IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT, derivatively on behalf of TESLA, INC., Plaintiff, v. ELON MUSK, BRAD BUSS, ROBYN M. DENHOLM, IRA EHRENPREIS, LAWRENCE J. ELLISON, ANTONIO J. GRACIAS, STEPHEN T. JURVETSON, LINDA JOHNSON RICE, JAMES MURDOCH, KIMBAL MUSK, KATHLEEN WILSON-THOMPSON, and HIROMICHI MIZUNO, Defendants, -and- TESLA, INC., a Delaware Corporation, Nominal Defendant.	C.A. No. 2020-0477-KSJM

COMPENDIUM TO PLAINTIFF'S OPENING BRIEF IN SUPPORT OF SETTLEMENT APPROVAL, AWARD OF ATTORNEYS' FEES AND EXPENSES, AND INCENTIVE AWARD

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2023, I caused a true and correct copy of the foregoing **Compendium to Plaintiff's Opening Brief in Support of Settlement Approval, Award of Attorneys' Fees and Expenses, and Incentive Award** to be served via File & Serve*Xpres*s on the following counsel of record:

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN CALMA, Derivatively on Behalf of CITRIX SYSTEMS, INC., Plaintiff, v. MARK B. TEMPLETON, THOMAS F. BOGAN, GARY E. MORIN, NANCI E. CALDWELL, STEPHEN M. DOW, MURRAY J. DEMO, GODFREY R. SULLIVAN, ASIFF S. HIRJI, and ROBERT D. DALEO, Defendants, -and- CITRIX SYSTEMS, INC., a Delaware corporation, Nominal Defendant.	C. A. No. 9579-CB

STIPULATION OF COMPROMISE AND SETTLEMENT

This Stipulation of Compromise and Settlement ("Stipulation"), dated May 12, 2016, is entered into, by and through their undersigned attorneys, among and between: Plaintiff John Calma, individually and derivatively on behalf of Citrix Systems, Inc. ("Citrix" or the "Company"); individual defendants Mark B. Templeton, Thomas F. Bogan, Gary E. Morin, Nanci E. Caldwell, Stephen M. Dow, Murray J. Demo, Godfrey R. Sullivan, Asiff S. Hirji, and Robert D. Daleo; and nominal defendant Citrix.

This Stipulation is intended by the Settling Parties to fully, finally, and forever compromise, resolve, discharge, and settle the Released Claims against the Released Persons and to dismiss the Action with prejudice, upon the terms set forth below and subject to the approval of the Court of Chancery of the State of Delaware pursuant to Court of Chancery Rule 23.1.[1]

I. BACKGROUND OF THE ACTION AND SETTLEMENT NEGOTIATIONS

Citrix is leading the transition to software-defining the workplace, uniting virtualization, mobility management, networking, and SaaS solutions to enable new ways for businesses and people to work better. Citrix solutions power business mobility through secure, mobile workspaces that provide people with instant access to apps, desktops, data and communications on any device, over any network or cloud.

On April 28, 2014, Plaintiff filed this Action derivatively on behalf of Citrix against the Individual Defendants, naming Citrix as a nominal defendant.[2] Plaintiff alleged claims for breach of fiduciary duty, waste of corporate assets, and unjust enrichment related to the equity awards that the Individual Defendants received under the 2005 EIP in 2011, 2012, and 2013. Plaintiff seeks, among other things, the recovery of monetary damages and other relief for damages allegedly caused to Citrix.

On July 21, 2014, Defendants moved to dismiss all of Plaintiff's claims, pursuant to Court of Chancery Rules 12(b)(6) and 23.1 (the "Motion to Dismiss"),

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[1] All capitalized terms not otherwise defined herein are defined in Section IV.1.

[2] A corrected complaint was filed on May 6, 2014.

principally on the ground that Plaintiff failed to state a claim under Delaware law. Plaintiff filed his brief in opposition to the Motion to Dismiss on September 19, 2014. Defendants submitted their reply brief in further support of the Motion to Dismiss on October 20, 2014.

The Court heard oral argument on the Motion to Dismiss on January 6, 2015. The Parties filed additional submissions on certain issues raised at the hearing, and the matter was submitted on February 2, 2015. On April 30, 2015, the Court issued its opinion granting in part and denying in part the Motion to Dismiss. *Calma on Behalf of Citrix Systems, Inc. v. Templeton*, 114 A.3d 563 (Del. Ch. 2015). The non-dismissed claims remain pending.

While the Parties were litigating, Plaintiff sought to commence discussions regarding an appropriate derivative settlement framework. On February 12, 2015, Plaintiff's Counsel sent a settlement demand to Defendants' counsel that included a proposed set of corporate governance reforms. In May 2015, the Parties agreed to extend the time for Defendants to answer the complaint in order to explore a possible resolution of the Action. In June 2015, Plaintiff served requests for the production of documents and a notice of a Rule 30(b)(6) deposition directed to Citrix. The Parties agreed to defer Citrix's formal written responses and objections. Defendants provided a formal written response to the settlement demand on June 23, 2015.

From late June through September 2015, the Parties vigorously negotiated arm's-length corporate governance reforms to address issues raised in the Action. Negotiations included the production of 422 pages of internal Citrix documents.

The Parties, and their respective counsel, engaged in numerous discussions concerning these reforms and other details for implementation of the Settlement. The Parties believed they had reached a settlement in principle, subject to the negotiation of minor details related to the execution of the Settlement in late September 2015.

In the following weeks, Plaintiff's Counsel and Defendants' counsel separately negotiated the amount of attorneys' fees and expenses to be paid to Plaintiff's Counsel. Plaintiff's Counsel and Defendants' counsel reached an agreement in principle on that issue as well.

Following the settlement approval hearing before this Court on December 9, 2015, in *Steinberg v. Casey*, C.A. No. 10190-CB, a case involving issues similar to the Action, Plaintiff's Counsel determined that additional discovery and clarification of settlement terms were necessary in order to proceed with the settlement of the Action. The Parties negotiated additional discovery in order to ensure that any settlement reached was in Citrix's best interests and that the Court would have sufficient information to consider the Settlement. On May 2, 2016, Citrix produced an additional 281 pages of internal Company documents.

As a result of these negotiations, the Parties have reached an agreement to settle the Action on the terms and subject to the conditions set forth in this Stipulation (the "Settlement").

II. PLAINTIFF'S CLAIMS AND THE BENEFITS OF SETTLEMENT

Plaintiff believes that the Action has substantial merit, and Plaintiff's entry into this Stipulation and Settlement is not intended to be, and shall not be construed as, an admission or concession concerning the relative strength or merit of the claims alleged in the Action. Plaintiff and Plaintiff's Counsel recognize and acknowledge the significant risk, expense, and length of continued proceedings necessary to prosecute the Action against Defendants through trial and appeal. Plaintiff's Counsel also have taken into account the uncertain outcome and the risk of any litigation, as well as the difficulties and delays inherent in such litigation. In addition, Plaintiff's Counsel are mindful of the inherent problems of proof and possible defenses to the claims alleged in complex cases such as the Action.

Plaintiff's Counsel have conducted a thorough review and analysis of the relevant facts, allegations, defenses, and controlling legal principles, and believe that the Settlement set forth in this Stipulation is fair, reasonable, and adequate, and confers substantial benefits upon Citrix and its stockholders. Plaintiff's Counsel further represents that they have conducted an investigation, including, *inter alia*, (i) reviewing Citrix's press releases, public statements, SEC filings, and securities analysts' reports and advisories about the Company; (ii) reviewing press releases, public statements, and SEC filings of other companies within Citrix's peer group; (iii) reviewing media reports about the Company; (iv) researching the applicable law with respect to the claims alleged in the Action and the potential defenses thereto; (v) preparing and filing a derivative complaint; (vi) conducting damages analyses; (vii) consulting with co-counsel on the course of the litigation; (viii) analyzing the Motion to Dismiss and drafting an opposition thereto; (ix) preparing for and attending oral argument on the Motion to Dismiss; (x) participating in informal conferences with Defendants' counsel regarding the specific facts of the case, the perceived strengths and weaknesses of the case, and other issues in an effort to facilitate negotiations and fact-gathering; (xi) analyzing internal documents produced by the Company, including Board minutes and other Board materials; (xii) drafting settlement demands; and (xiii) negotiating this Settlement with Defendants. Based upon the evaluation of Plaintiff's Counsel, Plaintiff has determined that the Settlement is fair, reasonable, adequate, and in the best interests of Citrix and Citrix's stockholders, and has agreed to settle the Action on the terms and subject to the conditions set forth herein.

III. DEFENDANTS' DENIAL OF WRONGDOING AND LIABILITY

Defendants have denied and continue to deny that they have committed, or threatened or attempted to commit, any violations of law or any other wrongdoing whatsoever or that they have breached any duty owed to Plaintiff, Citrix, or Citrix's stockholders. Defendants have maintained and continue to maintain that their conduct was at all times in compliance with applicable law and otherwise proper and that they acted in good faith. In addition, Defendants have maintained and continue to maintain that under longstanding Delaware law, director equity compensation awards made pursuant to and within the parameters authorized by an equity incentive plan that has been approved by a fully informed majority of disinterested shareholders are subject to the business judgment rule, which here Defendants believe protects the compensation judgments that they made from second-guessing.

Nonetheless, Defendants have concluded that further litigation of the Action would be protracted and expensive, and that it is desirable and beneficial for the Action to be fully and finally settled in the manner and on the terms and conditions set forth in this Stipulation, thereby avoiding the significant expense, time, and uncertainty associated with further litigation (including potentially lengthy appeals) of this matter. Citrix has approved the Settlement as being in the best interests of Citrix and its stockholders. Citrix, through its Board of Directors, acknowledges and agrees that the Settlement confers substantial benefits upon Citrix and its stockholders and that the Settlement is fair, reasonable, and adequate and in the best interests of Citrix and its stockholders.

IV. TERMS OF STIPULATION AND AGREEMENT OF SETTLEMENT

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among Plaintiff (on behalf of himself and derivatively on behalf of Citrix) and Defendants, each by and through their respective counsel as follows:

1. Definitions

As used in this Stipulation, the following terms have the meanings specified below:

1.1. "2005 EIP" means the 2005 Equity Incentive Plan approved by Citrix stockholders on or about May 5, 2005.

1.2. "2014 EIP" means the 2014 Equity Incentive Plan approved by Citrix stockholders on or about May 22, 2014.

1.3. "Action" means *Calma v. Templeton*, C.A. 9579-CB (Del. Ch.).

1.4. "Board of Directors" or "Board" means the Board of Directors of Citrix.

1.5. "Citrix Stockholder(s)" means any Person or Persons (as defined herein) who are record holders or beneficial owners of Citrix common stock as of the date of this Stipulation and their representatives, trustees, executors, administrators, heirs, successors, predecessors, or assigns. The Individual Defendants, the officers and directors of Citrix, members of their immediate families, and their legal representatives, heirs, successors, or assigns, and any entity in which the Individual Defendants have or had a controlling interest are excluded from this term.

1.6. "Compensation Committee Charter" means the charter for the Compensation Committee of the Board of Directors.

1.7. "Corporate Governance Reforms" means the corporate governance reforms specified in Section IV.2.

1.8. "Court" means the Court of Chancery of the State of Delaware.

1.9. "Defendants" means, collectively, nominal defendant Citrix and the Individual Defendants. "Defendant" means, individually, any of the Defendants.

1.10. "Effective Date" means the date by which all of the events and conditions specified in Paragraph 6.1 herein have occurred.

1.11. "Final" means the date upon which the last of the following shall occur with respect to the Judgment approving the Stipulation, substantially in the form of Exhibit C attached hereto, or an Alternative Judgment (defined in Paragraph 6.1.2): (i) the time within which to seek appeal, alteration, amendment, or other review of the Judgment or Alternative Judgment has expired without any appeal, alteration, amendment, or other review having been sought or taken; or (ii) if any appeal, alteration, amendment, or other review is filed, sought, or taken, the date as of which such appeal, alteration, amendment or other review shall have been finally determined in such a manner as to affirm the Judgment or Alternative

Judgment without any material change thereto and the time, if any, for commencing any further appeal has expired. For purposes of this definition, an "appeal" includes appeals as of right, discretionary appeals, interlocutory appeals, proceedings involving writs of certiorari, mandamus, or prohibition, and any other proceedings of like kind.

1.12. "Individual Defendants" means Mark B. Templeton, Thomas F. Bogan, Gary E. Morin, Nanci E. Caldwell, Stephen M. Dow, Murray J. Demo, Godfrey R. Sullivan, Asiff S. Hirji, and Robert D. Daleo.

1.13. "Judgment" means the [Proposed] Order and Final Judgment to be entered by the Court dismissing this Action with prejudice, substantially in the form attached hereto as Exhibit C.

1.14. "Notice" means the Notice of Pendency of Settlement of Action, substantially in the form attached hereto as Exhibit B.

1.15. "Person" means a natural person, individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, association, joint venture, joint stock company, estate, legal representative, trust, unincorporated association, government, or any political subdivision or agency thereof, any other type of legal or political entity, and any spouse, heir, legatee, executor, administrator, predecessor, successor, representative, or assign of any of the foregoing.

1.16. "Plaintiff" means John Calma, individually and derivatively on behalf of Citrix.

1.17. "Plaintiff's Counsel" means Young Conaway Stargatt & Taylor, LLP, and Robbins Arroyo LLP.

1.18. "Released Claims" means and includes any and all claims for relief or causes of action, debts, demands, rights, liabilities, losses, and claims whatsoever, known or unknown, fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law or in equity, matured or unmatured, or known and Unknown Claims, that have been or could have been or in the future might be asserted by Plaintiff as a stockholder, or any other Citrix Stockholder, or any other Person acting or purporting to act on behalf of Citrix, in the Action against the Released Persons, arising out of or relating to the facts, transactions, events, occurrences, acts, disclosures, statements, or omissions that were alleged in the Action against Defendants; provided, however, that it is understood that "Released Claims" and any release provided by this Settlement shall not include: (a) any claims to enforce the Settlement; and (b) any claims by the Defendants or any other Person to enforce their rights under any contract or policy of insurance.

1.19. "Released Persons" means the Individual Defendants and their heirs, trustees, executors, administrators, legal representatives, predecessors, successors, subsidiaries, affiliates, agents, attorneys, insurers, and each of their past or present officers, directors, and employees. "Released Persons" also includes Citrix and all current and former officers, directors, and employees of Citrix.

1.20. "Releasing Persons" means Plaintiff (both individually and derivatively on behalf of Citrix), any other Citrix Stockholder or former Citrix Stockholder acting or purporting to act on behalf of Citrix, and Citrix. "Releasing Person" means, individually, any of the Releasing Persons.

1.21. "Scheduling Order" means the order specified in Paragraph 3.1 and substantially in the form attached hereto as Exhibit A.

1.22. "SEC" means the U.S. Securities and Exchange Commission.

1.23. "Settlement Hearing" means the hearing set by the Court to consider final approval of the Settlement.

1.24. "Settling Parties" or "Parties" means, collectively, Plaintiff (both individually and derivatively on behalf of Citrix) and Defendants. "Settling Party" or "Party" means, individually, any of the Settling Parties.

1.25. "Unknown Claims" means any claims, causes of action, debts, demands, disputes, rights, liabilities, losses, matters, suits, and damages which Plaintiff or Defendants do not know of or suspect to exist in his, her, or its favor at the time of the release of the Released Claims, including without limitation those which, if known, might have affected the decision to enter into the Settlement. With respect to any and all Released Claims, the Parties agree that upon the

Effective Date, the Parties shall expressly waive, and all Releasing Persons shall be deemed to have waived, and by operation of the Judgment shall have waived, the provisions, rights, and benefits conferred by or under California Civil Code section 1542, or any other law of the United States or any state or territory of the United States or any foreign country, or principle of common law, which is similar, comparable, or equivalent to section 1542, which provides:

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

The Parties acknowledge that they may hereafter discover facts in addition to or different from those now known or believed to be true by them, with respect to the subject matter of the Released Claims, but it is the intention of the Parties to completely, fully, finally, and forever compromise, settle, release, discharge, and extinguish any and all Released Claims, known or unknown, suspected or unsuspected, contingent or absolute, accrued or unaccrued, apparent or unapparent, which do now exist, or heretofore existed, or may hereafter exist, and without regard to the subsequent discovery of additional or different facts. The Parties acknowledge that the foregoing waiver was separately bargained for and is a key element of this Stipulation of which this release is a part, and was relied upon by each and all of the Parties in entering into the Settlement.

2. Terms of the Settlement

2.1. As a direct result of the filing, prosecution, and settlement of the Action, Citrix has agreed to implement and maintain in substance the Corporate Governance Reforms set forth below for a period of no less than five (5) years from the Effective Date:

(a) **Limits on Annual Equity Compensation Grants for Non-Employee Directors**. Citrix shall cap the grant-date value of the annual equity compensation grant awarded to each non-employee director. The 2014 EIP shall be amended to add a new section that specifically addresses the annual equity compensation grants to non-employee directors. The new section shall specify the types of annual equity compensation grants available to non-employee directors; describe the vesting, exercisability and settlement of those annual equity compensation grants; and provide that the annual equity compensation grant awarded to each non-employee director shall not have a value that exceeds $795,000 as of the grant date.

(b) **Stockholder Approval**. The above amendments to the 2014 EIP shall be presented to the Citrix stockholders for approval at the 2017 annual stockholder meeting.

(c) **Enhanced Disclosures on Director Compensation Practices**. Commencing with its proxy statement filed with the SEC in connection with the

2017 annual stockholder meeting, Citrix shall provide enhanced disclosures in its proxy statement to be filed with the SEC in advance of the annual stockholder meeting in accordance with applicable SEC regulation, including, but not limited to: (i) a description of the compensation philosophy and rationale underlying non-employee director compensation; (ii) the process by which decisions were made concerning non-employee director compensation, including the role and analysis of the independent compensation consultant retained by the Compensation Committee of the Board of Directors; and (iii) the specific annual awards of non-employee director compensation in that particular year.

(d) **Enhanced Mandate for Compensation Committee**. As soon as practicable after the Effective Date, the Board of Directors shall amend the Compensation Committee Charter to provide that the Compensation Committee shall be responsible for: (i) conducting an annual review and assessment of all compensation, including cash and equity-based compensation, paid by Citrix to the non-employee directors; (ii) engaging an independent compensation consultant annually to advise the Compensation Committee with regard to the cash and equity-based compensation of non-employee directors to be awarded, including with respect to (a) the amount and type of compensation to be paid, and (b) comparative data deemed appropriate by such consultant; and

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(iii) recommending to the Board of Directors on the basis of its annual review and assessment the compensation to be awarded to non-employee directors.

3. Scheduling Order, Notice, Approval, and Dismissal of the Action

3.1. The Parties shall promptly submit this Stipulation together with its exhibits to the Court, and shall apply for entry of the proposed Scheduling Order, substantially in the form of Exhibit A attached hereto, requesting: (i) the approval of the Notice, substantially in the form attached hereto as Exhibit B; (ii) the Court's consideration of the proposed Settlement and Plaintiff's application for attorneys' fees; and (iii) a date for the Settlement Hearing.

3.2. Notice to Citrix Stockholders:

3.2.1. Within ten (10) business days after the entry of the Scheduling Order, Citrix shall mail the Notice to all record Citrix Stockholders at their respective addresses set forth in Citrix's stock records as of the date of entry of the Scheduling Order. All record holders who were not also the beneficial owners of the shares of Citrix's common stock held by them of record shall be requested to forward the Notice to the beneficial owners of those shares. Citrix shall make additional copies of the Notice available to any record holder who, prior to the Settlement Hearing, requests the same for distribution to beneficial owners; and

3.2.2. Within ten (10) business days after the entry of the Scheduling Order, Citrix and Robbins Arroyo LLP shall post copies of the Notice and this Stipulation on their websites.

3.3. Ten (10) business days prior to the Settlement Hearing, Defendants' counsel shall file with the Court an appropriate declaration with respect to the preparation and mailing of the Notice, and Plaintiff's Counsel shall file with the Court an appropriate declaration with respect to posting of the Notice and Stipulation.

3.4. Citrix, on behalf of Defendants or their insurers or re-insurers, shall be responsible for all costs associated with the mailing of the Notice. If additional notice is required by the Court, then the cost and administration of such additional notice will be borne by Citrix on behalf of the Individual Defendants.

3.5. The Parties believe the content and manner of notice constitutes adequate and reasonable notice to Citrix Stockholders pursuant to applicable law and due process.

3.6 The Scheduling Order also shall provide for a stay of proceedings in the Action, other than proceedings as may be necessary to carry out the terms and conditions of the Settlement, and order that, pending final determination of whether the Settlement provided for in this Stipulation should be approved, the Releasing Persons or any of them shall be preliminarily barred and enjoined from commencing, prosecuting, instigating, continuing, or in any way participating in the commencement or prosecution of any action, in any forum, asserting any Released Claims against any of the Released Persons.

3.7. At the Settlement Hearing, the Parties shall jointly request the Court enter the proposed Judgment, substantially in the form attached hereto as Exhibit C.

3.8. The Parties and their attorneys agree to use their individual and collective best efforts to obtain Court approval of the Settlement. The Parties and their attorneys further agree to use their individual and collective best efforts to effect, take, or cause to be taken all actions, and to do, or cause to be done, all things reasonably necessary under applicable laws, rules, regulations, and agreements to consummate and make effective, as promptly as practicable, the Settlement provided for hereunder and the dismissal of the Action.

4. Attorneys' Fees and Expenses

4.1. Subject to Court approval, Citrix, on behalf of all Defendants, shall pay Plaintiff's Counsel attorneys' fees and expenses in the agreed-upon amount of $425,000 (the "Fee and Expense Amount"). The Fee and Expense Amount shall be paid to Robbins Arroyo LLP within ten (10) business days after the Court enters the Judgment, subject to Plaintiff's Counsel's obligation to refund that amount if the Settlement or Fee and Expense Amount is reversed or modified on appeal

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within ten (10) business days from the date that the Settlement or Fee and Expense Amount is reversed or modified on appeal. Except as otherwise provided herein, each of the Settling Parties shall bear his, her, or its own fees and costs.

4.2. Approval of Plaintiff's request for a Fee and Expense Amount shall not be a condition of the Settlement. Any order or proceedings related to Plaintiff's request for the Fee and Expense Amount or any appeal from any order relating thereto or any modification thereof shall not operate to terminate or cancel this Stipulation, and shall not affect the Judgment approving this Stipulation or prevent the Settlement from becoming Final.

4.3 No fees or expenses shall be paid to Plaintiff's Counsel in the absence of entry of the Judgment, including all of the releases contemplated therein, substantially in the form attached hereto as Exhibit C.

4.4. Except as provided in Paragraph 4.1 of this Stipulation, Defendants shall have no other obligation to pay or reimburse any fees, expenses, costs, or damages alleged or incurred by Plaintiff, other current or former Citrix Stockholders, any other Person, or their attorneys, experts, advisors, agents, or representatives. Plaintiff's Counsel shall have exclusive responsibility for allocating and distributing the Fee and Expense Amount among respective Plaintiff's Counsel as may be agreed upon by Plaintiff's Counsel. Neither Citrix nor any of the Individual Defendants shall have any rights or responsibilities with respect to such allocation or distribution of the Fee and Expense Amount.

4.5. The Settling Parties further stipulate that Plaintiff's Counsel may apply to the Court for an incentive amount of up to $5,000 for Plaintiff (the "Incentive Amount"), only to be paid upon Court approval, and to be paid from the Fee and Expense Amount, in recognition of Plaintiff's participation and effort in the prosecution of the Action. Any failure by the Court to approve any requested Incentive Amount, in whole or in part, shall have no effect on the remainder of the Settlement. Neither Citrix nor any of the Individual Defendants shall be liable for any portion of any Incentive Amount.

5. Releases

5.1. Upon the Effective Date, the Releasing Persons shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever settled, released, discharged, extinguished, and dismissed with prejudice the Released Claims against the Released Persons; provided, however, that such release shall not affect any claims to enforce the terms of this Stipulation.

5.2. Upon the Effective Date, the Released Persons shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever settled, released, discharged, extinguished, and dismissed with prejudice all claims (including Unknown Claims) arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement, or resolution of the Action against Plaintiff and Plaintiff's Counsel; provided, however, that such release shall not affect any claims to enforce the terms of this Stipulation.

5.3 Notwithstanding anything in this Stipulation to the contrary, (i) nothing in this Stipulation constitutes or reflects a waiver or release of any rights or claims of Defendants against their insurers, or their insurers' subsidiaries, predecessors, successors, assigns, affiliates, or representatives, including, but not limited to, any rights or claims of Defendants under any directors' and officers' liability insurance or other applicable insurance coverage; and (ii) nothing in this Stipulation constitutes or reflects a waiver or release of any rights or claims of the Individual Defendants relating in any way to indemnification, whether under any written indemnification or advancement agreement, or under Citrix's charter and/or by-laws, or under applicable law.

6. The Effective Date, Effect of Disapproval, Cancellation, or Termination

6.1. The Effective Date of the Settlement shall be conditioned on the occurrence of all of the following events:

6.1.1. The Court enters the Scheduling Order, substantially in the form attached as Exhibit A hereto;

6.1.2. The Court, following notice to Citrix Stockholders and a Settlement Hearing, enters the Judgment, substantially in the form attached as

Exhibit C hereto, approving the proposed Settlement, providing for the dismissal with prejudice of the Action and approving the release of the Released Claims, or enters an order and final judgment that is not substantially in the form attached as Exhibit C hereto (an "Alternative Judgment") and the Parties agree to such Alternative Judgment;

6.1.3. The Court orders dismissal with prejudice of the Action without the award of any damages, costs, fees, or the grant of any further relief, except as provided in Paragraph 4.1 of this Stipulation; and

6.1.4. The Judgment or any Alternative Judgment to which the Parties agree becomes Final.

6.2. If any of the conditions listed in Paragraph 6.1 are not met, this Stipulation and the releases contemplated herein shall be null and void and of no force and effect, any court orders entered relating to the Settlement shall be treated as vacated *nunc pro tunc*, and the Settlement shall be deemed terminated, unless the Parties each agree otherwise in writing. In the event that the Settlement is terminated or the Effective Date otherwise does not occur, (a) the Settling Parties shall be restored to their positions on the date immediately prior to the execution date of this Stipulation, and (b) any and all sums paid by Citrix to Plaintiff's Counsel pursuant to Paragraph 4.1 above shall be refunded by Plaintiff to Citrix within ten (10) business days of any termination. This Stipulation shall not be deemed to entitle any Party to the recovery of costs and expenses incurred in connection with the intended implementation of the Settlement, except as provided in Paragraph 4.1 of this Stipulation.

6.3. Each Defendant shall have the right to withdraw from the Settlement, and declare it terminated pursuant to Paragraph 6.2 above, in the event that any Released Claims are instituted, commenced, prosecuted, continued, maintained, pursued, or asserted against any of the Released Persons in any litigation or proceeding of any kind prior to final approval of the Settlement and following a motion by such Released Persons such Released Claims are not dismissed with prejudice or stayed in contemplation of dismissal. In the event that any such Released Claims are instituted, commenced, prosecuted, continued, maintained, pursued, or asserted, the Parties agree to cooperate and use their reasonable best efforts to secure the dismissal thereof (or a stay thereof in contemplation of dismissal following final approval of the Settlement).

7. This Stipulation Is Not an Admission

7.1. This Stipulation, whether or not it is consummated and whether or not it is terminated, any of its provisions, any negotiations, proceedings or agreements relating to the Stipulation and the Settlement, all matters arising in connection with such negotiations, proceedings or agreements, and all acts performed or documents executed pursuant to or in furtherance of this Stipulation:

(a) shall not be offered or received against the Plaintiff or any of the Released Persons as evidence of a presumption, concession, or admission of any kind;

(b) shall not be offered or received against any of the Released Persons as evidence of an admission by any of those Released Persons with respect to the truth of any fact, including without limitation any fact alleged in the Action, or that could have been alleged in the Action, or the validity of any Released Claim, or the deficiency of any defense that has been, could have been, or could in the future be asserted, or any liability, negligence, fault, or wrongdoing of the Released Persons;

(c) shall not be offered or received against the Released Persons as evidence of any fault, misrepresentation, omission, or other actionable conduct of any kind with respect to any statement or written document approved or made by any of the Released Persons;

(d) shall not be offered or received against the Released Persons as evidence of any liability, negligence, fault, or wrongdoing, or in any way referred to for any other reason as against any of the Released Persons, in any other civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of this Stipulation; *provided*, *however*, that if this Stipulation is approved by the Court, the Released Persons may refer to it or file it to effectuate the release of Released Claims and other benefits granted them hereunder;

(e) shall not be construed as or received in evidence as an admission, concession, or presumption against Plaintiff or any Citrix Stockholder that any of their claims are without merit, or that any defenses asserted by Defendants have any merit; and

(f) shall not, in the event of termination of this Stipulation or the Settlement, be used by any Party for any purpose in any trial in the Action.

8. Miscellaneous Provisions

8.1. The Settling Parties agree that the terms of the Settlement were negotiated in good faith by the Parties, and reflect a Settlement that was reached voluntarily after consultation with competent legal counsel. Each of the Settling Parties reserves his, her, or its right to rebut, in a manner that such Party determines to be appropriate, any contention made in any public forum that the Action was brought or defended in bad faith or without a reasonable basis.

8.2. This Stipulation shall be deemed to have been mutually prepared by the Parties hereto and shall not be construed against any of them by reason of authorship.

8.3. The headings herein are used for the purpose of convenience and are not intended to have legal effect.

8.4. This Stipulation may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same document. Any signature to this Stipulation transmitted by facsimile or electronically scanned and sent via email shall be treated in all manner and respects as an original signature and shall be considered to have the same binding legal effect as an original signature.

8.5. All Persons executing this Stipulation hereby represent that they have been authorized and empowered to do so.

8.6. Plaintiff and Plaintiff's Counsel represent and warrant that none of Plaintiff's claims referred to in this Stipulation or that could have been alleged in this Action have been assigned, pledged, encumbered, or in any manner transferred in whole or in part.

8.7. This Stipulation embodies and represents the full agreement of the Parties and supersedes any and all prior agreements and understandings relating to the subject matter hereof between or among any of the Parties hereto. This Stipulation shall not be modified or amended, nor shall any provision of this Stipulation be deemed waived, unless such modification, amendment, or waiver is in writing and executed by or on behalf of the Parties. The waiver by any Party of any provision or any breach of this Stipulation shall not be deemed a waiver of any other provision or any other breach of this Stipulation.

8.8. If any provision of this Stipulation other than Paragraphs 1.18, 1.19, 1.20, 1.25, 3.7, 4.2, 4.3, 4.4, 4.5, 5.1, 5.2, 6.1, 6.2, 6.3, 7.1, 8.5, 8.6, and 8.7 is held to be unlawful, invalid, or unenforceable, (i) such provision will be fully severable; (ii) this Stipulation will be construed and enforced as if such unlawful, invalid, or unenforceable provision had never comprised a part of this Stipulation; and (iii) the remaining provisions of this Stipulation will remain in full force and effect and will not be affected by the unlawful, invalid, or unenforceable provision or by its severance from this Stipulation.

8.9. This Stipulation shall be binding upon, and inure to the benefit of, the successors and assigns of the Parties hereto.

8.10. Notwithstanding the entry of the Judgment or any Alternative Judgment, the Court shall retain jurisdiction with respect to the implementation, enforcement, and interpretation of the terms of this Stipulation, and all Parties submit to the jurisdiction of the Court for purposes of implementing, enforcing, and interpreting this Stipulation.

8.11. The construction and interpretation of this Stipulation shall be governed by and construed in accordance with the laws of the State of Delaware and without regard to the laws that might otherwise govern under principles of conflicts of law applicable hereto.

8.12. Without further order of the Court, the Parties hereto may agree to reasonable extensions of time to carry out any of the provisions of this Stipulation.

8.13. The following exhibits attached hereto are material and integral parts hereof and incorporated herein by reference:

(a) Exhibit A: [Proposed] Scheduling Order with Respect to Notice and Settlement Hearing;

(b) Exhibit B: Notice of Pendency of Settlement of Action; and

(c) Exhibit C: [Proposed] Order and Final Judgment.

IN WITNESS WHEREOF, IT IS HEREBY AGREED by the undersigned as of the date noted above.

<u>/s/ Susan M. Hannigan</u>
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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE EL PASO CORPORATION SHAREHOLDER LITIGATION	:	Consolidated Civil Action No. 6949-CS

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Chancery Courtroom No. 12D
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, December 3, 2012
12:40 p.m.

\- - -

BEFORE: HON. LEO E. STRINE, JR., Chancellor.

\- - -

SETTLEMENT HEARING

APPEARANCES:

STUART M. GRANT, ESQ.
MEGAN D. MCINTYRE, ESQ.
Grant & Eisenhofer, P.A.
-and-
MARK LEBOVITCH, ESQ.
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Bernstein, Litowitz, Berger & Grossmann LLP
-and-
IRA A. SCHOCHET, ESQ.
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-and-
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JOSEPH S. ALLERHAND, ESQ.
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for Kinder Morgan, Inc., Sherpa Merger Sub, Inc., and Sherpa Acquisition, LLC

DONALD J. WOLFE, JR., ESQ.
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-and-
BRADLEY R. WILSON, ESQ.
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for Defendants Juan Carlos Braniff, David W. Crane, Douglas L. Foshee, Thomas R. Hix, Ferrell P. McClean, Timothy J. Robert, Steven J. Shapiro, J. Michael Talbert, Robert F. Vagt, and John L. Whitmire

ANDRE G. BOUCHARD, ESQ.
Bouchard, Margules & Friedlander, P.A.
for Defendant Douglas L. Foshee

RAYMOND J. DiCAMILLO, ESQ.
Richards, Layton & Finger, P.A.
for The Goldman Sachs Group, Inc. and Goldman Sachs & Co.

ALSO PRESENT:

JEFFREY W. GOLAN, ESQ.
GUSTAVO F. BRUCKNER, ESQ.
MARVIN L. FRANK, ESQ.
WILLIAM S. NORTON, ESQ.
PAUL K. ROWE, ESQ.

- - -

THE COURT: Good afternoon, everyone. This may be the most people who were ever in this room. It's a historic occasion.

Good morning, Mr. Grant -- or good afternoon, Mr. Grant.

MR. GRANT: Good afternoon, Your Honor. I think I know most of them so that's good, even on my side.

This is the time that the Court set for the settlement hearing, the fairness hearing in the El Paso matter.

As the Court knows, usually when I have the privilege of bringing a settlement in front of the Court, we rarely get objections. Unfortunately, there were actually four in this case. And I want to address them because I take them seriously. Although, I don't take criticism well, and I look at that as criticism. Although, I must say the compliments they come privately through e-mails and telephone calls. So you shouldn't think that there is only criticism here.

The first one is that the settlement amount was too small. Now, I should say there are some themes that run through the criticism. While they're critical, they actually never give a solution to the problem.

So the first one, the settlement amount is too small. The reason is that Goldman Sachs makes lots of money, and therefore, you know, we should have been able to do a lot better. And in response I say, "Look. No one likes to beat up on Goldman Sachs more than me, and it's something that I try to make that a habit of. But, you know, the Court of equity does not allow punitive damages, so how much they make is somewhat irrelevant."

And also, the Court found in the Court's preliminary injunction opinion that the case against Goldman Sachs was going to be very difficult to prove, and the Court listed some of the problems with that. If there was any doubt how much Goldman Sachs would fight, they decided to put in a brief in this case, supposedly in support of the settlement, but I think one has to really kind of jump from this is why they had a lousy case to this is why the settlement is so good for them.

But we did get quite a bit from Goldman Sachs. Not only did we get $20 million, which they gave up their fees so that Kinder Morgan could kick in the extra dollars, but they also gave up all the other things that they were contractually entitled to, all the reimbursements. So I think it's -- the plaintiffs had a very good day against Goldman Sachs. There was no other criticism of who else should be paying more money in the objection, so I will skip that.

The second criticism was there was an objection to the de minimis payout exception that we wouldn't send checks out for under $10. Now, the objectors -- and there were a couple of them on this -- didn't say how much, you know, whether there should be a de minimis limit or not, and you know, no one argued well $7 or $5 or $15. So I don't know what their position is, but you know, one of them said, "I just got a 61-cent check. I am willing to invest this money to send in my objection so that I can get another 61-cent check." I understand that's the way he may feel, but there are a lot of class members who are saying, "I am not sure I want to spend $5 or $7 or $8 in administrative fees, which come out of the class, of course, so that he can get his 61-cent check." I don't know what the right number is.

THE COURT: You're saying it's

recognized that there has to be some number, and ten bucks is pretty sensible.

MR. GRANT: Yes. As long as the Post Offices keeps raising their prices, I guess that number has to keep going up. It's not fair to the rest of the class to burden the rest of the class with the economics of lots and lots of people getting 61-cent checks.

The third was -- and this one was actually my favorite -- was that the notice was misleading because it didn't --

THE COURT: It didn't calculate a per share --

MR. GRANT: Right.

THE COURT: -- amount.

MR. GRANT: Which is very, very difficult to do because of variables. You could figure out what the least amount is, but it's hard to calculate. And the reason I like that so much is one of the other objectors, of course, calculated that and said, "All we are getting is this per share." So, you know, it didn't --

THE COURT: It just says people can do some rough cowboy math if they need to just by taking the shares outstanding and divide it into $110 million. It won't come out perfect, but when you don't know exactly who the insiders are who aren't allowed to participate and then you have the people who are below the $10.

MR. GRANT: Or the people who don't claim at all or, you know, some other things like that. So you know what the minimum is, but you wouldn't know what the exact is. The last thing I would want to do is have to estimate that, send that out, and then someone will say, "How come I got less?" So, yes, and that information is provided to folks, and simple arithmetic can calculate that out.

The last one -- and I take it a little more seriously than the first three -- is the plan of allocation, meaning that the only folks who actually get a check at the end of the day are those who held the shares as of the merger. And I am not willing to say that those who did not get a check don't get a benefit, because it's clear to me that if one is looking at this in a pure economic way, economically rationale, and we believe in the efficient market, and this may be somewhat academic, but I still think we need to look at it this way.

When there is a filing of a lawsuit, if someone is calculating what is my expected value, what is the likelihood of the merger closing, how much time, that one would take that as another data point and say, "Okay. Well, I think there could be some extra money down the road." What would I give with that if I was going to buy shares now? So it certainly could at the early part once there is a lawsuit filed increase the consideration that class members get.

Certainly after the opinion came out, your opinion, when it said there is a likelihood of success on the merits and damages would be appropriate, the market would have to reflect that.

THE COURT: Isn't the reality, too, that this -- that corporate class actions based on breach of fiduciary duty are not secured --

MR. GRANT: Correct.

THE COURT: If someone wants to argue that there was a disclosure at a particular time, you can't cut up a fiduciary duty claim. This was a challenge to the closing of a merger and the fairness of a merger. And if someone sells out -- they sell to someone who then is holding the share before the merger, and unless they -- they sold the claim essentially. I mean, that's the way our law has treated it, and I don't know any other way to do it.

MR. GRANT: Well, I agree, but I want to circle back because I don't think that is an absolute rule, but I think it is the default rule.

THE COURT: Well, what I am saying is I think when we go away from that rule, we have to be very, very careful about the implications of it because there is -- you know, I was at Eataly last week. You get some really deliciously, very thinly sliced meat there. I'm not sure you want to -- you know, how many different periods during a merger contest are you going to divide the claim? You talk about the de minimus amount of fifty dollars? How are you going to allocate the right between the seller and the buyer of the stock?

MR. GRANT: Right.

THE COURT: I just don't know how to do it. When people challenge a merger, if you hold it up all the way through the time of the merger, you are the one that bought it. You bought it from somebody else.

MR. GRANT: It also explains why

sometimes you see on the day before the merger people buying the stock for a few cents more than the merger price and you say, "Well, why is that rationale?" It is because you're valuing it, not only do I get merger consideration, but I've looked at the case and I think I also get damages.

THE COURT: That's what I mean. I think we have to be careful not to punish buyers either on those theories of saying, "You're buying a claim." You may not have derivative standing or something else, but I think the Court is -- nobody has disqualified folks for that.

MR. GRANT: Right.

THE COURT: But there has to be a rule. So I understand how the person feels like they should get a cut of something, but I think what their objection doesn't really answer is what are they saying to the person that they sold the stock to.

MR. GRANT: Right.

THE COURT: Are they saying, "I sold this, but I didn't give you the right to participate in the settlement. I kept that for me, but I didn't tell you that," because that's essentially what they are saying. It can't be that share of stock that each of those shares that person held would be entitled to double recovery of everyone else who just held.

MR. GRANT: Agreed. But now we have had some cases -- Mr. Lebovitch and I did the Landry's case together, and on that one, you know, there were very specific facts there.

THE COURT: That's what I'm saying there may be some case specific facts --

MR. GRANT: Right.

THE COURT: -- particular situations when there may be more than one transaction, for example, that's being challenged. But even in that kind of situation, I think we have to be careful about getting too ornate.

MR. GRANT: Agreed. In that case, we wound up with two different considerations. One was a second buyout, and the other paid the people who missed out on the first buyout. I think that is again my criticism of the criticism of us is: You didn't give us a reason why we should move from the default rule, which I think of as the default rule, but you paid the people at the time of the merger.

THE COURT: As I said, I want to stress right now in terms of that objection, I understand it. I understand why the person feels that way, but I don't think they have a lens on it that's wide enough. I think the lens that they have is: They sold the stock to someone who took the risk of being the buyer in a transaction with them, and with the risk of being a buyer in that transaction also comes the benefits that come from stock ownership, which include the benefits of participating in a lawsuit attacking the fairness of the merger.

MR. GRANT: And they may have well paid some additional --

THE COURT: Well, that's what I'm saying. They took the good and the bad with it. Unless the seller of the stock -- I doubt the seller of the stock placed an order on E*Trade, or something like that, that said "exclusive of the right to participate." You can barter for that.

MR. GRANT: You could.

THE COURT: They could have found somebody. I see no evidence in the objection that they did, and so unless you are going to say that some stock gets double recovery because you have to have a rule, and the rule that we have is pretty sensible, which is you are attacking the fairness of a merger, that's what the case is about, the people who would be -- who are actually affected by the merger are the ones who share in the recovery. It may not be perfect, but it's hard for me to conceive of a better general rule.

MR. GRANT: Agreed. And I think that's what the default rule has to be. And if there are specific instances in cases, then one can bring that forward and explain why the allocation plan is accurate.

THE COURT: But I will also say just for the purpose of not belaboring a ruling later on, again, I understand why it's hard cheese for someone who would only be -- you know, say allocated $7 to not get their $7. But we live in a society where -- I mean, honestly people all the time you fight with utility, you fight for something, or you get something in business. You get poor service at a restaurant. You just do business with someone else the next time, or you move on. You can't sue over everything. There has to be some limit. $10 seems a fairly sensible thing.

And it's, you know, difficult for folks, but then that also ought to factor in to how people buy and sell securities, which is if you are buying publicly traded securities in amounts that are de minimis, you are probably trading, incurring all kinds of risks that Graham, who might not -- I don't think is alive. Although, there is probably someone named Graham who could tell you the same thing, or John Vogel is not rationale.

I feel for them, yes. In a perfect world without costs, we could send them their $7.20 or their $4 or their $9, but there has to be some limit in the best interests of the class, and $10 seems to me to be, frankly, pretty conservative in terms of going down in the dollar value. Somebody has an $11.47 check you are sending to them. So, again, I understand the concern of the class member, but that's not going to be an obstacle to my ruling on this.

MR. GRANT: I don't think we've asked for a large threshold. Again, I can't estimate exactly what people are going to get, but even on a --

THE COURT: Well --

MR. GRANT: -- minimum you can get, if you own 50 shares, you would be getting a check. These objectors have 13 shares, and they probably won't be getting a check.

THE COURT: Right. What I am saying is -- I am not saying there is nothing obviously -- do you want to buy 13 shares? It's America, and you are entitled to do it. It's probably not the wisest thing that a corporate financier would pay. And on an index fund or something else, you are probably better off doing that in terms of it.

But the reality is there has to be some limit. And I think $10 -- that means there is going to be a fair number of stockholders who get relatively small checks, which means there are going to be fairly high administrative costs in comparison to what's at stake. So I don't see $10 as an unreasonable limit. And I regret that some folks will miss out, but you know, this is justice, and justice requires justice not perfection. And I think perfection would be probably unjust.

MR. GRANT: Exactly.

Moving to legal fees --

THE COURT: Do you want to cover -- I know you dealt with the objections. Why don't you deal with the overall merits of the settlement before we get to the fees.

MR. GRANT: Okay.

THE COURT: Because that's obviously some of the objectors just basically say, "Mr. Grant, this is not enough. That in comparison to this big deal, you should have gotten a million or you should have gotten..." How do you respond to that?

MR. GRANT: Well, it's $110 million. If you put it on the scale of these cases, it's in the top five. So I start with that.

The second is it's a sure $110 million. We could have pushed forward. I think the Court in his opinion pointed out -- which is why I wasn't going to go over this with you because I am repeating your words to you -- but for the record, I will be happy to do so.

Your Honor indicated there was a likelihood of success on the merits. You indicated that a back-of-the-envelope kind of calculation could show damages of approximately $500 million. But you said you know you have a few problems. The guy who you can get it against most easily isn't going to have $500 million who can pay for it.

THE COURT: The back of the envelope was basically on --

MR. GRANT: -- was the difference

between the amount of the original deal and the sorry we made a miscalculation --

THE COURT: Right.

MR. GRANT: -- and we are taking money off the table.

THE COURT: So the difficulty is if, in the end, all you are able -- the only person you are able to prove liability against is --

MR. GRANT: Foshee.

THE COURT: -- Foshee and maybe one of his subordinates or something like that, and the rest are all independent directors, who presume were in the dark about this, you have basically one source of recovery unless you can prove that Kinder Morgan was somehow complicit.

MR. GRANT: And that was certainly going to be difficult, as Your Honor pointed out. It actually gets worse than that because even if I can win against the directors who say, "Okay. Well there is D&O coverage." Well, I have to show bad faith.

THE COURT: If you show bad faith --

MR. GRANT: That blows the D&O coverage.

THE COURT: That would be their net

worth or something.

MR. GRANT: Right. And so when you look at -- if you say well this settlement is again roughly 20 cents on the dollar for what the Court pointed out was a way of calculating damages. Look, if we tried this thing, we would have come in and said really the fair value was significantly higher. To be straightforward with the Court, we would have been asking for something probably in excess of a billion. But when you look at the bird in the hand and when you look at the difficulties that the Court already pointed out and you look at how vociferously Goldman Sachs was going to fight over this, $110 million -- one of the five largest settlements, at least that I am aware of -- makes a whole lot of sense.

Now, you know, if Your Honor had written about how easy the case would have been against Goldman Sachs and against Kinder Morgan, my guess is we could have done a lot better, but I have to deal with the world the way it is.

THE COURT: Well, I'm not even sure -- I mean, I have this memorandum in connection with the settlement. I may have to revise my PI opinion.

MR. GRANT: I think that's what the

purpose of it was.

I spoke to the defendants, and they said that they were not going to speak today, unless they want to address that issue.

THE COURT: I don't think anyone wants to speak to that.

MR. GRANT: That's all I have on the settlement, unless Your Honor has specific questions.

THE COURT: I do not.

MR. GRANT: Okay. Moving to the legal fees, and I think there was one objection as to that. It seemed that someone thought because we had been part of the plan of allocation that didn't give money to folks who sold their shares that we, therefore, should be almost as evil as Goldman Sachs and get nothing. Goldman was more evil so they had to pay something, but I think that was the view. It was some interesting reading, and several of us read it and read it carefully. We took it seriously, not the conclusion but in the idea that someone is upset that they feel they are giving release and not getting anything.

THE COURT: Was the mediator involved at all in the fee part of it?

MR. GRANT: No.

THE COURT: Not at all?

MR. GRANT: No.

THE COURT: That was just a negotiation between plaintiffs' counsel and the defendants on the agreement not to exceed an amount.

MR. GRANT: Well, no. The defendants weren't part of that at all. They put their money in and said you do what you want to do. So there was actually several discussions, and I think some of this is very important for the Court. First of all, there were discussions with the non-Delaware cases, because Your Honor has often guided us to be inclusive.

THE COURT: I don't know that I -- I am probably not alone in that. I think I am the robed voice of the defendant.

MR. GRANT: Yes. The defendants want us to be inclusive.

THE COURT: They don't want any strays out there.

MR. GRANT: Right. And Your Honor wants us to be nice to each other. The defendants actually don't care about that part.

THE COURT: Except as an instrumental

way.

MR. GRANT: Right. And so unfortunately bringing other jurisdictions has a cost to it, and the Texas folks are being brought in and to a much lessor extent the New York folks are being brought in. But they feel they've paid for, you know, a universal and that's what we are giving them. So, you know, it's important to understand that.

The fee that we wound up asking for is $26 million which is inclusive of expenses. It's 23.64 percent --

THE COURT: The $26 million includes the expenses?

MR. GRANT: Correct. So it's 23.64 percent.

THE COURT: Including the expenses?

MR. GRANT: Yes. That's right. That's everything.

THE COURT: Because a lot of -- I mean, that is important because there are a lot of -- you have to read settlement briefs very closely, because as people do they have this lower percentage and then it says plus expenses, which actually balloons them.

MR. GRANT: Right. And I know the Court likes kind of an all-in, so that's how we presented it. I will tell you that there were lots of discussions and there were people who thought that 25 percent or more would be justified and they asked for that. And there were people who felt less, but if one subtracts out the out-of-pocket costs and the fees to counsel in other cases, I mean the Delaware case is receiving a fee that's less than 22-and-a-half percent, and I think, you know, in our brief we -- you can always find these to justify anything online. But 25 percent to 30 percent is often given when you look at the lodestar hourly. I mean, you know, we all find the big ones.

THE COURT: The premium to lodestar for the folks who litigated this is about $2500 an hour fee. Is that what you are talking about?

MR. GRANT: Yes, except when you realize all the folks whose hours we didn't put in who will be feeding at the troth, so it's even less than --

THE COURT: I get it.

MR. GRANT: Yes. So that's what I have, unless Your Honor has any other questions.

THE COURT: You just did that for Mr. Wolf and Mr. Seitz.

MR. GRANT: Yeah. You know, sometimes you give the abuse; sometimes you get the abuse, but the abuse is always there.

THE COURT: I am not seeing a ton of sympathy on that side of the room.

MR. GRANT: No. And I would not expect it at all. Nor would I ask for it. But it's important that they see what their total piece is actually buying.

THE COURT: Well --

MR. GRANT: If I might hand up to Your Honor we took the final order and judgment, filled in all the blanks except for the fee, but it has all the correct dates and all that, if I might hand that up.

THE COURT: Sure. Thank you.

Do you have anything else to add?

MR. GRANT: I have nothing else.

THE COURT: Does anybody else have anything to add?

I am going to be brief. This is, obviously, a very interesting case, and I wrote about it in an earlier stage. You write about cases when you have the record that you have, and obviously, there were additional things to be -- that people would have said if they were actually on the stand. But there was a very full information base created by the plaintiffs.

I think these are very difficult cases for plaintiffs because stockholders agree in exculpatory charter provisions to limit the ability to recover monetary damages against directors. And they're difficult because, you know, honestly, I think the plaintiffs themselves were candid. You know, there is a certain amount of risk that you can prudently ask a Court to impose on stockholders and that doesn't usually include enjoining a multibillion dollar merger agreement that provides a substantial premium over market if the stockholders have the ability to turn that down for themselves. And I think the plaintiffs were hesitant rightly, I think, to have -- you know, they were ambivalent about whether you can do an injunction, and that does leave stockholders in situations or cases like these where you are never exactly sure they got the optimal price. And that's part of what Revlon is actually about, getting the optimal price.

And this remains, I think, a learning lesson. I hope it's not something that people exaggerate. One of the things, for example, I've heard coming out of this case is that: Do you mean if you are an investment banker and your cousin has 22 shares that, you know, you have to disclose that? Really? Is there anything about this case -- sometimes stark facts just need to be confronted as stark and unusual facts.

It's actually started a very productive conversation in certain circles about internal practices and other things to just avoid situations. The Court itself doesn't want to have cases turn on optics. And when you have frankly -- but it also does show there are some learning lessons about the importance of disclosure by everybody involved and the reminder of the reasons why there are certain advisers and there are certain things that are done in transactions, right?

It's not because -- I hate to burst the bubble of anyone, but it's not because people who are CFOs, heads of internal M&A, and the CEOs necessarily need independent directors or outside investment banks to do transactions. A lot of times they have those people involved because there are conflicts of interest, and that you're hired to be part of a cure of a conflict of interest.

And one of the things about that is when there is a conflict of interest, the corporate law has, in order to protect the represented, taken a very hard look at that. There are people who represent people who are stockholders and when there is a conflict of interest, they take a hard look at it. And whenever it gets to be that the protective elements of a process, the things that are designed to cure a process, end up being problematic, that kind of undermines the whole thing. And sometimes there are hygienes. We all know -- all of the lawyers in the room have had those situations where they were about to take on a representation and they did the conflicts check and they realized that their products liability partner had done $750,000 worth of work which kept them from making a $10 million fee on a merger. But that's part of why firms decide up front to deal with their policies and to set them in place.

This may be a learning lesson. These are difficult, and you hate to have cases where, again, through the narrow prism of a very accelerated preliminary injunction proceeding you know you have to make certain fact findings. I think -- as I said, the other lesson about it is you need to know about all sides because what came about here obviously is a situation where two facts that the plaintiffs came upon, two focuses came together in an unusual way that was frankly surprising for various elements of the defendants.

Now, would that have translated in liability in the end? And how does that influence my approval of the settlement? Well, the reality is the acquiror here paid a lot of money for this company. It did. So, you know, that's something that is a reality that the plaintiffs had to confront, market testing still matters. Is there -- was there potential for an overbid? Yes. Is it complicated by some of the ownership patterns? Sure.

But that was something that the plaintiffs had to take into account. And that's why some of the issues they focused on are important because it may have been a situation about trying to get the highest bid from this particular bidder and how you behave towards that particular bidder and how you benchmark that and use the leverage of looking at the other alternative could have been important.

That's also why I think it's hard to second guess the plaintiffs' determination that taking $110 million in these circumstances is not good value for the class because as we -- my colloquy with Mr. Grant indicated and the prior decision indicated -- you have an exculpatory charter provision on the part of the independent directors, that a course of action that the independent directors took was a plausible way to maximize value. They did bring in another distinguished investment bank. There were --

You know, I have to comment on the memorandum of law in connection with settlement. I don't buy into all of that. I understand that things may have been done in toto and good faith. I think that there is an important lesson to be learned though, which is if you don't -- if you are not part of something legitimately, then stay out of it entirely, which is if you are saying that you did not object -- if someone is saying they do not object for a new fee for the banker that's coming in to deal with the conflict, if the banker advises that another strategic alternative is accepted, then you don't object to that. And you just say, "Of course, I recognize the situation as a conflict situation, that bank needs to be compensated too for its role so that it can actually provide the service that it's doing as the cleansing bank."

When a client is struggling with whether to proceed -- and remember the Court has been very careful. Our court has encouraged, we recognize that there are often conflicts or things that are called conflicts. This was not anything that was an appearance of conflict. This was a portfolio company making an unsolicited bid for the client. A portfolio company of the investment bank. That's not a perceived conflict. That's an actual unusual, very unusual, not typical, never actually seen it before conflict. When the client is struggling, one of the things lawyers know when a client is struggling with a conflict are cannons require that you give the client every piece of material information that's necessary to make a judgment about whether to waive a conflict or to proceed with a conflict.

One of the lessons here I think is it's always awkward when a client, right, when the CEO, who is the one actually most desiring to help the service provider stay in the game because he respects it when he is surprised by something and testifies that it would have been influential. That's awkward for everybody. So one of the things to learn out of this is again everybody putting things on the table. But that said, this is a situation where those things may well -- at a trial you would have a larger lens on them. Some of it could be seen as sort of locker room stuff, right, which is this is the sort of stuff we do like worrying about lead table and all this kind of stuff and it really had no effect on economics, and there is a reasonable basis in the record to believe that.

It would have been difficult to prove through in terms of, for example, the investment bank. The law of the investment banker liability has been extremely investment banker friendly. It's very difficult to get them on any kind of theory, and there was a cabin droll regardless of whether it was perfectly done and there were other assurances of fairness. The most difficult part of the record was, obviously, the CEO's role as negotiator and then revealing he had had some other discussions and that was very difficult.

But as Mr. Grant talked about that doesn't get you the independent directors. There is no evidence in the record that they knew anything about this. You also then have to connect the process violation, as serious as it potentially was, and I think it potentially was very serious. Again, this is a situation of conflict of interest.

One of the reasons why -- in this case why frankly the independent board may have been less concerned about having its traditional financial adviser on the scene with a conflict of interest was because the CEO had so much skin in the game, was trusted by them, and he was the primary person the board was relying upon. And that's what made this difficult, right, which is the board may have been lulled into it? Okay. We have another really high quality financial advisor on the scene, that cleanses the conflict, and it's good to have them on the scene and, frankly, still tap into Goldman Sachs with our guy in the room because fundamentally we trust our management team. They have a lot of skin in the game, and they really know the business.

The problem is then when you learn later on of this awkward fact, it may or may not --

again, that is what we will never get to. That's the risk that is being compromised, but it creates a situation where everybody feels uncomfortable. And that's what you try to avoid in this thing. That's the art of the deal actually for the advisers and for the counsel and frankly for everybody is to try to come up with a situation where everybody has a good feeling about how you got there, even if there are debatable as there always will be debatable negotiating choices.

But getting to liability, again, it might prove a serious process violation, like Mr. Foshee. I don't think in any way, shape, or form this should have gone down the way it did. It just shouldn't. As a process matter, it shouldn't. If you have an idea as a CEO about buying an asset or something, the people who ought to be hearing about it is your board, not somebody else. That's not really anything innovative. It's pretty fundamental.

Now, does that mean -- does that equal that there was actually a substantively harmful effect? That's the predicament people put themselves in when they don't say things, right, because they create questions and then the law has things and the plaintiffs would have pushed on that. They would have said, "Look, there is a burden. They need to show it didn't have an effect."

But, you know, assuming they were successful, they would still -- you would be looking for somebody for a billion dollars or something, an individual or an officer. That's pretty difficult. And again you would have to show the value gap, and you know you can't -- those things are hard. So I think that the plaintiffs had a very difficult challenge against the big deep pocket, which would be Kinder Morgan because they are a third party, and frankly third parties are allowed -- you are allowed as a third party actually to come in and say, you know, I told you 27 but really my dog and a summer intern did that model, and we lost half a billion. You are allowed to do those as the negotiator actually. I mean, you are. You are not a fiduciary.

I mean, that's part of America, right? You are supposed to bargain for your stockholders, your equity holders. So they're very difficult, and the record doesn't really suggest any strong grounds for liability against them. The independent directors -- and Mr. Grant has pointed out even if you prove them liable, that's a very difficult thing. There is nothing in the record to suggest that the independent directors really did anything wrong. I mean, you know, again, it's a lesson for independent directors in the sense that they often defer to advisers on the selection of advisers.

I think there is a lesson for us in our profession, which is unfortunately whether you like it or not, the lawyers involved in these things have to very carefully monitor the adviser's selection and do the disclosures and all that stuff in terms of surfacing these things. It gets to be hard because people forget -- and this is one of the things that gets forgotten when people write about cases like this -- they forget about how hard people are working to actually address the economics of things and to address the real time to the best interest of stockholders. And so when you are talking to people about missing a detail or doing that kind of thing, you are forgetting about the thousand other things they did each day during that deal that were designed to promote the best interest to the stockholders. It's easy to pick out the weaker moments, but it also shows again that these foundational things about the process can have value.

But to price them at more than a $110 million, I am not in a position to second guess the excellent team of plaintiffs' counsel who very diligently pressed the preliminary injunction motion, got a very full record from which to make this, and secured a very large monetary settlement. And I give some credit to the fact that it was done through mediation, and that there was a distinguished mediator who also participated. That's something that I would give a shout out to. So for all those reasons, I think it would have been a difficult case.

I know I will say for the defendants I hear you. What I mean by that is, you know, I think it's always important -- that's part of the reason why I try not to write -- when you deny a motion to dismiss, I try not to write them up because you write up a version of facts and sometimes that's not captured that you are doing a judicial ruling based on somebody's version of facts, but you know -- and that's what we have in the preliminary injunction thing. It's a little bit -- it's closer to that, right? We had testimony. We have a record. But it's not the full range of experience and the input that we would have had at trial.

Now that doesn't mean that it couldn't have gotten better for the plaintiffs, too. I mean, things come out, right, and that's part of why defendants settle as well. But the Court is fully aware that it has the prism on the record. It has the record that the parties give, and you have the testimony of the CEOs and you have the testimony of the independent directors. You have the testimony of the bankers. That's what you get on a cold, paper transcript plus the documents, and that's what settlements are about is avoiding the fun of a full trial in this courtroom, which is sort of shaped like driving a car with a very long hood.

So I am happy to approve the settlement. I think it's a very substantial achievement for the class in a case in which the defendants were prepared, I think, to mount vigorous defenses on the merits and to point out that the substantial benefits that the transaction gave to El Paso stockholders, regardless of whether there was an additional settlement.

In terms of the fee, I see no reason under the Sugarland factors not to approve the amount that's requested. I think it is wrong headed to be parsimonious in those cases where the class actually gets sizeable monetary benefits. I think these are the cases in which awarding a reasonable fee is more important because these are the kind of cases that actual investors want to be brought.

Investors would like if all the suits where there was no monetary benefit probably went away or at most, 99 of percent of them go away, and the rare one percent where some truly, profoundly important non-monetary thing happened would remain, that would have to be an injunction though, and then have all the suits with monetary benefits go ahead with generous awards for the attorneys because that's money in their pockets. That's what would be cost effective for investors. So when investors get real money, I think it's wrong for the Court to be parsimonious.

If you look at the Sugarland factors, the most important is the benefit, and there is clearly a sizeable and tangible benefit that was produced only because of the litigation. This is not a shared benefit case. It's only because of the litigation. So the plaintiffs' lawyers are responsible. Their efforts are responsible for all of the benefit of the class.

They put in substantial effort, and when you look at the premium -- even if it's the full lode without the discount for hurting all the cats for the defendants, even if it's the full lode, it's a premium I'm comfortable with because it's kind of -- because of the kind of risks that's taken because of the fact that there are cases brought where no one gets compensation, and because it is the kind of premium that an actual client would be happy to pay for.

You know, as I said, I awarded -- I have traditionally taken this approach. There is nothing new about it. You can track it from the advent of e-filing or even before. Some of you even on the defense side have been the beneficiary of some of these large fees, and I have always taken the view that when there is real money achieved, that's when a real client would be happy to pay and when the Court is -- when I as the judge am most comfortable. So I think in terms of whether you look at the lodestar or the amount, the premium is reasonable. The difficulty of the litigation -- this is a difficult, hard-fought thing. There are excellent defense lawyers here. And so when you put it all together, I see no reason to quibble, and the percentage is inclusive. The percentage is less than 25 percent that's requested. It's inclusive of expenses. So I am confident that awarding the full amount requested is fair and reasonable.

And I regret that I have overruled the objections from the class members. They had heartfelt and understandable objections, but for the reasons I stated previously, I don't think that they stand in the way of what is a very good settlement for the class.

And, Mr. Grant, if you could just tell me the full number, and I would ask the defendants to cry in protest if it's any number that you haven't heard before.

MR. GRANT: $26 million, Your Honor.

THE COURT: $26 million flat, right?

MR. GRANT: Yes, Your Honor.

THE COURT: Thank you all. Enjoy an unseasonably warm day.

(Hearing adjourned at 1:25 p.m.)

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CERTIFICATE

I, CHRISTINE L. QUINN, Official Court Reporter for the Court of Chancery of the State of Delaware, 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 Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand this 5th day of December, 2012.

/s/ Christine L. Quinn

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 123-PS
Expiration: Permanent

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THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: FREEPORT-MCMORAN	:	Consolidated
COPPER & GOLD INC.	:	C.A. No. 8145-VCN
DERIVATIVE LITIGATION	:	

- - -

Chancery Court Courtroom #2
38 The Green
Dover, Delaware
Tuesday, April 7, 2015
2:00 p.m.

- - -

BEFORE: HON. JOHN W. NOBLE, Vice Chancellor

- - -

SETTLEMENT HEARING

- - -

CHANCERY COURT REPORTERS
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THE COURT: Good afternoon, everyone.

Mr. Grant.

MR. GRANT: Good afternoon, Your Honor. May it please the Court, this is the time that the Court has set for the Freeport fairness hearing. I know Your Honor is very familiar with the case having heard lengthy, lengthy arguments. I am very pleased to present to the Court a settlement in the gross amount of $153.75 million which is one of the largest settlements I think in the Chancery Court, and particularly as a derivative settlement.

Unless the Court really wants to hear all the details of the case and all that, I think that's in the brief, on top of which Mr. Savitt and Miss Goldstein are both here to make sure I don't say anything rotten about their clients.

I will talk a little bit about the settlement though.

THE COURT: I think it's important that we talk about the settlement, and a brief background will be fine. The scope of today's hearing has grown since it was originally scheduled.

As a result, I am just a tad concerned about the passage of time. Why don't you turn to the settlement. I think I understand the background.

MR. GRANT: Sure.

As the Court knows, this was a derivative action against the directors of Freeport for what we assert was overpaying to buy into companies in which they had an interest.

I mention it is derivative. There was no vote for the Freeport shareholders. So that's how the claims were laid out.

In addition, as we got into the discovery, we believe that there were potential claims against Credit Suisse for some of the things that they did.

Originally, we had tried to get all of the parties to get together for a mediation. When I say "all of the parties," the Court should understand that there were layers and layers of insurance carriers, and to some extent going through -- there were four mediations.

Going through this settlement was like ground hog day because each layer, whether they had ten or $20 million, they'd start off with "We don't owe anything," and you'd go back and forth, and you'd negotiate, and you'd put forward your evidence, you'd convince them that their piece was going to be gone anyway, and then they'd finally, "Okay, I'll kick the whole thing in," and then you start at ground zero again with the next carrier who says, "Well, I certainly don't owe anything," and you can't get them altogether because everyone on a higher layer says, "Well, until the layer below me exhausts, I'm not even interested in speaking with you."

So we had extensive mediation, after extensive discovery, after I think a four-hour argument in front of Your Honor on the motions to dismiss, and ultimately we reached a settlement which was $115 million from the various insurance carriers for the Freeport directors, as well as creating what we think was particularly appropriate here, which was an agreement by Freeport to dividend out what they were getting and then some, and I'll come back to in a moment, to the shareholders, because as I said earlier, this is a derivative action. Obviously, the damage is to the company, and any recovery would go to the company.

But unlike many other derivative actions, this one, when it was -- when the transaction was announced that we said was a breach of fiduciary duty, the stock dropped considerably.

THE COURT: How much did it drop per share?

MR. GRANT: It dropped about $7 a share, I believe, Your Honor.

THE COURT: And you're recovering ten or 11 cents?

MR. GRANT: The dividend will be 11 cents.

Now, as I mentioned, the stock itself dropped, and Your Honor, if this was a direct claim, and like a securities claim, we could say that that was the damage. Unfortunately, I cannot use that as the damage because, remember, the damage is to the company, not the shareholders.

So when Your Honor says the stock dropped $7, that is completely irrelevant to anything having to do with this case.

THE COURT: How much was overpaid for MMR?

MR. GRANT: So --

THE COURT: I'm not trying to hide the ball. My problem is I've got a settlement which, run the numbers any way you want to, it's nine, ten, 11 cents a share. But what am I comparing it to is what I'm trying to get to. I don't have a good reference point.

You settled and you came up with a number, and it's a big number, but when you have lots of shares, little numbers multiplied out gets you to big numbers.

MR. GRANT: Absolutely.

We did not complete expert reports, so I am hesitant to stand up in front of the Court and say the plaintiff's number is X and the defendants' number is Y because we don't have those completed and done. Although we certainly had experts and used it.

So it is our view that -- and we had certainly shared this with the defendants as part of the negotiations, and I am a little hesitant to get into that, that Freeport overpaid for MMR by somewhere between 280 and $650 million.

Now, we also had --

THE COURT: 50 cents a share.

MR. GRANT: Yes; on average 50 cents a share.

Now, if you listen to the defendants, they tell you, number one, that they didn't overpay at all, but even if you move everything around and give us certain benefits of some open issues, they say the most that was overpaid was $89 million for MMR.

So we recovered with the, what I'll call the 100, for these purposes, approximately $131 million, and that should be compared to somewhere between 280 and 650 on one side, and 89 on the other side.

So if the defendants are right and we won everything, including all our damages, we would have recovered about $1.30 to a $1.40 on the dollar for what they say the damages were that we might be able to prove.

And if we're right and you use that midpoint between 280 and 650 of basically four and a quarter, then we recovered, ballpark, about 33 cents on the dollar of the damages that we would be able to prove at trial. So if that's what the Court is looking at and comparing it to, that's what I think is fair.

THE COURT: I always like to have some reference point. I'm not sure there is a good reference point here.

MR. GRANT: Well, I agree.

We want the reference point also because, you know, how did we know what to do. So if you kind of look at the range of damages from -- I'll round it up to 90 on the low end and 650 on the high end, or, again, that midpoint of about four and a quarter, I think that this is a good settlement because there are clearly lots and lots of risks here on the liability side, on the damage side.

But, again, even assuming we're successful on all of those things, money goes back into Freeport, and the question becomes, academically, if you have a company and all of a sudden it gets $400 million back into its coffers, it should be worth $400 million more than it was ten minutes before that happened.

But I think when you're talking about large companies that frequently the market does not look at, well, what is this one-time extraordinary payment that you got. So the market looks at things like what are recurring earnings, what are projected earnings, and so often the stock price will not reflect a damage remedy that is provided to the company.

So I think that's why this settlement

is also unique in that because the stock price dropped in relation to this deal, even though that's not relevant for damage purposes for a derivative suit, we thought trying to get the money back to the stockholders was probably an appropriate thing in this case.

I think that's fairly unique. We couldn't find any precedent for it. But we think it made sense. And not only is the money that's coming from the insurance carriers, not only the money that's coming from Credit Suisse, but some additional money that was contributed by Freeport itself to say "We're going to push the dividend up again because we think that this will be appreciated, this special dividend, by the shareholders."

So I think in that regard, it's really putting money back in folks' pockets, which I think is another benefit of the settlement.

We should probably talk a little bit about the objections. I take these objections that come in very, very seriously. On some level, it's peoples' focus on my work. On the other hand, I must say that I hate them. I don't get them -- in very many settlements do I get objections, but there certainly are some, and it seems like often objections bring out a little bit of a fringe element who have more of a general agenda than seem to object to the specifics of the settlement. But I'd like to go through all the objections with the Court because I think it's important that people are heard.

I also think, on the positive side, with the objections that we got, I know that the notice was sufficient. I know that people heard about it. I think people know that they had the opportunity to review the material and to express their views to the Court. So I guess maybe that's a positive side when you are a plaintiffs' lawyer to getting objections.

The first was Stephen Schoeman, a PhD. and retired lawyer who nonetheless refuses to get information from the internet. So he wrote in and objected to the idea that he would actually have to go on the internet to get more detailed information about the settlement.

I don't know if what he wanted was all of the documents to be sent to the, whatever it is, 350,000 people who were sent notice, which would have jacked up the cost dramatically by literally millions of dollars. But as soon as he wrote to us, we immediately sent him all of the documents that he would have been able to access on the internet, and overnighted that to him. Nothing further was heard from him; not even a thank-you.

Michael Michaud was upset that there was no finding of a crime that was made and no declaration of guilt and concluded, therefore, there should be no settlement. I'm not sure if Mr. Michaud understands the difference between civil actions and criminal actions, but there's not a whole lot that I can do to get a criminal finding in a civil case.

THE COURT: I would have thought you would have been touting his objection. It appears that he refers to you as a legal lion.

MR. GRANT: Well, one must consider the source though. He also objects to the attorneys' fees and how his objection must be delivered, and I will speak to the attorneys' fees at some later time. That was his objection.

Kenneth Negley, he bought 500 shares at a much higher price and lost money in Freeport, and therefore, he objects to the attorneys making any money from the settlement because he has lost money in his Freeport investment. He objects to the attorneys' fees which, again, I will address at another time.

Michael Post, he is happy with the settlement if it results in some benefit to his account. He is not aware of any of the details of the settlement. He objects to the attorneys' fees though and believes that no attorney is worth even $500 an hour, whether they be from Wachtell or the plaintiffs' side; just no attorney.

He would like to have the name of each attorney, the hours worked and the billing rates provided to the Court. But, of course, even without his prompting, we did provide that to the Court.

Hubert Bussey, he would like the settlement rejected, interestingly enough, except for the non-monetary portion. He actually likes the governance reforms. Plus he is willing to give one dollar for attorneys' fees.

Now, his interesting issue is he believes that although the insurance carriers are paying 115 million, that they will seek to get that back from the company in the form of higher premiums, and that will be done quite quickly, and that therefore, really this is a wash because the premiums are going to go up so quickly and so high that that 115 will go right back out the door. And he also concludes that if this case had any merit, there would be criminal actions against the directors.

Russell Hankins objected twice; once when he got the original notice and once when he got the supplemental notice. He appears to support the settlement but believes that consideration should go to shareholders as of January 15th, 2015, the date of the settlement, which is actually an interesting objection and interesting thought.

I would appreciate Mr. Hankins' position if it weren't one out of self-interest because it appears that he sold his 1,025 shares between January 9th and March 12th. And while there is some appeal to the idea of should this go to the folks who were shareholders at the time the settlement was reached, the problem is that the way this money goes out from the company to the shareholders -- because, again, it is a derivative suit, and the company gets the benefits from this -- is by having a dividend declared by the Freeport board.

And the Freeport board can't or won't do that, and not without quite a lot of justification, but they can't or won't do that until the settlement is approved. And, therefore, it makes it impossible to say, "Well, the settlement would be approved now, and by the way, we're going to make the record date for the dividend back to January 15th."

So while it is an interesting philosophical concept that Mr. Hankins raises, I think it's one that's just not possible given the type of litigation this is.

Next was Rajeev Joshi who opposes the fact that the settlement is in the form of a dividend that will be taxable instead of a damage payment that, in his view, would not be taxable. First, this is a derivative action and so the money has to go to the company. It's not like it can go directly to the shareholders in the form of a damage remedy.

The fact that it's then being redistributed to the stockholders I think is a plus, and I think Mr. Joshi thinks it's a plus. He just thinks it ought to go another way that's just not possible. There's simply no way for that consideration to be paid directly as damages to shareholders.

But second, I'm not sure that

Mr. Joshi is right on the tax issue. Each shareholder may have different tax issues, which is why courts generally don't get into taxable or non-taxability of these kinds of settlements.

Finally, is Victoria Shaev. She objects because the release would release her claim in an unrelated action. We have agreed and negotiated with the defendants to carve out that claim from the release which would have otherwise covered that claim.

So we said, look, we know the release covers that claim. That's a very broad release, the broadest release allowed by law, but she has a specific issue, and as part of this, we want that carved out so she can raise her issue in court, and it will rise and fall on its merits, but it's not going to rise and fall on this settlement, and the defendants were gracious enough to agree to that.

So those are all of the objections.

THE COURT: What do I tell Mr. Bussey about his concern that, one way or another, Freeport is going to end up making up part of what the insurance companies paid?

MR. GRANT: I think he says that the insurance companies are going to raise premiums such that they will --

THE COURT: They'll get it back from Freeport.

MR. GRANT: I think there are a couple of things. First, I don't know whether Freeport's rates will be raised or not. One of the things that I am hoping is that the governance changes that we have implemented or got Freeport to agree to with the aid of the former SEC Chair Harvey Pitt will make it a better governed company so that hopefully the insurance carriers will recognize that and premiums won't go up.

Secondly, there is no doubt that D&O coverage is expensive, but I don't believe that we will be seeing policy increases in the eight figures. That's not usually what policies cost or what those certainly increases are.

It is possible their rates will go up. It is not possible that their rates will go up, even cumulative in the next ten years, to cover 100 plus million dollars. That's just not happening.

So I think those are the concerns. I mean, if that's what it was, we'd never ask for an insurance claim to be paid because insurance companies wind up raising their rates when claims are paid, whether that be a car, your homeowners or your D&O coverage. We don't not make claims on that because of that. I think the insurance companies would love that, but I don't think that's the way the world really works.

In addition to the total money coming in which, as I mentioned, was 115 from the insurance carriers, the other outside money was another 10 million from Credit Suisse, another six and a quarter million dollars of credits to be used, and of course, Freeport is a large user of investment banking services, and so it's not something that's a bunch of coupons that aren't going the get used. These will get used for any variety of services that they choose to use.

But there are also significant governance changes. As I said, the plaintiffs here went out -- and, again, interesting enough, because this is a derivative lawsuit, the company itself, although a nominal defendant, really stands as the plaintiff.

And so one of the interesting things is we got the company to agree, and the directors obviously, to agree to make some significant changes which would have been unachievable had we just gone to a straight litigation, including empowering independent directors, enhancement of the board and committee membership, approval and ratification policies of related-party transactions, policies related to executive management, succession planning and executive compensation, as well as equity vesting.

