.

8 This Court has posited that a measure
9 of damages in similar circumstances might be the
10 difference between the value of the redemption right
11 and the value of the shares received in the de-SPAC
12 transaction. That's from *Lordstown*. Another
13 potential of damages may be the difference between the
14 \$10 per share redemption value and the less than \$8
15 net cash per share value.

16 There has not been, as has been
17 mentioned, a post-trial decision endorsing any
18 particular damages theory, and that must await another
19 day.

20 As a benchmark for the award, the
21 plaintiffs compare the settlement here to that in
22 *MultiPlan*. The plaintiffs state that the settlement
23 here provides a \$0.47 per share recovery, versus
24 *MultiPlan*'s \$0.33 per share recovery. The plaintiffs

1 also point out that the \$21 million settlement amount
2 is the second largest *MultiPlan* settlement, behind
3 only the \$33.75 million in *MultiPlan* itself. In my
4 view, this is a reasonable recovery, given the
5 difficulties the plaintiffs would have faced in
6 establishing damages at higher ranges.

7 In exchange for this "get," the
8 settlement provides the defendants with a global
9 release of possible claims that may have arisen under
10 the allegations in the operative complaint. Under the
11 circumstances and weighing the "give" and the "get,"
12 they are reasonable.

13 I also find the proposed plan of
14 allocation, which provides for the settlement amount
15 to first pay administrative costs, attorneys' fees and
16 expenses, service awards to plaintiffs, any taxes and
17 tax expenses, and will be distributed *pro rata* to the
18 Class A stockholders pursuant to a claims process.
19 The plan of distribution is not opposed, and seems
20 reasonable to the Court.

21 The Court, therefore, concludes,
22 applying its own business judgment, that the
23 settlement is fair, reasonable, and adequate, and the
24 Court will approve it, along with the proposed plan of

1 allocation.

2 Finally, with respect to the Court's
3 retention of jurisdiction in this case, as outlined in
4 the settlement, you'll be able to pursue any
5 enforcement here, but I'm not going to keep the case
6 open on my docket.

7 Next, I turn to the proposed
8 attorneys' fee award. The amount of an attorneys' fee
9 award in class and derivative litigation is within the
10 discretion of the Court. The Court, of course, is
11 guided by the *Sugarland* factors, including the results
12 achieved, the time and effort of counsel, the relative
13 complexities of the litigation, any contingency
14 factor, and the standing and ability of counsel
15 involved. This Court has placed the greatest weight
16 upon the benefits achieved. The Court may also
17 consider the stage at which the litigation settled.

18 Here, plaintiffs' counsel seeks an
19 award of 19.5 percent of the settlement amount,
20 inclusive of over \$76,000 in expenses. The requested
21 fee and expense award amounts to a \$4,095,000 cash
22 payment. No objection to the fee has been lodged with
23 the Court.

24 For the result achieved, the benefit

1 of the settlement is easy to measure. It's cash.

2 Plaintiffs' counsel recorded over
3 2,000 hours from the inception of this action until
4 May 15, 2024, when the parties accepted the mediator's
5 proposal, for a total lodestar of just north of
6 \$1.4 million. Plaintiffs' counsel recorded another
7 140 hours between accepting the mediator's proposal
8 and the filing of the stipulation of settlement with
9 the Court. I appreciate that counsel provided that
10 breakdown in their affidavits.

11 Net of expenses, the requested fee
12 amount equates to an effective hourly rate of just
13 under \$2,000, and a multiplier of less than three
14 times the lodestar. These all suggest that the fee
15 request falls within a reasonable range.

16 The claims here fit the mold of the
17 now common SPAC suit, and while other complaints
18 asserting similar theories have been previously filed,
19 some of the theories asserted in this action remained
20 untested at the time of filing. I do not find that
21 the complexity factor weighs against the fee request.

22 Plaintiffs' counsel litigated this
23 case on an entirely contingent basis. They are
24 regular practitioners in this Court, and they have

1 achieved very strong results for clients over many
2 years.

3 I also consider the stage at which the
4 case settled. In the *Americas Mining* case, our
5 Supreme Court noted that a fee in the range from 15 to
6 25 percent is appropriate where the "plaintiffs have
7 engaged in meaningful litigation efforts, typically
8 including multiple depositions and some level of
9 motion practice."

10 As noted recently in the *Dell*
11 *Technologies* case, a fee award in the 25 to 30 percent
12 range is reserved for "late-stage settlements" arising
13 once trial preparation, beginning with the pretrial
14 briefing, has begun. By contrast, "[w]hen a case
15 settles early, the Court of Chancery tends to award
16 10-15% of the monetary benefit conferred."

17 Here, this case seems to have
18 progressed out of the "early stage." The parties
19 settled before pretrial preparation began, and in my
20 view, it falls within the 15 to 25 percent range for
21 meaningful litigation efforts. Prior to the
22 settlement, plaintiffs obtained 450 pages of documents
23 through a Section 220 demand and engaged in
24 substantial written discovery, including production of

1 over 11,300 pages and review of nearly 100,000 pages
2 produced by the defendants. The plaintiffs' counsel
3 contends that a 19.5 percent fee award is appropriate
4 given the Court's precedents.

5 When considering the appropriate
6 award, I look to recent awards in other SPAC cases.
7 At the higher end of the range, we have 22.5 percent,
8 plus expenses, in *Lordstown*, and 20 percent, which was
9 inclusive of expenses, in *MultiPlan*. Each case came
10 earlier in the SPAC wave and proceeded further than
11 this case did. In *Lordstown*, the parties fully
12 briefed two motions to dismiss, counsel reviewed
13 360,000 pages of documents, and counsel had to grapple
14 with the added complexity of a contemporaneous
15 bankruptcy filing.

16 In *MultiPlan*, the case survived a
17 motion to dismiss, and the Court observed the parties
18 had engaged in "substantial" discovery practice.

19 In the middle range there is the
20 18 percent award in *Gig2*. There, the plaintiff began
21 settlement discussions prior to commencing discovery,
22 and engaged in only limited confirmatory discovery,
23 which counsels towards the lower end of the 15 to
24 25 percent range. But the motion to dismiss in that

1 case paved new ground, and the opinion resolving it is
2 generally regarded as one of the three seminal SPAC
3 opinions, along with *MultiPlan* and *Gig3*.

4 The 18 percent award reasonably
5 balanced the complexity and novelty of the issues in
6 that case against the relatively early stage in which
7 it was settled.

8 Also in that middle range is the 17.5
9 percent awarded in *Finserv*. In that case, it
10 progressed out of the early stage but settled before
11 pretrial preparation began. The parties engaged in
12 motion practice and some discovery, although the
13 action settled before document discovery.

14 On the low end of the range, there's
15 the 13 percent in *Gig4*. There, the plaintiff began
16 settlement negotiations prior to substantial discovery
17 and did not engage in confirmatory discovery. The
18 case was settled prior to motion practice. Counsel in
19 *Gig4* sought an award equaling 18 percent of the
20 financial benefit achieved – the same as in *Gig2*. But
21 recognizing that the *Gig4* case settled without
22 substantial litigation efforts by counsel and was
23 filed after the *MultiPlan*, *Gig3*, and *Gig2* opinions had
24 provided a clear framework for SPAC cases, the court

1 reduced the award to 13 percent.

2 The parties engaged in more discovery
3 in this case than in either *Gig2* and *Finserv*, and
4 plaintiffs' counsel also obtained books and records
5 through a Section 220 demand. Altogether, considering
6 all of the *Sugarland* factors, I believe that
7 19.5 percent, although on the high end, falls within a
8 range of reasonableness, and I will approve it.

9 Finally, I turn to the request for the
10 plaintiff incentive awards to the lead plaintiffs,
11 Todd Katz and Xianming Zhou. Counsel seeks approval
12 for an incentive award for \$5,000 to each of them to
13 be paid out of the award of attorneys' fees. The
14 settlement notice disclosed that plaintiffs may seek
15 an incentive award of up to \$10,000, in compliance
16 with the updated Court of Chancery rules.

17 Rule 23 prohibits a representative
18 plaintiff in a class action from receiving "any form
19 of compensation," unless expressly approved by the
20 court, or where payment is made by counsel to
21 reimburse the plaintiff for "actual and reasonable
22 out-of-pocket expenditures incurred in prosecuting the
23 action." That's Rule 23(aa)(2).

24 These plaintiff incentive awards

1 function as risk-based compensation that work to
2 motivate the named plaintiffs to work collaboratively
3 and efficiently with counsel and to pursue meritorious
4 suits. See *Chen v. Howard-Anderson* from this Court in
5 2017.

6 This Court awarded a \$5,000 incentive
7 award to each of the plaintiffs in *Lordstown*, where
8 the plaintiffs' phones were imaged, their emails were
9 searched by a third-party vendor, and they were named
10 as parties in a separate bankruptcy proceeding.

11 This Court also awarded \$5,000 in
12 *In re FAST*, where the plaintiff moved with alacrity to
13 bring the case quickly, including a motion to expedite
14 and a TRO to preserve benefits for the class, and was
15 also subject to interrogatories.

16 As I've said before, in the current
17 litigation environment, a stockholder who signs up to
18 send a books and records demand, possibly institute a
19 Section 220 action, and then file a derivative or
20 class action complaint is faced with a real
21 possibility of having their computer and other
22 electronic devices imaged and searched, having to sit
23 for a deposition, perhaps more than one if they file a
24 Section 220 action, then perhaps having to testify at

1 trial.

2 The typical service award, where
3 warranted, runs in the range from 5,000 to \$10,000.
4 The Court has awarded higher amounts where the
5 plaintiffs' efforts were significant and worthy of a
6 higher amount.

7 On balance, the award of \$5,000 is
8 appropriate under the facts of this case. The
9 plaintiffs stepped forward as class representatives,
10 at least one of them participated in the Section 220
11 process, and cooperated with plaintiffs' counsel
12 throughout the case, and they maintained their
13 holdings of CMLS throughout the proceedings.
14 Therefore, in the exercise of my discretion, I will
15 grant the request for the two \$5,000 service awards to
16 the two named plaintiffs.

17 Counsel, I have a proposed form of
18 order that was submitted late last week. I will
19 review it when I get back to chambers, and I will
20 enter it later today.

21 Are there any questions about my
22 ruling?

23 ATTORNEY DEL GAIZO: No, Your Honor.

24 THE COURT: Thank you, counsel. Have

1 a good day.

2 (Court in recess at 11:52 a.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomat Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 47 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 28 through 46, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington this 10th day of December, 2024.

/s/ Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomat Reporter
Certified Realtime Reporter

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

Tab 6



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE LORDSTOWN MOTORS CORP. : Civil Action
STOCKHOLDER LITIGATION : No. 2021-1066-LWW

- - -

Chancery Courtroom No. 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, June 24, 2024
11:00 a.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

SETTLEMENT HEARING and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

2 GREGORY V. VARALLO, ESQ.
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3 -and-
4 THOMAS JAMES, ESQ.
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Bernstein, Litowitz, Berger & Grossmann LLP

5 -and-
6 GUSTAVO F. BRUCKNER, ESQ.

7 ANKITA SANGWAN, ESQ.
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8 -and-
9 ADRIENNE BELL, ESQ.
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10
11 RAYMOND J. DiCAMILLO, ESQ.

12 KEVIN M. GALLAGHER, ESQ.

13 NICHOLAS F. MASTRIA, ESQ.

14 Richards, Layton & Finger, PA
for Defendants David Hamamoto, Mark Walsh,
Andrew Richardson, Steven Hash, Judith
Hannaway, and DiamondPeak Sponsor LLC

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1 THE COURT: Good morning.

2 ATTORNEY DiCAMILLO: Good morning,
3 Your Honor. Ray DiCamillo for the defendants. Here
4 with me this morning from my firm, Kevin Gallagher and
5 Nick Mastria.

6 THE COURT: Good morning.

7 ATTORNEY DiCAMILLO: We also have in
8 the back of the courtroom, Your Honor, one of our
9 summer associates from Temple Law School, Andrew
10 Rosen.

11 THE COURT: Glad to have you here.

12 MR. ROSEN: Thank you.

13 THE COURT: Good morning, Mr. Varallo.

14 ATTORNEY VARALLO: Good morning, Your
15 Honor. Greg Varallo from BLBG for the plaintiffs. I
16 rise to introduce our table. This morning, with Your
17 Honor's permission, my partner Mr. Thomas James will
18 be making the argument.

19 THE COURT: Of course.

20 ATTORNEY VARALLO: With us today are
21 co-counsel Gustavo Bruckner --

22 ATTORNEY BRUCKNER: Good morning, Your
23 Honor.

24 ATTORNEY VARALLO: -- and Ankita

1 Sangwan from the Pomerantz firm, and Adrienne Bell
2 from the Kaskela Law firm.

3 THE COURT: Welcome.

4 Mr. James, glad to hear from you.

5 ATTORNEY JAMES: Thank you, Your
6 Honor. Always a pleasure to be here.

7 May it please the Court. Tom James,
8 Bernstein Litowitz Berger & Grossmann, on behalf of
9 plaintiffs, Benjamin Hebert and Autry Amin.

10 This is the time the Court has set for
11 plaintiffs' motion to approve the settlement in this
12 action, the allocation, award of attorneys' fees and
13 expenses, as well as an incentive award, and to
14 certify the class.

15 Unless Your Honor has a different
16 preference, I'll plan to give a brief overview of the
17 proposed settlement. I'll then address class
18 certification and then turn to the merits of the
19 settlement itself and the plan of allocation, and
20 finally, the fee and expense request and the incentive
21 award request.

22 THE COURT: That's fine, thank you.

23 ATTORNEY JAMES: And of course if Your
24 Honor feels we've exhausted a topic in the briefs, you

1 can waive me off and I'll happily concede.

2 At the outset I'll note, as we
3 represented last week in our letter to the Court, we
4 have not received any objections to the proposed
5 settlement or any of the issues today. I do not
6 believe there are any objectors present here today, so
7 I think we can move past that.

8 But turning to the facts of this case,
9 I'll try and be brief, given the comprehensive
10 briefing that we've submitted.

11 Our case begins back in 2019, when
12 DiamondPeak was first taken public. DiamondPeak was a
13 SPAC, and of course it bore many similarities to other
14 SPACs that Your Honor and others have had occasion to
15 consider over the past couple of years. DiamondPeak
16 issued 28 million units for \$10 a unit. As is
17 customary, those units contained one Class A public
18 share as well as a fraction of warrants. Those Class
19 A shares had redemption rights, meaning that
20 stockholders could choose to recoup their initial \$10
21 per share investment plus interest rather than roll
22 their shares into the *pro forma* entity that
23 DiamondPeak ultimately identified and merged with.

24 Like many other SPACs, DiamondPeak

1 also issued Class B founder shares, including to
2 defendants here, for nominal consideration that would
3 allow those insiders the ability to own a substantial
4 piece of the *pro forma* entity with a relatively low
5 up-front cost. And of course those founder shares
6 lack redemption rights, and Your Honor has written
7 extensively about the potential conflicts that dynamic
8 creates, so I won't retread that ground.

9 When DiamondPeak first identified
10 Legacy LMC as a merger target in June of 2020, it had
11 about nine months left of its 24-month window to
12 complete a de-SPAC transaction. Legacy LMC was an
13 electric vehicle manufacturer. Its flagship vehicle
14 was an electric pickup truck called the Endurance.
15 I'll note that in the registration materials,
16 DiamondPeak identified that it would be seeking to
17 merge with a targeted real estate business.

18 To their credit, defendants must have
19 realized that they needed to do some up-front
20 diligence, and they retained McKinsey for that
21 purpose. And perhaps to McKinsey's credit, as well,
22 they identified in the diligence they conducted what
23 we would submit were significant problems with Legacy
24 LMC's business plans and future prospects.

1 And chief among those issues that
2 McKinsey identified were the production start date, to
3 actually complete -- begin completing production of
4 the Endurance, which they felt was way too aggressive.
5 It would be eight or more months in the future; issues
6 that then flowed into Lordstown's projections, and the
7 issue that many of the preorders that Lordstown -- or
8 I guess at the time Legacy LMC had booked were
9 unreliable, potentially fraudulent.

10 We alleged in our complaint and what
11 we would submit the document discovery showed was that
12 defendants chose to press on, including by issuing a
13 false and misleading proxy statement that was designed
14 to encourage stockholders not to redeem their shares.
15 And we would submit the defendants in this case fell
16 prey to the very same incentives that Your Honor and
17 others have identified.

18 Plaintiffs have proceeded as Delaware
19 courts have come to expect. We made
20 Section 220 demands, we incorporated those 1400 or so
21 pages of documents from those demands into plenary
22 complaints, which were later consolidated.

23 I think Your Honor will recall that
24 there was more prediscovery activity in this case than

1 is typical. There was an initial motion to dismiss
2 filed by defendants, as well as a motion to stay. My
3 colleague Dan Meyer argued that motion to stay, which
4 Your Honor denied. And after it was fully briefed,
5 defendants withdrew their initial motion to dismiss --
6 their initial motion to dismiss, excuse me.

7 We amended the complaint, at which
8 point defendants renewed their motion to dismiss,
9 which was subsequently briefed again. And then I
10 believe after Your Honor issued the *Gig3* opinion, that
11 subsequent motion to dismiss was withdrawn as well and
12 we moved straight into plenary discovery.

13 I'll say that litigating this action
14 was, you know, intense, and uniquely so in ways that
15 we don't often experience. We served extensive
16 discovery. We ultimately ingested and reviewed over a
17 quarter of a million documents from both defendants
18 and third parties. We also litigated one largely -- a
19 motion to compel before Your Honor to compel document
20 production from Lordstown.

21 And what made this case unique and
22 uniquely difficult, I'd submit, was the fact that we
23 spent a significant amount of time litigating
24 basically a parallel bankruptcy action while this case

1 was proceeding. And we did so in order to preserve
2 the class's claims in this action.

3 Initially, Lordstown filed an
4 adversarial action in the bankruptcy court and named
5 co-lead plaintiffs in this case defendants in that
6 action and sought to stay this action in favor of the
7 bankruptcy action.

8 We retained bankruptcy counsel. We
9 opposed that action. That was a fairly intensive
10 effort that involved one of my colleagues, Glenn
11 McGillivray, deposing -- I believe it was Lordstown's
12 CFO and then cross-examining him on the stand during
13 the bankruptcy proceeding. That also involved one of
14 our colleagues, Ms. Sangwan, providing testimony in
15 the bankruptcy action and also submitting herself to
16 cross-examination there as well.

17 So it was a significant lift. And
18 that continued when Lordstown prepared a plan of
19 bankruptcy. And, you know, thankfully we had engaged
20 very good bankruptcy lawyers who identified that there
21 was language in that plan that may have actually
22 operated to release our claims. And we were able to
23 negotiate and make sure that there were no claims that
24 were released in that action as well.

1 You know, all in, those efforts, I
2 think, were fairly extensive. It would be represented
3 in our time charts; and it's also represented in our
4 expense application. Retaining our own bankruptcy
5 counsel was quite expensive.

6 THE COURT: I saw that. It was about
7 \$271,000, I believe.

8 ATTORNEY JAMES: That's correct.

9 THE COURT: Do I have any underlying
10 information about what that expense represents in
11 terms of the hourly rate that was charged or the time
12 that was incurred?

13 ATTORNEY JAMES: You know, we were
14 given bills regularly, obviously, by bankruptcy
15 counsel, which we reviewed and would have discussed
16 with them as they came in. They are not in the record
17 before Your Honor. If Your Honor would like a
18 supplemental submission, I'm sure we can arrange for
19 that.

20 THE COURT: Okay. Thank you.

21 ATTORNEY JAMES: What I will say,
22 though -- and Your Honor didn't ask it directly -- but
23 that effort was quite extensive, and you know, we
24 considered before retaining bankruptcy counsel certain

1 others. They came highly recommended to us. We
2 thought that they did a great job and were very
3 reasonable under the circumstances.

4 And, again, I think most obviously
5 from the initial adversarial action that was filed,
6 and then I think more subtly through the language in
7 the plan of bankruptcy itself, there was a real
8 concern on our end that the class claims would be
9 released and the class would be left with nothing.

10 So from our perspective these were
11 obviously significant costs, but highly necessary
12 costs and costs that we felt, as fiduciaries of the
13 class, that were necessary to incur.

14 So by the time that the parties
15 reached mediation in this case, I think it's fair to
16 say that we were all very knowledgeable about the
17 strengths and weaknesses of our respective claims.
18 I'll note further that we also retained a valuation
19 expert, both in the case itself, but also to help us
20 sharpen our damages and valuations theories going into
21 the mediation.

22 We attended a full-day mediation
23 session that was overseen by Miles Ruthberg from
24 Philips ADR. We continued to negotiate the settlement

1 under the auspices of Mr. Ruthberg for, I believe,
2 several weeks thereafter before entering into a term
3 sheet, and then it took another several weeks after
4 that to iron out all the fine points of the
5 stipulation itself.

6 So I think it's fair to characterize
7 the negotiation in this process as extensive and arm's
8 length. We submit the result ultimately obtained for
9 the class, which is a \$15.5 million cash payment, is a
10 very good one – I would say a great one under the
11 circumstances.

12 So unless Your Honor has any questions
13 about the background and the lead-up, I'll happily
14 move on to class certification.

15 THE COURT: No questions. Thank you.

16 ATTORNEY JAMES: Sure.

17 So the settlement contemplates
18 certification of a non-opt-out class under Rules
19 23(a), 23(b)(1), and (b)(2), which consists of holders
20 of DiamondPeak Class A common stock as of the time of
21 the de-SPAC merger, which is October 23, 2020. And
22 that class would exclude defendants, DiamondPeak
23 directors and officers, their immediate family
24 members, any DiamondPeak affiliates, and any entities

1 in which defendants or any of those excluded parties
2 had a controlling interest in as of the effective
3 date.

4 And Your Honor entered the scheduling
5 order in this matter and preliminarily certified the
6 class on March 12 of this year.

7 As Your Honor knows, under Rule 23, a
8 class may be certified if the criteria of Rule 23(a)
9 are met, as well as the criteria of Rule 23(b)(1) or
10 (b)(2). The Rule 23(a) criteria are numerosity,
11 commonality, typicality and adequacy. I'll walk
12 through those in order. I think they're all
13 relatively easily met here.

14 There were 28 million DiamondPeak
15 Class A shares outstanding. And as the affidavit of
16 Luiggy Segura from our settlement administrator, JND,
17 establishes, there were at least 32,551 notices mailed
18 to potential class members and their nominees. That's
19 at paragraph 8 of the affidavit which was filed
20 separately, I believe last week. This more than
21 satisfies the numerosity requirement.

22 As to commonality, I think it's fair
23 to say that the questions were uniform throughout.
24 And the issues here included whether defendants

1 breached their fiduciary duties in connection with
2 initiating, negotiating, and ultimately approving the
3 de-SPAC transaction at issue, as well as issuing the
4 false and misleading proxy statement. So commonality
5 is satisfied.

6 Similarly, the representative parties'
7 claims are not only typical, but I would say identical
8 to those asserted on behalf of the class. Our clients
9 were DiamondPeak Class A stockholders who owned as of
10 the effective time, as were all other class members,
11 so typicality is satisfied.

12 And, finally, the question of whether
13 the representative parties will fairly represent the
14 class's interest. I think the answer here is, again,
15 yes. We submitted affidavits required by
16 Rule 23(f)(2)(A), which detailed the involvement from
17 Mr. Amin and Mr. Hebert, their involvement in this
18 action, which I believe more than demonstrates their
19 adequacy. And again, those affidavits were included
20 with our opening brief.

21 Turning to Rule 23(b)(1), the question
22 for the Court today is whether, absent class
23 certification, there would be a risk of inconsistent
24 or varying adjudications with respect to individual

1 class members or adjudications of individual claims
2 that would, as a practical matter, be dispositive of
3 the interests of other parties that would otherwise be
4 part of the class.

5 And, again, I think the answer to both
6 of those questions is pretty clearly yes. As to the
7 former, it's possible that these same issues could
8 have been litigated before different judges,
9 ultimately resulting in different answers. And as for
10 the second question, I believe that, absent class
11 treatment, one or more stockholders could have
12 precluded the ability of others within the class to
13 achieve relief, or at least very possibly severely
14 prejudiced the rights of other class members.

15 And to wrap it up, I think this court
16 has repeatedly ruled that fiduciary duty cases such as
17 this one are well-suited to class treatment under
18 Rule 23(b)(1).

19 Turning briefly to 23(b)(2), the
20 question is whether defendants have acted or refused
21 to act on grounds that are generally applicable to the
22 class. Again, I think the answer to that question is
23 a simple yes. The conduct here, we allege,
24 identified -- the conduct here that we identified

1 treated all class members identically.

2 Turning to the notice, the Court,
3 again, entered an order on March 12 directing notice
4 to be mailed. As I mentioned earlier, we filed
5 Mr. Segura's affidavit on July 17 describing the
6 mailing of notice, the publication of the summary
7 notice, and the establishment of a telephone helpline
8 and website for the settlement.

9 I think I mentioned earlier that
10 35,551 copies of the notice were mailed to potential
11 class members and their nominees. That's paragraph 8
12 of the Segura affidavit.

13 The summary notice was also published
14 in *Investors Business Daily* and transmitted over *PR*
15 *Newswire* on May 6. That's in paragraph 9 of the
16 affidavit.

17 Additionally, JND, the settlement
18 administrator, established on April 26 of this year
19 and continued to maintain a settlement website that
20 includes information on this action and the proposed
21 settlement. It also includes copies of the notice,
22 the scheduling order, and the stipulation that are
23 available for download. That's at paragraph 11 of the
24 Segura affidavit.

1 Turning briefly to the contents of the
2 notice, which are set forth in the new
3 Rule 23(f)(3)(D). I'll run through this briefly. The
4 notice sets forth the location, date, and time of this
5 hearing. That's at paragraph 60.

6 The notice describes the nature of the
7 action in paragraphs 4 to 36. It contains the class
8 definition in paragraph 37. It contains a summary of
9 the claims, issues, defenses, and relief that the
10 action sought in paragraph 17 to 21.

11 The notice contains a description of
12 the terms of the proposed settlement at paragraph 38.
13 It describes the attorneys' fee and expense award and
14 incentive awards in paragraphs 55 through 57. It
15 includes instructions for objectors in paragraphs 61
16 through 67. It identifies class counsel and how to
17 contact class counsel in paragraphs 68 and 69. And it
18 includes the disclaimer not to contact the Court, but
19 rather, class counsel, also in paragraph 69.

20 So I think, wrapping that all up, the
21 record amply demonstrates that the notice requirements
22 in the scheduling order have been fully met. Notice
23 was given in conformity with the means approved by the
24 Court under Rule 23(f)(3)(C), and the content and

1 substance of the notice met the requirements of Rule
2 23(f)(3)(D), as well as due process.

3 So unless Your Honor has any questions
4 regarding class certification, I'll move on to the
5 settlement itself.

6 THE COURT: No questions. Thank you.

7 ATTORNEY JAMES: Sure.

8 So turning to the settlement approval,
9 I think this Court's task has been fairly described as
10 bringing the Court's own business judgment to bear to
11 ensure that the class receives fair consideration in
12 exchange for the releases granted. It's been
13 colloquially referred to in *Activision* and other cases
14 as comparing the "give" and the "get." And that's
15 meant to ensure the basic fairness, reasonableness,
16 and adequacy of the compromise.

17 I'll note further that the recently
18 adopted Rule 23(f)(5) further informs that analysis
19 and sets forth a list of factors that the Court has to
20 find in order to approve a settlement. And those
21 include that counsel adequately represented the class,
22 that notice was adequately provided, that the
23 settlement was negotiated at arm's length, and that
24 the relief provided falls within a range of

1 reasonableness, taking into account the strength of
2 the claims, the risks at trial and the appeal, the
3 scope of the release, and any objections.

4 I think I've covered a number of them,
5 but just to sort of wrap it up into one package, as I
6 mentioned earlier, we're not aware of any objections
7 to the settlement or the proposed fee. I just
8 discussed the notice, which was adequate and
9 constitutional in our view.

10 I mentioned previously that the
11 settlement was negotiated over several weeks under the
12 auspices of a neutral third-party mediator, and I
13 think that the strength of the outcome attests to the
14 adequacy of the representation here.

15 And so that leaves us with the more
16 traditional factors, such as the terms of the
17 settlement itself and how they were arrived at.

18 So turning first to the "give," the
19 scope of the release, I think that Your Honor will
20 find the release is relatively typical and similar to
21 ones that Your Honor has approved in other cases. The
22 release is limited to claims that plaintiffs asserted
23 in the complaint or claims based on the same set of
24 operating facts that relate to the ownership of

1 DiamondPeak Class A stock as of the effective time.

2 I'll note further that the release carved out the

3 claims that were, at that point, pending in the

4 federal securities action in the Northern District of

5 Ohio.

6 So measuring this release against the

7 "get," the \$15.5 million cash payment to the class, I

8 think, is substantial. I think the nice thing about

9 cash is that its value is self-evident, and I think

10 the settlement here is particularly reasonable given

11 the very real risks that plaintiffs had faced up to

12 that point and I think would continue to face going

13 forward.

14 THE COURT: Question for you about the

15 \$15.5 million payment. I saw in the stipulation that

16 there was 12 million coming from insurance.

17 ATTORNEY JAMES: Yes.

18 THE COURT: And 3.5 million that would

19 be in some form of a security from the defendants

20 themselves. Is that a bond? Has it been posted?

21 ATTORNEY JAMES: That's correct, Your

22 Honor. So, you know, we've discussed this extensively

23 with defendants' counsel. It is in the form of a

24 security agreement that we are in the process of

1 finalizing with defendants. The security is coming
2 from both Mr. Hamamoto and Mr. Walsh. I believe that
3 they're -- and Mr. DiCamillo can correct me if I'm
4 mistaken. I believe that they are currently
5 litigating their entitlement to indemnification in the
6 parallel bankruptcy action. The security arrangement
7 allows us to execute on that money in the event that
8 those claims aren't successful.

9 Let me know if I've misdescribed.

10 ATTORNEY DiCAMILLO: That accurately
11 describes it, Your Honor. I'm happy to answer any
12 questions.

13 An indemnification claim has been made
14 in the bankruptcy matter, and a hearing on that is
15 scheduled for sometime in July. If the bankruptcy
16 court tells the entity that they have to honor the
17 indemnification obligation, then that would be paid
18 over to the class.

19 In the event that it does not, then
20 Mr. James has security from Mr. Walsh and Mr. Hamamoto
21 for that 3.5 million.

22 THE COURT: Either way, the 3.5
23 million will be paid into the escrow account?

24 ATTORNEY DiCAMILLO: Correct.

1 THE COURT: Okay. Thank you very
2 much.

3 ATTORNEY JAMES: Thank you, Your
4 Honor.

5 So taking a step back, I think the
6 settlement here, as I mentioned, is reasonable, given
7 the risks that we had faced and would continue to
8 face.

9 I touched previously on Lordstown's
10 bankruptcy. Obviously, that had diverted significant
11 resources in the past. I think it would also -- it
12 had been and would continue to be difficult to get
13 discovery out of Lordstown. Your Honor saw firsthand
14 how vehemently they opposed our motion to compel.

15 I think it's fair to say that deposing
16 Lordstown witnesses would have been further difficult
17 because many of their officers and employees had left
18 the company by that point. Other of their officers
19 and employees were, you know, currently working and
20 tied up in the bankruptcy action itself. So that was
21 one practical difficulty that we faced.

22 Another practical difficulty that we
23 faced is, as we outlined in the brief, how either
24 party, really, could arrive at damages in this case.

1 I believe this can still be fairly described as an
2 open issue, even though a lot of the issues at the
3 motion to dismiss phase had been exhaustively ironed
4 through.

5 I'm unaware of a case going the full
6 distance and being tested at trial. You know, we gave
7 this a lot of thought. Lordstown is not unlike many
8 companies that are acquired in a de-SPAC transaction -
9 a private company in a somewhat novel industry that
10 doesn't have a history of building and beating
11 projections and not a lot of true comparables to speak
12 of. So, you know, applying a traditional income or
13 market approach to valuation would be quite difficult.
14 Doable, certainly, but very difficult.

15 And there was also the fact that
16 Lordstown's shares traded at or above the redemption
17 price for a period of time after the closing. Again,
18 I think we would have had strong arguments rebutting
19 that point, but it was a point of risk that we would
20 have had to face nonetheless.

21 I think, simply put, damages would
22 have been a very interesting but difficult question
23 for everybody involved; including Your Honor, I
24 expect.

1 As for the views of counsel,
2 plaintiffs' counsel strongly supports the settlement.
3 We believe the settlement is quite strong,
4 particularly given the risks that were faced here. We
5 think that we got a great result and the "get" far
6 outweighs the "give" in the settlement, and we would
7 respectfully submit that Your Honor approve the
8 settlement.

9 And unless Your Honor has any
10 questions, I'm happy to touch very briefly on the plan
11 of allocation and then move on to the fee and expense
12 award.

13 THE COURT: No questions, thank you.

14 ATTORNEY JAMES: Sure.

15 So the plan of allocation, which Your
16 Honor will find at paragraphs 47 through 52 of the
17 notice, is consistent with what this court has
18 previously approved. It provides for a direct
19 distribution to class members through the Depository
20 Trust Company, the DTC, which this court certified and
21 endorsed in other actions.

22 I'll note that the plan of allocation
23 here, in addition to withholding payment from excluded
24 parties, also would withhold payment from anybody who

1 redeemed their shares. Here, there are, I think, 970
2 shares that were redeemed; so a relatively small
3 number, but nonetheless, shares that would be excluded
4 from the plan of allocation.

5 Turning now to the fee and expense
6 award. We are seeking an award of 22.5 percent of the
7 settlement amount net of fees -- that equals
8 \$3,390,829.42 -- as well as reimbursement of
9 litigation expenses of \$429,647.01.

10 The applicable law is well known.
11 It's set forth in *Sugarland*. The Court examines the
12 results achieved, the time and effort applied, the
13 relative complexity of the litigation, the standing
14 and ability of counsel, the contingent nature of the
15 litigation, the stage at which the case ended, and
16 whether plaintiff can rightly claim credit for the
17 benefit conferred or only a portion of that benefit.

18 Again, we've discussed the benefit,
19 which is the predominant factor in the *Sugarland*
20 analysis. That is a \$15.5 million cash settlement, a
21 self-pricing "get." Under *Americas Mining* and
22 subsequent cases, the fee sought is often expressed as
23 a percentage of that benefit, and Delaware courts have
24 helpfully provided brackets where that award might

1 fall based on the relative stage of the case.

2 In our case, we settled after we
3 engaged in meaningful litigation efforts, and
4 paraphrasing from the *Dell Class V* case, which itself
5 cites to *Americas Mining*, the appropriate bracket is
6 15 to 25 percent.

7 And I think our papers make pretty
8 clear that we engaged in substantial and, as I
9 mentioned earlier, uniquely difficult litigation
10 efforts here. We litigated this case for close to
11 three years. That included three prediscovery
12 motions, including two motions to dismiss that were
13 all fully briefed. We obtained and reviewed a
14 substantial amount of document discovery and won a
15 motion to compel in the process.

16 We expended substantial time and
17 resources into the various issues relating to the
18 bankruptcy proceedings, including both eliciting and
19 giving testimony in the bankruptcy proceedings. And,
20 again, I would submit that it was our efforts and
21 diligence in those bankruptcy proceedings that
22 prevented the class's claims from being wiped out in
23 their entirety.

24 I think the 22.5 percent fee award

1 sought here is comparable to the precedents that we
2 identified in our papers.

3 Now, you know, you would typically
4 consider the time and effort of counsel as a
5 cross-check after running through the traditional
6 *Sugarland* factors. I thought it actually is a little
7 bit more helpful to consider them up front in
8 connection with the stage of the case, which I think
9 supports the reasonableness of the fee request sought
10 here.

11 As Your Honor saw from the affidavits
12 that were submitted by counsel, we spent 7600 hours
13 litigating this action, which works out to an
14 effective hourly rate of \$446.07.

15 I was never directly privy to this,
16 but I suspect that when I was a second-year associate
17 at a large defense firm, I was probably billed out at
18 a rate that was a little bit higher than that.

19 The remaining *Sugarland* factors I
20 think all weigh in favor of approval here. Again, we
21 took this action on an entirely contingent basis. We
22 faced real risk of being zeroed out; and we cited
23 precedent -- I believe it's from the *Sauer-Danfoss*
24 case -- that when you think about contingency risk,

1 you think about it ex-ante when you start the case.

2 And when we brought this case
3 originally, even Your Honor and your colleagues have
4 had occasion to rule on many, many SPAC motions to
5 dismiss at this point, I believe this was one of the
6 earlier cases. I believe in the motion to stay
7 decision, Your Honor made that point as well.

8 So I think that factor weighs in favor
9 of the real contingency risk that we faced here.

10 The litigation, I think, was fairly
11 complex. I think the additional bankruptcy layer
12 added another layer of complexity that we don't
13 otherwise face frequently.

14 Concerning the standing and ability of
15 counsel, we would like to think that our track record
16 of litigating meritorious cases before Your Honor and
17 others speaks for itself. And likewise, our
18 adversaries at Richards, Layton & Finger and Sullivan
19 Cromwell are fine advocates and well known to the
20 Court too.

21 And, finally, I don't believe that
22 there's any claim here that the credit here rests
23 anywhere but with plaintiffs and their counsel.

24 I want to spend a moment talking about

1 expenses. We have asked for expenses to be deducted
2 from the fee award and then the fee award to be
3 expressed as a percentage of the net fee award.

4 Again, I think that method is
5 supported in cases like *Dell Class V* and, more
6 recently, in the *Fishel* litigation before Chancellor
7 McCormick. And I think in addition to being supported
8 by precedent, it's supported by principles of
9 fairness. As Your Honor asked before, we absorbed
10 what I think are significant and necessary expenses
11 here, including the roughly \$270,000 to hourly
12 bankruptcy counsel and a substantial amount of other
13 fees that went into the bankruptcy proceeding --
14 deposition costs and the like -- as well as another
15 70,000 or so dollars in expert fees.

16 And those are fees, I think, that one
17 would typically expect to incur much later in a case
18 once you get deeper into expert discovery, perhaps
19 even closer to trial.

20 We rarely, if ever, expect to incur
21 the hourly fees of a bankruptcy firm. But, again, we
22 would submit that those fees were fair and necessary
23 and consistent with our fiduciary duties to incur in
24 order to protect the claims for the class.

1 And I'll note that -- I went back and
2 I looked at the papers from *MultiPlan* just to get a
3 sense of what their expenses were in that case. Those
4 expenses were roughly \$83,000. And if you take our
5 total expenses here and you back out those expenses
6 that I just mentioned, you get roughly in the same
7 ballpark. It ends up around \$87,000.

8 As I mentioned earlier, I think *Dell*
9 *Class V* and *Fishel* support deducting the expenses
10 first, in the manner we propose, and then applying the
11 fee percentage from the net settlement fund.

12 And I'll note further, as we spelled
13 out in our papers on page 44, the discrepancy between
14 the gross and the net fund expressed as just a pure
15 percentage identifies, I think, why applying the net
16 fund method is much fairer in these circumstances.

17 And so concluding that segment of this
18 presentation, we would respectfully submit that Your
19 Honor, in exercising your discretion and as informed
20 by precedent, *Sugarland*, award the fee request as fair
21 and reasonable, as well as reimbursement of expenses.

22 Unless Your Honor has any questions,
23 I'll spend just a moment on the incentive award
24 request.

1 THE COURT: No questions. Thank you.

2 ATTORNEY JAMES: Sure.

3 So as Your Honor noted from our
4 papers, we are seeking an additional, I'd say
5 relatively modest, incentive award of \$5,000 for each
6 of the named plaintiffs, Mr. Hebert and Mr. Amin, in
7 this action. And I think Your Honor put it best, and
8 very succinctly, in the *HomeFed* case, when Your Honor
9 said "it's important to incentivize stockholders to
10 serve as engaged representatives." I think it's
11 particularly important in SPAC cases where, in our
12 experience, many of the people who are members of the
13 class that we've spoken to and that we've seen in
14 other cases tend to be smaller retail investors.

15 As their affidavits demonstrate, both
16 of our clients, Mr. Amin and Mr. Hebert, were actively
17 involved in this action, including by participating in
18 discovery, having their devices and documents imaged
19 and collected.

20 As Vice Chancellor Laster noted in the
21 *Voigt v. Metcalf* case, that's not something that many
22 people would willingly agree to. Certainly not
23 something that I would feel super comfortable agreeing
24 to. But Mr. Hebert and Mr. Amin stepped up to the

1 plate in this action; and they were also named as
2 defendants in the bankruptcy action, which isn't
3 something that typically happens, I think, in the
4 ordinary course of serving as a class representative.

5 I think the request here is supported
6 by Your Honor's *HomeFed* decision and the logic in that
7 case, as well, and so we would respectfully submit
8 that the incentive fee application be approved too.

9 And unless Your Honor has any other
10 questions for me, I have nothing to add.

11 THE COURT: No questions. Thank you
12 very much. I appreciate it.

13 ATTORNEY JAMES: Thank you.

14 THE COURT: Mr. DiCamillo, anything
15 from you?

16 ATTORNEY DiCAMILLO: Nothing from
17 defendants, Your Honor. Thank you.

18 THE COURT: Okay. Thank you very
19 much.

20 Well, thank you for your time and for
21 being here today and for your briefs, which were
22 extraordinarily helpful to me in preparing.

23 I have a bench ruling ready that I can
24 deliver to you now, if you'll bear with me.

1 Before me this morning is the proposed
2 settlement of the matter captioned *In re Lordstown*
3 *Motors Corporation Stockholders Litigation*, which is
4 Civil Action No. 2021-1066-LWW. The matter concerns
5 an October 2020 de-SPAC merger between DiamondPeak
6 Holding Corporation, which is a SPAC, and Lordstown EV
7 Corporation, which was then a private electric truck
8 startup company.

9 An October 8, 2020, proxy statement
10 filed in connection with the merger stated that the
11 production of a truck called the Endurance was
12 expected to occur in the second half of 2021. The
13 proxy also reported preorders for about 38,000 trucks,
14 yielding an estimated total purchase price of
15 \$1.65 billion.

16 The proxy purportedly did not disclose
17 that 26,000 of the preorders were placed by a single
18 person who allegedly could not feasibly purchase this
19 volume of trucks.

20 In advance of the de-SPAC merger, the
21 board of the SPAC retained a consultant to engage in
22 due diligence. The consultant's work allegedly cast
23 doubt on the production timeline and the anticipated
24 purchase orders that were described in the proxy.

1 After the de-SPAC merger closed, a
2 group called Hindenburg Research published a report
3 with similar findings regarding the Endurance's
4 production. An SEC inquiry into Lordstown was
5 announced soon after that. I note that I'm not making
6 any findings of fact today in reciting the background;
7 I am simply reporting what was discussed in the
8 complaint.

9 This action was then filed on December
10 8 of 2021 after Section 220 demands, and an amended
11 complaint was filed on July 22 of 2022. The amended
12 complaint followed a motion to stay, which I denied in
13 a March 2022 decision, and a fully briefed motion to
14 dismiss that the defendants withdrew.

15 The plaintiffs alleged in their
16 amended complaint that the directors of the SPAC and
17 the SPAC's sponsor breached their fiduciary duties to
18 the SPAC's public stockholders. The core allegation
19 was that the fiduciaries knew or should have known,
20 based on the consultant's advice, that the proxy
21 misrepresented the timing of the Endurance's
22 production and the expected number of purchase orders,
23 which was purportedly material information that
24 deterred stockholders from exercising their redemption

1 rights.

2 The defendants moved to dismiss the
3 amended complaint in October of 2022. The motion was
4 fully briefed in December and was subsequently
5 withdrawn after my *Delman v. GigAcquisitions3* decision
6 was issued in January of 2023.

7 The case then proceeded into
8 discovery. The plaintiffs served 48 interrogatories,
9 70 document requests, and 12 subpoenas on nonparties,
10 including Lordstown. Over 360,000 pages of documents
11 were produced. The plaintiffs also responded to over
12 52 document requests and 52 interrogatories and
13 produced just under 700 documents to the defendants.

14 I resolved one motion to compel in the
15 summer of 2023, and fact discovery was set to close
16 that September.

17 In June of 2023, Lordstown declared
18 bankruptcy, which resulted in parallel bankruptcy
19 litigation that the plaintiffs became involved in to
20 contest the extension of the automatic stay to this
21 proceeding.

22 The automatic stay ultimately did not
23 extend to this case, and on September 27, the parties
24 attended an in-person mediation before Philips ADR.

1 An agreement on a term sheet was reached on October
2 31, and a formal stipulation of settlement was filed
3 with the Court in March of this year.

4 Notice was disseminated. No
5 objections to the settlement were received, and I
6 heard argument on the settlement this morning. No
7 objectors appeared at this hearing.

8 With that background, I'll turn to the
9 matters for resolution today, and I'll start with the
10 requirements of Rule 23.

11 First of all, the notice satisfies the
12 requirements of Rule 23. I provided some limited
13 comments on the proposed notice on March 12, 2024,
14 consistent with the newly amended version of the rule.
15 A revised form of notice was filed on April 16, and I
16 approved the form of notice on April 18.

17 The provision of notice was also
18 adequate, as I tentatively found on March 12 and can
19 confirm today after reviewing the affidavit of notice
20 that was filed, I believe, on June 17.

21 I also note that the co-lead
22 plaintiffs appropriately filed affidavits complying
23 with Rule 23(f), which were attached to the
24 plaintiffs' opening brief in support of the

1 settlement.

2 Turning next to class certification.
3 The parties ask that I approve a class for purposes of
4 the settlement. The parties stipulated to a proposed
5 settlement class, which is defined in paragraph 1(z)
6 of the settlement stipulation. Broadly speaking, it
7 includes holders of DiamondPeak's Class A common stock
8 at the time of the October 23, 2020, merger, excluding
9 the defendants and certain of their affiliates.

10 Rule 23 governs class certification in
11 this court, and certification is a two-step process.
12 The class must satisfy the four criteria of Rule 23(a)
13 and fall within at least one of the subsections of
14 Rule 23(b). The four requirements of Rule 23(a) are
15 numerosity, commonality, typicality, and adequacy of
16 representation.

17 The first criteria, numerosity, is
18 easily met, since, as of the September 23 record date,
19 there were 35 million shares of DiamondPeak common
20 stock outstanding and 28 million public shares.

21 The fourth criteria of adequacy is
22 also quite easily met. The plaintiffs have fairly and
23 adequately served the interests of the proposed class.

24 The second and third criteria are

1 arguably more interesting. The defendants initially
2 opposed the plaintiffs' motion for class certification
3 and argued that there were questions of individual
4 reliance and causation that made class certification
5 problematic.

6 The issues discussed in the papers
7 stem from the fact that Lordstown stock traded above
8 the redemption price for about a month after the
9 Hindenburg report that I mentioned before, and some
10 members of the proposed class might have sold at a
11 gain.

12 But this motion was never resolved; it
13 was never presented to me for decision since the
14 parties reached a settlement. So I will put aside my
15 academic interest and consider that the parties have
16 now joined issue on class certification and these
17 questions are no longer being contested.

18 For my purposes today, I accept that
19 there are common factual and legal questions in the
20 complaint, including whether the director-defendants
21 breached their fiduciary duties. The class
22 representatives' claims arise from the same events
23 that give rise to claims or defenses that are typical
24 among the class members.

1 And so I find for purposes of
2 approving the settlement class that the elements of
3 commonality and typicality are met.

4 In terms of Rule 23(b)'s requirements,
5 certification would be appropriate under either
6 subsection (1) or (2). Absent certification, there
7 would be potentially numerous lawsuits, risking
8 inconsistent judgments. The plaintiffs also allege
9 that the defendants engaged in a single course of
10 conduct generally applicable to the class.

11 And so I am comfortable approving the
12 class as a non-opt-out class for purposes of the
13 settlement only and will do that in the final order.

14 Next up I'll consider the merits of
15 the settlement itself. "[T]he court's function is to
16 consider the nature of the claim, the possible
17 defenses thereto, the legal and factual circumstances
18 of the case, and then to apply its own business
19 judgment in deciding whether the settlement is
20 reasonable in light of those factors.'" That's from
21 *In re Philadelphia Stock Exchange*, 945 A.2d 1123, from
22 the Delaware Supreme Court in 2008 at pages 1137 to
23 38.

24 In short, I must evaluate whether the

1 settlement is fair and reasonable, focusing on the
2 "give" and the "get." That means that I must compare
3 the value of the benefits achieved by the settlement
4 against the strength of the claims that are being
5 released.

6 The facts and circumstances that the
7 Court considers in assessing a proposed settlement are
8 described by the Delaware Supreme Court in the *Polk v.*
9 *Good* decision at 507 A.2d 531 and in the newly amended
10 version of Rule 23.

11 I'll start with the "get," which
12 consists of a common fund of \$15.5 million which will
13 be held in escrow until the effective date of the
14 settlement. The common fund includes \$12 million from
15 insurance, and there's also \$3.5 million which I
16 understand is subject to an indemnification dispute in
17 bankruptcy court or will be paid directly by the
18 individual defendants; but either way, the
19 \$15.5 million is certain.

20 This cash recovery for the class is
21 particularly notable given the backdrop of Lordstown's
22 bankruptcy.

23 I compare this to the "give," which is
24 a release of claims. The release is appropriately

1 limited to claims asserted in the complaint or that
2 the plaintiffs could have asserted based on the same
3 set of operative facts relating to the ownership of
4 DiamondPeak Class A common stock as of the date of the
5 de-SPAC.

6 The release carves out claims that
7 were asserted in the SEC's inquiry. The claims
8 released, I believe, are appropriately released when I
9 consider the strength of the recovery.

10 The claims arguably fell under the
11 entire fairness standard of review. The defendants
12 would likely have had the burden of proving fair price
13 and fair process. There were some bad facts that were
14 alleged in the complaint.

15 The plaintiffs point out, however,
16 that their success was also not without risks. I
17 identified some potential challenges before, when I
18 talked about class certification. There were also
19 some potential challenges to proving damages, since
20 Lordstown's stock traded above \$10 per share for some
21 time.

22 Lordstown's bankruptcy, again, added
23 an additional layer of risk. So on balance, I believe
24 that the certain monetary recovery for the class

1 outweighs the claims being released.

2 The arm's length negotiations before a
3 skilled mediator and the lack of objections further
4 support this view. The settlement is fair, adequate,
5 and reasonable, and I approve it on that basis.

6 I'm also going to approve the proposed
7 plan of allocation, which is consistent with those
8 endorsed by the court in other class action
9 settlements. The net settlement amount will be
10 distributed directly to eligible class members *pro*
11 *rata*. It avoids the costs and the unknowns of a
12 claims process and is also fair, reasonable, and
13 adequate.

14 That leaves the plaintiffs' request
15 for award of attorneys' fees and expenses and the
16 plaintiffs' request for incentive awards.

17 I'll start with the fee award.
18 Counsel requests \$3,390,829.42, and reimbursement of
19 \$429,647.01.

20 In setting fee awards, the Court must
21 make an independent determination of reasonableness.
22 That's from *Goodrich v. EF Hutton Group, Inc.*, 681
23 A.2d 1039. To do that, I must exercise my own
24 business judgment in assessing whether an award is

1 reasonable and appropriate. The *Sugarland* factors
2 traditionally guide that analysis.

3 I'll begin with the benefit conferred
4 in the litigation, which is the most important of the
5 *Sugarland* factors. The benefit here is self-pricing
6 and certain. It's the \$15.5 million fund that I
7 described before. This is substantial. And under the
8 Delaware Supreme Court's *Americas Mining* decision,
9 when a case settles after the plaintiffs have engaged
10 in meaningful litigation efforts, fee awards generally
11 range from 15 to 25 percent of the benefit conferred.

12 I believe that that range is
13 appropriate here. There were two rounds of fully
14 briefed motions to dismiss, a complicated motion to
15 stay, and a contested motion for class certification.
16 There was also the complexity of the bankruptcy
17 proceeding, which I heard quite a bit about today.

18 These motions came early on in the
19 SPAC litigation wave, and there was the added layer of
20 Lordstown potentially going bankrupt. So the bottom
21 of the range certainly seems too low to me. I don't
22 think the 25 percent upper end of the range is
23 warranted either, given the lack of depositions. But
24 on balance, the 22.5 percent range that the plaintiffs

1 seek seems perfectly fair to me and appropriate.

2 Before I apply the range, I am going
3 to start by subtracting out expenses. The expenses
4 here are relatively high for a case at this stage, but
5 that's largely because of an approximately \$271,000
6 expense for bankruptcy counsel. The fees were to
7 defend against Lordstown's efforts to extend the
8 automatic stay to this action. The plaintiffs
9 retained bankruptcy counsel, which was involved in
10 opposing the effort to extend the stay. A Lordstown
11 witness was deposed, and there was a hearing that
12 occurred with live testimony.

13 This seems like a very fair expense to
14 reimburse, from my standpoint, given that it allowed
15 the plaintiffs to secure this settlement, but I don't
16 have specifics on what the \$271,000 expense
17 represents. I don't have affidavits of time from
18 bankruptcy counsel, I don't know what rate they
19 charged.

20 Given the size of the expense, I'd
21 prefer to have some sense of that information. I
22 don't know that I need the time sheets, but a
23 high-level understanding of the rates, the hours, and
24 the tasks would be very helpful to me. I'm going to

1 ask that counsel provide that to me before I enter the
2 final order.

3 But assuming that information checks
4 out -- and I imagine that it will -- and the expense
5 is reasonable, I will be willing to approve it since,
6 again, it was an important piece of counsel being able
7 to secure this settlement at all.

8 The other expenses seem perfectly
9 appropriate to me. The biggest expense other than the
10 one I mentioned is for the standard costs like experts
11 and reasonable mediation expenses. So assuming that I
12 get the information that will give me comfort on the
13 bankruptcy counsel expense, I will approve the
14 expenses in full, and that leaves just over
15 \$15 million in the fund.

16 The fee award sought is 22.5 percent
17 of the net settlement fund, which, as I said before, I
18 think is appropriate here. And that gets us to the
19 \$3,390,829.42 fee that counsel seeks.

20 Looking to the other *Sugarland*
21 factors, they support awarding that fee. This case
22 was brought, again, before SPAC litigation began to
23 verge on strike suits. It was a complex case. It
24 presented a series of then-novel arguments. The case

1 was taken on contingency, and counsel on both sides is
2 excellent. So I believe that the *Sugarland* factors
3 also support the fee that's sought.

4 Looking to the time and expense that
5 was incurred by counsel as a cross-check, plaintiffs'
6 counsel put in collectively about 7600 hours in the
7 case from the commencement of litigation through the
8 signing of settlement stipulation. The implied hourly
9 rate from the net requested fee award comes out to
10 about \$446, which is more than reasonable. The total
11 lodestar is about \$4.2 million, with the requested fee
12 representing a 0.79x multiplier, also very reasonable.

13 Taking all of that together, assuming
14 that I get the information that I requested on
15 bankruptcy counsel expense, I will approve the fee and
16 expense award as fair and reasonable.

17 That leaves only the matter of
18 incentive fees. The two plaintiffs each request
19 \$5,000 incentive awards to be paid from the fee award
20 to counsel.

21 I don't reflexively approve incentive
22 awards, but I think they're fair and warranted in this
23 case. The plaintiffs not only invested time in
24 preparing the complaint and reviewing briefing, but

1 they meaningfully participated in discovery. Their
2 phones were imaged, their emails were searched by a
3 third-party vendor, and they were even named as
4 defendants in the bankruptcy action.

5 So that, coupled with the goal of
6 incentivizing people to serve as class
7 representatives, supports incentive awards of \$5,000
8 each here.

9 I believe that's everything I had on
10 my agenda for today. To recap, I'll certify the
11 class. I'll approve the settlement and the proposed
12 plan of allocation. I need a bit more information on
13 the bankruptcy counsel expense, so I'd like to see
14 that first. Assuming that I get it, barring any
15 issues, I'll also approve the fee and expense award
16 sought and enter the final judgment that was presented
17 to me. And the incentive fees are also approved to
18 the class representatives.

19 I'll be ready to enter the final order
20 promptly after I receive the information, so I'll keep
21 an eye on the docket for that.

22 Thank you very much for your time
23 today. Congratulations on a really fine settlement.
24 It's well done and you should be commended for it.

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(302) 255-0526

1 Unless you have any questions for me,
2 we're adjourned.

3 (Court adjourned at 11:52 a.m.)
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CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomat Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 48, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 9th day of July, 2024.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomat Reporter
Certified Realtime Reporter
Delaware Notary Public

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Tab 7

V

Defendants.

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1 APPEARANCES:

2 PETER B. ANDREWS, ESQ.

3 DAVID M. SBORZ, ESQ.

4 JACKSON E. WARREN, ESQ.

5 Andrews & Springer LLC

6 -and-

7 CHRISTOPHER H. LYONS, ESQ.

8 TAYLOR D. BOLTON, ESQ.

9 Robbins Geller Rudman & Dowd LLP

10 -and-

11 ERIK W. LUEDEKE, ESQ.

12 of the California Bar

13 Robbins Geller Rudman & Dowd LLP

14 -and-

15 GREGORY E. DEL GAIZO, ESQ.

16 of the California Bar

17 Robbins LLP

18 for Plaintiff

19 RYAN D. STOTTMANN, ESQ.

20 RACHEL R. TUNNEY, ESQ.

21 Morris, Nichols, Arsht & Tunnell LLP

22 for Defendants

23 - - -

24 CHANCERY COURT REPORTERS

500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 THE COURT: Good afternoon, everyone.

2 ATTORNEY STOTTMANN: Good afternoon,
3 Your Honor.

4 THE COURT: Mr. Stottmann.

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

8 ATTORNEY TUNNEY: Good afternoon.

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

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

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

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

24 ATTORNEY DEL GAIZO: Good afternoon,

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

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

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

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

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

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

12 THE COURT: That sounds great.

13 ATTORNEY DEL GAIZO: Thank you, Your
14 Honor.

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

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

1 defendants. That's Robert Mancini, Philip Kassin, and
2 James Carpenter. The controlling defendants took RMG
3 public on February 12, 2019. They sold 23 million
4 units at \$10 a unit if we include the underwriters'
5 overallotment. The units consisted of one share of
6 Class A stock and one-third of one warrant. That
7 \$230 million that was raised from the IPO was then
8 placed in a trust.

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

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

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

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

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

1 of shares for just \$25,000.

2 And what we have is --

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

5 ATTORNEY DEL GAIZO: Sure. I
6 believe --

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

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

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

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

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

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

15 THE COURT: Got it.

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

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

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

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

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

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

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

12 As Your Honor is familiar, in these
13 SPAC structures, shareholders, if they don't want to
14 invest in the post-closing company, can go instead and
15 seek to redeem their shares and get their \$10 plus
16 interest. Here, since it took so long to find a deal,
17 there is a good amount of interest. It was \$10.18 by
18 the time of the merger. And they can go get that
19 10.18 back. But looking at this company that's going
20 to be on the forefront, it looks like, of the EV
21 revolution, it's going to make all these battery
22 packs, there's not a single redemption. The
23 shareholders vote overwhelmingly -- I think it's
24 98 percent -- in favor of the deal. And the deal

1 closes and the shares start trading.

2 Three months after that deal is done,
3 on March 30th, the company announces its results. For
4 the first time, it discloses that it's got a shortage
5 in cell capacity and expects revenues between 18 and
6 40 million. Using that low end, we're talking about
7 an 80 percent cut from what's in the revenue
8 projections just three months later.

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

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

3 So the stock drops below the 10.18
4 price. Additional bad news continues. The company
5 actually reports revenue of less than 17 million for
6 2021. Again, in comparison to the 140 million
7 projected.

8 We filed this action on October 28th,
9 2021. I know there's been a good amount of *MultiPlan*
10 cases filed in this Court, but given that time, this
11 is one of the first -- this is four months before Vice
12 Chancellor Will issues her seminal decision in
13 *MultiPlan*. This is one of the initial cases.

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

21 Shortly thereafter, we talked with
22 defendants about whether it made sense to consider a
23 resolution. We spent a day in New York on March 23rd,
24 2023, with Judge Layn Phillips, and that mediation was

1 unsuccessful.

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

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

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

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

1 a two-trader model. It's a very preliminary analysis.
2 And what he came back to us and said is there's about
3 3.8 million shares that were actually damaged, shares
4 that could have been redeemed and were held until some
5 point where the stock fell below the redemption price.
6 And using his numbers, he said you have damages,
7 economic damages on those shares of about
8 \$12.5 million.

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

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

19 THE COURT: That's fine.

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

1 2020. The definition excludes defendants, their
2 family members, their entities, et cetera.

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

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

10 Rule 23(a) is that numerosity,
11 commonality, typicality, and adequacy. I will walk
12 through those in that order. I think they are
13 relatively easily met here. In fact, defendants' own
14 motion, when they filed their motion for judgment on
15 the pleadings, effectively admitted that we met Rule
16 23(a) requirements.

17 For numerosity, we have 23 million
18 shares of Class A common stock outstanding. As the
19 affidavit of Mr. Murray, who is our representative
20 from Gilardi, our settlement administrator, which we
21 filled on September 11, 2024, notes, that he mailed
22 out approximately 17,000 notices and was informed that
23 one institution was sending out the email to another
24 37,000-plus notices. That's at paragraph 11 of his

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

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

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

24 Regarding adequacy, Your Honor,

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

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

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

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

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

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

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

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

10 Gilardi established a toll-free telephone help line.

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

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

20 THE COURT: That's fine.

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

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

8 Going kind of backwards, looking at
9 the reasonableness of the settlement, I think the
10 Court is well familiar. We look at the "give" versus
11 the "get." The "get" here is pretty easy to value:
12 \$11.99 million. On a per-share basis, that's
13 approximately 52 cents per share. That is consistent
14 with the other *MultiPlan* settlements. In *MultiPlan*
15 itself, it was 44 cents a share. In *Lordstown*, it was
16 57 cents per share. In *FinServ*, it was 38 cents per
17 share. So towards the upper end of the middle of
18 those three cases.

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

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

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

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

19 As to the remaining factors in Rule
20 23(f)(5), there's been no objections. I looked around
21 today. There's not very many people here today. So I
22 don't think there's any objectors in the crowd.

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

1 mediator in doing so.

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

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

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

22 THE COURT: That's fine.

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

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

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

1 harm, no foul.

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

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

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

24 So unless Your Honor has any

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

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

8 ATTORNEY DEL GAIZO: Correct.

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

11 ATTORNEY DEL GAIZO: Sure, Your Honor.

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

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

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

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

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

19 ATTORNEY DEL GAIZO: Correct, Your
20 Honor.

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

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

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

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

15 THE COURT: Who will be running this
16 analysis?

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

1 possible.

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

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

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

21 ATTORNEY DEL GAIZO: Yes.

22 THE COURT: Okay.

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

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

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

5 ATTORNEY DEL GAIZO: Thank you, Your
6 Honor.

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

10 Here, Your Honor, we've asked for
11 18 percent of the fund. It equates to 2,158,200.
12 This is an all-in amount that includes plaintiff's
13 expense of a little over -- not a little over. About
14 70,500.

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

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

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

9 Using the brackets set forth in
10 *Americas Mining*, we are post motion to dismiss. We
11 are into meaningful discovery. That would normally
12 put us in the 15 to 25 percent bracket. Up to this
13 settlement, our view is that this was pretty
14 hard-fought litigation. It had some pretty unique
15 attributes of it. I don't think I've seen a judgment
16 on the pleadings/class certification from defendants
17 before. Of course, we talked about how this was a
18 relatively new area of the law. We opposed the motion
19 to dismiss. We submitted our supplemental authority.
20 We filed our own class cert. And we reviewed over
21 45,000 pages of discovery.

22 18 percent here, Your Honor, I think
23 compares favorably to the other *MultiPlan* settlements.
24 In *MultiPlan* itself, there was 20 percent. In

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

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

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

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

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

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

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

16 (Laughter.)

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

19 Regarding the incentive fee, we think
20 this is a relatively modest fee of \$2500. Your Honor
21 has the ability to do so -- award a fee under Rule
22 23(g)(4).

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

1 up and be a plaintiff, knowing that you're going to be
2 against such great lawyers and they are going to be
3 searching the world for everything you have ever said,
4 and you might have to stand for a deposition and
5 provide discovery. *EZCORP* was \$5,000. Vice
6 Chancellor Will, in *Sciabacucchi v. Howley*, awarded
7 \$4,000, when she said the plaintiff's efforts were
8 modest. Here, we are below those at 2500.

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

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

13 ATTORNEY DEL GAIZO: Thank you, Your
14 Honor.

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

17 ATTORNEY STOTTMANN: Not unless Your
18 Honor has questions.

19 THE COURT: I don't.

20 ATTORNEY STOTTMANN: Thank you.

21 THE COURT: All right. I want to make
22 just one tweak. I have a bench ruling here. I think
23 they may have updated our computers, and so my Office
24 365 is not synced in here. So I'm going to have to

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

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

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

8 THE COURT: Please be seated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 These questions are common to all
16 class members because each of the members held RMG
17 Class A common stock as of the redemption deadline.
18 Accordingly, the commonality requirement of Rule
19 23(a)(2) is satisfied.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 I now turn, as I must under Rule
8 23(f)(5), to whether the terms of the proposed
9 settlement are fair and reasonable, recognizing that
10 "[t]his Court generally favors settlement of
11 complicated litigation." That's from *Gatz v.*
12 *Ponsoldt*, a decision of this Court from 2009.

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

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

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

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

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

24 Defendants argued that Plaintiffs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 In this action, Plaintiff requests,
11 and the parties have stipulated and agreed to, a
12 \$2,158,200 fee award, which amounts to 18 percent of
13 the settlement fund. The 18 percent fee award is
14 inclusive of expenses.

15 I turn first to the results achieved.
16 As Plaintiff notes, "[f]ee awards for monetary
17 benefits are based on a sliding scale of increasing
18 percentages based on the litigation effort that
19 produced the benefit." Here, as discussed previously,
20 and noted extensively during the hearing, the
21 settlement is the result of significant efforts over
22 the course of three years. Plaintiff puts forth a
23 number of cases to support a conclusion that an
24 18 percent all-in fee award is reasonable and

1 appropriate. I agree.

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

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

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

20 In light of the foregoing, I find that
21 Plaintiff's fee and expense request in the amount of
22 \$2,158,200 is reasonable, and I grant the request.

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

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

15 I agree that an incentive award is
16 warranted in these circumstances, and that an award of
17 \$2,500, to be paid out of Plaintiff's counsel's fee
18 award, is appropriate here, and I grant that incentive
19 award.

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

24 Congratulations, everyone.

1 Anything else before we adjourn?

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

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

18 ATTORNEY DEL GAIZO: Thank you, Your
19 Honor.

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

22 We are adjourned.

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

24 -- -- --

CERTIFICATE

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

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

/s/ Debra A. Donnelly

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

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

Tab 8

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD DELMAN,

Plaintiff,

v

BRYANT R. RILEY, DANIEL SHRIBMAN,
KENNETH YOUNG, PATRICK J. BARTELS,
JR., JAMES L. KEMPNER, TIMOTHY M.
PRESUTTI, ROBERT SUSS, and B. RILEY
PRINCIPAL SPONSOR CO. II, LLC,

Defendants.

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: C. A. No.
: 2023-0293-LWW
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Chancery Courtroom No. 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, October 17, 2024
11:00 a.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

SETTLEMENT HEARING and RULINGS OF THE COURT**CHANCERY COURT REPORTERS**
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

2 KELLY L. TUCKER, ESQ.
3 Grant & Eisenhofer P.A.
4 for Plaintiff

5 KEVIN M. GALLAGHER, ESQ.
6 NICOLE M. HENRY, ESQ.
7 Richards, Layton & Finger, P.A.
8 for Defendants

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1 THE COURT: Good morning. Welcome
2 back, Mr. Gallagher.

3 ATTORNEY GALLAGHER: Nice to see you
4 again, Your Honor. Unfortunately for Your Honor, I
5 will be here again tomorrow for the trial we have.

6 THE COURT: Happy to see you then.

7 ATTORNEY GALLAGHER: Always a pleasure
8 to appear before Your Honor.

9 Just quickly, Kevin Gallagher on
10 behalf of the defendants. With me at counsel table,
11 Your Honor knows my colleague Nicole Henry.

12 THE COURT: Good morning, Ms. Henry.
13 Nice to see you.

14 ATTORNEY GALLAGHER: Hope to remain
15 quiet during the settlement hearing. But if Your
16 Honor has any questions, happy to address them.

17 THE COURT: All right. Thank you very
18 much.

19 Good morning, Ms. Tucker. Nice to
20 see you as well.

21 ATTORNEY TUCKER: Good morning, Your
22 Honor. Kelly Tucker, Grant & Eisenhofer, for the
23 plaintiff. Nice to see you as well.

24 I will start with a little bit of

1 background about this case, how we got here. It's
2 been a while since we were before Your Honor on the
3 motion to dismiss.

4 So this case is about the de-SPAC
5 merger between B. Riley Principal Merger Corp. II,
6 which I will refer to as "BRII," and Eos, which I will
7 refer to as "Legacy Eos."

8 On June 3rd, 2019, BRII was formed as
9 a Delaware SPAC. Its sole purpose, as with all SPACs,
10 was to find a privately held company with which to
11 combine and go public. And as with many SPACs with
12 which this Court is familiar, prior to the IPO, the
13 controller defendants granted themselves 20 percent
14 equity in the company by way of founder shares, in
15 exchange for nominal consideration, and then granted
16 founder shares to BRII's directors and officers, who
17 also had extensive personal and financial
18 relationships with the controller defendants. The
19 founder shares would be worthless if the business
20 combination didn't close.

21 The complaint alleges that because of
22 these incentives, immediately after the IPO,
23 defendants barreled towards a deal with Legacy Eos,
24 which designed and produced battery energy storage

1 systems for electrical grids.

2 On June 21st, 2020, about a month
3 post-IPO, BRII and Legacy Eos executed a letter of
4 intent. Thereafter, Legacy Eos and BRII agreed to
5 complete a merger based on what the complaint alleges
6 was a cursory due diligence process.

7 On October 23rd, 2020, the defendants
8 issued a proxy soliciting stockholder approval of the
9 merger and informing them of their redemption rights.

10 The complaint alleges that the proxy
11 omitted material information, included false and
12 misleading statements regarding net cash per share
13 that BRII stockholders would contribute to the merger,
14 as well as misleading statements about Eos's future
15 business prospects, financial projections, and
16 customer commitments. In particular, the proxy
17 implied that the BRII shares were worth \$10, when, in
18 fact, there was less than \$7 in cash underlying each
19 share.

20 Ultimately, stockholders voted in
21 favor of the merger, and public stockholders holding
22 approximately 8.5 million shares did not redeem,
23 although 6.4 million shares were redeemed. And on
24 November 16th, the merger closed.

1 After the merger, New Eos's stock
2 price traded above \$10.10 for a year – as high as \$31
3 a share. And this includes following a series of
4 events that started to disclose the truth, which is an
5 Iceberg Report which called into question customer
6 commitments that bolstered the proxy. That was
7 published in January 2021. And though New Eos dropped
8 20 percent after that report, it was still trading
9 above the redemption price.

10 Over time, as the projections dropped
11 and guidance was lowered, the stock price did
12 eventually trade below the redemption price, starting
13 on November 18th, 2021. And it ultimately dropped to
14 a low of 97 cents per share on December 12th, 2022.

15 On July 29th, 2022, the plaintiff in
16 this case, Mr. Delman, served a 220 demand. And as a
17 result of that process, he received 1300 pages of
18 documents, including certain contracts related to the
19 customer commitments touted in the proxy, projections,
20 board materials.

21 After review of those documents, he
22 filed the present action, alleging that the defendants
23 breached their fiduciary duties as controllers,
24 directors, and officers of BRII and were unjustly

1 enriched.

2 On June 22nd, 2023, defendants moved
3 to dismiss on a variety of bases, including, perhaps,
4 the most relevant here, because they believed that
5 because the stock price traded above 10 for such a
6 long period post merger that plaintiff would be unable
7 to prove anything other than nominal damages at trial.
8 Defendants also argued that the signed customer
9 commitments that plaintiff alleged did not exist did,
10 in fact, exist.

11 While that motion was pending, and
12 following argument, the parties engaged in a mediation
13 with Robert Meyer to explore whether they could reach
14 a potential settlement. Mediation was initially
15 unsuccessful, but subsequent to that mediation, with
16 Mr. Meyer's assistance, the parties reached agreement
17 to settle the claims for \$8.5 million, subject to
18 confirmatory discovery.

19 Plaintiff then conducted confirmatory
20 discovery, consisting of productions from both the
21 company and certain defendants, electronic searches
22 for documents using electronic search protocols, and
23 the production and review of 40,000 pages of
24 documents.

1 THE COURT: Do you know how many
2 documents were produced?

3 ATTORNEY TUCKER: Your Honor, it was
4 thousands, but I don't know the exact amount.

5 THE COURT: Okay.

6 ATTORNEY TUCKER: After that process
7 was complete, the parties entered into their
8 stipulation of settlement in June 2024. Notice was
9 provided to the class following the Court's approval
10 of the scheduling order and notice, and no objections
11 were received. And the notice process is set forth in
12 the Ewashko affidavit.

13 Plaintiff believed, and continues to
14 believe, that his claims in this case are strong. But
15 this case is not without significant challenges. This
16 is particularly true in light of the high percentage
17 of stockholders who redeemed and the fact that New
18 Eos's stock price traded above the redemption price
19 for a year post merger, even after the Iceberg Report
20 called into question the veracity of representations
21 about customer commitments.

22 Also, the SEC conducted an
23 investigation here and subsequently dropped it without
24 further action. And the confirmatory discovery

1 process revealed that the customer commitments that
2 were missing from the 220 production did exist.
3 Though the timing of those agreements and the levels
4 set forth therein was still problematic from
5 plaintiff's perspective, they weren't made up. And in
6 light of all these considerations, and given the
7 strength of the settlement here, the plaintiff and his
8 counsel believe that the settlement provides fair,
9 reasonable, and adequate relief to the class in
10 exchange for the release of their claims.

11 I'll talk briefly about the
12 substantial benefits that we believe the settlement
13 provides.

14 Because New Eos stock traded above the
15 redemption price for so long, looking at the per-share
16 benefit to the class likely massively understates the
17 level of recovery that class members who suffered
18 actual damages will receive. But even on a per-share
19 basis, this is an excellent recovery. It's 99.4 cents
20 per share. There are about 8.5 million shares in the
21 class. But stockholders who submit claims as part of
22 this process -- and they have 30 more days to do so --
23 will all receive up to 100 percent of the damages,
24 with the remainder being distributed nominally to all

1 class members. This compares favorably with
2 *MultiPlan*, where the per-share recovery was 36.8 cents
3 per share and the stock never traded above 10. This
4 is also different from *MultiPlan*, because there the
5 stock never traded above 10. The same is true in *Gig2*
6 and *Gig4*.

7 On a net-cash-per-share damages
8 theory, this is a 32 percent recovery, which again
9 compares favorably to *MultiPlan* and, taking into
10 consideration what the stock did here, also compares
11 favorably to *Gig2* and *Gig4*.

12 The remaining *Activision* factors
13 likewise support settlement approval and approval of
14 the plan of allocation. We set that forth in our
15 brief. Unless Your Honor wants to hear more about
16 that, I will move on to class certification.

17 THE COURT: That's fine. Thank you.

18 ATTORNEY TUCKER: The elements of
19 class certification of a nonopt-out class of BRII
20 stockholders, as set forth in the stipulation, are
21 likewise satisfied. As demonstrated by the Ewashko
22 declaration, there are thousands of class members.
23 Questions of law and fact are common to all class
24 members here. And plaintiff's claims are typical of

1 the class. And the class's interests were fairly and
2 adequately protected throughout this process. And we
3 detail that in pages 29 to 34 of our brief.

4 Additionally, plaintiff's counsel
5 seeks an award of 18 percent in attorneys' fees, which
6 is 1.445 million and inclusive of \$23,479.99 in
7 expenses.

8 The Court looks at the *Sugarland*
9 factors in determining the appropriateness of the
10 requested fee, granting the greatest weight to the
11 benefits conveyed. As discussed here, the benefits
12 are substantial, both on a per-share basis and in
13 light of the facts here. Class members stand to
14 receive up to 100 percent of their actual damages plus
15 a nominal damages award.

16 The Court could also look at the
17 guidelines in *Southern Peru*. In light of the
18 meaningful litigation that's occurred here, we have
19 not only a 220 process, we briefed and argued a motion
20 to dismiss, and we engaged in confirmatory discovery.
21 We believe that this puts this case in the 15 to
22 25 percent range. Given that it was still relatively
23 early on, we believe that 18 percent here is
24 appropriate, which is on the lower end of that range.

1 There's precedent for even larger awards where only a
2 220 process occurred. In *City of Monroe v. Murdoch*,
3 the Court awarded a 25 percent fee in an action in
4 which no litigation activity had occurred other than a
5 220 process. And the same is true in *Presidio*.

6 Plaintiff's counsel took this
7 litigation on a contingency basis and, given that this
8 action was filed early on in the de-SPAC merger line
9 of cases, took on a substantial risk. The issues
10 presented were complex in light of what the stock
11 price did post merger.

12 The time and efforts of counsel
13 support the requested fee award. In total, counsel
14 spent 733.2 hours litigating this action through the
15 signing of the stipulation of settlement. That's a
16 lodestar multiple of approximately 2.59 and an hourly
17 rate of \$2319, both of which are well within, if not
18 in the lower end of, multiples and rates this Court
19 has awarded and found to be reasonable where a
20 monetary benefit is achieved.

21 And unless Your Honor has any
22 questions, we will rest on our papers as to the rest.

23 THE COURT: I have no questions.

24 ATTORNEY TUCKER: Okay. Thank you,

1 Your Honor.

2 THE COURT: Thank you very much.

3 Mr. Gallagher, is there anything that
4 you would like to add?

5 ATTORNEY GALLAGHER: No, Your Honor.
6 Thank you very much.

7 THE COURT: Okay. Thank you very
8 much.

9 Thank you for your very thorough
10 brief, Ms. Tucker, and your presentation this morning.
11 I have a bench ruling prepared. If you wouldn't mind
12 being patient with me for a few minutes, I can work
13 through that now.

14 Before me is the proposed settlement
15 of Delman v. Riley, which is Civil Action
16 No. 2023-0293-LWW.

17 I will start briefly by summarizing
18 the factual allegations of the complaint and the
19 events that bring us to this settlement hearing today,
20 and then I will turn to the matters that I have on my
21 agenda for the settlement hearing itself.

22 The action concerns the November 16th,
23 2020, de-SPAC merger between B. Riley Principal
24 Sponsor Co. II, which I will call "BRII," which is a

1 SPAC, and Eos, which was then a private company.

2 BRII was formed in June of 2018 by
3 sponsor B. Riley Principal Co. II. And as with many
4 similar SPAC cases, the sponsor and the individuals
5 associated with it, who are defendants in this suit,
6 received a significant number of "Founder Shares" for
7 a nominal fee. After they were appointed to the
8 Board, the other individual defendants here were also
9 awarded a certain number of Founder Shares.

10 BRII's IPO was in May of 2020. Public
11 units that included shares of stock were sold. And
12 the proceeds of the IPO unit sales were placed into a
13 trust for the benefit of public stockholders. The
14 shares that were associated with the IPO units
15 included liquidation rights and redemption rights, as
16 is standard.

17 Soon after the IPO, BRII began
18 discussions with Eos, and a merger agreement was
19 signed in September of that year. Then, in October of
20 2020, BRII filed a proxy statement, which included
21 financial projections for the target and signed
22 letters of intent from customers that accounted for
23 the majority of projected growth reflected in those
24 projections.

1 The merger closed on November 16th,
2 following the closing of the redemption window and a
3 stockholder vote.

4 After closing, the stock price of the
5 post de-SPAC combined entity surged and reached a high
6 of about \$31 per share. But in January of 2021, a
7 research firm published what the plaintiffs call the
8 Iceberg Report, which called the customers that were
9 listed in the Proxy fake and called into question the
10 veracity of supposed customer commitments that were
11 reflected in the financial projections in the Proxy.
12 After the release of the Iceberg Report, the stock
13 price fell, and the combined company missed the
14 projections that had been included in the Proxy.

15 So as a result of all of that, the
16 plaintiff here served a Section 220 demand on the
17 combined company, and documents were produced in
18 response. Based on the information produced to him,
19 the plaintiff purportedly determined that the proxy
20 misrepresented the value of BRII shares. More
21 specifically, he asserts that he concluded there was
22 less than \$7 of value underlying the BRII shares
23 despite the proxy and merger agreement indicating a
24 \$10 per share value.

1 The plaintiff went on to file a class
2 action Complaint in this Court in March of 2023. He
3 alleged that the defendants breached their duty of
4 loyalty and were unjustly enriched by impairing public
5 stockholders' redemption rights.

6 This lawsuit came after this Court's
7 decisions in *MultiPlan*, *GigAcquisitions3*, and
8 *GigAcquisitions2*, which addressed similar claims and
9 theories.

10 In June of 2023, the defendants moved
11 to dismiss. They accepted, for purposes of the
12 pleading stage, that entire fairness applied under
13 *MultiPlan* and other decisions. They argued, however,
14 that the redemption rate was not actionably impaired
15 and that the plaintiff would be unable to prove actual
16 economic harm at trial, including because the stock
17 price traded so high for such a significant period,
18 and a significant portion of public stockholders
19 redeemed their shares.

20 In November of 2023, I heard oral
21 argument on the motion to dismiss. I prepared a
22 ruling, but the parties asked me to hold my decision
23 in abeyance while they participated in voluntary
24 mediation before Robert Meyer of JAMS.

1 In February of this year, the parties
2 reached an agreement in principle, which was subject
3 to confirmatory discovery.

4 The defendants then produced
5 confirmatory discovery, totaling over 40,000 pages of
6 non-public documents. After reviewing the documents,
7 the plaintiff confirmed the proposed settlement, and a
8 stipulation of settlement was signed and filed with
9 this Court in June.

10 So with that background, I will turn
11 to the first item on my agenda today, which is class
12 certification.

13 The plaintiff seeks to certify a class
14 of BRII's public stockholders who held those shares
15 between November 10th of 2020, the redemption
16 deadline, and November 16th of 2020, the closing of
17 the de-SPAC. The class excludes the defendants and
18 related persons and affiliates.

19 A class must satisfy the requirements
20 of Rule 23(a) and also fall within one of the
21 subsections of Rule 23(b). Rule 23(a) has four
22 requirements. They are numerosity, commonality,
23 typicality, and adequacy of representation. Each of
24 the four elements is met here. As of the redemption

1 deadline, there were over 11 million eligible
2 non-redeemed shares outstanding. There are common
3 questions of law and fact presented. The plaintiff is
4 similarly situated to other non-redeeming
5 stockholders. And the plaintiff and his counsel can
6 and have adequately represented the class.

7 In terms of Rule 23(b), certification
8 would be appropriate under either subsection (1) or
9 subsection (2), and so I am going to certify a
10 non-opt-out class as defined in the stipulation for
11 purposes of this settlement.

12 The other Rule 23 requirements are
13 also met. I preliminarily approved the form of notice
14 when I entered the scheduling order a few months ago.
15 I have reviewed the Ewashko affidavit that was filed,
16 and I can now also say that the provision and the
17 mailing of notice was adequate and in accordance with
18 my order. Notice satisfies Rule 23(e). The plaintiff
19 has also filed the requisite Rule 23(aa) affidavit.

20 That brings me next to the merits of
21 the settlement itself and whether it should be
22 approved as fair, reasonable, and adequate.

23 The Court's function in making this
24 assessment is "to consider the nature of the claim,

1 the possible defenses thereto, the legal and factual
2 circumstances of the case, and ... apply its own
3 business judgment in deciding whether the settlement
4 is reasonable in light of [those] factors." That's
5 from *In re Philadelphia Stock Exchange*, which is 945
6 A.2d 1123, at pages 1137 to 38. To put that more
7 generally, the Court must compare the value of the
8 benefits achieved by the settlement against the
9 strength of the claims that are being released.

10 Starting with the latter, the
11 plaintiff has agreed to release any claims arising out
12 of this action except for claims to enforce the
13 settlement stipulation. This is outlined in the
14 definition of "Released Plaintiff's Claims" in the
15 stipulation at paragraph (A)(1)(kk). The release is
16 appropriately tailored to the issues in this case and
17 in line with releases this Court has approved in
18 similar suits.

19 In terms of the strength of the claims
20 being released, there were entire fairness claims
21 pleaded. There were allegations of unfairness in view
22 of the redemption right. The confirmatory discovery,
23 however, undercut the theory of false customer
24 commitments. The plaintiff nevertheless believed that

1 he still had a cognizable theory of liability,
2 including on net cash per share.

3 A significant hurdle still was
4 presented by the fact that the combined company stock
5 traded above the redemption value for about a year
6 post-closing. There were a substantial number of
7 redeemed shares, which raises a question about whether
8 the redemption right was impaired. And even if unfair
9 process and price could be proven for liability, these
10 facts could have created complications for damages.

11 In terms of the "get," the plaintiff
12 secured an \$8.5 million cash recovery for the
13 stockholder class. This amounts to just under \$1 per
14 share and, in my view, is meaningful. I believe that
15 the settlement on balance is fair and reasonable, and
16 I approve it on that basis.

17 The lack of objections and the fact
18 that the settlement resulted from an arm's-length
19 mediation process before a skilled third-party
20 mediator further supports my conclusion and my comfort
21 in approving the settlement.

22 I will also approve the proposed plan
23 of allocation. Under that plan, class members who
24 submit valid proof of actual economic loss will

1 receive pro rata shares calculated as follows: for
2 each share sold before the filing of the complaint,
3 \$10.10 minus the sale price of the share; and for each
4 share held as of the date the complaint was filed,
5 \$10.10 minus \$1.86, which is the closing share price
6 on the date the complaint was filed.

7 In viewing the proposed plan of
8 allocation, I believe that it is appropriate,
9 adequate, and consistent with other plans of
10 allocation that have been endorsed by the Court in
11 class action settlements. So I approve that as well.

12 The remaining matter on my agenda is
13 the request for an award of attorneys' fees and
14 expenses for the plaintiff's counsel.

15 Counsel requests a fee award of
16 \$1,445,000, which is inclusive of \$23,479.99 in
17 expenses. I reviewed the affidavit outlining the
18 expenses, and I believe that they are all reasonable
19 and appropriate here.

20 Turning to the fee award, the Court of
21 Chancery must make an independent determination of
22 reasonableness. That's outlined in *Goodrich v. E.F.*
23 *Hutton Group*, 681 A.2d 1039. And my role in doing
24 that is to exercise my own business judgment in

1 determining whether an award is reasonable and
2 appropriate.

3 The *Sugarland* factors traditionally
4 guide that analysis, and they guide me here. I will
5 begin with the benefit conferred in the litigation,
6 which is generally the most important of the *Sugarland*
7 factors. As I mentioned, the settlement provides the
8 class with an \$8.5 million fund, to be distributed
9 based on the formula that I have already outlined,
10 which amounts to a per-share recovery of just over 99
11 cents. The plaintiff asserts in the settlement brief
12 that the fee sought equates to about 18 percent of the
13 benefit achieved, although I will say I get a slightly
14 different figure when I run that calculation myself.

15 With that framing in mind, I will
16 start with the *Americas Mining* framework, which I
17 generally find to be a useful guide for setting a fee
18 award.

19 As the Delaware Supreme Court observed
20 in *Americas Mining*, when a case settles after the
21 plaintiffs have engaged in meaningful litigation
22 efforts, which is generally taken to mean substantive
23 motions practice and depositions, fee awards will
24 typically range from 15 to 25 percent of the benefit

1 conferred. For an earlier-stage settlement, *Americas*
2 *Mining* describes the typical range as 10 to 15 percent
3 of the benefit conferred.

4 Here, there was motion to dismiss
5 briefing and argument, but the plaintiffs settled
6 before I delivered my ruling. There was also some
7 confirmatory discovery, including email searches and
8 Section 220 documents. But there were no depositions
9 and no non-confirmatory discovery.

10 When I look at that in the confines of
11 the *Americas Mining* framework, I conclude that
12 15 percent of the benefit is an appropriate starting
13 point, and perhaps even generous. It is directly
14 between the early stage and the mid-stage settlement
15 ranges that I have just described. Less expenses,
16 15 percent of the benefit would support a fee of
17 \$1,271,478.

18 I look next to the other *Sugarland*
19 factors, none of which support an upward or a downward
20 adjustment, in my view. Counsel is experienced,
21 excellent, and well qualified. The case was brought
22 on a contingent basis, which always presents a risk of
23 no recovery.

24 In *MultiPlan* and *Gig2*, I awarded

1 18 percent of the benefit, in part because this was at
2 the time a completely novel and developing theory.
3 This case does not have that same distinction. The
4 Court, in fact, has many of these cases alleging the
5 same net cash per share theory that's focused on here.
6 The theory was, of course, recognized in *Gig2* and
7 *Gig3*, but it's not a strict liability theory. And the
8 case presented limited risk, at least getting to
9 trial, since entire fairness applied, and there were
10 multiple preexisting precedents tackling similar
11 issues, as I have just noted.

12 In terms of time and effort, the case
13 settled relatively early. It did not -- and we'll
14 never know -- survive a motion to dismiss, since it
15 settled. So looking to the lodestar as a cross-check,
16 the total hours are about 733 from the 220 through the
17 signing of the settlement stipulation. According to
18 Plaintiff's Memorandum of Law in Support of His Motion
19 to Approve the Settlement, Certify the Class, and for
20 an Award of Attorneys' Fees and Expenses, the fee the
21 plaintiffs request represents a lodestar multiplier of
22 2.59x and an implied hourly rate of \$2,319, though I
23 will say I get slightly different numbers of 2.2x and
24 \$1,971 when I check their math. The fee I calculated

1 I believe is more reasonable, based on these metrics.
2 Under our calculations, the implied hourly rate is
3 \$1,734 per hour and the multiplier is 1.94x. This is
4 more in line with the recent SPAC settlements that I
5 have presided over.

6 So taking all of this together, I
7 believe that the fee I am awarding is adequate, it's
8 appropriate, and it compensates counsel for their
9 excellent work, while preserving value for the class.
10 And to say it again, the fee I am awarding is
11 \$1,271,478, inclusive of expenses.

12 That brings me to the end of my ruling
13 and my agenda for today. I know that there's a final
14 order that Ms. Tucker filed on the docket. I will go
15 through that, update it, and get that filed right
16 away.

17 Thank you so much for coming in and
18 your excellent work in getting this settlement
19 together. I'm grateful for it. We are adjourned.

20 Mr. Gallagher, it sounds like I will
21 see you tomorrow.

22 ATTORNEY GALLAGHER: I look forward to
23 it, Your Honor. Thank you very much.

24 (Proceedings concluded at 11:25 a.m.)

CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 25 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings on pages 13 through 25, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 6th day of November, 2024.

/s/ Debra A. Donnelly

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

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

Tab 9

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PAUL BERGER REVOCABLE TRUST,	:	
	:	
Plaintiff,	:	
	:	
v	:	C. A. No.
	:	2023-0820-JTL
FALCON EQUITY INVESTORS LLC, EAGLE	:	
FALCON JV CO LLC, ALAN G. MNUCHIN,	:	
JEFF SAGANSKY, EDGAR BRONFMAN, JR.,	:	
KAREN FINERMAN, MICHAEL RONEN, and	:	
SAIF RAHMAN,	:	
	:	
Defendants.	:	

- - -

Chancery Courtroom No. 12C
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, January 21, 2025
9:15 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

SETTLEMENT HEARING AND PARTIAL RULING OF THE COURT

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

2 CHRISTINE M. MACKINTOSH, ESQ.
3 JONATHAN C. MILLIS, ESQ.
4 Grant & Eisenhofer P.A.
5 for Plaintiff

6 KEVIN M. GALLAGHER, ESQ.
7 ANDREW L. MILAM, ESQ.
8 Richards, Layton & Finger, PA
9 -and-
10 GREGORY STARNER, ESQ.
11 of the New York Bar
12 White & Case LLP
13 for Defendants

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CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 THE COURT: Welcome, everyone.

2 ATTORNEY GALLAGHER: Good afternoon,
3 Your Honor. Kevin Gallagher of Richards, Layton &
4 Finger on behalf of the defendants.

5 Brief introductions, if permissible.
6 From White & Case, Your Honor, Greg Starner. And from
7 my office, Andrew Milam.

8 THE COURT: Thank you all for being
9 here. I appreciate it.

10 ATTORNEY MACKINTOSH: Good morning,
11 Vice Chancellor Laster. Christine Mackintosh from
12 Grant & Eisenhofer. I'm joined by my colleague Jon
13 Millis.

14 THE COURT: Thank you for being here
15 as well.

16 ATTORNEY MACKINTOSH: This is the time
17 the Court has set to consider the settlement reached
18 in the matter of *Paul Berger Revocable Trust v. Falcon*
19 *Equity Investors* matter or, as we like to call it, the
20 Sharecare de-SPAC merger litigation.

21 THE COURT: It's much longer.
22 Actually, maybe --

23 ATTORNEY MACKINTOSH: That word
24 "revocable" is a tongue twister for me.

1 THE COURT: Okay.

2 ATTORNEY MACKINTOSH: We're pleased to
3 present the settlement, which offers an \$11.5 million
4 cash payment to Falcon Capital Acquisition Corporation
5 shareholders -- we'll call those "FCAC" -- who were
6 deprived of their right to make a fully informed
7 decision about whether to redeem their FCAC shares or
8 invest in Sharecare, the company emerging from FCAC's
9 merger with Legacy Sharecare. The settlement
10 represents a gross recovery of approximately \$1.10 per
11 share, which compares highly favorably to the
12 per-share recoveries in similar SPAC settlements.

13 THE COURT: I'm going to go ahead and
14 ask you this. I like that stat. I wasn't sure about
15 the aggregate number comparison.

16 So first you basically just said
17 11.5 million, this contrasts favorably with -- and
18 then there was a string cite of other numbers. How do
19 you think we should be looking at these?

20 It seems to me like the more credible
21 way to look at it is as a per-share number. But since
22 you led with the aggregate, it seemed like you liked
23 the aggregate. So I wanted to understand why you
24 liked the aggregate.

1 ATTORNEY MACKINTOSH: I don't like the
2 aggregate better. Frankly, I don't recall what the
3 thought process was for why it was written that way.
4 I think clearly the most relevant is the aggregate per
5 share. \$1.10 per share is the highest, other than, I
6 believe, *Romeo*. And I think if you look at the
7 comparison of the damages -- I mean, none of these
8 have gone to trial. Right? So no one is really sure
9 how the damages are going to be measured.

10 We look at them two ways. One is
11 comparing the \$10 redemption value to the net cash per
12 share. If we use that metric, this settlement is
13 phenomenal. It's 55 percent of the net cash per share
14 damages, which we think is an extraordinarily hefty
15 percent.

16 Another way to look at it: This
17 company, Sharecare, was actually acquired on October
18 24th, 2024. At that time, it was trading for \$1.34
19 per share. So if you compare the \$10 redemption value
20 to sort of what somebody who rode it to the bottom
21 got, it's about 12.9 percent of that. And we think
22 that is above the median in your famous *Southern* --
23 the Dell Class V chart that you have in the *Southern*
24 *Peru* opinion.

1 THE COURT: That all makes sense to
2 me, and that's helpful. Part of me was thinking that
3 some of the -- there's going to be other factors
4 driving, like, the amount of the loss, including, I
5 would assume, capitalization size and how the stock
6 performed, et cetera. So I was dubious about the list
7 of cases that just gave me the total. I like the
8 other ones.

9 ATTORNEY MACKINTOSH: It's
10 interesting. And in all candor -- and I know that you
11 do look at all the papers -- if you look at the
12 lodestar in this one, I'm in a very odd position of
13 presenting a settlement on a case that I didn't
14 meaningfully work on. My partner Kelly Tucker is out
15 on maternity leave, and I am standing in for her. So
16 hopefully I'll be able to answer questions. Why it
17 was listed that way I don't know, but I'll certainly
18 pass that note along to my brethren in future
19 settlements, that that is not something that you
20 personally consider persuasive.

21 THE COURT: I'm sorry I'm beating the
22 dead horse, but I have the same feeling when you guys
23 just do a string cite of the size of the fee awards.
24 There's no contextualization. The numbers should be

1 tailored.

2 Anyway, we're on the same page on
3 this, it sounds like, so why don't you keep going.

4 ATTORNEY MACKINTOSH: So are there
5 particular things you'd like me to focus on, or should
6 I just sort of go through my spiel and at any point if
7 you are like, okay, I get it, I'll move on.

8 THE COURT: There could be another way
9 that you probably don't want to or need -- don't have
10 the ability to answer for, but twice in the complaint
11 I have a little bit of a whiplash effect. So let me
12 read this to you.

13 ATTORNEY MACKINTOSH: And Mr. Millis
14 is on the hot seat here because, you'll note, my name
15 is not on the complaint. So I told him if Vice
16 Chancellor Laster has questions I can't answer, you
17 are going to have to come in off the bench.

18 THE COURT: Just listen to this. "As
19 a result of these efforts, Plaintiff obtained
20 approximately 1,100 pages of documents. Armed with
21 this extensive factual record ... Plaintiff filed a
22 detailed complaint"

23 I'm glad you got 1,100 pages of
24 documents, but is that really an extensive factual

1 record?

2 ATTORNEY MACKINTOSH: I think we can
3 quibble about the word. Perhaps not the best word.

4 THE COURT: It shows up again on
5 page 33. Again, I had this -- here we go. "[L]arge
6 volume of documents" is what you called it there.

7 I had the -- people used to oversell
8 vigor all the time during the --

9 ATTORNEY MACKINTOSH: Leadership
10 fights.

11 THE COURT: -- leadership fights and
12 also during the "sue on every deal" disclosure
13 settlement era. I would have some of your brethren,
14 who were more of the industrial filers, come in and
15 tell me that they vigorously pursued the action. So
16 for probably a year in my sense and decades probably
17 in their sense, I would ask them to explain to me what
18 they did that was so vigorous. And it would get
19 painful because they really hadn't done anything
20 vigorous. And then I think people finally got the
21 message, like don't oversell that, and so I didn't
22 have to ask that anymore. And I had that same
23 reaction to the "extensive factual record."