THE COURT: What will be left come 2018?

MR. GRANT: Hopefully a new culture.

What you're trying to do is change the culture. I think we -- and I say "we" because a number of folks here on the plaintiffs' side have been working with institutions, and of course myself and my firm, in trying to change the atmosphere in the board room, in trying to make directors ask the tough questions, in trying to get directors to assert their independence and not to just be a go-along/get-along kind of board.

One hopes by putting in these new policies for three years -- it's a minimum of three years. That doesn't mean that in year four directors are then going to say, "Well, we're now voting to eliminate these policies." In fact, I think if they did, ISS and Glass Lewis might have concern about those directors who are going up for reelection.

So I think the effort that we made was to try to change the atmosphere in the board room so it wouldn't be so chummy, so there wouldn't be what we assert to be interested-party transactions which the defendants vehemently deny. I think that's the word we used, right; vehemently deny? Vehemently deny, and say that there were independent board members who looked over this and approved it.

There was outside advisors who looked over this and said it was fair. And so what we are trying to do is create an atmosphere where these kinds of transactions are looked at differently in the future.

With regard to the settlement itself, I'm not sure I have much else to add unless Your Honor has specific questions.

THE COURT: What does the settlement say specifically about your ability to pursue Credit Suisse?

MR. GRANT: What it said was that there would be a carveout for non-indemnifiable claims that we could pursue on behalf of Freeport. That caused two issues. The first is, as part of the agreement between Credit Suisse and Freeport, it was Credit Suisse's view, I think opposed by Freeport, that Credit Suisse believed that Freeport could not settle a case without getting them a full and complete release, you know, "get out of jail free not to worry about it."

So there was no doubt that Credit Suisse would have, number one, objected to the settlement because they would have said that it was in breach of contract. But number two, it would have said, "If you're going to approve the settlement, you've got to include us in the release so that we get a free pass."

The second issue, of course, is what exactly were non-indemnifiable claims. If you talked to Freeport, the plaintiffs, that was fairly broad. There were malpractice claims. There were other claims. There was aiding and abetting breach of fiduciary duty. If you talk to the folks at Credit Suisse, their view is, no, that was all indemnified and really you've got no claims left.

The interesting thing is the

malpractice claims had a contractual damage limitation of eight and a half million dollars. Because it basically said whatever the fee is, that's the most you can sue us for. That's the damage cap.

And there's a question of whether that damage cap would have been upheld. There's a pretty good chance it would be because, again, this would just be a straightforward kind of malpractice negligence claim that Credit Suisse would have said, number one, is indemnifiable; number two, you can't bring it, and number three, even if you did, the cap is eight and a half million. And that would have had to be brought contractually in New York.

The second piece is we still had an aiding and abetting claim, and with that obviously the damages could be quite larger. But even on the aiding and abetting claim, although it is joint and several, there would still be an opportunity to claim back against Freeport.

So even if we tag Credit Suisse for $100 million, Credit Suisse could have turned back with all their other defenses and also said but I believe that the Freeport directors were responsible for 90 percent of that and therefore have a judgment reduction down to 10 million.

Again, that's disputed whether they would be entitled to that, whether they wouldn't be. But one of the interesting things about everyone being at risk, both from a factual and a legal standpoint, is it causes people to say maybe this is the time to sit down and figure out how to work our own arrangement.

Credit Suisse felt strongly that they had done nothing wrong, and felt strongly that they had a number of legal defenses, dug in very tough and were not interested in paying much money at all.

I believe that we had responses to all of their legal defenses and factual assertions. We dug in tough, and ultimately, we couldn't reach a cash number that we both agree upon, and so what we were able to do is wind up reaching a settlement where we had a cash number, but we also had a second component which was a credit towards future services in the investment banking field that we were told, and I feel comfortable, that Freeport says we have enough needs that these are things that will really get used. This is not a throwaway, and these are things that we can do.

THE COURT: I am being asked to approve a settlement that is conditioned upon the board's declaring the special dividend. What happens if the special dividend isn't declared?

MR. GRANT: The settlement fails. I think what would happen is we would then -- I hope this is just theoretical because I believe that everyone has negotiated this in good faith and that they would have not agreed to that.

But if circumstances had changed dramatically where the board said, "Look, in our fiduciary duty we cannot declare this special dividend," I think that Mr. Savitt would come back to us, we'd sit down and try to understand what the issue was, if there was a real issue that we could agree to that we might, at that point, work something else out and present it to Your Honor.

If it wasn't, I think that we would probably come back before Your Honor and assert whatever contractual rights that we would have.

THE COURT: I just think it's important from my perspective. I am not ordering the payment of the dividend.

MR. GRANT: No.

THE COURT: I don't think I could, but that's an issue I don't even have to reach.

MR. GRANT: Correct.

If, at some point, the board, who has agreed to do this, says, "Circumstances have changed, and in the exercise of our fiduciary duty, we cannot do this," I would think that we would be back in front of Your Honor one way or another, either to talk to Your Honor and say, "Circumstances really have changed, and here's why we think you should amend the settlement," or "There's a dispute over whether circumstances have changed and here's why we're looking for specific performance."

But that is hopefully something that we will not come back to Your Honor for.

Other questions the Court might have?

THE COURT: Not about the settlement itself.

MR. GRANT: I could go on and talk about fees and the Blau objection which is related to a fee issue, or I could let anyone else who wants to speak on the settlement to speak.

THE COURT: Let's put the Blau issue to the back end. Why don't you go ahead and talk about attorneys' fees with respect to what I call the Freeport side of this.

MR. GRANT: Okay. So I sort of lumped it together, but let me --

THE COURT: If you want to talk about both at the same time, that's fine.

MR. GRANT: Let me try to unlump it if Your Honor would prefer. The request for fees in the aggregate is $32,812,500, and the request for expenses is $693,175.

I think it can be looked at in one of three ways. I looked at it all three ways, and I think that triangulation is what really should make the Court feel comfortable that it's reasonable.

First, it's 25 percent of the outside money coming in, meaning the money from the insurance carriers and the money from Credit Suisse. So that's one way of looking at it.

The second way of looking at it is 21 percent, a tiny bit over, but approximately 21 percent of the total monetary settlement, the $153,750,000. It's a little over 21 percent of that.

Then the last way of looking at it, I think, is it's approximately 20 percent of the total benefits of the whole settlement which includes the corporate governance changes. Because if you look at those changes and you say, well, those would be worth a few million dollars, and I can go back over those if you want, but if you look at some of the other kind of governance changes that have taken place, Alberto Culver, some of the others, this would probably be worth two and a half to $3 million on that end. And, again, if you subtracted that off the fee and then looked at how the rest compared to the money, it would be approximately 20 percent of the total benefits, including valuing the governance changes.

So when I looked at that in all three ways, it seems to me that it's a reasonable request. Quite frankly, while reasonable, I think it is a healthy fee. There's no doubt about that. But I think that this was a tremendously hard-fought litigation. I think it was complex. I think we came up with some novel ways of obtaining the benefits.

I think that few firms would have had the tenacity to continue to go after Credit Suisse; probably would have just folded them in and said, "Fine, we'll just give them a free pass, this is an awful lot of money."

I think few firms would have been creative enough to think about the special dividend. I think few firms would have had the tenacity to go insurer by insurer up the tower to be able to get what I think is every last penny there. I think that Judge Phillips was extremely helpful in being able to mediate this, but I think at the end of the day, he was extraordinarily surprised at how well we had done and thought that we would not have gotten nearly what we're able to get.

So I think that the settlement is fair, because depending on how you look at the benefits, it ranges between 20 to 25 percent on the fee. I think when you kind of look at what was accomplished, that providing a fee award on the higher end is probably appropriate.

THE COURT: I am very uncomfortable with the idea of assessing attorneys' fees based on the dividend money. It's the company's money, the shareholders money.

And even though the litigation may have prompted it, there's something about forcing the shareholders to pay 20 or 25 percent of the company's money to the lawyers so that he can get the company's money is not a happy position for someone who does what I do for a living.

MR. GRANT: Agreed, Your Honor. And that's why I looked at it in all the different ways.

It didn't surprise me at all that you would react that way, which is why I said let's just look at it first at 25 percent of the outside money coming in, because that's what it is. And when you think about, well, how did you get to 21 percent of the total monetary settlement, that's not a very round number, because that's not really the number that drove it.

When we negotiated, discussed back and forth what the number ought to be, I certainly focused on 25 percent of the outside money coming in. Now, I offered two other ways to look at that. One is of the total monetary settlement which, as I said, is only slightly over 21 percent or 20 percent of the total benefits.

I guess there's probably a third way of looking at it, which is what if you just look at the outside money coming in and the governance changes. So in other words, eliminate that other 22 and a half million dollars of the company's own money that's going to the dividend, and then I think it's about 23 and a half percent. So you take that into account also.

As I said, any way you look at that -- and I have no problem if the Court uses the number we've suggested and says, "But I'm not looking at it as 21 percent of the monetary settlement, I'm either looking at it as 25 percent of the outside money or approximately 23 and a half percent of the outside money plus an award for the governance changes." I think either way works and you still get up to the 32.8 number.

THE COURT: We're talking about Credit Suisse money now. I understand the notion of 25 percent for the bulk, but the 16 million at 25 percent seems to be a very high percentage, given the fact that much of the work that needed to be done for Credit Suisse was already done in the Freeport portion of the litigation.

Therefore, when we talk about the 21 percent, I have trouble trying to figure out why Credit Suisse should get more than that amount.

MR. GRANT: Well, I think the answer is -- when you say "all the work got done," this is a unitary settlement. So, yes, all the work that was done from the very beginning to the very end went to settle both cases, or the case. The fact that there were two pools of money, to me doesn't mean that the work that was done was any less.

On top of which we did go back and spent a lot of time with experts looking at the -- I have to be careful so Miss Goldstein doesn't rip my head off. The alleged error. Is that okay? Alleged error? Alleged error. And we got our experts to look at that.

We spent a lot of time going through the Credit Suisse numbers both in preparing the case, in preparing the mediation against Freeport, but also in building that, we did not file -- we did not file the amended complaint that we had that was loaded for Credit Suisse. So I think all of the work we did throughout the case was all honed in ultimately when what was going to be left was going after Credit Suisse now.

Had we been able to get them on board four to six weeks earlier and announced one giant settlement, I don't think the Court would be even thinking about, "Gee, should I split it up and think about a fee for one and a fee for the other." I think the Court would have just looked at it as $131.25 million coming in all in one shot and would have looked at it as a unitary settlement.

So I submit that we really are providing to you a unitary settlement. In fact, although they came in differently and it was signed differently, they're conditioned upon each other. And so it really is one settlement, and therefore, I think the percentage should be the same for both.

THE COURT: Have the defendants taken any position on your fee application?

MR. SAVITT: Your Honor, the Freeport defendants have taken no position on plaintiffs' fee application with the only exception being the concern regarding the Blau fee application.

MR. GRANT: We actually don't have a disagreement about that. Your Honor said we'll save Blau to the end.

To the extent Blau gets anything, which I do not agree that they should get, it should come out of whatever the fee award is. There should be one fee award. Blau should not be in addition to what we have put forward.

THE COURT: This is a question that probably should be directed to Mr. Savitt or Mr. Lafferty, but since you're at the podium, I'll ask you.

Do the directors have an obligation to evaluate, assess what you are seeking for the fee because it is coming out of funds that otherwise would go to the shareholders to whom they owe fiduciary duties?

MR. GRANT: I think that the directors have an obligation to look at the settlement as a whole. So they have to look at what the gross amount that is coming into the company because it's obviously a company asset. This is an inchoate claim. I think they have to look at the fees, and I think they have to look at what the net benefit is to the company, and then through the dividend to the shareholders.

Do I think they need to make a decision for any of those things individually? I don't think so. I frequently say to my clients that the number that they are really concerned about is what is the net recovery, because they can certainly find lawyers who are far less expensive than me and my firm, and frankly, my colleagues at the table.

But if they recover $10 million and pay $50,000 in attorneys' fees, they are probably not better off than if they recover $100 million and pay $25 million in attorneys' fees.

So I do think that the directors have an obligation to look at the settlement as a whole. I don't think that they have an obligation to vote or make a decision on each aspect of it. Maybe the defendants feel differently.

THE COURT: Thank you. I think that's all I have through the Credit Suisse settlement.

MR. GRANT: If there is anyone else who wants to speak to the settlement, I'm happy to sit down.

THE COURT: I need to do some administrative matters, so you can take a break.

MR. GRANT: Okay.

THE COURT: Are there any objectors present who want to be heard today? I see no one rising. So I will assume no one is here.

I also note that notice of today's gathering was given in a couple of different formats. One is documented by the affidavit of Jannette MacDonald which regards the mailing of the notice.

That's mailing of the original notice. And then there are several affidavits, all of which I think were filed on March 23, regarding the distribution of the supplemental notice.

Do either of you want to address my question about whether the directors have an obligation to take a position with respect to the fees or at least give some guidance here?

MR. SAVITT: Thank you, Your Honor. I'll just say a word on it. It's a very interesting question.

Good afternoon. It's always a pleasure to be here.

THE COURT: Good afternoon. Welcome.

MR. SAVITT: I think the answer that I would give is very much the same as my friend Mr. Grant has.

THE COURT: We probably should take a moment of silence on that.

MR. SAVITT: It happens more often than you might think.

Here is why. A couple of related reasons. One is that I think the structure of the resolution process, derivative and class claims, confides, in principle part, the resolution of attorneys' fee application, not to boards of directors, but to the Court.

Accordingly, boards of directors under Delaware law can reasonably look to the Court to properly evaluate and police fee requests in representative litigation. For that reason, a board, such as Freeport here, can look at the settlement, as Mr. Grant says, as a whole confident that the fee request will be judicially evaluated and approve it on that basis without knowing ex ante precisely what the fee will be.

A related thought on that score is that in contemplation of law at least, the payment of the attorneys' fee is part of the benefit to the class, or in this case the stockholders who are being represented derivatively, because they are receiving the expert work of the legal lions here at the table.

THE COURT: Understand that I am not quite as smart as some of you. This is a derivative action; therefore, it is the company's claim that is at issue. As much as I think this is a great way of dealing with the issue, technically, from my standpoint, this is a recovery for the company.

That's what derivative claims do.

MR. SAVITT: For sure, Your Honor.

THE COURT: That's why I'm thinking the board might have more of a role here than -- if this were a direct claim, then I wouldn't be asking this question. I'm asking the question because it's a derivative action.

MR. SAVITT: I understand. It's a great question.

I think the answer is supplied by the rule that attorneys' fees in this context, as in the direct context, are a matter ultimately of judicial discretion rather than company discretion.

As much as I would like to have told Mr. Grant and his colleagues how to prosecute the case on Freeport's behalf, they weren't doing it because they had a different representative obligation answerable to you, Your Honor, not to us. And I think the same goes with the payment of fees.

THE COURT: From time to time I come across matters that are committed to my discretion, but I find that I've got people on both sides trying to influence my discretion, and I was just looking for whatever help I could get. I'm not saying you're wrong. It's just something I had never thought about before.

MR. SAVITT: Candidly, Your Honor, I'll confess that until you brought it up, we haven't either. It's a rich intellectual question. My reaction listening to it is that while a company can object to attorneys' fees, it isn't obligated to, confident that the law provides the ultimate framework for their disposition.

THE COURT: Thank you.

MR. SAVITT: Thank you, Your Honor.

MR. GRANT: Your Honor, if I might just add to that as I'm thinking a little bit more, the difficulty with requiring the directors to comment on the attorneys' fee is these are -- the attorneys' fees will be paid to the lawyers who are suing the directors and who have asserted that this is a demand excused case because these folks were sufficiently interested in the transaction.

So it would be a little odd, after it was all done, to turn bark back to them and say, "Okay, the folks here who have beaten you up for the last two years, who have called you all these rotten names, and who have now caused your insurance carriers" -- or sometimes, quite frankly, those directors themselves, not in this case but in other cases as we're thinking about this intellectual exercise, to reach into your pockets and pay money to the company for you now to say, gee, you can fairly and adequately represent the company in determining what they should get paid is probably something that's not fair to ask a human.

THE COURT: I don't know that I disagree with you. It was just a question that came to mind because most of the time either the nominal defendant -- which is not quite where we are here but it works for these purposes -- takes no position or they say "We're not going to oppose a fee greater than X," something along those lines so there's some input from the other side.

I was just searching around to see if there was something here that could provide a source to assert, I guess, the interest of the shareholders in the sense that the less money paid to the lawyers, the more goes to the shareholders. That's the dynamic I was asking about.

I think I have beaten this poor horse enough.

With that, let's turn to the Blau Pension Trust.

MR. GRANT: So the Blau Pension Trust, or Wolf Haldenstein, because it's obviously the lawyers who are asking for the fee, seeks 450 some odd thousand dollars for the benefits achieved.

They acknowledge that they really can only get paid for the benefits that they caused. And they say, "Well, you know, we're not asking for much of the fee, and you know, surely we must have caused something."

Let's look at what they did. They made a demand on Freeport. Then, a number of days later, depending on how you look at it, because they made a demand and then they sent a second letter saying, "You know, we're really making a demand," and then shortly thereafter, they filed a case claiming that their demand was wrongfully refused.

I think on a most generous way, it's about three weeks between the demand that they made, and then filing the suit, the least generous I think it's eight or nine days. They did nothing else. For that, they want a piece of the fee.

As I said, I do agree with defense

counsel to the extent they are successful, it should come out of our fee, not out of anything else.

But it should not be successful, and I think the Court needs to reject their request for three reasons: Factual, legal and policy. Let me go through this.

THE COURT: You mention factual. Are there factual debates or factual inferences that can be debated that would preclude me from resolving this question in this venue, this forum, or do I actually need an evidentiary hearing?

MR. GRANT: No, you do not need an evidentiary hearing because no evidence has been put in front of you. The other side -- I'm not sure that there is any dispute that they didn't create any part of the benefit; in other words, there's no factual dispute.

First of all, the defendants agree and they say, "We never -- Savitt put in his brief. We never thought about Blau when we were negotiating any of this. It had no influence on us, nothing whatsoever."

I will tell you from the plaintiffs here, from ours, we never thought about Blau. We never brought them up. We never used that for leverage. We never did anything. And there has been no proof at all that's put forward by the Blau folks or even something that says, "Well, here, there could be this evidence out there or here's an exhibit or here's something." There's nothing at all. You got zip.

THE COURT: Well, who has the burden? Is there a presumption that they had some causal effect, or is it their burden to prove they had a causal effect?

MR. GRANT: I think it would actually be their burden. But I don't think we even have to get to that.

Let me just jump to the legal issue because that is game over. So in order to even be able to assert that they helped cause the benefit or have any entitlement to a fee, they would have to say their claim was viable when it was filed. In other words, they would have had to be able to withstand a motion to dismiss.

Even if a motion to dismiss wasn't made, they would still have to be able to withstand one if one was made. But it's clear that you can't make a demand on a board, and then, within an unreasonable amount of time, say, "Aha, you didn't do anything about that and therefore, the demand has been unlawfully refused."

We gave Your Honor a couple of cases, one that I think said that eight days was too short, and then another one that said four months was too short. If you think about it, they make a demand, and their demand is, "Gee, this whole transaction that you're doing isn't appropriate. You shouldn't be able to do it. We're unhappy with it."

Well, let's assume that the board was going to actually take that in good faith. What would they have to do? They have to get the demand. Then presumably they have to get the board together and say, "Okay, we got a demand. What are we going to do," and they talk about it, and then they'd say, "Well, we're going to need to go hire outside counsel. We'll investigate this."

They have to do that. They have an investigation. Even if they got one done in a Herculean effort, what would that be, 60 days, 90 days? Then they'd have to report back to the board. The board would have to meet and decide what action they wanted to take.

It's clear that somewhere between eight or nine days on the short end to three weeks on the long end is just not sufficient time.

THE COURT: But assuming the deal could have closed as early as early April, there are five weeks maybe, six weeks. If you say the board always needs at least two months, are we simply saying that if there is a short trigger, a shareholder demand is always futile?

MR. GRANT: No. I'm saying a couple of things. First of all, remember, they waited a long time before they made this demand. So if you're going to come in and say, "I don't want this deal to go through," you got to move quickly. The Chancery Court tells us about that regularly.

Second, I don't know that there was that much time before closing that Your Honor said, five or six weeks. But the bigger point is -- and the Court may remember that when this case started, there was a difference in strategy.

You had Miss Tikellis and two of the other folks here who came in and said, "We think that we ought to challenge the transaction," and she came in guns ablazing saying, "We want to enjoin this."

And we came in and said, "No, we think this is" -- Mr. Lebovitch and I came in and said, "No, we think this is a post-closing damage case."

The difference between what Miss Tikellis did and what we did and what the Blau group did was not for Your Honor to have to pick what the right strategy was, but was to legitimately pursue that strategy.

So when Miss Tikellis came in and said, "We have an issue with this deal closing," what did she do? She moved for expedited proceedings. She got discovery. She took depositions. She put briefs together. She was all ready to go. She did everything she could up to when she ultimately made the decision that said, "You know what, I don't think I have a real chance of enjoining this. I'd rather go back and deal with post-closing damages."

What did Mr. Lebovitch and I do? Well, we said we wanted to get discovery. We wanted to move forward, but we wanted to go for the post-closing damages. And so we continued to be involved in the litigation, and ultimately Miss Tikellis, to her credit, said, "You know what, we ought to be working together. Looks like we're not going to be able to enjoin this, but there's clearly wrongdoing here, and we can be successful together," and we joined forces and we worked together.

What did Blau do? They send a letter, and then they file a lawsuit and say, "Well, you know, we want this transaction rescinded," and then they do nothing until they come to the Court and say, "Hey, there's only five weeks left. We got to do something."

Do they move for expedited discovery? Do they move for an injunction? Do they move for anything? No. Which kind of leads in -- so that's why I say, as a legal claim, they do not have a viable legal claim to say -- which wipes them out.

They also don't have any factual basis where they show any fact whatsoever to justify that they were a cause of the award.

But let's talk about policy also. Because if you give the Wolf Haldenstein firm a fee here, you will open up a new cottage industry. When every time there's a demand excused case, someone will send a demand letter so they can get a fee. It's just going to happen. The plaintiffs bar will be able to smell that out.

And they will say, "I'm going to send a letter and I am going to do nothing." Because, let's face it, that's what the Wolf Haldenstein firm did here. They did nothing.

And they're going to say, "I'm just going to sit tight. I'm not going to get involved in any aspect whatsoever. I'm not going to participate in discovery. I'm not going to participate in depositions. I'm not going to participate in briefing. I'm not going to do anything.

"And then, at the end of the day, when I learn in the newspaper that the case has been settled, I'm going to walk in with my hand out and say what are you going to give me."

That is not what we want to encourage in Delaware. It's just an awful, awful policy, Your Honor.

When you look at whether they were helpful or harmful, in fact, they were harmful. We're alleging that this is a demand excused case. What did they do? They make a demand. So, remember, when Your Honor was talking about consolidating, we had to brief this whole issue because we were concerned that if you consolidated the cases that we get stuck with their demand, and that would be a potential defense to demand excused.

Now, Your Honor, in consolidating the cases, recognized that and said, "Look, I'm consolidating the cases because it's a lot easier procedurally, but not to worry, you are not going to be burdened by their demand," and that worked out.

But when you think about what they did, their $400,000 worth, all they did, and all they're claiming that they did to lead to any benefit, was they wrote a letter. The rest of the stuff was briefing the consolidation, was whatever else they did. But they claim they wrote a letter.

That demand letter had no effect on anything. It had no legal significance because it wouldn't support a claim when they then filed their suit. It wouldn't support a claim. And it's an awful, awful policy that will be created which will just have everyone putting in a demand any time there's a demand excused case.

For all those reasons, the idea of them getting hundreds of thousands of dollars for doing nothing, for not only not creating any benefit, but actually creating a risk because they wound up going a path that was antithetical to the one that we were going down, would be just a tragic result, and one that will come back to haunt the Court for years to come in every single derivative suit.

THE COURT: Thank you.

MR. GRANT: Thank you, Your Honor.

THE COURT: Mr. Savitt, do you want to address this now or do you want to wait?

MR. SAVITT: Your Honor, I don't think we have anything to add on this issue. Mr. Grant stated our position.

THE COURT: Thank you.

MR. ANTHONY: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. ANTHONY: David Anthony on behalf of plaintiff Steven Blau MD Money Purchase Pension Plan Trust. I'd like to introduce my co-counsel, Michael Jaffe, who has been admitted pro hac.

THE COURT: Good afternoon.

MR. JAFFE: Good afternoon, Your Honor. We apologize if we have expanded the scope of this hearing.

THE COURT: No apology needed. It's just that it means there's more to cover today than what I had originally anticipated.

MR. JAFFE: I understand, Your Honor. I felt it was incumbent on us. We could have waited for lead counsel to be awarded its fee and then determined whether we were being dealt with in a way that what we considered it proper. We thought it was incumbent upon us to make the motion at this point in time.

Counsel for Blau is seeking fees and expenses of approximately, as Mr. Grant just said, approximately $400,000. It represents our actual lodestar in the case plus the actual fees in the case, no multiplier, and it amounts to approximately less than 1.5 percent of the total request, not counting the Credit Suisse part of the settlement for which we are claiming zero credit. But it amounts to 1.5 percent of the fee request on the rest of the settlement being sought by lead counsel in this case, under 1.5 percent.

Now, Freeport and the lead plaintiffs have sort of ganged up on us here. They're both maintaining that we're not deserving of even this small fraction of the settlement of the fees in connection with the settlement or any fees whatsoever because we weren't a contributing factor to the settlement which we believe is, indeed, an excellent settlement. We take no issue with it whatsoever, not only the cash part of the settlement but the significant non-cash benefits of that settlement.

But the problem is both Freeport and lead plaintiffs are basing the fact that we're not deserving of even a small fraction of the settlement on what we consider a red herring. At first it sounds correct that Blau acted too soon. Blau waited a mere matter of two or three weeks before filing its action.

However, as Your Honor has suggested, the circumstances here were exigent. We had to act fast. And it wasn't just three weeks. The board actually didn't close this transaction for three months after we filed our case. So during that three-month interim of time, the board could have certainly addressed our demand, and it certainly could have frozen the transaction.

While that sounds like a drastic measure, it certainly could have responded to the shareholder demand by freezing the transaction and evaluating whether it was the proper course.

But apart from that timing issue, Your Honor, we think it's even more of a red herring, this point about prematurity, because once the transaction closed, that was rejection of Blau's demand. If there was any argument as to the demand being premature initially, that argument was mooted by the fact that they, indeed, rejected the demand -- the terms of the demand was to rescind the transaction or stop the transaction. They went through with the transaction full steam ahead.

There's no question to us obviously that that's a rejection of the demand. So the question really isn't whether we were premature here, and therefore, whether we were meritorious in that regard. The question is whether we were wrongfully rejected, whether, by going through with this deal amounted to wrongful rejection of our demand.

In that regard, Your Honor, we're on the same footing as the lead plaintiffs are. Their whole claim is that the board shouldn't have gone through with this transaction, that it was a violation of fiduciary duties to go through with this transaction, which we agree with, and that's the same issue that was triggered by the wrongful rejection here. Because the question as to whether the rejection was wrongful will be determined -- would be determined by whether, indeed, the transaction amounted to a violation of the Freeport board's fiduciary duties under the same principles that were being pushed by the lead plaintiffs here; that is, whether the entire fairness doctrine applied or the business judgment rule, whether the special committee insulated the transactions through its actions, through its deliberations.

Now, saying that we were on the same footing essentially as they were, of course, doesn't answer the whole question, because then the question becomes, okay, what was our causal connection to the settlement, what did we actually add to this settlement.

We're perfectly willing to stand here and say that what we added was entirely speculative, and it may be that there was no actual discussion of the Blau case at those mediation sessions. We weren't there, so we don't know.

But the fact is, as lead plaintiffs have said, our case was -- they call it diametrically opposed to their case. Now, we think that's a vast overstatement, because the fact is we view our case as fully complimentary with their case even though under Delaware law, when you make a demand on a board, it amounts to a per se -- generally a per se concession of the independence of that board.

We think this case was highly unusual and highly different than that typical case under Caremark or otherwise for damages. We were asking here for the board to stop a transaction which the market had reacted very negatively to, and in which the board of Freeport was split six/six in terms of its interestedness in the transaction. And in which the other part of the transaction was possibly not interrelated, and the board didn't have any conflict at all; that is, the Plains part of the transaction, the Plains transaction and the two-part transaction.

So we don't necessarily see this as a concession at all, but even if the Court were to call this -- even if it's going to be reviewed as a per se concession of the independence of the board with respect to both transactions, it certainly isn't a concession of independence as to the board in connection with its rejection of our demand by going through with the transaction.

So, that said, even though we were not diametrically opposed, we were actually complimentary of their action, in our view, and we actually added to that action. We did present additional problem for defendants. There's no question about that in our view, because even if they had successfully received a ruling from the Court on the motion to dismiss in all respects, including with respect to the demand issue under Rule 23.1, they would still have to face the fact that they rejected the Blau demand.

Whether that was a huge factor, it could have been a huge factor or not, I would have to stand here and say, no, it was not a huge significant. Was it a significant factor? Highly doubtful. But was it a factor justifying an award of 1.5 percent of -- less than 1.5 percent of the overall fee award here? We think that it, in fact, was.

We think it also presented a problem that they simply did not ever answer our demand even during that three or four-month interim before the transaction closed. That, in fact, as a factual matter, as the case moved forward, we thought would impact quite negatively on the board's behavior.

THE COURT: Trying to figure out what an appropriate fee for someone in your position would be is difficult. You have posited lodestar. And with a $28 million fee application, or whatever the number is, the number you've posited works.

What if it were a $2.8 million fee? How do I translate this to other cases? Because to do the kind of base level work you did, maybe it doesn't cost $400,000, but it cost 200,000 or it can be a big chunk of the fee, and yet the contribution, assuming there is a contribution, is so small.

What hope do I have to sit back and say this is a fee that makes sense in this context?

MR. JAFFE: Your Honor, I think two things in response to that.

First, I think we do view our contribution in this case as a small fraction of the case. We think the 1.5 percent number is appropriate, and it's very modest. However, if Your Honor were to -- it is based, indeed, on that $38 million figure that has been requested, the maximum figure that's been requested.

If Your Honor were to not award that amount, we would certainly understand the commensurate reduction in our request and therefore reduction in our lodestar.

For example, if the Court were only to award half the counsel fees here, we would expect half of that lodestar and fees. Well, fees included in that lodestar number.

We don't believe that the Court should award any less than has been requested. We think it's fully justified also. We agree with plaintiffs in that regard. But if that were to happen, that's one answer to your question.

The other point is every case is really different, and I think that what Mr. Grant has presented here is this false, very dramatic point about a cottage industry being created here surrounding this type of thing.

Well, this is a case where Blau did everything that Blau was supposed to do, that plaintiffs are supposed to do in this situation. We made a 220 request and pursued that request, just as Mr. Grant did with his plaintiffs.

We filed the complaint -- we demanded that the transaction be rescinded and stopped based on our analysis of those 220 documents as well as various public information that was available at that time. We filed the complaint when it was apparent that the transaction was not going to be rescinded, that complaint, both public and non-public versions, of the complaint.

We then pursued documents that, yes, were being created, transcripts and exhibits that were part of those transcripts from depositions being taken by lead plaintiffs in this case. We didn't insinuate ourselves into that discovery.

Mr. Grant suggested that we didn't take part in those depositions, but we did not -- to put it bluntly, simply, we were not invited. And we sought an invitation, but we were not invited to those depositions. Frankly, perhaps we weren't needed at that point in time.

We were simply pursuing the same exact claim except that we had made a demand which we thought added a different wrinkle certainly to this case, and we thought, by the way, it was the right approach under the circumstances where they had a board that was split six/six as to one side of the transaction, where another part of the transaction may not have been a conflict at all, and where, in fact, the board, even though split six/six, couldn't do the right thing here.

We could appeal to that board. Why should we be foreclosed from appealing to the board to make a decision after the market reacts so negatively to the -- to simply reconsider this transaction or consider it on new terms.

To be prevented from making that demand because of some of the legal consequence possible, the legal consequence that there could be an argument that we're waiving the independence argument as to the board, simply wasn't a reasonable position for us at the time.

I hope I have answered Your Honor's question about that, but it's a real case-by-case analysis. We don't think this will open the door to future cases, and certainly not only make a difference when, in fact, a demand made a difference, and when, in fact, plaintiffs did real work on the side, which we believe we did.

THE COURT: Let me read my notes. That's probably a dangerous thing for me to do, but I have: "Basic model, make 220 demand, file derivative action, do nothing else but show up to collect fee if lead plaintiffs are successful."

Isn't that awfully close to how you are standing in front of the Court today? I guess that's akin to my formulation of Mr. Grant's cottage industry reference.

MR. JAFFE: Your Honor, I understand the cottage industry concern, certainly. I understand the policy issues here.

But I do think that courts can distinguish this situation in which we're asking for 1.5 percent of the total fee and other situations, and the way that distinguishes -- first of all, demand here was a very close issue. This is not a case where independence was clearcut.

In fact, as you carry forward, and even present at today's hearing in support of the settlement itself, lead plaintiffs have conceded that there was still an issue with 23.1 hanging out there. And certainly defendants haven't backed off of that position. So that demand wasn't excused. So that differentiates us in the first place.

In the second place, we didn't just do nothing. We pursued 220 documents. This was not a simple task. We did what Delaware courts have told us is necessary before filing an action. We filed our own action, and we pursued discovery that was available through defendants' efforts.

Now, the question is why didn't we do more in that regard, why didn't we seek our own discovery, why didn't we try to insinuate ourselves into the action in a more forceful fashion.

The answer to that, Your Honor, is, number one, we didn't think it did anybody any good to ask for duplicative discovery, and that's essentially what we would do, unless we didn't trust lead plaintiffs' counsel, and we did trust them because we knew the job they were doing. We were watching what they were doing, and we thought, indeed, they were covering all the bases.

So should we have then sought to -- especially since we were not appointed lead plaintiffs. We were not even in a position to be appointed lead plaintiffs. Should we have sought duplicative discovery prior to the consolidation particularly?

And then post-consolidation, Your Honor, and we agreed we should be consolidated because it was a more efficient fashion, but post-consolidation, our hands were tied. We could not seek any discovery without permission of lead counsel as we recognized, and for us to go to court and say we need to act outside the auspices of lead counsel, we don't think that would be a winning argument, frankly.

And we would have to make the argument we don't think that lead counsel are doing a good job, and we have to do our own job here. Because what if, in fact, the Court rules a certain way on the 23.1 issue. We need to be in a perfect position to then act. But the fact is we certainly could have caught up if that were to happen.

Secondly, as far as our own independent discovery is concerned -- which we did serve. We served discovery as to the demand itself and the deliberations that the Freeport board went through. We didn't pursue that in the end because, Your Honor, frankly, again, on that point, we didn't believe that it would be efficient to do so.

We didn't think it was necessary to burden the Court and the parties to create any undue delay in the litigation by virtue of an area of discovery which may, indeed, not have been relevant if the Court had ruled a certain way on the motions to dismiss.

So I think in a sense we feel like, even though we're asking only for 1.5 percent of the maximum fee being requested, we're being penalized for not burdening the parties and the Court more, for not seeking discovery of those duplicative -- for not seeking discovery that might have been ultimately found to be irrelevant.

Those factors all weighed into the distinction of this case from the future cases that Mr. Grant has suggested will be the necessary result of any fee award by the Court here.

THE COURT: Is it your obligation this afternoon to demonstrate that your efforts or those of your colleagues were a contributing factor or there's a causal connection to the settlement, or just because you're out there, there's a presumption that you were a causal factor?

MR. JAFFE: Your Honor, there is law that we have actually cited in our opening motion that suggests that it is the defendants' presumption to disprove, in certain circumstances, that a litigation, a case, was not the cause of the settlement, or not the cause of things that they did, disclosure changes and things of that nature.

Whether that rule applies here, it's not clear to us. Do we have to make the showing? We think actually, even if we do have to make the showing ourselves, if we have the burden to make the showing, that burden is, indeed, a speculative one.

It's, indeed, one that cannot be -- you would have to go into the minds of defendants and see if there is any little lingering question in their mind as to whether Blau, in fact, caused them to settle for this amount and not that amount, or they had to be concerned a little bit that they'd have to do more work even if they won the motion to dismiss.

We'd have to depose them, I guess. We'd have to ask them what was on their minds. I don't see that as really a viable approach to take here. I think the courts have said, in the two or three cases we cited, and I think one of them was authored by Your Honor, that this is always going to be a speculative matter, this sort of causation -- causal connection to a settlement is always going to have some sort of speculative dimension to it.

Certainly we would welcome the opportunity to take Mr. Savitt's deposition on this.

But I don't think anybody wants that.

THE COURT: Thank you.

Mr. Grant.

MR. GRANT: I wouldn't mind that.

THE COURT: Tell me you're getting ready to take Mr. Savitt's deposition.

MR. GRANT: I wouldn't mind that, Your Honor. That would be actually quite fun.

So, again, I want to hit the three things: Fact, law, policy. So, first, the fact. The Freeport deal was announced on December 5. Seventy days later, on February 15 is when the demand is made. So when you talk about just sitting there and waiting on it, they created their own crisis.

Second, even if there was a presumption, and I don't think there is, but even if there was, I think counsel just talked himself out of a presumption. He says that Blau's case turns on the same issues as our cases, the plaintiffs' case, and then he says it's the exact same claim. That was a quote that I wrote down in my notes.

So if it is, what is it that they brought to the table? I don't get it. They said, "We raised the exact same claim you did."

Are we now rewarding every copycat claim, because I don't know that that makes sense. And he says also, well, the board of Plains was independent. But I'm thinking if he says that the board of Plains was independent, then the business judgment rule is going to apply, and it's going to be almost impossible to win a demand refused case.

So he has no evidence, no even theory of how he could have been at all relevant here. He just says "We must have had some effect. We must have had some effect," but never tells you what that effect is. Of course, remember, he voluntarily stayed his case. So from a factual standpoint, there is no basis for any fee.

From a legal standpoint, he says, "Well, the transaction closing was a rejection of our demand." But as a matter of law, the complaint had already been filed, and we look at when the complaint is filed to determine whether it's meritorious. And since he filed way too early before the demand was reasonably rejected, meaning reasonable in time, we know that he could not have withstood a motion to dismiss.

Then, finally, there is another issue

with regard to policy. Your Honor will see there's a lot of other counsel sitting back there from a lot of other firms that are unrelated to the ones that are sitting at the table here.

That's because, although the five lead counsel are here, there are other folks who helped along. We didn't shut people out like it was almost implied that we did. There were other firms helping us. There were other firms that got some work, and there were other firms who will share in the fee. But they did work and rode together with us.

Rewarding people for taking conflicting positions and doing no work not only is going to create that cottage industry, but is also going to have people say, wait a minute, to the extent that I'm willing to go along with lead counsel and offer to help and actually do work, and I get paid whatever I get paid, and someone else comes in here and says I want one and a half percent of the fee or 400,000 or something like that when you didn't do any work, what's that going to do when the Court asks us to organize all of the plaintiffs?

Are people going to be willing to say, "Yeah, I'll chip in. I'll do some work. I'll follow along in your lead," or are they going to say, "No, I'll just file a demand and sit back and I can go after the big dollars."

So I think for all those reasons, it would just be an awful, awful precedent to award anything to the Blau attorneys.

THE COURT: Thank you.

MR. GRANT: Your Honor, I do have -- I don't want to be presumptuous, but I do have copies of the final order and judgment that I could hand up to the Court if the Court is inclined to receive that.

THE COURT: I have one here amidst my stack of papers, but if you want to hand one up, that's fine. I have to work my way through a fair amount of stuff before I get to that.

MR. GRANT: Your Honor, this differs only from the final order that was submitted with the extended -- with the additional papers on March 16th in that a couple of the dates when things were sent out are filled in so that Your Honor doesn't have to do that.

THE COURT: Paragraph three had some insertions. It looks very familiar to the one I have reviewed.

MR. GRANT: Right, which it would be, except, as I said, we filled in the blanks except for one blank.

THE COURT: Does anybody have anything else?

I don't mean to scare anybody away, but it's probably going to take me 15 or 20 minutes to work through everything I have to go through, and for that reason, I think it's probably a good idea to take a ten-minute recess before I get started.

(At this time a short recess was taken)

THE COURT: Plaintiffs are shareholders of Freeport-McMoRan Copper & Gold. They brought this derivative action to challenge a complicated transaction involving Freeport's acquisition of McMoRan Exploration Co. and Plains & Exploration and Production Company.

The settlement involved payment of $115 million by third-party insurers. The Company has also agreed to add 22 and a half million dollars to that recovery and then to pay all of it, net of attorneys' fees and expenses, to the shareholders as a special dividend.

In addition, Freeport has agreed to

certain corporate governance reforms. In support of the corporate governance aspects, the Plaintiffs have submitted the declaration of Mr. Pitt. These corporate governance enhancements will last for at least three years from the date of adoption. That is not an especially long period, but it is an improvement for those three years, and perhaps there will be something of a change in corporate culture and that lasting corporate culture shift can provide real benefit to the shareholders.

The emphasis is on the independence of the directors and trying to have some controls in the event there are conflict situations. A new position of lead independent director will be established. There will be an executive committee consisting solely of independent directors. The executive and corporate responsibility, audit compensation and nominating and corporate governance committees will consist solely of independent directors.

With certain modifications, the New York Stock Exchange definition of independent director will be used. The Company will implement a related-party transaction policy. There will be an annual appointment of executive management and a review of its succession plan for senior executive staff. The compensation committee will have an independent compensation consultant who does not provide other services to the Company. An incentive compensation claw-back policy will be developed. Performance-based equity compensation to executives and directors will vest not merely on a change of control, but upon termination of employment or service.

A brief description of the events that resulted in this litigation is necessary.

Freeport and MMR were spun off in the mid-1990's from a predecessor company. Although they have different businesses, their boards and managements overlapped. Six members of Freeport's 12-member board also constituted a majority of MMR's 11-member board. MMR was the more speculative of the two, the more aggressive and the more risky. It was involved in ultra-deep gas exploration in the Gulf of Mexico.

MMR purchased some of PXP's assets in exchange for MMR stock. Thus, PXP owned 31 percent of MMR common stock and Freeport, based on an earlier cash infusion, owned approximately 16 percent. PXP had essentially veto power over any transaction between MMR and Freeport.

MMR's stock was under financial pressure, in part because PXP was thinking about selling its interest. Freeport wanted to help out MMR and sought out the assistance of PXP's leadership. PXP was able to leverage its stake into Freeport's acquisition of PXP as part of the same transaction to bring MMR back to Freeport.

Freeport did create a special committee. The special committee did not delve into alternatives. It arguably accepted too much input from Freeport's conflicted management. There was pressure on the advisors assisting the special committee to inflate the MMR valuation, or so it was alleged.

As a result of these conflicts of interest and valuation concerns, again, as alleged by Plaintiffs, Freeport overpaid for MMR and to a lesser extent for PXP. For example, the premium for MMR was 74 percent. When the transaction was announced, the price of Freeport's stock dropped by approximately 20 percent.

Ironically perhaps, the drop in price

required Freeport to pay even more for PXP. In short, the Plaintiffs allege that Freeport overpaid for MMR, in part because of the conflicts of many Freeport directors who had significant financial holdings in MMR, and the concern was that the conflicted directors tainted the entire process.

At the core of this dispute was the efficacy of the special committee. The litigation was vigorous. It was contested. Following a, I think it was, four-hour argument on Defendants' motion to dismiss, the parties advised the Court that they would like an opportunity to resolve the matter. It was submitted to mediation. The mediation process took a while. Discovery was ongoing, but they were eventually able to negotiate a settlement.

First is the question of whether to approve the settlement. This is not a decision on the merits, but I must consider the nature of the claims, the possible defenses, the legal and factual circumstances and eventually apply my own business judgment.

Despite the summary of Plaintiffs' allegations, the Defendants were not without substantial arguments in their favor. There was no single controlling stockholder. The special committee was comprised of independent directors. Although the chair of the special committee may have talked to Freeport management beforehand, it was not clear whether he was truly committed to the Freeport-MMR transaction or whether he was simply willing to consider it.

Independent directors were a majority of the Freeport directors who actually voted on the transaction because three directors recused themselves entirely from the process. Also, there was a substantial argument that the PXP side of the transaction was not conflicted. Thus, there was uncertainty as to whether this would be an entire fairness review or whether it would be subject to the business judgment rule.

Also, proving damages would have been something of a challenge because there had been substantial due diligence, and the prices paid were within a range of acquisition values that were endorsed by experienced financial advisors.

The Freeport stock dropped on announcement, and, thus, there was a loss of market capitalization for the shareholders, but that is not a good measure of damages. Damages would have required proof of overpayment for MMR and PXP. As with all valuation disputes, we would likely have had one of those battles of the experts, and that would bring even more uncertainty.

Thus, the Plaintiffs had a good case. They had a case worth pursuing. They did not have a case where recovery was certain.

Given the risks and the expense of continued litigation, this settlement is reasonable, adequate, and, frankly, makes sense.

Another aspect of the settlement is that the Plaintiffs were allowed to analyze, and if they so chose, as they did, to pursue additional certain non-indemnifiable claims against Credit Suisse which had been one of the financial advisors. The Credit Suisse claims have been resolved, and that settlement will be addressed later. That is yet another benefit of the overall settlement.

One of the unusual aspects of the settlement is payment of the recovery and cash, net of attorneys' fees and expenses, to Freeport's shareholders as a dividend. The settlement is conditioned upon the Freeport's board declaring the special dividend. I am asked to approve the settlement that, as part of it, a dividend will be paid. I do not need to address the question of if this were a cash recovery after trial of a derivative action could the Court order, without board approval, payment to the Company's shareholders as a dividend of the derivative litigation recovery.

For these reasons, the settlement of the Freeport litigation will be approved.

I turn to the question of attorneys' fees and expenses. Although some joint consideration of the fees for this aspect, along with the Credit Suisse aspect, would be appropriate, I focus now on the Freeport side. Plaintiffs' counsel look for $28.75 million in fees plus $693,000 and change in expenses. Given the almost 18,000 hours spent, that works out to an hourly rate of a little more than $1,600.

The factors to be considered in awarding a fee are well known: The benefits achieved, and that is always the most important of the factors, the efforts of counsel and time spent, the contingent nature of the fee, the difficulty of the litigation and the standing and ability of counsel.

Plaintiffs' counsel worked hard. They spent a lot of hours, almost 18,000 as I have mentioned. The fee was entirely contingent. The litigation was difficult. It took time. The motion to dismiss argument, as I have noted, took four hours. Some things stick in a judge's memory more specifically than others. But the standing and ability of counsel cannot be questioned.

Some comment on the benefits achieved is necessary. Whether the agreement of the Company to pay another 22 and a half million dollars as a dividend should be factored into the fee is a difficult question. That was the Company's money, and it was not money that was brought to the Company as a result of this litigation. If that additional payment is included, the effective rate is about 21 percent. If we simply look at what was obtained from the insurers, it works out to 25 percent. The special dividend does turn over capital to the shareholders. That arguably would reduce the risk that the board would make bad use of the capital later. Perhaps it simply sends a strong message about board accountability.

I am more content in assessing the fee

as a matter of the actual recovery for the benefit of the Company. That is what derivative actions tend to be about. Plaintiffs' counsel are the cause of the recovery. A 25 percent fee short of trial is on the high side, but so much went on in this case that merely pointing out that trial was not held does not make 25 percent an unreasonable percentage.

I recognize that the final number is a large number, but Southern Peru teaches that simply because a large number is awarded does not mean that the fee is unreasonable.

This is an exceptional recovery. As noted in Orchard Enterprises, that would tend to produce an exceptional fee. The effective hourly rate of $1,623 is not out of line. It represents roughly a three multiple of the lodestar. In context, the effective hourly rate is reasonable. Total fees of $28,750,000 are reasonable, fair and adequate, and are approved. The expenses are reasonable in the amount of $693,175.06, they are approved.

This settlement has produced a larger than typical number of objections. Even though the number of shares held by the objectors may be small, their objections merit careful attention. Every once in a while, Plaintiffs and defendants have their own reasons for doing what they do, and sometimes that does not fairly accommodate the interests of all shareholders.

I will go through the objections. A few can be considered collectively because the concerns set forth are substantially the same. The first objection is the Schoeman objection which involved difficulty in accessing settlement documents. Those documents were sent to him by Plaintiffs' counsel. No other communication has been received on this objection, and I am deeming it resolved.

Next is the Hankins objection about not receiving the special dividend because he sold his shares. He argues in two letters that the funds should be paid to shareholders as of January 15 of this year. That's when the settlement was announced. It's an interesting concept, but this is a derivative action. Even though the funds are being distributed eventually to the shareholders, it is a claim of the corporation. By selling his shares during the course of the litigation, Mr. Hankins lost standing, and by not being a shareholder as of the effective date of the dividend, he has no entitlement to that dividend.

It is yet for the board to make that decision, and certainly it is for the board to make the decision as to when the dividend is paid.

It also appears that some of Mr. Hankins' shares were sold after the public announcement of the settlement, and that addressed the record date question and noted that it would be in the future.

The Joshi objection is that the settlement proceeds are being paid out as a dividend which would be taxable to him. If this were a direct action, the recovery likely would be taxable, but more importantly, this is a settlement of a derivative action, and passing through the corporation is part of the process.

Messrs. Bussey, Michaud, Negley and Post object primarily to the fee application. While no finding of criminal liability or even civil liability has been achieved, that is the nature of a settlement.

This litigation was not frivolous. Sophisticated parties chose, presumably on an intelligent and informed basis, to settle this matter. The purchase of MMR at a 75 percent premium is enough to trigger skepticism, especially in light of the allegations about the conflicts which several board members suffered.

The questioning of the benefit to shareholders is difficult to understand because this is one of the largest cash settlements of a derivative action, and perhaps more importantly, the proceeds will largely go to the shareholders. In a typical derivative action context, the funds would remain with the corporation after settlement and would be under the control of the board.

These objections have focused on attorneys' fees and reflect that the objectors seemed to have underestimated the amount and quality of the work that the lead Plaintiffs and their counsel did. There was discovery. There was motion practice. There was extensive mediation, and of course, there were negotiations. But it took a lot of work getting this case ready to have a final settlement.

The Court has reviewed the time records and understands the 18,000 hours that were devoted to the effort. The fees which Plaintiffs' counsel have sought, both in the main Freeport action and in the Credit Suisse portion, are within the range of fees awarded by the Court.

Also, the process for registering objections was reasonable, and I have considered all objections without regard to the means of their presentation or specific evidence of individual stockholders holdings in Freeport.

In short, the various shareholder objections to the settlement and to the fee applications are overruled.

Next is the question of whether the Blau Pension Trust is entitled to an award of attorneys' fees and expenses. The transaction which led to this litigation was announced on December 5, 2012. Less than a week later, the Trust retained a law firm to make a demand under Section 220 to inspect Freeport's books and records.

On January 25, 2013, the several derivative actions that had already been filed were consolidated, and as is typical, lead Plaintiffs and lead counsel were appointed. Three months later, a revised consolidation order added other plaintiffs and additional lead counsel.

The Trust did obtain documents from its Section 220 efforts. On February 15, 2013, its counsel wrote to Freeport's board and demanded that the proposed MMR and PXP transactions be rescinded. The Trust demanded that the board act by February 25. On February 25, counsel for Freeport and its special committee replied that they were evaluating the demand and would respond within a reasonable time.

The next day, the Trust repeated its demand and insisted upon a response by February 28. The Trust attributes the short timeframe to the possibility that the transactions might have been consummated by very early April 2013. On March 5, the Trust filed a derivative action which was later consolidated into this action without objection from the Trust.

There has been a certain tension between the Trust and the other plaintiffs because by making a demand upon the board, the Trust essentially rejected the other plaintiffs' approach which depended upon the conflicted status of Freeport's directors. As the case played out, the arguments about director loyalty would seem to have carried the day.

In order to justify an award of a fee, the Trust needs to demonstrate that its complaint was meritorious when filed. As a general matter, filing a complaint in a derivative action less than two weeks after making demand upon the board would cause the action to be deemed non-meritorious because the board was simply not given sufficient time or opportunity to act or to evaluate the demand.

That the transactions could have closed in less than a month is the Trust's argument for such a short demand time even though it waited almost 70 days after announcement of the deal to make its first demand. I acknowledge that during that period of time, there were some efforts under Section 220.

In any event, I am not persuaded that the timing of the transaction -- and there is no evidence that timing was imposed to frustrate shareholder rights -- should undercut the basic principle that an independent board is entitled to a reasonable opportunity to assess a stockholder demand.

However, under the circumstances, I need not rely upon the extremely limited time afforded by the Trust to the Freeport board. Instead, as with any fee application, the most important element is the benefit conferred.

Here, even the Trust concedes that its

role in securing a benefit was minimal. Calculating a fee here -- the Trust asks for approximately $400,000, or less than 2 percent of the attorneys' fees to be awarded -- is very difficult. Invoking the Section 220 process is generally a good idea, one which this Court has encouraged before the filing of a derivative action. And the party and its counsel who followed the Section 220 process should not be punished because of their following that guidance.

Yet, on the facts of this case, the Trust can demonstrate nothing that it added to the process. Merely having another lawsuit pending does not justify a fee award, even if the desirable approach of pursuing a Section 220 remedy was attempted.

The Trust's attorneys were not involved in the mediation. They were not involved in the settlement negotiations. They did not brief the dismissal motion. They took no discovery. They simply acknowledge that they deferred to others out of a sense of efficiency. In essence, they argue that the Trust's mere presence and participation as a named party justifies a fee. Something more than that is necessary to persuade the Court that there is an entitlement to a fee.

To be sure, in a somewhat different circumstance, there is a presumption of an entitlement to a fee; a presumption that can be rebutted. If that notion is extended to this setting where the second litigation is filed in this Court, and eventually consolidated with another action that has already been consolidated in this Court, the burden may fall upon the other plaintiffs and perhaps the defendants to demonstrate that the Trust provided zero benefit, that is, in this instance, whatever it was the Trust did, it did not move this matter forward. That burden has been met by those opposing the Trust's fee application.

The Trust's suit was the last filed of several stockholder derivative suits. Mere filing in this factual context of a wrongful rejection of a shareholder demand suit did not alter the playing field. It obtained no discovery that had not already been produced to the lead plaintiffs.

As I have noted, the counsel did not attend a deposition. The amended complaint very closely followed the Plaintiffs' amended complaint.

In short, the Trust had no causal

connection to the settlement, and, thus, conferred no benefit. Any presumption of causation has been rebutted. As such, the Trust is not entitled to an award of fees and expenses. Thus, the Trust's application for an award of fees and expenses is denied.

As an aside, if the Trust were entitled to an award of fees and expenses, it would be deducted from the fee awarded to lead plaintiffs and their counsel. It would not yet be another charge to be borne by Freeport or the individual defendants.

Plaintiffs were critical of the work of Credit Suisse as a financial advisor to the special committee of Freeport's board in connection with the MMR and PXP transaction. Credit Suisse's fee for the MMR portion of the transaction was roughly $8 million.

The Plaintiffs specifically challenged Credit Suisse's valuation models and other aspects of its fairness opinion. They also asserted that Credit Suisse had pressured a geological consultant to maximize values. No complaint has been filed against Credit Suisse, but that filing was imminent when the Plaintiffs and Credit Suisse engaged in mediation earlier this year.

A settlement was reached with a $10 million cash payment and a credit of $6.25 million to be applied against future services as Freeport may request from Credit Suisse. The $10 million payment, net of attorneys' fees and expenses, will be included as part of the special dividend that has already been discussed.

The factors that inform a decision to approve the settlement have been mentioned. One benefit of the settlement is that it avoids a challenge that Credit Suisse may have made to this settlement of the Freeport side of the transaction which I have already approved. The argument was that the settlement constituted a breach of Credit Suisse's retainer agreement with Freeport. Because the Freeport settlement anticipated that certain claims could be pursued by Plaintiffs on behalf of Freeport, Credit Suisse was likely to have argued that it had not received the unconditional release to which it was entitled. I express no views on the merits of that argument.

As for the merits of the potential litigation against Credit Suisse, there were two claims; one, essentially a malpractice claim, and two, a claim of aiding and abetting Freeport directors in their breaches of fiduciary duty. The recovery is approximately two times the amount that Credit Suisse was paid for its work on the MMR transaction and that implicated a contractual liability limitation.

With respect to the aiding and abetting claims, there was no comparable limitation, but demonstrating knowing participation and the breach of fiduciary duties might have been a challenge to prove.

In sum, when one considers the risks of litigation, the expense of litigation and the uncertainties of litigation, settlement makes sense. This settlement especially makes sense in the context of the claims asserted. Accordingly, I will approve the settlement.

As for attorneys' fees, again, I have earlier reviewed the standards. The benefit achieved is the most important, and it is $16.25 million, partly cash and partly a credit for future services.

The fee was contingent. The standing and ability of counsel cannot be questioned. The litigation effort -- no suit was filed -- was not unusually complex, especially when contrasted with the balance of the Freeport litigation. That is not to say it was easy, but it certainly doesn't compare to what went on with the bulk of this proceeding otherwise.

There is a common fund recovery. The question essentially is what percentage of the common fund should be paid to Plaintiffs' attorneys for their efforts. The 25 percent fee was used as one marker for the Freeport settlement itself. That litigation, however, at least in my judgment, took much more effort and was far more complicated. The 25 percent figure was used in an effort to correlate a fee to the cash recovered from outside the Company. Causing the Company to pay a dividend of its own funds is not typical for a derivative outcome. And when one factors in the funds being contributed by Freeport, we get a percentage of roughly 21 percent of the cash recovery.

This claim, when viewed in isolation, did not require separate litigation. Much of the preparatory work had been done in the context of litigating or preparing to litigate the Freeport claims.

It is a good result, and Plaintiffs'

counsel should be rewarded for obtaining that result, but I am convinced that without more litigation directed specifically at this claim, a fee of 20 percent is at the upper range of fees that would be appropriately approved. I have even considered a 15 percent fee but that fee strikes me as on the low side because of the benefits that were achieved by Plaintiffs' counsel in difficult circumstances.

Accordingly, I will award a fee of $3,250,000, or 20 percent, for the Credit Suisse part. My understanding is that there is no application separately for expenses in this context.

When I look at both fees combined, they work out to an effective hourly rate of a little more than $1,800 which certainly is not out of line for a success such as this one.

When I add the numbers together, I come up with $32,693,175.06.

I have signed the final order and judgment after inserting the award of fees and expenses, dating the document, and I have also signed an order denying the Blau Trust application for fees. I am handing both orders to the clerk.

I appreciate your patience and sitting

and listening to me go through what I think I had to do.

With that, I wish you all safe travels. Thank you very much.

Recess court please.

(The Court adjourned at 4:10 p.m.)

CERTIFICATE

I, MAUREEN M. McCAFFERY, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 93 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 Dover, this 13th day of April, 2015.

/s/Maureen M. McCaffery

Maureen M. McCaffery
Official Court Reporter
of the Chancery Court
State of Delaware

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GARDNER DENVER, INC. SHAREHOLDER LITIGATION	CONSOLIDATED C.A. No. 8505-VCN

ORDER AND FINAL JUDGMENT

A hearing having been held before this Court on September 3, 2014, pursuant to this Court's Order for Notice and Scheduling of Hearing on Settlement dated July 3, 2014 (the "Scheduling Order"), and upon a Stipulation and Agreement of Compromise, Settlement and Release dated June 27, 2014 (the "Stipulation")[1] filed in the above-captioned action (the "Consolidated Action"), which is incorporated herein by reference; it appearing that due notice of such hearing has been given in accordance with the Scheduling Order; the respective parties to the Stipulation having appeared by their attorneys of record; this Court having heard and considered evidence in support of the proposed settlement (the "Settlement") set forth in the Stipulation; the attorneys for the respective parties to the Stipulation having been heard; an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the Scheduling Order; this Court having determined that notice to the Settlement Class was adequate and

[1] Except as otherwise expressly defined herein, all capitalized terms shall have the same definitions as set forth in the Stipulation.

sufficient; and the entire matter of the proposed Settlement having been heard and considered by this Court:

IT IS ORDERED, ADJUDGED, AND DECREED THIS 3rd DAY OF September, 2014, AS FOLLOWS:

1. The Notice of Class Action Settlement on behalf of Gardner Denver, Inc. Shareholders from July 13, 2012 through July 30, 2013 (the "Notice") has been provided pursuant to and in the manner directed by the Scheduling Order; proof of dissemination of the Notice was filed with the Court; and full opportunity to be heard has been offered to all parties, the Class, and persons in interest. The form and manner of the Notice is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with each of the requirements of due process, Delaware Court of Chancery Rule 23, and applicable law. It is further determined that all Class Members are bound by this Order and Final Judgment.

2. The Court hereby certifies the Consolidated Action as a non-opt-out class action pursuant to Rules 23(a), 23(b)(1), and 23(b)(2) of the Rules of the Court of Chancery of the State of Delaware. The Class consists of any and all persons or entities who held or beneficially owned shares of GDI common stock at any time between July 13, 2012 and July 30, 2013, along with their respective successors-in-interest, successors, predecessors-in-interest, predecessors,

representatives, trustees, executors, administrators, heirs, assigns or transferees, immediate and remote, and any person or entity acting for or on behalf of, or claiming under, any of them, and each of them, together with their predecessors and successors and assigns, excluding Defendants and their immediate family members, any entity controlled by any of the Defendants, and any successors–in–interest thereto. The Class satisfies the requirements of Court of Chancery Rules 23(a), 23(b)(1) and 23(b)(2), in that (a) the Class is so numerous that joinder of all members thereof is impracticable, (b) there are questions of law and fact common to the Class, (c) the claims of the Lead Plaintiff are typical of the claims of the Class, (d) Lead Plaintiff will fairly and adequately represent the interests of the Class, (e) the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the parties opposing the Class, and (f) Defendants are alleged to have acted or refused to act on grounds generally applicable to the Class. Further, the Court now finds, based on the record in the Consolidated Action, that Lead Plaintiff and his counsel have fairly and adequately protected and represented the interests of the Class.

3. The Settlement is found to be fair, reasonable, and adequate and in the best interests of the Class, and is hereby approved pursuant to Delaware Court of

Chancery Rule 23(e). The parties to the Stipulation are hereby authorized and directed to comply with and to consummate the Settlement in accordance with its terms and provisions, and the Register in Chancery is directed to enter and docket this Order and Final Judgment.

4. The Consolidated Action is hereby dismissed with prejudice in its entirety as to Defendants and against Plaintiff and all other Class Members and without costs, except with regard to any award of attorneys' fees and expenses set forth in Paragraph 10 below.

5. As provided for in the Stipulation, the Court hereby completely, fully, finally and forever compromises, settles, releases, discharges, extinguishes, relinquishes, and dismisses with prejudice any and all claims, demands, rights, actions, causes of action, potential actions, liabilities, damages, diminutions in value, debts, losses, obligations, judgments, interest, penalties, fines, sanctions, fees, duties, suits, costs, expenses, matters, controversies, and issues known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, liquidated or unliquidated, matured or unmatured, accrued or unaccrued, apparent or unapparent, including known claims and Unknown Claims, whether individual, direct, class, derivative, representative, legal, equitable or of any other type or asserted in any other capacity, that have been, could have been, or could ever be, asserted in any court, tribunal or proceeding (including, but not

limited to, any claims arising under federal, state, local, foreign, statutory or common law, including the federal or state securities, antitrust, and disclosure laws or any claims that could be asserted derivatively on behalf of GDI), by or on behalf of Lead Plaintiff or any Class Member, which arise out of or relate to such Class Member's GDI stockholdings or such Class Member's status as a GDI stockholder during the Class period, against Defendants, or any of their respective, direct or indirect, families, parent entities, controlling persons, associates, affiliates or subsidiaries and each and all of their respective past or present, direct or indirect, officers, directors, stockholders, principals, representatives, employees, attorneys, financial or investment advisors, consultants, accountants, investment bankers, commercial bankers, entities providing fairness opinions, advisors or agents, insurers, heirs, executors, trustees, general or limited partners or partnerships, investment funds, limited liability companies, members, managers, joint ventures, personal or legal representatives, estates, administrators, predecessors, successors or assigns (the "Released Persons"), whether or not each of the Released Persons were named, served with process, or appeared in the Actions, which the Releasing Persons ever had, now have, or may in the future have by reason of, arising out of, relating to, or in connection with the acts, events, facts, matters, transactions, occurrences, statements or representations, or any other matter whatsoever set forth in or otherwise related, directly or indirectly, to the allegations in the Actions, the complaints in the Actions, the Merger Agreement, the Merger or other transactions contemplated therein or ancillary thereto, any term, condition or circumstance of the Merger or the events that preceded the Merger, or disclosures made in connection therewith (including but not limited to any alleged misstatements or omissions or the adequacy and completeness of such disclosures) (the "Settled Claims"); provided, however, that the Settled Claims shall not include any claims to enforce the Settlement or the rights of the Parties to enforce the Stipulation.

6. As provided for in the Stipulation, the Court completely, fully, finally, and forever releases, relinquishes, and discharges each and all of the Releasing Persons and Plaintiff's Counsel from all claims (including Unknown Claims) arising out of, relating to, or in connection with, the institution, prosecution, assertion, settlement, or resolution of the Consolidated Action or the Settled Claims ("Defendants' Released Claims"); provided, however, that Defendants' Released Claims shall not include any claims to enforce the Settlement or the rights of the Parties to enforce the Stipulation.

7. The Settled Claims and Defendants' Released Claims include Unknown Claims. "Unknown Claims" means any claim that a Releasing Person or Released Person does not know or suspect exists in his, her, or its favor at the time of the release of the Settled Claims and the Defendants' Released Claims, including without limitation those which, if known, might have affected the

decision to enter into or object to the Settlement or any assertion by a Party that the Parties did not comply with the provisions of Delaware Court of Chancery Rule 11 or any similar provision.

8. With respect to any and all of the Settled Claims or Defendants' Released Claims, including any and all Unknown Claims, the Releasing Persons and Released Persons are deemed to waive, and have waived and relinquished to the fullest extent permitted by law, the provisions, rights and benefits of § 1542 of the California Civil Code (or any similar, comparable, or equivalent provision in any jurisdiction), which provides:

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

The Court finds that Lead Plaintiff has, on its own behalf and on behalf of the Releasing Persons, acknowledged that Class Members and/or other Company stockholders, may discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of this release, but that it is Lead Plaintiff's intention, as Lead Plaintiff and on behalf of the Class and other Releasing Persons, to completely, fully, finally, and forever compromise, settle, release, discharge, extinguish, and dismiss any and all Settled Claims without regard to the subsequent discovery or existence of additional or different facts. Lead Plaintiff acknowledges, and Class Members and other Releasing Persons by operation of law shall be deemed to have acknowledged, that the inclusion of Unknown Claims in the definition of Settled Claims was separately bargained for, constitutes separate consideration for, and was a key element of the Settlement and was relied upon by each and all of the Defendants in entering into the Stipulation.

9. The Releasing Persons are hereby permanently barred and enjoined from asserting any Settled Claim against any Released Person in any jurisdiction or forum.

10. Plaintiff's Counsel are hereby awarded attorneys' fees, costs and expenses of $ 7,250,000.00 solely for Plaintiff's Counsel's work in obtaining the Settlement Payment (the "Settlement Payment Fee and Expense Award"), which the Court finds to be fair and reasonable. Plaintiff's Counsel are separately awarded $ 1,600,000.00 solely for Plaintiff's Counsel work in obtaining the Supplemental Disclosures and the Standstill Waivers (the "Standstill Waivers and Supplemental Disclosures Fee Award"), which the Court finds to be fair and reasonable. The Settlement Payment Fee and Expense Award shall be paid solely out of the Settlement Fund. The Standstill Waivers and Supplemental Disclosures Fee Award shall be paid solely by GDI and/or its successor(s) in

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interest. Fee and expense awards shall be paid to Robbins Geller Rudman & Dowd LLP, on behalf of Plaintiff's Counsel, within ten days after the entry of this Order. Such payment shall be subject to the joint and several obligations of Plaintiff's Counsel to refund, within ten days, the amounts received and any interest accrued or accumulated thereon, if and when, as a result of any appeal, or successful collateral proceeding, the fee or expense award is reduced or reversed or if this Order does not become final, or if the Settlement itself is voided by any party as provided herein, or if the approval of the Settlement is later reversed by any court. Except as provided herein, the Released Persons shall bear no other expenses, costs, damages, or fees alleged or incurred by Lead Plaintiff in the Consolidated Action or by any of his attorneys, experts, advisors, agents, or representatives.

11. The effectiveness and finality of this Order and Final Judgment and the obligations of Lead Plaintiff 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 issue of Plaintiff's Counsel's application for an award of attorneys' fees, costs, and expenses.

12. Neither the Stipulation, the Settlement, this Order and Final Judgment, nor any of their terms and provisions, nor any of the negotiations, discussions, and proceedings in connection with the Settlement, shall be deemed, construed as, or constitute a presumption, concession, or an admission by any Defendant in the

Consolidated Action of any fault, liability, damages, or wrongdoing as to any facts or claims alleged or asserted in the Consolidated Action or any other actions or proceedings. The provisions contained in this Stipulation shall not be interpreted, construed, deemed, invoked, offered, or received in evidence or otherwise used by any person in the Consolidated Action or in any other action or proceeding, whether civil, criminal, or administrative, except in connection with any proceeding to enforce the terms of the Settlement or to effectuate the releases or dismissal with prejudice contained herein.

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

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Vice Chancellor

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GENENTECH, INC. : Consolidated
SHAREHOLDERS LITIGATION : Civil Action No. 3911-VCS

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Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Thursday, July 9, 2009
10:06 a.m.

\- - -

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

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SETTLEMENT HEARING AND RULINGS OF THE COURT

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CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street, Suite 11400
Wilmington, DE 19801
(302) 255-0524

APPEARANCES:

PAMELA S. TIKELLIS, ESQ.
ROBERT J. KRINER, JR., ESQ.
TIFFANY J. CRAMER, ESQ.
Chimicles & Tikellis LLP
-and-
STUART M. GRANT, ESQ.
MICHAEL J. BARRY, ESQ.
Grant & Eisenhofer, P.A.
-and-
MICHAEL HANRAHAN, ESQ.
Prickett, Jones & Elliott, P.A.
-and-
MARC A. TOPAZ, ESQ.
MICHAEL WAGNER, ESQ.
JAMES H. MILLER, ESQ.
of the Pennsylvania Bar
Barroway, Topaz, Kessler, Meltzer & Check, LLP
for Plaintiffs

S. MARK HURD, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
PAUL H. DAWES, ESQ.
ANDREW FARTHING, ESQ.
of the California Bar
Latham & Watkins LLP
for Defendants Herbert W. Boyer, Debra L. Reed, and Charles A. Sanders

ALLEN M. TERRELL, JR., ESQ.
DANIEL A. DREISBACH, ESQ.
BLAKE K. ROHRBACHER, ESQ.
Richards, Layton & Finger, P.A.
-and-
LAWRENCE PORTNOY, ESQ.
SCOTT B. LUFTGLASS, ESQ.
of the New York Bar
Davis, Polk & Wardwell
for Defendants William M. Burns, Erich Hunziker, Jonathan K. C. Knowles, and Roche Holdings, Inc.

APPEARANCES: (Continued)

MARTIN S. LESSNER, ESQ.
Young, Conaway, Stargatt & Taylor, LLP
-and-
IGNACIO E. SALCEDA, ESQ.
of the California Bar
Wilson, Sonsini, Goodrich & Rosati, P.C.
for Defendants Arthur D. Levinson and Genentech Inc.

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THE COURT: Good morning, everyone.

Good morning, Mr. Grant.

MR. GRANT: Good morning, Your Honor.

Your Honor, this is the time that the Court set for the settlement approval hearing In Re Genentech. Although I must say, when I walked in the courtroom, I wasn't sure that this was the matter that was on today, given that it is an unopposed motion and I saw the number of folks in the courthouse, I thought maybe this was a different case. But they've assured me that they are here for this case and they're not here to oppose the motion. So I think I'm the only one speaking.

Your Honor, I would -- unless the Court wants otherwise, I'll handle this in -- in two parts. One is the approval of the settlement itself, and the second is the approval of the attorneys' fees, if the Court doesn't mind me splitting those.

THE COURT: Sure. We are -- we've already done the other part of the traditional troika?

MR. GRANT: I'm sorry. Which is?

THE COURT: Class certification.

MR. GRANT: I was going to address that as -- as part of the approval of the whole --

THE COURT: Okay.

MR. GRANT: Yes. And -- and --

THE COURT: And the benefit. Do all three.

MR. GRANT: Right. And -- and -- and I guess with regard to the first two --

THE COURT: The defendants like that. It helps with the release and all, you know.

(Laughter)

MR. GRANT: Understood.

Your Honor, I've -- I've -- I don't think I've ever been accused of underlitigating a case. And so I know the Court's very familiar with it. I know we put in pretty detailed papers. I'm happy to go through and refresh Your Honor's recollection, but I've found --

THE COURT: No. I mean, honestly, you covered -- the certification is important, that that be covered in the order. I mean, this is a classic kind of case for a class certification. So that's not an issue. I don't think the fairness of the settlement is. And if you want to get into the heart of it, really, which is the fee, you know, we can do that. I mean, I don't know -- there's been no objection to the fairness of the settlement.

MR. GRANT: Right.

THE COURT: $95 is a plush price. You know, people could argue for more, but there was a vigorous process. I'm very familiar with the record.

The real question, I guess, there has been an objection from someone about the fee, and it's -- it's a well-reasoned objection. It may not -- it's understandably -- the objection doesn't have as firm a grasp of the record as maybe I have, but you've been involved in seeking very high fees in some cases but not as high as this.

And I guess the question is, I mean, really -- I understand there's been -- and then I want you to address it. What's on my mind is, I don't like to quibble about fees when there's been real adversarial litigation and some, you know, very important objective, particularly an economic objective rather than just some -- something theoretical has been achieved. And that's clearly the case here. There was a preliminary injunction motion. We had a long hearing. I asked a lot of hard questions to your colleague and Mr. Kriner over there. Then I asked a lot of questions of Mr. Portnoy, and

Mr. Dawes stood up, as I recall. And we went through all this stuff. So I'm very familiar with this.

But we're at a point where in comparison to some cases where I've awarded fees of -- approaching this magnitude, there's a couple distinctions, and I want to give you -- just put them on the table so you can address them.

In those other cases it tended to be absolutely clear that the only contributing factor to the -- the outcome was the litigation. And, you know -- and this is much more of a mixed situation, obviously, because there's the economic pressures of the marketplace in terms of people who are affected and there's a special committee which had never relented and said yes. So get that factor to weigh.

And, again, really, the fact the multiple, honestly, of a lodestar, which, you know, I'm not faulting anyone, but lodestars in these situations always strike me as, to begin with, inflated and, at the very least, often not accompanied by any real showing that they're market-tested lodestar; and then we're talking about I think the multiple -- you've all been very candid about it -- the multiple of the lodestar is something like 11.3.

The hourly rate is something like 5,400 and-some dollars. And that's just -- that's where I get to.

I mean, obviously you have to reward success. This is not a situation where anybody on the right side of the room, from my perspective, in the sense that I'm looking -- and talking about the plaintiffs' side. I just want people -- I guess we should talk about it like in nautical terms and then it would be easier for people -- maybe not easier, but port and starboard.

MR. GRANT: Well, instead of "right" we could use "just."

THE COURT: Right, exactly. My point, there's going to be a hefty fee awarded today. I don't think that's the question. I think the real issue is, you know, $24 1/2 million, how do I address that. What sort of incentive does it -- is it the right one. And that's really the thing that's most on my mind. And so I just wanted to throw that out there and let you get right into the heart of it.

MR. GRANT: Actually, I appreciate that very much, Your Honor, to be focused like that.

We also took the objector seriously. And, in fact, I had my colleagues call him yesterday.

You know, we addressed him, obviously, in the brief; but we also called him, and we said -- I think he was a little surprised -- and said, you know, "We took your objection seriously, and we just want you to understand where we think you missed the ball." And, you know, my colleagues spoke to him for -- you know, for quite awhile. Now, we didn't ask him to withdraw the objection, do anything else. But we actually felt it was important, since he took the time to object, that we took the time to -- to move forward and -- and explain to him why we thought he was wrong.

And let me address this. Your Honor, I -- I really did try very hard in -- in preparing for today and thinking that this was, you know, somewhat similar to Pure Resources, to see if I could extend the gorilla analogy from Pure Resources and have it come back today and live on. And as much as I tried, I was unable to. So I -- I -- I beg the Court's forgiveness on that.

THE COURT: Good. No. I'm actually glad.

(Laughter)

THE COURT: Because I've had more gorillas injected into arguments ever since that decision than I've ...

MR. GRANT: But I -- I do have -- I have another analogy that I -- I think is -- is apt and I -- and I would like to have this parallel, because I really will talk about each of these points.

But when I was explaining this, you know, what I, you know, asked my colleagues to tell Mr. Fotenos, you know, it's like in soccer. We brought the ball down the wing. We helped create the space. We served the ball across into the -- into the box, and the special committee headed it in. And if you read the box score, it says that they scored the goal. But if you watched the game, unless we brought it down the wing and served it up, this goal wasn't being scored.

Now, I do want to give credit to the special committee, because as we all know, many a time you serve a perfect cross and someone still manages even not to get their head on it or to, you know, shoot wide; and they didn't. But we should talk about kind of what happened and what we did to -- to contribute and then why I think the fee here is certainly on the high side but within the range of reasonableness.

And the first move at about the midfield was the first stipulation that we got entered. And that goes back quite aways. That goes back to September of 2008. And what was really important there is that the defendants and Roche was -- was pushing that the affiliation agreement was something that limited fiduciary duties. And we pushed -- and obviously that was our -- our case to say --

THE COURT: Well, was -- did Roche ever say that?

MR. GRANT: Well, they certainly didn't use those specific words; but they were saying that the affiliation agreement is what we have to live up to, not Delaware fiduciary duties. And we said "No. You've got to live up to Delaware fiduciary duties plus the affiliation agreement."

THE COURT: I guess what I recall about that is the complaint coming in saying "Oh, my gosh. This affiliation agreement is going to be construed by Roche and Genentech as essentially clearing the field and that it erases all the default principles of equity that would otherwise apply"; that I recall reading that part of the complaint not being terribly convinced at all by it, and the defendants more or less reacting by "We didn't really think that was the case, either. And if you want to clarify it, fine. Let's just move on."

MR. GRANT: I hear Your Honor, but that was the little move in midfield that started it all.

THE COURT: Well, okay, I mean, in the sense --

MR. GRANT: That's --

THE COURT: I mean --

MR. GRANT: That's the move that starts it all, and it really makes a difference --

THE COURT: Well, you're right. But it's more like the move -- it's, like, I coach -- you know, the reason why we're getting this for the uneducated is, most of the lawyers on both -- many of the lawyers on both sides know that I coach soccer, so that you're going to get subjected to this.

But because I coach youth soccer, I also know that the only time -- it -- it's one of the transitions from being even a good youth -- a sophisticated youth soccer player from just a youth soccer player when you cease to get excited about getting the kickoff.

(Laughter)

THE COURT: You would much rather know whether you're going uphill or downhill, because the kickoff -- getting the ball in a game like soccer is exactly like getting the ball first in a game like basketball.

So if what you're saying is this started the litigation in the sense that -- I get that.

MR. GRANT: No. I'm actually -- I'm actually saying much more than that, Your Honor. And I really think so and -- and let me explain why.

I'm saying this really starts the play that winds up being the -- the goal scoring, you know, game-winning goal. And -- because what that does is, it's the thing that really empowers the special committee. It's what now kind of starts to take this out of Pure Resources, because clearly, you know, the folks who are -- are -- are representing Roche are, you know, very smart, very fine lawyers. And they're saying "Okay. Well, the pattern is set for me in Pure Resources. This is what I have to do. You know, the folks in Pure Resources made a mistake here or there and I've got to, you know, kind of start fixing around that." And that was their defense. You know, that was their -- their -- you know, 442 was -- was their Pure Resources. And we had to recognize that and we had to start working on that.

And so although Your Honor may think well, that was a minor play, it's really what -- what started the whole thing.

We then moved on -- and I'm not, you know, pushing this as a disclosure case; but once they made the tender offer and -- and when -- once they -- you know, we really started pushing on the disclosure issues, because pushing on the disclosure issues was like starting to pressure the defense when all of a sudden you see where the weaknesses are. When they have to start articulating where -- you know, how is the back end going to work, why is the back end guaranteed to get someone on the front end at least as much money, you start to see where the weaknesses are.

And, obviously, we then --

THE COURT: Because that's when Mr. Portnoy coined the new M and A phrase, right, for the case, "back-end friendly"?

MR. GRANT: Yes.

THE COURT: Our new --

(Laughter)

MR. GRANT: Yes. And -- and -- and -- and -- and -- and in having reread that stuff, I said I was definitely staying away from there, but I did have to edit it out a bunch of times --

(Laughter)

MR. GRANT: -- but it really wasn't --

THE COURT: It's good for all the couch potatoes. And others.

MR. GRANT: So ... Yeah, I actually --

THE COURT: Right.

MR. GRANT: Actually, I -- I coined the phrase -- but since Your Honor raised it, I guess I'll use it. I said absent a clean back end, it would be very difficult to fit into Pure Resources. So --

THE COURT: "clean back end" is beautiful. Ivory Soap people may want to use that, Mr. Grant.

MR. GRANT: Anyway, so that's where the weaknesses in the -- in the defense started to be exposed. And, of course, that's when we made the strategic decision -- and -- and this is going to lead into some of the discussion about -- about lodestar --

as to whether we now wanted to ask for full-blown discovery and, you know, build the record that way, which, of course, you know, sitting here today, say "Gee, that would have added a bunch to the lodestar and," you know, "that could have generated another 5, 6, $700,000 in time," we'd be looking at much smaller multiples, much smaller everything else.

THE COURT: Well, but -- right, although I want you to know, one thing I'm not being critical of here is -- you know, I'm not asking you to inflate hours. And I would not have been impressed, for example, to see an additional thousand hours just to see them. I mean, I don't give people credit for hitting and hoping on -- or hiring experts. For example, you know, in a situation where Goldman Sachs was being employed by the special committee and producing valuation information, it wouldn't have been particularly useful to have a valuation report. And so -- and you didn't do that.

MR. GRANT: Right.

THE COURT: But if you had done that, that wouldn't -- what I'm saying, that wouldn't have impressed me --

MR. GRANT: Understood. And I'm not

even saying that people were doing things just to turn hours. What I'm saying was that there was a strategic decision to be made. And, you know, because I'm going to -- if I was wrong here, I'm going to be the one who gets the grief because I pushed real hard to say "Do you want to make this a rifle-shot issue on the legal issue, on, you know, a Pure Resources issue that this, you know, doesn't meet with Pure Resources and it is coercive and go for the summary judgment rifle shot; or do you want to ask for expedited discovery, take the discovery, and come in with a more fuller record that the Court might well appreciate, but, you know, does it make sense to raise, you know, lots of other issues?"

And strategically we decided in the best interest of the case and the best way to present it to the Court was to take the rifle shot. And no one considered well, you know, how is that going to affect the number of hours, how is that going to affect the fee. And I think one of the things the Court wants to make sure that we don't do is ever have that calculation come in, "Gee, we ought to do something less efficiently. We ought to do something more expansive because it's going to help us in the end," not what is the absolute best way to prosecute this case.

And so I must say that I, you know, really exerted myself here to say "No. The rifle shot, the summary judgment is" -- "is the way to go," and we filed that.

And then we, you know, reached the second stipulation which was -- you know, came after the argument on the preliminary injunction. And I think the papers laid it out really well. I'm not sure we articulated it as good as we should have for the Court that day, but the Court certainly picked up on it and pressed Mr. Portnoy very hard on how is this back end going to work and recognized the -- the difficulties that we had pointed out with the back end, that who was going to monitor this, you know, two-investment banker approach if Genentech is not the surviving entity; you know, how is this really going to be done fairly; the problems with how were people going to decide how to exercise their appraisal rights if they're not going to find out what the bankers do until, you know, at some point well into the future, and really started to, you know, point out all of the problems.

THE COURT: Well, temporally when we went into the injunction hearing, describe to me -- you know, there's one -- there's a couple price bumps here; right? There's the 86 to 93.

MR. GRANT: Right.

THE COURT: 93 had occurred before the injunction hearing; right?

MR. GRANT: After -- before the hearing itself, correct.

THE COURT: How did -- what is the argument for the litigation claims having influenced that movement?

MR. GRANT: Well, I -- I think that we would claim it influenced some but certainly not as much as the 93 to 95. And I think the answer is that Roche understood the difficulties they were going to have in moving forward with the -- the bid at 86.50 as -- as it existed. Because of all the problems that came out at the hearing, I think they understood that.

Now, I wouldn't be honest with the Court if I didn't say, you know, there were other factors, also. There clearly was the market factor.

THE COURT: Yeah. I'm assuming --

MR. GRANT: And I think the --

THE COURT: -- the institutional investor community was not thrilled with the dropped price.

MR. GRANT: Exactly right. Although the dropped price was from 89 to 86.50, so would they have been thrilled if they went to 89 or 90? I don't know. But clearly the market was pushing that they needed to come higher. So that's certainly part of it.

Clearly the special committee was saying "You're not getting our agreement." But clearly we pointed out how -- the problems, you know, in the deal in carrying it forward, as well as we pointed out the way that it was set up almost doomed the deal to failure because you were saying "We need to get a majority-of-the-minority tendered first so we can then squeeze them out; but, by the way, in the back end, you don't know what you're going to get, but if we're going to get by Pure Resources, you have to get at least that but you can get more."

THE COURT: Right. Well, no. It is an interesting dynamic. And that, I guess, also supports your over -- I mean, part of why you said there's economic benefit, is that by enforcing the structure of the affiliate agreement, it puts pressure on them to make the front end as lucrative as possible because the -- the extent to which people could -- you've got this issue -- I mean, I think we talked at the prior hearing, if you can encourage all your friends to tender --

MR. GRANT: You shouldn't.

THE COURT: Right.

MR. GRANT: It's like a prisoner's dilemma.

THE COURT: And then you can -- you can be guaranteed at least that much with the potential for more.

MR. GRANT: Right. Right. And so -- so those issues were going on. Remember, those were also going on at the absolute bottom of the market. Those were going on in late February and early March when I think it was, like, March 6th or something like that that the, you know, market completely hit bottom and we thought that, you know, we were going into The China Syndrome.

And, you know, part of our worries, of course, is okay, if we get this deal enjoined, you know, are we sure they're coming back and are we sure they're coming back now and what if the market continues the direction it's going. You know, DOW 4,000 in June, you know, that -- even the 86.50 is going to look good.

So we were certainly mindful of that. And in case we weren't mindful, the calls that would come in on a daily basis from the institutional investor community and particularly the arb community reminded us of that on a regular basis.

So the second stipulation and what led up to that was -- was very important. And I think we do give some credit for the move to 93, but I would be dishonest if I claimed exclusive credit for that.

But then we got to the issue of okay. Now we know exactly, you know, what you're going to do. You're going through this complex procedure. You're now going to have to give appraisal rights and then quasi-appraisal rights and everything else. And it turned into a three-way discussion of "Look" -- and this is why I say it goes back to that first move in midfield, was, you know, nailing down this affiliation agreement and saying that you got to abide by all those things. That's ultimately what got traded at the very end. That was the cross.

THE COURT: Right --

MR. GRANT: You know what --

THE COURT: -- because the idea is there, what -- what Roche needed -- what Roche was looking for was certainty. And the idea is if you could use, I take it -- when at the end of the hearing it became somehow -- maybe it had been clear in somebody's game plan that was not disclosed to anybody, including Mr. Portnoy, as I recall, that this was going to be the structure and it hadn't been disclosed to the special committee; but once we came out of that hearing to actually put together something that complied with the affiliation agreement was going to leave the special committee with an extremely strong hand to select a banker. It already had a banker. And as a result, you could have a situation where even if you hit the 90 percent, you're looking, from Roche's perspective, of paying even more. And the only way you can get a guaranteed price is to strike a deal --

MR. GRANT: Right.

THE COURT: -- amend the affiliation agreement, and have a merger, essentially.

MR. GRANT: Exactly. And the fear was

the -- the special committee had that 112 that, you know, they said they didn't really believe in, but we got 112, and you're going to get a second banker; and even if the second banker says, you know, yeah, 93, 94 was a good number, when you average those two, you're going to be paying well over a hundred for the other part of it. Again, I think we take a lot of credit for that.

And then there's a last piece of it which, as it turns out, was not as important an option as it could have been, but that was -- of course, the appraisal option remained. And that was very important, because, first of all, with the people who thought the 95 wasn't fair, we certainly wanted to give them an alternative; but the other interesting thing is the Avastin study. And the Avastin study was coming out in April, and that put some pressure on Roche, because I believe they thought it was going to come out positive and that they wanted to close this deal. So when it came out positive, that's great; they get a pop and -- and life is good.

But anyone who wanted to could have refused to tender, could get squeezed out, could say "I want to take appraisal," wait to see what happens to Avastin; and when it came out negative --

THE COURT: Someone who didn't take appraisal, shouldn't we find out who they are and see whether they need a guardian? Because as I understand it, I mean, somebody who's, like, elected not to -- not to take -- I mean --

MR. GRANT: Right. You either needed to tender or take appraisal. You could not tender and just say okay --

THE COURT: You needed to do the appraisal -- you needed to do the affiliation agreement; right?

MR. GRANT: Right, because what you wanted to do was say "Look, I want a second shot" --

THE COURT: "I want at least a blank."

MR. GRANT: Right. "I want a second shot" -- "I get my" -- you know, "I want" -- "I get at least 95, but I want a second shot because there's now no downside; and if Avastin comes in positive," you know, "maybe it's worth 112. And if it comes in negative, I've got 60 days to say, 'Just kidding' and say, you know, 'I'd be happy to take my' -- 'my 95.'"

And so it really left them that additional benefit. How many decided to exercise that, I honestly don't know; but it really left an additional benefit for those who wanted to play in the game. So that's what we did.

Now, let's -- I'm not going to go through the standards. Your Honor knows all that, but let me address your specific questions.

One I've already addressed, which is, you know, that "You're only a contributing factor as opposed to the litigation being the sole factor." I agree; but I think that, you know, it's a larger factor in the last two dollars. It's a smaller but still a factor in the first several dollars.

THE COURT: And I take it that's why you also aren't seeking something like a third of the fund or something like that.

MR. GRANT: Exactly. Exactly. Because while it's very large in terms of absolute dollars and lodestar, it's actually relatively small in terms of -- of percentage of the benefit itself.

And, you know, there's a footnote there that plays with all the numbers that says "Look, if you give us credit for the entire bump," you know, "it's under one percent. If you only give us credit for the last $2, it's two percent," whatever.

But this is a case where the numbers were very large. And that kind of leads into my second point, which is, you know, what we do is a very high-risk business. And sometimes you have a great case together and you have wonderful facts and you've worked really hard, and you could be on the eve of trial with a case that you are confident could be a winner and someone does something outside your control and you wind up with zero because, you know, of things un -- unlike that.

So we have a -- a high-risk business. And so when --

THE COURT: Something on your mind?

MR. GRANT: Nothing.

(Laughter)

MR. GRANT: Nothing, Your Honor. Still going to take a few days. But I'm coming out of rehab and I'm okay.

But -- but, you know, because of that --

THE COURT: You were supposed to be here today, anyway.

(Laughter)

MR. GRANT: Yes, but I have the

afternoon free.

The -- but, you know, because of that and because there are times when you wind up doing the same thing and it's a substantially smaller case and you can't turn around and say "Gee, I want a third of the benefit because that's really what I ought to get on a lodestar basis" and everything like that; and, you know, nobody says "Well, gee, look how hard you worked. You really ought to get this high lodestar." They say, "Well, I got to look at the percentage of recovery."

THE COURT: And we do -- we get -- and, obviously, that's why I said, you know, we're not talking about here a situation where there's not going to be a risk premium. The question is -- I mean, on page 43 of your brief, you know, you pulled out examples, right, of cases.

MR. GRANT: Top ones we could find.

THE COURT: And that's what I'm saying.

MR. GRANT: Yeah.

THE COURT: And this tops them all.

MR. GRANT: Yeah, it does. It does. And -- and the reason it tops them is a fewfold.

No. 1 -- and it's the largest driver -- is -- this is a mega case. It's huge dollars. It just is.

THE COURT: Size of the deal.

MR. GRANT: So it's size of the deal.

The second thing, as -- as Your Honor knows the line of cases and I think we talked about it at some of the seminars, this is being paid by Roche. It's not coming out of our clients' pockets at all. And I think Roche understood that it was, you know, a very large deal and -- and that that's what they were going to need to pay. But I should add one other thing that's really not in here -- and I think we talked about this at some of the seminars, also -- the new defense bar attitude of "You need to take care of all of my problems." And Roche had also been sued in California.

THE COURT: Why is that a new attitude? I think that's always been --

MR. GRANT: I don't know. It seems to be more prevalent.

THE COURT: -- if you want to settle a case, you want to settle everything.

MR. GRANT: Oh, I know. But it's now not only "You got to take care of this, but you've got to help my daughter get into college and you've got to," you know, "mow my lawn." And it's --

THE COURT: There are features of this dealing with daughters going to college?

MR. GRANT: Close -- close enough, Your Honor. So --

THE COURT: I didn't -- maybe we need to go over the settlement, the final judgment more closely, because I hadn't known I was dealing with anything. I mean, I know they want a global release.

MR. GRANT: Right. And -- and so what we had to do is, we took care of negotiating and resolving all of the California actions, also. And I will tell you that some of this fee winds up going to the California actions and the California folks, and they're all -- they've dismissed all --

THE COURT: Is that in this lodestar here?

MR. GRANT: No. So all -- so what you're seeing is the -- we didn't put any of their hours in because that wasn't this case; but some of the money --

THE COURT: Okay.

MR. GRANT: -- is going to -- to

California and you should know that.

THE COURT: I actually think the Court should know about that sort of thing. I'm not saying it's wrong; but given the practicalities of it, I don't know -- I'm not sure -- I'm not saying I didn't know, but, you know, it is a real-world factor.

MR. GRANT: And that's why I raise it with the Court. And maybe it should have been in the brief; but I'm just letting the Court know that not all that money sits on this side of the room, that, you know, several of it winds up going to California, to the West Coast to help them with their budget deficits.

THE COURT: We can have a bicoastal impact.

MR. GRANT: Yes.

THE COURT: I hope some of it's going to the center of the nation.

MR. GRANT: To the?

THE COURT: To the center of the nation.

MR. GRANT: Oh. I'm not sure it is. I'm not sure it is.

THE COURT: Well --

MR. GRANT: I think this is just a bicoastal event.

THE COURT: I think you all have then excluded the Midwest, and I just want to distance myself from that sort of behavior.

MR. GRANT: You know, when you talk about these back ends, you just find it much more on -- on the coasts.

But, anyway, the -- so that's -- that's -- that's the other aspect of it that -- that, you know, there were additional things, additional benefits achieved by the defendants. And I think that has --

THE COURT: Those cases will all be dismissed?

MR. GRANT: Everything will be dismissed. There will be total peace. They will have their complete release. I think that's one of the --

THE COURT: So -- and do the other courts have to review this or --

MR. GRANT: No. No. That's why it's all being settled through here.

THE COURT: Okay.

MR. GRANT: And that's why the money

is being paid from here; but, as I said, the hours were not.

THE COURT: How many -- how many other cases were filed; do you know?

MR. WAGNER: About 20, 26.

MS. TIKELLIS: I think it was closer to 20, and in federal court, Your Honor, and state court in California.

MR. GRANT: It was an awful lot. There were an awful lot of law firms out there. And I don't have to go on the rest, but Your Honor can imagine that --

THE COURT: Well, no, no. And the realities of the world these days is, that's important. And there are several -- as everybody in the room -- you're all sophisticated practitioners. You've seen some of the litigation recently about how to allocate fees between different cases and all that kind of stuff. And you're right; from the defendants' perspective, I mean, you don't want to pay the fee twice.

MR. GRANT: And I think Your Honor would find -- and I don't have exact numbers for you, and I'm not sure it would be appropriate to provide them; but I think you will find it actually fits a lot closer into the cases cited if you added those other hours in. And I can't, you know, vouch for the hours --

THE COURT: How do you deal with -- which is -- I mean, you don't want -- you don't want to undercompensate people, but you don't want to -- and I've got -- I understand here there's a little bit different dynamic. One of the -- when a case is settled in this way, that Roche had every incentive not to overpay, and that's not always true. I mean, that's why the Court has a fiduciary role with respect to representative litigation, because sometimes there's a lot more at stake for the lawyer and the class.

What I'm -- I still have a little trouble with is how -- how it doesn't create an under -- if you start awarding $5400 an hour or 11 times multiples on lodestars in cases where -- I'm not saying there wasn't a lot of effort, but it was a relatively focused proceeding. You all poured blood, sweat, and tears into this for about two months, I guess. I mean, there was the filing, but, really, it was the injunction.

MR. GRANT: Uh-huh.

THE COURT: How do you deal with the case where -- and I've had a few of these -- where people have worked, you know, tens of thousands of hours over three years and then you end up never getting any close to that kind of risk premium?

MR. GRANT: I agree, Your Honor. It's a problem. And I don't know what to do. And that's why I --

THE COURT: It seems to create an incentive where -- it's almost like -- I guess you can say it's like investment banking work, right, where you turn on sort of -- if somebody brings a derivative case -- and I guess maybe it makes sense on an economic thing, but if you bring a derivative case, I get a $500 million settlement but it took them five years to get there; whenever they get -- they get $1500 an hour when it's done just because of all the effort, even when you give them 25 to 30 percent; whereas if you do a big deal case, simply because of the numbers of the deal, you get a huge multiple even if, frankly, you're only a partial causal factor.

MR. GRANT: Your Honor, that's right. And that's also why I -- I talked a little bit about the high risk of the business. On the other hand, as I really made reference to -- and -- and you have a perfectly good example that happened this week -- you know, you can put an awful lot of effort in, you can put in millions of dollars of time, hundreds of thousands of dollars of expenses; and having nothing to do with what you did, it can all disappear.

And, you know, as Your Honor knows, we also practice in -- in the securities litigation. And those damage cases, although they take substantially longer and although they're also high risk because you can lose, the facts are all set. And it's not like all of a sudden something changes on a fraud that took place three years ago so that when you're three years in litigation a fact changes and you wind up, your case gets eviscerated. It could be that, you know, the Supreme Court comes down with a new ruling and -- and you can get eliminated that way. It's certainly not without risk. But on these deal cases, it's a lot of work in a shortened period of time, but things can happen very easily that causes your case to -- to disappear.

And -- and so the way I kind of rationalize -- it's a bit of a rationalization, because it's a very imperfect system. The way I rationalize that, the case that goes for two or three years, generally those facts are set because deals don't last for three years. And so it takes some risk out of it.

But, you know, I guess the question is, you know, what do you do on a deal that you litigate and you get enjoined a couple times and then it goes -- gets bumped and raised and it was only a $200 million deal and so the benefit's, you know, $40 million? That might justify a fee of 25 or $30 million, but you can't take 50 to 75 percent of the benefit.

So I'm acknowledging one of the things that allows this fee to be as large is because of the numbers we're talking about.

Now, you know, I guess there are two ways of doing it. You can say when it's really large like that, "I'm sorry. I'm going to have to cut you" or you can do when it's a small deal, you can say, you know, "You really deserve more" and really raise it up. But neither of those things seems terribly fair or effective, because you can't take money out of the, you know, shareholders' pocket and say "Well, I'm going to raise you up," you know, "and give you an excessively large percentage of the deal." So if you can't do that, do you then say "Well, I'm still going to punish you by" -- you know, "by dropping," you know, "the percentage of the deal because it's a big deal"?

And I think the problem is unsolvable. And so, you know, how do you rationalize it? You say "Well, you know what. You got more than" -- you know, "than you would have gotten if it was a small deal; but," you know, "the next time you come in here and it's a small deal and you get a little less, don't whine to me that the deal was too small."

I'd raise one last thing, unless Your Honor has any questions.

THE COURT: I don't.

MR. GRANT: One of the things I think was a little amazing about this case is that there was only one objector to the fee, and that was 300 shares. You didn't have a single institution. You didn't even have the professional objectors coming in here. One well-written objection from someone who I think didn't understand -- you know, kind of, as I said, read in the box score that the special committee scored the goal and wondered why the fee was going to, you know, the people who -- who crossed the ball.

But I think we explained it to him and I think he was satisfied. As I said, we didn't ask him to do anything. We just wanted him to understand. But I do think that if this fee was really excessive, you know, there's never a shortage of people willing to come out and shoot at lawyers' fees, especially in this environment.

And -- and I think the way Your Honor --

THE COURT: Well, I mean, the -- in this context, though, a lot of people really do put -- kind of put it in the rearview mirror once the economics are done.

MR. GRANT: Yeah. But there are lots of folks out there, whether they be professors or whether they be activists or whether they just be people who don't like people on the plaintiffs' side of the V, who usually are willing to come out and dump all over it. But I think that people were -- were really happy with -- what happened.

And I think Your Honor has described another case -- and you mentioned earlier today about how, you know, do the investment bankers get paid. And, you know, they work really hard for a couple months, you know, if there's a deal; and when the deal gets done within a couple months, they get a very big fee, and they also get a very big fee if it's a very large case, even though the percentages might be the same on a smaller matter. And, you know, if it stretches out a year, they get the same fee. And nobody goes back and says "Well, gee, the deal was done quickly or was done efficiently. We ought to have some of that fee back." Likewise, it's rare, but although I think the investment banks are now starting to say that "If this lasts more than a quarter, you got to keep paying us an additional quarterly fee to," you know, "keep us engaged and" -- "and yet we'll still get the big bonus at the end."

So those are, I think, the reasons that, you know, I need to acknowledge it's -- it's a very high fee; but I think it's still within the range of reasonableness. I think that if we take into account that some is going out to California, it becomes more in the range of reasonableness. And when you realize the percentage it is of the actual recovery, it's -- you know, it's certainly high, but I think it's very palatable.

THE COURT: Thank you.

MR. GRANT: Thank you, Your Honor.

THE COURT: Mr. Portnoy or anyone else? Anything to add?

MR. PORTNOY: No, Your Honor.

THE COURT: Is that correct about the California litigations were resolved as part of the negotiations here?

MR. PORTNOY: Yes. There were multiple cases filed in California. And in our discussions with the plaintiffs in this room, we said we want global peace.

THE COURT: And the plaintiffs here obtained that for you, which --

MR. PORTNOY: Yes, they did.

THE COURT: And usually you -- your experiencing global peace would mean the people who were involved in those cases who also expended effort would not be saying "We just want to applaud our colleagues who were in the Delaware cases and just" -- you know, "we'll take" -- "we're so enamored of the work they did that we'll do ours on a pro bono basis."

MR. PORTNOY: That would not be my

experience.

(Laughter)

THE COURT: Okay. No. That actually -- I will say -- I'll do the three things. This is a classic -- everybody in the -- corporate cases like this are a quintessential form of a class action. Everybody is affected equally, and the only difference is really how many shares they own. So -- so -- and the -- the proposed order sets forth the requisite findings under Rule 23. So the class certification is granted.

There's obvious economic benefits to the plaintiff class from the settlement here. There was real hard-fought litigation in a complicated setting. This affiliation agreement, I'm sure Roche is going to think back on, you know, was this a good idea or not. It's a very interesting agreement and presented some challenges to very good transactional lawyers and litigators involved to figure out exactly how you give life to this in the event of an actual transaction.

And -- and that leads to -- and so I think, obviously, the $95 per share is a lot more than the -- what was on the table at the beginning of the litigation. And the fact that it was offered to everybody, especially in a down market, you know, that's pretty valuable stuff. And it was reasonable given what Roche was seeking.

You know, if you're going to pay $95, you're going to want certainty for plaintiff to say give up their litigation and to go along with something that would essentially require allowing the affiliation agreement to be used as a -- an economic chit to get this done. So I have no problem approving the settlement.

I also am -- in terms of the fee, I thought the -- the objection was very thoughtful and measured in its tone. And -- and I think the -- the reason I don't embrace it is because being closer to the case, the central premise of the objection is one that I just don't share. And I'm -- I -- I probably have been more than willing to share premises like this than some of my friends on the plaintiffs' side would, you know, like at times. I mean, I've not been hesitant, nor have some of my colleagues, to look at a situation and say "No. You know, really, you're straining to claim a connection between what you did and something that happened economically."

Here, I watched this dynamic closely. I -- and how it all came together. And the enforcement that the plaintiffs gave to the affiliation agreement, in my view, was a very important causal factor in the ultimate result here. I think Mr. Grant is right to -- and -- and his colleagues who, when they wrote their brief together, write to not take as much credit for the move to 93.

But one of the things that Roche was facing was very active plaintiffs' lawyers willing to aggressively force the affiliation agreement. I don't want to be critical of the special committee. And the objector gives them credit. I'm happy to give them credit, too. They appear to have been vigilant in their duties. They did not choose to litigate. They chose to essentially share the way this went down with the plaintiffs. I'm not being critical of them.

But the reality is that the special committee learned important things and got leverage out of this litigation that it might not otherwise have gotten. At least that's my perception. My perception is, for example, that the -- that that -- there was a -- it was almost like a -- like the Discovery Channel the day we did the preliminary injunction hearing, that -- that for many of us, it was a learning experience about how it was that this affiliation agreement was actually going to be given life to in the event that, you know, Roche's modified tender offer went through and when it became clear that the plaintiffs were going to insist on scrupulous enforcement of the affiliation agreement.

But when you read the affiliation agreement and the definition of who had to do what, including who was an independent director and what their status had to be, it really did give a lot of clout to the special committee. And it really gave the special committee the ability to say "Well, one of the bankers is pretty obvious, named Goldman Sachs. And then we'll" -- you know, "we'll pick the other one, and we're really going to have a situation where people get to pick, get to have the higher of a price that we have offered to pay or the price that's determined."

And that creates this odd structure, which is you might not get any deal done at all, because if people are holdouts, you don't get enough, and Roche conditions it so that nobody gets anything in the class against -- and -- and that's a difficult situation, because if the -- if the sort of back-end right -- if it's too back-end friendly and so the option to stay in the back end is so good that nobody tenders in the front, then you're not going to have a deal done at all.

But it really -- it was that dynamic in some ways of being -- of saying this affiliation agreement really works as it was intended, as it turns out -- I mean, to the extent it was intended to protect the minority, it had economic utility, is my perception, in the end; and it was precisely the ability to trade away those rights in exchange for economics that was critical in getting the deal finally done.

Can we know with a certainty that -- that Roche would not have agreed to a deal without knowing that the litigation went away and just dealing with the special committee? I'm not sure, but I do know that the special committee had been content to allow the plaintiffs to be the ones litigating over the affiliation agreement. And at that stage it would seem to make sense, if you're going to reach a deal, for it to involve both elements to get certainty for everyone and that that inducement and that encouragement and that promise of certainty is -- is -- was important to getting Roche to put that extra $2 on the table. I also think the dynamics that's created by the affiliation agreement encouraged them to stretch their original move up to 93.

So with that I'm saying I -- I don't doubt that there's a significant achievement here. I also think it's not a case where I have to examine this and pretend that the special committee wasn't important, contend that market dynamics weren't important, because the plaintiffs are not claiming anything like the kind of percentage they would get in a sole benefit case. If we only examine the move from 93 to 95 percent, you know, it's nearly a billion bucks. It's just big, big dollars here.

And so the plaintiffs aren't claiming 25, 30 percent or 20 or even 15 or 10 percent of that. They're looking for something in the 2 range.

I -- you know, I love the name that we have for our fee award, you know, because it seems like sort of divinely inspired, the fact that our fee award -- leading fee award case is called Sugarland. I mean, it just seems -- always seemed deliciously appropriate to me.

And this is certainly -- we're right -- you know, this is Sugar -- this is core Sugarland. I mean, this is much better than Disneyland, EPCOT Center, or anything like that. This is really Sugarland.

And so you've got to weigh all the factors, the effort, the result obtained, the difficulty of the litigation, you know. When you put it altogether, you really come down to a situation, is this a fitting and proportionate fee in light of the fact that the plaintiffs had to do what they had to do, that they don't get compensated in other cases, in light of the effort that they put in, and in light of the difficulty of the issues.

And on balance, I -- I have to say I struggled -- I was struggling coming in with this, because I've -- I've not hesitated to award very big fees, nor have I hesitated, frankly, to trim fees in cases. But this one, what I was worried about was some of the incentive effects.

Coming out of the argument and what I was toying with -- I'll just be very candid -- was whether there was some modest -- and I mean genuinely -- it wouldn't be modest to me. I mean, it would be a sizable increase to my personal net wealth the kind of modification I was talking about. I mean, it might quintuple my personal net wealth or something like that, but it would be a modest reduction of what was sought here, given the magnitude of the fee. I was toying with that.

But after considering, you know, the back and forth with -- with counsel, I'm -- and the important factor of this California -- these other suits, I'm not going to modify the fee. And let me explain why I believe the fee is fair and reasonable in light of what I've heard today and the record.

One, the benefit is large. And I've already described, I believe, that the plaintiffs deserve substantial credit, particularly for the last move from 93 to 95; and I believe they also deserve some credit for the move from 86 to 93. And that was big, big bucks.

They're not claiming a third of that or 25 percent of that. They're claiming something like 2.26 percent of the -- just the 93 to 95, far smaller if you consider them to have contributed to the 86 to 93 move.

I also have been fairly consistent in

my view of that you shouldn't penalize folks simply because they obtained big success, which is -- I -- I know that some -- they're very well-reasoned and -- and people I very much respect who believe in something -- who believe in declining percentages, even in sole benefit cases, such that if you -- if you got 5 -- if you got $2 billion, you shouldn't get a third of that because it overly rewards the lawyers and that it should start to tier down at some percentage.

I'm not sure exactly why that is, because if you -- if you only get 200,000 and you go on a percentage basis, you often get less -- you know, I've seen situations where people get far less than a lodestar. I've had cases where people get $75 an hour or something like that because the amount of effort they had to put in once they've undertaken the fiduciary representation of the class to put it in and get it done, because the economic stakes are small, when they even take a third of it, it's just -- frankly, it's discount work.

And I think if we wish to actually encourage vigorous representation in big cases and people not to just lay down and settle, then we've got to reward effort. And the fact that you took on a big case and succeed, I don't think we should penalize people for that.

So I -- I try to be consistent in that. And here, I think you do get -- I mean, Genentech and Roche, they have big market capitalization. It's a big case. I have no doubt that the defense lawyers have gotten paid hefty sums, and I have every confidence that the bankers took advantage in the marketplace of the size of the deal to -- to get paid handsomely. And so I don't think we should just single lawyers on the plaintiffs' side and say no; they're the only ones in the world who don't get to benefit when there are huge numbers at stake, because, as I said, you have to be consistent and because there are a lot of cases that don't involve big market cap. And in those circumstances, you know, the lawyers often have to sacrifice. Consistency means that you should -- you should not penalize here. And the percentage that's being asked for, the benefit from that perspective, is not -- is not -- is not in any way unreasonable.

What is a bit eyebrow-raising, obviously, is the hourly rate. I -- I've been candid in the past in saying this, and I don't hesitate to say it again. The so-called lodestars that I often get in cases like this are ones I just don't have much confidence that they're market tested. Not saying that the lawyers involved aren't very good; but many times you get these situations, they're not averments that people regularly pay these hourly rates. So the lodestar starts out in my mind probably being a bit plush. I mean, sometimes a rate that's just -- but we get to a point where -- and the plaintiffs acknowledge -- this would be as high a multiple of lodestar or an hourly rate as this Court has awarded. I have every confidence that the plaintiffs' lawyers searched high and low to find something higher than this.

So I get to be, you know -- I guess it could be -- I could go home and say to my wife tonight, "Honey, I gave the highest multiple to a lodestar ever. Tell the kids. Let's go out to dinner."

(Laughter)

THE COURT: "Daddy did this."

But that was weighing on my mind. But I think I have to -- and that's where the California thing helps me a bit, which is I don't have any, obviously, precision to that. But my sense is if there are that -- there are lawsuits, that there are at least hundreds and maybe in the low thousands of hours or something where people are also going to share in the fee.

And so that, obviously, brings this down -- still brings it down to a very hefty fee. I mean, say -- I mean, I was toying with do I bring it down to 5,000. I mean, shouldn't I just be a bit conservative and stick at 5,000 an hour or 4,000. But I don't think there's a magic number. And in a situation like this where the benefit is so large, I -- I'm not going to quibble about it, because the risk premium is important here. There is uncompensated work that gets done. There are cases where people take on risk and they don't get anything for it.

And so in a situation where the benefit is sizable to the class and where the defendants had every incentive at this point -- and this is an important factor, which is the Court -- one of the reasons why the Court has to look at certain types of settlements closely, even though there's a negotiated fee, is because the plaintiffs' incentive is not as pure perhaps as it should be to keep the fee down. They may be repeat players in some sort of dynamic. It may be that, really, the benefits of the settlement are fairly insubstantial to the class and the defendants' cost to defend what would be a fairly minor claim are fairly high.

And so the defendants' best route is to try to -- they have to do what they have to do to do what's best for their client, come up with a cosmetic settlement that can be presented to a court and pass muster, get the defendants a global release, not expend things, and that the best way to do that is to be -- signal in some way -- and everybody says they don't do it, but -- and I'm not saying they do; but we can't know for sure because we're not there -- signal that they'll be a little bit more generous on the fee. When you get to that point where it seems to be that the lawyer is getting more out of it than the class, you get uncomfortable.

Here, the incentives, once this deal was pretty -- was done, you know, I mean, it was done. I mean, the plaintiffs weren't going to be able to go back on this. They had -- they had settled at 95. The special committee had. There was no real advantage to Roche of overpaying, I think, on the fee.

One of the dynamics, obviously, is to get all the litigation settled. And I don't know -- I mean, epistemologically I'd have to think about how that all went down; but I don't really need to. I'm confident in everybody's integrity. But that's a real factor if you're trying to deal with all the cases.

But Roche didn't -- it wasn't the class' money at that point. And I'm confident Roche could -- probably got approached with even higher numbers than this and bargained down to what it could live with. Is it perfect? Is it what -- you know, I could second-guess it and say, you know, they should have got 20, 15, 17.

The key for me is, it's in a range of reasonableness where I don't have any problem looking at myself in the mirror and saying this is a respectable fee to -- for this Court to award in a case like this. Could it have been lower? Sure. Could it be much, much higher? I don't think it could be much, much higher. I mean, I do think this is at the high end of the range. But plaintiffs' lawyers are entitled to bargain in good faith with their friends on the other side. And when the other side really doesn't have any kind of impermissible motive at that point not to bargain hard, that should be and has been given weight by our Court.

So for all those reasons, which I would say have been set forth fulsomely -- and I say that to encourage people not to use "fulsome" in a praiseworthy way, which is I'm not praising what I said by saying I was -- I set them forth in a fulsome way. I'm saying I was long-winded, and the plaintiffs are just anxious to hand me the final order so they can have 24.5 inserted into it before I change my mind or another objector runs through the door and says "Stop these proceedings, Your Honor. I have new information"; I will stop.

But class certification is granted. The settlement is approved, and the fee is approved as -- as requested. And -- and I -- if Mr. Grant or someone or Ms. Tikellis has an updated order, I will enter it.

MR. GRANT: (Handing document)

THE COURT: Oh, and I should mention. The plaintiffs were willing, graciously, to include the $93,000 of expenses in the 24,500,000. So for anyone teetering on the edge and wondering if that factor is important in the balance, it additionally supports my award.

We're at the -- we're the 9th of July? It's always good for the judge to signal that he knows what day it is when he's doing something of this magnitude.

So thank you, everyone. It's a beautiful summer day. Enjoy the rest of it.

MR. GRANT: Thank you, Your Honor.

MS. TIKELLIS: Thank you, Your Honor.

(Court adjourned at 11:06 a.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 4 through 57 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, this 10th day of July 2009.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GOOGLE INC. CLASS C SHAREHOLDER LITIGATION : Consolidated C.A. No. 7469-CS

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Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, October 28, 2013
10:01 a.m.

\- - -

BEFORE: HON. LEO E. STRINE, JR., Chancellor.

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SETTLEMENT HEARING and RULINGS OF THE COURT

\- - -

APPEARANCES:

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MR. GOLDBERG: Good morning, Your Honor.

THE COURT: Good morning, everyone.

MR. GOLDBERG: Your Honor, Robert Goldberg on behalf of the plaintiffs in this matter.

I don't know if you want to go through introductions. We got an awful lot of people here.

THE COURT: It's -- it's really your choice.

MR. LAFFERTY: Your Honor, we'll reserve the introductions until we see if I have to speak at all, and then we'll go from there. We'll just get started.

MR. GOLDBERG: On behalf of plaintiffs, Your Honor, we have colead counsel at the table here, Jeffrey Block of the law firm of Block & Leviton; Laurence Paskowitz of The Paskowitz Law Firm; Nicholas Porritt of the Levi & Korsinsky law firm. I also have with me today Whitney Street, who is of the Block & Leviton firm.

Mr. Block has been admitted pro hac vice and will be making the presentation on behalf of plaintiffs, Your Honor.

MR. BLOCK: Thank you, Your Honor.

Good morning, Your Honor. Jeffrey Block on behalf of the plaintiffs from the Block & Leviton firm.

Your Honor, we appreciate your sending us the e-mail over the weekend so we can address your concerns. And I'll start off by hopefully clearly answering the questions you posed, and then I will give you the explanations and the reasons behind what we've achieved here.

I think your first question is asking whether Mr. Page and Mr. Brin will share in any potential payment. And the answer to that is yes, they will.

I think the second question you asked is: What is the math? The math is that the current Class A shareholders have 83 percent of the economic ownership of Google. Page and Brin have approximately 15 percent. And the other Class B shareholders, like Mr. Schmidt, Mr. Doerr, et cetera, have 2 percent.

So if there's any payout that is made under the payment ladder, everybody would share in it pro rata. So 83 percent would go to the As; 15 percent, assuming that's what they still own, would go to Page and Brin; 2 percent would go to the others.

THE COURT: Wait a minute. Go through

that again.

MR. BLOCK: Certainly, Your Honor.

THE COURT: There -- so -- so the founders, with their high-vote stock, they're going to get C shares, too?

MR. BLOCK: Exactly, Your Honor. The way -- the way the recapitalization is going to work is every shareholder who has an A and a B share will be issued one Class C share. So for Mr. Page, for example, right now, according to the 2013 proxy, he owns 24.9 million Class B shares. He will, after the split, have 29. -- 24.9 million Bs, 24.9 million Cs. Same thing for Mr. Brin. He has 24.3. Same.

So if I'm a Class A shareholder and I have a hundred shares of A shares, after the split I'll have a hundred As and a hundred Cs. And that will be the same for every shareholder in the company.

If the company elects to -- if there is a payment made -- and I'm going to assume it's going to be the payment --

THE COURT: So what you're telling me here in terms of the settlement is that the founders who wish to retain voting control but not by continuing to purchase shares with an economic interest and preserving that voting control that way, they're not taking any haircut in this. For example, I mean, you know, I don't know why everyone -- I mean, maybe it's set up this way -- why everyone had to get the nonvoting stock, because nonvoting stock doesn't affect control. That's the whole point of this exercise.

So if the two founders wanted to continue to exercise -- you know, they wanted to have the -- swing the bat that Ruth used to swing -- you can see a bunch of them in the Orioles museum in Baltimore. And they're pretty formidable things. Because people forget his first team was actually the Baltimore Orioles. It was a minor league team at the time. But they could have done that without getting any of these shares; right?

MR. BLOCK: The -- well, yes, Your Honor, they could have gone into the market. But if --

THE COURT: No, no, no. Is there any reason why, when the company structured this, the founders' class had to get a dividend? Did you have to do a dividend on -- do you have to do a dividend on all, on all classes? I don't know.

MR. BLOCK: I don't know, Your Honor. I know the way that the plan was presented -- and perhaps this is more of a corporate question. But the way the plan was presented and approved by the board and to the stockholders was every single share was going to get the dividend.

THE COURT: Oh, I understand. This was a litigation about stopping the plan.

MR. BLOCK: Right. Right. And --

THE COURT: And so litigations about stopping plans can also have an effect on the shape of those plans.

MR. BLOCK: Yes.

THE COURT: And all I'm saying is, observationally, what you're telling me is there's actually no gain sharing in terms of sacrifice by the founders who wish to retain control. There's no economic sacrifice; and that all of the price support payments that anyone else and the class receives, the nonclass member founders who caused all this hoo-ha --

MR. BLOCK: Well --

THE COURT: I mean, it's a tribute to yourself. I mean I understand. These folks have had -- they're very creative people. They've had a huge beneficial effect on people who have invested in the company because the company has grown. You know, they created a verb.

MR. BLOCK: Uh-huh.

THE COURT: I mean, not everybody can create a verb. So I'm not being critical. I'm just trying to grasp this.

This wasn't a situation, for example -- it would be much easier for me to understand the very large benefit you're claiming for the settlement if the two founders --

MR. BLOCK: Okay.

THE COURT: -- even with their 17 percent ownership, if essentially they were funding 17 percent of the payment --

MR. BLOCK: Uh-huh.

THE COURT: -- to the class, you got to think that is a better -- that's a kind of bigger contribution than you're telling me that essentially this is all just a support payment to prop up something, that that's something that does not need to be propped up absent this plan going forward.

This plan was suggested by the founders because they wished to retain control over the company, while having an asymmetry between -- an even more profound potential asymmetry between their economic share of the firm and their voting control; right?

MR. BLOCK: Yes, Your Honor. I think I understand what you're saying. Let me see if I can explain it this way:

The reason why the founders, also the B shares, were also receiving C shares is because the effect of the split would be to have the share price in the market. So instead of having 270 million shares trading at a thousand dollars a share, you're now going to have $540 million a share -- and this would have been a dispute in litigation -- let's say each trading at 500.

So if you -- if the founders don't get the C shares, their economic ownership of the company is now cut in half. So that's why they also received the C shares, because by -- by creating --

THE COURT: They just had to take it.

MR. BLOCK: I'm sorry, Your Honor?

THE COURT: I'm not sure every member of the class would look at it that way, was that this was a measure of sacrifice on their behalf, that they would have to receive more.

MR. BLOCK: I'm not saying --

THE COURT: Is the payout to the class in cash?

MR. BLOCK: The payout is going to be the election --

THE COURT: Is the true-up in cash or in shares?

MR. BLOCK: It's going to be at the election of the board at the time, either cash or shares, and everybody in that regard will be treated the same.

What --

THE COURT: And why would they -- do they have to, as a matter of corporate law, even though it's a litigation settlement?

MR. BLOCK: Do they have to make the election?

THE COURT: Do the founders -- would it, as a matter of law, be the case that in a settlement of litigation, was there a reason why the two founders needed to be getting a true-up when they suggest that there will be no discount, when, again, you know, you could potentially -- there are limits on the true-up. If the founders were excluded from the -- from the potential of receiving the true-up, presumably the limits could be expanded a little bit to the benefit of the members of the actual class. Was that explored in the negotiation of this?

MR. BLOCK: Absolutely it was, Your Honor.

THE COURT: And it was objected by the defendants.

MR. BLOCK: Yes, Your Honor.

THE COURT: Because the two founders wished to also get the true-up for themselves.

MR. BLOCK: Correct, Your Honor. And when we tried to weigh those benefits versus what the founders received in some of the payout versus what we think we achieved for the class, at the end of the day, we felt that the risk balanced so that the settlement was -- was valuable and worth it versus allowing, you know, a small payment to go to the founders. If --

THE COURT: Did you explore negotiating that the founders would pay the transaction costs that the company incurred for the pursuit of this initiative?

MR. BLOCK: No, we did not, Your Honor. Our understanding is that -- and perhaps defendants can address this better; but the legal fees incurred in this were, I believe, subject to payments by insurance companies, but I'm not sure on that.

THE COURT: I mean, that also -- that has effect on the future, as you know. Which, I mean -- unless I miss my guess, there's no insurance company in the world who does not take into account past claims experience in setting future rates.

MR. BLOCK: Well --

THE COURT: And I cannot imagine that this was on any front, including the prelitigation front, an inexpensive process in terms of advisor fees.

MR. BLOCK: We did not explore the amount of the fees, Your Honor. What we were focused on were the -- what we thought were the major harms in this deal, one which would be a potential trading discount, which we think will exist. And we wanted to mitigate that.

THE COURT: But the trading discount -- I mean, my only concern -- I mean, I'm not saying you haven't mitigated the trading discount risk.

And I'm just going to preview for the objectors. I get their point, but I think they somehow misunderstand how settlements work and they misunderstand class actions in terms of Delaware.

MR. BLOCK: Uh-huh.

THE COURT: Which is as I -- I get the point that -- the reality is -- the point is that this -- these kinds of things run with the shares.

MR. BLOCK: Uh-huh.

THE COURT: And that, for example, if you -- if there's a price support aspect to the C shares, then you're able to sell them to somebody and that -- at a higher price than you would otherwise because then when they receive the shares and there's the potential for the true-up that comes with that guarantee. So I get all that.

MR. BLOCK: Okay.

THE COURT: What I think is a more fundamentally important point in assessing what you've actually achieved is that if I'm sitting here as a stockholder right now at Google, I don't need any price support. All the stuff around price support is something that I presumably need, because you're going to give me something that I did not ask for and that at the polls -- because I understand your own point -- at the polls, when the disinterested electorate got to express their views, they overwhelmingly said, "I don't really need this. Turning my, you know, publicly traded share into two publicly traded shares, one of which is now nonvoting, might be nifty for the two founders; but my own view is they, frankly, have a lot of reasons to stay fairly interested in the business and I'm not really interested in going down this route."

Using their own voting power, they have a different view.

What you're telling me now, though, that the principal economic benefit of this is to provide price support for these C shares which nobody in the class actually wanted, or very few people; right?

MR. BLOCK: Yes. Yes.

THE COURT: And that rather than the founders funding any of it or even the transactional cost of negotiating this thing, it's essentially everybody treated pro rata, except it's not really pro rata, because the only ones who actually get something different than they already have out of it are the founders whose ability to retain voting control in the future is perpetuated. The public investors are in exactly the same place except that they get some price support that they don't need in the absence of the transaction.

MR. BLOCK: Let me -- let me address that point, Your Honor. I think what you're -- you're hitting the nail on the head of this question, is does this transaction perpetuate the founders' control. And I understand that --

THE COURT: Well, what I mean by "perpetuate" is --

MR. BLOCK: Yes.

THE COURT: -- there's a very obvious reason why the founders came with this.

MR. BLOCK: Uh-huh.

THE COURT: Which is Google is the type of company -- and most companies need to use a lot of equity for other sorts of things. They use it for acquisitions and they use it to provide incentives to their employees.

MR. BLOCK: Right.

THE COURT: If Google, in the normal

course of things, continues to do those things, then the pressure will be on the founders to either, frankly, step up to the plate and buy more actual normal equity in which the voting rights are aligned with the cash flows that are available to the public investors, the cash flow sharing --

MR. BLOCK: Uh-huh.

THE COURT: -- dividend rights -- so to step up and actually have more of their personal wealth locked up in Google -- or to do what they've done, which is to create a situation where Google can give out stock to people that has no voting rights, thereby allow the founders to continue to exercise voting control over Google. Not normal order of things.

And I think it was your argument -- your friend's and your argument in the beginning was -- this is kind of unusual because the only party -- what you're telling us, it's like, you know, if President Obama or President Bush at the end of his term or President Reagan said, "Really what's great for everybody is just that I stay. And what we need to do is to give out nonvoting," you know -- "we need to create a class of nonvoting citizens in which I can be assured that no changes in the demographics will threaten my control because it's just really good for the USA for me to stay in office. I can't really muster" -- you know, it's an odd kind of concept.

MR. BLOCK: It is, Your Honor. It's an odd concept. And when we, I guess, dug into the case, what we saw -- and let me give you the numbers which hopefully will bear it out. We don't think this plan, just the issuance of the nonvoting stock by themselves, really affects Page and Brin's ability to continue to have control in this company. They have 56 percent voting control together. They're going to have that voting control as long as they want it, whether this plan goes forward or not. They each -- with their stock ownership they each have about -- I think it's about 28 percent of the voting control.

So just -- just to put the numbers on it --

THE COURT: Wait a minute.

MR. BLOCK: -- right now --

THE COURT: Again, I assume smart people, including people smart as this, even have a good eye for islands -- I saw one of the founders' islands. I got to tool by it in a boat. It's kind of a cool place. It's right next to Richard Branson's island, although Richard Branson bought another island. So there's an island-buying competition going on. So these are very smart people.

MR. BLOCK: Yes.

THE COURT: There's a purpose for this plan.

MR. BLOCK: And that's what I'm getting to.

THE COURT: Well, no. The purpose is exactly what we're talking about. Now you're telling me that the plan has no purpose, in which case everybody could just rescind it and we could avoid all this stuff.

MR. BLOCK: No.

THE COURT: The purpose is -- they're at 56 now. If they wish to do things like take some of their wealth and diversify it, that puts at issue their voting control, or if the company, in order to do the two things that I just mentioned, which are normal things, make acquisitions using your stock as currency or, even probably more important in the case of a company like Google, provide equity-based incentives to the employees, 56 is a lot cooler than

46, but it's still -- there was something on their mind where there's a certain amount of dilution, particularly because, as the point was made in your papers -- and I get it -- that there are two founders. They're friends, but, you know, they're not -- nobody says that they have to be aligned forever.

MR. BLOCK: Right.

THE COURT: Even families like the Koch brothers have had disputes over the years. They get along, but they've had disputes. People and families have disputes, and I get all that.

MR. BLOCK: Uh-huh. Uh-huh.

THE COURT: But what I'm just trying to say, really, economically the only reason why you're trying to get support arrangements is because of a plan that was proposed by these founders in order to lengthen the period of time over which they could exercise voting control of this company. Right?

MR. BLOCK: Correct. Correct. And --

THE COURT: And there is no gain sharing by them in the sense of them stepping up even with transaction costs in the settlement; right?

MR. BLOCK: Right.

THE COURT: There is no gain sharing

by them, the settlement being structured in a way where they don't get the support payment.

MR. BLOCK: Correct.

If I may, Your Honor, what we --

THE COURT: How can I get a benefit to the class, then? Because I don't understand a benefit to a class -- I don't understand this as a derivative benefit and now I don't understand it as an economic benefit to the class, because you would say that the economic benefit to the class is in the price support; right?

MR. BLOCK: Yes.

THE COURT: The problem with that is typically you would say "Okay, let's look at the benefit to the class." And if what you're saying is the company is paying for it, then what we would look at is some differential from a group of people who have been defined outside of the class who would be providing a contribution so that you could say that the class, in comparison to the people being sued, is comparatively better off after the settlement --

MR. BLOCK: Uh-huh.

THE COURT: -- than they are before.

What I'm now understanding, which the

papers didn't really illuminate, is that as between a member of the class and the defendants who have been excluded from the class, there is no economic distinction.

MR. BLOCK: Under the payment plan, that is correct, Your Honor. What -- what we think is -- is the real issue here in terms of the benefit of this plan to Page and Brin is what may happen down the road, which is if they want to divest -- if they want to achieve liquidity, if they want to divest nonvoting stock but still continue --

THE COURT: I understand that; but you have a pretty sizable fee request which is built, in large measure, not on the increases in the limitations in the future on their ability to make transfers, for example, between themselves.

MR. BLOCK: Uh-huh.

THE COURT: The ability to waive the -- the --

MR. BLOCK: TRA.

THE COURT: -- the TRA, which, look, I understand now you've ratched up with that committee and essentially unanimous independent director approval. I get that.

MR. BLOCK: Uh-huh. Uh-huh.

THE COURT: But an expert who's done well in this Court, you know, has wielded around figures of a billion.

MR. BLOCK: Uh-huh.

THE COURT: But that's -- there's pro rata treatment for the two founders in that; right?

MR. BLOCK: Right. What --

THE COURT: And so all I'm saying is, observationally, that is a whole transfer payment that does not have to exist if this plan simply goes away. And because the two founders are treated pro rata and Mr. Doerr is treated pro rata, they might as well just be defined as members of the class for the purposes of that economic benefit.

MR. BLOCK: Well, I think --

THE COURT: And, in fact, that one -- can argue is actually -- I would think most economists would say it's pretty observationally true that if the only point of an expenditure like that is to actually avoid economic harm that you're creating by your own actions, plus you're going to rack up tremendous transaction costs because there will be advisor fees, there will be other things to determine whether it's stock or cash, there will be, then, SEC communications about the implications to the receiving people about the consequences of receiving stock or cash, that I think most people from Chicago, even those who just eat Chicago-style hot dogs or those who were at the school at Hyde Park, would say, "Just stop where you are. Do not do that which is going to cause you to just to incur costs in a year." If the only reason you're going to incur, make a billion-dollar payout, have to spend millions of dollars on lawyers, have to have people have tax consequences when they wouldn't otherwise -- because that's the other thing. Is some of this potentially taxable?

MR. BLOCK: That's a good question, Your Honor. I --

THE COURT: Well, it is kind of a good question because as a investor, I'm not sure I want a true-up payment when I already have one -- I have one voting share right now of Google. You've turned it into two securities. You're now telling me that there's going to be some sort of discount true-up in a year. I'm going to get mailed either a piece of cash or a stock dividend. I'm going to have to figure out the tax consequences of that, which may already be a headache for me --

MR. BLOCK: I --

THE COURT: -- all over this? when the only reason we're doing this is because the two founders want to perpetuate their voting control?

MR. BLOCK: Well, I understand that, Your Honor. And, obviously, but for -- if Your Honor ruled in our favor at trial, this plan goes forward because it was approved by the board, shareholders voted to approve it. Obviously that's why we filed the lawsuit to stop it.

And in litigating the case, we identified -- what we didn't identify was a -- a direct concrete valuable benefit that we could quantify today that would go to the founders based on what we see the numbers are. Right now -- if I can -- if I can just give you the numbers, maybe you'll understand where we are coming from.

Right now Page and Brin have 493 million votes based on their shares. The Class A shareholders have 270 million votes based on their shares. At the time of the transaction, Google would have to issue 220 million Class A shares or about $125 billion worth of stock before the Class A would ever get to be equal to Page and Brin in terms of voting rights. Today it's $220 billion.

The company on average issues around 3 1/2 million shares for employee compensation. So at the old prices it would take forever for --

THE COURT: And for the plan -- if one founder sold to the other their high-vote shares, were there any restrictions?

MR. BLOCK: Selling, no. So, for example, Mr. Page could just buy Mr. Brin's voting shares with cash and they stay as the supervoting shares. So there's no restrictions.

So we think what this plan obviously did is it now creates this currency for Page and Brin to sell nonvoting shares, get this liquidity but keep their voting control, and it also allowed for this founder-to-founder transfer. So if --

THE COURT: No. But what I'm saying is before the plan --

MR. BLOCK: Right.

THE COURT: -- a founder who wished to sell to his friend who said, you know, "My interest in the business, I'm kind of," you know -- "I've moved on to other things" --

MR. BLOCK: Uh-huh.

THE COURT: -- could sell his shares to his friend and fellow founder, and that friend and fellow founder could continue, you know, to reap the voting control.

MR. BLOCK: Correct, Your Honor. Under the charter, if Mr. Page sold to Mr. Brin or Mr. Brin sold to Mr. Page, those shares continued to stay as supervoting shares.

THE COURT: Right. It's only if they sell to someone else.

MR. BLOCK: Exactly. Exactly. So, you know, they're -- they've had two 10b5-1 plans. They sold, I think it was about 20 percent of their holdings. So obviously when they sell, their voting power goes down. This plan, we think that the wealth transfer potential here is if in the future they want to sell their nonvoting stock or they want to do this founder-to-founder transfer, we think the real effect on their control would be if one founder decided to leave and the other founder said, "I'm going to be left with what would work out to be 37 percent control. I no longer will have the control. We need to do something about that."

And that's why we think that the TRA modifications are pretty critical here and we think -- we think the special committee recognized these potential liquidity benefits. They took steps to try to reign them in, but we don't think they went far enough because, as we pointed out in the papers, you know, you've got approval by a majority of the board prior to the settlement. With the settlement, it is now, as Your Honor knows, the special committee, notice to the shareholders, no objection to an entire fairness review, which in the future --

THE COURT: Yeah, I'm trying to figure out what -- you know, whichever of my fellow judges I victimize by assigning that litigation so that he or she has to think about what does it mean for the entire fairness standard to apply in that circumstance.

MR. BLOCK: Well, the intent --

THE COURT: Because I want to hear from the defendants about that, which is does that mean that despite the fact that when it's approved in the future, there will be a special committee with advisors?

MR. BLOCK: Yes.

THE COURT: There will be unanimous approval by the independent directors.

MR. BLOCK: Yes.

THE COURT: That irrespective of any cause law which would give any kind of consequence to that in relieving the defendants of the burden of actually proving substantive fairness, the defendants would bear that and the Court would put aside procedure and the defendants would have to essentially prove the -- to the Court in an evidentiary hearing that what was done was substantively fair.

MR. BLOCK: That was our intent behind that provision. So if there is this potential wealth transfer down the road, we felt that it really -- that is where you get the wealth transfer to Page and Brin. And that's where they potentially would --

THE COURT: So there's no nonlitigation option with a procedural protection to even shift the burden of persuasion on fairness.

MR. BLOCK: Well, I don't think at the time we negotiated the settlement we had the benefit of Your Honor's ruling, that if it's --

THE COURT: It's not really -- I mean, you don't need -- I assume you're going to go to a case involving initials or something like that.

MR. BLOCK: Yes.

THE COURT: But it's not really even a question of whether that's the case. If you think about Kahn v Lynch, if you think about just what's in the agreement itself --

MR. BLOCK: Uh-huh.

THE COURT: -- traditionally if you had a diligent and well-motivated special committee with qualified advisors who was given the ability to say no --

MR. BLOCK: Uh-huh.

THE COURT: -- and they chose to say yes, that has burden-shifting effect, which rather than the -- the defendants having to prove that the thing is fair, the plaintiffs have the burden of persuasion on fairness.

MR. BLOCK: Right.

THE COURT: I'm trying to get a sense, because I think it's important, when you put in place in a settlement like that, whether people understand what they mean.

As I understand what folks are sort of saying here is, you know, the old-time religion entire fairness standard applies, which means the defendants have to prove entire fairness. If what you mean is something that you don't -- that you actually don't each understand what you mean, I suppose there's also a kind of thing that's not sort of answered by the text itself, which is what if the board puts it up to a disinterested vote of the stockholders other than the founders and, upon full information, gets those? I just would like to know, you know, for the -- on that one --

MR. BLOCK: Right.

THE COURT: -- what it is that the parties actually mean, because what you're saying -- you know, I mean, we're getting into alternative entity land --

MR. BLOCK: Uh-huh.

THE COURT: -- which --

MR. BLOCK: What -- what we, on our side, meant was that in that scenario, where you had a waiver of the TRA, you went through the whole process, that the defendants, the company, or the board, would still have the burden. We did not at that time contemplate whether there would be a further mechanism allowed for a vote of the disinterested --

disinterested shareholders based on full disclosure. So that -- that never came up in the negotiations, I will -- I will say that.

But, again, that's why we think the TRA modifications -- because that's where we think you get --

THE COURT: But it was understood that the defendants would have the burden on --

MR. LAFFERTY: Yes, Your Honor.

MR. BLOCK: Yes.

THE COURT: What about for a stockholder vote?

MR. LAFFERTY: We did not discuss that issue, and, you know, that -- that's not something that's been the subject of any discussion between the parties, nor have I discussed it even with my colleagues.

THE COURT: Should it be?

MR. LAFFERTY: I -- I mean ... look, Your Honor, I think the understanding was that the defendants were going to bear the burden of fairness in this setting. But we really did not get to the level of talking about what we would do, because I honestly don't think anyone thought it was a likely option that was going to be used.

THE COURT: Okay. I'm just -- you know, I think it's incumbent upon me, in terms of discharging my obligations towards this Court and its members, particularly because I'm not sure I'd be the victim.

MR. LAFFERTY: Understood.

THE COURT: I might victimize myself with the case, but in a weak moment I might victimize someone else to actually reflect -- to have inquired into this.

MR. LAFFERTY: Understood.

MR. BLOCK: If I can go back for a moment, Your Honor, to the -- to the benefits. You talked about the fee and what benefits would support that. I think even if you wanted to just completely set aside the support payment, I think what Mr. Clarke explains, which would be just the trading benefits, when people who are getting C shares that obviously the A shareholders do not want. They voted against it. It's no question about that --

THE COURT: But, see, again, you're missing my point.

MR. BLOCK: Okay.

THE COURT: That economic benefit is only a benefit --

MR. BLOCK: Right.

THE COURT: -- in the sense that people who do not want something --

MR. BLOCK: Right.

THE COURT: -- are now receiving on pro rata terms with the people who proposed it and who are not -- who are defined out of the class. The same economic support is being provided to the founders; right?

MR. BLOCK: If they sell, yes, that is correct.

THE COURT: If they sell or not.

MR. BLOCK: Right.

THE COURT: People -- you know, rich people -- one of the things that they do is they have assets against which they can borrow, they can do all kinds of things --

MR. BLOCK: Right.

THE COURT: -- and hire those valuations of those assets. You know, that tends to be a good thing for everybody; right?

MR. BLOCK: Yes. I mean, I don't

think there would be a way to structure the support payment to eliminate their ability to sell C shares without getting the potential support, if they sell in the market. I understand the point on the actual payment by the company. But as we said, we think just the effect of the --

THE COURT: Oh, no. There's certainly ways to structure things in litigation settlements unless I hear differently, for example, that they have a lockup for a year of their C, that there won't be any payment to them because the payment is a litigation settlement. Frankly, I think sometimes there are tax benefits to getting a payment. I've heard in past cases people come to me with structures and say, "We want to structure them this way because if we structure the payment" --

MR. BLOCK: Uh-huh.

THE COURT: -- "as litigation damages, that has some favorable" --

MR. BLOCK: Uh-huh.

THE COURT: -- "tax treatment compared to something that's structured as a dividend."

MR. BLOCK: Uh-huh.

THE COURT: So I'm just saying I don't

believe it's a distinct -- I mean, their pro rata on the price support is their pro rata on the payout; right?

MR. BLOCK: Yes.

THE COURT: And they're not locked up any more than anybody else; right?

MR. BLOCK: They are not locked up. Again, Your Honor, that was a point of the negotiations. And at the end, obviously we balanced our risk of prevailing in front of Your Honor and -- and winning the case and getting our injunction versus what we thought those risks were versus what we thought we achieved for the shareholders, balanced against letting the founders share in this -- this potential benefit, which, just to put it in context, if the price support payment is paid at the levels Clarke estimates, it would be a little over a hundred thousand shares of C stock or A stock to each of the two founders.

And when we looked at that, we looked at what we got -- and yes, people don't want this; but absent -- if we had lost, it goes through without any of these protections, without anything else. Hopefully, if we had won --

THE COURT: I'm not -- just, again --

MR. BLOCK: Yes.

THE COURT: -- it's not a question -- this is very helpful to me. I'm just trying to understand --

MR. BLOCK: Right.

THE COURT: -- you know, this is a very different -- there is essentially no economic gain to the class that's not shared in by the founders and Mr. Doerr; right?

MR. BLOCK: That is correct. And we -- we struggled with, you know, this latter point of excluding Page and Brin from sharing in this, notwithstanding the negotiating points, along with a thought that do we want to have their economic interest completely aligned with everybody else with all the C shareholders so that, you know, in the first year, if they're not sharing in that, does that create now a disincentive or different interest between their interest and the class?

And that's one of the factors that we weighed, and we did go round and round on our side on that. And we felt, at the end of the day, the small amount that they would share would be offset by probably the benefit of having their interest completely aligned with everybody else because, I mean, they have done well as a company. And since Mr. Page has taken over as CEO, the stock's done well.

So when we looked at that -- and we did weigh it and we did balance it, and we ultimately decided that what we got was better off for the class and will do more to protect the A shareholders than if we had lost at trial, because if we had lost at trial, we'd have none of these protections and none of these what we think are benefits.

And that's why we did that balancing act, and that's why we weighed it, and that's why we came down on the side that we did. So that's where we ended up.

And, again, as far as the benefits, I mean, I think just the trading benefits. I understand your point on the circularity of the support payment.

THE COURT: And did you try to get them to pay the advisor cost, or was the argument that it was just absorbed by -- by D and O insurance?

MR. BLOCK: Well, I think -- I think the advisor costs in terms of --

THE COURT: And I'm trying to figure

out how D and O insurance paid for the committee process or the financial advisors.

MR. BLOCK: I'm sorry. I must have misspoke, Your Honor. I wasn't suggesting D and O was paying for those costs.

THE COURT: But that was fairly considerable; right? Bankers are -- I mean, unless something has changed, bankers tend to be paid more than members of our profession. I will say I'm unapologetic --

MR. BLOCK: Uh-huh.

THE COURT: -- ally a fan of our profession. So I don't think that's fair in terms of the contributions people provide to the process, but the market tends to have a different perspective.

MR. BLOCK: I do know, Your Honor -- I feel a little constrained by giving out the numbers of the bankers, what they got here. But it was not very high. It was -- it was -- I was surprised it was pretty much on the low side.

THE COURT: Low side being millions?

MR. BLOCK: Under a couple million.

THE COURT: Under a couple million?

MR. BLOCK: Yes. As I recall.

THE COURT: Okay.

MR. BLOCK: Yes.

THE COURT: Yeah, I won't mention any bankers' names because they --

MR. BLOCK: I won't do that. I -- we don't know what the costs were to pay the attorneys advising the special committee or outside counsel to the company. That I don't know.

THE COURT: No. I mean, you assume -- we would not expect the D and O insurer to pay for that process.

MR. BLOCK: Right. And so I'm sure what you will hear from the company they view this as a valid corporate purpose and it perpetuates, you know, the corporate goal of the corporate governance structure which they would have paraded all the directors in here who would have testified and, you know, that we disagree with them.

THE COURT: Oh, no. Look, I get it.

MR. BLOCK: Yeah.

THE COURT: I get it. I think we all get the concept.

MR. BLOCK: Right.

THE COURT: I think what you would say

is if everybody else in society gets the concept, then there's very little danger that these folks are going to be thrown out. If they reach a different stage of founderdom --

MR. BLOCK: Uh-huh.

THE COURT: -- and people do reach different stages of founderdom where it's less productive --

MR. BLOCK: Uh-huh.

THE COURT: -- cousins and retainers and other people start coming on the payroll or wine sellers get, you know, compensation packages, start getting weird -- I'm not saying this is happening here --

MR. BLOCK: Right.

THE COURT: -- that that's when the stockholders would --

MR. BLOCK: Yes.

THE COURT: -- might take a different view and might rightly take a different view. If it's these two really smart committed folks who, to their credit, I believe, right, they've already promised if they sell the company, they're not taking a premium; right?

MR. BLOCK: Correct.

THE COURT: They've already done some things. You know, they're the kind of -- look, you want -- if you're an investor and you can coinvest it along with very smart founders or private equity and then in the event of a liquidity event, you know, have a contractual promise to pro rata treatment that's honored, that's really, frankly, a very good thing as an investor. And I think sometimes people forget that.

MR. BLOCK: Yes.

THE COURT: So I'm not being critical of anyone here. I'm just saying it's a little odd to create a process --

MR. BLOCK: Yes.

THE COURT: -- where what I think you're saying on behalf of the class is "We kind of get that. And if these two guys are actually -- why would we want to throw them out of control unless they start doing different things? And, frankly, if they start doing different kind of vanity things or -- it's 25 years down the line and they're really not -- you know, there's a new generation and they're kind of -- you know, they're talking about Katy Perry and people look at Katy Perry as one of the sister acts who were in the movies with Bing Crosby and saying "You guys might have been cool a long time ago," but nobody has heard of these people -- you know, Katy Perry, what are you listening to? And, you know, Bruno Mars, "Come on, we want something new" --

MR. BLOCK: Right. Right.

THE COURT: -- then here at that point Rosemary Clooney might still be in command because of this transaction.

MR. BLOCK: That's very true, Your Honor. And that's -- I don't want to repeat what we put in the papers, but I will to some degree. And that's why what Professor Yadav, I think, put his finger on, which is having both of them in equal control kind of is that balance you're talking about, buying the wine sellers or, you know, spending hundred dollars of millions --

THE COURT: Because they're a check on each other.

MR. BLOCK: Exactly right. And if you get to the future and one wants to leave and the other one says, "Hey, I'll just stay in control," that's where you start getting into those horizontal agency costs.

And that's why we wanted a strong TRA with the burden on the defendants so that we don't get into that. And maybe if that happens in the future, the tradeoff is "Okay, you'll have control, but we want to have the outside shareholders now start electing a majority of the board," which would be the check. I mean, I don't know. That's obviously for the future, but that's what we were trying to get at.

And one of the arguments you would have heard is any claim that there's a waiver of the TRA is premature, it hasn't happened. We don't know if it's ever going to happen. That's what we're trying to address, exactly what Your Honor said. That's what we foresaw, and that's one of the things we wanted to do in the settlement.

THE COURT: Thank you. Shall we hear from the objector next, maybe? And then if the defendants -- you want to object to the objectors' point?

MR. BLOCK: Thank you, Your Honor.

MR. PENTZ: Thank you, Your Honor. John Pentz on behalf of Howard Essner and Mike MacMurdy and Ms. Rosenzweig.

In light of your comments about our objection, I'd like to pretty much take up where you just left off with your questioning of Mr. Block.

And I think that your questions really put your finger on the fundamental circularity of this settlement whereby because the founders are not being asked to subsidize any amount of this true-up payment, there's really no net economic gain for the class here.

The true-up payment does help to ameliorate, to a certain extent, the damage the class is going to suffer by the creation of these C shares and the dilution of the value of their A shares; but the net costs of this entire process are going to leave the company with less equity, which is, in fact, the thing that they use to acquire companies and incentivize employees. That's the whole point of the C shares. And -- so this settlement is going to leave the company and the A Class A shareholders worse off. And that was the fundamental point of our -- our objection.

I think if you look at --

THE COURT: Well, in terms of your objection, though, your clients did not step up and try to block this transaction. So to the extent that the world was just one in which your clients did whatever they did, the transaction would be occurring.

MR. PENTZ: That's correct, yes.

THE COURT: Wouldn't you concede -- I think your objection does concede -- that on the corporate governance side of this, the plaintiffs have achieved some substantial tightening which is going to make it much more difficult in the future for these folks to do anything similar and relax these protections; right?

MR. PENTZ: Yes, yes.

THE COURT: I think what you're just saying the point I engaged in with Mr. Block is, "Wait a minute. Don't tell us that this is like a payment to the class that's funded by the two founders, or even, like, it's a payment to the -- that 17 percent of the payment to the class is funded by the founder and the rest by Google. There's essentially no distinction between the class members and the founders in this; and, therefore, we got to look at this really as a corporate governance settlement and not a damage case like a Southern Peru or an AIG or AT&T Wireless kind of case.

MR. PENTZ: Yes, exactly. That's exactly it. There's no shifting of -- of value between two different classes of shareholders, as you might find in certain derivative settlements.

THE COURT: Well, and certainly those, usually it's between the interested parties who have been the fiduciary who propose certain action who then have to engage, either not share in the benefits and, therefore, if you are a -- you know, would even say these fellows necessarily had to go out-of-pocket; but, therefore, because of their ownership of Google, there would be a subsidy to the class of some percent -- you know, 17 percent --

MR. PENTZ: Right.

THE COURT: -- could be a sizable contribution. What you're saying is their percentage contribution is nothing.

MR. PENTZ: Right. That contribution -- the consideration for that contribution would be the benefits they're going to get from these C shares --

THE COURT: Right.

MR. PENTZ: -- to preserve their control of the company and not dilute that in any way by issuing C shares. So I agree with your analysis.

THE COURT: The point of your -- you're not saying these folks shouldn't be rewarded; but the idea of awarding them something like 3 1/2 times lodestar is excess when you consider that economic factor.

MR. PENTZ: Well, yeah. Moving to attorneys' fees, yes, our point is that we don't believe this is really a case that's appropriate for a percentage-of-the-fund fee award.

THE COURT: I get what you're saying. I don't need you to repeat the --

MR. PENTZ: Right.

THE COURT: -- I think I get your point and the basis for it.

MR. PENTZ: In looking at -- so then you move to, you know, what's the lodestar and what kind of multiplier has been earned here. And I think if you look -- one thing that jumped out at me -- two things, really, is the average hourly rate in this case is $608 an hour, which is very high for a class action where you usually find, say, 60 percent or more of the hours generated by associates and, therefore, you'd have an average hourly rate that's less than

500.

Here we have a very partner-heavy lodestar. And in my quick calculations based on the affidavits, about --

THE COURT: But look at the team you're having to tangle with here.

MR. PENTZ: True. Well, that may be, but 75 --

THE COURT: I was scared to even walk in the room.

(Laughter)

MR. PENTZ: In any event, my calculations come with about 7500 partner hours for the class counsel here, which is well over 50 percent and at rates up to $900 an hour. I guess that's for Mr. Porritt of Levi & Korsinsky. Mr. Paskowitz had 1800 hours, which just -- you know, that jumped out at me. That's an associate billing target. That's full-time work, 40 hours a week for a year. It may be that Mr. Paskowitz worked on nothing else for a year, but I'd question whether all of those hours were necessary.

In going through the declaration of class counsel, in terms of the tasks that were performed, you know, there are things that might require a partner, consulting with the client, discussions with Google's attorneys, certainly the discovery requests, drafting the complaint --

THE COURT: I mean, some of us have worked at places where, you know, 40 hours is like a day and a half.

MR. PENTZ: We should all be that lucky.

THE COURT: Where you say, like, you can say you worked 10 years someplace but you were actually there only five chronological years, but it --

MR. PENTZ: Yeah, right.

THE COURT: -- actually grew. And so --

MR. PENTZ: Well, yeah. But that's not usually a partner's work schedule, Your Honor. It's usually an associate.