24 ATTORNEY MACKINTOSH: Look, *mea culpa*.

1 It's 1,100 pages. It's probably about the size of *War*
2 *and Peace*, which one would say is an extensive
3 literary work. But your point is well-taken.

4 THE COURT: Thank you.

5 ATTORNEY MACKINTOSH: Returning to my
6 presentation. Our settlement administrator, A.B.
7 Data, provided notice to more than 5,000 potential
8 class members by First-Class Mail, published a summary
9 notice in *Investor's Business Daily*, transmitted the
10 summary notice over the PR Newswire, and provided
11 information about the settlement on a detailed
12 website, and not a single class member has objected to
13 any aspect of the settlement.

14 During today's hearing, I plan to do
15 the following: First, I'll provide a brief high-level
16 overview of the case. Second, I'll review the terms
17 of the settlement and the proposed plan of allocation.
18 Third, I'll address the motion for class
19 certification. And finally, I'll address our motion
20 for an attorneys' fees and expenses. I'm happy to
21 discuss these topics in a different order. But if
22 this is fine, perfect.

23 This case arises from a July 1st,
24 2021, merger between FCAC and Legacy Sharecare. On

1 June 5th, 2020, FCAC was incorporated in Delaware as a
2 SPAC. Like all SPACs, FCAC had no business
3 operations and was formed for the sole purpose of
4 combining with another company and going public in a
5 de-SPAC merger.

6 After FCAC was incorporated, its
7 controllers filled its director seats with nominally
8 independent directors who had deep financial ties to
9 the controller defendants and who were incentivized by
10 gifts of founder shares to see FCAC close the deal,
11 any deal.

12 THE COURT: So that was another word
13 that I didn't understand. What you guys say in your
14 brief and in your complaint is that sponsor set this
15 up, the sponsor of course gets the sponsor shares, and
16 then you use the word "gifted." What does that mean?

17 It seems to say that -- it suggests
18 that Mnuchin gifted these things in a direct transfer
19 to the three insiders. But I would have expected this
20 to be another situation in which the sponsor is
21 issuing those shares. But can you just -- what is the
22 deal there?

23 ATTORNEY MACKINTOSH: Perhaps
24 Mr. Millis can fill in some more of the factual ...

1 ATTORNEY MILLIS: Your Honor, all we
2 meant in the complaint was that the directors who
3 received founder shares, they did not have to pay any
4 cash for those shares. It was freely given to them.

5 THE COURT: But they were issued and
6 awarded in return for no consideration; that's what
7 you're saying?

8 ATTORNEY MILLIS: That's correct, Your
9 Honor.

10 THE COURT: So when you say Mnuchin
11 gifted, the subject there is Mnuchin and the verb is
12 gifting in the sense that I am making a gift to you.
13 Hearing that, do you understand why there's a
14 disconnect between that description and what actually
15 happened, which is Mnuchin caused an entity to issue?
16 Does that make sense?

17 ATTORNEY MILLIS: I understand, Your
18 Honor. And, yes, I would agree with you.

19 THE COURT: Great. Again, words
20 matter. And that sent one of my clerks off on a
21 little bit of a wild goose chase. So let's try to
22 describe the transactions as they actually happen.
23 And I get that "gifting" seems like a more powerful
24 word, but it's actually sort of a misleading word.

1 ATTORNEY MILLIS: I understand, Your
2 Honor, and I sincerely apologize.

3 THE COURT: It's all good. Again,
4 these are things that sometimes get routinized. Just
5 a public service announcement.

6 ATTORNEY MILLIS: I understand. Thank
7 you, Your Honor.

8 THE COURT: Thank you.

9 ATTORNEY MACKINTOSH: We're working
10 for it today. You know, it's funny, I envy Mr. Peach
11 and the opportunity that he has been given here, and I
12 think that it -- you know, with great whatever comes
13 great responsibility. It seems like it's a pretty
14 difficult, difficult gig.

15 THE COURT: I'll sign you up for a
16 year. I'm filled out a couple years in advance. But
17 if you want to come and labor in the salt mines, you
18 are perfectly welcome to.

19 ATTORNEY MACKINTOSH: I think it would
20 be a phenomenal experience. But based on this
21 interaction today, I think it would be a lot harder
22 than working for Jay Eisenhower.

23 THE COURT: Mr. Gallagher, that goes
24 for you too. If you ever want to make a short journey

1 into the salt mines, we'd love to have you.

2 ATTORNEY GALLAGHER: I appreciate the
3 offer, Your Honor.

4 ATTORNEY MACKINTOSH: So on September
5 24th, 2020, FCAC completed its IPO, and it sold
6 34.5 million shares for \$10 per share. Immediately
7 after the IPO, FCAC began its search for a merger
8 partner and eventually settled on Legacy Sharecare, a
9 private digital health company. After allegedly
10 meeting three times, the board approved the merger on
11 February 12th, 2021.

12 The reason I say "allegedly" is in our
13 220 production we were not given a single set of board
14 minutes, so we don't know what happened at these
15 meetings.

16 On June 3rd, 2021, FCAC filed the
17 merger proxy. That proxy, unfortunately, was replete
18 with false statements and material omissions designed
19 to minimize redemptions and ensure that FCAC's
20 stockholders would approve the merger.

21 First, the proxy falsely claimed that
22 the FCAC stockholders who opted to roll over into the
23 post-merger entity would receive stock with a deemed
24 value of \$10 per share. That was simply not true

1 because, in reality, FCAC's net cash per share was
2 less than \$8 a share.

3 Second, the proxy failed to disclose
4 that FCAC director Jeff Sagansky, who played a major
5 role in negotiating the merger, had a substantial
6 financial interest in FCAC's sponsor, which was Falcon
7 Equity Investors LLC, and thus Mr. Sagansky had a
8 personal interest in the sponsor's founder shares and
9 private placement warrants.

10 Third, the proxy failed to disclose
11 material information about the board's financial
12 advisor, Goldman Sachs. First, the proxy did not
13 disclose that Goldman Sachs had a \$12 million
14 contingent payment for services it had rendered in
15 connection with FCAC's IPO that was riding on the
16 merger closing. It didn't disclose that Goldman Sachs
17 stood to receive compensation from the role as the
18 placement agent for the PIPE that FCAC was undertaking
19 in connection with the merger. And finally, it didn't
20 disclose when and by whom Goldman Sachs was retained
21 in connection with the merger or exactly what Goldman
22 Sachs had been retained to do.

23 Fourth, the proxy made materially
24 false and misleading statements about the extent of

1 due diligence the company had conducted into Legacy
2 Sharecare and the efforts it had made to vet its
3 financial projections.

4 On June 29th, 2021, FCAC approved the
5 merger, and it closed on July 1st. Approximately
6 10,438,000 shares opted not to redeem and rolled over
7 into in the proposed merger company.

8 On March 31st, 2022, Sharecare
9 announced disappointing results for its 2021 fiscal
10 year and it issued guidance for 2022, and that
11 guidance was significantly lower than the proxy
12 projections. The same day, Sharecare announced that
13 it had decided to suspend certain key products. Its
14 stock collapsed, falling 25 percent on heavy trading.

15 Moving into August of 2022, the
16 company announced that it was spending guidance for
17 the rest of 2022.

18 In March 2023, following months of
19 silence, Sharecare finally announced its 2022 results,
20 and they were dismal. By the time plaintiff filed its
21 complaint in August of 2023, Sharecare stock had lost
22 88 percent of its value compared to the \$10 per share
23 redemption price.

24 Plaintiffs made a Section 220 demand.

1 We completed an investigation, and we received nearly
2 1,100 pages. After completing this investigation,
3 plaintiffs filed its detailed complaint on August 11
4 of 2023. The parties fully briefed defendants' motion
5 to dismiss and were proceeding towards an April 19th,
6 2024, argument date.

7 With the argument date fast
8 approaching, on April 12th, 2024, the parties agreed
9 to mediate before Greg Danilow of Phillips ADR and to
10 stay the action pending the mediation. In advance of
11 the mediation, defendants provided plaintiffs some
12 additional documents, including documents relating to
13 defendants' sales of Sharecare stock post-merger.
14 Based on this information, plaintiffs learned that the
15 defendants had not sold a material amount of their
16 Sharecare stock after the merger closed.

17 On July 25th, 2024, the parties
18 engaged in a full-day mediation with Mr. Danilow. At
19 the conclusion of this mediation, the parties agreed
20 to settle the action for \$11.5 million, which was in
21 excess of available insurance.

22 With that background, unless Your
23 Honor has further questions about the facts, we can
24 move to the terms of the settlement.

1 As Your Honor knows, in assessing a
2 settlement, the Court compares the "get" to the
3 "give."

4 The "get" here is substantial. It's
5 an \$11.5 million cash recovery. By any measure, this
6 \$11.5 million recovery is a fantastic result. As we
7 mentioned earlier, it provides 55 percent of the
8 class's net cash per share of damages, and it provides
9 12.9 percent of the damages measured by comparing the
10 redemption value to where the stock was trading at the
11 time the company was acquired by Altaris.

12 And the "give" here is a standard
13 release of claims.

14 The settlement was approved following
15 arm's-length negotiation between experienced counsel
16 before an experienced and well-respected mediator,
17 which further supports its reasonableness. And we
18 respectfully submit that the settlement should be
19 approved as fair, reasonable, and adequate.

20 Unless Your Honor has other questions
21 about the terms, let's move to the plan of allocation.

22 THE COURT: So this is the one where
23 you are going to have to explain to me why we're doing
24 this because this looks to me like a federal

1 securities law-type structure. These claims, again,
2 to my mind, travel with the shares. So if you sold
3 your shares, you sold your shares. So why are we
4 doing this multi-injured-person allocation as opposed
5 to just looking at who held on the acquisition date
6 since that gives us an end point for the stockholder
7 profile?

8 ATTORNEY MACKINTOSH: On the
9 acquisition date of the Altaris acquisition?

10 THE COURT: Isn't that when the shares
11 are going to stop trading? I mean, they are done;
12 right?

13 ATTORNEY MACKINTOSH: That's when the
14 shares are going to stop trading. So our plan -- we
15 were planning to distribute the \$11.5 million pro
16 rata -- so the class here is defined as the people who
17 had the right to redeem and opted not to redeem. So
18 those are the injured parties.

19 THE COURT: Right.

20 ATTORNEY MACKINTOSH: I hear your
21 point about the claims traveling with the shares.
22 Perhaps defense counsel can shed light on why we
23 negotiated to do it this way. I'm really not trying
24 to be difficult, Vice Chancellor Laster.

1 THE COURT: And I'm not suggesting you
2 are being difficult.

3 Here is one of the other things I
4 wondered, because I didn't go back and look at other
5 allocation approaches in these cases. Is this
6 basically how these SPAC settlements have been done,
7 with this type of allocation methodology?

8 ATTORNEY MACKINTOSH: I know they've
9 been done this way in some other ones because that's
10 what we modeled it off of. I think Your Honor -- I
11 was actually talking to my colleague about this
12 earlier. Your Honor oversaw the View settlement. In
13 that one, for some reason, we had managed to negotiate
14 a 10-cent-per-share distribution for everyone who had
15 the right to redeem but didn't as sort of a
16 compensation for the impairment of the voting right.
17 And on this one, this is how we negotiated it. It
18 seemed to be the most fair and equitable way to divide
19 the 11.5 million between --

20 THE COURT: At least as I understood
21 your plan of allocation, if I didn't redeem, I held
22 for a year, and then I sold, I still get something
23 based on my demonstrable losses as opposed to my
24 claims passing to the buyer of my shares and them

1 getting the benefit of the settlement.

2 ATTORNEY MACKINTOSH: Well, people
3 here that sold, they are part of the class and they
4 are recovering on their demonstrable losses.

5 THE COURT: I'm just, again, asking
6 for Delaware law settlement. Like why? Isn't that
7 basically giving people a freebie when they sold their
8 claims along with selling their shares?

9 ATTORNEY MACKINTOSH: I don't know
10 that I'd think of it as a freebie. And if you look at
11 how these things traded -- I mean, this one traded
12 over \$10 for a brief moment in time, and then it kind
13 of rode down. I guess I'm not sure who the class of
14 people are that you are concerned are getting a
15 freebie on this.

16 THE COURT: Again, it's the people who
17 sell and -- again, my framework is that if I sell my
18 shares, the claims I had go with my shares. So the
19 person who is now the new owner of the shares gets to
20 benefit from the value of those claims. And I, as the
21 seller, like, I'm out, I'm done. I made a decision.
22 The stock was going down. Yeah, I've suffered because
23 the stock went down, but I made a decision, like, I'm
24 done, I'm selling. And you, buyer, you not only get

1 my shares, but you get all the rights that come with
2 the shares.

3 Again, this is not a good analogy by
4 any means, but imagine a world where I own a car for
5 three years and then I sell it to somebody else, and
6 then the buyer comes in and buys it. Like, your
7 allocation method is the equivalent of giving me part
8 of the money for that sale because even though I sold
9 the car and I don't have any rights in it anymore, I
10 don't have anything, your allocation method,
11 nevertheless, gives me something because during my
12 ownership, the value of the car depreciated from
13 whatever I bought it for down to here, and therefore,
14 I had some "loss" in that regard.

15 And that's why I'm suggesting to you
16 it's a "freebie," because the person has sold on their
17 shares, including the claim, and they don't have any
18 property right anymore that they are getting
19 compensated for.

20 ATTORNEY MACKINTOSH: So the
21 underlying injury is the right to have had the
22 opportunity to make an informed investment decision.
23 So that's why the class members are defined as the
24 people who had that right.

1 So if I had that right and I sold the
2 share for \$7, I have \$3 of damages. The person who
3 then bought that share for \$7, they're not getting
4 anything because they are not part of the class. So
5 I'm not sure where the "freebie" problem is coming in.

6 THE COURT: It comes back to the
7 question of whether the injury happens to the holder
8 of the shares, including as it follows along, or
9 whether it happens to the human who then passes along
10 the shares but keeps the injury.

11 So in your world, it sounds like
12 there's a class of people who made the redemption
13 decision, and then those people were injured. And so
14 when they sell their shares, their damages are fixed,
15 done. The person new buys them and, therefore,
16 doesn't have any loss. That's one framework. I think
17 that's a securities law framework. I think that's a
18 securities fraud approach.

19 But if we believe *Urdan* and if we
20 believe that the claim follows with the shares, then
21 the seller actually doesn't have a separate injury.
22 And what the seller has done is sold on both the
23 shares and the attached claim. So they are basically
24 saying, like, I'm out. I'm out. Maybe I've had some

1 losses, maybe I could sue on those losses, but I'm
2 handing over the claim to you, buyer, and I'm done
3 here.

4 And so that's where the disconnect is
5 happening for me. I've passed on all the property
6 rights for which I could be compensated and yet here I
7 am in the settlement and I'm getting money as opposed
8 to the new holder getting any money. Look, I agree
9 with you that the new holder, by buying at 7, is in a
10 different position. But the new holder also takes the
11 claim based on the redemption.

12 ATTORNEY MACKINTOSH: I hear what you
13 are saying, but the new holder wasn't the person that
14 had the initial right to decide whether to redeem at
15 \$10 per share. And that's the underlying injury.
16 When we're calculating the damages, we're trying to
17 figure out how you quantify what that was worth. And
18 the person who bought your share for \$7, they never
19 had the opportunity to redeem at \$10 based on that
20 proxy and they weren't the person that had their
21 voting rights interfered with.

22 THE COURT: I understand the argument.
23 How is that different from a merger settlement? When
24 the proxy is wrong in some way, the people who were

1 injured were the people who held the vote; and yet
2 what we do, because the claims travel with the shares,
3 is we use the class as of the date of the merger
4 because all of those shares, boom, boom, boom, all
5 those claims, the decision to -- the claim for the
6 uninformed decision to vote yes or no, they have all
7 traveled to the end date, and you get the class as of
8 the effective time. It seems to me it's the same
9 issue.

10 ATTORNEY MACKINTOSH: I think it's
11 slightly different because in a merger you are just
12 voting on whether or not you are going to accept the
13 merger up or down; yes or no. And in these fact
14 situations, the money that the \$10 per share
15 represents is actually cash that's held in trust for
16 your benefit as the SPAC holder. So we think this is
17 the most fair way to allocate it, given the nuances of
18 this type of claim and how it differs from a merger
19 claim.

20 THE COURT: But again, what I don't
21 understand is why you wouldn't simply pick a record
22 date and distribute to everyone who held the shares as
23 of that date. Here, you've got a sweet substitute for
24 a record date, which is you know when these shares

1 stop trading. So you know as of that date who the
2 owners were of all of the rights associated with the
3 shares, including the claim back here for the
4 disclosure violations in connection with the
5 redemption.

6 ATTORNEY MACKINTOSH: I feel like that
7 would be giving more of a freebie because, in your
8 hypothetical, the person who actually had the
9 redemption right, who the \$345 million was held in
10 trust for, who was duped into rolling over and they
11 chose to sell for \$5, they get bupkis. But the person
12 who had nothing to do with that initial thing and they
13 didn't have their rights interfered with, that person
14 who buys for \$5, they are the ones that are now
15 recovering. I think that would be the more
16 inequitable result.

17 THE COURT: Look, I understand that's
18 a way to view it. And I don't argue with you that
19 that is the functional outcome. It just seems to me
20 that if the claims travel with the shares, like,
21 that's the result.

22 It's analogous to, again, me selling
23 my car. I'm done, I had depreciation, it stinks for
24 me, I'm selling this. Maybe even I was defrauded and

1 paid too much for my car. I mean, once the defraud --
2 that's the difference between, I think -- why my
3 hypothetical doesn't work well is because the car
4 fraud is very similar to what the securities fraud is,
5 where we view the human as being injured as opposed to
6 the property carrying this right. But here, we're in
7 a situation where the property is the part that
8 matters because it carries its own rights with it.

9 ATTORNEY MACKINTOSH: I hear what you
10 are saying. I'm just picturing -- going back to your
11 car analogy, if I bought a Mercedes and I'm told that
12 I'm going to have the right to either keep the
13 Mercedes or roll over into the new car, and I'm told
14 that the new car is a BMW and the new car ends up
15 being a Hyundai, I think it's more equitable to give
16 the money to the person that forwent the chance to
17 trade their Mercedes for a BMW than the guy who
18 purchased the Hyundai knowing full well that it was a
19 Hyundai.

20 THE COURT: I hear you. I'm the guy
21 who wrote *Activision*, where it basically dealt with
22 the same issue in terms of the plan of allocation.
23 And the argument that you are making to support your
24 plan of allocation is exactly the argument that

1 Mr. Hanrahan and my now colleague Mr. Fioravanti came
2 in with as to why some -- in their objection to the
3 settlement as to why some of the settlement proceeds
4 should be going to these earlier holders. And the
5 ultimate result of *Activision* was, sorry, Prickett
6 Jones, it's a nice argument, but that's not how the
7 idea of the claims following with the shares works for
8 a Delaware law settlement.

9 Why don't you keep going. I feel like
10 we at least know where each of us is on this issue.

11 ATTORNEY MACKINTOSH: Yes. I mean,
12 that's what I got on the plan of allocation. I
13 imagine that you are okay with the rest; that if
14 there's more, there's a second distribution. And if
15 that's -- great.

16 THE COURT: It's just the "who is in
17 the class" question that I --

18 ATTORNEY MACKINTOSH: Who is in the
19 class. I hear you.

20 Let's move on to the request for class
21 certification. I'm happy to march through these
22 elements. But if not, we can rest on our brief here.
23 I think we're okay with that.

24 Let's move to our award of fees and

1 expenses. We seek an award of 15 percent of the
2 \$11.5 million settlement, inclusive of expenses.

3 As Your Honor knows, the Court looks
4 at the *Sugarland* factors in determining the
5 appropriateness of the requested fee. And we
6 respectfully submit that the *Sugarland* factors support
7 the requested fee here.

8 The Court, as you know, affords the
9 greatest weight to the benefits conferred. As we
10 discussed earlier, we respectfully submit that the
11 11.5 million settlement confers substantial benefits
12 on the class.

13 Under the *Americas Mining* scale, fees
14 ranging between 10 and 15 percent are typically
15 awarded for early-stage settlements. 15 to 25 percent
16 is sort of the mid-stage. We respectfully submit that
17 we are sort of right at the intersection of that.

18 We did do a thorough 220
19 investigation. We carefully analyzed the documents.
20 We prepared a detailed pleading. We fully briefed a
21 motion to dismiss. We negotiated for additional
22 documents at the time of the mediation that would shed
23 light on whether these people had had profits from
24 selling later. And we think that 15 percent is in

1 line with similar matters, including the *EOS*
2 settlement approved by Vice Chancellor Will in
3 October.

4 THE COURT: What would be an example
5 of a 10 percenter?

6 ATTORNEY MACKINTOSH: A 10 percenter
7 would be you did no 220, you filed a 15-page
8 complaint, no one did a motion to dismiss. They said
9 *mea culpa*, we did bad, and we're settling. That's 10
10 percent.

11 15 percent is you did a 220, which is
12 analogous to document discovery in some respects, you
13 draft a very detailed complaint, you fully brief a
14 motion to dismiss. They reach out to you on the eve
15 of that motion because they recognize that they are
16 probably not going to win. They actually end up
17 withdrawing the motion, I believe. And then we
18 mediate.

19 And there were expenses in this case.
20 This wasn't something where there was no -- there was
21 no money at risk. And we put in meaningful effort
22 here. We have over 1,500 hours of lodestar, over
23 1.23 million on a fully contingent basis. So we think
24 this is closer to 15 than to 10.

1 Do you want me to go through the rest
2 of the *Sugarland* factors, or are we kind of --

3 THE COURT: I don't think you need to
4 do that.

5 ATTORNEY MACKINTOSH: So with that,
6 unless Your Honor has further questions, I will be
7 concluding my presentation.

8 THE COURT: Thank you.

9 Defendants, I know you usually don't
10 have anything to say, and that's fine. But talk to me
11 a little bit about the allocation plan because, again,
12 I do -- that's the issue where I have some misgivings.
13 So tell me what you think about that.

14 ATTORNEY STARNER: I think, Your
15 Honor, the short answer is I may have some views on
16 that, but in terms of -- on behalf of my clients, I
17 think we're agnostic. I don't necessarily take a
18 position on allocation.

19 Obviously, we're interested in
20 settling this. We've considered various
21 considerations about the claims and the damages
22 theories. I can certainly share my general view about
23 why the claims we don't think actually stand up, the
24 damages, et cetera, et cetera.

1 So the allocation is, by extension,
2 not something we take a position on. We think taking
3 into consideration all -- considerations that we, as
4 the defendants took in, you know, we think this is a
5 reasonable settlement is the short answer.

6 THE COURT: All right. Thank you.

7 ATTORNEY STARNER: Thank you, Your
8 Honor.

9 THE COURT: Why don't we take until
10 five of. So let's recess until the big hand is on the
11 11. We'll stand in recess until then.

12 (Recess taken from 9:47 a.m. to 9:58 a.m.)

13 THE COURT: Welcome back, everyone.
14 Please be seated. Thanks for letting me think about
15 this allocation issue for a moment. I appreciate it.

16 We're here today so that I can
17 consider the proposed class settlement in *Paul Berger*
18 *Revocable Trust v. Falcon Equity Investors LLC*, which
19 is Civil Action No. 2023-0820-JTL.

20 This is basically a standard SPAC
21 action primarily driven by disclosure violations in
22 connection with the redemption election. There are
23 other challenges to the SPAC as well that run along
24 standard lines.

1 The SPAC in question is Falcon Capital
2 Acquisition Corp, which I'll call the "Company." It
3 went public through a standard SPAC process, in which
4 significant amounts of equity were issued to the
5 insiders affiliated with the sponsor. The SPAC
6 eventually merged with a company called Sharecare to
7 form an entity that I think of as New Sharecare.

8 The plaintiffs claim that in the proxy
9 that was filed with the SEC for purposes of that
10 merger there were material misstatements. The proxy
11 implied that the shares had a value of \$10 when, in
12 fact, the amount in the trust could not support a \$10
13 valuation. There are assertions that there were
14 omissions about insider conflicts as well as omissions
15 of information about the financial advisor and the
16 extent of due diligence.

17 The deal was approved. There was a
18 relatively high rate of redemption, but approximately
19 10 million company shares were not redeemed.

20 After the merger closed, New Sharecare
21 performed poorly. The stock by March 2023 had fallen
22 to \$.46 per share, down 88 percent from the \$10 per
23 share redemption value.

24 The plaintiffs served a Section 220

1 demand. They obtained documents. The production did
2 not contain any company board minutes, which for the
3 plaintiffs reinforced their view that the deal had not
4 been adequately diligenced or considered by the board
5 and, in fact, was rushed through to secure the insider
6 benefits that always accompany a successful de-SPAC
7 merger under this type of structure.

8 The plaintiffs filed a complaint. In
9 August 2023, the defendants moved to dismiss. That
10 motion was fully briefed. Just before oral argument,
11 the parties agreed to mediate with Greg Danilow. And
12 later that month, they filed a stipulation and
13 proposed order staying the action pending completion
14 of the mediation, and the defendants withdrew their
15 motion to dismiss. That mediation ultimately resulted
16 in the settlement.

17 The first thing that I'm going to
18 address is class certification. The class is defined
19 as "All record and beneficial holders of [the
20 Company's] Class A Common Stock, who held [the] stock
21 immediately [after]" -- it says "following," but I
22 never know why three syllables are better than two.
23 So I just mentally substituted "after," which is what
24 I would do if I were editing one of my clerk's drafts

1 in real time -- "following the Redemption Deadline ...
2 and as of the Redemption Deadline, had the right to,
3 but did not, exercise their right to redeem some or
4 all [of the] shares of [] stock, excluding the
5 Excluded Persons."

6 The "Excluded Persons" consist of the
7 defendants and their affiliates.

8 I don't think that's the right class.
9 It seems to me that, at a minimum, the class has to
10 include the people who are successors and assigns of
11 those individuals. We have successors and assigns for
12 the excluded parties, but we don't have, at least in
13 the portion of the definition that's in my notes here,
14 successors and assigns for the class. And this is
15 going to dovetail into the allocation issue that I
16 have that I don't think was sufficiently vetted.

17 There's, at a minimum, two types of
18 claims here. There's federal claims and state law
19 claims. State law claims are appurtenant to the
20 shares. So under the *Urdan* decision by the Delaware
21 Supreme Court, those claims travel with the shares,
22 which means if you have been injured by an event, for
23 Delaware law purposes, and you then choose to sell
24 your shares, you are choosing to sell not only your

1 shares, but also the right to recover that comes with
2 those shares.

3 Now, a case like this is a little bit
4 more tricky because one of the primary drivers is
5 disclosure violations. The disclosure violations
6 could be brought either here, as they were, under a
7 breach of fiduciary duty theory or they could be
8 brought under a federal securities law fraud theory.
9 The federal securities laws treat the fraud action as
10 personal. In other words, the injury is to the
11 individual, and it stays with the individual. And so
12 it fits with the parameters that plaintiff's counsel
13 was suggesting.

14 The Delaware versions of those claims
15 aren't personal. The Delaware versions of those
16 claims are appurtenant to the shares, and they travel
17 with the shares.

18 It seems to me like there needs to be
19 a little bit more thinking about the definition of the
20 class and a little bit more consideration given to the
21 allocation plan in light of that. And I say that
22 because I do think that the federal securities law
23 claims here are theoretically meaningful to a similar
24 degree as the state law claims, which I don't think

1 was true in the *Activision* situation.

2 I will tell you that however you
3 structure the class, it's clearly sufficient in terms
4 of the requirements of Rule 23. This is a classic
5 type of situation for a Rule 23 certification.

6 I also think that adequate notice has
7 been given in connection with this settlement.

8 You-all have complied with all of that. And I think
9 in the abstract, in terms of the amount of
10 consideration you obtained for the settlement -- and
11 by "you," I'm referring to the plaintiffs -- I do
12 think that this is a result that easily falls within
13 the range of reasonableness and, as counsel
14 demonstrated, compares favorably with other cases on a
15 per share basis and in terms of the total amount of
16 the loss.

17 The plan of allocation is where I
18 originally stumbled in terms of my review of this
19 because I just didn't get why it was being handled as
20 a federal securities law-type settlement rather than a
21 Delaware settlement, where the claims travel with the
22 shares under *Urdan*.

23 If we get to the point where we clean
24 up the plan of allocation and the class definition,

1 then, again, I think the settlement is easy to
2 approve. And I think that the award of attorneys'
3 fees is also reasonable, given the amount of work that
4 was done, the stage of the case, the nature of the
5 settlement, et cetera. If I run through the *Sugarland*
6 factors, then I think that it's a fee that I would
7 approve.

8 I want you-all to think about the
9 class definition and the plan of allocation. I also
10 want you to think about whether we can do this simply
11 by you-all submitting some form of amended order with
12 a cover letter that explains these things to me so
13 that I can enter it.

14 We may need further notice. Let's
15 assume you changed the class definition to emphasize
16 the Delaware claims. I can imagine a world where if
17 you are a holder of claims and you receive notice of
18 this settlement and you thought that Ms. Mackintosh's
19 view of the world was right, you wouldn't object. But
20 if you now heard that because the Delaware claims
21 travel with the shares, that you were being treated
22 differently, well, now you might object. I get that
23 because of rational apathy, that's an unlikely
24 scenario. But it does give me pause in terms of

1 whether we need to find some way to inform the
2 stockholders if you-all decide to change the class.

3 I'm going to leave it there. What I'm
4 really asking you-all to do is think about the class
5 definition and the plan of allocation in light of
6 *Activision* and *Urdan*. Send me some type of joint
7 submission, and then also in that tell me whether you
8 think we need to have some notice and how it can be
9 done in a reasonable way that is cost effective and
10 doesn't put too much of a drag on what the injured
11 people are going to get.

12 But if we take care of that -- I hope
13 you are hearing me say it because I'm trying to say
14 it -- I do think the settlement overall is a good one.
15 It's one that I approve in terms of the substantive
16 amounts. And likewise, I don't have any trouble with
17 the fee. It's just a matter of this allocation and
18 definition that is giving me pause.

19 Let me stop there and see if anyone
20 has any questions.

21 ATTORNEY MACKINTOSH: Just super
22 quick. I want to make sure that we are as responsive
23 as possible to all of Your Honor's concerns. Do you
24 have a view on notice?

1 In other words, do you have a view
2 that this requires a full-blown renotice, 60-day
3 window opportunity to object, or is there something in
4 between that might satisfy the Court?

5 THE COURT: I'm looking for something
6 in between. It seems to me like everyone already
7 knows that this settlement is happening. Again, I at
8 least believe that most of the stockholders are
9 rationally apathetic as to these settlement notices,
10 which is why, contrary to some of the Delaware cases,
11 I don't give a lot of weight to the lack of objections
12 to a settlement. But let's envision that what we're
13 really dealing with is a reasonable and vigilant
14 stockholder who read all this and thought about it.
15 It seems to me that person is already on the watch,
16 and so they don't need a full renotice and all the
17 costs associated with that.

18 It seems to me like you-all ought to
19 think about whether we can do it without notice. But
20 I am concerned that doing it without notice wouldn't
21 be sufficient. So it seems to me like we need some
22 mechanism to put out there in the world any change to
23 the allocation plan, and then we need some amount of
24 time where, theoretically, people could come in and

1 say, in substance, "Well, I was fine with the original
2 allocation plan because I was getting something, but
3 now I'm getting less or nothing, and that's just not
4 something I can stand by, accept, and so I want to
5 object." I think we need some amount of time that is
6 a reasonable period for people to come in and make
7 that objection, if anybody wants to do that.

8 ATTORNEY MACKINTOSH: Thank you.

9 THE COURT: Defendants, anything?

10 ATTORNEY STARNER: No, Your Honor.
11 Thank you for that.

12 THE COURT: Well, thank you all for
13 thinking about these issues further. I apologize for
14 being, I guess, a stickler about this idea that the
15 claims travel with the shares. But it's something
16 that caught my eye, so I want a lit bit more comfort
17 on it.

18 It's good to see you-all. Thank you
19 for coming in. Thank you to *pro hac vice* counsel for
20 coming in from out of town. I hope you have a safe
21 trip back, and I hope that everyone stays warm.

22 We stand in recess.

23 (Court adjourned at 10:13 p.m.)
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(302) 255-0526

CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 40 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 31 through 40, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 23rd day of January, 2025.

/s/ Dennel Niezgoda

Dennel Niezgoda
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter

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Tab 10

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE TS INNOVATION : Civil Action
ACQUISITIONS SPONSOR, LLC : No. 2023-0509-LWW
STOCKHOLDER LITIGATION :

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Monday, May 12, 2025
11:02 a.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

TELEPHONIC RULINGS OF THE COURT ON SETTLEMENT

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

2 KELLY L. TUCKER, ESQ.
3 EDWARD M. LILLY, ESQ.
4 Grant & Eisenhofer P.A.

5 -and-

6 P. BRADFORD deLEEuw, ESQ.
7 DeLeeuw Law LLC

8 -and-

9 LAWRENCE EAGEL, ESQ.
10 of the New York Bar
11 Bragar Eagel & Squire, P.C.

12 -and-

13 KAJA S. ELMER, ESQ.
14 of the Louisiana Bar
15 Fishman Haygood, L.L.P.
16 for Plaintiffs

17 E. WADE HOUSTON, ESQ.
18 Abrams & Bayliss LLP

19 -and-

20 MATTHEW A. SCHWARTZ, ESQ.
21 WILLIAM S.L. WEINBERG, ESQ.
22 of the New York Bar
23 Sullivan & Cromwell LLP

24 for Defendants Tishman Speyer Properties, Inc.,
Tishman Speyer Properties, L.P., TS Innovation
Acquisitions Sponsor, L.L.C., Robert J. Speyer,
Jerry I. Speyer, Paul A. Galiano, and Jenny
Wong

KELLY L. FREUND, ESQ.
DLA Piper LLP (US)
for Defendants Joshua Kazam, Ned Segal,
Jennifer Rubio, and Michelangelo Volpi

- - -

1 THE COURT: Good morning. This is
2 Vice Chancellor Will on the line.

3 ATTORNEY TUCKER: Good morning, Your
4 Honor. You have Kelly Tucker, Kaja Elmer, Larry
5 Eagel, Brad deLeeuw, and Ed Lilly on for plaintiff.

6 THE COURT: Thank you very much,
7 Ms. Tucker.

8 Who do we have for the defendants?

9 ATTORNEY HOUSTON: Good morning, Your
10 Honor. For the sponsor, Paul Galiano, Jenny Wong,
11 Robert Speyer, and Jerry Speyer, it's Wade Houston
12 from Abrams & Bayliss and Matthew Schwartz and William
13 Weinberg from Sullivan & Cromwell.

14 THE COURT: Thank you very much.

15 ATTORNEY FREUND: Good morning. This
16 is Kelly Freund from DLA Piper. I'm here for Joshua
17 Kazam, Ned Segal, Jennifer Rubio, and Michelangelo
18 Volpi.

19 THE COURT: Thank you.

20 Is there anyone else who wishes to
21 make an appearance?

22 Can I confirm we have a court reporter
23 on the line with us?

24 THE COURT REPORTER: Yes, Your Honor.

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1 It's Karen.

2 THE COURT: Thank you all very much
3 for making the time this morning for me to give you a
4 ruling on the pending settlement, which was presented
5 to me several weeks back. There was an issue with
6 some of the language in the notice, and so, as you all
7 know, I asked that notice be remailed to address the
8 fact that there was a claims process involved.

9 I'm happy to say that that notice was
10 issued and it looks to be in order. So my plan for
11 today is to walk through my ruling on the issues that
12 are before me today -- the settlement, the proposed
13 fee and expense award, the incentive award, the plan
14 of allocation -- and then I'll raise at the end a
15 question that I have on the class definition. But
16 I'll get to that shortly.

17 Before we get to those agenda items,
18 I'll start by laying out some brief discussion of the
19 background that brings us here today. The matter
20 concerns the de-SPAC merger of TS Innovation
21 Acquisitions Corp., a SPAC, which I'm going to refer
22 to as the "Company." The Company was formed by Robert
23 Speyer and an entity he controlled called Tishman
24 Speyer Properties, L.P., which was incorporated in

1 Delaware in September of 2020 -- the SPAC, that is.

2 Before the Company went public, it
3 sold 8.6 million Class B founder shares to the sponsor
4 at a nominal price of \$35,000. And the sponsor sold
5 30,000 founder shares to the four purportedly
6 independent members of the Company's board. The value
7 of the founder shares was dependent on the Company
8 closing a de-SPAC merger, in which case they would
9 potentially be worth tens of millions of dollars.

10 The Company went public during IPO on
11 November 13th of 2020, and 30 million IPO units were
12 sold for \$10 each. Each unit included one Class A
13 share and one-third of a redeemable warrant to
14 purchase one Class A share at \$11.50 per share.

15 The Company's charter gave it a
16 two-year window to close a business combination. At
17 this time, the sponsor also purchased over \$5 million
18 private placement warrants, which would be also be
19 valueless if a de-SPAC merger was not timely closed.

20 At the same time as the IPO, the
21 Company allegedly zeroed in on Latch -- then a private
22 company that made electronic smart locks and other
23 smart home technologies -- as a potential business
24 combination partner. Officers of the Company met with

1 Legacy Latch five times between November 12th and
2 November 23rd of 2020. The independent directors were
3 allegedly not involved in that process.

4 A term sheet was then submitted on
5 November 23rd, before the Company's board met about
6 the Latch potential merger. The Company's officers
7 alone allegedly performed diligence. And after three
8 meetings, the board approved the business combination
9 on January 24th of 2021.

10 On March 10th of 2021, the Company
11 issued a proxy statement which included financial
12 projections and business metrics for Latch. It
13 allegedly misrepresented the reliability of the
14 projections and Latch's actual revenue expectations.

15 The proxy told public stockholders
16 that they could invest in the post-de-SPAC combined
17 company or could redeem their shares and receive \$10
18 per share. The proxy also stated that the net cash
19 underlying the Company's shares was \$10 per share
20 when, according to the plaintiffs here, it was less
21 than \$7.50 per share accounting for dilution and
22 dissipation of the cash. Stockholders voted to
23 approve the business combination on June 3rd of 2021,
24 with few redemptions, and the de-SPAC closed the next

1 day.

2 A couple of months later, Latch
3 reported a massive loss. It had \$15.6 million in
4 revenue for the first half of 2021, which made it
5 unlikely to hit the \$49 million revenue target in the
6 proxy projections. Latch's stock price fell upon this
7 announcement. Then in February of 2022, Latch lowered
8 its revenue guidance relative to that in the proxy
9 projections. The stock price fell further.

10 An SEC investigation into revenue
11 recognition practices was announced in August. And
12 the financial restatement for 2021 and the first
13 quarter of 2022 was announced as well. The stock fell
14 again. The SEC investigation then expanded.

15 Things continued to worsen in November
16 when Latch announced that it had received a delisting
17 notice from Nasdaq. It was delisted effective
18 August 20th of 2023. From the redemption deadline to
19 the date that this suit was filed on August 8, the
20 stock lost about 92 percent of its value.

21 The lawsuit here followed a Section
22 220 demand in September of 2022 by one of the named
23 plaintiffs. And then in this lawsuit before me, the
24 plaintiffs alleged that the company's directors,

1 officers, and sponsor breached their fiduciary duties
2 and were unjustly enriched by failing to disclose
3 material financial information and by making
4 materially misleading statements in the proxy.

5 The suit is one of many that have come
6 to this Court after decisions in *MultiPlan*,
7 *GigAcquisitions3* and *GigAcquisitions2*, among many
8 others.

9 In terms of the litigation, the
10 complaint was answered. Over 124,000 documents were
11 produced to the plaintiffs, and three depositions
12 occurred before a settlement was reached.

13 Mediation took place with David M.
14 Murphy of Phillips ADR Enterprises on January 8th and
15 on June 28th of 2024, but both of these initial
16 sessions proved unsuccessful.

17 On July 2nd, the parties agreed to a
18 double-blind mediator's proposal to settle for
19 \$29,750,000. And the parties proceeded to negotiate
20 the definitive terms of a settlement agreement, which
21 was executed on December 2nd of 2024.

22 On December 19th, I entered a
23 scheduling order that preliminarily certified the
24 settlement class and ordered notice of the settlement

1 hearing.

2 That hearing was held on March 27th of
3 this year. I heard a presentation from the
4 plaintiffs' counsel at the hearing. No objections
5 were filed and no objectors appeared. And at the
6 conclusion of the hearing, I asked that a revised form
7 of notice be mailed that provided for the claims
8 process that the settlement papers contemplated.

9 I also addressed why that procedure
10 was, in my view, an equitable way to provide the
11 settlement proceeds to class members depending upon
12 when and whether they sold.

13 That notice was mailed, and an
14 affidavit outlining it was filed on April 21st, which
15 brings us here today so that I can deliver a ruling on
16 the proposed settlement, the proposed fee and expense
17 award, the requested incentives award, and the plan of
18 allocation, among other things.

19 I'll start with the adequacy of notice
20 as the first item on my agenda. I preliminarily
21 approved the form of notice to absent class members
22 when I entered the scheduling order in December that I
23 referenced a moment ago. And the Ewashko affidavit of
24 mailing demonstrated that the notice was adequately

1 delivered in accordance with that order. But, as I
2 said before, at the settlement hearing I requested
3 that notice be reissued to reflect the claims process
4 that was discussed in the other settlement papers.

5 After reviewing the newly filed
6 affidavit of notice, I conclude that notice complied
7 with Rule 23 and is acceptable, fair, reasonable and
8 adequate.

9 That brings me to the merits
10 settlement itself, and whether it should be approved
11 as fair, reasonable, and adequate. The Court's
12 function in a settlement of a representative action
13 like this is to apply my "own business judgment in
14 deciding whether the settlement is reasonable."
15 That's from *In re Philadelphia Stock Exchange*, 945
16 A.2d 1123 at pages 1137 to 38.

17 As we often put it in this Court, I
18 need to weigh the "give" and the "get" by comparing
19 the value of the benefits achieved by this settlement
20 against the strength of the claims being released.

21 The release includes any claims
22 arising out of this action except for claims to
23 enforce the settlement. The definition of "Released
24 Plaintiffs' Claims" is set out in the settlement

1 stipulation at paragraph A.1(ii).

2 The release is appropriately tailored
3 to the issues in this case and in line with releases
4 that the Court has approved in similar suits.

5 In terms of the strength of the claims
6 being released, there were claims of breach of
7 fiduciary duty and unjust enrichment that were
8 allegedly subject to the entire fairness standard of
9 review.

10 This sort of fiduciary duty claim was
11 first recognized in this Court's *MultiPlan* decision
12 and in a number of cases since then for impairment of
13 public stockholders' redemption rights. More
14 recently, in *Hennessy*, the Delaware Supreme Court
15 affirmed a dismissal of a de-SPAC case that relied on
16 the reasoning of *MultiPlan*, and so that reasoning is
17 relatively well-settled at this point.

18 Under that reasoning, this was an
19 entire fairness case. And though I never had to weigh
20 in on the merits of this case, the claims here were
21 better pleaded than those in *Hennessy*, which were
22 dismissed at the pleading stage.

23 Still, there was no guarantee of
24 success for the plaintiffs. This Court has never had

1 occasion to weigh in on multiple issues that could
2 present wrinkles, including how damages could be
3 proven and calculated. Even if damages were based on
4 the net cash per share delta, New Latch's stock price
5 also traded above the redemption value for about four
6 months post-closing, which could have significantly
7 complicated the plaintiffs' ability to prove damages.

8 In terms of the "get," the plaintiffs
9 secured a \$29,750,000 recovery. This amounts to just
10 under \$1 per share. Relative to the other de-SPAC
11 settlements that my colleagues and I have approved,
12 this is a fairly strong result on a per share basis.
13 So on balance, I view the settlement as fair and
14 reasonable after weighing the "give" and the "get."
15 But I can't approve the settlement just yet, for
16 reasons that I'll get to shortly.

17 In terms of the proposed plan of
18 allocation, it's somewhat different than the plans
19 that I've approved in other de-SPAC cases involving
20 *MultiPlan*-style claims. My colleagues, in the *Romeo*
21 *Power* and *View* cases that were cited in the settlement
22 brief, have approved the sort of plan presented here.

23 Plaintiff contemplates that each class
24 share held as of the redemption deadline and not

1 redeemed will receive a *pro rata* distribution of their
2 eligible loss per share.

3 Class members who sold their shares
4 between the June 1st, 2021, redemption deadline and
5 the last business day before the settlement on
6 November 29, 2024, for less than \$10 will recover the
7 difference between \$10 and the sale price.

8 If class members held their shares
9 longer, the plan contemplates that they'll receive the
10 difference between \$10 and the closing price of 17
11 cents that day. And there's also a discussion of a
12 nominal amount of 10 cents per share that's added to
13 each class member's recognized claim.

14 I have mixed feelings about that, but
15 overall the way that the settlement consideration is
16 being allocated is fair and reasonable, with one
17 significant caveat about the class definition that
18 I'll get to shortly, which leaves me unable to approve
19 the proposed plan of allocation today.

20 Next, I'll address the request for an
21 award of attorneys' fees and expenses for the
22 plaintiffs' counsel. The plaintiffs' counsel requests
23 a fee award of \$7 million, inclusive of \$241,463 in
24 expenses.

1 In setting fee awards, "the Court of
2 Chancery must make an independent determination" of
3 reasonableness. That's from *Goodrich v. E.F. Hutton*
4 *Group, Inc.* 681 A.2d 1039, at page 1046 from the
5 Delaware Supreme Court in 1996.

6 The *Sugarland* factors traditionally
7 guide this analysis. I'll begin with the benefit
8 conferred from the litigation, which is the most
9 important of the *Sugarland* factors.

10 Here, the benefit is self-pricing.
11 It's the \$29.75 million fund to be distributed *pro*
12 *rata* to class members. The plaintiff asserts in his
13 settlement brief that the fee sought equates to
14 23.52 percent of the benefit achieved -- although I
15 get a slightly different figure when I run that
16 calculation myself. Subtracting out the expenses, a
17 fee of \$7 million is about 23.72 percent.

18 In the *Americas Mining* case, the
19 Delaware Supreme Court observed that, "When a case
20 settles after the plaintiffs have engaged in
21 meaningful litigation efforts," typically substantive
22 motion practice and discovery, fee awards will
23 typically range from 15-25% of the benefits conferred.
24 For an early-stage settlement, *Americas Mining*

1 describes the typical range as "10-15% of the monetary
2 benefit."

3 In this case, there was no motion to
4 dismiss or other substantive motions practice. But
5 some meaningful discovery occurred. So we aren't at
6 the high end of the range, but we also aren't at the
7 bottom.

8 If the applicable range is 15 to
9 25 percent for substantive motions and discovery, and
10 we have meaningful document discovery and about three
11 depositions but no motions, I'd say we're in the mid
12 to lower part of that range. Since this was a
13 relatively strong result though, I'm inclined to
14 pinpoint it right in the middle at 20 percent. Less
15 expenses, 20 percent of the benefit supports a fee of
16 \$5.95 million.

17 The other *Sugarland* factors support
18 this award. Counsel was experienced and skilled. The
19 case was brought on a contingent basis. And the case
20 isn't especially novel. It's a well-worn theory at
21 this point after *MultiPlan* and the *Gig* cases, plus
22 others.

23 I'll note that given the stage of the
24 case and the results, the percentage of the fund I'm

1 awarding would be the same I awarded in *MultiPlan*,
2 which was a novel case and involved a very complex
3 motion to dismiss, plus significant document
4 production. There were depositions here and not
5 there, and experts were retained, but the theory is no
6 longer a novel one.

7 Looking also at the lodestar as a
8 cross-check, the total hours are about 4,405 from the
9 Section 220 demand through the signing of the
10 settlement stipulation. The plaintiffs' requested fee
11 is equivalent to a lodestar of about 3.25 million.

12 Under the plaintiffs' suggested award,
13 the lodestar multiplier is 2.16X, and the implied
14 hourly rate is \$1,589.12, which is more than the
15 maximum partner rate among the plaintiffs' counsel.

16 With the fee I've calculated, the
17 implied hourly rate is \$1,340 per hour, and the
18 multiplier is 1.82X. But this is relatively generous
19 compared to the other SPAC settlements that I've
20 reviewed. The implied hourly rate is higher than in
21 *MultiPlan*, which again was a novel case with a
22 hard-fought motion to dismiss. And the multiplier is
23 high.

24 Taking all that into account warrants

1 a downward adjust to \$5.5 million. This amount both
2 rewards counsel for their fine result while preserving
3 value for the class and accounting for the fact that
4 this is no longer a novel theory.

5 The three named plaintiffs have also
6 asked for incentive fees of \$7,500. This is also a
7 bit on the high side for this stage of this case. I
8 will award them each a \$5,000 incentive fee given
9 their ongoing involvement and my interest in
10 incentivizing people to serve as class
11 representatives.

12 So, just to recap that, I am willing
13 to award a fee of \$5.5 million and incentive awards of
14 \$5,000 to come out of that fee and expense award.

15 But as I flagged at the beginning,
16 there's one more issue that I wanted to raise today,
17 which is class certification. The plaintiffs seek to
18 certify a class of public company stockholders who
19 held their shares between the May 11th, 2021, record
20 date and the June 4th, 2021, closing date of the
21 de-SPAC who did not submit their shares for
22 redemption. The class excludes the defendants and
23 related persons and affiliates, but it includes
24 successors in interest.

1 Generally speaking, a class must
2 satisfy Rule 23(a) and fall within one of the three
3 subsections of Rule 23(b). I view the Rule 23
4 requirements as being easily met. As of June 1, 2021,
5 the redemption deadline, there were about 30 million
6 eligible nonredeemed shares. There are common
7 questions of law presented, including whether the
8 defendants breached fiduciary duties to the class
9 members by impairing their redemption rights. The
10 plaintiff is similarly situated to other nonredeeming
11 stockholders, and the plaintiffs and counsel can, and
12 have, adequately represented the class.

13 In terms of the Rule 23(b)
14 requirements, I could see certification being
15 appropriate under either subsection (1) or (2).

16 But I'm concerned about the class
17 definition. In particular, it isn't clear to me why
18 it includes successors in interest.

19 And my issue is this: If the stock
20 was sold after the merger closed, there would no
21 longer be a redemption rate carried with that share.
22 The redemption rate didn't travel with the share, and
23 the successors in interest would not have a right to
24 sue based on an impairment of their redemption right

1 as far as I can tell.

2 But in looking over precedent, it
3 seems that the class definitions in the settlements
4 the judges on this Court -- including me -- have
5 approved have been mixed in terms of whether or not
6 the class includes successors. The early cases like
7 *MultiPlan* and *Lordstown* focused on class members at
8 the time that the business combination closed. Some
9 of the more recent cases have had broader definitions.

10 This doesn't seem to have been
11 something that the parties, or court, focused on until
12 recently when Vice Chancellor Laster asked in one of
13 his settlement hearings whether successors in interest
14 need to be included in a SPAC settlement class and
15 whether the claim runs with the shares.

16 I'm skeptical that it does. But given
17 the potentially competing views on this, and way that
18 the class definitions are diverging, plus the new
19 approach to plans of allocation with a claims process,
20 I think this is somewhere that we're going to need
21 clarity going forward.

22 And so what I'm going to do is ask for
23 a short supplemental submission from the plaintiffs'
24 counsel -- and from the defense counsel if they have a

1 view on this -- on whether successors in interest are
2 appropriately included in the class definition, given
3 that the claim hinges on an alleged impairment of the
4 redemption right, which is gone when the business
5 combination closes.

6 Other than that, I am comfortable
7 certifying a class for purposes of the settlement only
8 as meeting the Rule 23(a) and (b) requirements as soon
9 as I work out that one definitional change.

10 So that's my ruling today. You have
11 my views on the settlement, which is that it's fair
12 and reasonable. You have my views on the fee and
13 expense award and the incentive awards, and also the
14 fact that I think this is a class that can be
15 approved, so long as I have some clarity on whether
16 that definition should include successors in interest
17 as it does now, or whether that language needs to come
18 out.

19 So I would like to see a short
20 supplemental submission from the plaintiffs'
21 counsel -- and defendants' counsel if they have a
22 view -- on whether successors in interest should
23 appropriately be included in the class definition of a
24 *MultiPlan*-style claim. You should also address how

1 this might affect the plan of allocation and notice.

2 As soon as you get that to me, I can
3 make a decision on the class definition. And I expect
4 that I will be in a position to enter the final order
5 or a modified proposed order depending on the class.

6 Beyond that, I think that I have
7 everything that I need from you to issue a final
8 ruling on the settlement after I have that clarity.

9 Let me stop there and ask if there are
10 any questions for me about that little curveball that
11 I threw at you at the end. And then, as I said, as
12 soon as I get your supplemental submissions, I think
13 that I'll be able to go ahead and enter a final order.

14 Ms. Tucker, do you have any questions
15 for me about that?

16 ATTORNEY TUCKER: I do not, Your
17 Honor, and I'm happy to address that issue.

18 THE COURT: Thank you. I appreciate
19 it. It seems like it's a new question on many of our
20 minds, so I'm grateful.

21 Any questions from the defense
22 counsel?

23 Okay, great. Well, I will look for
24 that submission from you. And, like I said, as soon

1 as I get that, I'll be in a position to go ahead and
2 rule on the final order.

3 But thank you very much for your time
4 and your patience as we work through the steps on this
5 one. I'll look for your submission. And I'm sure
6 we'll be talking again soon.

7 Hope you have a great week. We're
8 adjourned.

9 COUNSEL: Thank you, Your Honor.

10 (Court adjourned at 11:25 a.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Diplomat Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 22 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except as revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington this 14th day of May, 2025.

/s/ Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomat Reporter
Certified Realtime Reporter

CHANCERY COURT REPORTERS
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(302) 255-0526

Tab 11

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GORES HOLDINGS IV, INC. :C.A. No.
STOCKHOLDER LITIGATION :2023-0284-LWW

- - -

Chancery Courtroom No. 12C
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, July 15, 2025
1:30 p.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

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12 for Defendants

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1 THE COURT: Good afternoon.

2 ATTORNEY ARONSTAM: Good afternoon,
3 Your Honor. Very brief introductions on behalf of the
4 Gores defendants. My co-counsel from Weil Gotshal,
5 John Neuwirth and Evert Christensen.

6 THE COURT: Welcome. Thank you very
7 much.

8 ATTORNEY TUCKER: Good afternoon, Your
9 Honor. I'm joined today by Gregory Del Gaizo from
10 Robbins LLP, Jason Avellino and Tayler Bolton from
11 Robbins Geller.

12 THE COURT: Nice to see you.

13 ATTORNEY TUCKER: May it please the
14 Court, Your Honor, I'm pleased today to be presenting
15 for the Court's consideration our settlement in the
16 Gores Holdings IV stockholder litigation. I'll
17 briefly go through the background, explain why the
18 class should be certified, and address fees and the
19 service awards.

20 On June 12, 2019, the alleged
21 controller defendants in this case, who also had
22 formed 12 other SPACs, formed Gores Holdings IV, which
23 I'll refer to as Gores IV. That company is now
24 renamed UWM Holdings Corp. Gores IV was a typical

1 SPAC. The controllers granted themselves 20 percent
2 interest in post-IPO equity in exchange for \$25,000,
3 and then promptly granted 25,000 Founder Shares to
4 each of the SPAC's outside directors. Those outside
5 directors also served on many of Gores' other SPAC
6 boards, and they had long-standing personal and
7 professional relationships.

8 As we were well into discovery in this
9 case when the settlement was reached and as the
10 Court's well familiar with SPACs and the unique issues
11 that come up in these cases, I'll focus on the things
12 we discovered in discovery and issues that make this
13 case unique and make this settlement unique.

14 Following its IPO, Gores IV zeroed in
15 on the deal with Legacy UWM. It was a private
16 residential wholesale mortgage lender. At the time
17 the merger was being discussed Legacy UWM was an
18 established company. It had \$3.5 billion in revenue,
19 in annual revenue, and adjusted EBITDA of \$472 million
20 the year before the merger closed.

21 After zeroing in on the merger, the
22 principals at Gores IV, who were Alec Gores and Mark
23 Stone and Legacy UWM, which is Matt Ishbia, began what
24 defendants themselves called not a negotiation to

1 hammer out the terms of the merger and the PIPE
2 agreements.

3 As part of that process Mr. Ishbia,
4 who now owns the Phoenix Suns, and Mr. Gores, whose
5 family owns the Detroit Pistons, discussed a side deal
6 by which Mr. Ishbia would potentially invest in the
7 Pistons at the same time they were discussing the deal
8 between Gores IV and UWM. This sidebar wasn't
9 disclosed to the board or stockholders. Ultimately
10 that deal didn't come to fruition.

11 Due diligence in this case was
12 expedited, advisor advice was ignored, and important
13 questions remained unanswered when on September 23,
14 2020 Gores IV and Legacy UWM announced the merger
15 which valued the combined company at an equity value
16 of approximately \$16.1 billion or \$10 per share.

17 Gores IV issued a proxy statement that
18 informed stockholders of the redemption rights, and
19 that proxy omitted material information and included
20 false and misleading statements concerning the
21 reliability of projections for UWM, including by
22 failing to adequately account for what was then a
23 historically low interest rate for mortgages which
24 inflated refinancing and originations at a level

1 unlikely to continue should these rates rise. The
2 proxy also omitted information about regulatory risk,
3 net cash per share, which, assuming no redemptions in
4 this case, was \$8.25 per share.

5 Concurrently with the merger
6 agreement, Gores IV entered into subscription
7 agreements in connection with a \$500 million PIPE
8 transaction. Those PIPE shares were offered at \$10
9 per share. Discovery revealed that the large majority
10 of PIPE investors were Gores and Legacy UWM friends
11 and family. In fact, Gores Group itself had committed
12 to purchase hundreds of million of dollars of PIPE
13 shares.

14 It then syndicated those shares and
15 sold them to other investors, presumably to de-risk
16 their position. It did so at a price of \$9 per share
17 for at least a hundred million dollars of those PIPE
18 shares, so 20 percent. This sweetheart deal wasn't
19 disclosed to stockholders in the proxy, and the offer
20 was not extended to stockholders who are foregoing
21 \$10.01, the redemption value, by not redeeming those
22 shares and investing in the merger.

23 Ultimately stockholders voted in favor
24 of the merger, there were minimal redemptions, and on

1 January 21, 2021 the merger closed. Defendants later
2 would refer to this merger as a nightmare or the worst
3 case scenario, but it wasn't as bad as some of the
4 other SPAC cases. After the merger the New UWM stock
5 price rose as high as \$11.50 per share, and during
6 that period when it was trading above 10.01 there was
7 2.4 times churn.

8 Following an investigation by
9 Mr. Delman initiated on August 24, 2022, he filed his
10 complaint on March 7, 2023. Mr. Farzad filed his
11 complaint on March 31, 2023. The Court subsequently
12 consolidated the actions and appointed plaintiffs lead
13 plaintiffs and counsel lead counsel. Defendants then
14 answered the complaint, and the parties engaged in
15 discovery, including the production of over 77,000
16 documents comprising 400,000 pages. The parties --
17 plaintiffs took two depositions of defendants the week
18 the settlement was agreed to in principal. Two other
19 depositions of defendants had been scheduled, and
20 depositions of plaintiffs were also scheduled to take
21 place. The parties engaged in some discovery motion
22 practice and retained experts to address valuation,
23 whose work was well under way.

24 As discovery was unfolding, the

1 parties engaged in informal settlement discussions
2 that spanned months, but we were unable to reach an
3 agreement on our own. The parties decided to engage
4 Robert Meyer of JAMS to mediate. On June 1, 2024, the
5 parties participated in a voluntary mediation. We
6 didn't reach agreement as to terms on that date, but
7 on June 11, 2024, Mr. Meyer made a double blind
8 mediator's recommendation that the parties settle the
9 action for \$17.5 million, which the parties
10 subsequently agreed.

11 Notice was provided to class members
12 in this case in accordance with the scheduling order
13 previously entered by this Court. No class member has
14 objected to the settlement, the plan of allocation,
15 the attorneys' fees, or service awards.

16 Plaintiffs believed and continue to
17 believe that their claims in this case were strong and
18 the settlement reflects that, but this case isn't
19 without challenges. Legacy UWM was not a typical
20 de-SPAC merger target. It was a legitimate company
21 owned and founded by a now billionaire that operates
22 in a highly regulated industry. In 2020, the year
23 prior to the merger, UWM earned \$3.5 billion in
24 revenue and was extremely profitable.

1 On the day the complaint was filed,
2 New UWM stock was trading at \$4.59 per share, and
3 trended upward from then until the date the parties
4 reached agreement in principle to settle the claims,
5 on which date it was trading at \$7.20 per share.
6 Thereafter it traded as high as over \$9.30 per share
7 in 2024. That makes it very distinguishable from
8 other SPAC settlements where the stock was trading
9 below \$1 and continued to trade below \$1 throughout
10 the duration of the case.

11 Legacy UWM was not teetering on the
12 edge of bankruptcy, and it was not pre profit. It
13 wasn't even pre revenue. We discussed some of these
14 cases in note 2 of our brief. If Your Honor would
15 like to see the comparisons, that's where you could
16 find it.

17 During the period between the merger
18 and the settlement, New UWM stock traded above \$5 per
19 share 80 percent of the time and above \$8 per share
20 32 percent of the time based on volume. The challenge
21 that this market-based evidence presented was
22 acknowledged by the Court in *Hennessy* in which it
23 observed that a finding of unfair price, not to
24 mention damages, may prove unattainable when the stock

1 price of the post-merger company traded above \$10 per
2 share per month. That didn't happen over an extended
3 period here, but the volume was high in the period
4 when it did and the stock traded at a high price
5 thereafter.

6 With the benefit of discovery, likely
7 damages measures were converging in the area of \$1.00
8 to \$1.75 per share, assuming that we were to be
9 successful in our claims at trial. Taking these
10 factors into consideration, combined with the benefit
11 of substantial document and deposition discovery and
12 expert advice and given the strength of the settlement
13 here, plaintiffs and their counsel believe that this
14 settlement provides fair, reasonable, and adequate
15 relief to class members in exchange for the release of
16 their claims.

17 I note that the class definition in
18 this case does not have the issue identified by the
19 Court in other cases. So that issue does not need to
20 be addressed for the court to approve the settlement.

21 There's substantial benefits provided
22 to the class as a result of this settlement because
23 the stock traded above redemption price for a
24 significant period on high trading volume and because

1 the stock price did not drop as low as it has in some
2 other cases for any extended period of time. Class
3 members' actual economic losses are likely less than
4 they are in a lot of other cases and those damages are
5 mitigated.

6 Looking on a per-share basis, the
7 settlement is a little over 41 cents per share. This
8 compares favorably with *MultiPlan* and other SPAC
9 settlements and exceeds what was recovered in *XL*
10 *Fleet*, *View*, and *Finserve* and as comparable to the
11 recovery in *Avepoint* and *QuantumScape*, which this
12 Court approved last week.

13 On a gross basis the total settlement
14 value is the fourth largest settlement presented to
15 the court for approval. The settlement here also
16 represents a recovery on a net cash per share damages
17 theory of nearly 23 percent, which compares favorable
18 or in line with other SPAC cases on this metric.
19 Importantly, the 41-cent-per-share recovery reflects
20 41 percent recovery of what was likely to be -- the
21 most likely damages award, which is the delta between
22 \$10.01 and the \$9 per share that Blackrock negotiated
23 for themselves.

24 The remaining *Activision* factors, like

1 why support settlement approval and approval of the
2 plan of allocation, the plan of allocation
3 contemplates a pro rata distribution of nominal
4 damages to class members who submit a claim in
5 addition to a pro rata distribution of actual damages,
6 the plan of allocation similar to what Your Honor
7 approved in *Eos* and *Latch* and what's been approved in
8 other de-SPAC merger cases to date.

9 The elements of class certification of
10 a non-opt out class of Gores IV stockholders is
11 likewise satisfied. There are thousands of class
12 members. Questions of law, in fact, are common to all
13 class members. Plaintiffs' claims are typical of the
14 class, and the class's interests were fairly and
15 adequately protected throughout this process. We
16 discuss those factors in more detail in our brief at
17 pages 29 to 33.

18 Does Your Honor have any questions
19 about class certification?

20 THE COURT: No questions.

21 ATTORNEY TUCKER: Plaintiffs' counsel
22 in this case seeks an award of \$3,937,500 in
23 attorneys' fees and expenses. Expenses were
24 \$364,502.21. After taking out expenses, the fee award

1 is approximately 20.4 percent of the total settlement.

2 The Court looks at the *Sugarland*
3 factors in determining the appropriateness of the fee
4 award and grants the greatest weight to the benefits
5 conveyed. As discussed, we believe the benefits
6 conveyed here are substantial when you look at all the
7 factors that go into this consideration.

8 The Court can also look to the
9 guidelines set forth in *Southern Peru* in determining
10 an appropriate fee range, in light of the meaningful
11 litigation efforts that have occurred here, there was
12 some motion practice, there was a 220 process, there
13 was substantial document production and depositions
14 taken and underway.

15 THE COURT: The only motion was the
16 discovery motion?

17 ATTORNEY TUCKER: That's correct.

18 THE COURT: Okay.

19 ATTORNEY TUCKER: Defendants answered
20 the complaint, which I would say speaks to the
21 strength of the complaint when we filed it. This puts
22 this case in the 15 to 25 percent fee range. Our
23 requested fee award is right above the median there.

24 In other de-SPAC merger cases the

1 courts awarded similar fees. In *GeneDX* the Court
2 awarded a 19.5 percent fee. There were no
3 depositions, there was some motion practice.
4 *MultiPlan*, the Court awarded 20 percent. There were
5 no depositions, there was motion practice. *Lordstown*
6 *Motors* the Court ordered a 22.5 percent fee. Again,
7 no depositions, some motion practice. And cases in
8 other contexts, as we set forth in our brief, support
9 the requested fee award.

10 Plaintiffs' counsel took this
11 litigation on a contingency basis and took on
12 substantial risk. This case was filed after Gig II
13 and Gig III, but in those cases the Court made clear
14 and has made clear since that a disclosure based on
15 net cash per share must demonstrate a material
16 difference between the redemption value and the net
17 cash per share. 8.25 is far from what the Court found
18 material in Gig II and Gig III, and that presented a
19 significant risk and hadn't been decided. No cases
20 even close to that had been decided at the time this
21 case was filed.

22 Time and efforts of counsel also
23 support the requested fee award. In total, counsel
24 spent 5,297.65 hours litigating this action through

1 the signing of the settlement stipulation. The
2 requested fee award amounts to a lodestar multiple of
3 approximately one times an hourly rate of \$674.45,
4 both of which fall on the lower end of multiples and
5 rates this Court has found to be reasonable where a
6 monetary benefit was conferred. In *MultiPlan* the
7 hourly rate awarded in that case was \$1,079. So it
8 falls well below the implied hourly rate there.

9 This case also presented novel legal
10 and factual issues. I discussed the issue related to
11 net cash per share. That issue, the net cash per
12 share disclosure theory, has not yet been tested by
13 the Delaware Supreme Court. None of these cases have
14 gone to trial to date. We don't know how the Court
15 will determine damages. Those are all risks that we
16 took into account and presented novel issues in this
17 case as in other SPAC cases.

18 Legacy UWM was a real, operating,
19 profitable company prior to the merger and was trading
20 above \$7 per share at the time that the settlement was
21 reached. That also is a unique factor in this case.

22 Finally on these factors, counsel has
23 a long-standing practice before the Delaware Court of
24 Chancery and a lengthy track record of success in

1 de-SPAC merger cases and others.

2 Does Your Honor have any questions
3 about fees before I move on?

4 THE COURT: No questions.

5 ATTORNEY TUCKER: We've also asked the
6 Court to award incentive awards to the named plaintiff
7 in the amount of \$5,000 to be paid out of the fee
8 award. Plaintiff Delman served and verified a 220
9 demand. Both plaintiffs verified the complaint and
10 conducted related diligence, reviewed pleadings,
11 searched for and produced over 6,000 pages of
12 documents, provided verified responses to extensive
13 interrogatories, and as I mentioned previously, were
14 on the eve of depositions when the case settled. A
15 service fee award of \$5,000 is well supported. The
16 Court recently awarded \$5,000 service awards in *Latch*.
17 Similarly in *Lordstown Motors*, *GeneDX*, and *Finserve* the
18 plaintiff were all awarded \$5,000 per plaintiff on
19 similar circumstances.

20 Unless Your Honor has any questions,
21 we'll rest on our papers as to the remaining issues
22 that I haven't addressed.

23 THE COURT: Thank you very much for
24 the thorough presentation, Ms. Tucker. I have no

1 questions.

2 Mr. Aronstam, is there anything that
3 you or your colleagues would like to say?

4 ATTORNEY ARONSTAM: Nothing today,
5 Your Honor.

6 THE COURT: Thank you very much, and
7 thank you for being here.

8 Counsel, I appreciate you coming in.
9 Thank you for your very thorough settlement papers,
10 and Ms. Tucker, thank you again for your presentation
11 this afternoon.

12 I have a bench ruling prepared that I
13 can read into the record now if you'll be patient with
14 me while I do that. Then I'm happy to answer any
15 questions at the end.

16 Before me this afternoon is the
17 proposed settlement of In re Gores Holdings IV, Inc.,
18 Stockholder Litigation, which is Civil Action No.
19 2023-0284-LWW. I'll start with the background as set
20 out in the complaint. I note that I haven't made any
21 findings of fact in this case, and I'm not making any
22 findings of fact today.

23 At a high level, the case concerns the
24 January 21, 2021 merger of a special purpose

1 acquisition company called Gores Holdings IV, Inc., or
2 Gores IV, with a private entity that I'll call Legacy
3 UWM. Gores IV was incorporated in 2019 by Gores
4 Sponsor IV, LLC for the purpose of combining with
5 another company through a de-SPAC merger within 24
6 months of an IPO.

7 The SPAC Sponsor and the Sponsor's
8 appointed directors held "Founder Shares" which were
9 purchased for a nominal price that would become
10 worthless if a business combination was not timely
11 consummated. The members of Gores IV's board were
12 also given 25,000 Founders Shares in exchange for a
13 nominal price of \$50.

14 In January 2020 Gores IV completed its
15 IPO. Funds raised were placed into a trust for public
16 stockholders who had the option to redeem their shares
17 for \$10 plus interest if a merger were announced and
18 stood to receive back their investment if Gores IV
19 liquidated.

20 Gores IV began discussions with Legacy
21 UWM in April of 2020, and the Gores IV Board approved
22 the merger on September 22 of 2020, publicly
23 announcing it the next day.

24 The merger was contingent on Gores IV

1 contributing a minimum of \$712.5 million in cash,
2 meaning that, inclusive of PIPE funds, redemptions
3 could not exceed 50 percent of public shares.

4 On December 16 of 2020, Gores IV
5 disseminated a proxy statement, which the plaintiffs
6 allege contained a series of material misstatements
7 and omissions. I won't list them all today, but they
8 include the allegation that the net cash per share
9 that stockholders would be contributing to the
10 combined entity was significantly less than the amount
11 disclosed in the proxy; that there was an inflated
12 value disclosed for Legacy UWM; that there are
13 potential regulatory compliance issues; that there was
14 an undisclosed discounted PIPE deal; that the
15 defendants had negative views of the merger. Again,
16 these are all allegations which are laid out in the
17 complaint.

18 Gores IV stockholders approved the
19 merger with less than 1 percent of public shares
20 redeemed. The merger closed on January 21 of 2021, at
21 which point in time what I'll call New UWM stock
22 traded at \$11.54 per share making the Founder Shares
23 worth over \$112 million.

24 The last date that New UWM stock

1 traded over \$10 per share was February 5, 2021, but
2 before that time, the New UWM stock traded over the
3 redemption price of \$10.01 and it traded at a
4 significant volume during the course of that period.

5 On August 24, 2022, plaintiff Richard
6 Delman served a Section 220 Demand on New UWM, seeking
7 company books and records about the IPO, the merger
8 process, and the relationships among the defendants.
9 After reviewing those documents, Delman filed this
10 lawsuit on March 7, 2023. He alleged breach of
11 fiduciary duty and unjust enrichment against the
12 defendants for impairing public stockholders'
13 redemption rights through materially false and
14 misleading disclosures in the proxy. Plaintiff
15 Michael Farzad filed his complaint the same month, and
16 I consolidated the cases in April.

17 The defendants answered the operative
18 complaint in June 2023 and discovery ensued.
19 Discovery included the production of 77,000 documents
20 by the parties and five nonparties; successful
21 discovery motions practice on one motion to compel;
22 and two depositions of certain defendants with other
23 depositions scheduled.

24 The parties began mediating in June

1 2024 and the mediator, Robert Meyer of JAMS, made a
2 double blind recommendation of a \$17.5 million cash
3 settlement, to which the parties ultimately agreed.
4 The Stipulation of Settlement was signed on
5 February 7, 2025, and that's the settlement that was
6 presented before me today.

7 With that background, I'll start with
8 the first item on my agenda, which is class
9 certification. A class must satisfy the four
10 requirements of Rule 23(a) and fall within one of the
11 three subsections of Rule 23(b). The Rule 23(a)
12 requirements are numerosity, commonality, typicality,
13 and adequacy of representation. All four of those
14 requirements are easily met here.

15 As of the redemption deadline, there
16 were over 40 million public stockholders who had not
17 redeemed their shares. There are common questions of
18 law and fact among the putative class members whose
19 redemption rates were allegedly impaired by the
20 defendants' actions. The named plaintiffs are
21 similarly situated to other nonredeeming stockholders.
22 The named plaintiffs' claims are typical of other
23 class members who did not receive their shares, and
24 both the named plaintiffs and their counsel are

1 suitable class representatives.

2 The class could be certified under
3 either Rule 23(b)(1) or (b)(2). Separate actions risk
4 inconsistent judgments, and the adjudication of one
5 class member's claim would effectively resolve the
6 others.

7 The class is also appropriately
8 limited to "record and beneficial holders of Gores IV
9 Class A Common Stock ... who purchased, acquired, or
10 held those securities at any time during the period
11 from September 22, 2020, the date of the announcement
12 of the Merger, through and including January 21, 2021,
13 the date of the Closing" of the merger, excluding
14 related parties.

15 There I'm quoting from the class
16 definition in the Stipulation of Settlement, and I
17 note that this definition does not expand the class to
18 successors in interest, which is an issue that I've
19 dealt with recently in other matters. The class here
20 is appropriate, and I will certify it as a nonopt out
21 class for settlement purposes only under Rule 23.

22 Next up, keeping with Rule 23, is the
23 question of notice. I determined that the form of
24 notice to putative class members was adequate when I

1 entered the scheduling order to that effect on
2 April 25, 2025. Now, I've reviewed the supplemental
3 affidavit of notice that was filed, and I conclude
4 that the provision of notice was adequate as well. So
5 all of the relevant Rule 23 requirements are met.

6 The third item on my agenda is to
7 determine whether to approve the proposed settlement
8 as fair and reasonable. My role in doing that is "to
9 consider the nature of the claim, the possible
10 defenses thereto, the legal and factual circumstances
11 of the case, and to apply my own business judgment in
12 deciding whether the settlement is reasonable in light
13 of those factors." There I'm quoting from *In re*
14 *Philadelphia Stock Exchange*, which is 945 A.2d 1123,
15 at pages 1137 to 38 from the Delaware Supreme Court in
16 2008.

17 As we often put it in this Court, my
18 job is to balance the "give" and the "get" of the
19 settlement and see how they compare. This entails
20 looking to the value of the benefits obtained through
21 the settlement against the strength of the claims that
22 are being relinquished.

23 Starting with the "give," the
24 plaintiffs have agreed to release the claims in this

1 action and those related to the merger that could have
2 been brought individually or on behalf of the class.
3 That's from the Stipulation's definition of
4 "Plaintiffs' Released Claims."

5 I viewed the release. I believe it's
6 appropriately tailored to the factual predicate of the
7 case and the claims that were advanced. The
8 defendants arguably bore the burden of proving entire
9 fairness, as the plaintiffs' claims were likely
10 subject to that standard of review. Nevertheless, as
11 the plaintiffs acknowledge, they faced meaningful risk
12 that they might not be able to show economic harm or
13 prove damages, particularly since the stock traded
14 above the \$10.01 redemption price at a high volume for
15 a period after closing.

16 In terms of net cash per share, as
17 counsel also acknowledged, the delta between that
18 figure and the redemption price was relatively small
19 compared to some of the other cases that I've heard in
20 this case or in this similar type of suit, which also
21 created risk of potential nonrecovery on that theory
22 as well.

23 Balanced against the "get," which is a
24 \$17.5 million cash recovery for the class that is

1 certain, I believe that the settlement shows a
2 meaningful recovery for the class and is fair and
3 reasonable on balance in view of the claims that were
4 pleaded. So for all of the reasons, I will approve
5 the settlement, and that conclusion is supported by
6 the absence of objections -- there are no objectors
7 here today -- and the involvement of a skilled
8 mediator in reaching a settlement of this case.

9 I'll also approve the proposed plan of
10 allocation. That includes a claims process. The
11 plaintiffs explained the reasoning behind the
12 implementation of that process in their March 13
13 letter to me. I found the explanation to be helpful
14 and persuasive, as I have in other similar cases.

15 The claims process accounts for the
16 fact that in distributing the settlement proceeds
17 there are different prices at which class members sold
18 their stock, and there was quite a swing in difference
19 between the trading prices during the relevant period.
20 The claims process that counsel has outlined is an
21 equitable approach, and I think that it outweighs the
22 extra cost and burdens of a claims process. So I'll
23 approve that as well.

24 The next item on my agenda is the

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1 plaintiffs' request for attorneys' fees and expenses,
2 as well as incentive awards for the two named
3 plaintiffs. The plaintiffs seek an all-in fee and
4 expense award of \$3,937,500, which is inclusive of
5 \$364,502.21 in litigation expenses. Noting that the
6 expenses were laid out in counsel's papers, I've
7 reviewed them. There was an expert expense that was
8 the bulk of the total expenses; it was a little over
9 six figures. But I see nothing in the expenses that
10 concern me or that was in any way unreasonable.

11 In terms of the overall fee request, I
12 "must make an independent determination of
13 reasonableness." That's laid out in *Goodrich v. E.F.*
14 *Hutton Group, Inc.*, 681 A.2d 1039, 1045 (Del. 1996)
15 and my analysis of the request is guided by the
16 *Sugarland* factors. The most important *Sugarland*
17 factor is often described as the benefit conferred,
18 and here, as I mentioned before, that benefit is a
19 \$17.5 million cash fund to be equitably distributed to
20 class members.

21 In *Americas Mining* the Delaware
22 Supreme Court observed that "[w]hen a case settles
23 after the plaintiffs have engaged in meaningful
24 litigation efforts" -- typically substantive motions

1 practice and discovery -- fee awards will typically
2 "range from 15 to 25% of the [] benefit[s] conferred."

3 Here, there was some discovery, there
4 was the production of a significant number of
5 documents, and two depositions. There was also a
6 Section 220 process that I discussed earlier. There
7 were no substantive motions that were filed. There
8 was, however, a discovery motion. That makes this a
9 midstage settlement, but not at the high end of the
10 midstage.

11 The fee sought is about 22.5 percent
12 of the fund. Less expenses, the fee is 22.98 percent
13 of the fund. But, given the absence of substantive
14 motions practice, an award at the high end of the
15 applicable range is too great here. The *MultiPlan*
16 case that the plaintiffs cited in their papers is a
17 useful precedent and guidepost.

18 In that case I awarded 20 percent of
19 the total settlement fund. It presented a completely
20 novel legal argument and followed a complex and very
21 hard-fought motion to dismiss as well as some
22 discovery. I believe there weren't any depositions,
23 but there was, again, very substantive motions
24 practice.

1 I don't see why this case warrants a
2 higher fee percentage than in *MultiPlan*. The midpoint
3 of 20 percent seems fitting here since, again, I have
4 depositions but no substantive motions. That range
5 gives me a starting point of \$3.5 million, which I'll
6 consider under the remaining *Sugarland* factors.

7 Counsel is highly skilled on both
8 sides. Plaintiffs' counsel took the case on a
9 contingency basis, but the case itself isn't
10 particularly novel at this point in time, and it
11 wasn't an especially risky case to pursue. So the
12 *Sugarland* factors largely balance each other out.

13 On the time and effort expended,
14 counsel spent about 5,300 hours litigating the case
15 from inception through the signing of the Stipulation
16 of Settlement with a lodestar of \$3,242,773. A
17 20 percent award implies a lodestar multiplier of 1.08
18 and an implied hourly rate of \$660.67. The hourly
19 rate is on the lower end based on my review of
20 precedent, but the lodestar is more than being
21 recovered by the fee that I've calculated. So taking
22 all of the *Sugarland* factors into account, I conclude
23 that the 20 percent fee of \$3.5 million is
24 appropriate.

1 I will also approve the requested
2 incentive awards of \$5,000 to each plaintiff for
3 stepping up as class representatives. In each case
4 the plaintiffs not only reviewed filings, but they
5 also engaged in some discovery themselves, and they
6 were preparing for depositions before settlement. I
7 wouldn't be comfortable awarding a higher incentive
8 award than this, but I think that the \$5,000 sought is
9 reasonable.

10 So to recap, the settlement class is
11 certified, the settlement is approved, the plan of
12 allocation is approved, a fee and expense award of
13 \$3.5 million is approved, and incentive award of
14 \$5,000 paid to each of the named plaintiffs out of the
15 fee award is approved.

16 That is the conclusion of my ruling.
17 Congratulations on bringing this case to a close, well
18 done.

19 Are there any questions for me while
20 we're all together?

21 ATTORNEY TUCKER: No questions from
22 the plaintiffs, Your Honor.

23 THE COURT: Thank you very much.

24 ATTORNEY ARONSTAM: None here. Thank

1 you, Your Honor.

2 THE COURT: Thank you. I know that I
3 have a final order on the docket. So I will get to
4 entering that shortly. Thank you again for coming in.
5 It was nice to see you all. We're adjourned.

6 (Court adjourned at 2:05 p.m.)

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CERTIFICATE

I, TINA M. ALFARO, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 31 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 24th day of July, 2025.

/s/ Tina M. Alfaro

Tina M. Alfaro
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
Delaware Notary Public

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Tab 12

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE INTERPRIVATE ACQUISITION : CONSOLIDATED
CORP. STOCKHOLDER LITIGATION : C.A. No.
: 2024-0221-LWW

- - -

Chancery Courtroom No. 12C
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, September 12, 2025
1:30 p.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

SETTLEMENT HEARING and RULINGS OF THE COURT

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1 APPEARANCES:

2 KELLY L. TUCKER, ESQ.
3 DAVID WISSBROECKER, ESQ.
4 Grant & Eisenhofer P.A.

5 -and-

6 JASON M. AVELLINO, ESQ.
7 Robbins Geller Rudman & Dowd LLP

8 -and-

9 GREGORY E. DEL GAIZO, ESQ.
10 of the California Bar
11 Robbins LLP
12 for Plaintiffs

13 D. MCKINLEY MEASLEY, ESQ.
14 PHILLIP REYTAN, ESQ.
15 Morris, Nichols, Arsht & Tunnell LLP

16 -and-

17 JOSHUA I. SCHILLER, ESQ.
18 of the California Bar
19 Boies Schiller Flexner LLP

20 -and-

21 GINA A. ROSSMAN, ESQ.
22 of the District of Columbia Bar
23 Boies Schiller Flexner LLP
24 for Defendants

- - -

1 ATTORNEY MEASLEY: Good afternoon,
2 Your Honor.

3 THE COURT: Good afternoon. Nice to
4 see you.

5 ATTORNEY MEASLEY: Nice to see you.
6 Mac Measley from Morris Nichols on behalf of
7 defendants. With me at counsel table are my
8 colleagues Josh Schiller from the Boies Schiller firm.

9 THE COURT: Good afternoon.

10 ATTORNEY SCHILLER: Good afternoon,
11 Your Honor.

12 ATTORNEY MEASLEY: As well as his
13 colleague Gina Rossman and my associate Phil Reytan
14 from Morris Nichols.

15 THE COURT: Thank you, Mr. Measley.
16 Good afternoon, Ms. Tucker.

17 ATTORNEY TUCKER: Good afternoon, Your
18 Honor. I am joined today by David Wissbroecker of
19 Grant & Eisenhofer, Greg Del Gaizo from Robbins, and
20 Jason Avellino from Robbins Geller.

21 THE COURT: Welcome back.

22 Ms. Tucker, I assume you are taking
23 the lead.

24 ATTORNEY TUCKER: I am. Very happy to

1 be here today to present this settlement on behalf of
2 InterPrivate Acquisition Corp. public stockholders for
3 the Court's approval. This is the first time we have
4 been in front of the Court, so I thought I would give
5 you a little background about the facts of this case.

6 On August 16th, 2019, InterPrivate,
7 which was later renamed Aeva Technologies, Inc., was
8 incorporated in Delaware as a SPAC. InterPrivate's
9 sole purpose, as with all SPACs, was to find a
10 privately held company with which to combine and take
11 public.

12 The alleged controller defendants
13 granted themselves 20 percent equity in the post-IPO
14 equity of the company by way of founder shares in
15 exchange for nominal consideration. The controller
16 defendants then granted 30,000 founder shares to the
17 two outside directors, Cinquegrana and Harris.

18 On February 3rd, InterPrivate
19 consummated its IPO, in connection with which the
20 sponsor and other entities purchased hundreds of
21 thousands of private placement units. Both the
22 private placement units and the founder shares would
23 be worthless if InterPrivate didn't close the deal.
24 The complaint alleges that because of these perverse

1 incentives, defendants did everything they could to
2 ensure a deal would close by the liquidation deadline,
3 which in this case was November 21st.

4 After a potential deal dried up in
5 August 2020, InterPrivate turned the focus to Legacy
6 Aeva. Legacy Aeva was a provider of perception
7 solutions for automated driving applications, focused
8 in its 4D LiDAR-on-chip silicon photonics technology,
9 which I understand to be technology used for kind of
10 like auto driving.

11 THE COURT: Got it.

12 ATTORNEY TUCKER: The due diligence
13 InterPrivate conducted of Aeva was expedited and
14 cursory, as it often is in these cases. Over the
15 course of two months, defendants met with Legacy Aeva
16 management. They received a management presentation
17 that included projections that were substantially
18 lower than the projections that would end up in the
19 proxy.

20 InterPrivate retained McKinsey and
21 Yole to serve as advisors in this transaction.
22 McKinsey is a regular business consultant. Yole is a
23 specialist in this industry.

24 Both sets of advisors warned that

1 Legacy Aeva's projections were overstated and that
2 Legacy Aeva's technology was far behind its
3 competitors in the space. Nonetheless, on
4 November 2nd, about two months after they began
5 discussions, Legacy Aeva and InterPrivate had signed a
6 deal.

7 Thereafter, InterPrivate issued its
8 proxy in connection with the merger. The proxy
9 contained allegedly materially false and misleading
10 representations and omitted material information about
11 Legacy Aeva's value in the deal. That included that
12 net cash per share would only be less than \$8.50; that
13 Legacy Aeva's ordinary-course financial projections
14 were not disclosed, despite being provided to the
15 board. It included that -- they omitted that a set of
16 projections prepared by InterPrivate management that
17 was also provided to the board, which were also
18 materially lower than the proxy projections, were not
19 included. And it didn't disclose the fact that Legacy
20 Aeva's customer commitments set forth in the proxy had
21 been called into question by both sets of advisors,
22 which then called into question the reliability of the
23 proxy projections.

24 The stockholders voted on the deal on

1 March 11, 2021. And on March 12th the deal closed.

2 On the date of the merger, and shortly
3 thereafter, New Aeva's stock price traded as high as
4 16, \$17 per share. And that continued for a period of
5 six months post-merger, where it traded above the
6 redemption price of \$10.07.

7 Thereafter, the stock price dropped
8 significantly. New Aeva was threatened with
9 delisting. They conducted a reverse stock split.
10 When results started coming out, they were
11 substantially below the proxy projections. New Aeva's
12 2022 revenue was barely one-tenth of the revenue
13 projected in the proxy. And 2023 revenue was even
14 lower, and only one-twenty-fifth of the proxy
15 projections. After this news came out or started to
16 roll out, New Aeva's stock price did start to drop.

17 Both plaintiffs in this case
18 separately made 220 demands. And then subsequently
19 both filed class action complaints.

20 The Smith complaint was filed first.
21 Defendants moved to remove that case. It was removed
22 to the District of Delaware. Defendants argued that
23 it was removable due to SLUSA and that, also, SLUSA
24 preempted the claims. If defendants were correct as

1 to this novel argument, there's an argument that all
2 breach of fiduciary duty cases on behalf of SPAC
3 stockholders would be preempted, and these
4 stockholders would have no resolution or available
5 relief.

6 On June 12, 2024, after the motion to
7 remand and dismiss had been briefed in the Smith
8 action, the parties mediated in front of Greg Danilow
9 and ultimately agreed on settlement consideration of
10 \$14 million. Subsequent to the mediation, a term
11 sheet and stipulation were negotiated.

12 That settlement stipulation was
13 submitted for preliminary approval in the District of
14 Delaware, where the Smith action was pending at the
15 time. At the hearing on preliminary approval, the
16 Court expressed concerns about whether it had
17 jurisdiction to approve the settlement. We explained
18 to the Court subsequently that it did because the
19 plaintiff in the Smith action was a foreign national;
20 there was diversity of jurisdiction. But the Court
21 nonetheless remanded. And then when back in the Court
22 of Chancery, we consolidated the cases, and we
23 presented an amended stipulation to Your Honor for
24 approval.

1 Today, plaintiffs are moving the Court
2 for the Court to approve a class of nonopt-out
3 InterPrivate stockholders. The elements of class
4 certification are met here. The court's certified
5 similar classes as that proposed here. And I believe
6 we're up to 20 different cases at this point in
7 de-SPAC mergers. There might be more. I note that
8 even though the stipulation was filed prior to the
9 Court's decision in *Latch*, it doesn't have the issue
10 the Court identified there.

11 As demonstrated by the Ewashko
12 declaration, which we filed on September 3rd, there
13 are thousands of class members. Notice was provided
14 to those class members as provided for in the
15 scheduling order. And as this court has held in many
16 other similar cases, questions of law and fact are
17 common to the class.

18 Plaintiffs' claims here are also
19 typical of the class. They have no unique defenses.
20 And the class's interests were fairly and adequately
21 represented by counsel in this case. And we go
22 through this in more detail in our brief at pages 18
23 to 24.

24 Accordingly, plaintiffs submit that

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1 class certification is appropriate here.

2 Plaintiffs also ask that the Court
3 approve the settlement and the proposed plan of
4 allocation.

5 The settlement here conveys
6 substantial benefits to InterPrivate public
7 stockholders who held as of the redemption deadline.
8 Because the stock traded above the redemption price
9 for a significant period of time post-merger -- six
10 months -- during which 117 million shares changed
11 hands -- so that's a five times multiple of the class
12 shares, if just looking at those -- some class
13 members' actual economic losses were mitigated.

14 And so looking on a per-share basis,
15 the settlement is very good. It's 58 cents a share.
16 And this doubles the recovery per share in *MultiPlan*.
17 It represents a recovery on a net cash per share
18 theory of 36.5 percent. This compares very favorably
19 to other settlements. It only falls behind *Latch*,
20 *Eos*, *Sharecare*, and *MoneyLion* on this metric.

21 The remaining *Activision* factors
22 likewise support settlement approval and approval of
23 the plan of allocation. The plan of allocation we
24 submitted here is similar to the plan of allocation

1 submitted and approved in many other cases, such as
2 *Eos*, *Gores IV*, *Latch*, *MoneyLion*, and *QuantumScape*. It
3 provides for a nominal damages or base amount to be
4 provided to all stockholders. And it also -- all
5 class members, excuse me. It also allows class
6 members to recover for their actual damages when they
7 submit claims.

8 Plaintiffs' counsel seeks an award of
9 attorneys' fees in this case of \$2,240,000, inclusive
10 of \$59,619.12 in expenses. So that amounts to
11 approximately 15.6 percent in fees, with the rest
12 being made up of expenses.

13 The Court looks at the *Sugarland*
14 factors in determining the appropriateness of the
15 requested fee award and grants the greatest weight to
16 the benefits conferred. As discussed, the benefits
17 here are substantial. It's a 36.5 percent recovery of
18 net cash per share damages that plaintiffs might be
19 able to obtain if they were successful at trial. The
20 Court can also look at the *Southern Peru* factors in
21 determining an appropriate fee range.

22 Here, there were meaningful litigation
23 efforts. Defendants raised a novel theory that had
24 significant consequences. There was motion briefing.

1 There was a robust 220 process, deep dive of those
2 documents, and a filing of the complaint. So
3 plaintiffs believe that this case falls within the 15
4 to 25 percent fee range.

5 Precedent also supports this fee
6 award. In *GeneDX*, the Court awarded a 19.5 percent
7 fee. There was some motion practice, but no
8 depositions, no significant discovery. In *MoneyLion*,
9 the Court awarded 18 percent. There was no motion
10 practice, though there was robust 220 discovery. In
11 *AvePoint*, the Court awarded 14 percent. There, there
12 was no motion practice and no discovery.

13 Plaintiffs' counsel took this
14 litigation on a contingency basis. And that was with
15 substantial risk. In addition to the novel issues
16 raised by remand and removal, and the issues raised by
17 defendants with regard to SLUSA, the delta between the
18 redemption price and net cash per share here was only
19 \$1.57. That delta is yet to be tested. And I think
20 that as you get closer to 20 percent, challenges arise
21 with those claims.

22 The time and effort of counsel also
23 support the requested fee award. In total, counsel
24 spent 1,163.2 hours from inception through the signing

1 of the amended settlement stipulation. This amounts
2 to a lodestar multiple of approximately 1.98 times and
3 an hourly rate of \$1,874.47, both of which fall within
4 the range of lodestar multiples and hourly rates
5 awarded in other breach of fiduciary duty cases.

6 Ultimately, no cases are easy to try,
7 this one included. New Aeva stock traded above the
8 redemption price for a period of six months on
9 significant volume. And *Hennessy* tells us that this
10 may complicate or mitigate the available damages.
11 Given the lack of reliable projections in this case, I
12 think that the most likely fee award would be the net
13 cash per share damages. So a 36.5 percent recovery is
14 excellent.

15 As to the final consideration, counsel
16 have a long-standing practice before the Court of
17 Chancery, including in de-SPAC merger cases.

18 Plaintiffs also move the Court for an
19 award of incentive awards to the named plaintiff in
20 the amount of -- named plaintiffs, excuse me, in the
21 amount of \$2500. The plaintiffs here reviewed
22 pleadings. They conducted 220 demands. And service
23 awards of 2500 in these circumstances, which is a
24 modest award, we think is reasonable and appropriate.

1 The Court in several other de-SPAC merger cases have
2 awarded similar or greater incentive awards in similar
3 circumstances.

4 And unless Your Honor has any
5 questions, I would be happy to turn it back over to
6 you.

7 THE COURT: No questions. Thank you
8 very much.

9 ATTORNEY TUCKER: Thank you very much.

10 THE COURT: Mr. Measley, is there
11 anything that you or your colleagues would like to
12 add?

13 ATTORNEY MEASLEY: Nothing from
14 defendants, Your Honor.

15 THE COURT: Thank you very much.

16 ATTORNEY TUCKER: Your Honor, one
17 thing I should mention. There have been no objections
18 to the settlement.

19 THE COURT: Fantastic. And I note for
20 the record that there are no objectors in the
21 courtroom today.

22 Well, thank you, Ms. Tucker, for your
23 presentation, and thank you for your brief. I have a
24 bench ruling prepared that I can read into the record

1 now if you will bear with me.

2 Before me this afternoon is the
3 proposed settlement of In re InterPrivate Acquisition
4 Corp. Stockholder Litigation, which is Civil Action
5 No. 2024-0221-LWW.

6 I will start by briefly summarizing
7 the factual allegations in this case and the events
8 leading up to the settlement. I note that I haven't
9 made any findings of fact in this case, and I'm not
10 making any today.

11 At a high level, the case concerns a
12 March 2021 de-SPAC merger between InterPrivate, which
13 was a SPAC, and Legacy Aeva, Inc., which was then a
14 private company. The plaintiffs assert that
15 defendants, including the SPAC's directors, officers,
16 and controlling stockholder, breached their fiduciary
17 duties by prioritizing their own personal and
18 financial interests during the merger, leading to the
19 omission of material information necessary for public
20 stockholders to make an informed redemption decision.
21 Their main allegation is that the defendants were
22 incentivized to convince public stockholders not to
23 redeem their shares, as each share redeemed would --
24 again, according to the complaint -- dilute the

1 defendants' interests and reduce the liquidity
2 provided to the post-merger combined company.

3 The defendants allegedly published a
4 false and materially misleading proxy that withheld
5 information about the high degree of dilution of SPAC
6 public stockholders and dissipation of cash that would
7 occur in relation to the merger. The proxy also
8 allegedly omitted Legacy Aeva's true financial
9 prospects. And according to the plaintiffs, the
10 resulting merger was a financial windfall for the
11 defendants.

12 These allegations are based in part on
13 documents produced from Section 220 demands brought by
14 the plaintiffs. Plaintiff Smith filed his action
15 first, with an amended complaint filed in April of
16 2024. The defendants then moved that action to
17 federal court, the District of Delaware, on the theory
18 that SLUSA preempted the plaintiffs' claims. Smith
19 moved to remand. The defendants opposed the motion
20 for remand and also cross-moved to dismiss.

21 I believe in the meantime Plaintiff
22 Katz then separately filed a complaint here in this
23 court. And in June of 2024, the parties participated
24 in a full-day mediation session overseen by Phillips

1 ADR. They reached an agreement in principle to settle
2 for \$14 million in cash.

3 Smith moved for a preliminary approval
4 in federal court, and the court expressed concern
5 about whether it had jurisdiction to consider the
6 settlement. I learned today that there was, in fact,
7 diversity jurisdiction. But in March, Smith's motion
8 for remand was granted, and the Smith and Katz cases
9 were consolidated before me in this court.