THE COURT: Well ...

MR. PENTZ: In any event, I think that should be taken into consideration, the high number of hours billed by partners, the high rates. And we're not arguing against a reasonable multiplier. But what we think in this case, maybe, you know, 1.5 or something less than 2, would be more appropriate. I don't -- I would suggest that if Your Honor is going to use lodestar as the basis for a fee here, you may want a little more detail than provided in these summary affidavits.

THE COURT: Yeah. I'm -- I'm going to probably try to muddle through without that.

MR. PENTZ: Okay. Then I would just say that the -- the record --

THE COURT: But I get your point, yeah.

MR. PENTZ: The evidence in the record --

THE COURT: We do apply a sort of gumption factor to these lodestars, realizing that as I think our friends in the plaintiffs' bar recognize, that they're not quite the market-tested lodestars that some other people in the room necessarily have.

MR. PENTZ: Well, that pretty much concludes my points about --

THE COURT: Thank you.

MR. PENTZ: -- about the value of the fees.

Thank you.

THE COURT: Would the defendants like to speak at all or --

MR. LAFFERTY: Your Honor, I guess I would like to add a few things. And I guess I will briefly introduce everybody on our side.

THE COURT: Sure.

MR. LAFFERTY: I think Your Honor knows everyone in the courtroom. Boris Feldman from Wilson Sonsini, Bill Barry from Google, George Garvey from Munger Tolles. He's here on behalf of the founders, and Mr. Lamb from Paul Weiss, also on behalf of the founders. And then back here we've got Mr. Berger and Mr. Chandler, also from Wilson Sonsini.

THE COURT: Welcome.

MR. LAFFERTY: And then Mr. Bouchard is here on behalf of Mr. Schmidt, and then Mr. Coen from my office. Sorry to inundate you with all those.

I just wanted to share, Your Honor, from the perspective of the defendants --

THE COURT: If you could do a quick lodestar, like just an average multiple -- I would just like to see how the hourly fee works out.

MR. LAFFERTY: Any math, I've given

that off to Mr. Garvey today.

THE COURT: We'll let the plaintiffs' lawyers confirm the math because they're better at that. But if you guys could just write down the hourly number, and then they'll do the multiplication and division.

MR. LAFFERTY: We -- we wanted to briefly address --

THE COURT: See, I'm not good at math. So it's not even actually multiplication. It would just be, I believe. addition, then division. I defer to Mr. Lamb, who's pretty good at that stuff, but ...

MR. LAFFERTY: Your Honor, we wanted to add a few points, you know, from our perspective, why we believe the settlement ought to be approved here.

THE COURT: Could you just -- just before you do that, I take it you don't disagree there's essentially pro rata treatment of the founders and the nonclass stockholders of Google, such that there really isn't a transfer payment in any way from the founders or others to the class members?

MR. LAFFERTY: That is correct.

THE COURT: So it can't really be

conceived of as a damages.

MR. LAFFERTY: That is correct, also. And, indeed, we never thought of this as a damages situation.

THE COURT: Right.

MR. LAFFERTY: It was clear from our negotiations of the settlement and the terms of the settlement themselves that it really is a therapeutic settlement --

THE COURT: Right.

MR. LAFFERTY: -- both in the amendments to the TRA and the other nonadjustment payment issues.

THE COURT: And the defendant -- I mean, the plaintiffs pressed on those issues, but the defendants did not relent.

MR. LAFFERTY: That is absolutely true.

THE COURT: Okay.

MR. LAFFERTY: That is absolutely true. And, indeed, if -- if they would have insisted upon a wealth transfer, there would not have been a settlement. That I can say with -- with definite -- definiteness.

Your Honor, Your Honor's well aware that what -- what's required in a settlement hearing is not necessarily a decision on the merits --

THE COURT: Right.

MR. LAFFERTY: -- of the underlying claims. It's a balancing. And here we believe that the balance tilts in favor of approving the settlement.

From our perspective, this transaction would have been -- we had very strong defenses to this case. We believed that the business judgment rule would have applied under Williams versus Geier. We also had statutory authority for doing the amendment to create the class of nonvoting stock under 242.

The purpose, as Your Honor, I think, has delved into, although I think Your Honor takes maybe a slightly different view of the purpose, the purpose here was to give the company additional flexibility to manage this voting dilution problem. The board unanimously viewed that it was in the best interests of the company and all the stockholders to continue the current structure for the long term and to allow the company to continue to prosper as it has done.

It has been wildly successful under anyone's viewpoint. And that has been a benefit to everyone. And rather than the company just continuing to potentially use cash -- because it could have managed this voting dilution problem a different way. It could have simply used more cash for compensation or cash for acquisitions.

THE COURT: But that might potentially be suboptimal for everybody.

MR. LAFFERTY: Absolutely, because the company believes that reinvesting that cash is, again, beneficial for the long term for the company. And having this Class C -- the dividend in and of itself doesn't -- doesn't affect the mix of control. It -- what it does is it gives the board an additional arrow in the quiver later on when it -- when it wants to do an acquisition. It doesn't have to use voting stock. And the same is true for compensation --

THE COURT: No, no. What I'm saying -- everybody -- and, again, part of the reason why I think the plaintiffs face a difficult challenge, even the defendants, that this is a fairly novel situation because, very straightforwardly, what people -- this is about these founders' voting control, and it's about ... The reality is if you used voting stock for these sorts of things in the future, then even with the high vote/low equity stock that they have, at some point in time, you know, I mean, you make a few major acquisitions, a billion here, a billion there -- and, frankly, you know, Google's also in the type of business where you hire talented people and where equity grants are a regular part of it, that you get to the point where the founder is voting, absolute voting control is there and that creates psychological effects on them. It creates economic incentive effects on them. It makes them feel vulnerable.

So I get -- I'm not being critical. I'm saying it is unusual. I mean, I think we have to concede this is unusual, because it really is motivated only by -- no public company with a CEO had 4.9 percent would do this. He just wouldn't. You wouldn't need to. This is about their voting control and about the ability for them to have voting control while allowing the company to grant equity. And the solution to that is that the equity will have no voting rights. That's just an observation. It's not -- I mean, that was what the lawsuit was going to be about, whether that was okay or not, well-motivated. And you obviously had a special committee of independent directors whose independence and good faith you were going to defend vigorously.

MR. LAFFERTY: Absolutely. But the plaintiffs' principal challenge here was that that this was a benefit, a unique benefit to the founders and that it was going to potentially give them liquidity and other things that somehow was not available to the A holders. And obviously we believe Williams versus Geier involved the exact same circumstance. We still think it would have been business judgment; but even if not, even if fairness had been the test here, we believe we would have met that burden.

The special committee here --

THE COURT: And I'm trying to put aside, by the way, that one of the benefits of the settlement for me is that I would not have to go back and read Williams v Geier, like, five times because --

MR. LAFFERTY: We would just make you read the --

THE COURT: Incredibly, that is not one of the -- it doesn't flow like a clear mountain stream.

(Laughter)

MR. LAFFERTY: Your Honor, you may remember from -- from the trial briefs that we submitted, the mound of paper -- I'm sure you've committed them to memory; but this -- this committee process was not just some sort of short "We got this proposal from the founder, we're going to roll over and" -- "and be done with it." The committee engaged independent advisors. It had Latham & Watkins and Richards Layton as its counsel. It engaged Wasserstein Perella -- or Perella Weinberg I guess it is now -- as its financial advisor. And it proceeded to deliberate and negotiate over this -- over this Class C stock issuance and to consider it and what to do for 15 months. And the committee was fully empowered. It had the power to say no. And it negotiated hard over all of the provisions and protections that it got through the transfer restriction agreement, among other things, the equal treatment provision which wasn't in the existing charter, as well as the stapling provisions which prevent the founders from selling their C shares without selling equal number of their voting shares.

These were -- these were significant negotiations. We believe that that -- that we would have proven here that the process and the substance of this were fair.

So let me just turn, I think, briefly to the terms of the settlement. I think one thing that one has to keep in mind -- and I think I -- I've kept in mind -- this was never a damages case. This was always they were seeking an injunction to prevent us from going through with this.

We actually agreed -- they sought an injunction initially. We didn't think it made sense to present this case on a record that was paper. We thought the issues were important. We agreed to a trial. And we -- we agreed to hold off issuing the C shares until -- until that trial was going to happen. So this was always about an injunction. It wasn't a damages case.

And the benefits of the -- of the settlement, as I mentioned, were they're really all therapeutic. The modifications -- some of them haven't really been focused on here -- the modifications to the transfer restriction agreement; the agreement that independent directors will review issuances of over 10 million Class C in any acquisition and the consideration to afford Class C voting rights in the future. These all have value in addition to the adjustment payment mechanism that you spent more time focusing on.

The amendments to the TRA I think that I would just highlight -- again, I think we've touched on them a little bit. But the concerns that the plaintiffs had throughout this case were that the TRA could just be blithely waived by the board after it was put in place and that the benefits of liquidity and other things that were achieved -- that would be achieved by the founder, somehow to the detriment of the Class As, we never really believed that; but, nonetheless, to address these concerns, we agreed to this heightened oversight procedure.

And I guess there are three or four prongs to it. One is that any -- any waiver has to be considered and approved by an independent committee advised by independent advisors and all.

Second, the committee then makes a recommendation to the full board, and there has to be unanimous approval.

Third, we also agreed to give advance

notice, if you will, of at least 30 days of the decision to allow time for a stockholder challenge.

And then as Your Honor already hit on, we've also said that we would not object to the application of the entire fairness standard and that we would, in essence, bear the burden.

THE COURT: Would you be open to clarifying language that made clear that that meant that in the event of a litigation challenge, the defendants would bear the burden of proving the substantive economic fairness of the transaction?

MR. LAFFERTY: The answer is yes, Your Honor, we would.

THE COURT: I just think it would be helpful. I really do feel an obligation for us all to all of our successors, whether we're counsel -- every lawyer in the room on the defense side at least has known the joy of stepping into a situation created by a distinguished predecessor's ambiguous drafting efforts. And so to the extent we can spot one now and at least be clear and everybody know what they're getting into, I think that's to the betterment of everybody.

MR. LAFFERTY: And we're happy to

either have that on the record or to work out some other clarifying language is fine.

THE COURT: I think I'd prefer to have it in the stipulation.

MR. LAFFERTY: Your Honor, I could touch on -- the other two areas that -- that -- that didn't get much airplay were the large issuance restrictions --

THE COURT: Yeah. Will you talk about that one? because the one question I had about that one is is there any potential to game it with incremental smaller ones?

MR. LAFFERTY: Well --

THE COURT: If you know what I mean.

MR. LAFFERTY: So the plaintiffs had expressed concerns that the recap had created the threat that this new class of nonvoting stock could be used in a manner that would cause unnecessary dilution or -- or economic harm. And to address this, we agreed to provide for greater scrutiny, if you will, of large issuances of C shares in the future. And so for a period of three years following the issuance of the C shares, in the event that we consider issuing in excess of 10 million shares for an acquisition, the independent directors will consider the effects of any such acquisition on the Class A holders and the company.

Now, you know, that -- that gives a separate, I guess -- I think the board would have done its job, in any event, in one of those issuance. So don't get me wrong. I -- but what it -- what it gets is a guarantee that the independent directors will be tasked with looking at that --

THE COURT: And they will focus on the Class A.

MR. LAFFERTY: Correct.

THE COURT: How about -- wasn't there something on there about issuances to the founders? Or no? Maybe I misread that.

MR. LAFFERTY: Well, there's a -- so the other area was that the plaintiffs have expressed concern about the possibility that the founders -- that once the founders no longer had voting control, a party acquiring less than 25 percent of Google's shares could be in a position to get voting control of the company.

THE COURT: Right.

MR. LAFFERTY: And in order to address

that issue, the settlement provides that once the founders' aggregate voting control goes below 15 percent, the board will take steps to cause the Class C shares to convert to Class A shares if the board determines in good faith that it is no longer in the best interests of Google to have the nonvoting stock.

And, again, this is a prophylactic, therapeutic --

THE COURT: Their aggregate voting power goes down to 15 percent?

MR. LAFFERTY: Correct. So, again, it's a therapeutic settlement on the -- on the -- you know, on the forward-looking side.

THE COURT: What was this 34 percent threshold and if you go beneath 34 percent, the TRA goes away?

MR. LAFFERTY: So that's -- that's the combined voting power of -- of the founders.

THE COURT: If it goes down to 33 1/2 on one day and then goes up to 35 within a week, is the TRA gone forever? I mean, I remember -- I understood that -- you know, I get the point -- look, we're all dealing with --

MR. LAFFERTY: Right.

THE COURT: -- future eventualities that may never happen. But I just saw that that one wasn't -- for example -- I mean, I can -- by analogy to the support payment, right, the support payment thing was measured in some way against a range of trading prices or values.

And the only thing that caught my eye was, again -- you know, things happen. People do liquidity events, they do other things. And, you know, this -- this was a little flip -- you know, if you went to 34. -- you went to 33.99 percent on one day, this thing went way, not that you went below it for some period of time, where you were really sure that they had done that. And I just -- I'm not saying it blows the deal. I just want to understand that if on a day they go to 33.99 percent, the TRA goes away.

MR. LAFFERTY: Your Honor, let me just ask my colleagues about that. I'm not sure whether there's a mechanism in the TRA itself that specifies how you measure the 34 percent. I believe there might be something that addresses that in the TRA itself, but I don't have that at my fingertips.

(Pause in the proceedings)

MR. GARVEY: Your Honor, I'm looking at the proxy statement description of the TRA, and it doesn't answer Your Honor's question. I don't know whether the underlying contract itself does.

THE COURT: Well, maybe your friends, the plaintiffs, can -- I mean, I read it as just a flat out you go to -- and I'm not saying -- again, I'm asking questions. It's not -- I don't want anybody to lose physical or emotional control over the issue.

MR. LAFFERTY: And I apologize, Your Honor. I don't know the absence as I stand here, but we'll try to get that answer -- we'll try to get that answer for you -- for you pronto.

MR. GARVEY: Your Honor, Mr. Bouchard had the contract language here. And it does appear from the contract language that once it drops below 34, it's -- it's terminated, although we're having a hard time envisioning a real-world circumstance under which it would go back up again, since the whole context -- the whole significance of the transfer restrictions in the first place would be how to deal with attempts by founders to liquidate shares and they'd have to buy shares back to get back up.

THE COURT: It's just that has

happened with founders -- the reality is people, even rich people, have liquidity situations or, you know, they have obligations they have to meet. And sometimes they take some of their equity and they meet that and then they top up later. And, you know -- but I get it. I mean, again, I was just asking -- I wanted to make sure my understanding is correct, which is when they go -- you know, if they go buy it on any day, then it's over --

MR. GARVEY: Right.

THE COURT: -- even if they go back up after that. And I think you would also say if they go back up after that, it would be because they bought voting stock that is aligned with economic interest and that they're not able -- you know, once you essentially get out of that high vote/low equity stock, you're out of that high vote/low equity stock, and if you're buying back up, you're in a way that's much more aligned with the normal investor.

MR. GARVEY: Exactly, Your Honor.

MR. LAFFERTY: That's right.

Your Honor, I know we've already touched on the adjustment payment mechanism, but I want to -- I want to just sort of focus it again because the -- the point of disagreement in the case was that it was always that the plaintiffs' position was the new C was going to trade as a discount to the As. Our view was to the contrary.

Our view was that there wasn't going to be a material discount and that even if there was this so-called discount, that that's just another way of saying that the A was trading at a premium to the Cs. And we thought that --

THE COURT: Which is another way of saying --

MR. LAFFERTY: The enterprise --

THE COURT: -- that it's -- right now I have a certain percentage contractual expectancy if Google pays out dividends, and then I have a certain kind of noncontractual market-based assumption about how people look at the equity of the company.

MR. LAFFERTY: Right.

THE COURT: You've now taken my same interest and just divided it in half, and that what you're saying is if the A got a premium to the C, A plus C equals your preexisting ...

MR. LAFFERTY: That's correct. That's correct. And that was our view -- and this was --

THE COURT: And that's why I'm just analyzing it, and that's why what we've talked about in terms of analyzing whether there's really -- this is like a damages case or any gain sharing for the founders is also true for the founders, because everybody's -- the price support to the C goes equally to everybody.

MR. LAFFERTY: That's correct. And this was going to be the subject of a lot of expert testimony. And the plaintiffs had Professor Clarke or Mr. Clarke and -- and Professor Fischel was going to come in and testify on behalf of the defendants and that would have gotten sorted out here.

But the settlement, the payment mechanism, the adjustment payment mechanism, you know, provides for these payments after calculating potential trading discounts that might occur in the one year after the C begins to trade. And, you know, from our perspective, this was not intended to be a payment per se. I mean, it was -- it was not intended to be a wealth transfer as we talked about. It was done as a mechanism to help support or to lessen the impact if there was going to be a discount. It was intended as a -- I guess as a price support mechanism, if you will, and nothing more, nothing -- nothing less. And in that sense, again --

THE COURT: Well, I assume you'd have --

MR. LAFFERTY: -- it could be viewed as therapeutic.

THE COURT: -- it could have -- whether ... Look, I mean, I don't know how anybody knows for sure. I mean, I can easily envision down the road there being a disparity that emerges between these classes of shares, particularly in an eventuality where the founders wind out. I mean, if the founders wind out of their high vote/low equity, then you can easily imagine situations where particular buyers in the market would be far more interested in the shares that could vote and influence the company, for all the reasons why they were talking about somebody being able to buy control with a 25 percent, you know ...

MR. LAFFERTY: Yeah. Your Honor, I guess I --

THE COURT: But that's why you have the trigger in there to try to turn the C into voting stock at some point in the future.

MR. LAFFERTY: That's true. And I think the one-year period gives the class members the opportunity, if they --

THE COURT: There's --

MR. LAFFERTY: -- there's a likely scenario to sell.

THE COURT: There's a little bit in plaintiffs' brief of a punt on what would be required to give them the vote. Wouldn't the A have to vote to give them -- would the A have to vote to give the C the vote? I would think --

MR. LAFFERTY: About whether a separate Class A vote was required to provide voting rights to the C.

THE COURT: Yeah. I mean, there was a kind of a punt in that. There was something like "a vote, if required."

MR. LAFFERTY: Right.

THE COURT: I kind of want to know whether it would be required and whether the A at the time -- it's not just the board of directors snapping their fingers and deciding they want to turn a broadly traded class of nonvoting securities into voting securities. Oftentimes there are things in certificates of designation which protect the interest of stockholders, and would the A have to vote at the time as a class -- well, because -- or even if they don't, who would be voting? Because the non -- you wouldn't have a vote of the nonvoting. So at the time that the C would be turned into a voting security, the voting classes would be the A and the B; right?

MR. LAFFERTY: Right.

THE COURT: But do you need to have a class vote of the A?

MR. LAFFERTY: I -- again, I don't know, but I don't think so. I think it would be a, I think, a combined vote of the A and the B. But I -- again, we'd have to -- we'd have to confer, I think, to make sure that we're right about that.

THE COURT: Which is by no means certain that, you know, to the extent -- it's a huge company now, as one -- unfortunately, we've seen huge companies' market caps become less prodigious at times -- it's not necessarily certain that the voting class, people owning the voting securities are going to be all that hep, getting everybody else to vote; right?

MR. LAFFERTY: I agree with that, although as I stand here now, I'm not sure that the A would have a separate class vote, but --

THE COURT: No. I'm just saying --

MR. LAFFERTY: -- I don't believe they would, but --

THE COURT: -- this is a scenario where I believe the A -- or the B is the high vote.

MR. LAFFERTY: The B is the high vote.

THE COURT: The scenario where this kicks in is the B's proportion of the voting power has shrunk to --

MR. LAFFERTY: Yes.

THE COURT: -- being fewer than -- fewer than -- less than 15 percent; right?

MR. LAFFERTY: Right.

THE COURT: So that the bulk of the voting, even if it's a combined Class A and Class B, 85 percent of the electorate who would vote on the amendment would be the Class A. And the -- the stark point that would be put to them is "Do you wish, without compensation to yourself of any kind, to give other people voting rights?"

MR. LAFFERTY: Right. That is correct. That is correct.

THE COURT: And no. And I've learned

to live as a judge on this Court. I've lived to learn to understand that even if somebody -- if you have a contractual right that's -- to consent to something and that the party proposing that you consent to is that you give them $10, that they'll usually ask for a dollar just for the consent right, in order to receive the 10.

MR. LAFFERTY: Right.

THE COURT: "Well, you mean you're going to give me 10? But I have a right to consent to it, Mr. Lafferty. I'd really like 11."

MR. LAFFERTY: Your Honor, the bottom line is, I guess where we come out, from our perspective, we -- we -- we litigated this case hard. We believe we had strong defenses. We believe we would have prevailed. We -- we've agreed to a settlement that was negotiated.

THE COURT: And would you confirm -- I mean, there was one affidavit that was not something I'd ever actually seen before.

MR. LAFFERTY: Yeah, I -- I was getting to that, Your Honor. And I -- so my -- my -- my wrap-up on the settlement itself was simply to say look, we negotiated -- we litigated hard. The plaintiffs litigated the case hard. We were prepared to go to trial. We settled on the eve of trial, literally on the eve of trial. We agreed to the terms that are presented. I think it ought to be approved.

THE COURT: I think I remember the e-mail.

MR. LAFFERTY: Say that again, Your Honor?

THE COURT: I think I got an e-mail.

MR. LAFFERTY: I believe you were in Brazil.

THE COURT: It was interesting that it came from your Yahoo! account. That's not actually true.

MR. LAFFERTY: That's not true.

Your Honor, we would ask that the settlement be approved.

I did want to just briefly -- and I know we haven't gone to the fee issue, but maybe you'll stop me from having to stand up again, is to simply say this: There's a suggestion, at least in one of the objections, that the settlement was collusive because we agreed not to oppose a fee application of up to $25 million.

And that is categorically not true. The parties never talked about a fee until -- not just after we signed the MOU, but until after we signed the settlement stipulation which was submitted to the Court on August 2nd. So for the period from June until August 2nd, when we signed that final settlement agreement, we did not even talk about the concept of what the magnitude of a fee would be or what their request would be. And it wasn't until after that that we began those discussions and we involved Judge -- retired Judge Phillips as a mediator.

THE COURT: As I say, I've never -- I'm not sure -- I may have. Look, memories are faulty and I may have seen such a document before, but I don't recall it. Is -- but is his affidavit correct?

MR. LAFFERTY: In -- in some specific request, Your Honor? But yes --

THE COURT: I believe I have an affidavit from the mediator saying that he gave the number, which I -- again, I'm assuming that that affidavit was --

MR. LAFFERTY: It is -- it is accurate.

THE COURT: -- I'm assuming it was

procured with consent --

MR. LAFFERTY: Correct.

THE COURT: -- of all parties --

MR. LAFFERTY: It was.

THE COURT: -- to the mediation. Okay.

MR. LAFFERTY: It was, and it is accurate. And the parties had negotiated over it. They had, obviously, diametrically opposed views about the number --

THE COURT: But you were aware that the plaintiffs were requesting affidavits?

MR. LAFFERTY: Yes, we were.

THE COURT: Okay.

MR. LAFFERTY: And we saw it before it was submitted.

THE COURT: And you gave them permission to --

MR. LAFFERTY: We did.

THE COURT: Okay.

MR. LAFFERTY: Yes.

So, Your Honor, that's all I have to say about it. I -- the notion that it was somehow collusive is just false.

Thank you.

MR. BLOCK: Thank you, Your Honor. Just a few points. I'll try to be somewhat brief.

Just to follow up on what Mr. Lafferty said, yes, this -- any suggestion this is collusive is just flat-out wrong. The number we got to was a recommendation that was made by Retired Judge Phillips. So that's how we got to that number.

THE COURT: I take it you had a much higher number?

MR. BLOCK: We did, Your Honor.

If I can address the last point you made about the Cs getting vote rights and the founders wanting out.

And I think that -- that, along with a lot of the other issues, highlights that this was not just your average run-of-the-mill kind of a case. There were a lot of complexities to this case. And we did our best to try to address them in the settlement.

And that was an issue. And we identified that issue down the road as well, what happens when the founders leave? You've got probably less than half the economic ownership in the As and more than half in the Cs without voting rights, and we tried to create a mechanism so this could be addressed. And the reason why our understanding that the board has to recommend it is because it would require an amendment to the charter.

THE COURT: Oh, no, no. I understand why the board has to recommend it.

MR. BLOCK: Yeah.

THE COURT: Just a question of --

MR. BLOCK: Yeah.

THE COURT: -- as -- unlike the situation here, right --

MR. BLOCK: Right.

THE COURT: -- in this situation, if there weren't the founder voting power, we wouldn't have a case; right?

MR. BLOCK: Correct.

THE COURT: The circumstances where we're positing where the high vote/low equity stock falls to less than 15 percent of the total voting power --

MR. BLOCK: Right.

THE COURT: -- the idea of being able to give the Cs -- if the idea -- if the concern there, for example, is that, you know -- you're at a point in time where people can buy influential blocks of voting securities in Google because the founder voting -- the high vote/low equity stock now is only 15 percent thing, the idea that when the board of directors now says "Let's go out and give the C voting rights," that it's -- you know, that that's just the easy slam dunk, especially because I do expect that over time, given the market cap of Google, that the identity of interests that will exist the nanosecond after the C goes out and before the high-velocity traders have gotten their portion of it, you know, or are into it, that that asymmetry will grow, and such that for years down the line there's no necessarily -- you know, there's not going to be it necessary where everybody has sort of equal shares of A and C.

MR. BLOCK: Right.

THE COURT: Right. And there can be entire classes of -- for example, if the C becomes the primary -- and you can see this, especially if there's not a discount. I mean, one of the issues for the discount, the support for the discount issue, the argument would be that, you know, you have to give more of it to employees if there's a discount.

MR. BLOCK: Right.

THE COURT: But at some point -- there could be a very different block of stockholders who own the B and the C and since the -- I mean not the B -- the A and the C.

MR. BLOCK: Yes, right.

THE COURT: The A would then be voting on giving the C voting rights. It's not clear that they're just going to do that.

MR. BLOCK: I agree, Your Honor. Obviously that 15 percent number I will tell you was a point of negotiation. And we certainly hope -- what we've seen so far from the company is the two times Page and Brin sold stock, it's pursuant to 10b5-1 plans.

THE COURT: Right.

MR. BLOCK: And we certainly hope that will plan for the eventuality that when they decide to leave, that even before they get to 10 percent, that they will undertake the vote with Page and Brin voting to give the Cs voting rights.

So exactly what they -- one of the reasons why they say they want this plan is to prevent, you know, a corporate raider from coming in, that they'll address that in the future so it won't happen after they leave.

THE COURT: Well, again, there's a lot of practical reasons why --

MR. BLOCK: Yeah.

THE COURT: -- their exit, you know, it's not an easy total exit --

MR. BLOCK: Right.

THE COURT: -- you know, without some sort of big transaction or something like that.

MR. BLOCK: Right.

And as far as the -- the 34 percent trigger number in the TRA that you were asking about, you know, our understanding is that yes, once they go below 34, they go to 33.99, that TRA falls away. But at that point in time, if they're going to go out and buy in to get over the 34 percent, they're going to be buying As. As a practical matter, they wouldn't do it to game the system. It doesn't make any sense to us.

As far as what we're considering the economic benefits in this case -- and you heard from Mr. Lafferty exactly that. They never viewed this as a damages case. And had we won, we would have gotten an injunction; that would have been it. But if you want to just look at what we'll call the trading benefits -- and I know what Your Honor said is that Page and Brin get to share in those -- pursuant to their 10b5-1 plans, they can sell collectively another 2 million of shares. So presumably they'll sell their 2 million C shares. Mr. Clarke estimates, based on prior trading, that there will be 46 million shares sold. He said, "I went back and looked at the last two years" -- and I think one year -- "and the turnaround in the institutions from the 13Fs," and it shows that 46 million shares were turned over.

So if we just take that number -- and we think that's a low number because we think more people will sell Cs than previously sold As -- and you back out this trading benefit that would go to Page and Brin, it's still $310 million of trading benefits that go just to the A shareholders without including Page and Brin.

Did that make sense or should I --

THE COURT: No, it doesn't.

MR. BLOCK: What -- what --

THE COURT: It's either pro rata or it's not, and you've conceded it's pro rata. And I don't know -- you know, I don't know Mr. Brin and Mr. Page. And if I knew them well enough that they share with me their anticipated plans under -- you know, for selling over the next year, I would recuse. And I have no affidavit in that. So I don't know and, you know, I'm not sure, you know -- I'm not sure the normal Burton Malchiel rules about the past not necessarily being prologue doesn't apply also to this situation.

MR. BLOCK: I understand, Your Honor. I'm just going by their -- I'm just trying to explain --

THE COURT: Again, let's not argue the inarguable. It's either pro rata or it's not. What -- you did not get at the bargaining table any subsidy from the founders or from Mr. Doerr to this, such that there's a transfer payment from the nonclass stockholders of Google to them. You got -- you did get things from the founders that restricted their future flexibility, and that's the things we've been talking about in terms of the TRA. They gave up things like having to now have every single board member in the future approve any amendment. They gave up other sorts of things which I, you know, recognize as potentially valuable and important; but here, you're just -- I think we're just at a point where you're kind of imagining situations where they won't sell as many shares, so the price support won't be as beneficial to them as it would be to others; right?

MR. BLOCK: No. That's not the point I was trying to make. Obviously I didn't do it very well.

The point I was trying to make was that if you just assume what Mr. Clarke does in his report, that of the current Class A shareholders, when they receive those C shares, they will sell 46 million of those C shares, that the trading benefit to them as a result of this plan will be $326 million, irrespective of what may go to the founders.

I guess our view is that even if the founders sold more than what's in their 10b5-1 plan, it's not going to affect the amount that's going to go to the Class A shareholders. So even if you just look at those selling benefits that are paid by new C shareholders, it still creates $326 million.

THE COURT: The selling benefits are all paid for by Google.

MR. BLOCK: No, Your Honor.

THE COURT: Yes, they are.

MR. BLOCK: No.

THE COURT: Yes, they are, because the selling benefit that Mr. Clarke aptly points to as plausible is that people who purchase the C will purchase at a higher valuation than they otherwise would because of the contractual promise of Google to deal with any discount to the extent provided for in the stipulation of settlement. Thus, any trading benefit is paid for by Google.

MR. BLOCK: But that -- what -- I think what we're suggesting or what we're saying is, what Mr. Clarke is saying, the $3,626,000,000 that he's pointed to is new money that --

THE COURT: I think Google has been really good, but now we're getting into alchemy. The $326 million of trading benefits is precisely in Mr. Clarke's, I think, fully rational affidavit. Again, I think the -- I don't even know that Professor Fischel and Mr. Clarke would have an argument about the logic behind Mr. Clarke's thing. I think they have an argument primarily about whether there will be a discount at all.

MR. BLOCK: Yes.

THE COURT: Mr. Clarke's point is as follows: To a purchaser of the C who's going to pay money for the C, if that purchaser knows that along with the C share comes a contractual right at the end of the year, that if there is a trading discount that meets the --

MR. BLOCK: Right.

THE COURT: -- formula in the thing, that you'll get a true-up of some amount, then that essentially affects the security, because what you're buying is the Class C plus the contractual expectancy as a result of that promise you'll pay a higher valuation than you otherwise would. It's not distinct from, in fact, from the true-up. I guess you could argue that it has some complex interaction with the true-up being made because in a weirdly but weird thing, the possibility of the true-up being made minimizes arguably the probability that the discount will arise, that actually would result in the true-up.

And it's early and most of us haven't been fully caffeinated and it's Monday. So I don't -- you know, it's hurting my head to even think through this, and I know it's hurting your heads. But I don't really view -- I don't think you're arguing a distinct thing, because it's still the contractual promise of Google to make the payment at the end of the year, which results in both the payment itself and any trading benefit to those who sell. That promise is -- is equally beneficial to the nonmembers of the class who are Google stockholders, including the two founders and Mr. Doerr, and they're all pro rata; right?

MR. BLOCK: Uh-huh. Uh-huh. I guess the only way we looked at it, Your Honor, is those -- the trading benefits -- I understand your point.

THE COURT: I think I -- I know how you've --

MR. BLOCK: Yes, okay.

THE COURT: Look, I understand the powerful incentives that you have to look at it the way that you have.

MR. BLOCK: Okay.

THE COURT: Just understand that I have a professional duty to look at it in a way that's different from either side of the --

MR. BLOCK: Understood, Your Honor.

Just if I can just address the points that were made about the lodestar and --

THE COURT: Yes. That is pretty hefty, don't you think?

MR. BLOCK: It is and it's not. This -- we litigated the case on a compressed time frame. We filed this case in April and we originally had an October trial date. So we really had to gear up very quickly and put --

THE COURT: No, no. I get that. I'm talking about the 600 -- what was the average?

MR. BLOCK: 608 I think is what Mr. Lafferty said.

THE COURT: Right.

MR. BLOCK: This is a case which actually required a lot of partner time because of the complexities of the case. I mean, we spent an enormous amount of time with our experts trying to figure out and understand the effects of the trading discount, what the potential benefits could be to Page and Brin out of this. There were 17,000 documents produced here. So it wasn't like it was a heavy document-intensive case where we had to have -- you know, most of the hours were put into reviewing documents.

The heavy hours in this case were preparing for and taking the depositions, putting together the theory of the case, understanding the --

the economics of the case and the potential value of the case, the settlement negotiations.

We then went back to the discovery and trial prep. Most of that is not the kind of thing that we were going to have a, you know, first- or second-year associate do. The document review, yes, we tried to have -- our associates did document review. I can assure you I didn't do any first-level document review in this case. I got what we were told were the hot documents, and then we went from there to prepare our documents.

THE COURT: Hot documents?

MR. BLOCK: Well, that's what we call them. But --

THE COURT: You know, some of us learned early in our career to never create a RedWeld containing the words "hot documents" on it.

MR. BLOCK: Well, I will pass it on to the rest of the plaintiffs' bar.

So that's what you see the high hourly rate, just because of the complexities --

THE COURT: You could have somebody, like, with -- who had bifocals, look over them, or, like, had the reading glasses, look over you and instruct you never to do that again.

MR. BLOCK: I will take that to heart, Your Honor.

THE COURT: I think there are two of us in the room who have experienced that very precisely at one point in time.

MR. BLOCK: Okay, Your Honor. Thank you.

So that's why the lodestar is where it is, and that's why you have the high hourly rate, because of the nature of the case and the work we put in. And, you know, we then put in a lot of work to get ready for trial.

THE COURT: I just -- I understand -- I mean, you know -- I just think we all have to recognize -- I mean, your lodestars are not market-tested rates; right? What I'm saying is --

MR. BLOCK: Not -- not -- yes, not in the traditional sense in that we have -- I mean, I have some clients who pay me by the hour at those rates, but certainly I can't say all my clients.

THE COURT: Right.

MR. BLOCK: Most of the cases are contingency.

THE COURT: Right. I'm just -- you know, I mean, that's --

MR. BLOCK: Yes.

THE COURT: -- you know, senior associates don't bill out at 600, do they? Or do they?

MR. BLOCK: In my firm, they do not. We -- those aren't our rates.

THE COURT: Okay.

MR. BLOCK: But that's why we got to the lodestar that we did. And, you know, that's -- unless Your Honor has any other questions.

THE COURT: By the way, one good idea in discovery is to always ask in document requests for -- "Produce all files labeled 'Hot Documents.'"

(Laughter)

MR. BLOCK: We'll start doing that. We will.

Okay. Thank you, Your Honor.

THE COURT: Thank you.

MR. PASKOWITZ: Excuse me, Your Honor. A personal privilege, if I may.

THE COURT: Uh-huh.

MR. PASKOWITZ: Mr. Pentz expressed

some doubt whether I devoted as many hours as I put in my affidavit. At this stage of my career -- Your Honor knows me -- I take on very few cases. In the past year or two -- maybe I filed one case in the past year in addition to Google. This is the case I devoted my time to in the past year. My colleagues can attest to my e-mails at 2:00 and 3:00 in the morning. This case aggravated my long-standing insomnia. But between briefing, discovery, trial, and so forth, I may have filed two cases, maybe one case in the past year. This is the case to which I devoted my practice.

Thank you, Your Honor.

THE COURT: Do we have all three things to do?

MR. BLOCK: I believe so, Your Honor.

THE COURT: Class certification?

MR. BLOCK: Yes, Your Honor.

THE COURT: This is -- as is traditional, we have the three things to do. First is whether this should be a class certification.

Corporate actions of this kind are the quintessential examples of when you need to have a single answer to a problem. The only variation between class members is the amount of shares they own as -- as a -- in this class, the proposal is essentially the certified class, excluding the founders and Mr. Doerr in their capacity. And you cannot have opt-outs in these kinds of cases. And you just cannot. And that's in keeping with long-standing Delaware tradition. And the proposed order makes the requisite findings, and class certification is in order.

With regard to the settlement, this is a complicated and difficult and novel case. Williams versus Geier would be strong precedent on the side of the defendants. You could argue that the logic of cases like Blasius would be on the other side and that just like when people say that, you know -- when people are negotiating deals, a preemptive price is its own deal protection, then a wonderful reputation as a founder is your own ballot box protection.

The reality is that was going to be a big part of what the trial was about. Williams v Geier would weigh heavily in favor of the defendants. I think there are some tensions in our law, because it's never been the case that interested voting power gets a pass simply because it has voting power. That would be greatly inconsistent with Schnell. And there are some tensions in the law that -- when you suggest an interested voting power can somehow have a cleansing effect.

I think the stronger argument on behalf of the defendants is that they were well-motivated independent directors who they would have presented at trial who believed that this was the right thing for Google's public stockholders and that from the beginning, everyone has been clear with the people who lined up in hoards, as if they were young teenagers trying to go to a One Direction concert, to buy Google stock, with the understanding that these founders were going public but with no attention -- intention to relinquish voting control over the company that they founded and loved, and that when you invested in Google, that was sort of your understanding.

Now, I understand the plaintiff and the class' point is that the understanding is the understanding at the time of their instruments. And we're at a new dawn in terms of the company perhaps being at a stage when it needs to issue additional equity. That puts tension on the voting control mechanism which was put in place at the IPO stage. But that's what the trial was going to be about.

And I don't think -- I was -- you know, you get to a stage in your judicial career, which some of our distinguished colleagues in the room can identify with, when you've really had enough interesting cases, so that even if you have a really interesting one, you cannot fairly say that the disappointment factor of it going away actually outweighs the psychic impersonal benefits of simply being able to turn to your other workload. I can't say that this was sufficiently interesting that that -- that I wanted the trial to go forward. But it was interesting and novel. And it was a kind of unique situation. So I think it would be hazardous for anyone to predict how it would have come out.

And I think the plaintiffs would have also had to confront the reality that while they had reasoned arguments, that what the committee negotiated was not adequate, that there was clearly a lot of negotiation and there were protections that were put in place that were designed to address any abuses that might emerge as a result of that. And the plaintiffs would have had to overcome that. And very talented and skillful defense counsel, who were -- this was a situation where, you know, you could imagine situations where a founder or a controlling family, where the idea that it would be laughable that it would be beneficial to others to give more of an opportunity for them to retain voting control, where that would just be kind of met with obvious guffaws.

That's not the case here. I mean, the reality is this is a rather astonishing market success. These are two folks who actually created a company that is, in fact, a verb. They arguably created a company where many Americans spend more time with their invention than the people to whom they owe the most important family and friendship obligations. And that's been hugely beneficial to investors.

So there's a plausibility here in this odd context to this that there wouldn't be in other situations. And that's been proved out by business experience.

So all of that -- for all those reasons, given the novelty of the legal dynamic; given the sort of novelty of the business dynamic; and given, as I said, Williams v Geier, which I take seriously -- and I didn't mean to be critical of it.

I think that was a case that also dealt with an unusual factual situation, and sometimes judicial decisions dealing with those have all the complexity in them of the context. And every time I read it, I have to relearn the facts of the underlying transaction, because they were pretty complicated.

But for all those reasons, I think the settlement should be approved, because when I look at the gains that were achieved by the plaintiffs, I -- I think that they justify the giving of the release.

I believe that the primary gains are in the strengthening of the TRA and in the corporate governance protections that kick in when the founders' percentage interest goes down. I give less weight, as I said, to the -- I think it's nifty to think of converting the C into voting stock. I'm a little less optimistic that that can be done. I think that a very strong antiwaiver aspect of the settlement has considerable value, especially in this day and age, being the reality is that there is a high degree of scrutiny of independent directors. There are network effects that we all know about that come into play with independent directors who often, you know, frankly, do serve as professional directors and who like to stay in the network of independent directors; that when they take action at one of the companies in which they sit, can have an effect on their ability and popularity at other boards of directors and where other nominating committees may not necessarily wish to be on their slate in the future if they draw adverse attention.

So by requiring essentially every independent director of Google to approve a waiver of the TRA, that gives a lot of assurance to the public shareholders that, frankly, you know, it may be improbable that you'll get any amendment, or, at the very least, the negotiating power of the independent directors will be so substantial that if there is an amendment, there's an ability to actually get concessions from the founders that fully justify in the public investors' mind the amendment. Also, these things which give increased leverage to the independent directors to the extent of big issuances are of value.

I am not saying that the support -- economic support provisions of this are not potentially beneficial to Google. I think, though, we have to be mindful of the fact that there really -- I don't want to put harm -- I would say cost mitigation factors, which is absent the creation of the C, you wouldn't need anything like this. They're not -- this is not like getting an extra dividend at the expense of the founders. This is essentially a transaction cost to going forward with this transaction.

The plaintiffs have presented a well -- I actually don't -- you know, to the extent that Professor Fischel's opinion is that there will be no discount or market anomaly at all between the A and the C, I find that a little unusual, to be honest. I do. I mean, I'm not saying that there will be a 25 percent thing; but the idea that there isn't even in this context some utility to having the vote in the future, especially when you get pricing anomalies -- I mean, we're talking about something -- I believe that the defendants -- that there will be no discount at all. The market's wacky enough that to imagine that they just trade one for one, I mean, that seems to be mathematically improbable, but maybe they will.

But all I'm saying is I give some weight to Mr. Clarke's idea that there could be -- and he looked at some other situations -- that there could be a disparity of some account -- of the thing.

That's why I was asking the question I did coming into this, which is it would be one thing if the plaintiffs extracted from -- and one can imagine litigation settlements are powerful and normal things like you have to treat everybody equally. Well, no, you don't have to in a settlement; in a situation where the true-up was only available to the members of the class; where the founders were locked up for a year, could not share in the one-time payment. Well, then, there would be some form of transfer payment between -- from the defendants to the class, and you could figure out the economics of that, and that would be a subsidy economically between -- by the founders, not just Google itself, to the class.

That's not this. This is not one of the damages cases that the plaintiffs have cited where the Court has looked at a damages payment that went to the class and that was not shared in by the defendants. It's not this.

I'm not saying that -- again, I want to be clear about that. I'm not being negative about it. I'm being observational. But it's important, as we look at this, to be clear about what it is.

I'm also not saying it isn't

necessarily beneficial to Google sort of as a whole, which is, you know, if you're going to use this C, this nonvoting currency for employee compensation purposes, if you're going to use it for acquisition purposes, then one hopes that Professor Fischel's opinion is actually -- comes to be true, because to the extent -- let's imagine a year from now the C trades at a 25 percent discount to the A and you wish to do a stock-for-stock merger with a company that we would all think is sizable because it's got a market cap of $3 billion. Google, you know, thinks that's cafeteria rounding error after foie gras Thursday, or something like that, you know, a motivational event for -- or if you had employees like me, it would be a motivational event -- is you make a $3 billion acquisition, and you want to do it by giving the stockholders of the $3 billion corporation, you want to give them C shares. If the C shares are trading at a discount to the A shares, that's not going to be particular -- you're going to have to give them more of it. And so there's some interest.

But, again, that's not -- this is not -- I think that's more of a corporate therapeutic. And where I have a problem -- and I will say this in terms of approving the settlement but also when I get to the fee: Look, this is in some ways initiated by the founders. Not in some ways. It was initiated by the founders. The board thought it was a good idea, but the costs of all that are being borne by the Google stockholders as a whole on a pro rata basis. And that kind of subsidy to the C shares in order to prop them up and the benefit to being -- using -- is really all a matter of doing this transaction to begin with, because if you were giving out voting shares, you wouldn't have to do any of this. You would simply be giving people voting shares. They would obviously have to assess that in relationship to the founders' voting control, but there would be none of the oddments of what happens down the road if the founders get this and whether -- you know, you'd be getting traditional stock with at least the voting rights that the existing public stockholders already have.

So when I approve the settlement, I give credit to this for, again, really, this currency -- in some ways I actually view it as more beneficial to Google in terms of being able to use the C stock for the corporate purposes that people are talking about than I do to the members of the class, because from the members of the class, this is simply -- I don't even know what it is. It is simply -- I don't really view it as a net gain. I view it as cost or harm mitigation that comes in connection with a complicated corporate transaction; and that, as I said, if you looked at it on a -- if you looked at it simply alone and you took Professor Fischel's view -- he's the defendant -- I think he would say, "Wait a minute. You own A right now. Splitting it into" -- "you own A and B. Let's split it into A, B, plus you get C. Because we split it into something that is nonvoting, there's the potential for an anomaly to come to pass because the C that we give you doesn't have voting rights. So we're going to make a transfer payment from ourselves in a year which has unknown or complicated tax things that we'll have to invest by people who have to advise people about. We'll have to pay investors." I think they would say "Don't go forward with the transaction; just leave everybody where they are."

If you're going to go forward with the transaction, I do think that there are some -- the benefits I've mentioned in terms of the corporate objectives, but I don't think that they can be translated into a billion-dollar benefit economically to the class, nor -- I mean the trading benefit -- it's -- again, I just -- I'm not saying that those things aren't really numbers in some sense. I just don't think that they're -- they're real in the sense that the plaintiffs would have me adopt.

But overall, I think given the difficulties that the plaintiffs faced, the precedent like Williams v Geier, and this -- the meaningful benefits achieved by the corporate governance provisions, I'm going to approve the settlement.

When it comes to the fee, I think our Supreme Court has been very helpful in making clear that whether -- that -- whether something is quantum meruit or whether something is in the aptly named Sugarland basket, the key is really looking -- the Court trying to make a principled assessment of the benefit to the class and to provide a reasonable fee that takes into account the risk of litigation, the complexities of it, the quality of counsel's effort, and to provide a reasonable fee that recognizes that you need to incentivize people to take on these kind of cases because they take on many cases where they don't get anything.

And with all those factors taken into account, I would say I can't -- again, I'm not looking at this in the same way that the plaintiffs are. I give credit that the mediator was involved. My sense is that he looked at this in the way that the plaintiffs did. I really don't know what to make of the affidavit. I'm comforted that everybody saw it. It gives me comfort, although I really didn't have much doubt in this situation that it was negotiated in good faith, because the principal terms of the settlement had already been established; but I can't get to the 25 million box because, again, the mediator may -- and I respect that a mediator was involved. I think the only way you get there is to actually look at this as if it was some sort of damages case.

And I think the problem with it is all the things that I've said before, which is then this is a damages case in which the principal defendants who are the ones who are the interested party -- and I don't say that in a pejorative sense; but the arguably interested party, which would be the two founders whose voting control was the subject of this, received the same economic benefits as the members of the class. That's not -- I don't really get that. And even recognizing that there are derivative cases where people say, "Well, wait a minute. You shouldn't measure the fee because I own 35 percent of it. You should really deduct my 35 percent," well, that's a derivative case and -- and this isn't in -- in some ways it's not a derivative case.

Also, there's no money going into Google. This is not like there's money going into Google and the defendants are arguing, "Well, wait a minute. There should an offset for the 17 percent that really is ours." We're not even there. You're talking about pro rata treatment for the class -- all the stockholders of Google, including the defendants.

So I think giving credit to the mediator, "I'm going to give credit when I get my fee," I can't get anywhere close to 25 million. And it makes me feel not as bad as the people on Wheel of Fortune who did that devastating thing to that young man who clearly got a word right and then they penalized him for mispronunciation and took away a million dollars. I don't feel as bad as they should. And that's a normative statement that I make, but -- and I admit that that's a contestable proposition, and defenders of Pat Sajak may -- I note their objection.

I will get to a substantial fee, and the fee I get to is $8 1/2 million. And I'll explain that.

The lodestar is 7. Is that right?

MR. BLOCK: Yes, Your Honor.

THE COURT: And the lodestar does not include the fees and expenses -- I mean the expenses?

MR. BLOCK: No, it doesn't, Your Honor.

THE COURT: Okay. I'm going to get to 8 1/2, plus I will give you the expenses. So -- and the way I get to that is the following: I think this is largely a corporate governance settlement. I think the benefits are substantial. I don't think it's a home run. It's somewhere between a solid single and a double.

What I mean by that -- and I asked some questions about that -- is would I feel differently that this was a more substantial settlement if the dividend -- the true-up was not available to the founders? Yes, I would. That wasn't achieved. Would I feel differently even if, frankly, the advisor cost of this were paid from the founders? I would. Now, that sounds small, but even if D and O insurers paid for are this, there's no free situation like this. It's priced. And I'm not saying that, in the scope of Google, that's market moving, but this is litigation. And what the plaintiffs are asking me to do is to size a benefit. I didn't see any of those benefits. What I saw is the corporate governance things.

I think when you look at the lodestar, I think, one, I do credit the objector. I think the lodestar is healthy, you know. I think it's, you know, had a really hearty breakfast. And I don't quibble with the hours or anything like that. I think everybody did work probably very hard to settle on the eve of trial, and I give credit to the fact the plaintiffs took it to the eve of trial.

But I think a million and a half on top of a lodestar, which is essentially what it is, I think that is a pretty good incentive premium. And I'm going to give my former -- you know, our former member of the judicial club, I'm crediting a full half million of that to Judge Phillips in the sense I probably would have only given a million-dollar premium, but a mediator was involved. And that gives me some comfort, and, you know, you can credit him with a half million. I can't get -- the delta on the other one, I think he and I may be just looking at the case in a different way totally economically. I think given the substantial expenses you put in -- and I know those are real out-of-pockets -- I'm going to award that on top of what I did. So it would be 8 1/2 plus the expenses that you submitted.

If you could scriven with the defendants the entire fairness language, I would consider that a meaningful contribution of us all, to future Google stockholders, future Google advisors, future plaintiffs' lawyers, and future members of the Court of Chancery and the Delaware Supreme Court and current ones because you never know how quickly these things move.

But I appreciate everybody being to the point. I appreciate the objector being to the point.

Do we need to do anything else today rather than just get the settlement scrivened and an order filled in? I prefer to see the -- I think for fairness to everybody, I'd prefer to give you the chance to scriven it and then to enter the final order that reflects the little clarification. And that's all it really is, I think, is a clarification.

MR. LAFFERTY: That makes sense to us, Your Honor.

MR. BLOCK: Yes. Same with us, Your Honor.

THE COURT: Okay. Well, I'll look for that. And, again, thank you all for coming in on Monday morning.

(Court adjourned at 12:05 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime 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 4 through 112 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.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 8th day of November 2013.

/s/ Neith D. Ecker

Chief Realtime Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DONALD A. KURZ and SEMS DIVERSIFIED VALUE, LP, Plaintiffs, v. JAMES L. HOLBROOK, JR., et al., Defendants. ---------------------------------- JAMES L. HOLBROOK, JR., et al., Counterclaim Plaintiffs, v. DONALD A. KURZ and SEMS DIVERSIFIED VALUE, LP, Counterclaim Defendants, and JAMES L. HOLBROOK, JR., et al., Third-Party Plaintiffs, v. TAKE BACK EMAK, LLC, Third-Party Defendants. ----------------------------------	Civil Action No. 5019-VCL

ORAL ARGUMENT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

CRONW EMAK PARTNERS, LLC, :

Counterclaim/Third Party Plaintiff, :

v. :

DONALD A. KURZ, et al., :

Counterclaim/Third Party Defendants. :

\- - -

Chancery Courtroom 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, July 19, 2010
10:00 a.m.

\- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

\- - -

APPEARANCES:

JOEL FRIEDLANDER, ESQ.
ANDRE G. BOUCHARD, ESQ.
Bouchard Margules & Friedlander, P.A.
for Donald A. Kurz, Sems Diversified Value, LP

KENNETH J. NACHBAR, ESQ.
SHANNON E. GERMAN, ESQ.
Morris Nichols Arsht & Tunnell, LLP
for EMAK Worldwide, Inc.

ALSO PRESENT:

BRADLEY R. ARONSTAM, ESQ.
Connolly Bove Lodge & Hutz, LLP

CATHERINE A. GAUL, ESQ.
Ashby & Geddes, P.A.

THE COURT: Good morning, everyone.

MR. FRIEDLANDER: Good morning, Your Honor.

THE COURT: Mr. Friedlander, welcome back.

MR. FRIEDLANDER: It's good to be back, Your Honor.

On behalf of plaintiffs, Donald Kurz and Sems Diversified Value Fund, we're here on the fee application, the interim fee application.

This has been a contentious litigation throughout, as Your Honor knows, and this fee application is no exception; so I thought, therefore, I would begin, maybe in an era of good feeling, I thought it might make sense to begin by pointing out the basic points on which the parties apparently agree.

First, EMAK agrees that the litigation challenging the exchange transaction was meritorious when filed. EMAK also agrees that the rescission of the exchange transaction was causally related to this litigation. EMAK does not appear to dispute that the plaintiffs succeeded in invalidating the Crown bylaw amendment through trial and appeal.

EMAK does not contest that the litigation presented difficult legal issues; that our firm expended significant efforts on the litigation; or that our firm undertook the litigation on a contingent basis.

There is a warmly contested point about whether our co-counsel pursued the case on a contingent basis. They had not asked for discovery on that, and therefore, in our reply papers, we've supplied that fee agreement saying that that was a flat-fee basis. Luce Forward was retained with a carve-out for potential future contingent litigation.

EMAK does not dispute the allocation of time that we used in our papers, which is essentially we took 25 percent of the contingent litigation time from December 12th, 2009, when we learned about the Crown consent, through March 31st, 2010, the disposition of the appeal.

Putting aside the time representing EMAK, which is a different client matter, but the underlying litigation, we took 25 percent of the time and allocated that to the invalidation of the Crown consents as opposed to litigating over the TBE consents. And that allocation came up to roughly 233 hours for the Crown consents, through trial and appeal.

Plaintiffs and EMAK agree that the time spent litigating over the TBE consents is not compensable under the corporate benefit doctrine, so the fee application does not address the 699 hours devoted to litigating over the validity of the Broadridge consent on behalf of the beneficial owners or the Boutros consent or the duty of disclosure claims relating to the TBE consent solicitation. That's not part of our fee application.

And there is no argument by EMAK that our hours and expenses were excessive in relation to the points we did litigate that are the subject of the fee application. In total, we're talking about 1,587 compensable total hours at issue and out-of-pocket expenses of $139,378. We never tried to mathematically calculate with certainty how much the defendants allocated to the same issues, but I think it's unavoidably the case that the number is far higher on the defense side.

Now, EMAK does raise a number of issues in its answering brief.

THE COURT: Let me ask quickly about your hours. I'm assuming, given the size of your firm and number of depositions and things like that and number of hours, that you all weren't working on too many other things when you were working on this. Is that fair? How much of a commitment to this case did this represent?

MR. FRIEDLANDER: Well, really, I mean, during this relevant period, the firm had five lawyers; all five billed significant time. In the fall of 2009, in November, when we literally had triple-track depositions on, we were all putting in significant time. We had two partners in Los Angeles, I was in Washington, and we had briefs, motions.

I mean, we were all fully engaged. The document production was extensive. The privilege logs on both sides were rather long, so the associates were putting in the time. So that was a full commitment of the firm I would say about that November time frame.

When we moved into 2010, litigating for the trial, it was myself and Mr. Bouchard at the trial, and I think we tried to do that on an hourly basis. I can't say we were fully committed, but it was a full commitment for the firm for an intense period of time.

THE COURT: Thank you.

MR. FRIEDLANDER: Now, the issues apparently that are in dispute are whether rescission of the exchange transaction is a substantial benefit or an ascertainable benefit; whether invalidation of Crown's bylaws is a substantial benefit; whether proxy contestants are disabled from claiming corporate benefits -- and this Diversified Value Fund is not even a proxy investment; whether the corporate benefit doctrine requires a benefit to the preferred stock as well as to the common stock; whether the value of EMAK and its common stock limits the size of the fee award; whether EMAK is entitled to an offset from a fee award, as there is an issue about expenses incurred in litigating over the outcome of the consent solicitation, such as the Boutros transaction. The expense of litigating over the authority of the interim board in 2010. Expenses incurred by the interim board. The fact that we represented EMAK while the interim board was seated.

Now, rather than sort of rehash our reply brief and go through all those seriatim and presume that EMAK is sticking with all of those arguments, I would like to make the affirmative case for a fee application and address the issues that way.

Now, taking the issue of whether rescission of the exchange transaction is a substantial benefit, we think that the factual proposition is that if not for the rescission of the exchange transaction, there could not have been a contestable consent solicitation to elect new directors.

Crown, Holbrook, and the other officers and management would have formed a bloc of 47.2 percent, according to at least one of the e-mails quoted in the brief. That's what Chris Austin pointed out to the insiders. And Crown along would have 28 percent of overall voting power.

So you can talk about how, hypothetically, people might vote different ways, but I think the facts will make it pretty clear there was a voting alliance of what would have been 47 percent if Crown had -- on all directors if Crown had been permitted to vote pursuant to the exchange transaction.

And that voting alliance would have foreclosed Kurz and the stockholders who supported him from acting by written consent to remove Holbrook and the other incumbents and elect new directors. Without the exchange transaction, the contest was up for grabs.

Now, I know there is this whole discussion of whether it was inevitable, and we can get to that if necessary, but I don't know at what point it seemed that inevitable that Crown was going to win. I mean, to take the position to its logical extension --

THE COURT: I think after we got Justice Holland's opinion.

MR. FRIEDLANDER: But up until the moment we got that opinion, then it would have been inevitable, we would have known that interpretation of the restricted stock agreement would have carried the day and everything else would have fallen into place and there was no way we could have won, but that's the argument; but putting that argument aside, the contest was up for grabs but for -- unless you accept that every single thing that happened was inevitable.

So if there is a contestable election, if there was -- and I take it as a first principle of Delaware law, the power of common stockholders to elect new directors is a good thing. Our statute requires annual meetings of stockholders. Our statute allows for action by written consent at any time.

We have a Blasius standard about the intentional interference with stockholder votes to elect directors. Elections are the ultimate check on director performance, and they're the ultimate source of director authority. Annual meetings can't be cancelled because the prospect of a contested election is too expensive or too destabilizing or because a preferred stockholder want to keep incumbents in place. Nor can action by written consent be eliminated for those same reasons.

Now, Crown conceivably could have negotiated ten years ago, as a condition for making its investment, that I'm only going to invest $25 million if action by written consent is eliminated; or that if EMAK's fortunes decline, I get to appoint automatically a majority of the board; or I get to vote on an as-converted basis for the election of all directors. Those could have been the rules of the game set up if EMAK was willing to go along with them, but those were not in Crown's preferred security.

So instead, the common stockholders possessed the right and authority to try to right this ship and steer a new course by electing new directors. And that's exactly what Donald Kurz and Take Back EMAK, LLC were trying to do, rally sufficient common stockholders to take back EMAK by electing new directors.

And we submit the whole lawsuit was based on the premise that the board was obliged to respect that effort. They could distribute their own solicitation materials, advocating why they were doing such a great job and why the common stockholders should not replace the incumbents, but they could not intentionally interfere with the right of common stockholders to make that choice by written consent.

So they could not place a 28 percent voting bloc in friendly hands, or in this case, as we say, in the hands of a friendly predator. They could not create a new right for Crown to get $25 million upon the election of new directors by Kurz and his affiliates. They could not lie about why they handed out new voting rights to Crown or handed out payment rights to Crown.

And that's what this first phase of this litigation was all about. EMAK's incumbents tried to foreclose consent solicitation by giving Crown new voting rights and new payment rights, and by lying to stockholders about what they had done and why they had done it.

So we obtained rescission of the exchange transaction on December 3rd. We obtained the unsealing of the Court record on December 4th. And consequently, on Monday, December 7th, EMAK finally felt the need to issue proxy materials explaining why common stockholders should keep the incumbents in place. And that same week, RiskMetrics Group and Glass Lewis each issued reports recommending votes in favor of the dissidents.

So after expending great effort and costs on a contingent basis, we had brought about what we thought at that time, for a brief moment in time, was a consent solicitation without a preordained victor and without the taint of the false and misleading ratification disclosures. So in those closing two weeks of the consent solicitation, it appeared that common stockholders unaffiliated with management had the power to elect new leadership.

Now, as a matter of logic and precedent, I submit that is a substantial corporate benefit. It's beyond dispute that a mere heightened level of disclosure is a compensable corporate benefit, and Your Honor sees that all the time. And Tandycrafts makes clear, a stockholder who sues individually can be awarded a fee for producing a heightened level of disclosure.

And Tandycrafts also illustrates the plaintiff might have its own reasons for wanting to oppose a vote that management is putting forward. The plaintiff in Tandycrafts was interested in potentially acquiring a controlling interest in the company. The other stockholders may or may not support the management proposal or what the other stockholder wants to do, but that's irrelevant.

What matters in Tandycrafts was is there a better informed vote. Was there a heightened level of disclosure, or as Tandycrafts also said, was there a change to corporate policy.

Here, we not only had a better informed electorate, but the electorate gained the ability to cast a meaningful vote as well as a fully informed vote. What I mean by a meaningful vote is a vote without a preordained victor. So we submit that under Tandycrafts, this would fall under the change to corporate policy prong. That would be a substantial corporate benefit. Basically, it was a change to corporate policy that allowed for the effective exercise of the stockholder franchise.

If Tandycrafts weren't enough, we submit that recent case law makes clear that removing an impediment to a fair election is a substantial benefit. Take the Yahoo case. In that case, a vote for dissidents in a director election was no longer subject to the coercive impact of potential severance liability. Where there could be severance liability -- if you vote for the dissidents, you get a new change in the board, but if you voted for the incumbents, that would not be a trigger to the plan.

In Ceridian, a vote for dissidents in a director election was no longer subject to the coercive impact of the potential termination of a merger. There was a provision in the merger agreement saying that if you vote for new directors, the merger partner has the right to walk.

So here, similarly, the rescission and exchange transaction meant that a vote for dissidents, a vote to replace directors, was no longer subject to the coercive impact of the new $25 million proxy put or the voting dilution of the 28 percent voting bloc.

Unlike Yahoo and Ceridian, where there was a removal of impediment to a potential future contest, here, EMAK's common stockholders gained an immediate realtime benefit as part of a pending election contest. A vote that otherwise would have been meaningless, all of a sudden, became meaningful. And the two future courses of the future of the company were presented to the common stockholders; and it was up to the common stockholders which one would prevail, based on the benefits obtained in this litigation.

THE COURT: It's a little bit tougher to make that argument for the invalidation of the Crown consents, isn't it? Because that was effectively happening contemporaneously with the vote. And so the stockholders didn't know that they were getting this benefit, couldn't really take it into account in the sense of having a free and uncoerced election until the same moment that the whole ball of wax was adjudicated.

MR. FRIEDLANDER: Well, I suppose in the sense that the stockholders didn't know they were subject to that, because I guess, I don't think there was any great public disclosure about, We've just adopted this bylaw; but in reality, it's the same thing. We knew in order for these votes to be tabulated -- so it's not just the state of mind of the voter.

Certainly, for the folks on our side who knew what was going on, in order to pursue this and make the effort and try to rally the votes, it was an absolute precondition that the Crown consent had to be invalidated, just logically, or else there was just no point to continue. You just couldn't win. So I would say for a large percentage of the people I talked to, I think that was a very real factor.

And just to draw a distinction between the counting of the votes and figuring out who won and which cards were valid versus whether you get to that vote-counting exercise at all, has this election been foreclosed, essentially, Crown's argument was actually you can remove directors. They said they can be removed.

But once you remove directors, even if we won the vote, we're down to a three-person board, and you can't put new people in their place. So if that was the case, then you would never get to the exercise of tabulating votes and figuring out who the majority of the board was. There just wouldn't be the slots there. So I think, in fact, it has the same effect. It was a precondition to the whole vote-counting exercise.

And it was going to be happening in realtime, those ten days before the conclusion of the TBE consent solicitation, from December 12th, when the consent was delivered, and then the board decides not to do anything about it, and then the consents are delivered on December 18th.

So in order, then, to determine -- we couldn't just have a litigation over the -- to put it conversely, we couldn't just have a vote-counting litigation and say, This is worth contesting. Do we have a majority or not? You have to litigate the Crown consent even just to get there.

Now, the plaintiff had no agenda that posed any threat to the common stockholders. This is not the two hostile bidder cases that are out there, I guess the losing bidder cases. The right to participate in a full and fair consent solicitation is an unvarnished good. That's all we had here.

There was no election contest coupled with a course of tender offer or something that the plaintiffs were trying to -- there was no transaction the plaintiffs were trying to impose on the current company as a whole. There was no divergent interest or potentially divergent interest between the plaintiffs and the common stockholders as a whole.

One of the plaintiffs is an entity called Sems Diversified Value, LP, just an institutional investor in the company. And Your Honor already found after the trial that Mr. Kurz had no reason to vote "other than in the manner he thinks would best maximize the value of

EMAK as a corporation."

Now, turning to the Crown consent, we're talking about the main benefit of that was just that it allowed there to be a meaningful election in the same sense that the exchange transaction did, but it also provided a temporal space for the board to operate and defend against Crown seizing control of the support of the minority common stockholders.

At the time the Crown bylaw was adopted, they had two affiliates as designees, director designees. There was Crown manager, Jeffrey Deutschman, and Jason Ackerman, who worked with one of the affiliates as a nephew of Peter Ackerman. And Mr. Deutschman testified at trial that having two Crown designees would make it easier to restructure Crown's investment in the company.

But because the board -- I'm sorry. Because the bylaw was invalidated, the board possessed the power, the authority, to defend against Crown. There were certain things the interim board was in the works of doing, whether it's soliciting against Crown, examining a super-majority bylaw, examining acquisition, among other things.

On the flip side, when the interim board was unseated, the remaining incumbent, unlike in December, they did not sit just idly and allow Crown to appoint two directors of their choosing, but they entered into a contract with Crown that bars Crown from designating two persons affiliated with Crown as its two designees.

As they publicly stated, EMAK did, they said, Crown does not control the Board of Directors. That's something they accomplished. And we submit that EMAK's own conduct demonstrates the benefit of invalidating a bylaw that otherwise would have allowed immediate seizure of control of the company by Crown.

Now, I would like to turn to probably the main theme of EMAK's opposition, which is whether the value of EMAK as a company or the value of its common stock operates as a limit on the size of the fee award. I think that proposition runs into a number of obstacles. I'll identify three of them.

First, there really is no way to measure the benefit of a contested election at EMAK. There is a reason why we have corporate benefit cases and we have common fund cases. In corporate benefit cases, we do not have a measurable, quantifiable benefit. And there are a number of reasons why that's the case, a number of aspects in which that's the case.

Well, for one, we have no valuation of EMAK in the record, as a factual matter. We have no valuation of the preferred stock in the record. The trading price of the common stock, I don't think would be deemed reliable, given the listing, the thinness of trading, and the possibility of a restructured Crown investment.

But more fundamentally, perhaps, is that what was at stake was control of the company and the potential future value of EMAK under either of two paths that the common stockholders could choose. What if the dissidents had prevailed? On the other side, it is pretty clear, it ultimately would have been an unmitigated disaster.

Alternatively, what the dissidents were working on was the purchase of Omlet, a stock acquisition of this branding company, entertainment company. They had their own business strategy. And then what would the value of the company have been worth on day one, six months out, one year out? Who knows? What would the preferred have been worth?

Now, I submit that the preferred under that scenario would have been worth its conversion value, essentially. It was worth 20 percent of the company, whatever the value of the company is. There would have been no realistic prospect that it would have gotten paid any other way.

Indeed, the Omlet deal itself was predicated on the common stock not being worth the 72 cents that they can find it quoted at. I think they found one trade in there. But that the future value of this was a growing enterprise, and that this is under combined management. This is something that could work out very well and make the company a lot more valuable, but that was the premise of that acquisition. And the corollary of that is that the preferred stock would have been worth a lot less.

Now, under the current state of the world, who knows? But, again, now Crown is in a different position. But what was at stake was presenting this choice, and it's about future states of the world and people's estimates of how to vote and what they think might happen through either state of the world. That's why the value of franchise rights in a fundamental sense is not quantifiable.

Indeed, it's when the value of the company may be low and the stock price is low that franchise rights are most valuable, because you're trying to correct -- it's only in extreme circumstances when people are going to go through the effort of trying to take back control of the board and elect new majority directors.

And you know, how often do you see proxy advisors come out and say, Yes, replace a majority of the board. Let's completely change the direction of the company. It's an unusual thing, and part of the reason is because of the dire straits and the low valuation the company has.

THE COURT: It does raise the question how you price it, though. Because the same arguments that you're making go to the vagueness of how to put a dollar value on the benefit, or even a loose dollar value of the benefit, either for a benefit conferred or for a quantum meruit, which I'm sure you're going to get to. But it's the same issue.

MR. FRIEDLANDER: It's the same issue. I think it goes to why we have a standard, which is called, is it an ascertainable benefit, is it a significant benefit, is it a substantial benefit? There is not a quantum to it. It's not, is it a measurable benefit, and then the fee is related to that. You either have a substantial benefit or you don't. Franchise rights are either valuable or they aren't. Disclosure is either valuable or it isn't. And there is a threshold for that.

But then, in measuring what the fee award is, and you go through the Sugarland factors, you don't see the size of the company. And that takes me to the second argument.

When you look at the case law, the case law, generally, in the corporate benefit realm, has looked at effective hourly rates. A lot of factors fold into that, whether it's called a back-check or otherwise. That seems to be how the cases generally are looking at it, looking at the multitude of factors, and therefore, what's the appropriate rate.

I'm not aware of any case that looks at the size of the corporation and values the corporate benefit in relation to the size of the company. And let's take Yahoo as an example of that. The fee award in Yahoo is roughly .05 percent of the market value -- of the market capital of the company, $8.4 million. I believe at that time, the market capital was about 17 billion.

And this is a time when Icahn had some designees on the board. There was a question of what would happen in the next year, and whether -- his agenda of what to do with the old Microsoft, and the stock price was moving based on the likelihood of a potential future deal.

And therefore, the impediment to whether Mr. Icahn could take control of the board the following year seemed a very real thing. And in a company of that size, you consider there is a certain level of noise. If there is a 1 percent moves in the stock price, they wouldn't even know what -- it's just a daily fluctuation.

But you don't see any suggestion in the opinion that the Chancellor is saying, I think .05 is the correct number. Plaintiffs are seeking .06, and that's too high.

THE COURT: I hear you. And the only place where it seems like we've come close to going that route is in the deal bump cases where you take the deal bump at some starting point, but then it's mitigated by this concept of causal role, which allows great discretion in terms of how you treat that. But at least as a threshold starting point, those cases to some degree look at this bump concept, which has some obvious relationship to market.

MR. FRIEDLANDER: Right. I think it's an anomaly of our law. I'll submit that. As long as you make a partial causation -- and the threshold has not been high for whether the litigation contributed to a deal bump.

THE COURT: Right.

MR. FRIEDLANDER: And no matter how many lawyers you've got or how many law firms or how redundant the legal work was, you can point to that and say, well, that's enough. And then the multiples -- I could probably start at 700. I don't know if it goes below that. And then it gets to 4,000, 5,000. Even in cases 20 years ago, people were getting $4,000 for deal bumps.

It's a funny thing, I submit, in this partial causation world, that that's the exercise you go through. And somehow, it still always ties into the effective hourly rate. Because the numbers, I don't believe it's ever below 1500 or above 4500, let's say.

THE COURT: The whole system creates some of the rather odd incentives that Chancellor Strine has been talking about for years, that I've talked about a couple times. It's just an odd set-up to price these things that way, because as all of us know, you don't do any more or less work when you're challenging a $100 million or $150 million deal than you do when you're challenging a $6.6 or $10 billion deal.

I mean, maybe as a defense lawyer, you have a little bit more leeway to employ a bigger team, but the same concepts in terms of challenging the deal protections, challenging the disclosure, challenging the process, they don't vary based on size.

So the idea that you would price these bump cases based on size, it really is a factor of I think questionable relevance, and it really does create this post hoc ergo propter hoc problem. But nonetheless, it's out there. And so your friends have at least a decent point that it is something that we have focused on from time to time.

MR. FRIEDLANDER: But I don't think explicitly. I don't know where the case is where it says that. Even the disclosure cases, looking at Globis, it was about a half billion deal, and the fee award was $1500 an hour. But it's not that the disclosures are so good in relation to the deal. I don't know any case where that's been part of the rationale, ever.

Instead, there is this I guess floating -- there is a band in which even all the bump cases fall, and I submit all the therapeutic cases fall. And it's keyed off what is deemed to be, under some multi-factor test, under the Sugarland factors, what's the appropriate effective hourly rate.

And in Seinfeld versus Coker, the Chancellor was very explicit that even in a corporate -- even in a common fund case, looking at it that way, it is deemed even in common fund cases, he says, Let's look to hours and effective hourly rates, and that's the way to really figure out how much a lawyer should be compensated.

That's problem two. We have the valuation rationale, first point. Second is case law. And third, what Your Honor is alluding to is incentive structure and the realities of litigation. And I would add to that the problem of deterrence or under-deterrence. We usually talk about over-deterrence. And usually that's in the bump cases and the rest of them where you have teams of lawyers from all across the country descending on the court as part of a fee application. Here, you have a real problem of under-deterrence under the state of the world that EMAK is arguing for.

I mean, this case epitomizes, illustrates how fiduciaries of a small company who have the capacity and willingness to spend a significant percentage of the company as well, and cash reserves, earn retention of control, and even if it means doing so by means that I would submit are inequitable and contrary to law, which is the finding as to the bylaws.

Now, the litigation could have lasted two days. EMAK and Crown, the records show they didn't have Delaware counsel when they put this deal together. They didn't have lawyers that knew anything about Blasius. At least in the record, Mr. Austin didn't know what Blasius was.

Once they hired their Delaware counsel and became familiar with Blasius, everyone could have sat down and gotten rational and said, Did this make sense? And on the plaintiff's side, you're always hoping, who knows, maybe we'll write a good complaint and the litigation will end. As we always joke, any time you get a call from the client, every client maybe says that. You can't count on that. You sort of learn pretty quickly not to count on that, about how the other side is going to conduct themselves in litigation or, for instance, the transaction.

So instead, we have a justification for the exchange transaction that could not be squared with the e-mail record. We had a full offense against the plaintiffs, and not just against the plaintiffs, but also against Take Back EMAK, LLC. We had the affirmative defense of unclean hands. We had the affirmative defense that the litigation was pursued for improper purpose. The depositions of not only Mr. Kurz, Mr. Sems, but Michael Konig and Sam Konig.

THE COURT: You ran into a grudge match. You ran into a grudge match where people had serious animosities toward each other. And taking on a contingent case in that context is materially different from rolling into a deal situation where everybody is looking towards the eventual settlement, global release, deal insurance, peace.

Instead of a context where you're looking for opportunities to settle, and everybody is, you know, not biding their time, but litigating with the eventual idea that settlement is a global good that always happens, and this is unlikely to be the rare case where you go the whole way, you guys took on the case where people hated each other, so the prospects of this global resolution were much less.

And I think -- I mean, you don't have to belabor the point. I think that has to be taken into account in terms of assessing the level of contingent risk that you all undertook.

MR. FRIEDLANDER: I would submit it wasn't just a grudge match. There was real money at stake in the sense that Mr. Ackerman, when deposed, was firmly of the view he's owed $25 million. And the point of view on our side is that that preferred stock is not worth anything close to $25 million. And someone is looking to get back that $25 million.

Holbrook has his job at issue. The other directors, who knows what their motivations are or why they do what they do. You know, that can all be litigated. And it was the subject of a lot of discovery. But there were people's real lives that were at stake.

THE COURT: I agree with that too. There was animosities, but there was also real disputes. I mean, my point is this wasn't one of these situations where everybody got into it knowing that you were going to fight about stuff, but there was a clear opportunity to get some type of settlement that would make everybody happy.

This was one that you got into, at least my sense is, believing that you were either going to have a hard-fought settlement or you were going to have to go the distance.

MR. FRIEDLANDER: Right. And even when the point came where the defendants professed shock to learn that we were continuing on a contingent basis -- which I think is interesting itself because EMAK not only knew they were spending their own money on the counsel for the directors, but they also knew under their view of the contract that they had to pay Crown's lawyers throughout all this.

And apparently, they were working under the assumption that the plaintiffs were spending out-of-pocket too to keep this going. And it's hard to think that that was not a factor in this litigation going as long as it did in terms of it not -- the rescission taking place the day before the preliminary injunction hearing, to ratchet up the burden on the plaintiff's side.

And they professed shock to learn that we were retained on a contingent basis. And what did they do then? All of a sudden, Oh, we better act differently. And the Crown bylaw came down the pike a couple days after that court filing.

THE COURT: It just becomes a question of how long you and Mr. Bouchard can bear the pain as opposed to how long Mr. Kurz can bear the pain. The rationale for imposing the pain remains the same.

MR. FRIEDLANDER: I think that goes actually to the Sugarland factors, what those factors really go to, how intensely you have to litigate. What is the contingent risk you're taking on?

When you start the litigation, it's just about the exchange transaction, but once you're representing clients on an expedited basis, you have to deal with each issue that comes along. And whether it's the time, you know, that's not part of the fee or just all the duration of the litigation, there is just a whole extent of burdens and out-of-pocket costs that are folded into the calculus.

In Seinfeld versus Coker, the point to that is that the Chancellor, in a very open way, talks about the incentives of lawyers in light of effective hourly rates, and the factors of the difficulty of legal issues, the extent of the work that counsel had to do.

So I think that all of the case, law whether it's Seinfeld versus Coker or whether it's the Sugarland factors, generally, whether it's Ceridian and Yahoo or whether it's Tandycrafts, all point to a significant premium above the hourly rate.

If I can spend a minute or less than a minute on another flavor from the opposition is that they're entitled to an offset. And on that, there is just no law on that. It's not part of the Sugarland factors. It's never been done; but not only that, the legal doctrines all point the opposite direction.

If defendants want to get money from plaintiffs for the defense litigation costs, you have to go to fee shifting. But even fee shifting cases, usually, it's the plaintiff seeking money from the defendants, for the egregious conduct from the defendants. To get money from the plaintiffs, you have to say that the whole litigation was pursued on a fraudulent basis or some such extremely sanctionable conduct that was the basis for litigation.

THE COURT: There is this footnote in this Thorpe case which I hadn't focused on before this dispute, so it was interesting to see Chancellor Allen's thoughts on it, where he does say that -- he does suggest in Footnote 1 that one might want to take into account net benefits, essentially, I think as a way of policing -- it's sort of like an additional policing against strike suits.

If you've got somebody rolling in with a pure disclosure claim or something like that that ends up inflicting a million dollars in defense costs on the company, or here, in Thorpe, he had something where he ended up only awarding 180,000, he seems to be asking whether you really want to just look at one side of the ledger.

MR. FRIEDLANDER: Let's talk about Thorpe. Thorpe was a damages case. The plaintiffs -- it was a usurpation of corporate opportunity, but the plaintiffs proceeded on the basis of, Well, there was a deal that could have been done that would have been very profitable to the company. The defendant stopped that deal from happening. Therefore, you should look at this hypothetical benefit from a hypothetical transaction.

The Chancellor said, Look, you litigated very hard. You're industrious folks, but this is just an incredible waste of judicial resources, litigation resources, to pursue all this.

So the argument was made by the company that even if there is an economic -- there was an economic benefit of about half a million dollars of the money that the Eriksons had taken for themselves in an upfront fee, there was a letter of intent and a cost to the company of the special counsel that it had retained.

So there was a common fund of about half a million dollars. And the defendant said, How dare you even think about awarding any of that money. Look at all the millions we've had to expend, what a waste this has been.

And Chancellor Allen, as a footnote, says, interesting argument, but I think it is interesting the way he puts it. In the end of the footnote, he says, "I can't imagine why you wouldn't look at net benefit for judging the equity of fee shifting in a case where defendants prevail on the most central issues."

And the point was it's unnecessary in this case because there was at the core of that case the usurpation of the corporate opportunity, the improper conduct by the defendants. And indeed, the case is now cited as maybe a leading example of a post-trial finding of improper fiduciary misconduct.

What do we have here? There is one issue that the defendants, EMAK, prevailed on, and that was the interpretation of the Boutros restricted stock agreement as applied to the purchase agreement. That's it. The rest of the case was about the exchange transaction. We have the exchange transaction which was rescinded, and the Crown bylaw, which was invalidated.

So we never get to the footnote. Instead, since Chancellor Allen just put that in as dictum, it may be relevant in a future case. What he actually did in that case, it was a common fund, he said the lawyers worked really hard. I'm going to give them the absolute top I can award, given the common fund. The common fund was about half a million, and the fee award was 175.

Again, I think that that supports the result here because the fee is calculated under a different setup or different rubric of corporate benefit rather than a common fund.

And to get to the problem of deterrence, you know, when there is misconduct, you know, there will always be a threshold of cases that say, Is this pot of money worth fighting over? But apart from that, when you're talking about corporate control and there is a significant amount of money that is at stake, it's real to all the people involved at this company.

The other thing is by exercising misconduct by the defendants to stop a corporate election, and to say even if, theoretically, ultimately, we're on the hook for it as defendants because of indemnification as a royalty exception, but nobody is going to bring this case. Because if you take a percentage of the value of the company, that's going to create an artificial ceiling on a fee award. It's clear that the cases just won't be brought.

And there would be a real problem with deterrence and a real problem with Delaware law as applied to a whole class of companies that otherwise -- where judicial redress and the judicial resources are not sufficient for Your Honor and this Court to take the time we do, because of the Court this is and the jurisdiction that we're in. That, and the importance we place on the corporate election process.

There is no carve-out for small cap companies. And if there were, if there were, I think this case illustrates the problem that you would have. The litigation wouldn't be there. The misconduct would persist. And I don't know who would stand for that as a legal regime if Delaware were put in that position where defendants are going to say, I'm going to foreclose an election. I'm going to stop this from happening. And you Mr. Dissident Director, Mr. Unhappy Large Stockholder, there is nothing you can do about it.

I'll save everything else for the reply.

THE COURT: Thank you.

Mr. Nachbar. Welcome back to you too, by the way.

MR. NACHBAR: Thank you, Your Honor. Good to be back.

This case had two fundamental problems from the outset, problems that plaintiffs could never overcome and, indeed, have never overcome. First, under the capital structure of the company, the preferred had a $25 million preference, and the company was not and is not worth near that amount, as all parties admit.

But the second and bigger problem, and we heard it admitted here today, I think, is that under the company's voting structure, the preferred had 28 percent of the votes on an as-converted basis. Thus, if it could garner support of 22 percent of the common stock, it could control the bylaws and thereby control the company.

Now, what we heard this morning was that there was a 47.2 percent bloc that was committed, working together, to do just that. And that was the officers and directors, together with Crown. So if they could get the support of even a couple of stockholders, game over.

And in fact, they had that support. It's undisputed they had the support of Heartland. They had the support of Gruber McBain. They had the support of several other stockholders. That's why they were able to deliver consents when they needed to for well over 50 percent of the total stock.

So it was known by all from the outset that with the support of just a few more common stockholders beyond the 47.2 percent bloc that Mr. Friedlander talks about, the preferred could amend the bylaws to require super-majority votes to take board action. It could amend the bylaws to reduce the size of the board. It could amend the bylaws to create special committees. It could amend the bylaws in any way that stockholders could lawfully amend bylaws. Not only it could, but it would.

So at the end of the day, if there was even support of just a few common stockholders, in the long run, Crown was going to win, and everybody knew that.

Now, Don Kurz was not a stranger to EMAK. He had run the company previously. He had been asked to resign. He was well known to Crown. He was well known to the large stockholders of the company. He was well known to Mr. Robeck, who co-founded the company, served on the board with him. He was well known to Heartland. He was well known to Gruber McBain. Those holders of common stock did not want Kurz back at the helm. And that was well known to both Crown and the Board of Directors.

So what happened? As tensions with Mr. Kurz increased in 2009, the board began exploring an exchange transaction by which Crown would surrender its right to elect two directors in exchange for the right to vote with holders of the common stock on all matters, including the election of directors.

The record establishes that the board viewed this, first, as a way to prevent Crown from taking its own stockholder action to control the board, and second, as a potential first step in what everybody viewed to be a necessary reorganization of the company's capital structure.

The transaction was planned before Kurz announced any proxy contest. Then the next thing that happened, before it could be implemented, Kurz said, Well, I intend to solicit proxies. The exchange transaction was put into place anyway. Kurz sued.

The board and the company defended the exchange offer, pointing out that it was not, not, handing control to Crown, since Crown could seize that control in any event. That's something that plaintiffs now admit, since they now say, Yeah, that there was a 47.2 percent bloc at all times, and if they could just get one or two other holders of common, they could control the company.

During the pendency of the litigation, the company solicited and obtained ratifications for the exchange transaction. And the thought process there was pretty simple. In addition to whatever legal effect ratification might have, we thought that once Mr. Kurz saw that the holders of the common stock did not support him, and that this voting bloc of 47.2 percent actually had the support of others beyond the voting bloc, he would realize that his proxy contest could not succeed, and he would stop spending money on a lawsuit that, even if he won, had no practical value.

What we didn't know at the time was that Mr. Kurz's lawyers were litigating the case on a contingent basis, and therefore, neither Mr. Kurz nor his lawyers really had any interest in practicalities. From Kurz' standpoint, the litigation was a bludgeon to be used to attempt to embarrass the company and perhaps extract some settlement. Certainly, to cause the company to pay legal fees that, you know, at the end of the day, maybe just throw in the towel and give something to Kurz to go away.

From the standpoint of plaintiff's counsel, it appears that the main goal was to achieve something that could later be argued to be a victory, and then apply for premium legal fees, which they have now done. Any, any rational person, looking at the practicalities, would have reached a settlement when the ratifications were submitted.

THE COURT: If that was so obvious, then, why didn't you all just rescind the day after the complaint was filed, confident that you all were going to win the consent solicitation, and just win it at the ballot box?

MR. NACHBAR: Well, because the board put the exchange transaction in place for a reason. The board thought that it was preferable to take away Crown's right to appoint two directors. Where we are now, is that -- okay.

Let's say there were 100 common votes outstanding before the exchange transaction, if you just look at the common. And Crown has 28 percent on a fully diluted basis. So basically, it's like there is 128 votes. You need 64 of them to be a majority. So with a 64 percent super-majority, holders of the common can throw Crown out. They can amend the bylaws. They can increase the size of the board. They can take back control.

Same thing as after the exchange offer. You could elect new directors. You would need 64 out of 128 votes to win. Or if not everybody voted, it could be a little bit lower, but this is a company that there are so few stockholders, that almost everybody wound up voting in this election.

So we're in the exact same place. The only difference is that there's actually a downside for Crown in the event of an exchange offer because it could be thrown out altogether. Right? If it doesn't have the right to elect two directors, if that 64 percent coalesces and votes against Crown, Crown is out cold. It has nobody on the board.

By rescinding the exchange transaction, we get to the exact same place, albeit with a lot of litigation, except it's better for Crown, because now, Crown, worst case, has two directors on the board, and can at least monitor what's going on at the board and have whatever protection those two directors provided.

THE COURT: I follow you, but I guess what I'm asking is, again, if it was so obvious to everyone on your side that there was no need for this additional 28 percent to guarantee the result of the election, why not make the Crown conversion effective two months later? Fight the Kurz consent solicitation based on the voting dispersion as it existed on that day. You know you're going to win.

You don't have to worry about Laster getting all fired up about putting 28 percent of the vote of directors in Crown's hands. You get your cold win that everybody anticipates, and then you get the result that you say is better because it avoids -- or it puts Crown in greater jeopardy. You submit it after you've successfully defeated the Kurz contest, and you don't have this litigation problem.

MR. NACHBAR: That's what we did.

THE COURT: That's not what you did. You fought the litigation. You didn't move this out until literally the day before the hearing.

MR. NACHBAR: What we did is we did the ratification, because we thought that, you know, the other side knew theoretically that they could be defeated, but maybe they thought it wasn't real. Maybe they thought that people wouldn't actually exercise those consents. Maybe they thought that Robeck would support them at the end of the day. Maybe they thought that Heartland wasn't going to vote with Crown.

So we went out and we got the ratifications, and we said, Here they are. You can't win. You do not have the support. Crown does. That's it. And we really thought that that was going to end the litigation, because it made no sense at that point. It didn't end the litigation. Instead, it ratcheted up the litigation.

You know in terms of people being defrauded or anything like that, that's simply not true. This is a small company. These stockholders know each other. Steven Robeck was not going to be persuaded by anything that was or wasn't in a proxy statement. He knows Don Kurz. He founded the company with him.

Heartland, they're not worried about reading the minute disclosures in a proxy statement. They talk to the management of the company. They talk to Kurz. They have an understanding of who's who. If this were a New York Stock Exchange listed company and there were 5,000 stockholders who each held 1,000 shares, maybe that's a different story. That's not what this company was.

So there was no false disclosure. There was no corrective disclosure ever required. But the disclosures didn't matter. The people who were ratifying were ratifying based upon their knowledge of the company and their experience with Mr. Kurz. That's what this was about. It was a referendum on Kurz, and the stockholders didn't want him. He had run the company, and they had thrown him out. They didn't want him back, and that was the fundamental reality.

So when the ratification didn't make the case go away, we did rescind the exchange transaction. Why did we rescind it? Because Crown wanted us to rescind it. They had been asking us to rescind it for some time. Obviously, the plaintiffs wanted us to rescind it. We got the distinct impression that the Court wanted us to rescind it. So we rescinded it. That seemed to be what everybody wanted.

And we knew when we rescinded it that we were handing the keys to Crown, but we didn't feel like we had a choice. That's -- we were going to end up in the same place anyway; and sure enough, we did.

Now, contrary to plaintiff's allegations, the exchange transaction was never put in to entrench the board or to prevent Kurz from controlling the company. It was inevitable that he was going to control the company in any event.

Now, the other side says, Aha, but yes, you know, had we succeeded at the Supreme Court, an interim board could have done all kinds of nefarious things. It could have required a super-majority vote for amendments to the bylaws, or it could have issued a bunch of stock into friendly hands and diluted -- it could have done a lot of things. None is that is remotely real. There was a status quo order in place. It couldn't do any of those things.

But let's say there hadn't been a status quo order in place. What would have happened? The same people who exercised the Crown consent would have gotten into a room, they would have executed a new piece of paper, and it would have said, The bylaws require consent of at least four directors to take any of the following actions, and it would have looked a lot like the status quo order, and then the board couldn't have done any of those things without Crown's consent. So we were getting to the same place anyway.

Now, after the exchange transaction was rescinded, Kurz still got no additional traction from among the holders of the common stock. He went into the proxy contest with 40 percent of the common lined up. He couldn't get the last 10 percent. So what did he do? He illegally purchased the shares of Peter Boutros and claimed control of the company.

During the ensuing appeal -- and all of these facts are not disputed. I mean, I want to comment on the reply brief, because I think it's, in some sense, it almost seems mistitled, because it really doesn't reply to much of what's in the answering brief. It's really like opening brief part two.

But among the things that they don't reply to, factually, is that Kurz sought to take over the company, he expended $800,000 on legal fees, or on fees, I should say, largely to seek to terminate Mr. Holbrook, and some of the fees went to the very lawyers who are making this application. Some of the money went directly to Mr. Kurz and Mr. Sems or their personal companies.

The lawyers here not only got paid and not only represented EMAK, following the temporary change of control, but they represented EMAK when they had previously sued EMAK individually. It's a substantially related matter. That's an obvious conflict.

They say they didn't sue EMAK individually. I would invite Your Honor to read the complaint and the amended complaint. They're not brought derivatively. They're brought individually, and EMAK is a named defendant.

Now, when they identify the parties, it says nominal defendants, EMAK; that much is true. But look at the releases they seek. What do they seek? They seek to invalidate a transaction to which EMAK is a party, the exchange transaction, and they seek an injunction against EMAK.

So they sued EMAK, and then a short time later, in a substantially related matter, purported to represent EMAK.

THE COURT: What are you supposed to do when you -- and granted, it was temporary. But what are you supposed to do when you successfully win a control play? Do you just dump the guy who advised you all along and bring in someone new?

It strikes me there are a lot of good reasons that we require separate counsel on derivative actions and apply these conflict concepts, but this strikes me as a situation where traditional conflict principles are being applied in a setting where they don't really make a lot of sense because of the changeover in management that at least temporarily occurred. What was the right thing to do there, just hire somebody brand new and get another law firm billing?

MR. NACHBAR: They did that. They had Richards, Layton & Finger. Richards billed a lot of money. You could have had Richards be your advisor.

And Your Honor, I mean, those arguments come with particular ill grace from the other side, because you may recall that my firm represented the company and Mr. Holbrook. When the temporary takeover happened, I was fired as counsel for EMAK.

THE COURT: That's the reason I welcomed you back.

MR. NACHBAR: I appreciate that. But something else happened. I also got a letter saying that I could no longer represent Mr. Holbrook because Mr. Holbrook's interests were adverse to those of EMAK, my former client, and it was a substantially related matter.

And what I did is I said, as much as I hate to admit it, these guys are right. And so I didn't represent Mr. Holbrook. When we had all those applications in the court after the temporary victory, you didn't see me in the courtroom, you didn't see me on the papers, and that's why.

So for the other side to say, Well, you know, we don't really pay attention to conflicts in these areas, well, obviously, they do. At least when I'm the one, when it's my conflict, they pay a lot of attention; when it's their conflict, less so.

THE COURT: I wasn't that, frankly, exercised at all by the challenge against you either. Part of what happens in these things when you have a board change is people realign. But I hear you. I understand, technically, the issues are there, and I understand that the same arguments were used offensively against you during your time in the wilderness.

MR. NACHBAR: That's the point.

So anyway, you know, we get back to the merit or lack of merit, the benefit or lack of benefit. Ultimately, the Supreme Court ruled, obviously, that Mr. Kurz's purchase of shares from Peter Boutros was illegal. His proxy contest was unsuccessful, as was inevitable from the outset, in the absence of an exchange offer. Crown acted by written consent to amend the bylaws to reduce the size of the board. It now appoints two of the company's three directors.

Now, the gravamen of any attorneys fee is the benefit achieved. Case after case so holds. Yet in it reply brief, plaintiffs say for the first time that the fee award should be evaluated in terms of the hourly rate, and they should be paid at a rate of $1700 per hour because similar rates were paid in Yahoo, Ceridian and Globis.

Those cases are readily distinguishable. Not only were there real and substantial benefits found in each of those cases, the attorneys' fees awarded were also negligible given what was at stake. Mr. Friedlander very helpfully pointed out that Yahoo was he said a $16 billion corporation. I think it was 20, but you know, what's 4 billion among friends?

THE COURT: Right.

MR. NACHBAR: So the attorneys' fees were either 4/100 of 1 percent or 5/100 of one percent, depending on how you measure it. But that's equivalent in percentage terms in this case to a $4200 fee award, and we would stipulate to that. And that's assuming that EMAK had a value of $10 million.

By the way, just as an aside, the other side says, Well, there is no value in the record, nothing about the value of EMAK. That's not exactly true. Mr. Kurz testified that most of the value of EMAK resides in the preferred stock, and that the common is underwater, so we have that record.

We have the record of other purchases which have taken place at 72 cents a share to as much as a dollar a share, which would put the total value of at least the common at 5 to 7, $8 million, that range. And we have Kurz's testimony that when he purchased Mr. Boutros's shares for I think it was $1.50 a share, he paid a premium because those were the swing votes. So we have all of that record.

Ceridian, that was a stipulated fee. It was a $5.3 billion merger. The fee was 1/10 of 1 percent of the merger value. Globis, $600 million merger. The attorneys' fees in that case were 2/10 of 1 percent.

So you know, the plaintiffs seek an award here, again, undisputed, that would constitute 87 percent of the company's remaining available cash, more than 50 percent of the current market capitalization of the company's common stock. There is absolutely no precedent for that type of award.

The other side says, Well, there is no case that's ever expressly so held, and I concede that, but there's certainly no case going the other way. There is no case that says, Yes, this company is worth $5 million total, but the benefit here was so enormous that we're going to award attorneys' fees of 2.8 million. It doesn't make any sense.

Attorneys' fees, there are two caps, I think. One is the effective hourly rate, which is one of the Sugarland factors that the Court looks at, but the other is the benefit achieved. 30 percent of the benefit is pretty much the high end of the range.

So if you're going to award $3 million of fees, the company has to be worth $10 million. If the company -- and the litigation benefit has to be worth $10 million. If the company is worth $5 million, how is the litigation benefit worth $10 million? The company would have been worth negative 5 million but for the litigation? I mean, it doesn't make any sense.

And so there is no precedent for what they're seeking, and I don't think that there should be precedent for that.

THE COURT: How would you apply this in the vicinity of an insolvency scenario? We know post-Gheewalla that the derivative claims, presumably, somebody could bring that on a contingency basis. When would you be able to get a fee award if you were litigating on behalf of a corporation that was in the vicinity of insolvency.

MR. NACHBAR: Normally, those types of claims are for recovery of money, so if you recover $10 million for the creditors, even if the creditors are still underwater, you can claim 10 or 20 percent of the 10 million you recover, and you can get a fee award.

You know, good governance type claims for an insolvent company present a problem, and I think a Court should be wary of any fee award in those situations, but if it's going to award fees, it certainly shouldn't do so at some enormous premium that takes away money from the other constituents of the corporation.

THE COURT: Who was the $850 an hour guy?

MR. NACHBAR: It wasn't me.

THE COURT: Mr. Austin?

MR. BOUCHARD: Don Davis.

MR. NACHBAR: Somebody at Ropes & Gray.

THE COURT: You guys do these calculations after the payout of 5.2 on the defense side. They get essentially a preference in that calculation versus the plaintiffs. Can't I back that back in when I'm calculating percentages?

MR. NACHBAR: I don't know that they do get a preference. I mean, it was a necessary expenditure. These were serious claims, and they did need to be litigated. Unfortunately, the way this was set up, you know, we had to pay Crown's fees. We didn't really have a choice. We had to have separate counsel for the company and the individuals. Again, I don't think we really had a choice. So you know, litigation is expensive. That's just the way it is. And we had three sets of defendants who needed to be represented. We tried to do it in a way that was non-duplicative.

THE COURT: There is not as daunting a percentage of cash when you restore the 5.2.

MR. NACHBAR: That is correct. It's still a big chunk of the company's cash, but it's not 87 percent. I would concede that.

So, you know, the related question, and it's a good segue to where we just were, and plaintiffs nowhere address it, is who exactly benefitted from their efforts? Because they say there was this great benefit.

Now, what do they say in their brief? They say it was the common stockholders who they claim were an ascertainable group that benefitted from their actions in causing rescission of the exchange transaction. That's at Page 23 of their reply brief. But I think that precludes payment from the corporate treasury, because as Kurz himself conceded, most of the value of the company resides in the preferred stock. The common has little, if any, value.

So what they're really doing is they're really taking money from the preferred stockholders to pay for a benefit that they say was a benefit that was achieved for the common stockholders, conferred on the common stockholders. There is no basis for doing that. And you know, the preferred stockholder here was a defendant. The lawsuit wasn't brought for their benefit. Mr. Kurz admitted that on the stand.

Moreover, plaintiffs cannot plausibly claim that even the body of common stockholders benefitted. A majority of those stockholders executed ratifications saying that, essentially, they did not want Mr. Kurz running this company. And again, Mr. Kurz admitted on the stand that his lawsuit was not brought to benefit the people who supported Crown and supported the exchange transaction. So again, that's a majority of the common stockholders.

Those stockholders made the decision when they executed the ratifications, and later, when they voted against Mr. Kurz' slate, that they didn't want him back at the helm. Those stockholders were not benefitted by the lawsuit, and they should not be made to pay for it, much less at the exorbitant rates that will strip the company of most of its remaining cash.

Now, I think in exercising its discretion, the Court should and must consider the totality of the actions of plaintiffs and their counsel. Plaintiffs try to sidestep that by saying, Well, you know, we haven't made out a case for fee shifting, and therefore, it doesn't matter what else they might have done.

First of all, I'm not sure that there isn't a basis for fee shifting for any of their claims; but beyond that, it's irrelevant. Plaintiffs are before this Court. They're seeking equity. They not only want their fees awarded, they want them awarded at high premium rates.

One who seeks equity must do equity. Obviously, plaintiffs' assertion that the Court should not consider the propriety of plaintiffs' actions in addressing the application is, thus, I think, without basis. And when the Court does assess that conduct, it's troubling in two respects.

First, as Mr. Kurz testified, one of the law firms seeking the premium fees in this case or both of the law firms seeking the premium fees in this case advised Mr. Kurz on the Boutros transaction. Now, that's no small matter. That's an illegal transaction that directly harmed the company. It caused the Supreme Court appeal that never would have been necessary but for the illegal vote buying.

It caused disruption of an improperly seated board that was in place for ten weeks during the pendency of the appeal. It caused the expenditure by that improperly seated board of over $800,000 for advisors and consultants, including payments to the very counsel now seeking fees, as well as to the plaintiffs themselves.

THE COURT: This is one of those times that I'm glad for judicial immunity because the reality is I thought, at minimum, there was a reasonable basis for the position that they took. Obviously, the Supreme Court disagreed with me.

But it's hard for me to embrace the notion that so frivolous was their argument that it would give rise to either Rule 11 sanctions or shifting of fees when the distinction on which they relied is something that was, from the face of the two agreements, supported by 203, supported by 13(d), and again, it at least seemed colorable to me. So you know, given that -- so I blew it. But given that they at least can cite Laster having sided with them, how do you get to a fee shift on that?

MR. NACHBAR: I don't think it's a fee shift, but I do think that it is a factor that the Court should take into account in exercising its discretion of whether these people should be awarded premium fees. They gave advice that was legally erroneous, that led to some harm.

And you know, yes, Your Honor agreed with them in the first instance. Ultimately, the Supreme Court disagreed. But you know, had they not given that advice, you know, life would have been very different. And I think that is something that should be taken into account.

Second, plaintiffs' counsel, as I talked about, purported to represent EMAK even though they were suing EMAK in a substantially related matter. And again, I don't think that's something that the Court can simply disregard. That's a pretty clear conflict.

And plaintiffs' excuses for the improper behavior are pretty unconvincing. They say that they were only derivative claims. That's just not true. Their initial complaint and their amended complaint were both brought individually. They first filed the derivative complaint sometime in late December, which I believe was actually after the exchange transaction was rescinded.

Nor is it any response to a claim that a motion to disqualify Mr. Kirkland was denied in California, which is what they say in their brief, and what Mr. Kirkland says in his declaration. If you read the minute order, it's very clear that motion was denied for procedural reasons, and it was denied without prejudice.

If plaintiffs are attempting to suggest that Mr. Kirkland was somehow absolved, if that's their claim, then they would be deliberately misleading the Court. I don't accuse them of that. I don't think that's what they're doing, but I'm not sure why they put it in the record if it's just a procedural denial without prejudice, but that is what it is.

I think the conduct of plaintiffs' counsel is relevant, may be, and should be considered by the Court in exercising discretion of whether and how much to award fees.

In sum, any award of attorneys' fees must be tied to an ascertainable benefit to the stockholders who are asked to pay for the award. Here, I don't think that there was benefit to anyone. Certainly, to the extent there was benefit, it wasn't to the preferred stockholders. And as Mr. Kurz himself admitted, it wasn't to the stockholders who didn't support him.

So if the Court wants to award some fees to be paid by the people who supported Mr. Kurz, that's fine. You know, I don't represent those people. And you know, I don't really have a dog in that fight. To the extent that some holder of EMAK can be said to have had benefit, the award should be sought from them.

If there is any benefit at all, the size of the award needs to be considered proportionately to the benefit achieved and to where this company is and what's at stake. And when you do that, the type of award that the plaintiffs seek is simply not defensible, and there is no precedent at all for it.

We just can't be giving out half the value of a company to stockholders as a percentage of some benefit, presumably, that can't even be identified. We believe the award should be denied in its entirety. If an award should be granted over that objection, it should be substantially reduced.

Thank you, Your Honor.

THE COURT: Thank you.

MR. FRIEDLANDER: Starting where Mr. Nachbar left off, let's talk about our conduct and whether there's any conflict. This case was brought individually. The company was named for purposes of relief. That's the only reason why it was named. It wasn't brought against EMAK.

Now, as Your Honor recognized when Crown moved to dismiss back on December 3rd -- we had the hearing on December 4th and a mini-oral argument on the motion to dismiss, and Your Honor suggested Crown might want to put it off a bit -- that when Crown moved to dismiss, Your Honor pointed out, isn't Crown potentially on the hook for fees here?

There's been an expenditure of litigation, litigation expense. EMAK has talked about in their press releases how much this grievous expense is they've had to bear because of these transactions and this litigation. Why was Crown, as a potential aider or abettor, not a defendant in that damages claim?

Now, then we amended our complaint to seek damages for the very same conduct. When they say we were sued as the company, actually, the exact same claims and exact same conduct, we're now suing on behalf of the company to recoup all this expense for the benefit of the company.

And I don't know if you call it a supplemental brief, but I wrote a brief to Mr. Wilensky at Morris Nichols when they raised this issue of whether there is a conflict here. It's Exhibit 37 to this appendix. This is a long single-spaced letter saying there is no conflict under the rules, under any of this.

And then in their answering brief, of course, they don't cite a single case. They don't even cite a rule or a comment to a rule. So I'm not going to apologize for not having a lengthy rebuttal to that point. There was no citation, but it's there.

This is a case brought on behalf of the company to recoup the very same litigation expenses not only that we're seeking, but that were expended on behalf of the defendants. So I don't see the conflict.

Now, as to Mr. Boutros, I mean, there is a question of what's in the record and what's not. Of course, the Boutros agreement wasn't even in the record of the Supreme Court, so we don't have a problem with that, in its entirety. But what's certainly not in the record is what advice was given.

I mean, they were calling us aiders and abettors, tortious interferers or whatnot, but there is nothing in the record about what advice we gave or what advice Mr. Boutros' firm gave.

THE COURT: Sounds like that's going to be California.

MR. FRIEDLANDER: Right. We have not yet been named a defendant. I don't want to invite -- I don't think they have jurisdiction over us, but meanwhile, the company is out there suing for punitive damage and compensatory damages for Mr. Boutros's transaction.

We all know they want to avoid litigation expenses, so Mr. Nachbar always insists, but I don't know if the folks at Robes & Gray got the same message. Or I guess it's now Latham & Watkins. But they have that claim.

It's going to go through the Court system however it will go. How that's a defense to a fee application completely eludes me. There is nothing in the record that we did anything improper or that Luce Forward did anything improper in connection with the Boutros transaction.

Now, let's step back to the beginning. It was all inevitable and, therefore, we all should have given up. When exactly was it inevitable? I guess we heard for the first time, when they submitted the ratification consents. I guess that's the first time Heartland signed one of those ratification consents and Gruber McBain. Heartland by itself was significant.

Was it inevitable before then that Heartland wouldn't vote with us? And if it was so inevitable, why did they lie in seeking ratification?

Let's just go back to the disclosure claims. What they said in seeking ratification, "Over the years, Crown has been diligent in working with us as a partner, implementing our long-term strategic plans." That's the one thing said about Crown in those ratification solicitations, nothing about how Crown has taken draconian measures to demand that they get paid as liquidation preferences and all the unilateral actions that might take place at the expense of the common. That was not worth mentioning.

Since Crown no longer has any guaranteed board representation, it needed assurance that there was some incentive to pay out any change of control or redemption payments. So that's why they got this new payment regime, with an escalating new rate of interest in case there was a change of control. But whoops, wait a minute. If there was a change of control transaction, Crown had a contractual right to put its directors on the board. So that's actually just flatly wrong.

I mean, to the extent that Crown no longer has guaranteed board representation, there is a change of control, and they need some other special relief. If there is a change of control, they get board representation:

"The board thought very carefully about the exchange transaction." Your Honor had this opinion, talking about adverbs. We have two adverbs here, both "carefully" and "very carefully," but nothing about the deliberative process or any history about how the board came to the decision to enter into the exchange transaction.

"There is no secret poison pill, nor any other effort to entrench the board. Crown is free to vote its shares as it sees fit. It has no voting agreement with the board." As we all know, 13(d) -- you know, is there an agreement or understanding about how Crown will vote these shares? Anything about the e-mails? About, Oh, Crown is now my partner? Crown wants to make sure Don doesn't get control? Just a flat lie.

"Crown has surrendered the right to appoint its own designees to EMAK's board." Should we mention that Mr. Deutschman was immediately reappointed to the board to make sure he stays on through the next election? It didn't say that.

"Ratification is a powerful factor which will help to defeat Mr. Kurz's claims, and should help EMAK and its directors save our company a significant amount of cash that would otherwise be spent on legal fees to fight this lawsuit, so please get your consents in before December 4th with the hearing." So it would potentially save the amount of fees that would be spent at the oral argument on December 4th. I guess that's the argument. And "ratification is a powerful factor." Of course, it requires full disclosure, and it doesn't defend against a duty of loyalty claim.

The exchange transaction, "in order to better align the interests of Crown with the common stockholders." How in the world does the exchange transaction align the interests of Crown and the common stockholders? Crown still has its preference for $25 million on a change of control or on dissolution. The common stock is still the residual equity bearer in all of that.

Mr. Deutschman testified that the security is not worth much if we don't get paid. So their incentive is to get paid the $25 million. It's not to grow the company or to seal the future success of the company, unless they just want to have the benefit of their conversion, their conversion price. So it's just lie after lie after lie after lie. And we're supposed to just give up?

Makes you wonder how inevitable it was, if they have to do the transaction in the first place, they have to manipulate the record, and then they have to lie to stockholders about it. Similar things were in the press releases.

But these are all stockholders who all know each other. There are two institutions. There's RiskMetrics. There's Glass Lewis. Nobody pays attention to them. Maybe we're naive, thinking people might pay attention to them.

This all came down to 106,000 votes because it was inevitable that Mr. Boutros wouldn't vote for us unless there was a payment? That was inevitable? What date was that inevitable? It was inevitable that Mr. Daniels wouldn't vote for us? Because he voted for us once and switched, and he wouldn't switch back. It didn't matter what Your Honor said or what RiskMetrics said. It was inevitable.

It's just this failure to grasp the factual record that underlies this whole defense here, that this was a transaction that was mooted on the eve of an injunction hearing for an illogical reason.

And to bring us back to the law of fee applications, there is a reason why we have a thing called meritoriously filed and causation, and there is a reason why it's not being argued here, at least formally.

Maybe through the back door, trying to, but there is a reason why it's not being contested because this was not inevitable, and as Your Honor knows from the whole history of the litigation, how things could have turned out.

There is nothing we could do about Crown. Talk about ill grace. This is talking about the lawyer who said, This bylaw looks fine to me, and there is nothing we can do about super-majority. We can write briefs saying this is a draconian threat, but we can't defend against it?

Of course there was something the board could do. Of course there was a written consent bylaw put in place, and the board had the ability to exercise its own powers. We do not have a legal regime where stockholders, regardless of what they're up to, what their purposes are, or who they're aligned with, can impose their powers on the corporation without the board having a say.

And I would agree on one thing. Litigation is expensive, as my friend says. I agree. It's been expensive. There is a reason why it's expensive. It takes lawyers to do it. And no matter how obvious it might seen on day one that you might win, or maybe not obvious, you've got to litigate it a long way to get to the end of the road, and you still don't know how it's going to turn out. You never can foresee what ultimately will make the difference and how much money was at stake.

I mean, the idea that this was all pursued for some frivolous reason, not on the merits, because the folks who owned all these common shares of the company didn't really care about the future of the company, weren't really trying to add value through new leadership, that can't be established. I know it's an affirmative defense. They say this whole litigation was brought for an improper purpose, but it hasn't been made out, I submit, at this stage, and I don't think it ever will be.

And you know, the Omlet transaction, I think, goes to that. These are people who were working hard to resuscitate a business. And let's just to go back in time. Let's remember that this consent solicitation began right after the Burger King customer went away.

And you know, getting back to inevitability, let's remember, September 24, 2009, 6:16 a.m., Jim Holbrook e-mail: "I suspect Don's group may buy shares after the BKC announcement, assuming the price drops. There are roughly 2.6 million shares or 37 percent of the voting for the board, so they need an additional million shares to net 51 percent. That's 6:16 a.m. on September 24th.

8:12 a.m. on September 24th, Mr. Holbrook's e-mail: "EMAK today announces a new strategic direction for the company, including the following. The board has approved full voting rights to the preferred," and he also mentioned the loss of Burger King. "While the company does have cash on hand, et cetera, the BK loss is a mighty blow. EMAK will continue to operate in light of its options." Mr. Holbrook recognized the threat.

Mr. Ackerman recognized his own threat to him and about his ability to extract money out of the company because of the Burger King announcement. They delayed the Burger King announcement and they put in the exchange transaction.

Holbrook's initial thought was, Well, we'll get a standstill on the return. Of course, he never even bothered asking for the standstill. And the exchange transaction, they justified it by saying, Well, if we don't do this, we're facing this threat. Then they don't do anything to defend against the other threats. That's what this litigation was about. That's most of the hours here we're seeking.

Then we come to the value of the company, the value of the corporate benefit. This is a fight over corporate control. Many millions of dollars were at stake. The future of the company was at stake. This is a company that, at that time, still had its products business and had its personnel. It had relationships.

Now it's a shrunken version of itself. That whole business went down the drain. Mr. Kurz tried to save it. And who knows how it would have turned out, you know. Mr. Daniels voted as he did. The Boutros consent was invalidated for the reason it was invalidated. Heartland voted as it did.

But what we do know is through this litigation, the stockholders had a choice. Now we have the regime we're in. Crown does not have control of the company, according to their own legal work and public statements. And we have a damage claim to recoup this amount, because there's no reason why there couldn't have been a straight-up consent solicitation and why the board couldn't have taken defensive measures against Crown way back in September of 2009.

But the stockholders made their choice. It didn't turn out. This fee award doesn't turn on how the stockholders made their choice. The defendants, they did make choices, over and over and over again, about the exchange transaction, about the fraudulent ratification disclosures, about the bylaw. And this litigation necessarily will continue until it's resolved over the consequence of those choices the defendants made.

And the reason we have this system, the reason we have the corporate benefit doctrine, and the reason we have all the cases we do, is so that those claims can be adjudicated on a fair playing field, which takes into account whether lawyers are paid by the hour, whether they are paid on a contingent basis, how hard they work, and what they achieve.

Here, what we have achieved was the ability of stockholders to choose a different future for this company, and even, you know, if Mr. Rednor and Mr. Holbrook decide to take a new approach, and even how this board deals with Crown going forward.

THE COURT: All right. Here's what I'd like to do. I want to adjourn for 10 minutes. We will reconvene at quarter of, and I'll give you my ruling. So we stand in recess until quarter of.

(A recess was taken.)

THE COURT: All right. Thank you for giving me a moment to collect my thoughts. I have thought about whether to write on this fee petition because it's a fairly interesting one, but I think I'm just going to go ahead and give you my ruling orally.

To avoid the suspense, I am going to grant the fee petition, and the all-in award that I will award is 2.5 million. So you can now sit back and listen, knowing that, and either listen for all the reasons that I got right, or for the other side, all the issues that I get wrong.

The first question is, why am I awarding an interim fee in this case, given that interim legal fees are discouraged. Well, to reiterate the ruling I made by letter dated March 2nd, 2010, this is the type of case where I think it's appropriate to consider an interim award.

As to the exchange transaction, the facts surrounding the mooting of that application for injunctive and other equitable relief were established at that point. They were not subject to revision. The benefits from that act would be assessed as of that date, and I do assess them as of that date.

It's effectively a separate phase of the case. And so as I noted then and as I still believe, what happened after that doesn't change the benefit conferred as of that time. Indeed, had it made sense to do so, and I didn't think it did because everyone was so busy litigating the various issues in this dispute, one could have had a fee application right then.

And I analogize the knocking out of the exchange transaction similar to when someone knocks out a defensive measure, like a termination fee or an option lockout. You don't know when that fee or defense is knocked out whether, in fact, somebody is going to come in and bid higher, but the fact that you knock it out creates a benefit. It opens up a process that may not previously have been opened up. It creates the opportunity. That's the benefit. And I'll describe that more later.

And this type of knocking out a defense to create the benefit is precisely analogous to what happened in Ceridian and Yahoo.

Now, dissimilarly, I feel that it's appropriate to grant an interim fee based on the Crown consent solicitation and the board size reduction. The issue there is that there has been a final order entered and affirmed in part, the pertinent part. You also have -- and that isn't going to be set aside now. It's something that we can look at and, therefore, is appropriate to address.

Also, the disclosures in connection with the underlying consent solicitation, that information was put out. I can assess it. It's done. Nothing more is going to happen.

So while one might, in the grand sense, prefer not to entertain interim fee applications, when there is something discrete like this that can be addressed on a limited basis and is not subject to being upset later, I think it's helpful to do so, rather than to put things off until who knows when.

For the exchange transaction, the key question is should a fee be awarded on a mootness doctrine. The mootness doctrine has three elements: first, an ascertainable class has to have received a substantial benefit; second, there has to be a causal connection between the litigation and the benefit; and third, the litigation has to have been meritorious when filed.

There are many cases that stand for that. One is the Dover Historical Society versus City of Dover. It's a Delaware Supreme Court case. One could also cite Tandycrafts or the Vanguard decision.

The whole premise of mootness doctrine is designed to insure that even without a favorable education by a Court, plaintiffs' counsel gets compensated for beneficial results. The idea is to prevent frustration of remedial policy of rewarding professional compensation by allowing the defendants to get rid of the litigation.

Here, the claims were clearly meritorious when filed. There were substantial claims for breach of fiduciary duty challenged in the exchange transaction. The conduct was actionable under Mercier versus Inter-Tel, the other unified standard. It was actionable in my view under Schnell versus Chris-Craft. It was a plain example of conduct that's actionable as a straightforward duty of loyalty valuation.

I haven't yet made detailed factual findings regarding whether, in fact, there were breaches of loyalty. I haven't had to address that on the merits because the rescission of the exchange transaction mooted the need for me to issue a preliminary injunction decision.

I also didn't go that route in the 225 trial. It was a one-day affair where a number of the individuals who potentially could have faced personal liability from an adverse duty of loyalty finding did not appear and did not testify. Hence, I didn't feel that I should reach duty of loyalty issues with potential personal liability implications unless it was absolutely necessary.

That's because any findings that I made in that trial likely would have had res judicata and collateral estoppel effects for the claims. And so, believing that I had an independent legal basis to adjudicate the 225 action, I didn't reach and did not make any duty of loyalty issues.

But I will say this, because it does influence my fee application greatly. I think there is substantial and credible evidence that Mr. Holbrook breached his duty of loyalty in connection with the exchange transaction. I think there is substantial and credible evidence that Mr. Holbrook misled the board and/or withheld material information in connection with the events leading up to the exchange transaction.

This litigation did not suddenly spring forth with the dropping of the Take Back EMAK's consent. It actually had its roots in a dispute that went much further back, over control of the corporation. Mr. Holbrook succeeded Mr. Kurz as CEO.

And while it has never been my job and still is not my job to determine whether Mr. Kurz's tenure was more successful or Mr. Holbrook's tenure was more successful, that's always been for the board; and who the board is, is up to the stockholders. One can say as an outside observer that there were at least external indications that Mr. Holbrook's tenure was less than satisfactory. He presided over an approximately 90 percent drop in the value of the stock, and there were other problems as well.

And again, by pointing out those things, I don't mean to suggest that Mr. Kurz's tenure was particularly exemplary. I don't express any view on it one way or the other. But what I do mean is that by mid-2008, it was not surprising that Mr. Kurz became interested in reacquiring EMAK with the help of a financial sponsor, because at that time, the company's trading price was down 90 percent.

It's not surprising, in connection with that effort, Mr. Kurz filed a Schedule 13(d) that stated that he was considering a potential acquisition and also would seek management and board changes.

It's clear from the record that Mr. Holbrook regarded this 13(d) group as a threat, because in November of 2008, he wrote to EMAK's advisors that he planned to contact Ackerman to ask to support the implementation of the staggered board, and he stated the reasons bluntly. "We want to move to a staggered board in order to avoid a proxy slate by Don."

All right. Now, move forward to April 2009, when EMAK lost its second biggest client, MillerCoors. At that point, Mr. Kurz sent a letter to the board informing them that he no longer believed any third-party transaction was viable. But equally importantly, at that point in time, he took on Mr. Holbrook and incumbent management.

He offered a pointed and detailed critique of how they, in his view, "have literally run the company into the ground." And he pointed out that he had personally lost 16 million in value as the company devolved over the three and a half years of Mr. Holbrook's tenure, from a NASDAQ-listed issuer trading at approximately $11 per share at the time Kurz resigned as CEO to a "deregistered 21-cent bid illiquid pink sheet traded stock."

Kurz also said if the board chose not to execute his proposal, he would seek to remove all the common shareholder representatives on the board. He also threatened to sue the directors for breach of fiduciary duty. So there is no question that as of early 2009, Kurz had emerged as a major threat to Holbrook.

Meanwhile, a gentleman named Mr. Ackerman was applying pressure of his own. He, too, had grown frustrated with his investment in EMAK and wanted out. And he personally attended a December 2008 board meeting and delivered the message that he wanted par redemption of Crown's preferred stock. And as Mr. Holbrook later memorialized the conversation, Mr. Ackerman's message to the board and management was, "the current situation is unacceptable to me."

And for the next eight months, until approximately September 2009, Mr. Ackerman consistently demanded that EMAK take out Crown for the full $25 million face amount of the Series AA preferred stock. As Holbrook testified in this action, Mr. Ackerman told him that he doesn't take haircuts; he gives them. And his position was, Get me out for par.

Now, the problem Crown faced was that the Series AA preferred carried relatively limited rights. It paid no dividends, had no fixed maturity date or put right, had no right of redemption in the absence of the change of control, no right to a liquidation preference in the absence of dissolution, no right to vote with the common in the election of directors, no class voting rights of the type typically found in preferred stock. Another thing is it doesn't have a veto right on a merger.

So the board at that point could have leveraged up by pursuing an Avatex transaction to completely moot the preferred, but instead, without the legal ability to pursue anything meaningful, what Ackerman and Crown did was to resort to threats against EMAK, including against Mr. Holbrook.

And there was testimony throughout this case, including by Mr. Austin, the outside advisor to Mr. Holbrook and the board, that Crown has consistently stated that they think the directors had particular duties to Crown. They have consistently proposed a zone of insolvency analysis. Mr. Deutschman has on numerous occasions during board meetings said, The company used to be worth more. Now it's less. Somehow, it's your fault, and I will sue you if you continue on the path of not letting me get paid.

So Crown's core pitch all throughout 2009 was legal action. It wasn't what the defendants now say, this inevitable concept of voting with the common to amend the bylaws. What Crown instead was advocating is the same thing Crown's counsel advocated to me at the scheduling conference; namely, that Crown had a special claim against the directors; that it was owed duties; and that it was prepared to enforce those duties.

Now, as I pointed out, the conference -- and I think that had EMAK had Delaware counsel of the caliber that it eventually retained involved, they would have recognized that this threat was relatively empty.

In other words, in the aftermath of Trenwick, Gheewalla, Equity-Linked, and Trados, Crown simply didn't have that type of leverage. Even more recently in LC Capital, Vice Chancellor Strine confirmed this view of the law.

But rather than pushing back against Crown, what happened was Mr. Holbrook found himself caught between Mr. Ackerman and Mr. Kurz. And there is substantial evidence -- and again, I have not had to make findings on this, but since the defendants have tried to portray this fee dispute as if it happened on a pristine record in which their clients did nothing wrong and Mr. Kurz was entirely to blame, I think it important that those assertions be corrected.

As early as a May 5th, 2009 e-mail, Mr. Holbrook was writing things like headline number one: "I am scared of Don Kurz and Peter Ackerman and legal action. I do not know what to do: sell now, sell later, build the business, milk, squeeze the business." And then later in his e-mail, "I need assurance about personal coverage, as does management team and probably the directors." That was in an e-mail to Robeck.

In the weeks after this rather desperate-sounding May 5th e-mail, Holbrook came to support a proposal that Ackerman had floated with Kurz in April. This was the split the baby concept in which EMAK would be divided into its two constituents' businesses: the services business with the Upshot subsidiary and its products business. Crown would receive Upshot. Holbrook would be CEO of Upshot. Kurz and the common would receive the products business. And at the time, the idea was that

Crown would receive a note for approximately 8 million.

Now, on May 20th, Holbrook proposed this split the baby option to the board, and indicated that management would begin analyzing it and two other alternatives. On June 18, he provided a quick update on the split the baby plan and also provided it to Ackerman.

Now, what seems at least a strong inference from the record, as described to date, is that by the middle of 2009, Holbrook saw Ackerman as his potential benefactor. And the idea that Holbrook would try to align with Ackerman makes sense because at the time, Kurz was calling for his head. The two men also personally disliked each other.

Ackerman, in contrast to Kurz, hadn't attacked Holbrook in a letter to the full board, and Ackerman also was a significant financial player who could help out Holbrook. And also, if the EMAK baby was split, Ackerman would own Upshot, and that's where Holbrook hoped to go.

So what you see after July in the record is Holbrook pushing the split the baby option. He does so in a July 21 e-mail. He does so -- let's see. I guess the July 21 e-mail is really the signature e-mail on that. All right.

But then the split the baby proposal hit a bump in the road, because in August 2009, the board decided that instead of proposing the split the baby with the note that had been previously contemplated, they would simply propose to Crown a straight-up exchange of Upshot for the preferred stock and warrants held by Crown.

Deutschman and Crown's counsel told EMAK's counsel that Ackerman was outraged by this idea. From Ackerman's standpoint, the gist of it was that before Kurz became a director, he had committed to support the $8 million note for Crown, and Crown felt that Kurz had tried to retrade that deal.

What you see in the record following that is Holbrook siding with Ackerman and Crown. So in an e-mail to Robeck, the chairman of the board, and Austin, he criticized the board's revised split the baby proposal, the exclusion of Deutschman from the discussion. He also e-mailed what's best described as an emotional 12-point missive to Rednor in which he attacked Kurz and lobbied for Ackerman.

In one of the signature paragraphs from that e-mail, here's what Holbrook writes: "Why we didn't originally figure out a way to give him," Ackerman, "25 million, configured in whatever creative way; i.e., Upshot for 20 million, 2 million in cash, 3 million in warrants or some structure, and let him win is beyond me. Instead, we decided to teach him a lesson and show him what his preferred is really worth. I think we've poked the bear with the stick. With creative packaging, we could have gotten out of this thing more easily."

Now, on August 17th, Holbrook proposed his own preferred resolution to Crown. Under this resolution, he proposed to give Crown 60 percent of the common stock of EMAK, a percentage more than twice the size of the 28 percent yielded by the Series AA's contractual conversion rate. There was some dispute at the board level over why Mr. Holbrook would have done this apparently without board authorization.

Then we come to the Burger King events. What happened there was in early August, Mr. Kurz got word that Burger King was actively considering using EMAK's competitor as its sole source and that Holbrook had a bad relationship with Burger King. Kurz advised the independent directors on the board of this, but unfortunately, they interpreted Kurz's information as a play for Holbrook's job. Now, that is the type of business judgment that it's not in my place to second-guess.

In September, however, Burger King terminated EMAK's contract, and regrettably proved Kurz right. At this point, though, rather than trying to consider what to do about this revelation, the primary action that Austin and Holbrook took was to attack Kurz. What Holbrook also did at this point was to enlist Crown as his ally. And in particular, at a September meeting with Crown, Holbrook essentially cut a deal with Crown whereby, according to his e-mail, he and Ackerman became partners.

During this same time period, Kurz was making louder noises about a proxy contest and what eventually grew into the exchange transaction, although the defendants now say that it didn't happen until after Kurz announced his proxy consent solicitation and the consent was delivered.

What's clear from the record is that Holbrook was working this angle from long before. And there is powerful evidence that Holbrook's primary reasons for doing so were his desire to keep his job.

And as I've said before, I also questioned whether the board got full information from Holbrook about the events leading up to the Burger King transaction. And it's quite unclear to me whether they had had full information about the Burger King transaction, whether they might have done something differently.

So this leads us to what happened in the exchange transaction. The exchange transaction converted Crown's preferred from something that didn't vote in the election of directors into a new security that had 28 percent of the voting power in the election of directors. It also provided Crown with rights to veto mergers, eliminating one of the ways that the company could have attempted to address the Crown situation. And it also, as the plaintiffs have pointed out, expanded the triggers by which Crown could get its liquidation preference effectively to include an insurgent proxy solicitation by Kurz.

Now, as I've said, all of this leads me to conclude that this action wasn't simply meritorious when filed. This action was meritorious when mooted. This was a case, again, where there were substantial loyalty issues. And I have not heard Mr. Holbrook testify. Perhaps he has wonderful and credible explanations for all this.

I have not heard Mr. Ackerman testify. It's clear to me that he was bargaining on behalf of Crown, which he has a legitimate right to do. What is suggested by the e-mail record, however, at least Mr. Holbrook's side of it and Mr. Austin's side of it, is that he was deeply aware of the conflicts on the board, deeply aware of Mr. Holbrook's insecurities, and used them to his advantage.

So all of this to say that I think it's highly likely that I would have enjoined the exchange transaction. I think it's simply not accurate for the defendants to come in and essentially make a no harm, no foul argument.

What the mooting of the exchange transaction did was change the factual terrain on which any consent solicitation was based. It effectively changed the factual universe in which the election contest was run.

Prior to the mooting of the exchange transaction, a consent solicitation was effectively, if not mathematically, impossible, at least realistically unobtainable. In fact, whatever the higher phrasing in Selectica, you only get an injunction if you can possibly never win or whatever the magic language is, this would even meet that.

The idea that because Kurz eventually lost is essentially a no win, no benefit argument, and that's just -- that's the flip side of no harm, no foul. It's also a variant of the post hoc ergo propter hoc theory, which we don't follow in Delaware. And the whole idea that this was inevitable, I just don't buy it.

As somebody who read all the factual record in connection with preparing for a preliminary injunction hearing, and perhaps I am as naive as the plaintiffs, but it certainly wasn't clear to me that when stockholders understood the types of machinations that went on here, that they would inevitably side with the defendants. That's ultimately their choice, but it certainly wasn't clear to me. And I suggest that given the closeness of the result, it probably wasn't clear to anybody.

And I also think, as Mr. Deutschman testified, part of the reasons why they did the Crown consent was because they were worried that Kurz might win. So the idea that this was all inevitable, it's some time of Calvinist predestination concept that I just don't cotton to at all.

And it also is Calvinist in the sense that it suggests that because Mr. Kurz is a bad guy, he couldn't want -- what you have is a company that was in serious trouble, had undergone a disastrous period in its history, and stockholders were entitled to make a decision whether to hang that on the heads of incumbent management and seek a change, or whether to stick with incumbent management for the path out of the wilderness.

I think it was far from inevitable that things turned out as they did. And certainly, judging it based on the mooting of the exchange transaction, one can't reach that conclusion.

So for those reasons, I think that the exchange transaction mooting was a direct and obvious benefit to all stockholders. And I say "all stockholders" because what it presented was the opportunity to change the direction of the company.

There is the suggestion made that this wasn't a benefit to the stockholders who voted against Kurz. Well, they had the right to vote against Kurz. They had the right to vote for Kurz in a free election. Generally, in the western world, particularly in this country, we think free elections are a good thing, whether its politically or in the corporate con it text.

Likewise, as to the preferred, while the preferred may have had their own motivations, that doesn't mitigate the concept that the corporation as a whole benefitted from the free election. Now, the benefit is still there whether or not it was one that the preferred themselves would have sought.

And this same logic applies to the Crown consent. I asked Mr. Friedlander whether he could make the same argument, and I think he's right. The fact that they were out there challenging the Crown consent was a key part of what made the election contest viable. And the fact that both were adjudicated simultaneously doesn't change the fact that you needed to get the Crown consent invalidated to have the free election and the potential for a different outcome.

I also agree with Mr. Friedlander that one of the benefits of invalidating the Crown consent and invalidating the original exchange transaction was to give the board a window in which it could act, if it wanted to, to address the Crown threat.

Whether the board did everything it could in that window is a question for another day. It certainly did something in that it got this standstill. Had it not had that ten-day window, that opportunity, it couldn't have done that. And had the incumbents remained in power, they could have done other things, which we could have litigated but at least the board had the opportunity to deploy its board power.

Finally, I do think the disclosures are a benefit here. The disclosures were false and misleading. When you compared the disclosures to what was written in the briefs and when you compared the disclosures to what was in the e-mails, there was absolutely no way that they could be squared.

What the defendants had which was going to be a legitimate question was a total mix argument because their argument was that the plaintiffs were putting out information of their own. And so the two sides were balanced and, Laster, why do you get involved when both sides are bludgeoning each other?

But the idea that the consent solicitation materials that were put out for the ratification statement are accurate is just not one that I can agree with. And I think that had I been forced to write on that and square up those issues, that is exactly the outcome that I would have reached.

All right. So for all these reasons, I think that there is a basis for a fee award. The question that I have to do now is evaluate the benefit. Some amount of fee is appropriate. The question is how much. Several things are relevant to that, in my mind, as background.

The first is that the defendant spent 5.2 million litigating the same actions, and they did so without any contingency risk. When you've got two sides litigating the same dispute, what one side incurs is at least relevant to the reasonableness of fees.

Obviously, you have to take into account multiple parts. Obviously, you have to take into account that the defendants and plaintiffs are differently situated. But it at least gives you a sense of what the universe is, what the -- perhaps what the solar system is, in terms of where a fee award can come out.

But other than that, I'm faced with two radically disparate acts. The plaintiffs say 2.8 million, which I think is at the upper end of reasonableness, but it's at least within the range; but against that, I have defendants who say zero. And zero is not a viable response.

Before I go into the Sugarland factors, I do want to address a couple tangential or secondary arguments that were put through just to make sure I have covered everything just in case this goes further. I guess I shouldn't call them tangential or secondary because they are essential to the defendant's "no money at all" position.

The first is I should limit any size of my fee award based on the cash held by the company. I agree with Chancellor Allen in the Thorpe v. CERBCO decision that there are situations where one would want to take that into account. But I think, as Chancellor Allen suggested in Thorpe v. CERBCO, the time when you would do that would be a time when the defendants have largely prevailed.

Here, the defendants didn't largely prevail. They won on what I think was a difficult interpretation of a stock restriction. I think it could have gone either way. I think there are reasonable arguments either way. I obviously reached one decision. The Supreme Court reached another, as is their power as the higher Court. Otherwise, the plaintiffs won. And the plaintiffs won not only on the Rule 54(b) decision, but they won completely on the mooting of the exchange transaction. So I don't think that this is a situation where it calls for some type of direct limitation based on size.

I have taken the company's available cash into account, but to the extent the company is already willing to pay its non-contingently retained lawyers 5.2 million and proposes to make the cash arguments after that payment goes out, I think the company has largely given up any argument that it might have that a fee in the range of what the plaintiffs suggest is excessive.

In other words, if you're willing to pay out 5.2 million of your diminishing cash stake, you've given up the equity to claim that 2.8ish is too much. But that doesn't mean that in some future case somebody couldn't take into account the types of factors that Mr. Nachbar cites.

The other argument that I want to make sure that I've touched on is this idea that there was no benefit to the preferred. As I've already tried to suggest, the preferred is part of the entity. The entity and all its stockholders were benefitted by this action. All of the people who voted in the control contest were benefitted by this action. The fact that the preferred did not bargain for a right to vote in the election of directors doesn't give it the opportunity to say, Oh, no, we were harmed, not helped.

The election itself is a good. The election itself, free and unaffected by a 28 percent thumb on the scales, was a good. And so that benefits all stockholders, and it is not problematic in my view to have the corporation pay the fee award as a collective action mechanism for the stockholders.

Third, the argument was made that Mr. Kurz shouldn't be able to recover his fees as a proxy contestant, analogizing to Mentor Graphics and other case law. The reason that we don't let bidders get fees is because bidders have a contrary incentive. In other words, they're trying to get the company for the least possible.

And so even though the bidder may impose some collective benefit in the same sense or similar sense to what Kurz imposed; i.e., providing a free and fair election, the fact that the bidder is doing it as a means to getting the company for a lower price is what has caused our Courts to say that they cannot invoke the corporate benefit doctrine.

Now, the defendants would analogize those cases to Mr. Kurz by saying what he wanted was to become CEO. I have rejected that argument. I reject it again. Mr. Kurz was the largest common holder of this company. Mr. Kurz wanted to become CEO in my view because he thought the company was broken; and he thought, as a co-founder of the company, he was best situated to fix it.

He was not seeking to become CEO because he wanted to get paid. Yes, I believe he thought he should get paid for his work. I don't think he wanted to work for free, but his purposes in pursuing this proxy contest and his reasons for voting were those that aligned him with all of the stockholders in his capacity as the largest holder. So he is not someone to whom the Mentor Graphics lines of cases applies.

And then, finally, the argument that I should limit or deny fees because the claims here were frivolous or inequitable, primarily based on the Boutros shares issue and the conflict issues, I don't agree with that. I think the Boutros shares issue was fairly litigable.

I think the conflict issues, as I tried to explain in my conversation with Mr. Nachbar, those arise out of the odd situation that we're dealing with corporate claims and we have a change in control over the corporation. So all of a sudden, people who used to be on the outside are on the inside.

And I think conflict rules, while they are certainly important and need to be respected, they also need to be applied with an understanding of the realities of what happens when a new group of lawyers comes in who had been representing the outsiders, or the old group of lawyers comes out.

I didn't reach any of the disqualification motions. I guess there was only one filed, but even if there was one filed against Mr. Nachbar, he didn't bring it to a head, but I wouldn't be moved by any of the disqualifications motions in this case.

I think this was a case where you had very good lawyers, some of whom were temporarily out of favor because of my decision. And different lawyers were in, and then you had another changing of the guard because of the reversal on the Boutros issue, and that's all it was. It wasn't an excuse to try to use conflicts for litigation advantage, which is something that Info Technology precludes regardless.

All right. So now I get to the five Sugarland factors and how I get to 2.5 million. I'm going to start with the difficulty of the litigation.

This case did involve complex and novel issues of Delaware law, including questions of first impression and matters of Delaware public policy. It was not a routine deal injunction case.

It was not a case where somebody filed and the nature of the transaction made it likely that there would be a settlement. I think that the relationships between the parties made settlement unlikely. I think the complexity of the legal issues made settlement unlikely.

There was a shifting factual landscape in this case brought on by the ratification solicitation. Counsel had to not only deal with legal issues, but learn the complex history of Kurz's involvement, Crown's investment. There were multiple factual threads. What was going on in 2008 and 2009 was a mess because you had essentially negotiations happening on multiple fronts.

To litigate this, there was a tightly packed deposition schedule. There is no question, it's the type of thing that should support a fee. The depositions taken were many, and while not overly numerous, they were sufficient to do the job. So I have no problem finding that this was a difficult litigation.

Standing and ability of counsel. The Bouchard firm is well known to the Court. It's small, it's efficient, it's experienced, but I think those are the attributes that allowed them to pull this off. I think to do a case like this, you were best-served by having a small trial team with experienced people that know the law and are willing to do the work. This is not a case where you can throw ten associates at it and be efficient. So I think that that factor is certainly met. And I take into account that they were opposed by five rather significant law firms.

The efforts of counsel and the time spent. Plaintiffs' counsel put in 1,587 hours of attorney time. I credit that figure. This isn't the type of inflated hourly figure that you see when you get a fee application filed by 12 different law firms from the traditional plaintiffs' bar who all they did was file a complaint, serve a discovery request, and sit around for confirmatory discovery.

This is hours that were spread over a relatively narrow period of time, and they are the toughest kind of hours because they're the hours for expedited cases. Everybody in this room knows that 50 hours makes a big difference, whether it's the difference between 200 and 250, between 250 and 300, or north of 300.

Also, I take into account that given the size of the firm at least for a particular period of time as Mr. Friedlander points out in November, they were fully committed to this litigation.

The next factor is the contingent nature of the fee. There are contingent cases and there are contingent cases. It is a different level of contingency risk when you hold a diversified portfolio of litigation that you essentially just file and hold onto and see what hits. That inventory model is contingent in the same sense that holding a portfolio of the S&P 500 takes on market risk. It doesn't take on case-specific all-in contingent fee risk.

That's what these guys did here, Bouchard Margules. They went all-in on a concentrated bet, where they invested a material amount of their firm's resources to get an outcome. So this is a case where I think the contingency risk is enhanced.

Results achieved. As I've already said, I think they largely got everything or most of what they wanted. Certainly, in the exchange transaction, they got everything they wanted.

So now how do I price that? The defense figure of 5.2 shows 2.8 isn't out of whack or off the charts. The Globis Capital, Minneapolis v. Ceridian, and Yahoo cases have been cited to me as comparables, where benefits generated large awards. All of those were settlements. Here, I think there wasn't a settlement. Here, I think there was a lot more work. Here, there was a lot won.

So as I look through this, I think an appropriate award solely for the invalidation and rescission of the exchange transaction is 1.7 million.

I am pricing these things separately because I think that there may be different arguments for the degree to which they could be included in damages later. And I'm not making any conclusion on that, obviously. The Chancellor has moved in that direction with Berger v. Pubco. Because I think these could be differently situated, I'm not doing a single all-in award. I'm pricing these phases separately.

But the exchange transaction, I think a reasonable fee award, given the comparables, given the amount of work, given the benefits conferred, is 1.7 million.

For knocking out the Crown consent, I think a reasonable amount is 400,000. And I say that because, essentially, although it was a victory, what it really did was delay the Crown strategy until the annual meeting. So it's similar to a deal injunction, and so I draw on that type of precedent by analogy.

Third, the disclosures, again, I think these were meaningful disclosures that corrected what were false and misleading solicitation materials. And so I think an additional 400,000 is appropriate for the disclosures.

So all-in, that gets me to 2.5 million. When I cross-check with hourly rates, it is well within the range of what this Court has passed on in the past as a quantum meruit cross-check.

And finally, as a public policy matter, I do think this is the type of litigation that Delaware needs to reward. This isn't pro forma litigation. This was a strong challenge brought to a transaction where there was, as I've already discussed, real evidence of loyalty breaches; and rescinding the transaction fundamentally changed the corporate governance landscape.

And all this only happened because Bouchard

Margules was willing to assume the risk and go all-in for at least a period of a month where they dropped everything and did nothing else, but I think in terms of a significant commitment for a longer period.

So as a result, I grant a fee award of 2.5 million. It will be paid within five days of the entry of an order.

Mr. Friedlander, I ask that you submit a simple one or two sentence ordered today, upon notice to Mr. Nachbar, and I'll enter it.

MR. NACHBAR: Your Honor, I have a procedural question. Is there going to be a Rule 54(b) certification, or is this an order that the company is required to pay without any right of appeal?

THE COURT: Well, it's interesting you raise that because I actually want to hear from you guys on that. I thought about it coming in. I thought about whether I should certify it. And the short answer is, I don't know. And I haven't had a chance to research it.

So if you all could each give me a little submission, maybe talk about it, if you agree that it's a 54(b) order, I'm happy to certify it as a 54(b) order; but I don't have a view off the top of my head as to whether it should be.

MR. FRIEDLANDER: I apologize for not having briefed it. We did put it in a reply brief. We requested 54(b), so maybe we have agreement.

MR. NACHBAR: I don't think we object to that. We would object, obviously, to any order that required us to pay a significant amount of money like this without having any opportunity to appeal. So I think our view would be either it's an award that doesn't need to be paid until the case is finally adjudicated, which would seem to be contrary to the whole idea of an interim fee award --

THE COURT: Correct.

MR. NACHBAR: -- or there should be a 54(b) certification. And then we can post a bond, if the client chooses to do that, and take our chances on appeal.

THE COURT: Mr. Friedlander?

MR. FRIEDLANDER: I was just going to say, a 54(b) and a stay pending appeal are two completely different things. So a 54(b) I think makes sense, because it's an interim fee award, and also because of the business risk of the company. And we've already been assuming it for eight or nine months. Otherwise, I don't know when it would be finally decided.

As for -- I think we should just follow the rules about whether they don't have to pay or can post a bond, in terms of that. I have to go back and check, but usually for a monetary award, it would have to be bonded.

THE COURT: Why don't you all talk about that. I do see the rationale for requiring some security, you know, one could envision either in the form of a bond or in the form of some escrow or something like that. But why don't you talk about all that in the first instance.

As I said, I think it's clear to me from my experience in CNX Gas, this is not going to be an interlocutory order that I certify. Because while CNX Gas was turned down, this has none of the factors that I think made CNX Gas worth certifying.

But I do think I have no objection to it being certified as a Rule 54(b). And certainly, if the parties agree to it, why don't you all just talk about the bond issue or escrow or something on that, and then I will get it done. All right?

MR. FRIEDLANDER: Thank you, Your Honor.

MR. NACHBAR: Thank you, Your Honor.

THE COURT: Thank you, everyone, for your time today. I appreciate it, and let me know what needs to be done going forward.

We stand in recess.

(Court adjourned at 12:34 p.m.)

CERTIFICATE

I, JEANNE CAHILL, Official Court Reporter of the Court of Chancery, State of Delaware, do hereby certify that the foregoing pages numbered 1 through 112 contain a true and correct transcript of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor in the Court of Chancery of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand this 21st day of July, 2010.

/s/ Jeanne Cahill

____

Jeanne Cahill, RDR, CRR
Official Court Reporter
of the Chancery Court
State of Delaware

Certification No. 160-PS
Expiration: Permanent Status

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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

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- - -

THE COURT: Good morning, counsel. Who do we have on the line?

MR. BAYLISS: Good morning, Your Honor. It's Tom Bayliss on behalf of the FrontFour plaintiffs. David Lorber from FrontFour is on. So are Lori Marks-Esterman and Adrienne Ward of Olshan Frome Wolosky; and Eric Veres and Joe Sparco are on from my office as well.

MR. DITOMO: Good morning, Your Honor. This is John DiTomo, Morris Nichols Arsht & Tunnell on behalf of the Medley defendants. With me on the line is my colleague from Cadwalader, Nathan Bull.

MR. MORITZ: Good morning, Your Honor. This is Garrett Moritz from Ross Aronstam on behalf of the Defendants Mark Lerdal, Karin Hirtler-Garvey, John Mack, and Arthur Ainsberg. I'm joined by my partner, Mike Sirkin. I'm also joined on the line by co-counsel from Kramer Levin, Alan Freedman.

MR. ROHRBACHER: Your Honor, Blake Rohrbacher and Kevin Gallagher from Richards, Layton & Finger for Defendants Sierra Income Corporation, and with us on the line are Matthew Larrabee and Paul Kingsbery from Dechert.

MS. AMATO: Good morning, Your Honor.

Christine Amato, Prickett Jones, also joined by John Day, on behalf of Stephen Altman.

THE COURT: Do we have any persons from the public who have dialed in to today's call or anyone else on the line who has not announced him or herself, aside from our esteemed court reporter?

MR. BAYLISS: Your Honor it's Tom Bayliss. Dan McBride just joined us in my office.

THE COURT: Excellent. Thank you.

All right, folks. I hope you have a glass of water. This will be a long bench ruling. And I ask you to bear with me. If you can't hear me at any point in time, please let me know. Of course, there will also be a transcript of this ruling.

On October 24, 2019, I heard argument regarding the proposed settlement of claims and petitions for fees in In re Medley Capital Corporation Stockholder Litigation, Civil Action No. 2019-0100.

This is my ruling on the matter. To save you the suspense, I am certifying the class, approving the settlement, and I'm also awarding fees. I am going to approve a fee award today of $3,075,000 for various noncontingent therapeutic benefits attained in the settlement. I am also approving a fee contingent on the amended transaction which shall equal 26 percent of the grossed-up settlement fund, as modified by a partial look-through that I will explain. I further approve a fee contingent on the closing of the transaction for $100,000 for the agreement to appoint an independent director on the board of the post-merger entity.

I will now describe the background and my reasoning behind these rulings.

Plaintiffs in this case are FrontFour Capital Croup LLC and FrontFour Master Fund, Ltd. Plaintiffs beneficially own 1,674,946 shares of Medley Capital common stock, approximately 3.1 percent of Medley Capital's outstanding shares.

Plaintiffs filed this lawsuit on behalf of themselves and similarly situated stockholders of Medley Capital Corporation. There are a number of defendants in this case. The director defendants are Brook Taube, Seth Taube, Jeff Tonkel, Mark Lerdal, Karin Hirtler-Garvey, John E. Mack, and Arthur S. Ainsberg. Medley Capital Corporation, which I will refer to as "Medley Capital," as well as its affiliates, Medley Management, Inc., MCC Advisors LLC, Medley Group LLC, and Medley LLC, are also named defendants. Finally, Sierra Income Corporation, which I will refer to as "Sierra," is also a named defendant. Sierra is not a party to the stipulation of settlement that was presented to the Court, and in light of this, I will refer today to the defendants other than Sierra as the "Settling Defendants."

As set forth in the scheduling order entered on August 12, 2019, and the notice dated August 30, 2019, I must rule on essentially three issues.

First, I must determine whether to certify the settlement class preliminarily certified for settlement purposes on August 12, 2019, as a non-opt-out class pursuant to Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2).

Second, I must determine whether the settlement is fair, reasonable, and adequate. In connection with this second task, I must determine whether final judgment should be entered dismissing the action and approving the release as it is drafted in the Stipulation of settlement.

Further, I must determine whether plaintiffs and plaintiffs' counsel have adequately represented the interests of the settlement class in the action.

Third, I must consider the application by plaintiffs' counsel for attorneys' fees and reimbursement of expenses. I will also consider the petition of counsel to Mr. Altman for fees and reimbursement of expenses, as well as the defendants' and Mr. Altman's objections to plaintiffs' counsel's fee petition.

Further, I received letters from two Medley Capital stockholders, Doug Getter and Kevin McCallum, objecting to plaintiffs' counsel's fee request. I will address both of those as well.

The settlement class, which I preliminarily certified in the August 12, 2019, scheduling order, includes: "Any and all record holders and beneficial owners of MCC common stock at any time during the Settlement Class Period, together with their successors and assigns, but excluding Stipulating Defendants, their Immediate Family, SIC and any person, firm, trust, corporation, joint venture, partnership, foundation or other entity related to or affiliated with any of the Stipulating Defendants, members of their Immediate Families or SIC." And I refer the parties to the stipulation of settlement itself for the cipher of the defined terms in this proposed class.

As the Delaware Supreme Court explained in *Prezant v. De Angelis*, the certification of a lawsuit as a class action involves a two-step analysis. The first step requires that the action satisfy the four prerequisites of Rule 23(a), which are numerosity, commonality, typicality, and adequacy.

If the Rule 23(a) prerequisites are established, the second step is to determine whether the suit properly fits into one or more of the three Rule 23(b) categories based on the alleged wrongs, the relief sought, or a combination of the two.

I turn first to the four prerequisites of Rule 23(a), starting with numerosity, which requires that a proposed class be so numerous that joinder of all members is impracticable.

The Delaware Supreme Court observed in its 1991 decision, *Leon N. Weiner & Associates, Inc. v. Krapf*, that "Numbers in the proposed class in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement"

According to public filings, as of August 30, 2019, Medley Capital had approximately 55 million shares outstanding, held by hundreds and potentially thousands of persons or entities throughout the world. Individual joinder of all of those persons would be highly impracticable. Accordingly, the proposed class satisfies the numerosity requirement.

Next, Rule 23(a)(2) requires that a question of law or fact be common to the class. A proposed class meets the commonality requirement where "the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." And that quote, again, is from the *Weiner v. Krapf* case.

Linking the class members in this case are common questions of law, including whether defendants breached their fiduciary duties and whether the class was harmed by those breaches. Those questions of law stem from the same factual underpinnings: the sales process, the merger agreement, and the allegedly false statements and omissions issued in connection with the merger agreement. Thus, the commonality requirement is satisfied.

Third, Rule 23(a)(3) requires a class representative's claim to be typical of those of the class. As the Delaware Supreme Court observed in *Weiner v. Krapf*, "The test of typicality is that the legal and factual position of the class representative must not be markedly different from that of the members of the class."

The *Krapf* Court explained that "A representative's claim or defense will suffice if it arises from the same event or course of conduct that gives rise to the claims or defenses of other class members and is based on the same legal theory."

In this case, plaintiffs were threatened by the same harm other Medley Capital stockholders faced flowing from the allegedly flawed process, inadequate merger consideration, and misleading or incomplete disclosures. Plaintiffs filed this action to seek relief from that harm and their claims are therefore typical of those of the class.

Finally, Rule 23(a)(4) requires that a representative plaintiff fairly and adequately protect the interests of the class. The Supreme Court of the United States observed in *Phillips Petroleum Company* *v. Shutts* that the due process clause of the United States Constitution requires "that the named plaintiff at all times represent the interests of the absent class members."

The Delaware Supreme Court expounded on these due process requirements in *Krapf*, stating, "In an application of the fourth prerequisite of Rule 23(a), the predominant considerations are due process related: that there be no conflict between the named party and the other class members; and that the named party may be expected to vigorously defend not only themselves but the proposed class."

In this case, plaintiffs collectively own the largest non-management block of Medley Capital common stock. Incentives created by plaintiffs' stock ownership caused plaintiffs to publicly oppose the challenged transactions, seek and then sue for books and records, prosecute the litigation through an expedited trial, and secure this proposed settlement for the class.

There is no suggestion from the record that plaintiffs' interests are, or have ever been, in conflict with those of the class. Plaintiffs retained experienced counsel who are well known to this Court, and plaintiffs' counsel vigorously prosecuted plaintiffs' claims. The adequacy requirement is therefore met.

Having determined that the settlement class satisfies the requirements of Rule 23(a), my next task is to determine whether the putative class properly qualifies as a non-opt-out class under Rules 23(b)(1) or 23(b)(2). The plaintiffs do not seek certification as a so-called "damages class" under Rule 23(b)(3).