10 An amended stipulation of settlement
11 was filed here on April 29th of 2025.

12 And on May 23rd, I entered a
13 scheduling order providing for notice of the
14 settlement to the stockholders and preliminarily
15 approving the form of that notice informing
16 stockholders of today's hearing.

17 I note again that there have been no
18 objections filed, and there are no objectors here in
19 the courtroom today.

20 And so with that, I will turn to the
21 matters on my agenda for resolution.

22 I will start with notice, which
23 satisfies the requirements of Rule 23. I approved the
24 form of notice on May 23rd, when I entered an order to

1 that effect. And after reviewing the affidavit of
2 notice that was filed, I believe on September 3rd, I
3 can also confirm that the provision of notice was
4 adequate.

5 The next matter is certification of a
6 class for settlement purposes. The parties stipulated
7 to a proposed settlement class, which is defined in
8 paragraph I-A of the amended stipulation of
9 settlement. Broadly speaking, it includes holders of
10 InterPrivate Class A common stock during the class
11 period who continued to hold redeemable common stock
12 on the redemption deadline. Rule 23 governs class
13 certification in this court. It's a two-step process.
14 The class must satisfy the four criteria of Rule 23(a)
15 and at least one subsection of Rule 23(b).

16 The four requirements of Rule 23(a)
17 are numerosity, commonality, typicality, and adequacy
18 of representation. And each of these requirements are
19 met here.

20 As of the March 9th, 2021, redemption
21 deadline, there were more than 24 million shares of
22 InterPrivate Class A common stock outstanding, held by
23 thousands of beneficial holders. The factual and
24 legal issues are common among members of the class and

1 arise from the same alleged conduct by the defendants.
2 And the plaintiffs have fairly and adequately served
3 the interests of the proposed class, as have their
4 counsel.

5 In terms of the Rule 23(b)
6 requirements, certification would, in my view, be
7 appropriate under subsections (1) or (2). Absent
8 certification, there could be multiple lawsuits,
9 risking inconsistent adjudications. And the
10 plaintiffs allege the defendants engaged in a single
11 course of conduct that is generally applicable to the
12 class. I will, because of that, approve the proposed
13 class as a non-opt-out class for purposes of
14 settlement only.

15 Next up is to consider the merits of
16 the settlement. And as explained in *In re*
17 *Philadelphia Stock Exchange*, my role is "to consider
18 the nature of the claim, the possible defenses
19 thereto, the legal and factual circumstances of the
20 cases, and then to apply [my] own business judgment in
21 deciding whether the settlement is reasonable in light
22 of [those] factors." For the record, that's 945 A.2d
23 1123, at pages 1137 to 38, from the Delaware Supreme
24 Court in 2008.

1 As we often put it in this court
2 simply, I must evaluate whether the settlement is fair
3 and reasonable, focusing on the "give" and the "get."

4 The "get," or the benefit of the
5 settlement here, consists of a \$14 million cash
6 payment to the class. It's favorable on a per-share
7 basis relative to many of the other SPAC settlements
8 that I've heard.

9 I compare this to the "give," which is
10 the claims being released. The release is
11 appropriately limited to claims asserted in the
12 complaint or that the plaintiffs could have asserted
13 based on the same set of operative facts. It's
14 consistent with many other releases that this court
15 has approved, and I think it's appropriate here. The
16 claims being released, as I explained before, arise
17 from the alleged impairment of public stockholders'
18 redemption rights in the form of allegedly materially
19 misleading disclosures. The plaintiffs say that it
20 was reasonably conceivable the entire fairness
21 standard applied to these claims, as outlined in
22 decisions like *In re MultiPlan*.

23 At the same time, as the plaintiffs
24 point out in their brief and acknowledge today, there

1 were meaningful litigation risks for the plaintiffs.

2 One particular problem could have been proving actual
3 economic harm tied to the redemption price, especially
4 because Aeva's stock traded above the redemption value
5 for a substantial period of time -- for months --
6 after closing. But on balance, I believe that the
7 certainty of the monetary recovery for the class
8 outweighs the potential and uncertain recovery on the
9 claims. And because of that, the settlement is fair,
10 adequate, and reasonable, and I approve it on those
11 grounds.

12 The arm's-length negotiations before a
13 skilled mediator and the lack of objections also
14 supports that conclusion.

15 I'll also approve the proposed plan of
16 allocation, which is consistent with those recently
17 endorsed by this court in other similar settlements.
18 And as I remarked in prior cases where I considered
19 this approach, I believe that it's an equitable one in
20 cases of this nature. It allows for a distribution of
21 settlement proceeds that better compensates
22 stockholders with greater losses. I have some
23 reservations about the nominal payment, but it's
24 ultimately a more appropriate allocation than a flat

1 pro rata distribution. And so I similarly approve it
2 here.

3 That leaves the plaintiffs' request
4 for an award of attorneys' fees and the two individual
5 plaintiffs' requests for incentive awards.

6 I'll start with the fee award request.
7 Counsel request \$2.24 million, inclusive of an expense
8 reimbursement of just under \$60,000. The expenses, I
9 note, all appear reasonable to me.

10 In setting fee awards, the Court must
11 "make an independent determination of reasonableness."
12 And that's from *Goodrich v. E.F. Hutton Group, Inc.*,
13 681 A.2d 1039. To do that, I must exercise my own
14 business judgment in determining whether an award is
15 reasonable and appropriate. The *Sugarland* factors
16 guide that analysis. They are: the result achieved,
17 the time and effort of counsel, complexity of the
18 litigation, contingency risk borne by counsel, and
19 counsel's standing and ability.

20 I'll start with the benefit conferred
21 in the litigation, which is the most important of the
22 *Sugarland* factors. And the benefit is an obvious one
23 here. It's the \$14 million cash fund, which will be
24 distributed to stockholders after paying certain

1 administrative costs and any fee and expense awards.

2 The Delaware Supreme Court's decision
3 in *Americas Mining* observed that when a case settles
4 early, the typical range for a fee is 10 to
5 15 percent. And when a case settles after meaningful
6 litigation efforts, fees are generally awarded in the
7 15 to 25 percent range.

8 The secondary *Sugarland* factors
9 effectively moderate the percentage of the recovery
10 that's appropriate for a fee award. An early
11 settlement will typically not command the same
12 percentage as a recovery obtained after years of
13 hard-fought litigation. That's especially true if the
14 case isn't particularly novel or complex.

15 Now, this case settled before any
16 discovery or dispositive motions practice, though
17 there were the 220 demands that I heard about before.

18 At the same time, plaintiffs' counsel
19 defeated a novel removal attempt, securing a remand
20 from the federal court that they argue preserved the
21 class's claims in this forum.

22 Coupled with certain other *Sugarland*
23 factors, the contingent nature of the representation
24 and the skill of counsel on both sides, I believe that

1 the *Sugarland* factors support the award that counsel
2 has sought. It's about 16 percent of the recovery,
3 net of expenses, and, in my view, strikes the
4 appropriate balance because it fairly rewards counsel
5 for achieving a strong result for the class through
6 efficient and contingent litigation, including the
7 novel remand and removal issue that I mentioned
8 before.

9 The next step of the analysis, after
10 looking at the *Sugarland* factors, is to consider the
11 lodestar as a cross-check. And I generally do that by
12 looking at the multiplier and the implied hourly rate.

13 In this case, plaintiffs' counsel
14 collectively put in just under 1200 hours on the case
15 from inception through the date that the stipulation
16 of settlement was signed. The total lodestar is about
17 \$1.1 million. The implied hourly rate from the net
18 requested fee award comes out to about \$1,875. I
19 don't view that as a windfall. Nor is the multiplier,
20 which is less than 2x in this case.

21 So taking all of that into account, I
22 am going to approve the fee and expense award that's
23 requested. And I believe that it's reasonable and
24 appropriate in this case.

1 The final matter on my agenda is the
2 plaintiffs' request for incentive awards. They are
3 each requesting a \$2500 incentive award, to be paid
4 from plaintiffs' counsel's fee and expense award.
5 Neither plaintiff was required to produce formal
6 discovery, but they maintained some involvement in the
7 litigation, as I understand. The level of
8 participation is not extraordinary, but the incentive
9 award being sought is not an extraordinary one either.
10 So given their efforts and commitment to the class, I
11 am comfortable awarding \$2500 to each of the named
12 plaintiffs.

13 To recap, I will certify the class. I
14 will approve the settlement. I will approve the
15 proposed plan of allocation. I approve the proposed
16 fee and expense award. And I award the \$2500
17 incentive awards to each of the named plaintiffs.

18 That's everything that I had on my
19 agenda today. Thank you for bearing with me while I
20 worked through that on the record.

21 Congratulations to all of you on a
22 really well-done settlement in an interesting and
23 tricky case.

24 Thank you for coming out on a Friday.

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1 It was very nice to see you-all. And we are
2 adjourned. I hope you have a great weekend.

3 (Proceedings concluded at 1:58 p.m.)
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CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 26 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings on pages 14 through 26, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 24th day of September, 2025.

/s/ Debra A. Donnelly

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

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Tab 13

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

- - -

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

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

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

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1 APPEARANCES:

2 CHRISTINE M. MACKINTOSH, ESQ.
Grant & Eisenhofer P.A.

3 -and-

4 JASON M. AVELLINO, ESQ.
Robbins Geller Rudman & Dowd LLP

-and-

5 GREGORY E. DEL GAIZO, ESQ.
ERIK W. LUEDEKE, ESQ.
6 of the California Bar
Robbins Geller Rudman & Dowd LLP
7 for Plaintiffs

8
9 SUSAN W. WAESCO, ESQ.
Morris, Nichols, Arsht & Tunnell LLP

10 -and-

11 MARIE C. BAFUS, ESQ.
of the California Bar
Fenwick & West LLP
12 for Defendants

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

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

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

11 THE COURT: Wonderful. Thank you.
12 Welcome.

13 Good morning, Ms. Mackintosh.

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

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

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

1 THE COURT: I have not.

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

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

14 THE COURT: Great.

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

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

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

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

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

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

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

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

24 THE COURT: I hope so. I spent more

1 time sorting through this than I care to admit.

2 Hopefully we've come to a good place.

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

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

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

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

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

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

15 THE COURT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 Two days later, Apex's board
10 reconvened and approved the merger during a cursory
11 15-minute meeting. The board never met again.

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

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

24 Second, the proxy failed to disclose

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

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

12 Finally, the proxy failed to disclose
13 material information about the economic interests that
14 William Blair, Apex's financial adviser, had in the
15 merger. The proxy didn't disclose that William Blair
16 would receive only \$25,000 in expense reimbursements
17 unless a merger closed, and it also didn't disclose
18 that William Blair stood to receive a portion of a
19 \$13.5 million deferred underwriting and capital assets
20 markets advisory fee in the event a merger closed.

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

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

1 rolled over into the New AvePoint.

2 On November 15, 2021, New AvePoint
3 released its third quarter 2021 financial results.
4 That was the first full quarter following the merger.
5 And the results were very disappointing. After they
6 were announced, New AvePoint stock dropped nearly
7 10 percent, and it remained depressed throughout 2022.

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

11 The parties engaged in a protracted
12 220 negotiation process that spanned nearly a year.
13 AvePoint twice certified substantial completion only
14 to later be forced to turn over documents that were
15 within the scope of agreed production after plaintiffs
16 identified missing documents and pressed for more.

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

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

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

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

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

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

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

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

7 In addition, the 14.4 million provides
8 14.2 percent of the class's net cash per share
9 damages. And we think that compares favorably with
10 the median 12.35 percent of potential damages
11 recovered in the post-*Southern Peru* entire fairness
12 settlement that Vice Chancellor Laster went through in
13 his *Dell Class V* opinion.

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

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

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

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

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

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

24 Let's move on to the request for class

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

8 And the usual suspects are excluded
9 from the class.

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

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

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

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

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

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

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

16 THE COURT: No questions, thank you.

17 ATTORNEY MACKINTOSH: We are seeking
18 an award of \$2,060,000 which is 14 percent of the
19 \$14.4 million settlement, inclusive of a little under
20 \$50,000 of expenses reasonably incurred in litigating
21 the action.

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

1 this case.

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

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

11 Under the *Americas Mining* scale, fees
12 between 10 and 15 percent are typically awarded for
13 early-achieved settlements, and then it moves to 15 to
14 25 percent for meaningful litigation effort
15 settlements.

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

1 other documents that we should have given you.

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

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

24 Finally, we request permission to make

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1 \$2,000 incentive award payments to both of the named
2 plaintiffs to be paid from our attorneys fee award.
3 These awards are modest and comparable to what has
4 been awarded in similar cases, and we think that those
5 should be approved, as well.

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

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

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

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

14 THE COURT: Sure.

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

24 THE COURT: I completely understand.

1 Thank you very much.

2 ATTORNEY WAESCO: Thank you.

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

8 ATTORNEY WAESCO: Thank you.

9 THE COURT: It's nice to see you all.
10 And I really appreciate you getting together to
11 resolve the class issue so quickly. I know that that
12 wasn't an easy lift since I dropped it on you at
13 5 p.m. yesterday. But thank you. I'm grateful for
14 that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I'll start with the "give."

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

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

1 defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The plaintiffs seek an award that

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

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

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

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

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

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

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

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

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

1 paid out of counsel's fee.

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

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

12 That's it. Any questions?

13 ATTORNEY MACKINTOSH: No, thank you so
14 much.

15 ATTORNEY WAESCO: Thank you, Your
16 Honor.

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

19 (Proceedings concluded at 11:35 a.m.)
20
21

22 - - -
23
24

CERTIFICATE

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

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

/s/ Kathy Cortopassi

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

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

Tab 14

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

- - -

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

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

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

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

2 DAVID M. SBORZ, ESQ.
Andrews & Springer LLC

3 -and-

4 GREGORY E. DEL GAIZO, ESQ.
of the California Bar
Robbins LLP

5 -and-

6 ERIK W. LUEDEKE, ESQ.
of the California Bar
Robbins Geller Rudman & Dowd LLP
7 for Plaintiff

8
9 STEPHEN C. NORMAN, ESQ.
Potter, Anderson & Corroon LLP

10 -and-

11 DAVID B. HENNES, ESQ.
of the New York Bar
Ropes & Gray LLP

12 -and-

13 SARAH M. SAMAHA, ESQ.
of the District of Columbia Bar
Ropes & Gray LLP
14 for Defendants

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

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

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

8 THE COURT: Of course.

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

11 THE COURT: Welcome back.

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

14 THE COURT: Welcome.

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

19 THE COURT: That's fine. Thank you.

20 Good morning, Mr. Norman.

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

24 ATTORNEY HENNES: Good to see you

1 again.

2 THE COURT: Good to see you, too.

3 ATTORNEY NORMAN: And Sarah Samaha.

4 THE COURT: Welcome.

5 ATTORNEY NORMAN: Thank you.

6 THE COURT: Thank you very much.

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

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

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

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

23 THE COURT: That order sounds fine.

24 Thank you.

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

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

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

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

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

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

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

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

24 Our allegations are that the board was

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 THE COURT: That's fine. Thank you.

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

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

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

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

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

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

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

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

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

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

13 Regarding Rule (b)(1), there is the
14 risk of inconsistent or varying adjudications. And
15 concerning the two defendants have acted on grounds
16 that are generally applicable to the class, so
17 consistent with other decisions of this court,
18 including AEVA last week, we think this satisfies both
19 23(a), (b)(1), and (b)(2).

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

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

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

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

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

1 settlement here.

2 Looking at the Rule 23(f)(5) criteria,
3 starting with whether the settlement was within the
4 range of reasonableness, looking at traditionally the
5 "give" versus the "get," here the "get" is
6 \$12 million. This is directly attributable to this
7 action. On a per share basis, the \$12 million equates
8 to 59 cents per share. That's consistent with other
9 *MultiPlan* settlements. Last week we had AEVA, which
10 was 58 per share. *Lordstown*, another example is 57
11 cents per share.

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

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

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

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

11 And, finally, what defendants have
12 strenuously argued to us was that the European
13 gambling issue was not really what was moving the
14 stock. That dovetails a bit into some of the still
15 unknowns within the SPAC world really regarding
16 damages. What we heard from defendants is that there
17 must be a link between the false statement and the
18 proxy, the truth coming out, and a disclosure that
19 moved the stock price altogether. Now to me, that's a
20 10(d) case, not a breach of fiduciary duty case. But
21 that was an argument we were going to face, a concern
22 we had.

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

1 was about \$78.5 million. That would make the recovery
2 here about 15.3 percent of those damages. That's
3 consistent with some other cases such as *AvePoint* was
4 14.2 percent of net-cash-per-share damages; *Finserve*,
5 15.7 percent net-cash-per-share damages.

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

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

24 My colleagues at Robbins Geller and I

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

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

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

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

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

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

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

8 THE COURT: No questions, thank you.

9 ATTORNEY DEL GAIZO: So moving on to
10 the fee and expense award, plaintiff here requests
11 17 percent of the funds. It equates to \$2.04 million.
12 This is an all-in amount that includes plaintiffs'
13 expenses of a little over 55,000. If you back that
14 number out, we're a little under 2 million.

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

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

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

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

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

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

1 At roughly 22,000 pages of discovery and no
2 deposition, Vice Chancellor Fioravanti awarded
3 17.5 percent of the fund there. Here, we're a little
4 bit below it asking for 17 percent.

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

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

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

18 Looking at the lodestar cross-check,
19 this also supports the amount we requested. We spent
20 1400 hours on the case, roughly. About a million
21 dollars in total time, stopping when we signed the
22 SIP. It equates to an hourly rate under \$1500 an
23 hour. After taking out expenses, it's a multiplier of
24 1.96.

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

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

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

20 Unless Your Honor has any questions?

21 THE COURT: No questions. Thank you
22 very much.

23 ATTORNEY DEL GAIZO: Thank you.

24 THE COURT: Mr. Hennes, do you have

1 anything you'd like to add?

2 ATTORNEY HENNES: No, Your Honor.

3 Nothing at this time. Appreciate it.

4 THE COURT: All right. Thank you very
5 much.

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

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

13 Before me this morning is the proposed
14 settlement of Newman versus Sports Entertainment
15 Acquisition Holdings LLC, which is Civil Action Number
16 2023-0538-LWW.

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

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

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

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

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

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

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

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

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

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

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

1 and no objectors appeared at the hearing this morning.

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

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

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

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

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

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

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

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

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

1 circumstances of the case, and to apply [my] own
2 business judgment in deciding whether the settlement
3 is reasonable in light of those factors." That's from
4 *In Re Philadelphia Stock Exchange*, 945 A.2d 1123, at
5 pages 1137 to 38 from the Delaware Supreme Court in
6 2008.

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

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

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

24 But the plaintiff acknowledges that

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

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

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

1 claims process.

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

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

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

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

21 In setting fee awards, I "must make an
22 independent determination of reasonableness." That's
23 from *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d
24 1039. To do that, I must apply my own business

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

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

8 In *Americas Mining*, the Delaware
9 Supreme Court observed that, when a case settles
10 early, fees are typically in the 10 to 15 percent
11 range. And when a case settles after "meaningful
12 litigation efforts," meaning "some level of motion
13 practice" and discovery, fees are awarded in the 15 to
14 25 percent range.

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

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

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

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

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

24 That leaves the matter of Mr. Newman's

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

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

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

16 Any other questions or anything we
17 should talk about?

18 ATTORNEY SBORZ: No, Your Honor.

19 ATTORNEY HENNES: Looking forward to
20 seeing you on Wednesday.

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

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

24 - - -

CERTIFICATE

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

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

/s/ Kathy Cortopassi

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

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

Tab 15

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, October 21, 2025
3:15 p.m.

- - -

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

- - -

TELEPHONIC BENCH RULING ON THE MOTION TO APPROVE THE
PROPOSED SETTLEMENT

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(302) 255-0526

1 APPEARANCES:

2 DAVID M. SBORZ, ESQ.
Andrews & Springer LLC

3 -and-

4 JASON M. AVELLINO, ESQ.
Robbins Geller Rudman & Dowd LLP
for Plaintiff

5 JAMES M. YOCH, JR., ESQ.
6 Young Conaway Stargatt & Taylor, LLP
-and-

7 JEFFREY CROUGH, ESQ.
WILL STRIPLING, ESQ.
8 of the Texas Bar
Vinson & Elkins LLP
9 for Defendants

10 HERBERT W. MONDROS, ESQ.
Rigrodsky Law, P.A.

11 -and-

12 RAFFI MELANSON, ESQ.
of the Massachusetts Bar
Hagens Berman Sobol Shapiro LLP
13 for Objecter

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CHANCERY COURT REPORTERS

500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 THE COURT: Good afternoon. Vice
2 Chancellor joining. Do we have counsel for the
3 parties on the line?

4 ATTORNEY SBORZ: We do, Your Honor.

5 ATTORNEY RICKERT: Yes, Your Honor.

6 THE COURT: Do we have counsel for the
7 objector on the line?

8 ATTORNEY MONDROS: Yes, Your Honor.

9 ATTORNEY MELANSON: Yes, Your Honor.

10 THE COURT: Counsel, thank you for
11 getting on the line. I'm going to give you my ruling
12 on the motion to approve the settlement, and I am
13 going to rule on the objection. If you would kindly
14 put your phones on mute, I will give my bench ruling.
15 It is going to last approximately 30 to 40 minutes
16 based on my estimation.

17 The plaintiff, John Malork, or
18 "Plaintiff," seeks approval of a class action
19 settlement of claims arising out of the merger of
20 Decarbonization Plus Acquisition Corp., or "Decarb," a
21 special purpose acquisition company, or "SPAC," and
22 Hyzon Motors Inc., or "Legacy Hyzon," the resulting
23 entity being "Hyzon."

24 In exchange for a release of claims,

1 the settlement consideration to the class is
2 \$8.8 million in cash. For the benefits conferred by
3 the settlement, Plaintiff's counsel seeks an award of
4 attorneys' fees and expenses in the amount of
5 \$1,760,000 in the aggregate, which represents 20
6 percent of the settlement amount. Plaintiff's counsel
7 also seek approval of a \$10,000 incentive award to the
8 Plaintiff to be paid out of any fee award.

9 There is one objection to the proposed
10 settlement. Former Decarb stockholder Alfred Miller
11 has objected. Miller is the lead plaintiff in a
12 parallel federal securities action. I'll discuss the
13 grounds for the objection as I go through my ruling.

14 The operative complaint alleges that
15 the individual defendants, as directors, and for some
16 of them also as officers, of Decarb, collectively the
17 "Director Defendants," and Riverstone Investment Group
18 LLC, Decarbonization Plus Acquisition Sponsor, LLC,
19 and WRG DCRB Investors, LLC, in their capacities as
20 Decarb's alleged controlling stockholders, which I
21 refer to collectively as the "Controller Defendants,"
22 breached their fiduciary duties in negotiating,
23 recommending, and approving the de-SPAC merger with
24 Legacy Hyzon. I refer to the Controller Defendants

1 and the Director Defendants collectively as the
2 "Decarb Defendants."

3 The Plaintiff has also asserted a
4 claim against the Decarb Defendants for unjust
5 enrichment and a claim against Craig M. Knight and
6 Legacy Hyzon, collectively the "Legacy Hyzon
7 Defendants," for aiding and abetting the Decarb
8 Defendants' breach of fiduciary duties.

9 On November 4, 2024, the Plaintiff
10 reached an agreement in principle to settle his claims
11 against the Decarb Defendants. On May 14, 2025,
12 Plaintiff voluntarily dismissed the Legacy Hyzon
13 Defendants, without prejudice, pursuant to Court of
14 Chancery Rule 23(f). On June 10, the remaining
15 parties executed the settlement agreement.

16 On June 25, the Court entered a
17 scheduling order providing for an October 3, 2025,
18 settlement hearing. Miller filed a timely objection,
19 to which the parties have responded. Miller's counsel
20 presented argument on the objection at the October 3
21 hearing, and no other objections have been filed.

22 I have four issues to address today:
23 class certification; the proposed settlement,
24 including the plan of allocation; the application for

1 attorneys' fees and expenses; and the proposed
2 plaintiff incentive award.

3 The class is generally defined as a
4 non-opt out class of "all [p]ersons who held shares of
5 Decarb Class A common stock as of [4:00 p.m., Eastern
6 Time, on July 13, 2021], either of record or
7 beneficially, and who did not redeem all of their
8 shares, including their successors-in-interest who
9 obtained shares by operation of law, but excluding
10 Excluded Persons." "Excluded Persons" are defined as
11 the Decarb Defendants and the Legacy Hyzon Defendants,
12 "as well as the members of their immediate families,
13 and any entity in which any of them has a controlling
14 interest, and the heirs, successors, or assignees of
15 any such excluded party[, including] any trusts,
16 estates, entities or accounts that held shares of
17 Decarb for the benefit of any of the foregoing."

18 The Legacy Hyzon Defendants are not
19 parties to the settlement, and the release does not
20 extend to claims against them. The settlement
21 agreement proposes to certify the Plaintiff as the
22 class representative and Robbins Geller Rudman & Dowd
23 LLP, Robbins LLP, and Andrews & Springer LLC as class
24 counsel.

1 Court of Chancery Rule 23 governs
2 class certification. To be certified, the class must
3 first satisfy the four prerequisites of Rule 23(a):
4 numerosity, commonality, typicality, and adequacy. If
5 those requirements are met, then this court must find
6 that the suit properly fits into one of the Rule 23(b)
7 categories.

8 Under the Delaware Supreme Court's
9 decision in *Prezant v. De Angelis*, 636 A.2d 915 from
10 1994, this court must make explicit findings on the
11 record that the Rule 23 requirements are satisfied.

12 There is ample precedent in cases
13 challenging de-SPAC mergers under analogous
14 circumstances to certify the proposed class here under
15 Rule 23(b)(1) and (b)(2). See, for example, the Final
16 Order and Judgment in *TS Innovation Acquisitions*
17 *Sponsor, L.L.C. Stockholder Litigation*, Civil Action
18 No. 2023-0509-LWW on July 10, 2025; the Final Order
19 and Judgment in *Darcy Lien v. Eagle Equity Partners*
20 *II, LLC, et al.*, Civil Action No. 2022-0972-PAF from
21 September 2, 2025; and, with minor differences, the
22 Order and Final Judgment in *Martel, et al. v. Fusion*
23 *Sponsor LLC, et al.*, Civil Action No. 2024-0329-NAC on
24 July 24, 2025.

1 First, numerosity requires that "the
2 class is so numerous that joinder of all members is
3 impracticable". That's Rule 23(a)(1). Decarb was
4 publicly traded with approximately 22.6 million Class
5 A shares issued and outstanding at the time of the
6 merger, and just over 9 percent of those shares were
7 redeemed in connection with the merger. Therefore,
8 the proposed class consists of holders of
9 approximately 20.5 million shares. Joinder of so many
10 stockholders is impracticable, and the numerosity
11 requirement is satisfied.

12 Commonality requires "questions of
13 fact or law common to the class." That's Rule
14 23(a)(2). Here, the claims allege that the Decarb
15 Defendants (i) breached their fiduciary duties by
16 impairing stockholder redemption rights; (ii) failed
17 to disclose material information and/or made
18 materially misleading statements in the proxy
19 statement for the merger and investor presentations in
20 connection with the merger; (iii) undertook an unfair
21 merger process at an unfair price; (iv) unjustly
22 enriched themselves by securing unique financial
23 benefits to the detriment of the public stockholders;
24 and (v) injured Plaintiff and other members of the

1 class through their conduct. These claims raise
2 common questions of law and fact pertaining to each
3 member of the class, and accordingly, commonality is
4 satisfied.

5 Rule 23(a)(3) requires that "the
6 claims or defenses of the representative parties are
7 typical of the claims or defenses of the class."
8 Here, Plaintiff's claims for breach of fiduciary duty
9 and claims for unjust enrichment arise from the same
10 course of conduct that would underlie the claims of
11 all Class A stockholders who did not redeem their
12 shares in connection with the merger, and the defenses
13 to the Plaintiff's claims would be typical of the
14 defenses asserted against the class. No information
15 has been provided to the court to suggest otherwise.

16 Miller objects to certifying the
17 class. He contests the adequacy of notice provided to
18 the class, and he urges the court not to approve the
19 settlement, which he argues extinguishes and offers
20 inadequate consideration for currently live federal
21 law claims that he is pursuing in the United States
22 District Court for the Western District of New York.

23 A brief history of the federal
24 securities class action is warranted. The federal

1 securities class action was filed on September 30,
2 2021, and asserted claims under Sections 10(b) and
3 20(a) of the Exchange Act. Over the course of four
4 years, the federal plaintiffs amended the complaint
5 three times. Miller's third amended complaint filed
6 on June 23, 2023, added Section 14(a) claims tracking
7 a redemption theory, which, Miller acknowledges,
8 significantly overlaps with the breach of fiduciary
9 duty claims that Malork has asserted here and will
10 release in connection with the settlement.

11 On July 14, 2025, the court in the
12 federal action dismissed the Section 14(a) claims. In
13 its ruling, the federal court did not give Miller
14 leave to file an amended complaint to reassert his
15 Section 14(a) claims. Instead, it permitted him to
16 file a motion to amend the complaint. Miller has
17 filed such a motion, which has been fully briefed and
18 is awaiting decision. But to be clear, there are no
19 live Section 14(a) claims in the federal action.

20 Miller has standing to object to the
21 proposed settlement here because he is a member of the
22 proposed class.

23 Miller contends that the Plaintiff's
24 claims are atypical of those of the class he purports

1 to represent. Miller makes much ado out of the
2 Plaintiff not disclosing the number of shares he owned
3 in Decarb. There is no dispute that Malork owned
4 shares of Decarb at the relevant time and is a member
5 of the class that he purports to represent. He has
6 filed affidavits required under Rule 23 confirming as
7 much, and the objector does not challenge the veracity
8 of the affidavits. Miller's gripe concerns the size
9 of Malork's shareholdings in Decarb.

10 The number of shares that a plaintiff
11 owns is a factor that federal courts consider to
12 determine lead plaintiff status, and it is also a
13 factor that this court considers when there is a
14 contest among stockholder plaintiffs in being selected
15 as a lead plaintiff. But it is not an express
16 criterion under Rule 23. In any event, there is no
17 assertion that the Plaintiff was not a stockholder of
18 Decarb at the relevant time or that the size of his
19 shareholdings makes him unqualified to serve as the
20 class representative. As disclosed at the settlement
21 hearing, the Plaintiff owned 400 shares of Decarb.
22 Thus, the court finds Plaintiff's claims are typical
23 across the class.

24 Adequacy requires that the

1 "representative parties will fairly and adequately
2 protect the interests of the class." That's Rule
3 23(a)(4). This requirement will be satisfied when the
4 class representative is represented by competent and
5 experienced counsel and the representative's interests
6 do not conflict with the class's interests. See *In re*
7 *Lawson Software, Inc.*, 2011 WL 2185613, at *2 from
8 this court on May 27, 2011.

9 The recovery achieved through this
10 litigation by Plaintiff's counsel on behalf of the
11 Plaintiff and absent class members is indicative of
12 the competence and effectiveness of Plaintiff's
13 counsel. Plaintiff's counsel is well-known to this
14 court in class and derivative litigation and have
15 achieved strong results for their clients over the
16 years. The Plaintiff has held Decarb Class A shares
17 at all relevant times, and he submitted an affidavit
18 that satisfies Rule 23(f)(2)(A).

19 Miller objects to the certification of
20 the class because Miller avers that the Plaintiff has
21 not made a showing of adequacy. Miller asserts that,
22 "because [Plaintiff] has chosen to settle early in the
23 litigation, before moving for class certification,
24 there is no way of testing whether he is subject to

1 any unique circumstances or defenses that make him
2 'markedly different from that of the members of the
3 class.'" That's in the objection at pages 25 to 26.

4 This argument is entirely speculative.
5 Miller took no discovery into the settlement, even
6 though he could have served discovery as an objector.
7 See *In re AMC Entertainment Holdings, Inc.*,
8 2023 WL 3750545, at *1 from this court on May 31,
9 2023. If such an infirmity is alleged to exist,
10 Miller had every opportunity to find it and present
11 evidence of it to this court.

12 Miller also contends that the
13 Plaintiff is inadequate because the Plaintiff did not
14 include Miller and Miller's counsel in settlement
15 conversations. This Delaware courts do not require.
16 In fact, this last challenge is, in my mind, telling
17 as to the real motivation behind the objection. In
18 sum, I reject the objector's challenge to the
19 Plaintiff's adequacy to serve as a class
20 representative.

21 Adequacy, like the remainder of the
22 Rule 23(a) requirements, is satisfied.

23 Having satisfied Rule 23(a), the class
24 must now fall into one of the categories indicated in

1 Rule 23(b). The parties assert that the class should
2 be certified under Rule 23(b)(1) and (b)(2). This is
3 a quintessential class action certifiable under both
4 subsections of the rule. As our Supreme Court
5 observed in *In re Celera Corp. Shareholder Litigation*,
6 59 A.3d 418 at page 433 in 2012, Delaware courts
7 "repeatedly have held that actions challenging the
8 propriety of director conduct in carrying out
9 corporate transactions are properly certifiable under
10 both subdivisions (b)(1) and (b)(2)."

11 Rule 23(b)(1) applies to class actions
12 that are necessary to avoid harms that could arise
13 from inconsistent adjudications of similar claims.
14 Certification under subdivision (b)(1) is appropriate
15 where, as here, adjudication of the claims by any one
16 stockholder would, practically speaking, be
17 dispositive of the interests of other stockholders as
18 well. Certification under Rule 23(b)(2) is also
19 appropriate here because the conduct at issue is
20 generally applicable to all class members.

21 Having found the requirements of Rules
22 23(a) and (b) satisfied, the court must also determine
23 that notice of the resolution of the claims was
24 provided to all class members, as required by Rule

1 23(f)(3).

2 The finalized notice of settlement
3 found at Exhibit A to the affidavit of Jack Ewashko
4 complies with the requirements of Rule 23(f)(3).

5 Mr. Ewashko is Director of Case Management of A.B.
6 Data, Ltd. Class Action Administration Company, or
7 "A.B. Data," the proposed settlement administrator.

8 The June 25, 2025, scheduling order
9 required dissemination of the notice via First-Class
10 U.S. mail or other mail service if mailed outside the
11 U.S., posting the notice on a website established for
12 the settlement, and publication of the notice over the
13 *PR Newswire*. Plaintiff submitted the Ewashko
14 affidavit, which attests that on July 16, 2025, A.B.
15 Data caused notice to be mailed via First-Class U.S.
16 mail to 19,745 potential class members identified by
17 counsel and the 4,899 addresses in A.B. Data's
18 proprietary broker database. A.B. Data also caused
19 the notice to be posted on the Depository Trust
20 Company's Legal Notice System on July 16, 2025. A.B.
21 Data avers that through August 18, 2025, it received
22 304 direct requests for notice and mailed those. A.B.
23 Data also represents that it re-mailed 1,960 notice
24 packets to persons who requested their address to be

1 updated. Altogether, A.B. Data represents that it has
2 mailed a total of 28,421 notices to potential class
3 members. A.B. Data also represents that it set up a
4 telephone help line for class members with questions.

5 Miller challenges the adequacy of the
6 notice. First, this court rejects the argument that
7 Plaintiff's notice is deficient because it did not
8 explain why, in the Plaintiff's view, the settlement
9 amount is reasonable. Plaintiff's notice complied
10 with the court's order and satisfies Rule 23.

11 Admittedly, it would have been better to have included
12 in the notice itself a bit more information about the
13 strengths and weaknesses of the claims. But the
14 notice referred stockholders to a dedicated website
15 which contained the stipulation and the briefs in
16 support of the settlement. It also referred any
17 questions to class counsel and provided contact
18 information in the notice. And as the objector
19 acknowledges, the Plaintiff's brief in support of the
20 settlement contains the information that he asserts
21 was lacking in the notice itself.

22 Second, Miller relies on *In re*
23 *Lendingclub Securities Litigation*, 282 F.Supp.3d 1171
24 from 2017, to argue that the notice should have

1 mentioned the federal action and is not fair and
2 adequate without that information.

3 In *Lendingclub*, the federal court was
4 asked to enjoin state court plaintiffs from sending
5 notice to class participants where both the federal
6 and state court plaintiffs were asserting the same
7 federal claim and there was a pending U.S. Supreme
8 Court case to determine whether the state court had
9 jurisdiction over the federal claim. The court
10 declined to enjoin the state court and instead ordered
11 the parties to amend the notice to the class in state
12 court to include information about the federal action
13 and the Supreme Court case.

14 In regard to this action, the objector
15 requested the court in the Western District of New
16 York to enter a similar order in response to Miller's
17 motion in the federal action to enjoin this action.
18 The federal court has not done so. I also emphasize
19 that there is no pending Section 14(a) claim in the
20 federal action that concerns the proxy disclosures.
21 Those claims were dismissed, not with leave to amend,
22 but with leave to file a motion to amend.

23 This court will not require the
24 Plaintiff to resend notice to include information

1 about dismissed federal claims that may or may not be
2 resurrected. The court finds that the notice of
3 settlement complied with the court's order and was
4 fair and adequate and satisfies Rule 23 and due
5 process. Therefore, the court will certify the
6 class --

7 Next, I turn to the substance of the
8 settlement agreement. "The Court must act as a
9 fiduciary on behalf of the class to ensure that the
10 outcome falls within a range of reasonable outcomes
11 that a disinterested decision-maker, acting on behalf
12 of the class and with the benefit of the information
13 available, could accept." That's from *In re AMC*
14 *Entertainment Holdings, Inc. Stockholder Litigation*,
15 299 A.3d 501 at page 523 from this court in 2023.

16 Court of Chancery Rule 23(f)(5)
17 requires the court to consider whether (A) the
18 representative party and class counsel have adequately
19 represented the class; (B) adequate notice of the
20 hearing was provided; (C) the proposed dismissal or
21 settlement was negotiated at arm's length; and (D) the
22 relief provided for the class falls within a range of
23 reasonableness"

24 As I have already discussed, the

1 Plaintiff and his counsel have adequately represented
2 the class and provided adequate notice of the
3 settlement. Nothing in the record suggests that the
4 proposed settlement was the product of anything but
5 arm's length negotiations, which I further note was
6 reached with the assistance of a well-respected
7 mediator with significant experience in complex
8 business litigation.

9 To determine whether the settlement
10 falls within a range of reasonableness, the court
11 "looks to the facts and circumstances upon which the
12 claim is based, the possible defenses thereto, and
13 then exercises a form of business judgment to
14 determine the overall reasonableness of the
15 settlement." That's from *Polk v. Good*, 507 A.2d 531
16 at page 536 from our Supreme Court in 1986.

17 Rule 23(f)(5)(D) captures this
18 requirement, which directs the court to consider "(i)
19 the strength of the claims; (ii) the costs, risks, and
20 delay of trial and appeal; (iii) the scope of the
21 release; and (iv) any objections to the proposed
22 dismissal or settlement."

23 The Plaintiff had seemingly strong
24 claims with respect to liability. This was a duty of

1 loyalty case governed by the entire fairness standard,
2 in which an alleged conflicted controller and
3 conflicted board conducted a flawed process that
4 resulted in a transaction through which they received
5 non-ratable benefits. Although Plaintiff's disclosure
6 theories were of varying strength, some seemed to
7 support a finding of unfair process and unfair price.
8 The headwinds for the Plaintiff, however, came with
9 respect to damages.

10 This court has posited that a measure
11 of damages in similar circumstances might be the
12 difference between the value of the redemption right
13 and the value of the shares received in the de-SPAC
14 transaction. See *In re Lordstown Motors Corp.*
15 *Stockholders Litigation*, 2022 WL 678597, at *5 from
16 this court on March 7, 2022.

17 The Plaintiff proffers a potential
18 measure of damages of approximately \$55.7 million
19 using the *Lordstown Motors* calculation, and the
20 settlement provides class members approximately 15.8
21 percent of this potential post-trial damages figure.
22 There is not, however, a post-trial decision endorsing
23 this method in the SPAC litigation context, and, as
24 the Plaintiff identifies, this court may have limited

1 the recovery to nominal damages.

2 The Plaintiff posits that nominal
3 damages might result in a recovery of between \$0.50
4 and \$2.00 a share, for a potential measure of damages
5 of approximately \$10.24 million and \$41 million, and
6 in this case, the settlement represents a recovery of
7 between 86 percent and 21 percent of the potential
8 post-trial damages figure, respectively. I offer no
9 opinion on the potential viability of nominal damages
10 on a per-share basis in this case or one within the
11 range that the Plaintiff has posited in his settlement
12 brief.

13 In exchange for this "get," the
14 settlement provides the Decarb Defendants with a
15 global release of possible claims that may have arisen
16 under the allegations in the amended complaint,
17 excluding the Plaintiff's possible claims against
18 Legacy Hyzon Defendants, and specifically those claims
19 that were or could have been alleged that are "based
20 upon, arise out of, or relate in any way to the
21 impairment of the redemption rights of any Decarb
22 Class A Stockholder."

23 While the Plaintiffs would have
24 proceeded with their fiduciary duty claims at trial

1 under entire fairness, this was not without risk at
2 both the trial level and on appeal. And the Plaintiff
3 notes as much in the opening brief. The Plaintiff
4 also correctly notes this court's skepticism regarding
5 certain of the Plaintiff's theories and claims and
6 discovery may have swayed this court away from the
7 Plaintiff's view on those and other issues. Trial was
8 not a certain victory for the Plaintiff, and he faced
9 real risk.

10 The "give" in this case is not a
11 global release. The release only releases the Decarb
12 Defendants and does not release Legacy Hyzon
13 Defendants, nor does it release claims which are not
14 "based upon" and do not "arise out of or relate in any
15 way to the impairment of the redemption rights of any
16 Decarb Class A stockholder." The release releases the
17 activity which is core to the wrongdoing alleged here.
18 In that respect, the release is narrower than in other
19 SPAC settlements in this court. See, for example, *In*
20 *re MultiPlan Corp. Shareholders Litigation*, 2023 WL
21 2329706 from this court on March 1, 2023, and *In re*
22 *GeneDx De-SPAC Litigation*, Civil Action No.
23 2023-0140-PAF, at pages 15-16, of the settlement
24 agreement filed on August 16, 2024.

1 The objector initially seemed to
2 contend that only a federal plaintiff may settle
3 federal claims and so any release of federal claims in
4 a state court is improper. This is incorrect under
5 established U.S. Supreme Court jurisprudence, which
6 the objector acknowledged at the settlement hearing.

7 A state court may release certain
8 federal claims. See *Matsushita Electric Industrial*
9 *Company, Ltd. v. Epstein*, 516 U.S. 367 in 1996. In
10 *Matsushita*, the Supreme Court held "[w]hile § 27 [of
11 the Exchange Act] prohibits state courts from
12 adjudicating claims arising under the Exchange Act, it
13 does not prohibit state courts from approving the
14 release of Exchange Act claims in the settlement of
15 suits over which they have properly exercised
16 jurisdiction, i.e., suits arising under state law or
17 under federal law for which there is concurrent
18 jurisdiction." That's at page 381 of the opinion.

19 Because this court has jurisdiction
20 over both the breach of fiduciary duty and aiding and
21 abetting claims brought by Plaintiff, Miller, the
22 objector and the plaintiff in the federal action, does
23 not have a special right to pursue all claims relating
24 to the same facts in the federal action. Miller

1 provides no case law which suggests that the PSLRA
2 overruled *Matsushita*.

3 And if that were the state of the law,
4 he could have and could still make that argument to
5 the federal court in his action. However, this court
6 is only aware of one such case in which a federal
7 court has exercised jurisdiction to stay a settlement
8 in state court in favor of the federal plaintiff under
9 the PSLRA. The Eastern District of Missouri did that
10 in *BankAmerica Corporation Securities Litigation*, in
11 which the court stayed a California state court
12 proceeding in favor of the federal plaintiff. The
13 court provided two primary reasons: First, the
14 special rights the court understood that the PSLRA
15 provided federal plaintiffs to bring securities
16 actions, and second, the state court plaintiff
17 counsel's poor litigation tactics and behavior,
18 including "blatant forum shopping" and putting forward
19 lead plaintiffs with criminal backgrounds. See
20 *BankAmerica Corp. Securities Litigation*, 95 F.Supp.2d
21 1044 at page 1049 from the Eastern District of
22 Missouri in 2000.

23 In *Lendingclub*, a case on which Miller
24 relies for a different proposition, the District Court

1 in the District of Northern California refused to
2 extend *BankAmerica*, noting both its singularity and
3 the specific and extreme facts on which the
4 *BankAmerica* decision rests. Thus, this court may
5 release certain federal claims, even when the federal
6 lead plaintiff objects to the release.

7 Miller also objects to the proposed
8 settlement's reasonableness because it is "a fraction
9 of the up to \$2.72 per share that absent class members
10 could potentially get through trial." But Miller
11 engaged in no discovery and provided no evidence to
12 support his proposition that the Plaintiff's counsel
13 were not diligent in their efforts to pursue a
14 reasonable settlement with Decarb Defendants, nor does
15 Miller provide evidence to show that the Plaintiff's
16 assessment of the trial risks were unrealistic.

17 Miller further objects that the scope
18 of the release is a reasonable "give," asserting the
19 Plaintiff's release is overbroad and that the
20 Plaintiff has not made an attempt to identify
21 surviving claims.

22 Miller relies on *Off v. Ross* from 2008
23 in this court to support the proposition that "the
24 [c]ourt should balance any dismissal of federal claims

1 against the additional benefits, if any, the settling
2 party has extracted for the benefit of the [c]lass to
3 settle claims in another action" and whether such
4 claims in the different action are "segregable [such]
5 that the proposed release in the [s]ettlement would
6 not materially undermine and complicate the ability of
7 the class to pursue their claims in the [federal
8 action.]" That's at the objection, page 19, citing
9 the *Off* opinion, 2008 WL 5053448, at *10.

10 In *Off*, the court held that "the
11 release of claims arising out of or related to
12 [contentious transactions] ha[d] the potential of
13 substantially weakening the consolidated class action
14 brought [in the New York court], in which the
15 plaintiffs seek a more comprehensive remedy." In *Off*,
16 allowing the Court of Chancery settlement to go
17 forward would detract from the New York plaintiff's
18 ability to pursue the New York claims because the
19 challenged transactions "reasonably can be viewed as
20 integral parts of [d]efendants' broader plan to
21 transform the nature of Centerline's investment
22 portfolio and future strategy." That's at *12 of the
23 opinion.

24 In fact, the court noted that were the

1 transactions "not so closely interrelated" with the
2 other transactions at issue in the New York action,
3 "the prospect that the release of stockholder class
4 and derivative claims for breaches of fiduciary duty
5 in this [c]ourt might preclude claims in other forums
6 would not be cause for concern." That's at *13 of the
7 opinion.

8 Miller conceded at oral argument that
9 the damages for his Section 14(a) claims were in the
10 same range as the Plaintiff has presented in this
11 case. Miller did not provide a convincing argument as
12 to why he would procure more from the Decarb
13 Defendants than the \$8.8 million settlement which the
14 Plaintiff has. It seems to this court that it is of
15 no import whether the settlement amount is derived
16 from a settlement of a federal or state claim.

17 Thus, it is only left for the court to
18 determine whether the release will prevent or
19 undermine Miller's federal claims that have survived
20 the latest motion to dismiss – his Section 10b-5 claim
21 regarding post-merger statements by Hyzon and its
22 executives and a corresponding Section 20(a) claim.
23 Miller has not made such an argument, and this court
24 is not persuaded that the proposed settlement would

1 impair Miller's other federal claims. The scope of
2 the release is reasonable.

3 Under the circumstances here, and
4 weighed against the "get," this is a reasonable
5 "give."

6 I now turn to the plan of allocation,
7 which provides for pro rata distribution to all
8 authorized claimants in proportion to their economic
9 loss sustained as a result of not redeeming their
10 shares of Decarb Class A common stock. Authorized
11 claimants comprise beneficial and record holders of
12 Decarb Class A common stock as of the merger closing
13 and their successors-in-interest by operation of law,
14 excluding redeemed shares and shares held by Excluded
15 Persons. In addition, all class members who submit a
16 claim will receive nominal damages of \$0.10 per share
17 for each share that was held as of July 13, 2021, and
18 could have been but was not redeemed. This nominal
19 damages payment is in recognition of the alleged
20 direct harm to their redemption rights.

21 I am going to approve the proposed
22 plan of allocation. The trend in SPAC cases seems to
23 be in favor of a claims-made process whereby those
24 eligible class members who sold their post-merger

1 stock at amounts above the redemption price receive
2 less than those who did not sell at amounts above the
3 redemption price. I approved this type of allocation
4 plan in *GeneDx*, and some of my colleagues have as
5 well. Additionally, there have been no objections to
6 the proposed plan of allocation, which factors into my
7 decision to approve it.

8 The court concludes, applying its own
9 business judgment, that the settlement is fair,
10 reasonable, and adequate, and the court will approve
11 it.

12 The proposed final order provides for
13 the court's retention of jurisdiction of the case. I
14 will, of course, be closing this case after entry of
15 the final order. The court always has the power to
16 enforce its orders, and I can reopen the case if
17 necessary, but I don't want it lingering open on my
18 docket indefinitely.

19 I turn next to the Plaintiff's fee
20 application. The amount of an attorneys' fee award in
21 class and derivative litigation is within the
22 discretion of the court. The court's discretion is
23 guided by the well-known *Sugarland* factors, which are:
24 (1) the results achieved; (2) the time and effort of

1 counsel; (3) the relative complexities of the
2 litigation; (4) any contingency factor; and (5) the
3 standing and ability of counsel involved. "This court
4 has traditionally placed [the] greatest weight upon
5 the benefits achieved by the litigation." That's from
6 *In re Anderson Clayton Shareholders' Litigation*,
7 1988 WL 97480, at *3 from this court in 1998.

8 The court may also consider the stage
9 at which the case settled. Our Supreme Court has
10 noted that the Court of Chancery may use the
11 stage-of-case benchmarks as a guide for setting fees.

12 Here, the Plaintiff's counsel seeks an
13 award of 20 percent of the settlement amount,
14 inclusive of their expenses of \$109,064.20. In dollar
15 terms, the all-in request is for \$1,760,000. No
16 objection to this fee has been lodged with the court.

17 For the result achieved, the benefit
18 of the settlement is easily measurable, and, as I have
19 already discussed, it is a good outcome for the class.

20 Plaintiff's counsel recorded just
21 under 8,000 hours from the inception of the action
22 until the execution of the settlement term sheet, for
23 a total lodestar of just over \$5 million. Plaintiff's
24 counsel spent an additional 586 hours from August 1,

1 2024, through the execution of the stipulation
2 pursuing claims against Legacy Hyzon Defendants and
3 documenting the settlement, amounting to an additional
4 lodestar of about \$350,000. As I have mentioned in
5 past cases, I expect to receive this type of breakdown
6 from counsel. And I do appreciate that counsel did so
7 in this case.

8 As I indicated, Plaintiff's counsel
9 incurred expenses of over \$109,000. Subtracting
10 counsel's expenses from the award that they seek, the
11 net award sought is \$1,650,935.80, which yields an
12 effective hourly rate of \$639 and a multiplier of
13 .33x.

14 I recognize that time expended does
15 not include efforts in pursuit of the claims against
16 the Legacy Hyzon Defendants, which have been dismissed
17 without prejudice and are not being released.
18 Notwithstanding that consideration, though, the amount
19 of time and effort expended supports the fee request.

20 The claims here fit the mold of the
21 now-standard SPAC suit, although some of the theories
22 asserted in this action remained untested at the time
23 of filing. SPAC cases are reasonably complex, and
24 none have gone to trial and judgment. This factor

1 supports the fee request.

2 Plaintiff's counsel litigated the case
3 on an entirely contingent basis. Plaintiff's counsel
4 are regular practitioners in this court and they have
5 achieved strong results for their clients over the
6 years. These factors also support the fee request.

7 I also considered the stage of the
8 case at which the parties reached the settlement.
9 Here, the litigation progressed out of the early
10 stages, but the parties settled before the heavy
11 lifting of depositions and expert discovery began.

12 As noted by our Supreme Court in the
13 *Americas Mining* case, this would warrant a fee in the
14 range of 15 to 20 percent of the monetary benefit
15 where the parties engaged in meaningful litigation
16 efforts. Prior to reaching the agreement in
17 principle, Malork prevailed against the motion to
18 dismiss the amended complaint, engaged in written
19 discovery, and prevailed in part on a motion to
20 compel. Malork obtained over 810,000 pages of
21 documents from Decarb Defendants and nonparties,
22 obtained responses to interrogatories, as well as
23 provided written objections and responses to Decarb
24 Defendants' discovery, and produced just under 4,000

1 pages of documents to Decarb Defendants in response to
2 discovery requests. Plaintiff was also deposed by the
3 Decarb Defendants on April 3, 2024.

4 Recognizing that this action has not
5 proceeded far past the motion to dismiss stage,
6 Plaintiff's counsel contends that a 20 percent award
7 is appropriate given the court's precedents.

8 When considering the appropriate
9 award, I look to recent awards in other SPAC cases.
10 At the higher end, we have the award of 22.5 percent,
11 plus expenses, in *Lordstown* and 20 percent, which
12 included expenses, in *MultiPlan*. We also have my
13 decision in *GeneDx* with an award of 19.5 percent.

14 In the middle range, there is the 18
15 percent award in *GigAcquisitions2*. There, the
16 plaintiff began settlement discussions prior to
17 commencing discovery and engaged in only limited
18 confirmatory discovery. The 18 percent award
19 reasonably balanced the complexity and novelty of the
20 issues in that case against the relatively early stage
21 in which it was settled.

22 Slightly lower, there was a 17.5
23 percent award in *Lien v. Eagle Equity Partners II,*
24 *LLC, et al.*, Civil Action No. 2022-0972-PAF from

1 September 2, 2025. There, the plaintiff settled
2 claims after prevailing on motions to dismiss and
3 engaging in written discovery but before formally
4 producing documents to defendants in response to
5 discovery requests.

6 At the low end of the range, there is
7 the 13 percent award in *GigAcquisitions4*. There, the
8 plaintiff began settlement negotiations prior to
9 substantial discovery and did not engage in
10 confirmatory discovery. The case was settled prior to
11 motion practice. Counsel in *GigAcquisitions4* sought
12 an award equal to 18 percent of the financial benefit
13 achieved – the same percentage as in *GigAcquisitions2*.
14 But recognizing that the *GigAcquisitions4* case was
15 settled without substantial litigation efforts by
16 counsel and was filed after the *MultiPlan*,
17 *GigAcquisitions3*, and *GigAcquisitions2* opinions had
18 provided a clear framework for SPAC cases, the court
19 awarded 13 percent.

20 This case here falls between *MultiPlan*
21 and *Lien*.

22 Considering all of the Sugarland
23 factors and the fee awards in similarly situated
24 cases, I conclude that the requested fee of 20 percent

1 of the recovery, although on the high side, falls
2 within a range of reasonableness, and I will approve
3 it.

4 Therefore, I approve the settlement of
5 the fee award of \$1,760,000 for the Plaintiff's
6 counsel in this case.

7 Finally, I turn to the request for an
8 incentive award for the Plaintiff. Counsel seeks
9 approval of an incentive award of \$10,000 for the
10 Plaintiff, to be paid out of the attorneys' fee award.
11 I note that the notice stated that the Plaintiff may
12 seek an incentive award of up to \$15,000, which
13 encompasses the amount requested here, in compliance
14 with the updated rules of this court.

15 Rule 23 prohibits a representative
16 plaintiff in a class action from receiving any form of
17 compensation unless expressly approved by the court or
18 where the payment is made by counsel to reimburse the
19 plaintiff for actual and reasonable out-of-pocket
20 expenditures incurred in prosecuting the action.
21 That's Rule 23(aa)(2).

22 These plaintiff incentive awards
23 function as risk-based compensation that work to
24 motivate the named plaintiffs to work collaboratively

1 and efficiently with counsel and to pursue meritorious
2 results. See *Chen v. Howard-Anderson*,
3 2017 WL 2842185, at *2 from this court on June 30,
4 2017. "The decision of whether to grant an incentive
5 award to a named plaintiff in a class action following
6 conclusion of the litigation is within a court's
7 discretion." That's at *3 of the order. Incentive
8 awards may be warranted where the named plaintiff has
9 incurred a significant amount of time and effort,
10 provided meaningful expertise, or generated
11 significant benefits for the class.

12 I am going to approve the request in
13 this case. Rule 23(aa)(2) requires meaningful
14 contributions by the plaintiff. Here, the Plaintiff
15 responded to discovery and sat for a deposition. On
16 this record, I find that it's appropriate under the
17 circumstances to approve the incentive award of
18 \$10,000 for Mr. Malork to be paid out of counsel's
19 fee.

20 In conclusion, I am certifying the
21 class, approving the settlement, approving the
22 requested fee award and the requested incentive award,
23 and I am denying the objection.

24 Counsel, that is my ruling. I am not

1 asking for reargument, but I will, of course, respond
2 to any questions about my ruling if you have them.
3 And I will give the parties five days after this
4 transcript becomes available to move for reargument.

5 Are there any questions about my
6 ruling? Let me first turn to counsel for the
7 plaintiff.

8 ATTORNEY SBORZ: Your Honor, not for
9 plaintiff. Thank you.

10 THE COURT: For the defendants.

11 ATTORNEY RICKERT: Your Honor, none
12 from for the defendants. Thank you.

13 THE COURT: And the objector.

14 ATTORNEY MELANSON: Your Honor,
15 nothing from the objector at this time.

16 THE COURT: Thank you, Counsel. Have
17 a good day.

18 Court stands in recess.

19 (Proceedings concluded at 3:58 p.m.)

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- - -

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CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 37 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except as revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 22nd day of October, 2025.

/s/ Denne! Niezgoda

Denne! Niezgoda
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

Tab 16

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HAVERHILL RETIREMENT SYSTEM, on behalf:
of itself and all other similarly :
situated stockholders of THE :
PROVIDENCE SERVICE CORPORATION, and :
derivatively on behalf of THE :
PROVIDENCE SERVICE CORPORATION, :
Plaintiff, :
v : C. A. No.
: 11149-VCL
RICHARD A. KERLEY, KRISTI L. MEINTS, :
WARREN S. RUSTAND, CHRISTOPHER :
SHACKELTON, DAVID SHACKELTON, COLISEUM: :
CAPITAL MANAGEMENT, LLC, COLISEUM :
CAPITAL PARTNERS, L.P., COLISEUM :
CAPITAL PARTNERS II, L.P., BLACKWELL :
PARTNERS LLC, COLISEUM CAPITAL :
CO-INVEST, L.P., PAUL HASTINGS LLP, :
RBC CAPITAL MARKETS, LLC, and BANK OF :
AMERICA, N.A., :
Defendants, :
and :
THE PROVIDENCE SERVICE CORPORATION, :
Nominal Defendant. :

- - -

Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, September 28, 2017
10:00 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

SETTLEMENT HEARING and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

1 APPEARANCES:

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5 -and-

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7 of the New York Bar

8 Friedman Oster & Tejtzel PLLC

9 for Plaintiff

10 BRADLEY R. ARONSTAM, ESQ.

11 S. MICHAEL SIRKIN, ESQ.

12 NICHOLAS D. MOZAL, ESQ.

13 Ross Aronstam & Moritz, LLP

14 for The Special Litigation Committee

15 MICHAEL A. PITTENGER, ESQ.

16 MATTHEW A. GOLDEN, ESQ.

17 Potter, Anderson & Corroon LLP

18 for Defendants Coliseum Capital Management,

19 LLC, Coliseum Capital Partners, L.P., Coliseum

20 Capital Partners II, L.P., Blackwell Partners

21 LLC, and Coliseum Capital Co-Invest, L.P.

22 ROBERT S. SAUNDERS, ESQ.

23 NICOLE A. DISALVO, ESQ.

24 Skadden, Arps, Slate, Meagher & Flom LLP

for Defendant Christopher Shackelton

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-and-

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Shearman & Sterling LLP

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Appearances Cont'd ...

1 ... Appearances Cont'd

2 ALBERT H. MANWARING, IV, ESQ.
Morris James LLP

3 -and-

4 PAUL SPAGNOLETTI, ESQ.
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5 Davis Polk & Wardwell LLP
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6
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13 KURT M. HEYMAN, ESQ.
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14 -and-

15 ELLIOTT GREENFIELD, ESQ.
of the New York Bar
Debevoise & Plimpton LLP
16 for Nominal Defendant The Providence Service
Corporation

17
18
19 - - -
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21
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23
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1 THE COURT: Good morning, everyone.

2 MR. WEINBERGER: Good morning, Your
3 Honor. Ned Weinberger on behalf of the plaintiff.
4 Before I start, I'll just make a couple of
5 introductions. Thomas Curry from my firm.

6 MR. CURRY: Good morning.

7 MR. WEINBERGER: David Tejtcl from
8 Friedman, Oster & Tejtcl.

9 THE COURT: Good morning.

10 MR. WEINBERGER: We're here on motions
11 for class certification, settlement approval, and an
12 award of attorneys' fees and expenses.

13 We filed the affidavit of mailing a
14 couple weeks ago regarding notice. We believe the
15 notice is adequate, due process was satisfied. The
16 settlement administrator mailed notice to each of the
17 29 record holders of the company. Also used
18 reasonable efforts to send notice to other -- to
19 beneficial holders and nominees, mailed another
20 approximately 7500 notices to those folks. There have
21 been no objections to class certification, settlement,
22 or the proposed fee and expense award.

23 With respect to the specific motions,
24 I guess I'll start with class certification, and I

1 guess I'll only spend a moment or two on this, unless
2 Your Honor has specific questions. We believe the
3 class period is appropriate. It consists of record
4 and beneficial holders, the transferees of the shares
5 that are outstanding from the time in September 2014,
6 when there was an option award, to the record date of
7 the vote on the proposal to lift the caps with respect
8 to the shares of preferred stock. We go through, in
9 our brief, Rule 23(a) and Rule 23(b), and so, for the
10 reasons outlined in the brief, we'd ask that the class
11 be permanently certified.

12 With respect to the settlement, it's a
13 \$10 million gross cash fund. We think it's a very
14 good result. Certainly a result that falls within the
15 range of reasonableness. We tried in our papers to
16 sort of walk through our assessment of the claims, why
17 we resolved those claims and resolved the claims for
18 the amount we did.

19 I think it's fair to say that the
20 claims here were ones that, following expedited
21 discovery, we were very eager to continue litigating.
22 The record generated in expedited discovery was very
23 strong. I think, as Your Honor had accurately noted
24 the last time we were in front of you, this was a

1 situation where every time we peeled back a layer of
2 the onion, we did find things that were astonishing.
3 Rampant conflicts, more conflicts than we probably
4 would have imagined; conflicts that had not been
5 disclosed to stockholders and conflicts that had not
6 been managed by Providence's board of directors.

7 And so last year, when our friends Mr.
8 Aronstam and Mr. Sirkin contacted us, told us an SLC
9 had been formed, we thought this may be the somewhat
10 unusual situation where an SLC ultimately sees things
11 our way, either affirmatively supports the claims
12 going forward or takes no position, and either way,
13 we're back litigating the case.

14 And so with the SLC formed, we
15 determined to engage the SLC. We presented to the SLC
16 a couple of times in person. The second time we
17 presented to the SLC, we did so with our financial
18 expert, and their expert was at that meeting as well.
19 And then, following that second meeting, there was a
20 good bit of back and forth between us and Mr. Aronstam
21 and Mr. Sirkin, because there was this apparent, you
22 know, disconnect with the way we were looking at
23 damages.

24 And as we talk about in the brief, we

1 did discover this take-out feature that we were not
2 aware of. We did not have a fee letter. That was not
3 produced to us in expedited discovery. Did not, you
4 know, understand that the banks had the ability to
5 issue a take-out demand and potentially cause the
6 company to issue debt on potentially onerous terms.

7 And so we get to the end of the stay
8 period last year. Counsel for the SLC all but tells
9 us that they're going to move to dismiss. They're
10 underscoring their view that the damages here would be
11 very difficult to prove and de minimis.

12 So we ultimately make a determination.
13 We get to the \$10 million number. We determine that
14 that's in the range of reasonableness. We have our --
15 sort of our max damages figure, discounting that
16 pretty significantly, even without accounting for the
17 risk of a potential motion to dismiss by the special
18 litigation committee.

19 The fund here is -- it will be
20 allocated to both the company and to current
21 stockholders. 75 percent of the net fund goes to the
22 company, 25 percent to stockholders, other than
23 defendants. So stockholders get the pro rata indirect
24 benefit. The company recovery, they get the direct

1 benefit of the distribution, which Coliseum and other
2 defendants are not able to share in. We're going to
3 distribute the funds in a cost-effective, efficient,
4 we believe appropriate way. It recognizes that claims
5 travel with shares. We're going to do a direct
6 distribution with the assistance of our settlement
7 administrator.

8 In terms of the fee application, Your
9 Honor, we are seeking fees and expenses of
10 \$2.85 million. The fee is slightly under 17 1/2
11 percent of the net fund after you deduct expenses and
12 if \$1.275 million were awarded on the nonmonetary
13 benefits. The fee would obviously go down if Your
14 Honor believed that the nonmonetary benefits were
15 worth more than \$1.275 million.

16 In terms of the ranges, and sort of
17 where this case falls within them, if we are in the 15
18 to 25 percent range, there were meaningful litigation
19 efforts here. There were contested depositions taken.
20 There was motion practice. We filed a brief in
21 support of our motion for preliminary injunction,
22 which we would submit is -- was probably a heavier
23 lift than, say, an opposition to a motion to dismiss.
24 We had discovery fights here. I know Your Honor

1 didn't see them. We challenged privileged
2 designations. We had text messages produced. So we
3 would submit that 17 1/2 percent would be reasonable.

4 With respect to the nonmonetary
5 benefits, I guess primarily focusing on the
6 disclosures, Your Honor has commented on the
7 significance of the disclosures before. I think the
8 magnitude of disclosure here could be accurately
9 described as unprecedented. We looked at precedent
10 cases and could not find one where disclosures had
11 been as extensive, as plainly material.

12 This was a situation where
13 stockholders really knew virtually nothing about the
14 process. And as a result of the litigation, you
15 learn, among other things about the advisors, the
16 advisors have conflicts and that those conflicts were
17 not managed. So I think the disclosures here could be
18 valued more than the 800,000 awarded in Lear, more
19 than the 750,000 to 1 million range in ArthroCare and,
20 arguably, more than the 1.6 million from Del Monte.

21 I think we also caused meaningful
22 reform at this company going forward. And I know
23 defendants, you know, dispute that this board
24 expansion had anything to do with this litigation, but

1 I think if you look at the timeline, the company had
2 added a new director, Ms. Norwalk, and we don't take
3 credit for that. The company had announced that they
4 were going to appoint one additional director. But
5 then, I guess it's spring of last year, the SLC's --
6 they formed the SLC. They formed this dividend
7 committee with respect to the -- to dividends on the
8 preferred stock, and then the board expands from five
9 to eight members, with three additional putatively
10 independent directors.

11 I know the defendants are not giving
12 us credit for that. We could have taken discovery of
13 this. I don't think that would have been a good use
14 of the company's resources, or anybody's resources,
15 frankly, particularly where defendants are not
16 opposing our fee, the SLC is not opposing our fee, and
17 I think the fee is otherwise supported by the other
18 benefits.

19 The case was fully contingent. We
20 devoted a little over 2,000 hours to the case. I know
21 Your Honor always looks very closely at hours
22 expended. We tried to be as sort of transparent and
23 informative as possible, and the fee affidavits
24 submitted show Your Honor what the time was that we

1 spent and why that time would be compensable. The
2 implied hourly rate, at the fee we're seeking, would
3 be a little over \$1300 an hour, which I think is
4 supported by other precedent.

5 Does Your Honor have any questions?

6 THE COURT: Yeah. I'm confused as to
7 how you handled the expenses. On page 37 of your
8 brief, you first say subtracting expenses of
9 \$63,296.99 from the \$10 million fund, which is
10 appropriate because the expenses were a cost that
11 plaintiff had to bear to create the fund, leaves a net
12 settlement fund of 9.9. But then elsewhere, and then
13 this morning -- really, at the end of that
14 paragraph -- you referred to a 2.85 million all-in
15 award, which, at least in my parlance, would mean that
16 you weren't taking out expenses separately. And I
17 think today you referred to it as an all-in award.

18 So what are you doing? Which way are
19 you doing this?

20 MR. WEINBERGER: So the 2 point --
21 we're sort of following the way Your Honor has
22 calculated fees in the past, looking at the Court's
23 precedents. From the top-line number, we do take out
24 the fee -- or we take out our expenses, and then you

1 would reduce from that amount whatever Your Honor
2 awards for the -- for the nonmonetary benefits.

3 THE COURT: When I've historically
4 said "all-in," I think I've meant you don't get
5 separately expenses. When you use the phrase
6 "all-in," you just mean total; is that fair?

7 MR. WEINBERGER: That is fair, Your
8 Honor.

9 THE COURT: Okay.

10 MR. WEINBERGER: Can I answer any
11 other questions, Your Honor?

12 THE COURT: Yeah. I mean, can you
13 give me a better sense? Because, frankly, I was
14 thinking of "all-in" the way I use "all-in." It's not
15 your fault. I'm sure it's my fault. Remind me or
16 point me to where I look to see what you managed to
17 spend \$63,000 on.

18 MR. WEINBERGER: \$63,000 -- it's in
19 the affidavits. I believe above 40,000 of those
20 expenses -- I'll have to look at the exact number --
21 are attributable to expert fees. Those are the
22 majority of the fees expended in this case. And
23 that's, you know, why we take the position that they
24 are, you know, appropriately compensable here, given

1 that we had to have a financial expert and that was
2 necessary to achieving this fund. But --

3 THE COURT: Yeah. The point of doing
4 separate expenses was when people go deep into the
5 case and when they really have a heavy load, and hence
6 it's really going to undercut their hourly rate. This
7 is the first time that I've had somebody backflow that
8 idea, for me at least. Maybe other people are doing
9 it all the time. Maybe it's, you know, the greatest
10 thing in the world. But this is the first time I've
11 had somebody in front of me backflow that into the
12 idea that the work you do on the front really ought to
13 be treated the same way.

14 I mean, I think the front was where --
15 and this is, again, the legacy of the litigation
16 explosion. We were getting all these things, we were
17 getting applications. And first our Chief Justice and
18 then I, following in his footsteps, suggested, "Why
19 are you guys not doing all-in awards?"

20 And so then we got to the practice in
21 that world of doing all-in awards, and then that
22 proved unfair when people went beyond that and really
23 took a case far in, did a lot of depositions, you
24 know, invested like a million bucks in an expert. So

1 I'm balking at the idea that we're now going to come
2 full circle back to where we started and do separate
3 expense awards in cases where that did not happen to
4 the same degree.

5 MR. WEINBERGER: So, Your Honor, I
6 guess two points on that. In terms of just, I guess,
7 what our total ask is, I think you get to the
8 \$2.85 million -- and I can't do the math off the top
9 of my head -- I think you get to the \$2.85 million if
10 more than the 1.275 million were awarded on the
11 nonmonetary benefits, which is sort of the baseline we
12 put in the chart at the end that shows the various
13 calculations.

14 But in terms of -- yeah, absolutely, I
15 understand that the Court had a practice, or has had a
16 practice, of just doing all-in numbers to award
17 efficiency. And we certainly endeavored here to keep
18 down expert costs, although those were sort of a --
19 were the primary costs, and also a necessary cost
20 here, Your Honor.

21 You know, without the expert, there's,
22 I mean, no way to assess the expected value of this
23 claim. I don't think we would have been able to
24 engage with the SLC, you know, in a thoughtful manner

1 whatsoever with respect to what we viewed with respect
2 to the damages, recoverable or proveable damages in
3 this case.

4 THE COURT: Help me, because that was
5 the other thing that I started to get disappointed in
6 back in the days of the litigation epidemic, is it
7 seemed like people would hire an expert just to be
8 able to say they hired an expert, and they'd pay him
9 \$10,000 or \$5,000 to take a quick look right around
10 filing. It wasn't clear to me what the person was
11 really doing of value. And then it would show up
12 later, and I wouldn't know who these people were,
13 whether they had any real credentials or not. And as
14 I say, it wasn't really clear what these folks were
15 adding, since it was quite often the same type of
16 complaint every time.

17 So what did your guy do for his 40?

18 MR. WEINBERGER: What our expert did
19 was basically come up with a potential damages model
20 here and assessed whether -- assisted us with, okay,
21 what are the other available alternatives here. And I
22 know that we had -- before we were aware, even, of the
23 availability of the bridge financing, we did have our
24 experts assist in kind of telling us, all right, what

1 alternatives might have been available here.

2 And then, you know, when we identified
3 the bridge financing, our expert basically did an
4 assessment of what the savings would have been for the
5 company, had the company taken the bridge financing
6 and then paid off that bridge loan in the fourth
7 quarter of 2015 with the proceeds of the sale of
8 subsidiaries of Providence, and how that would have
9 looked. The expert also assessed -- so our expert
10 assessed what the difference in the cost of financing
11 would be to the company, what the potential dilution
12 was to stockholders as a result of having this
13 convertible feature on the preferred stock.

14 As I also mentioned, our expert was
15 with us -- or he was on the phone, but was with us to
16 present to the SLC in September of last year. So,
17 yeah, this was not like -- and I know exactly what
18 Your Honor is saying, and this is not like a situation
19 where we hired an expert to look at a proxy and say,
20 hey, what are the financial disclosure claims here.
21 This was someone who actually helped us assess, going
22 forward, what is the potential value of this claim and
23 helped -- and, you know, and ultimately -- which
24 ultimately guided our decision to settle this case.

1 THE COURT: Who was this person?

2 MR. WEINBERGER: David Clarke from The
3 Griffing Group.

4 THE COURT: All right. What else do
5 you want to tell me?

6 MR. WEINBERGER: I have nothing else,
7 Your Honor, unless Your Honor has any other questions.

8 MR. ARONSTAM: Good morning, Your
9 Honor, and may it please the Court. Brad Aronstam on
10 behalf of the special litigation committee in this
11 action, along with my colleagues Mike Sirkin and Nick
12 Mozal.

13 At the outset, I want to very briefly
14 note for the record the members of the SLC, Leslie
15 Norwalk and Frank Wright, as well as the significant
16 amount of time and attention that they brought to bear
17 throughout a very lengthy process.

18 We've submitted our brief. For the
19 reasons set forth therein, we strongly believe that
20 the proposed settlement is a highly favorable one that
21 comfortably falls within a range of reasonableness and
22 should be approved. I'm really here today to address
23 any concerns or questions Your Honor may have
24 regarding the settlement, but other than that, I'm

1 happy to rest on our thinking as set forth in the
2 submission, rather than repeat what's already in
3 there.

4 THE COURT: The only thing I wondered,
5 can you give me a little bit more insight into the
6 allocation between the two types of claims.

7 MR. ARONSTAM: Are you saying between
8 the class and the direct -- the long and short of it,
9 obviously, 75 percent is going to the company and 25
10 percent are going to the unaffiliated stockholders,
11 lower case "u." From the SLC's perspective, that
12 wasn't something that was negotiated until after
13 January 20th, when we informed the Court of the
14 settlement. And frankly, that was something that we
15 left to the plaintiffs and the broader defendants to
16 sort out.

17 From the SLC's perspective, we viewed
18 it as essentially a dividend decision. The company
19 was not cash poor. Any class component was going to
20 go to current stockholders. Our primary concern, as
21 we conveyed to plaintiffs' counsel and talked about
22 with our committee members beforehand, was making sure
23 that settlement consideration wasn't unnecessarily
24 eaten up in distributing the shares if there was going

1 to be a class component.

2 We were ultimately given comfort --
3 and I think that Mr. Weinberger's submission
4 corroborates this -- that it's a relatively modest
5 settlement administrative expense, and therefore, the
6 SLC, again, was ambivalent as to allocation.

7 THE COURT: Thank you.

8 MR. ARONSTAM: Thank you.

9 THE COURT: Anybody else want to add
10 anything? All right.

11 We're here today so that I can
12 consider the settlement of the proposed class and
13 derivative claims in this action. It's a settlement
14 that the special litigation committee brokered but,
15 ultimately, was reached between the defendants and the
16 plaintiffs. I am going to approve the settlement.

17 The settlement has both a class and
18 derivative aspect, so I have a series of tasks to take
19 care of. First, in terms of class certification, the
20 parties stipulated to a non-opt-out class consisting
21 of all record holders and beneficial owners of shares
22 of Providence common stock that were issued and
23 outstanding during the period beginning on September
24 11, 2014, through and including July 2015. In their

1 capacities as holders of class shares, the class
2 extends to their successors and representatives, et
3 cetera. It excludes the defendants in the action.
4 This is a reasonable and appropriate class.

5 In terms of the 23(a) requirements,
6 numerosity is met. There are approximately 2.4
7 million shares outstanding that have excluded shares
8 during the class period. The class involved common
9 questions of law and fact, including whether Coliseum
10 owed fiduciary duties, whether members of the board
11 wrongfully coerced stockholders and breached their
12 duty of disclosure, whether there were aiding and
13 abetting questions, and the relief to which the class
14 might be entitled.

15 Typicality is also met. The
16 plaintiffs were stockholders during the relevant
17 period and would have suffered the same injury as all
18 other stockholders.

19 Based on the plaintiff's affidavits,
20 there's no evidence of any divergence of interest that
21 would undermine adequacy of class representation.
22 Given that I am approving the settlement as fair and
23 adequate, it follows that I necessarily believe that
24 the class representatives, as well as the derivative

1 action representatives, provided adequate
2 representation in this matter.

3 The class is appropriately certified
4 pursuant to Rule 23(b)(1) as a non-opt-out class,
5 because had this action been prosecuted separately by
6 individual class members, there would have been a risk
7 of inconsistent or varying results, and effectively,
8 adjudication with respect to one would have been
9 dispositive of everyone's interests. So consequently,
10 I am certifying this matter as a non-opt-out class
11 pursuant to Rules 23(a) and 23(b)(1).

12 The procedural requirements for
13 approval of a settlement are met. The Rule 23(aa)
14 affidavit was filed by plaintiff Haverhill Retirement
15 Systems. The Rule 23(e) affidavit was also filed, as
16 well as the Rule 23.1(b) affidavit.

17 In terms of notice, notice is a
18 constitutional requirement as well as something under
19 our rules. Both Rule 23(e) and 23.1(c) require notice
20 to the absent class members or beneficial owners of
21 the claim. Notice of settlement is sufficient if it
22 "contains a description of the lawsuit, the
23 consideration for the settlement, the location and
24 time of the settlement hearing, and informs class

1 members that additional information can be obtained by
2 contacting class counsel." That's from the
3 Philadelphia Stock Exchange case.

4 The notice here adequately describes
5 the lawsuit, including the claims asserted and
6 proceedings to date. That's at pages 3 through 8. It
7 adequately describes the consideration for the
8 settlement. That's at page 8 through 10. It provides
9 the location and time of the settlement hearing at
10 page 13, and it informs class members whom to contact
11 for further information at page 15.

12 The notice was adequately delivered,
13 as reflected by the affidavit of Steven J. Straub of
14 A.B. Data. He attests that the notice was mailed to
15 29 unique record holders and further mailed to 4,200
16 institutions and 2,177 individuals identified as
17 potential beneficial owners. An additional 1,152
18 notices were provided at the request of brokers or
19 other nominees to be forwarded to their constituents.

20 And in terms of the merits of the
21 settlement, the Court's function is to consider the
22 nature of the claim, the possible defenses thereto,
23 the legal and factual circumstances of the case, and
24 then apply its own business judgment in deciding

1 whether the settlement is reasonable in light of all
2 those factors. That's a paraphrase of the
3 Philadelphia Stock Exchange case. My sense of it has
4 been that my job is to figure out whether the
5 settlement falls within a range of reasonableness that
6 parties acting with adequate information could
7 reasonably accept. Here, I think the settlement does
8 fall within a range of reasonableness.

9 The underlying transaction involved
10 Providence Services Corporation, which was a holding
11 company, still is a holding company. Its shares trade
12 on NASDAQ. In 2012, an entity called Coliseum Capital
13 Management acquired 12.5 percent of Providence's
14 stock. As a result of that acquisition, the cofounder
15 and comanaging partner of Coliseum, Chris Shackleton,
16 became chairman of the Providence board. Shackleton
17 had relationships with Providence's senior management,
18 previously worked with Providence's then-CFO, as well
19 as its then-treasurer and vice president, and his
20 younger brother David served as vice president and
21 head of corporate development for Providence.

22 In October 2014, Providence entered
23 into an agreement to acquire a company that's known,
24 shorthand, as Matrix, for approximately \$400 million,

1 but Providence had difficulty financing this
2 transaction. They had initially hoped to raise part
3 of the funding from the high-yield market, but after a
4 week-long roadshow, the rate it would have to pay
5 climbed, and even at the revised price point, its book
6 runners were unable to build out a full book and the
7 offering failed.

8 At this point, Coliseum provided the
9 financing for the acquisition. Through a series of
10 transactions, Coliseum acquired stock with more than
11 19.99 percent of the voting rights, which triggered a
12 listing rule requiring a stockholder vote. In terms
13 of the transaction, there were limits on what
14 Providence could do if it didn't get the vote, but
15 there are also corresponding provisions that kicked in
16 that would benefit Providence if the vote wasn't
17 obtained.

18 In February 2015, Providence and
19 Coliseum entered into an exchange agreement that
20 further documented aspects of the transaction,
21 including that Coliseum's preferred stock would be
22 exchanged for a convertible preferred with a nearly 90
23 percent higher cash dividend.

24 On July 29, Providence issued a

1 definitive proxy statement soliciting stockholder
2 approval. The proxy contained a single-page
3 background section describing Coliseum's financing in
4 the Matrix acquisition and a board recommendation
5 section outlining that the board advised elimination
6 of the caps, that the Coliseum financing was more
7 favorable than other options, and that the removal of
8 the caps did not have a dilutive effect on the
9 company's stockholders.

10 This litigation ensued. The
11 plaintiffs initially moved for expedited proceedings
12 and sought injunctive relief. The parties engaged in
13 expedited discovery through June, July, and August of
14 2015. The plaintiffs, in August, filed a lengthy
15 opening brief in support of a preliminary injunction.

16 On September 2, Providence issued a
17 proxy statement that contained approximately eight
18 pages of supplemental disclosures. A number of those
19 disclosures were striking in their significance in
20 terms of the revelation of conflicts. These included
21 that Shackelton and Coliseum enjoyed unfettered access
22 to internal Providence information while negotiating
23 the financing for the Matrix acquisition. That was at
24 a time when Shackelton was across the table from the

1 company.

2 Before Shackelton proposed the
3 Coliseum financing, he and his brother worked directly
4 with Providence's financial advisors on alternative
5 financing options. Shackelton used Providence
6 resources to formulate the Coliseum financing,
7 including its advisors, initially without approval
8 from the Providence board. After proposing the
9 Coliseum financing, Shackelton attended meetings of
10 the Providence board and participated in their
11 discussions about the financing.

12 Paul Hastings was the firm that
13 represented Providence in the negotiations opposite
14 Shackelton. They did so even though they had
15 continuously represented Coliseum since 2010 and even
16 though Paul Hastings became counsel to Providence as a
17 result of Coliseum's original investment in
18 Providence. But it was Paul Hastings who was
19 ostensibly representing the company opposite its
20 long-time client.

21 Shackelton's brother David assisted
22 both Shackelton and the Providence board in connection
23 with the financing, and it was he who advised the
24 board that the Coliseum financing was preferable to

1 alternative financing options.

2 On September 25, 2015, the parties
3 entered into a partial settlement that related only to
4 the disclosure claims and a claim for coercion based
5 on the provisions that would change if the vote wasn't
6 obtained. I declined to approve that settlement
7 because it was going to be difficult to surgically
8 excise a small portion of the claims and then have
9 this litigation proceed and then try to figure out
10 what the implications of the settlement were later.

11 At that point, the board of Providence
12 formed a special litigation committee. The SLC
13 engaged Ross Aronstam & Moritz, which proceeded to
14 conduct an investigation over a period of eight
15 months. The SLC's investigation appears to have been
16 extremely thorough. They engaged an expert. They
17 reviewed over 71,000 documents. They interviewed 17
18 potential fact witnesses. They held 11 meetings to
19 consider the investigation and discuss developments.
20 They also met with and received a presentation from
21 the plaintiffs. The plaintiff's counsel has not
22 challenged the independence of the SLC.

23 At the conclusion of its
24 investigation, the SLC sought to broker a settlement.

1 The good news is that the SLC's efforts were
2 successful, leading to the settlement that's before
3 me, and the SLC supports the proposed settlement.

4 In terms of weighing the claims that
5 were brought, in my view, in terms of liability, there
6 were potentially strong claims, both direct and
7 derivatively, against the defendants. That doesn't
8 mean the plaintiffs would have won, but that means for
9 purposes of bargaining with the defendants and for
10 purposes of my job in approving the settlement, I
11 think that the conflicts were quite striking and could
12 have led to the entire fairness standard applying and
13 could have easily led to a finding that the process,
14 at a minimum, was unfair.

15 The level of conflicts in the
16 boardroom among the advisors and, perhaps most
17 troublingly, among the lawyers was something that, as
18 I said previously at the settlement, was really
19 somewhat astounding. I mean, there is enough business
20 in the world that you don't have to work both sides of
21 a deal. And one of the actual good ways of getting
22 more business is to refer an aspect of the deal that
23 might give you a conflict to another reputable firm,
24 recognizing that they might themselves be in the same

1 position some day and want to bring you in.

2 I really don't know what people were
3 thinking here. I really don't. And this is, I think,
4 the third one of these. I don't know whether it's
5 plaintiffs have been focusing on law firms more, but I
6 think this is the third one of these where I've had
7 lawyers that seem to be ignoring pretty clear conflict
8 calls, or at least being aggressive in wanting to take
9 multiple roles in a deal.

10 As I say, I don't know whether it's a
11 hunger for business or what, but I think the long-term
12 consequences of putting yourselves in this position
13 are potentially quite detrimental and, in this case,
14 potentially problematic. Not only did these conflicts
15 raise potential problems on the merits for the
16 principals, but they also created potential aiding and
17 abetting exposure for the third parties involved.

18 Now, where I thought the case was
19 relatively weaker was on the question of damages. And
20 because harm, damages, is, in fact, an element -- or
21 at least an aspect -- of a fiduciary breach claim, you
22 conceivably could have proven that there was no breach
23 of duty, notwithstanding the absence of a fair
24 process, because Providence's difficult financial

1 situation and its potential inability to secure
2 financing on better terms meant that the price was
3 fair.

4 Looking at these things, having a
5 strong claim -- which you may lose on. Again, I'm not
6 saying these claims would have prevailed -- but having
7 a strong claim to get damages that might be nothing or
8 very small is not the most appetizing position to be
9 in. Not just for lawyers but, really, for the class
10 and the company. There could have been a lot of money
11 spent here for very little recovery.

12 So in evaluating all these issues, I
13 do believe that the amount obtained falls within the
14 range of reasonableness. The \$10 million payment is
15 real money. It's real money in a context where the
16 plaintiffs conceivably could have gone to trial, shown
17 that things were done in a manner that was not only
18 not according to Hoyle, but perhaps even contrary to
19 Hoyle, and yet not been able to obtain a meaningful
20 damages award. So in my view, this is a settlement
21 that falls within the range of reasonableness.

22 I also don't have any significant
23 objection to the allocation plan. There are both
24 class and derivative claims in the case. I frankly

1 don't have a better way to allocate them than what was
2 done here. I don't think there's particular magic to
3 the number. I do agree that the principal heft of the
4 claims was derivative, and so I think it makes sense
5 to put the bulk of the recovery there.

6 In short, I'm approving the
7 settlement. In terms of the award of attorneys' fees,
8 Delaware's policy is to ensure that even without a
9 favorable adjudication, counsel will be adequately
10 compensated for the beneficial results they produce,
11 provided the action was meritorious when filed and had
12 a causal connection to the benefit conferred. That's
13 a paraphrase of the Allied Artists case.

14 In setting fee awards, the Court of
15 Chancery must make an independent determination of
16 reasonableness. That's from the Goodrich decision by
17 the Delaware Supreme Court. The Court is guided by
18 the Sugarland factors, which focus on primarily the
19 amount of benefit conferred and then consider other
20 factors in terms of cross-checks.

21 For purposes of the fee award, I think
22 I can consider not only the \$10 million that was
23 obtained in this settlement, but also the earlier
24 disclosure benefits that the plaintiffs obtained.

1 Those disclosures were quite substantial. They were
2 eye-opening. They uncovered real conflicts that
3 people needed to know about. I agree with the
4 plaintiffs that, given our precedent, this was one of
5 those rare situations where the disclosures, standing
6 alone, would support a high 6, low-7-figure award.
7 The plaintiffs have put it at 1.275. That sounds like
8 the right ballpark.

9 Once I get beyond that, in terms of
10 the amount that counsel has requested as a percentage
11 of the monetary recovery, I agree that it falls within
12 the appropriate range. It's ballpark 17, perhaps 18
13 percent, depending on how you value things. And we'd
14 be in a range where, in my view, 15 to 25 percent of
15 the monetary benefit is the right range to be looking
16 at. I don't see any reason to depart upward or
17 downward from this.

18 In terms of expenses, I am not going
19 to do them separately here. I think the amount that
20 I'm awarding, \$2.85 million, is a big fee, given the
21 potential of the litigation and the size of the
22 monetary award. Yes, it includes an amount for the
23 disclosures. But I am just not inclined to tack on
24 another 65,000 in specific expenses for things that

1 were incurred relatively early in the case.

2 Perhaps I am wrong about this. I am
3 happy to revise my views depending on how things
4 unfold or if there's guidance from other sources. But
5 I really have been thinking about the separate expense
6 award as something that I do when people go deep in a
7 case and incur substantial amounts that would
8 undermine the compensatory effect of the fee award.
9 So I've been doing this in cases where people have put
10 out high six figures to an expert, or a lot of time, a
11 lot of expenses, doing discovery and depositions and
12 things like that, where it would really affect the
13 compensatory function of the fee number.

14 You guys are getting \$2.85 million,
15 and it equates to an hourly rate of about \$1,300,
16 using your lodestar. I think that's already pretty
17 generous. I am not going to do a separate expense
18 award here. I'm going to treat it as an all-in award
19 in the sense that I think our Chief Justice used
20 "all-in," and I know that I was using "all-in," which
21 means everything you get. Not all-in as in all the
22 different components added up, but all-in as in
23 everything you get. But I will certainly approve the
24 \$2.85 million that was requested.

1 MR. WEINBERGER: I have a copy of the
2 order.

3 THE COURT: Thank you.

4 All right. So I've signed the order.
5 I'm going to hand it to the court clerk.

6 I want to thank everybody for their
7 hard work on the case. I particularly want to thank
8 the special litigation committee and its counsel for
9 becoming involved and doing the type of thing that the
10 Court really can't do short of trial, which is coming
11 in and taking a hard look at things and figuring out
12 as best you can what's really going on, not only in
13 terms of claims, but also in terms of potential
14 damages.

15 Please pass on to your clients my
16 appreciation not only for their hard work, but also
17 for their decision to try to broker something that
18 would resolve this, which I think really was the best
19 outcome for everybody, as opposed to reflexively
20 trying to dismiss their portion and then who knows
21 what happens with any direct claims. I think it was
22 very helpful to take that constructive approach and
23 achieve something that, while everyone is probably
24 somewhat unhappy with it, ultimately works out better

1 for all concerned.

2 Thank you, everyone, for your hard
3 work on this case. I'm grateful for it.

4 (Court adjourned at 10:45 a.m.)

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CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 4 through 35, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 29th day of September, 2017.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

Tab 17

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KYLE MARTEL and JOE BRYANT,

Plaintiffs,

v

FUSION SPONSOR LLC, JOHN JAMES,
JEFFREY GARY, JIM ROSS, KELLY DRISCOLL,
BEN BUETTELL, DIWAKAR CHOUBEY, and
BROADHAVEN CAPITAL PARTNERS, LLC,

Defendants.

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: C. A. No.
: 2024-0329-NAC
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Chancery Courtroom No. 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, July 24, 2025
11:17 a.m.

- - -

BEFORE: HON. NATHAN A. COOK, Vice Chancellor

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT**CHANCERY COURT REPORTERS**
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

2 KELLY L. TUCKER, ESQ.
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3 -and-

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TIMOTHY D. BRENNAN, ESQ.
of the New York Bar
5 Wolf Popper LLP
for Plaintiffs

6 PAUL J. LOUGHMAN, ESQ.
7 Young Conaway Stargatt & Taylor, LLP
-and-

8 JOSEPH D. WEEDMAN, ESQ.
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9 White & Case LLP
for Fusion Defendants

10
11 BRADLEY R. ARONSTAM, ESQ.
Ross Aronstam & Moritz LLP

12 -and-

13 ADAM M. GREENE, ESQ.
of the New York Bar
Davis Polk & Wardwell LLP
14 for Defendant Diwakar Choubey

15
16 WILLIAM M. LAFFERTY, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
17 for Defendant Broadhaven Capital Partners, LLC

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1 THE COURT: All right. Good morning,
2 everyone. Apologies for the late start. I had
3 something I needed to take care of. This has been
4 quite the week. Three post-trial arguments. I have
5 done two so far. I think they all went four hours.
6 One expedited trial. And the settlement hearing. So
7 it's like a scene from Jerry Maguire, you know, you're
8 hanging on by a very thin thread. That's how I feel.

9 All right. You can do appearances or
10 we can dispense with that and just get started.

11 ATTORNEY LOUGHMAN: Happy to do
12 appearances if you would like, Your Honor.

13 THE COURT: Sure. That sounds great.

14 ATTORNEY LOUGHMAN: Thank you for
15 fitting us into your busy schedule. Paul Loughman
16 from Young Conaway on behalf of the Fusion defendants.
17 And with me is Joshua Weedman from White & Case.

18 THE COURT: Let's be clear. I'm
19 always happy to fit a settlement into the schedule.

20 ATTORNEY ARONSTAM: Good morning, Your
21 Honor. Very briefly. Brad Aronstam on behalf of
22 Defendant Choubey. With me, my co-counsel from Davis
23 Polk, Adam Greene. I'll save the time and just
24 introduce Bill Lafferty on behalf of Broadhaven.

1 Thank you, Your Honor.

2 ATTORNEY TUCKER: Good morning, Your
3 Honor. Kelly Tucker, Grant & Eisenhofer. And I'm
4 joined by my colleague Adam Blander of Wolf Popper,
5 and Tim Brennan is in the back.

6 I'm happy to be here today, Your
7 Honor, to hopefully take something off of your docket.

8 We're presenting what we believe to be an excellent
9 settlement on behalf of Fusion Acquisition
10 Corporation's stockholders for the Court's approval.

11 As this is the first time we are
12 before Your Honor in this case, I thought I would go
13 through the background, the procedural history, and
14 explain how we got here, then I'll discuss the class
15 certification, including your Honor's question about
16 Latch. And then I will ask for the Court's approval
17 for the settlement, attorneys' fees, and service
18 awards.

19 Is that order of operations
20 acceptable?

21 THE COURT: That sounds great.

22 ATTORNEY TUCKER: Okay. On March 6,
23 2020, Fusion Acquisition Corp, which I'll refer to as
24 "FAC", and it's now renamed as MoneyLion Inc., which

1 I'll refer to "New MoneyLion", was formed as a
2 Delaware SPAC. As with almost all SPACs, FAC's sole
3 purpose was to find a privately held company and take
4 it public.

5 As with many SPACs, the controller
6 defendants, after forming FAC, granted themselves
7 20 percent of the company as post-IPO equity in the
8 way of founders shares, which they then granted to all
9 of FAC's officers and directors through granting them
10 interest in the sponsor. They also granted them
11 interest in private placement warrants that were
12 purchased in connection with the IPO. Both the
13 founders shares and private placement warrants would
14 be worthless if FAC did not close the deal.

15 The complaint alleges, and discovery
16 reveals, that because of these perverse incentives,
17 even before the SPAC's June 30th, 2020, IPO the
18 defendants barreled towards the deal with Legacy
19 MoneyLion.

20 Legacy MoneyLion is a consumer lender
21 that primarily offered short-term loans to consumers
22 with immediate needs. FAC director and officer,
23 Mr. Gary and Chris Sugden, a member of MoneyLion's
24 board of directors and a significant investor in

1 MoneyLion through his group Edison Partners, have
2 known each other for years through their mutual
3 country club and had started discussing a deal in
4 advance of that IPO.

5 No later than August 2020, defendants
6 became aware that in March 2020 Legacy MoneyLion
7 conducted an equity offering pursuant to which Legacy
8 MoneyLion was able to raise only \$25 million at a
9 valuation of \$675 million.

10 During the due diligence process in
11 this case, it became clear that Legacy MoneyLion had
12 substantial accounting irregularities, had no forecast
13 for future performance, and Legacy MoneyLion was
14 unable to even provide historical financials to FAC
15 and the board for an extended period of time.

16 By December 12, 2020, despite that
17 being the state of affairs, when Mr. James suggested
18 that FAC send a letter of intent to Legacy MoneyLion,
19 the defendants signed off. At that point, all the
20 defendants had seen, as two productions for future
21 financial performance, was a screenshot during a Zoom
22 call that included four metrics for future
23 projections.

24 On December 29th, Mr. Gary sent an

1 email to the board and recommended that they should
2 shorten the due diligence in time to publicly announce
3 the deal. Mr. James agreed and noted "I would argue
4 on this case that we wouldn't need more than two weeks
5 to finalize due diligence." All this over a
6 \$2 billion deal.

7 Mr. Buettell, another defendant in
8 this case, expressed concerns that a J.P. Morgan
9 presentation, who was FAC's financial adviser at the
10 time, suggested a valuation of \$2.2 billion, which
11 ended up being the deal price. He thought that J.P.
12 Morgan and the board were "using numbers to justify a
13 valuation conclusion."

14 On January 26, 2020, notwithstanding
15 Mr. Buettell's concerns, FAC and Legacy MoneyLion
16 announced a deal at \$2.2 million (sic). While these
17 questions were outstanding, including as to accounting
18 irregularities and necessary restatements, and without
19 the board having a single meeting despite the proxy
20 saying otherwise, on February 10th, 2021, apparently
21 the board signed a written consent approving the
22 merger and the merger agreement although there's no
23 records of that written consent in the discovery
24 produced.

1 Ultimately, FAC also raised
2 a \$250 million PIPE in connection with the merger.

3 Months later, on September 3rd, 2021,
4 FAC filed the proxy and disseminated it to
5 stockholders and set the reduction deadline as
6 September 17, 2021.

7 The proxy failed to disclose the
8 outside directors' significant interests in the
9 sponsor and, instead, disclosed that they had no
10 interest in the founders shares. It didn't disclose
11 that FAC would contribute less than \$7 per share in
12 the merger and, instead, implied that it would
13 contract \$10 per share.

14 The proxy stated that a board meeting
15 occurred where there's no evidence that meeting
16 occurred in the discovery produced.

17 And it also manufactured due diligence
18 that, based on the discovery we had, had not actually
19 occurred.

20 The proxy failed to disclose that the
21 proxy projections were created in connection with the
22 merger and included a cash infusion that would result
23 and also failed to disclose the extent of the
24 accounting irregularities.

1 Immediately after the proxy was
2 issued, FAC's stock price dropped below \$10 per share.
3 Defendants were concerned that this would increase
4 redemptions. And they started talking with bankers
5 about how they could prop up the price to get it
6 to \$10 to lower redemptions.

7 Four days later -- excuse me, four
8 days after a discussion Mr. James had with Defendant
9 Choubey, who is the CEO of Legacy MoneyLion and its
10 founder, while this was going on, the stock price was
11 trading below \$10, Mr. Choubey provided updated
12 financial projections to FAC which increased revenues
13 over the production's period, and FAC promptly
14 published those updated projections in a proxy
15 supplement.

16 On September 21st, stockholders voted
17 in favor of the merger, and on September 22nd, it
18 closed.

19 On the date of the merger, the stock
20 price was trading at \$10.76 per share. It traded
21 above the redemption value for a very short period,
22 and thereafter the stock price dropped. In the year
23 after the merger, it traded in between about \$4
24 and \$9.50. About seven weeks after the deal, it was

1 trading around \$9 per share.

2 A few things happened along the way
3 that contributed to the drop in stock price. In
4 November 2021, seven weeks after the deal, New
5 MoneyLion announced an acquisition of a company by
6 which it would contribute shares that it valued at \$9
7 per share. This arguably set a ceiling on the stock
8 price at the time. It didn't trade above \$9 again for
9 a very long time and then only shortly.

10 In March 2022, New MoneyLion announced
11 that certain of its historical financials would need
12 to be restated and lowered guidance for certain
13 measures for fiscal year 2022.

14 On September 29th, perhaps the biggest
15 contributor to the stock price drop, the
16 CFPD announced it had filed a litigation against
17 MoneyLion related to its violations -- its alleged
18 violations of the Consumer Financial Protection Act
19 and the Military Lending Act. Last I saw, that case
20 was still ongoing.

21 And by November 2022, so 14 months
22 post-merger, the stock was -- New MoneyLion told
23 stockholders that the stock was at risk of delisting
24 because it had traded below a dollar a share for 30

1 consecutive days.

2 And in light of all these, some
3 publicly known facts, some not publicly known, both
4 plaintiffs in this case, Mr. Martel and Mr. Bryant,
5 made separate 220 demands. Then finding the company's
6 productions incomplete, they filed 220 actions.

7 As a result of these efforts,
8 plaintiffs negotiated an extensive ESI search protocol
9 as part of that process. Search terms were run over
10 three of the defendant director and officer emails
11 using terms that were agreed upon amongst the parties
12 and resulted in the production of about 5,000
13 documents pre-complaint filing.

14 Those documents revealed key
15 information that was relevant to plaintiffs'
16 allegations, including as to the accounting
17 irregularities, the projections, and the directors and
18 officers' undisclosed interests in the sponsor.

19 After getting that information, the
20 plaintiffs filed their plenary complaints. The Fusion
21 defendants answered. And Defendants Choubey and
22 Broadhaven, who plaintiffs alleged aided and abetted
23 the breaches of fiduciary duty, filed motions to
24 dismiss. Those motions were fully briefed, and

1 argument was set for January of 2025.

2 On October 23rd, 2024, plaintiffs were
3 engaged in discovery, had started to obtain
4 productions from non-parties and some additional
5 documents from defendants. The parties attended a
6 full-day mediation with Mr. Murphy of Phillips ADR.
7 That mediation was unsuccessful, but the parties
8 continued discussions, and ultimately on January 11th,
9 2025, accepted a double blinds mediator's
10 recommendation at \$12.75 million; and the parties
11 thereafter negotiated the settlement stipulation and
12 filed that on April 14th, 2025.

13 I'll move on to the class
14 certification unless Your Honor has any questions?

15 THE COURT: I'll save my questions for
16 the end, how about that?

17 ATTORNEY TUCKER: Okay.

18 THE COURT: I have some questions
19 about the facts you just discussed because it's an
20 interesting factual picture. Why don't we go through
21 to the end and then we can discuss.

22 ATTORNEY TUCKER: Okay. No problem.

23 Your Honor, here we are moving for
24 class certification of a non-opt-out class of FAC

1 stockholders who held as of the merger date and those
2 who thereafter obtained shares by operation of law.

3 This Court has certified similar
4 classes in 17 different cases at this point.

5 I note that after entering in the
6 stipulation and briefing class certification, the
7 parties conferred and modified the class definition in
8 the papers to conform with what the Court said was
9 appropriate in the *Latch* case.

10 After that clarification, I just want
11 to -- Vice Chancellor Fioravanti raised something
12 earlier this week in another class certification
13 hearing about whether -- who obtained shares by
14 operation of law modifies all of successors,
15 successors-in-interest, and heirs in the answers.
16 That is our intention.

17 As demonstrated by the Ewashko
18 declaration, which was submitted to the Court, there
19 are thousands of class members.

20 Questions -- additionally, questions
21 of law and facts are common to all class members,
22 including whether defendants breached their fiduciary
23 duties, the standard of review, what damages are, and
24 how they were suffered.

1 Plaintiffs' claims are typical of the
2 class. They're similarly situated to all other public
3 stockholders of Fusion Acquisition Corp. And the
4 class's interests were fairly and adequately protected
5 throughout this process. We go into more detail in
6 our brief at pages 27 to 34 about the specific factors
7 for class certification.

8 I also note that notice was provided
9 in accordance with the Court's scheduling order. We
10 submitted that affidavit by Mr. Ewashko following the
11 filing of the brief.

12 No one has objected to the settlement,
13 the plan of allocation, the class definition,
14 attorneys fees or service awards. We've gotten no
15 objections at all.

16 And, accordingly, plaintiffs submit
17 that class certification is appropriate here as
18 modified by the parties' letter last week.

19 Does Your Honor have any questions
20 about class certification?

21 THE COURT: None, no.

22 ATTORNEY TUCKER: Okay.

23 Your Honor, whilst also asking the
24 Court approve the settlement, this settlement presents

1 substantial benefits, monetary consideration to class
2 members.

3 The stock price did not immediately
4 drop to the price at which it ended up. It was
5 trading at a higher price for a period of a year
6 post-merger. And that means that not all stock
7 members -- excuse me, not all members suffered the
8 same loss or suffered as substantial a loss as others.

9 The \$12.75 million settlement
10 represents a recovery on a pro rata basis of \$1.40 a
11 share. That is the highest recovery on a pro rata
12 basis of settlements in the eight figures -- or,
13 excuse me. *Gig2* and *Gig4* were higher on a per-share
14 basis, but those settlements were only 7.25 and
15 4.75 million --

16 This makes this exceed -- excuse me.
17 It more than quadruples the per-share recovery in
18 *MultiPlan*. That was about 36 cents per share. And
19 the settlement here represents recovery on a net
20 cash-per-share damages theory of approximately
21 47 percent. And that's better than every other case
22 other than *Sharecare*, although I note that my
23 colleague filed another settlement recently that
24 recovers 60 percent of net-cash-per-share damages.

1 The remaining *Activision* factors
2 likewise supports settlement approval and approval of
3 the plan of allocation. The plan of allocation we
4 propose is like the plans of allocations that have
5 been accepted in *Romeo Power, Latch, Boris 4*. It
6 contemplates a pro rata distribution to all class
7 members of a nominal amount of 10 cents per share.
8 And then the class members who suffered actual
9 economic damage submit claims, and they will be paid
10 based on their share of total damages.

11 Additionally, plaintiffs' counsel
12 seeks an award of \$2,295,000 in attorneys' fees,
13 inclusive of \$72,565.16 of expenses. That's
14 approximately, after its net of expenses, 17.4 percent
15 of the net settlement fund.

16 This Court looks at the *Sugarland*
17 factors in determining the appropriateness of the
18 requested fee award and grants the greatest weight to
19 benefits conferred. As discussed, we believe the
20 benefits conferred here are substantial. This is a
21 very significant settlement that provides immediate
22 relief to class members and contemplates that they
23 will be compensated in accordance with their actual
24 damages.

1 The Court can also look to the
2 guidelines set forth in *Southern Peru* in determining
3 an appropriate range. Cases where there have been
4 substantial litigation efforts, fee range falls into
5 the 15 to 25 percent range. Here, by the time the
6 settlement stipulation had been signed and settlement
7 in principle -- agreement in principle had been
8 reached, the plaintiffs had engaged in extensive 220
9 process, had both pursued 220 actions. Plaintiffs had
10 and reviewed over 5,000 documents obtained through
11 that 220 process and litigation discovery, had fully
12 briefed two motions to dismiss, and we think that that
13 puts this case firmly in the 15 to 25 percent range,
14 although on the lower side of that range, which is why
15 we're requesting 17.4 percent.

16 Now, this is consistent with fees that
17 have been awarded in other de-SPAC merger cases that
18 were similar or less advanced. In *GeneDX*, the Court
19 ordered a 19.5 percent fee. In *Lordstown Motors*, the
20 Court ordered a 22.5 percent fee. And cases in other
21 contexts also support the fee award.

22 Plaintiffs' counsel took this
23 litigation on a contingency basis and took on
24 substantial risk. Defendants raised several arguments

1 in this SPAC case and others that while settled in the
2 Court of Chancery, we believe, present still risk on
3 appeal and at trial.

4 The time and efforts of counsel also
5 support the requested fee award. In our papers, we
6 put forth the hours from inception to the filing of
7 the settlement stipulation. Your Honor asked for
8 supplemental affidavits to show hours in between
9 initiation and settlement fee reached in principle.
10 That total is 1,527.15 hours for a lodestar of
11 \$1,181,372. So at the fee requested, that implies an
12 hourly rate of \$1,455.28, and the lodestar multiple is
13 1.88 percent. And we have some examples in notes 152
14 and 153 at page 48 of our brief that show that's well
15 within the range this Court has awarded in other
16 cases.

17 I touch on it briefly, but this court
18 does present some novel factual and legal issues.
19 Plaintiffs allege aiding and abetting claims, which
20 have arguably become harder since the Supreme Court's
21 decision in *Mindbody* and *Columbia Pipeline*, although
22 we think we had good facts here. The
23 net-cash-per-share disclosure theory is yet to be
24 tested by the Supreme Court. And no cases were easy

1 to try, including this one.

2 There are questions about the fact
3 that MoneyLion exceeded its proxy projections for
4 revenue in the first year of post-merger, which called
5 into question the issues with the projection
6 disclosures and called into question whether
7 plaintiffs would be successful in proving unfair value
8 and damages.

9 And a few months post-merger,
10 MoneyLion entered into a third-party arm's length
11 negotiation by which it provided consideration in
12 shares of New MoneyLion valued at \$9 per share. So if
13 the Court found that to be a reliable market indicator
14 of value, not accounting for interest, the settlement
15 is actually a better result for plaintiffs than if we
16 had gone to trial.

17 Plaintiffs believe, and continue to
18 believe, that our claims are strong, but we believe
19 that that's why the settlement reflects that.

20 As to the final consideration, Counsel
21 have a long-standing practice before the Court of
22 Chancery both in de-SPAC merger cases and other breach
23 of fiduciary duty cases representing classes of
24 stockholders.

1 Plaintiffs are also seeking service
2 awards in the modest amount of \$2500 to be paid out of
3 any fee and expense award. Here, both plaintiffs
4 served and verified a 220 demand, verified the
5 complaint, and conducted related diligence, reviewed
6 other pleadings and oversaw the settlement on behalf
7 of all members of the class.

8 The courts awarded higher service fees
9 in other de-SPAC merger cases where discovery was
10 sometimes a little farther along, sometimes not, in
11 *Latch*, *Bores 4*, *Lordstown Motors*, *GeneDX*, *Finserve* and
12 others, the Court awarded \$5,000 per plaintiff.

13 That's what I have for Your Honor.
14 I'm happy to answer any questions you have. And we
15 can go back to your question about the facts.

16 THE COURT: So, in reading the
17 settlement brief, I have to say I was really struck by
18 the description of the movement in projections, the
19 preparation of projections, and their interplay with
20 the transaction here.

21 I was also struck by the discussion in
22 the settlement brief that when plaintiffs sought 220
23 documents here, they were told that the entity had no
24 minutes and, therefore, folks were able to access ESI,

1 custodial ESI.

2 These all seem like remarkable or
3 unusual facts.

4 On the projections point, as I was
5 thinking about it, I have some dim recollection that
6 during the heyday of the SPAC craze, one of the
7 reasons why folks really preferred or sought to pursue
8 accessing public markets via a de-SPAC merger was that
9 you could put into the market projections, which is
10 not something that is permitted in connection with an
11 IPO. I think I recall that from a -- maybe a Matt
12 Levine email at some point.

13 But assuming that's correct, one might
14 argue that what happened here -- and to be clear, I
15 recognize this case didn't go to trial and defendants
16 didn't make their arguments. I'm not making fact
17 findings. And everything should be understood as
18 extraordinarily caveated with those understandings.

19 But if one were to accept the
20 plaintiffs' view of the world, and if one were to
21 believe that that view of the world were to extend
22 through to a post-trial decision, then one might argue
23 that the treatment of projections here in connection
24 with achieving the de-SPAC merger reflects a poster

1 child scenario for the problems and malincentives
2 associated with the de-SPAC form.

3 Now, to be clear, I'm not saying that
4 there's an inherent problem. I'm not saying that
5 there is some sort of pejorative that should be
6 associated. But I also can't ignore common sense.
7 And I think how folks have reacted over the years to
8 these transactions and how they have performed -- and,
9 again, you know, this is all heavily caveated -- I
10 understand some transactions have been, I believe,
11 quite successful and folks can point to examples.

12 But there are risks associated, as
13 there are with anything in life. And if I'm
14 remembering this email and this discussion of the
15 particular risk associated with projections in
16 connection with de-SPAC mergers, if I'm remembering
17 this email correctly in the prior discussions, then it
18 would seem as though the fact picture being put
19 forward by the plaintiffs here is arguably emblematic
20 of that risk, which I am willing to acknowledge and
21 say that seems significant to me.

22 But everyone should understand that's
23 extraordinarily caveated. There are no fact findings.
24 Defendants haven't put forward their defenses. This

1 didn't go to trial. Folks didn't take depositions.
2 I'm sure -- one thing I learned as a litigator is very
3 often I would be certain I had the right view of what
4 happened. And then we'd start taking discovery and it
5 would turn out there was this other explanation I
6 hadn't even thought of. And that happens 9 times out
7 of 10. So that is -- that's what happens in
8 discovery. And that's why the discovery process is
9 important. That's why the trial process is important.
10 And that's why all the caveats I've described are
11 important.

12 But it just seemed significant that
13 I'm reading these things in plaintiffs' brief, and
14 they seem to line up with these risks that folks have
15 identified with perhaps some of the incentives
16 associated with a particular type of transaction. And
17 that's not to say, you know, with the advice of good
18 counsel, with folks acting in a knowledgeable way,
19 there are all sorts of ways that risks can be
20 mitigated and folks do things the right way.

21 So it just seemed very interesting to
22 me to read this and have read about identification of
23 risk and it seemed like oh, this is right here seeming
24 to embody those prior concerns. And, again, I say

1 that with every single caveat in the book.

2 But I also recognize plaintiffs got
3 internal emails because folks -- as part of a 220,
4 because folks didn't -- apparently didn't keep
5 minutes.

6 So plaintiffs here -- maybe in other
7 de-SPAC settlements, the plaintiffs have to talk at a
8 bit of a higher level. Here, the plaintiffs, as I
9 understand it, got emails, got internal
10 communications, took discovery from third parties.
11 And so when you're thinking about discovery, you know,
12 the mists that obscure what happened are starting to
13 lift a little bit. It's not saying that we have in
14 any way, shape, or form a clear picture. But maybe
15 it's a little bit clearer picture than in other -- in
16 the context of other settlements.

17 So it's not really a question. It's
18 just something that I wanted to remark on that it
19 was -- it struck me in reading papers.

20 ATTORNEY TUCKER: Your Honor, if I
21 could just address the point on projections. I agree.
22 Obviously we thought that was an important part of the
23 story, which is why we included it in our complaint
24 and our settlement brief. We think it's important for

1 stockholders who are evaluating the settlement to know
2 that the challenge that we had in this case, which is
3 not the case in a lot of other SPAC cases where
4 projections similarly come together in kind of this ad
5 hoc way, is that MoneyLion met its revenue projections
6 for a year post-merger. So it missed on other
7 metrics, but it's pre-revenue.

8 So when you're talking about valuation
9 of a pre-revenue company -- or excuse me, pre-profit
10 company, you're looking at whether they're meeting
11 their revenue projections. Because people assume
12 they'll figure it out. You know, you make enough
13 money, you figure out the rest.

14 So the problem with this case, which
15 was one of the challenges we had -- and despite this,
16 I still think this is an excellent settlement. This
17 is \$1.40 a share. The stock did not trade down to a
18 dollar for a year post-merger. Damages were mitigated
19 because people sold in between then and the end of the
20 merger and when the stock price reached that.

21 But the challenge we have is we have
22 to show unfair price. We have to show damages. And
23 when you have the company, despite how those
24 projections came together, meeting them for a year

1 post-merger, that presents a real challenge because I
2 think the Court, in general, has looked with
3 skepticism at projections beyond a year or even before
4 a year. And I think that the market is mostly looking
5 near term, as well.

6 So that presented a significant
7 challenge. And I think that you don't have that in
8 all of these other de-SPAC merger cases. You have
9 them missing projections immediately and massively.
10 And we just didn't have that here.

11 So that's -- plenty of cases have gone
12 to trial. PLX. They found a breach of fiduciary duty
13 and damages were zero. That's a risk. And it's a
14 substantial one when you have the company meeting the
15 projections for an entire year.

16 I do agree with Your Honor that I
17 think that a lot of these SPACs did not engage in the
18 kind of corporate formalities we would expect from a
19 Delaware corporation. And I think that's true in a
20 lot of these cases, as we've seen and as Your Honor
21 has seen.

22 So I don't think that's particularly
23 unique here. I think that we did a really good job
24 pushing the 220 process. And I think through our

1 diligence we got all of this stuff that helped inform
2 our case that I think in general that is not so
3 unusual to me from where I stand and the documents
4 that I see.

5 So just to -- I don't think I have
6 anything else to address those two points. I think
7 that's the main thrust of it.

8 THE COURT: That's fantastic
9 clarification.

10 The meeting revenues, the revenue
11 projections -- and this is the benefit of, you know, I
12 spend however long it takes to get through the
13 settlement brief and the facts and other folks who
14 have lived with this for a long time. So I think it's
15 a great point.

16 It's, I suppose, the dynamics here are
17 just so fascinating in how these things come together.

18 But I think to your point, that that
19 would also likely be -- and as I'm considering the
20 strength of the claims versus strength of defenses,
21 that would probably go in the column of strength of
22 defenses, that however folks got to the projections,
23 they ended up meeting the revenue projections after
24 the merger for a year, which is -- that is quite

1 significant, so I appreciate you pointing that out.

2 And then on this issue of: Did folks
3 engage in corporate formalities? I also appreciate
4 the input that maybe that's not so uncommon in these
5 sorts of circumstances.

6 I suppose I was all ready to get
7 excited that this was really quite extraordinary, but
8 I suppose, as I think about it, in the small number of
9 de-SPAC cases that I've seen, that is ringing a bell
10 that this notion of folks not really having a meeting
11 before approving a merger and so forth, I mean, for
12 better or worse, I suppose, is not unique to this
13 case. And I'm sure the transactional folks will have
14 their -- have their view on that as to how that
15 proceeds. But -- or the meeting, if they do have a
16 meeting, it's basically the first meeting or one of
17 only a handful. So I appreciate the clarification and
18 maybe bringing me back down to earth a little bit.

19 You'd make a great defense lawyer.

20 [Laughter.]

21 ATTORNEY TUCKER: Not today.

22 Did Your Honor have anymore questions?

23 THE COURT: Let's see.

24 Do you have any insight -- and if you

1 don't, that's fine. I'm not sure there would be any
2 reason for folks to pursue this in discovery, but do
3 you have any insight as to whether there were large
4 holders or large institutional holders who didn't
5 receive their shares as part of the public stockholder
6 float?

7 ATTORNEY TUCKER: I don't know for
8 sure. I assume that there are some just because of
9 what we've seen in other cases.

10 And we also have large institutional
11 investors investing \$250 million in the PIPE at \$10
12 per share. So even if they had the opportunity to
13 redeem and didn't, you had \$250 million coming in from
14 large institutional investors.

15 THE COURT: I was just thinking about
16 whether or not these sorts of transactions, or
17 transactions, where stockholders don't redeem, the
18 folks who don't redeem might be comprised more than in
19 other types of mergers, might be comprised of retail
20 holders; and if that's true, then this might be an
21 example of a circumstance where the two plaintiffs
22 here, individuals, this might be an example of a
23 circumstance where there's not really a large
24 institutional holder who would participate in this

1 sort of transaction, not redeem, and then be available
2 to step forward as a representative plaintiff.

3 You know, I was just thinking about
4 that, is this a circumstance -- because there are
5 transactions where, really, you only have small retail
6 holders; and if anyone is going to step forward and
7 get a recovery, there were reasons why there aren't
8 large institutions.

9 I had another case where -- I'm going
10 to probably get this wrong, but I think it was a
11 forward split and then reverse split or a reverse
12 split and then a forward split. But, anyway, the
13 point was all the small holders were knocked out,
14 allegedly, at an unfair price.

15 And so there, that's another example
16 of a case where there's just -- it doesn't affect
17 large institutional holders. It's just something I've
18 been, I suppose, noodling about a little bit.

19 ATTORNEY TUCKER: So I think that in
20 these SPAC cases, what we've kind of seen as a general
21 rule is you do have a higher level of retail investors
22 investing, not redeeming.

23 But a lot of it depends on the facts
24 and circumstances, what the stock price is doing at

1 the time when the transaction closed because a lot
2 of -- earlier on in this kind of SPAC boom, nobody was
3 redeeming because the stock price was always trading
4 above 10 as of redemption deadline. So if the stock
5 price is trading above 10, you don't redeem if you
6 want out and sell.

7 I think that there were a fair number
8 of redemptions in this case. There were only
9 9 million shares outstanding after the redemption
10 closed.

11 But we have seen, at least in the
12 documents we got, I think I mentioned there was
13 back-and-forth about getting the stock price to stay
14 at 10 around the redemption deadline. And they did.
15 I mean, the stock price was 10.76 on the date the
16 merger closed. It was around 10 before then. And it
17 seems like for some of those institutional investors,
18 it was automatic: You sell if it's below 10, you stay
19 in if it's above 10.

20 So I think it depends on when they
21 were making that decision. But I do think that in
22 these SPAC cases, people get excited. You get to
23 participate in an IPO. It's not something a retail
24 investor typically gets to do. And I think that it is

1 more likely that retail investors are the ones who are
2 going to bring these cases forward. And that's what
3 we've seen.

4 THE COURT: That's great. Thank you.

5 My four-hour post-trial argument
6 yesterday I think involved a de-SPAC. My recollection
7 is 99 percent of folks redeemed. So it sounds like
8 this was a different circumstance.

9 ATTORNEY TUCKER: Yes, yeah.

10 THE COURT: Okay. All right. Thank
11 you very much. That was great.

12 ATTORNEY TUCKER: Thank you, your
13 Honor.

14 THE COURT: Anything from the defense
15 side?

16 ATTORNEY WEEDMAN: Your Honor, unless
17 you have any further questions, I think Ms. Tucker did
18 a very good job answering the questions you had from
19 our perspective, as well.

20 THE COURT: All right. That's great.
21 Thank you. Okay.

22 All right. Now is my chance to read
23 at everyone for 15, 20 minutes. So I suppose everyone
24 can relax and hopefully this is -- it'll pass by

1 relatively quickly. I will save everyone suspense.

2 For the reasons I'll describe, I'm
3 going to approve the settlement, approve class
4 certification, grant the fee application, and grant
5 the request for an incentive award.

6 As I'll describe, I think this is a
7 really excellent recovery and outcome that's achieved
8 here on behalf of the class, and I think this is an
9 extremely positive result for everyone. And there's
10 every reason to approve the settlement in all the
11 applications today.

12 So as I noted, I'll now provide my
13 ruling. For the reasons I'll discuss momentarily, I
14 am certifying the class, approving the proposed
15 settlement, and granting the fee application.

16 The parties are clearly familiar with
17 the background of this matter -- and also thank you,
18 Ms. Tucker, for the excellent presentation today and
19 the excellent briefing in support of the proposed
20 settlement -- so with that, I'll proceed straight to
21 my analysis.

22 I have five tasks for purposes of
23 today's hearing: Class certification, determining the
24 adequacy of the notice of the settlement, approving

1 the settlement and plan of allocation, deciding the
2 fee application, and determining whether to approve
3 plaintiffs' requested incentive award.

4 Turning first to class certification,
5 the settlement class is defined as "all record and
6 beneficial holders of FAC Class A common stock, who
7 held such stock as of the redemption deadline of
8 September 17, 2021, and who elected not to redeem all
9 or some of their stock, including their heirs,
10 successors-in-interest, and successors who have
11 obtained shares by operation of law, and assigns, but
12 excluding any Excluded Persons."

13 Excluded persons has the meaning
14 described in the settlement stipulation and includes
15 defendants, their immediate family, any manager or
16 managing member of any Entity Defendant as of
17 September 17, 2021, any affiliate of an Entity
18 Defendant, and any entity in which any defendant or
19 other Excluded Person or groups of Excluded Persons,
20 has or had as of the redemption deadline a controlling
21 interest.

22 I note further that the class
23 definition I just described includes, as I stated, the
24 text "who have obtained shares by operation of

1 law[.]” The parties filed a letter stating that they
2 had agreed to add this text and, to delete a reference
3 to “transferees” in that same spot, following the
4 minute order that I issued concerning Vice Chancellor
5 Will's recent decision in *TS Innovation Acquisitions*
6 *Sponsor, LLC Stockholder Litigation*. For that, see
7 docket entries 66 and 68. That is an appropriate
8 clarification in light of Vice Chancellor Will's
9 decision, which I appreciate and which makes today's
10 decision easier. I find the class as now defined to
11 be a reasonable and adequately cohesive unit for the
12 purposes of this litigation and will turn to my
13 Rule 23(a) analysis.

14 Under Rule 23(a), there are four
15 criteria that must be satisfied for class
16 certification: Numerosity, commonality, typicality,
17 and adequacy of representation.

18 Rule 23(a)(1) requires “the class [to
19 be] so numerous that joinder of all members is
20 impracticable.” “There are no bright-line cutoffs,
21 but numbers in excess of forty, and particularly in
22 excess of one hundred, have sustained the numerosity
23 requirement.” That is from this court's 2009
24 *Countrywide* decision.

1 Here, plaintiffs explain that there
2 were over 9 million public shares outstanding as of
3 the redemption deadline that were not submitted for
4 redemption in connection with the merger. Plaintiffs
5 explain that, absent litigation on a class basis, that
6 would require the joinder of "likely thousands of
7 holders of millions of shares."

8 The settlement administrator's
9 affidavit further provides that the settlement notice
10 had been mailed or emailed to over 18,000 potential
11 class members. There is therefore no question that
12 joinder of the number of potential class members we're
13 talking about here would be impracticable and, under
14 our case law, the numerosity requirement is easily
15 satisfied.

16 Rule 23(a)(2) requires there to be
17 "questions of law or fact common to the class."

18 The common issues of law and fact in
19 this case are whether the FAC Defendants allegedly
20 breached their fiduciary duties by impairing
21 stockholders' redemption rights, causing Delaware law
22 disclosure violations in connection with the merger,
23 causing a merger that was unfair to the public
24 stockholders, and then unjustly enriching themselves.

1 The common issues of law and fact further include
2 whether Choubey and Broadhaven allegedly aided and
3 abetted the FAC Defendant's breaches of fiduciary
4 duty.

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

10 Rule 23(a)(3) requires that "the
11 claims or defenses of the representative part[y] [be]
12 typical of the claims or defenses of the class."
13 Here, all class members, as stockholders, face the
14 same injury from the same conduct. Because plaintiffs
15 are affected in the same way as the rest of the class,
16 I conclude that the typicality requirement of
17 Rule 23(a)(3) is satisfied.

18 Finally, Rule 23(a)(4) requires "that
19 the representative part[y] will fairly and adequately
20 protect the interests of the class." I must examine
21 (1) whether the representative plaintiff holds
22 interests that are aligned with the class, and, (2)
23 whether plaintiff is represented by competent and
24 experienced counsel. For that I cite this court's

1 2001 *O'Malley* decision.

2 Here, the plaintiffs' interests are
3 aligned with those of the class: Plaintiffs held FAC
4 Class A shares on the redemption deadline, like all
5 class members, and are typical members of the class
6 they seek to represent.

7 Plaintiffs' counsel has substantial
8 experience in stockholder class actions and are
9 well-known to the members of this court. Counsel here
10 have skillfully and vigorously litigated this action,
11 as is evidenced by the result here today; and,
12 accordingly, I conclude that the plaintiffs and
13 plaintiffs' counsel adequately represent the class and
14 Rule 23(a)(4) is satisfied.

15 Pursuant to Rule 23(f)(2)(A), the lead
16 plaintiffs must file a Rule 23(aa)-compliant affidavit
17 confirming that they "ha[ve] not received, been
18 promised, or been offered – and will not accept – any
19 form of compensation" aside from any damages or
20 compensation granted by the court, or reimbursement of
21 expenses by their attorneys.

22 Both lead plaintiffs filed the
23 required affidavits on June 24, 2025. I conclude this
24 requirement is met.

Turning to Rule 23(b), in addition to satisfying the requirements of Rule 23(a), a proposed class must fall within the parameters outlined by Rule 23(b). Certification under Rule 23(b)(1) is appropriate if the prosecution of separate actions by individual class members would risk inconsistent or varying results that would impose inconsistent obligations; or adjudication with respect to one class member would be dispositive of the class's interests. "[A]ctions challenging the exercise of corporate fiduciary duties are frequently certified under this rule." That's from this court's 2009 decision in *CME Group v. Chicago Board Options Exchange*.

Here, approval of the proposed settlement would protect all absent class members' interests in uniform fashion, and adjudication with respect to one class member could be dispositive of the class's interests at large. Absent certification of the class, separate actions may be brought by individual FAC stockholders, which would create a risk of inconsistent results and obligations.

Dealing with these claims on an individual basis would be grossly inefficient, since each claim's adjudication should be uniform to the

1 others.

2 Accordingly, I conclude the
3 certification under Rule 23(b)(1) is appropriate.

4 In addition, Rule 23(b)(2) is
5 satisfied if the defendants' conduct is "generally
6 applicable to the class," making appropriate
7 class-wide declaratory or injunctive relief.
8 Defendants' alleged actions here uniformly impacted
9 the entire class. Accordingly, certification under
10 Rule 23(b)(2) is appropriate here as well.

11 In sum, the class is certified as a
12 non-opt-out class under Rules 23(b)(1) and 23(b)(2).

13 I'll now turn to the adequacy of the
14 notice. Under Rule 23, notice "by mail, publication
15 or otherwise of the proposed dismissal or compromise
16 shall be given to shareholders or members in such
17 manner as the Court directs."

18 Our high court's 2008 *Philadelphia*
19 *Stock Exchange* decision provides that a notice of
20 settlement is sufficient if it "contains a description
21 of the lawsuit, the consideration for the settlement,
22 the location and time of the settlement hearing, and
23 informs class members that additional information can
24 be obtained by contacting class counsel."

1 This court's Rule 23(f)(3) lays out
2 further details as to notice in this context.

3 Having considered the relevant factors
4 and the notice, I conclude it is appropriate,
5 reasonable, and sufficient. Among other things, the
6 notice here adequately describes the lawsuit,
7 including the claims asserted and the proceedings to
8 date. The notice adequately describes the
9 consideration for the settlement. The notice provides
10 the location and time of this settlement hearing. The
11 notice informs the class members whom to contact for
12 further information.

13 As to adequate delivery, the
14 settlement administrator's affidavit describes the
15 extensive notice efforts undertaken here. This
16 includes the settlement administrator causing, on
17 June 2nd, 2025, the notice and proof of claim and
18 release form to be sent by First-Class Mail to the
19 4,899 mailing records contained in the settlement
20 administrator's proprietary database -- which
21 comprises the largest and most common banks, brokers,
22 and other nominees -- to reach owners of FAC Class A
23 stock held in "street name." That's from the
24 affidavit of Jack Ewashko, docket entry 65.

1 The settlement administrator has
2 received an additional 134 names and addresses of
3 potential class members from individual or brokerage
4 firms and other nominee holders. The settlement
5 administrator has also received requests from brokers
6 and other nominee holders for 10,255 notice packets
7 and 2,877 email copies of the notice packet were
8 mailed by nominees to potential class members who
9 preferred to receive such communications
10 electronically; that is, the email copies. That's
11 also from the Ewashko affidavit.

12 To date, over 18,000 notice packets
13 have been mailed or emailed to potential class members
14 and nominees. On June 2nd, the settlement
15 administrator submitted the notice packet to DTC to
16 post on their Legal Notice System. Also, on June 2nd,
17 2025, the settlement administrator established both a
18 case-specific, toll-free telephone helpline and a
19 settlement website for this action containing
20 information about the action, proposed settlement,
21 objection deadline, and time and date of the
22 settlement hearing, in addition to copies of the
23 notice, complaint, stipulation, and plaintiffs' brief
24 in support of the settlement.

1 Further, the settlement administrator
2 caused the publication notice to be published on
3 Investors Business Daily and PR Newswire on June 16.

4 I conclude the notice here and its
5 delivery was adequate and appropriate.

6 The deadline to object to the
7 settlement and the fee and expense award was July 9,
8 2025. No objection was filed.

9 I now turn to consider, as I must
10 under Rule 23, whether the terms of the proposed
11 settlement are fair and reasonable, recognizing that
12 "[t]his Court generally favors settlement of
13 complicated litigation." That's from this court's
14 2009 decision in *Gatz v. Ponsoldt*.

15 The Court's function is "to consider
16 the nature of the claim, the possible defenses
17 thereto, the legal and factual circumstances of the
18 case, and [] to apply its own business judgment in
19 deciding whether the settlement is reasonable in light
20 of these factors." That's from the *Philadelphia Stock*
21 *Exchange* decision.

22 In short, my task is to "evaluate[]
23 the claims and defenses on the discovery record to
24 achieve a sense of the relative strengths of the

1 parties' positions." That is from this court's 1996
2 decision in *Caremark*.

3 I'll now turn to the nature of the
4 claims and defenses. This action arises out of
5 defendants' alleged impairment of FAC Class A common
6 stockholders' right to make an informed redemption in
7 connection with the de-SPAC merger between FAC and
8 Legacy MoneyLion.

9 Plaintiffs allege: (i) that the FAC
10 Defendants, aided and abetted by Choubey and
11 Broadhaven, caused FAC to make material, false, and
12 misleading public statements about the benefits of the
13 proposed merger; (ii) that the merger was not entirely
14 fair to FAC stockholders; and (iii) that the alleged
15 breaches of fiduciary duty, related to aiding and
16 abetting breaches of fiduciary duty, and unjust
17 enrichment harmed the class by, among other things,
18 dissuading class members from redeeming their stock.
19 Plaintiffs sought an award of monetary or rescissory
20 damages for themselves and the class.

21 Turning to defenses and obstacles to
22 the claims, although plaintiffs were guardedly
23 optimistic about their chances of prevailing at trial,
24 plaintiffs were well aware that even an entire

1 fairness trial was not a low risk proposition. As
2 this court noted in its 2023 decision in *Dell*, in the
3 years since our high court's 2012 decision in *Americas*
4 *Mining*, "there have been at least ten post-trial
5 decisions in entire fairness cases where the
6 defendants prevailed, plus three more where the Court
7 awarded only nominal damages of \$1.00." See page 37
8 plaintiffs' settlement brief.

9 I also note the discussion from oral
10 argument by counsel concerning the post-merger entity
11 achieving the revenue projections in the year
12 following the merger, which would have arguably
13 complicated a liability determination and finding.

14 While plaintiffs believe their
15 allegations as to aiding and abetting against Choubey
16 and Broadhaven were strong and informed by substantial
17 discovery, plaintiffs acknowledge that our high
18 court's recent decisions in *Mindbody* and *Columbia*
19 *Pipeline* raised serious concerns about those claims.
20 See pages 37 to 38 of the plaintiffs' settlement
21 brief.

22 Moreover, even if plaintiffs were to
23 win at trial, they would have faced "significant risk
24 on appeal," given the reality they acknowledge that,

1 in the eight post-*Americas Mining* appeals from
2 post-trial damages awards in which representative
3 plaintiffs obtained cash recoveries and defendants
4 challenged the liability determination that our high
5 court has heard, only three of those cases were
6 affirmed, and the rest were reversed.

7 Also, claims in de-SPAC merger cases,
8 including as to allegations related to omission in
9 net-cash-per-share proxy statements have yet to be
10 substantively addressed on appeal. See page 38 of
11 plaintiffs' settlement brief.

12 Further, plaintiffs explain that
13 although they believed that they would have prevailed
14 in proving that the FAC defendants breached their
15 fiduciary duties, and Choubey and Broadhaven aided and
16 abetted those breaches, defendants may have proved
17 that these breaches did not cause the class's damages.
18 See pages 38 to 39 of the plaintiffs' brief and the
19 discussion during this hearing today.

20 Having now assessed the nature of the
21 claims and defenses, I'll turn to the give and the get
22 of the settlement.

23 Plaintiffs explain that the settlement
24 consideration, measured on a per-share basis, amounts

1 to a \$12.75 million cash recovery, or \$1.40 per class
2 share. Plaintiffs calculate reasonably maximum
3 net-cash-per-share damages, assuming they prevailed,
4 as being measured by the difference between the
5 redemption value of \$10.00 per share and the net cash
6 per share contributed around \$7.00 per share -- or, in
7 other words, damages of \$3.00 per share.

8 There were just over 9 million shares
9 that were not submitted for redemption. Per
10 plaintiffs, full recovery under this damages
11 calculation would equal a little over \$27 million
12 before interest. Plaintiffs explained that this, in
13 turn, equates to a settlement recovery here of nearly
14 half that value. That is from pages 35 and 36 of the
15 settlement brief. That is an excellent recovery.

16 In exchange, upon the effective date,
17 plaintiffs and the entire class shall release
18 defendants, FAC, and each of their respective current
19 and former parents, affiliates, subsidiaries,
20 committees, insurers, heirs, administrators, agents,
21 predecessors, successors, immediate family members,
22 beneficiaries, and assigns -- which I'll refer to as
23 the Released Defendant Parties -- from all claims that
24 have been or could have been asserted in the action

1 that arise out of the transaction or the same set of
2 operative facts alleged in this action -- excluding
3 claims asserted in the case captioned *Frommer v.*
4 *MoneyLion Technologies, Inc.*, Civil Action Number
5 1:23-cv-06339 pending in the U.S. District Court for
6 the Southern District of New York, the right to
7 enforce this settlement or any final judgment in this
8 action, and any actual or potential claims held by the
9 company that can be brought by someone other than
10 plaintiffs or a class member.

11 Having considered the excellent
12 recovery here, the risk associated with taking this
13 matter to trial and on any appeal, the releases and
14 exclusions thereto, I conclude that the consideration
15 and outcome here is plainly adequate, fair, and
16 reasonable and should be approved.

17 Turning to the plan of allocation, the
18 plan of allocation provides for an equitable recovery
19 that will allow class members who did not redeem and
20 sold their shares for less than the redemption amount
21 (or held their shares to the day the complaint was
22 filed) to recover a portion of any economic damages
23 they suffered.

24 It also provides that an automatic

1 base recovery of 10 cents to be paid to all class
2 members through DTC participant data, regardless of
3 whether they submit a claim. The plan of allocation
4 mirrors the plan this court has repeatedly approved
5 now in these sorts of settlements, as plaintiffs well
6 explained in the settlement brief.

7 Indeed, as this court recently noted,
8 in *TS Innovation*, this type of plan of allocation is
9 smart and makes sense because stockholders are selling
10 or holding at different times: "[I]t's a very
11 thoughtful way to distribute fairly to class members
12 ... and address the delta between when they might have
13 sold their stock, if they held their stock, and the
14 recovery that they're getting here."

15 As contemplated by Rule 23(f)(6), the
16 plan of allocation provides that residual settlement
17 funds be redistributed to identified class members
18 unless redistribution is uneconomic. In such cases,
19 the funds will then be transferred to the Combined
20 Campaign for Justice.

21 Accordingly, I conclude that the
22 distribution methodology contemplated by the plan of
23 allocation is fair, reasonable, and adequate.

24 I also want to note the settlement was

1 the result of the parties' acceptance of a mediator's
2 proposal following extended mediation efforts before
3 David Murphy of Phillips ADR, a respected mediator
4 well-known to this Court. This all confirms to me
5 that the settlement is the product of arm's length
6 negotiations, and to me the involvement of the
7 mediator here is also strong support for approving
8 this settlement.

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

13 Now, turning to attorneys' fees.
14 Delaware's policy is to ensure that "even without a
15 favorable adjudication, counsel will be compensated
16 for the beneficial results they produced, provided
17 that the action was meritorious and had a causal
18 connection to the conferred benefit." That's from our
19 high court's 1980 decision in *Allied Artists*.
20 Plaintiffs' counsel is entitled to fees and expenses
21 under the common fund doctrine for the monetary
22 benefit counsel conferred on the class here. For
23 that, I'll cite this court's 1999 decision in *In re*
24 *First Interstate Bancorp*.

1 In setting fee awards, this Court
2 "must make an independent determination of
3 reasonableness on behalf of the common fund's
4 beneficiaries,...." That's from our high court's 1996
5 decision in *Goodrich v. E.F. Hutton*.

6 "When a case settles early, the Court
7 of Chancery tends to award 10 - 15% of the monetary
8 benefit conferred. When a case settles after the
9 plaintiffs have engaged in meaningful litigation
10 efforts, typically including multiple depositions and
11 some level of motion practice, fee awards in the Court
12 of Chancery range from 15 - 25% of the monetary
13 benefits conferred." That's from our high court's
14 decision in *Americas Mining*.

15 In determining the amount of an award
16 of fees in a given case, the Court considers the
17 factors laid out in *Sugarland Industries v. Thomas*,
18 where there are seven factors, and they're listed in
19 the case. In the interest of trying to shorten this
20 ruling, I'll just cite the case and won't go through
21 the factors.

22 "This Court has consistently noted
23 that the most important factor in determining a fee
24 award is the size of the benefit achieved." That's

1 from the *Gatz* decision again.

2 Here, plaintiffs' counsel seeks an
3 all-in fee and expense award of \$2.295 million, which
4 represents 18 percent of the \$12.75 million settlement
5 fund. And I note counsel explained during her
6 argument today that the fee, after expenses,
7 represents 17.4 percent of the net settlement fund.

8 As to the benefit achieved, Counsel
9 achieved a \$12.75 million monetary benefit for the
10 class. Compared to other de-SPAC merger settlements,
11 this 47 percent recovery of net-cash-per-share damages
12 ranks among the highest achieved in this court as
13 discussed by counsel today and also at page 36 of
14 plaintiffs' settlement brief.

15 As to the stage of litigation,
16 plaintiffs engaged in "Meaningful litigation efforts",
17 which should fall in the 15 percent to 25 percent
18 range of fee awards.

19 Each plaintiff served and pursued a
20 books-and-records demand, prosecuted a Section 220
21 action, and obtained custodial document productions
22 comprising thousands of documents prior to filing the
23 complaint. That's from page 24 of the settlement
24 brief.

1 After filing the March 2024 complaint,
2 the FAC defendants filed an answer, and plaintiffs
3 fully briefed two separate motions to dismiss filed by
4 Broadhaven and Choubey. All those motions were
5 pending. Plaintiffs pressed for discovery and
6 obtained document productions from defendants and New
7 MoneyLion, as well as third parties, Edison Partners
8 and J.P. Morgan. That's from page 26 of the
9 settlement brief.

10 In October 2024, the parties attended
11 a full-day, in-person mediation in New York. The
12 mediation was unsuccessful. The parties continued
13 their arm's length negotiations with the assistance of
14 the mediator, while at the same time continuing to
15 litigate and meet and confer on various discovery
16 matters.

17 In January 2025, the parties accepted
18 a double-blind mediator's proposal to settle the
19 action. Afterwards, the parties engaged in
20 negotiations concerning the terms of the settlement
21 stipulation. The parties informed the Court, and the
22 Court removed oral argument on the pending motions to
23 dismiss from the calendar shortly before the scheduled
24 argument. That's from pages 26 to 27 of plaintiffs'

1 brief.

2 Ultimately, plaintiffs' counsel
3 obtained and reviewed more than 5,000 documents
4 comprising more than 29,000 pages before the parties
5 were able to reach agreement in principle to settle
6 the claims. That's from page 47 of the settlement
7 brief.

8 In considering the circumstances of
9 this de-SPAC merger case -- including the stage at
10 which it settled after the Section 220 efforts and 220
11 productions -- the motion to dismiss briefing,
12 obtaining some plenary discovery, and the parties'
13 mediation efforts, I find it helpful to review a range
14 of similar de-SPAC precedent from this court.

15 Just recently, in *In re Gores*, this
16 court awarded lead counsel a 20 percent fee. There,
17 plaintiffs served a Section 220 demand, which resulted
18 in a significant 220 document production. Then,
19 plaintiffs filed a plenary complaint, after which
20 defendants answered; no motion to dismiss was filed.
21 After the pleading stage, plaintiffs obtained and
22 reviewed more than 400,000 pages of documents through
23 plenary discovery, deposed two witnesses, and argued
24 and partially won a discovery motion. The parties

1 participated in mediation efforts. Lead counsel
2 obtained a settlement recovery of approximately
3 23 percent of potential damages.

4 In *Yu v. RMG Sponsor*, the court
5 awarded lead counsel approximately an 18 percent fee.
6 There, defendants eventually decided to answer
7 plaintiffs' complaint, but only after plaintiffs
8 amended their complaint multiple times and filed an
9 answering brief in opposition to a motion to dismiss.
10 Plaintiffs obtained 6,700 documents of plenary
11 discovery, reviewed 45,000 pages of documents, engaged
12 in extended mediation efforts, but did not take any
13 depositions. Lead counsel obtained a settlement
14 recovery of approximately 25 percent of potential
15 damages.

16 And then in *In re Finserve*, this court
17 awarded lead counsel approximately a 17.5 percent fee.
18 There, plaintiffs served a Section 220 demand, which
19 resulted in 1,000 pages of documents produced. Then
20 plaintiffs filed a plenary complaint, amended their
21 complaint, and argued and won in part a motion to
22 dismiss. After the pleadings stage, plaintiffs
23 propounded 49 requests for production, 19
24 interrogatories, and issued two subpoenas before

1 engaging in mediation, but there was no plenary
2 document production or depositions. Lead counsel
3 obtained a settlement recovery of approximately 15.7
4 percent of potential damages.

5 Also recently, *In re*
6 *Kensington-QuantumScape*, this court awarded lead
7 counsel approximately a 16 percent fee. There,
8 plaintiffs obtained 44 documents comprising 1,300
9 pages through Section 220 discovery. They also
10 defeated two motions to dismiss; engaged in limited
11 document and other written discovery, including
12 reviewing 519 documents and preparing responses to two
13 sets of interrogatories; and engaged in two
14 unsuccessful mediation sessions. The parties did not
15 engage in depositions. Lead counsel obtained a
16 settlement recovery of approximately 28.2 percent of
17 potential damages.

18 For context, in *Gig4*, which is at the
19 lower end of the fee range for de-SPAC settlements,
20 the court awarded lead counsel approximately a
21 13 percent fee. There, plaintiffs filed a complaint,
22 a motion to dismiss was filed but not briefed, and the
23 parties did not engage in discovery. Lead counsel
24 obtained a settlement recovery of approximately

1 31.3 percent of potential damages.

2 The situation here falls in line with
3 or around the range of *RMG Sponsor* and, at the lower
4 end, of *QuantumScape*. This case, *Finserve*, and
5 *QuantumScape* all involve Section 220 efforts and 220
6 document production. Each case involved some plenary
7 discovery efforts as well. Unlike *QuantumScape* and
8 *Finserve*, however, this case did not result in a
9 motion to dismiss argument, but neither did *RMG*
10 *Sponsor*. Indeed, most of the defendants actually
11 answered here, and the motion to dismiss was fully
12 briefed and actually on the eve of argument before the
13 parties' settlement.

14 I note that the settlement recovery
15 here of approximately 47 percent of net-cash-per-share
16 damages appears to be significantly greater than the
17 percentage recovery of potential damages award in
18 basically all of *RMG Sponsor*, *Kensington*, and
19 *Finserve*, not to mention *In re Gores*.

20 In the circumstances, and considering
21 all the facts of this matter, I conclude that an
22 18 percent fee award is entirely appropriate here,
23 particularly in light of the exceptional recovery from
24 the class obtained by lead counsel in particular, the

1 fact that plaintiffs engaged in some plenary discovery
2 and received some plenary document productions, the
3 parties' mediation efforts, and the parties' motion to
4 dismiss briefing, pleadings, and also the 220
5 custodial production.

6 The secondary *Sugarland* factors also
7 support that award, as does the contingent nature of
8 the litigation. Here, counsel pursued this case on a
9 fully contingent basis. Counsel spent 1,709.15 hours
10 litigating this action from inception through the
11 April 14, 2025, signing of the settlement stipulation.
12 This amounts to a lodestar of \$1,319,961. Counsel
13 also incurred \$72,565 in expenses. Plaintiffs
14 explained that an 18 percent all-in fee award here
15 represents approximately a 1.7 times multiple of that
16 lodestar inclusive of the *de minimis* expenses, which
17 is well within the range of hourly rates and lodestar
18 multiples previously awarded by this court. See pages
19 47 to 48 of the settlement brief.

20 Also, per a minute order I issued,
21 plaintiffs' counsel updated their attorney affidavits
22 to break out attorney time before and after the
23 January 11 term sheet. Those updated affidavits
24 confirm that the vast majority of fees and expenses

1 were incurred by counsel prior to January 11. And
2 counsel explained during argument today that, backing
3 out lodestar between the term sheet and signing the
4 stipulation, the lodestar multiple moves only
5 marginally to 1.88 times, which is likewise well
6 within the range of hourly rates and lodestar
7 multiples previously awarded by this court.

8 As to complexity, counsel contend that
9 although plaintiffs' claims presented well-established
10 legal challenges concerning defendants' duties to act
11 loyally with regard to FAC stockholders, they involved
12 uncertainties associated with complex litigation and
13 legal disputes that have not yet been tested at trial
14 or on appeal.

15 Similarly, plaintiffs argue that their
16 disclosure claims related to Legacy MoneyLion's
17 alleged material weaknesses raised arguably novel
18 questions about the extent the disclosure required.

19 The aiding and abetting claims were
20 also untested. As Broadhaven was keen to point out in
21 its motion to dismiss, it was unable to identify any
22 Delaware decision evaluating an aiding and abetting
23 claim filed against a fiduciary's transaction
24 counterparty's financial adviser. Broadhaven was not

1 just a financial advisor but also a substantial and
2 long-time Legacy MoneyLion investor with a director on
3 the target's board of directors. Plaintiffs' claims
4 against Broadhaven were novel, raised complex issues
5 about the "knowing participation" element of an aiding
6 and abetting claim, and were vigorously challenged by
7 Broadhaven. Recent Delaware Supreme Court decisions
8 highlight the uncertainty of success on these claims.

9 The factual issues presented in this
10 action were also complex. This includes, for example,
11 plaintiffs' explanation at pages 49 to 51 of their
12 brief that they had to delve into the alleged
13 interrelationships between each of the defendants.

14 As to the standing of plaintiffs'
15 counsel, counsel is, of course, well-known to the
16 members of this court for their experience in
17 successfully prosecuting stockholder class actions and
18 corporate governance litigation. And as the Court may
19 also consider the standing of opposing counsel,
20 defendants' counsel are likewise experienced,
21 skillful, and well-respected.

22 In other words, the *Sugarland* factors,
23 I conclude, amply support the conclusion that an 18
24 percent all-in fee award is reasonable and fully

1 appropriate here, taking into account all the
2 considerations I've just discussed.

3 Finally, I turn to the request for
4 a \$2,500 incentive fee for each lead plaintiff,
5 Mr. Martel and Mr. Bryant, to be paid out of the
6 all-in fee and expense award to counsel that I just
7 approved.

8 A modest incentive fee is appropriate
9 where a plaintiff has stepped forward and taken the
10 risk of getting involved in representative litigation,
11 which is, frankly, not a costless enterprise. I'll
12 cite this court's 2018 decision in *EZCORP* for that.

13 In determining the appropriateness of
14 an incentive fee, the Court considers the time and
15 effort expended by the class representative and the
16 size of the benefit to the class. See, for example,
17 this court's 2006 decision in *In re Raider v.*
18 *Sunderland*.

19 "In typical baseline circumstances, an
20 incentive award of \$5,000 rewards competent
21 participation." For that, I'll cite this court's 2023
22 decision in *AMC Entertainment*.

23 Here, plaintiffs are retail
24 stockholders of FAC. Without plaintiffs, there would

1 have been no settlement. Their requests for service
2 awards were disclosed in the notice, and no
3 stockholder has objected. See pages 53 to 54 of the
4 settlement brief.

5 Having considered the application, I
6 conclude a \$2,500 incentive fee for each lead
7 plaintiff is amply supported, including in light of
8 the excellent recovery that I've already described.

9 That concludes my ruling for today.

10 I'll now ask if counsel has any
11 questions. Ms. Tucker?

12 ATTORNEY TUCKER: No questions, Your
13 Honor.

14 ATTORNEY WEEDMAN: No questions, Your
15 Honor.

16 THE COURT: Okay. I take it I can
17 just enter the form order that's on the docket?

18 ATTORNEY TUCKER: Yes, Your Honor.
19 The amended order that we submitted with the letter
20 has the updated class language.

21 THE COURT: Great, thank you. All
22 right. Well, thank you for bearing with me while I
23 was reading that extraordinarily long ruling. I'm
24 glad to see everyone's still awake. But thank you.

1 It is important. So I appreciate everyone bearing
2 with me.

3 All right. Well, this is an excellent
4 result. Everyone should be congratulated. And with
5 that, we're adjourned. Thank you.

6 (Proceedings concluded at 12:38 p.m.)

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CERTIFICATE

I, KATHY CORTOPASSI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomat Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 63 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 8th day of August, 2025.

/s/ Kathy Cortopassi

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

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

Tab 18

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TERRY JANDREAU,	:
	:
Plaintiff,	:
	:
v	: C. A. No.
	: 2024-0119-MTZ
BRENDAN WALLACE, ANDRIY MYKHAYLOVSKYY,	:
ALANA BEARD, VICTOR COLEMAN,	:
ANGELA HUANG, WISDOM LU, FIFTH WALL	:
ACQUISITION SPONSOR LLC, and	:
FIFTH WALL ASSET MANAGEMENT LLC,	:
	:
Defendants.	:

- - -

Chancery Courtroom No. 12C
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, November 20, 2025
11:00 a.m.

- - -

BEFORE: HON. MORGAN T. ZURN, Vice Chancellor

- - -

SETTLEMENT HEARING and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

2 CHRISTINE M. MACKINTOSH, ESQ.
Grant & Eisenhofer P.A.

3 -and-
4 JUSTIN O. RELIFORD, ESQ.
Scott + Scott LLP
for Plaintiff

5
6 S. MICHAEL SIRKIN, ESQ.
Ross Aronstam & Moritz LLP
7 -and-
8 CHRISTOPHER D. BELELIEU, ESQ.
JERELIN LUTHER, ESQ.
of the New York Bar
9 Gibson, Dunn & Crutcher LLP
for Defendants

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1 THE COURT: Good morning.

2 ATTORNEY SIRKIN: Good morning, Your
3 Honor. Mike Sirkin from Ross Aronstam & Moritz for
4 the defendants. With me at counsel table today is
5 Chris Belelieu and Jerelin Luther from Gibson Dunn.

6 THE COURT: Thank you.

7 ATTORNEY SIRKIN: Thank you.

8 ATTORNEY MACKINTOSH: Good morning,
9 Vice Chancellor Zurn. Christine Mackintosh from
10 Grant & Eisenhofer, joined by my colleague Justin
11 Reliford of Scott + Scott.

12 THE COURT: Good morning.

13 ATTORNEY MACKINTOSH: This is the time
14 the Court has set down to discuss the settlement
15 agreement reached in the Jandreau/Wallace matter, or
16 as we like to call it, SmartRent. We're pleased to
17 present the settlement, which offered an
18 \$11.375 million cash payment to former stockholders of
19 Fifth Wall Acquisition Corp., which we call "Fifth
20 Wall," who were deprived of their right to make a
21 fully informed decision of whether to redeem their
22 Fifth Wall shares or to invest in New SmartRent, the
23 company that emerged from Fifth Wall's merger with
24 Legacy SmartRent.

1 The settlement provides a gross
2 recovery of approximately 13 percent of the class's
3 estimated damages and works out to 33 cents per share,
4 which compares favorably with the per-share recoveries
5 in similar SPAC settlements.

6 Our settlement administrator, A.B.
7 Data, mailed more than 9100 notice packets to
8 potential class members and their nominees, published
9 notice on the DTC's legal notice system, caused the
10 summary notice to be transmitted over the *PR Newswire*,
11 provided information about the settlement on a
12 dedicated website, and maintained a case-specific
13 toll-free helpline.

14 Despite all that notice, not a single
15 class member has objected to any aspect of the
16 settlement.

17 During today's hearing, I plan to do
18 the following: First, I'll provide a high-level
19 overview of the case. Second, I'll address the terms
20 of the settlement, including the plan of allocation.
21 Third, I'll address the motion for class
22 certification. And, finally, I'll address our request
23 for attorneys' fees and expenses and a \$3,000 service
24 award for the named plaintiff.

1 I'm happy to discuss these topics in a
2 different order or skip some if Your Honor feels she
3 doesn't need to hear from me on any of them, but
4 otherwise let's dive in.

5 This case arises from an August 24,
6 2021, merger between Fifth Wall and Legacy SmartRent.
7 On November 23, 2020, Fifth Wall was incorporated in
8 Delaware as a SPAC. And Fifth Wall, like all SPACs,
9 had no business operations, but was formed for the
10 purpose of combining with a different company in a
11 de-SPAC merger.

12 Fifth Wall was controlled by its
13 sponsor, which was Fifth Wall Acquisition Sponsor LLC.
14 It was further controlled by its sponsor's controller,
15 which was a venture capital firm called Fifth Wall
16 Asset Management, or as we call it, "FWAM," and FWAM's
17 managing members, Brendan Wallace and Andriy
18 Mykhaylovskyy. We refer to them collectively as the
19 "controller defendants."

20 The controller defendants recruited
21 people to serve on Fifth Wall's board of directors and
22 secured their loyalty by giving them founder shares
23 and private placement shares that would only have
24 value if Fifth Wall closed a business combination.

1 The founder shares and private
2 placement shares ensured that the interests of Fifth
3 Wall's directors were aligned with the controller
4 defendants in seeing Fifth Wall close a deal,
5 regardless of whether that deal was in the best
6 interests of Fifth Wall's stockholders.

7 On February 9, 2021, Fifth Wall
8 completed its IPO, selling 34.5 million Class A shares
9 for \$10 each.

10 Immediately after the IPO, Fifth Wall
11 zeroed in on Legacy SmartRent, which was a propriety
12 technology or "prop tech" company, as its acquisition
13 target. Once Legacy SmartRent had been identified,
14 Fifth Wall's board took a back seat and effectively
15 let FWAM run the entire merger process, including due
16 diligence, price negotiations, and valuation work.

17 On March 6, 2021, Fifth Wall submitted
18 a proposal to merge with Legacy SmartRent. And in
19 that initial proposal, they valued Legacy SmartRent at
20 \$2.448 billion. Fifth Wall's board did not know about
21 this proposal before it was made, and they didn't
22 authorize it.

23 On March 17, 2021, the Fifth Wall
24 board was belatedly brought into the fold. During

1 this board meeting, the board learned that FWAM stood
2 on both sides of the proposed transaction.
3 Specifically, FWAM had invested in Legacy SmartRent in
4 a March 2020 financing round through a different SPAC
5 that Wallace controlled, known as FWF2. That
6 March 2020 financing round valued SmartRent at only
7 \$300 million, a tiny fraction of what the board was
8 now being told Legacy SmartRent was worth.

9 During discovery, we uncovered
10 additional internal valuations from March 2021, the
11 timeframe during which the merger was being
12 negotiated, that also suggested that Legacy SmartRent
13 was worth substantially less than they were being
14 asked to pay in the merger and was worth much closer
15 to the \$300 million valuation from the March 2020
16 round.

17 The board also learned during this
18 meeting that two of Fifth Wall's directors, Mr. Huang
19 and Mr. Coleman, had also invested in FWF2, and they
20 too were on both sides of the deal. Despite that, the
21 board did not discuss whether those directors should
22 have been recused.

23 On March 18, 2021, the next day, Fifth
24 Wall submitted a revised proposal, dropping

SmartRent's enterprise value from 2.448 billion to 1.75 billion. The board again wasn't consulted about the revised proposal, didn't approve it being made, and wasn't told what accounted for the massive valuation drop in just a few days' time. Instead, the parties signed off on the revised term sheet with no further board involvement.

A few weeks later, the board retained Moelis as its financial advisor. Within two weeks, Moelis had completed its diligence and rendered a fairness opinion.

FWAM, in turn, had retained Houlihan Lokey to prepare a due diligence report. Houlihan Lokey's report identified a number of concerns about SmartRent's customer base and discounting practices that called into question whether its projections were reliable. The board never saw this report, and the existence of Houlihan Lokey was not disclosed in the merger proxy.

On August 6, 2021, Fifth Wall filed a proxy. And as happens all too often in the de-SPAC merger world, the proxy was replete with false statements and material omissions.

First, the proxy claimed that Fifth

1 Wall stockholders who opted to roll over into the
2 post-merger entity would receive stock worth about \$10
3 per share when in reality Fifth Wall's net cash per
4 share was only about \$7.50.

5 Second, the proxy didn't disclose
6 Legacy SmartRent's stand-alone projections. Instead,
7 it provided only projections for the combined
8 post-merger entity that assumed a \$500 million cash
9 infusion from the merger.

10 The proxy projections reflected a
11 materially inflated version of SmartRent's stand-alone
12 projections that had been prepared in consultation
13 with FWAM personnel. FWAM personnel had worked hand
14 in hand with SmartRent management to juice up the
15 company's stand-alone existing projections by making a
16 number of unsupported adjustments, and those were the
17 projections ultimately given to the stockholders in
18 deciding whether to approve the merger and whether to
19 redeem.

20 Third, the proxy materially
21 misrepresented the extent of customer commitments,
22 which undermined the ultimate achievability of those
23 proxy projections.

24 Fourth, the proxy didn't disclose that

1 the merger process was effectively run by conflicted
2 FWAM personnel, with limited board involvement.

3 And, finally, although the proxy
4 mentioned the March 20th financing round, it did not
5 disclose that the value ascribed to SmartRent in that
6 round was only \$300 million or explain what could have
7 possibly accounted for the nearly 6 times valuation
8 multiplier that had allegedly occurred in the
9 12 months between the March 2020 round and the time
10 when they entered into the merger agreement.

11 On August 23, 2021, Fifth Wall
12 stockholders approved the merger, and it closed the
13 next day. All but 246 of the 34.5 million shares
14 entitled to redemption actually exercised their
15 redemption rights. The rest rolled over into the
16 combined company.

17 After the merger closed, the truth
18 about Legacy SmartRent's prospects emerged, as New
19 SmartRent was forced to repeatedly lower its guidance
20 as it became clear the company had no prospect of
21 meeting the fanciful proxy projections.

22 By February 1, 2024, New SmartRent was
23 trading at only \$3.01, a fraction of the \$10
24 redemption price.

1 Before reaching the settlement,
2 plaintiffs spent more than two years investigating and
3 litigating this action. In March of 2023, we served
4 our first books and records demand, which was followed
5 up by a second demand in May of 2023.

6 After obtaining and reviewing internal
7 corporate documents, we filed the complaint on
8 February 9, 2024. The complaint clearly stated viable
9 claims. None of the defendants, not even the
10 defendants who were only charged with aiding and
11 abetting, even bothered moving to dismiss.

12 The parties immediately moved into
13 fact discovery; and the discovery here was extensive.
14 We propounded document requests and interrogatories on
15 all of the defendants, and we served six third-party
16 subpoenas. In total, we received and reviewed over
17 200,000 pages of documents.

18 A year into the litigation, in the
19 middle of fact discovery, we mediated before David
20 Murphy of Phillips ADR on February 9, 2025. The
21 mediation failed. We immediately noticed and began to
22 take depositions. In total, plaintiffs took 12 fact
23 depositions. In addition, the plaintiff prepared for
24 and sat for his own deposition.

1 The parties had also fully briefed a
2 motion for class certification, and plaintiffs had
3 retained a valuation expert, Jaime d'Almeida, and
4 were days away from serving his opening expert report
5 when the parties accepted a double-blind mediator's
6 recommendation to settle the action on July 8, 2025.

7 And at the time we agreed to that
8 settlement, we had spent nearly \$300,000 on expert
9 fees. So that gives Your Honor a sense of how close
10 we really were to being able to serve that report.

11 With that background, let's move to
12 the terms of the settlement.

13 In assessing a settlement, the Court
14 compares the "get" to the "give." And the "get" here
15 is substantial – an \$11.375 million cash settlement.
16 By any measure, this is a strong result. The
17 11.375 million provides a gross recovery of about
18 33 cents per share, which compares favorably with
19 similar SPAC settlements, including *XL Fleet* – that
20 was 21 cents a share; *MultiPlan*, which was 37 cents a
21 share; *View*, which was 32 cents a share; and *FinServ*,
22 which was 38 cents a share.

23 In addition, the 11.375 million
24 provides 13.2 percent of the class's net cash per

1 share damages, which compares favorably with the
2 median of 12.35 percent, excluding two outliers, that
3 was discussed in Vice Chancellor Laster's *Dell Class V*
4 opinion.

5 And the "give" here is the standard
6 release of claims.

7 The settlement was approved with full
8 benefit of a complete factual discovery record, which
9 gave us a strong sense of our likely prospects of
10 success at trial, and following arm's length
11 negotiation between competent counsel and a
12 well-respected mediator, further supporting the
13 reasonableness.

14 We respectfully submit that the
15 settlement should be approved as fair, reasonable, and
16 adequate.

17 Moving on to the plan of allocation.
18 The 11.375 million will be distributed *pro rata* among
19 class members who submit a valid proof of claim. And
20 then payment will take two forms. First, every class
21 member who submits a valid claim will receive a
22 nominal damages award of 10 cents per share, which
23 recognizes that the impairment of the redemption
24 decision causes harm separate and apart from any

1 economic injury that might have been sustained.

2 And, second, class members who sold
3 their New SmartRent stock for less than the redemption
4 value or who continued to hold when we filed the
5 complaint will receive additional money based on their
6 recognized economic loss.

7 This proposed plan of allocation is
8 identical to ones that have been approved in a number
9 of other settlements in de-SPAC merger litigation,
10 including the *GeneDX* case that Vice Chancellor
11 Fioravanti approved, the *View* case that Vice
12 Chancellor Laster approved, the *RMG* case that Vice
13 Chancellor Cook approved, the *Latch* and *AvePoint* cases
14 approved by Vice Chancellor Will, and the *Quantumscape*
15 case approved by Vice Chancellor Laster.

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

18 Let's move on to our request for class
19 certification. Your Honor provisionally certified the
20 class by order dated August 26, 2025, and we
21 respectfully request that it be finally certified now.

22 We are requesting approval of a
23 certification of a non-opt-out class for settlement
24 purposes only, consisting of all persons who held

1 shares of Fifth Wall Class A common stock as of the
2 redemption deadline, either as of record or
3 beneficially, and who elected not to redeem some or
4 all of their stock, including their
5 successors-in-interest who obtained their shares by
6 operation of law. That comports with what Vice
7 Chancellor Will approved in the *Latch* case.

8 The class satisfies the requirements
9 of Rules 23(a), 23(b)(1), and 23(b)(2).

10 As of the redemption deadline, there
11 were nearly 34.5 million shares outstanding. There
12 are likely thousands of class members, and thus the
13 numerosity requirement is satisfied.

14 Questions of law are common to the
15 class, including whether the defendants breached their
16 fiduciary duties, whether the proxy failed to disclose
17 material information or contained false and misleading
18 statements, whether the defendants undertook an unfair
19 merger process and agreed to a merger at an unfair
20 price, whether the defendants were unjustly enriched,
21 and whether plaintiffs and the class were injured by
22 defendants' conduct.

23 Plaintiff's claims are also typical of
24 the class, and there's no divergence of interest

1 between plaintiff and the absent class members.

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

7 Unless Your Honor has further
8 questions about that, I'll move on to the request for
9 fees and expenses.

10 THE COURT: I took the liberty of
11 poking around the fully briefed motion for class
12 certification, and that sent me down a rabbit hole on
13 whether Mr. Jandreau actually suffered the injury that
14 he's purporting to claim that the class suffered.

15 I understand the claim to be a typical
16 redemption impairment. His decision to redeem was not
17 impaired, sounds like to me from his deposition.

18 ATTORNEY MACKINTOSH: So we understand
19 his deposition testimony. But we do think that,
20 nonetheless, he is an adequate class representative.
21 Had we pressed the issue, we would have been willing
22 and able to substitute in a different plaintiff. And
23 respectfully, we think it would work injustice on the
24 broader class as a whole to not approve the settlement

1 in light of his testimony.

2 THE COURT: I take your point on the
3 justice of the matter. I still have to find
4 commonality and typicality. And I'm struggling sort
5 of at a more fundamental level to conclude that he has
6 standing. If he wasn't injured and he didn't suffer
7 the injury in the complaint, does he have standing to
8 bring those claims?

9 ATTORNEY MACKINTOSH: Yes, we do think
10 he still suffered the injury. I mean, I acknowledge
11 that his testimony was that he personally likely
12 wasn't going to redeem and was going to hold. But he
13 still received the proxy that contained that
14 misinformation that -- you know, whatever factors he
15 took into account, it still was the false information
16 that harmed the class in the same way. And he still
17 undoubtedly suffered the economic injury because he
18 was, you know, continuing to hold the stock.

19 And I know we talked about this a
20 little bit during the *Lottery* settlement hearing --
21 not settlement hearing, motion to dismiss hearing the
22 other week, where Your Honor sort of acknowledged
23 that, yes, we do refer to these as redemption claims,
24 but at bottom, they're also standard entire fairness

1 claims; where there's, you know, an unfair merger
2 negotiated by conflicted fiduciaries that close at an
3 unfair price, and it works economic harm on the entire
4 class.

5 There are also unjust enrichment
6 claims that don't necessarily relate to the impairment
7 of the voting right per se.

8 So for those reasons, we certainly
9 think that our plaintiff has standing to bring the
10 claims. And, you know, had Your Honor had issues with
11 his typicality, we would have easily swapped in
12 another plaintiff, as has been done in many cases.

13 And we respectfully don't think that
14 those concerns, although legitimate, are reason to
15 deny the rest of the class the benefit of this, you
16 know, substantial settlement that was heavily
17 negotiated, with well-represented counsel.

18 They clearly had issues with the
19 potential class certification, and they brought the
20 motion on those grounds. But we also uniformly agreed
21 to negotiate the settlement.

22 THE COURT: Can I ask -- and you can
23 tell me that there are reasons why you can't answer
24 the question if they exist. Can I ask when

1 Mr. Jandreau's counsel knew that he always intended to
2 redeem and that he didn't read the proxy before he
3 made his decision?

4 ATTORNEY MACKINTOSH: Frankly, the
5 first time I heard that was when I read the deposition
6 transcript that -- I did not defend or prepare the
7 deposition. The first time I heard that was the
8 deposition transcript.

9 THE COURT: Do you know if anyone on
10 your team knew that information around the time of
11 filing the complaint?

12 ATTORNEY MACKINTOSH: I can't say for
13 certain, but my strong suspicion is they did not know
14 that. Because obviously that is an issue. And when
15 we are working with investors here, we would never
16 want to be in a situation where we're using a
17 plaintiff that we think even potentially has a
18 standing problem. That's just not something that we
19 would do.

20 So to the best of my knowledge,
21 information, and belief, no one knew about that until
22 his deposition testimony. I can say as an officer of
23 the court that I personally learned for the very first
24 time when I read the deposition transcript.

1 THE COURT: Thank you.

2 So just to open up the conversation a
3 little further, I fully understand your perspective
4 that this is a good result for the class and that
5 there was an easy fix here.

6 I think I have two concerns. One is
7 maybe the time to do that easy fix was before we
8 headed into mediation and showed up here.

9 The other concern that I have is that
10 this is a great result for the class, but it has come
11 about where I have a complaint from Mr. Jandreau that
12 he verified that in its language is just a redemption
13 impairment claim. I understand that it went to a
14 stockholder vote and the stockholder vote caused a
15 transaction to come about in which Mr. Jandreau got
16 less than \$10 net cash per share and that he suffered
17 harm in that way. I understand that maybe that's a
18 source of indirect injury.

19 But just from a process perspective, I
20 have broader issues with proceeding forward on a
21 complaint verified by somebody who didn't suffer the
22 injury in the complaint. That is difficult for me to
23 swallow.

24 ATTORNEY MACKINTOSH: Okay. So I have

1 a couple of responses.

2 First, we did not know at the time
3 that the mediation started in February that that was
4 going to be his testimony. I cannot remember the date
5 of his deposition; I believe it was sometime in the
6 late May time period.

7 So, yes, you are correct, we
8 potentially could have addressed it at the time. I
9 think that we didn't think that that was a
10 standing-destroying piece of evidence. And the
11 defendants -- I don't want to speak for them, but they
12 continued to negotiate the settlement with us on that
13 basis.

14 So I suppose we could have done that.
15 We didn't.

16 As for the complaint, I don't think
17 it's a fair reading to say that it's redemption
18 impairment only. I'm looking at the first cause of
19 action for breach of fiduciary duty. Paragraph 132
20 says the director defendants also breached their
21 fiduciary duties by approving the unfair merger. So I
22 think that's part of it.

23 And the merger was not entirely fair,
24 and the director defendants will be unable to carry

1 that burden of entire fairness. And I think, you
2 know, there's unjust enrichment claims. There are
3 claims against the controller defendants. I think
4 it's broader than just an impairment.

5 And I think it's sort of hard for
6 Mr. Jandreau, sitting *ex-post*, to say for certainty
7 what he would have done had the merger actually had
8 the information that he didn't know.

9 It's one thing to say, okay, I've
10 invested in a couple of these SPACs and I typically
11 don't redeem. It's another thing to say, had I
12 actually been sitting there faced with a proxy that
13 said, hey, you're not rolling over for \$10, you're
14 rolling over for \$7.50; and, hey, this company isn't
15 worth 1.75 million, it was valued at 300 million in a
16 financing round in March of 2020, and there are
17 internal valuations from March of 2021 valuing the
18 company at -- I do not remember if I have that in my
19 notes, but there were valuations in March of 2021 on a
20 fair market value basis and another basis that it was
21 substantially lower too.

22 So I understand his testimony.
23 Unfortunately, I wasn't at his deposition. These
24 people are not always necessarily the most

1 sophisticated people, and he might not have
2 necessarily understood the questions that he was being
3 asked, and his testimony might not have been as clear
4 as it could have been.

5 But given the totality of the
6 circumstances here, I respectfully don't think that
7 his testimony on that point should destroy this
8 settlement or render it not approvable.

9 THE COURT: Thinking through it less
10 from a standing perspective and more for a typicality
11 and commonality perspective, the research that we did
12 instructs me, I think, that I'm supposed to first
13 think about this as to whether this is an issue that
14 comes up sort of logically prior -- which is a concept
15 I don't quite understand what that means -- but
16 logically prior to the breach of fiduciary duty issues
17 and whether it presents a unique defense against
18 Mr. Jandreau that wouldn't be present and perhaps in
19 some way threatens the viability of the claims
20 altogether.

21 And so in thinking through that, I
22 think there's a couple cases out there that talk about
23 this as a -- it is logically prior to the breach.
24 We've got then-Vice Chancellor Steele in the *Dieter*

1 matter and we've got Strine in *Andra v. Blount* talking
2 about this as a standing issue, and in *Aristotle* in
3 the context of whether someone who has elected
4 appraisal can sue on disclosure issues.

5 I think *Aristotle* and *Andra*, the
6 appraisal cases, lack that sort of second-tier injury
7 that we've been talking about this morning, so I see
8 them as distinguishable there. But there's pretty
9 strong language about not allowing someone who didn't
10 suffer a disclosure injury to lead a class for
11 post-closing damages.

12 And I just wanted to kind of lay open
13 everything that I'm thinking about.

14 ATTORNEY MACKINTOSH: So, I mean, I do
15 think he suffered disclosure injury. The document
16 that he relied on and that the rest of the class also
17 relied on in deciding to make this decision
18 undoubtedly contained highly material false statements
19 and material omissions.

20 THE COURT: But he didn't -- and I
21 understand this opens the whole *Dubroff* can of worms,
22 which I don't think we need to get into this morning,
23 but I don't think he relied on it. That's the part
24 where it sort of breaks down.

1 ATTORNEY MACKINTOSH: Well, in his
2 testimony, I believe his testimony was something along
3 the lines of "I've invested in a couple of SPACs and I
4 don't redeem."

5 I think that's one thing that -- you
6 know, that's not to say that if he had been given the
7 actual information, he might not have made a different
8 choice.

9 THE COURT: Well, he said he only even
10 read what he did receive after August of 2021.

11 ATTORNEY MACKINTOSH: I mean, I hear
12 you. But again, respectfully, I think that there are
13 ways to fix this that don't require rejection of the
14 settlement.

15 And again, the injury isn't just the
16 impairment of the redemption decision. It's being
17 cashed out on unfair terms. It's the unjust
18 enrichment that flowed to the controller defendants.
19 There's a lot of harm here. And I think if we start
20 slicing it and saying, well, this is only a redemption
21 injury case, I think that misses other aspects of
22 these SPAC lawsuits generally and this one in
23 particular.

24 THE COURT: Could you remind me of the

1 timing of the briefing of the class cert motion and
2 the conclusion of the mediation?

3 ATTORNEY MACKINTOSH: The briefing of
4 the class cert motion, if I remember correctly,
5 happened in the, like, late June time frame. I forget
6 the exact dates and --

7 ATTORNEY BELELIEU: I think it was
8 early July.

9 ATTORNEY MACKINTOSH: Yeah, defendants
10 are saying early July.

11 So this was all sort of happening at
12 the same time. And we got the double-blind mediator's
13 recommendation on July 8.

14 And we had not even yet secured a
15 hearing date on the motion for class certification.
16 So, like, we had briefed it, but there was time to
17 switch out a different plaintiff if the class
18 certification motion had been denied on that basis.

19 And I think at the time, we felt
20 comfortable that the class would be certified. We
21 recognized there was potential risk that could be
22 cured. I am assuming that the defense counsel, having
23 agreed to pay what they agreed to pay, didn't think
24 they had a silver bullet on class cert that couldn't

1 have been cured, because otherwise their client would
2 have been paying \$11.357 million to settle a case that
3 they thought was completely uncertifiable and that,
4 you know, that could not be fixed.

5 THE COURT: I'm just checking my
6 notes.

7 All right. Thank you. If you want to
8 move on to the fee.

9 ATTORNEY MACKINTOSH: Sure.

10 We're seeking an award of
11 \$2,570,262.60 in attorneys' fees. That is
12 23.5 percent of the net settlement amount -- i.e., the
13 11.375 million less the litigation expenses -- plus
14 reimbursement of \$437,712.36 in expenses occurred in
15 the litigation, for a total fee and expense award of
16 3,007,974.96, plus a \$3,000 service award for the
17 plaintiff, to be paid out of attorneys' fees.

18 The court looks to the *Sugarland*
19 factors in determining the appropriateness of the
20 requested fee: benefit achieved, time and effort of
21 counsel, standing and ability of counsel, relative
22 complexity of the litigation, stage at which the
23 litigation ended, and the contingency factor. And we
24 respectfully submit that the *Sugarland* factors fully

1 support the requested fee here.

2 The court, as Your Honor is well
3 aware, affords the greatest weight to the benefits
4 conferred. And as we discussed earlier, we
5 respectfully submit that the settlement confers a
6 substantial benefit on the class. We've recovered
7 33 cents per share, which is in excess of 13 percent
8 of the class's net cash per share damages.

9 Under the *Americas Mining* scale, fees
10 ranging between 15 and 25 percent are typically
11 awarded for meaningful litigation effort settlements.
12 And we respectfully submit that this litigation falls
13 towards the top end of that scale.

14 At the time the parties accepted the
15 double-blind mediator's proposal on July 8, we had
16 invested over two years litigating this case. We had
17 fully completed fact discovery. We took 12
18 depositions. We reviewed over 200,000 pages of
19 documents. Plaintiff produced his own documents and
20 responded to interrogatories and sat for a deposition.
21 We had briefed a fully contested motion for class
22 certification, and we were mere days away from serving
23 our opening expert report.

24 We think that the requested

1 23.5 percent falls within the range of precedent, as
2 detailed at length in the chart on pages 35 to 37 of
3 our opening brief.

4 And the time and effort expended here
5 supports our ask. As I mentioned before, we litigated
6 for nearly two years, expending nearly 5300 hours, on
7 a fully contingent basis, with a lodestar value of
8 over \$3.7 million. And we spent more than \$435,000 on
9 litigation expenses.

10 The requested fee implies an hourly
11 rate of \$485.98 and works out to a negative lodestar
12 multiple – specifically, 0.68. We respectfully submit
13 that this request is reasonable and should be granted.

14 Finally, we request a \$3,000 award for
15 the named plaintiff, to be paid from any award of
16 attorneys' fees that Your Honor might grant. This
17 modest award is comparable to what has been awarded in
18 similar cases and is supported by plaintiff's efforts
19 here on behalf of the class.

20 Unless Your Honor has further
21 questions, that concludes my comments.

22 THE COURT: Thank you. I think the
23 only questions that I have -- I've got *Lordstown*,
24 *MultiPlan* and *XL Fleet* swimming around on the *Americas*

1 *Mining* percentage. Lordstown was 22.5, *MultiPlan* was
2 20, and *XL Fleet* was 20.

3 What specifically pushes this above
4 that?

5 ATTORNEY MACKINTOSH: I think we went
6 deeper than that. I don't have chapter and verse of
7 the number of depositions and the litigation efforts
8 in those cases, but we took 12 depositions, and we
9 spent hundreds of thousands of dollars on an expert
10 report. We were mere days away from settling when we
11 reached that -- days away from submitting the expert
12 report when we reached settlement. So I think this is
13 as close as you can get to the top end.

14 THE COURT: Thank you.

15 ATTORNEY MACKINTOSH: You're welcome.

16 THE COURT: Anything to add?

17 ATTORNEY SIRKIN: Not unless you have
18 some specific questions for us, Your Honor.

19 THE COURT: No, thank you.

20 I appreciate the colloquy on
21 Mr. Jandreau. If it's all right with you, I want to
22 take a brief recess and just make sure my notes
23 reflect my current thoughts. So I'll be back.

24 Thank you.

(Court in recess, 11:32 to 11:58 a.m.)

THE COURT: Thank you. Please be seated.

All right. The settlement is approved.

ATTORNEY MACKINTOSH: Thank you, Your Honor.

THE COURT: You're welcome. I will now do the ceremonial awkward reading.

I'll begin with a brief background. The plaintiff is a former stockholder of Fifth Wall Acquisition Corp. I, or "Fifth Wall." Fifth Wall was a Delaware SPAC formed on November 23, 2020, for the sole purpose of merging with or acquiring a private company. Fifth Wall went public on February 9, 2021.

Plaintiff challenges the 2021 de-SPAC merger with SmartRent, Inc., which was subject to the now-familiar tension between Fifth Wall common shares with redemption rights and founder shares that were worthless without a transaction before the two-year deadline.

In the story that often grows out of the founder share incentives, plaintiff alleges Fifth Wall zeroed in on a merger partner, SmartRent, Inc.,

1 and Fifth Wall insiders pushed the merger through
2 while the board sat supine. The board approved the
3 merger on April 20 and announced it on April 22.

4 The next step of the familiar SPAC
5 saga followed: an allegedly misleading proxy meant to
6 entice stockholder approval of a transaction – any
7 transaction. Fifth Wall issued the relevant proxy on
8 August 6. The merger closed on August 24.

9 By the time plaintiff initiated this
10 action in February 2024, SmartRent's stock price
11 dropped nearly 70 percent from the \$10 per share
12 investors would have received by redeeming.

13 Plaintiff filed his verified class
14 action complaint on February 9, 2024, alleging breach
15 of fiduciary duty claims against Fifth Wall directors,
16 officers, and alleged controllers; an aiding and
17 abetting claim against Fifth Wall Asset Management
18 LLC; and an unjust enrichment claim against all
19 defendants. Plaintiff's core allegation is that the
20 Fifth Wall board approved an unfair merger and
21 disseminated a false and misleading proxy statement.

22 According to plaintiff, the proxy
23 omitted at least five categories of material
24 information: one, Fifth Wall's net cash per share;

1 two, material information concerning its SmartRent
2 financial projections; three, material information
3 concerning SmartRent's projected revenue; four,
4 material information concerning the extent of Fifth
5 Wall Asset Management's role in the merger process;
6 and, five, material information concerning SmartRent's
7 enterprise valuation. These material misstatements
8 and omissions allegedly interfered with the meaningful
9 exercise of public stockholders redemption rights.

10 Defendants filed their answer on
11 May 10 and discovery ensued.

12 On February 9, 2025, the parties
13 participated in an in-person mediation session with an
14 experienced mediator. This mediation did not
15 immediately produce a settlement. Discovery marched
16 forward while the parties continued to engage in
17 settlement discussions through the mediator.

18 On July 8, the parties accepted a
19 double-blind mediator's proposal to settle this action
20 for \$11.375 million, and the stipulation was filed on
21 August 22.

22 I have four tasks before me today:
23 class certification; determination of the adequacy of
24 notice; determining whether the settlement should be

1 approved; and, finally, if so, a fee award.

2 The class definition is reasonable and
3 an adequately cohesive unit for litigation.

4 Numerosity is also satisfied.

5 As for commonality and typicality, as
6 my conversation with plaintiff's counsel revealed, I
7 have fundamental and structural concerns with a
8 plaintiff bringing a redemption impairment claim whose
9 redemption was not impaired, based on his own
10 testimony under oath at his deposition.

11 This plaintiff did not suffer a
12 redemption impairment injury, and I doubt he has
13 standing to bring that disclosure claim post-close,
14 following *Andra v. Blount* and *In re Aristotle*. But
15 the plaintiffs in those cases did not suffer any
16 indirect injury, and their appraisal claims meant
17 there was no other relief left for them to seek.

18 Here, Mr. Jandreau suffered an
19 additional and unremedied injury in rolling over his
20 shares into an entity that was far less valuable than
21 the entity his fellow stockholders voted to recommend,
22 based on information that was faulty due to the
23 disloyalty of their fiduciaries. He brought claims
24 based on that indirect injury.

1 Following the roadmap in *O'Malley v.*
2 *Boris*, I do not think Jandreau's professed nonreliance
3 on the proxy comes logically prior to a merits
4 assessment of those fiduciary breaches. Nor do I
5 think that nonreliance presents a defense that
6 jeopardizes the merits of those claims.

7 I also take instruction from *Andra* and
8 *Aristotle* on how strictly I should hold to standing or
9 injury or reliance requirements at this stage. Those
10 cases both recommended flexibility on those points
11 when the named plaintiff is obtaining a short-term
12 class-wide benefit. They spoke of the preclose
13 preliminary injunction phase.

14 Here, Jandreau seeks to represent a
15 class that is poised to receive 33 cents per share.
16 If I were to reject him as failing the commonality or
17 typicality requirements, that would just increase the
18 cost to defendants, the court, and plaintiff's counsel
19 of obtaining that same good result after finding and
20 swapping in a new plaintiff.

21 Commonality does not require the
22 individuals to be identically situated, and typicality
23 only requires the plaintiff must not be markedly
24 different. And Mr. Jandreau's potential standing

1 issue is less black and white than the contemporaneous
2 ownership requirement addressed in *Dieter*.

3 I find the elements of commonality and
4 typicality are met here, and I also find Mr. Jandreau
5 to be an adequate class representative.

6 He has filed the requisite Rule 23
7 affidavit. Certification under either Rule 23(b)(1)
8 or (b)(2) is appropriate here, and I certify this as a
9 non-opt-out class.

10 The notice is sufficient. It
11 describes what it needs to describe and provides the
12 information it needs to provide. And it was also
13 disseminated adequately, according to the claims
14 administrator's affidavit.

15 Turning to the merits of the
16 settlement to compare the "give" and the "get,"
17 mindful that the court generally favors settlement of
18 complicated litigation. The settlement provides class
19 members will release all claims, known and unknown,
20 that were or could have been asserted in this action.

21 The complaint alleges Fifth Wall's
22 conflicted board, officers, and controllers, aided and
23 abetted by Fifth Wall Asset Management, breached their
24 fiduciary duties by approving an unfair merger and

1 causing Fifth Wall to issue a false and mislead proxy
2 statement. Plaintiff's core claim is that defendants'
3 disloyal conduct in connection with the merger
4 impaired the class members' right to make an informed
5 redemption decision and led to an unfair result.

6 By this point, Delaware law is well
7 settled on such claims. Defendants would bear an
8 entire fairness burden at trial. Although plaintiffs
9 raised credible disclosure theories supporting a
10 finding of unfair process, plaintiff faced headwinds
11 moving forward. The largest headwinds came with
12 respect to unfair price and damages.

13 SmartRent's stock price traded above
14 the \$10 per share redemption price for nearly five
15 months after the merger closed. As the brief points
16 out, this court observed in *Hennessy* that "a finding
17 of unfair price (not to mention damages) may prove
18 unobtainable [when a de-SPAC entity's] stock price ...
19 traded around \$10 per share for months."

20 The brief also acknowledges a
21 potential uphill battle with respect to proving aiding
22 and abetting liability. While plaintiff remains
23 guardedly optimistic about prevailing on that claim,
24 he recognizes that the decisions in *Mindbody* and

1 *Columbia Pipeline* from the Supreme Court underscore
2 the rigor with which aiding and abetting claims are
3 evaluated. Under those claims, a mere failure to act
4 is insufficient to prove aiding and abetting
5 liability. In short, continued litigation carried
6 risk for recovery.

7 In exchange for that release, the
8 settlement provides an \$11.375 million cash recovery,
9 representing a recovery of approximately 33 cents per
10 share for each of the 34 million unredeemed Fifth Wall
11 Class A common shares.

12 This per-share recovery is within the
13 range of per-share recoveries approved by this court
14 in previous SPAC cases. It's on the lower end, but
15 it's consistent with precedent and the product of
16 arm's length negotiations overseen by an experienced
17 mediator. No objections have been raised.

18 The crux of the exercise, balancing
19 the "give" against the "get." Plaintiff estimates
20 total potential class damages to be approximately
21 \$86.25 million, which is the difference between the
22 \$10 per share redemption price and the alleged \$7.50
23 net cash per share multiplied by the number of shares
24 in the class.

1 The settlement represents 13.2 percent
2 of the estimated total net cash per share damages.
3 Again, that's on the lower end of the range, but in
4 light of the hurdles plaintiff would have faced moving
5 forward, an immediate and certain \$11.375 million
6 settlement outweighs the risk of an uncertain
7 recovery. I conclude the settlement is within the
8 range of reasonableness, and I approve it as fair.

9 I also approve the plan of allocation,
10 which is claims-based and recently recommended per
11 *TS Innovation*.

12 Finally, I turn to the plaintiff's
13 motion for an award of attorneys' fees. Counsel
14 represents a total fee and expense award of
15 \$3,007,974.96. This is 23.5 percent of the net
16 settlement fund in fees plus the reimbursement of
17 \$437,000 and change in litigation expenses. Counsel
18 has requested 23.5 percent of the net settlement fund
19 after deducting that \$437,000 in out-of-pocket costs.

20 When a case settles early and
21 routinely, there is a preference for an all-in award.
22 But when a case has involved real litigation efforts
23 and significant out-of-pocket costs, an all-in award
24 can generate unfairness by forcing counsel to

1 internalize those costs.

2 As a result, this court has recognized
3 that "[i]n a case where counsel has incurred
4 significant out-of-pocket costs, the approach that
5 best balances the interests of the attorneys and the
6 class is to reimburse for out-of-pocket costs first,
7 then award a fee based on the percentage of the net
8 fund." That's from *Dell Technologies*.

9 I've reviewed the expenses, and the
10 bulk of them -- around \$292,000 -- were incurred in
11 connection with retaining a business valuation expert
12 to assess SmartRent's value as of the redemption date,
13 SmartRent's value as of closing, and the appropriate
14 measure of damages. This seems to be a fair expense
15 to reimburse.

16 The parties were just days away from
17 exchanging their expert reports when they settled. As
18 such, I think the *Dell* approach is appropriate here.

19 Turning to the fee itself, the policy
20 is to ensure that even without a favorable
21 adjudication, counsel will be compensated for the
22 results that they produced. Counsel is entitled to
23 fees and expenses under the common fund doctrine, and
24 my task is to make an independent determination of

1 reasonableness following the well-known *Sugarland*
2 factors.

3 Here, the benefit is quantifiable,
4 \$11.375 million in cash. Under *Americas Mining*, when
5 the benefit is quantifiable by the creation of a
6 common fund, the Court should consider the fee award
7 as a percentage of that benefit. Where, as here, a
8 case settles after meaningful litigation efforts but
9 before trial, an appropriate percentage range is 15 to
10 25 percent.

11 Here, plaintiff filed a complaint
12 after serving two 220 demands, reviewed over 200,000
13 pages of documents produced in discovery, conducted a
14 notable 12 depositions, briefed a contested motion for
15 class certification, and was about to begin expert
16 discovery and serve their expert report when the
17 parties reached a settlement.

18 Given those efforts, plaintiff
19 requests a fee at the high end of the appropriate
20 percentage range, which is higher than the fees
21 awarded in several other SPAC cases.

22 As I noted earlier, *Lordstown* awarded
23 22.5 percent plus expenses, *MultiPlan* awarded
24 20 percent inclusive of expenses, and *XL Fleet* awarded

1 20 percent plus expenses. But this case has proceeded
2 further in litigation than any of the cases I just
3 mentioned. I think all of the work that went into
4 this case warrants the requested award here.

5 Lodestar and an implied hourly rate
6 can serve as a useful cross-check. Counsel expended a
7 total of 5,288.85 hours litigating this case from
8 inception to the date on which the parties executed
9 the settlement stipulation. The lodestar is about
10 \$3.7 million, and the fee award implies an hourly rate
11 of \$485.98. The cross-check supports the fee award.

12 I'll briefly tick through the
13 remaining *Sugarland* factors. The claims and theories
14 raised in this case are not especially novel. The
15 action commenced after the *MultiPlan*, *Gig2*, and *Gig3*
16 decisions paved a clear framework for SPAC cases. But
17 counsel worked hard on this case on an entirely
18 contingent basis and with great skill.

19 Taking all the *Sugarland* factors into
20 account, I conclude a fee and expense award of
21 23.5 percent of the net fund plus reimbursement of
22 expenses is appropriate here.

23 Finally, I'll address the \$3,000
24 service award requested for plaintiff. It's approved

1 in my discretion, given his participation in this
2 action to date. He stepped forward as class
3 representative, produced nearly 900 documents, oversaw
4 settlement negotiations and, notably, sat for a
5 deposition. I conclude a modest \$3,000 service award
6 is amply supported.

7 And with that, we are adjourned.
8 Congratulations on the settlement.

9 (Court adjourned at 12:11 p.m.)

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CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 43, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 4th day of December, 2025.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

Tab 19

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE KENSINGTON-QUANTUMSCAPE : Civil Action
DE-SPAC LITIGATION : No. 2022-0721-JTL

- - -

Chancery Courtroom No. 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, February 21, 2024
11:00 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

ORAL ARGUMENT AND RULING OF THE COURT ON DEFENDANTS'
MOTIONS TO DISMISS

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
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Brad Buss, John L. Doerr, and Vinod Khosla

- - -

CHANCERY COURT REPORTERS**500 N. King Street, Ste 11400, Wilmington, DE
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1 THE COURT: Welcome, everyone.

2 ATTORNEY LYONS: Good morning, Your
3 Honor. I'll just briefly make some introductions for
4 plaintiffs.

5 Obviously, Chris Lyons from Robbins
6 Geller Rudman & Dowd on behalf of the plaintiff. With
7 me here today I have my partner Erik Luedeke from
8 Robbins Geller in California. You know Dave Sborz
9 from Andrews & Springer. Mario Valdovinos, our
10 co-counsel at Robbins LLP. My colleague Tayler Bolton
11 from Robbins Geller. And Greg Del Gaizo from Robbins.
12 And in the peanut gallery we have Mr. Andrews as well.

13 THE COURT: Thank you all for being
14 here.

15 ATTORNEY CORDO: Good morning, Your
16 Honor. By way of introduction, Andrew Cordo from
17 Wilson, Sonsini, Goodrich & Rosati on behalf of the
18 Legacy QuantumScape defendants. I'd like to introduce
19 my colleague Jessica Hartwell. Thank you, Your Honor.