As the Delaware Supreme Court explained in *Krapf*, "Class suits are not necessarily mutually exclusive; an action may be certified under more than one subdivision of Rule 23(b) in appropriate circumstances."

The Delaware Supreme Court has also remarked in *In re Celera Corp. Shareholder Litigation* that "Delaware courts repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2)."

Former Chancellor Allen explained in *In re Mobile Communications Corp. of America, Inc.,* *Consolidated Litigation* that "Typically an action challenging the propriety of director action in connection with a merger transaction is certified as a (b)(1) or (b)(2) class because plaintiff seeks equitable relief in the form of the injunction; because all members of the stockholder class are situated precisely similarly with respect to every issue of liability and damages; and because to litigate the matters separately would subject the defendant to the risk of different standards of conduct with respect to the same action."

Those observations of Chancellor Allen are true in this case. The conduct the plaintiffs challenged involved breaches of fiduciary duties in connection with the negotiations and sales processes leading up to two cross-conditioned merger transaction. The merger transactions were subject to stockholder approval.

And deficient disclosures concerning the directors in entering the deal create the very real potential for an uninformed stockholder vote, which would have harmed all members of the settlement class equally. Individual prosecutions of these claims could have led to incompatible determinations and injunctive relief which would have created varying and conflicting standards of conduct for the defense.

Further, the homogeneity of the class members' grievances concerning the defendants' self-dealing and other conduct in connection with the merger agreement is apparent. Accordingly, certification is appropriate under Rules 23(b)(1) and (b)(2).

In addition, no class member has sought to opt out of the settlement or argued that the settlement should be an opt-out settlement. I find it appropriate to certify this class as a non-opt-out class under Rules 23(b)(1) and (b)(2).

Although Rule 23 requires some form of notice to the class as a matter of due process, as the Delaware Supreme Court noted in *Nottingham*, the form of notice is largely discretionary.

When entering the August 12, 2019, scheduling order, I reviewed and approved, in form and substance, the Notice of Pendency of Proposed Settlement of Class Action and the Summary Notice of Pendency of Proposed Settlement of Class Action. I also approved a form of notice as the best notice practicable under the circumstances, requiring plaintiffs' counsel to cause the approved forms to be mailed by U.S. mail, first class, postage pre-paid, no later than thirty days from the date of the scheduling order and at least forty-five days before the settlement hearing, to each person shown to be a record owner of shares of common stock of Medley Capital Corporation at any time between and including August 9, 2018, and August 12, 2019, which was the date of entry of the scheduling order.

Paragraphs 7, 8, and 9 of the scheduling order address the form, adequacy, and instructions. Subsequently, I reviewed the affidavit of mailing and publication dated September 23, 2019, submitted by Eric Schachter, Vice President of A.B. Data Limited.'s Class Action Administrative Company, which was the settlement administrator in this case. That affidavit detailed the efforts of counsel and plaintiffs in distributing the notice and I view those efforts as more than adequate.

So, to sum it up, the requirements of Rule 23(a), 23(b)(1), 23(b)(2) have been satisfied, and the form of notice to the class is adequate. I therefore certify the class as a non-opt-out class pursuant to these provisions.

I will turn now to the merits of the settlement.

As the Delaware Supreme Court explained in *Barkan v. Amsted Industries*, "The Court of Chancery plays a special role when asked to approve the settlement of a class or derivative action. It must balance the policy preference for settlement against the need to insure that the interests of the class have been fairly represented."

In approving a settlement, the Court's function is to make an independent determination, through the exercise of its own business judgment, that the settlement is intrinsically fair and reasonable.

As Vice Chancellor Laster explained in *Acitivsion Blizzard*, the Court must ultimately "determine whether the settlement falls within a range of results that a reasonable party in the position of the plaintiff, not under any compulsion to settle and with the benefit of the information then available, reasonably could accept."

To make this determination, the Court considers certain factors, including the nature of the claims, the possible defenses thereto, and the legal and factual circumstances of the case. I turn now to an overview of these factors.

By way of a brief background, as set forth in greater detail in my March post-trial opinion, this case arose from an Agreement and Plan of Merger, dated as of August 9, 2018, by and between Medley Capital and Sierra, through which defendants sought to combine Medley Capital and Sierra, two business development corporations, with their affiliate Medley Management, an asset management firm founded and majority owned by brothers Brook and Seth Taube.

The proxy was filed on December 21, 2018, more than four months after announcing the transactions. Within a week, plaintiffs served a Section 220 demand and, on January 11, 2019, commenced a books and records action. Using documents produced by Medley Capital, plaintiffs filed this plenary action and moved to expedite on February 11, 2019.

In view of the special meeting schedule for March 8, 2019, and a March 30, 2019, drop-dead date under the merger agreement, I accommodated the parties' request for an early March trial. The parties then compressed a year's worth of discovery into three weeks. This is to the parties' credit, and their efforts are truly admirable, so I'll describe them in some detail.

In the course of discovery, defendants produced and plaintiffs reviewed more than 12,000 documents. That's in addition to those produced in the 220 action. Plaintiffs also sought third-party discovery and reviewed over 12,400 documents produced by the merging entities' financial advisors, Goldman Sachs and Co., LLC; Barclays Capital Inc; Sandler O'Neill and Partners, L.P.; Broadhaven Capital Partners, LLC, as well as five potential alternative transaction partners: ZAIS Group, LLC; Lantern Capital Partners; NexPoint Advisors, L.P.; Origami Capital Partners, LLC; and Marathon Asset Management L.P.

Defendants sought, and plaintiffs produced, substantial documents as well. The parties conducted thirteen depositions: five representatives of defendants, the plaintiffs' representative, representatives of the three financial advisors, each side's expert witness, and representatives of two of the five potential alternative transaction partners. So the amount accomplished in this time period was truly impressive, and the time constraints did not seem to diminish the quality of advocacy on both sides.

I held a trial on March 6 and 7, 2019. On March 8, 2019, each of the special meetings of stockholders of Sierra, Medley Capital, and Medley Management was convened and adjourned until March 15, 2019. On March 11, 2019, I issued a post-trial memorandum opinion that enjoined a stockholder vote on the transactions pending curative disclosures. I will not repeat the holdings of that post-trial memorandum opinion. It was long. I direct interested persons to the opinion itself.

Touching on the highlights only, the opinion found that the transactions were subject to entire fairness review because the Taube brothers were controllers, at least two members of the special committee who had approved the transactions were beholden to the Taubes, and the special committee allowed the Taube brothers to dominate its process.

I further held that the transactions were the product of an unfair process and resulted in an unfair price to Medley Capital's unaffiliated stockholders, and that the deal protections in the merger agreements could not withstand enhanced scrutiny.

I enjoined a vote by Medley Capital's stockholders until defendants made disclosures consistent with the opinion. However, I declined plaintiffs' request to rewrite aspects of the merger agreement by ordering a curative sale process because plaintiffs failed to prove their claim for aiding and abetting against Sierra.

As I expressed in the opinion, *C&J Energy* prevented this Court from ordering what I believed would be the most equitable relief for the Medley Capital stockholders: a curative sales process. Relevant to the issues before the Court today, a number of events transpired following my post-trial decision.

First, each special meeting was adjourned to accommodate post-trial settlement negotiations.

On March 18, 2019, one week after I issued the opinion, the two directors and the special committee who were found to be conflicted with respect to the transactions resigned from the board. Also around that time, plaintiffs and the settling defendants began settlement discussions, which continued through mid-April 2019. In briefing, plaintiffs' counsel describes these discussions as "intense, adversarial negotiations."

Judging from the conduct of the parties during litigation and the tone of briefing concerning the fee requests, I have no doubt that this description is accurate, and perhaps even understated. As I noted at the outset, Sierra is not a party to the stipulation of settlement. Sierra also did not participate in the settlement negotiations.

For the record, I will provide an overview of the negotiations that have led to the amended merger agreement and settlement agreement that are now before me, which is drawn largely from the amended proxy issued on August 30, 2019.

You'll recall that the drop-dead date for the original transaction was March 30, 2019. On March 28, 2019, the Sierra special committee determined that "changed circumstances" since August 2018 warranted renegotiating the original transaction. According to the Sierra special committee members and their advisor, these "changed circumstances" included Medley's failure to meet its own EBITDA forecasts for 2018 and its likely EBITDA shortcomings for 2019. At the same meeting, the full Sierra board discussed the "desirability for [Medley Capital] to be given a go-shop opportunity."

On April 15, 2019, Plaintiffs and the Settling Defendants executed a term sheet, which Medley Management disclosed publicly on April 16, 2019.

Consistent with the term sheet, on the day the term sheet was executed, the board appointed plaintiffs' corporate representative, David A. Lorber, as well as non-party Lowell W. Robinson, who was independent of plaintiffs and defendants, to the board seats formerly occupied by the two special committee members who were found to lack independence from the Taube brothers.

Those seats would not otherwise have been open until 2020 and 2021, respectively. The board also reconstituted the special committee to add Lorber and Robinson, with Lorber appointed as chair of the committee.

In a letter to the Court on April 18, 2019, plaintiffs noted that any proposed merger agreement amendments would require Sierra's agreement. That same day, Medley Capital requested Sierra's consent to the amendments to the Medley Capital merger agreement contemplated by the term sheet.

Sierra declined to give its consent on April 23, 2019.

On April 24, 2019, I entered a stay of all proceedings except as necessary to implement the settlement contemplated by the term sheet.

In May 2019, Medley Capital's newly reconstituted special committee hired a new financial advisor, Houlihan Lokey, to conduct a go-shop process.

On May 10, 2019, Broadhaven advised Sierra on possible terms that might be renegotiated, including the exchange ratio and the structure and duration of any go-shop provision.

On May 15, 2019, Sierra conveyed an offer to Medley Capital concerning a new transaction. The offer included a proposed exchange ratio of .65, which took into account Medley Capital's decline in net asset value, a 30-day go-shop period for each of Sierra and Medley Capital with a $6 million termination fee if a new deal emerged, and a price adjustment arising from any settlement liabilities.

Sierra took a hard line in negotiations, insisting on a revised exchange ratio despite some pushback to the proposed exchange ratio from Medley Capital, who insisted on maintaining the original .8050 exchange ratio. Medley Capital ultimately countered with a .77 proposed ratio.

On May 30, 2019, Sierra responded with a .70 exchange ratio, a 60-day go-shop that was reciprocal for Sierra and Medley Capital, and an expense reimbursement fee capped at $4 million, in lieu of a termination fee. Sierra also conveyed that it would not agree to assume Medley Capital's liability arising from this litigation.

On June 5, 2019, Sierra discussed the possibility of establishing a range for the exchange ratio that varied depending on the amount of legal expenses incurred by Medley Capital.

On June 7, 2019, Sierra revised its outstanding offer with an exchange ratio of .68 after better understanding the possible range of attorneys' fees and defendants' insurance coverage.

On June 11, 2019, Medley Capital rejected this offer, evidencing particular concern with the $4 million expense reimbursement/termination fee, and countering with an exchange ratio of .70 and a 60-day go-shop with a $1 million expense reimbursement cap. Sierra rejected this proposal the next day.

On June 19, 2019, Sierra countered with a .70 exchange ratio if attorneys' fees were $10 million or less, a .69 exchange ratio if the fees were between 10 and $12.5 million, and a .68 exchange ratio if the fees exceeded $12.5 million. This proposal also included a 60-day go-shop with no termination fee or expense reimbursement if a superior proposal emerged.

In considering this proposal, the Medley Capital special committee was most concerned with Medley Capital's significant trading discount to its net asset value and its deterioration in value since August 2018.

Then, in view of Medley Capital's late June preliminary projected financial results, Sierra again revised its offer. Using the same staggered declining exchange ratio structure as the previous offer, Sierra proposed lowering the range to 0.66-0.68, which was the range ultimately agreed upon.

The parties continued to negotiate aspects of the go-shop and Sierra's matching rights through July 2019.

On July 29, 2019, Sierra and Medley Capital issued a joint press release to announce the execution of the Amended and Restated Agreement and Plan of Merger, "Amended Merger Agreement."

On that same day, the Settling Defendants and Plaintiffs executed the Stipulation and Agreement of Compromise and Settlement, "Stipulation of Settlement." So that is how the stipulation of settlement and the amended merger agreement came to be.

In determining whether to approve this settlement, I must weigh the "give" and the "get" obtained in the settlement. Again, to quote *Activision*, the goal is to "determine whether the settlement falls within a range of results that a reasonable party in the position of the plaintiff, not under any compulsion to settlement and with the benefit of the information then available, reasonably could accept."

To aid in this analysis, I'll put a fine point on the "gives" and the "gets," starting with what the class is getting from the proposed settlement.

First, the settlement called for the

appointment of two independent directors at Medley Capital. As I noted earlier, these directors, Lorber and Lowell, were installed almost immediately upon execution of the settlement term sheet.

Second, the Medley Capital special committee was empowered to conduct a go-shop process. As part of that process, defendants agreed to waive any standstill or similar agreement that would prevent third parties from engaging with Medley Capital during the go-shop.

By way of background, during the original process that occurred before the challenged transaction was conceived, Medley Management required that any interested parties enter into standstill agreements.

Those standstill agreements prevented interested parties from negotiating the transaction with funds managed by Medley Management, including Medley Capital, for anywhere between 12 and 24 months, depending on the agreement.

When the term of the Medley Management-Medley Capital deal were announced, the standstills on their face prevented 30 previously interested third parties from making a superior proposal.

By the time of the go-shop for the amended merger, only two of the original 30 standstills were in effect. Both of those two standstills were waived under the terms of the settlement.

The 60-day go-shop period began on July 29, 2019. During the go-shop, the special committee and Houlihan Lokey contacted 194 potential interested parties. Twenty-seven of these parties executed nondisclosure agreements. Seven of these submitted a total of 12 proposals.

When the go-shop was due to expire in September 2019, the special committee exercised its contractual right under the amended merger agreement to continue negotiating for an additional 14 days with two potentially interested parties.

Though the special committee believed that these two parties might submit proposals superior to the Sierra merger, in the end, the special committee determined after consultation with independent legal and financial advisors that neither proposal was more favorable than the Sierra amended merger agreement.

The go-shop ended on October 12, 2019.

Third, the settlement called for the parties to work together in good faith to agree on the content of supplemental disclosures consistent with my post-trial decision. Medley Capital filed an amended proxy containing these corrective disclosures on August 30, 2019.

In relevant part, the amended proxy contained and disclosed:

One, the existence of proposals for an alternative transaction with Medley Capital from ZAIS, Origami, NexPoint and Lantern.

Two, that the special committee had not been made aware of the existence of the standstills prior to the execution of the original merger agreement.

Three, that plaintiffs proved "that half of the Special Committee was beholden to the Taube brothers."

Four, that plaintiffs proved the Taube brothers dominated and controlled the board.

Five, that I found that the enjoined transactions were not entirely fair to Medley Capital's stockholders.

And six -- and the sixth was negotiated by counsel for Altman -- the correct formula used to calculate how management shares were being "echo voted" for or against the transaction.

Fourth, the settlement includes provisions concerning the governance of the post-merger entity. The original merger agreement provided that two Medley Capital directors would serve on the post-merger board.

The amended merger agreement provides that the board of the combined entity will include one independent director of Medley Capital, and for the chairman of the board of the combined entity to be one of the current independent directors of Sierra.

Fifth, the settlement calls for the settling defendants to contribute to a settlement fund in the event the go-shop does not lead to a superior proposal and the revised merger actually closes. The fund will not be created if the revised merger does not close.

If the merger does close, the fund is to consist $17 million in cash and of $30 million in stock in the combined company. I note that the real-world value of the stock component of the consideration might not actually be $30 million.

The total settlement fund was negotiated with a $1 per share benefit to the Class in mind, if the combined company's stock trades at net asset value. However, Sierra, MC and Medley Management's financial advisors expect that the Sierra common stock will trade below its net asset value after the completion of the merger, resulting in a discount to the value of the stock component of the settlement fund.

In exchange for these therapeutic and potential monetary benefits, the class is giving the settling defendants a release of claims. The defined term "Released Plaintiffs' Claims" in Paragraph 1(jj) means "all claims arising out of or relating to: (1) alleged mismanagement of [Medley Capital]; (2) the Transactions," which is a capital "T" defined term that refers to the transactions contemplated in the original merger agreements, and which includes any actions, deliberations and negotiations relating thereto; (3) the original and amended merger agreements (including any actions, deliberations and negotiations relating thereto); (4) the disclosures regarding the original transactions; (5) the fiduciary duties of the Stipulating Defendants in connection with the review of strategic alternatives available to Medley Capital; (6) the vote or any adjournment of the vote of Medley Capital stockholders on the Medley Capital Merger; and (7) proxy solicitation efforts in connection with the votes of Medley Capital stockholders on the original merger.

I note that the stipulation of settlement originally proposed the release of claims arising through the date of the closing of the amended merger. After execution of the settlement, the parties agreed to amend the release to limit its scope to claims that were or could have been asserted through the date of the settlement hearing.

Still, this release is somewhat unusual because it releases claims, albeit historical claims, as to the amended merger, which was not the subject of the litigation.

Because none of the parties' initial settlement briefs addressed the propriety of the scope of the release, and given its unusual nature, at the October 24, 2019 settlement hearing, I afforded the parties the opportunity to submit supplemental briefs on this issue, which were filed on October 31, 2019.

I turn now to the critical task at hand, and that's evaluating the give in light of the get to determine whether the settlement is fair and reasonable.

As a threshold matter, I note that most of the settlement consideration has already been implemented. As a general rule, settlements of class actions must be supported by present consideration. That general rule, attributed to this Court's 1970 *Chickering* decision, serves to guard against surreptitious buyouts of representative plaintiffs, which would leave other class members without plaintiffs. At the same time, Delaware law recognizes that implementing component parts of a settlement timely can benefit a class.

In *Polk v. Gold*, the Delaware Supreme Court clarified that "[v]alidity of a settlement does not depend on every compromised claim in a lawsuit being supported by independent consideration" and that "there may be cases where action is compelled before a court can give notice of or hold a hearing on a settlement petition."

In *Barkan*, the Delaware Supreme Court affirmed approval of a class action settlement in the face of a *Chickering* challenge, where the parties were acting on a "relatively expedited schedule."

In this case, it was also critical that the therapeutic terms agreed upon be implemented promptly for them to benefit the class, and thus I find that this case too falls within the exception to the general rule set forth in *Chickering*.

Turning now to the meat of the analysis, this litigation is the product of merger negotiations gone wrong. At a simplistic level, the terms of the settlement collectively aimed to address the precise wrongs in the sales process I identified in my post-trial opinion.

Potentially, it also provides direct monetary compensation for the harms suffered by Medley Capital stockholders, should the amended mergers close. These measures will improve the precise corporate vulnerabilities that have been revealed throughout this litigation and are in that sense beneficial.

As I mentioned, the release of claims is slightly atypical in that it releases claims as to the amended agreement, which was not the subject of the litigation. The parties' supplemental briefing helped me reason through this issue.

Delaware law does not require that claims be actually litigated in order to be released. Rather, in *Nottingham Partners*, the Delaware Supreme Court held that a court may permit the release of a claim based on the "identical factual predicate as that underlying the claims ...."

That phrase, "identical factual predicate," was later interpreted by the Delaware Supreme Court in *In Re Philadelphia Stock Exchange, Inc.*, to mean "same set of operative facts." In *In re Philadelphia Stock Exchange*, a stockholder objected to the release of claims to the extent it released claims concerning a demutualization of the exchange.

Rejecting this argument, the Supreme Court articulated a pro-settlement standard, reasoning that the demutualization was not "a transaction that was 'unrelated' or 'tangential' or 'remote' from the conduct that formed the basis of the specific claims" that were litigated.

In this case, the plaintiff litigated breaches of fiduciary duty by settling defendants. Aspects of the amended merger agreements and the curative sale process arose from the operative facts challenged in litigation. For example, relaxation of the deal protections, the go-shop, and sales process, and other aspects of the settlement in the amended merger agreement were a direct effort to correct breaches found in my post-trial opinion.

Other aspects of the amended merger agreement, including negotiations with Sierra regarding the exchange ratio, did not arise from the litigation but, rather, were prompted by Sierra's demands and Medley Capital's declining net asset value.

The question is whether the parties should be permitted to release claims as to all historical aspects of the amended agreement despite the fact that certain terms are unrelated to the litigated issues and, indeed, certain of the economic terms to the amended agreement have been described by the parties in the context of settlement briefing as less beneficial to the class than the original agreement.

Having mulled this over quite a bit, I conclude that a release of the nature proposed is appropriate. This conclusion is guided mostly by one policy and common sense considerations, and that's the fact that, generally, defendants agree to a settlement in order to achieve finality in litigation. If implementing the settlement terms themselves gives rise to new claims, then therapeutic settlements requiring post-execution implementation would be impracticable.

The plaintiffs made this point in their supplemental briefing. And further, sometimes implementing settlement terms requires papering a new transaction or deal terms, and sometimes those negotiations might take place in a different economic climate warranting new economic terms.

Adequate class representatives know best how to manage these risks in a way that promotes beneficial settlements in light of all the circumstances. And the standard for determining whether a new transaction that results from settlement negotiations relates to core facts must favor approval of a settlement.

Thus, I conclude that the language in *Philadelphia Stock Exchange* supplies the appropriate standard I must apply considering the release of claims concerning a new deal that was not totally the subject of litigation. That is, I must approve the scope of release as to the new transaction unless the transaction is unrelated or tangential to or removed from the conduct that forms the basis for the specific claims for relief asserted in the complaint.

Implicit in the standard and in the settlement approval process generally is the notion that the terms achieved were negotiated by adequate class representatives, a conclusion I have already reached.

This approach is generally consistent with settlements that involve implementation of therapeutic benefits concerning a sale process. And for a sampling of those cases, I direct interested persons to the parties' supplemental briefing concerning the scope of the release.

Applying this standard to this case I conclude that the amended merger agreement is not unrelated, tangential to, or removed from the conduct that formed the basis for the specific claims in the complaint. To the contrary, there is a direct reaction to findings in the post-trial opinion, although aspects of it resulted from other forces and causes.

As comfort, I repeat that no

stockholder objected to the terms of the settlement, which included this release. I note that the settlement was negotiated by board members and adequate class representatives fully incentivized to achieve the greatest consideration possible for the class, and that there was a great deal of transparency concerning post-litigation events.

Thus, I approve the settlement.

I will turn now to the difficult task of explaining the fee award.

The role of the Court in setting a fee award is to exercise its own "sound business judgment," and the Court has "substantial discretion in the methods it uses and the evidence it relies upon" to quantify the benefits obtained by counsel. And that's a quote from the *Compellent Shareholder Litigation* decision.

Scientific precision is not required, nor is scientific precision really possible in this exercise. As much as I would appreciate the ability to pinpoint precise values with "mathematical exactitude," my colleagues have recognized that the best a person in my position can do is "rough calculations." That's another quote from *Compellent*.

Nevertheless, our calculations must be "supported by the record" and the "product of a logical deductive process," as the Delaware Supreme Court instructed in *Goodrich v. E.F. Hutton Group*.

Traditionally, the *Sugarland* factors have guided the Court's analysis of these sorts of petitions. Of those factors, the most important in quantifying an appropriate fee award is the benefit conferred in the litigation. I'll focus my efforts on the analysis of those benefits.

The other factors used to assess the propriety of a fee award are the standing and ability of counsel, the complexity of the litigation, the time and effort of counsel, and the contingent nature of the representation.

As I have discussed, the settlement included both monetary and non-monetary benefits.

Plaintiffs' counsel seeks fees in the amount of $22 million total, not including their out-of-pocket expenses. They believe the therapeutic benefits of the settlement are worth $3.1- to $6.55 million and the settlement fund is worth $16.7- to $20.2 million. They say that $22 million, then, is conservative, and they seek the entirety of this amount now even though the settlement fund might not be created.

Medley Capital opposes any fee award exceeding $3.1 million. They arrive at this position by valuing therapeutic benefits and adding a modest risk premium to account for the contingent nature of the case. They say that the Court should apply this quantum meruit method rather than the percentage-of-the-fund method because the class achieved results that were not economically beneficial.

Sierra, too, objects to the fee request. Sierra does not dispute that some amount is appropriate but says that the settlement fund is worth nothing, even if it is created.

I'll start with the last point by addressing the value of the settlement fund.

Again, the defendants contend that the class is worse off than they were before the litigation because the new deal provides Medley Capital stockholders less consideration than the original deal.

I have not been presented with evidence that would allow me to value the amended merger, but I do note that Sierra negotiated for an exchange ratio more beneficial to Sierra in light of Medley Capital's net asset value, such that it seems likely that defendants are correct, and the new transaction is less beneficial than the last, even with the cash bump and stock consideration component.

From this premise, that the new transaction is less beneficial to the class than the original transaction, defendants make the logical leap that the settlement confers no benefit whatsoever upon the class. This conclusion rests on a series of faulty suppositions.

First, fundamentally, defendants wrongly seek to hold plaintiffs accountable for a change in market conditions. Multiple decisions of this Court stand for the proposition that plaintiffs cannot take credit for benefits that were not a result of their litigation.

Chancellor Allen's decision in *In re Anderson Clayton Shareholders Litigation* recognized that what is relevant is the benefit achieved by the litigation, not a benefit that is otherwise conferred after the litigation commences.

In *Dann v. Chrysler Corp.*, this Court held that plaintiffs could not take credit for any benefits flowing not from their litigation, but from the general resurgence of the automobile industry.

Just as plaintiffs cannot take credit for benefits not achieved from litigation, plaintiffs should not be blamed for detriments not caused by the litigation.

In this case, any decrease in the benefit to the class in the form of the amended exchange ratio appears attributable to market conditions or management decisions or both. Nothing in the record ties the alleged diminution of deal value to this litigation.

Because plaintiffs did not cause any detriment, they cannot suffer for it, as this Court recognized in *In re Loral Space and Communications Inc*. when it declined to reduce plaintiff counsels' fees after the 2008 financial crisis depressed the corporation's stock price.

I also note that, implicitly, defendants' argument assumes that the original transaction would have closed but for the disclosure injunction. But this assumption does not resonate with representations made at trial. Specifically, Sierra pushed the Court to issue the opinion on a timeline that would have permitted the transaction to close by the original drop-dead date, regardless of the outcome of the trial.

In an alternate universe, the parties to the original agreement could have issued corrective disclosures and tried to go through with the original deal. So, the litigation cannot be determined as the sole causal factor behind terminating the original transaction.

Moreover, the logical corollary to defendants' argument that the litigation conferred a detriment is the supposition that plaintiffs should not have pressed the litigation, regardless of defendants' breaches of fiduciary duty. This foolhardy position is deeply inconsistent with every tenet this Court stands for, and I just don't buy it.

Defendants' second line of defense is to argue that the settlement fund is too speculative to support a fee. I also reject this argument. Put succinctly, if the settlement fund is sufficient to support the settlement and the release of claims, then it is sufficient to support a fee.

Defendants cannot have it both ways. Also, the settlement fund provides the class with a guaranteed floor in terms of consideration stockholders will receive if the amended merger closes, and that benefit is not speculative.

That said, there, the contingent nature of the settlement fund does raise a host of issues. For one, the fund can't be precisely quantified prior to closing due to the nature of the consideration. Both parties expect the stock to trade at a discount to net asset value, so the stock portion of the fund might actually be worth less than the nominal $30 million. Further, the deal might not close, so the fund might never be created. Thus, awarding fees on the fund now would create a windfall to plaintiffs' counsel.

Accordingly, my award of fees on the settlement fund is contingent on the creation of the settlement fund.

As plaintiffs pointed out at the settlement hearing, approval of this type of contingent fee award is not unprecedented. Former Chancellor Chandler approved a similar request in the *Digex* case, where he approved a fee award fixed at a percentage of a settlement fund that would be valued according to the corporation's stock price upon the consummation of the contemplated transaction. As in this case, the award was made contingent on the consummation of the merger.

Turning now to the value of the benefit, in *Americas Mining*, the Delaware Supreme Court stated that "when the benefit is quantifiable ... by the creation of a common fund, Sugarland calls for an award of attorneys' fees based upon a percentage of the benefit." Thus, the inputs for calculating fee awards based on a quantifiable benefit are the appropriate percentage and the amount of the benefit.

As I mentioned, there are complications in applying this formula in this case because the value of the stock component of the settlement fund is not fixed. So, rather than award a lump sum today, I'm going to assign a percentage that is linked to the settlement fund and provide direction on whether and how to gross up the fund amount when applying that percentage.

Turning to the percentage, this Court has explained in cases that settle close to trial, "a typical fee award ... ranges from 22.5% to 25%." And that's from the *In re Orchard Enterprises Incorporated*

Shareholders Litigation.

This Court has explained that "higher percentages are warranted when cases progress to a post-trial adjudication." And that's from *Americas Mining*.

The Delaware Supreme Court has made it clear that 33 percent is the upper bound for reasonableness of plaintiffs' fees. This case proceeded to a post-trial adjudication, warranting a fee north of 25 percent. But I do not believe this case hits the 33 percent mark, in part because the contingency risk was cabined by the highly compressed time frame, and in part because the case warranting that type of award is rare.

In my view, 26 percent is the appropriate percentage. We searched for a case procedurally analogous to this one. It appears that no one has ever had to experience litigation quite like this, which is probably a good thing. But this percentage compares favorably with other cases that bear some similarities to this litigation, including *Talecris Biotherapeutics*, where the Court awarded a 25 percent award for a four-month litigation that involved fewer depositions and settled pre-trial; and

In re Orchard Enterprises, where the Court awarded 24 percent of the benefit conferred after counsel took or defended eight depositions, engaged in discovery and related motion practice, and briefed and argued summary judgment before settling.

The 26 percent award in this case rewards plaintiffs for their "herculean efforts" to litigate, and litigate adeptly, what is at least a year's worth of litigation in just a few weeks while also being cognizant that such a compressed time frame does merit some degree of discounting.

Turning to the next issue, when the common fund represents a net amount, it has been the practice of this Court, at least since the 2011 Atlas Energy settlement by my memory, to "gross up" the common fund to account for the fee award.

The settling defendants argue against this approach. Citing to Vice Chancellor Glasscock's transcript ruling in *In re Globe Specialty Metals*, defendants argue that the gross-up method should be used only if the attorneys' fees are "not going to come from the class." They contend that if the settlement fund is not inclusive of the fee award, then Medley Capital or the post-merger entity will be required to pay the fee, which would indirectly harm the class members.

Plaintiffs in turn say that there is a likelihood that any such funds would come from insurance carriers, and the parties disputed this point through supplemental submissions and affidavits. In the end, I'm not convinced by the look-through method, at least not applied in this manner.

I do believe that *Globe Specialty* directs that defendants bear the burden of convincing me that the approach set forth is most equitable. The affidavits submitted by settling defendants do not meet that burden. And at least two stockholders have submitted letters objecting to the net fund approach, as I'll discuss later. So, with one caveat that I'll explain next, we're grossing up.

Here's the caveat. Plaintiffs described the fund as a "net" fund in that any award of attorneys' fees will be in addition to the fund amount, so it will not come from the fund. In reality, however, the fund is a hybrid of a net/gross fund, due to what plaintiffs have described as the "look-through" component of any fee award, which alters the exchange ratio in the amended merger agreement if costs and attorneys' fees exceed $10 million, as I previously explained.

Plaintiffs estimate that the merger consideration received by the class would decrease by between $4.1 and $5.9 million correlating to any fee award ranging from $10 million to $15 million.

So, when grossing up the fund, the parties shall account for this look-through amount, applying what I will call the "modified gross-up formula." And that formula is found in footnote 17 of plaintiffs' reply brief in support of settlement and fee awards, which accounts for the look-through component.

So to sum up my analysis concerning the settlement fund, if the settlement fund is created, Plaintiffs' counsel is entitled to payment in the amount of 26 percent of the value of the fund, grossed up using the modified gross-up formula that accounts for the look-through component.

I'll turn now to address fees attributable to the benefits conferred by the therapeutics. On this issue, defendants also raise two threshold objections. First, Sierra seeks to delay a fee award on the therapeutics by pointing to decisions of this Court that describe "interim fee" awards as "disfavored."

Sierra specifically cites to *Frank v. Elgamal* and *In re Novell, Inc*. for this proposition, but neither case is on point. Both *Frank* and *Novell* involved fee applications for pre-merger disclosure claims where post-merger damages claims were still being litigated. Those applications were interim in nature because the litigation was ongoing. By contrast, in this case, the litigation has concluded, and thus the requested fees are not interim. So now I'll turn to addressing the benefits conferred by the therapeutics.

The settling defendants argue that when valuing therapeutic benefits, this Court should adopt a quantum meruit approach, calculating a fee award by adding a premium to the hours billed by the plaintiffs' counsel. But that is not the typical approach of this Court. Rather, this Court looks to precedent awards from similar cases in matters where the value of the benefit is not easily quantified.

Vice Chancellor Laster recently repeated the good reasons for this approach when resolving the fee petition in the *Sciabacucchi* action, explaining that "Like the use of guideline ranges, reliance on precedent promotes fairness and fulfills the equitable principle that 'like cases should be treated alike.'" I agree with that proposition, and will look to the hours worked and implied billable rate only as a cross-check on the precedent approach.

I'll turn now to valuing the five categories of therapeutic benefits in this case.

The parties agree that benefits are conferred by the appointment of independent directors and disagree as to the value of the benefit. Plaintiff's counsel seek an award in the range of $1.1 to $2.1 million. The settling defendants counter that benefit is worth no more than $200- to $300,000.

The parties' positions reflect the extreme swings in values decisions of this Court have ascribed to this sort of benefit. In *EMAK Worldwide v. Kurz*, the Supreme Court affirmed an award of $400,000 for a benefit that invalidated a consent that would have reduced the board from seven members to three members, allowing a controller to control the board.

And in *Liberty Tax*, Chancellor Bouchard found it reasonable to award $350,000 to

$500,000 for the elimination of a controller's influence from a company and the company's board.

In *Mudrick*, the Court approved a corporate governance settlement that, in part, achieved board representation, and granted a fee award of $3 million. That settlement involved other therapeutic benefits, but certainly board representation for the minority was a critical component.

In *Google*, then-Chancellor Strine awarded $8.5 million in fees for a corporate governance settlement that resolved a challenge to a stock plan. The primary benefit of the settlement was that each time the controllers sought to issue new non-voting stock, they would need the approval of every independent director on Google's board.

The then-Chancellor awarded $8.5 million in fees on a $7 million lodestar, noting that the benefits of the settlement were not a "home run" but "somewhere between a solid single and a double."

In *Activision*, this Court mused that fees in the realm of $5- to $10 million were reasonable for the installation of two independent directors and the reduction of a controller's controlling stake in a large-cap company.

So, taking a step back, of course, *Google* and *Activision* are both large-cap companies. The market capitalization of *Activision*, for instance, was $15 billion, nearly 100 times the size of Medley Capital. And the governance terms affected the controllers' stock holdings or control over stock issuances in those two cases.

And so it makes sense, in some instances, to scale for market capitalization if the value ascribed to the independent director hews on the expected increase in value an independent director will provide to the company's market capitalization.

In any event, given the unhelpful range offered by precedent concerning the value of therapeutic benefits of appointing independent directors to a board, I was intrigued by plaintiffs' preferred alternative valuation methodology.

Plaintiffs analogize the value of the benefit to the cost of running a proxy contest by an activist stockholder, which they say is the rough equivalent of what the class would have paid to achieve the placement of independent directors on the board.

Plaintiffs' counsel points to a 2011 doctoral dissertation by Nickolay M. Grantchev, which I believe was published in 2013, which reports the average cost of an activist campaign that ends in a proxy contest, with no guarantee of success, at $10.71 million.

I was a little skeptical of this number. My gut questions why an activist would pay $10 million to obtain board representation on a company of this size. Only interests not comparable to those of the class, like reputation value or other assets, would lead to this business decision. But I was still intrigued by the idea that we can value independent board representation by what it would cost to obtain that representation through a proxy contest, so I found the dissertation online and I read it. And I view the $10.71 number as really not applicable.

For one, the dissertation defines activist campaigns as a "sequence of escalating decision steps, in which an activist chooses a more hostile tactic only after less confrontational approaches have failed." In the escalating decision steps, the decision to wage a proxy contest is the last and combines the costs of all prior steps, which might have been successful in achieving the board representation. And only 7 percent of activist campaigns result in this end-game number, according to the author. So it's a good thought, but it is poorly supported here and does not provide a reliable benchmark for me to value this therapeutic benefit.

So all that said, in the end, I think the appropriate fee award, based on the precedent I've been provided for the appointment of the two independent directors in this case, is $1 million.

This is on the high side of fees granted for the appointment of independent directors in companies of comparable size. I erred on the high side because of the unique circumstances of this case. It's tempting to view the appointment of independent directors in terms of a ratio, like 2 of 5, or 3 or 6, or, in this case, 2 of 7. When a person's job is to quantify something, we gravitate toward any available numbers. But these ratios do not tell the entire story.

Recall that plaintiffs proved at trial the key source of control exercised by the Taube brothers was their influence over two of the independent directors on the special committee. By replacing those directors, plaintiffs neutralized this concern at the board and special committee level at a critical time in the life of this company. That is, these two directors punched above their weight, so to speak, because they effectively neutralized the control concerns identified in the post-trial opinion, which poses greater significance here than the numerator and denominator of the board would otherwise suggest.

Defendants claim that the benefit of the independent directors is duplicative of other therapeutic benefits, because the primary value of these independent directors was, to paraphrase a statement from page 46 of plaintiffs' opening brief, these directors' service "as stewards of the curative sales process."

But the fact that the independent directors were placed on the special committee at a critical juncture does not diminish their value. To the contrary, that has inherent, distinct value from the go-shop process, and would have been compensable even outside of the sales process.

Further, the methodology for valuing modifications of deal protections presumes that fiduciaries are doing their jobs by acting in an independent and disinterested manner, a presumption we could not have made but for the appointment of the independent directors through the settlement. So I do not discount the value of the appointment of the independent directors based on the theory that it is duplicative of other benefits, such as the go-shop, and analysis of which I turn to next.

Let's start with the premise that go-shops confer a benefit to a class of stockholders even if an alternative bidder does not materialize. This is well established under precedent decisions valuing this therapeutic, and even defendants concede this point. The go-shop essentially delivers option value to shareholders.

In *Del Monte* and *Compellent*, Vice Chancellor Laster derived a methodology for quantifying the value of relaxed deal protections. That methodology quantified the option value by determining, one, the likelihood of the emergence of a competing bid, and, two, the incremental increase of such a bid.

Now, this methodology is not intended to impose mathematical certainty where none has previously existed. It creates, to quote *Compellent*, "an order of magnitude within which this Court can craft an appropriate award." Exactitude is not the aim of this exercise, and I don't pretend that it is.

The parties do not offer independent research concerning the propriety of the two inputs, that is, one, the likelihood of the emergence of a competing bid, and, two, the incremental increase of such a bid. Rather, the parties analogize to the circumstances of the cases in which the Vice Chancellor applied this methodology.

Plaintiffs point to *Del Monte*, in which the Vice Chancellor explained that the termination fee of the original deal is a reasonable "lower bound for the incremental value of a topping bid." He also summarized academic research, explaining that the likelihood of a topping bid depends on the type of go-shop. A pure go-shop, where a single bidder negotiation is follow by a post-signing go-shop, "generate[d] a higher offer 23% of the time," he summarized.

The settling defendants point to *Compellent Technologies*. There, rather than gaging the premium of a topping bid on a range bookended at lower end by the value of the termination fee, the Vice Chancellor cited to research supporting the conclusion that topping bids were a certain percentage greater than the original deal value.

And in that case, he adopted a premium of 11.37 percent because the deal protection measures left in place were restrictive. He also determined that in light of the deal protection devices, there was an 8 percent chance that the deal at issue would be topped.

Concerning the first input, the settling defendants have conceded that this was a "pure go-shop" and that it is reasonable to conclude there was a 23 percent chance of a topping bid. Given that this is an adversarial proceeding, I'm granting substantial weight to that concession, which is consistent with the evidence at trial that numerous competing bidders had expressed interest in an alternative transaction.

Now I must determine the incremental value of such a topping bid. I can use either the original transaction or the new transaction as benchmarks for calculating the incremental value.

Looking at the original transaction,

using the original termination fee of $6 million as a lower bound and the 23 percent likelihood as an upper bound, I derive a range of $372,000 to $3.5 million.

Looking at the new transaction, there are various inputs that determine the value of the amended merger for the class. I'll cut through it. The range I derive is $1.2 million to $1.9 million.

Countervailing considerations pull toward opposite ends of the ranges. Counseling in favor of the lower end of the ranges is the fact that the probability of a topping bid was lessened somewhat by the projected decline in Medley Capital's net asset value coupled by the passage of time.

Counseling in favor of the higher end of the range is the fact that the go-shop best embodies the equitable relief that I felt would address the harms to the class, as I explained in the opinion. Given the competing considerations, a mid-range number is appropriate, and I grant $1.5 million in fees for the go-shop, which is in the middle of both ranges generated by the two relevant benchmarks.

Next, we come to the waiver of the standstills. I view the waiver of the standstills as an input in determining the probability of a topping bid relevant to valuing the go-shop. I do not view them as having independent value, and so I do not award a fee on that basis.

Turning now to the corrective disclosures, the parties seem to be in agreement that $500,000 is reasonable for the corrective disclosures negotiated by plaintiffs' counsel, and I agree. This Court has found that number to be reasonable when new material conflicts of interests are brought to the attention of shareholders through supplemental disclosures. I do not see a reason to disturb such a consensus in an otherwise adversarial proceeding.

Last, I'll turn to valuing the post-merger board members.

If the transactions contemplated by the amended merger agreement are consummated, than the class will have an additional benefit in the form of board representation. I view this benefit as worth $100,000.

In *Baupost v. Providential Corp.*, this Court awarded fees of $326,000 for installing three new independent directors to constitute a majority on the new board. Plaintiffs in *Baupost* based this request on an hourly rate and did not seek a risk premium.

In *CytRx*, the Court considered the fees to award on a monetary benefit of approximately $100,000 and nonmonetary benefits that included bylaw amendments, the appointment of an independent director, and other governance improvements. The Court awarded $220,000 in fees.

I find that these precedents indicate that the board representation guaranteed by the one independent director would support a fee award of $100,000. However, like the fees attributed to the settlement fund, payment of this $100,000 is contingent on the transaction closing.

So for completeness, I turn now to the remaining Sugarland factors, all of which confirm the propriety of a fee award. Defendants do not dispute that the issues in this case were complex. Plaintiffs started out with a 220 action and discovered the worst. The attorneys on the case were forced to quickly digest the Medley entity structure and business relationships to present them in an orderly fashion to the Court.

Plaintiffs' counsel is experienced in

the field of stockholder litigation and well-known to the Court. Their efforts this time did not disappoint. And the plaintiffs' counsel undertook representation in this case on a wholly contingent basis.

The time and effort of counsel warrants slightly greater pause, as defendants have argued that it requires a discount. I have already accounted, to some extent, for the duration of the litigation in determining the percentage appropriately applied to the settlement fund.

Defendants effectively argue that the time and consideration of counsel should be considered twice, and that plaintiffs' counsel should take a haircut on their fees because the case was highly expedited. Defendants go as far as to refer to plaintiffs' time and effort as "relatively modest."

I do not agree with that characterization. To be sure, the lion's share of this litigation occurred over the course of a month, but it was the sort of month that takes years off of a person's life. In my view, this fact does not warrant a haircut.

In fact, I recall that when expedited

deal litigation was at its zenith in this court in recent decades, defense attorneys charged a premium on their billable hours to drop everything and handle those matters. So, I am definitely not granting a haircut based on this factor. Moreover, the compressed timeframe did not negatively affect plaintiffs' counsel's work product. They are entitled to the entirety of the fee attributable to the benefits achieved.

As a cross-check on the fee award, I note that plaintiffs invested 3,672.8 hours, according to their submissions, of which 3,241.9 hours related to the prosecution of this case through the execution of the term sheet. I have reviewed counsel's affidavits, which reflect that the hours multiplied by counsel's ordinary billable rates generate a value of approximately $1.2 million in work performed by Olshan, $1 million in work performed by Abrams & Bayliss, and approximately $100,000 in work performed by Bernstein Litowitz.

The hours expended in the 220 phase by Bernstein Litowitz and others are appropriate to include in the lodestar because those efforts were part of the continuous litigation strategy for a continuum of work.

All told, the lodestar is at $2.3 million. This means that the fee award of $3 million awarded for therapeutics is a slight premium to the lodestar. And if the settlement fund comes through, plaintiffs' counsel will be compensated handsomely. And that risk/reward makes sense to me.

As another cross-check, if I had awarded the full amount requested by plaintiffs of $22 million, the implied hourly rate would have been $5,989.

This is not beyond the bounds of reasonableness. It is not practical to calculate the implied hourly rate I am awarding today given the contingent nature of a portion of the award. But the implied rate will almost certainly be less than what I just recounted. Because the upper bound is reasonable, anything lower would be more so.

If the settlement fund is created, the resulting fee would be approximately 6X or 7X plaintiffs' counsel's normal hourly rate, by my estimation. While this implied rate might strike a casual observer as high at first glance, it is well within the range that this Court has awarded over the years. And a sampling of the relevant cases can be found in Exhibit 7 to plaintiffs' reply brief in support of the settlement.

Plaintiffs have also requested reasonable costs in the amount of $420,334 associated with this litigation. I approve reimbursement of those costs and expenses. They were out of pocket, and there is no principled reason for making plaintiffs wait until the amended merger agreement closes for reimbursement, so that amount shall be paid at the same time as the $3 million awarded in connection with the therapeutics.

I'll now address a series of other requests.

Counsel to Mr. Altman, who pursued a parallel claim concerning the challenged transaction, also requested fees associated with the filing of their 220 action and subsequent monitoring of the proceedings in this case.

It is conceded that these attorneys obtained for the class is an additional disclosure regarding the "echo voting" issue. I am going to grant a nominal amount based on what I think this specific disclosure is worth, and that's $75,000.

In determining appropriate fees for these more modest types of disclosures, this Court has weighed the materiality of the disclosures attained, and awarding lesser fees for disclosures that "approach the limits of materiality."

In *Pace v. Arbitron*, for example, the Court found the disclosures might be interesting to stockholders but did not alter the total mix of information and awarded $100,000 in fees for two minimally additive disclosures.

In *BEA Systems*, the Court found two disclosures to be "meritorious" yet "modest." There, the Court chose to award one-quarter of the plaintiffs' requested costs and fees, plus a risk premium.

In this case, the disclosure achieved by Mr. Altman's counsel can't be said to have moved the needle all that much. The thrust of the justification is that the proxy overstated the amount of echo votes in favor of the transaction as "just over 50%" instead of "just barely over 50%" or "approximately 49%". Either way, the vote was hotly contested, and a stockholder with knowledge of that slim margin would go to the polls or be incentivized to do so.

Therefore, Altman's corrective disclosures were "interesting" and even "meritorious," but for all intents and purposes, they were relatively modest. Thus, I find an amount of $75,000 in this case is consistent with precedent and appropriate.

That said, I do have reservations about this aspect of the fee award. Generally speaking, I do not want to incentivize a free-rider phenomenon where plaintiffs' counsel can sit back, merely monitor a case, make suggestions here or there, and then rush in to claim fees in the end. That practice would be bad for our system. It would create inefficiencies for plaintiffs and plaintiffs' counsel who are trying to do things the right way. It would also burden the Court with unnecessary fee petitions.

I am granting fees despite these general concerns because I do not believe that Mr. Altman or his counsel engaged in such gamesmanship here. And that's clear from a cursory review of his team's actions.

Mr. Altman commenced separate litigation on March 20, 2019 against the settling defendants. The complaint alleged that the defendants breached their fiduciary duties to stockholders of Medley Capital in connection with the adjournments of the vote of Medley Capital Stockholders on the proposed mergers. These were valid concerns that prompted me to schedule hearing on Mr. Altman's motion for expedition.

In response, FrontFour moved to consolidate these actions. I delayed a hearing on the motion to expedite, and the parties ultimately agreed to consolidation.

There was a critical time there when I had some questions similar to what Mr. Altman raised, and so, again, I do not think that his team's actions were an effort at gamesmanship or otherwise triggering any of the policy concerns I just described. So a modest award for the disclosure achieved is appropriate.

Finally, I turn to the objections of Doug Getter and Kevin McCallum, both of whom received the notice and submitted letters opposing the fees requested in connection with the settlement.

Mr. Getter's letter was dated October 1, 2019, and received by the Court on October 15, 2019. Mr. Getter has been a shareholder of Medley

Capital dating back to 2009 or 2010. He objected to an award of attorneys' fees in the amount of $22 million because he feared that it would leave very little remaining from the $30 million settlement fund. Mr. Getter requested that the fee award not exceed $3 million.

Mr. McCallum expressed similar concerns that plaintiffs' counsel would be compensated in a way "punitive to shareholders" despite the subsequent loss of market value of the merging entities.

The fact that the fees are not actually diminishing the $30 million settlement fund should allay these stockholders' concerns. I have already explained in great detail why I find the amount of fees I have awarded to be reasonable. Thus, I decline to otherwise adopt the objectors' suggestions.

So to recap, the class is certified. The settlement is approved. On the question of fees, I grant a total of $3,075,000 in fees relating to the therapeutic benefits implemented to date, broken down as follows: $1 million for the independent directors; $1.5 million for the go-shop; and $500,000 for the corrective disclosures achieved by Front Four, plus $75,000 for Mr. Altman's corrective disclosure.

On top of that, I approve reimbursement of $420,334 to plaintiffs' counsel. I further grant, contingent on closing of the amended transaction, 26 percent of the settlement fund, and $100,000 for the post-merger director.

I ask that plaintiffs' counsel prepare a form of order that memorializes this lengthy bench ruling, conferring with defendants concerning the propriety of that form, and submit it to the Court for my review.

That concludes my bench ruling.

I'd, of course, be remiss if I did not again say that the actions and efforts of all counsel involved in this litigation have been truly commendable. The advocacy throughout was exemplary and reminds me of how lucky I am to serve as a member of this Court, so I thank you.

With that, are there any questions?

MR. BAYLISS: Your Honor, Tom Bayliss on behalf of the FrontFour plaintiffs. No questions here. Thank you very much.

MR. DITOMO: Your Honor, this is John

DiTomo on behalf of Medley. I was writing copious notes, so I apologize for missing this, but with respect to the gross-up, the stock contingent, was that being valued at the .7 or 1 percent of NAV?

THE COURT: I don't have an answer for you on that. And so if it needs further clarification, you can write to me and I will have a round four.

The formula used in the footnote in the reply brief, and I'll find it specifically for you --

MR. DITOMO: I believe you said Footnote 17 of the plaintiff's reply.

THE COURT: That's correct, and I believe they used the higher NAV.

Just give me one moment.

MR. DITOMO: Thank you, Your Honor, I appreciate it.

THE COURT: So Footnote 17 of the reply brief says it's going to be at one times NAV. And it says a 33 percent fee award, but, again, I've altered that to be a 26 percent fee award. And it provides the formula for the look-through amount, and that's what I've adopted.

MR. DITOMO: Thank you, Your Honor.

THE COURT: Any further questions?

All right. Well, we are adjourned. Thank you.

MR. BAYLISS: Thank you, Your Honor.

(Conference adjourned at 12:23 p.m.)

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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 Diplomate Reporter
Certified Realtime Reporter

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MINNEAPOLIS FIREFIGHTERS' RELIEF ASSOCIATION, on behalf of itself and all other similarly situated shareholders of Ceridian Corporation,	:	
Plaintiff,	:	
vs.	:	Civil Action No. 2996-CC
CERIDIAN CORPORATION, KATHRYN V. MARINELLO, NICHOLAS D. CHABRAJA, RONALD T. LEMAY, GEORGE R. LEWIS, L. WHITE MATTHEWS, III, RICHARD SZAFRANSKI, WILLIAM L. TRUBECK, ALAN F. WHITE, THOMAS H. LEE PARTNERS, LP, FIDELITY NATIONAL FINANCIAL, INC., FOUNDATION HOLDINGS, INC. and FOUNDATION MERGER SUB, INC.,	:	
Defendant.	:	

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Chancery Court
34 The Circle
Georgetown, Delaware
Monday, February 25, 2008
2:30 p.m.

BEFORE: HON. WILLIAM B. CHANDLER III, Chancellor.

SETTLEMENT HEARING

CHANCERY COURT REPORTERS
34 The Circle
Georgetown, Delaware 19947
(302) 856-5645

APPEARANCES:

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-and-
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-and-
STEPHEN R. DiPRIMA, ESQ. (via telephone)
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Wachtell, Lipton, Rosen & Katz
for Defendant Ceridian Corporation and the Director Defendants

NATHAN A. COOK, ESQ.
Abrams & Laster, LLP.
-and-
VIRGINIA H. JOHNSON, ESQ.
of the New York Bar
Weil, Gotshal & Manges, LLP.
for Defendants Thomas H. Lee Partners, LP, Fidelity National Financial, Inc., Foundation Holdings, Inc., and Foundation Merger Sub, Inc.

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THE COURT: Mr. Friedlander.

MR. FRIEDLANDER: Good morning, Your Honor.

THE COURT: Good afternoon.

MR. FRIEDLANDER: Good afternoon, Your Honor. It's a pleasure to be here in person, especially after all the communications in this case have been either by letter or telephonically up until now. So it's good to be here this afternoon. I'm here with Mark Lebovitch.

MR. LEBOVITCH: Good afternoon.

MR. FRIEDLANDER: With Bernstein, Litowitz, Berger and Grossmann, LLP. I think there are other people on the line for Your Honor.

THE COURT: Yes. I think Mr. DiPrima is on the line.

Are you there, sir?

MR. DiPRIMA: I am, Your Honor. Steve DiPrima, and Garrett Moritz from Wachtell, Lipton on the line.

THE COURT: We apologize for the sound system. It may be a little tough for you to pick up some voices. I hope you can bear with us. If you have trouble hearing, please let us know.

MR. DiPRIMA: We will do our best. Thank you very much.

THE COURT: Mr. Friedlander.

MR. FRIEDLANDER: Sure. Your Honor, we were last before the Court telephonically on July 12th. My partner Andy Bouchard presented, telephonically, a partial settlement of this action; and that was done so that we could immediately seek implementation of the settlement terms that were agreed upon on July 12th, or immediately before then.

I'd like to go back a little bit and start about where we were then and what's happened since then.

The litigation had its origin or the transaction had its origin in early 2007 when Pershing Square, the largest stockholder of Ceridian, decided to conduct a proxy contest, and they had been advocating a spin-off of Ceridian's Comdata subsidiary. The company Ceridian then publicly announced that it was exploring strategic alternatives, which lead some weeks or a couple months later to an announced transaction to sell the company for $36 per share to Thomas H. Lee Partners and Fidelty National Financial.

Upon seeing the terms of the merger agreement, our initial concern was that the buy-out was -- seemed to be choreographed to frustrate the proxy contest by Pershing Square and to prevent the stockholders from electing new directors who may be more open to strategic alternatives, other than a sale of the company to a private equity firm. And there were two components to that: One has been that the company had delayed its annual meeting, and then was going to look into having its annual meeting held in conjunction with the vote on the buyout, some fifteen or sixteen months after their prior meeting; and also that the merger agreement contained the provision in which we ended up dubbing the election walkaway provision, saying that if the shareholders voted against an election of directors, assuming the election of directors was held prior to the vote on the merger, then that was itself -- created a termination right for the buyers to walkaway from the deal.

So we filed a Section 211 action to get an immediate annual meeting, but we also -- and we also filed a breach of fiduciary duty action and sought an expedited trial on the election walkaway provision, because we couldn't have -- our whole theory of the case was we couldn't have an unfettered election of directors until the cloud of election walkaway provision was litigated.

When the preliminary proxy came out and we started getting discovery, you know, let me just say that election walkaway challenge was initially disparaged by defense counsel in a letter to the Court as baseless for, among other reasons, that the buyers reasonably wanted to avoid triggering change of control provisions in the employment agreements of the CEO, which would cause their departure and cause change of control payments to be made to the CEO.

We ended up learning that the buyout itself triggered those same change of control provisions. So the CEO was getting paid up either way. Of course, the CEO had not committed to stay on with the buying entity in any event.

As the litigation proceeded, we became increasingly concerned that the transaction actually had been structured to stifle the emergence of any true alternative to a sale of the company to this particular -- to these particular bidders in this particular form of transaction sale to a financial buyer. One thing that struck us a little, was described in the preliminary proxy statement as a customary confidentiality agreement or a customary standstill agreement, was that all the prior bidders had signed standstill agreements prohibiting them from bringing any proposal to -- publicly or to the board. You know, it was within 18 months after the auction; and they were also forbidden from seeking a waiver from that provision. They couldn't even request a release from that to make a new proposal.

And that seemed especially egregious in this case, because the leading alternative to the sale of the company for $36 was a proposal by Warburg Pincus for a recapitalization, which would have entailed tendering for just over half of the stock of the company for $37 per share, and then leaving it in public hands, leaving the rest of the company public. And so, even though shareholders and the board and lots of people could reasonably think that that's actually a more valuable proposal -- because if the company hit its projections, or even came anywhere close to hitting its management projections and future earnings, the company would radically increase in value beyond that initial $37 per share, and the numbers grew much higher -- that Warburg Pincus could not come back into the fray. They could not -- even though they were talking about investing, you know, a billion dollars and some odd into this transaction -- their proposal could not be presented to the board, could not be presented to the stockholders; and they couldn't do anything about it, because they had -- they were bound by this standstill agreement that barred them from making any offer or from even seeking a waiver from that standstill provision itself.

So not only do we have the standstill provision, but there was also the fiduciary out provision, and the merger agreement had a threshold that was relatively high, 66 2/3 percent. The board could only -- and again, thinking of this dynamic, that new directors might be elected -- a new board or existing board could only pursue an alternative proposal if it involved 66 2/3 percent of the stock or assets of the company. The recapitalization proposal only involved roughly half the stock of the company. A spin-off of Comdata was something a little just over 40 percent of the company. So those types of alternatives were foreclosed from board consideration.

We also looked at the termination fee, which on its face might seem just I hate to say the standard three percent, but in that range. It was unclear whether it covered recapitalizations; and, indeed, when we got into discovery we realized that the buyers and the company disagreed about whether if a recap came along, whether any termination fee would be owed. So -- but with leaving the possibility, therefore, that even if the company, with its own money, tenders for its own stock and there's no buyer coming in, that the buyer -- the Thomas Lee and Fidelity could claim they're entitled to 165 million, whatever the number is, used for a transaction by a company using its own funds.

So, we realized -- this is all in the midst of heated discovery battles, constant battles over everything, because we're gearing up for a trial at the very end of July, beginning of August, on the election walkaway and the Section 211. We were also seeking injunctive relief about these other provisions I just mentioned. And we realized that it was our litigation posture that the possibility of a bifurcated vote was a real pressure point for the defendants.

It seemed that there could be, while the deal was pending, a new election of directors could be held and new directors could come onboard -- and we sought that in the letter to the Court of July 5th. But we also realized that maybe -- maybe more importantly was if we were going to try to open up this process to alternative bidders, those alternative bidders needed time to be able to organize and put forward a new proposal.

So, after -- just as we were about to enter into depositions and heading toward a three-day trial/hearing on all these issues, we were able to reach a settlement with the defendants, which, essentially, we will now no longer seek a bifurcated vote provisionally on the default basis; the vote would be on September 12th for both the merger and the election. But they were going to open up the process and do it a couple different ways: The elimination of the "don't ask provision" of the standstill agreements, and also that those prior bidders would be immediately notified in a specific way and essentially invited to be released from their standstill agreements. This superior proposal threshold lowered from 66 2/3 percent down to 40 percent.

And, as I said, the elimination of the election walkaway -- which still had some residual value because there was the potential that for -- due to subsequent events and adjournment, lack of a quorum on the merger vote -- that there could still be votes on two separate dates, because it would be a lower quorum for the election of directors because it would be a Section 211 order requiring the election of directors to go forward. And -- but a vote on the buyout would require 50 percent plus one votes in favor.

And that partial settlement left certain issues intentionally open. So, any conduct after July 11th was subject to challenge. All our disclosures claims were subject to being worked out because we didn't know what was on the final proxy yet. And specifically carving out -- instead of trying to reach some compromise about the amount of the termination fee, instead, flagging this issue, leaving that to be litigated on some future date, if necessary -- but the applicability of the termination fee and disclosing to the shareholders that that would -- that there was a dispute about how it could be interpreted, so maybe potentially some other bid could be structured in such a way to take advantage of that.

We deemed this to be essentially a victory, because the whole basis for our lawsuit was the frustration of alternatives to this deal emerging. And now we thought by this relief we were allowing an unfettered market to decide who the directors would be and what the best proposal could come forward.

THE COURT: Albeit a market that was in some disarray at that point, right?

MR. FRIEDLANDER: Well, not really at that point. This is July 12th. That's -- that's I think merely in the alternative.

So, on July 12th -- and the -- Pershing Square had signed off that they were basically not going to object to this settlement. What we learned -- and then immediately after the settlement was approved and we had the hearing before Your Honor -- counsel for Warburg Pincus called up a senior partner at the Bernstein firm, complemented that, "My gosh, it's an incredible relief," and they immediately sent in a letter asking for relief from the standstill provision, Warburg Pincus did, on July 12th. And they got that waiver granted I believe on July 19th.

Also, on July 12th, Pershing Square sent a letter to the board saying, "We believe 36 undervalues the company. We believe there's lots of strategic alternatives to this deal. We're going to be going out and pursuing them." They retained Lazard to assist in that effort; and they were seeking information from the company to help them do that. That letter -- that request was rejected because they didn't really have a proposal on the table. But I think it shows that there was a vitality in the market place at that time; that it was now a process by which people could go out and look for deals that could fit within this new rubric; and, in particular, Warburg Pincus which was probably the most, perhaps -- we didn't know at the time when we filed suit -- but perhaps was the most logical alternative, because it was now back in the game.

It was not until -- and then a couple

weeks later that was heard with the Deal.com, which we attached to our papers, saying that this ruling on the standstill could really be significant for purposes of future deals, that it's really not right to tie up bidders in this way; and it's certainly not. I think maybe if that's not a blanket rule in all cases, certainly in this case we have a real apples versus oranges type of auction going on; sell the company or do something really different like a recapitalization, just to foreclose or compute the B instead of the A from being able to put in their competing transaction to the board or to the shareholders. So we were fully expecting that there would be -- that this was just round one.

We then proceeded with depositions of the CEO, the chairman and the financial advisor in mid July. Learned a lot about the sales process, the management projections. There seemed to be some tension between the CEO and the chairman about whether the management projections were aggressive or not aggressive. The CEO was very determined that she was confident she could reach them, and no one ever told her they were aggressive. The chairman thought they were aggressive, so he said. And that was the reason why the board -- one of the big reasons why the board said they favored the sale of the entire company at a lower risk transaction versus public shareholders having a chance to sort of achieve the benefit of those projections if the company stayed public in some fashion.

THE COURT: Did the CEO, Marinello, did she have a continuing role after the buyout with the private equity group?

MR. FRIEDLANDER: I'm not sure.

MR. LEBOVITCH: Your Honor, she negotiated preliminary terms at the time the merger was announced. In other words, she negotiated something previous. At the time that I deposed her, she did not have anything finalized, but we knew the economic terms that were in place. She now, we believe, is with the company; and the deal was she was going to remain as CEO with the company.

She testified that whoever was her owner, the shareholders or the private equity firm, she's hitting those projections. That was the gist of her view.

THE COURT: All right.

MR. FRIEDLANDER: Right. And that

was in the deposition that there was an exchange of term sheets that had taken place before the announcement of the deal, but not a contract at that time.

A whole ream of supplemental disclosures were agreed to for the final proxy. Those are attached in the final exhibit to the Silk affidavit.

So now we're ready for round two. If another deal is going to emerge, we have no release of the post July 11th conduct. We have a pretty reasonably developed record about the sales process to date, of what happened to date. We're entitled to immediate notification of any bids or requests to be released from standstills, such as Warburg Pincus, or any response to bids. The termination fee issue was on the table.

What happened -- as Your Honor has seen with many other cases in the world -- was that the credit markets collapsed, and people all of a sudden were not eager to raise a billion dollars or "X" number of billion dollars to finance new acquisitions or new proposals.

It was on August 14th that Pershing

Square announced that they were, in light of the then current market conditions, now supporting the buyout. Initially, as of that time, they were still going to pursue the proxy contest, they said, but they then abandoned that some days later. And so, there was no -- ended up being no challenge to the directors, and the buyout went through.

But the effect of the market disruptions, we submit, did not effect the -- impact the fairness of the settlement that had been previously implemented and negotiated back in early July.

If I could turn -- and the only objection to the settlement, which we have attached as Exhibit A to our brief, I think is really just two prongs: I think one based on a misreading of the release, and the second based on a misreading of SLUSA. This objector -- who, by the way, does not attach any evidence that he ever owned stock in the company, although he says he did and sold -- says you can't have a release of claims.

He says he's also an investor in Fidelty National, one of the buyers, and that he thinks his claims are released. But those claims or any claims that he has in that capacity as a stockholder would not be released, the claims he might have against Fidelty National. But he says that this is not -- says it's a derivative claim dressed up like a 10b-5 claim, and that's improper.

The simple answer to that, Your Honor, is that under SLUSA this falls under the Delaware carve-out to SLUSA, which says that any recommendation or other communication on behalf of an issuer concerning a decision of equity holders with respect to the voting of securities, under state -- under the law of the state of incorporation, such a claim can be pursued. There's not a bar against maintaining such a claim.

And here we have a preliminary proxy statement and disclosure claims related to that, and breach of fiduciary duty claims generally relating to a request to vote under state law. So I think it fits very much into the Delaware carve-out to SLUSA. And so, we have a claim that can be brought, which perhaps is not surprising. And the fact that that claim is being compromised and, as part of it, related federal claims are being released is really just in the nature of -- it's really the standard test for when federal claims can be released, if they arise out of the same operative facts as the state claims, with Nottingham Partners or Matsushita acknowledging and many other cases acknowledging global releases of that sort. So I think that really takes care of that objection. And that's the only objection to the settlement.

I think that really concludes my presentation as it relates to the fairness of the settlement.

At the defendant's request, we deferred our fee application to a later time. The defendants asked for more time to brief that. Although there are law firms that are renowned for their briefing on a quick basis, we deferred, and said if they want thirty days from our brief, that's fine.

We will need to set a date for a hearing on that, but that's really for a later time. And just over the weekend, the last couple days, we filed -- really just on our way down was filed a stipulation respecting the identity of the payor of attorneys' fees. It can be I guess the company or the private equity buyers or the buyers; and we have agreed to that. So we have a stipulation that we filed that is requiring Your Honor's okay on that.

THE COURT: I have that stipulation, and I have no problem approving it.

MR. FRIEDLANDER: So that really concludes my presentation. We have submitted the fairness of the settlement. The class certification, I think, is standard. And we're deferring the fee application to a later time. Unless Your Honor has any questions?

THE COURT: Let me see if anyone from the other side, the defense side wants to add or say anything in addition to what has already been presented.

Mr. DiPrima, or anyone here in the courtroom want to do that?

MR. DiPRIMA: I don't have anything to add to that, Your Honor.

MR. WRIGHT: Nor do I, Your Honor.

MS. JOHNSON: Nor do we.

MR. COOK: No, Your Honor.

THE COURT: Well, as you probably already know, I am pretty familiar with many of the facts that Mr. Friedlander was reciting for me as to the nature of this litigation, even predating this litigation of the Pershing Square litigation against Ceridian, which is an interesting case in its own, I thought, that 220 action. When this one was filed right on the heals of the Pershing Square action, I thought this one was really going to be interesting, because I thought it had some very intriguing questions about some of these defenses. And it struck me as quite novel.

The briefing that you submitted, Mr. Friedlander, indicates that you've searched for a case, and you, Mr. Lebovitch, on a merger agreement that had a similar walkaway right, and you couldn't find one of those. I looked a little bit when this case was filed for something like that. I couldn't find any cases that had anything like that.

Then you had the waiver provision on the standstill, which -- even post Topps and Vice Chancellor Strine's comments there about the legitimate use versus the illegitimate use of a standstill -- still made this look to me as one of the more interesting cases that I had seen come in.

So, I was, believe it or not, actually looking forward to maybe having some argument about it and seeing where it took all of us. But it was, after all, sort of the dog days of summer, and I realized that the idea that you might want to trek down to Georgetown in sultry August weather might not be as appealing to you as it was to me. So, I was not shocked, but somewhat disappointed, that the case had resolved itself and you worked out a solution. And so, we had that earlier hearing, and I was willing to go ahead and approve the partial settlement and going forward.

Today, I can tell you, to relieve any anxiety that you may have, that I am going to approve the settlement as presented. Let me sort of begin the way I necessarily must begin under our law.

First, the application to certify the class, I am satisfied, meets all the requirements under Rule 23. The standard litany of numerosity, typicality and adequacy, and to the extent that I need to go through that, they are all satisfied here easily in this; and this can be certified to the class action along the lines proposed.

In addition, I have done the Prezant analysis that I am required to do. There is no evidence of any kind of conflict here that would disable counsel or the lead plaintiff in any way whatsoever. To the contrary, I have to say -- I am glad to say that lead counsel here and the plaintiff shareholder admirably prosecuted this litigation in a frenetic way, but a very professional way, and were met ably on the other side by the very skilled and talented counsel who were defending on behalf of Ceridian, which was one of the reasons why I thought it would be an extra treat to try this case in Georgetown on an expedited basis. But that's really not the question.

The question is whether the settlement here is in the best interest of the class and the best interest of the company. Settlements, of course, are approved by the Court because they are really favored in the sense that it is better for litigants to find a way to resolve litigation than to try them. And in this case it probably is true as well, because the world has moved on; conditions have changed. Dynamics here are different than they were in July and June when this thing was shaping up. The market has changed some.

Here, the transaction that was ultimately approved by the shareholders may well have been the best transaction available. But what is important is that the litigation itself can easily have been said to have contributed to the shareholders' ability to make that judgment, both by the removal of the walkaway provision from the agreement and the waiver provision with respect to the standstill and the other terms, including the additional disclosures here which were quite significant, it seemed to me, for these shareholders to be able to make a fully informed decision about whether to accept this deal, or whether to try to press the board perhaps to consider alternatives like the recapitalization or the spinoff of Comdata -- which, of course, Pershing Square was one of the major champions for that option here for the company.

The fact that I am a little comforted by the fact that Pershing Square's analysis of this, in the end, they concluded that $36 is probably the best number we can get; that, as I said, gives me some comfort as well that this was probably the right result.

So, for all of those reasons, I am convinced that given the difficulty of the litigation on such an expedited basis, some of these claims being rather novel -- yes, you got strong pushback from Mr. McBride about the baselessness of your claims, but that's what Mr. McBride is paid to do after all. So, I take that, with all due respect, but with all due grains of salt added to that as well.

So I think it would have been a challenge, in any case, to litigate to the bitter end. Given that the market dynamics were moving, it may have been risky to try to force the issue on; and given those risks, I think it was probably very sensible to settle it and along the lines you did, which, after all, were pretty good accomplishments.

It wasn't a lay-down settlement. You did quite a bit of work in filing the complaint on an expedited basis on two fronts: On the 211 and on the breach of fiduciary duty front. Moving for expedition. Getting me to agree to that expedition on a really rapid schedule, like I said, in the dog days of summer, was not a small feat. You were also undergoing quite a bit of document review, preparing for depositions both offensively and defensively.

So, given all of that, I think perhaps at least Bouchard and Friedlander was being occupied pretty frenetically in August. I don't know about Mr. Lebovitch's firm, they may have been as well. So, given all of that, I think it was a fairly remarkable achievement and a very successful achievement on the plaintiffs' side, and I give due credit to the work that was done to get ready on that basis to present to me. I am sure that if we had gone to trial, it would have been very professionally handled, and a very strong advocacy and professional advocacy on both sides.

So, for all those reasons, I am satisfied fully that the settlement is fair, adequate and in the best interest of the class. Therefore, the Court of Chancery will approve it.

Now, having said all of that, I will enter an order today that approves the settlement along those lines, and certifies the class. We will do that electronically so you will have it instantly.

I will wait for you to go ahead -- if you want to do that, I will wait for you to go ahead and submit the briefs on the attorneys' fees, but I don't know exactly why you would want to do that. Let me just say without trying to tell you that I have made up my mind, I think that this was hard fought litigation. This was not a lay-down settlement. This was serious lawyers, seriously litigating some rather interesting and novel claims.

I think that given that they were able to achieve -- some of those claims were able to be achieved as part of the settlement, the changes in the merger terms and the additional disclosures, I will be interested in seeing some argument about why I shouldn't approve fees like this that are undertaken on a contingent basis by very good firms doing that. I will be open-minded about it, but you might think carefully about whether it is worth briefing, spending a lot of attorneys' time, billing on that question, as opposed to just moving on from this dispute to some other dispute. So I will leave it at that and not say any more.

Do you want a hard copy of this, or is an electronic version satisfactory, Mr. Friedlander?

MR. DiPRIMA: Electronic version is satisfactory, Your Honor.

THE COURT: All right. Mr. DiPrima says an electronic version is okay with him.

Is it okay with you?

MR. FRIEDLANDER: Yes, it is.

THE COURT: Very good. I will do that as soon as I get back in chambers.

Is there anything else we can do today, counsel?

MR. FRIEDLANDER: No, Your Honor.

THE COURT: All right. We are adjourned.

Thank you, Mr. DiPrima, for being available.

MR. DiPRIMA: Thank you, Your Honor.

THE COURT: Bye now. We are off the record now.

(The hearing adjourned at 3:06 p.m.)

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CERTIFICATE

I, JENNIE L. WASHINGTON, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 28 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.

IN WITNESS WHEREOF I have hereunto set my hand at Georgetown, this 25th day of February, 2008.

/s/Jennie L. Washington
Official Court Reporter
of the Chancery Court
State of Delaware

Certification Number: 140-PS
Expiration: Permanent

10

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FREDRIC D. PASCAL, derivatively on behalf of COLUMBIA FINANCIAL, INC., and individually on behalf of himself and all other similarly situated stockholders of COLUMBIA FINANCIAL, INC.,	:	
Plaintiff,	:	
v	:	C. A. No. 2020-0320-SG
FRANK CZERWINSKI, RAYMOND G. HALLOCK, NOEL R. HOLLAND, THOMAS J. KEMLY, HENRY KUIKEN, MICHAEL MASSOOD, JR., ELIZABETH E. RANDALL, and ROBERT VAN DYK,	:	
Defendants,	:	
and	:	
COLUMBIA FINANCIAL, INC., a Delaware corporation,	:	
Nominal Defendant.	:	

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Court of Chancery Courthouse
Courtroom No. 1
34 The Circle
Georgetown, Delaware
Monday, February 7, 2022
11:40 a.m.

\- - -

BEFORE: HON. SAM GLASSCOCK III, Vice Chancellor

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SETTLEMENT HEARING and RULINGS OF THE COURT

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

APPEARANCES:

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SUSAN M. HANNIGAN, ESQ.
Richards, Layton & Finger, P.A.
for Nominal Defendant Columbia Financial, Inc.

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THE COURT: What a pleasure to have an actual hearing in a meet-based courtroom instead of a virtually-based courtroom. Pleasure to see you-all.

Mr. Jenkins.

ATTORNEY JENKINS: Thank you, Your Honor. Am I allowed to take my mask off?

THE COURT: Yes, you are.

ATTORNEY JENKINS: Good. I would prefer it. It gets a little hot in here.

THE COURT: It's easier to understand, too.

ATTORNEY JENKINS: Our crack stenographer has told me -- and I believe it -- that it's a lot easier to hear people when you can read their lips.

Before we begin, I would like to make some brief introductions, because this is the first time we have been before the Court not virtually.

This is Steven Purcell. He is my co-counsel from Purcell Julie & Lefkowitz in New York.

THE COURT: Welcome, Mr. Purcell.

ATTORNEY JENKINS: And this is my colleague Jason Miller from my office in Wilmington.

THE COURT: Mr. Miller, welcome.

ATTORNEY JENKINS: And I believe Ms. Hannigan has a brief introduction.

ATTORNEY HANNIGAN: Good morning, Your Honor. Susan Hannigan from Richards, Layton & Finger on behalf of the nominal defendant, Columbia Financial. I am joined today by my client representative from Columbia Financial, Eugene Schwartz.

THE COURT: Welcome, Mr. Schwartz.

ATTORNEY NACHBAR: And Kenneth Nachbar, Morris Nichols Arsht & Tunnell, here on behalf of the individual defendants.

THE COURT: Always a pleasure, Mr. Nachbar.

Would you like to begin.

ATTORNEY JENKINS: Yes, Your Honor. Good morning, Your Honor.

THE COURT: What I suspect we should do is do class certification, and I can rule on that; move on to the settlement, and I can rule on that; and then move on to the requested fee, if that suits you.

ATTORNEY JENKINS: That is fine, Your Honor.

Let me begin. May it please the

Court, David Jenkins for plaintiff.

Before we begin substantively, I'm glad to be back here. It's been nearly three years. And Your Honor, two years ago, witnessed my first experience with a Zoom court hearing. And you may recall -- I certainly recall -- how badly that went for me. I couldn't get on. I eventually learned, but it's so much easier in person.