20 THE COURT: Thank you all for being
21 here.

22 ATTORNEY WAESCO: Good morning, Your
23 Honor. Susan Waesco from Morris, Nichols, Arsht &
24 Tunnell on behalf of the Kensington defendants. By

1 way of introductions, Shahzeb Lari from Hughes
2 Hubbard. And in the back table I have Miranda Gilbert
3 of my office and Katherine Taylor from Hughes Hubbard.

4 THE COURT: Thank you all for being
5 here.

6 ATTORNEY WAESCO: With the Court's
7 permission, Mr. Lari will be making the argument on
8 behalf of the Kensington defendants this morning.

9 THE COURT: Sure. Please proceed.

10 ATTORNEY LARI: Good morning, Your
11 Honor. Shahzeb Lari from Hughes Hubbard for the
12 Kensington defendants.

13 Your Honor, I'm aware of the Court's
14 recent decisions regarding de-SPAC transactions, so I
15 am not going to retread arguments that have been made
16 in those cases. I realize that in light of those
17 decisions, some of the arguments in our briefing are
18 now moot, and I'm not going to reargue those
19 arguments. For example, I understand that entire
20 fairness is the applicable standard of review.

21 Similarly, in light of Your Honor's
22 *PaySafe* decision, I'm not going to argue about the
23 wide gulf between net cash per share and the \$10
24 redemption price.

1 Where I'd like to focus on today is
2 why I think this case is different from the prior SPAC
3 decisions and why I don't believe that any of the
4 prior SPAC decisions have addressed the issue here
5 that I wanted to address today. And I know, Your
6 Honor, that's probably not the first time you've heard
7 that, but I really do think this case is different.

8 And the reason for that is I don't
9 think that any of the recent SPAC decisions have
10 addressed a situation where the post de-SPAC company,
11 so the public company here, QuantumScape, traded at
12 multiples above \$10 even after the information that
13 was allegedly concealed in the proxy was revealed to
14 the market. And I don't think that's a minor factual
15 difference, Your Honor, because it really goes to the
16 heart of the plaintiff's case.

17 The plaintiff's theory here is that
18 his redemption right was impaired because the proxy
19 overstated facts about QuantumScape's operations to
20 justify a valuation of \$10 per share and the value was
21 significantly less than \$10 per share. And that's
22 crystallized in paragraphs 11 to 13 of the amended
23 complaint.

24 And this is the same theory as in the

1 other de-SPAC cases, right, Your Honor. The
2 allegation is always the proxy led investors to think
3 that the value was \$10. It wasn't \$10. But in all of
4 those cases, once additional information about the
5 public company came out, the stock price fell below
6 \$10. Whether that was right after closing when there
7 are additional disclosures or when there was a
8 corrected disclosure in the form of typically a short
9 supplement. But in all of those instances, the stock
10 price pretty much immediately falls below \$10, and so
11 it's reasonably inferable that \$10 was not actually an
12 accurate valuation; it was overvalued.

13 That was the case in the *PaySafe* case,
14 Your Honor. The stock price fell to below \$2 once the
15 truth came out. That was the case in *Astra*, where the
16 stock was trading at 54 cents once the complaint was
17 filed. *XL Fleet*, the same thing. And *Electric Last*
18 *Mile*, I think the company went bankrupt when the news
19 came out.

20 And that theory just doesn't align
21 with the facts here. QuantumScape's stock was trading
22 above \$10 for 18 months after the de-SPAC. And that
23 includes for 13 months after the truth was allegedly
24 disclosed.

1 And I just want to briefly address the
2 chronology. The de-SPAC transaction closed on
3 November 25th, 2020. And at that point QuantumScape
4 became publicly traded. The stock price was 23.50.

5 On December 8th, 2020, QuantumScape
6 announced new test results about its performance and
7 its battery technology.

8 On January 4th, 2021, a report was
9 published on *Seeking Alpha* that essentially criticized
10 the new testing data, and the stock price fell from
11 around \$60 to \$50. So still five times the redemption
12 price.

13 Then April 15th, 2021, a short seller
14 report comes out. That's the Scorpion Capital report.
15 It also criticizes the test results and extrapolates
16 from that that the state of QuantumScape's technology
17 and its sort of pace towards commercialization is not
18 what had previously been thought. The stock price
19 drops again to \$35. Still three and a half times the
20 redemption price.

21 Those two reports are really the basis
22 for plaintiff's allegations that the proxy was
23 misleading. If you look at -- I think it's paragraphs
24 108 to 117 of the amended complaint, they discuss in

1 detail, in particular, the Scorpion Capital report and
2 basically assert that the allegations in that report
3 demonstrate that the proxy statements about
4 QuantumScape were false. But even then the stock
5 price does not drop below \$10. And, in fact, the
6 stock price trades above \$20 for another eight months,
7 until January 2022. And then it trades above \$10
8 until June 13th, 2022. So that's a full 13 months
9 after the truth is disclosed. The stock price finally
10 falls below \$10 in June of 2022.

11 There is no allegations in the
12 complaint about why that happened. There's no attempt
13 to connect it to any of the disclosures in the proxy.
14 I think it was just really a market drift. It fell
15 below \$10; it promptly rebounded. But based on those
16 facts, there's simply no basis to infer that the value
17 of QuantumScape's stock was overvalued at \$10 per
18 share at the time of the de-SPAC. You know,
19 stockholders who didn't redeem didn't get something
20 that was worth less than \$10. In fact, they got
21 something that was worth more. They could have sold
22 at three times, five times the price for a full
23 18 months after the de-SPAC closed. And that's
24 nothing like any of the other -- you know, the prior

1 de-SPAC decisions, Your Honor.

2 There is one case that addressed a
3 similar situation. That's the *Delman v. B. Riley*
4 case. Vice Chancellor Will heard arguments on a
5 motion to dismiss in that case in November of last
6 year and took the motions under advisement. The case
7 settled in the interim, so we don't really have any
8 guidance from the Court on this particular issue.

9 I will note that that case was
10 actually even factually very similar. That was a
11 battery technology company. It was a SPAC that went
12 public in November 2020. And the plaintiffs were
13 arguing that a share price declined in November 2022,
14 which is what plaintiffs argue here -- I'm going to
15 get that in a second -- so it showed that the de-SPAC
16 price was unfair. That's really, I think, the only
17 case I'm aware of that addresses the situation. And
18 again, there's no decision in that case.

19 I think in plaintiff's answering
20 brief, their response to this argument is really just
21 to say that, well, the full truth about QuantumScape
22 wasn't disclosed until November 2022. And that's when
23 a Morgan Stanley analyst issued a report that referred
24 to QuantumScape's Q3 results for 2023 as narrative

1 changing, and that caused the stock price to drop to
2 6.14. That's in paragraphs 121 and 122 of the amended
3 complaint.

4 Your Honor, that argument, I think, in
5 all honesty, is quite a makeweight argument.
6 Plaintiff doesn't explain how that analyst report
7 connected to anything that was contained in the proxy.
8 It doesn't explain how it provided new information
9 that was not disclosed in the Scorpion Capital and
10 *Seeking Alpha* reports. And again, it is those reports
11 which form the basis for plaintiff's allegations of
12 falsity.

13 And a notion that those reports did
14 not adequately reveal the issues that plaintiff is
15 contesting here is impossible to reconcile with the
16 fact that it is those reports that led to the
17 securities class action which the plaintiffs cite to
18 as establishing falsity here. It led to the filing of
19 the five derivative complaints that are before Your
20 Honor right now. I believe those are stayed. It led
21 to the filing of this action.

22 This action was filed on August 16th,
23 2022. That was several months before the Morgan
24 Stanley report came out. And now I understand, Your

1 Honor, that the action initially filed was styled as a
2 derivative case and they then amended the complaint
3 and filed the direct case in March of last year. But
4 the derivative case had the exact same disclosure
5 violations alleged, the due diligence, the statements
6 about QuantumScape's business. It's all the same
7 thing. The only difference is, I think, that there's
8 no net cash per share allegations in that complaint.
9 That was first raised when the plaintiffs filed their
10 amended complaint, and that was in March of 2023.

11 Even at that point, Your Honor -- I
12 should say, when the plaintiffs filed their original
13 complaint, the stock price was still above \$12. So
14 again, above the redemption price. When the
15 plaintiffs filed their amended complaint, the stock
16 price closed, I believe, at 9.40. But it rebounded
17 shortly thereafter and traded above 10 several
18 times -- for several days, if not weeks.

19 But even if you take that argument at
20 face value, that the true filing came out in November
21 of 2022, plaintiff's position is basically that a
22 stock price decline two full years after the de-SPAC
23 shows that the de-SPAC price was unfair and that they
24 were false disclosures in the proxy statement. And

1 that's nothing more than fraud by hindsight, Your
2 Honor. There's nothing connecting the challenged
3 disclosures with the price decline in November 2022.
4 That's particularly the case since when these issues
5 were initially disclosed in the Scorpion Capital
6 report and the *Seeking Alpha* report, the price clearly
7 did not go anywhere near \$10 per share.

8 I think that goes to the weakness of
9 the disclosure issues here, which I just wanted to
10 address briefly, Your Honor. There's really three of
11 them. There's this idea about the prospects for
12 QuantumScape's business, the due diligence conducted
13 by the Kensington board, and then the net cash per
14 share allegation.

15 Starting with the arguments about
16 QuantumScape's prospects. Plaintiffs really focus on
17 a single half page of the proxy. The proxy is a
18 500-page document. It has pages and pages of risk
19 disclosures. But plaintiffs focus on two paragraphs,
20 which are titled "Benefits of [QuantumScape's]
21 Technology."

22 And if you look at the prefatory
23 language to those two paragraphs, Your Honor, it's
24 very clear that what this is is QuantumScape's

1 projections, not Kensington's, but QuantumScape's
2 projections or thoughts about the possible future
3 benefits of its technology.

4 But the proxy also contains, as I
5 said, detailed risk disclosures -- and we go through
6 these in our opening brief at 11 to 14 -- warning that
7 QuantumScape had no operations or revenue, may never
8 be able to commercialize production, had not produced
9 a battery, didn't have the means of manufacturing a
10 battery at that point. They may never be able to
11 achieve any of the benefits it was hoping for.

12 And that's a far cry from the
13 disclosures at issue in *Gig3*, where the problem was
14 that the disclosures did not provide impartial,
15 balanced or counter information to sort of the glowing
16 disclosures about the company's business. That's not
17 these disclosures. Your Honor, again, I would just
18 point to our opening brief, which goes through those.

19 And, frankly, Your Honor, the fact
20 that the price didn't fall below \$10 when the Scorpion
21 Capital and *Seeking Alpha* reports came out, which,
22 again, said commercialization is not that far along,
23 it's not really surprising because the risk
24 disclosures very clearly stated that commercialization

1 may never happen. This was a company that had no
2 product, that had no ability to make the product. So
3 I think it was priced into the \$10.

4 But setting that aside, Your Honor,
5 the entire basis for the allegations of falsity is
6 this notion that the proxy -- that the statements in
7 the proxy were false because the test results that
8 were disclosed on December 8th after the merger were
9 then criticized in the Scorpion Capital and *Seeking*
10 *Alpha* reports. But the proxy doesn't mention those
11 test results at all. There's nothing in the proxy
12 about them. There's nothing to suggest -- there's no
13 facts pled to suggest that those tests played any role
14 in any of the proxy disclosures or if that even
15 occurred at that time.

16 I don't want to spend too much time on
17 any of the disclosure points, Your Honor, so I'll just
18 move on to the next one, which is the due diligence
19 issue. And the contention there essentially is that
20 the 220 materials that QuantumScape produced to the
21 plaintiff don't show that the Kensington board did
22 adequate due diligence on QuantumScape. And we
23 address this point in our brief, so I won't belabor
24 it.

1 One, Your Honor, due diligence
2 materials are not typically the kind of board
3 materials you see in a Section 220 request. I don't
4 know if they requested those. I don't know what
5 QuantumScape and plaintiffs agreed to as sort of
6 sufficient 220 disclosures. I have no idea because,
7 again -- and that goes to the key point here -- they
8 are trying to infer wrongdoing against the Kensington
9 board based on QuantumScape's Section 220 production.
10 I just don't really see how you get there.

11 And then, third -- and I left this for
12 last because it's probably the biggest issue, which is
13 the net cash per share issue. That's the final
14 disclosure issue. And, obviously, this circles back
15 to the point I was making earlier about the stock
16 price trading above \$10 for months, even after the
17 corrected disclosures came out. And because of that,
18 there's nothing to suggest that the \$10 price in the
19 proxy or the \$10 redemption price was overstated in
20 any way.

21 All the other cases address situations
22 where the net cash per share disclosure is necessary
23 because the stock price immediately falls below \$10,
24 suggesting that the \$10 price was inaccurate and

1 wasn't properly valued and so you have to look to the
2 net cash per share as really the only proper valuation
3 mechanism. But you don't even get there here because
4 there's no decline in the stock price indicating that
5 the stock was improperly valued at \$10. So I don't
6 think you really get to a point where the net cash per
7 share calculation is presumptive material, as it is in
8 the other cases.

9 Your Honor, that was it for me, unless
10 you have questions.

11 THE COURT: Thank you so much.

12 ATTORNEY CORDO: Good morning again,
13 your Honor. For the record, Andrew Cordo of Wilson,
14 Sonsini, Goodrich & Rosati.

15 Your Honor, I'll just focus right in
16 on the element of knowing participation for aiding and
17 abetting. The only claim asserted in the amended
18 complaint against the Legacy QuantumScape defendants
19 is aiding and abetting. The complaint does not allege
20 any knowing participation on the part of the Legacy
21 QuantumScape defendants.

22 The plaintiff's argument as
23 articulated in the answering brief is that Legacy
24 QuantumScape supplied false information about its

1 operation and finances to Kensington. That
2 information found its way into the proxy. And
3 therefore, according to plaintiff, the Legacy
4 QuantumScape defendants, the individuals, aided and
5 abetted in the alleged breaches of fiduciary duty of
6 disclosure committed allegedly by the Kensington
7 defendants.

8 And for that argument, plaintiff
9 relies on cases like *Mindbody* and *Columbia Pipeline*.
10 But what's different between plaintiff's arguments and
11 those cases is they are not asserting the aiding and
12 abetting claim against the counterparty, they are
13 asserting it against the fiduciaries of the
14 counterparty.

15 And I think there's policy reasons to
16 be careful before expanding aiding and abetting
17 liability another step. But I submit the Court
18 doesn't need to get into those because, at the end of
19 the day, the complaint does not allege that the Legacy
20 QuantumScape defendants did anything. Certainly the
21 answering brief does not cite anything in the amended
22 complaint for the proposition that the Legacy
23 QuantumScape defendants participated in a breach.
24 They are only alleged in five paragraphs to have done

1 anything. Those five paragraphs, I'll refer to them
2 as simply having board meetings.

3 In plaintiff's answering brief, the
4 only thing they cite for the proposition -- or the
5 plaintiff cites for the proposition that the Legacy
6 QuantumScape defendants participated in a breach is a
7 reference in the opening brief to the board having
8 considered draft "documentation" at a board meeting
9 that was held on September 2nd, 2020.

10 But if you look at the board minutes
11 that are cited at Exhibit 4 at page 4, that refers to
12 the board having looked at draft resolutions, a draft
13 of the business combination agreement, and a draft of
14 the amended certificate of incorporation. There's no
15 reference to reviewing any financial information,
16 providing financial information, reviewing the draft
17 proxy. And nowhere in the amended complaint are there
18 any allegations that any, let alone all, of the Legacy
19 QuantumScape defendants ever did any of those things.

20 And, in fact -- this is not cited in
21 the answering brief, but looking at the complaint
22 ourselves, there's only one allegation that even seems
23 to touch on this concept, and that's found in
24 paragraph 83, in which the amended complaint alleges

1 that Buss reviewed with the board the financials that
2 would go in the draft proxy. There's a citation to
3 Exhibit 4 at page 4.

4 If you look at the cited source,
5 that's not what it says. It says that Mr. Buss was
6 given the authority to review and approve financials
7 before they went out the door to Kensington. And it
8 does not allege that anyone else did anything besides
9 give him that authority. Once again, no allegations
10 that anyone then reviewed anything after that.

11 So I submit that what is missing here
12 are any allegations of participation at all. And
13 that's what distinguishes this case from *Electric Last*
14 *Mile*, the only case that we're aware of sustaining an
15 aiding and abetting claim against the fiduciaries of a
16 counterparty in a transaction. And in the
17 Chancellor's decision, you'll see her finding numerous
18 allegations with action verbs about the aiders and
19 abettors. They personally gave information to the
20 SPAC. When they did it, they knew it was false. They
21 misled their fellow directors about conflicts of
22 interest. They did, in fact, review the draft proxy,
23 which was inferable because of their "active
24 participation" throughout the transaction process.

1 There's just nothing of that sort in
2 the complaint. There's nothing at all in the
3 complaint. So participation is lacking.

4 Also, given the absence of any
5 allegations of what the Legacy QuantumScape defendants
6 did, when they did it, how they did it, or what they
7 were thinking when they did it, there's no basis on
8 which to infer that they acted with scienter. To
9 infer that they had a culpable state of mind, there
10 need to be allegations about what they were doing.
11 But again, simply absent.

12 So for all those reasons, Your Honor,
13 the complaint fails to state a claim for aiding and
14 abetting, and we'd ask that Count III be dismissed.

15 THE COURT: This probably is a
16 function of my own naivety. But I look at this proxy
17 and I see a lot of your information in it,
18 particularly when I get to page 156 and read on from
19 there. There's 41 pages of information about
20 QuantumScape. If you-all didn't participate on the
21 participation prong, where did that come from?

22 ATTORNEY CORDO: Well, if I may, Your
23 Honor, drill into your use of the word "you-all."
24 You-all -- QuantumScape provided that information.

1 What the plaintiff is asking for is an inference that
2 every single one of the defendants, the directors, did
3 it. QuantumScape is not being -- a claim for aiding
4 and abetting is not being asserted against
5 QuantumScape or Legacy QuantumScape. It is being
6 asserted against the individual defendants. And the
7 argument that all of the individual QuantumScape
8 defendants may potentially face liability for aiding
9 and abetting because of what QuantumScape allegedly
10 did really smacks of ignoring the corporate
11 separateness of the directors and the company. They
12 say the company did this; therefore, you should infer
13 all the directors did it. And that's not a recognized
14 pleading theory in Delaware. If you want to allege
15 the director did it, allege the director did it.

16 THE COURT: CEO, can we infer that
17 your CEO gave some of it?

18 ATTORNEY CORDO: No.

19 THE COURT: So this stuff just went
20 over without his being involved at all; that's your
21 claim?

22 ATTORNEY CORDO: I'm saying the
23 complaint makes no effort to even allege what his
24 degree of involvement was.

1 THE COURT: Which means, from your
2 standpoint, it is inconceivable -- it is not
3 reasonably conceivable that the CEO had any
4 involvement in sending over this, as I said, 41-page
5 description of your business?

6 ATTORNEY CORDO: I respectfully
7 submit, Your Honor, you are asking me to negate an
8 allegation that's not in the complaint. They don't
9 allege that anyone did it.

10 THE COURT: Am I allowed to draw
11 inferences?

12 ATTORNEY CORDO: Of course, Your
13 Honor.

14 THE COURT: Am I allowed to consider
15 materials that are incorporated by reference in the
16 complaint and which your fellow defendants provided
17 me?

18 ATTORNEY CORDO: Of course.

19 THE COURT: So if I'm considering the
20 proxy statement -- and, again, we can start reading on
21 page 156. As I say, there's 41 pages of description
22 about your business, about the existing problems with
23 the lithium model, how your solid-state model is going
24 to be better. There's a picture of a hand that is

1 inferably the hand of a QuantumScape employee.

2 QuantumScape is a step function ahead of conventional
3 cells. You know, all of these things.

4 So why is it not a reasonable
5 inference that, at a minimum, the senior officers at
6 your company were involved in that?

7 ATTORNEY CORDO: You say involvement.
8 You mean providing the information to --

9 THE COURT: Now what I'm trying to
10 focus on is the concept of participation. What you
11 walked up to the podium and said is, there is
12 absolutely no way to infer that we even participated
13 in this. I mean, we don't know where they got it.
14 From this complaint, like, you can't even think that
15 they ever talked to us.

16 I am pressing you on that. And so
17 initially your response was, okay, all right, it might
18 be reasonable to infer that the company was involved,
19 but you can't think anything beyond that. I mean, you
20 could at least infer that there was somebody at
21 QuantumScape. But beyond that, it's impossible. And
22 so now I'm pushing you on that and I'm saying, why
23 isn't it a reasonable inference that at least your CEO
24 and your CFO and probably your chief technology

1 officer were involved in this type of information
2 sharing? I mean, again, maybe it's a fair point that
3 some outside director, one of your VC guys from
4 Kleiner Perkins, or the other folks on the list, maybe
5 those guys weren't involved in sending over the
6 information. But it had to come from somewhere.

7 ATTORNEY CORDO: The phrase is
8 reasonable inference from the facts alleged in the
9 amended complaint. There are five paragraphs that
10 refer to the Legacy QuantumScape directors doing
11 anything. Your Honor is drawing inferences that --
12 let me step back.

13 The plaintiffs don't allege the CEO
14 provided this information, and that's a reasonable
15 inference because. They say --

16 THE COURT: Why do they have to say
17 it? What is the notice pleading standard?

18 ATTORNEY CORDO: They must plead facts
19 from which it can be reasonably inferred that a
20 particular fact is true or that an element is met.

21 THE COURT: You have to allege facts
22 from which it is reasonable to infer that a claim can
23 be stated. They don't have to say every little thing
24 that might have happened.

1 ATTORNEY CORDO: I agree with that.
2 But they don't say any little thing that happened in
3 this complaint.

4 THE COURT: What is the "any little
5 thing"? What is the any little fact by which this
6 information got from your company to the other
7 company?

8 ATTORNEY CORDO: It is certainly
9 inferable that the information was provided. That's
10 not the inference the plaintiffs are asking for.

11 THE COURT: No. They are asking for
12 an inference that -- again, this is why I'm focusing
13 on your CEO or your senior folks. I mean, it doesn't
14 seem to me that it would be possible for this type of
15 information to be shared as part of a major
16 transaction where you-all are effectively going public
17 without your top officers being involved.

18 ATTORNEY CORDO: Plaintiff certainly
19 didn't make that distinction in the complaint or in
20 their answering brief. They simply say the Legacy
21 QuantumScape defendants aided and abetted this. And
22 my argument to Your Honor is that the complaint does
23 not allege that. If they wanted to allege that,
24 perhaps they could have, but they did not.

1 But let me move to the corollary or
2 the next step from the inference that Your Honor is
3 drawing. I don't want to argue with Your Honor about
4 a point if Your Honor's mind is made up. But let's
5 take that the next step. You've inferred that some
6 subset of the Legacy QuantumScape defendants
7 participated. Now we need to infer that members of
8 this subset did so with scienter. What are the
9 allegations from the amended complaint to draw that
10 inference?

11 Once again, we have five allegations
12 that the Legacy QuantumScape defendants did anything.
13 All five of them refer to what they did at board
14 meetings that occurred before the agreement was
15 signed, that occurred before any information was
16 shared. What is the basis on which to infer that some
17 officer or director had a culpable state of mind when
18 they took -- when they handed over the information
19 that is being inferred was handed over? How do you
20 infer that there was -- that they knew it was false
21 and intended to participate in this breach of duty?

22 Once again, we have nothing in the
23 complaint. The plaintiffs argue that you can look to
24 the core operations doctrine. And the core operations

1 doctrine talks about the notion that when someone
2 takes particular action that's suggestive that they
3 have particular knowledge, you can infer they did, in
4 fact, have that knowledge, like in *Pfeiffer v. Toll*.
5 Unusually timed, unusually voluminous stock
6 transaction, you can infer that the person knew bad
7 information about the company was insider trading.

8 Where is the allegation of the action
9 that's indicative of knowledge that this information
10 that was being handed over was false, that the person
11 who knew -- here, I'm giving you information,
12 Kensington, and I know this isn't true? There is
13 nothing in the complaint from which to draw that
14 inference. Even if you've made the inference that the
15 action happened, now you need state of mind. And
16 state of mind -- I can see perhaps anticipating a
17 question -- can be alleged generally, but it has to be
18 alleged. There has to be something from which to draw
19 that inference.

20 And that's, again, where I'll
21 distinguish *Electric Last Mile*, allegations of fact
22 about what the aiders and abettors did, and contrast
23 that with *XL Fleet*, another decision from our
24 Chancellor, where she dismissed aiding and abetting

1 claims against fiduciaries of the counterparty and
2 described them as sparse because there were no
3 particular -- there were no identified allegations
4 that the aiders and abettors had done anything in
5 particular.

6 THE COURT: What do you understand
7 them to be alleging is false about your-all's
8 disclosures?

9 ATTORNEY CORDO: My understanding is
10 that they contend, based upon the blog post in the
11 short seller's report, that the technology could not
12 perform as predicted -- or perhaps a better way to say
13 that would be it was more risky than it had been --
14 than public statements had indicated.

15 THE COURT: They hadn't made as much
16 progress as they were claiming and they hadn't gotten
17 the type of success that they were suggesting they had
18 done in general terms; fair or not fair?

19 ATTORNEY CORDO: Yes, fair.

20 THE COURT: So in that type of -- you
21 know, it's a big picture allegation. It's a big
22 picture allegation that basically QuantumScape was
23 being pumped up beyond what it was. Doesn't your
24 management team inferably know about that?

1 I can understand the argument if it's
2 something more specific or detailed. But the gist
3 here is, like, what -- the pitch was we're cranking at
4 100 percent, and the reality was we're only getting
5 70 percent of what we're supposed to be getting. I'm
6 not using those percentages in terms of what their
7 outputs were or what their testing outputs were or
8 anything of that sort. I'm using it as sort of a
9 broad metaphorical sense.

10 Again, why isn't it reasonable to
11 infer that your top folks would have known about
12 something that big? And we're not -- you don't need
13 to accept for my question that it really was pumped
14 up. I mean, you don't need to challenge me on that.
15 I'm sure that it's challengeable. I'm sure that
16 there's deep questions. And for all I know, maybe
17 QuantumScape was pulling off everything it could have
18 done.

19 But if the theory is that basically
20 the business was a A+ player when, in fact, it was a
21 B- player, again, why isn't that inferably something
22 that, at a minimum, your senior guys would have known?

23 ATTORNEY CORDO: Well, that's an
24 inference that is not -- the inference that you need

1 to draw in order to find scienter here is not that,
2 that the QuantumScape's documents said it was an A+
3 player and, in fact, it's a B- player or it's
4 debatably a B- player. The inference you would need
5 to draw is that when somebody, some subset of the
6 QuantumScape defendants passed along this information,
7 they knew that QuantumScape was a B- player and yet
8 intentionally said that it was an A+ player.

9 What we haven't said -- we're drawing
10 an inference, at most, of when this information was
11 handed over and by whom, and now we need to infer what
12 that person knew when they did it, but we don't even
13 know who the person is or the circumstances under
14 which it was being done.

15 Furthermore, these inference -- not
16 just that it was inaccurate, but it was knowingly
17 inaccurate depends on this conclusion that someone --
18 depends on some reason to infer that the person
19 handing the information over knew that.

20 And what is the basis of that
21 inference? Two public reports from several months
22 later that even the market didn't think indicated that
23 QuantumScape was nowhere near what it was disclosed to
24 be. The market's reaction was, at most, for the stock

1 price to go down to 36, I believe, after the second of
2 the two reports. So this is not the market saying --
3 well, if we're taking the word of these reports,
4 everyone must have known this company isn't what we
5 were being told it was.

6 I submit that the facts that are
7 necessary to draw this inference of scienter are
8 missing. I'm not arguing with you about what Your
9 Honor -- the chain of events Your Honor is laying out,
10 but I am saying that it is too far to draw the
11 inference of state of mind from them in the absence of
12 pled facts that ultimately boil down to just five
13 paragraphs that say, in so many words, the Legacy
14 QuantumScape directors had a meeting.

15 THE COURT: All right. What else
16 would you like to tell me?

17 ATTORNEY CORDO: That's all I have,
18 Your Honor. Thank you.

19 THE COURT: Thank you. I appreciate
20 it.

21 ATTORNEY LYONS: Good morning, Your
22 Honor. With the Court's permission, I guess I'll
23 start with where Your Honor left off, on the aiding
24 and abetting. It may be a little out of logical

1 order, but I think Your Honor asked a good question in
2 the discussion in terms of participation and the
3 breach: Where did all this QuantumScape information
4 come from? And Mr. Cordo said we don't allege that.
5 I think we do.

6 Paragraph 84 of the complaint says
7 that QuantumScape was required -- Legacy QuantumScape
8 and Kensington were required to work together in the
9 proxy. That's actually based on the merger agreement
10 provision, which is Section 7.01, which is in Gilbert
11 affidavit Exhibit 1, pages 396 to 397 of 496.

12 So the company gave the information,
13 it was required to give the information, just like in
14 *Electric Last Mile*. And the only inference is that it
15 came from the people who were running QuantumScape.
16 So that's the founders, the CEOs, Mr. Singh.

17 THE COURT: What do you think? I
18 mean, you've named Singh, and then the rest of it is
19 outside folks. I mean, they are VC folks who pride
20 themselves on being people involved in the business
21 rather than just hanging around. But still, is there
22 a distinction to be drawn between Singh and the other
23 QuantumScape side people that you've named?

24 ATTORNEY LYONS: So for that I'd

1 point -- I would point to the paragraph of the
2 complaint that Mr. Cordo referenced, paragraph 83.
3 The board did meet, they did look at the
4 documentation, they did talk about providing the
5 information to the Kensington side. So Mr. Buss was
6 also part of it, in addition to Mr. Singh,
7 specifically provided the financials.

8 But more broadly, as Your Honor said,
9 these are sophisticated investors who had been -- who
10 were on the board of this company and were hands-on
11 investors and had a lot of money at stake.

12 You know, we also allege at
13 paragraph 69 about how they -- you know, they were
14 told by Goldman Sachs that Kensington was the only
15 game in town that was going to pay them this type of
16 valuation for the company. So they all had an
17 incentive to maximize the value and to paint a rosy
18 picture of the company.

19 So can I show Your Honor emails of
20 individual outside directors from venture capital
21 firms commenting on the proxy? Not yet. But I think
22 it's a reasonable inference that they were all
23 knowledgeable about the company and involved. So I
24 think that goes to both pieces.

1 Of course, that's why we submitted
2 *Electric Last Mile*. Just like in *Electric Last Mile*,
3 these are senior executives and directors of the
4 legacy company. The disclosure problems had
5 everything to do with the substance of the technology
6 of the business that they had invested in over the
7 years. It would just be -- I think it would defy
8 belief to say that these people didn't know what was
9 going on with the technology, didn't know the status
10 of it. And what we have alleged is that the status of
11 it was not what it was painted to be in the proxy.
12 I'll circle back to the statements themselves
13 submitted.

14 THE COURT: Before you go to there,
15 why don't you touch on the argument that really you
16 should be suing some entity as aider and abettor
17 rather than these individuals. I guess the fact that
18 it's a merger is a little bit of a problem for that
19 response, but at least it does pose the question of
20 whether -- you know, when these individuals are
21 acting, they can be tapped for what they do themselves
22 as opposed to what they do on behalf of what was then
23 the separate company.

24 ATTORNEY LYONS: I think Your Honor, I

1 guess, hit on the practical issue in terms of you
2 can't sue a company when it was the subject of a
3 merger. But the test is not -- the aiding and
4 abetting test, I think, just from first principles, is
5 not about who were you working for at the time. And
6 there's no argument of some sort of *respondeat*
7 *superior* or anything like that here. The aiding and
8 abetting test is, you know, was there a fiduciary
9 breach -- was there a fiduciary duty, was there a
10 breach of the fiduciary duty, and did the defendant
11 knowingly participate in that breach?

12 And here, the fact that there is a
13 company involved doesn't change the fact that for
14 these individuals, all those elements are met.

15 THE COURT: Basically, if you frame
16 this in terms of the *Columbia Partners* concept, which
17 both folks have cited -- I guess maybe you-all cited
18 more than the other side, at least I remember you-all
19 citing it -- basically what you would be saying is
20 that the TransCanada CEO was -- I'm sorry, I'm
21 blanking on his name -- he could have been named
22 individually as an aider and abettor had the
23 plaintiffs wanted to. They simply chose to only name
24 TransCanada as the aider and abettor, but they could,

1 if they wanted to, have reached inside and gotten the
2 negotiator.

3 ATTORNEY LYONS: That's an interesting
4 question, Your Honor. I don't know, I guess, is my
5 honest answer.

6 THE COURT: But from a doctrinal
7 standpoint -- I mean, look, there's the question of
8 whether you can do it, and then there's the question
9 whether you have the facts to allege it. But
10 doctrinally the premise of your argument is that one
11 can do that because that's what you are doing.

12 ATTORNEY LYONS: Yes. There's no
13 immunity for individuals just because they are
14 working. And I think, as a practical matter, in most
15 cases there would probably be implications in terms of
16 indemnification and who actually winds up being liable
17 there. So you would still wind up with TransCanada, I
18 think, being the party in interest in that claim in
19 the *Columbia Pipeline* situation. But I don't think
20 there's been any claim that there is just an absolute
21 immunity or -- I don't think there is any rules for an
22 absolute immunity of individual representatives of the
23 other side.

24 In fact, in the one we lost, in the

1 Oracle-NetSuite litigation, the reason that our aiding
2 and abetting claim against the NetSuite officers and
3 directors failed wasn't the fact that you could only
4 sue NetSuite; it was we just hadn't pled the elements
5 of aiding and abetting. And that was, of course, a
6 different claim there because we were claiming that
7 effectively they got too good of a deal. Here, what
8 we are arguing is that they obviously contributed to a
9 proxy statement, participated in the preparation of
10 the proxy statement that misled investors and
11 compromised their ability to make a redemption
12 decision.

13 THE COURT: Why don't you circle back
14 to the disclosure claims and where things hinge.

15 ATTORNEY LYONS: Thank you, Your
16 Honor. I think I heard this morning -- the standard
17 of review is no longer in dispute, so I won't belabor
18 control and mirror Kensington's conflicts.

19 You know, I would highlight, as we
20 pointed out in the papers and Vice Chancellor Will has
21 pointed out, the fact that it is entire fairness
22 doesn't matter for the disclosure analysis. It is the
23 defendant's burden to show that they did fair dealing,
24 that they met the requirements of fairness. And that

1 includes with respect to the disclosures. So what
2 that means is all we have to plead are some facts
3 showing unfair dealing.

4 And again, Your Honor, I think of them
5 as being in two buckets: the disclosures about
6 QuantumScape, the company itself, and the disclosures
7 about Kensington's contribution to the merger. It's
8 net cash per share.

9 Honestly, I'm not quite certain where
10 we stand on net cash per share this morning. I think
11 I still hear a dispute over whether or not --

12 THE COURT: I think there's still a
13 dispute. I mean, I think there's a dispute about the
14 materiality of it because even if it was something
15 that didn't need to be -- even if it was something
16 that was an omission at the time of the deal, you had
17 such an extended period of time when the stock price
18 traded not just materially higher, but multiples
19 higher than the \$10 level, that it can't be that this
20 nondisclosure resulted in harm when, whatever it is,
21 18 months later the stock price finally dips below the
22 \$10 per share mark.

23 So when I was writing my notes, I
24 reframed it in my head as sort of a version of a

1 causation argument in that even if we assume that
2 12 1/2 percent is material, which it is in my world,
3 the materiality at the time of disclosure couldn't
4 have caused your folks harm because it's not
5 reasonably inferable that one led to the other.

6 ATTORNEY LYONS: I think Your Honor
7 actually hit on at least part of my response there at
8 the end in terms of a lot of what I heard this morning
9 had to do with causation, damages. You know, when the
10 truth came out, it came out in multiple revelations
11 that led to the stock price going down.

12 So I think those are all -- those
13 arguments about the directness of the connection
14 between the statements in the proxy and the ultimate
15 harm, those are not motion to dismiss stage arguments
16 about materiality of the statement, I don't think. I
17 think they are really down the road when we have to
18 prove causation and damages.

19 THE COURT: Let me repose it to you
20 this way and frame it in terms of the motion to
21 dismiss stage. Why is it reasonably conceivable that
22 the disclosure at the time of the de-SPAC merger could
23 have led to harm for the class when 18 months passed
24 when it's trading majestically at numbers above \$50

1 before it begins to spiral downward?

2 ATTORNEY LYONS: I think it's still
3 reasonably conceivable because as to net cash, the
4 company was not contributing what investors thought it
5 was contributing. It was contributing, at most, \$8.74
6 per share. And that part of the difference is at
7 least part of the reason that the company paints a
8 rosier picture of itself, and it takes time for the
9 market to realize and for the harm to fully come to
10 fruition. But the fact -- the number of months it
11 takes has I don't think any impact on the actual
12 logical connection between the proxy and the harm.

13 THE COURT: When I was thinking about
14 this, essentially what this would mean, though, is you
15 have a material disclosure violation at the time of
16 the merger and it is a disclosure violation that
17 affects somebody's ability to take the status quo as
18 opposed to going along with the new entity. And here
19 we have a really nice hypothetical for that because we
20 know that the baseline is 10 bucks.

21 It seems to me that what you are
22 almost saying is that the fiduciaries who engage in
23 that breach become guarantors for the statute of
24 limitations period such that if the stock falls below

1 the \$10 mark, a class of plaintiffs can come in and
2 say, "But if you had told us this at the time of the
3 merger, we would have bailed out then and we would
4 never have been in this situation now where we're
5 stuck with this \$7 or \$5 stock." And in your world,
6 that would, at a minimum, take you through the statute
7 of limitations period. And then if you guys could
8 find some tolling rationale, you would extend beyond
9 that.

10 A, why isn't that the implication of
11 your argument? And, B, if it is the implication of
12 your argument, why is that a good idea or why is that
13 how the law should work?

14 ATTORNEY LYONS: I guess partly I
15 would take a step back. This is -- the reason we are
16 where we are is because we have a conflicted
17 transaction with a conflicted controller. We skipped
18 over it because of the concession this morning. But
19 it's not like these are -- it's just any IPO, where
20 people are potentially on the hook. We're talking
21 about conflicted fiduciaries.

22 THE COURT: You need an actionable
23 claim.

24 ATTORNEY LYONS: Right. You need an

1 actual claim, an --

2 THE COURT: Actionable.

3 ATTORNEY LYONS: -- an actionable
4 claim against conflicted defendants. And then, yes,
5 ultimately you have to prove causation and damages.
6 And I think as you start getting further away and if
7 it -- you know, the net cash per share, maybe it gets
8 more complicated, and there would be expert disputes
9 about how that connects to the value later.

10 But I think one thing that's important
11 to keep in mind is lock-up periods, I think, are an
12 important piece of this too because what it means is
13 that defendants, in order to complete -- the wrong
14 that all these cases are about is trying to get cash.
15 They actually want the stock price to stay inflated as
16 long as they can so that the lock-up period expires
17 and then they can sell their shares.

18 So if the rule was that you need to
19 have a drop within a month after the de-SPAC merger,
20 then defendants would just have to do a better job of
21 concealing it so that they can actually get their
22 profits.

23 THE COURT: Look, I understand that
24 concern. And so I'm with you that you shouldn't have

1 to have some immediate price reaction to things.

2 But here, what doesn't seem to have
3 happened -- and you correct me if I'm wrong because I
4 only know what you guys have told me -- but what
5 doesn't seem to have happened is an actual sort of
6 fantastic Bernie Madoff style flameout or Theranos
7 style exposure as a fraud. It seems to me like you've
8 got these two reports, and then things are just sort
9 of coasting down. And that, when you just look at it,
10 has more of a feel, at least intuitively to me, of the
11 business going out through time as opposed to some
12 discovery of something disastrous. And I would think
13 that if there's discovery of something disastrous,
14 then sort of the theory you are expounding of people
15 want to keep this quiet as long as they can, they want
16 to get beyond the lock-up, they want to sell out as
17 much as they can, that's more conceivable than if you
18 have this pattern where it just seems to be coasting
19 downward.

20 So feel free to explain to me why I'm
21 wrong about the pattern and why it shouldn't matter
22 and anything you want to say in response to that.

23 ATTORNEY LYONS: In terms of the
24 pattern, I think it's fair to say there were at least

1 multiple steps down. I don't know if it was
2 necessarily -- I don't think it was necessarily a
3 slope based on developments in the business over time.
4 I think you have multiple revelations, which we allege
5 the individual drops. So it is different from a
6 single-drop case. But I think there's an easy analogy
7 to the federal securities cases where a lot of times
8 there are multiple drops as sort of information comes
9 to the market about what is going on with the
10 business. And that's not a problem there any more
11 than it is here because the market learns.

12 And I think part of the reason for it
13 in this case is QuantumScape was a -- setting aside
14 what the truth was versus what was disclosed about the
15 state of batteries, even the disclosed version of it
16 was that it was not a battery that is currently in
17 vehicles. So people knew it was not going to be
18 immediate. So I think that's why people, some people,
19 some market participants continued to believe in the
20 technology after the first report and the second
21 report, and it took time for people, such as Morgan
22 Stanley, to say, okay, no, the narrative is different
23 from what we were told.

24 THE COURT: Why don't you segue from

1 that into the business fraud argument, and then we'll
2 finish up with the due diligence argument.

3 ATTORNEY LYONS: So on that point, the
4 proxy holds out the battery technology is superior to
5 the existing technologies. We've read and heard about
6 the context and the risk disclosures and sort of --
7 like the statements are just aspirational. But the
8 proxy says things like "Our solid-state battery cell
9 uses a ceramic separator which is not combustible and
10 is therefore safer than conventional polymer
11 separators."

12 THE COURT: Give me where that's at.

13 ATTORNEY LYONS: In the complaint it's
14 at paragraph 98. And it's a long paragraph.

15 What I just read is about increased
16 safety. Also, the last bullet in there, cost, is also
17 a very clear and direct statement of present fact. It
18 says, "Our battery technology eliminates the anode
19 host material and the associated manufacturing costs
20"

21 THE COURT: So let's assume that these
22 are fact-ish and we believe it may not be enough to
23 get you out. But why is there an inference of
24 scienter that these things were false?

1 ATTORNEY LYONS: So inference of
2 scienter -- so we know about the falsity from reading
3 the other reports I showed that actually the batteries
4 were not as far along as they were represented. The
5 testing was -- what they talk about is compromised
6 testing, you know, where the conditions were not
7 real-world conditions. So the basis for the
8 statements was based on the testing, which actually
9 was not representative.

10 The inference that people knew that is
11 based -- for Legacy QuantumScape, we talk about the
12 core operations doctrine. We're talking about the
13 co-founder and the chief technology advisor. These
14 are the people that are more involved in the
15 technology than anyone else. And the investors on the
16 board are also -- they are all technology people.
17 They are very fundamentally involved and knowledgeable
18 about the technology.

19 On the Kensington side of the board --
20 or of the equation, it's more of a reasonably
21 available information to them if they had done the due
22 diligence that they didn't do.

23 THE COURT: It seems to me like that
24 segues into your due diligence analysis.

1 ATTORNEY LYONS: Right.

2 THE COURT: But on the business fraud
3 or business falsehoods concept, your friends stress
4 that these two reports, the Scorpion report and the
5 other report, the *Seeking Alpha* report, they come out
6 after the press releases in December 2020. And when I
7 read the federal securities action decision, it is
8 correct that all of the statements that are discussed
9 in there are post de-SPAC. So it seems to me like you
10 have to make some jump to reach the things that are in
11 the proxy. How do you get from one to the other?

12 ATTORNEY LYONS: Part of the answer at
13 least is, yes, the statements in that case are post
14 de-SPAC. But actually one of the statements in there
15 is literally copy and pasted from the proxy.

16 So the one I just read, I think, about
17 "Our battery technology eliminates the anode host
18 material ... providing a structural cost advantage
19 compared to traditional lithium-ion batteries" -- I
20 think it's statement 18 and statement 26 in the
21 federal securities case. That's the exact same
22 statement, and it's false for the same reasons that it
23 was found false there.

24 And separately, there's also the

1 question of the timeline. The proxy talks about
2 commercial production in 2024. It has an actual
3 picture of the timeline, how long it's going to take
4 to do these things. And again, the report quotes a
5 number of employees, both QuantumScape and Volkswagen,
6 that say that was nowhere near reality, you know,
7 we're a decade away or more, and everybody that's
8 working on it knows it. So those are sort of the two
9 pieces, I think, of knowingly false information about
10 the product and the timeline.

11 And again, from the Kensington side,
12 this is -- Vice Chancellor Will wrote in, I think, the
13 *Gig3* decision about the obligation to counterbalance
14 the information that's being provided by the
15 QuantumScape folks with impartial information that's
16 reasonably available to them. And the Kensington
17 board did not do that. They didn't provide any sort
18 of counterbalancing disclosure.

19 And obviously, a big part of the
20 reason for that is our next disclosure issue, which
21 has to do with the lack of diligence that the board
22 did. So the proxy says that "the Kensington Board
23 conducted significant due diligence on QuantumScape."
24 That's in paragraph 100 of the complaint.

1 It also talks about discussions
2 between the board and QuantumScape's management and
3 Kensington's financial legal advisors concerning the
4 due diligence. It talks about -- the proxy claims the
5 board met 13 or more times.

6 Again, the Section 220 documents don't
7 support any of that. You know, we only identified
8 three meetings to discuss the deal, only one of them
9 actually touched on diligence, with one presentation
10 slide on the topic. There's no -- there's just no
11 basis for the conclusion that the board actually did
12 this "significant due diligence" that is held out in
13 the proxy. And I think it had an obligation to do
14 that under Delaware law, which is probably why they
15 said that they did it. But they didn't do it. And
16 citing the proxy for the truth of the matter asserted
17 in terms of the meetings having actually happened even
18 though there's no record, you know, that's not what we
19 can do on a motion to dismiss.

20 So I think the disclosures about the
21 involvement of the board and due diligence are
22 independently false. And they are also obviously part
23 of the reason for the -- either the inclusion of the
24 misleading information about the business or the

1 Kensington board's failure to counterbalance it with
2 the impartial information because they didn't do what
3 they should have done to get information that was
4 reasonably available to them.

5 I think that's all I have on the
6 disclosures. I guess briefly on exculpation, unless
7 Your Honor has any other questions on disclosures.

8 I think the Kensington defendants can
9 be held liable under all three prongs of *Cornerstone*.
10 They are interested. Obviously, Mirro and Kensington
11 Capital -- I don't think there's any dispute anymore
12 that they are interested. As for the other directors,
13 their only interest in Kensington are indirect
14 interests in founder shares. So they are aligned on
15 the sponsor's side, not on the public shareholder's
16 side. It's true, no, we don't know how large their
17 individual interests are yet. But the only reasonable
18 inference is they are large enough to be material,
19 otherwise Mirro wouldn't have given them to them and
20 these folks would not have agreed to serve on the
21 board. Their interests were necessarily incentivizing
22 because that's why they are there. If anything, the
23 failure to disclose the size of them is a separate
24 material nondisclosure, that those individual

1 defendants inferably knew their own interests and
2 didn't disclose them.

3 Separately, they also lack
4 independence from Mirro and Kensington Capital.
5 Again, these are repeat players. They are on multiple
6 SPAC boards. The defendants make the argument that,
7 oh, this was Kensington I, so they didn't know yet
8 that they would be on Kensington II, III, IV, V.
9 That's just not the way the world works. These are
10 people that Mirro knew for decades. The SPAC business
11 model is that -- you know, you do a number of them,
12 and these people were going to be on all the boards.
13 And because of that, they knew it was in their
14 interest to go along with what Mirro wanted.

15 Consistent with the *Goldstein v.*
16 *Denner* analysis as well as *Gig3* and others, these
17 people would expect to be considered for future
18 directorships on all the SPACs. The fact that the
19 other ones hadn't happened yet doesn't matter.

20 And separately, they can be held
21 liable under the bad faith prong because of knowing
22 disclosure violations. They are all members of the
23 board. They know what they did and did not do. And
24 what they did not do was the significant due diligence

1 that was held out to the investors in the proxy. So
2 they know that. So they can be held liable under that
3 prong too.

4 Unless Your Honor has any other
5 questions, I think that's all I have, Your Honor.

6 THE COURT: Thank you.

7 ATTORNEY LARI: Your Honor, very
8 briefly on a couple of points.

9 THE COURT: Come on up.

10 ATTORNEY LARI: Your Honor, on the
11 point about insider sales, the lock-up expired after
12 the Scorpion Capital and *Seeking Alpha* reports came
13 out. And so the only insider sales against any
14 Kensington defendant alleged are against Mr. Mirro.
15 He did not sell until July of 2021, at which point the
16 truth had been revealed, so to speak. And I think his
17 lowest sale was at 21.03. So he was not profiting at
18 the expense of public stockholders.

19 With respect to the idea, I think,
20 that you mentioned, Your Honor, of a drift in the
21 stock price; it wasn't like a shock that was brought
22 on by something. If you look at -- I think it's
23 Exhibit 11 to our opening brief, which is a stock
24 price chart. It also has the historical stock prices.

1 If you look at that, Your Honor, you can see that's
2 exactly the case. It's a downwards drift. There's no
3 shock to the system.

4 THE COURT: Yep.

5 ATTORNEY LARI: I think on the
6 disclosure -- well, I should also say your question
7 about, well, aren't they basically seeking to have
8 someone guarantee the stock price until the statute of
9 limitations expires, I think that's exactly right
10 because they didn't bring these claims until two and a
11 half years after the merger closed. So six months
12 before the statute expires.

13 Just briefly on the disclosure claims,
14 Your Honor. I just wanted to make a point with
15 respect to the business fraud aspect, which I think
16 Mr. Lyons referred to paragraph 98 of the complaint
17 and language cited in that. Well, if you look -- that
18 cites language from page 162 of the merger proxy. And
19 that is the section that I mentioned previously, Your
20 Honor. It's about the benefits of QuantumScape's
21 technology.

22 But if you read the prefatory
23 paragraph, it's very clear that they are talking about
24 future potential benefits. It's "We believe our

1 battery technology will enable significant benefits
2" We believe those benefits will provide
3 significant value. And then there's the listing of
4 what they think those future benefits would be, and
5 that's what Mr. Lyons read through.

6 And I think this goes to the point
7 about not providing countervailing information. Your
8 Honor, if you flip back a couple of pages in the
9 proxy, there is page 157. There's a section which is
10 titled "Current Battery Technology Will Not Meet the
11 Requirements for Broad Adoption of EVs[,] " and then it
12 talks about vehicles, et cetera. But then it goes
13 through all the reasons why QuantumScape does not yet
14 have the technology to substitute for those existing
15 batteries.

16 So I would say, Your Honor, that
17 nothing in that section is a statement of present fact
18 at all. It is future looking. And I think that the
19 law is pretty clear in Delaware that statements in a
20 proxy which are future looking and are offset by real
21 risk disclosures, which I think these are, should not
22 be actionable or cannot be actionable.

23 And then, Your Honor, I just wanted to
24 briefly address the exculpation issue, which I didn't

1 address in my opening argument.

2 But with respect to the outside
3 directors -- and that's most of the Kensington board
4 members. I think it's five or seven -- there's really
5 no basis pled under *Cornerstone*. I think Mr. Lyons
6 admitted that there's no allegation in the complaint
7 about the extent of the founder shares that those
8 individuals had and says, well, that's an incorrect
9 disclosure and that's insufficient.

10 I just point out that in the *Gig*
11 cases, Your Honor, Vice Chancellor Will actually found
12 that allegations of interest based on founder shares
13 when you didn't disclose how much the founder shares
14 were does not state a claim for interest. And it
15 specifically held that. So if the plaintiff hasn't
16 alleged how many founder shares the outside directors
17 had, you can't make a determination of materiality.
18 It then went on to find that there was a lack of
19 independence because all of those individuals worked
20 for the controller. That would be Mirro here.
21 There's no allegations like that, Your Honor.

22 And I won't belabor this, but if you
23 look at our brief, we sort of go through this. The
24 alleged sort of web of relationships is -- for one of

1 them, it's that they once worked at GM together 20
2 years ago. GM is a large company. There's no
3 allegation that they knew each other, that they worked
4 together. Nothing. Again, I'm not going to go
5 through all those, Your Honor. But the independence
6 issue just doesn't work.

7 I don't think they've pled bad faith
8 against any of the outside directors because there's
9 allegations against them. Really, the only thing that
10 is similar to the other cases is this notion of, well,
11 you can infer that they would have an interest in
12 other SPACs. And I would just say, Your Honor, if
13 it's correct that they have not pled an interest in
14 this SPAC because they haven't pled the founder
15 shares, I don't think that, you know, multiplying that
16 by five really gets you anywhere because it's still
17 zero.

18 That was all I had, Your Honor, unless
19 you have questions.

20 THE COURT: Thank you so much.

21 ATTORNEY CORDO: Nothing from me, Your
22 Honor, unless you have any questions.

23 THE COURT: No.

24 ATTORNEY CORDO: Thank you.

1 THE COURT: Well, I appreciate
2 everyone's arguments this morning. I am going to go
3 ahead and give you a ruling now.

4 We're here for the motion to dismiss
5 in Kensington-QuantumScape DE-SPAC Litigation,
6 2022-0721-JTL. It's a challenge to a de-SPAC
7 transaction. We've heard about the facts this
8 morning. I'm not going to go into them in too much
9 detail.

10 The transaction happened in 2020.
11 This lawsuit was filed in August 2022. I do think
12 it's reasonable to infer that it was inspired by a
13 federal securities decision that came out in January
14 2022 which determined that there was a claim for false
15 statements by QuantumScape that survived a motion to
16 dismiss. Those statements were made after the de-SPAC
17 transaction at issue, which I'll come back to. They
18 are similar in kind to some of the statements that are
19 challenged in this case.

20 The principles of law that govern here
21 have been set forth in *MultiPlan*, *Gig2*, *Gig3*, *Malork*
22 *v. Anderson*, and *XL Fleet*, among others. I'm not
23 going to go through those again.

24 I will make a public service

1 announcement that I often make. On pages 15-16 of the
2 defendants' opening brief, you-all gave me the voting
3 figures for the de-SPAC merger in terms of the number
4 of shares voted at the meeting. As I say so often,
5 that's not the standard. It would be as if we wanted
6 to know who won an election in Delaware and you told
7 me what the voting totals were in Sussex County. It
8 always impairs my confidence when we all know that the
9 voting standard is a majority of the outstanding and
10 somebody trots out the statistics based on a majority
11 of the quorum. It is an opening move suggesting,
12 "Hey, Judge, look at this shiny object over here even
13 though the real issue is over here." And so it always
14 sets me off. I have flagged this many times. But
15 since it happened again in this case, I'm going to
16 flag it here as well.

17 The rest of my ruling is going to
18 sound a lot like *Farzad v. Trasimene Capital* because
19 this case involves quite similar arguments, and so
20 quite similar outcomes.

21 There's two groups of defendants in
22 this case. There's the SPAC side and the target side,
23 or the Legacy QuantumScape side. Although it wasn't
24 pressed this morning, all of the defendants in their

1 brief disputed whether entire fairness applied. For
2 the same reasons that I explained in *Farzad*, I think
3 that this is an interested transaction to which entire
4 fairness applies.

5 Once that is the case, then one only
6 has to infer some basis for unfairness. Under
7 *Weinberger*, disclosure is part of the entire fairness
8 analysis. Ultimately, the breach in *Weinberger* was
9 based on the failure to disclose the Arledge-Chitiea
10 report. This case likewise turns on disclosure
11 issues.

12 I don't think that it's too late to
13 remedy a disclosure violation. The defendants argued
14 that in Footnote 20 of their brief. It is true that
15 you can't remedy disclosure in the sense of going back
16 in time and providing people with the information that
17 they would have had. But I think you can remedy
18 disclosure through an award of money. I addressed
19 that at length in the *Orchard* decision.

20 To give you some highlights, you could
21 conceivably, although I think it would be vanishingly
22 unlikely in this case, have some form of rescissory
23 damages remedy. Some of the precedents on that:
24 *Vickers II*, damages were awarded seven years after the

1 transaction involving the disclosure violations, which
2 closed in 1981. *Weinberger*, damages were awarded five
3 years after the transaction involving the disclosure
4 violations, which closed in 1978. *Technicolor*,
5 damages were identified as a form of relief in 1993, a
6 decade after the transaction closed. These are
7 Delaware Supreme Court decisions that are recognizing
8 that you can remedy disclosure violations through a
9 damages award well after the fact.

10 The same is true for quasi-appraisal.
11 The citations that the *Orchard* decision collects
12 include *Steiner*, *Ocean Drilling*, *Arnold*, *Turner v.*
13 *Bernstein*, et cetera.

14 You could even, as I suggested in the
15 recent *Columbia* case, come in with studies about the
16 value of voting because disclosure violations impair
17 voting rights. We have a way to determine the value
18 of a vote by comparing the share price to a paired
19 put/call option that is the economic equivalent of a
20 share without voting rights. So you can actually
21 value the harm to the voting right.

22 And here, of course, we can tie the
23 alleged disclosure problem to the opportunity to
24 redeem at \$10 per share.

1 I think that this is a case where one
2 can remedy all of the alleged harms, notwithstanding
3 the amount of time that has passed.

4 Before I get to the disclosure
5 violations in detail, I am going to talk about the
6 idea of the positive reaction to the stock price. I
7 do think that this makes this a weak case. I'm not
8 supposed to evaluate the strength of the claims at the
9 pleadings stage other than to say that they are
10 reasonably conceivable or not. But I think that the
11 stock trading pattern and the timing of the point at
12 which the company dips below the \$10 redemption price,
13 as well as the circumstances surrounding that --
14 namely, that it doesn't seem to be the result of some
15 momentous disclosure -- makes me think that what
16 happened was due to industry or economic trends or
17 company issues that evolved over time. That gives me
18 pause in terms of what to do with this motion. But I
19 do think in terms of a strict application of the law,
20 the claim is a reasonably conceivable one
21 notwithstanding the stock price.

22 At a minimum, I think that for a
23 disclosure violation like this you could get nominal
24 damages. The reality is that if it's a disclosure

1 problem, there is harm. The fact that you may be able
2 to sell afterwards is alternative relief in the form
3 of self-help, but you are still harmed at the time of
4 the decision. It doesn't seem to me like there should
5 be a rule where it's no harm, no foul if your stock
6 trades above for a sufficient period of time before
7 the harm manifests itself.

8 I also think that there is a pretty
9 solid argument here that the faithless fiduciary bears
10 the risk of the post-closing performance. There's a
11 rough analogy to how we handle it when someone is
12 wrongfully prevented from engaging in a trade and you
13 show that that's a breach of the duty of loyalty.
14 What the plaintiff can potentially recover in that
15 setting is highest intermediate value. That's the
16 *Duncan v. TheraTx* case.

17 Here, there's a similar concept, but
18 it's protection from harm. Essentially what we are
19 saying, from the plaintiff's standpoint, is there's
20 T1, the de-SPAC transaction, and then there's T2,
21 which is the point at which it's too late to bring a
22 claim. And during that period of time, instead of
23 looking at highest intermediate value, you are
24 protected against a price below the redemption price

1 because you can argue during those periods that if we
2 had only had full information for the de-SPAC, then we
3 would have exited at the \$10 at the de-SPAC level.

4 Now, there's obvious artificiality to
5 that. Nobody can go back in time. But likewise,
6 there's artificiality in the upside case because no
7 one can time one highest intermediate price. The
8 upside case is explicitly designed to put the risk of
9 the pricing variation on the faithless fiduciary. The
10 plaintiff's argument involves something similar.

11 The disclosure violations seem, at the
12 pleadings stage at least, to be weaker than other
13 cases. This doesn't seem to me to be a vast fraud.
14 Maybe it was. Maybe it will be proven to be. But
15 there doesn't seem to be the screaming and gnashing of
16 teeth that would suggest that. But if you think about
17 a true fraud, the idea that the fraud performed well
18 for a period of time after it began shouldn't deprive
19 you of your remedy simply because you could have
20 gotten out during the good days.

21 The extreme example of this would be
22 Bernie Madoff. He carried on his fraud for something
23 like 17 years, and some of his original investors
24 ultimately got hurt. It would be hard to say to them,

1 well, you had the opportunity to get out during the
2 time when his returns were great. Why didn't you just
3 do that? They are the victims.

4 This all gets back to the idea that
5 while there may be timeliness concerns that come into
6 play at some point, if you are within the statute of
7 limitations or laches period and there's a loyalty
8 claim or a breach of fiduciary duty claim, the risk of
9 loss does seem to fall, at least conceptually, on the
10 faithless fiduciary.

11 I ultimately conclude that while I
12 think that the plaintiff may fail to prove a
13 sufficient degree of causation, I can't rule out the
14 possibility at the pleadings stage that this
15 disclosure claim could result in some type of damages
16 award once the stock price drops below the \$10 mark on
17 the theory that people could have, had they known the
18 truth, taken the \$10 at the de-SPAC phase.

19 Now let's turn to the disclosure
20 claims. I think that the failure to disclose net cash
21 is a clean disclosure violation and is material. As
22 opposed *Trasimene*, where it was 15 percent, here, it's
23 12 1/2 percent. I think that all the same points from
24 *Farzad v. Trasimene* apply to why that's material.

1 That's really enough for today for the
2 SPAC defendants. The question is whether the
3 complaint states a claim on which relief can be
4 granted, not whether the complaint states every claim
5 on which relief can be granted.

6 I do think there is enough here for
7 the disclosure claims about the quality of the
8 business. I do think that the disclosures are similar
9 in kind to the later disclosures that the court in the
10 federal securities lawsuit found were material and
11 supported inference of scienter. Plaintiff's counsel
12 has pointed out that at least two of them are
13 identical. The federal lawsuit also deals with the
14 forward-looking issue. The judge in that case
15 explained how the statements might be framed in the
16 language of belief, but they were sufficiently
17 specific in their claims about the current status of
18 the business that they could support liability.

19 The due diligence claim is the
20 weakest. I do think that it's reasonably conceivable
21 that these defendants were just along for the ride and
22 not really paying attention. Regardless, because the
23 claims against the SPAC-side defendants survive, at a
24 minimum, on the failure to disclose the net cash

1 available, the complaint goes forward.

2 Now we pivot to the QuantumScape side,
3 the target side defendants, in terms of the claim for
4 aiding and abetting. As counsel pointed out, the
5 claim is not against the former target side entity but
6 against the specific individuals involved. I don't
7 think that should make a difference for aiding and
8 abetting.

9 I do think that it's true that people
10 don't routinely reach inside an entity to make an
11 aiding and abetting claim. I think that's mainly a
12 function of ease of suit and ease of proof and who the
13 potential deep pocket is when plaintiffs are picking
14 defendants rather than any type of doctrinal
15 impediment. Aiding and abetting is an equitable
16 concept. It's not a legal concept. Corporate
17 separateness is a legal concept. The core idea is
18 that when you face a creditor's claim for breach of
19 contract or some similar lawsuit at law, the creditor,
20 the claimant, can't reach the assets of the investors.
21 They can only sue the entity. It's not supposed to
22 deal with inherently equitable claims, like breach of
23 duty. Equitable claims look to who is actually
24 involved.

1 Here, with an equitable claim for
2 aiding and abetting, I do think it's a question of who
3 knowingly participated. When I think about who
4 knowingly participated, I do think it's reasonable to
5 infer from the allegations of the complaint, narrow
6 they may be or few they may be, and from, more
7 importantly, the proxy statement, which I read most
8 of, that this information came from the QuantumScape
9 side. And by "this information," I mean the
10 QuantumScape information. And as I spoke with counsel
11 about, I am particularly focused on the 41 pages of
12 information in the proxy statement that start on
13 page 156 and go to page 197. I think it's reasonably
14 conceivable that the information at that level of
15 detail came from QuantumScape.

16 I think the same is true for the pro
17 forma analysis that is in the proxy statement. Who
18 can we infer knowingly participated in providing that
19 information? I think, at a minimum, I can infer right
20 now that it was the senior management folks. I think
21 I probably could infer that the directors had some
22 involvement too. But, at a minimum, I think I can
23 infer that Mr. Singh, who is the CEO, president, and
24 co-founder of QuantumScape, as well as being a

1 chairman of the board, and Fritz Prinz, who also was a
2 co-founder of QuantumScape and one of its key
3 technology people, had the necessary understanding of
4 the business such that if it is true -- and I think
5 it's reasonably conceivable that it is true -- that
6 the business was not sufficiently far along to be able
7 to support the statements that were being made --
8 again, along the lines that the federal securities
9 action held -- then, at a minimum, it's reasonably
10 conceivable that those two individuals could have
11 aided and abetted by providing the information that
12 appeared in the proxy.

13 I'll dismiss the other QuantumScape
14 side people because they are outside directors as
15 opposed to insiders with the type of role that I have
16 identified. But as I often say, that's a pleadings
17 stage ruling, so it's interlocutory and it's subject
18 to revisiting under the law of the case doctrine. If
19 it turns out, and I wouldn't be surprised if it did,
20 that those directors had some meaningful involvement
21 in the disclosures, then they can be brought back in.

22 In terms of scienter, I do think it's
23 reasonable to infer that if these disclosures are
24 incorrect in the manner that the plaintiffs allege and

1 in the manner that the federal securities lawsuit
2 found, that scienter exists.

3 Last, I'll touch on SPAC-side
4 exculpation. I think that at the pleadings stage I am
5 entitled to draw an inference that the founder shares
6 are sufficiently valuable to make those folks
7 interested in the transaction. I get it that my
8 colleague didn't get that far in her case. But what
9 we're talking about here is shares that had a
10 disclosed value if the merger closed of around \$88
11 million to \$122 million. That is a lot of money.
12 Now, however you divvy up that pie among the sponsor
13 side participants, people are going to be getting a
14 good amount.

15 Yes, it is true that it is not
16 specifically alleged in the complaint that Person X
17 has a net worth of X million dollars and was going to
18 receive Y million dollars as a result of their sponsor
19 shares, and therefore, that is materially inferable to
20 be material in the context of their specific economic
21 situation. That is not information that there's any
22 way for the plaintiff to get. And I think that at the
23 pleadings stage, particularly on a notice pleading
24 standard, it is decidedly unfair to require a

1 plaintiff to plead facts where there is absolutely no
2 way to get that information. Even a 220 request will
3 not reveal that type of information. Companies do not
4 keep data regarding their directors' net worth. There
5 just isn't a way to get it unless somebody is so
6 wealthy as to qualify for the Forbes 100 wealthiest
7 Americans or whatever the number is at this point.

8 I am going to deny exculpation on that
9 basis. If the defendants want to come forward and
10 proffer evidence saying "I am so rich that even though
11 I would have received X million dollars in this SPAC,
12 that is so immaterial to me that I wouldn't even look
13 at it if I passed it on the street," I'm more than
14 happy to consider it. Obviously, I'm framing that
15 tendentiously. The question simply would be if they
16 want to move on the basis that it's not a material
17 portion of their wealth, then I'm happy to consider
18 that.

19 But at this point, as I say, I'm not
20 going to dismiss them from the case on the basis of
21 something that the plaintiff has no way to plead. The
22 sponsor shares as a whole are inferably a material
23 amount. I think that that would be contrary to
24 justice. And if you read Rule 8 -- I think it's Rule

1 8(e). It might be Rule 8(f) -- if there's one thing
2 we are compelled to do, it's to construe pleadings to
3 do substantial justice. And I do not think it would
4 be construing a pleading to do substantial justice if
5 one required the plaintiff to plead something that
6 they had no ability to access.

7 For all those reasons, I'm denying the
8 motion to dismiss. I appreciate your time here this
9 morning. Thank you all, and have a good day.

10 (Court adjourned at 12:33 p.m.)

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CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 71 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 57 through 71, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 26th day of February, 2024.

/s/ Dennel Niezgoda

Dennel Niezgoda
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

Tab 20



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE EL PASO CORPORATION
SHAREHOLDER LITIGATION

CONSOLIDATED
C.A. NO. 6949-CS

FINAL ORDER AND JUDGMENT

WHEREAS, Delaware Co-Lead Plaintiffs, on behalf of themselves and the other members of the Class (defined below), Defendants, and non-party El Paso have entered into a Stipulation and Agreement of Settlement dated September 7, 2012 (the "Stipulation"), that provides for a complete dismissal with prejudice of the claims asserted in the above-captioned consolidated action (the "Consolidated Action"), as well as the resolution, discharge, dismissal and settlement with prejudice of (i) each and every one of the Released Plaintiff Claims against each and every one of the Released Defendant Persons and (ii) each and every one of the Released Defendant Claims against each and every one of the Released Plaintiff Persons, subject to the approval of this Court; and

WHEREAS, by Order dated September 14, 2012 (the "Scheduling Order"), this Court: (a) preliminarily certified the Class solely for purposes of effectuating the Settlement; (b) ordered that notice be provided to all potential Class Members in the manner and form set forth in the Scheduling Order; (c) set forth the procedures by which potential Class Members could appear and object to the proposed Settlement; and (d) scheduled a hearing to consider the proposed Settlement; and

WHEREAS, adequate and sufficient notice of the Settlement and the hearing has been given to the Class in accordance with the Scheduling Order, which notice complied in all respects with the requirements of Court of Chancery Rule 23, the United States Constitution (including the Due Process Clause), and all other applicable laws and rules; and

WHEREAS, the respective Parties have appeared by their attorneys of record; and

WHEREAS, an opportunity to be heard has been given to all other Persons requesting to be heard in accordance with the Scheduling Order and the Notice; and

WHEREAS, the Class has been adequately represented by Delaware Co-Lead Plaintiffs and Delaware Co-Lead Counsel in connection with the Consolidated Action; and

WHEREAS, this Court conducted a hearing on December 3, 2012 to consider, among other things, whether: (a) the terms and conditions of the Settlement are fair, reasonable and adequate to the Class and should therefore be approved; and (b) a judgment should be entered dismissing the Consolidated Action as against Defendants with prejudice and on the merits and providing for the resolution, discharge, dismissal and settlement with prejudice of the (i) Released Plaintiff Claims as against each of the Released Defendant Persons; and (ii) Released Defendant Claims against each of the Released Plaintiff Persons; and

WHEREAS, this Final Order and Judgment hereby incorporates by reference the definitions in the Stipulation, and unless otherwise indicated herein, the capitalized words and terms used herein shall have the same meaning as they have in the Stipulation (certain of which are repeated herein for ease of reference only); and

WHEREAS, the Court has reviewed and considered the Stipulation, all papers filed and proceedings held in connection with the Settlement, all oral and written comments regarding the proposed Settlement and the record in the Consolidated Action, and with good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THIS 3d DAY OF DECEMBER, 2012 AS FOLLOWS:

1. **Incorporation of Documents** – This Final Order and Judgment incorporates and makes a part hereof: (a) the Stipulation filed with the Court on September 7, 2012 and all of its terms, conditions, provisions, and exhibits; and (b) the Notice and Summary Notice, filed with the Court on November 8, 2012.

2. **Jurisdiction** – This Court has jurisdiction over the subject matter of the Consolidated Action and all matters relating to the Settlement, as well as personal jurisdiction over all of the Parties and each of the Class Members.

3. **Notice** – The Court finds that the dissemination of the Notice and publication of the Summary Notice: (a) were implemented in accordance with the Court’s Scheduling Order; (b) constituted the best notice reasonably practicable under the circumstances; (c) constituted notice that was reasonably calculated under the circumstances to advise potential Class Members (including, without limitation, the Texas Plaintiffs and the New York Plaintiff) of: (i) the pendency of the Consolidated Action, (ii) the effect of the Settlement (including the releases provided for therein), (iii) Delaware Co-Lead Counsel’s application for attorneys’ fees and reimbursement of Litigation Expenses, (iv) the rights of Class Members to object to the Settlement and/or Delaware Co-Lead Counsel’s application for an award of attorneys’ fees and reimbursement of Litigation Expenses, and (v) the rights of Class Members to appear at the Settlement Hearing; (d) constituted due, adequate and sufficient notice to all Persons entitled to receive notice of the proposed Settlement; and (e) satisfied the requirements of Court of Chancery Rule 23, the United States Constitution (including the Due Process Clause), and all other applicable laws and rules.

4. **Class Findings** – With respect to the Class set forth below, this Court finds (solely for purposes of effectuating the Settlement) that the prerequisites for a class action under

Court of Chancery Rules 23(a), 23(b)(1) and 23(b)(2) have been satisfied in that: (a) the members of the Class are so numerous that their joinder in the Consolidated Action would be impracticable; (b) there are questions of law and fact common to the Class; (c) the claims of Delaware Co-Lead Plaintiffs are typical of the claims of the Class; (d) in connection with both the prosecution of the Consolidated Action as well as the Settlement, Delaware Co-Lead Plaintiffs and Delaware Co-Lead Counsel have and will fairly and adequately represent and protect the interests of the Class; (e) the prosecution of separate actions by individual members of the Class would create a risk of inconsistent adjudications which would establish incompatible standards of conduct for Defendants; (f) as a practical matter, the disposition of the Consolidated Action would influence the disposition of any pending or future identical cases brought by other Class Members; and (g) Defendants have allegedly 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.

5. Solely for purposes of the Settlement, the Court finds that the Consolidated Action is a proper class action pursuant to Court of Chancery Rules 23(a), 23(b)(1) and 23(b)(2) and hereby finally certifies the Class as consisting of: all Persons who held El Paso Corporation common stock at any time during the period beginning on August 30, 2011 through and including May 25, 2012 (the “Class Period”) (including, without limitation, the Texas Plaintiffs and the New York Plaintiff), and each of their transferees, successors and assigns. Excluded from the Class are the following: (a) (i) the Individual Defendants and each member of their Immediate Families; (ii) El Paso (including El Paso Corporation) and the Kinder Morgan Defendants, their respective parents, subsidiaries, and affiliates, as well as each Person who served as a Section 16 Officer, director, partner or member of El Paso (including El Paso

Corporation) or any of the Kinder Morgan Defendants during the Class Period and each member of their Immediate Families; (iii) the Goldman Defendants and Morgan Stanley and their respective parents, subsidiaries, and affiliates (including, without limitation, the GS Entities), as well as each Person who served as a Section 16 Officer, director (including managing directors), partner or member of any of the Goldman Defendants or Morgan Stanley during the Class Period and each member of their Immediate Families; and (iv) any Person in which any Defendant or El Paso (including El Paso Corporation) has or had a Controlling Interest (the Persons identified herein in (a)(i) through (a)(iv) are collectively, the “Excluded Parties”), provided, however, that any Investment Vehicle other than the GS Entities shall not be deemed an Excluded Party; and (b) each of the Excluded Parties’ respective legal representatives, heirs, beneficiaries, successors or assigns (together, with the Excluded Parties, the “Excluded Persons”).

6. Solely for purposes of the Settlement, Delaware Co-Lead Plaintiffs, Pompano Beach Police & Firefighters’ Retirement System, Pipefitters Local Union #537 Trust Funds, Saratoga Advantage Trust Energy & Basic Materials Portfolio and Saratoga Advantage Trust Mid Capitalization Portfolio, are appointed as Class Representatives and Delaware Co-Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP, Grant & Eisenhofer P.A., and Labaton Sucharow LLP, are appointed as Class Counsel.

7. **Final Settlement Approval and Dismissal of Claims** – Pursuant to, and in accordance with, Court of Chancery Rule 23, this Court hereby fully and finally approves the Settlement set forth in the Stipulation in all respects (including, without limitation, the amount of the Settlement, the Releases provided for therein and the dismissal with prejudice of (a) any and all of the Released Plaintiff Claims against each and every one of the Released Defendant Persons and (b) any and all of the Released Defendant Claims against each and every one of the

Released Plaintiff Persons) and finds that the Settlement is, in all respects, fair, reasonable and adequate and in the best interests of the Class. The Court further finds that the Settlement set forth in the Stipulation is the result of arm's-length negotiations between experienced counsel representing the interests of the respective Parties. Accordingly, this Court fully and finally approves the Settlement set forth in the Stipulation in all respects (including the Releases contained therein and the dismissal with prejudice of (a) the Released Plaintiff Claims against each and every one of the Released Defendant Persons and (b) the Released Defendant Claims against each and every one of the Released Plaintiff Persons). The Parties and their Counsel are hereby authorized and directed to comply with and to consummate the Settlement in accordance with the terms and provisions of the Stipulation.

8. As of the Effective Date, the Consolidated Action and all claims asserted against Defendants in the Consolidated Action (including each and every count contained in the complaints filed in the Delaware Cases and in the Verified Consolidated Class Action Amended Complaint in the Consolidated Action served on November 29, 2011) are hereby dismissed with prejudice on the merits. The Parties shall bear their own costs and expenses, except as otherwise provided in the Stipulation.

9. The terms of the Stipulation and of this Final Order and Judgment shall forever be binding on each and every one of the Releasing Plaintiff Persons (whether or not any individual Class Member actually submits a Claim Form, seeks or obtains a distribution from the Net Settlement Fund or is entitled to receive such a distribution under the plan of allocation approved by the Court) and each and every one of the Releasing Defendant Persons.

10. **Releases** – The releases and liability protections set forth in Paragraphs 31-35 of the Stipulation (the “Releases”), together with the definitions contained in Paragraph 1 of the

Stipulation relating thereto (certain of which are repeated herein below) are expressly incorporated herein in all respects. These Releases shall be effective as of the Effective Date.

11. Accordingly, this Court orders that, upon the Effective Date:

(a) each and every one of the (i) Released Plaintiff Claims as against the Released Defendant Persons by any of the Releasing Plaintiff Persons; and (ii) Released Defendant Claims as against the Released Plaintiff Persons by any of the Releasing Defendant Persons, is hereby compromised, settled, released, discharged and dismissed with prejudice by virtue of this Final Order and Judgment.

(b) each and every one of the Releasing Plaintiff Persons (which includes, without limitation, the Texas Plaintiffs and the New York Plaintiff) (regardless of whether such Person actually submits a Claim Form, seeks or obtains a distribution from the Net Settlement Fund, is entitled to receive such a distribution under the plan of allocation approved by the Court or has objected to the Settlement, the Plan of Allocation and/or any application for an award of attorneys' fees or Litigation Expenses): (i) shall have and shall be deemed by operation of the Judgment to have completely, fully, finally, and forever dismissed, released, relinquished and discharged with prejudice each and every one of the Released Defendant Persons from any and all of the Released Plaintiff Claims; (ii) shall forever be barred and enjoined by operation of the Judgment from filing, commencing, intervening in, participating in (as a class member or otherwise), instituting, maintaining, prosecuting, seeking relief in (including filing an application or motion for preliminary or permanent injunctive relief) or receiving any recovery, remedy, benefits or other relief from any other lawsuit, arbitration or other proceeding in any jurisdiction that asserts any of the Released Plaintiff Claims against any of the Released Defendant Persons; and (iii) shall have and shall be deemed by operation of the Judgment to have covenanted not to

sue any of the Released Defendant Persons with respect to any and all of the Released Plaintiff Claims; and

(c) each and every one of the Releasing Defendant Persons: (i) shall have and shall be deemed by operation of the Judgment to have completely, fully, finally, and forever dismissed, released, relinquished and discharged with prejudice each and every one of the Released Plaintiff Persons from any and all of the Released Defendant Claims; (ii) shall forever be barred and enjoined by operation of the Judgment from filing, commencing, intervening in, participating in, instituting, maintaining, prosecuting, seeking relief in or receiving any recovery, remedy, benefits or other relief from any other lawsuit, arbitration or other proceeding in any jurisdiction that asserts any of the Released Defendant Claims against any of the Released Plaintiff Persons; and (iii) shall have and shall be deemed by operation of the Judgment to have covenanted not to sue any of the Released Plaintiff Persons with respect to any and all of the Released Defendant Claims.

12. As provided in the Stipulation:

(a) "Released Claims" means collectively the Released Defendant Claims and the Released Plaintiff Claims.

(b) "Releasing Persons" means collectively the Releasing Defendant Persons and the Releasing Plaintiff Persons.

(c) "Released Defendant Claims" means (a) any and all claims, demands, rights, liabilities, losses, obligations, duties, damages, costs, interests, debts, expenses, charges, rights, interest, penalties, sanctions, fees, attorneys' fees, actions, potential actions, causes of action, suits, agreements, judgments, decrees, matters, issues and controversies of any kind, nature and description whatsoever; (b) whether known or unknown, disclosed or undisclosed,

accrued or unaccrued, apparent or not apparent, foreseen or unforeseen, matured or not matured, perfected or not perfected, choate or inchoate, suspected or unsuspected, liquidated or not liquidated, fixed or contingent, ripened or unripened, including any Unknown claims; (c) whether at law or equity, whether based on or arising under state, local, foreign, federal, statutory, regulatory, common or other law or rule and upon any legal theory, no matter how asserted; (d) that previously existed, currently exist, or that exist as of the date of the approval of the Settlement by the Court; (e) that were or could have been asserted by any or all of the Releasing Defendant Persons against any or all of the Released Plaintiff Persons in the Actions, in any federal or state court, or in any other court, tribunal, arbitration, proceeding, administrative agency or other forum in the United States or elsewhere; and (f) that arise out of or relate in any way to the institution, prosecution, settlement or dismissal of the claims against the Defendants in the Actions (or any of the constituent actions that comprise the Actions). “Released Defendant Claims” shall not, however, include any claims to enforce the Settlement or this Stipulation.

(d) “Released Plaintiff Claims” means: (a) any and all claims, demands, rights, liabilities, losses, obligations, duties, damages, costs, interests, debts, expenses, charges, rights, interest, penalties, sanctions, fees, attorneys’ fees, actions, potential actions, causes of action, suits, agreements, judgments, decrees, matters, issues and controversies of any kind, nature and description whatsoever; (b) whether known or unknown, disclosed or undisclosed, accrued or unaccrued, apparent or not apparent, foreseen or unforeseen, matured or not matured, perfected or not perfected, choate or inchoate, suspected or unsuspected, liquidated or not liquidated, fixed or contingent, ripened or unripened, including any Unknown claims; (c) whether at law or equity, whether based on or arising under state, local, foreign, federal,

statutory, regulatory, common or other law or rule and upon any legal theory (including but not limited to any claims arising under the federal securities laws, including any claims arising under Section 14 of the Securities Exchange Act of 1934 or any claims that could be asserted derivatively on behalf of El Paso), no matter how asserted; (d) that previously existed, currently exist, or that exist as of the date of the approval of the Settlement by the Court; (e) that were or that could have been asserted by the Releasing Plaintiff Persons against any or all of the Released Defendant Persons in the Actions, in any federal or state court, or in any other court, tribunal, arbitration, proceeding, administrative agency or other forum in the United States or elsewhere that arise out of or relate to its/her/his ownership of El Paso Corporation common stock, its/her/his status as El Paso Corporation shareholders, or its/her/his El Paso Corporation stockholdings during the Class Period; and (f) that are based upon, arise out of, relate in any way to, concern or involve, in whole or in part, any of the following: (A) the Merger, (B) the Merger Agreement, (C) any actions, deliberations, negotiations or financial advisory services in connection with the Merger, including the process of deliberation or negotiation, by each of El Paso and Kinder Morgan and any and all of their respective officers, directors, employees, representatives or advisors, (D) the consideration received by Class Members in connection with the Merger, (E) the Proxy as well as any other disclosures, public filings, periodic reports, press releases, amendments, information statements, solicitation materials, notifications or other statements issued, made available, propounded, disseminated, published or filed relating to or discussing, in whole or in part, the Merger, (F) the October 16, 2011 Voting Agreement entered into by and among El Paso and the stockholders of Kinder Morgan listed on the signature pages thereto, (G) any fiduciary obligations of any of the Released Defendant Persons in connection with the Merger or the Merger Agreement, including the negotiation and consideration of the

Merger or any disclosures related thereto, (H) the proposed Spin-Off and the decision by the El Paso Board of Directors not to consummate the Spin-Off, (I) any actual or potential conflicts of interest by any Defendant or Released Defendant Person, and/or (J) any other facts, matters, occurrences, conduct, allegations, representations, omissions, transactions, actions, things or causes whatsoever, or any series thereof, that were alleged, asserted, raised, made, set forth, claimed, embraced, involved in, related to, or referred to, in whole or in part, in the Delaware Consolidated Complaint, in any of the other complaints, pleadings or briefs filed by plaintiffs in the Actions (including, without limitation, the Texas Action and the New York Action) and/or in the Court's opinion dated February 29, 2012. "Released Plaintiff Claims" shall not, however, include (i) any claims to enforce the Settlement or this Stipulation; or (ii) any claims solely for statutory appraisal with respect to the Merger pursuant to Section 262 of the Delaware General Corporation Law of the State of Delaware by El Paso Corporation stockholders who properly perfected such claims for appraisal and have not otherwise waived their appraisal rights.

(e) "Released Defendant Persons" means each of: (a) the Defendants and El Paso (the "Defendant Party Releasees"); (b) each of the Defendant Party Releasees' respective past and/or present affiliates, subsidiaries, parents, general partners, limited partners and any Person in which any Defendant Party Releasee has or had a Controlling Interest (the "Defendant Affiliated Releasees," and together with the Defendant Party Releasees, the "Defendant Releasees"); and (c) each of the Defendant Releasees' past and/or present family members, heirs, principals, trustees, executors, administrators, predecessors, successors, assigns, members, parents, subsidiaries, employees, officers, managers, directors, partners, limited partners, agents, investment bankers, attorneys, representatives, estates, divisions, financial advisors, estate managers, assigns, insurers and reinsurers.

(f) “Released Plaintiff Persons” means each of: (a) Delaware Co-Lead Plaintiffs and the other Class Members (including, without limitation, the Texas Plaintiffs and the New York Plaintiff) (the “Plaintiff Party Releasees”); (b) each of the Plaintiff Party Releasees’ respective past and/or present affiliates, subsidiaries, parents, general partners, limited partners and any Person in which any Plaintiff Party Releasee has or had a Controlling Interest (the “Plaintiff Affiliated Releasees,” and together with the Plaintiff Party Releasees, the “Plaintiff Releasees”); and (c) each of the Plaintiff Releasees’ past and/or present family members, heirs, principals, trustees, executors, administrators, predecessors, successors, assigns, members, parents, subsidiaries, employees, officers, managers, directors, partners, limited partners, agents, investment bankers, attorneys, representatives, estates, divisions, financial advisors, estate managers, assigns, insurers and reinsurers.

(g) “Releasing Defendant Persons” means each and all of the following: El Paso and each and every Defendant, on behalf themselves, each of the other Released Defendant Persons, and each and all of the Released Defendant Persons’ respective successors in interest, predecessors, representatives, trustees, executors, administrators, agents, heirs, estates, assigns, or transferees, immediate and remote, and any other Person who has the right, ability, standing or capacity to assert, prosecute or maintain on behalf of El Paso and/or any of the Defendants any of the Released Defendant Claims or to obtain the proceeds of any recovery therefrom in whole or in part.

(h) “Releasing Plaintiff Persons” means each and all of the following: Delaware Co-Lead Plaintiffs and each and every other Class Member (including, without limitation, the Texas Plaintiffs and the New York Plaintiff) (regardless of whether such Person actually submits a Claim Form, seeks or obtains a distribution from the Net Settlement Fund, is

entitled to receive such a distribution under the plan of allocation approved by the Court or has objected to the Settlement, the Plan of Allocation and/or any application for an award of attorneys' fees or Litigation Expenses), on behalf of themselves and each and all of their respective successors in interest, predecessors, representatives, trustees, executors, administrators, agents, heirs, estates, assigns, or transferees, immediate and remote, and any other Person who has the right, ability, standing or capacity to assert, prosecute or maintain on behalf of any Class Member any of the Released Plaintiff Claims (or to obtain the proceeds of any recovery therefrom), whether in whole or in part.

13. With respect of the use of the term "Unknown" in the definitions of Released Plaintiff Claims and Released Defendant Claims:

(a) (i) Delaware Co-Lead Plaintiffs specifically acknowledge (and the other Releasing Plaintiff Persons shall be deemed by operation of this Final Order and Judgment to have acknowledged) that the term "Unknown" in the definitions of the Released Plaintiff Claims shall mean all claims that each of the Releasing Plaintiff Persons do not know or suspect to exist at the time of the release of the Released Plaintiff Claims against the Released Defendant Persons, but which, if known by it/her/him, might affect its/her/his decision with respect to the Settlement (including the decision to object or not to object to the Settlement); and (ii) Defendants and El Paso specifically acknowledge (and the other Releasing Defendant Persons shall be deemed by operation of this Final Order Judgment to have acknowledged) that the term "Unknown" in the definitions of Released Defendant Claims shall mean all claims that each of the Releasing Defendant Persons do not know or suspect to exist at the time of the release of the Released Defendant Claims against the Released Plaintiff Persons, but which, if known by

it/her/him, might affect its/her/his decision with respect to the Settlement (including the decision to object or not to object to the Settlement);

(b) (i) Delaware Co-Lead Plaintiffs expressly acknowledge (and the other Releasing Plaintiff Persons shall be deemed by operation of this Final Order and Judgment to have acknowledged) that they may hereafter discover facts in addition to or different from those that he, she or it now knows or believes to be true with respect to the subject matter of the Released Plaintiff Claims but that it is nevertheless its/her/his intention to fully, finally and forever settle and release those claims without regard to the subsequent discovery of any such additional or different facts; and (ii) El Paso and the Defendants expressly acknowledge (and the other Releasing Defendant Persons shall be deemed by operation of this Final Order and Judgment to have acknowledged) that they may hereafter discover facts in addition to or different from those that it/she/he now knows or believes to be true with respect to the subject matter of the Released Defendant Claims but that it is nevertheless its/her/his intention to fully, finally and forever settle and release those claims without regard to the subsequent discovery of any such additional or different facts; and

(c) the Parties expressly acknowledge (and the other Releasing Persons shall be deemed by operation of the Judgment to have acknowledged) that the inclusion of “Unknown” claims in the definitions of Released Claims was separately bargained for and was a key element of the Settlement, and with respect to the Released Claims the Parties expressly waive and relinquish, and the other Releasing Persons shall be deemed to have waived and relinquished, and by operation of the Judgment shall have specifically waived and relinquished: (i) any and all provisions, rights and benefits conferred under Section 1542 of the California Civil Code, which provides as follows:

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

and (ii) any and all provisions, rights and benefits conferred by any law of the United States or state or territory of the United States or principle of common law or foreign law which is similar, comparable or equivalent to Section 1542 of the California Civil Code.

14. The effectiveness of the provisions of this Final Order and Judgment and the rights and obligations of the Parties under the Settlement (including without limitation the Releases contained herein) shall not depend on, or be conditioned on or subject in any way to, the resolution of any orders, proceedings, rulings, consideration, appeals or other matters concerning, relating to, based upon or arising out of: (a) the application by Delaware Co-Lead Counsel for an award of reasonable attorneys' fees and Litigation Expenses to Plaintiffs' Counsel in connection with the Settlement (including the allocation of such fees among counsel); and/or (b) the Plan of Allocation.

15. Nothing contained in this Final Order and Judgment shall preclude any action to enforce the terms of the Stipulation or this Final Order and Judgment.

16. **No Admissions** – This Final Order and Judgment, the facts and terms of the Settlement and the Stipulation (including all of its exhibits), as well as all negotiations, discussions, acts performed, agreements, drafts, documents signed and proceedings in connection with the Settlement:

(a) shall not be described as, construed as, interpreted as, or offered or received against any of the Released Defendant Persons as evidence of and/or deemed to be evidence of any presumption, concession, or admission by any of the Released Defendant

Persons as to: (i) the truth of any fact alleged in the Actions; (ii) the validity of any claim that has been or could have been asserted in the Actions or in any other litigation; (iii) the deficiency of any defense that has been or could have been asserted in the Actions or in any other litigation; and/or (iv) any liability, breach of fiduciary duty, negligence, fault or wrongdoing on their part;

(b) shall not be described as, construed as, interpreted as or offered or received against Delaware Co-Lead Plaintiffs or any other Class Member as evidence of any infirmity in the claims of the Delaware Co-Lead Plaintiffs or any other Class Member or that damages recoverable from the Defendants would not have exceeded the Settlement Amount;

(c) shall not be described as, construed as, interpreted as, offered or received against any of the Parties as an admission or concession that the consideration to be given in the Settlement represents the amount which could be or would have been awarded after trial; and

(d) shall not be construed, offered interpreted, deemed, or received in evidence or otherwise against any of the Released Defendant Persons or Released Plaintiff Persons in any other civil, criminal or administrative action, litigation or proceeding, except in connection with any proceeding to enforce the terms of the Stipulation or this Final Order and Judgment.

17. Notwithstanding the provisions of paragraph 16 above, the Released Defendant Persons and the Released Plaintiff Persons may file, offer, refer to and otherwise employ, the Stipulation and this Final Order and Judgment in the Consolidated Action or in any other proceeding: (a) to enforce the terms of the Settlement, the Stipulation or this Final Order and Judgment; (b) to enforce or effectuate the Releases provided under the Stipulation and this Final Order and Judgment; and/or (c) to support a defense or counterclaim based on principles of res

judicata, collateral estoppel, release, discharge, good faith settlement, judgment bar or reduction, any theory of claim preclusion or issue preclusion or similar defense or counterclaim.

18. **Plan of Allocation** – The Court hereby finds and concludes that the Plan of Allocation is, in all respects, fair and reasonable to the Class. Accordingly, the Court hereby approves the Plan of Allocation proposed by Delaware Co-Lead Plaintiffs.

19. **Attorneys' Fees and Expenses** – Plaintiffs' Counsel are hereby awarded \$ 26,000,000 in attorneys' fees and reimbursement of Litigation Expenses, which sum the Court finds to be fair and reasonable and which shall be paid to Plaintiffs' Counsel from the Settlement Fund.

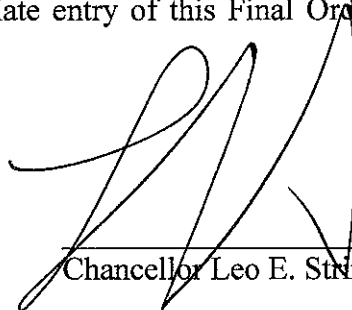
20. **Retention of Jurisdiction** – Without affecting the finality of this Final Order and Judgment in any way, this Court retains continuing and exclusive jurisdiction over: (a) the Parties for purposes of the administration, interpretation, implementation and enforcement of the Settlement; (b) the disposition of the Settlement Fund and the Net Settlement Fund; (c) the Class Members for all matters relating to the Consolidated Action; and (d) any motion for a Class Distribution Order.

21. **Termination** – In the event that the Settlement is terminated pursuant to the terms of the Stipulation or does not become effective: (a) the Settlement and the Stipulation shall be null and void and without prejudice to, or force and effect to or upon, the rights of the participants to the agreement and none of their terms shall be effective or enforceable (except for those provisions contained in ¶¶ 3, 18, 20, 37, 49, 50, 56, and 63 of the Stipulation); (b) the fact and terms of the Settlement shall not be admissible in any trial of the Actions; (c) the participants to the agreement shall be deemed to have reverted to their respective litigation positions in the Actions immediately prior to July 18, 2012; and (d) except as otherwise expressly provided, the

participants to the agreement shall proceed in all respects as if the Stipulation, this Final Order and Judgment, the Scheduling Order and any other orders of the Court relating to the Settlement had not been entered.

22. **Modifications of the Settlement Agreement** – Without further approval from the Court, Delaware Co-Lead Plaintiffs and Defendants: (a) are hereby authorized to agree to and adopt such amendments, modifications, and expansions of the Stipulation and/or any of the exhibits attached thereto to effectuate the Settlement that are not materially inconsistent with this Final Order and Judgment and/or that do not materially limit the rights of Class Members under the Stipulation; and (b) may agree to reasonable extensions of time to carry out the provisions of the Settlement.

23. **Entry of Final Judgment** – There is no just reason to delay the entry of this Final Order and Judgment. Accordingly, immediate entry of this Final Order and Judgment by the Register in Chancery is expressly directed.



Chancellor Leo E. Stine, Jr.

Tab 21

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CODY LAIDLAW,

Plaintiff,

v

GIGACQUISITIONS2, LLC, RALUCA
DINU, AVI S. KATZ, NEIL MIOTTO,
JOHN MIKULSKY and GIL FROSTIG,

Defendants.

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: C. A. No.
: 2021-0821-LWW
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Chancery Courtroom No. 12D
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, October 8, 2024
1:30 p.m.

- - -

BEFORE: HON. LORI W. WILL, Vice Chancellor

- - -

ORAL ARGUMENT AND THE COURT'S RULING ON PLAINTIFF'S
SETTLEMENT AND AWARD OF ATTORNEYS' FEES

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0522

1 APPEARANCES:

2 MICHAEL J. BARRY, ESQ.
3 KELLY L. TUCKER, ESQ.
4 Grant & Eisenhofer, P.A.
for Plaintiff

5 RONALD N. BROWN, III, ESQ.
6 DLA Piper LLP (US)
for Defendants

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1 THE COURT: Good afternoon, Mr. Brown.
2 Nice to see you.

3 ATTORNEY BROWN: Nice to see you as
4 well. Ron Brown of DLA Piper on behalf of defendants.

5 THE COURT: Thank you very much.
6 Mr. Barry, nice to see you.

7 ATTORNEY BARRY: Your Honor, good to
8 see you. With me at counsel table is Kelly Tucker
9 from my office.

10 THE COURT: Welcome.

11 ATTORNEY BARRY: Your Honor, we are
12 here today on two cases. I will refer to them as
13 "Gig4" and "Gig2." Your Honor may recall these are
14 two of three gig-related SPAC cases --

15 THE COURT: I recall.

16 ATTORNEY BARRY: Gig3 is currently
17 in -- is going to be settled with the related
18 securities action in the Federal District Court of
19 Colorado. They will hear that. The hearing on that
20 settlement is in the beginning of November.

21 THE COURT: Great. Thank you for the
22 update.

23 ATTORNEY BARRY: In any case, Gig2 and
24 Gig4 are both on the smaller side of the SPAC cases,

1 and, frankly, may not have been brought originally if
2 there weren't three of them. But because of the kind
3 of procedural posture of the cases and, frankly, the
4 kind of notable misdisclosures in the case, they
5 merited consideration and they merited being
6 prosecuted.

7 In terms of -- we will get to the
8 *Sugarland* factors later, but in terms of complexity, I
9 think the Gig2 case was the first case where the issue
10 of the net cash per share was resolved for the first
11 time. I think that has framed the SPAC jurisprudence
12 in many cases. So even though ours is a smaller case,
13 it is a very important case, so it was important in
14 that regards.

15 Gig4 had similar allegations but
16 because the decision from Your Honor had come out in
17 Gig2, less complex, and most defendants simply
18 answered, and then we settled shortly after that. In
19 terms of the procedural posture of both cases, they
20 were both similar. In Gig2 -- in Gig2 we were past
21 the motion to dismiss. Gig4, most of the defendants
22 filed an answer and there was one who filed a *pro*
23 *forma* motion that was never briefed. But in any case,
24 we reached those agreements after extensive

1 negotiations and renegotiation of the settlement terms
2 in Gig2 to make sure the release was appropriate.
3 Then we applied that release in Gig4.

4 In terms of the merits of the
5 settlement, Gig2 is \$7.25 million that will be
6 allocated among all the "eligible shares." Gig4 is
7 \$2.5 million to be allocated among those eligible
8 shares. Those numbers in and of themselves for the
9 Court of Chancery don't sound like big numbers. And
10 usually when I'm up here talking about a case, we're
11 talking about the recoveries are much more
12 significant. But on a per-share basis recovery, these
13 results really are extraordinary.

14 In Gig2, we estimate the per-share
15 recovery would be about 31 to 40 percent of the
16 potential recovery on damages. That is based on the
17 difference between the redemption value and the net
18 cash per share, or the redemption value and the price
19 at which the stock was trading when we filed the
20 action. So that equates to a recovery \$1.94 per share
21 for eligible shares.

22 On Gig4, the results are actually even
23 better even though it is a smaller number. In that
24 case, Gig4, the recovery is about \$2.38 a share, which

1 is, again, between 31 and 42 percent of the potential
2 damages. Those numbers are significant. Those
3 numbers stand out from any of the per share
4 settlements that, if you look at it on a per-share
5 basis for virtually any other settlement that I have
6 seen recently in the Court of Chancery. And notably,
7 those settlements were achieved where they have very
8 kind of interesting facts that apply to these
9 situations; most particularly, these cases had very
10 high redemption rates.

11 In Gig2, it was 63 percent of the
12 shares redeemed. And let me throw this number out to
13 you, in Gig4, out of the 38 million shares that were
14 issued in the IPO, the eligible shares, excluding all
15 of the ones that were redeemed and everything that was
16 subject to a forward purchase agreement, the eligible
17 shares are just over 1.04 million. That means
18 97 percent of the IPO'd shares redeemed or were
19 subject to a forward purchase agreement.

20 So in both cases, notwithstanding my
21 arguments about all these -- the materiality of all
22 the -- the net cash per share and the
23 misrepresentations about the process or the
24 projections, in both cases had we gone to trial, the

1 defendants would have been saying, yeah, but nobody
2 was deceived because most of the people redeemed or in
3 Gig4 almost everybody redeemed. So under those
4 circumstances, the settlement numbers that we got here
5 were truly extraordinary.

6 Because of that, that is why our fee
7 request in this case, although commensurate with the
8 size -- relative size of the cases, we're asking for
9 18 percent.

10 We appreciate that is a tad higher
11 than 15 percent on the early stage, but we think it is
12 made up for the fact that this per-share size that we
13 got and the kind of nature of that.

14 So unless Your Honor has any more
15 questions, I'm happy to rest on the papers on the
16 other *Sugarland* factors and everything else.

17 THE COURT: No questions.

18 Mr. Brown, anything else you would
19 like to add?

20 ATTORNEY BROWN: No, Your Honor,
21 unless Your Honor has questions for me.

22 THE COURT: No questions. Thank you.

23 ATTORNEY BARRY: Your Honor, one more
24 thing, in preparing for today I noticed there was a

1 typo in my affidavit. I referred to no objections
2 being filed as of September 21, 2021. I filed
3 corrected affidavits probably within the last half
4 hour to correct that to 2024.

5 THE COURT: That brings to mind one
6 question I did have for you, and it has to do with
7 your co-counsel's affidavit in Gig4. It looks like
8 there's time listed through September 4 of 2024, which
9 is after the stipulation was filed. I wanted to
10 understand why that might have been.

11 ATTORNEY BARRY: Gig4?

12 THE COURT: Exhibit 2 to your brief.
13 I didn't see that same issue at all with Gig2 and I
14 didn't see it in your affidavit.

15 ATTORNEY BARRY: To be honest, Your
16 Honor, I had not noticed it myself. I don't think
17 that changes the issue because we are not asking for a
18 multiplier on the lodestar. But you are correct that
19 I had not noticed that number earlier.

20 THE COURT: Thank you.

21 Thank you for your presentation and
22 for your papers, and to all of you for being here. I
23 have a bench ruling prepared for each of the two
24 settlements that were presented. I'm going to do my

1 best to consolidate them. So bear with me while I
2 work through both.

3 Today I heard from the parties
4 regarding the proposed settlement of matters captioned
5 *Laidlaw v. GigAcquisitions2*, Civil Action No.
6 2021-0821-LWW. We will call that case "Gig2." As
7 well as the matter captioned *Steven Bushansky v.*
8 *GigAcquisitions4, LLC*, which is Civil Action No.
9 2023-0685-LWW, which I will call "Gig4." The
10 background of the Gig2 case is laid out in my March 1,
11 2023 memorandum opinion denying the defendants' motion
12 to dismiss.

13 At a high level, to recount some of
14 the facts, the plaintiff challenged de-SPAC merger
15 between GigCapital2, Inc., which was a SPAC, and two
16 then-private companies operating in the telehealth
17 space. The plaintiff alleged that the directors of
18 the SPAC and the sponsor breached their fiduciary
19 duties owed to public stockholders and were unjustly
20 enriched. The core allegation there was that the
21 fiduciaries knew of unfavorable information that
22 stockholders would have considered material when they
23 were voting on the merger and making a redemption
24 decision.

1 The plaintiff also asserted that the
2 merger was a conflicted controller transaction and
3 that a majority of the board was not disinterested or
4 independent. As a result of that, the plaintiff
5 argued that the entire fairness standard of review
6 applied.

7 Defendants moved to dismiss under
8 several theories. Since this was early on in the SPAC
9 litigation wave, they argued that this was a
10 derivative case; that the business judgment rule
11 applied; that these are truly contract claims and also
12 holder claims. I rejected most of these arguments in
13 my memorandum opinion, and determined that entire
14 fairness applied. And I held that the plaintiff had
15 adequately pleaded breach of fiduciary duty and unjust
16 enrichment claims.

17 A few months later in that case, in
18 August of 2023, the parties began settlement
19 discussions, which concluded in a September 18, 2023,
20 term sheet. The defendants then produced several
21 thousand pages of non-public documents. The parties
22 negotiated and executed a settlement stipulation on
23 March 13 of this year, and an amended stipulation on
24 June 18. And under the final settlement terms in that

1 case, the defendants agreed to pay a total of
2 \$7.25 million, which will be distributed pro rata to
3 all holders of eligible shares.

4 The other case that is before me today
5 involves GigCapital4, Inc. or Gig4, a SPAC
6 incorporated in Delaware in 2020 by sponsor
7 GigAcquisitions4, LLC. The individual defendants in
8 this case are former members of the SPAC sponsor or
9 the SPAC's management team and board. The claims like
10 Gig2 are in the style of those addressed in the *In re*
11 *Multiplan* case, and concern alleged breaches of
12 fiduciary duty by a conflicted sponsor and conflicted
13 board who were allegedly incentivized to close a value
14 destructive deal and minimize disclosures by public
15 stockholders.

16 More specifically in that case,
17 according to the complaint, the proxy failed to
18 disclose multiple material economic revisions to the
19 merger agreement, which were made after the
20 announcement of the merger but before the redemption
21 deadline, and allegedly set an artificially high
22 deemed value for the merger consideration based on
23 allegedly inflated projections. The proxy also,
24 according to the complaint, failed to disclose the net

1 cash per share that Gig4 would exchange in the merger.
2 That is a similar theme that was explored in Gig2. In
3 the Gig4 case, though the proxy set a deemed value of
4 \$10 per share. According to the plaintiff, the true
5 value was less than \$4.25 per share. As in Gig2, the
6 plaintiff asserted that the entire fairness standard
7 of review applied because the transaction was
8 allegedly a conflicted controller transaction and
9 because a majority of the board was not disinterested
10 or independent.

11 And in that case, one of the
12 individual defendants filed a one-page motion to
13 dismiss, which was never briefed. All other
14 defendants answered the complaint in August of 2023.
15 Then in December of 2023, the parties began settlement
16 discussions. The plaintiffs served document requests
17 in March of 2024, which were not responded to because
18 settlement negotiations progressed, and a settlement
19 stipulation was executed in July.

20 With that background in both cases, I
21 will turn to the items on my agenda today which are
22 class certification, to consider the merits of the
23 settlement itself, the proposed plan of allocation and
24 request for the fee and expense awards in both Gig2

1 and Gig4.

2 The first item on my list is class
3 certification. The plaintiff is seeking to certify
4 two separate classes, one of Gig2's public
5 stockholders, excluding the defendants, as well as in
6 the Gig4 case, Gig4's public stockholders also
7 excluding the defendants. The specific class
8 definitions are laid out in the respective
9 stipulations of settlement.

10 In considering the proposed classes, I
11 must review the Rule 23(a) factors which are
12 numerosity, commonality, typicality and adequacy.
13 Those criteria are met in each of the two cases. In
14 Gig2, for example, there were over 3.7 million shares
15 of common stock outstanding as of the redemption
16 deadline. There are common questions of law. The
17 plaintiff's claims are typical of the rest of the
18 class and the representation was easily adequate.

19 The Gig4 case leads to a similar
20 conclusion in review of the factors as laid out in the
21 plaintiff's brief.

22 Certification in both cases would also
23 be appropriate under either subsection of the Rule
24 23(b), subsection (1) or subsection (2). So I will

1 certify each of proposed non-opt out classes as
2 defined in the stipulations of settlement for purposes
3 of the two settlements before me. The Rule 23
4 requirements are also met in both of the two cases. I
5 preliminarily determined that the form of notice was
6 adequate under Rule 23(e) when I entered the
7 scheduling order in each of the two cases. The
8 affidavits that were subsequently filed by the
9 settlement administrator demonstrate to me that the
10 dissemination of notice was adequate as well. And in
11 both cases, the Rule 23(aa) required affidavit was
12 filed by the representative plaintiff. So having
13 certified the class and confirmed that the Rule 23
14 requirements are met, I will turn next to analyzing the
15 two settlements themselves.

16 My task here is to compare the value
17 of the benefits achieved by the settlement against the
18 strength of the claims being released, which we talk
19 about in this court as the "give" versus the "get."
20 And the Delaware Supreme Court's *Polk v. Good* decision
21 guides my analysis of the settlement. In terms of the
22 "give," and I will start with the Gig2 case, the
23 plaintiffs agreed to release any and all claims
24 arising out of, or relating to that action, in whole

1 or in part, as outlined in the stipulation.

2 This release is linked to the issues
3 and claims raised in the complaint, and consistent
4 with other releases approved by the court in similar
5 cases. In terms of the strength of the claims being
6 released, the entire fairness standard applied and the
7 claims survived a motion to dismiss. But there were,
8 as the plaintiff acknowledges in its brief,
9 significant hurdles. I have spoken before about the
10 challenges of assessing damages and even proving
11 unfair price in these sorts of cases. And here, in
12 both cases, the relatively high level of redemptions
13 in Gig2 was about 68%, might significantly lower any
14 damages that were awarded. On liability, the number
15 of redemptions might undermine the argument that the
16 redemption right was impaired. Given these risks in
17 the Gig2 case, the "get" is a certain cash recovery
18 for stockholders totaling \$7.25 million, which is
19 meaningful. And on balance, the Gig2 settlement is
20 fair, reasonable and adequate, and I approve it on
21 that basis.

22 In the Gig4 case, I take a similar
23 approach to the settlement. And in that case, the
24 "get" being received is the recovery of a \$2.5 million

1 cash fund that will be distributed to eligible class
2 members. The claims being released, there is a
3 similar release of claims, face some of the same
4 hurdles that I just talked about in the Gig2 case.
5 These were entire fairness claims. The allegations
6 are fairly strong even compared to some other SPAC
7 claims I have seen in the past few years. The real
8 challenges, again, were valuation and damages in
9 particular.

10 So on balance, in the view of cash
11 recovery in each of those cases, compared to the
12 claims that were being released, I believe that the
13 settlement is fair, reasonable and adequate, and I
14 will approve it on that basis.

15 I will also approve their proposed
16 plan of allocation in both cases, which is similar.
17 The net settlement amount will be distributed directly
18 to eligible class members on a pro rata per-share
19 basis. This is consistent with plans of allocation
20 that have recently been approved by the court and it
21 avoids the potentially high administrative costs of a
22 claims process. So I will approve that as well as
23 adequate.

24 That leaves the question of attorneys'

1 fees. And I will start with the Gig2 request for fees
2 and turn then to the Gig4 request for a fee.

3 In the Gig2 action, plaintiff's
4 counsel requests a fee and expense award of \$1.305
5 million inclusive of \$7,677 in expenses. In setting
6 fee awards, the Court of Chancery "must make an
7 independent determination of reasonableness." That is
8 from *Goodrich v. EF Hutton Group, Inc.*, 681 A.2d 1039,
9 and the role of the court is to exercise its own
10 business judgment in determining whether the award is
11 reasonable and appropriate. The *Sugarland* factors
12 traditionally guide the court's analysis of these
13 issues. Of the *Sugarland* factors, the first factor,
14 the benefit achieved, is generally given the greatest
15 weight. I will start there.

16 As I mentioned before, the benefit
17 achieved in the settlement here is cash recovery for
18 the class of \$7.25 million to be distributed pro rata
19 to approximately 3.8 million shares. This amounts to
20 a very meaningful benefit of \$1.94 per share for the
21 class members. The *Americas Mining* framework lays out
22 the ranges of recovery based upon the stages of the
23 case. This is not a rigid framework and selecting the
24 appropriate fee is much more of an art than a science,

1 but it's useful in setting a starting point. This
2 case falls somewhere between the early stage
3 settlement range of 10 to 15 percent, and the
4 meaningful litigation effort range of 15 to
5 25 percent, which typically involves extensive
6 discovery and motion practice.

7 Here, though, there was a hard-fought
8 motion to dismiss, limited discovery, but a
9 complicated motion to dismiss on some novel issues.
10 This might indicate 15 percent as a starting point,
11 but the other *Sugarland* factors suggest to me that
12 something higher is warranted here. There was, as I
13 said before, a very hard-fought motion to dismiss. It
14 was complicated, and there was new territory that was
15 being explored. But I view this in the trifecta of
16 our early SPAC cases alongside *Gig3* and *Multiplan*.
17 *Multiplan* was a 20 percent recovery of the cash fund.
18 And the plaintiff asks for 18 percent, maybe a bit
19 higher if I subtract out expenses first. I view the
20 *Sugarland* factors overall as supporting that
21 18 percent fee in this case.

22 That translates to an implied hourly
23 rate of \$1,476, which is not unreasonable. The time
24 submitted is through the stipulation of settlement,

1 which is appropriate. And the fee represents a 1.88X
2 multiplier, *Multiplan* was about 2.50X. So overall, I
3 believe that the fee sought here is appropriate and I
4 will award it in whole, which is \$1.35 million,
5 inclusive of reasonable expenses that were sought.

6 In the Gig4 case, plaintiff's counsel
7 requests a fee award of \$450,000, inclusive of
8 \$2,172.86 expenses. The benefit conferred is my
9 starting point here. Again, under *Sugarland*, as it
10 was in *Gig2*, and as I mentioned settlement provides
11 the class with \$2.5 million funds to be distributed
12 pro rata to about one million shares for a per share
13 recovery of \$2.38, which is a great recovery. The
14 fees sought by plaintiff equates, again, to about
15 18 percent of the financial benefit achieved.

16 Starting again with the *Americas*
17 *Mining* framework, I look to the 10 to 15 percent range
18 in this case, since there was no motions whatever and
19 no discovery. But considering the strength of the
20 settlement, I don't necessarily believe that the
21 bottom of the range is appropriate here either, and
22 I'm looking to something above the mid point. And I
23 conclude that a 13 percent recovery is appropriate,
24 balancing the very early stage of the settlement with

1 the strength of the settlement overall. So less
2 expenses, 13 percent of the benefit supports a fee of
3 \$324,717.53, which I will round up to \$325,000. None
4 of other *Sugarland* factors here support an upward or
5 downward adjustment in my view. Counsel is
6 experienced and well qualified. The case was brought
7 on a contingency basis. But it presented a lower risk
8 of recovery, especially when I compare it to *Gig2* and
9 some of the other cases since then. It was an entire
10 fairness case and there was multiple existing
11 precedent at this point that laid out the framework
12 for analyzing the lawsuit.

13 Looking to the loadstar as a cross
14 check, I flagged before that there is a complication
15 since there was some hours postdating the signing of
16 the stipulation in one of the affidavits. The total
17 hours submitted are about 311, which would yield a
18 loadstar of \$287,215, and a 1.13X multiplier. The
19 true multiplier might be a little higher since the
20 post-settlement hours were included. But in terms of
21 the implied hourly rate, even if I were to assume all
22 311 hours predated the stipulation, the rate would
23 about \$1044 per hour based on the fee that I
24 calculated, and it would be even higher if I were to

1 subtract out some of those hours. I believe that that
2 fee is also appropriate and supportable here. So
3 taking all of this together, I will award a fee of
4 \$325,000, plus the full amount of the expenses that
5 were requested since it is a smaller fee award.
6 Rounding up, that gets me to \$328,000 all in for the
7 fee award in Gig4.

8 I believe that gets me through my
9 agenda items in both of the two settlements. I've
10 managed to consolidate them. Let me stop there and
11 ask if there are any questions for me while we are all
12 together.

13 Mr. Brown, any questions from you?

14 ATTORNEY BROWN: None from me, Your
15 Honor.

16 THE COURT: Thank you very much.
17 Mr. Barry?

18 ATTORNEY BARRY: Your Honor, no
19 questions.

20 THE COURT: Thank you for your time.
21 I have orders on the docket and I will go back and
22 enter them right away. It was nice to see you-all.
23 Have a great afternoon.

24 We are adjourned.

(The hearing ended at 1:56 p.m.)

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CERTIFICATE

I, JOHN P. DONNELLY, Court Reporter of the State of Delaware, Registered Merit Reporter, Registered Diplomate Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 22 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 9 through 22, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 3rd day of November 2024.

/s/ John P. Donnelly

John P. Donnelly
Court Reporter
Registered Merit Reporter
Registered Diplomate Reporter
Delaware Notary Public

Tab 22

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DARCY LIEN, Individually and on	:
Behalf of All Others Similarly	:
Situated,	:
	:
Plaintiff,	:
	:
v	: C. A. No.
	: 2022-0972-PAF
EAGLE EQUITY PARTNERS II, LLC, HARRY	:
E. SLOAN, SCOTT M. DELMAN, JOSHUA	:
KAZAM, ALAN MNUCHIN, LAURENCE E. PAUL,	:
ELI BAKER, and JEFF SAGANSKY,	:
	:
Defendants.	:

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, September 2, 2024
1:30 p.m.

- - -

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

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT

CHANCERY COURT REPORTERS
500 N. King Street, Ste 11400, Wilmington, DE
(302) 255-0526

1 APPEARANCES:

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5 KEVIN M. GALLAGHER, ESQ.

6 Richards, Layton & Finger, PA
-and-

7 GREGORY STARNER, ESQ.

8 of the New York Bar

9 White & Case LLP

10 for Defendants Eagle Equity Partners II,
11 LLC and Jeff Sagansky12 - - -
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1 THE COURT: Good afternoon, everyone.
2 Mr. Gallagher.

3 ATTORNEY GALLAGHER: Nice to see you,
4 Your Honor. Kevin Gallagher of Richards, Layton &
5 Finger on behalf of defendants. Brief introduction,
6 if I may. Gregory Starner from White & Case.

7 ATTORNEY STARNER: Good afternoon.

8 ATTORNEY GALLAGHER: And, Your Honor,
9 obviously it's a settlement hearing. So we'll stand
10 at the side, but if you have any questions we're happy
11 to address, Your Honor.

12 THE COURT: Thank you.

13 ATTORNEY OBERSTE: Good afternoon,
14 Your Honor.

15 THE COURT: Good afternoon.

16 ATTORNEY OBERSTE: Mae Oberste of
17 Bernstein Litowitz Berger & Grossmann LLP on behalf of
18 plaintiffs. With me today is Andrew Blumberg from my
19 firm.

20 ATTORNEY BLUMBERG: Good afternoon.

21 THE COURT: Good afternoon.

22 ATTORNEY OBERSTE: May it please the
23 Court, this is the time the Court has set for the
24 hearing on plaintiff's motion to approve the

1 settlement of this action and the plan of allocation,
2 to certify the class, and for an award of attorneys'
3 fees and expenses, as well as an incentive award for
4 the named plaintiffs.

5 Unless Your Honor has a different
6 preference, I will briefly discuss the case and the
7 proposed settlement, then turn to the merits of the
8 settlement itself, the proposed plan of allocation and
9 class certification, and then finally the request for
10 fees and expenses and incentive awards.

11 Also at the outset, I will note that
12 we and our clients believe this settlement is a good
13 result for the class. We fully support it. And I
14 will reiterate, as we noted in our letter to the Court
15 on August 26, plaintiffs have not received any
16 objection to either the settlement or the application
17 for fees and expenses. That continues to be true, and
18 there do not appear to be any objectors in attendance
19 today.

20 Turning to the facts, I'll be brief
21 given our comprehensive papers.

22 Back in early 2020, defendants took
23 the SPAC Flying Eagle public. Flying Eagle was, in
24 many respects, similar to other SPACs that Your Honor

1 has encountered in other actions.

2 Flying Eagle issued 69 million units
3 for \$10 per unit, with each unit containing one Flying
4 Eagle Class A share and a fourth of a warrant. Those
5 Class A shares had redemption rights, meaning that
6 Class A stockholders could choose to recoup their \$10
7 per-share investment, plus interest, rather than roll
8 their shares into the merger target Flying Eagle
9 found.

10 Flying Eagle also issued Class B
11 founder shares to its sponsor for nominal
12 consideration, less than two tenths of a penny per
13 share.

14 After the IPO, all defendants except
15 Mnuchin held directly or indirectly founder shares;
16 thus owning a substantial piece of the *pro forma*
17 entity at a low, up-front cost. Importantly, the
18 founder shares lacked redemption rights. They were an
19 all-or-nothing proposition.

20 Your Honor has already considered here
21 and in other actions the potential conflicts that
22 founder shares create, so I won't retread that ground.

23 Flying Eagle first disclosed its
24 consideration of Skillz as a merger target a few

1 months after the SPAC's IPO.

2 Skillz is a tech company that helps
3 game developers monetize their multi-player games.
4 Flying Eagle was able to identify this target so
5 quickly because defendants Sloan and Baker had a
6 relationship with Skillz going back years.

7 Your Honor may recall from the motion
8 to dismiss briefing, what the Section 220 production
9 showed was an absence of Flying Eagle's diligence in
10 advance of the merger. The registration statement
11 claimed the board met twice, in June and August 2020,
12 to discuss the merger. But nothing in the 220
13 production backed that up. There were no
14 presentations, no minutes. No evidence of meaningful
15 due diligence or that the board reviewed any diligence
16 materials.

17 Then, on September 1st, 2020, the
18 board approved the merger and merger agreement via
19 unanimous written consent.

20 On September 8th Flying Eagle filed a
21 preliminary proxy, apparently without board review or
22 approval.

23 In November 2020, defendants issued
24 the registration statement, which we allege included

1 false and misleading statements to encourage Class A
2 stockholders not to redeem. The false and misleading
3 statements highlighted in the amended complaint
4 concern the board's role and due diligence in
5 assessing the merger, Sloan's and Baker's history with
6 Skillz, and the value of the SPAC shares as
7 consideration in the merger.

8 The merger closed in December 2020.
9 But by the third quarter of 2021, the market had
10 serious doubts about the sustainability of Skillz's
11 business model. Around the time we filed the amended
12 complaint, Skillz's stock had fallen to 55 cents per
13 share.

14 We would submit that defendants fell
15 prey to the same conflicts that Your Honor and others
16 have identified in SPACs, and that the conflicts here
17 interfered with defendants' fiduciary duties to the
18 Class A stockholders.

19 Plaintiff Darcy Lien proceeded as
20 Delaware courts have come to expect. He made a
21 Section 220 demand and incorporated those 1100 pages
22 of documents into the plenary complaint.

23 Desiring to move this litigation
24 along, we successfully opposed defendants' motion to

1 suspend the deadlines in the action pending a decision
2 in another SPAC-related case.

3 The parties submitted papers and
4 presented argument on an expedited basis. And Your
5 Honor equally quickly denied that motion.

6 Defendants then filed an initial set
7 of two motions to dismiss. Plaintiff filed an amended
8 complaint, and defendants again moved to dismiss.
9 After briefing and argument, Your Honor denied both
10 motions to dismiss in a bench ruling in May 2024,
11 sustaining all claims against all defendants.

12 Shortly thereafter, discovery
13 commenced. We served request for production,
14 interrogatories, and several third-party subpoenas.
15 Defendants, likewise, served a request for production
16 and interrogatories on plaintiffs Darcy Lien, and
17 plaintiff served his responses and objections.

18 Parallel to these discovery efforts,
19 the parties engaged in settlement negotiations. To
20 help inform those negotiations, plaintiff retained a
21 valuation and damages consultant. Without on-point
22 precedent, we considered different methods of
23 evaluating damages. For purposes of mediation, we
24 opted for a conservative approach and used a

1 two-trader model. With that model, the consultant
2 estimated damages at approximately \$13.5 million.

3 In October 2024, we attended an
4 in-person mediation session in New York. Despite
5 significant back and forth, the parties did not reach
6 an agreement that day.

7 In January 2025, four stockholders
8 filed an unopposed motion to intervene, and Your Honor
9 granted that motion.

10 Throughout the months of early 2025,
11 the parties engaged in settlement discussions and
12 ultimately reached an agreement to settle the action.

13 We submit that the result achieved for
14 the class, a \$10 million cash payment, is a good
15 result.

16 As for approval of the settlement, the
17 Court's task has been described as bringing the
18 Court's business judgment to bear to assure that the
19 class receives fair consideration in exchange for the
20 releases granted.

21 This comparison of the "give" and the
22 "get" assures the basic fairness, reasonableness, and
23 adequacy of the compromise.

24 And Rule 23(f)(5) further informs that

1 analysis. It requires a finding by the Court of the
2 reasonableness of the settlement based on several
3 factors, including that counsel adequately represented
4 the class, that adequate notice was provided, that the
5 settlement was negotiated at arm's length, and that
6 the relief provided falls within a range of
7 reasonableness, taking into account the strength of
8 the claims, the risk of trial and appeal, the scope of
9 the release, and any objections.

10 I think several of these factors are
11 easily met. There are no objections to the settlement
12 or the proposed fee. Notice was adequate and
13 constitutional. The strength of the outcome attests
14 to the adequacy of representation. And the settlement
15 was negotiated over several weeks after the parties
16 participated in mediation.

17 I'll note further that the parties
18 spent weeks negotiating the finer points of the
19 stipulation thereafter, further emphasizing that this
20 was an arm's-length process.

21 Turning first to notice. The Court
22 entered an order on June 12th directing that notice be
23 sent to potential settlement class members.

24 On August 26th, we filed the affidavit

1 of Luiggy Segura describing how notice was
2 disseminated to potential settlement class members and
3 also the publication of the summary notice and
4 establishment of the telephone helpline and website
5 devoted to the settlement.

6 28,007 copies of the notice were
7 mailed or emailed to potential class members and their
8 nominees. The summary notice was published in
9 *Investor's Business Daily* and transmitted over *PR*
10 *Newswire* on July 14, 2025.

11 In addition, on July 2nd, JND, the
12 settlement administrator established, and continues to
13 maintain, a settlement website which includes
14 information regarding the action and the settlement.

15 That website also included copies of
16 the notice, scheduling order, and settlement
17 stipulation available for download. We later posted
18 the amended stipulation on the website as well.

19 The contents of the notice also
20 satisfy the requirements of Rule 23(f)(3)(D). It
21 supplies the location, date, and time of any hearing;
22 the nature of the action; the preliminary certified
23 definition of the class; a summary of the claims,
24 issues, defenses, and relief that the class action

1 sought; a description of the terms of the proposed
2 settlement; any award of attorneys' fees or expenses,
3 or any representative party award that will be sought
4 if the proposed settlement is approved; instructions
5 for objectors; that additional information can be
6 obtained by contacting class counsel and how to
7 contact class counsel; and instructions not to contact
8 the court with questions about the terms of the
9 proposed settlement.

10 To conclude, the record demonstrates
11 that the notice requirements of the Court's scheduling
12 order have been met in full. Notice has been given in
13 conformity with the means approved by the Court under
14 Rule 23(f)(3)(C), and the notice given met the
15 substantive requirements of Rule 23(f)(3)(D) and due
16 process.

17 Now, I'll give a short analysis of the
18 settlement terms themselves and how they were arrived
19 at.

20 Turning first to the "give," that is
21 the release. I think Your Honor will find that this
22 release is consistent with others that have been
23 approved. The release is limited to claims plaintiffs
24 asserted in the complaint, or claims based on the same

1 set of operative facts relating to the ownership of
2 Flying Eagle Class A common stock as of the merger
3 closing date.

4 I'll note that the release carved out
5 claims in *Hanna v. Paradise*, a derivative action
6 pending before Chancellor McCormick.

7 Measured against this "give," the
8 "get," a \$10 million cash payment to the class, is
9 substantial. And, indeed, the nice thing about a cash
10 payment is that its value is self-evident.

11 I think the settlement here is
12 particularly reasonable given the very real risk that
13 plaintiffs had and would continue to face.

14 The first, the risk of trial, is a
15 substantial risk. Any trial, even an entire fairness
16 trial, comes with risk. Even should plaintiffs
17 prevail at trial, the risk on appeal is significant,
18 especially as the Supreme Court has not had the
19 opportunity to consider any SPAC cases to date.

20 The risk in demonstrating damages here
21 is also substantial. Without a clear roadmap on
22 damages, plaintiff's estimate of \$13.5 million is a
23 useful measuring stick against the \$10 million
24 settlement amount.

1 Simply put, damages would have been a
2 difficult, albeit fascinating, question for everyone
3 here.

4 As for the views of counsel,
5 plaintiff's counsel strongly supports this settlement.
6 As I noted, we believe that this settlement is a good
7 outcome for the class. We think the "get" far
8 outweighs the "give" and that the settlement should be
9 approved.

10 Touching briefly on the plan of
11 allocation, which is paragraphs 35 to 41 of the
12 notice. The plan of allocation is consistent with
13 what this Court has previously approved. It provides
14 for a direct distribution to class members through the
15 Depository Trust Company, which the Court has
16 endorsed. And, importantly, the plan of allocation
17 withholds payment from excluded parties and anyone who
18 exercise redemption rights.

19 Unless the Court has questions, I will
20 now turn to class certification.

21 THE COURT: I do have a few questions.

22 The brief indicates what the
23 plaintiffs believe was a conservative or low side of
24 damages of \$13.5 million. But there's nothing in the

1 papers that I saw from an expert or any representation
2 of what your upside damages might have been.

3 ATTORNEY OBERSTE: So the upside
4 damages would be the value of the shares at that
5 moment in time, or at the time that we filed the
6 complaint, as compared to \$10. So when we filed the
7 complaint, that was 55 cents a share.

8 THE COURT: Let me ask you about the
9 plan of allocation. One of the precedents that is
10 cited in the plaintiff's supporting brief is the
11 *GeneDX* case, which was my case from last December.

12 In that case, Mr. Del Gaizo from
13 Robbins LLP, who happens to be co-lead counsel here,
14 argued for the plaintiffs in favor of a plan of
15 allocation that deviated from the straight *pro rata*
16 distribution that had been approved in some of the
17 other cases and which is what's proposed in this case.

18 And in arguing for the plan of
19 allocation in that case that I approved, Mr. Del Gaizo
20 said: "We believe the process that we put together is
21 the most equitable one and will become the new norm."
22 That's at page 20 of the settlement hearing
23 transcript.

24 Now, the process in that case that was

1 proposed and was implemented involves eligible class
2 members submitting a claim, and then it specifically
3 accounts for the situation here where some class
4 members sold their shares in the post de-SPAC entity
5 at prices above the redemption price.

6 So in the plan of allocation there --
7 which seems to have become more common now -- would be
8 to pay a baseline amount and then to decrease it for
9 those who sold at above, I think in that case they
10 said \$10 a share, but it's essentially the redemption
11 amount.

12 So why is the plan of allocation in
13 *GeneDX*, which has been adopted in more recent cases,
14 not the better approach than the *pro rata* approach
15 that is proposed here?

16 ATTORNEY OBERSTE: Your Honor, we
17 discussed this at length internally. Both
18 approaches -- direct pay and claims-based -- have
19 their merits. And, frankly, their detractions too.

20 The reason why we came down on direct
21 pay, why we opted for that, is because, as a principle
22 of fairness, each stockholder suffered the same harm:
23 the impairment of their redemption rights. So we felt
24 that the same relief could be appropriate here.

1 And then also, as a pragmatic point, a
2 claims-based settlement process is much more
3 expensive, to the tune of at least six figures. It
4 also takes months longer. So we opted for a process
5 that gets the maximum amount of money to the
6 stockholders in the fastest amount of time.

7 THE COURT: Is there data that is
8 available in the market that perhaps analyzes the time
9 differences in administering a claims-made process
10 versus a straight *pro rata* distribution?

11 ATTORNEY OBERSTE: Your Honor, I don't
12 know if that's available in the market. It was based
13 very much on our own experience. We're a firm that
14 administers many settlements, both with securities
15 claims-based processes and direct pay. And it's
16 simply our experience that a claims-based process runs
17 9 to 15 months longer than a direct pay. That's
18 simply based on our own experience.

19 THE COURT: What struck me in this
20 case -- and I am a bit troubled by it, I will admit --
21 is that the plaintiffs have represented that for a
22 period of nine months after the de-SPAC merger, the
23 stock traded above the redemption price. And that my
24 understanding, what I took away from the plaintiff's

1 brief was that that lowered your potential damages
2 because there's essentially a mitigation of damages
3 element to this for those class members who sold above
4 the redemption price.

5 And I get that regardless of whether
6 they sold above the redemption price, I do agree that
7 there was harm above and beyond the difference in
8 delta between the redemption price and what they may
9 have sold at. Right? There was an informational
10 aspect of entire fairness that is at play here.

11 But why is it not appropriate,
12 particularly in a case like this, where a big portion
13 of your class sold above the redemption price should
14 benefit from the same settlement amount per share as
15 others who may not have been able to sell out or who
16 chose not to sell out above the redemption price?

17 ATTORNEY OBERSTE: Well, Your Honor, I
18 want to focus in on the word that you selected,
19 "appropriate." I personally think both approaches are
20 appropriate. It's a discretionary issue. And in one
21 set of circumstances, one may be more appropriate than
22 the other.

23 Now, if Your Honor determines, you
24 know, at settlement approval we should do a

1 claims-based process in order to approve the
2 settlement, we will proceed likewise. And, of course,
3 I think that would require notice to the class again,
4 and all those things that go with it.

5 But, as I stated earlier, because each
6 class member suffered the same harm, impairment of the
7 redemption rights, and combined with the amount of the
8 settlement here, we think that it's appropriate to do
9 a direct pay distribution.

10 THE COURT: Thank you.

11 ATTORNEY OBERSTE: So I will move
12 forward with the plan of allocation. I'm sorry, I
13 will move on to class certification.

14 The original settlement stipulation
15 contemplated certification of a non-opt-out class
16 under Rules 23(a), (b)(1), and (b)(2), consisting of
17 all holders of Flying Eagle stock as of the closing of
18 the merger on December 16, 2020, including
19 successors-in-interest and excluding defendants,
20 Flying Eagle officers and directors, their immediate
21 family members, any affiliates of Flying Eagle, the
22 sponsor, or Legacy Skillz, and any entities in which
23 defendants or any excluded parties had a controlling
24 interest as of the effective time.

1 The Court entered the scheduling order
2 in this matter, preliminarily certifying that class on
3 June 12, 2025.

4 On August 22nd, the parties filed an
5 amended stipulation to amend the class. The
6 definition largely remains the same, except to limit
7 successors-in-interest to those who obtain their
8 shares by operation of law. This amendment comports
9 with recent rulings.

10 Under Rule 23, a class may be
11 certified if the criteria of Rule 23(a) are met and
12 Rule 23(b)(1) or (b)(2) are also met. The Rule 23(a)
13 criteria are numerosity, commonality, typicality, and
14 adequacy.

15 Taking those in order. There were
16 69 million Flying Eagle shares outstanding and, as the
17 affidavit of Luiggy Segura establishes, there were
18 over 28,000 notices sent to potential class members
19 and their nominees. This more than satisfies the
20 numerosity requirement.

21 As to commonality, the questions were
22 uniform and common throughout. The issues here
23 include whether defendants breached their fiduciary
24 duties in connection with their diligence and ultimate

1 approval of the merger, and issuing the false and
2 misleading registration statement. So commonality is
3 satisfied.

4 Similarly, the representative parties'
5 claims are not only typical, but identical to those
6 asserted on behalf of the class. Our clients were
7 former Flying Eagle stockholders like all other class
8 members. Typicality is satisfied.

9 Finally, the question of whether the
10 representative parties will fairly represent the
11 class's interest is clearly yes. The affidavits
12 required by Rule 23(f)(2)(A) detailed the plaintiffs'
13 involvement in the action and demonstrate their
14 adequacy.

15 Turning to Rule 23(b)(1), the question
16 for the Court is whether, absent class certification,
17 there would be a risk of inconsistent or varying
18 adjudications respecting individual class members, or
19 adjudications of individual claims that would, as a
20 practical matter, be dispositive of the interests of
21 other parties that would otherwise be part of the
22 class.

23 The answer to both questions is yes.
24 Absent class treatment, it is possible that these same

1 issues could have been litigated before different
2 judges with differing answers. And the answer for one
3 or more stockholders could have precluded the ability
4 of others within the class to achieve relief, or could
5 have at least severely prejudiced their rights.

6 In short, as this Court has repeatedly
7 ruled, fiduciary duty cases such as this are
8 well-suited to class treatment under Rule 23(b)(1).

9 Finally, under Rule 23(b)(2), the
10 question for the Court is whether the defendants have
11 acted or refused to act on grounds that are generally
12 applicable to the class. Again, the answer is yes.
13 The conduct here treated all class members
14 identically.

15 Finally, as explained in detail
16 earlier, notice to the class was adequate and
17 constitutional.

18 Turning now to the fee and expense
19 request. We are seeking an award of 17.5 percent of
20 the settlement amount including fees. That equals
21 \$1,663,684.59 net of fees with reimbursement of
22 litigation expenses of \$86,315.41.

23 The applicable law is well-known and
24 set out in *Sugarland*. The benefit achieved is

1 considered the predominant factor under *Sugarland*, and
2 the \$10 million settlement is a self-pricing "get."

3 Under *Americas Mining* and its progeny,
4 the fee sought is expressed as a percentage of the
5 benefit. And Delaware courts have helpfully bracketed
6 where that award might fall based on the stage of the
7 case.

8 In our case, which settled after
9 plaintiffs engaged in meaningful litigation efforts,
10 the appropriate bracket is 15 to 25 percent. I think
11 our papers made clear that we engaged in meaningful
12 litigation efforts here. We pursued Section 220
13 documents. We filed two complaints. We litigated
14 prediscovery motions, including the motions to
15 dismiss. And we obtained and reviewed a substantial
16 amount of document discovery.

17 That 17.5 percent fee award sought
18 here is, likewise, comparable to the precedence that
19 we identified at pages 38 and 39 of our opening brief.

20 Although the time and effort of
21 counsel is typically considered as a cross-check, I
22 think those figures amply support the award sought.
23 We spent over 2500 hours litigating this action, which
24 works out to an effective hourly rate of about \$665.

1 Likewise, our lodestar multiplier was 0.9X. These
2 metrics certainly don't give the impression of a
3 windfall.

4 And the remaining *Sugarland* factors
5 all weigh in favor of settlement approval. We took
6 this action on an entirely contingent basis and faced
7 real risk of being zeroed out. Indeed, we brought
8 this case initially when the contours of SPAC
9 litigation was still developing.

10 The litigation was also reasonably
11 complex.

12 Concerning the standing and ability of
13 counsel, we'd like to think that our track record of
14 litigating meritorious litigation in this Court speaks
15 for itself. Likewise, our adversaries are fine
16 advocates and known to the Court as well.

17 Finally, I do not believe there is any
18 claim that the credit for the benefit here rests
19 anywhere but with the plaintiffs and their counsel.

20 Accordingly, we respectfully submit,
21 Your Honor, in exercising your discretion as informed
22 by precedent and the *Sugarland* factors, that Your
23 Honor should award the fee requested as fair and
24 reasonable in the circumstances, as well as

1 reimbursement of expenses.

2 Finally, we are requesting court
3 approval to pay an incentive award for the named
4 plaintiff from any fee that the Court may award us in
5 the total amount of \$25,000, or \$5,000 to each named
6 plaintiff.

7 The Court has recognized it is
8 important to incentivize stockholders to serve as
9 engaged representatives. As their affidavits
10 demonstrate, plaintiffs were actively involved in this
11 action, on the part of plaintiff Darcy Lien, by
12 participating in class discovery; and on the part of
13 the other four plaintiffs, by agreeing to intervene.
14 And I think the request here is supported by Your
15 Honor's *Finserve* decision as well.

16 Unless Your Honor has any further
17 questions, that concludes my presentation.

18 THE COURT: I do not. Thank you.
19 Do the defendants have anything to
20 add?

21 ATTORNEY GALLAGHER: No, Your Honor.

22 THE COURT: All right. Thank you.

23 The Plaintiffs here, Darcy Lien, Tony
24 Diao, Michael Ogilvie, Walter Sutherland, and Wesam

1 Taliani, the "Plaintiffs," seek approval of a class
2 action settlement of claims arising out of the merger
3 of Flying Eagle Acquisition Corp., a special purpose
4 acquisition company, or "SPAC," and Skillz, Inc., or
5 "Legacy Skillz," which resulted in Skillz.

6 In exchange for a release of the
7 claims, the settlement consideration is \$10 million in
8 cash. For the benefits conferred by the settlement,
9 the Plaintiffs' counsel seeks an award of attorneys'
10 fees and expenses of \$1.75 million in the aggregate,
11 which represents 17.5 percent of the settlement
12 amount. Plaintiffs' counsel also seek approval of
13 \$5,000 incentive awards to each of the five named
14 Plaintiffs.

15 These Plaintiffs are former common
16 stockholders of Flying Eagle holding Class A common
17 stock. The operative complaint alleges that
18 Defendants Jeff Sagansky, Harry Sloan, and Eli Baker,
19 and Eagle Equity Partners II, LLC, as controllers of
20 Flying Eagle, and Flying Eagle directors Scott Delman,
21 Joshua Kazam, Alan Mnuchin, and Laurence Paul,
22 breached their fiduciary duties in negotiating,
23 recommending, and approving the de-SPAC merger with
24 Legacy Skillz.

1 In addition to their breach of
2 fiduciary duty claims, the Plaintiffs have asserted a
3 fourth count against all of the Defendants for unjust
4 enrichment.

5 The Defendants moved to dismiss the
6 amended complaint, and I denied the motions in late
7 May of last year, after which discovery ensued.

8 The settlement agreement is dated
9 May 19 of this year. And on June 12 of this year, the
10 court entered a scheduling order providing for the
11 settlement hearing today.

12 On August 22nd, the parties filed an
13 amended stipulation of settlement, which updated the
14 definition of the settlement class to include only
15 those successors-in-interest who obtained their shares
16 by operation of law, in line with Vice Chancellor
17 Will's letter decision in *In re TS Innovation*
18 *Acquisitions Sponsor LLC Stockholder Litigation*,
19 2025 WL 1892466, from this court on July 9.

20 No objections to the proposed
21 settlement have been filed, and there is no one here
22 at this hearing today raising any objection.

23 I have four issues to address: class
24 certification; the proposed settlement, including the

1 plan of allocation; the application for an award of
2 attorneys' fees and expenses; and the proposed
3 incentive awards to the named Plaintiffs.

4 The class is generally defined as a
5 non-opt-out class of "all holders of Flying Eagle
6 Class A common stock, whether beneficial or of record
7 as of the closing of the Merger, including
8 successors-in-interest who obtained their shares by
9 operation of law," excluding the Defendants and
10 essentially the immediate family members and
11 affiliates of the Defendants and officers and
12 directors of Flying Eagle, Eagle Equity Partners, or
13 Legacy Skillz, and their agents, affiliates, heirs,
14 successors, and assigns of any such excluded person or
15 entity.

16 The release does not extend to the
17 claims in the case of *Hanna v. Paradise*, which is
18 2024-0228-KSJM, a derivative action pending before the
19 Chancellor.

20 The settlement agreement proposes to
21 certify the Plaintiffs as the class representatives,
22 and Bernstein Litowitz Berger & Grossmann LLP and
23 Robbins LLP as class counsel.

24 Court of Chancery Rule 23(c)(1)

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1 provides that the court certify a class prior to
2 disposition of a class action. To be certified, the
3 class must satisfy the four prerequisites of
4 Rule 23(a): numerosity, commonality, typicality, and
5 adequacy.

6 If the class meets the requirements of
7 section (a), the court must then find that the suit
8 properly fits into one of the 23(b) categories. The
9 court must make explicit findings on the record that
10 these requirements are satisfied, under the Delaware
11 Supreme Court's decision in *Prezant v. De Angelis* from
12 1994.

13 There are several prior decisions of
14 this court certifying a Rule 23(b)(1) and (b)(2) class
15 in the settlement of similar claims under analogous
16 circumstances. See, for example, the final order and
17 judgment in the *TS Innovation Acquisitions Sponsor*
18 case that I referenced earlier, and, with minor
19 differences, the order and final judgment in *Martel v.*
20 *Fusion Sponsor*, 2024-0329-NAC, from this court on
21 July 24. They are all persuasive authority.

22 Numerosity requires that "the class is
23 so numerous that joinder of all members is
24 impracticable." Flying Eagle was publicly traded with

1 69 million Class A shares outstanding at the time of
2 the de-SPAC transaction. Joinder of so many
3 stockholders is impracticable, and numerosity is
4 satisfied.

5 Commonality requires "questions of law
6 or fact common to the class." Here, the claims
7 alleging that the Defendants breached their fiduciary
8 duties in connection with the de-SPAC transaction
9 present common questions of law and fact pertaining to
10 each member of the class. Accordingly, commonality is
11 satisfied.

12 Third, Rule 23(a)(3) requires that
13 "the claims or defenses of the representative parties
14 are typical of the claims or defenses of the class."
15 Here, the Plaintiffs' claims for breach of fiduciary
16 duty arise from the same course of conduct that would
17 underlie the claims of all Class A stockholders
18 related to the de-SPAC transaction, and the defenses
19 against the claims asserted by the Plaintiffs would be
20 typical of the defenses asserted against the class.
21 Thus, the class claims are typical.

22 Fourth, adequacy requires that "the
23 representative parties will fairly and adequately
24 represent the interests of the class." This

1 requirement will be satisfied when the class
2 representative is represented by competent and
3 experienced counsel, and the representative's
4 interests do not conflict with the class's interests.

5 No one has challenged the Plaintiffs'
6 representation of the class or the quality of
7 Plaintiffs' counsel, who have diligently pursued this
8 litigation. The Plaintiffs have held Flying Eagle
9 Class A shares at all relevant times, submitted a
10 presuit Section 220 demand as to Plaintiff Lien, and
11 submitted affidavits satisfying Rule 23(f)(2)(A).
12 Therefore, adequacy, like the rest of the 23(a)
13 requirements, is satisfied.

14 Having satisfied Rule 23(a), the class
15 must now fall within one of the categories indicated
16 under Rule 23(b). The parties asserted that the class
17 should be certified under Rules 23(b)(1) and (b)(2).

18 In my view, this is a quintessential
19 class action, certifiable under both subsections of
20 the rule.

21 As the Delaware Supreme Court observed
22 in *Celera* from 2012, Delaware courts "repeatedly have
23 held that actions challenging the propriety of
24 director conduct in carrying out corporate

1 transactions are properly certifiable under both
2 subdivisions (b)(1) and (b)(2)."

3 Rule 23(b)(1) applies to class actions
4 that are necessary to avoid harms that could arise
5 from inconsistent adjudications of similar claims.
6 Certification under (b)(1) is appropriate here where
7 adjudication of the claims by any one stockholder
8 would, practically speaking, be dispositive of the
9 interests of other stockholders as well.

10 Certification under Rule 23(b)(2) is
11 also appropriate here because the conduct at issue is
12 generally applicable to all the class members.

13 Having found Rules 23(a) and (b)
14 satisfied, the court must also determine that notice
15 of the resolution of the claims was provided to all
16 class members, as required by Rule 23(f)(3) and due
17 process.

18 The finalized notice, found at Exhibit
19 A to the affidavit of Luiggy Segura, complies with the
20 requirements of Rule 23(f)(3). Mr. Segura is the Vice
21 President of Securities Class Actions at JND Legal
22 Administration, the proposed settlement administrator.

23 The court entered a scheduling order
24 on June 12 of this year, which required dissemination

1 of the notice via first-class U.S. mail, except for
2 instances where electronic communication was permitted
3 for the potential settlement class members who had
4 consented to receiving information from Flying Eagle
5 electronically, posting the notice to a website
6 established for the settlement, and publication of the
7 notice in *Investor's Business Daily*, and to be
8 transmitted over the *PR Newswire*.

9 Plaintiffs submitted the Segura
10 affidavit, which attests that on July 3rd of this year
11 JND caused notice to be mailed via first-class U.S.
12 mail to 708 record holders identified by JND and the
13 4,080 addresses in JND's proprietary broker database.

14 JND also caused the notice to be
15 posted on the Depository Trust Company's Legal Notice
16 System on July 2nd. JND avers that through August 25,
17 it received 877 direct requests for notice and mailed
18 those, as well as an additional 4,105 notices to
19 nominees requesting forwarding to their customers.

20 JND further avers that it forwarded
21 the notice by email to 18,237 potential settlement
22 class members. Altogether, JND represents that it has
23 mailed or emailed a total of over 28,000 notices to
24 potential class members. JND also represents that it

1 set up a telephone helpline for class members with
2 questions.

3 As reported by Plaintiffs' counsel and
4 by reviewing the docket, there are no objections to
5 the settlement to date, and there is no one here
6 objecting to the settlement.

7 The court finds that the notice
8 provided complied with the court's scheduling order
9 and was fair and adequate, and satisfies Rule 23 and
10 due process. Therefore, the court will certify the
11 class, lead counsel as class counsel, and the
12 Plaintiffs as representative class Plaintiffs.

13 Next, I turn to the substance of the
14 settlement. This court has a fiduciary duty on behalf
15 of a class "to ensure that the outcome falls within a
16 range of reasonable outcomes that a disinterested
17 decision-maker, acting on behalf of the class and with
18 the benefit of the information available, could
19 accept." That's from *In re AMC Entertainment*
20 *Holdings, Inc. Stockholder Litigation*, 299 A.3d 501,
21 at page 523, from this court in 2023.

22 Court of Chancery Rule 23(f)(5)
23 requires the court to consider whether "(A) the
24 representative party and class counsel have adequately

1 represented the class; (B) adequate notice of the
2 hearing was provided; (C) the proposed dismissal or
3 settlement was negotiated at arm's length; and (D),
4 the relief provided for the class falls within a range
5 of reasonableness"

6 As I have already discussed,
7 Plaintiffs and their counsel have adequately
8 represented the class and provided adequate notice of
9 the settlement. Nothing in the record here suggests
10 that the proposed settlement was the product of
11 anything but arm's length negotiations.

12 To determine whether the settlement
13 falls within a range of reasonableness, the court
14 looks to the facts and circumstances upon which the
15 claims were based, possible defenses thereto, and then
16 exercises its own form of business judgment to
17 determine the overall reasonableness of the
18 settlement. That's from *Polk v. Good*, 507 A.2d 531,
19 at page 536, from our Supreme Court in 1986.

20 Court of Chancery Rule 23(f)(5)(D)
21 captures this requirement, which directs the Court to
22 consider "(i) the strength of the claims; (ii) the
23 costs, risks, and delay of trial and appeal; (iii) the
24 scope of the release; and (iv) any objections to the

1 proposed dismissal or settlement."

2 The Plaintiffs had seemingly strong
3 claims with respect to liability. This was a duty of
4 loyalty case governed by the entire fairness standard
5 in which an alleged conflicted controller and alleged
6 conflicted board conducted a flawed process that
7 resulted in a transaction through which they received
8 nonratable benefits.

9 Although Plaintiffs' disclosure
10 theories were of varying strength, some seemed to
11 support a finding of unfair process and unfair price.
12 The headwinds for the Plaintiffs, of course, came with
13 respect to damages. This court has posited that a
14 measure of damages in similar circumstances might be
15 the difference between the value of the redemption
16 right and the value of the shares received in a
17 de-SPAC transaction. See *In re Lordstown Motors Corp.*
18 *Stockholder Litigation* from 2022.

19 The Plaintiffs proffer a potential
20 measure of damages of approximately \$13.5 million,
21 using a two-trader model. There is not, however, a
22 post-trial decision endorsing either method in SPAC
23 litigation context. And as the Plaintiffs have
24 identified, valuing Skillz would have been difficult

1 and likely to have come down to a battle of experts.

2 The Plaintiffs say that their damages
3 consultant provided a preliminary estimate of downside
4 damages using the two-trader model which resulted in
5 damages of approximately \$13.5 million. The problem
6 that the Plaintiffs appear to have faced is that a
7 significant number of Flying Eagle stockholders who
8 did not redeem their shares sold their stock in the
9 post-merger entity at prices above the redemption
10 price.

11 Now, the \$10 million settlement award
12 would be a 74 percent recovery on a preliminary
13 downside damages theory. But Plaintiffs did not
14 supply an upside estimate, and the court does not
15 quantify the potential higher ranges of damages,
16 although counsel indicated to me that an upside would
17 have been about 55 cents per share. When you multiply
18 that by 69 million shares outstanding, you get
19 something a little bit north of, I think, \$37 million.

20 But it's fair to say that establishing
21 materially higher damages awards would have posed
22 significant challenges for the Plaintiffs.

23 In exchange for the "get," the
24 settlement provides the Defendants with a global

1 release of possible claims that may have arisen. And
2 under the circumstances, the "get" is reasonable in
3 relation to the "give." And I also note the *Hanna*
4 claim I listed has been carved out.

5 I turn now to the plan of allocation,
6 which provides for *pro rata* distribution to all
7 eligible class members. Eligible class members
8 comprise beneficial and record holders of Flying Eagle
9 Class A common stock as of the closing of the merger,
10 and their successors-in-interest by operation of law;
11 excluding redeemed shares, converted Class B shares,
12 and shares held by excluded persons.

13 Each eligible class member will
14 receive the same per-share recovery calculated by
15 dividing the net settlement fund by the total number
16 of eligible shares.

17 I am going to reluctantly approve the
18 proposed plan of allocation. I say "reluctantly"
19 because, as noted in my colloquy with counsel, the
20 trend seems to be in favor of a claims-made process,
21 whereby those eligible class members who sold their
22 post-merger stock at amounts above the redemption
23 price receive less than those who did not sell at
24 amounts above the redemption price.

1 I approved that type of plan of
2 allocation in the *GeneDX* settlement, and some of my
3 colleagues have as well.

4 But I am approving what has been
5 proposed here because there are precedents for it in
6 the settlement of SPAC litigation, including
7 settlements that I previously approved. If I were to
8 reject the proposed plan of allocation in favor of
9 what I consider to be the more modern approach, I
10 would likely need to require new notice to class
11 members and a subsequent hearing.

12 There have been no objections to the
13 proposed *pro rata* distribution, which factors
14 significantly in my decision to approve the plan of
15 allocation. But going forward, I will probably be
16 much less willing to approve a straight *pro rata*
17 allocation of settlement proceeds in SPAC settlements
18 that resemble the facts of this particular case.

19 The court concludes, applying its own
20 business judgment, that the settlement is fair,
21 reasonable, and adequate, and the court will approve
22 it.

23 The proposed final order provides for
24 the court's retention of jurisdiction over this case.

1 I'm going to close this case after the
2 entry of the final order. Of course, the court always
3 has the power to enforce its orders, and the court can
4 reopen the case if necessary. But I don't want it
5 lingering on my docket indefinitely.

6 I turn next to the Plaintiffs'
7 application for award of fees and expenses. The
8 amount of an attorneys' fees award in class and
9 derivative litigation is within the discretion of the
10 court. The court's discretion is guided by the
11 well-known *Sugarland* factors, which are the results
12 achieved, the time and effort of counsel, the relative
13 complexities of the litigation, any contingency
14 factor, and the standing and ability of counsel
15 involved.

16 This court has traditionally placed
17 the greatest weight on the benefit achieved. The
18 court may also consider the stage at which the case
19 settled, which our Supreme Court noted recently in the
20 *Dell* litigation.

21 Here, the Plaintiffs' counsel seeks an
22 award of 17.5 percent of the settlement amount,
23 inclusive of their expenses, of \$86,315.41. I'm sure
24 that the expenses have gone up a little bit since the

1 filing of the affidavit. In dollar terms, the all-in
2 request is for \$1.75 million. No objection to the fee
3 has been lodged.

4 For the result achieved, the benefit
5 of the settlement is easily measurable. And as I've
6 already discussed, the outcome is a good one for this
7 class.

8 As a discretionary cross-check,
9 Plaintiffs' counsel recorded about 2,500 hours from
10 the inception of the action until the execution of the
11 settlement term sheet. And the lodestar amount was
12 about \$1.9 million.

13 Adding the hours that Plaintiffs'
14 counsel recorded between the execution of the term
15 sheet and the filing of the stipulation of the
16 settlement with the court, Plaintiffs' counsel
17 recorded a total of just over 2,600 hours, for a total
18 lodestar of just north of \$2 million.

19 As I have mentioned in past cases, I
20 expect to receive this breakdown from counsel, and I
21 appreciate that counsel did so in their affidavits in
22 this case.

23 The effective hourly rate is about
24 \$665. It's a multiplier of .9X from the pre-term

1 sheet time. They both fall within a range of
2 reasonableness, and are in accord with the range of
3 fees awarded by this court.

4 But, again, I am really driven by the
5 size of the benefit, which is cash on the barrelhead.

6 The claims here fit the mold of the
7 now-standard SPAC suit, although some of the theories
8 asserted in this action remain untested, at least at
9 the time of the filing of the original complaint.

10 SPAC cases are reasonably complex, and not one has
11 gone to trial and judgment thus far. This factor
12 supports the fee request.

13 Counsel litigated the case on an
14 entirely contingent basis. Plaintiffs' counsel are
15 regular practitioners in this court, and they have a
16 strong reputation for achieving outstanding results
17 for their clients over the years.

18 I also consider the stage of the case
19 at which the parties reached a settlement. Here, this
20 would be considered a somewhat early stage of the
21 case. The parties settled before pretrial
22 preparation. They had engaged in meaningful
23 litigation efforts, including litigating a motion to
24 dismiss, being involved in a Section 220 demand, and

1 also engaging in written discovery.

2 Before the settlement, plaintiff Lien
3 obtained about 1,100 pages of documents through the
4 220 demand, prevailed against those motions to dismiss
5 the amended complaint, and had engaged in written
6 discovery. Lien obtained over 23,000 pages of
7 documents from the Defendants and nonparties, obtained
8 responses to interrogatories, and provided written
9 objections and responses to the Defendants' discovery,
10 but does not appear to have formally produced
11 documents to the Defendants in response to discovery
12 requests -- at least that's my take from the record.

13 Recognizing that this action has not
14 proceeded far past the motion to dismiss stage,
15 Plaintiffs' counsel seek 17.5 percent.

16 That percentage is reasonable when
17 measured against recent awards in other SPAC cases.
18 At the higher end we have 22.5 percent plus expenses
19 in *Lordstown*, and then 20 percent in *Multipplan*. Each
20 of them came earlier in the SPAC wave, and they
21 proceeded further than this case.

22 In the middle range, there's
23 18 percent in *Gig2*. And there, the plaintiff began
24 settlement discussions prior to commencing discovery,

1 and engaged in only limited confirmatory discovery.

2 At the low end is the 13 percent in
3 *Gig4*. There, the plaintiff began settlement
4 negotiations prior to substantial discovery, and did
5 not engage in what was called "confirmatory
6 discovery." The case was settled prior to motion
7 practice.

8 Counsel in *Gig4* sought an award equal
9 to 18 percent of the financial benefit, which was the
10 same percentage as in *Gig2*. But recognizing that the
11 *Gig4* case settled without substantial litigation
12 effort by counsel and was filed after *Multiplan*, *Gig3*,
13 and *Gig2* opinions, the court reduced the award to
14 13 percent.

15 This case falls somewhere between *Gig2*
16 and *Gig4*. Considering all of the *Sugarland* factors
17 and the fee awards in similarly situated cases, I
18 conclude that the requested fee of 17.5 percent of the
19 recovery all-in is fair and reasonable under the
20 circumstances. I also note that it is somewhat
21 comparable to the percentage that I awarded in the
22 *FinServ* case, and slightly lower than I awarded in
23 *GeneDX*.

24 Therefore, I will approve the award of

1 \$1,750,000 for Plaintiffs' counsel's fees and expenses
2 in this action.

3 Finally, I turn to the request for
4 plaintiff incentive awards for each of the five
5 Plaintiffs and class representatives.

6 Counsel seeks approval of an incentive
7 award of \$5,000 for each of the five Plaintiffs to be
8 paid out of the award of the attorneys' fees that I
9 have approved. I note that the notice stated that
10 Plaintiffs may seek an incentive award up to this
11 amount in compliance with the updated Court of
12 Chancery rules.

13 Rule 23 prohibits a representative
14 plaintiff in a class action from receiving "any form
15 of compensation" unless expressly approved by the
16 court, or where payment is made by counsel to
17 reimburse the plaintiff for actual and reasonable
18 out-of-pocket expenses incurred in prosecuting the
19 action.

20 These plaintiff incentive awards
21 function as risk-based compensation that work to
22 motivate the named Plaintiffs to work collaboratively
23 and efficiently with counsel and to pursue meritorious
24 suits. See *Chen v. Howard Anderson* from 2017 in this

1 court.

2 "The decision of whether to grant an
3 incentive award to a named plaintiff in a class action
4 following conclusion of the litigation is within the
5 court's discretion." That's *Chen* at *3.

6 Incentive awards may be warranted
7 where the named Plaintiffs have incurred a significant
8 amount of time and effort, provided meaningful
9 expertise, or generated significant benefits for the
10 class. That's also from the *Chen* opinion.

11 I decline to approve the full request
12 in this case.

13 Rule 23(aa)(2) requires meaningful
14 contributions by the plaintiff. Here, plaintiff Lien
15 stepped forward at the outset, obtained books and
16 records in response to a Section 220 demand, which
17 allowed the Plaintiffs to survive the motions to
18 dismiss.

19 The other four Plaintiffs, by
20 contrast, joined after written discovery was nearly
21 completed after the unsuccessful mediation session,
22 and only shortly before the settlement was reached.
23 They were added primarily to support the challenges to
24 Lien's adequacy as a class representative. They do

1 not appear to have made a personal significant
2 investment or involvement in this case.

3 On this record, I find it appropriate
4 under the circumstances to approve an incentive award
5 of \$5,000 for Lien, to be paid out of counsel's fee,
6 but I am not persuaded that the four late-joining
7 Plaintiffs incurred significant time and effort to
8 warrant an incentive fee.

9 Counsel, that is my ruling. I'm happy
10 to answer any questions about my ruling; otherwise, I
11 will enter the final order when I get back to my
12 office.

13 Are there any questions?

14 ATTORNEY OBERSTE: Your Honor, would
15 you like a copy of the --

16 THE COURT: That would be great. We
17 can upload it, and we can have it entered today.

18 Is there anything else we can do for
19 the good of the order?

20 ATTORNEY GALLAGHER: Not from us, Your
21 Honor. Thank you very much for your time.

22 ATTORNEY OBERSTE: No, Your Honor.

23 THE COURT: All right. Thank you,
24 counsel.

1 With that, the court stands in recess.

2 Have a good afternoon.

3 (Court in recess at 2:25 p.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 48 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 25 through 47, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington this 10th day of September, 2025.

/s/ Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter

CHANCERY COURT REPORTERS
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Tab 23

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE VERSUM MATERIALS, INC. : CONSOLIDATED
STOCKHOLDER LITIGATION : C.A. No. 2019-0206-JTL

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, July 16, 2020
9:16 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

ORAL ARGUMENT and RULINGS OF THE COURT HELD VIA ZOOM
ON PLAINTIFFS' PETITION FOR AWARD OF ATTORNEYS' FEES
AND EXPENSES

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
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1 THE COURT: Good morning, everyone.
2 Welcome. I see a lot of people on the screen. Who is
3 going to be speaking today for plaintiffs?

4 MR. HANRAHAN: I will, Your Honor.
5 It's Mike Hanrahan.

6 THE COURT: All right. Great,
7 Mr. Hanrahan. You look well-poised there at the
8 podium.

9 And how about for the defendants?

10 MR. WALDMAN: Good morning, Your
11 Honor --

12 MR. STOTTMANN: Good morning, Your
13 Honor. Mr. Waldman will be speaking today.

14 THE COURT: All right. Great. Thank
15 you very much. That's helpful.

16 Mr. Hanrahan, why don't you go ahead.

17 MR. HANRAHAN: Thank you, Your Honor.
18 Good morning. This is the hearing on plaintiffs'
19 application for an award of attorneys' fees and
20 expenses. Plaintiffs' claims challenging a
21 stock-for-stock merger between Versum and Entegris
22 with a value of about \$41 per share, and then Versum's
23 use of a poison pill rights plan to deter a competing
24 \$48 per share all-cash offer from Merck, were mooted

1 by defendants.

2 First, Versum removed the
3 acting-in-concert provision of the rights plan.
4 Second, in exchange for plaintiffs' foregoing
5 expedited depositions and withdrawing their motion for
6 a preliminary injunction, Versum terminated the rights
7 plan. Third, Versum engaged with Merck, which raised
8 its offer from \$48 to \$53. And ultimately, Versum
9 terminated the Entegris merger and entered into and
10 consummated a \$53 per share merger with Merck. Thus
11 plaintiffs achieved the full relief they sought:
12 Versum's elimination of the preclusive rights plan and
13 acceptance of a higher offer from Merck.

14 Plaintiffs satisfy the three
15 established elements for a mootness fee. Their claims
16 were meritorious when filed, defendants took action
17 producing a corporate benefit while the litigation was
18 pending, and finally, there was a causal connection
19 between the benefits and the litigation.

20 Defendants first assert that
21 plaintiffs' claims were not meritorious. And then
22 their next argument they attempt to frame as a lack of
23 corporate benefit, but they actually concede there
24 were corporate benefits. Defendants cannot deny that

1 the AIC provision was removed from the rights plan,
2 nor can they disown the March 31, 2019, stipulation
3 with plaintiffs providing for withdrawal of the
4 preliminary injunction motion if the rights plan was
5 terminated.

6 Versum terminated the rights plan,
7 which would have precluded a deal with Merck had it
8 remained in place. There also can be no dispute that
9 Versum ultimately ended the Entegris merger agreement
10 and effected a \$53 merger with Merck. So it is a
11 mathematical and financial fact that as a result of
12 the elimination of what Merck called the "egregious
13 AIC provision," the termination of the rights plan --
14 which defendants, their expert, and Merck admit would
15 have precluded Merck's acquisition of Versum -- and
16 the substitution of the \$53 Merck merger for the
17 Entegris merger with a value in the low 40s, as a
18 result of those, the Versum stockholders received
19 nearly \$1.2 billion in additional merger
20 consideration.

21 So there really is no issue as to
22 whether there were corporate benefits. Defendants'
23 real argument is that the litigation did not cause
24 those benefits. They have just attempted to disguise

1 their causation argument as a no-benefit argument in
2 an unsuccessful effort to avoid the presumption of
3 causation.

4 In the end, the issue here is shared
5 credit as to the success of the \$53 Merck merger. The
6 litigation's causation of the removal of the AIC and
7 termination of the rights plan is clear. The
8 questions are how much of the approximately
9 \$1.2 billion benefit from the Merck merger should be
10 attributed to the litigation, and what percentage of
11 that attributable benefit the Court should award as
12 fees and expenses. Even attributing around 10 percent
13 of the total benefit to the litigation, and even
14 awarding only about 10 percent of that attributable
15 benefit as a fee, the fee request of \$12 million is
16 reasonable.

17 Let me turn first to the
18 meritoriousness of the claims. First off, defendants
19 rely on materials outside the complaints. That
20 amounts to a forfeit on the issue of whether
21 plaintiffs' claims were meritorious when filed. The
22 meritorious claims element of the mootness fee test,
23 as defendants acknowledge, is based on a motion to
24 dismiss standard. So when you start relying on things

1 outside of the complaint, you've now departed from the
2 standard.

3 The Court cannot consider matters
4 outside the complaint, nor, in these circumstances,
5 can the Court convert the matter into a summary
6 judgment proceeding, because that would require
7 discovery into the underlying claims. And it would
8 defeat the whole purpose of having a motion to dismiss
9 standard govern a mootness fee, because the Court is
10 trying to avoid turning the procedure on a fee
11 application into a mini-trial on the merits of the
12 mooted claims.

13 Now, if the Court disregards the Werth
14 declaration, the 56-page Subramanian report, and all
15 these other materials that are outside the complaint,
16 defendants really have no argument that the claims
17 were not meritorious when filed. Moreover, defendants
18 also rely on events after the complaints were filed,
19 such as Merck's subsequent actions. That's
20 inconsistent with the standard that the Court must
21 evaluate the merits of the complaint when filed, not
22 in light of subsequent events. So we think that
23 defendants' meritoriousness argument fails at the
24 outset because they basically have not complied with

1 the standard that governs the determination of the
2 merit of the claims.

3 Now, if the Court is going to consider
4 the meritoriousness issue despite the fact that
5 defendants have lobbed in matters outside the
6 complaint, it's a very difficult standard to meet in
7 this context. Defendants admit that their use of the
8 AIC and the poison pill is subject to enhanced
9 scrutiny under *Unocal*. *Unocal* holds that the board
10 has the burden of showing both reasonable grounds for
11 believing there was a threat to corporate policy and
12 that the defense was reasonable in relation to that
13 threat. As the *Carmody* case recognized, enhanced
14 scrutiny is inherently fact-driven and requires a
15 factual record. Therefore, that test is rarely
16 satisfied on a motion to dismiss unless the complaint
17 attacking the pill is wholly conclusory.

18 Plaintiffs' complaints were not
19 conclusory. The cases defendants rely on, such as
20 *Unocal*, *Unitrin*, *Third Point*, *Yucaipa*, and *Selectica*,
21 all involve factual records, many of them preliminary
22 injunction records. But nonetheless, these decisions
23 that sustain the use of a pill, they were in a context
24 where the Court was relying on a factual record.

1 That can't be done here. And in part
2 it can't be done because defendants folded up their
3 tent while expedited discovery was going on. And so
4 there never was a sort of merits hearing. But that's
5 because they granted, actually, more relief than we
6 could have gotten if we had won the preliminary
7 injunction motion.

8 A case like *Gaylord*, they cite the
9 summary judgment opinion, but they don't discuss the
10 opinion in *Gaylord* and the opinion in other cases,
11 like *Ebix*, where the Court denied motions to dismiss
12 claims challenging a poison pill. So by submitting a
13 purported factual record, defendants have conceded
14 that they cannot satisfy their burden of showing that
15 the allegations of the complaint did not state a claim
16 when filed.

17 With respect to the AIC claim, the
18 initial complaint filed by Plumbers and Steamfitters
19 alleged that the causal provisions of the AIC, the
20 Versum rights plan, would inhibit stockholders from
21 sharing information, consulting with each other, or
22 expressing views on Merck's offer and the Entegris
23 merger. That's at paragraphs 4 to 6 and 31 to 38.
24 Based on the terms of the AIC that the complaint

1 alleged, the rights plan impermissibly interfered with
2 voting rights and was unreasonable in relation to any
3 potential threat.

4 Now, defendants' response to the
5 meritoriousness of the AIC claim was to ignore the
6 allegations of the complaint and to lob in the
7 Subramanian report, which cannot be considered because
8 it's outside the complaint. Moreover, some Harvard
9 professor's speculation about why some companies adopt
10 AIC provisions is no evidence of what the Versum board
11 was thinking, if anything, when the AIC was placed
12 into the rights plan.

13 Indeed, if the Court considers the
14 minutes and other documents outside the complaint,
15 those documents, as we indicate in our brief, would
16 show that it's not clear that the board considered the
17 AIC at all, much less focused on a specific threat
18 that it concluded justified the AIC. Defendants also
19 rely on the Werth declaration, which, too, is outside
20 the complaint and purports to reflect what Merck, not
21 the Versum board, was thinking.

22 Defendants' other argument on the AIC
23 claim is that the definition of "Beneficial Ownership"
24 in the rights plan provides that the AIC does not

1 apply to tender offers and proxy contests. As our
2 briefs show, the plain language of the definitions of
3 "Acting in Concert" and "Beneficial Ownership"
4 establish that defendants' interpretation is wrong.
5 But even if defendants' construction was reasonable, a
6 motion to dismiss would be denied because the
7 provisions demonstrate that plaintiffs' construction,
8 at the very least, is a reasonable alternative
9 reading.

10 The rights plan claim also had merit
11 when filed. Defendants' attack on the rights plan
12 suffers from the same defects as their argument
13 against the AIC claim. They rely on matters outside
14 the operative complaint, and they rely on speculation
15 from Subramanian about what he says is modern practice
16 regarding rights plans.

17 Defendants do not address the detailed
18 allegations of the operative complaint that was filed
19 by Providence. For example, they ignore the multiple
20 allegations concerning the interplay of stacking the
21 poison pill on top of the numerous defensive
22 provisions of the merger agreement. Defendants also
23 do not respond to plaintiffs' allegations that even
24 after rejection of the Entegris merger, the rights

1 plan would preclude Merck from acquiring Versum.

2 The facts are those that are alleged
3 in the complaint. In the circumstances here, it's not
4 just a matter of a rights plan adopted on a clear day.
5 It's a right plan adopted in specific response to
6 Merck's offer in the context of a merger agreement
7 with numerous defensive and protective provisions and
8 a pending stock-for-stock merger. And the complaint
9 certainly makes out a claim for the pill not being --
10 being a breach of fiduciary duty, as applied in this
11 circumstance.

12 The Providence complaint alleges
13 specific facts demonstrating that the all-cash,
14 all-shares Merck offer at a price that was above
15 Lazard's fairness range posed no legitimate threat,
16 and certainly did not make a preclusive pill
17 reasonable. While offering weak evidence that comes
18 from Harvard and from Germany, defendants do not offer
19 any direct evidence from the Versum directors
20 themselves regarding the threat they perceived that
21 they claim justified their adoption and maintenance of
22 the pill, despite the numerous protective provisions
23 already in the Entegris merger agreement.

24 Evidence extrinsic to the complaint

1 should not be considered at all. But if such evidence
2 was permissible, what would be relevant is evidence
3 from the Versum directors. Not a report from an
4 expert or a declaration from some Merck official, when
5 both of them lacked any firsthand knowledge of what
6 threat, if any, the Versum board perceived and what
7 analysis, if any, the board performed of the
8 reasonableness of adding a preclusive pill to the
9 already formidable defenses for the Entegris merger.

10 Let me turn to causation. Defendants
11 have not attempted to overcome the presumption that
12 the litigation caused the Versum board to remove the
13 AIC and the rights plan. There are no affidavits from
14 any of the directors, and no minutes or other
15 documents showing that the board's action in removing
16 the AIC and later terminating the rights plan were
17 unrelated to the litigation. The presumption is that
18 causation exists precisely because defendants possess
19 the evidence of what motivated their actions. Their
20 failure to produce evidence amounts to a default that
21 concedes causation.

22 The causal connection between the
23 litigation and the removal of the AIC is shown by
24 several factors. First, defendants do not even

1 attempt to show the AIC was removed for a reason
2 independent of the litigation.

3 Second, the timing of the AIC removal,
4 just a few days after the filing of the litigation
5 challenging the AIC and just hours after the Court
6 agreed to schedule a preliminary injunction hearing,
7 establishes a causal connection.

8 Third, Versum's privilege log shows
9 consideration of the rights plan "in anticipation of
10 litigation" in the days between the filing of the
11 litigation and the removal of the AIC. So the only
12 evidence there is about what was being considered
13 shows that the litigation was a factor during that
14 time period.

15 Defendants also cannot show a lack of
16 causal connection between the elimination of the
17 rights plan and the litigation. First, defendants,
18 again, have produced no director affidavits or minutes
19 or other evidence that the rights plan was terminated
20 for some independent reason. Defendants cannot rebut
21 the presumption when they failed to provide rebuttal
22 evidence from the board itself.

23 Second, defendants agreed that removal
24 of the poison pill would be in consideration of

1 plaintiffs' withdrawal of expedited depositions and
2 their preliminary injunction motion. The negotiation
3 and execution of the March 31, 2019, stipulation is
4 conclusive evidence of causation. In fact, defendants
5 admitted in an 8-K that they were resolving
6 plaintiffs' injunction motion by terminating the
7 rights plan.

8 Third, contemporaneous documents, such
9 as the agenda for the March 22, 2019, board meeting
10 and Versum's privilege log, reflect that there was
11 consideration of the litigation in connection with the
12 rights plan during the second half of May, just before
13 the rights plan was terminated.

14 Now, defendants' purported evidence of
15 lack of causation is irrelevant, and it's weak.
16 Instead of offering evidence from the Versum directors
17 concerning what caused them to remove the AIC and
18 later abandon the entire rights plan, defendants offer
19 the 56-page Subramanian report and the 16-page
20 declaration from Mr. Werth of Merck. A professor's
21 theory on what M&A practitioners think and Merck's
22 story of what it supposedly was thinking are no
23 evidence whatsoever of why the Versum board took out
24 the AIC and ended the rights plan.

1 With respect to Subramanian, Delaware
2 law on causation is not based on the efficient capital
3 markets hypothesis. That may have use in other
4 contexts, but that's not the standard here. And the
5 issue is what caused the board to act, not what a
6 professor says his theory is about market reaction.

7 Merck's tender offer was conditioned
8 on elimination of the poison pill. Merck,
9 Subramanian, and cases the defendants cite like
10 *Gaylord*, all recognize that Merck could not close an
11 acquisition of Versum while the rights plan was in
12 effect.

13 Defendants claim that the rights plan
14 was irrelevant to Merck and the success of its offer.
15 That's refuted by Merck's contemporaneous words and
16 actions attacking the rights plan. It's refuted by
17 the fact that they conditioned their tender offer on
18 the elimination of the rights plan. Merck thought the
19 rights plan was highly relevant in March 2019, when it
20 issued various proxy materials attacking the poison
21 pill as an entrenchment tool that would preclude its
22 purchase of stock from Versum stockholders and prevent
23 any deal but the Entegris merger. That's what Merck
24 said at the time.

1 Now they come in with this declaration
2 and try to tell a different story more than a year
3 later. Merck even admitted that litigation was an
4 effective means of pressuring the Versum board to
5 pursue Merck's offer. So the different story that
6 Merck tells now has zero credibility, because the
7 Court ought to look at what they said at the time.

8 Over 30 years of Delaware law
9 establishes that revision and removal of defensive
10 measures is a corporate benefit. Defendants' argument
11 that removal of the AIC and rights plan were not
12 corporate benefits is contrary to decades of Delaware
13 law. From *Roizen* in the 1980s to *Chalfin* in the 1990s
14 through *Boilermakers* this past decade, this Court has
15 repeatedly held that defendants cannot withdraw a
16 challenged action in the face of litigation and then
17 claim the withdrawal was not a benefit.

18 Chancellor Brown rejected that long
19 ago in *Roizen*. Vice Chancellor Jacobs, in *Chalfin*,
20 and Chief Justice Strine in *Boilermakers*, all
21 recognized, as the Chief Justice put it, you can't
22 "punk out" and then say, oh, well, getting rid of the
23 transaction that was challenged isn't a benefit.
24 Delaware law recognizes that it is. And, again,

1 decades of Delaware law establish that when you cause
2 the revision or removal of defensive measures, that's
3 a benefit that warrants an award of attorneys' fees.

4 Back in the 1980s, in the *Edelman v.*
5 *Phillips* settlement, the major benefit was revision to
6 the rights plan, which was then a -- you know, the
7 rights plan was a fairly recent phenomenon. And I
8 remember that settlement because in the negotiations,
9 Ted Mirvis taught me a lot about rights plans, back
10 when we were both young lawyers. That's how far back
11 it goes, to where changing a rights plan -- and there,
12 it wasn't removed, but it was revised -- is a benefit
13 that justifies an award of attorneys' fees.

14 And through the years, there have been
15 modification of other defensive devices, whether it's
16 topping fees or no-shops or whatever; and more
17 recently, *Compellent*, which found the removal of a
18 rights plan was a substantial benefit even when there
19 was no actual competing bid and no such bid ever
20 emerged.

21 Finally, let me turn to why the
22 \$12 million fee request is reasonable under the
23 circumstances here. There is a quantifiable benefit.
24 The Merck merger represented approximately

1 \$1.2 billion in increased merger consideration over
2 the Entegris merger. That benefit is far easier to
3 quantify than in *Compellent*, where there wasn't an
4 actual offer. The Court had to try to determine,
5 well, what are the odds an offer will emerge, and if
6 it did, what would the offer look like.

7 Here, those facts are known. The
8 amount of the fee, really, turns on how much of the
9 \$1.2 billion financial benefit can be attributed to
10 the litigation and what percentage of the benefit
11 attributable to the litigation should be awarded as
12 attorneys' fees. And I know the Court frequently gets
13 lawyers coming in and they would claim a huge credit
14 and they would seek a high percentage fee. We've
15 taken a very conservative approach here. Essentially,
16 if you take 10 percent of the benefit and attribute it
17 to the litigation, approximately 120 million, and then
18 if you awarded a 10 percent fee from that, that gives
19 you a \$12 million fee.

20 We could certainly make arguments
21 about why our causation was greater than 10 percent
22 and why the fee should be greater than 10 percent, but
23 we're also, Your Honor, trying to limit ourselves to
24 what we regard as a reasonable fee. And we think

1 that's our obligation. You don't go ask for, you
2 know, the maximum you think you can get.

3 But we've already taken into account
4 things like -- with joint causation, we recognize it's
5 hard to precisely quantify what percentage to
6 attribute to the litigation. We recognize that this
7 is -- was an early-stage case. Although it wasn't a
8 case where we just filed the complaint and didn't do
9 anything and then had a settlement or something, and
10 we said, oh, well, give us -- these old monitoring
11 cases, where people would file a bunch of complaints,
12 there would be a competing bidder, a higher deal would
13 be announced, and they said, oh, well, see, we should
14 get a fee. That's not this case. While the
15 litigation was only active for about a month, we were
16 very busy in that time pursuing expedited proceedings.

17 And I think another factor that's
18 extremely important is look at the relief we got. We
19 achieved a complete victory that actually probably
20 went beyond what we could have gotten if we won a
21 preliminary injunction, which would just temporarily
22 restrain the transaction from going forward. It
23 wouldn't necessarily compel the removal of the rights
24 plan, wouldn't necessarily compel a pursuit of a deal

1 with Merck. But we got those things.

2 The rights plan was completely
3 eliminated. And as Your Honor commented in
4 *Compellent*, that doesn't happen very often. That's a
5 considerable victory. And we didn't agree to dismiss
6 our case, like the defendants asked. We said, "No.
7 We'll withdraw the motion for a preliminary
8 injunction, but we're keeping our claims. There's no
9 release here, and we're going to see what you do."
10 And what they did was, eventually, they did the \$53
11 deal with Merck.

12 So I think, in considering what the
13 fee award ought to be, the Court ought to consider the
14 degree of success that was achieved. Even if it was
15 achieved quickly, you know, it involved substantial
16 effort. We recognize it's an early-stage resolution,
17 but it's a very favorable resolution.

18 And now, the connection to Merck's
19 offer. Elimination of the rights plan was a
20 prerequisite for Merck's offer to succeed. The
21 stipulation and other evidence confirm that the
22 litigation was the cause of the removal of the AIC and
23 poison pill, which would have precluded the closing of
24 Merck's offer. So the litigation had some causal role

1 in the success of the higher Merck offer that provided
2 the stockholders with substantially more
3 consideration.

4 We presented the Beach report, which
5 supports attributing at least 10 percent of the total
6 increased merger consideration to the litigation.
7 Now, we did not submit the Beach report in support of
8 whether our claims were meritorious or whether the
9 elimination of the AIC and poison pill were legally
10 cognizable benefits. Those are Delaware law issues
11 for the Court.

12 And what we got in response was the
13 Subramanian report, which, first, offers opinions on
14 the merits of plaintiffs' claims and on causation,
15 mostly citing Professor Subramanian's own Law Review
16 articles and his Casebook. But these are Delaware law
17 issues for the Court. And it doesn't matter how many
18 schools at Harvard you have degrees from or teach in;
19 you cannot give a Delaware judge opinions on Delaware
20 law. And Subramanian repeatedly does that.

21 Now, Your Honor, we've discussed in
22 some detail -- and particularly in the Beach reply
23 report -- why Mr. Subramanian's opinions are not
24 valid, stray into subjects that are legal issues, into

1 subjects where he has no firsthand knowledge. And I
2 can go through those if the Court would like, but I
3 think we've covered them adequately, though I do want
4 to raise it because I suspect my friends may have
5 something to say about it on their answering argument,
6 and I'll respond.

7 So, Your Honor, ultimately, we think
8 that, based on Mr. Beach's analysis, based on
9 *Compellent*, and then based on the other case law,
10 including *Sugarland*, where the Court used 20 percent
11 and 5 percent of the benefit for two phases -- you
12 know, the initial offer and then the ultimate hire
13 offer. In *NCS*, the Court used 15 percent and 5
14 percent. In *GFI*, the Court used 20 percent. And so
15 based on these precedents, we think they also support
16 a fee of at least 10 percent of the approximately
17 \$120 million benefit attributable to the litigation.

18 And I had mentioned earlier the
19 monitoring cases. The fees there were sometimes 1.25
20 percent to 1.5 percent of the total increase in merger
21 consideration. Well, that's actually a little more
22 than the equivalent of attributing 10 percent of the
23 benefit to the litigation and then awarding 10 percent
24 of that attributable benefit as a fee.

1 And those are cases where people just
2 were monitoring and where, often, the bidder was doing
3 the heavy lifting, in terms of the litigation. Here,
4 we were the ones who did the litigation, the only ones
5 who did it. And so I think those cases, as well,
6 would support the fee we asked for here.

7 Finally, benefit conferred, not hours,
8 is a primary determinant of the amount of the fee. We
9 did -- it's not a case where we just filed the
10 complaint and then settled it. Instead, we got -- and
11 we didn't settle for modest relief. We didn't settle
12 at all. We didn't give a release. But we got all the
13 relief you could possibly hope for, and we did it
14 quickly and efficiently. And so while we could ask
15 for more, we think that what we've asked for is
16 reasonable, and it certainly is a lot more reasonable
17 than defendants' position, who come in and say the
18 Court should award no fee at all.

19 So we think that the \$12 million fee
20 request is reasonable, and we would ask the Court to
21 grant it in full. Thank you, Your Honor.

22 THE COURT: Thank you very much. I
23 appreciate it.

24 Mr. Waldman, would you like to

1 proceed?

2 MR. WALDMAN: Yes. Thank you very
3 much, Your Honor.

4 There's been a lot of ink dedicated to
5 this issue -- briefs, affidavits, and expert
6 reports -- as well as the argument by counsel this
7 morning. I want to start with a quick observation
8 that the fundamental difference between the parties is
9 pretty simple. Plaintiffs -- the defendants believe
10 plaintiffs did not cause the board to take any action
11 that benefited the corporation, whether that benefit
12 is defined as increasing the likelihood of the
13 original Merck Darmstadt, Germany, bid or the
14 difference between that \$48 bid and the \$53 ultimate
15 offer.

16 Fundamentally, this is because Merck
17 made its initial bid a full week before any litigation
18 was filed. Plaintiffs almost completely ignore this
19 critical point. And the fact is, they cannot claim
20 any causal benefit for Merck Germany showing up as a
21 bidder.

22 Instead, defendants believe, at most,
23 plaintiffs had some influence over the timing of when
24 the AIC provision was removed and when the pill was

1 ultimately withdrawn, actions that were going to
2 happen regardless of whether or not plaintiffs filed
3 or pursued this litigation, and actions that had no
4 impact on the bidding dynamics. I'll go into a little
5 more detail on that in a minute, but before I do that,
6 I want to address one more point head on, which we saw
7 in both the reply brief and in argument by counsel
8 before.

9 Plaintiffs fault the defendants for
10 purportedly not offering reasons for the deletion of
11 the AIC and, in their words, ignoring the stipulation
12 where plaintiffs agreed to withdraw the preliminary
13 injunction motion when defendants terminated the
14 rights plan. The answers to both of those are readily
15 apparent in the record.

16 Defendants deleted the AIC because the
17 facts developed in such a way as to make that
18 provision irrelevant. By March 14, the situation had
19 become clear. This was a battle between Entegris and
20 Merck Germany. There was no wolf pack emerging. As
21 Your Honor noted during the scheduling conference that
22 day, expedited proceedings impose substantial burdens
23 on the Court and the parties, and there was no need to
24 go through all of that litigation over a provision

1 that was no longer relevant. This was now a fight
2 between Entegris and Merck, and Merck only.

3 Likewise, on April 2, Versum filed an
4 8-K stating that the board removed the pill to, quote,
5 "avoid the expense and distraction of litigating the
6 motion and to instead focus" on the transaction.
7 That's Exhibit 31 to plaintiffs' opening brief, and
8 Versum is not walking away from it now.

9 As I will discuss momentarily, the
10 pill had already worked to give the board additional
11 leverage and flexibility to maximize value for the
12 shareholders. In other words, the pill had its
13 intended effect. It caused Merck to deal with the
14 board and helped get it to raise its \$48 offer to \$53.

15 Defendants do not dispute, as
16 plaintiffs suggest, that the litigation was a factor
17 in defendants' decision on when to amend the pill.
18 But defendants do dispute that there was any benefit
19 from the litigation in this connection with either
20 Merck's bids or the price ultimately received by the
21 shareholders.

22 With those fundamental disputes in
23 mind, the issue we believe that is before the Court is
24 whether the plaintiffs' counsel is entitled to a fee

1 award where the record shows that they did not obtain
2 any benefit for the Versum stockholders. The answer
3 is no, for a couple of reasons. Versum's board acted
4 appropriately throughout the process. After Merck
5 Germany sought to jump Versum's merger of equals with
6 Entegris, Versum's -- excuse me, the board adopted
7 proportional defensive measures to maintain control of
8 the process and extract the best deal available from
9 either suitor for the company's stockholders.

10 To be clear, the pill was put in for
11 business reasons, the pill was pulled for business
12 reasons. Plaintiffs' lawsuit was a distraction that
13 the company did not need to fight. Yes, Versum
14 modified its pill at the time that it modified it in
15 order to get rid of plaintiffs' litigation. But that
16 alone is not a benefit to the stockholders. The pill
17 would have been modified with or without the
18 litigation.

19 As shown in contemporaneous documents,
20 Mr. Werth's affidavit, and Professor Subramanian's
21 report, this lawsuit had no impact on the outcome of
22 the sales process or the price ultimately received by
23 stockholders. Plaintiffs' counsel are not entitled,
24 on those facts, to a large reward at a rate of nearly

1 \$11,000 per hour simply for inserting themselves into
2 that process. That is not the policy that the
3 corporate benefit doctrine was developed to advance.

4 If, Your Honor, the Court nonetheless
5 finds that there has been a benefit and is inclined to
6 award a fee, where, as here, any benefit achieved
7 through litigation is not clear or quantifiable,
8 quantum meruit is the appropriate measure. Plaintiffs
9 concede that, using their own rates, that would lead
10 to a quantum meruit award of about \$680,000.

11 I'll just go into a little bit more
12 detail on the couple of stages of the sales process
13 and defendants' view that plaintiffs' fee petition
14 fails at each step of that process.

15 First, Merck Germany offered a cash
16 buyout at \$48 per share on February 27, 2019, more
17 than a week before the lawsuit was filed. At that
18 time, Merck Germany's management was authorized to bid
19 up to \$50 per share. This offer was driven entirely
20 by Merck Germany. Plaintiffs' counsel had nothing to
21 do with it, and they are not entitled to any award
22 based on it. Nonetheless, more than 50 percent of the
23 plaintiffs' fee demand is based on this posted
24 increase from Entegris's merger of equals price --

1 today said to be about \$41 -- to the \$48 share price.
2 That amount should come off the top.

3 In addition, following Merck Germany's
4 initial offer and adoption of the pill, Versum's stock
5 traded consistently above \$48. The market recognized
6 that a higher bid was likely, with or without the
7 pill. The public analyst reports and Lazard's private
8 analysis for Versum's board all said the same thing:
9 An offer in the low to mid 50s was going to be
10 necessary to complete the transaction; again, with or
11 without an AIC, with or without any type of pill.

12 Second, the record shows that the AIC
13 provision had no impact on Merck Germany's conduct and
14 did not prevent any communication with Versum
15 stockholders. Accordingly, removing the AIC provision
16 had no impact and provided no benefit to the
17 stockholders. Merck Germany is a large,
18 multi-national strategic buyer. It was not acting in
19 concert with anyone. So the AIC provision was simply
20 irrelevant to the bidding dynamics.

21 On March 1, Merck Germany reported
22 internally that the pill would not change its plans.
23 That's evidenced by a presentation that Merck
24 Germany's internal team delivered to its management.

1 In that declaration, Merck Germany told its management
2 that the pill does not preclude any of our currently
3 contemplated actions or mutually agreed deal.
4 However, it can be used for counter-messaging in the
5 media.

6 On March 12, Merck filed a proxy
7 statement -- Merck Germany filed a proxy statement
8 with the SEC communicating directly with Versum
9 shareholders. On March 14, before the removal of the
10 AIC provision had been publicly announced, Merck
11 Germany held a roadshow presentation for Versum
12 shareholders which was then filed publicly with the
13 SEC.

14 In addition, no one reacted to
15 Versum's announcement that the AIC provision had been
16 removed. Analysts ignored it, trading volumes weren't
17 changed, and the stock price barely moved. And
18 Mr. Werth's affidavit merely confirms the obvious
19 point, that Merck Germany did not care about the AIC
20 provision. Retaining or deleting the AIC provision
21 was meaningless to Merck Germany and its plans.
22 Versum's decision to modify the pill had no impact at
23 all on Merck Germany's bidding strategy and therefore
24 provided no benefit to the stockholders.

1 Plaintiffs contend that Versum pulled
2 the AIC language because of their litigation,
3 establishing causation sufficient for them to earn a
4 fee. But the early removal of the AIC provision and
5 the rights plan played no causal role in Merck's
6 successful \$53 per share offer. It is true that
7 Versum pulled the AIC in part to avoid litigation over
8 it. But only because it did not matter. Merck
9 Germany was not a wolf pack, and the concerns that had
10 been expressed by Lazard in late February, prior to
11 any litigation, over unusual trading had subsided.

12 Turning now to the redemption of the
13 pill entirely, as opposed to the modifications of the
14 AIC, neither Versum's decision to redeem the pill
15 entirely nor plaintiffs' counsel's efforts were
16 responsible in any way for Merck Germany's decision to
17 increase its bid from \$48 to \$53. Once the AIC
18 provision was removed, the pill was plain vanilla,
19 with a relatively high trigger point of 12.5 percent.
20 But everyone in the market knew it would never be
21 triggered. That's what the analyst reports show,
22 that's what the stock price shows, that's what Merck
23 Germany's internal analyses show, and that's the basic
24 point of Professor Subramanian's analysis. Merck

1 Germany and Entegris were in a bidding contest for
2 Versum, and the bidder that offered the most economic
3 value would succeed, regardless of the pill or when
4 the pill was redeemed.

5 On March 26, Merck Germany launched a
6 public tender offer at \$48 per share. Under SEC
7 rules, Merck Germany could not purchase any shares
8 outside of that tender offer. Accordingly, as of
9 March 26, there was no risk of a creeping takeover
10 from Merck Germany. At that point, the pill had done
11 its job, and Versum's board could proceed with an
12 informal, and then a formal, discussion with Merck
13 Germany about an increased offer.

14 Rather than spend time on the
15 litigation, meeting with lawyers, and getting deposed,
16 Versum's board decided to redeem the pill and focus on
17 the sales process. That is what Versum told the
18 market in its April press release was the reason it
19 was redeeming the pill.

20 Merck Germany ultimately decided to
21 increase its offer to \$53 per share, and Entegris
22 declined to match it. As confirmed by Mr. Werth, the
23 litigation played no role in that bid. Indeed, Merck
24 Germany's supervisory board had not even been informed

1 about the pill or the litigation.

2 Finally, Your Honor, turning to the
3 calculation of any fee, in its initial papers,
4 plaintiffs sought to have the Court look to *Compellent*
5 as the most relevant authority. We believe, rather
6 than *Compellent*, the most relevant authority here is
7 *Dunkin' Donuts*. Whatever impact plaintiffs' counsel
8 may have had is too speculative, uncertain, and
9 unquantifiable to justify a large fee award.
10 Plaintiffs' counsel set their own hourly rates, though
11 they concede that using them, as I said before, would
12 lead to a quantum meruit award of about \$680,000. As
13 in *Dunkin' Donuts*, that is the maximum that plaintiffs
14 should receive here.