THE COURT: I hope we never achieve expertise in remote hearings. I hope we never have to do so.

ATTORNEY JENKINS: Agreed completely, Your Honor.

This is the time for the settlement hearing on the Columbia Financial matter. An affidavit on the required notice was filed January 24th, 2022. There are no objectors to the settlement. Defendants oppose the fee, but that's separate.

THE COURT: Are there any nondefendant stockholder objections to the fee?

ATTORNEY JENKINS: There are no nondefendant stockholder objections to anything.

THE COURT: All right.

ATTORNEY JENKINS: We received nothing.

THE COURT: Let me ask Madam Clerk to call the matter in the well of the courthouse to make sure no one has arrived and is lingering about.

THE COURT CLERK: As of right now, that would be a no.

THE COURT: All right. Thank you, Madam Clerk.

THE COURT CLERK: You are welcome.

ATTORNEY JENKINS: And I will note, Your Honor, that it's 10 minutes past 11:30, the scheduled start time. So I think it's fair to say that any stockholder who wished to appear and be heard has had plenty of time to do so.

THE COURT: I, as is my usual practice, wanted to start a little bit late just to make sure no one is coming through security. But I think we've cleared that up.

ATTORNEY JENKINS: Your Honor, you indicated you wish to start with class certification. I had planned to leave all of that argument to the brief. The defendants do not oppose it at all. I think it's obvious that this should be -- a class should be certified.

THE COURT: And, likewise, I'm not going to go through the factors of the rule. It is obvious that this is an action of the type in which we typically find that class status is appropriate. There's no objection to the particular plaintiffs here, and it is entirely appropriate that I certify the class. And I will do so when I address the order.

ATTORNEY JENKINS: Thank you, Your Honor.

Let me go on, then, to the settlement itself. I'm going to leave a lot of that to the briefs, but I do -- on this one, I do have some things I would like to say.

And as I indicated earlier, the parties agree on one thing, which is that the settlement -- actually, they agree on two things. They agree the settlement should be approved. They agree the class should be certified.

Through discovery, we believe we developed a strong factual record that the defendants would be unable at trial to meet their burden of showing that the conversion grants they awarded themselves were entirely fair. You never know what happens when you come to trial, which is why you have settlements in the first place. But bluntly, we expected to win. I have set this out in the briefs, at pages 29 to 32 of the opening brief. I'm only going to hit a few high points here, and if Your Honor has questions, I believe I'm capable of answering them.

Entire fairness, of course, as we all know -- Your Honor knows better than we do -- has two prongs, fair process and fair price. We believe that the directors would have had problems with both of them.

Just briefly on fair process. The directors and their compensation consultant -- the company was called McLagan; the individual witness was Brian Lemke. They disagreed on whether McLagan recommended certain changes to the peer group. I won't spend a lot of time on this, but the analysis of what is appropriate here -- and it comes down to both fair process and fair price -- is you take the Columbia Financial metrics and you compare them to a peer group. Your Honor has been through this before in financial analysis. It's important who's in the peer group, and if you -- I will use the colloquial term "fix" -- if you fix the peer group so that it is dissimilar companies that happen to have very high awards, you can fix the outcome. We believe that something like that happened here; that there were changes to the initial peer group proposed, and they uniformly cut in one direction. This was not some reduced the median, some increased the median. The reduction -- excuse me. The changes uniformly cut in the direction of raising the amount of the median conversion awards.

Secondly, in their peer group, Columbia Financial used two cases, *Investors Bancorp*, in which I have personal experience, and *Beneficial*, in which Mr. Purcell, in addition to *Investors Bancorp*, also has personal experience. They used the presettlement awards, not what the directors actually received. There was a material difference. This was not told to the board of directors, and we think it's important.

Thirdly, one of the concepts that was raised to justify the conversion grants was retention of people. Now, I get that for, we will call them, the employees up to the CEO level. That is a standard reason for having equity grants, and it makes sense.

At the CEO level, more so than the directors, it does make sense. For the directors, it makes less sens. And especially here, where two of the directors were going to be resigning shortly after the conversion grants and everybody knew that this was going to happen.

The board got around that by forming a new advisory board, putting the two directors on it, and saying as long as you stay on the advisory board, your conversion grants continue to vest, where otherwise they would not have.

Let me turn to fair price. The conversion grants were far higher than the median and average awards of other banks -- we have set that out in the brief -- even though Columbia Financial was not a particularly good financial performer: return on assets, how much money it made, et cetera.

Secondly, the directors chose to use a multiple of cash compensation to justify the conversion grants. In a vacuum, that's not ridiculous. We asked the directors, why did you do this instead of something else, and they could not explain that to us.

And, finally, there was no fairness

opinion here. Yes, you don't need a fairness opinion; it is not required under Delaware law. But it's something that you could have asked for to help assist the stockholders analyzing this, potential plaintiffs' attorneys like me and Mr. Purcell analyzing it, and eventually the Court.

But as I said, you never know. We had strong arguments, but you never know. They might have been able to convince the Court that the awards were entirely fair.

A critical witness was Brian Lemke, who was the representative of McLagan, the compensation advisor. He was a credible witness at his deposition. I took him; he was credible. We believe his testimony really helped us, but defendants relied upon him as well. And as in many cases, Your Honor would have gotten to hear him and decide whether or not his testimony supported us or supported the defendants.

So a negotiated settlement here makes sense. And in this negotiated settlement, we got something that we could not have gotten at trial. At trial, assuming we win everything, there would have been a rescission -- well, we would have prayed for a rescission. The Court may not have granted it all. Here, the stockholders get to vote on their fiduciary's compensation. We think this is important. Defendants appear to agree; they offered it. And it gives the stockholders a chance to say whether or not they think these directors, this chief executive officer is worthy of these conversion grants. So it is a way to avoid time-consuming, costly, expensive trial before the Court and give the stockholders a say.

Let me briefly touch on the terms of the settlement. There are three separate ratification votes here. One is for the nonemployee directors who are currently directors today. The other is for the two nonemployee directors who are continuing to receive their conversion grants solely because they are on the advisory board. That's Mr. Hallock and Mr. Kuiken. And the third ratification vote is for Mr. Kemly, the chief executive officer.

Your Honor, could I take a brief sip of water?

THE COURT: Sure. Mr. Jenkins, for the rest of my tenure on the bench, you are free to take a sip of water whenever you like without asking permission.

ATTORNEY JENKINS: The last time I was here before Your Honor, I asked the same question. You gave me permission, and you said the same thing.

THE COURT: Well, I'm consistent, even if I don't have a good memory.

ATTORNEY JENKINS: All I can say is I'm getting old, and I was taught -- as a young attorney, I was taught by Andy Kirkpatrick, who tried to train me, that when you want to do something in the court other than just talk, you ask permission.

THE COURT: Well, that's a good tradition, and I appreciate your preserving it.

ATTORNEY JENKINS: Let me turn to the shares eligible to vote.

THE COURT: But I do note that you are my age, so you can't possibly be getting old, Mr. Jenkins.

ATTORNEY JENKINS: I believe I'm older than Your Honor. And some days I feel older than that.

The shares eligible to vote here -- this is going to have some importance when I attempt to distinguish one of the cases on which defendants rely. All shares held on the record date by Columbia Financial stockholders is where you start out, but there's some critical reductions. First, shares held by the holding company for Columbia Financial don't get to vote. Shares held by defendants don't get to vote. Shares held by relatives of the defendants don't get to vote. And shares held by affiliates of the defendants don't get to vote. I am using "relatives" and "affiliates" in a colloquial sense. In the brief, we put forth the precise definition there. But for purposes of argument, I think that's close enough.

The required vote for ratification is the majority of eligible shares that vote on each of the proposed ratifications. This is not a case such as a merger, for example, where it's the majority of the outstanding shares. Now, if 100,000 shares vote in this, and 51,000 vote in favor and 49,000 vote against or abstain, ratification occurs.

THE COURT: I think this is an appropriate time for me to note, because if I don't, I might forget it, that it is not entirely clear which record date is being used. And there are two references to the vote required. One is a majority of the vote, as you've just described. The other just says a majority, and that is somewhat confusing as well. So it may be worth revisiting just those very minor but not inconsequential ambiguities in the order.

ATTORNEY JENKINS: All right. Thank you, Your Honor. You caught two things that I did not catch.

THE COURT: No, my clerk did. I didn't catch it. I would have read right over it.

ATTORNEY JENKINS: Then your clerk caught two things that I did not catch but we will discuss.

Assuming Your Honor grants the settlement -- because if you don't, that's the end of all of this.

THE COURT: I think there's a pretty good chance at this point that I'm going to grant the settlement. I don't mean to be coy. I think there's a pretty good chance.

ATTORNEY JENKINS: We thought so. But I will raise this with Mr. Nachbar and Ms. Hannigan. I don't believe that the record date has been set yet again.

THE COURT: Well, what's not clear is if it's a past record date or if it's going to be a new record date. I assume it's going to be a new record date. It just might be good to clarify when the record date will be set.

ATTORNEY NACHBAR: I can clarify. It will be a new record date. Assuming the settlement is approved, we will set a record date, which will probably be promptly. We will send out a proxy. The form of proxy has been discussed and approved with the plaintiffs. And then we will have a vote with that new record date.

THE COURT: All right. Thank you. That was my assumption. I just wanted to clear it up.

ATTORNEY JENKINS: Thank you, Your Honor. Sometimes, as Your Honor knows, the devil is in the details. And this is the sort of thing we wouldn't want to make a mistake on.

Let me go on to the effect of the vote. Again, there's three tranches. The vote will be counted separately on the three. If a majority vote in favor of ratification on any of the three tranches, then the conversion votes for that tranche are ratified and will remain outstanding. That's true for all three. If, however, a majority does not vote in favor on any of the three tranches, those shares will not be -- will have lost the ratification vote, and those shares will be canceled. If the ratification is not successful, the board has reserved the right to consider issuing replacement grants. But we negotiated for and got that they must take into account the results of the ratification vote. And I will leave that there.

Let me just make a couple of other points on the settlement. The settlement gives the stockholders the opportunity to vote on their fiduciary's equity compensation. From what we can tell, this is relatively unusual. Your Honor already knows from our briefs that I intend to attempt to distinguish the cases on which defendants rely, saying those were much easier "gives" and, therefore, much easier "gets." This is more unusual. The actual compensation on which we sued, the existing conversion grants, is up for grabs.

Only one of the cases -- and I will mention this more later -- the Facebook case, got a vote similar to ours. And in that case, because Mr. Zuckerberg, who, for better or worse, owns

61 percent of the voting control of Facebook, had already said in advance he was going to vote in favor of nonemployee director compensation, it was a foregone conclusion. There's no foregone conclusion here.

Now, I'm going to leave the details to the brief, but the stockholders received in the notice -- this was negotiated over -- certain bullet points that we thought were important for them to receive. There's always -- I get proxy statements, and they are dozens or hundreds of pages long, and my eyes tend to glaze over. That was always a problem. So what we chose to do was we had four bullet points. We picked what we thought were the four best facts that we got out of -- or groups of facts that we got out of discovery that we thought the stockholders should know in connection with the vote. That went in the notice to the stockholders. We could have gone on for pages, but then defendants would have wanted to respond in pages, and we thought what we did would be easier for the stockholders to understand.

That's what we got. That's where we are. We believe the settlement should be approved.

THE COURT: Thank you, Mr. Jenkins.

Anything from any of the defendants?

ATTORNEY HANNIGAN: No, Your Honor.

THE COURT: Thank you. I was anxious to get a chance to talk about the settlement, which I intend to approve, because I think it is an ideal settlement under the circumstances.

I wrote many years ago, in the context of appraisal, that it is an odd thing for a judge to second-guess a market decision. In the same way, we could have had a trial here, and I would have had to decide whether the compensation was entirely fair. But it seems to me a far better proposition for the stockholders to decide whether it's fair. They're going to have the opportunity to do that. What this settlement does is it gives them the opportunity to evaluate the circumstances, including whatever incentive value there is, and decide whether it's fair or unfair under the circumstances. That's a far better outcome, it seems to me, than a contentious, hard-fought trial over the Court's opinion on entire fairness.

I particularly think this is well structured because it does break down the three significant categories on which the stockholders would have to vote. And those, it seems to me, have substantial differences in incentive value. So I think this is an extraordinarily good result from the point of view of equity.

Of course, I have to look at the "give" and the "get." The "give" here is giving up an entire fairness claim, which is a relatively smooth road for a plaintiff to pursue, and the potential to receive disgorgement or rescission of an incentive award or an equity award to the defendants. I don't see how that outcome could be better than this outcome.

So this is an unusual settlement, in my experience, and I think a good one, because it reinforces the rights of stockholders to control decisions that would otherwise, under the DGCL, be controlled by conflicted fiduciaries, rather than interposing a third party, the Court, to make a decision as to fairness.

So I not only approve the settlement, but I'm pleased to approve the settlement. I think it's an appropriate and wise settlement.

ATTORNEY JENKINS: Thank you, Your Honor. As you could tell, on behalf of the plaintiff, we agree. We thought this was a good result for precisely those reasons.

May I continue on to the fee request, Your Honor?

THE COURT: Would you, please.

ATTORNEY JENKINS: Okay. Plaintiff seeks a fee and expense award, all inclusive, of 2.5 million. This is not a common fund case. At least for me as a practitioner, common fund cases in the Court of Chancery are easier to consider because, yes, there can be questions about what exactly is the fund. But once you figure out what the fund is, there has grown up a tradition in the last decade of using various percentages, depending on how far the case goes along, and so at least both sides are generally talking about the same numbers. That isn't true here.

Both parties, however, agree that the Court should look to precedents to determine what is the value of obtaining this ratification vote for the stockholders.

THE COURT: In your view, what would the percentage be if, given the state of litigation at the time of settlement, that would be appropriately applied? If, for instance, we had settled at the same point, but for a fund amount.

ATTORNEY JENKINS: May I think on that just for a moment, Your Honor?

THE COURT: Sure.

ATTORNEY JENKINS: Because in the brief I assumed we had won at trial and, therefore, used a higher percentage.

THE COURT: Sure. But what it really would have been is a number that was achieved at the same point in litigation as this settlement was achieved.

ATTORNEY JENKINS: If we could have achieved that number during settlement talks.

THE COURT: Right. If, instead of agreeing to a vote, the defendants had come and said, how about we disgorge $3 million or $10 million. What percentage of that would it be appropriate for me to attribute to the plaintiffs in a common fund situation?

ATTORNEY JENKINS: Let me explain exactly where we were, and then I will answer the Court's question directly.

THE COURT: Sure. I would hope that the defendants would in their response give me the same opinion. That would be helpful.

ATTORNEY JENKINS: We had done a lot of discovery. We had taken the depositions of all but one director. We had taken the deposition of the compensation -- I have to be very careful what I say here. The compensation consultant who spent more time advising the board. We still had a compensation consultant to go, maybe the attorney to go -- that had not been completely agreed upon -- and one director remained. We were in the process of working with experts. I presume defendants were as well. But expert reports had not been prepared and, therefore, no expert discovery. And then we still had to do the pretrial briefs and go to trial.

That, under my understanding of where the Court of Chancery is these days, is somewhere between 20 and 25 percent. As a plaintiff, I would argue we were getting close to trial; it should be closer to 25 percent. And maybe the Court in this counter -- in this hypothetical would have accepted that, maybe not. But I think it is fair to say that the Court of Chancery precedents look at 20 to 25 percent.

THE COURT: Fair enough. Thank you.

ATTORNEY JENKINS: And as long as I'm on that point, there is also a dispute in the briefs over what the actual value of the conversion grants are.

The stockholders are being told that they're worth $13 million. There are statements in the defendants' brief that said, no, they're really worth materially less. They don't show their math. There's no expert report saying this is how I value it. We don't have an expert report on that because that's not the way we're analyzing the case. Cutting against that would be the fact that we are told that Columbia Financial's stock has, I think, doubled since the IPO. And the conversion grants are stock options and restricted stock units. I might have the letters wrong. So an increase in -- a doubling of the stock price is going to make, everything else being equal, going to make the options more valuable, going to make the restricted stock units more valuable. So if you look at grant date fair value, it's around 13 million. What it is worth today, I do not know.

THE COURT: Fair enough.

ATTORNEY JENKINS: Let me go on to the cases that we cite.

There is no perfect precedent here. There rarely is. All these cases are a little bit different. We cite to *Cheniere Energy* and several others cases. And I will describe them briefly. The other side relies on Facebook and a series of orders that I'm going to group together.

And defendants acknowledge, as I think is fair, that the vote at issue here in Columbia Financial -- and I'm quoting here -- "more closely resembles the vote at issue [in *Cheniere*], as it involved compensation under an equity plan ...." And we think that's fair.

The cases we have found -- and we looked carefully at what they cited, and we obviously did a lot of research ourselves -- we think *Cheniere Energy* is the case closest to this. There was a lot else going on in *Cheniere Energy*, but one of the claims alleged that the company's management used the wrong methodology to argue that stockholders approved an amendment to an incentive plan authorizing the issuance of additional stock. It's not important here, but there it was. Cheniere Energy had a bylaw that required absentations to count as no votes. The company did not do that. That can make a very material difference.

In the settlement in *Cheniere Energy*, the company had to obtain a revote before it could issue in the future certain shares available under the incentive plan, a revote under the correct standard pursuant to the company's bylaws. And the Court awarded 2.5 million for that result. It awarded other money for other things, but those don't affect us because we didn't get the other things. So it's just the vote. And Your Honor will not be surprised to know that that 2.5 million in *Cheniere*, which is the case we most closely think is on point, that's where we got our ask from.

Defendants attempt to distinguish *Cheniere*. They say it was a revote, as opposed to an additional vote. With respect, I'm not sure I understand that distinction. We're getting a vote here, and it was not an easy vote to get.

Secondly, they say the equity awards in *Cheniere Energy* were much larger than they are here. That is true. I used a long quote in the brief to show that Vice Chancellor Laster explained why that should not be the rule and, in fact, was not the rule in *Cheniere Energy*.

The defendants also say that we don't know here the outcome of the ratification vote. And they say, look, we got a lot of votes on the "say on pay," an advisory vote. I don't know what's going to happen to the ratification vote, and I don't think anyone can positively predict, and I would be skeptical of how they knew what's going to happen on a vote that hasn't occurred. "Say on pay" is an advisory vote solely on the CEO, not at all on the directors, let alone the advisory board directors. So how much it's going to have an effect here, I don't know, and I don't think anybody knows.

We also cite to two other cases. *Hawkes v. Bettino*, that was granted a $3.85 million fee, which is over 50 percent more than what we're asking for. There, plaintiff's counsel obtained -- it was a mootness settlement, a stockholder vote under Section 203. This was at a time when the Court -- it was Vice Chancellor Fioravanti -- had not yet ruled whether Section 203 applied. So this additional vote would have been relevant if the Court had decided that Section 203 applied, required a two-thirds vote of the unaffiliated stockholders to support the transaction. So there was a "might have" aspect there. Here, the vote could be dispositive. I've explained that. We also cite to *Assad v. Telenav*. I hope I haven't butchered that name. That was a $1.6 million fee. It was an agreed-upon fee for obtaining defendants' agreement to condition a merger vote on receiving two-thirds of the vote.

I will tell the Court in advance that -- and we said this in our opening brief -- that both *Assad*, plus many of the other cases cited by defendants, where there is no real description by the Court of what's happening, gives me limited information. Therefore, I can't tell the Court about it. Why is this fee appropriate? It was agreed upon. The Court just signed an order. Who knows?

Let me turn to the two major cases or groups of cases cited by defendants. The first is the *Espinoza v. Zuckerberg* case, Facebook. On the surface, it does seem somewhat similar to our case because it was an attack on the compensation of nonemployee directors. That's what we have here. And plaintiff obtained in the settlement a stockholder vote on that compensation. But there's one major difference. Mr. Zuckerberg -- again, he held 61 percent of the -- I say the voting power. He held

61 percent of the voting power and had already tried to use a written consent to say, all by himself, to say I approve of the nonemployee directors' compensation. Chancellor Bouchard threw that out for various reasons. But the vote that the plaintiff got in the settlement, Mr. Zuckerberg was not prevented from voting his shares. He had already said he was going to vote in favor. The vote was, as best I can tell, a foregone conclusion. That's not true here. We -- I don't want to say it was a difficult negotiation, but we kept out related parties so that it will be the true -- it's not a majority of the minority case here, but it will be the true independent stockholders who are voting on it here. We think that's a significant distinction.

Then there are seven cases that defendants also cite. There are some precedential problems with them. They were all orders. There's no discussion of fees. And the agreed-upon fee -- the fee was either agreed upon or not objected to. So you have the problem we pointed out in *Sauer-Danfoss*. But there is a substantive problem as well. What we got here was we got the defendants to agree that the very equity compensation we complained about in the complaint, the conversion grants, and that was the subject of all the discovery, that's up to a vote. The stockholders can reject that or they can reject one of the tranches of it. Your Honor pointed out, we picked them apart so that -- because it made sense to do so. Mr. Kemly, the CEO, is not in the same position as the directors who have already retired and are sitting solely on the advisory board. That's our view. If the stockholders agree with that, that could make a difference.

All seven of these cases cited by defendants -- and we have them in the brief -- concentrated -- not concentrated. They got solely prospective relief. Some of them, three or four of them had stockholder votes; others did not. Others had corporate governance changes. And one or two had limits on future compensation. But what none of them got was a stockholder vote, or any other form of relief on the current complaint, of compensation in the complaint. All they got was prospective relief.

Excuse me. I need to pause just a second to make sure I have got the following correct so I don't get in trouble.

I think it's human nature that it's

easier to give up something in the future -- the future may never occur; you may never get it; you may retire; you may die -- than something that's already in your pocket, either literally or figuratively.

The conversion grants are literally or figuratively in the defendants' pocket. They were granted -- excuse me, Your Honor. I have to think what year this is. They were granted almost three years ago, in 2019. So they've started to vest. Once they vest, it's in your pocket. You're thinking I've got this to spend; you may have plans for it, et cetera. That's a much more difficult "give" on their part and, therefore, "get" on our part than giving up future compensation that, as I said, may never come to pass. The world's too complex to know what's going to happen three and five years from now.

So we think what we got here was materially superior to what was gotten in those other cases. Those other cases were awarding fees in the low to mid hundreds of thousands of dollars. We got something, in our opinion, much superior to that, and that's why we think we're justified in asking for a much greater fee.

Let me just touch on two other points.

One is the time and effort of counsel. Your Honor knows that's a secondary consideration. We put it in. The law firm spent around 1900 hours, and our total lodestar is just over a million. A little over 50,000 in expenses. We think that as a cross-check fully justifies what we're asking for.

And one last point. We have requested an incentive award to be granted to the plaintiff. The defendants have taken no position on that. We're asking $5,000. It will come out of whatever money the Court sees fit to award us.

THE COURT: How was this plaintiff different from a typical plaintiff in a class action?

ATTORNEY JENKINS: For three reasons, Your Honor. Excuse me just a second. I have to think if I can say something.

THE COURT: Well, you can't unsay something, so you're wise to think.

ATTORNEY JENKINS: I'm thinking about it. But let me be vaguer. I was going to be very specific. Let me be vaguer. I have been in situations in which I have asked for incentive fees for plaintiffs who did essentially nothing. Our plaintiff here did three things. Number one, participated in a books and records investigation that was done by Mr. Purcell's firm before we got involved. That helped us get some useful documents that we were able to put in the complaint. Secondly, our plaintiff responded to document requests and interrogatories that were directed to him. And, thirdly, he sat for a deposition and answered all the questions. So those are three things he did.

I am aware -- I will get specific here. Your Honor and I have had this discussion before -- you perhaps remember it -- in which you've said I can't give it in every case; I've got to have some distinguishing features. I think these are distinguishing features that justify it. This is the sort of case that should have been brought, in my admittedly biased opinion. Without a plaintiff such as Mr. Pascal, it doesn't get brought.

This was a derivative and class action case. The derivative part, obviously, he was never going to get cash in his pocket. The class action portion, Count III was in connection with voting rights. Those are individual, hence class, but it doesn't put money in his pocket. To encourage plaintiffs to do this, we think a -- in this case, we're only asking for $5,000 -- an award is appropriate.

THE COURT: All right. Thank you, Mr. Jenkins.

ATTORNEY JENKINS: I have nothing else. If Your Honor has further questions, I will attempt to answer them.

THE COURT: No; you have been very clear.

Who is going to argue?

ATTORNEY HANNIGAN: That would be me, Your Honor.

THE COURT: All right. Ms. Hannigan, I'm happy to hear you.

ATTORNEY HANNIGAN: Thank you.

Good afternoon, at this point, Your Honor. Again, Susan Hannigan from Richards, Layton & Finger on behalf of the nominal defendant.

So there are a number of points, of course, with which we agree with the plaintiff. Obviously, we believe that the settlement should be approved. We also agree that the benefit conferred by the settlement is the ratification vote, which will allow Columbia Financial stockholders to approve some or all of the challenged awards. And we also agree this benefit is nonmonetary and that, therefore, the appropriate course is for the Court to consider precedents of similar cases; it's just that we have significant disagreement as to what the correct precedents are.

There are, of course, some substantial differences in the views of the strengths of the case. I think Mr. Nachbar could speak at length as to why he believes his clients would ultimately succeed. But there is a flavor of that in the brief, so I won't dwell on it.

In preparing for today, I sort of thought, on a very basic level, well, what makes a case a good precedent? And in *Sauer-Danfoss*, which related to supplemental disclosures, another form of nonmonetary benefit, the Court observed that all supplemental disclosures aren't created equal -- there's qualitative importance to the disclosures -- and observed that consistency promotes fairness by treating like cases alike and rewarding similarly situated plaintiffs equally.

So with the idea of like cases and similarly situated plaintiffs, there's a few high-level framing points before I dig into the cases themselves. Every single precedent case cited by defendants involved a claim that director defendants breached fiduciary duties by granting themselves excessive compensation. That, too, is the main allegation here. Only one case cited by any party involved a stockholder ratification vote on specific challenged awards, and that's the *Espinoza* or Facebook case, which I will come back to. And none of the cases cited by plaintiff involved a ratification vote. And that, of course, is the biggest conceptual difference we have with plaintiff.

Here, the stockholders had no right to vote on the challenged awards to begin with. What they're getting through the settlement is not a vindication and a protection of their franchise rights. They're getting a one-time opportunity for a ratification vote. So the question is, does it matter in terms of valuing the benefit? And, respectfully, we submit it definitely does matter.

Turning to the *Cheniere* decision, which is a big focus here, I won't repeat the facts. They're in our briefs. Mr. Jenkins ably summarized them. But I do note that, you know, we have this argument from plaintiff that they believe that case is particularly instructive. It's still not entirely clear why, despite it being their burden.

The votes in *Cheniere* and the present case are actually quite different and solve for different things. The problem in *Cheniere* was that the stockholders had a right to approve the amendment to the incentive plan, and it seemed that stockholders had not actually approved the amendment because of how the votes were counted. Yet, the company had gone forward as if they had. So the benefit of the revote was that it preserved stockholder voting rights.

We explained all this in our brief. And plaintiff's reply is essentially, well, *Cheniere* doesn't discuss that distinction. So, therefore, it's not a valid distinction. And I think there are two fundamental problems with that. First, it misunderstands the context of the *Cheniere* decision. But also, I think it substantively misunderstands why the *Cheniere* Court looked to the *EMAK* and *Bradbury* decisions.

And to put *Cheniere* in context, you know, at least in this case, I would say the parties agree on what the benefit is. In *Cheniere*, they were in two totally different universes. The plaintiff there had conceptualized the benefit as a monetary one and was seeking to be paid based upon the market value of those 7.8 shares. And the defendant there said, whoa, hold on a second. This is a voting case. So that's why they had looked to *EMAK* and *Bradbury*. But nobody is arguing about whether the right to elect directors in *EMAK* and the right to vote on an incentive plan were different because they were just focused on a bigger conceptual difference. And certainly no one argued as to whether there was a distinction between a revote and a ratification vote. It just wasn't an issue there. So I don't think you can make the inferential leap that plaintiff wants to make that Vice Chancellor Laster concluded the nature of the vote was irrelevant.

So, relatedly, the fact that plaintiff seems to believe this I think reveals a misapprehension as to why *Cheniere* looked to *EMAK* and *Bradbury* to begin with. And so I do need to touch on *EMAK* very briefly. The facts and the details are all in the brief. But basically, in that case, as a result of the plaintiff's efforts, you had a reclassification which would have effectively destroyed the voting rights of the common stockholders being rescinded. The plaintiff there also succeeded in invalidating a bylaw amendment that would have transferred control of the board to the preferred stockholders. And so in affirming the Court of Chancery's fee award, the $2.5 million, the Supreme Court noted that voting rights are sacrosanct and that shareholders have limited opportunities to exercise their right to vote. The Court doesn't go into detail about these limited opportunities, but that could include the right to vote on directors in a director election, the right to vote on certain merger transactions, or the right to vote on certain corporate actions at an annual meeting.

And the language used by the Supreme Court confirms that the focus is on vindicating existing stockholder voting rights. The Court stated: "Preserving shareholder voting rights ... produces a non-monetary [corporate] benefit." And further, that "Plaintiff's counsel produced corporate benefits by preserving voting rights ...." And that citation is 50 A.3d, at 432 and 34.

So voting rights cannot be preserved unless they exist in the first place. There necessarily must be an underlying vote. So when plaintiffs suggest there's no basis in law for us to look at whether or not there is an underlying right to vote, I don't think they can square that with *EMAK*. And it makes sense to me that *Cheniere* relied upon *EMAK*, because the settlement in *Cheniere* preserved a stockholder voting right through the revote. And it's the same for the *Bradbury* and *Hawkes* cases that Mr. Jenkins mentioned. There were underlying rights to vote for directors and a right to vote for a merger transaction in those cases, and those were impacted by the challenged conduct in those cases and then preserved by settlement.

So that's how I think these cases tie together. And I think it's important to note that plaintiff doesn't offer any other explanation for what the common thread there is in these cases if it's not what we say.

So for those reasons, we think plaintiff's precedents are distinguishable. But if, for the sake of argument, I am wrong, then essentially what we're left with in *Cheniere* is a plaintiff who got $2.5 million in fees because it obtained a stockholder vote on an amendment to an equity incentive plan. Well, the defendants cite cases that are quite similar in that regard. *Steinberg v. Casey* and *Calma v. Templeton* also involved stockholder votes on amendments to equity incentive plans. And there, the fee awards were $500,000 and 425,000, respectively.

We also cite five other settlements that provide for a stockholder vote on director compensation. And the range of those is 240,000 to 400,000.

So if you view it from that perspective, *Cheniere* would be an extreme outlier, providing compensation for a vote on an incentive plan that is way out of line with all of these precedents. And I don't think there would be any cause for the Court to rely on an outlier.

Plaintiff says that these seven settlements are not comparable because in the present case -- or they're not comparable to the present case because they provide relief tied to future compensation under new compensation plans and it wasn't the past compensation challenged in the complaint. But plaintiff hasn't cited any cases which value the return of a specific compensation award differently than savings from future compensation limits. And plaintiff speculates that from the perspective of the individual defendants here, putting the existing compensation to a ratification vote is a harder give than agreeing to a future compensation arrangement. But I would submit that's just speculation. A number of the directors were deposed here. There are no record cites for that speculation. And, in fact, as we cite in our brief, you know, Mr. Kemly's equity compensation was, in fact, put up to a "say on pay" vote. It is advisory. But over 97 percent of the stockholders voting on it did approve it, as to his 2019 compensation.

So moving on to *Espinoza*, that settlement does provide for a stockholder ratification vote on the specific equity grants challenged. And that's what we're hearing is very important. But plaintiff says it's not comparable because there was a controlling stockholder there and, therefore, the vote was illusory.

So just to be clear, the nonemployee directors whose compensation was at issue in the Facebook case were not entitled to vote on that ratification vote. But plaintiff's apparent position is that the *Espinoza* vote would only be comparable to this situation if Mr. Zuckerberg had been excluded.

A couple of responses. The first is that the *Espinoza* vote was not illusory. I think plaintiff is simply wrong on this point. The background is that Mr. Zuckerberg testified in his deposition, somewhat vaguely, about his support for the director compensation. And on those grounds, the defendants moved for summary judgment and they claimed that the compensation had been effectively ratified. In a capital O "Opinion," Chancellor Bouchard found that a disinterested controlling stockholder cannot ratify a transaction approved by an interested board without using one of the methods prescribed by the DGCL. And his reasoning was that all stockholders must observe corporate formalities, even if you're a controlling stockholder. And those serve to protect the corporation and all of its stockholders by ensuring precision, both in defining what action has been taken and establishing the requisite number of stockholders approve such action and by promoting transparency, particularly for nonassenting stockholders.

So it's no surprise, then, that when

the Court approved the settlement, on page 20 of the settlement transcript the Chancellor said, "while it is true the vote will be, I expect, a foregone conclusion, there is the question of having precision and transparency, which are important in voting matters. Those benefits, I think, are achieved by having an open vote. And, in addition, you have the benefit of actually getting a sense from the other stockholders what their views are on the compensation issues even though it really is more precatory than anything else as a practical matter under the circumstances." So I think it's clear from the history in *Espinoza* that the Court there did not view that ratification vote as illusory.

And before I move on from discussing our precedents, I just want to touch on the fact that our settlements were, in fact, unopposed. I think plaintiff's criticism in this regard is a little bit overblown, because the critical question is which set of precedents are more akin to the present case. And if defendants are correct, I respectfully submit that doesn't mean that the settlements we cite get disregarded. *Sauer-Danfoss*, which plaintiff cites, doesn't stand for that proposition. That case talks about de-emphasizing uncontested fee awards when a meaningful body of contested fee award precedents exist. So, unfortunately, there is no body of relevant contested fee awards here. But the settlements we cite nevertheless were all negotiated at arm's length, they were all approved by the Court, they all have validity.

And so the last point is that I think this fee award in this context would be a windfall because it compensates plaintiff as if he had achieved via settlement a complete victory, which would be a 100 percent rescission of the challenged awards.

Now, Your Honor had asked the question of Mr. Jenkins, if this were a common fund case, what percentage of the benefit would plaintiff be entitled to? So I think we look to the *Americas Mining Corp.* case, which suggests that when a case settles before trial, it's in the range of 15 to 25 percent. Our view is that 20 percent, you know, at most, probably would be appropriate here. And that's because, as was recognized, depositions were underway, but they weren't complete. Expert reports hadn't been issued. There were no expert depositions, no pretrial activities. Trial was still several months out. So that's why we come up with the 20 percent number.

Now, I note that 2.5 million would be about 19 percent of $13.2 million, which is the total grant date value of the equity awards here. So our point is simply this. If plaintiff had hit an absolute grand slam in this settlement, they had gotten 100 percent rescission, which would be a 100 percent victory, and they had prevailed on what would likely be a dispute over how to value those shares, even then, you know, the upper range of what they would be looking to get is 2.5 million. But plaintiff didn't achieve that here. And so the vote, it's meaningful, no doubt, but it's not that grand slam; it's nowhere near it. And so we believe that awarding plaintiff as if he had hit that grand slam when he did not is a windfall.

So for those reasons, Your Honor, unless the Court has any questions, defendants would respectfully submit that a fee award in the range of 240,000 to 525,000 would be appropriate.

THE COURT: Thank you, Ms. Hannigan.

ATTORNEY NACHBAR: Your Honor, very briefly, I just want to address the eight precedent cases.

So those cases, they all involve stockholder votes on awards. As Mr. Jenkins said, they were largely prospective awards. And so what happened? The company in most of those -- I think all of those cases, but certainly most of them -- had adopted some plan going forward. We're going to give directors X per year. And that was put to a vote, in some cases a binding vote, going forward. And even if it's not a binding vote, it's very hard to sustain those awards if the stockholders vote no.

So the awards in those cases ranged from 240,000 to 525,000. The plaintiff here seeks an award that is five times to ten times the amount of those awards. So it's not 20 percent higher or 30 percent higher; it's between 500 percent higher and 1,000 percent higher. Big difference.

Is that justified? I submit that it's not. Consider it this way. The directors of Columbia Financial were granted approximately, I think it's $870,000, the outside directors vesting equally over five years. That's the equivalent of $175,000 a year. So case one is our case. Year one, directors are granted $870,000, roughly, payable vesting over five years. It's clear that there's no intent to make any additional awards during that time period. That's case one. That's put to a vote. If the vote -- if they ratify it, it stands. If they're not ratified, it's canceled and they go back to the drawing board.

Case two is the company, let's say Columbia Financial, instead of $870,000 in year one just says we're adopting a program going forward, $175,000 a year forever, you know. We can always change it, but that's our intention going forward, with no defined end date. And let's say now there's a vote on those awards.

Are they really that different? I mean, yes, there's some difference because, you know, in hypothetical one, if the stockholders vote no, two years of vested awards will be, you know, invalidated and there might be some new grant. And in case two, it would only be prospective. So that is certainly a difference, but it's not a major difference. And the awards here, there's three years remaining, and then they're going to end, in case one. In case two, it goes on forever. So, you know, would you rather get $175,000 a year in perpetuity, or would you rather get $860,000 payable over five years? You might prefer the latter, actually.

The point is this. The point is you might be able to justify 1.2, even 1.5 times those other cases. You can't justify 5x or 10x. The differences are not that great. That's my only point.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Nachbar.

Any response, Mr. Jenkins?

ATTORNEY JENKINS: Thank you, Your Honor.

There will be three areas I'm concentrating on. Number one is *Cheniere*. Number two is Facebook. Number three are these other cases which Mr. Nachbar has mentioned.

I heard from Ms. Hannigan that *Cheniere* is different from here because it -- I think I got this right -- preserves voting rights, and we're not preserving voting rights, we're creating voting rights. I don't mean the following facetiously. I have been thinking about this, and I think I can do it without making a joke out of it. One of them is preserving voting rights that had you gone to trial, presumably, and you showed that the voting rights existed and were interfered with, presumably the Court would have enforced them. Here, as I said -- and I won't put words in Your Honor's mouth. Here, we're getting a ratification vote that we could not have gotten at trial. What I don't want to say facetiously is isn't the second greater than the first? I am not arguing that. I'm not sure which way those cut. But to say that one is preserving and one is creating voting rights, it's not obvious why preserving is suddenly so much greater.

Ms. Hannigan also noted that -- and I think she was quoting from the *EMAK* case -- that the Supreme Court said that there are limited opportunities for the stockholders to vote. And we have no doubt about that. We're getting them another opportunity here, one they normally wouldn't have. That's got real value.

Let me turn to Facebook. We have -- my understanding, based on what they provided on Facebook, was that it was a situation in which Mr. Zuckerberg had done a written consent and said, using the 61 percent voting power, I'm going to -- I'm supporting the equity awards to the nonemployee directors. As I think I heard Chancellor Bouchard say in the transcript, yeah, I'd say it's a foregone conclusion. Yeah, it may be a foregone conclusion, but there's still some value there. It can't, however, be anywhere close to the value we're creating here. These are real ratification votes. They have real consequences. If the stockholders vote them down, they're canceled. That's what everybody agreed upon.

Let me go to the third one, which is Mr. Nachbar's explaining why there are -- why there is less difference than may otherwise meet the eye between prospective relief and what we're getting here. He acknowledges fairly that prospective relief is different. And let me emphasize that. What we're getting here is exactly what was complained about in the complaint. The examples Mr. Nachbar used were you get a vote on prospective future compensation. I'm not sure I got all the facts in his hypothetical. But if the company is not committed to giving that compensation, then the directors don't have it in their pocket.

Ms. Hannigan's -- and this goes to the point Ms. Hannigan said, that I'm just speculating here that it's an easier "give" and therefore an easier "get" when you're talking about stuff you don't have in your pocket. I will represent to the Court that defense counsel in other cases has told me that. And it sort of seems natural. Money in a person's pocket is difficult to take out. Money down the road is a much easier get, for the reasons that I have explained.

May I ask Mr. Purcell one question, Your Honor?

THE COURT: Sure.

ATTORNEY JENKINS: I knew he had told me something. One of the differences between -- another difference between Facebook and here is the vote in Facebook, in addition to being -- I'm going to use illusory. I think it's illusory. Here, it's where the stockholders are fully informed. We gave them, in critical bullet points, what we found in discovery. That did not occur in Facebook because little, if any, discovery had been taken.

I have nothing further, Your Honor. If you have questions, I will do my best to answer them.

THE COURT: No. Thank you, Counsel. I appreciate it.

I'm going to give you a decision on the fee award. Before I do, I just want to make sure, I have agreed to the settlement based on my understanding that the reference to a record date is for a prospective record date and that the margin of voting for ratification is greater than 50 percent of those shares actually cast in a vote. And you're going to clarify that for me to the extent you think I'm right that it could use some clarification. So I just want to make clear, that's my understanding. I have approved that settlement.

Let me turn, then, to the --

ATTORNEY JENKINS: What Your Honor said is consistent with what we believe the voting standards are. But Mr. Nachbar and Ms. Hannigan and I will talk.

ATTORNEY NACHBAR: We agree.

THE COURT: All right. Thank you.

So let me turn to the fee award. It's clear that there was a benefit conferred here, a substantial benefit, as a result of the litigation. It is not a common fund, and, therefore, as Mr. Jenkins pointed out, there are difficulties in setting the appropriate amount of the fee award.

I have considered here the *Sugarland* factors that our Supreme Court has told us are the appropriate metric to use to value an award in this situation. I'm not going to go through all of them, because the two most important here, to me, are the result achieved and the lodestar as a check. And I'm not going to describe the other factors, other than to say that they do not cause me to depart from those two parts of the metric.

Let me first start with the case law that's been cited. Our court has long had a rule, inconsistently applied, that transcript rulings are not precedential in value. Obviously, because so much of what occurs in fee awards is represented by transcripts, and not written opinions, that becomes problematic in its own right. But nonetheless, the reason for reluctance to rely on transcript rulings is that they are, like the one you're listening to right now, delivered informally and without, perhaps, a full explication of what is in the judge's mind. So they can be relied on, I suppose, to some extent, but not slavishly.

Having said that, let me talk about some of the precedents, not all of which, obviously, are transcript rulings. And I will start out by saying I don't think there's an exact precedent here.

This is a very elegant settlement. I don't think it corresponds precisely to anything I have seen in the record.

In *Espinoza*, there was a real benefit conferred, but it was not the kind of benefit being conferred here. Because there, I think it is reasonable to say that whatever the benefits of a vote on the record, that the results of that vote were, if not foregone, nearly so. So I don't think it's a great help.

Cheniere, which relies on *EMAK*, I do think is somewhat different, in that it vindicates a right to vote and talks about the fact that a vindication of such right should not be dependent on the capitalization of the company. I am not minimizing the value of what's been conveyed here, but it is not a case where there was a voting right that was being threatened or stripped; it is a case where there was a dispute over the fairness of a board decision, and the result of the settlement is to allow the stockholders to be able to determine the fairness for themselves. That is a benefit. It's not the same nature of benefit, to me, that was at issue in *Cheniere*.

I don't think there are really any strong precedents here, so how can I address this in a way that is reasonable? I noted the *Cheniere* and *EMAK* references to settlements resulting in vindicating a voting right or other right, where the resulting fee should not be dependent on the capitalization of the company or the amount that was being referenced in that vote. For the reasons I've already mentioned, I think this is a little different situation. This is conveying onto stockholders the ability to determine whether the board's actions, taken for their own benefit, were entirely fair.

So at issue is an award that is valued -- and the parties dispute this somewhat -- but I think it's fair to say it's valued at around $13 million. There is almost certainly some corporate value to those incentive awards. So the fair value of those incentives can't be zero. It's something greater than zero; probably substantially greater than zero. It is unlikely to be, however, the entire $13 million. It's somewhere in the middle. And it's a significant right that's being given to stockholders to determine whether the value of those incentives is justified as fair. I've already mentioned the utility of breaking these votes out into the three different groups, because I think there's significantly different considerations that have to go into the fairness of these different groups. But at any rate, somewhere between $13 million and zero dollars is at issue in the ratification decision that the stockholders are making. So what is the value to them of the newly acquired right to make that determination?

Well, to my mind, it can't be more than the fair value of those incentives. And I'm, in a very gross way, guessing that the value to the stockholders in deciding whether those incentives should be given in any amount or not is about half of the $13 million fund that would have been achieved if there had been an entire victory, or around $6.5 million. I agree with both sides that if that had happened in a settlement, not necessarily the $13.5 million, or the $6.5, but whatever was achieved, a 20 percent recovery would be appropriate here.

So if I have to consider that the value of the right to vote which has been conferred here can't be worth more than $6.5 million, I think a fair attorneys' fee would be in the amount of

20 percent of that. That is a $1.3 million attorneys' fee. I've looked at the lodestar amount. That certainly seems like a reasonable result given the lodestar. And so I am granting an attorneys' fee in the amount of $1.3 million, all in.

I'm also approving the $5,000 incentive, given the long tenure of the service of the plaintiff; that he went through a books and records case and that he was forced to participate directly in discovery. I think that's appropriate.

I know that wasn't the result you were looking for, Mr. Jenkins, but was it comprehensible, at least?

ATTORNEY JENKINS: The end was. Could I ask a question? At the end, you said a $1.3 million attorneys' fee. Twice before that, you talked about a $1.3 million settlement.

THE COURT: I'm sorry. I misspoke. I'm talking about the fee. I found that the value of the right conferred can't exceed $6.5 million, and I'm awarding 20 percent of that as a fee.

ATTORNEY JENKINS: Right.

THE COURT: That's what I mean about speaking off the cuff. Some of us have a harder time than others. But if I said a $1.3 million settlement, I misspoke, and I meant a $1.3 million fee and expense award all in.

ATTORNEY JENKINS: Thank you, Your Honor. First, we wanted to get it right for here; and, secondly, despite what Your Honor says, you know that these transcripts go all over the country and are going to be cited back to people. So I wanted to make sure it was clear.

THE COURT: I'm glad you cleared that up. And since I am the master of my own rulings, I will probably clear that up. So this discussion will look nonsensical, and it will look like you're raising a problem that doesn't exist, Mr. Jenkins.

ATTORNEY JENKINS: No one will be surprised, since it's me. So thank you, Your Honor.

THE COURT: Otherwise, was that comprehensible? That was my question to start with.

ATTORNEY JENKINS: Yes, Your Honor, it was.

THE COURT: With Mr. Jenkins' corrections of my often-slipping tongue, was that ruling comprehensible?

ATTORNEY HANNIGAN: Yes, Your Honor.

Thank you.

THE COURT: All right. What else can we do here this afternoon before we break?

ATTORNEY JENKINS: Nothing from the plaintiff's side, Your Honor.

ATTORNEY HANNIGAN: Nothing from the defense side, Your Honor.

THE COURT: All right. Well, thank you for the briefing and the argument. It was very helpful. Both sides did a masterful job -- perhaps too good -- of distinguishing the precedents, which ultimately kind of left me unaided by precedent. But I do appreciate the obvious work and preparation that went into this.

More than that, I will just say it's a pleasure to have you in my courtroom, and this is what litigation and argument should be like. I thank you for attending and for participating, and I hope you have a good trip home.

ATTORNEY JENKINS: Thank you, Your Honor. It's a pleasure to be here in the courtroom again.

(Proceedings concluded at 12:52 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 60 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 19 and 20 and 52 through 60, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 18th day of February, 2022.

/s/ Debra A. Donnelly

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

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EFiled: Sep 17 2019 03:36PM EDT
Transaction ID 64214428
Case No. 2018-0922-AGB

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SALESFORCE.COM, INC. DERIVATIVE LITIGATION	))	CONSOLIDATED C.A. No. 2018-0922-AGB

STIPULATION OF COMPROMISE AND SETTLEMENT

This Stipulation of Compromise and Settlement (the "Stipulation"), dated September 13, 2019, is entered into by and among the following parties, by and through their undersigned attorneys: Co-Lead Plaintiffs Judy Pill ("Pill") and Richard Lewkowicz ("Lewkowicz") and plaintiffs Shiva Stein ("Stein") and James Clem ("Clem," and with Pill, Lewkowicz, and Stein, the "Plaintiffs"), individually and derivatively on behalf of salesforce.com, inc. ("Salesforce" or the "Company"); defendants Marc Benioff ("Benioff"), Keith Block ("Block"), Craig Conway, Alan Hassenfeld, Neelie Kroes, Colin Powell, Sanford Robertson, John V. Roos, Lawrence Tomlinson, Bernard Tyson, Robin Washington, Maynard Webb, and Susan Wojcicki (collectively, the "Individual Defendants"); and nominal defendant Salesforce (with the Individual Defendants, the "Defendants"). Plaintiffs and Defendants are collectively referred to herein as the "Settling Parties" and each individually as a "Settling Party."

This Stipulation is intended by the Settling Parties to fully, finally, and forever compromise, resolve, discharge, and settle all claims in the Released Claims against the Released Persons and dismiss the Consolidated Action with prejudice, upon the terms set forth below and subject to the approval of the Court pursuant to Court of Chancery Rule 23.1.[1]

I. BACKGROUND OF THE CONSOLIDATED ACTION AND SETTLEMENT NEGOTIATIONS

Salesforce offers cloud-based software, including services such as sales force automation, customer service and support, marketing automation, digital commerce, community management, collaboration, and other specialized platforms. The Individual Defendants are or were members of Salesforce's board of directors (the "Board"), each of whom other than Benioff and Block are non-employee directors (the "Non-Employee Director Defendants").

On June 21, 2018, Lewkowicz served upon Salesforce a books and records demand under 8 *Del. C.* § 220 (the "220 Demand") seeking to inspect documents related to Salesforce's non-employee director compensation.

On August 29, 2018, after execution of a Confidentiality and Non-Disclosure Agreement between Lewkowicz and Salesforce (the "NDA"), the Company produced documents for inspection to Lewkowicz in response to the 220 Demand.

On December 21, 2018, Pill commenced a derivative action captioned *Pill v. Benioff et al.*, C.A. No. 2018-0922-AGB (the "Pill Action") in the Delaware Court

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[1] All capitalized terms not otherwise defined are defined in Section IV.1.

of Chancery, asserting claims of breach of fiduciary duty against the Individual Defendants and unjust enrichment against the Non-Employee Director Defendants.

On January 15, 2019, Stein commenced a derivative action captioned *Stein v. Benioff et al.*, C.A. No. 2019-0028-AGB (the "Stein Action") in the Delaware Court of Chancery, asserting claims of breach of fiduciary duty against the Individual Defendants and unjust enrichment against the Non-Employee Director Defendants.

On January 22, 2019, Lewkowicz commenced a derivative action captioned *Lewkowicz v. Conway et al.*, C.A. No. 2019-0047-AGB (the "Lewkowicz Action") in the Delaware Court of Chancery, asserting claims of breach of fiduciary duty against the Individual Defendants and unjust enrichment against the Non-Employee Director Defendants.

On January 25, 2019, Clem commenced a derivative action captioned *Clem v. Benioff et al.*, C.A. No. 2019-0055-AGB (the "Clem Action") in the Delaware Court of Chancery, asserting claims of breach of fiduciary duty against the Individual Defendants and unjust enrichment against the Non-Employee Director Defendants.

On January 30, 2019, the Court granted a Stipulation and Proposed Order Governing Consolidation and Leadership Among Plaintiffs and Defendants, which among other things: (i) consolidated the Clem Action, the Lewkowicz Action, the

Pill Action, and the Stein Action into the Consolidated Action; (ii) appointed Lewkowicz and Pill as Co-Lead Plaintiffs in the Consolidated Action; and (iii) appointed the law firms Purcell Julie & Lefkowitz LLP and Wolf Popper LLP as Co-Lead Counsel for Co-Lead Plaintiffs, Rosenthal, Monhait & Goddess, P.A. as Delaware Liaison Counsel, and Barrack, Rodos & Bacine and Robbins Arroyo LLP as members of Plaintiffs' Executive Committee in the Consolidated Action.

Following consolidation, Pill, Stein, and Clem became parties to the NDA. On March 1, 2019, Co-Lead Plaintiffs filed a Verified Consolidated Stockholder Derivative Complaint in the Consolidated Action (the "Complaint"), asserting claims of breach of fiduciary duty against the Individual Defendants and unjust enrichment against the Non-Employee Director Defendants. In the Complaint, Co-Lead Plaintiffs allege, among other things, that the compensation paid to the Non-Employee Director Defendants in the Company's 2016, 2017, 2018, and 2019 fiscal years was excessive and unfair to Salesforce.

On March 8, 2019, April 22, 2019, May 20, 2019, June 20, 2019, July 22, 2019, and August 21, 2019 the Court granted stipulations and proposed orders extending Defendants' time to answer, move, or otherwise respond to the Complaint.

From March 2019 through early May 2019, Co-Lead Plaintiffs and Defendants negotiated regarding a settlement of the claims asserted in the

Consolidated Action, including working through several rounds of proposals and counter-proposals.

On May 1, 2019, the Court granted a Stipulation and Proposed Order Governing the Production and Exchange of Confidential Information (the "Confidentiality Order").

On May 8, 2019, Co-Lead Plaintiffs and Defendants entered into a Memorandum of Understanding (the "MOU") that was intended to fully resolve the claims in the Consolidated Action. The MOU was subject to the approval of the Board. In the MOU, Defendants agreed to provide reasonable, mutually-agreeable discovery ("Confirmatory Discovery") to Co-Lead Plaintiffs for the purpose of allowing Co-Lead Plaintiffs to determine that the settlement is fair, reasonable, and adequate. Pursuant to the MOU, Co-Lead Plaintiffs could render the MOU null and void in the event they did not determine that the settlement was fair, reasonable, and adequate after conducting Confirmatory Discovery.

On May 16, 2019, Salesforce produced documents to Co-Lead Plaintiffs as part of Confirmatory Discovery.

On June 6, 2019, the Board approved entry into the MOU.

On June 19, 2019, at the request of Co-Lead Plaintiffs, Salesforce produced additional documents as part of Confirmatory Discovery.

On June 27, 2019, counsel for Co-Lead Plaintiffs deposed Sarah Dods, Esq., Salesforce's Executive Vice President and Associate General Counsel, Corporate Transactions and Governance.

On July 12, 2019, at the request of Co-Lead Plaintiffs, Salesforce produced additional documents as part of Confirmatory Discovery.

On July 18, 2019, Co-Lead Plaintiffs confirmed to Defendants that the settlement embodied in the MOU is fair, reasonable, and adequate.

After the completion of Confirmatory Discovery and following agreement among the Settling Parties to the terms of this Stipulation other than with respect to the amount of any attorneys' fees and expenses to be paid to Plaintiffs' Counsel, Plaintiffs' Counsel and Salesforce separately negotiated and reached agreement regarding the amount of attorneys' fees and expenses to be paid to Plaintiffs' Counsel. Co-Lead Plaintiffs and Defendants did not discuss the appropriateness or amount of attorneys' fees and expenses at any time prior to August 29, 2019, and the Settling Parties understood at all times that the settlement was not contingent on agreement or payment of any attorneys' fees and expenses to Plaintiffs' Counsel.

As a result of these negotiations, the Settling Parties reached an agreement to settle the Consolidated Action upon the terms and subject to the conditions set forth in this Stipulation (the "Settlement").

II. PLAINTIFFS' CLAIMS AND THE BENEFITS OF SETTLEMENT

Plaintiffs and Plaintiffs' Counsel believe the Consolidated Action has substantial merit, and Plaintiffs' entry into this Stipulation and the Settlement is not intended to be and shall not be construed as an admission or concession concerning the relative strength or merit of the claims alleged in the Consolidated Action. However, Plaintiffs and Plaintiffs' Counsel also recognize and acknowledge the significant risk, expense, and length of continued proceedings necessary to prosecute the Consolidated Action through trial and through possible appeals, and have considered, in particular, the expense of continued proceedings that could be borne by Salesforce. Plaintiffs' Counsel has also taken into account the uncertain outcome and the risk of any litigation, especially in complex cases such as the Consolidated Action, as well as the difficulties and delays inherent in such litigation. Plaintiffs' Counsel is also mindful of the inherent problems of proof and possible defenses to the claims alleged in such actions.

Plaintiffs' Counsel has conducted a thorough review and analysis of the relevant facts, allegations, defenses, and controlling legal principles, and believes that the Settlement set forth in this Stipulation is fair, reasonable, and adequate, and confers substantial benefits upon Salesforce and its stockholders. Plaintiffs' Counsel has conducted an extensive investigation, including, *inter alia*: (i) analyzing Salesforce's public statements, SEC filings, and securities analysts' reports and advisories about the Company; (ii) analyzing the SEC filings of other companies within Salesforce's peer group and other large technology companies which could comprise a peer group of Salesforce in the future; (iii) reviewing media reports about the Company; (iv) reviewing documents produced pursuant to the 220 Demand and in Confirmatory Discovery; (v) conducting the deposition of Ms. Dods; (vi) understanding and reviewing the applicable law with respect to the claims alleged in the Consolidated Action and the potential defenses thereto; (vii) conducting damages analyses; and (viii) participating in informal conferences with Defendants' Counsel regarding the specific facts of the case, the perceived strengths and weaknesses of the case, and other issues. Based upon Plaintiffs' Counsel's evaluation, Plaintiffs have determined that the Settlement is fair, reasonable, adequate, and in the best interests of Salesforce and Salesforce's stockholders and have agreed to settle the Consolidated Action upon the terms and subject to the conditions set forth herein.

III. DEFENDANTS' DENIAL OF WRONGDOING AND LIABILITY

The Individual Defendants have denied, and continue to deny, any and all allegations of wrongdoing or liability asserted in the Consolidated Action. Without limiting the foregoing, the Individual Defendants have denied, and continue to deny, among other things, that they breached their fiduciary duties or any other duty owed to Salesforce or its stockholders; committed, threatened, or attempted to commit any violations of law or wrongdoing whatsoever; or that Plaintiffs, Salesforce, or Salesforce's stockholders suffered any damage or were harmed as a result of any act, omission, or conduct by the Individual Defendants alleged in the Consolidated Action or otherwise. The Individual Defendants have further asserted, and continue to assert, that at all relevant times, they acted in good faith and in a manner that they reasonably believed to be in the best interests of Salesforce and its stockholders.

Defendants are entering into this Stipulation and the Settlement solely to eliminate the uncertainty, distraction, disruption, burden, risk, and expense of further litigation.

Neither this Stipulation, nor any of its terms or provisions, nor entry of the Judgment, nor any document or exhibit referred or attached to this Stipulation, nor any action taken to carry out this Stipulation, may be construed as, or may be used as evidence of, the validity of any of the Released Claims or an admission by or against Defendants of any fault, wrongdoing, or concession of liability whatsoever by any Person in the Consolidated Action, or any other actions or proceedings, whether civil, criminal, or administrative.

IV. TERMS OF STIPULATION AND AGREEMENT OF SETTLEMENT

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among Plaintiffs (individually on behalf of themselves and derivatively on behalf of Salesforce) and Defendants, each by and through their respective counsel, subject to the approval of the Court pursuant to Court of Chancery Rule 23.1, that in exchange for the consideration set forth below, the Released Claims shall be and hereby are compromised, settled, discontinued, and dismissed with prejudice, as to all Settling Parties, and the Consolidated Action shall be dismissed with prejudice as to the Defendants, upon the terms and subject to the conditions set forth herein as follows:

1. Definitions

As used in this Stipulation, the following terms have the meanings specified below:

1.1. "Consolidated Action" means *In re Salesforce.com Inc., Derivative Litigation*, Consolidated C.A. No. 2018-0922-AGB.

1.2. "Committee" means the Nominating and Corporate Governance Committee of the Board.

1.3. "Co-Lead Counsel" means Purcell Julie & Lefkowitz LLP and Wolf Popper LLP.

1.4. "Co-Lead Plaintiffs" means Judy Pill and Richard Lewkowicz, individually and derivatively on behalf of Salesforce.

1.5. "Court" means the Court of Chancery of the State of Delaware.

1.6. "Current Salesforce Stockholder(s)" means any Person or Persons (as defined herein) who are record or beneficial owners of Salesforce common stock as of the date of this Stipulation, excluding the Individual Defendants, the officers and directors of Salesforce, members of their immediate families, and their legal representatives, heirs, successors, or assigns, and any entity in which any of the Individual Defendants have or had a controlling interest.

1.7. "Effective Date" means the date by which all of the events and conditions specified in Section IV.6.1 herein have been met and have occurred.

1.8. "Final" means the expiration of all time to seek appeal or other review of the Judgment, or if any appeal or other review of such Judgment is filed and not dismissed, after such Judgment is upheld on appeal in all material respects and is no longer subject to appeal, re-argument, or review by writ of certiorari or otherwise.

1.9. "Defendants' Counsel" means Wilson Sonsini Goodrich & Rosati, P.C.

1.10. "Judgment" means the Order and Final Judgment entered by the Court dismissing this Consolidated Action with prejudice, substantially in the form annexed hereto as Exhibit C.

1.11. "Notice" means the Notice of Pendency of Settlement of Consolidated Action, substantially in the form annexed hereto as Exhibit B.

1.12. "Person" means a natural person, individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, association, joint venture, joint stock company, estate, legal representative, trust, unincorporated association, government, or any political subdivision or agency thereof, any business or legal entity, and any spouse, heir, legatee, executor, administrator, predecessor, successor, representative, or assign of any of the foregoing.

1.13. "Plaintiffs' Counsel" means Rosenthal, Monhait & Goddess, P.A., Purcell Julie & Lefkowitz LLP, Wolf Popper LLP, Barrack, Rodos & Bacine, and Robbins Arroyo LLP.

1.14. "Released Claims" means and includes any and all claims for relief or causes of action, debts, demands, rights, liabilities, losses, and claims whatsoever, known or unknown, fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law or in equity, matured or unmatured, suspect or unsuspected, apparent or unapparent, and without regard to the subsequent discovery of additional or different facts, that have been or could have been or in the future might be asserted by Plaintiffs as stockholders of Salesforce, or any other Salesforce stockholder, or any other Person acting or purporting to act derivatively on behalf of Salesforce against the Released Persons, asserted in any of the complaints in the Consolidated Action or that could have been asserted in any of the complaints in the Consolidated Action or in any other forum arising out of, or based upon, any of the allegations, transactions, facts, matters, events, disclosures, non-disclosures, occurrences, representations, statements, acts or omissions, alleged or referred to in any of the complaints filed in the Consolidated Action; provided, however, that it is understood that “Released Claims” and any release provided by this Settlement shall not include: (a) any claims to enforce the Settlement, and (b) any claims by the Defendants or any other insured to enforce their rights under any contract or policy of insurance.

1.15. “Released Persons” means the Individual Defendants and their predecessors, successors, subsidiaries, affiliates, agents, attorneys, insurers, and each of their past or present officers, directors, and employees. “Released Persons” also includes Salesforce and all current and former officers, directors, or employees of Salesforce that could have been named in the Consolidated Action.

1.16. “Releasing Persons” means Plaintiffs (both individually and derivatively on behalf of Salesforce), any other Salesforce stockholder acting or purporting to act on behalf of Salesforce, and Salesforce. “Releasing Person” means, individually, any of the Releasing Persons.

1.17. “Scheduling Order” means an order scheduling a Settlement Hearing and approving the form of Notice and method of giving notice, substantially in the form annexed hereto as Exhibit A.

1.18. “SEC” means the U.S. Securities and Exchange Commission.

1.19. “Settlement Hearing” means the hearing set by the Court to consider final approval of the Settlement.

1.20. “Unknown Claims” means any Released Claim(s) that Plaintiffs or Defendants do not know of or suspect to exist in his, her, or its favor at the time of the release of the Released Claims, including without limitation those which, if known, might have affected the decision to enter into the Settlement. With respect to any and all Released Claims, the Settling Parties agree that upon the Effective Date, the Settling Parties and all Releasing Persons shall be deemed to have waived the provisions, rights, and benefits conferred by or under California Civil Code Section 1542, or any other law of the United States or any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code Section 1542, which provides:

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

The Settling Parties acknowledge that they may hereafter discover facts in addition to or different from those now known or believed to be true by them, with respect to the subject matter of the Released Claims, but it is the intention of the Settling

Parties to completely, fully, finally, and forever compromise, settle, release, discharge, and extinguish any and all Released Claims, known or unknown, suspect or unsuspected, contingent or absolute, accrued or unaccrued, apparent or unapparent, which do now exist, or heretofore existed, or may hereafter exist, and without regard to the subsequent discovery of additional or different facts. The Settling Parties acknowledge, and the Salesforce stockholders shall be deemed by operation of the Judgment to have acknowledged, that the foregoing waiver was separately bargained for and is a key element of this Stipulation of which this release is a part, and was relied upon by each and all of the Defendants in entering into the Settlement.

2. Terms of the Settlement

2.1. For Salesforce's fiscal years beginning February 1 of each calendar year from 2020 through 2024:

2.1.1. The Committee will annually retain an independent compensation consultant (the "Consultant"). Prior to the Committee recommending the annual compensation for Salesforce's non-employee directors each year, and the Board approving such compensation (or taking no action to change existing compensation levels), the Consultant will, among other things, provide a report on non-employee director compensation practices at a group of peer companies (the "Peer Companies," and each a "Peer Company"), including an assessment of the mean total compensation paid to the individual non-employee directors of each of the Peer Companies as reported in their proxy statements for their most recently reported fiscal year (excluding any non-employee directors who served for less than a full year). In selecting the Consultant, the Committee shall consider the independence factors set forth in 17 CFR § 240.10C-1(b)(4), as may be amended or superseded, substituting the Committee for references to a compensation committee in that regulation. The Committee may, but is not required to, appoint as the Consultant the same independent compensation consultant that is appointed by the Board's Compensation Committee.

2.1.2. The Peer Companies will include at least fifteen (15) companies selected annually by the Committee in its sole discretion with the guidance of the Consultant. The Peer Companies selected by the Committee will be appropriate for Salesforce's industry, size (considering, for example, market capitalization, revenue, profitability, and/or employee count), and competitive environment for executives and/or directors.

2.1.3. The mean total compensation paid to Salesforce's individual non-employee directors for their Board service and service as the chair or member of any Board committee(s) as reported in Salesforce's annual proxy statement for each fiscal year will be no more than the mean total compensation paid to the individual non-employee directors at the Peer Company representing the 75th percentile of mean total individual non-employee director compensation among the Peer Companies as reported by the Peer Companies in their respective proxy statements for their most recently reported fiscal year (determined based on individual director compensation and not aggregate board of director compensation), as reported by the Consultant pursuant to Section IV.2.1.1. Notwithstanding the foregoing, the mean total compensation paid to Salesforce's non-employee directors for any fiscal year after the fiscal year beginning on February 1, 2020 need not be reduced below the 75th percentile level as calculated by the Consultant applicable for Salesforce's fiscal year beginning on February 1, 2020. The mean total compensation paid to Salesforce's non-employee directors, for any year subject to this Stipulation, may be calculated in the manner required under the SEC rules for proxy reporting as applicable with respect to Salesforce's fiscal 2019 proxy statement filed in calendar year 2019, or in the manner that may be required under future SEC proxy reporting rules as then in effect, in the best judgment of the Consultant.

2.1.4. Where dividing the number of Peer Companies by four does not render a whole number, the 75th percentile shall be calculated as the mean of the two Peer Companies bracketing closest to the 75th percentile (one being above the 75th percentile and one being below the 75th percentile). The Consultant will use its best judgment in calculating the mean total individual non-employee director compensation for Salesforce and each of the Peer Companies, and may make appropriate adjustments to annualize multiyear compensation practices (for example, attributing 1/3 of the value of Amazon.com, Inc.'s triennial equity awards to each of the three years covered by the award).

3. Scheduling Order, Notice, and Approval

3.1. Promptly after execution of this Stipulation, the Settling Parties shall submit this Stipulation together with its exhibits to the Court, including the proposed Scheduling Order with Respect to Notice and Settlement Hearing (the "Scheduling Order"), substantially in the form of Exhibit A attached hereto, requesting: (i) the approval of the manner of notice to Salesforce stockholders substantially in the form attached hereto as Exhibit B; (ii) the Court's consideration of the proposed Settlement and Plaintiffs' application for attorneys' fees and expenses; and (iii) a date for the Settlement Hearing.

3.2. Notice to Current Salesforce Stockholders shall consist of the Notice of Pendency of Settlement of Consolidated Action (the "Notice"), substantially in the form attached hereto as Exhibit B, and shall be provided to Salesforce stockholders as follows: Within ten (10) business days after the entry of the Scheduling Order, Salesforce shall mail the Notice to all record Salesforce stockholders at their respective addresses currently set forth in Salesforce's stock records. All record holders who were not also the beneficial owners of the shares of Salesforce's common stock held by them of record shall be requested to forward the Notice to the beneficial owners of those shares. The Company shall use reasonable efforts to give notice to such beneficial owners by: (i) making additional copies of the Notice available to any record holder who, prior to the Settlement Hearing, requests the same for distribution to beneficial owners, or (ii) mailing additional copies of the Notice to beneficial owners as reasonably requested by record holders who provide names and addresses for such beneficial holders.

3.3. At least ten (10) business days prior to the Settlement Hearing, Defendants' Counsel shall serve on counsel in the Consolidated Action and file with the Court an appropriate affidavit with respect to the preparation and mailing of the Notice.

3.4. Salesforce, on behalf of the Individual Defendants, shall be responsible for all costs associated with the mailing of the Notice. If additional notice is required by the Court, then the cost and administration of such additional notice will be borne by Salesforce on behalf of the Individual Defendants.

3.5. The Settling Parties believe the content and manner of Notice constitutes adequate and reasonable notice to Salesforce stockholders pursuant to applicable law and due process.

3.6. Pending the Court's determination as to final approval of the Settlement, Plaintiffs agree to stay this proceeding and not to initiate any other proceedings other than those incident to the Settlement itself.

3.7. The Settling Parties will request the Court to order (in the Scheduling Order) that, pending final determination of whether the Settlement should be approved by the Court, Plaintiffs in the Consolidated Action and all Salesforce stockholders are barred and enjoined from commencing, prosecuting, instigating, or in any way participating in the commencement or prosecution of any action asserting any Released Claim against Defendants or any of the Released Persons.

3.8. The Settling Parties and their attorneys agree to use their individual and collective best efforts to obtain Court approval of the Stipulation. The Settling Parties and their attorneys further agree to use their individual and collective best efforts to effect, take, or cause to be taken all actions, and to do, or cause to be done, all things reasonably necessary, proper, or advisable under applicable laws, regulations, and agreements to consummate and make effective, as promptly as practicable, the Stipulation provided for hereunder and the dismissal of the Consolidated Action.

4. Attorneys' Fees and Expenses

4.1. Defendants acknowledge and agree that Plaintiffs' Counsel is entitled to a fee award. Subject to the terms and conditions of the Stipulation and any Order of the Court, Salesforce has agreed that it will not oppose any such application for fees and expenses, provided that the award of attorneys' fees and expenses shall not exceed $1,000,000 in the aggregate (the "Fee and Expense Amount"). Plaintiffs' Counsel may apply for attorneys' fees and expenses only in the Court and shall make no application for attorneys' fees or expenses in any other jurisdiction. The Fee and Expense Amount shall be paid to Co-Lead Counsel within ten (10) business days after the Court enters the Judgment, subject to Plaintiffs' Counsel's timely provision of the requisite payment information, including wire instructions and a completed Form W-9, and obligation to refund that amount within ten (10) business days if the Settlement is reversed, vacated or modified on appeal or by collateral attack. Except as otherwise provided herein, each of the Settling Parties shall bear his, her, or its own fees and costs and neither Salesforce nor any other Released Person shall have any obligations with respect to Plaintiffs' Counsel's fees and/or expenses beyond the Fee and Expense Amount.

4.2. Any failure of the Court to approve a request for the Fee and Expense Amount in whole or in part shall not affect the remainder of the Settlement.

4.3. No fees or expenses shall be paid to Plaintiffs' Counsel pursuant to the Settlement in the absence of approval by the Court of a complete release of all Released Persons, substantially in the form of Section IV.5.1 herein. This section shall be immediately binding on the Settling Parties.

4.4. Except as provided in Section IV.4.1 of this Stipulation, Defendants shall have no obligation to pay or reimburse any fees, expenses, costs, or damages alleged or incurred by Plaintiffs, by Salesforce stockholders, or by their attorneys, experts, advisors, or representatives with respect to the Released Claims.

5. Releases

5.1. Upon the Effective Date, the Releasing Persons shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever settled, released, discharged, extinguished, and dismissed with prejudice the Released Claims against the Individual Defendants and each and all of the Released Persons; provided, however, that such release shall not affect any claims or impair or restrict the rights of any Settling Party to enforce the terms of this Stipulation.

5.2. Upon the Effective Date, the Released Persons and Salesforce, along with their predecessors, successors and assignees, shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever settled, released, discharged, extinguished, and dismissed with prejudice all claims (including Unknown Claims), arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement, or resolution of the Consolidated Action against Plaintiffs and Plaintiffs' Counsel, and their predecessors, successors and assignees;

provided, however, that such release shall not affect any claims or impair or restrict the rights of any Settling Party to enforce the terms of this Stipulation.

6. Conditions of Settlement, Effect of Disapproval, Cancellation, or Termination

6.1. The Settlement shall be conditioned on the occurrence of all of the following events:

6.1.1. Court approval of the Settlement, following dissemination of the Notice to Salesforce stockholders and the Settlement Hearing;

6.1.2. entry of the Judgment in the Consolidated Action approving the proposed Settlement and providing for the dismissal with prejudice of the Consolidated Action and the grant of the release of the Released Claims;

6.1.3. dismissal with prejudice of the Consolidated Action without the award of any damages, costs, fees, or the grant of any further relief to any party, except as provided in Section IV.4.1 of this Stipulation; and

6.1.4. the passing of the date upon which the Judgment becomes Final.

6.2. If any of the conditions listed in Section IV.6.1 are not met, this Stipulation and any Settlement documentation shall be null and void and of no force and effect. Furthermore, in the event that any of the conditions listed in Section IV.6.1 are not met: the Settling Parties shall be restored to their positions on the date immediately prior to the execution date of this Stipulation, this

Stipulation shall not be deemed to constitute an admission of fact by any Settling Party, and neither the existence of this Stipulation, nor its contents, shall be admissible in evidence or be referred to for any purposes in the Consolidated Action or in any litigation or judicial proceeding; this Stipulation shall not be deemed to entitle any Settling Party to the recovery of costs and expenses incurred in connection with the intended implementation of the Settlement, except as provided in Section IV.4.1 of this Stipulation; and all releases delivered in connection with this Stipulation shall be null and void.

7. Dismissal of the Consolidated Action

7.1. If the Court approves the Settlement, the Settling Parties shall promptly request that the Court enter the proposed Judgment, substantially in the form annexed hereto as Exhibit C.

8. The Stipulation Is Not an Admission

8.1. This Stipulation reflects, among other things, the compromise and settlement of disputed claims among the Settling Parties hereto, and neither this Stipulation nor the releases given herein, nor any consideration, nor any actions taken to carry out this Stipulation, are intended to be, nor may they be deemed or construed to be, an admission or concession of liability (or lack thereof), or the validity of any claim, or defense, or of any point of fact or law on the part of any Settling Party hereto regarding those facts that have been or might have been alleged in the Consolidated Action or in any other proceeding. Defendants and the Released Persons may file the Stipulation and/or Judgment in any action that has been or may be brought against them in order to support a claim or defense based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

9. Miscellaneous Provisions

9.1. The Settling Parties acknowledge that it is their intent to consummate the terms and conditions of this Stipulation and agree to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of the Stipulation and to exercise their best efforts to accomplish the terms and conditions of the Stipulation expeditiously.

9.2. The Settling Parties agree that the terms of this Stipulation and the Settlement were negotiated in good faith by the Settling Parties and reflect a Settlement that was reached voluntarily after consultation with competent legal counsel. The Settling Parties reserve their rights to rebut, in a manner that such Settling Party determines to be appropriate, any contention made in any public forum that the Consolidated Action was brought or defended in bad faith or without a reasonable basis.

9.3. This Stipulation shall be deemed to have been mutually prepared by the Settling Parties hereto and shall not be construed against any of them by reason of authorship.

9.4. This Stipulation may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same document. Any signature to the Stipulation by means of facsimile or electronically scanned and sent via email shall be treated in all manner and respects as an original signature and shall be considered to have the same binding legal effect as if it were the original signed version thereof.

9.5. All Persons executing this Stipulation thereby represent that they have been authorized and empowered to do so.

9.6. Plaintiffs and Plaintiffs' Counsel represent and warrant that none of Plaintiffs' claims referred to in this Stipulation or that could have been alleged in the Consolidated Action have been assigned, encumbered, or in any manner transferred in whole or in part.

9.7. This Stipulation embodies and represents the full agreement of the Settling Parties and supersedes any and all prior agreements and understandings relating to the subject matter hereof between or among any of the Settling Parties hereto. This Stipulation shall not be modified or amended, nor shall any provision of this Stipulation be deemed waived, unless such modification, amendment, or waiver is in writing and executed by or on behalf of the Settling Parties. The waiver by any Settling Party of any provision or the breach of this Stipulation shall not be deemed a waiver of any other provision or breach of this Stipulation.