15 Indeed, even *Compellent* suggests a far
16 lower award than plaintiffs' counsel requested. In
17 *Compellent*, the plaintiffs' counsel challenged more
18 defensive measures, conducted more discovery
19 proceedings, including, in that case, depositions,
20 spent close to twice as many hours on the case, and
21 were awarded fees at a rate of about \$1,000 per hour.
22 That's in contrast to here, where plaintiffs' counsel
23 is seeking an award at a rate of approximately \$11,000
24 per hour.

1 For those reasons, Your Honor, we
2 believe the fee petition should be denied. Thank you.

3 THE COURT: Why do you think 12.5
4 percent is a relatively low pill trigger? I'm sorry.
5 Relatively high pill trigger was your claim.

6 MR. WALDMAN: Yeah. Yes, Your Honor.
7 It's a high pill trigger because no one, including
8 Merck, had anywhere near that amount of stock, and
9 there was no effort by Merck -- and certainly by no
10 one else -- to even try to accumulate that kind of
11 number.

12 THE COURT: All right. Thank you.

13 MR. WALDMAN: Thank you, Your Honor.

14 THE COURT: Mr. Hanrahan, would you
15 like to reply?

16 MR. HANRAHAN: Yes, please, Your
17 Honor.

18 Mr. Waldman's presentation never
19 answered the question of why are there no director
20 affidavits, minutes, or other evidence establishing
21 why the board removed the AIC, why it eliminated the
22 rights plan. You get all this "defendants believe
23 this, defendants" -- essentially, that's Mr. Waldman
24 testifying. But those aren't facts. That's not

1 evidence. There's no evidence from the board. The
2 consent removing the AIC doesn't give any reason.

3 On causation, it's their burden. They
4 control the evidence. What did they do? They don't
5 present anything from the directors. You have only a
6 consent with respect to the removal of the AIC. With
7 respect to the termination of the rights plan, they
8 never produced any minutes after about early March.

9 So there's a description of March 22
10 and March 26 board meetings in the proxy. It doesn't
11 mention anything about the rights plan. And they
12 don't produce the minutes. They don't produce any
13 director affidavits. So they have failed. They have
14 the burden of producing evidence showing a complete
15 lack of a causal connection. They haven't offered any
16 evidence of an independent -- we may have
17 Mr. Waldman's arguments, we may have Professor
18 Subramanian's speculation about what M&A practitioners
19 do, blah, blah, blah, but where is the evidence?

20 They say that the Merck \$48 offer was
21 before the lawsuit. But remember, the Merck \$48 offer
22 was rejected. The benefit here, the causal benefit,
23 is the removal of defensive measures that would have
24 dimmed the prospect for success of that offer.

1 Everybody concedes, Merck's \$48 offer could not have
2 closed if the poison pill remained in place.

3 They say they deleted the AIC because,
4 oh, it developed there was no wolf pack. Well,
5 where's the record on that? There's no board minutes.
6 The consent doesn't say that. And, in fact, there's
7 no discussion of a wolf pack. There never was any
8 wolf pack. And there's no discussion, in these
9 minutes when the rights plan was adopted, there's no
10 discussion of the AIC at all.

11 In fact, as we pointed out, the --
12 there's a version of the AIC late on February 27th --
13 I mean, a version of the rights plan. It doesn't have
14 the AIC in it. It's not even clear when that got put
15 in, whether the board ever saw it. But one thing's
16 clear. They do have minutes from those meetings, and
17 there's no reference to the AIC in those minutes.

18 So, you know, you cannot meet your
19 burden of proving absolute lack of causal connection
20 when you don't produce any evidence, when the evidence
21 that there is, including their privilege log and the
22 timing of it, shows that there was a causal
23 connection. And, indeed, it's the only cause that's
24 established by the record.

1 They say, oh, well, it was just too --
2 we terminated the rights plan to avoid expense and so
3 we could focus on the transaction. The transaction
4 they were focused on was the Entegris merger.
5 Mr. Waldman seems to forget that when they announced
6 the removal of the rights plan, the Versum board also
7 reconfirmed support for the Entegris merger and
8 reconfirmed its recommendation that the stockholders
9 reject the Merck offer.

10 So, you know, again, we get into this
11 issue of, oh, they take positions now, but when you
12 look at what they said at the time, it's not
13 consistent. Merck has a lot to say about, oh, the
14 pill wouldn't -- Mr. Waldman said, oh, Merck believed
15 the pill wouldn't preclude their offer. That's not
16 what they said at the time. They conditioned their
17 tender offer on removal of the pill. They said to the
18 stockholders in proxy materials, "This poison pill is
19 an entrenchment device which will preclude you from
20 receiving our offer."

21 You can't go back and rewrite history.
22 The contemporaneous documents show what happened. And
23 they haven't even bothered to put in affidavits from
24 the directors to try to rewrite the story. They're

1 trying to have Professor Subramanian -- he may be a
2 brilliant guy, but he can't rewrite history. And
3 Merck can't rewrite history, particularly when you
4 point to words and actions by Merck itself at the time
5 that are inconsistent with the story it now tells.

6 Mr. Waldman kept saying that they
7 modified the rights plan. They didn't modify it, they
8 terminated it. It wasn't like -- they modified it
9 when they took out the AIC provision, but then they
10 ultimately took the whole thing out. And what you end
11 up with is that, you know, there's all this talk
12 about, oh, everyone knew this, and what the market
13 knew and what the analysts said and what Merck
14 thought. Where is the board?

15 The issue is what caused the board to
16 act. The people in the best position to give evidence
17 on that are the directors themselves. And they're
18 entirely absent. In fact, there's one declaration
19 from a board member, and what's really interesting
20 about it is it doesn't give any information on why the
21 AIC was removed, why the rights plan was terminated.
22 So I think that's a conspicuous omission.

23 And as we point out, when you produce
24 weak evidence from a Harvard professor, a Merck

1 official who has no firsthand knowledge, when strong
2 evidence should be available in the form of statements
3 from the directors themselves and minutes and
4 contemporaneous documents, the Court can only conclude
5 that the strong evidence would not support defendants'
6 position. And therefore, we think the Court ought to
7 ignore that. There is a quantifiable benefit.

8 And, you know, *Dunkin' Donuts*, there
9 was no specific achievement in *Dunkin' Donuts*. Here,
10 specific things happened that the lawsuit sought. The
11 AIC was eliminated. The rights plan was eliminated.
12 And ultimately, Versum considered and accepted the
13 higher offer from Merck. That was the goal of the
14 litigation, and we accomplished all those goals.
15 That's a far cry from being sort of on the sidelines
16 and just vaguely there was litigation out there. No.
17 We litigated specific issues and we won those issues.
18 So we think the fee we request is well supported as a
19 modest percentage of a modest attributable benefit.

20 Thank you, Your Honor.

21 THE COURT: Can you speak a little bit
22 more to the implied hourly rate. I think it's one of
23 those issues where someone perhaps not versed in our
24 benefit law would look at it and think it was an

1 eyebrow-raising number that should be taken more into
2 account.

3 MR. HANRAHAN: Certainly, Your Honor.
4 And, of course, we've had hourly rates, as in *Southern*
5 *Peru*, as high as \$35,000 an hour. And the reason for
6 that is because, again, this goes back all the way to
7 *Sugarland*. The primary factor is benefit conferred,
8 and the Court sometimes uses hours as a cross check.
9 But frequently the Court says, look, here's a massive
10 benefit.

11 And what we've done, by basically
12 saying attribute 10 percent of the benefit to the
13 litigation and award a 10 percent fee, we've already
14 taken into account that there were a limited number of
15 hours spent. But Your Honor in *Olson*, and this Court
16 in other cases, has observed that you don't penalize
17 people because they achieve success early on.

18 And what's very important is this is
19 not some marginal success. This is complete success
20 in eliminating the AIC, eliminating the rights plan,
21 and getting additional consideration for the
22 stockholders. And we think that ought to be the
23 primary focus. And we believe, by not asking for
24 20 percent of the benefit, not asking for a 15 or

1 20 percent fee, we think we've already accounted for
2 the fact that the Court can look at it and say, yes,
3 this would be a high hourly rate. On the other hand,
4 the success was great.

5 And so we're entitled to a reasonable
6 portion of that benefit and shouldn't be -- you know,
7 Mr. Waldman says, oh, well, they had \$600,000 worth of
8 time in it. Yeah, well, I don't know how much time
9 the defendants had, and I bet it was more than that.
10 And they were guaranteed of getting paid. We took on
11 what is a very tough case. As the Court observed in
12 *Compellent*, it doesn't happen very often. Pill cases
13 don't usually succeed. And we succeeded. We have
14 hard evidence, in terms of the stipulation, that we
15 did have a causative effect. And we think that we
16 should be awarded an appropriate fee.

17 We didn't ask -- you know, we could
18 have come in asking for 25 million or 50 million, or
19 whatever. But we took into account the situation,
20 including the limited number of hours. So we think,
21 in light of the overall factors, with benefit
22 conferred being the primary factor, that the
23 \$12 million is reasonable here, regardless of the fact
24 that it may seem like a high hourly rate.

1 Let's keep in mind also that, you
2 know, Versum didn't mind paying its investment bankers
3 huge fees. As we point out in our reply brief, it was
4 okay then. They didn't say, oh, Citibank came in late
5 and really didn't -- you know, went to a few meetings
6 and really didn't do much. They thought that their
7 input was so valuable they paid them a huge fee for
8 very little work.

9 And, you know, Citibank was brought in
10 to try to fend off Merck. They didn't succeed in
11 that. We did succeed. And now they say, ah, you
12 should just get your hourly rate. We don't think
13 that's a reasonable result here, Your Honor.

14 Thank you.

15 THE COURT: One of the other things
16 that I've mentioned before, and still think, is that,
17 as you point out, the 1.25 percent or 1.75 percent
18 numbers that were being given out in these monitoring
19 award cases were probably a little high, I guess is a
20 fair way to put it, a generous way to put it.

21 When you're ending up in the same
22 ballpark -- and I recognize that you end up at about 1
23 percent, as opposed to 1.25 to 1.75 -- but why isn't
24 that some indication that your ask is towards the

1 higher end of what you really ought to be getting on
2 this?

3 MR. HANRAHAN: Because this was not a
4 monitoring case, Your Honor. These older cases --
5 and, you know, I was practicing back then, and things
6 worked a little differently and people filed a whole
7 bunch of cases. And oftentimes, if there was
8 litigation, it was really the bidder who was -- and
9 there was no specific accomplishment that this
10 litigation -- the lawyers who litigated the case could
11 point to. Nothing specific happened that was related
12 to the litigation. It was kind of, well, we were here
13 monitoring, and then the deal price got raised, and
14 therefore, we should get a fee.

15 And for doing that, Your Honor, I'd
16 agree that 1.25 percent, 1.5 percent, is high. But
17 that's not our case. We were the only ones to
18 challenge the pill, and we achieved specific results
19 attributable to the litigation -- elimination of the
20 AIC, termination of the rights plan, and ultimately,
21 the higher offer occurs.

22 In the earlier cases, those first two
23 steps are missing. They didn't get any kind of relief
24 related to the litigation. It was just that it

1 happened at the end that there was a higher price.
2 They didn't eliminate an obstacle that would have
3 precluded the higher price. We did. And that's why
4 we think, you know, our ask is really not so great in
5 relation to what happened in this particular case.
6 And we, frankly, refer to those earlier cases to say,
7 you know, maybe it was a little high. Maybe it should
8 have been 1 percent. Maybe it should have been less
9 than 1 percent. But it certainly indicates that, for
10 what we accomplished here, 1 percent is a reasonable
11 result in terms of a fee.

12 THE COURT: All right. Thank you very
13 much.

14 Let's go ahead and take a little break
15 until 10:30. I'll ask Mr. Houchens to put everyone
16 back in the waiting room, and then we'll resume then.

17 (A recess was taken, 10:21 to 10:30 a.m.)

18 THE COURT: All right. Welcome back,
19 everyone. Thank you very much.

20 I was trying to decide whether I
21 should take this matter under advisement or go ahead
22 and give you a ruling now, but I think, in the
23 interests of efficiency, I am going to go ahead and
24 give you a ruling now.

1 This litigation challenged the
2 deployment and maintenance of a stockholder rights
3 plan adopted by Versum Materials, Inc. to protect its
4 stock-for-stock merger with Entegris, Inc. from an
5 all-cash topping bid by Merck KGaA. The rights plan
6 included an acting-in-concert provision where the
7 rights plan could be triggered by stockholders
8 discussing the Merck offer, exchanging information
9 regarding the Merck offer, holding a meeting
10 concerning the Merck offer, or taking other minimal
11 steps that are customary in contested transactions.

12 After one of the plaintiffs filed a
13 complaint challenging the acting-in-concert provision,
14 the Versum board removed it. The plaintiffs moved
15 forward towards a preliminary injunction hearing, with
16 depositions set to begin. The parties negotiated a
17 stipulation on March 31 in which the plaintiffs agreed
18 to withdraw their application if Versum withdrew the
19 rights plan. Two days later, on April 2, Versum
20 withdrew the rights plan.

21 For these benefits, plaintiffs seek an
22 award of \$12 million in fees and expenses. They cite
23 the withdrawal of the acting-in-concert provision and
24 the complete elimination of the rights plan. Merck

1 ultimately acquired Versum, and the merger has closed.

2 The defendants now argue that no fee
3 should be awarded whatsoever. To the extent a fee is
4 awarded, they claim that the total amount of the fee
5 should be the base lodestar without any type of
6 multiplier or any consideration for a risk premium.
7 That would be a fee of around \$680,000, which is
8 roughly in the same ballpark for what might be
9 obtained for significant supplemental disclosures.

10 The posture of this case is thus
11 reminiscent of *Solomon v. Take Two Software*, where
12 Vice Chancellor Lamb took into account that the
13 defendants had taken aggressive positions on whether
14 any fee was due and also had taken an unreasonable
15 position on the amount. As in that case, I'm
16 confronted with a situation where I think, all things
17 considered, the plaintiffs' ask is probably a little
18 high. I think it's at the upper end of reasonable.
19 They have justified it, but it's the type of situation
20 where, had I had help from the defendants in terms of
21 engaging on matters responsibly, then I might well
22 have reached a different determination. But as it is,
23 I am going to award the full amount of the request.

24 The factual background, in summary, is

1 as follows: On January 27, 2019, Versum and Entegris
2 entered into a merger agreement. It provided for
3 Versum's stockholders to receive 1.12 shares of
4 Entegris's common stock for each share of Versum that
5 they owned. The transaction was billed as a "merger
6 of equals," and Versum's stockholders would own 47.5
7 percent of the combined company. The merger implied a
8 value for Versum of approximately \$35.08 per share
9 based on Entegris's closing price of \$31.12 per share
10 on January 25. The implied deal price thus reflected
11 a 10.8 percent premium to Versum's closing price on
12 that same day.

13 At the time of the deal, Versum and
14 Entegris estimated that the merger would result in
15 approximately \$75 million in cost synergies, and they
16 announced that figure at the time of the merger.
17 After the announcement of the deal, including those
18 synergies estimates, Versum's stock price closed at
19 \$36.67 per share.

20 The defendants argue that the
21 combination had much greater long-term value. To the
22 extent that one wants to strongly embrace the
23 efficient capital markets hypothesis, as the
24 defendants seemed to do at various points during their

1 briefing, that price of \$36.67 per share was the
2 market's estimate of the long-term value of the deal
3 as discounted by its likelihood of completion.

4 I've reviewed the Entegris merger
5 agreement. It contained a relatively standard package
6 of deal-protection provisions. There was a no-shop
7 with a superior-proposal out. There was a
8 no-change-of-recommendation provision that was subject
9 to both the superior-proposal out and an
10 intervening-event out. Nothing jumped out at me as
11 exceptional in terms of the deal protection measures
12 in the agreement, and the plaintiffs haven't really
13 cited anything.

14 Now, approximately one month later, on
15 February 27, 2019, Merck announced and delivered a
16 fully financed, all-cash acquisition proposal to
17 acquire Versum for \$48 per share. Based on Entegris's
18 closing price the prior day, the merger consideration
19 at that point was worth \$42.26 per share. The very
20 next day, the board adopted a rights plan with a 12.5
21 percent ownership trigger.

22 As I may come back to later, I don't
23 endorse the view that the trigger is measured based on
24 existing levels of stock ownership in the market, as

1 counsel suggested today. The trigger is designed to
2 cap maximum ownership at a level that's believed to be
3 able to influence a possible control outcome.

4 The original pills focused on
5 20 percent as the trigger. That generally crept
6 down to a market standard of 15 percent. That's also
7 reflected in Section 203 of the Delaware General
8 Corporation Law. It's only with the recent spate of
9 NOL pills that people really have gone far below that,
10 and they've tied that to the 5 percent ownership
11 limitation that's related to NOLs. 12.5 percent,
12 thus, wasn't a relatively high threshold. If
13 anything, it was on the lower side. I wouldn't say it
14 was extremely low, but it was not by any means
15 relatively high.

16 More importantly, when measuring
17 ownership, the rights plan's definition of "Acquiring
18 Person" used the concept of acting in concert. It
19 started with the basic definition of "Beneficial
20 Ownership" under Rule 13d-3, and it included in that
21 definition anyone who had the right to acquire or vote
22 securities pursuant to an agreement, arrangement or
23 understanding. That aspect of the pill is quite
24 customary.

1 But it then added the concept of
2 "Acting in Concert," and that definition is truly
3 expansive and worth quoting in full. So a person
4 could have beneficial ownership attributed to them if
5 they were acting in concert with another person,
6 defined as follows: "if such Person knowingly acts
7 (whether or not pursuant to an express agreement,
8 arrangement or understanding, whether oral or in
9 writing) in concert with such other Person in, or
10 towards a common goal relating to, changing or
11 influencing the control of the Company or" -- so
12 disjunctive -- "in connection with or" -- again
13 disjunctive -- "as a participant in any transaction
14 having that purpose or effect, in parallel with such
15 other Person"

16 I'm going to pause there. That's the
17 baseline concept. You don't have to have any type of
18 agreement, arrangement, or understanding of any type,
19 oral or in writing. All you have to do is simply
20 knowingly act. And we know from the *Hexion* case that
21 knowing action simply means to take an action
22 knowingly, as opposed to inadvertently. Instead of
23 bumping into someone, you're actually knowing that
24 you're going to, for example, a meeting. That's all

1 you have to do.

2 And then you have to also -- and I'm
3 going to continue the definition now -- "where at
4 least one additional factor supports a determination
5 by the Board of Directors that such Person intended to
6 act in concert or in parallel with the other Person,
7 which such additional factors may include exchanging
8 information, attending meetings, conducting
9 discussions or making or soliciting invitations to act
10 in concert or in parallel."

11 So again, you have to knowingly do
12 something, which simply means you have to not
13 inadvertently do it, and then you have to do one other
14 thing, which can simply be going to a meeting or
15 exchanging information or conducting discussions. In
16 other words, the types of things that invariably
17 happen in a proxy solicitation, in a vote-no campaign,
18 in a roadshow. And I'll come back to this.

19 Finally, the provision states that "A
20 Person who or which is Acting in Concert with another
21 Person shall also be deemed to be Acting in Concert
22 with any third person who is also Acting in Concert
23 with such other Person."

24 That is a daisy-chain provision, where

1 any one person who went to a meeting with someone else
2 in connection with an effort to affect control could
3 be treated as acting in concert with another person.
4 And if that person who also attended the meeting then
5 went and had a separate meeting with a third person,
6 all of them could be added up for purposes of
7 beneficial ownership. So what this all means is that
8 anyone acting in parallel, for purposes of this
9 definition, with Merck could have had their shares
10 aggregated for purposes of the ownership threshold, as
11 long as there was only one of these minimal factors
12 present -- again, exchanging information, attending
13 meetings, conducting discussions, or making or
14 soliciting information.

15 The definition of the "Acquiring
16 Person" had the traditional exception for making a
17 revocable tender or giving a revocable proxy. Those
18 have been customary since *Moran*. The original *Moran*
19 pill didn't have one for an irrevocable proxy, and it
20 was mooted out.

21 What the action-in-concert provision
22 attempts to cut off, or at least threaten, is all of
23 the activities that lead up to the giving of the
24 revocable proxy or the making of the revocable tender.

1 So it nominally preserves the end product, the
2 revocable tender or giving of the revocable proxy, but
3 it interdicts all of the preliminary steps that lead
4 to the customary rendering of that proxy or the making
5 of the tender.

6 The definition excluded Entegris and
7 the Entegris merger and also the company. It was thus
8 asymmetrical. The incumbents could solicit freely in
9 favor of their chosen transaction, but anyone else,
10 including Merck -- and I'm going to come back to this
11 later, but including Merck -- faced risk that, simply
12 by virtue of attending meetings with stockholders in
13 connection with their offer, that anyone attending
14 those meetings, or daisy-chained with other people
15 attending those meetings, could be treated as an
16 acquiring person.

17 On the same day that Versum adopted
18 this rights plan, February 28, 2019, Entegris filed a
19 registration statement on Form S-4 that included a
20 preliminary proxy statement. And it was a joint
21 preliminary proxy statement, so I guess it's fair to
22 say that it was both Entegris and Versum. That
23 document contained Lazard's analyses of the value of
24 the merger using synergies of \$75 million. To

1 shorthand it, they supported the superiority of the
2 Merck offer or, at a minimum, that it was reasonably
3 likely that the Merck offer would lead to a superior
4 proposal. But on March 1, 2019, the Versum board
5 rejected the Merck offer, declined to treat it as a
6 superior proposal, and reaffirmed Versum's commitment
7 to the merger of equals.

8 Versum then hired a second financial
9 advisor, Citigroup Global Markets. Citigroup ran
10 analyses on newly increased cost synergies of
11 \$125 million, as well as new revenue synergies of
12 \$100 million. Those synergies could well have been
13 legitimate. Their discovery is also legitimately
14 questionable, given their timing relative to Merck's
15 offer.

16 Not only that, but the midpoint of
17 Citi's pro forma discounted cash flow analysis
18 remained right around \$47.85. Thus even with these
19 newly found synergies, it wasn't clear -- again, to
20 put it neutrally -- that the Merck offer wasn't one
21 that could reasonably lead to a superior proposal.
22 But on March 8, 2019, Versum reaffirmed its commitment
23 to the merger of equals and Versum and Entegris
24 announced another \$50 million in projected synergies.

1 That same day, Plumbers and
2 Steamfitters Local 60 Pension Trust filed its
3 complaint and moved to expedite. The parties agreed
4 to expedition, but on March 13, 2019, I held a
5 telephone conference because I wanted to make sure
6 that, depending on how this contest transpired, that I
7 would have time to write, if necessary, and the
8 parties would also have time to seek review. After
9 that conference, the board acted by written consent to
10 remove the acting-in-concert provision.

11 The next day, March 14, a second suit
12 was filed by the City of Providence. The focus of
13 that complaint was on the retention of the rights plan
14 in the face of Merck's offer and the Versum board's
15 ongoing refusal to engage with Merck. The cases were
16 consolidated, and the parties moved forward towards a
17 hearing on a preliminary injunction.

18 On March 22, Merck issued a proxy
19 statement and began soliciting proxies against the
20 Entegris merger. On March 25, Merck supported its
21 proxy solicitation with a tender offer at \$48 per
22 share. That tender offer was conditioned on -- and
23 again, this is customary -- the redemption,
24 invalidation, or inapplicability of the rights plan.

1 Why is that done? Because the rights plan effectively
2 prevents the tender offer from closing unless it's
3 redeemed or eliminated.

4 Around March 26, Versum's counsel
5 asked plaintiffs' counsel to reschedule certain
6 depositions so that Versum's board could consider its
7 options. On March 28, Versum determined that the \$48
8 Merck offer could lead to a superior proposal and,
9 therefore, began discussions.

10 On March 31, the plaintiffs entered
11 into a stipulation agreeing that the preliminary
12 injunction motion would be withdrawn if the rights
13 plan was withdrawn. And shortly after the market
14 closed on April 2, Versum announced that it had
15 terminated the rights plan, triggering the stipulation
16 and mooted the plaintiffs' injunction motion.

17 A bidding contest, somewhat limited,
18 then ensued. On April 6, Merck increased its offer to
19 \$53 in cash. On April 7, Entegris increased its offer
20 to 1.236 shares of Entegris stock plus \$5 in cash.
21 This increased consideration was worth approximately
22 \$51.82 at then-current market prices.

23 On April 7, 2019, the Versum board
24 determined that the \$53 in cash was the superior

1 proposal. On April 12, they terminated the Entegris
2 merger agreement and entered into a merger agreement
3 with Merck at that \$53 per share price. Versum's
4 stockholders approved the merger on June 17 and it
5 closed on October 7. It's against that factual
6 background that the plaintiffs are here seeking a
7 mootness fee.

8 Under the *United Vanguard v. TakeCare*
9 case from the Delaware Supreme Court, a plaintiff is
10 entitled to a mootness fee if three conditions are
11 met. First, the suit was meritorious when filed.
12 Second, the action producing the corporate benefit was
13 taken by the defendants before judicial resolution was
14 achieved. And, third, the resulting corporate benefit
15 was causally related to the lawsuit.

16 First, in terms of whether the
17 plaintiffs' claims were meritorious when filed, here,
18 they undoubtedly were. A claim is meritorious when
19 filed if it would survive a motion to dismiss. That's
20 from the *Allied Artists* case from 1980. One can also
21 consider the defendants' actions in response to the
22 claims when evaluating its strength, and that's from
23 the *TakeCare* decision, although at the Chancery level.

24 The challenge to the rights plan in

1 general, and the action-in-concert provision in
2 particular, would be reviewed under enhanced scrutiny
3 under *Unocal*. The challenge to the action-in-concert
4 provision was relatively strong.

5 The first prong of *Unocal* is whether
6 the board was responding in good faith to a threat.
7 It is certainly possible, as the good Professor
8 Subramanian notes, that an action-in-concert provision
9 in a rights plan can be used to limit creeping
10 takeovers and potential wolf pack activity by hedge
11 funds. But Professor Subramanian doesn't cite any
12 evidence of that in this case.

13 The plaintiffs' expert, Mr. Beach,
14 says he sees no evidence of that. That's in his
15 rebuttal affidavit. The record on the existence of
16 wolf pack activity, at least as provided to me, is
17 quite skimpy. There's, at most, an oblique reference
18 to it in some minutes.

19 But assuming that, nevertheless, there
20 was a valid threat to which the board could respond in
21 good faith after reasonable investigations, the second
22 prong of *Unocal* is proportionality. And here, we have
23 an expansive provision that goes beyond traditional
24 concepts of beneficial ownership to include, as I've

1 already discussed, any type of parallel action in the
2 context of a control contest, regardless of the
3 existence of any type of arrangement, agreement, or
4 understanding, and with the indicative events being,
5 really, customary activities, such as exchanging
6 information, attending meetings, or conducting
7 discussions.

8 Again, to use an example the
9 plaintiffs used, if Merck talked to Boston Partners at
10 one meeting and then Merck talked to Iridian at
11 another meeting and then Iridian talked to State Farm
12 at a third meeting, all four of them could be deemed
13 to be acting in concert. If Merck met or had
14 discussions with Vanguard and then Merck subsequently
15 met with Black Rock, all three of them could be deemed
16 to be acting in concert.

17 Merck seems to have been oblivious to
18 this fact. But what this provision did was to put at
19 risk their roadshows, their solicitation calls, their
20 meetings with stockholders. The provision, as I've
21 also noted, was asymmetric in that the incumbents and
22 their deal were not similarly constrained.

23 The more general suit against the
24 rights plan was also meritorious when filed. At that

1 point, it was reasonably conceivable, to use the
2 standard on a motion to dismiss, that the Versum board
3 could be using the rights plan to block a
4 higher-valued cash deal and protect its merger of
5 equals. Supporting evidence at that time included the
6 board's persistent refusal to engage with Merck, its
7 failure to determine that the Merck bid was reasonably
8 likely to lead to a superior proposal, despite ample
9 indications of that, the adoption of a rights plan
10 with a 12.5 percent trigger, and the locating of new
11 synergies. And I would also say, as to this, it's not
12 just the 12.5 percent trigger, but it's the original
13 adoption of an aggressive plan that includes the
14 acting-in-concert provision.

15 None of this means that the board was
16 necessarily breaching its fiduciary duties. It's, as
17 in most of these cases, ambiguous conduct. But all of
18 this conduct supports a reasonably conceivable
19 inference that the board was seeking to protect the
20 lower-valued merger-of-equals transaction against the
21 higher-valued Merck offer and, therefore, would
22 support a claim on which relief can be granted.

23 In that regard, it is certainly true,
24 as Professor Subramanian notes, that a rights plan can

1 be used positively. It's a tool, like anything else.
2 It can be used well or it can be used poorly. Even
3 though he only mentions this in passing, Professor
4 Subramanian does premise his entire report on the
5 assumption of loyal fiduciaries. He notes that in a
6 parenthetical on perhaps the second page of his
7 analysis.

8 *Unocal* is intended to suss out when
9 fiduciaries aren't being loyal or when fiduciaries who
10 subjectively believe themselves to be acting loyally
11 are, in fact, given the circumstances they face, not
12 acting loyally. Here, there were litigable questions
13 about whether the Versum board could maintain the
14 rights plan in the face of Merck's tender offer.

15 It's thus quite clear, at least to me,
16 that the complaints were meritorious when filed. To
17 return to the observation I made at the outset about
18 reasonable positions in terms of opposition, this is
19 one where it's disappointing to me that the defendants
20 chose to fight on that front.

21 Now let's move to TakeCare's second
22 element, which is whether the defendants took mooted
23 action without judicial resolution. Clearly they did.
24 The defendants removed the acting-in-concert provision

1 after Plumbers filed its complaint and after the
2 scheduling conference on March 13, 2019. Two weeks
3 later, the defendants addressed the rights plan, after
4 entering into the stipulation and to avoid the April
5 17 injunction hearing. There hadn't been a judicial
6 ruling on either of those things. Both of those
7 things were the subject matter of the litigation.
8 Both were rendered moot by the defendants' action.

9 Those are the first two elements of
10 the *TakeCare* analysis. The third element, causation,
11 is also, in my view, easily met. Under *TakeCare*, the
12 plaintiffs are entitled to a presumption that there
13 was a causal connection between the lawsuit and the
14 benefits that resulted from mooted their claims. The
15 defendants only removed the acting-in-concert
16 provision after Plumbers filed its complaint. It
17 really appears to be the sole cause. There is no
18 evidence to the contrary from any defense witness,
19 really, with personal knowledge about some other
20 reason that could have been cited. The same is true
21 for the rights plan.

22 Those, in turn, have a causal linkage
23 to the success of the Merck offer. Here, I think the
24 plaintiffs cast it entirely correctly. They weren't

1 the sole cause. They're not claiming to be the sole
2 cause of success of the Merck offer. But they were a
3 contributing cause. This is straight out of *TakeCare*.
4 The litigation was a causal factor in the eventual
5 final agreement, and that agreement was higher than it
6 would have been in the case where there had been no
7 lawsuit.

8 Here we have a basic situation where
9 Merck's offer could not proceed in the face of the
10 rights plan. There are three ways to get rid of a
11 rights plan so that your offer can proceed. One is
12 negotiation, but that means the other side has to
13 agree. If the other side is not willing to agree,
14 then you have two options. One is litigation. The
15 other is a full-blown vote-no campaign followed by a
16 hostile proxy solicitation to replace the board at the
17 next annual meeting. As long as the rights plan was
18 in place, if the incumbents wanted to stick with their
19 MOE or stand-alone, the only other options were
20 litigation or a hostile proxy contest.

21 Let's start first with the
22 action-in-concert provision. That necessarily had
23 some limiting effect on Merck's ability to pursue its
24 offer, to solicit against the merger of equals, and,

1 had they eventually been willing to take the step --
2 and there's evidence in the record that they
3 weren't -- to pursue a hostile proxy contest.

4 Mr. Roman Werth claims that Merck did
5 not pay any attention to the action-in-concert
6 provision. In paragraph 19 of his affidavit, he says,
7 "The existence, nuances, and details of the poison
8 pill were of no consequence to [Merck]."

9 In paragraph 28, he saw the pill as
10 "of no relevance." That is said with admirable
11 directness and certainty. But his subjective intent
12 or lack of appreciation for the implications of the
13 action-in-concert provision is not dispositive.

14 Taking his affidavit as true, Merck
15 well could have blundered into a situation where
16 Versum could wield the action-in-concert provision
17 against various combinations of stockholders or as a
18 trigger eventually for the flipover. The fact that
19 they didn't appreciate that doesn't mean it wasn't an
20 impediment. It means they could have blundered into
21 it.

22 And again, he doesn't seem to have
23 understood this. He seems to have viewed the rights
24 plan as simply a plain-vanilla pill. And to that

1 effect, Merck went forward with having investor
2 meetings, meeting with significant Versum investors on
3 a roadshow and giving presentations. These were
4 precisely the kind of conduct that, had the
5 action-in-concert provision remained in place, Versum
6 could have cited to invoke its effects against the
7 Versum investors who were thereby deemed to be acting
8 in concert, and the Merck offer or a Merck
9 transaction.

10 It's also important to remember that
11 Merck isn't the only party making decisions in the
12 face of the action-in-concert provision. Even if
13 Merck didn't appreciate the implications of this broad
14 definition and thought it was just dealing with a
15 plain-vanilla pill, institutional investors could well
16 have been affected by it. An institutional investor
17 could well have not wanted to risk an
18 action-in-concert determination and, therefore, have
19 declined to meet or declined to otherwise engage in a
20 manner that they would have been willing to do had the
21 action-in-concert provision not been present.

22 That also takes care of this idea that
23 just because Merck is a strategic bidder, it's not
24 acting in concert with anyone. It is acting in

1 concert. It's acting in concert within the broad
2 definition of this term because Merck is trying to get
3 its deal done. And to get its deal done, it is
4 holding meetings, it is engaging in discussions, it is
5 providing information, it is going on roadshows. And
6 those are things that the action-in-concert provision
7 makes problematic because of the risk of a pill
8 trigger.

9 So, yes, it is true that Merck itself
10 is not a hedge fund acting as a wolf pack. But the
11 deployment of this pill with that provision in it had
12 effects, or would have had effects on folks focused on
13 it, that were problematic. If anything, it shows the
14 misfit between the pill and the situation. And it
15 would have strengthened the challenge on the merits to
16 the action-in-concert provision.

17 I also don't find credible this
18 factual argument that the board pulled the
19 action-in-concert provision because no wolf pack had
20 emerged. The point of these things is prophylactic.
21 They're deterrents. You're putting these things in
22 place so as to avoid the emergence of a wolf pack and
23 to signal that you are on guard against them. To the
24 extent that concern was valid on pill adoption, it

1 remained valid at the time of pill redemption.

2 It seems to me that the
3 action-in-concert provision and its redemption
4 necessarily had some effect on the likelihood of
5 success of the Merck offer. The same is true for the
6 rights plan itself. As I've said, there were three
7 basic options: negotiate, litigate, or defeat the
8 merger at the ballot box and elect a new slate in
9 2020.

10 The Werth affidavit suggests that
11 Merck was only prepared to negotiate and that they
12 actually weren't prepared to pursue either of the
13 other options. Paragraph 5. "[Merck's] strategy in
14 pursuing the Versum acquisition was always to reach a
15 negotiated merger agreement with Versum's management
16 and board of directors."

17 Paragraph 6. "It was always [Merck's]
18 understanding that any Versum acquisition would
19 proceed only through a consensually negotiated
20 transaction."

21 Paragraph 10. "Any deal [Merck]
22 contemplated would require the cooperation of the
23 Versum board." And I should say I'm substituting
24 there "Merck" for the relatively cumbersome

1 abbreviation that the defendants used.

2 If all you're willing to do is
3 negotiate and enter into a negotiated deal, then the
4 rights plan is an effective deterrent, because you
5 don't have a meaningful way to eliminate it. And in
6 real time, this is how Merck described the rights
7 plan. They described it as an obstacle. The March 26
8 press release described the rights plan as an attempt
9 to preclude the completion of a purchase of stock
10 directly from the shareholders. An April 2
11 presentation described it as an aggressive adoption of
12 a poison pill to the detriment of shareholder value
13 and an example of Versum putting up barriers to any
14 deal apart from the one they are intent on. It also
15 described the rights plan as adopted to preclude
16 shareholders from accepting a tender offer. The
17 litigation took care of the rights plan problem.

18 Professor Subramanian posits that a
19 rights plan could not have been used for any type of
20 just-say-no defense because the company didn't have an
21 effective staggered board and Merck might have run a
22 proxy contest at the February 2020 meeting.

23 I'm going to quibble with his
24 timeline. That's when the 13 months were up and the

1 possibility of a Section 211 suit ripens. It's
2 unlikely that you could have gotten to a meeting until
3 60 to 90 days later, so let's put the meeting in April
4 or May. There's no indication from the Werth
5 affidavit that Merck had any intention of going the
6 distance and running that type of hostile proxy
7 contest.

8 You also have the problem of time,
9 which is the real implication of Professor
10 Subramanian's research on the effective staggered
11 board, which is that time is the enemy of deals, and
12 particularly the enemy of hostile deals. You just
13 don't know what's going to happen. On the timeline
14 that Professor Subramanian plots out and I have
15 moderately modified, by the time you get to soliciting
16 for a meeting, you're in the pandemic.

17 I think that there was, in fact,
18 potential for the rights plan to be used as a
19 just-say-no defense. That doesn't mean that it was
20 inevitably going to be preclusive and successful, but
21 it means that removing the rights plan had a material
22 effect on the likelihood of the offer being completed.

23 Moving off of the specific facts and
24 into the world of theory, Professor Subramanian posits

1 a regime in which the high bid always wins. As he
2 says, once the high bidder appears, M&A practitioners
3 know how the chess game plays out. And he later
4 modifies that to say a high bid usually wins. But in
5 this hypothetical world, causation never exists for
6 any defensive measure, and litigation never has any
7 effect because the high bidder always triumphs.

8 This is, frankly, a simplistic
9 analysis. Usually what I like about Professor
10 Subramanian's work is that he appreciates small
11 nuances that affect the overall chances of success,
12 pro and con. For example, he has demonstrated that
13 all go-shops are not equal. It matters how long the
14 headline number of days is, but more importantly, it
15 matters how the go-shop is put together, in terms of
16 what you have to do to qualify, what you have to do to
17 be able to continue due diligence after the headline
18 period ends. Likewise, in terms of other defensive
19 measures, he's engaged in similarly nuanced analysis.

20 You have nothing approaching that
21 level of subtlety here. It's just a flat claim that
22 the high bid always wins, which I don't think is
23 credible in terms of defensive measures that need to
24 be litigated.

1 Ultimately, the standard for defeating
2 causation is the defendants have to establish the
3 complete absence of any causal relationship between
4 the litigation and their actions which rendered moot
5 the plaintiffs' claims. That's from the *TakeCare*
6 decision. Defendants didn't do that.

7 Now I get to the key issue -- or what
8 should have been the key issue -- which is the amount
9 of the award. The Court has to make a discretionary
10 decision. Each case stands on its own. The Court is
11 called upon, in the exercise of its discretion, to
12 make an award that furthers the policy objectives of
13 encouraging monitoring behavior by stockholders and
14 protecting the interests and the assets of Delaware
15 corporations from unreasonable opportunistic demands.
16 That's from the *James* case. I put it slightly
17 differently. We want to incentivize positive value
18 litigation, meaningful litigation. We want to avoid
19 and disincentivize free-riding, and we can do that by
20 not handing out windfalls.

21 In determining the fee to grant, the
22 Court considers the *Sugarland* factors. They are
23 familiar, I won't recite them. The Court also,
24 following *Americas Mining*, considers the point at

1 which the litigation was resolved.

2 Of these factors, the greatest weight
3 is given to the benefit achieved by the litigation.
4 That's from the *Americas Mining* case. Where, here,
5 the benefit is quantifiable, *Sugarland* calls for an
6 award of attorneys' fees based on the percentage of
7 benefit. Again, that's from the *Americas Mining* case.
8 And the benefit here is substantial. As I noted in
9 *Compellent*, eliminating a rights plan or a feature of
10 a rights plan is a really rare result in Delaware
11 corporate litigation. It's a significant thing.

12 Ultimately, the plaintiff in this case
13 ties the benefit it claims to the bump in the merger
14 consideration. The *Cox Radio* case explains that fee
15 awards in cases involving a bump in the consideration
16 paid to shareholders are usually based on percentage
17 of the increased consideration. This Court has been
18 entrusted with discretion in the methods it uses and
19 the evidence it relies upon when pricing the benefit
20 and the resulting fee. A fee can be awarded on a
21 percentage basis if the benefit is capable of some
22 realistic valuation. The Court does not require
23 scientific precision. The Court can base its judgment
24 on rough calculations. Those are paraphrases of

1 precedent.

2 Here, we have two real events. We
3 have the Merck first proposal at \$48, which is a bump
4 of about \$625,000 over the existing deal
5 consideration. And for the existing deal
6 consideration I'm valuing is it at \$42.26, which was
7 the price on the day before the Merck offer. I'm not
8 going back in time to the price at announcement. We
9 then have the second Merck bump to \$53.

10 The plaintiffs can't, and don't, claim
11 credit for delivering that Merck offer. What they
12 claim is credit for increasing the likelihood that
13 stockholders would actually receive that offer. Value
14 isn't value if it's not received. It's just potential
15 in the ether. And so what the plaintiffs are claiming
16 credit for is increasing the chances of receiving that
17 offer. Similarly, they don't claim credit for the
18 bump to \$53. That was a result of decisions Merck
19 made and market forces. But they do claim credit for
20 increasing the likelihood that stockholders would
21 receive that value.

22 Ideally, what I would like to do is
23 I'd like to have a control world where I could run the
24 likelihood of the Merck bid succeeding without

1 litigation, and I'd like to then compare that to what
2 happened in our world, where we had litigation. By
3 comparing those two worlds, you could discount each
4 offer for the likelihood of success. You could then
5 subtract them and get an example of the net benefit.
6 We can't do that, so we have to look at precedent and
7 other indicators.

8 I do think *Compellent* provides some
9 insight. It's not a direct precedent, by any means,
10 but what it was was an effort to price the benefits of
11 litigation as litigation, independent of the specific
12 actions that a bidder took, such as actually deciding
13 to make an offer or deciding to make a bump, et
14 cetera. *Compellent* was a pure litigation case. There
15 wasn't a topping bid to anchor off of or skew the
16 analysis.

17 But I do think it can be instructive
18 to look at what the value of this type of relief might
19 have been under the *Compellent* framework. If you
20 imagine a hypothetical where Versum adopted the rights
21 plan at the outset, at the same time of the Entegris
22 merger, before the emergence of the Merck bid, and
23 that the plaintiffs, in the absence of the Merck bid,
24 get the rights plan withdrawn, and you run the same

1 type of percentages as in *Compellent*, you get to a
2 value of about \$40 million in terms of benefit.

3 You'd then have to apply a percentage
4 to that based on the stage of the litigation. This is
5 an early-stage case, so 10 to 15 percent. That gets
6 me to an award of about \$4 to \$6 million. And that's
7 part of the reason why I feel like the plaintiffs are
8 at the higher range of what I would have thought, in
9 the abstract, the case was worth.

10 But that's only one marker on the
11 chessboard. Another place to look is the stock price
12 reaction. Professor Subramanian said there was no
13 value there, but his analysis seemed a little skimpy
14 to me. And on rebuttal, the plaintiffs' expert,
15 Mr. Beach, had persuasive criticisms. Mr. Beach
16 looked at the one-day and two-day windows around the
17 changes to the rights plan. For the one-day window,
18 there's a total benefit of \$75 million. For the
19 two-day window, there's a total benefit of \$142
20 million.

21 I would have liked to know if any of
22 this was tied to some type of news about Entegris.
23 One can imagine that Versum is trading in rough
24 lockstep with Entegris at the time, and that's part of

1 the reason why Beach and Subramanian both don't look
2 at broader market metrics. Nobody told me whether
3 something happened with Entegris on those days, but
4 I'm going with what I have.

5 If one uses the one-day window, which
6 Beach appears to prefer, and you assume the litigation
7 was the sole cause of the market price changes, you
8 get a litigation benefit of about \$75 million. At a
9 10 to 15 percent figure, you get 7 1/2 million to
10 \$11.25 million, a bit less than what the plaintiffs
11 are asking for. But if you use the two-day figure of
12 \$142 million, you'd basically get double that, \$15 to
13 \$22.5 million.

14 Another way that I've thought about
15 this is what does a \$12 million award imply about the
16 value of the litigation. And this is a point that
17 Mr. Hanrahan made a couple times this morning. If you
18 assume it's derived using a stage of litigation
19 benefit of 10 to 15 percent, that means the litigation
20 had an implied value of about \$120 million to \$180
21 million. And that's approximately 10 to 15 percent of
22 the total bump. What that means, as Mr. Hanrahan
23 suggested this morning, is it's suggesting that the
24 litigation had a causal role of about 10 to 15

1 percent, in terms of improving the chances of the
2 Merck bid.

3 Another comparator which was in the
4 briefing, and I've thought about, is with the fees in
5 monitoring litigation. As I discussed with
6 Mr. Hanrahan, historically, the Court was awarding
7 1.25 to 1.5 percent of the consideration increase.
8 And that was in cases where the stockholder plaintiffs
9 really hadn't done anything at all. They were, if
10 anything, just tagging along with a bidder lawsuit.
11 But often it was just file and then settle.

12 Here, a fee of 1.25 to 1.5 gets you to
13 \$14.6 million to \$17.5 million, with a midpoint of
14 \$16 million. That makes the approximately 1 percent
15 of \$12 million that the plaintiffs are considering
16 seem fairly realistic.

17 I also thought about the precedents
18 addressing the level of causal credit that the
19 plaintiffs should receive. I gathered and discussed
20 them in the *Smith Katzenstein v. Fidelity* case. The
21 general approach, you can see it in *Sugarland* itself,
22 but in joint causation cases, there's often an
23 anchoring around 20 to 25 percent causation for the
24 litigation. If you use that rough measure, you're

1 well above what the plaintiffs are asking. You're
2 basically at double that.

3 The plaintiffs' briefs showed other, I
4 think, insightful ways to look at this. They provided
5 some helpful tables. There's no magic to this. It's
6 ultimately a discretionary issue.

7 As I said at the outset, I do think,
8 just from my own reaction, the plaintiffs are at the
9 higher end of the range. I think they've done a
10 decent job justifying it, but if you asked me to price
11 this on a clear day without any input from the
12 parties, they're higher than I probably would have
13 thought in the abstract. But they've done a good job
14 supporting their analysis.

15 The defendants haven't given me
16 anything. As in *Take Two*, the defendants came in and
17 said, "No causation, no claim, and all you ought to
18 get is your lodestar," not even recognizing that in a
19 contingent fee case, where people actually litigate
20 and get things, even if you do the lodestar method --
21 which this Court generally doesn't use -- you get some
22 type of risk multiplier. And what the defendants are
23 arguing is really an amount that, certainly
24 pre-*Trulia*, was what people were handing out for

1 disclosures. And even today, for good disclosures in
2 a litigated scenario, it's the same order of
3 magnitude.

4 The plaintiffs got the defendants to
5 redeem a pill, and they got the defendants to take out
6 an action-in-concert provision. I really am struck,
7 and like Vice Chancellor Lamb, am influenced by the
8 fact that the defendants' position is just unhelpful
9 and a nonstarter. It's difficult not to take that
10 into account when you have one side that has engaged
11 meaningfully with the precedents and the concepts, and
12 you have the other side that is taking an extreme
13 position about what the level of compensation ought to
14 be.

15 I'm going to run through the other
16 *Sugarland* factors. The first is the complexity of the
17 case. I think this was a normal level of complexity
18 for expedited deal litigation. The reason why folks
19 like Mr. Hanrahan can claim high hourly rates, and
20 that folks on the other side of the case do the same,
21 is that deal litigation is important. It's complex.
22 Here, the action-in-concert provision was interesting
23 and a neat twist, but I don't think this gives me any
24 reason to depart up or down.

1 On standing and ability of plaintiffs'
2 counsel, I have the same reaction. No reason to
3 depart up or down.

4 The case was contingent, and it's the
5 contingent nature of the case that gets the plaintiff
6 a percentage of the benefit award. If the plaintiff
7 had come in with a stockholder who was paying their
8 freight, so that there was no risk, then they would
9 have just gotten their hourly rates.

10 Then we get to the time and effort of
11 counsel. This is the other factor that I have
12 pondered and thought about at some length. Because in
13 addition to my feel that the \$12 million is within a
14 range, but at the upper end and probably a little bit
15 higher than if I would have just called this without
16 any briefing from the parties, the amount of work that
17 the plaintiffs did does result in a number for an
18 hourly rate that is quite high. Let's say \$10,000 and
19 change. That's substantial. And I don't like the
20 idea of creating an impression that we're granting
21 windfalls.

22 That said, the defendants' cases about
23 rates exceeding \$1,000, or around \$1,000, you'd now
24 have to introduce inflation. A lot of those

1 precedents are from the 2000s. I ran some quick CPI
2 inflation calculations on them, and you see a big
3 change. And I bet lawyer rates have inflated at well
4 beyond the CPI. Not only would you have to inflate
5 those numbers, you'd also have to do some type of
6 risk-based multiplier to the lodestar. That still
7 doesn't get you as far as \$12 million, but it makes
8 the \$10,000 and change not seem as extreme.

9 Ultimately, we have a core question of
10 how we compensate for these types of cases. Do we
11 compensate based off of benefit conferred and an
12 effort to price off the economic metrics that are out
13 there, such as the change in market price or the total
14 deal bump? Or do we do some type of lodestar
15 methodology as in *Dunkin' Donuts*? I do agree with
16 Mr. Hanrahan, *Dunkin' Donuts* is a distinguishable
17 case. *Dunkin' Donuts* was a monitoring case. The
18 plaintiffs didn't do anything real. The bidder's
19 counsel did all the work, and the plaintiffs didn't
20 achieve anything.

21 Here, you've got the plaintiffs as the
22 sole cause of knocking out an action-in-concert
23 provision and then getting the pill redeemed. And it
24 seems to me that in that setting, under *Americas*

1 *Mining* and cases like *Cox Radio*, you measure based on
2 benefit conferred.

3 It's not without some misgivings that
4 I award the fee that the plaintiffs have requested.
5 I've told you this a couple of times now. If you had
6 just come to me cold about this case, not given me any
7 briefing whatsoever, and asked me to ballpark a number
8 of what I would award, the plaintiffs are above that.
9 I also do think that the implied hourly rate is high,
10 and I paused over that.

11 But ultimately, I'm in a situation
12 where I think the plaintiffs have done a good job
13 dealing with the applicable precedents and given me
14 ways to think about the relief and the award that is
15 consistent with our law, and I think that, as in *Take*
16 *Two*, the defendants have given me a really aggressive
17 response that is, at least under current law, a
18 nonstarter. I'm in the same situation that Vice
19 Chancellor Lamb was. Had I had help from the
20 defendants, I might have been able to reach a
21 different conclusion. But on the record that I have,
22 I believe that the plaintiffs have supported their
23 application for the full amount of the fee, and I am
24 going to award it.

1 I know that was a lengthy discourse.
2 I apologize for keeping you-all here while you had to
3 listen to me go through it, but that is the answer, or
4 at least the answer at my level.

5 I hope everyone has a good day. I
6 hope you-all stay safe in what has been a troubling
7 time and seems to be increasingly becoming a more
8 troubling time. Please do stay healthy and take care
9 of your loved ones and spend time with them.

10 Everyone have a good rest of the day.

11 (Hearing concluded at 11:30 a.m.)

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CERTIFICATE

I, JULIANNE LABADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 84 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 17th day of July, 2020.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

Tab 24



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

- - -

Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, November 19, 2019
11:00 a.m.

- - -

BEFORE HON. KATHALEEN ST.J. McCORMICK, Vice Chancellor

- - -

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

CHANCERY COURT REPORTERS
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4 -and-

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6 Olshan Frome Wolosky LLP

for Plaintiffs FrontFour Capital Group LLC

7 and FrontFour Master Fund, Ltd.

8 JOHN P. DITOMO, ESQ.

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9 -and-

NATHAN BULL, ESQ.

10 of the New York Bar

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11 for Defendants Brook Taube, Seth Taube, Jeff

Tonkel, Medley Management Inc., MCC Advisors

12 LLC, Medley Group LLC, Medley LLC, and

Medley Capital Corporation

13 CORINNE ELISE AMATO, ESQ.

14 JOHN G. DAY, ESQ.

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Arthur S. Ainsberg

21
22
23 Continued ...

1 APPEARANCES CONTINUED:

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3 KEVIN M. GALLAGHER, ESQ.

4 Richards, Layton & Finger, P.A.

5 -and-

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8 of the New York Bar

9 Dechert LLP

10 for Defendant Sierra Income Corporation

11 - - -

1 THE COURT: Good morning, counsel.
2 Who do we have on the line?

3 MR. BAYLISS: Good morning, Your
4 Honor. It's Tom Bayliss on behalf of the FrontFour
5 plaintiffs. David Lorber from FrontFour is on. So
6 are Lori Marks-Esterman and Adrienne Ward of Olshan
7 Frome Wolosky; and Eric Veres and Joe Sparco are on
8 from my office as well.

9 MR. DITOMO: Good morning, Your Honor.
10 This is John DiTomo, Morris Nichols Arsht & Tunnell on
11 behalf of the Medley defendants. With me on the line
12 is my colleague from Cadwalader, Nathan Bull.

13 MR. MORITZ: Good morning, Your Honor.
14 This is Garrett Moritz from Ross Aronstam on behalf of
15 the Defendants Mark Lerdal, Karin Hirtler-Garvey, John
16 Mack, and Arthur Ainsberg. I'm joined by my partner,
17 Mike Sirkin. I'm also joined on the line by
18 co-counsel from Kramer Levin, Alan Freedman.

19 MR. ROHRBACHER: Your Honor, Blake
20 Rohrbacher and Kevin Gallagher from Richards, Layton &
21 Finger for Defendants Sierra Income Corporation, and
22 with us on the line are Matthew Larrabee and Paul
23 Kingsbery from Dechert.

24 MS. AMATO: Good morning, Your Honor.

1 Christine Amato, Prickett Jones, also joined by John
2 Day, on behalf of Stephen Altman.

3 THE COURT: Do we have any persons
4 from the public who have dialed in to today's call or
5 anyone else on the line who has not announced him or
6 herself, aside from our esteemed court reporter?

7 MR. BAYLISS: Your Honor it's Tom
8 Bayliss. Dan McBride just joined us in my office.

9 THE COURT: Excellent. Thank you.

10 All right, folks. I hope you have a
11 glass of water. This will be a long bench ruling.
12 And I ask you to bear with me. If you can't hear me
13 at any point in time, please let me know. Of course,
14 there will also be a transcript of this ruling.

15 On October 24, 2019, I heard argument
16 regarding the proposed settlement of claims and
17 petitions for fees in In re Medley Capital Corporation
18 Stockholder Litigation, Civil Action No. 2019-0100.

19 This is my ruling on the matter. To
20 save you the suspense, I am certifying the class,
21 approving the settlement, and I'm also awarding fees.
22 I am going to approve a fee award today of \$3,075,000
23 for various noncontingent therapeutic benefits
24 attained in the settlement. I am also approving a fee

1 contingent on the amended transaction which shall
2 equal 26 percent of the grossed-up settlement fund, as
3 modified by a partial look-through that I will
4 explain. I further approve a fee contingent on the
5 closing of the transaction for \$100,000 for the
6 agreement to appoint an independent director on the
7 board of the post-merger entity.

8 I will now describe the background and
9 my reasoning behind these rulings.

10 Plaintiffs in this case are FrontFour
11 Capital Croup LLC and FrontFour Master Fund, Ltd.
12 Plaintiffs beneficially own 1,674,946 shares of Medley
13 Capital common stock, approximately 3.1 percent of
14 Medley Capital's outstanding shares.

15 Plaintiffs filed this lawsuit on
16 behalf of themselves and similarly situated
17 stockholders of Medley Capital Corporation. There are
18 a number of defendants in this case. The director
19 defendants are Brook Taube, Seth Taube, Jeff Tonkel,
20 Mark Lerdal, Karin Hirtler-Garvey, John E. Mack, and
21 Arthur S. Ainsberg. Medley Capital Corporation, which
22 I will refer to as "Medley Capital," as well as its
23 affiliates, Medley Management, Inc., MCC Advisors LLC,
24 Medley Group LLC, and Medley LLC, are also named

1 defendants. Finally, Sierra Income Corporation, which
2 I will refer to as "Sierra," is also a named
3 defendant. Sierra is not a party to the stipulation
4 of settlement that was presented to the Court, and in
5 light of this, I will refer today to the defendants
6 other than Sierra as the "Settling Defendants."

7 As set forth in the scheduling order
8 entered on August 12, 2019, and the notice dated
9 August 30, 2019, I must rule on essentially three
10 issues.

11 First, I must determine whether to
12 certify the settlement class preliminarily certified
13 for settlement purposes on August 12, 2019, as a
14 non-opt-out class pursuant to Court of Chancery Rules
15 23(a), 23(b)(1), and 23(b)(2).

16 Second, I must determine whether the
17 settlement is fair, reasonable, and adequate. In
18 connection with this second task, I must determine
19 whether final judgment should be entered dismissing
20 the action and approving the release as it is drafted
21 in the Stipulation of settlement.

22 Further, I must determine whether
23 plaintiffs and plaintiffs' counsel have adequately
24 represented the interests of the settlement class in

1 the action.

2 Third, I must consider the application
3 by plaintiffs' counsel for attorneys' fees and
4 reimbursement of expenses. I will also consider the
5 petition of counsel to Mr. Altman for fees and
6 reimbursement of expenses, as well as the defendants'
7 and Mr. Altman's objections to plaintiffs' counsel's
8 fee petition.

9 Further, I received letters from two
10 Medley Capital stockholders, Doug Getter and Kevin
11 McCallum, objecting to plaintiffs' counsel's fee
12 request. I will address both of those as well.

13 The settlement class, which I
14 preliminarily certified in the August 12, 2019,
15 scheduling order, includes: "Any and all record
16 holders and beneficial owners of MCC common stock at
17 any time during the Settlement Class Period, together
18 with their successors and assigns, but excluding
19 Stipulating Defendants, their Immediate Family, SIC
20 and any person, firm, trust, corporation, joint
21 venture, partnership, foundation or other entity
22 related to or affiliated with any of the Stipulating
23 Defendants, members of their Immediate Families or
24 SIC." And I refer the parties to the stipulation of

1 settlement itself for the cipher of the defined terms
2 in this proposed class.

3 As the Delaware Supreme Court
4 explained in *Prezant v. De Angelis*, the certification
5 of a lawsuit as a class action involves a two-step
6 analysis. The first step requires that the action
7 satisfy the four prerequisites of Rule 23(a), which
8 are numerosity, commonality, typicality, and adequacy.

9 If the Rule 23(a) prerequisites are
10 established, the second step is to determine whether
11 the suit properly fits into one or more of the three
12 Rule 23(b) categories based on the alleged wrongs, the
13 relief sought, or a combination of the two.

14 I turn first to the four prerequisites
15 of Rule 23(a), starting with numerosity, which
16 requires that a proposed class be so numerous that
17 joinder of all members is impracticable.

18 The Delaware Supreme Court observed in
19 its 1991 decision, *Leon N. Weiner & Associates, Inc.*
20 *v. Krapf*, that "Numbers in the proposed class in
21 excess of forty, and particularly in excess of one
22 hundred, have sustained the numerosity requirement"

23 According to public filings, as of
24 August 30, 2019, Medley Capital had approximately 55

1 million shares outstanding, held by hundreds and
2 potentially thousands of persons or entities
3 throughout the world. Individual joinder of all of
4 those persons would be highly impracticable.
5 Accordingly, the proposed class satisfies the
6 numerosity requirement.

7 Next, Rule 23(a)(2) requires that a
8 question of law or fact be common to the class. A
9 proposed class meets the commonality requirement where
10 "the question of law linking the class members is
11 substantially related to the resolution of the
12 litigation even though the individuals are not
13 identically situated." And that quote, again, is from
14 the *Weiner v. Krapf* case.

15 Linking the class members in this case
16 are common questions of law, including whether
17 defendants breached their fiduciary duties and whether
18 the class was harmed by those breaches. Those
19 questions of law stem from the same factual
20 underpinnings: the sales process, the merger
21 agreement, and the allegedly false statements and
22 omissions issued in connection with the merger
23 agreement. Thus, the commonality requirement is
24 satisfied.

1 Third, Rule 23(a)(3) requires a class
2 representative's claim to be typical of those of the
3 class. As the Delaware Supreme Court observed in
4 *Weiner v. Krapf*, "The test of typicality is that the
5 legal and factual position of the class representative
6 must not be markedly different from that of the
7 members of the class."

8 The *Krapf* Court explained that "A
9 representative's claim or defense will suffice if it
10 arises from the same event or course of conduct that
11 gives rise to the claims or defenses of other class
12 members and is based on the same legal theory."

13 In this case, plaintiffs were
14 threatened by the same harm other Medley Capital
15 stockholders faced flowing from the allegedly flawed
16 process, inadequate merger consideration, and
17 misleading or incomplete disclosures. Plaintiffs
18 filed this action to seek relief from that harm and
19 their claims are therefore typical of those of the
20 class.

21 Finally, Rule 23(a)(4) requires that a
22 representative plaintiff fairly and adequately protect
23 the interests of the class. The Supreme Court of the
24 United States observed in *Phillips Petroleum Company*

1 *v. Shutts* that the due process clause of the United
2 States Constitution requires "that the named plaintiff
3 at all times represent the interests of the absent
4 class members."

5 The Delaware Supreme Court expounded
6 on these due process requirements in *Krapf*, stating,
7 "In an application of the fourth prerequisite of Rule
8 23(a), the predominant considerations are due process
9 related: that there be no conflict between the named
10 party and the other class members; and that the named
11 party may be expected to vigorously defend not only
12 themselves but the proposed class."

13 In this case, plaintiffs collectively
14 own the largest non-management block of Medley Capital
15 common stock. Incentives created by plaintiffs' stock
16 ownership caused plaintiffs to publicly oppose the
17 challenged transactions, seek and then sue for books
18 and records, prosecute the litigation through an
19 expedited trial, and secure this proposed settlement
20 for the class.

21 There is no suggestion from the record
22 that plaintiffs' interests are, or have ever been, in
23 conflict with those of the class. Plaintiffs retained
24 experienced counsel who are well known to this Court,

1 and plaintiffs' counsel vigorously prosecuted
2 plaintiffs' claims. The adequacy requirement is
3 therefore met.

4 Having determined that the settlement
5 class satisfies the requirements of Rule 23(a), my
6 next task is to determine whether the putative class
7 properly qualifies as a non-opt-out class under Rules
8 23(b)(1) or 23(b)(2). The plaintiffs do not seek
9 certification as a so-called "damages class" under
10 Rule 23(b)(3).

11 As the Delaware Supreme Court
12 explained in *Krapf*, "Class suits are not necessarily
13 mutually exclusive; an action may be certified under
14 more than one subdivision of Rule 23(b) in appropriate
15 circumstances."

16 The Delaware Supreme Court has also
17 remarked in *In re Celera Corp. Shareholder Litigation*
18 that "Delaware courts repeatedly have held that
19 actions challenging the propriety of director conduct
20 in carrying out corporate transactions are properly
21 certifiable under both subdivisions (b)(1) and
22 (b)(2)."

23 Former Chancellor Allen explained in
24 *In re Mobile Communications Corp. of America, Inc.*,

1 *Consolidated Litigation* that "Typically an action
2 challenging the propriety of director action in
3 connection with a merger transaction is certified as a
4 (b)(1) or (b)(2) class because plaintiff seeks
5 equitable relief in the form of the injunction;
6 because all members of the stockholder class are
7 situated precisely similarly with respect to every
8 issue of liability and damages; and because to
9 litigate the matters separately would subject the
10 defendant to the risk of different standards of
11 conduct with respect to the same action."

12 Those observations of Chancellor Allen
13 are true in this case. The conduct the plaintiffs
14 challenged involved breaches of fiduciary duties in
15 connection with the negotiations and sales processes
16 leading up to two cross-conditioned merger
17 transaction. The merger transactions were subject to
18 stockholder approval.

19 And deficient disclosures concerning
20 the directors in entering the deal create the very
21 real potential for an uninformed stockholder vote,
22 which would have harmed all members of the settlement
23 class equally. Individual prosecutions of these
24 claims could have led to incompatible determinations

1 and injunctive relief which would have created varying
2 and conflicting standards of conduct for the defense.

3 Further, the homogeneity of the class
4 members' grievances concerning the defendants'
5 self-dealing and other conduct in connection with the
6 merger agreement is apparent. Accordingly,
7 certification is appropriate under Rules 23(b)(1) and
8 (b)(2).

9 In addition, no class member has
10 sought to opt out of the settlement or argued that the
11 settlement should be an opt-out settlement. I find it
12 appropriate to certify this class as a non-opt-out
13 class under Rules 23(b)(1) and (b)(2).

14 Although Rule 23 requires some form of
15 notice to the class as a matter of due process, as the
16 Delaware Supreme Court noted in *Nottingham*, the form
17 of notice is largely discretionary.

18 When entering the August 12, 2019,
19 scheduling order, I reviewed and approved, in form and
20 substance, the Notice of Pendency of Proposed
21 Settlement of Class Action and the Summary Notice of
22 Pendency of Proposed Settlement of Class Action. I
23 also approved a form of notice as the best notice
24 practicable under the circumstances, requiring

1 plaintiffs' counsel to cause the approved forms to be
2 mailed by U.S. mail, first class, postage pre-paid, no
3 later than thirty days from the date of the scheduling
4 order and at least forty-five days before the
5 settlement hearing, to each person shown to be a
6 record owner of shares of common stock of Medley
7 Capital Corporation at any time between and including
8 August 9, 2018, and August 12, 2019, which was the
9 date of entry of the scheduling order.

10 Paragraphs 7, 8, and 9 of the
11 scheduling order address the form, adequacy, and
12 instructions. Subsequently, I reviewed the affidavit
13 of mailing and publication dated September 23, 2019,
14 submitted by Eric Schachter, Vice President of A.B.
15 Data Limited.'s Class Action Administrative Company,
16 which was the settlement administrator in this case.
17 That affidavit detailed the efforts of counsel and
18 plaintiffs in distributing the notice and I view those
19 efforts as more than adequate.

20 So, to sum it up, the requirements of
21 Rule 23(a), 23(b)(1), 23(b)(2) have been satisfied,
22 and the form of notice to the class is adequate. I
23 therefore certify the class as a non-opt-out class
24 pursuant to these provisions.

1 I will turn now to the merits of the
2 settlement.

3 As the Delaware Supreme Court
4 explained in *Barkan v. Amsted Industries*, "The Court
5 of Chancery plays a special role when asked to approve
6 the settlement of a class or derivative action. It
7 must balance the policy preference for settlement
8 against the need to insure that the interests of the
9 class have been fairly represented."

10 In approving a settlement, the Court's
11 function is to make an independent determination,
12 through the exercise of its own business judgment,
13 that the settlement is intrinsically fair and
14 reasonable.

15 As Vice Chancellor Laster explained in
16 *Acitivsion Blizzard*, the Court must ultimately
17 "determine whether the settlement falls within a range
18 of results that a reasonable party in the position of
19 the plaintiff, not under any compulsion to settle and
20 with the benefit of the information then available,
21 reasonably could accept."

22 To make this determination, the Court
23 considers certain factors, including the nature of the
24 claims, the possible defenses thereto, and the legal

1 and factual circumstances of the case. I turn now to
2 an overview of these factors.

3 By way of a brief background, as set
4 forth in greater detail in my March post-trial
5 opinion, this case arose from an Agreement and Plan of
6 Merger, dated as of August 9, 2018, by and between
7 Medley Capital and Sierra, through which defendants
8 sought to combine Medley Capital and Sierra, two
9 business development corporations, with their
10 affiliate Medley Management, an asset management firm
11 founded and majority owned by brothers Brook and Seth
12 Taube.

13 The proxy was filed on December 21,
14 2018, more than four months after announcing the
15 transactions. Within a week, plaintiffs served a
16 Section 220 demand and, on January 11, 2019, commenced
17 a books and records action. Using documents produced
18 by Medley Capital, plaintiffs filed this plenary
19 action and moved to expedite on February 11, 2019.

20 In view of the special meeting
21 schedule for March 8, 2019, and a March 30, 2019,
22 drop-dead date under the merger agreement, I
23 accommodated the parties' request for an early March
24 trial. The parties then compressed a year's worth of

1 discovery into three weeks. This is to the parties'
2 credit, and their efforts are truly admirable, so I'll
3 describe them in some detail.

4 In the course of discovery, defendants
5 produced and plaintiffs reviewed more than 12,000
6 documents. That's in addition to those produced in
7 the 220 action. Plaintiffs also sought third-party
8 discovery and reviewed over 12,400 documents produced
9 by the merging entities' financial advisors, Goldman
10 Sachs and Co., LLC; Barclays Capital Inc; Sandler
11 O'Neill and Partners, L.P.; Broadhaven Capital
12 Partners, LLC, as well as five potential alternative
13 transaction partners: ZAIS Group, LLC; Lantern Capital
14 Partners; NexPoint Advisors, L.P.; Origami Capital
15 Partners, LLC; and Marathon Asset Management L.P.

16 Defendants sought, and plaintiffs
17 produced, substantial documents as well. The parties
18 conducted thirteen depositions: five representatives
19 of defendants, the plaintiffs' representative,
20 representatives of the three financial advisors, each
21 side's expert witness, and representatives of two of
22 the five potential alternative transaction partners.
23 So the amount accomplished in this time period was
24 truly impressive, and the time constraints did not

1 seem to diminish the quality of advocacy on both
2 sides.

3 I held a trial on March 6 and 7, 2019.
4 On March 8, 2019, each of the special meetings of
5 stockholders of Sierra, Medley Capital, and Medley
6 Management was convened and adjourned until March 15,
7 2019. On March 11, 2019, I issued a post-trial
8 memorandum opinion that enjoined a stockholder vote on
9 the transactions pending curative disclosures. I will
10 not repeat the holdings of that post-trial memorandum
11 opinion. It was long. I direct interested persons to
12 the opinion itself.

13 Touching on the highlights only, the
14 opinion found that the transactions were subject to
15 entire fairness review because the Taube brothers were
16 controllers, at least two members of the special
17 committee who had approved the transactions were
18 beholden to the Taubes, and the special committee
19 allowed the Taube brothers to dominate its process.

20 I further held that the transactions
21 were the product of an unfair process and resulted in
22 an unfair price to Medley Capital's unaffiliated
23 stockholders, and that the deal protections in the
24 merger agreements could not withstand enhanced

1 scrutiny.

2 I enjoined a vote by Medley Capital's
3 stockholders until defendants made disclosures
4 consistent with the opinion. However, I declined
5 plaintiffs' request to rewrite aspects of the merger
6 agreement by ordering a curative sale process because
7 plaintiffs failed to prove their claim for aiding and
8 abetting against Sierra.

9 As I expressed in the opinion, *C&J*
10 *Energy* prevented this Court from ordering what I
11 believed would be the most equitable relief for the
12 Medley Capital stockholders: a curative sales process.
13 Relevant to the issues before the Court today, a
14 number of events transpired following my post-trial
15 decision.

16 First, each special meeting was
17 adjourned to accommodate post-trial settlement
18 negotiations.

19 On March 18, 2019, one week after I
20 issued the opinion, the two directors and the special
21 committee who were found to be conflicted with respect
22 to the transactions resigned from the board. Also
23 around that time, plaintiffs and the settling
24 defendants began settlement discussions, which

1 continued through mid-April 2019. In briefing,
2 plaintiffs' counsel describes these discussions as
3 "intense, adversarial negotiations."

4 Judging from the conduct of the
5 parties during litigation and the tone of briefing
6 concerning the fee requests, I have no doubt that this
7 description is accurate, and perhaps even understated.
8 As I noted at the outset, Sierra is not a party to the
9 stipulation of settlement. Sierra also did not
10 participate in the settlement negotiations.

11 For the record, I will provide an
12 overview of the negotiations that have led to the
13 amended merger agreement and settlement agreement that
14 are now before me, which is drawn largely from the
15 amended proxy issued on August 30, 2019.

16 You'll recall that the drop-dead date
17 for the original transaction was March 30, 2019. On
18 March 28, 2019, the Sierra special committee
19 determined that "changed circumstances" since August
20 2018 warranted renegotiating the original transaction.
21 According to the Sierra special committee members and
22 their advisor, these "changed circumstances" included
23 Medley's failure to meet its own EBITDA forecasts for
24 2018 and its likely EBITDA shortcomings for 2019. At

1 the same meeting, the full Sierra board discussed the
2 "desirability for [Medley Capital] to be given a
3 go-shop opportunity."

4 On April 15, 2019, Plaintiffs and the
5 Settling Defendants executed a term sheet, which
6 Medley Management disclosed publicly on April 16,
7 2019.

8 Consistent with the term sheet, on the
9 day the term sheet was executed, the board appointed
10 plaintiffs' corporate representative, David A. Lorber,
11 as well as non-party Lowell W. Robinson, who was
12 independent of plaintiffs and defendants, to the board
13 seats formerly occupied by the two special committee
14 members who were found to lack independence from the
15 Taube brothers.

16 Those seats would not otherwise have
17 been open until 2020 and 2021, respectively. The
18 board also reconstituted the special committee to add
19 Lorber and Robinson, with Lorber appointed as chair of
20 the committee.

21 In a letter to the Court on April 18,
22 2019, plaintiffs noted that any proposed merger
23 agreement amendments would require Sierra's agreement.
24 That same day, Medley Capital requested Sierra's

1 consent to the amendments to the Medley Capital merger
2 agreement contemplated by the term sheet.

3 Sierra declined to give its consent on
4 April 23, 2019.

5 On April 24, 2019, I entered a stay of
6 all proceedings except as necessary to implement the
7 settlement contemplated by the term sheet.

8 In May 2019, Medley Capital's newly
9 reconstituted special committee hired a new financial
10 advisor, Houlihan Lokey, to conduct a go-shop process.

11 On May 10, 2019, Broadhaven advised
12 Sierra on possible terms that might be renegotiated,
13 including the exchange ratio and the structure and
14 duration of any go-shop provision.

15 On May 15, 2019, Sierra conveyed an
16 offer to Medley Capital concerning a new transaction.
17 The offer included a proposed exchange ratio of .65,
18 which took into account Medley Capital's decline in
19 net asset value, a 30-day go-shop period for each of
20 Sierra and Medley Capital with a \$6 million
21 termination fee if a new deal emerged, and a price
22 adjustment arising from any settlement liabilities.

23 Sierra took a hard line in
24 negotiations, insisting on a revised exchange ratio

1 despite some pushback to the proposed exchange ratio
2 from Medley Capital, who insisted on maintaining the
3 original .8050 exchange ratio. Medley Capital
4 ultimately countered with a .77 proposed ratio.

5 On May 30, 2019, Sierra responded with
6 a .70 exchange ratio, a 60-day go-shop that was
7 reciprocal for Sierra and Medley Capital, and an
8 expense reimbursement fee capped at \$4 million, in
9 lieu of a termination fee. Sierra also conveyed that
10 it would not agree to assume Medley Capital's
11 liability arising from this litigation.

12 On June 5, 2019, Sierra discussed the
13 possibility of establishing a range for the exchange
14 ratio that varied depending on the amount of legal
15 expenses incurred by Medley Capital.

16 On June 7, 2019, Sierra revised its
17 outstanding offer with an exchange ratio of .68 after
18 better understanding the possible range of attorneys'
19 fees and defendants' insurance coverage.

20 On June 11, 2019, Medley Capital
21 rejected this offer, evidencing particular concern
22 with the \$4 million expense reimbursement/termination
23 fee, and countering with an exchange ratio of .70 and
24 a 60-day go-shop with a \$1 million expense

1 reimbursement cap. Sierra rejected this proposal the
2 next day.

3 On June 19, 2019, Sierra countered
4 with a .70 exchange ratio if attorneys' fees were \$10
5 million or less, a .69 exchange ratio if the fees were
6 between 10 and \$12.5 million, and a .68 exchange ratio
7 if the fees exceeded \$12.5 million. This proposal
8 also included a 60-day go-shop with no termination fee
9 or expense reimbursement if a superior proposal
10 emerged.

11 In considering this proposal, the
12 Medley Capital special committee was most concerned
13 with Medley Capital's significant trading discount to
14 its net asset value and its deterioration in value
15 since August 2018.

16 Then, in view of Medley Capital's late
17 June preliminary projected financial results, Sierra
18 again revised its offer. Using the same staggered
19 declining exchange ratio structure as the previous
20 offer, Sierra proposed lowering the range to
21 0.66-0.68, which was the range ultimately agreed upon.

22 The parties continued to negotiate
23 aspects of the go-shop and Sierra's matching rights
24 through July 2019.

1 On July 29, 2019, Sierra and Medley
2 Capital issued a joint press release to announce the
3 execution of the Amended and Restated Agreement and
4 Plan of Merger, "Amended Merger Agreement."

5 On that same day, the Settling
6 Defendants and Plaintiffs executed the Stipulation and
7 Agreement of Compromise and Settlement, "Stipulation
8 of Settlement." So that is how the stipulation of
9 settlement and the amended merger agreement came to
10 be.

11 In determining whether to approve this
12 settlement, I must weigh the "give" and the "get"
13 obtained in the settlement. Again, to quote
14 *Activision*, the goal is to "determine whether the
15 settlement falls within a range of results that a
16 reasonable party in the position of the plaintiff, not
17 under any compulsion to settlement and with the
18 benefit of the information then available, reasonably
19 could accept."

20 To aid in this analysis, I'll put a
21 fine point on the "gives" and the "gets," starting
22 with what the class is getting from the proposed
23 settlement.

24 First, the settlement called for the

1 appointment of two independent directors at Medley
2 Capital. As I noted earlier, these directors, Lorber
3 and Lowell, were installed almost immediately upon
4 execution of the settlement term sheet.

5 Second, the Medley Capital special
6 committee was empowered to conduct a go-shop process.
7 As part of that process, defendants agreed to waive
8 any standstill or similar agreement that would prevent
9 third parties from engaging with Medley Capital during
10 the go-shop.

11 By way of background, during the
12 original process that occurred before the challenged
13 transaction was conceived, Medley Management required
14 that any interested parties enter into standstill
15 agreements.

16 Those standstill agreements prevented
17 interested parties from negotiating the transaction
18 with funds managed by Medley Management, including
19 Medley Capital, for anywhere between 12 and 24 months,
20 depending on the agreement.

21 When the term of the Medley
22 Management-Medley Capital deal were announced, the
23 standstills on their face prevented 30 previously
24 interested third parties from making a superior

1 proposal.

2 By the time of the go-shop for the
3 amended merger, only two of the original 30
4 standstills were in effect. Both of those two
5 standstills were waived under the terms of the
6 settlement.

7 The 60-day go-shop period began on
8 July 29, 2019. During the go-shop, the special
9 committee and Houlihan Lokey contacted 194 potential
10 interested parties. Twenty-seven of these parties
11 executed nondisclosure agreements. Seven of these
12 submitted a total of 12 proposals.

13 When the go-shop was due to expire in
14 September 2019, the special committee exercised its
15 contractual right under the amended merger agreement
16 to continue negotiating for an additional 14 days with
17 two potentially interested parties.

18 Though the special committee believed
19 that these two parties might submit proposals superior
20 to the Sierra merger, in the end, the special
21 committee determined after consultation with
22 independent legal and financial advisors that neither
23 proposal was more favorable than the Sierra amended
24 merger agreement.

1 The go-shop ended on October 12, 2019.

2 Third, the settlement called for the
3 parties to work together in good faith to agree on the
4 content of supplemental disclosures consistent with my
5 post-trial decision. Medley Capital filed an amended
6 proxy containing these corrective disclosures on
7 August 30, 2019.

8 In relevant part, the amended proxy
9 contained and disclosed:

10 One, the existence of proposals for an
11 alternative transaction with Medley Capital from ZAIS,
12 Origami, NexPoint and Lantern.

13 Two, that the special committee had
14 not been made aware of the existence of the
15 standstills prior to the execution of the original
16 merger agreement.

17 Three, that plaintiffs proved "that
18 half of the Special Committee was beholden to the
19 Taube brothers."

20 Four, that plaintiffs proved the Taube
21 brothers dominated and controlled the board.

22 Five, that I found that the enjoined
23 transactions were not entirely fair to Medley
24 Capital's stockholders.

1 And six -- and the sixth was
2 negotiated by counsel for Altman -- the correct
3 formula used to calculate how management shares were
4 being "echo voted" for or against the transaction.

5 Fourth, the settlement includes
6 provisions concerning the governance of the
7 post-merger entity. The original merger agreement
8 provided that two Medley Capital directors would serve
9 on the post-merger board.

10 The amended merger agreement provides
11 that the board of the combined entity will include one
12 independent director of Medley Capital, and for the
13 chairman of the board of the combined entity to be one
14 of the current independent directors of Sierra.

15 Fifth, the settlement calls for the
16 settling defendants to contribute to a settlement fund
17 in the event the go-shop does not lead to a superior
18 proposal and the revised merger actually closes. The
19 fund will not be created if the revised merger does
20 not close.

21 If the merger does close, the fund is
22 to consist \$17 million in cash and of \$30 million in
23 stock in the combined company. I note that the
24 real-world value of the stock component of the

1 consideration might not actually be \$30 million.

2 The total settlement fund was
3 negotiated with a \$1 per share benefit to the Class in
4 mind, if the combined company's stock trades at net
5 asset value. However, Sierra, MC and Medley
6 Management's financial advisors expect that the Sierra
7 common stock will trade below its net asset value
8 after the completion of the merger, resulting in a
9 discount to the value of the stock component of the
10 settlement fund.

11 In exchange for these therapeutic and
12 potential monetary benefits, the class is giving the
13 settling defendants a release of claims. The defined
14 term "Released Plaintiffs' Claims" in Paragraph 1(jj)
15 means "all claims arising out of or relating to: (1)
16 alleged mismanagement of [Medley Capital]; (2) the
17 Transactions," which is a capital "T" defined term
18 that refers to the transactions contemplated in the
19 original merger agreements, and which includes any
20 actions, deliberations and negotiations relating
21 thereto; (3) the original and amended merger
22 agreements (including any actions, deliberations and
23 negotiations relating thereto); (4) the disclosures
24 regarding the original transactions; (5) the fiduciary

1 duties of the Stipulating Defendants in connection
2 with the review of strategic alternatives available to
3 Medley Capital; (6) the vote or any adjournment of the
4 vote of Medley Capital stockholders on the Medley
5 Capital Merger; and (7) proxy solicitation efforts in
6 connection with the votes of Medley Capital
7 stockholders on the original merger.

8 I note that the stipulation of
9 settlement originally proposed the release of claims
10 arising through the date of the closing of the amended
11 merger. After execution of the settlement, the
12 parties agreed to amend the release to limit its scope
13 to claims that were or could have been asserted
14 through the date of the settlement hearing.

15 Still, this release is somewhat
16 unusual because it releases claims, albeit historical
17 claims, as to the amended merger, which was not the
18 subject of the litigation.

19 Because none of the parties' initial
20 settlement briefs addressed the propriety of the scope
21 of the release, and given its unusual nature, at the
22 October 24, 2019 settlement hearing, I afforded the
23 parties the opportunity to submit supplemental briefs
24 on this issue, which were filed on October 31, 2019.

1 I turn now to the critical task at
2 hand, and that's evaluating the give in light of the
3 get to determine whether the settlement is fair and
4 reasonable.

5 As a threshold matter, I note that
6 most of the settlement consideration has already been
7 implemented. As a general rule, settlements of class
8 actions must be supported by present consideration.
9 That general rule, attributed to this Court's 1970
10 *Chickering* decision, serves to guard against
11 surreptitious buyouts of representative plaintiffs,
12 which would leave other class members without
13 plaintiffs. At the same time, Delaware law
14 recognizes that implementing component parts of a
15 settlement timely can benefit a class.

16 In *Polk v. Gold*, the Delaware Supreme
17 Court clarified that "[v]alidity of a settlement does
18 not depend on every compromised claim in a lawsuit
19 being supported by independent consideration" and that
20 "there may be cases where action is compelled before a
21 court can give notice of or hold a hearing on a
22 settlement petition."

23 In *Barkan*, the Delaware Supreme Court
24 affirmed approval of a class action settlement in the

1 face of a *Chickering* challenge, where the parties were
2 acting on a "relatively expedited schedule."

3 In this case, it was also critical
4 that the therapeutic terms agreed upon be implemented
5 promptly for them to benefit the class, and thus I
6 find that this case too falls within the exception to
7 the general rule set forth in *Chickering*.

8 Turning now to the meat of the
9 analysis, this litigation is the product of merger
10 negotiations gone wrong. At a simplistic level, the
11 terms of the settlement collectively aimed to address
12 the precise wrongs in the sales process I identified
13 in my post-trial opinion.

14 Potentially, it also provides direct
15 monetary compensation for the harms suffered by Medley
16 Capital stockholders, should the amended mergers
17 close. These measures will improve the precise
18 corporate vulnerabilities that have been revealed
19 throughout this litigation and are in that sense
20 beneficial.

21 As I mentioned, the release of claims
22 is slightly atypical in that it releases claims as to
23 the amended agreement, which was not the subject of
24 the litigation. The parties' supplemental briefing

1 helped me reason through this issue.

2 Delaware law does not require that
3 claims be actually litigated in order to be released.
4 Rather, in *Nottingham Partners*, the Delaware Supreme
5 Court held that a court may permit the release of a
6 claim based on the "identical factual predicate as
7 that underlying the claims"

8 That phrase, "identical factual
9 predicate," was later interpreted by the Delaware
10 Supreme Court in *In Re Philadelphia Stock Exchange,*
11 *Inc.*, to mean "same set of operative facts." In *In re*
12 *Philadelphia Stock Exchange*, a stockholder objected to
13 the release of claims to the extent it released claims
14 concerning a demutualization of the exchange.

15 Rejecting this argument, the Supreme
16 Court articulated a pro-settlement standard, reasoning
17 that the demutualization was not "a transaction that
18 was 'unrelated' or 'tangential' or 'remote' from the
19 conduct that formed the basis of the specific claims"
20 that were litigated.

21 In this case, the plaintiff litigated
22 breaches of fiduciary duty by settling defendants.
23 Aspects of the amended merger agreements and the
24 curative sale process arose from the operative facts

1 challenged in litigation. For example, relaxation of
2 the deal protections, the go-shop, and sales process,
3 and other aspects of the settlement in the amended
4 merger agreement were a direct effort to correct
5 breaches found in my post-trial opinion.

6 Other aspects of the amended merger
7 agreement, including negotiations with Sierra
8 regarding the exchange ratio, did not arise from the
9 litigation but, rather, were prompted by Sierra's
10 demands and Medley Capital's declining net asset
11 value.

12 The question is whether the parties
13 should be permitted to release claims as to all
14 historical aspects of the amended agreement despite
15 the fact that certain terms are unrelated to the
16 litigated issues and, indeed, certain of the economic
17 terms to the amended agreement have been described by
18 the parties in the context of settlement briefing as
19 less beneficial to the class than the original
20 agreement.

21 Having mulled this over quite a bit, I
22 conclude that a release of the nature proposed is
23 appropriate. This conclusion is guided mostly by one
24 policy and common sense considerations, and that's the

1 fact that, generally, defendants agree to a settlement
2 in order to achieve finality in litigation. If
3 implementing the settlement terms themselves gives
4 rise to new claims, then therapeutic settlements
5 requiring post-execution implementation would be
6 impracticable.

7 The plaintiffs made this point in
8 their supplemental briefing. And further, sometimes
9 implementing settlement terms requires papering a new
10 transaction or deal terms, and sometimes those
11 negotiations might take place in a different economic
12 climate warranting new economic terms.

13 Adequate class representatives know
14 best how to manage these risks in a way that promotes
15 beneficial settlements in light of all the
16 circumstances. And the standard for determining
17 whether a new transaction that results from settlement
18 negotiations relates to core facts must favor approval
19 of a settlement.

20 Thus, I conclude that the language in
21 *Philadelphia Stock Exchange* supplies the appropriate
22 standard I must apply considering the release of
23 claims concerning a new deal that was not totally the
24 subject of litigation. That is, I must approve the

1 scope of release as to the new transaction unless the
2 transaction is unrelated or tangential to or removed
3 from the conduct that forms the basis for the specific
4 claims for relief asserted in the complaint.

5 Implicit in the standard and in the
6 settlement approval process generally is the notion
7 that the terms achieved were negotiated by adequate
8 class representatives, a conclusion I have already
9 reached.

10 This approach is generally consistent
11 with settlements that involve implementation of
12 therapeutic benefits concerning a sale process. And
13 for a sampling of those cases, I direct interested
14 persons to the parties' supplemental briefing
15 concerning the scope of the release.

16 Applying this standard to this case I
17 conclude that the amended merger agreement is not
18 unrelated, tangential to, or removed from the conduct
19 that formed the basis for the specific claims in the
20 complaint. To the contrary, there is a direct
21 reaction to findings in the post-trial opinion,
22 although aspects of it resulted from other forces and
23 causes.

24 As comfort, I repeat that no

1 stockholder objected to the terms of the settlement,
2 which included this release. I note that the
3 settlement was negotiated by board members and
4 adequate class representatives fully incentivized to
5 achieve the greatest consideration possible for the
6 class, and that there was a great deal of transparency
7 concerning post-litigation events.

8 Thus, I approve the settlement.

9 I will turn now to the difficult task
10 of explaining the fee award.

11 The role of the Court in setting a fee
12 award is to exercise its own "sound business
13 judgment," and the Court has "substantial discretion
14 in the methods it uses and the evidence it relies
15 upon" to quantify the benefits obtained by counsel.
16 And that's a quote from the *Compellent Shareholder*
17 *Litigation* decision.

18 Scientific precision is not required,
19 nor is scientific precision really possible in this
20 exercise. As much as I would appreciate the ability
21 to pinpoint precise values with "mathematical
22 exactitude," my colleagues have recognized that the
23 best a person in my position can do is "rough
24 calculations." That's another quote from *Compellent*.

1 Nevertheless, our calculations must be
2 "supported by the record" and the "product of a
3 logical deductive process," as the Delaware Supreme
4 Court instructed in *Goodrich v. E.F. Hutton Group*.

5 Traditionally, the *Sugarland* factors
6 have guided the Court's analysis of these sorts of
7 petitions. Of those factors, the most important in
8 quantifying an appropriate fee award is the benefit
9 conferred in the litigation. I'll focus my efforts on
10 the analysis of those benefits.

11 The other factors used to assess the
12 propriety of a fee award are the standing and ability
13 of counsel, the complexity of the litigation, the time
14 and effort of counsel, and the contingent nature of
15 the representation.

16 As I have discussed, the settlement
17 included both monetary and non-monetary benefits.

18 Plaintiffs' counsel seeks fees in the
19 amount of \$22 million total, not including their
20 out-of-pocket expenses. They believe the therapeutic
21 benefits of the settlement are worth \$3.1- to
22 \$6.55 million and the settlement fund is worth \$16.7-
23 to \$20.2 million. They say that \$22 million, then, is
24 conservative, and they seek the entirety of this

1 amount now even though the settlement fund might not
2 be created.

3 Medley Capital opposes any fee award
4 exceeding \$3.1 million. They arrive at this position
5 by valuing therapeutic benefits and adding a modest
6 risk premium to account for the contingent nature of
7 the case. They say that the Court should apply this
8 quantum meruit method rather than the percentage-of-
9 the-fund method because the class achieved results
10 that were not economically beneficial.

11 Sierra, too, objects to the fee
12 request. Sierra does not dispute that some amount is
13 appropriate but says that the settlement fund is worth
14 nothing, even if it is created.

15 I'll start with the last point by
16 addressing the value of the settlement fund.

17 Again, the defendants contend that the
18 class is worse off than they were before the
19 litigation because the new deal provides Medley
20 Capital stockholders less consideration than the
21 original deal.

22 I have not been presented with
23 evidence that would allow me to value the amended
24 merger, but I do note that Sierra negotiated for an

1 exchange ratio more beneficial to Sierra in light of
2 Medley Capital's net asset value, such that it seems
3 likely that defendants are correct, and the new
4 transaction is less beneficial than the last, even
5 with the cash bump and stock consideration component.

6 From this premise, that the new
7 transaction is less beneficial to the class than the
8 original transaction, defendants make the logical leap
9 that the settlement confers no benefit whatsoever upon
10 the class. This conclusion rests on a series of
11 faulty suppositions.

12 First, fundamentally, defendants
13 wrongly seek to hold plaintiffs accountable for a
14 change in market conditions. Multiple decisions of
15 this Court stand for the proposition that plaintiffs
16 cannot take credit for benefits that were not a result
17 of their litigation.

18 Chancellor Allen's decision in *In re*
19 *Anderson Clayton Shareholders Litigation* recognized
20 that what is relevant is the benefit achieved by the
21 litigation, not a benefit that is otherwise conferred
22 after the litigation commences.

23 In *Dann v. Chrysler Corp.*, this Court
24 held that plaintiffs could not take credit for any

1 benefits flowing not from their litigation, but from
2 the general resurgence of the automobile industry.

3 Just as plaintiffs cannot take credit
4 for benefits not achieved from litigation, plaintiffs
5 should not be blamed for detriments not caused by the
6 litigation.

7 In this case, any decrease in the
8 benefit to the class in the form of the amended
9 exchange ratio appears attributable to market
10 conditions or management decisions or both. Nothing
11 in the record ties the alleged diminution of deal
12 value to this litigation.

13 Because plaintiffs did not cause any
14 detriment, they cannot suffer for it, as this Court
15 recognized in *In re Loral Space and Communications*
16 *Inc.* when it declined to reduce plaintiff counsels'
17 fees after the 2008 financial crisis depressed the
18 corporation's stock price.

19 I also note that, implicitly,
20 defendants' argument assumes that the original
21 transaction would have closed but for the disclosure
22 injunction. But this assumption does not resonate
23 with representations made at trial. Specifically,
24 Sierra pushed the Court to issue the opinion on a

1 timeline that would have permitted the transaction to
2 close by the original drop-dead date, regardless of
3 the outcome of the trial.

4 In an alternate universe, the parties
5 to the original agreement could have issued corrective
6 disclosures and tried to go through with the original
7 deal. So, the litigation cannot be determined as the
8 sole causal factor behind terminating the original
9 transaction.

10 Moreover, the logical corollary to
11 defendants' argument that the litigation conferred a
12 detriment is the supposition that plaintiffs should
13 not have pressed the litigation, regardless of
14 defendants' breaches of fiduciary duty. This
15 foolhardy position is deeply inconsistent with every
16 tenet this Court stands for, and I just don't buy it.

17 Defendants' second line of defense is
18 to argue that the settlement fund is too speculative
19 to support a fee. I also reject this argument. Put
20 succinctly, if the settlement fund is sufficient to
21 support the settlement and the release of claims, then
22 it is sufficient to support a fee.

23 Defendants cannot have it both ways.
24 Also, the settlement fund provides the class with a

1 guaranteed floor in terms of consideration
2 stockholders will receive if the amended merger
3 closes, and that benefit is not speculative.

4 That said, there, the contingent
5 nature of the settlement fund does raise a host of
6 issues. For one, the fund can't be precisely
7 quantified prior to closing due to the nature of the
8 consideration. Both parties expect the stock to trade
9 at a discount to net asset value, so the stock portion
10 of the fund might actually be worth less than the
11 nominal \$30 million. Further, the deal might not
12 close, so the fund might never be created. Thus,
13 awarding fees on the fund now would create a windfall
14 to plaintiffs' counsel.

15 Accordingly, my award of fees on the
16 settlement fund is contingent on the creation of the
17 settlement fund.

18 As plaintiffs pointed out at the
19 settlement hearing, approval of this type of
20 contingent fee award is not unprecedented. Former
21 Chancellor Chandler approved a similar request in the
22 *Digex* case, where he approved a fee award fixed at a
23 percentage of a settlement fund that would be valued
24 according to the corporation's stock price upon the

1 consummation of the contemplated transaction. As in
2 this case, the award was made contingent on the
3 consummation of the merger.

4 Turning now to the value of the
5 benefit, in *Americas Mining*, the Delaware Supreme
6 Court stated that "when the benefit is
7 quantifiable ... by the creation of a common fund,
8 Sugarland calls for an award of attorneys' fees based
9 upon a percentage of the benefit." Thus, the inputs
10 for calculating fee awards based on a quantifiable
11 benefit are the appropriate percentage and the amount
12 of the benefit.

13 As I mentioned, there are
14 complications in applying this formula in this case
15 because the value of the stock component of the
16 settlement fund is not fixed. So, rather than award a
17 lump sum today, I'm going to assign a percentage that
18 is linked to the settlement fund and provide direction
19 on whether and how to gross up the fund amount when
20 applying that percentage.

21 Turning to the percentage, this Court
22 has explained in cases that settle close to trial, "a
23 typical fee award ... ranges from 22.5% to 25%." And
24 that's from the *In re Orchard Enterprises Incorporated*

1 *Shareholders Litigation.*

2 This Court has explained that "higher
3 percentages are warranted when cases progress to a
4 post-trial adjudication." And that's from *Americas*
5 *Mining*.

6 The Delaware Supreme Court has made it
7 clear that 33 percent is the upper bound for
8 reasonableness of plaintiffs' fees. This case
9 proceeded to a post-trial adjudication, warranting a
10 fee north of 25 percent. But I do not believe this
11 case hits the 33 percent mark, in part because the
12 contingency risk was cabined by the highly compressed
13 time frame, and in part because the case warranting
14 that type of award is rare.

15 In my view, 26 percent is the
16 appropriate percentage. We searched for a case
17 procedurally analogous to this one. It appears that
18 no one has ever had to experience litigation quite
19 like this, which is probably a good thing. But this
20 percentage compares favorably with other cases that
21 bear some similarities to this litigation, including
22 *Talecris Biotherapeutics*, where the Court awarded a 25
23 percent award for a four-month litigation that
24 involved fewer depositions and settled pre-trial; and

1 *In re Orchard Enterprises*, where the Court awarded 24
2 percent of the benefit conferred after counsel took or
3 defended eight depositions, engaged in discovery and
4 related motion practice, and briefed and argued
5 summary judgment before settling.

6 The 26 percent award in this case
7 rewards plaintiffs for their "herculean efforts" to
8 litigate, and litigate adeptly, what is at least a
9 year's worth of litigation in just a few weeks while
10 also being cognizant that such a compressed time frame
11 does merit some degree of discounting.

12 Turning to the next issue, when the
13 common fund represents a net amount, it has been the
14 practice of this Court, at least since the 2011 Atlas
15 Energy settlement by my memory, to "gross up" the
16 common fund to account for the fee award.

17 The settling defendants argue against
18 this approach. Citing to Vice Chancellor Glasscock's
19 transcript ruling in *In re Globe Specialty Metals*,
20 defendants argue that the gross-up method should be
21 used only if the attorneys' fees are "not going to
22 come from the class." They contend that if the
23 settlement fund is not inclusive of the fee award,
24 then Medley Capital or the post-merger entity will be

1 required to pay the fee, which would indirectly harm
2 the class members.

3 Plaintiffs in turn say that there is a
4 likelihood that any such funds would come from
5 insurance carriers, and the parties disputed this
6 point through supplemental submissions and affidavits.
7 In the end, I'm not convinced by the look-through
8 method, at least not applied in this manner.

9 I do believe that *Globe Specialty*
10 directs that defendants bear the burden of convincing
11 me that the approach set forth is most equitable. The
12 affidavits submitted by settling defendants do not
13 meet that burden. And at least two stockholders have
14 submitted letters objecting to the net fund approach,
15 as I'll discuss later. So, with one caveat that I'll
16 explain next, we're grossing up.

17 Here's the caveat. Plaintiffs
18 described the fund as a "net" fund in that any award
19 of attorneys' fees will be in addition to the fund
20 amount, so it will not come from the fund. In
21 reality, however, the fund is a hybrid of a net/gross
22 fund, due to what plaintiffs have described as the
23 "look-through" component of any fee award, which
24 alters the exchange ratio in the amended merger

1 agreement if costs and attorneys' fees exceed \$10
2 million, as I previously explained.

3 Plaintiffs estimate that the merger
4 consideration received by the class would decrease by
5 between \$4.1 and \$5.9 million correlating to any fee
6 award ranging from \$10 million to \$15 million.

7 So, when grossing up the fund, the
8 parties shall account for this look-through amount,
9 applying what I will call the "modified gross-up
10 formula." And that formula is found in footnote 17 of
11 plaintiffs' reply brief in support of settlement and
12 fee awards, which accounts for the look-through
13 component.

14 So to sum up my analysis concerning
15 the settlement fund, if the settlement fund is
16 created, Plaintiffs' counsel is entitled to payment in
17 the amount of 26 percent of the value of the fund,
18 grossed up using the modified gross-up formula that
19 accounts for the look-through component.

20 I'll turn now to address fees
21 attributable to the benefits conferred by the
22 therapeutics. On this issue, defendants also raise
23 two threshold objections. First, Sierra seeks to
24 delay a fee award on the therapeutics by pointing to

1 decisions of this Court that describe "interim fee"
2 awards as "disfavored."

3 Sierra specifically cites to *Frank v.*
4 *Elgamal* and *In re Novell, Inc.* for this proposition,
5 but neither case is on point. Both *Frank* and *Novell*
6 involved fee applications for pre-merger disclosure
7 claims where post-merger damages claims were still
8 being litigated. Those applications were interim in
9 nature because the litigation was ongoing. By
10 contrast, in this case, the litigation has concluded,
11 and thus the requested fees are not interim. So now
12 I'll turn to addressing the benefits conferred by the
13 therapeutics.

14 The settling defendants argue that
15 when valuing therapeutic benefits, this Court should
16 adopt a quantum meruit approach, calculating a fee
17 award by adding a premium to the hours billed by the
18 plaintiffs' counsel. But that is not the typical
19 approach of this Court. Rather, this Court looks to
20 precedent awards from similar cases in matters where
21 the value of the benefit is not easily quantified.

22 Vice Chancellor Laster recently
23 repeated the good reasons for this approach when
24 resolving the fee petition in the *Sciabacucchi* action,

1 explaining that "Like the use of guideline ranges,
2 reliance on precedent promotes fairness and fulfills
3 the equitable principle that 'like cases should be
4 treated alike.'" I agree with that proposition, and
5 will look to the hours worked and implied billable
6 rate only as a cross-check on the precedent approach.

7 I'll turn now to valuing the five
8 categories of therapeutic benefits in this case.

9 The parties agree that benefits are
10 conferred by the appointment of independent directors
11 and disagree as to the value of the benefit.
12 Plaintiff's counsel seek an award in the range of \$1.1
13 to \$2.1 million. The settling defendants counter that
14 benefit is worth no more than \$200- to \$300,000.

15 The parties' positions reflect the
16 extreme swings in values decisions of this Court have
17 ascribed to this sort of benefit. In *EMAK Worldwide*
18 *v. Kurz*, the Supreme Court affirmed an award of
19 \$400,000 for a benefit that invalidated a consent that
20 would have reduced the board from seven members to
21 three members, allowing a controller to control the
22 board.

23 And in *Liberty Tax*, Chancellor
24 Bouchard found it reasonable to award \$350,000 to

1 \$500,000 for the elimination of a controller's
2 influence from a company and the company's board.

3 In *Mudrick*, the Court approved a
4 corporate governance settlement that, in part,
5 achieved board representation, and granted a fee award
6 of \$3 million. That settlement involved other
7 therapeutic benefits, but certainly board
8 representation for the minority was a critical
9 component.

10 In *Google*, then-Chancellor Strine
11 awarded \$8.5 million in fees for a corporate
12 governance settlement that resolved a challenge to a
13 stock plan. The primary benefit of the settlement was
14 that each time the controllers sought to issue new
15 non-voting stock, they would need the approval of
16 every independent director on Google's board.

17 The then-Chancellor awarded \$8.5
18 million in fees on a \$7 million lodestar, noting that
19 the benefits of the settlement were not a "home run"
20 but "somewhere between a solid single and a double."

21 In *Activision*, this Court mused that
22 fees in the realm of \$5- to \$10 million were
23 reasonable for the installation of two independent
24 directors and the reduction of a controller's

1 controlling stake in a large-cap company.

2 So, taking a step back, of course,
3 *Google* and *Activision* are both large-cap companies.
4 The market capitalization of *Activision*, for instance,
5 was \$15 billion, nearly 100 times the size of Medley
6 Capital. And the governance terms affected the
7 controllers' stock holdings or control over stock
8 issuances in those two cases.

9 And so it makes sense, in some
10 instances, to scale for market capitalization if the
11 value ascribed to the independent director hews on the
12 expected increase in value an independent director
13 will provide to the company's market capitalization.

14 In any event, given the unhelpful
15 range offered by precedent concerning the value of
16 therapeutic benefits of appointing independent
17 directors to a board, I was intrigued by plaintiffs'
18 preferred alternative valuation methodology.

19 Plaintiffs analogize the value of the
20 benefit to the cost of running a proxy contest by an
21 activist stockholder, which they say is the rough
22 equivalent of what the class would have paid to
23 achieve the placement of independent directors on the
24 board.

1 Plaintiffs' counsel points to a 2011
2 doctoral dissertation by Nickolay M. Grantchev, which
3 I believe was published in 2013, which reports the
4 average cost of an activist campaign that ends in a
5 proxy contest, with no guarantee of success, at \$10.71
6 million.

7 I was a little skeptical of this
8 number. My gut questions why an activist would pay
9 \$10 million to obtain board representation on a
10 company of this size. Only interests not comparable
11 to those of the class, like reputation value or other
12 assets, would lead to this business decision. But I
13 was still intrigued by the idea that we can value
14 independent board representation by what it would cost
15 to obtain that representation through a proxy contest,
16 so I found the dissertation online and I read it. And
17 I view the \$10.71 number as really not applicable.

18 For one, the dissertation defines
19 activist campaigns as a "sequence of escalating
20 decision steps, in which an activist chooses a more
21 hostile tactic only after less confrontational
22 approaches have failed." In the escalating decision
23 steps, the decision to wage a proxy contest is the
24 last and combines the costs of all prior steps, which

1 might have been successful in achieving the board
2 representation. And only 7 percent of activist
3 campaigns result in this end-game number, according to
4 the author. So it's a good thought, but it is poorly
5 supported here and does not provide a reliable
6 benchmark for me to value this therapeutic benefit.

7 So all that said, in the end, I think
8 the appropriate fee award, based on the precedent I've
9 been provided for the appointment of the two
10 independent directors in this case, is \$1 million.

11 This is on the high side of fees
12 granted for the appointment of independent directors
13 in companies of comparable size. I erred on the high
14 side because of the unique circumstances of this case.
15 It's tempting to view the appointment of independent
16 directors in terms of a ratio, like 2 of 5, or 3 or 6,
17 or, in this case, 2 of 7. When a person's job is to
18 quantify something, we gravitate toward any available
19 numbers. But these ratios do not tell the entire
20 story.

21 Recall that plaintiffs proved at trial
22 the key source of control exercised by the Taube
23 brothers was their influence over two of the
24 independent directors on the special committee. By

1 replacing those directors, plaintiffs neutralized this
2 concern at the board and special committee level at a
3 critical time in the life of this company. That is,
4 these two directors punched above their weight, so to
5 speak, because they effectively neutralized the
6 control concerns identified in the post-trial opinion,
7 which poses greater significance here than the
8 numerator and denominator of the board would otherwise
9 suggest.

10 Defendants claim that the benefit of
11 the independent directors is duplicative of other
12 therapeutic benefits, because the primary value of
13 these independent directors was, to paraphrase a
14 statement from page 46 of plaintiffs' opening brief,
15 these directors' service "as stewards of the curative
16 sales process."

17 But the fact that the independent
18 directors were placed on the special committee at a
19 critical juncture does not diminish their value. To
20 the contrary, that has inherent, distinct value from
21 the go-shop process, and would have been compensable
22 even outside of the sales process.

23 Further, the methodology for valuing
24 modifications of deal protections presumes that

1 fiduciaries are doing their jobs by acting in an
2 independent and disinterested manner, a presumption we
3 could not have made but for the appointment of the
4 independent directors through the settlement. So I do
5 not discount the value of the appointment of the
6 independent directors based on the theory that it is
7 duplicative of other benefits, such as the go-shop,
8 and analysis of which I turn to next.

9 Let's start with the premise that
10 go-shops confer a benefit to a class of stockholders
11 even if an alternative bidder does not materialize.
12 This is well established under precedent decisions
13 valuing this therapeutic, and even defendants concede
14 this point. The go-shop essentially delivers option
15 value to shareholders.

16 In *Del Monte* and *Compellent*, Vice
17 Chancellor Laster derived a methodology for
18 quantifying the value of relaxed deal protections.
19 That methodology quantified the option value by
20 determining, one, the likelihood of the emergence of a
21 competing bid, and, two, the incremental increase of
22 such a bid.

23 Now, this methodology is not intended
24 to impose mathematical certainty where none has

1 previously existed. It creates, to quote *Compellent*,
2 "an order of magnitude within which this Court can
3 craft an appropriate award." Exactitude is not the
4 aim of this exercise, and I don't pretend that it is.

5 The parties do not offer independent
6 research concerning the propriety of the two inputs,
7 that is, one, the likelihood of the emergence of a
8 competing bid, and, two, the incremental increase of
9 such a bid. Rather, the parties analogize to the
10 circumstances of the cases in which the Vice
11 Chancellor applied this methodology.

12 Plaintiffs point to *Del Monte*, in
13 which the Vice Chancellor explained that the
14 termination fee of the original deal is a reasonable
15 "lower bound for the incremental value of a topping
16 bid." He also summarized academic research,
17 explaining that the likelihood of a topping bid
18 depends on the type of go-shop. A pure go-shop, where
19 a single bidder negotiation is followed by a
20 post-signing go-shop, "generate[d] a higher offer 23%
21 of the time," he summarized.

22 The settling defendants point to
23 *Compellent Technologies*. There, rather than gaging
24 the premium of a topping bid on a range bookended at

1 lower end by the value of the termination fee, the
2 Vice Chancellor cited to research supporting the
3 conclusion that topping bids were a certain percentage
4 greater than the original deal value.

5 And in that case, he adopted a premium
6 of 11.37 percent because the deal protection measures
7 left in place were restrictive. He also determined
8 that in light of the deal protection devices, there
9 was an 8 percent chance that the deal at issue would
10 be topped.

11 Concerning the first input, the
12 settling defendants have conceded that this was a
13 "pure go-shop" and that it is reasonable to conclude
14 there was a 23 percent chance of a topping bid. Given
15 that this is an adversarial proceeding, I'm granting
16 substantial weight to that concession, which is
17 consistent with the evidence at trial that numerous
18 competing bidders had expressed interest in an
19 alternative transaction.

20 Now I must determine the incremental
21 value of such a topping bid. I can use either the
22 original transaction or the new transaction as
23 benchmarks for calculating the incremental value.

24 Looking at the original transaction,

1 using the original termination fee of \$6 million as a
2 lower bound and the 23 percent likelihood as an upper
3 bound, I derive a range of \$372,000 to \$3.5 million.

4 Looking at the new transaction, there
5 are various inputs that determine the value of the
6 amended merger for the class. I'll cut through it.
7 The range I derive is \$1.2 million to \$1.9 million.

8 Countervailing considerations pull
9 toward opposite ends of the ranges. Counseling in
10 favor of the lower end of the ranges is the fact that
11 the probability of a topping bid was lessened somewhat
12 by the projected decline in Medley Capital's net asset
13 value coupled by the passage of time.

14 Counseling in favor of the higher end
15 of the range is the fact that the go-shop best
16 embodies the equitable relief that I felt would
17 address the harms to the class, as I explained in the
18 opinion. Given the competing considerations, a
19 mid-range number is appropriate, and I grant \$1.5
20 million in fees for the go-shop, which is in the
21 middle of both ranges generated by the two relevant
22 benchmarks.

23 Next, we come to the waiver of the
24 standstills. I view the waiver of the standstills as

1 an input in determining the probability of a topping
2 bid relevant to valuing the go-shop. I do not view
3 them as having independent value, and so I do not
4 award a fee on that basis.

5 Turning now to the corrective
6 disclosures, the parties seem to be in agreement that
7 \$500,000 is reasonable for the corrective disclosures
8 negotiated by plaintiffs' counsel, and I agree. This
9 Court has found that number to be reasonable when new
10 material conflicts of interests are brought to the
11 attention of shareholders through supplemental
12 disclosures. I do not see a reason to disturb such a
13 consensus in an otherwise adversarial proceeding.

14 Last, I'll turn to valuing the post-
15 merger board members.

16 If the transactions contemplated by
17 the amended merger agreement are consummated, than the
18 class will have an additional benefit in the form of
19 board representation. I view this benefit as worth
20 \$100,000.

21 In *Baupost v. Providential Corp.*, this
22 Court awarded fees of \$326,000 for installing three
23 new independent directors to constitute a majority on
24 the new board. Plaintiffs in *Baupost* based this

1 request on an hourly rate and did not seek a risk
2 premium.

3 In *CytRx*, the Court considered the
4 fees to award on a monetary benefit of approximately
5 \$100,000 and nonmonetary benefits that included bylaw
6 amendments, the appointment of an independent
7 director, and other governance improvements. The
8 Court awarded \$220,000 in fees.

9 I find that these precedents indicate
10 that the board representation guaranteed by the one
11 independent director would support a fee award of
12 \$100,000. However, like the fees attributed to the
13 settlement fund, payment of this \$100,000 is
14 contingent on the transaction closing.

15 So for completeness, I turn now to the
16 remaining Sugarland factors, all of which confirm the
17 propriety of a fee award. Defendants do not dispute
18 that the issues in this case were complex. Plaintiffs
19 started out with a 220 action and discovered the
20 worst. The attorneys on the case were forced to
21 quickly digest the Medley entity structure and
22 business relationships to present them in an orderly
23 fashion to the Court.

24 Plaintiffs' counsel is experienced in

1 the field of stockholder litigation and well-known to
2 the Court. Their efforts this time did not
3 disappoint. And the plaintiffs' counsel undertook
4 representation in this case on a wholly contingent
5 basis.

6 The time and effort of counsel
7 warrants slightly greater pause, as defendants have
8 argued that it requires a discount. I have already
9 accounted, to some extent, for the duration of the
10 litigation in determining the percentage appropriately
11 applied to the settlement fund.

12 Defendants effectively argue that the
13 time and consideration of counsel should be considered
14 twice, and that plaintiffs' counsel should take a
15 haircut on their fees because the case was highly
16 expedited. Defendants go as far as to refer to
17 plaintiffs' time and effort as "relatively modest."

18 I do not agree with that
19 characterization. To be sure, the lion's share of
20 this litigation occurred over the course of a month,
21 but it was the sort of month that takes years off of a
22 person's life. In my view, this fact does not warrant
23 a haircut.

24 In fact, I recall that when expedited

1 deal litigation was at its zenith in this court in
2 recent decades, defense attorneys charged a premium on
3 their billable hours to drop everything and handle
4 those matters. So, I am definitely not granting a
5 haircut based on this factor. Moreover, the
6 compressed timeframe did not negatively affect
7 plaintiffs' counsel's work product. They are entitled
8 to the entirety of the fee attributable to the
9 benefits achieved.

10 As a cross-check on the fee award, I
11 note that plaintiffs invested 3,672.8 hours, according
12 to their submissions, of which 3,241.9 hours related
13 to the prosecution of this case through the execution
14 of the term sheet. I have reviewed counsel's
15 affidavits, which reflect that the hours multiplied by
16 counsel's ordinary billable rates generate a value of
17 approximately \$1.2 million in work performed by
18 Olshan, \$1 million in work performed by Abrams &
19 Bayliss, and approximately \$100,000 in work performed
20 by Bernstein Litowitz.

21 The hours expended in the 220 phase by
22 Bernstein Litowitz and others are appropriate to
23 include in the lodestar because those efforts were
24 part of the continuous litigation strategy for a

1 continuum of work.

2 All told, the lodestar is at \$2.3
3 million. This means that the fee award of \$3 million
4 awarded for therapeutics is a slight premium to the
5 lodestar. And if the settlement fund comes through,
6 plaintiffs' counsel will be compensated handsomely.
7 And that risk/reward makes sense to me.

8 As another cross-check, if I had
9 awarded the full amount requested by plaintiffs of \$22
10 million, the implied hourly rate would have been
11 \$5,989.

12 This is not beyond the bounds of
13 reasonableness. It is not practical to calculate the
14 implied hourly rate I am awarding today given the
15 contingent nature of a portion of the award. But the
16 implied rate will almost certainly be less than what I
17 just recounted. Because the upper bound is
18 reasonable, anything lower would be more so.

19 If the settlement fund is created, the
20 resulting fee would be approximately 6X or 7X
21 plaintiffs' counsel's normal hourly rate, by my
22 estimation. While this implied rate might strike a
23 casual observer as high at first glance, it is well
24 within the range that this Court has awarded over the

1 years. And a sampling of the relevant cases can be
2 found in Exhibit 7 to plaintiffs' reply brief in
3 support of the settlement.

4 Plaintiffs have also requested
5 reasonable costs in the amount of \$420,334 associated
6 with this litigation. I approve reimbursement of
7 those costs and expenses. They were out of pocket,
8 and there is no principled reason for making
9 plaintiffs wait until the amended merger agreement
10 closes for reimbursement, so that amount shall be paid
11 at the same time as the \$3 million awarded in
12 connection with the therapeutics.

13 I'll now address a series of other
14 requests.

15 Counsel to Mr. Altman, who pursued a
16 parallel claim concerning the challenged transaction,
17 also requested fees associated with the filing of
18 their 220 action and subsequent monitoring of the
19 proceedings in this case.

20 It is conceded that these attorneys
21 obtained for the class is an additional disclosure
22 regarding the "echo voting" issue. I am going to
23 grant a nominal amount based on what I think this
24 specific disclosure is worth, and that's \$75,000.

1 In determining appropriate fees for
2 these more modest types of disclosures, this Court has
3 weighed the materiality of the disclosures attained,
4 and awarding lesser fees for disclosures that
5 "approach the limits of materiality."

6 In *Pace v. Arbitron*, for example, the
7 Court found the disclosures might be interesting to
8 stockholders but did not alter the total mix of
9 information and awarded \$100,000 in fees for two
10 minimally additive disclosures.

11 In *BEA Systems*, the Court found two
12 disclosures to be "meritorious" yet "modest." There,
13 the Court chose to award one-quarter of the
14 plaintiffs' requested costs and fees, plus a risk
15 premium.

16 In this case, the disclosure achieved
17 by Mr. Altman's counsel can't be said to have moved
18 the needle all that much. The thrust of the
19 justification is that the proxy overstated the amount
20 of echo votes in favor of the transaction as "just
21 over 50%" instead of "just barely over 50%" or
22 "approximately 49%". Either way, the vote was hotly
23 contested, and a stockholder with knowledge of that
24 slim margin would go to the polls or be incentivized

1 to do so.

2 Therefore, Altman's corrective
3 disclosures were "interesting" and even "meritorious,"
4 but for all intents and purposes, they were relatively
5 modest. Thus, I find an amount of \$75,000 in this
6 case is consistent with precedent and appropriate.

7 That said, I do have reservations
8 about this aspect of the fee award. Generally
9 speaking, I do not want to incentivize a free-rider
10 phenomenon where plaintiffs' counsel can sit back,
11 merely monitor a case, make suggestions here or there,
12 and then rush in to claim fees in the end. That
13 practice would be bad for our system. It would create
14 inefficiencies for plaintiffs and plaintiffs' counsel
15 who are trying to do things the right way. It would
16 also burden the Court with unnecessary fee petitions.

17 I am granting fees despite these
18 general concerns because I do not believe that
19 Mr. Altman or his counsel engaged in such gamesmanship
20 here. And that's clear from a cursory review of his
21 team's actions.

22 Mr. Altman commenced separate
23 litigation on March 20, 2019 against the settling
24 defendants. The complaint alleged that the defendants

1 breached their fiduciary duties to stockholders of
2 Medley Capital in connection with the adjournments of
3 the vote of Medley Capital Stockholders on the
4 proposed mergers. These were valid concerns that
5 prompted me to schedule hearing on Mr. Altman's motion
6 for expedition.

7 In response, FrontFour moved to
8 consolidate these actions. I delayed a hearing on the
9 motion to expedite, and the parties ultimately agreed
10 to consolidation.

11 There was a critical time there when I
12 had some questions similar to what Mr. Altman raised,
13 and so, again, I do not think that his team's actions
14 were an effort at gamesmanship or otherwise triggering
15 any of the policy concerns I just described. So a
16 modest award for the disclosure achieved is
17 appropriate.

18 Finally, I turn to the objections of
19 Doug Getter and Kevin McCallum, both of whom received
20 the notice and submitted letters opposing the fees
21 requested in connection with the settlement.

22 Mr. Getter's letter was dated October
23 1, 2019, and received by the Court on October 15,
24 2019. Mr. Getter has been a shareholder of Medley

1 Capital dating back to 2009 or 2010. He objected to
2 an award of attorneys' fees in the amount of \$22
3 million because he feared that it would leave very
4 little remaining from the \$30 million settlement fund.
5 Mr. Getter requested that the fee award not exceed \$3
6 million.

7 Mr. McCallum expressed similar
8 concerns that plaintiffs' counsel would be compensated
9 in a way "punitive to shareholders" despite the
10 subsequent loss of market value of the merging
11 entities.

12 The fact that the fees are not
13 actually diminishing the \$30 million settlement fund
14 should allay these stockholders' concerns. I have
15 already explained in great detail why I find the
16 amount of fees I have awarded to be reasonable. Thus,
17 I decline to otherwise adopt the objectors'
18 suggestions.

19 So to recap, the class is certified.
20 The settlement is approved. On the question of fees,
21 I grant a total of \$3,075,000 in fees relating to the
22 therapeutic benefits implemented to date, broken down
23 as follows: \$1 million for the independent directors;
24 \$1.5 million for the go-shop; and \$500,000 for the

1 corrective disclosures achieved by Front Four, plus
2 \$75,000 for Mr. Altman's corrective disclosure.

3 On top of that, I approve
4 reimbursement of \$420,334 to plaintiffs' counsel. I
5 further grant, contingent on closing of the amended
6 transaction, 26 percent of the settlement fund, and
7 \$100,000 for the post-merger director.

8 I ask that plaintiffs' counsel prepare
9 a form of order that memorializes this lengthy bench
10 ruling, conferring with defendants concerning the
11 propriety of that form, and submit it to the Court for
12 my review.

13 That concludes my bench ruling.

14 I'd, of course, be remiss if I did not
15 again say that the actions and efforts of all counsel
16 involved in this litigation have been truly
17 commendable. The advocacy throughout was exemplary
18 and reminds me of how lucky I am to serve as a member
19 of this Court, so I thank you.

20 With that, are there any questions?

21 MR. BAYLISS: Your Honor, Tom Bayliss
22 on behalf of the FrontFour plaintiffs. No questions
23 here. Thank you very much.

24 MR. DITOMO: Your Honor, this is John

1 DiTomo on behalf of Medley. I was writing copious
2 notes, so I apologize for missing this, but with
3 respect to the gross-up, the stock contingent, was
4 that being valued at the .7 or 1 percent of NAV?

5 THE COURT: I don't have an answer for
6 you on that. And so if it needs further
7 clarification, you can write to me and I will have a
8 round four.

9 The formula used in the footnote in
10 the reply brief, and I'll find it specifically for
11 you --

12 MR. DITOMO: I believe you said
13 Footnote 17 of the plaintiff's reply.

14 THE COURT: That's correct, and I
15 believe they used the higher NAV.

16 Just give me one moment.

17 MR. DITOMO: Thank you, Your Honor, I
18 appreciate it.

19 THE COURT: So Footnote 17 of the
20 reply brief says it's going to be at one times NAV.
21 And it says a 33 percent fee award, but, again, I've
22 altered that to be a 26 percent fee award. And it
23 provides the formula for the look-through amount, and
24 that's what I've adopted.

1 MR. DITOMO: Thank you, Your Honor.

2 THE COURT: Any further questions?

3 All right. Well, we are adjourned.

4 Thank you.

5 MR. BAYLISS: Thank you, Your Honor.

6 (Conference adjourned at 12:23 p.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 75 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 27th day of November, 2019.

/s/ Jeanne Cahill

Jeanne Cahill, RDR, CRR
Official Chancery Court Reporter
Registered Diplomat Reporter
Certified Realtime Reporter

Tab 25

IN RE: ACTIVISION BLIZZARD, INC.) Consolidated
STOCKHOLDER LITIGATION) C.A. No. 8885-VCL

A hearing having been held before this Court on March 4, 2015 pursuant to this Court's Scheduling Order with Respect to Notice and Settlement Hearing, dated December 23, 2014 (the "Scheduling Order"), and upon a Stipulation of Compromise and Settlement, dated December 19, 2014 (the "Stipulation") outlining a Settlement of the above-captioned action (the "Action"), which is incorporated herein by reference, the parties having appeared by their attorneys of record, the Court having heard and considered the submissions and evidence presented in support of the proposed Settlement, the application for an award of attorneys' fees, expenses, and the application for a special award to Plaintiff, the opportunity to be heard having been given to all other persons requesting to be heard, and the entire matter of the proposed Settlement having been heard and considered by the Court,

1. Unless otherwise defined herein, all capitalized terms shall have the same meanings as set forth in the Stipulation and the Scheduling Order.

2. The Court has jurisdiction over the subject matter of the Action, and all matters relating to the Settlement of the Action, as well as personal jurisdiction over all of the Parties, and it is further determined that Plaintiff, Defendants, Activision, and the Class, as well as their transferees, heirs, executors, successors, and assigns, are bound by this Order and Final Judgment (the “Judgment”).

3. Notice has been given to all Activision stockholders as of July 25, 2013 and all current stockholders of the Company pursuant to and in the manner directed by the Scheduling Order, proof of mailing, and other dissemination of the Notice was filed with the Court and full opportunity to be heard has been offered to all parties, members of the Class, Current Stockholders, and persons in interest. The form and means of the Notice was the best notice practicable under the circumstances and was given in compliance with the requirements of Court of Chancery Rules 23 and 23.1 and due process of law, such that all members of the Class and stockholders of Activision are bound by this Judgment.

4. With regard to the class claims, a class has been certified previously by the Court. Plaintiff and Plaintiff’s Counsel have adequately represented the interests of the Class.

5. With respect to the derivative claims, the Plaintiff has held stock in the Company since the time of the conduct complained of in the Action, otherwise

has standing to prosecute the Action, and is an adequate representative of all stockholders of Activision.

6. Based on the record in the Action, each of the provisions of Chancery Court Rules 23 and 23.1 has been satisfied and the Action has been properly maintained according to the provisions of Chancery Court Rules 23 and 23.1.

7. The Settlement is fair, reasonable, adequate, and in the best interests of the Class, Activision and its stockholders.

8. Pursuant to Court of Chancery Rules 23 and 23.1, this Court approves the Settlement in all respects, and the parties are directed to consummate the settlement in accordance with the terms of the Stipulation.

9. The Action is hereby dismissed with prejudice as to all Defendants and as to Activision, and against Plaintiff, the Class and all Current Stockholders. As between Plaintiff and Defendants, the parties are to bear their own costs, except as otherwise provided in this Order or in the Stipulation and the Scheduling Order.

10. Upon entry of this Judgment and subject to Activision's receipt of the Settlement Payment, Activision, Plaintiff, the Class and each and every other Activision stockholder, on behalf of themselves and any other person or entity who could assert any of the Released Plaintiff's Claims on their behalf, in such capacity only, shall fully, finally, and forever release, settle, and discharge, and shall forever

be enjoined from prosecuting, the Released Plaintiff's Claims against Defendants and any other Defendants' Releasees, except for any claims any Defendant or Nominal Defendant may have against any insurer, co-insurer or re-insurer that are not released pursuant to other documentation.

11. Upon entry of this Judgment and subject to Activision's receipt of the Settlement Payment, Defendants and the other Defendants' Releasees, on behalf of themselves and any other person or entity who could assert any of the Released Defendants' claims on their behalf, in such capacity only, shall fully, finally, and forever release, settle, and discharge, and shall forever be enjoined from prosecuting, the Released Defendants' Claims against Plaintiff's Releasees, except for any claims any Defendant or Nominal Defendant may have against any insurer, co-insurer or re-insurer that are not released pursuant to other documentation.

12. The Parties are authorized, without further approval from the Court, to agree to adopt such amendments and modifications of the Stipulation that are consistent with this Judgment and the Stipulation and that do not limit the rights of Plaintiff, Defendants, Activision, the Class or the Company's stockholders under the Stipulation. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any provisions of the Stipulation.

13. Neither this Judgment, nor the Settlement nor any act or omission in connection therewith shall be deemed to be evidence of or to constitute an admission or concession by: (a) Defendants, Activision, or any of the other Defendants' Releasees as to (i) the truth of any fact alleged by Plaintiff, (ii) the validity of any claims or other issues raised, or which might be or might have been raised, in the Action or in any other litigation, (iii) the deficiency of any defense that has been or could have been asserted in the Action or in any litigation, or (iv) any wrongdoing, fault, or liability of any kind by any of them, which each of them expressly denies; or (b) Plaintiff or any of the other Plaintiff's Releasees that any of their claims are without merit, that any of the Defendants or Defendants' Releasees had meritorious defenses, or that damages recoverable under the Fifth Amended Class and Derivative Complaint would not have exceeded the Settlement Payment.

14. In the event that the Settlement is terminated in its entirety pursuant to Paragraph 6.1 of the Stipulation or the Effective Date otherwise fails to occur for any other reason, then (i) the Settlement and the Stipulation (other than Section VI and Paragraph 3.3 thereof) shall be canceled and terminated; (ii) this Judgment and any related orders entered by the Court shall in all events be treated as vacated, *nunc pro tunc*; (iii) the Releases provided under this Judgment shall be null and

void; (iv) the fact of the Settlement shall not be admissible in any proceeding before any court or tribunal; (v) all proceedings in, and parties to, the Action shall revert to their status as of November 13, 2014, and no materials created by or received from another Party that were used in, obtained during, or related to settlement discussions shall be admissible for any purpose in any court or tribunal, or used, absent consent from the disclosing party, for any other purpose or in any other capacity, except to the extent that such materials are required to be produced during discovery in the Action or in any other litigation; (vi) the Court shall set a revised schedule for trial; (vii) the Parties shall proceed in all respects as if the Settlement and the Stipulation (other than Section VI and Paragraph 3.3) had not been entered into by the Parties; and (viii) the Settlement Fund paid or due with respect to such amounts, less any escrow fees or costs actually incurred and paid or payable, shall be refunded directly to Defendants and any insurers who made payments pursuant to paragraph 2.1(b) of the Stipulation in any amount proportional to their contributions within five (5) business days after such cancellation or termination.

15. In the event Vivendi fails to make the Vivendi Settlement Payment as required by Paragraph 2.1(a) of the Stipulation, Plaintiff shall have the right to terminate the Settlement and the Stipulation as to the Vivendi Defendants by

providing written notice of his election to do so to the other parties to this Stipulation and the Court within five business days of such default. In the event Activision does not receive the Non-Vivendi Settlement Payment as required by Paragraph 2.1(b) of the Stipulation, Plaintiff shall have the right to terminate the Stipulation as to the Defendants other than the Vivendi Defendants by providing written notice of his election to do so to the other parties to this Stipulation and the Court within five business days of such default. In the event this Settlement is terminated pursuant to this paragraph as to less than all Defendants, the provisions of Paragraph 6.2 of the Stipulation shall be applicable, but solely as between Plaintiff and the Defendants as to whom the Settlement has been terminated, and the parties shall otherwise confer with the Court to modify its prior Orders and Judgment consistent with such limited termination and to confer the releases provided herein solely as to the Defendants as to whom the Settlement is not terminated. In addition to the foregoing, Plaintiff shall have the right to specifically enforce the Stipulation and compel the payment of the Vivendi Settlement Payment and the Non-Vivendi Settlement Payment.

16. Plaintiff's Counsel are awarded attorneys' fees and expenses in the sum of \$72,500,000 to be payable from the Settlement Fund, which the Court finds to be reasonable, to be paid in accordance with the terms of the Stipulation.

Plaintiff's Counsel shall allocate the attorneys' fees awarded amongst Plaintiff's Counsel and Miller's Counsel in a manner which they, in good faith, believe reflects the contributions to achieving the benefits of the Settlement.

17. Plaintiff's Counsel may pay to Plaintiff Anthony Pacchia a special award of \$50,000, to be payable from the fees and expenses awarded by the Court.

18. No proceedings or Court order with respect to the Fee Award shall in any way disturb or affect this Judgment (including precluding the Judgment from being Final or otherwise being entitled to preclusive effect), and any such proceedings or Court order shall be considered separate from this Judgment. Nothing herein dismisses or releases any claim by or against any party to the Stipulation arising out of a breach of the Stipulation or violation of this Judgment.

19. Without affecting the finality of this Judgment in any way, this Court reserves jurisdiction over all matters relating to the administration, enforcement and consummation of the Settlement and this Judgment.



Vice Chancellor J. Travis Laster
Dated: May 20, 2015

Tab 26



GRANTED

EFiled: Dec 27 2022 11:39AM EST
Transaction ID 68736272
Case No. 2020-1046-SG



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE AVX CORPORATION
STOCKHOLDERS LITIGATION

Consolidated C.A. No. 2020-1046-SG

[PROPOSED] ORDER AND FINAL JUDGMENT

WHEREAS, a stockholder class action is pending in this Court, entitled *In re AVX Corporation Stockholders Litigation*, Consolidated C.A. No. 2020-1046-SG (the “Action”);

WHEREAS, by Order entered on April 26, 2022, this Court certified the Action as a non-opt out class action pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2) on behalf of a class consisting of all former record holders and/or beneficial owners of common stock of AVX Corporation (“AVX”) who received \$21.75 per share in cash in exchange for their shares of AVX common stock in connection with the acquisition of the outstanding shares of AVX stock not already owned by Kyocera Corporation (“Kyocera”), in their capacities as record holders and/or beneficial owners of such stock (the “Class Shares”), together with their heirs, assigns, transferees, and successors-in-interest, in each case in their capacity as holders of Class Shares (the “Class”). Excluded from the Class are (i) Defendants and their heirs, trusts, estates, successors, and assigns; (ii) the immediate family members of the Individual Defendants (defined below); (iii) the senior officers and directors of AVX and Kyocera at the time of the closing of the

acquisition of AVX by Kyocera and their immediate family members; (iv) any parent, subsidiary, or affiliate of AVX or Kyocera; and (v) all entities in which any Defendant or any other excluded person or entity has, or had at the time of the closing of the acquisition of AVX by Kyocera, a direct or indirect controlling interest. Also excluded from the Class are Arbitrage Fund, Water Island Merger Arbitrage Institutional Commingled Fund LP, and Morningstar Alternatives Fund A Series of Morningstar Funds Trust.

WHEREAS, (i) plaintiffs Amy Stone Lamborn, Robert Reese, Harriet Herman, and Albert Herman (collectively, “Plaintiffs”), on behalf of themselves and the other members of the Class; and (ii) defendant Kyocera and defendants Shoichi Aoki, Hiroshi Fure, Koichi Kano, John Sarvis, Hideo Tanimoto, and Goro Yamaguchi (collectively, the “Individual Defendants,” and together with Kyocera, “Defendants”) (Plaintiffs and Defendants, together, the “Parties”) have entered into a Stipulation and Agreement of Settlement, Compromise, and Release dated September 21, 2022 (the “Stipulation”) that provides for a complete dismissal with prejudice of the claims asserted against Defendants in the Action on the terms and conditions set forth in the Stipulation, subject to the approval of this Court (the “Settlement”);

WHEREAS, by Order dated September 23, 2022 (the “Scheduling Order”), this Court (i) ordered that notice of the proposed Settlement be provided to potential

Class Members; (ii) provided Class Members with the opportunity to object to the proposed Settlement, the proposed Plan of Allocation, and/or Co-Lead Counsel's application for an award of attorneys' fees and expenses; and (iii) scheduled a hearing regarding final approval of the Settlement;

WHEREAS, the Court conducted a hearing on December 22, 2022 (the "Settlement Hearing") to consider, among other things: (i) whether the terms and conditions of the Settlement are fair, reasonable, and adequate to the Class, and should therefore be approved; (ii) whether a Judgment should be entered dismissing the Action with prejudice as against Defendants; (iii) whether the proposed Plan of Allocation of the Net Settlement Fund is fair and reasonable, and should therefore be approved; and (iv) whether the application by Co-Lead Counsel for an award of attorneys' fees and expenses should be approved; and

WHEREAS, due notice of the hearing has been given in accordance with the Scheduling Order; the Parties having appeared by their respective attorneys of record; the Court having heard and considered evidence in support of the proposed Settlement; the attorneys for the respective Parties having been heard; an opportunity to be heard having been given to all other persons or entities requesting to be heard in accordance with the Scheduling Order; the Court having determined that notice to members of the Class was adequate and sufficient; and the entire matter of the proposed Settlement having been heard and considered by the Court;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, this ___ day of December, 2022, as follows:

1. **Definitions**: Unless otherwise defined herein, capitalized terms used herein shall have the same meanings given to them in the Stipulation.

2. **Jurisdiction**: The Court has jurisdiction over the subject matter of the Action, and all matters relating to the Settlement, as well as personal jurisdiction over the Parties and each of the Class Members.

3. **Notice**: The Court finds that the dissemination of the Notice and the publication of the Summary Notice: (i) were implemented in accordance with the Scheduling Order; (ii) constituted the best notice practicable under the circumstances; (iii) constituted notice that was reasonably calculated, under the circumstances, to apprise Class Members of: the pendency of the Action; the effect of the proposed Settlement (including the Releases to be provided thereunder); the proposed Plan of Allocation; Co-Lead Counsel's application for an award of attorneys' fees and expenses; their right to object to any aspect of the Settlement, the Plan of Allocation, and/or Co-Lead Counsel's application for an award of attorneys' fees and expenses; and their right to appear at the Settlement Hearing; (iv) constituted due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the proposed Settlement; and (v) satisfied the

requirements of Court of Chancery Rule 23, the United States Constitution (including the Due Process Clause), and all other applicable law and rules.

4. **Final Settlement Approval and Dismissal of Claims:** Pursuant to, and in accordance with, Court of Chancery Rule 23(e), this Court hereby fully and finally approves the Settlement set forth in the Stipulation in all respects (including, without limitation: the Settlement consideration; the Released Claims; and the dismissal with prejudice of the claims asserted against Defendants in the Action), and finds that the Settlement is, in all respects, fair, reasonable, and adequate to the Class. The Parties are directed to implement, perform, and consummate the Settlement in accordance with the terms and provisions contained in the Stipulation, which this Judgment incorporates and makes a part hereof.

5. All claims asserted against Defendants in the Action by Plaintiffs and the other Class Members are hereby dismissed with prejudice. The Parties shall bear their own fees, costs, and expenses, except as otherwise provided in the Stipulation and this Judgment.

6. **Binding Effect:** The terms of the Stipulation and of this Judgment shall be forever binding on the Parties and all Class Members (regardless of whether or not any individual Class Member was entitled to receive a distribution from the Net Settlement Fund or in fact receives a distribution from the Net Settlement Fund).

7. **Releases:** The Releases set forth in paragraphs 3 and 4 of the Stipulation, together with the definitions contained in paragraph 1 of the Stipulation relating thereto, are expressly incorporated herein in all respects. The Releases are effective as of the Effective Date. Accordingly, this Court orders that:

(i) Upon the Effective Date of the Settlement, Plaintiffs and each of the other Class Members, on behalf of themselves and their respective heirs, executors, administrators, predecessors, successors, and assigns in their capacities as such, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged any and all Released Plaintiffs' Claims against Defendants and the other Released Defendants' Persons, and shall forever be barred and enjoined from prosecuting any and all Released Plaintiffs' Claims against any of the Released Defendants' Persons. This Release shall not apply to any of the Excluded Plaintiffs' Claims.

(ii) Upon the Effective Date of the Settlement, Defendants, on behalf of themselves and their respective heirs, executors, administrators, predecessors, successors, and assigns in their capacities as such, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged any and all Released Defendants' Claims against Plaintiffs and the other Released

Plaintiffs' Persons, and shall forever be barred and enjoined from prosecuting any and all Released Defendants' Claims against any of the Released Plaintiffs' Persons.

8. Notwithstanding paragraph 7 above, nothing in the Stipulation or in this Judgment shall in any way impair or restrict the rights of the Parties to enforce the terms of the Settlement pursuant to the Stipulation.

9. **Award of Attorneys' Fees and Expenses:** Plaintiffs' Counsel are hereby awarded an all-in award of attorneys' fees and litigation expenses in the amount of \$10,728,500, which sum the Court finds to be fair and reasonable. The fee and expense award to Plaintiffs' Counsel (the "Fee and Expense Award") shall be paid solely out of the Settlement Fund.

10. No proceedings or court order with respect to the Fee and Expense Award to Plaintiffs' Counsel shall in any way affect or delay the finality of this Judgment (or otherwise preclude this Judgment from being entitled to preclusive effect), and shall not affect or delay the Effective Date of the Settlement.

11. **Plan of Allocation of Net Settlement Fund:** The Court hereby finds and concludes that the formula for the calculation of payments to eligible Class Members as set forth in the Plan of Allocation provides a fair and reasonable basis upon which to allocate the proceeds of the Net Settlement Fund with due consideration having been given to administrative convenience and necessity. No proceedings or court order with respect to approval of the Plan of Allocation shall in

any way affect or delay the finality of this Judgment (or otherwise preclude this Judgment from being entitled to preclusive effect), and shall not affect or delay the Effective Date of the Settlement.

12. **Modification of the Stipulation:** Without further approval from the Court, the Parties are hereby authorized to agree to and adopt such amendments or modifications of the Stipulation or any Exhibits attached thereto to effectuate the Settlement that: (i) are not materially inconsistent with this Judgment; and (ii) do not materially limit the rights of Class Members in connection with the Settlement. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any provisions of the Settlement.

13. **Termination of Settlement:** If the Settlement is terminated as provided in the Stipulation or the Effective Date of the Settlement otherwise fails to occur, this Judgment shall be vacated, rendered null and void, and be of no further force and effect, except as otherwise provided by the Stipulation; this Judgment shall be without prejudice to the rights of the Parties or the Class; and Plaintiffs and Defendants shall revert to their respective positions in the Action as of immediately prior to the execution of the Stipulation on September 21, 2022, as provided under the Stipulation.

14. **Retention of Jurisdiction:** Without affecting the finality of this Judgment in any way, this Court retains continuing and exclusive jurisdiction over

the Parties and all Class Members for purposes of the administration, interpretation, implementation, and enforcement of the Settlement, and all other matters relating to the Action and the Settlement.

15. **Entry of Final Judgment:** There is no just reason to delay the entry of this Judgment as a final judgment in the Action. Accordingly, the Register in Chancery is expressly directed to immediately enter this final Judgment in the Action.

Vice Chancellor Sam Glasscock III

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

Court: DE Court of Chancery Civil Action

Judge: Sam Glasscock

File & Serve

Transaction ID: 68721049

Current Date: Dec 27, 2022

Case Number: 2020-1046-SG

/s/ **Judge Sam Glasscock**

Tab 27

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE EZCORP INC. CONSULTING :
AGREEMENT DERIVATIVE LITIGATION : C.A. No. 9962-VCL

- - -

Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, April 3, 2018
10:00 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

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PLAINTIFF'S MOTION FOR FINAL APPROVAL OF PROPOSED
SETTLEMENT, AN AWARD OF ATTORNEYS' FEES AND EXPENSES,
AND AN INCENTIVE AWARD, AND THE COURT'S RULINGS

CHANCERY COURT REPORTERS
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3 -and-

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1 THE COURT: Welcome, everyone.

2 MR. WELCH: Good morning, Your Honor.

3 MR. DUPRE: Hello, Your Honor. Andrew
4 Dupre, McCarter & English. I'm serving as local
5 counsel for the plaintiffs.

6 THE COURT: Don't use that term in my
7 courtroom, please.

8 MR. DUPRE: Delaware counsel.

9 THE COURT: Thank you.

10 MR. DUPRE: Well said, sir.

11 With your permission, Mr. Porritt will
12 be making the argument today. He is admitted pro hac
13 vice.

14 MR. GARDNER: Your Honor, briefly,
15 Cliff Gardner of Skadden Arps on behalf of the Cohen
16 defendants. After Mr. Porritt's presentation, if you
17 have questions about the substance of the settlement,
18 I'll be happy to field those. I want to introduce at
19 counsel table Mr. Welch, whom you know.

20 MR. WELCH: Good morning, Your Honor.

21 MR. GARDNER: My colleague, Veronica
22 Bartholomew, will be making the presentation on the
23 incentive fee award issue.

24 THE COURT: Thank you all for being

1 here.

2 MR. WELCH: Thank you, Your Honor.

3 MR. PORRITT: Thank you very much,
4 Your Honor.

5 We're here on the settlement in the
6 EZCORP consulting contract matter. Three matters here
7 are: one, just to confirm notice has been properly
8 given; second, to approve the overall settlement and
9 then to final judgment; and thirdly, the attorney fee
10 and incentive award matters.

11 So the notice can be easily handled,
12 Your Honor. I think there is an affidavit of service
13 filed by the defendants showing that notice has been
14 mailed out in accordance with the terms of this
15 Court's preliminary scheduling order. Over 5,000
16 notices have been mailed out. The form of the notice
17 was as approved by the Court.

18 Secondly, moving on to the settlement,
19 this is a cash settlement of a \$6.45 million payment
20 to the company from a combination of insurers and
21 individual contributions by the defendants. I don't
22 need to belabor the points about what the factors the
23 Court considers on what is fair, reasonable and
24 adequate.

1 Here, the first question is the
2 viability of the claims. Obviously, the claims were
3 upheld by Your Honor's motion to dismiss opinion.
4 This is a case where the theory, as pleaded, did not
5 necessarily survive contact with the evidence.

6 As Your Honor may recall, the initial
7 theory of the complaint was that these consulting
8 agreements were essentially a device to extract rent
9 or special dividend on behalf of the controller.

10 When we got into evidence, it turns
11 out that there was substantial work done, and so the
12 case changed into a debate as to whether those
13 services were really worth 18.4 million or not. There
14 was obviously a difference of opinion on that. We
15 could have come here and presented experts, and the
16 Court could have determined one way or the other.

17 We resolved that dispute by reaching
18 the amount of 6.45 million. Due to the application of
19 the statute of limitations, there was approximately
20 18.4 million in payments that was in dispute in this
21 case. So the settlement represents approximately
22 one-third, in fact just over one-third, of the amount
23 in dispute, which we would submit was an excellent
24 result on behalf of the company in this particular

1 case.

2 There have been no objections,
3 obviously, pursuant to the notice. And actually, it
4 was also disclosed by the company in a 10-K, so it's
5 been widely disseminated. And the result was also a
6 result of arm's-length mediation with the assistance
7 of a very experienced mediator, Mr. Robert Meyer, at
8 JAMS.

9 So we would submit that the settlement
10 is fair, reasonable and adequate. The final judgment
11 should be entered in the terms proposed. The releases
12 are suitable and appropriately tailored to the claims
13 asserted in this case.

14 Unless Your Honor has any questions
15 about the substance, I'll move on to the attorneys'
16 fees, Your Honor.

17 THE COURT: Please do.

18 MR. PORRITT: We are seeking here an
19 attorneys' fee award \$1,290,000. That's also to cover
20 approximately \$19,000 in expenses that have been
21 accrued. Once again, I don't mean to belabor the
22 point, the factors that the Court needs to consider.
23 The Court is well familiar with the Sugarland factors,
24 the most important of which, of course, is the benefit

1 obtained through the litigation.

2 Here, we would submit the benefit is
3 substantial. Again, this is not a corporate
4 governance settlement, so no -- this is a cash
5 settlement, so the benefit is readily apparent.

6 I think there are some also benefits
7 from the case that are, if you like, noncash in the
8 sense of, through Your Honor's opinion, through the
9 motion practice, we did establish the standard,
10 suitable review standard, for other contracts between
11 Mr. Cohen, if he remains a controller of the company,
12 and the company, and EZCORP, which was a matter in
13 dispute.

14 As I said at the beginning, the
15 defendants maintained that was subject to business
16 judgment evaluation. Your Honor found that it was to
17 the entire fairness standard. So that is, if you
18 like, a therapeutic benefit that was achieved that was
19 not in a sense of -- an attachment to the stipulation
20 of settlement.

21 We would submit this is not an early
22 -- this case was -- although it settled before trial,
23 it settled in the middle of discovery. There
24 obviously was substantial briefing on the motion to

1 dismiss and then also on an interlocutory appeal.
2 Substantial document discovery was done, which was
3 really, in particular, the company prepared or,
4 rather, the Madison Park defendants prepared a very
5 detailed 277-page spreadsheet detailing the work, with
6 references to emails and so on, on a month-by-month
7 basis, which was really the key element, if you like,
8 of the discovery that enabled us to sort of try and
9 assess the work that was done.

10 So we would submit that it falls
11 fairly in the 15 to 25 percent appropriate bracket for
12 awarding a fee as a percentage to the benefit, and
13 we've asked for a benefit in the middle of that range
14 at 20 percent.

15 THE COURT: You didn't take any merits
16 depositions. You just took the two confirmatory
17 depositions. Is that right?

18 MR. PORRITT: That is correct, Your
19 Honor. Yes. So we were at that stage, really, in
20 discovery that we would've -- we had more or less
21 finished document discovery, and we would have been at
22 the stage of scheduling the deposition when it was
23 decided that we would attempt to mediate the dispute.
24 And then we subsequently went on and took fairly

1 lengthy confirmatory depositions that both went for
2 well over half a day. Both of them went through into
3 the middle, mid to late afternoon.

4 The time and effort of counsel. Your
5 Honor, I submitted my affidavit showing the time
6 spent. It comes up to a lodestar of approximately
7 \$485,000. That's not a padded lodestar. I think
8 we've litigated this case very efficiently. It
9 implies a multiplier of about 2.6 times, which I
10 think, again, is well within the range allowed by this
11 Court.

12 We cited a number of cases, both of
13 this Court and other Vice Chancellors and Chancellors
14 of this Court, which has awarded fees in similar
15 circumstances of the same amount. We refer to the
16 Sanchez case, which in many ways is very similar of
17 our larger case where the recovery was almost exactly,
18 again, about a third of the amount in dispute in that
19 case, and the Court awarded them a fee of 20 percent.

20 We cited the China Agritech and China
21 Integrated cases, decisions, again, awarding fees of
22 20.7 percent and 26 percent, again, prior to
23 depositions. I think both of those cases, they
24 settled after getting books and records discovery

1 rather than the detailed discovery obtained in this
2 case. So we would submit that the 20 percent fee
3 request, again, is entirely reasonable, consistent
4 with practice here.

5 I would also recognize this was an
6 entirely contingent case. So to date, obviously,
7 plaintiff's counsel has not received any fee and
8 undertook the entire risk of not succeeding in this
9 case.

10 On the incentive award, we are seeking
11 a very modest incentive award of \$5,000 for
12 Mr. Treppel, the representative plaintiff. Awards of
13 this amount are routinely granted, we would submit, in
14 this Court. There is no prejudice to defendants or
15 the company. The amount will be paid entirely out of
16 whatever attorney fee award the Court awards us.

17 We think Mr. Treppel has provided a
18 benefit here by standing up and enabling this case to
19 be brought and enabling the benefit to be obtained.
20 And we don't think an award of this size is likely to
21 raise policy considerations or concerns about either
22 creating a conflict between the representative
23 plaintiff and the company in this instance or
24 increasing dramatically the risk of vexatious

1 litigation in terms of the modest amount of size.

2 Mr. Treppel did spend approximately 20
3 hours in assisting us in prosecuting this matter.
4 That equates to an hourly rate of approximately 250
5 per hour, which is far from excessive in our
6 submission.

7 Unless Your Honor has any questions,
8 that concludes my presentation.

9 THE COURT: Thank you.

10 MR. GARDNER: Good morning again, Your
11 Honor.

12 Unless you have further questions, I
13 thought I would just very quickly walk through those
14 factors that are set forth in Activision that support
15 -- that you would apply in deciding whether or not to
16 approve the settlement.

17 THE COURT: I don't think you need to.

18 MR. GARDNER: Okay. Well, thank you,
19 Your Honor. I'd like to turn it over to
20 Ms. Bartholomew.

21 THE COURT: Great. Thank you very
22 much.

23 MS. BARTHOLOMEW: Good morning, Your
24 Honor. Veronica Bartholomew from Skadden Arps on

1 behalf of Phillip Ean Cohen, MS Pawn Limited
2 Partnership, MS Pawn Corporation, and Madison Park,
3 LLC, collectively referred to as the Cohen defendants
4 in this action.

5 As set forth in our opposition to
6 plaintiff's motion for an award of attorneys' fees and
7 for an incentive award, we oppose the fee award
8 because it includes a request for an incentive award
9 in the amount of \$5,000 to the plaintiff in this
10 action, Mr. Treppel. We oppose the incentive award
11 because this Court recognizes a presumption against
12 granting incentive awards, and Mr. Treppel has not
13 demonstrated any special circumstances to overcome
14 that presumption.

15 The Court recognizes a presumption
16 against paying incentive awards to plaintiffs for
17 serving in a representative capacity. The Court of
18 Chancery Rule 23.1 prohibits a representative
19 plaintiff in a derivative action from receiving any
20 form of compensation, directly or indirectly, unless
21 it is either reimbursement of expenses incurred, which
22 is not what is requested here, or fees costs or other
23 payments expressly approved by the Court.

24 As the Court stated in *Fuqua*, "In

1 Delaware, representative plaintiffs typically receive
2 no compensation for their services other than their
3 pro-rata share of the class recovery and their
4 reasonable out-of-pocket costs and expenses. A
5 'plaintiff's award' is an additional sum intended to
6 reward and incentivize extraordinary service to the
7 class performed by the class representative."

8 The Court similarly recognized in
9 Oliver v. Boston University that "awards to
10 representative plaintiffs should be rare" and it is
11 only in the exceptional case that an application
12 should be granted.

13 The Court is reluctant to award lead
14 plaintiffs anything other than reasonable
15 out-of-pocket costs and expenses. The Court should
16 only grant incentive awards to plaintiffs when there
17 is a significant amount of time, effort and expertise
18 expended by the plaintiff. That is not the case here.

19 An overview of the case law shows the
20 level of participation and types of contributions
21 required by a plaintiff to constitute that significant
22 amount of time and effort to deserve an incentive
23 award.

24 For example, in Activision, Your Honor

1 found that the plaintiff, who participated
2 meaningfully in the case was deposed, attended the
3 hearings and mediation, and survived contentious
4 leadership and class certification stages deserved an
5 incentive award.

6 In Oliver v. Boston University, the
7 Court found that the plaintiff, who dedicated 2,000
8 hours of time to the litigation, was deposed, attended
9 every day of trial, assisted with document review and
10 identifying key documents, and brought certain
11 knowledge and expertise to the litigation deserved an
12 incentive award.

13 And in Raider v. Sunderland, the Court
14 found that the plaintiff, who spent over 200 hours on
15 the matter, did his own independent investigation and
16 analysis, reviewed documents, was deposed, and
17 negotiated with the settlement and class counsel's
18 fee, deserved an incentive award.

19 Here, the burden was on Mr. Treppel to
20 prove that he is entitled to any incentive award, but
21 his actions in this litigation fall short. In his
22 affidavit, he states the following reasons for his
23 request of incentive award: spending approximately 20
24 hours in serving in connection as lead plaintiff,

1 reviewing documents filed in the action, responding to
2 requests for documents and interrogatories, and
3 discussing the progress of the action with his
4 attorneys.

5 Mr. Treppel believes that in exchange
6 for that level of participation, he should receive an
7 incentive award. However, those actions, reviewing
8 file documents, responding to document requests, and
9 being updated by your counsel on the progress of the
10 litigation is the absolutely bare minimum that's
11 required of any representative plaintiff.

12 Mr. Treppel's actions are not beyond
13 those provided by a typical plaintiff. He did not
14 travel to Delaware for any of the hearings. He was
15 not deposed. He did not attend the mediation session.
16 He did not provide any special knowledge or expertise.
17 He did not conduct any independent analysis. And he
18 did not contribute to the settlement negotiations.

19 The record and Mr. Treppel's own
20 affidavit make it very clear that his efforts are not
21 in line with those of plaintiffs to whom this Court
22 has granted incentive awards.

23 In plaintiff's reply to our
24 opposition, nor here today, counsel, again, does not

1 indicate that anything more was done here by
2 Mr. Treppel than what was stated in his affidavit.
3 Instead, counsel claims that because there have been
4 no objections, that the fee award, including the
5 incentive award, should be approved. But there is an
6 opposition here by the Cohen defendants, and perhaps
7 there are no objectors because the Cohen defendants
8 are already opposing the incentive award.

9 Nevertheless, the lack of objections
10 has no implication on whether Mr. Treppel has met the
11 standard set by this Court. Plaintiff discusses and
12 cites a series of cases to assert that incentive
13 awards are routinely granted and so that one should be
14 granted here.

15 What counsel fails to address is the
16 disparity between the efforts made by plaintiffs in
17 those cases compared to Mr. Treppel, even if the
18 requested incentive awards in those matters was also
19 \$5,000. Further, counsel ignores that out of the 18
20 cases cited in their reply, only five of those cases
21 included an opposition to the incentive award and only
22 two of those were in the Court of Chancery.

23 Plaintiff criticizes the Cohen
24 defendants for failing to cite any Delaware cases in

1 which an incentive award is denied and further claims
2 that incentive awards are granted all the time in
3 federal court, but that does not mean that there is
4 not a standard to be met either in federal court or in
5 this Court.

6 There is a far smaller sample set in
7 Delaware than in federal courts where you see
8 incentive awards requested. And for counsel to argue
9 that these are granted in federal court and even in
10 this court, I do agree, but what is also true is that
11 most people do not oppose the incentive awards. But
12 that doesn't mean that we don't have a right to oppose
13 or that Mr. Treppel is excused from the standard.
14 Regardless of whether this case is before this Court
15 or a federal court, there is still a standard that
16 must be met.

17 Perhaps in circumstances where
18 plaintiffs do very little, their counsel does not
19 actually request an incentive award. I do understand
20 that I am contesting an incentive award here today,
21 which often does not happen, but that does not mean
22 that Mr. Treppel has met the standard and deserves an
23 incentive award.

24 To briefly address some of the cases

1 that plaintiff cited in their reply, as I just
2 mentioned, out of the 18 cases cited, only five of
3 those contained oppositions to the incentive award.
4 In addition, unlike Mr. Treppel here, in plaintiff's
5 cited cases, half of those plaintiffs were also
6 deposed. Plaintiff fails to note in their reply the
7 important factors that distinguish the plaintiffs in
8 their cited cases from Mr. Treppel.

9 For example, in Nitsche, the incentive
10 award was unopposed. The plaintiff was a Delaware
11 lawyer who in court requested a \$5,000 incentive award
12 after spending nearly \$2800 in expenses in the
13 litigation, routinely engaging in strategy discussions
14 with his counsel, and contributing to settlement
15 negotiations.

16 In Physicians, the incentive award was
17 unopposed. The plaintiffs were both deposed and
18 attended two mediation sessions.

19 And in Ryan, the fee awards to two
20 named plaintiffs of \$5,000 each were both unopposed.
21 One plaintiff there spent 50 hours on the litigation,
22 was deposed, analyzed information, reviewed documents,
23 and provided counsel with useful insights on complex
24 factual matters. The other plaintiff to whom counsel

1 points in their reply brief also spent 20 to 25 hours
2 on the litigation but was also deposed in addition to
3 reviewing documents.

4 And to briefly address Raider, which
5 counsel gives a lot of attention in their reply brief,
6 in Raider, the incentive award was unopposed. The
7 plaintiff was an attorney, an accountant, and a
8 manager who dedicated 205 hours to the litigation, was
9 in constant communication with counsel, was an expert
10 in tax and financial analysis, conducted his own
11 independent analysis, contributed expertise to the
12 litigation, reviewed documents, was deposed,
13 negotiated the settlement, and negotiated counsel's
14 fee. And after all of that, the Court found that only
15 a \$200 hourly rate was appropriate. And as counsel
16 recognized today, Mr. Treppel is requesting an
17 incentive award that equates to a \$250 hourly rate.

18 One additional point is that if a
19 plaintiff who has done as little as Mr. Treppel here
20 is found to deserve an incentive award, then what
21 plaintiff wouldn't receive an incentive award? These
22 incentive awards are intended to serve as a benefit
23 for a representative plaintiff whose actions have
24 furthered and supported the litigation in a beneficial

1 and meaningful way.

2 I think that there is a spectrum of
3 potential named plaintiffs and a level of involvement
4 that they may have in a litigation. But here,
5 Mr. Treppel is an example of a plaintiff who has done
6 nothing more than what was absolutely required of him.
7 Therefore, on behalf of the Cohen defendants, we
8 respectfully request that the Court deny plaintiff's
9 motion for an incentive award to Mr. Treppel and that
10 the Court make the fee award to plaintiff's counsel
11 that Your Honor finds appropriate but that the fee
12 award should not include or permit the incentive award
13 to Mr. Treppel.

14 Unless Your Honor has any questions, I
15 have nothing further.

16 THE COURT: Why do you think this
17 expectation has developed that the named plaintiff is
18 the one representative person in the litigation that's
19 expected to work for free?

20 MS. BARTHOLOMEW: I think that the
21 Court is hesitant to freely grant incentive awards
22 because of the incentives that that may create for a
23 plaintiff. If these incentive awards are freely
24 given, you may have plaintiffs who seek to prolong

1 litigation longer than necessary in seeking an
2 incentive award, or they may accept a quick settlement
3 hoping to receive an incentive award. I think that
4 there are concerns with the incentives of named
5 plaintiffs.

6 The Court will grant reasonable
7 out-of-pocket costs and expenses to reimburse a
8 plaintiff for those out-of-pocket costs that they
9 expend on the litigation, but the Court has recognized
10 that it will look to the size of the benefit and also
11 the significant amount of time and effort that the
12 plaintiff put forth to actually contribute to that
13 benefit in order to grant the incentive award.

14 THE COURT: Yeah. I mean, as I think
15 through these things, I'm usually less -- I know that
16 the cases talk about the size of the benefit. And to
17 the extent that you're awarding somebody for doing a
18 good job where they wouldn't otherwise have a claim to
19 the benefit, like counsel, that makes sense to me.
20 But for the named plaintiff, they're getting their
21 reward of the size of the benefit in the form of
22 essentially their pro rata participation and whatever
23 the damages would be, so they're already incentivized
24 there.

1 What I worry about with the named
2 plaintiff is we're not exactly a culture anymore where
3 people do things for the benefit of others. Like, we
4 are truly independent homo economicus where if you
5 don't get compensated for doing something, then you're
6 likely to walk out the door.

7 So you've got people representing the
8 plaintiffs. They're going to get paid. You've got
9 people representing the defendants. You guys are
10 going to get paid. I certainly hope you're going to
11 get paid. I think you deserve to get paid. And then
12 you've got this party, this individual, who is really
13 representing, at least theoretically, the company, and
14 we're expecting him or her to basically do stuff for
15 free.

16 Why doesn't that count the balance too
17 far against the representative plaintiff, that they
18 have to be the charitable person to come in and do
19 this?

20 MS. BARTHOLOMEW: I mean, in some of
21 the cases, the plaintiffs aren't necessarily -- you
22 know, I gave you some examples where the plaintiffs
23 had significant knowledge and expertise to contribute
24 to the litigation. I mean, but there are matters

1 where the plaintiff, you know, takes a deposition and
2 produces documents and will receive an incentive
3 award.

4 In the Atlas Energy matter, Your Honor
5 found that \$5,000 and \$10,000 incentive awards were
6 appropriate, and you indicated that what swayed you
7 there was that both plaintiffs had been deposed. We
8 don't have those circumstances here.

9 So I don't think that it's that, you
10 know, representative plaintiffs are being asked to,
11 you know, do so many things that it becomes so
12 prohibitive for them to get involved in the
13 litigation. If they do become very involved, then the
14 incentive award is one avenue to also compensate them,
15 but I don't think the Court requires them to do so
16 much that it should inhibit them.

17 THE COURT: That's one of the other
18 things I wonder about, is whether there's been a
19 sufficient change in the practice. So it used to
20 be -- and perhaps I am remembering a fictitious
21 Halcyon time when, like, people didn't just routinely
22 beat up the named plaintiff. They didn't routinely
23 test the stockholder's standing in terms of equity
24 ownership. They didn't necessarily go after the guy

1 for purposes of documents. They didn't necessarily
2 take the person's deposition. Really, we thought of
3 these more as counsel-driven lawsuits, and this person
4 really was just along for the ride.

5 And I feel like now, at least based on
6 just -- and I'm not as directly involved as you all
7 are. I just see these things from my position. It is
8 now pretty much routine to -- obviously, it didn't
9 happen here -- depose the named plaintiff, get
10 documents from them.

11 I had this one case that Mr. Porritt
12 will remember well where, essentially, part of the
13 defense strategy was just to go after the named
14 plaintiffs. And I actually had a sanctions hearing,
15 and I sanctioned one of the fellows, one of the named
16 plaintiffs.

17 And so this is all a long-winded
18 windup. But some of the cases that have said we
19 really don't need to do this, do you think they have
20 at all been influenced by those perhaps gentler days
21 where you really could mail it in as a named
22 plaintiff, as opposed to now, where you're more likely
23 to be stepping up, signing on for a little bit of
24 brass-knuckles treatment by a fine firm like your own?

1 MS. BARTHOLOMEW: Yes, I agree with
2 that, Your Honor. I think that that's possibly one
3 explanation for why the genesis of these incentive
4 awards and the goal, then, to compensate named
5 plaintiffs for bringing the litigation and being put
6 through the paces.

7 THE COURT: But you would say what?
8 So if that is the world now and people need to step
9 up, doesn't that counsel in favor of me saying to
10 someone like Mr. Treppel, Here, look, you were -- I
11 wouldn't want to say courageous, that implies a little
12 bit more -- but you took on the mantle and, therefore,
13 you should be recognized for having done that?

14 MS. BARTHOLOMEW: But I think, then,
15 that would be true of any named plaintiff. Because as
16 I've indicated, Mr. Treppel didn't do more here than
17 was really absolutely required of him, you know,
18 reviewing the Court filings, responding to one
19 document request.

20 And as counsel recognized in their
21 reply, there was an error in his affidavit. Nobody
22 served interrogatories on him. And then just being
23 updated by counsel.

24 And so I think if you grant an

1 incentive award to Mr. Treppel, I think any named
2 plaintiff has the right to then come forward and say,
3 you know, I should receive an incentive award because
4 I brought the litigation.

5 And for those incentives that I -- you
6 know, those adverse incentives that I spoke about
7 earlier, in bringing the litigation and requiring them
8 to actually put forth time and effort in the
9 litigation, I think if you grant one here, you know,
10 there is nothing that would require a plaintiff to
11 really do much more.

12 THE COURT: So if I synthesize the two
13 main points that we've talked about, what I'm hearing
14 you say is that the world may have changed in terms of
15 plaintiffs' expectations, but it hasn't changed so
16 much that we ought to be compensating folks in every
17 case.

18 MS. BARTHOLOMEW: Absolutely.

19 THE COURT: So what's the line you
20 would draw? It seems like you talk about depositions.
21 If the person gets deposed, you're more inclined?
22 Where would you -- what would you tell me to do?

23 MS. BARTHOLOMEW: I think in every
24 example that I've seen, the representative plaintiff

1 had at least been deposed. The purpose of the award
2 is to compensate the plaintiff for the time and effort
3 they expended. And so in a deposition, a plaintiff
4 has to travel to the deposition. They have to prepare
5 for it with counsel, spend a day, and testify at the
6 deposition. And so the incentive award is
7 compensation after the fact for that time and effort.

8 THE COURT: All right. Thank you.

9 MS. BARTHOLOMEW: Thank you, Your
10 Honor.

11 THE COURT: Reply?

12 You know I was thinking about Mr. Chen
13 and Mr. Steinhardt. I mean, that's --

14 MR. PORRITT: I started having
15 shudders sitting there, Your Honor.

16 THE COURT: I imagine you had a little
17 posttraumatic stress disorder from that. And that's
18 just an example of how you can walk into what is truly
19 bare-knuckles back-and-forth even though you're
20 ostensibly there in a "representative capacity."

21 MR. PORRITT: Very much so, Your
22 Honor. I think your observations are well-taken.

23 THE COURT: Engage, if you would, on
24 this idea that although that means you award people

1 who actually get caught up in that, that here,
2 Mr. Treppel was almost a throwback. He really did get
3 to mail it in and let you take the laboring oar.

4 MR. PORRITT: So I think I would say
5 two things. One, I mean, that is just -- first of
6 all, he took the risk of -- he understood -- I'll
7 advise the Court he was willing to sit for a
8 deposition. He's actually done a books and records
9 case in another matter in Delaware where he appeared
10 and testified at trial, at a 220 trial. So he was
11 willing and able to do it. So it was just the
12 circumstances of when we settled.

13 If you create a bright-line rule,
14 there's costs and benefits for every bright-line rule,
15 as the Court is aware. If you create a bright-line
16 rule that you need to have a deposition taken before
17 you get an incentive award, then you can guarantee the
18 lead plaintiff will sit for a deposition in more or
19 less every case. Or the representative plaintiff. I
20 apologize.

21 THE COURT: What if they don't want
22 to? What are you going to do, beg them to sit for a
23 deposition?

24 MR. PORRITT: Well, then, I guess if

1 they don't want to -- but if they don't want to,
2 they're probably not a proper representative
3 plaintiff.

4 So I think it's a mistake to create a
5 sort of minimum set of requirements, if you like. I
6 think if you have really done nothing, it really
7 depends upon the case. I mean, unfortunately it ends
8 up being a facts and circumstances inquiry, which I
9 know isn't helpful for the Court, but nonetheless, you
10 can establish standards that way.

11 Mr. Treppel did more than -- there's
12 simply putting a name on a complaint, and then some
13 cases settle at that early stage. I think it would be
14 hard for -- I don't think I would stand up here and
15 ask for an incentive award where a plaintiff,
16 literally all they've done is reviewed a complaint and
17 authorized its filing.

18 But to the extent of where you're
19 getting into actually responding to discovery, I think
20 that is -- and I think 20 hours is not an
21 insignificant amount of time. That's half a week.

22 So then I think the Court is well able
23 to assess whether sort of some of the bad incentives
24 that Ms. Bartholomew raised about an incentive on

1 behalf of representative plaintiffs to bring
2 litigation or prolong litigation, I think the Court is
3 well able to assess whether there's been any
4 divergence of interests when you're assisting a
5 settlement and seeing what happens there.

6 I would say the cases she talked about
7 where -- typically, where the plaintiff has done their
8 own analysis -- as you know, there was a lengthy
9 discussion about those contributions later on in the
10 Chen v. Howard-Anderson matter. We had the whole
11 trial, sitting here, on that issue. And so the
12 incentive fees awards in those cases are much, much
13 greater, obviously, than the very modest amount here.

14 So I would say here that this is a
15 recognizing of the risk and inconvenience that
16 plaintiffs now take on as a routine matter.
17 Representative derivative litigation is essential to
18 the corporate governance structure in Delaware here
19 with the common law assessment and application and
20 expansion and explanation of the relevant standards,
21 and that requires plaintiffs to be willing to take on
22 the risk and bring cases so that issues can be
23 challenged in this Court. So I would submit that
24 here, it's entirely reasonable.

1 THE COURT: Who did -- there was a
2 books and records demand that preceded the suit here.
3 Was that Treppel, too?

4 MR. PORRITT: Yes, it was, Your Honor.

5 THE COURT: All right. Thank you.

6 MR. PORRITT: Thank you.

7 THE COURT: I appreciate everyone
8 coming in today. The reason we're here is so that I
9 can consider the proposed settlement in the EZCORP
10 derivative litigation. I am going to approve the
11 settlement.

12 In terms of the procedural
13 requirements, we have confirmed, "we" being the
14 intrepid brain trust of my clerks and I, not the royal
15 "We," that the requisite affidavits have been filed,
16 and the notice, as Mr. Porritt has described it, was
17 adequately delivered and sufficient in terms of its
18 detail.

19 In terms of the merits, I, of course,
20 have to consider the nature of the claim, the possible
21 defenses thereto, the legal and factual circumstances
22 of the case, and then apply my own judgment in
23 deciding whether the settlement is reasonable in light
24 of those factors.

1 I issued an opinion in this case on
2 the motion to dismiss that allowed the case to go
3 forward, so I have determined at least in my own view
4 that the case was sufficiently meritorious in terms of
5 being fairly litigable.

6 Picking up after that fact, discovery
7 proceeded. And as summarized in the papers and by
8 Mr. Porritt this morning, discovery, as it will, not
9 infrequently, produced documents that were
10 inconsistent with the more aggressive characterization
11 of events in the complaint in which the payments to
12 Madison Park really had no benefit whatsoever or no
13 underlying reason.

14 There was a substantial number of
15 documents showing that Madison Park was performing
16 some work for EZCORP. And then the question in terms
17 of the litigation was going to be what those services
18 were worth and was the amount that Madison Park was
19 paid for its services entirely fair to EZCORP.

20 That would have been a contested
21 issue. There would have been experts involved. There
22 would have been weighing of a lot of different
23 factors, and ultimately, I would have had to make
24 credibility determinations and assess weight and all

1 those factors that make trial inherently difficult and
2 uncertain.

3 In the face of that, the parties
4 reached a settlement of \$6.45 million that EZCORP will
5 receive. In terms of assessing that claim, I think
6 that outcome falls within a range of reasonableness,
7 given the likely difficulties in proof, the
8 uncertainty of the outcome, and the amount of the
9 total potential damages that the settlement reflects.

10 I have done things like look at the
11 form of the release, and I think that it is not
12 excessive. It contains the usual amazing list of
13 thesaurus-derived nouns, but it's appropriately
14 tailored to the matters at issue in this litigation.

15 The next issue that I have to deal
16 with is attorneys' fees and the award for the
17 representative plaintiff. I'm a little bit on the
18 fence in terms of attorneys' fees. Our general policy
19 is to ensure that without a favorable adjudication,
20 "... counsel will be compensated for the beneficial
21 results they produced, providing the action was
22 meritorious when filed and had a causal connection to
23 the conferred benefit." That's the Allied Artist
24 case.

1 This action was meritorious when
2 filed. It was the sole cause of the benefit. The
3 question is pricing it.

4 The benefit is easily priced at
5 \$6.45 million. You could wonder what the
6 noncontroller share of that benefit is, given the fact
7 that this is an interested transaction, but people
8 haven't really gone into that. And this is a
9 situation where there was high-vote stock involved,
10 which makes that analysis more complex.

11 The real problem for me is how early
12 things happened. In other words, documents were
13 produced and reviewed, but there weren't any merits
14 depositions taken. So I'm really on the fence as to
15 whether this is a 20 percenter or more like a 15
16 percenter.

17 But it may be because Villanova won
18 last night -- there's certainly ample empirical
19 studies that show that judges are not immune to
20 external influences like that. There is a lot of data
21 that shows that if you're going before an immigration
22 judge, you want to be the first petition of the day.
23 You don't want to be the petition that happens around
24 11:00 or 11:30 in the morning where the judge gets

1 hungry. Statistically comparable applicants get
2 rejected much more often if they come in at 11:00 or
3 11:30 than if they come in at 9:00 in the morning. So
4 while I do have misgivings, I am going to go ahead and
5 award the agreed-upon amount rather than blue-pencil
6 it to some other number.

7 I'm also going to do the same thing
8 for the incentive award. I very much appreciate the
9 arguments that Ms. Bartholomew made this morning. I
10 understand the precedents that you've cited.

11 My personal view is that because of
12 the direction in which representative litigation has
13 moved, where we want and expect representative
14 litigation clients to take a more active role in the
15 dispute, the old learning about people just being
16 along for the ride, at least in my view, has less
17 purchase.

18 I also do think that in this new, or
19 not perhaps new but more contemporary, brass-knuckles
20 age, it is I think understandable and important to
21 give some compensation to people who step forward and
22 take the risk of having outstanding defense lawyers go
23 through publicly available information about them and
24 then potentially take an intrusive deposition or ask

1 for documents or things like that.

2 I think that, from my standpoint, the
3 potential problems which Ms. Bartholomew cited, which
4 I think were very well put in terms of the things that
5 we need to be concerned about, are best addressed
6 through the requirement that any type of payment be
7 requested, disclosed, and receive Court approval.

8 Here, I personally do not believe that
9 a \$5,000 payment risks creating malincentives. I
10 thought about reducing it. I thought about saying,
11 "I'm only going to give \$1,000 or \$2,000," but I'm in
12 a non-second-guessing mood today. I didn't
13 second-guess Mr. Porritt in terms of his fee
14 application, and so I'm also not going to second-guess
15 the amount that he wants to allocate out of his fee to
16 the plaintiff.

17 I think if it were much bigger than
18 the 5K, at least at this stage of the development of
19 the law, I would be more receptive to what
20 Ms. Bartholomew has said, but it is tough for me to
21 get excited about a payment of \$5,000 to a named
22 plaintiff when I am now seeing pretty much typical
23 partner hourly rates over \$1,000.

24 I remember when breaking the \$1,000

1 barrier was a big deal. I think the last three fee
2 applications we've seen, basically, if you are a
3 big-firm partner now, you are billing at over \$1,000.

4 And so with that being the type of
5 norm that we're compensating for, for involvement --
6 and obviously, there's lots of distinctions between
7 partners and named plaintiffs. We can go through the
8 litany. I get all of that. But I have a lot of
9 trouble having personal agita about \$5,000 to the
10 named plaintiff, even for the relatively minor
11 involvement that happened here. So that's why I'm
12 coming out where I am.

13 Mr. Porritt, do you have a form of
14 order that you'd like me to sign, or should I just
15 take care of it on the docket?

16 MR. PORRITT: I think we --

17 THE COURT: You've got to stand up,
18 man.

19 MR. PORRITT: I'm sorry, Your Honor.
20 I beg your pardon.

21 THE COURT: That's all right. We're
22 crazy Delawareans down here. We don't do the New York
23 thing. It's no worries.

24 MR. PORRITT: I don't have a form with

1 me, Your Honor, but we can submit one.

2 THE COURT: No need. We'll take care
3 of it in terms of the LexisNexis e-file.

4 MR. PORRITT: Thank you, Your Honor.

5 THE COURT: Thank you all for coming
6 in. I appreciate all the work that went into
7 resolving this case. It would have been an
8 interesting one to try, but at the same time, it would
9 have involved a lot of time for everybody. So I
10 commend you all on reaching what seems to me to be a
11 result that falls within the range of fairness.

12 Thank you, everyone, for your time
13 today.

14 MR. GARDNER: Thank you, Your Honor.

15 MR. WELCH: Thank you, Your Honor.

16 (Court adjourned at 10:43 a.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 38 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 13th day of April, 2018.

/s/ Jeanne Cahill

Jeanne Cahill, RDR, CRR
Official Chancery Court Reporter
Registered Diplomat Reporter
Certified Realtime Reporter

Tab 28



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KYLE MARTEL and JOE BRYANT,)

Plaintiffs,)

v.)

C.A. No. 2024-0329-NAC

FUSION SPONSOR LLC, JOHN)

JAMES, JEFFREY GARY, JIM)

ROSS, KELLY DRISCOLL, BEN)

BUETTEL, DIWAKAR)

CHOUBEY, and BROADHAVEN)

CAPITAL PARTNERS, LLC,)

Defendants.)

ORDER AND FINAL JUDGMENT

WHEREAS, a stockholder class action is pending in this Court, titled *Martel v. Fusion Sponsor LLC*, C.A. No. 2024-0329-NAC (the “Action”);

WHEREAS, a Stipulation and Agreement of Settlement, Compromise, and Release, dated April 14, 2025 (the “Stipulation”), has been entered into by and among the following parties: (i) Plaintiffs Kyle Martel and Joe Bryant (the “Plaintiffs”), on behalf of themselves and the Class (as defined herein), (ii) Defendants John James, Jeffrey Gary, Jim Ross, Kelly Driscoll, Ben Buettell, Diwakar Choubey, Fusion Sponsor LLC, and Broadhaven Capital Partners, LLC (collectively, the “Defendants,” and together with Plaintiffs, the “Parties,” and each a “Party”); and

WHEREAS, the Stipulation provides for a settlement, subject to the approval of the Court, among the Parties and for dismissal of the Action with prejudice as against Defendants upon the terms and conditions set forth in the Stipulation (the “Settlement”); and

WHEREAS, except for terms defined herein, the Court adopts and incorporates the definitions in the Stipulation for purposes of this Order and Final Judgment; and

WHEREAS, by Order dated April 28, 2025 (the “Scheduling Order”), the Court (i) preliminarily certified the Class solely for purposes of effectuating the Settlement; (ii) ordered that the Notice of the proposed Settlement be provided to potential Class Members; (iii) provided Class Members with the opportunity to object to the proposed Settlement, the proposed Plan of Allocation, and/or Plaintiffs’ Counsel’s application for a Fee and Expense Award; and (iv) scheduled a hearing regarding final approval of the Settlement; and

WHEREAS, the Court conducted a hearing on July 24, 2025 (the “Settlement Hearing”) to: (i) determine whether to finally certify the Class for settlement purposes only, pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2); (ii) determine whether Plaintiffs and Plaintiffs’ Counsel have adequately represented the Class, and whether Plaintiffs should be finally appointed as Class representatives for the Class and Plaintiffs’ Counsel should be finally appointed as Class counsel for

the Class; (iii) determine whether the proposed Settlement should be approved as fair, reasonable, and adequate to the Class and in the best interests of the Class; (iv) determine whether the Action should be dismissed with prejudice and the Releases provided under the Stipulation should be granted; (v) determine whether the Order and Final Judgment approving the Settlement should be entered; (vi) determine whether the proposed Plan of Allocation of the Net Settlement Fund is fair and reasonable, and should therefore be approved; (vii) determine whether and in what amount any Fee and Expense Award should be paid to Plaintiffs' Counsel out of the Settlement Fund; (viii) determine whether and in what amount any service award should be paid to Plaintiffs out of the Fee and Expense Award; and (ix) hear and rule on any objections to the Settlement, the proposed Plan of Allocation, and/or Plaintiffs' Counsel's application for a Fee and Expense Award; and

WHEREAS, it appearing that due Notice of the hearing has been given in accordance with the Scheduling Order; the Parties having appeared by their respective attorneys of record; the Court having heard and considered evidence in support of the proposed Settlement, the Plan of Allocation, and the application by Plaintiffs' Counsel for a Fee and Expense Award and service award; the attorneys for the respective Parties having been heard; an opportunity to be heard having been given to all Class Members or other Persons requesting to be heard in accordance with the Scheduling Order; the Court having determined that the Notice to Class

Members was adequate and sufficient; and the entire matter of the proposed Settlement having been heard and considered by the Court;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. Except for terms defined herein, the Court adopts and incorporates the definitions in the Stipulation for purposes of this Order and Final Judgment.

2. The Court has jurisdiction over the subject matter of the Action and all matters relating to the Settlement, as well as personal jurisdiction over the Parties and the Class Members, and it is further determined that Plaintiffs, Defendants, and the Class, as well as any and all of their respective legal representatives, heirs, estates, executors, administrators, predecessors, successors, predecessors-in-interest, successors-in-interest, transferees, and assigns, including, without limitation, any corporation or other entity with which any party hereto may merge, reorganize, or otherwise consolidate, any Released Parties, and any Person acting for or on behalf of, or claiming under, any of them, are bound by this Order and Final Judgment.

3. The delivery of the Notice, substantially in the form attached as Exhibit B to the Stipulation, and publication of the Summary Notice, substantially in the form attached as Exhibit C to the Stipulation, pursuant to and in the manner prescribed in the Scheduling Order, combined with the posting of the Notice on the

Settlement Administrator's website, pursuant to and in the manner prescribed in the Scheduling Order, is hereby determined to be the best notice reasonably practicable under the circumstances, to constitute due and sufficient notice to all Persons entitled to receive notice of the Settlement, and in full compliance with Delaware Court of Chancery Rule 23, the requirements of due process, and all other applicable law and rules.

4. Pursuant to the Scheduling Order, the Court provisionally certified, for settlement purposes only, a non-opt-out class pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2), on behalf of the following class:

All record and beneficial holders of FAC Class A Common Stock, who held such stock as of the Redemption Deadline of September 17, 2021, and who elected not to redeem all or some of their stock, including their heirs, successors-in-interest, successors, transferees, and assigns, but excluding: (a) Defendants; (b) members of the immediate family of any Individual Defendant; (c) any person who was a manager or managing member of any Entity Defendant as of September 17, 2021, and any members of their immediate family; (d) any parent, subsidiary, or affiliate of an Entity Defendant; (e) any entity in which any Defendant or any other Excluded Person, or group of Excluded Persons, has, or had as of the Redemption Deadline, a controlling interest; and (f) the legal representatives, agents, affiliates, heirs, estates, successors, or assigns of any such Excluded Persons.

5. Subsequently, the parties agreed to modify the provisionally certified class, for settlement purposes only, as a non-opt out class (the "Class") pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2) consisting of:

"Class" means a non-opt-out class for settlement purposes only and pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2),

consisting of all record and beneficial holders of FAC Class A common stock, who held such stock as of the redemption deadline of September 17, 2021 (“Redemption Deadline”), and who elected not to redeem all or some of their stock, including their heirs, successors-in-interest, and successors who have obtained shares by operation of law, and assigns, but excluding any Excluded Persons.

6. Pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2), the Court hereby finally certifies the Class for settlement purposes only.

7. The Court hereby finally appoints Plaintiffs as class representatives for the Class and Grant & Eisenhofer P.A. and Wolf Popper LLP (“Plaintiffs’ Counsel”) as counsel for the Class.

8. For purposes of the Settlement only, the Court finds that each element required for certification of the Class pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2) has been met in that: (a) the Persons who are members of the Class (collectively, the “Class Members”) are so numerous that their joinder in the Action would be impracticable; (b) there are questions of law and fact common to the Class; (c) the claims of Plaintiffs are typical of the claims of the Class; (d) in connection with the prosecution of the Action and the Settlement, Plaintiffs and Plaintiffs’ Counsel have fairly and adequately represented and protected the interests of the Class; (e) the prosecution of separate actions by individual Class Members would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for Defendants, and, as a practical matter, the disposition of the

Action as against Defendants would influence the disposition of any pending or future identical suits, actions, or proceedings brought by other Class Members; and (f) Defendants are alleged to have 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.

9. The Settlement as provided for in the Stipulation is approved as fair, reasonable, and adequate, and in the best interests of the Class.

10. Pursuant to Court of Chancery Rule 23, the Court fully and finally approves the Settlement in all respects, the Parties are hereby authorized and directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation, and the Register of Chancery is directed to enter and docket this Order and Final Judgment dismissing the Action in its entirety and with prejudice.

11. The Stipulation shall be binding upon and inure to the benefit of the Released Parties.

12. Upon the Effective Date, the Released Plaintiff Parties shall be deemed to have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged the Released Plaintiffs' Claims against the Released Defendant Parties, and shall forever be barred and enjoined from prosecuting the Released Plaintiffs' Claims against the Released Defendant Parties.

13. Upon the Effective Date, the Released Defendant Parties shall be deemed to have, have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged the Released Defendants' Claims against the Released Plaintiff Parties, and shall forever be barred and enjoined from prosecuting the Released Defendants' Claims against the Released Plaintiff Parties.

14. The terms of the Settlement were negotiated at arm's-length and in good faith, and reflect a settlement that was reached voluntarily based upon adequate information and sufficient discovery and after consultation with experienced legal counsel.

15. Plaintiffs' Counsel are hereby awarded a Fee and Expense Award in the amount of \$2,295,000, which amount the Court finds to be fair and reasonable. The Fee and Expense Award shall be paid solely out of the Settlement Fund. Neither Plaintiffs, nor Plaintiffs' Counsel or any other counsel, nor any Class Member, shall make, or assist any other counsel in making, any application for an award of fees, cost, or expenses in any other jurisdiction from Defendants, the Company, or any of Released Defendant Parties, in connection with this Settlement or Action. In addition, Plaintiffs are each awarded a service award in the amount of \$2,500, which is to be paid from the Fee and Expense Award.

16. The Court hereby finds and concludes that the formula for the calculation of payments to Eligible Class Members as set forth in the Plan of

Allocation stated in the Notice provides a fair and reasonable basis upon which to allocate the proceeds of the Net Settlement Fund among Eligible Class Members with consideration having been given to administrative convenience and necessity.

17. The binding effect of this Order and Final Judgment and the obligations of Plaintiffs, Class Members, and Defendants, under the Stipulation shall not be conditioned upon or subject to the resolution of any appeal from this Order and Final Judgment that relates solely to the Fee and Expense Award or to the Plan of Allocation.

18. The Parties and all Class Members shall be and are deemed bound by the Stipulation and this Order and Final Judgment. This Order and Final Judgment, including the release of all Released Plaintiffs' Claims against all Released Defendant Parties; and the release of all Released Defendants' Claims against all Released Plaintiff Parties, shall have *res judicata*, collateral estoppel, and all other preclusive effect in all pending and future lawsuits, arbitrations, or other proceedings involving any of the Released Claims against any of the Released Parties.

19. The Court finds and concludes that the Parties and their respective counsel have complied in all respects with the strictures of Delaware Court of Chancery Rule 11 in connection with the institution, prosecution, defense, and settlement of the Action.

20. If the Settlement is terminated as provided in the Stipulation or the Effective Date otherwise fails to occur, (a) this Order and Final Judgment shall be rendered null and void and shall be vacated; (b) all orders entered and releases delivered in connection herewith shall be null and void; (c) all of the Parties shall be deemed to have reverted to their respective litigation statuses as of immediately prior to the execution of the Stipulation on April 14, 2025, and they shall proceed in all respects as if the Stipulation had not been executed and any related orders had not been entered; (d) all claims and defenses as to any issue in the Action shall be preserved without prejudice; (e) the statements made in connection with the negotiation of the Stipulation shall not be deemed to prejudice in any way the positions of any of the Parties with respect to the Action, or to constitute an admission by any Party, and shall not be used or entitle any Party to recover any fees, costs, or expenses incurred in connection with the Action; and (f) no materials created by or received from any other Party that were used in, obtained during, or related to the Settlement discussions shall be admissible for any purpose in any court or other tribunal, or used, absent consent from the disclosing party, for any other purpose or in any other capacity, except to the extent that such materials are otherwise required to be produced during discovery in the Action or in any other litigation.

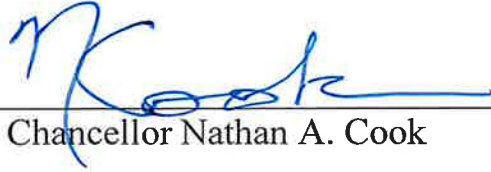
21. Neither the Stipulation, the fact of or any terms and conditions of the Settlement, nor any communications relating thereto, are evidence, or a presumption, admission, or concession by any Party of any wrongdoing, fault, liability, or damages whatsoever, which are expressly denied and disclaimed by each of the Parties. Neither the Stipulation, nor any of their terms, conditions, and provisions, nor any of the negotiations or proceedings in connection therewith, nor any of the documents or statements referred to herein or therein, nor the Settlement, nor the fact of the Settlement, nor the Settlement proceedings, nor any statements in connection therewith, shall (a) be argued to be, used, or construed as, offered or received in evidence as, or otherwise constitute an admission, concession, presumption, proof, evidence, or a finding of any liability, fault, wrongdoing, injury, or damages, or of any wrongful conduct, acts, or omissions on the part of any of Released Defendant Parties, or of any infirmity of any defense, or of any damage to Plaintiffs or any Class Member; (b) otherwise be used to create or give rise to any inference or presumption against any of Released Defendant Parties concerning any fact alleged or that could have been alleged, or any claim asserted or that could have been asserted, in the Action, or of any purported liability, fault, or wrongdoing of any of Released Defendant Parties or of any injury or damages whatsoever to any Person; (c) be argued to be, used or construed as, offered or received in evidence as, or otherwise constitute an admission, concession, presumption, proof, evidence, or

finding that any of Plaintiffs' claims are without merit, that any of Defendants had meritorious defenses, or that damages recoverable from Defendants under the Complaint would not have exceeded the Settlement Amount; or (d) be admissible, referred to, interpreted, construed, deemed, invoked, offered, or received in evidence or otherwise used by any Person in the Action, or in any other suit, action, or proceeding whatsoever, whether civil, criminal, or administrative; provided, however, that the Stipulation and/or this Order and Final Judgment may be introduced in any suit, action, or proceeding, whether in this Court or otherwise, as may be necessary to argue that the Stipulation and/or this Order and Final Judgment has res judicata, collateral estoppel, or other issue or claim preclusive effect, or to otherwise consummate or enforce the Stipulation, Settlement, and/or this Order and Final Judgment, including, without limitation, to secure any insurance rights or proceeds, or as otherwise required by law. This provision shall remain in force in the event that the Settlement is terminated for any reason whatsoever.

22. Without further order of the Court, the Parties may agree in writing to reasonable extensions of time to carry out any of the provisions of the Stipulation and the Settlement.

23. Without affecting the finality of this Order and Final Judgment in any way, the Court reserves jurisdiction over all matters relating to the administration and consummation of the Settlement.

24. The Action is hereby dismissed in its entirety and with prejudice. The Parties are to bear their own costs, except as otherwise provided in this Order and Final Judgment, the Scheduling Order, and the Stipulation.



Vice Chancellor Nathan A. Cook

Tab 29



GRANTED

EFiled: Sep 16 2025 11:23AM EDT
Transaction ID 77085606
Case No. 2024-0221-LWW



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE INTERPRIVATE
ACQUISITION CORP.
STOCKHOLDER LITIGATION

CONSOLIDATED
C.A. No. 2024-0221-LWW

**[PROPOSED] ORDER APPROVING PLAN OF ALLOCATION,
AN AWARD OF ATTORNEYS' FEES AND EXPENSES,
AND INCENTIVE AWARDS**

WHEREAS, on September 12, 2025, the Court entered the Final Judgment and Order (Trans. ID 77072013) in the above-captioned action (“Judgment”); and

WHEREAS, pursuant to paragraph 12 of the Judgment, the Court shall enter a separate order regarding approval of the Plan of Allocation¹ as set forth in the Notice and Plaintiffs’ Counsel’s application for an award of attorneys’ fees and expenses, which includes payment of any incentive awards to Plaintiffs as approved by the Court;

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Court approves the Plan of Allocation submitted by Plaintiffs’ Counsel.
2. Plaintiffs’ Counsel are hereby awarded attorneys’ fees in the amount of \$2,240,000.00, inclusive of litigation expenses (the “Fee and Expense Award”),

¹ Unless otherwise stated, capitalized terms herein shall have the same meaning as set forth in the Amended Stipulation of Settlement filed in this action on April 29, 2025 (Trans. ID 76169336).

which amounts the Court finds to be fair and reasonable. The Fee and Expense Award shall be paid solely out of the Settlement Fund. Neither Plaintiffs, nor Plaintiffs' Counsel, nor any Class Member, shall make, or assist any other counsel in making, any application for an award of fees, costs, or expenses in any other jurisdiction from Defendants, or any other of Released Defendants Parties.

3. Each named Plaintiff is awarded a service award in the amount of \$2,500.00, which is to be paid from the Fee and Expense Award.

Dated: _____

Vice Chancellor Lori W. Will

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

Court: DE Court of Chancery Civil Action

Judge: Lori W. Will

File & Serve

Transaction ID: 77084154

Current Date: Sep 16, 2025

Case Number: 2024-0221-LWW

Case Name: CONS W/(2024-0598)IN RE Interprivate Acquisition Corp. Stockholder Litigation

Court Authorizer

Comments:

The order is granted for the reasons given in the court's September 12, 2025 bench ruling. See transcript.

/s/ Judge Lori W. Will