9.8. If any provision of this Stipulation is held to be unlawful, invalid, or unenforceable: (i) such provision will be fully severable; (ii) this Stipulation will be construed and enforced as if such unlawful, invalid, or unenforceable provision had never comprised a part of this Stipulation; and (iii) the remaining provisions of this Stipulation will remain in full force and effect and will not be affected by the unlawful, invalid, or unenforceable provision or by its severance from this Stipulation, except that in no event will this Stipulation or any part thereof be enforceable if any of Sections IV.1.14, IV.1.15, IV.1.16, IV.5.1 or IV.5.2 are found to be unlawful, invalid, or unenforceable.

9.9. The Stipulation shall be binding upon, and inure to the benefit of, the successors and assigns of the Settling Parties.

9.10. Notwithstanding the entry of the Judgment, the Court shall retain jurisdiction with respect to the implementation, enforcement, and interpretation of the terms of the Stipulation. All Settling Parties submit to the exclusive jurisdiction of the Court (or any other state or federal court in the State of Delaware should the Court lack subject matter jurisdiction) for purposes of implementing, enforcing, and interpreting the Stipulation. With respect to such action, each Settling Party irrevocably and unconditionally: (i) consents to the personal jurisdiction in the State of Delaware; (ii) waives any objection to venue in the State of Delaware and any claim that Delaware is an inconvenient forum; and (iii) consents to service of process by registered or certified mail directed to Plaintiffs' Counsel or Defendants' Counsel.

9.11. The construction and interpretation of this Stipulation shall be governed by and construed in accordance with the laws of the State of Delaware and without regard to the laws that might otherwise govern under principles of conflicts of law applicable hereto.

9.12. Without further order of the Court, the Settling Parties hereto may agree to reasonable extensions of time to carry out any of the provisions in Section IV.2 of the Stipulation.

9.13. The following exhibits are annexed hereto and incorporated herein by reference:

(a) Exhibit A: Scheduling Order with Respect to Notice and Settlement Hearing;

(b) Exhibit B: Notice of Pendency of Settlement of Consolidated Action; and

(c) Exhibit C: [Proposed] Order and Final Judgment.

IN WITNESS WHEREOF, IT IS HEREBY AGREED by the undersigned as of the date noted above.

Dated: September 17, 2019

ROSENTHAL, MONHAIT &
GODDESS, P.A.

/s/ Jessica Zeldin

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Transaction ID 66250331
Case No. 2020-0775-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN SOLAK, derivatively on behalf of DENALI THERAPEUTICS, INC., Plaintiff, v. VICKI L. SATO, Ph.D., RYAN J. WATTS, Ph.D., DOUGLAS G. COLE, M.D., JENNIFER COOK, JAY FLATLEY, PETER KLEIN, ROBERT T. NELSEN, DAVID P. SCHENKEIN, M.D. and MARC TESSIER-LAVIGNE, Ph.D., Defendants, and DENALI THERAPEUTICS, INC., a Delaware corporation, Nominal Defendant.	C.A. No. 2020-0775-JTL

STIPULATION OF COMPROMISE AND SETTLEMENT

This Stipulation of Compromise and Settlement (the “Stipulation”), dated January 13, 2021, is entered into by and among the following parties, by and through their undersigned attorneys: Plaintiff John Solak (“Plaintiff”), individually and derivatively on behalf of Denali Therapeutics Inc. (“Denali” or the “Company”); defendants Vicki L. Sato, Ph.D., Ryan J. Watts, Ph.D., Douglas G. Cole, M.D., Jennifer Cook, Jay Flatley, Peter Klein, Robert T. Nelsen, David P. Schenkein, M.D., and Marc Tessier-Lavigne, Ph.D. (collectively, the “Individual Defendants”); and nominal defendant Denali (with the Individual Defendants, "Defendants"). Plaintiff and Defendants are collectively referred to herein as the "Settling Parties" and each individually as a "Settling Party."

This Stipulation is intended by the Settling Parties to fully, finally, and forever compromise, resolve, discharge, and settle all claims in the Released Claims against the Released Persons and dismiss the Derivative Action with prejudice, upon the terms set forth below and subject to the approval of the Court pursuant to Court of Chancery Rule 23.1.[1]

I. BACKGROUND

WHEREAS, Denali is a biotechnology company incorporated in Delaware and headquartered in South San Francisco, California engaged in developing and discovering therapeutics to treat neurodegenerative diseases;

WHEREAS, the Individual Defendants are comprised of current members of the Board of Directors (the "Board") of Denali;

WHEREAS, on September 10, 2020, Plaintiff commenced a derivative action captioned *Solak v. Sato et al.*, C.A. No. 2020-0775-JTL (the "Derivative Action") in the Delaware Court of Chancery by filing a Verified Shareholder Derivative Complaint for Breach of Fiduciary Duty, Unjust Enrichment, and Waste of Corporate Assets (the "Complaint");

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[1] All capitalized terms not otherwise defined are defined in Section II.1 herein.

WHEREAS, on October 14, 2020 the Court entered an order extending the time for Defendants to respond to the Complaint to December 11, 2020;

WHEREAS, on October 20, 2020 Plaintiff made a settlement proposal intended to fully resolve the claims at issue in the Derivative Action;

WHEREAS, on November 30, 2020, the Court entered a second order extending the time for Defendants to respond to the Complaint to January 11, 2021;

WHEREAS, after multiple rounds of negotiations between the Settling Parties, and following a significant exchange of informal discovery, on December 15, 2020, the Settling Parties reached an agreement to settle all of the claims asserted in the Derivative Action upon the terms and subject to the conditions set forth in this Stipulation (the "Settlement");

WHEREAS, following agreement among the Settling Parties to the terms of this Stipulation other than with respect to the amount of any attorneys' fees and expenses to be paid to Plaintiff's Counsel, Plaintiff's Counsel and Defendants separately negotiated and reached agreement regarding the amount of attorneys' fees and expenses to be paid to Plaintiff's Counsel;

WHEREAS, Plaintiff and Defendants did not discuss the appropriateness or amount of attorneys' fees and expenses at any time prior to reaching agreement on the terms of the Settlement, and the Settling Parties understood at all times that the

Settlement was not contingent upon agreement or payment of any attorneys' fees and expenses to Plaintiff's Counsel;

WHEREAS, Plaintiff and Plaintiff's Counsel believe the Derivative Action has merit, and Plaintiff's entry into this Stipulation and the Settlement is not intended to be and shall not be construed as an admission or concession concerning the relative strength or merit of the claims alleged in the Derivative Action;

WHEREAS, Plaintiff and Plaintiff's Counsel also recognize and acknowledge the significant risk, expense, and length of continued proceedings necessary to prosecute the Derivative Action through trial and through possible appeals, and have considered, in particular, the expense of continued proceedings that could be borne by Denali;

WHEREAS, Plaintiff's Counsel has also taken into account the uncertain outcome and the risk of any litigation, especially in complex cases such as the Derivative Action, as well as the difficulties and delays inherent in such litigation, and Plaintiff's Counsel is also mindful of the inherent problems of proof and possible defenses to the claims alleged in such actions;

WHEREAS, based upon Plaintiff's Counsel's evaluation, Plaintiff has determined that the Settlement is fair, reasonable, adequate, and in the best interests of Denali and Denali's stockholders and has agreed to settle the Derivative Action upon the terms and subject to the conditions set forth herein;

WHEREAS, the Individual Defendants have denied, and continue to deny, any and all allegations of wrongdoing or liability asserted in the Derivative Action;

WHEREAS, without limiting the foregoing, the Individual Defendants have denied, and continue to deny, among other things: that they breached their fiduciary duties or any other duty owed to Denali or its stockholders in connection with the Company's compensation practices; that they were unjustly enriched as a result of any breach of fiduciary duty or other act, omission, or conduct; that they committed any waste of Denali's corporate assets; that they committed any violations of law or wrongdoing whatsoever; or that Plaintiff, Denali, or Denali's stockholders suffered any damage or were harmed as a result of any act, omission, or conduct by the Individual Defendants alleged in the Derivative Action or otherwise;

WHEREAS, the Individual Defendants have further asserted, and continue to assert, that at all relevant times, they acted in good faith and in a manner that they reasonably believed to be in the best interests of Denali and its stockholders;

WHEREAS, Defendants are entering into this Stipulation and the Settlement solely to eliminate the uncertainty, distraction, disruption, burden, risk, and expense of further litigation; and

WHEREAS, neither this Stipulation, nor any of its terms or provisions, nor entry of the Final Judgment, nor any document or exhibit attached to or referred to in this Stipulation, nor any action taken to carry out this Stipulation, may be construed as, or may be used as evidence of, the validity of any of the Released Claims or an admission by or against Defendants of any fault, wrongdoing, or concession of liability whatsoever by any Person in the Derivative Action, or any other actions or proceedings, whether civil, criminal, or administrative.

II. TERMS OF STIPULATION AND AGREEMENT OF SETTLEMENT

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among Plaintiff (individually on behalf of himself and derivatively on behalf of Denali) and Defendants, each by and through their respective counsel, subject to the approval of the Court of Chancery (the "Court") pursuant to Court of Chancery Rule 23.1, that in exchange for the consideration set forth below, the Released Claims shall be and hereby are compromised, settled, discontinued, and dismissed with prejudice, as to all Settling Parties, and the Derivative Action shall be dismissed with prejudice as to the Defendants, upon the terms and subject to the conditions set forth herein as follows:

1. Definitions

As used in this Stipulation, the following terms have the meanings specified below:

1.1. "Effective Date" means the date by which all of the events and conditions specified in Section II.6.1 herein have been met and have occurred.

1.2. "Execution Date" means the date upon which all Settling Parties have executed this Stipulation.

1.3. "Final Judgment" means the Order and Final Judgment entered by the Court dismissing this Derivative Action with prejudice, substantially in the form annexed hereto as Exhibit D.

1.4. "Notice" means the Notice of Pendency of Settlement of Action, substantially in the form annexed hereto as Exhibit C.

1.5. "Person" means a natural person, individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, association, joint venture, joint stock company, estate, legal representative, trust, unincorporated association, government, or any political subdivision or agency thereof, any business or legal entity, and any spouse, heir, legatee, executor, administrator, predecessor, successor, representative, or assign of any of the foregoing.

1.6. "Released Claims" means and includes any and all claims for relief or causes of action, debts, demands, rights, liabilities, losses, and claims whatsoever, known or unknown, fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law or in equity, matured or unmatured, suspected or unsuspected, apparent or unapparent, and without regard to the subsequent discovery of additional or different facts, that have been or could have been asserted by Plaintiff as a stockholder of Denali, or any other Denali stockholder, or any other Person acting or purporting to act derivatively on behalf of Denali against the Released Persons, in the Derivative Action or in any other forum arising out of, or based upon, any of the allegations, transactions, facts, matters, events, disclosures, non-disclosures, occurrences, representations, statements, acts or omissions, alleged or referred to in the Complaint, including, without limitation, (i) any compensation Denali paid to its non-employee directors from January 1, 2017 through the Effective Date, (ii) any non-employee director compensation plan, policies, or guidelines in effect at Denali from January 1, 2017 through the Effective Date, and (iii) any decision of the Company's officers or directors related to the foregoing; provided, however, that it is understood that "Released Claims" and any release provided by this Settlement shall not include: (a) any claims to enforce the Settlement, and (b) any claims by Defendants or any other insured to enforce their rights under any contract or policy of insurance.

1.7. "Released Persons" means the Individual Defendants and their predecessors, successors, subsidiaries, affiliates, agents, attorneys, insurers, and each of their past or present officers, directors, and employees. "Released Persons" also includes Denali and all current and former officers, directors, or employees of Denali that could have been named in the Derivative Action.

1.8. "Releasing Persons" means Plaintiff (both individually and derivatively on behalf of Denali), any other Denali stockholder acting or purporting to act on behalf of Denali, and Denali. "Releasing Person" means, individually, any of the Releasing Persons.

1.9. "Scheduling Order" means an order scheduling a Settlement Hearing and approving the form of Notice and method of giving notice, substantially in the form annexed hereto as Exhibit B.

1.10. "Settlement Hearing" means the hearing set by the Court to consider final approval of the Settlement.

1.11. "Unknown Claims" means any Released Claim(s) that Plaintiff or Defendants do not know of or suspect to exist in his, her, or its favor at the time of the release of the Released Claims, including without limitation those which, if known, might have affected the decision to enter into the Settlement. With respect to any and all Released Claims, the Settling Parties agree that upon the Effective Date, the Settling Parties and all Releasing Persons shall be deemed to have waived the provisions, rights, and benefits conferred by or under California Civil Code Section 1542, or any other law of the United States or any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code Section 1542, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR

> SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

The Settling Parties acknowledge that they may hereafter discover facts in addition to or different from those now known or believed to be true by them with respect to the subject matter of the Released Claims, but it is the intention of the Settling Parties to completely, fully, finally, and forever compromise, settle, release, discharge, and extinguish any and all Released Claims, known or unknown, suspected or unsuspected, contingent or absolute, accrued or unaccrued, apparent or unapparent, which do now exist, or heretofore existed, or may hereafter exist, and without regard to the subsequent discovery of additional or different facts. The Settling Parties acknowledge, and the Denali stockholders shall be deemed by operation of the Final Judgment to have acknowledged, that the foregoing waiver was separately bargained for and is a key element of this Stipulation of which this release is a part, and was relied upon by each and all of the Defendants in entering into the Settlement.

2. Terms of the Settlement

2.1. Defendants have implemented or shall implement and maintain the Corporate Governance Reforms set forth in Exhibit A hereto.

3. Scheduling Order, Notice, and Approval

3.1. Promptly after execution of this Stipulation, the Settling Parties shall submit this Stipulation together with its exhibits to the Court, including the proposed

Scheduling Order substantially in the form of Exhibit B attached hereto, requesting: (i) the approval of the manner of notice to Denali stockholders substantially in the form attached hereto as Exhibit C; (ii) the Court's consideration of the proposed Settlement and Plaintiff's application for attorneys' fees and expenses; and (iii) a date for the Settlement Hearing.

3.2. Notice to current Denali stockholders shall consist of the Notice of Pendency of Settlement of Derivative Action (the "Notice"), substantially in the form attached hereto as Exhibit C, and shall be provided to Denali stockholders as follows: within ten (10) business days after the entry of the Scheduling Order, Denali shall mail the Notice to all record stockholders of Denali at their respective addresses currently set forth in Denali's stock records. In addition, the Company shall use reasonable efforts to give notice to all beneficial owners of Denali's stock by (i) filing a Form 8-K with the Securities and Exchange Commission ("SEC") that discloses the Settlement and attaches the Notice as an exhibit, and (ii) posting a copy of the Notice on the Company's website.

3.3. At least ten (10) business days prior to the Settlement Hearing, Defendants shall serve on counsel in the Derivative Action and file with the Court an appropriate affidavit with respect to the preparation, mailing, and public disclosure of the Notice in the manner set forth in Section II.3.2.

3.4. Denali shall be responsible for all costs associated with the mailing and public disclosure of the Notice. If additional notice is required by the Court, then the cost and administration of such additional notice will be borne by Denali.

3.5. The Settling Parties believe the content and manner of the Notice constitutes adequate and reasonable notice to Denali stockholders pursuant to applicable law and due process.

3.6. Pending the Court's determination as to final approval of the Settlement, Plaintiff agrees to stay this proceeding and not to initiate any other proceedings other than those incident to the Settlement itself.

3.7. The Settling Parties will request the Court to order (in the Scheduling Order) that, pending final determination of whether the Settlement should be approved by the Court, Plaintiff in the Derivative Action and all Denali stockholders are barred and enjoined from commencing, prosecuting, instigating, or in any way participating in the commencement or prosecution of any action asserting any Released Claim against Defendants or any of the Released Persons.

3.8. The Settling Parties and their attorneys agree to use their individual and collective best efforts to obtain Court approval of the Stipulation. The Settling Parties and their attorneys further agree to use their individual and collective best efforts to effect, take, or cause to be taken all actions, and to do, or cause to be done, all things reasonably necessary, proper, or advisable under applicable laws, regulations, and agreements to consummate and make effective, as promptly as practicable, the Stipulation provided for hereunder and the dismissal of the Derivative Action.

4. Attorneys' Fees and Expenses

4.1. Defendants acknowledge and agree that Plaintiff's Counsel is entitled to a fee award. Subject to the terms and conditions of the Stipulation and any Order of the Court, Denali has agreed to pay an award of attorneys' fees and expenses to Plaintiff's Counsel of $385,000 (the "Fee and Expense Amount") or any lesser amount permitted by the Court or the Delaware Supreme Court. The Fee and Expense Amount shall be paid by Denali and/or its insurers. Plaintiff's Counsel may apply for attorneys' fees and expenses only in the Court and shall make no application for attorneys' fees or expenses in any other jurisdiction. The Fee and Expense Amount shall be paid to Plaintiff's Counsel within ten (10) business days after the Court enters the Final Judgment, subject to Plaintiff's Counsel's timely provision of the requisite payment information, including wire instructions and a completed Form W-9, and obligation to refund that amount within ten (10) business days if the Settlement is reversed, vacated or modified on appeal or by collateral attack. Except as otherwise provided herein, each of the Settling Parties shall bear his, her, or its own fees and costs and neither Denali nor any other Released Person shall have any obligations with respect to Plaintiff's Counsel's fees and/or expenses beyond the Fee and Expense Amount.

4.2. Any failure of the Court to approve a request for the Fee and Expense Amount in whole or in part shall not affect the remainder of the Settlement.

4.3. No fees or expenses shall be paid to Plaintiff's Counsel pursuant to the Settlement in the absence of approval by the Court of a complete release of all Released Persons, substantially in the form of Section II.5.1 herein. This section shall be immediately binding on the Settling Parties.

4.4. Except as provided in Section II.4 of this Stipulation, Defendants shall have no obligation to pay or reimburse any fees, expenses, costs, or damages alleged or incurred by Plaintiff, by Denali stockholders, or by their attorneys, experts, advisors, or representatives with respect to the Released Claims.

5. Releases

5.1. Upon the Effective Date, the Releasing Persons shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever settled, released, discharged, extinguished, and dismissed with prejudice the Released Claims (including Unknown Claims) against the Individual Defendants and each and all of the Released Persons; provided, however, that such release shall not affect any claims or impair or restrict the rights of any Settling Party to enforce the terms of this Stipulation.

5.2. Upon the Effective Date, the Released Persons and Denali, along with their predecessors, successors and assignees, shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever settled, released, discharged, extinguished, and dismissed with prejudice all claims (including Unknown Claims), arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement, or resolution of the Derivative Action against Plaintiff and Plaintiff's Counsel, and their predecessors, successors and assignees; provided, however, that such release shall not affect any claims or impair or restrict the rights of any Settling Party to enforce the terms of this Stipulation.

6. Conditions of Settlement, Effect of Disapproval, Cancellation, or Termination

6.1. The Settlement shall be conditioned on the occurrence of all of the following events: (a) Court approval of the Settlement, following dissemination of the Notice to Denali's stockholders and the Settlement Hearing; (b) entry of the Final Judgment in the Derivative Action approving the proposed Settlement and providing for the dismissal with prejudice of the Derivative Action and the grant of the release of the Released Claims; (c) dismissal with prejudice of the Derivative Action without the award of any damages, costs, fees, or the grant of any further relief to any party, except as provided in Section II.4.1 of this Stipulation; and (d) the expiration of the time to seek an appeal or otherwise review the Final Judgment.

6.2. If any of the conditions listed in Section II.6.1 are not met, this Stipulation and any Settlement documentation shall be null and void and of no force and effect. Furthermore, in the event that any of the conditions listed in Section II.6.1 are not met: the Settling Parties shall be restored to their positions on the date immediately prior to the Execution Date, this Stipulation shall not be deemed to constitute an admission of fact by any Settling Party, and neither the existence of this Stipulation, nor its contents, shall be admissible in evidence or be referred to for any purposes in the Derivative Action or in any litigation or judicial proceeding; this Stipulation shall not be deemed to entitle any Settling Party to the recovery of costs and expenses incurred in connection with the intended implementation of the Settlement, except as provided in Section II.4 of this Stipulation; and all releases delivered in connection with this Stipulation shall be null and void.

7. Dismissal of the Derivative Action

7.1. If the Court approves the Settlement, the Settling Parties shall promptly request that the Court enter the proposed Final Judgment, substantially in the form attached hereto as Exhibit D.

8. The Stipulation Is Not an Admission

8.1. This Stipulation reflects, among other things, the compromise and settlement of disputed claims among the Settling Parties hereto, and neither this Stipulation nor the releases given herein, nor any consideration, nor any actions taken to carry out this Stipulation, are intended to be, nor may they be deemed or construed to be, an admission or concession of liability (or lack thereof), or the validity of any claim, or defense, or of any point of fact or law on the part of any Settling Party hereto regarding those facts that have been or might have been alleged in the Derivative Action or in any other proceeding. Defendants and the Released Persons may file the Stipulation and/or Final Judgment in any action that has been or may be brought against them in order to support a claim or defense based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

9. Miscellaneous Provisions

9.1. The Settling Parties acknowledge that it is their intent to consummate the terms and conditions of this Stipulation and agree to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of the Stipulation and to exercise their best efforts to accomplish the terms and conditions of the Stipulation expeditiously.

9.2. The Settling Parties agree that the terms of this Stipulation and the Settlement were negotiated in good faith by the Settling Parties and reflect a Settlement that was reached voluntarily after consultation with competent legal counsel. The Settling Parties reserve their rights to rebut, in a manner that such

Settling Party determines to be appropriate, any contention made in any public forum that the Derivative Action was brought or defended in bad faith or without a reasonable basis.

9.3. This Stipulation shall be deemed to have been mutually prepared by the Settling Parties hereto and shall not be construed against any of them by reason of authorship.

9.4. This Stipulation may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same document. Any signature to the Stipulation by means of facsimile or electronically scanned and sent via email shall be treated in all manner and respects as an original signature and shall be considered to have the same binding legal effect as if it were the original signed version thereof.

9.5. All Persons executing this Stipulation thereby represent that they have been authorized and empowered to do so.

9.6. Plaintiff and Plaintiff's Counsel represent and warrant that none of Plaintiff's claims referred to in this Stipulation or that could have been alleged in the Derivative Action have been assigned, encumbered, or in any manner transferred in whole or in part.

9.7. This Stipulation embodies and represents the full agreement of the Settling Parties and supersedes any and all prior agreements and understandings relating to the subject matter hereof between or among any of the Settling Parties hereto. This Stipulation shall not be modified or amended, nor shall any provision of this Stipulation be deemed waived, unless such modification, amendment, or waiver is in writing and executed by or on behalf of the Settling Parties. The waiver by any Settling Party of any provision or the breach of this Stipulation shall not be deemed a waiver of any other provision or breach of this Stipulation.

9.8. If any provision of this Stipulation is held to be unlawful, invalid, or unenforceable: (i) such provision will be fully severable; (ii) this Stipulation will be construed and enforced as if such unlawful, invalid, or unenforceable provision had never comprised a part of this Stipulation; and (iii) the remaining provisions of this Stipulation will remain in full force and effect and will not be affected by the unlawful, invalid, or unenforceable provision or by its severance from this Stipulation, except that in no event will this Stipulation or any part thereof be enforceable if any of Sections 1.6, 1.7, 1.8, 1.11, 5.1 or 5.2 are found to be unlawful, invalid, or unenforceable.

9.9. This Stipulation shall be binding upon, and inure to the benefit of, the successors and assigns of the Settling Parties.

9.10. Notwithstanding the entry of the Final Judgment, the Court shall retain jurisdiction with respect to the implementation, enforcement, and interpretation of the terms of the Stipulation. All Settling Parties submit to the exclusive jurisdiction of the Court (or any other state or federal court in the State of Delaware should the Court lack subject matter jurisdiction) for purposes of implementing, enforcing, and interpreting the Stipulation. With respect to such action, each Settling Party irrevocably and unconditionally: (i) consents to the personal jurisdiction in the State of Delaware; (ii) waives any objection to venue in the State of Delaware and any claim that Delaware is an inconvenient forum; and (iii) consents to service of process by registered or certified mail directed to the undersigned counsel.

9.11. The construction and interpretation of this Stipulation shall be governed by and construed in accordance with the laws of the State of Delaware and without regard to the laws that might otherwise govern under principles of conflicts of law applicable hereto.

9.12. Without further order of the Court, the Settling Parties hereto may agree to reasonable extensions of time to carry out any of the provisions in Section II.2 of the Stipulation.

IN WITNESS WHEREOF, IT IS HEREBY AGREED by the undersigned as of the date noted above.

Dated: January 13, 2021

WILSON SONSINI GOODRICH
& ROSATI, P.C.

/s/ Brad D. Sorrels
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EFiled: May 01 2021 03:10PM EDT
Transaction ID 66564862
Case No. 2020-0775-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN SOLAK, derivatively on behalf of DENALI THERAPEUTICS, INC.,

Plaintiff,

v

VICKI L. SATO, Ph.D., RYAN J. WATTS, Ph.D., DOUGLAS G. COLE, M.D., JENNIFER COOK, JAY FLATLEY, PETER KLEIN, ROBERT T. NELSEN, DAVID P. SCHENKEIN, M.D., and MARC TESSIER-LAVIGNE, Ph.D.,

Defendants,

and

DENALI THERAPEUTICS, INC., a Delaware corporation,

Nominal Defendant.

C. A. No. 2020-0775-JTL

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, April 16, 2021
1:30 p.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT
HELD VIA ZOOM

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0533

APPEARANCES:

BLAKE A. BENNETT, ESQ.
Cooch and Taylor, P.A.
-and-
JEFFREY M. NORTON, ESQ.
of the New York Bar
Newman Ferrara LLP
for Plaintiff

BRADLEY D. SORRELS, ESQ.
Wilson Sonsini Goodrich & Rosati, P.C.
for Defendants

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THE COURT: Welcome, everyone. Thank you for being here. I appreciate it.

Mr. Bennett, I think it's your time to proceed if you'd like to.

MR. BENNETT: Thank you, Your Honor, and may it please the Court. Blake Bennett from Cooch and Taylor on behalf of the plaintiff, John Solak. I'm joined today by my co-counsel, Jeffrey Norton of Newman Ferrara LLP. Mr. Norton is admitted *pro hac vice* and, with Your Honor's permission, will present on behalf of the plaintiff today.

Thank you, Your Honor.

THE COURT: That's fine. Thank you.

MR. SORRELS: And, your Honor, I'll rise virtually for a moment for introductions. Brad Sorrels from Wilson Sonsini Goodrich & Rosati. With me on video is Christopher Walsh who is the associate general counsel at Denali Therapeutics.

THE COURT: Great. Thank you, Mr. Sorrels, I appreciate it.

Mr. Walsh, thank you for being here. I appreciate it.

MR. WALSH: Thank you, Your Honor.

MR. NORTON: Good afternoon, Your

Honor. Jeffrey Norton, Newman Ferrara, for the plaintiff John Solak.

We are pleased to today to present for your approval a final -- a settlement in this matter together with an agreed-upon application for attorneys' fees and expenses.

As Your Honor is aware, this is a derivative action brought by John Solak who was a stockholder of Denali Therapeutics. It involves claims of excessive compensation policies and practices by Denali's board of directors, specifically its nonemployee members who, at times, as alleged in the complaint, received compensation at levels two to three times that of directors of the company's peers. Mr. Solak has brought this case raising claims of breach of fiduciary duty, unjust enrichment, and claims of waste.

To the company's credit, not long after we commenced this action back in September of 2020, the parties began, almost immediately, discussing the potential for early resolution. At that time we began engaging in formal discovery efforts with the company, providing years of board-level documents relating to compensation practices and policies. The parties engaged in numerous proposals and counterproposals and debated the merits of this case. Within several months, fortunately, the parties were able to reach a comprehensive settlement agreement that reflects significant changes in reforms and a multi-year commitment to maintain these practices, all relating to excessive compensation.

I'll summarize those benefits, although we do -- it's provided in great detail in the complaint, as well as the settlement agreement itself. Among those benefits achieved are reductions in and controls over total annual compensation for Denali's nonemployee directors, whereby total compensation will be tagged at a level no greater than 75 percent of the average of the company's peer group.

In addition, the company's agreed to make changes in equity grants which better align the interests of directors and the company and its stockholders. This includes mandatory stock ownership guidelines, and a decrease in option grants in greater favor of restricted stock units. The RSUs would now take, I believe, 60 percent of the equity grants.

The company also agreed --

THE COURT: What was it before? What you said in your papers is that, on page 7, now "no more than 60 percent of each non-employee director's annual and initial equity awards will be granted in the form of stock options." So the 40 percent was the RSUs.

But what was the split before?

MR. NORTON: I believe it was 75 -- Brad can correct me -- but as I recall, it was 75 percent before, previously.

MR. SORRELS: Yeah, I think the number had changed over time. I think more recently it had been 70 percent. And so this is a decrease from that.

MR. NORTON: The company also -- any other questions on that, Your Honor?

THE COURT: Not on that one.

MR. NORTON: Okay. The company also agreed to a host of formal guidelines for setting compensation and selecting its peer group annually, in reviewing its peer group annually. The company agreed to provide greater disclosures relating to the compensation-setting process and peer group selection. And, finally, the company has agreed to maintain these practices and policies for no less than four years.

THE COURT: Tell me what's going to happen in terms of the peer group selection. Are there any agreements regarding that? Is some outside consultant going to be coming in, or is this just the directors are going to think about it?

MR. NORTON: Well, the company already utilizes the services of a compensation consultant. In the settlement agreement, we do have metrics -- essentially agreed to metrics of how that peer group will be selected with regard to industry, market cap, revenue, things that are typically looked at for --

THE COURT: Can you point me to that?

MR. NORTON: Excuse me, Your Honor?

THE COURT: Can you point me to that?

MR. NORTON: Yes. In the settlement agreement, Exhibit A, which lists the corporate governance reforms, it is No. 5 of the reforms on page 3. It says, beginning "Through the Commitment Date, the Company will assess its peer group annually based on such factors as the Compensation Committee deems relevant after discussion with its compensation consultant, and shall consider, among other companies as determined appropriate by the Compensation Committee, for selection as peer companies those companies which are: operating in the same industries as the Company (by reference to Global Industry Classification Standard code or similar reasonable identifiers, which may change from time to time); ... (b) similar in size to the Company based on market capitalization (or, during volatile market conditions, revenue may be an acceptable alternative measure of size)."

THE COURT: How does this compare to what they were doing before?

MR. NORTON: I don't believe there was a formal process prior to this. I think they relied heavily on the compensation consultant before.

THE COURT: But was the compensation consultant, in fact, picking companies operating in the same industries?

MR. NORTON: Yes, same industries. But from our analysis, we didn't believe that they were -- they fit the other standards. Like, a lot of their market caps were significantly higher or revenue was greater -- significantly greater. So we've tried to narrow that selection process through this.

THE COURT: In terms of No. 6, tell me how that compares to the disclosure obligation that the company already would have in terms of nonemployee director compensation.

MR. NORTON: It closely aligns with their disclosure obligations already.

THE COURT: What does it add?

MR. NORTON: I mean, it just -- I believe it's broader because it will disclose all compensation, whether consulting agreements or anything like that. It would include any compensation. And I don't think their disclosure obligations necessarily require as broad as this.

THE COURT: Mr. Sorrels, do you have any additional insight into how 6 compares with what the company's existing disclosure obligations are?

MR. SORRELS: Yeah, Your Honor, I think from our perspective this wouldn't add materially to what the existing obligations are. We didn't go off and close off specifically what would have been required under the relevant SEC 34 Act rules.

But I think, from our perspective, when we saw this line item, it was a good, you know, sort of reinforcement of what the obligations were. I think the thought would be that these disclosures would be included within the description of compensation not necessarily disclosed elsewhere in, you know, the proxy statement or other areas.

THE COURT: Thank you.

Mr. Norton, do you want to continue?

MR. NORTON: Sure. Thank you, Your Honor.

So as reflected in our motion papers and supporting materials, we believe the benefits achieved here create a significant value for the company and stockholders, both quantifiable and unquantifiable. In fact, we did submit a declaration from our damages expert who said the value of this -- just the reductions in annual compensation alone could have a value of over 20 million over four years.

THE COURT: So when I think about my job here, I have to compare the give against the get. So the give is what you thought you were giving up in terms of the value of your claim. What do you think that value was?

MR. NORTON: That we're giving up in the value of our claim?

THE COURT: How did you go about -- presumably you thought about that.

MR. NORTON: Well, what we gave up was any effort for clawbacks for the company.

THE COURT: Right. So you came in saying, "You guys paid yourself too much. The company should get money back." Right?

MR. NORTON: Correct.

THE COURT: So how much? How much do you think that -- what was the value you put on your claim?

MR. NORTON: So over the time alleged in the complaint, we alleged that the average annual compensation for the directors was somewhere like around 480, $460,000, a year per director. Whereas the average compensation, depending on how you look at it, was anywhere from 230,000 per director to 330 per director.

So it's, you know, the difference between -- with six nonemployee directors, I don't have that -- I'm not the math mind like that to put that together quickly. But the difference between the average compensation of its peers and the excessive compensation over that time period.

THE COURT: Yeah. That's basically how I thought about it, right. I mean, Mr. Sorrels is going to come in and say that the directors ought to get paid something. It's probably going to be the peer group is the baseline. And we're going to compare that to what they got during the 2017, '18, '19 period.

So that's my starting point, is what you could have gotten. And do you know what that amount was?

MR. NORTON: I don't have that handy. But it would be, quick math, probably around 3 or 4 million.

THE COURT: I get 4.5, depending on which peer group you use. If you use your peer group in the complaint, I get 4.9 million. If we use the peer group your expert used, I get 3.9 million. And if we used -- that's your expert's industry group. And if I use your expert's revenue group, I get 4.6. If I average those, I get 4.5 million.

So I'm thinking about this case as a possible get of 4.5 million at the high end and obviously costs involved, things like that. And then I weigh that -- that's the give, you gave that up -- and then the question is what you got in return.

So help me understand. What your

expert looked at was the maximum potential compensation each year under the company's plan. Now, you already contended that 400,000 a year, on average, was a breach of duty. But your expert looked at a million dollars per director in comp?

MR. NORTON: Well, that was the -- the million dollar -- that was the former limit that the company had.

THE COURT: But they had never done that, right?

MR. NORTON: They had never done that.

THE COURT: And you thought that something materially less than that was a breach of duty?

MR. NORTON: That's correct. But it was basically no limits. You know, that's not a realistic limit. But there was no limits. So they could award up to that amount, and had come close to $700,000 in the recent past as alleged.

So it's not like they hadn't approached that number, because they had, and there was nothing stopping them from --

THE COURT: It approached that number. I mean, the bulk of the high years is because of the

$600,000 initial bonus. It's not a run rate figure. Fair?

MR. NORTON: That's fair.

THE COURT: Again, I'm just puzzled why your expert would use as a comparator for the baseline a hypothetical world that the company had never done, and which you thought, you know, was double -- more than double levels that you already thought constituted breach of duty.

MR. NORTON: Well, Your Honor, we think it's significant that the company had this existing cap on compensation, and to compare that to what we were able to reduce it to, bring it to a level that is well within the peer group. Whereas that cap does not have any reflection or any tie to a peer group.

THE COURT: What happens in terms of the value of the get if we just extend out the company's existing practices over the commitment period and compare that to the compensation that could be given under the settlement?

In other words, what if we just assume that the company actually keeps doing what it's doing, and then we look at what you got relative to that.

MR. NORTON: I guess in that context, if we did the math on that, you would add -- it would probably come up to 8 to 10 million.

THE COURT: Why do you think that?

MR. NORTON: Because of, you know, if we're at 4 1/2 million for the get from -- up to present. I mean, if they were to continue the practices and you double it, essentially -- I mean, maybe I misunderstood your question, but that's --

THE COURT: What we're comparing is the current practices compared to the compensation limits that you're putting in.

MR. NORTON: Right. So if they had stayed on the same course, I'm saying that, you know, it would be -- well, okay. I mean, excluding the number so far. So it would probably be a third more than what the get could have been. So since it's four years, not two or three years, 6 million?

THE COURT: All right. And my estimate is materially lower than that. Now, in fairness, what I did was I used run rate comp without assuming that there was going to be considerable board turnover, so I didn't need the $600,000 bonuses.

What I got when I compared the

historic comp number -- which is 404,000 on average once you exclude the $600,000 bonus, versus the expert's compensation estimate which is $343,374. Basically what I get is a delta per directer per year of 70,000 bucks. And when I extend that out over four years -- and I'm giving you a full eight directors per year -- I get 2.2 million. Again --

MR. NORTON: I trust your math on that.

THE COURT: But I mean, I guess it sounds like you didn't look at it this way. Is that fair?

MR. NORTON: Well, only from the standpoint of, you know, putting a quantifiable number on the settlement. But it doesn't -- I don't think that detracts from the substantial benefits obtained.

Putting reigns on their compensation practices going forward is undoubtedly going to save the company money and align the stockholders -- align the directors' interests with those of the stockholders in the company. Not just the reduction in compensation and more reasonable compensation practices, but together with the other stock holding requirements which they didn't have, and the switch --

and the move towards more RSUs. I think those are very valuable benefits.

THE COURT: Yeah, again, I'm supposed to weigh give and get. So it's one thing to just like throw things out and say, "Oh, it's all here." I actually have to think about whether what you got is worth what you gave. And there's no -- these things aren't clearly instances where one can be mathematically precise. But, you know, I'm trying to think about them realistically.

And I'll tell you, the idea that this thing was worth, I forget whether you said 21 million or more, but what your expert came out with, just struck me as rather incredible. So, again, I tried to think about what you really got here. And what you seem to have really gotten was a reduction in -- some reduction in their run rate comp.

What I'm giving you -- the reason I'm putting this out here is I'm trying to be transparent and give you an opportunity to tell me, you know, "No, no, Vice Chancellor Laster. You're thinking about this all wrong. Really you should think about it in a different way."

So that's why I'm sharing this with

you, because this is how, when I look at what you presented to me coming in, again, I thought that the expert analysis was implausible.

MR. NORTON: Right, Your Honor. Well, I think it's just different ways of analyzing the benefit. I mean, yours is a more concrete valuation whereas there's a potential valuation were the company to go --

THE COURT: Like go off the rails, like go nuts? I guess go hog wild would be the right term.

MR. NORTON: And, Your Honor, we have seen it in other cases, so it's not totally implausible. We have some of these cases where they indeed go to their stated limits.

But I understand Your Honor's point, and I appreciate it. I don't think that -- we certainly didn't put in that valuation to hide the ball or anything. It was just a way of looking at the benefit, and one way of valuing one of the benefits achieved through the settlement.

THE COURT: All right. What else do you want to tell me about the settlement? The other thing we got to talk about is the notice. I sent you-all a letter about that.

MR. NORTON: Right. I mean, I would let -- I would only say, I'll defer to Mr. Sorrels to tell you the notice. But I trust that the Court will be satisfied with his explanation on that.

But I will note that we've received zero objections from shareholders with regard to the settlement itself or with regard to the application for fees and expenses, which I'm glad to talk about now or come back to, whatever Your Honor would prefer.

THE COURT: Why don't we cover the notice first and make sure we don't need to take any more steps to ensure that people had adequate notice.

MR. NORTON: Sure. Thank you.

MR. SORRELS: Your Honor, if you'll indulge me for a moment, maybe I'll touch just briefly on the merits of claims relative to the give and the get. I think it might be helpful to sort of close off that line of thought, and then obviously I do want to address the notice.

You're not going to be surprised to hear we have sort of a different view on the merits of underlying claims here, right, in the sense that the company feels pretty strongly that the directors were appropriately compensated. I think Mr. Norton heard from me at length, probably more than he wanted to, about the company's approach to compensation, how thorough it was and how deliberative their processes were.

I'll note here that this is a highly accomplished board of directors. The president of Stanford is on the board of directors. Vicki Sato is an accomplished scientist and former Harvard professor. She is on numerous public company boards, Bristol-Myers Squibb and others. Very accomplished board.

I think Your Honor sort of noted that the initial grants that were challenged were in the $600,000 range. Those were the initial sort of post-IPO grants that were intended to sort of replicate when directors come on to a public company board. And then you had the more normalized run rate, in sort of the $400,000 range which was set based on an independent compensation consultant using a peer group. So, you know, when we looked at this, we were fully prepared to defend the compensation here.

With that said, I think, as Your Honor knows, the jurisprudence following *Investors Bancorp* is not conducive to a motion to dismiss. I think Your Honor's decision in *China Automotive*, for example, sort of gets to the heart of this, right. Defendants can't come in and point to an extensive process, as we have here, and you can't point to defendant compensation consultants, they can't point to peer groups as defined in the proxy statement as a basis to support the compensation.

So from our perspective, although we think fundamentally the claims were weak, we thought the package of therapeutics that were agreed to here were beneficial to the company and stockholders as a whole and they fully support the settlement of these claims, you know, given their relative weight. So that's how we think about it.

I will just touch briefly on the million-dollar cap. I think as Your Honor probably knows, post-*Investors Bancorp* world, you know, we always sort of struggle on how to advise companies. A lot of existing compensation plans had these million-dollar caps in them for tax reasons. And, you know, sort of post-*Investors Bancorp*, there was sort of a question of how to advise boards around doing compensation -- and this is high level, this is not specific to Denali.

And, you know, a lot of the companies like Denali sort of come up with a peer group set and then they award compensation well below that cap. There was never any intention to award compensation up to that cap for sure, as I think Your Honor understands, and certainly wasn't the company's practice on a go-forward basis.

So I hope that's helpful as Your Honor's thinking about the merits of the claims and the relative give and get here. Unless Your Honor has any questions on that, I'll just turn to the notice.

So, again, I think I'll start by -- I appreciate Your Honor finding the issue in a letter so that we could speak to it. Your Honor is absolutely right, I mean, we did not comply with the letter of the scheduling order with respect to notice here. It was sort of unfortunate.

What happened was we were working with the company's transfer agent, AST, to get the information. There was some delay. We got the list. It didn't have -- the number of -- I can get into more details, but the number of individuals on it didn't look right. It only included pre-IPO stockholders.

So it took a little bit of time working with them to get the correct list. And then, obviously, we had to work with the notice administrator. And then the notice administrator has his process to get out the mailing. So at the end of the day, it took roughly 30 days -- I think a little less than 30 days to get the mailing out.

I will say that's probably more in line with the typical time frame. Candidly, what happened here was we used a set of precedent papers with a 10 day -- 10 business day notice deadline. And that precedent set of papers was actually for another settlement where you had a much smaller window between when the settlement papers were filed and when the settlement hearing was scheduled.

It was a case, it was actually *Anixa Biosciences* in front of now-Chancellor McCormick where we only had 40 days between the settlement papers and the hearing. So that's why that deadline was so tight.

In my experience, when you have a 90-day window like we had here, you typically would have 30 days to get the notice out and then the notice is essentially out 60 days in advance.

THE COURT: I mean, what I really care about is more of the back-end window. I don't like that to be any less than 60 days. So what did it end up working out to be here?

MR. SORRELS: So I think the notice went out on the 19th, and today is the 16th. So I think it's somewhere in that 58- to 59-day range. And you're right, I think that's the sort of typical range.

And I'll note, we did go back and look -- so, for example, at Your Honor's recent *China Automotive* case there was a 44-day window, to the extent that's helpful from comparative --

THE COURT: I try to catch it; I don't always catch it. Sometimes people sneak things by me.

MR. SORRELS: Well, in fairness, Your Honor, I'm sure they complied with the deadline in the order of that case, which we didn't here. So I will give them the benefit there.

And I think the other thing I'd add too is we issued an 8-K in this case. And I think, frankly, we viewed that as the more significant form of notice here, right. Because we provided the formal mailing to record holders. The 8-K was really kind of the headline notice. And that went out on February 5th, well in advance of this.

So, you know, from our perspective, again, none of this is to make an excuse, it's just to say we don't think there's any prejudice here based on the amount of time the notice was available. We obviously take very seriously our obligations to comply with the order. We genuinely tried to do so here. But, at the end of the day, I don't think there was any prejudice.

MR. NORTON: I might add, Your Honor, for what it's worth, even though it wasn't part of the notice program or order, we did immediately post the notice on our firm website well within the time.

THE COURT: I think you said that went up on February 19th though. Your declaration said "on or before." So I didn't know whether to view it as February 19th or some mysterious day before February 19th.

MR. NORTON: I actually think it went -- I believe it did go up, like probably a week before that, maybe the 10th as I recall. But ...

THE COURT: Okay. Why don't we -- unless anybody has anything to add, either on the merits or on the notice, why don't we shift to the fee application.

MR. NORTON: Okay. As Your Honor can see, after we agreed to all the material terms of the settlement and had reduced all of those to an agreement, we began discussing attorneys' fees and expenses. And the parties agreed to an expense amount, which we've asked for 370,000. That is different than the amount that's noted in the stipulation, which was 385,000.

And the reason for that is following the execution of the settlement agreement, an issue arose regarding the fact that Mr. Solak purchased his shares in January of 2019 and there were allegations in the complaint relating to 2017/2018 compensation. And it doesn't change his ability to settle on the terms reached in the action, which are all prospective. But, rather than get into a debate about how that affected the claims of the case, we mutually agreed that we would only seek -- we would reduce that ask by $15,000 to $370,000 voluntarily.

THE COURT: That's a weird fix that doesn't seem to address the issue raised. The issue raised is whether your plaintiff has standing to challenge those years. And you're right that the settlement was -- the benefits were forward looking. But it also includes a release. So what should I do about that?

MR. NORTON: Well, any claims from 2017 would have been time barred anyway. The claims for 2018, he would still have standing with regard to any disclosures which didn't come out until three months or so after he became a shareholder.

So really we're talking about the clawbacks for compensation in 2018, which are the only things that probably would be viable for some other shareholders. So we acknowledge that if Your Honor or the Court needs, would have to carve out that --

THE COURT: What do you mean about 2017 being time barred? Are you saying that if someone were to sue now it would be time barred? Clearly you don't think it was time barred when you filed the action.

MR. NORTON: No, now. If someone were to bring that now.

MR. SORRELS: Your Honor, may I jump in here?

THE COURT: Sure.

MR. SORRELS: So, again, just to sort of piggyback off Mr. Norton's comments. I think, you know, obviously this came out right after we had finalized the papers and submitted them to the Court. From our perspective, it didn't change the merits of the settlement in any way. It did, however, you know, for us, raise the question of: Well, we potentially had a defense that we didn't otherwise know about prior to entering into the settlement.

So I think, you know, at that moment we paused and sort of did our due diligence. I think we ultimately concluded that: Well, no, the settlement is valuable; it should go forward.

I think we recognize at most it would be a defense that Mr. Norton certainly could find another stockholder who might cover the entire period. That's how, at least, we analyzed it on our end.

I do think that Mr. Solak can release claims broader than ones that he could assert. I think that's sort of the black-letter law that someone can enter into a release --

THE COURT: That's the interesting thing. So certainly as to claims within the time period that you could assert. I'm curious about the standing dimension now because the idea would be that it's just not justiciable. It really is, to some degree, your problem because the question would be -- and it does raise the time barred issue, so this is potentially just academic interest.

But some other stockholder could roll in and say, as to the years when this fellow didn't have standing, like, it's just a nonjusticiable dispute. And so you wouldn't get the benefit of what you bargained for. And I'm sure there are a bunch of other issues that would be raised there. Go ahead.

MR. SORRELS: No, as Your Honor recognizes, we sort of thought through a lot of these permutations. Again, I don't take any comfort in the time bar because, as Your Honor notes, there are concepts of class action tolling and things like that.

But I do genuinely believe that even in an instance where someone didn't have standing to bring claims during some period of time, that person can still, in the context of resolving an action, agree to a release that would cover claims that he otherwise couldn't have brought. I mean, if you can release future claims and if you can release claims that exist prior to points in time where you may have had standing. You know, layered into this is the representative piece of it, you know, the class has been certified for purposes of approving the settlement.

From our perspective, I've certainly seen in the past instances where we've had settlement releases that go back beyond points in time where the stockholder held shares. And so, from our perspective, there's no reason why -- particularly when you're getting the benefit of the therapeutics -- why there can't be a broader release that extends beyond the stockholder's physical ability to bring a claim.

THE COURT: All right. Well, we were in the middle of Mr. Norton talking about his fee request. So why don't you continue and resume where we were.

MR. NORTON: Thank you, Your Honor.

Well, I submit that the fee request, at either 385 or 370, is well within the range and even low end of the range for cases of this nature. And we give a number of examples in our papers with fees anywhere from 350 to a million dollars for very similar cases.

There was a recent one involving *Salesforce*, which was almost an identical type of settlement, where the fees were a million dollars in that case.

THE COURT: But the problem I have with all of those is that there wasn't a single one where you gave me what the value of the settlement was. So you could have this same settlement structure, and because of the different number of directors, different baseline compensation, different historical practice, the value of the settlement could be multiples higher.

And so to, you know, draw an analogy and put a fee number without giving some comparator, it's like numbers out of the air. I mean, you know, the structure doesn't drive, the structure doesn't necessarily drive the quantum of the benefit conferred. It depends on things like, as we've talked about today, you know, the rough justice math in terms of what you're giving up, what you could get, what the prospective limitations actually do.

I mean, can you shed any light on any of these cases as to whether, from a pricing standpoint, they are actually in the ballpark?

MR. NORTON: Well, I think a number of them are. And a couple of those cases were our firm's cases which were somewhat similar in terms of numbers to the company. So I don't have those numbers at hand.

But in my experience, it's not just that quantifiable benefit that this case is based on. It's based on, you know, major changes in the practice and the stockholding requirements and other things that are tremendous benefits for the company.

So those were examples of cases -- pretty much the cases that deal with the exact same issues of excessive compensation and prospective changes. You know, none of them involve clawbacks. So they're all about what the -- changing the company's policies and practices and going forward to reign in and keep a check on compensation, just like this case.

THE COURT: I do understand that high level similarity.

MR. NORTON: So when we began discussing fees with Mr. Sorrels, those were our benchmarks: Let's see how cases -- looking at all the cases that have really dealt with excessive nonemployee director compensation. And we did keep our discussions within that range. I mean, they were, there were no disagreements as to the value or the range of value of fees for this type of case.

So we believe that this is well within the reasonable range and weighed against the benefits achieved and the risk going forward. And we think it's an appropriate, fair, and reasonable fee and was obviously agreed to by the company.

We respectfully request that the settlement terms -- material settlement terms were fair and appropriate and reasonable. And we'd ask that Your Honor approve the settlement as well as the fee, which we believe is fair and reasonable and appropriate.

THE COURT: Thank you.

Mr. Sorrels, anything else you want to add? You had some helpful thoughts so far. I don't know if there's anything else you want to share.

MR. SORRELS: No. I mean, unless Your Honor has any questions.

I think a moment ago I did misspeak and say a class could be certified as such. This is a derivative case and Your Honor knows that. And I do think that genuinely in this context ostensibly where the company is releasing the claims because they're derivative claims that the standing issue doesn't create any issue with respect to the scope they raise.

THE COURT: Yeah, it's a puzzlement. And I don't intend to give any definitive answer to it today. I mean, I think that -- I wasn't terribly offended by your comment about the class because we do have cases -- *Solara* is the one that speaks most readily to mind, but I think there's an earlier one as well where everybody agreed that the stockholder really didn't have standing, and people just drove right on.

But I've always thought it was actually an interesting question. And it's particularly interesting or potentially interesting when the standing problem is statutory. So, anyway, but -- it's a head scratcher, I'll tell you that much.

I'm going to go ahead and give you my ruling now. We're gathered so that I can consider a proposed settlement in *Solak v. Sato*. The plaintiff is John Solak, who's a stockholder of nominal defendant Denali Therapeutics, Inc., which I'll refer to as "the Company." He filed this litigation derivatively on behalf of the company in September of 2020. He asserted claims for breach of fiduciary duty and waste of corporate assets.

The gist of the claims is that the nonemployee directors on the board paid themselves excessive compensation. The theory is that the compensation plans didn't have preapproved limits. Therefore, the compensation was an interested transaction, and the compensation was unfair because the levels far exceeded various peer companies.

Promptly after filing, the parties began informal discussions about settlement, including sharing information. They ultimately executed a formal stipulation of settlement in January 2020, so basically five months after filing. There wasn't any meaningful and observable litigation activity after the filing of the complaint. I credit that there were discussions back and forth between counsel.

I have three basic tasks. I need to make sure that notice was adequately delivered and provided, which is an issue of constitutional dimension. I have to consider the reasonableness of the settlement. And if I approve the settlement, then I have to consider the amount of the attorneys' fees.

By rule, notice by mail, publication, or otherwise of the proposed settlement has to be given by shareholders or members in such manner as the Court directs. That's in Rule 23.1(c). A notice of settlement is sufficient if it contains a description of the lawsuit, the consideration of the settlement, the location and time of the settlement hearing, and informs the recipients where additional information can be obtained. That's a paraphrase of the *Philadelphia Stock Exchange* case.

Here, I previously determined that the notice was adequate and entered a scheduling order to that effect. I am confirming that ruling today. The real question is whether the notice was adequately delivered because there was a misstep regarding compliance with the Court's scheduling order. I'm satisfied, based on the presentations provided by the parties, that the failure to comply strictly with the scheduling order was not prejudicial, and that adequate notice was provided.

In short, there was some slippage regarding when the actual mailing went out. But from the date when mailing actually was provided, the amount of time from the mailing to the hearing approximates the 60-day window that we generally use. 60 days isn't a hard number. Counsel has indicated it was approximately 58 days.

In addition, there was a Form 8-K filed on the 5th of February that gave anyone who wanted to object even more time to understand the settlement and potentially make an objection. So I'm satisfied that notice was adequately delivered.

I now turn to the merits of the settlement. The question is whether the terms fall within a range of reasonableness, recognizing that this Court generally favors the settlement of litigation. My job is to consider the nature of the claim, the possible defenses, legal and factual circumstance of the case, and then apply my own judgment to decide whether the settlement is reasonable in light of those factors.

What this essentially means is that one has to evaluate the give and the get and decide whether that's within a reasonable range that parties could accept. And in saying that, I paraphrase cases such as *Philadelphia Stock Exchange*, *Gatz v. Ponsoldt*, the *Infinity Broadcasting* case and *Caremark*.

Here, the company is a biotech company

that went public in 2017. Since 2017, its median compensation for nonemployee directors has averaged $480,279 per director. That number is skewed, however, because the company gives an upfront grant of approximately $600,000, so the run rate figure after that is lower. Nevertheless, this level of compensation is significantly above the compensation for nonemployee directors at other companies.

The plaintiffs proffered a list of comparable companies in the complaint where compensation ranged from $150,000 to $250,000 per director. The plaintiffs also identified average compensation at S&P and Fortune 500 companies which ranged from $250,000 to $300,000 per director. And in 2019, among biotech peers -- or what the plaintiffs say is biotech peers -- the average compensation was $335,000 per director.

This was a case which, at least as a legal matter, was quite strong. Under the Supreme Court's decision in *Investors Bancorp*, this was a case where entire fairness would be the standard of review because the directors were approving their own compensation. This was not a case that was likely dismissible at the pleading stage because of that.

Nor is it likely that it could have been resolved as a matter of summary judgment because the Court would have had to look at the evidence from the light most favorable to the nonmovant plaintiff and would have had to draw inferences in the plaintiff's favor such as the comparison to the peer group.

Consequently, this is a case that likely would have had to be tried. And, during trial, the defendants would have had the burden to show that the compensation was entirely fair. That fact doesn't mean that defendants would have lost. Scholarly work shows that defendants prevail in entire fairness cases with meaningful regularity. The authority I often cite for that is a Reza Dibadj article called *Networks of Fairness Review in Corporate Law* from 2008.

Here, the defendants would attempt to show that their process was fair and that, because of attributes unique to the company and the directors involved, the level of compensation was fair. There would be expert testimony on these various issues. It would have been a fairly litigable dispute, and both sides would have had risk.

Assuming that there was a showing of breach, it would have been unlikely that the entire amount of compensation that the directors received would have had to be disgorged. Instead, it's likely that the outcome would have been some delta between a fair rate of compensation and what the directors received.

So with that background, I have to think about the give versus the get. The give here is that the plaintiffs gave up, on behalf of the company, the ability to recover real cash money from the directors.

As I adverted during the discussions with counsel, it's not too hard to figure out what the actual real cash money value of the case is, at least based on how it's been framed. One takes the actual compensation that the directors received and subtracts the various peer indicators that folks have cited. So the actual cash money that the directors received is as follows. In 2017, the six directors received 3.7 million. In 2018 they received, again, about 3.7 million. In 2019, they received 3.2 million.

Then you compare those totals with what they would have gotten if they had been paid based on the comparable peer group. So if I use the complaint's peer group -- which contemplated compensation of $260,000 -- the case, at best, for the plaintiffs on behalf of the company, could have recovered $4.9 million. If I used the plaintiff's expert who submitted her report in favor of the settlement, there the delta is $3.9 million because the comparable peer comp was $305,000 per year. And if I use the revenue base peer group that the expert cited, the comp drops to $272,000 per year, resulting in a potential damage recovery of $4.6 million.

When I average those three, the potential get for the plaintiffs -- again, the get that the plaintiffs could get for the company -- is about $4.5 million. Now, you have to discount that. You've got to discount it by the reality that the defendants might have proven that their compensation was fair. You also have to discount that for the time and cost that it would take to get there.

So let's assume a world where the plaintiff wins and gets $4.5 million. There would be a fee award deduction from that. And if the plaintiffs went the distance, they'd probably get a third. If the plaintiffs went the distance, they'd probably get expenses on top of that. So let's think $1.5 million in fees, and maybe another $500,000 if they had to pull in experts. So what we're looking at a net to the company of about $2.5 million.

You could potentially discount it further if you think about the defendants' expenses. I don't know what role insurance plays in this. If there really was a finding of liability, potentially some advancement might come back at the indemnification stage. There's more variation on that. But let's take a relatively high-end approach for the plaintiffs and let's think that the net benefit to the company is probably going to be max around $2.5 million. Maybe lower, but let's use that as a ballpark figure.

What did the plaintiffs get? Well, the plaintiffs got a settlement that did not involve any money changing hands. Instead, what they got was some corporate governance metrics which envisioned lower compensation outlays and beneficial practices going forward. So the defendants have agreed to adopt certain changes to their compensation practices until the annual meeting of stockholders that the company will hold in 2025. Looking at some of the other cases that the plaintiffs have presented, these seem to be emerging as a relatively common package of settlement measures.

First, the defendants agreed to modify the compensation policy for the nonemployee directors to provide that until the commitment date -- that's this annual meeting in 2025 -- neither the cash retainers nor value of equity compensation will exceed the 75th percentile for the company's then-applicable peer group. The board will determine the peer group, but as the plaintiff suggested today, there's at least some additional guidance as to what the board should consider.

In addition, the defendants have agreed that until the commitment date, no more than 60 percent of the equity awards will be in stock options. It's been represented to me today that the prior number was -- or prior practice was about 70 percent.

The defendants have also agreed that the company will adopt guidelines for nonemployee director stock ownership. And the defendants have also agreed to include disclosures in the company's annual proxy statement regarding director compensation.

I will tell you that I'm not terribly

enthused about these changes. I agree that they have some value, but they don't seem to have overwhelming value. The disclosures in particular seemed largely to track what the company already would be doing under the federal securities law. I'm not sure there's really any incremental value there. The peer group limitation perhaps has some marginal tightening effect, but it doesn't seem like a large tightening.

The real get as far as I'm concerned is this limitation on comp to the 75th percentile. That seems to be the most meaningful thing that the plaintiffs obtained.

So then the question is how to value that. The plaintiffs submitted a report from Cynthia Jones, a vice president of Monument Economics Group, who purported to quantify the benefits of this change. To do so, she calculated the total maximum noncash compensation that the nonemployee directors could have awarded themselves between the date of the settlement and the commitment date.

The maximum noncash compensation for each director in the plan was $1 million. So she calculated that the total maximum compensation that the eight nonemployee directors could receive over the four-year period was $32 million.

She then constructed a peer group using factors such as industry segment market capitalization and revenues, and calculated the 75th percentile of director compensation to be $334,374 annually. Over four years across eight directors, that amounts to 10.7 million. She then subtracted that from the hypothetical maximum compensation of $32 million. You get a potential savings of 21.3 million.

I don't find that analysis convincing. That, to me, seems to be a pie-in-the-sky analysis. The company has never paid its directors anything approaching $1 million annually. During the years when the directors initially joined the board, yes, they got an initial grant of $600,000 which pushes their compensation up. But there's no reason to think that there will be wholesale board replacement every year. And there's certainly no reason to think that they would get $1 million in compensation every year.

Moreover, the plaintiff in this case alleges that approximately $400,000 on average in compensation per year constitutes a breach of duty. So the idea that there is legitimacy to paying

$1 million a year such that it should be used as the baseline for comparison to me makes no sense. If the plaintiff believes what its saying, that compensation is facially disallowable. It's more than double what the plaintiff already thinks can be invalidated as a matter of breach of fiduciary duty. So I reject that report and that analysis.

Now, what the expert does do helpfully is she calculates that, under the settlement, the total maximum annual compensation for the nonemployee directors cannot exceed $2.7 million per year. So what that lets one do is derive the benefit of the settlement if one were to continue the company's existing compensation practices during the commitment period.

So to do that, the way I think about it -- and there's no real magic to this, I'm just trying to ballpark what the plaintiffs actually got as opposed to this $21 million crazy number. If you take the value of every nonemployee director's compensation except in their first year -- so you eliminate that $600,000 outlier -- you get a run rate compensation of $404,621 per director.

You then take the delta between that

number and the expert's compensation estimate and you get about $70,000 per director per year. If the company has eight directors, that's about $561,000 in compensation expense. You multiply that times four years and you get about $2.25 million in value from this change. That's what I think the plaintiff's governance changes realistically got.

Now, maybe there's some -- I want to say, again, there's some fuzziness in that. The math should not be suggestive of a false air of precision. But it's about 10 percent of the value that was claimed.

You'd also, I think, need to present value these figures because they're coming over the four years in the future between now and the commitment date. So, really, if you present value it as of now, it's going to be less. But that's also a little -- you wouldn't get the $2.5 million net benefit from the litigation until sometime in the future either. So there's a little bit of squishiness on both sides.

What I have to ask myself is this: Is this approximately $2.2 million with a present value of something less a reasonable give for the potential recovery which I've already said is somewhere in the $2.5 million, likely somewhat less? It is. That's within the range of reasonableness. It's not an amazing settlement, but it's a reasonable settlement. One could give that up for this. Again, there's uncertainty on both sides of the equation. But that's really what I think we're talking about here.

So having determined that the give and the get falls within a range that I think people armed with reasonable information could accept, I approve the settlement as submitted.

Now I turn to the attorneys' fees. Our policy is to ensure that "even without a favorable adjudication, counsel will be compensated for the beneficial results they produced, provided that action was meritorious [when filed] and had a causal connection to the conferred benefit." That's the *Allied Artists* case. When setting compensation, we follow the *Sugarland* factors, which I will talk about as I go through them.

The first and most important factor is the size of the benefit conferred. As I have now explained, the size of the benefit conferred is not

$21 million. The size of the benefit conferred is more like $2.2 million. At present value, it's a little less, but I get that there's some other things going on. Maybe some of these other corporate governance measures actually have value. Let's say it's somewhere between 2 and 2.5. So that's the real driver of my analysis.

In terms of complexity, notwithstanding the claims that this case was complex, this case was not complex. *Investors Bancorp* established the law. There really were not major legal issues here. There were going to be some factual issues, but much less so in terms of complexity than a normal case -- at least a normal case in this Court.

I don't question the standing or experience and ability of counsel. I don't think that warrants an upward or downward adjustment.

In terms of contingency risk, it's true that the plaintiffs brought this on a contingent basis, but I think this was a low-risk case. It was a low-risk case because from the time of filing, the plaintiffs could credibly threaten a trial where entire fairness would be the standard and where the defendants faced meaningful risk.

This is also a case where, based on the precedents that have been submitted, there's now a pattern of reaching similar settlements. There's a relatively ready-made settlement opportunity. So I view this as low risk in terms of contingency. I agree there's a contingency risk, but in the range of contingency risk, this is relatively low risk.

In terms of the stage of litigation, this case was in its infancy. The defendants had not answered the complaint. All that happened was a complaint was filed. And, again, I credit that there was informal exchange of information. But, really, when I think about the stage of litigation, this was as early as one could be.

In terms of the time and effort that plaintiff expended, their time indicates that they put in approximately 200 hours in attorney time.

So what do I do with this? The requested fee is $370,000. That's more than -- if I used my 2.2, 2.25 estimate, that's getting close to -- it's somewhere between 15 and 20 percent of the amount sought. It's between 16 and 17 percent of the amount sought. Given where we are, under *Americas Mining*, we should be talking about 10 percent of the benefit range. I can't get to $370,000.

I also shouldn't have had to think through as much as I had to think through in terms of valuing this case. The expert report was a distractor. It was an effort to say, "Look at this bright light over here," rather than really dealing with what the give and the get actually was.

And when I move off the benefit conferred, there's several *Sugarland* factors that suggest a downward adjustment rather than an upward adjustment. So I'm going to reduce the fee to an even $300,000. If I used 2.25 as my pricing of the benefit and a 10 percent stage of case factor, I would get, not surprisingly, a fee of $225,000.

I'm going beyond that and giving $300,000, in light of the fact that the parties negotiated the higher amount and in light of the fact that there's some other sources of value here. But I cannot, in good conscience, get to $370,000.

We also seem to be at in a world where, I won't say this is disclosure-only settlement world. People are getting things, like real governance changes. But when you're coming in and doing the same or substantially similar things in each case, a court starts to think about whether the numbers shouldn't reflect that.

I should also say, because I talked about this with counsel, that I can't give any credence to these other fee numbers that were pointed out because there has been no effort at all to price them for me. The fact that you put in similar structures in another case which may have had higher baseline compensation, higher cap compensation, means the math could be totally different. And without any indication as to what is really comparable, there's just no way to figure it out.

So I know it's disappointing to counsel. But I feel confident that $300,000 is a fair fee given how this case unfolded and the relief that was requested.

I will grant the order with modifications so that that result is on the docket.

I want to thank you all for coming in today. I particularly want to thank counsel, both Mr. Norton and Mr. Sorrels, for answering my questions. And in particular, it was helpful for Mr. Sorrels to be versed in what happened with the notice.

I'd be remiss -- since we have a Wilson Sonsini person -- if I didn't say how excited we are for Lori Will to be joining us. I know that's still subject to Senate confirmation, so the last thing I want to do is jinx her. But congratulations to her and to the firm. We're all looking forward to having her arrive.

We're, of course, going to miss Chancellor Bouchard greatly. But I think it's also very exciting that Vice Chancellor McCormick -- again, no jinxing -- will be our next chancellor, which I think is just great for all concerned.

So thank you all. I hope you have a good rest of the day and that you have a good weekend.

COUNSEL: Thank you, Your Honor.

(Proceedings concluded at 2:45 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 53 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 34 through 53, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 23rd day of April, 2021.

/s/Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN SOLAK, derivatively on behalf of REATA PHARMACEUTICALS, INC.,

Plaintiff,

v.

J. WARREN HUFF, MARTIN W. EDWARDS, M.D., WILLIAM D. MCCLELLAN, JR., R. KENT MCGAUGHY, JR., JACK B. NIELSEN, CHRISTY J. OLIGER, WILLIAM E. ROSE and SHAMM RUFF,

Defendants,

and

REATA PHARMACEUTICALS, INC.,

Nominal Defendant.

C.A. No. 2022-0400-LWW

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Chancery Courtroom 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, January 11, 2023
1:30 p.m.

\- - -

BEFORE: HON. LORI WILL, Vice Chancellor

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ORAL ARGUMENT AND THE COURT'S RULING RE PLAINTIFF'S MOTION TO APPROVE SETTLEMENT, AWARD FEES, EXPENSES AND AN INCENTIVE FEE

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ATTORNEY BENNETT: Good afternoon, and Happy New Year, Your Honor.

THE COURT: Happy New Year.

ATTORNEY BENNETT: Thank you.

Blake Bennett from Cooch and Taylor on behalf of Plaintiff John Solak. I rise to make introductions today. I'm joined by my associate, Andrew Ralli from my firm; our co-counsel, Jeffrey Norton and Benjamin Baker from Newman Ferrara. They're both admitted *pro hac vice*, but with the Court's permission, Mr. Baker will make today's presentation.

THE COURT: That's fine. Thank you, Mr. Bennett.

ATTORNEY BENNETT: Thank you.

ATTORNEY TELKITS: Good morning, Your Honor. David Teklits on behalf of the defendants.

THE COURT: Welcome, Mr. Teklits.

ATTORNEY TELKITS: Thanks.

THE COURT: Mr. Baker, you can proceed whenever ready.

ATTORNEY BAKER: Good afternoon, Your Honor. Benjamin Baker for the plaintiff, John Solak.

Today, we are here to present a proposed settlement of this matter for the Court's approval together with an agreed-upon application of attorneys' fees, inclusive of an incentive award.

As Your Honor knows, this is a derivative action brought on behalf of Reata Pharmaceuticals by stockholder John Solak for claims of breach of fiduciary duty and unjust enrichment related to excessive compensation that the company's board had awarded its nonemployee members since 2019. That compensation significantly exceeded the average nonemployee director compensation awarded to directors at the largest companies in the country, the company's self-selected, peers and it stood at more than 4 1/2 times the median compensation awarded by comparable small cap companies.

This was the result of there being no meaningful limits on the company's nonemployee director compensation and the board's decision not to seek stockholder approval. The proposed settlement addresses plaintiff's claims.

As Your Honor knows, the standard for approving settlements in representative actions like this one is whether the terms of the settlement represent fair, reasonable and adequate consideration for the release of all claims. To reach this determination, the Court considers the "give" and the "get" of the settlement, whether the benefits of the settlement are reasonable in comparison with the potential recovery that might be had if the case were litigated to a final resolution on the merits.

We respectfully submit that the proposed settlement represents a fair, reasonable and adequate result because it offers the company significant benefits, and the quantifiable benefit is similar to our estimated value of the claims that will be released if the settlement is approved.

In summary, there are four main benefits achieved by this settlement: first, a five-year commitment to director-specific limits on total annual compensation awarded to the company's nonemployee directors, inclusive of cash fees and equity.

Second, the commitment to amend the company's compensation committee charter to incorporate reforms regarding the selection of a compensation facility and mandatory metrics to consider when selecting the companies in Reata's peer group, which is used to determine nonemployee director compensation.

THE COURT: How is that different than what the company is doing currently?

ATTORNEY BAKER: It is because it puts it into the charter, which it wasn't already. They were taking practices that were similar, but it wasn't officially part of the charter.

Third, commitments to make fulsome disclosures in the company's next proxy statement about the nonemployee director compensation policy established under the settlement.

And fourth, the commitment to disclose any financial benefits received by the company's nonemployee directors from third parties in connection with their service on the board.

THE COURT: Is that different than what the company is doing currently?

ATTORNEY BAKER: It goes farther than the requirements under -- that NASDAQ imposes on companies because there are no exclusions to that. So, yes, it's definitely different.

The substantial benefits of the settlement were achieved with a minimum litigation cost, minimal distraction to the company, which we think makes for a particularly favorable outcome. I would submit we were able to achieve this result, Your Honor, because we started with a strong case.

As the claims involve compensation that was approved and received by a majority of the individual defendants, they are subject to the entire fairness standard, and defendants would be required to prove the fairness, propriety of the process, and price of the challenged transactions.

Based upon our review of the extensive confirmatory discovery that was produced after the parties reached an agreement in principle on the terms of the settlement, we were able to evaluate the strength of the defenses that the individual defendants would likely raise if the case were to be litigated further.

Ultimately, the confirmatory discovery offered us sufficient information to determine that this settlement represents a fair, reasonable, and adequate resolution of the claims asserted in this matter while obviating the costs and risks that all parties would face by litigating this case to a resolution on the merits.

In fact, because our estimated value of the "give" is nearly equal to our estimated value of the "get," we do not think that we would achieve a materially greater benefit for the company through further litigation and a potentially favorable outcome on the merits.

And it seems the company's stockholders agree with our assessment. Following the distribution of notice required by the Court, there have been no objections to the settlement, and no stockholder has raised any concerns or misgivings about the settlement.

On balance, we think that the settlement is a fair, reasonable, and adequate outcome, and we would respectfully ask that you approve it.

I'm happy to answer any questions Your Honor may have on the settlement or provide specific terms in the stipulation Section 2.

THE COURT: I have a question about 2002. That year has obviously passed. That's one of the years that's covered by the settlement. How is that working?

ATTORNEY BAKER: 2022?

THE COURT: I'm sorry. 2022.

ATTORNEY BAKER: So when we were negotiating the terms of the settlement in August 2022, the parties wanted the terms of the settlement to take effect immediately. So the board agreed to impose the limits under the stipulation, and they have done so. So it's -- I mean, and in the future, if the proxy statement says they didn't do so, they would be required to comply with it. So it's --

THE COURT: So that's already happened. That's done.

ATTORNEY BAKER: Right, but it --

THE COURT: Why is that something I should be thinking about in terms of the settlement, if it's already happened? Why isn't it more of a mootness issue?

ATTORNEY BAKER: Because it happened as a result of the action. It happened as a result of our negotiations.

THE COURT: If I rejected the settlement today, it's already done.

ATTORNEY BAKER: Right. I mean, I guess they would -- because they would -- it -- I mean, it would still be the outcome of our action. So it wouldn't --

THE COURT: Why isn't it a mootness fee, then?

ATTORNEY BAKER: Because it happened in connection with our complaint and our negotiations. It wasn't true before then.

THE COURT: But it's not as a result of the settlement that you're asking me to approve today. It's already done.

ATTORNEY BAKER: I guess if there were -- so, okay, one benefit is that if there were any compensation that weren't awarded under the limits agreed to in the settlement in 2022, even though they represented that there have been, we -- you know, they would have to comply with the terms of the settlement, and we would be able to bring an action to enforce compliance if, for some reason, they hadn't calculated it the same way that we do or if they hadn't upheld their agreement to do so. So there's definitely a compliance benefit, and they will be held to it and wouldn't otherwise be. It would be a self-imposed limit.

THE COURT: Okay. But it's already done and over, so that limit was applied in 2022, regardless of what I do today on the settlement.

ATTORNEY BAKER: Yes.

THE COURT: Okay. I have some other questions about this as well, but we can talk about them in the context of the fee.

ATTORNEY BAKER: Okay.

THE COURT: You can continue.

ATTORNEY BAKER: In light of the 7.6 to $8.9 million quantifiable benefit achieved through the settlement, plaintiff seeks a fee and expense award of $350,000, inclusive of a nominal $2,500 proposed incentive award for Mr. Solak.

Plaintiff's requested fee and expense award is entirely reasonable in comparison to this Court's past awards of attorneys' fees in cases with similar resolutions to this case. And it represents just 3.9 to 4.6 percent of our estimated quantifiable benefit of the settlement.

THE COURT: Can we walk through the expert report on that?

ATTORNEY BAKER: Sure.

THE COURT: Because I have some questions for you. I have Exhibit E in front of me.

ATTORNEY BAKER: Okay.

THE COURT: So to start with, if I'm looking at 2019 and 2020, those were years before the December 2020 change was put into effect that lowered total compensation.

ATTORNEY BAKER: But --

THE COURT: So why should I be using 2019 and 2020 in the average?

ATTORNEY BAKER: They were all self-imposed. I mean they were all awards that were either -- they were awarded and received by the board. Even the reduction of the awards in 2020 was only agreed to by the board. There was nothing external and no requirement that it take -- that it award that compensation. So all of the compensation that was alleged in the complaint was excessive in connection with the peer group. And we didn't consider the limits because it was all the result of board action. It wasn't the result of anything external or any limits.

THE COURT: But the board changed its compensation policy in December 2020.

ATTORNEY BAKER: Right.

THE COURT: This lowered the total average nonemployee director compensation. So is 2021 the best year for me to be using as the comparison then, given the change?

ATTORNEY BAKER: We think that looking at three years provides less bias and a better picture of the board's compensation practices than looking at one year of compensation. So I would submit that this three-year average that we provide in connection with our settlement is better than looking at just 2021.

THE COURT: But two of the years were under a different policy than the other year.

ATTORNEY BAKER: I understand. I think that notwithstanding the policy, it's the overall compensation that was awarded that we've looked at to determine the reduction that the settlement imposes. Because even though they did put in place the limit that reduced it, it's still -- I mean it's still -- it's not the lowest year of compensation and also wouldn't make a meaningful difference in the --

THE COURT: Well, let's talk about that. So in 2021, it's $660,541, according to your complaint, according to the expert report. But I looked at the proxy, and that includes two directors that received the one-time new director stock option grants. And it increased their compensation to over a million dollars, but all of the other directors were under $500,000. So why would I use that as the comparison to the settlement figures that exclude the initial director stock option grants? They're two different figures.

ATTORNEY BAKER: I think that the initial compensation that's granted under the terms of the settlement is still based on the -- it's twice the equity awarded under the terms of the settlement. Right? And so --

THE COURT: But the settlement says, in 2.1.1, that these numbers, the 405,000, 430,000, et cetera, excludes the value of any new director one-time sign-on equity grant. So that number is not included in the figure that you're using. But the expert did include them in the $660,000 figure from 2021. So how can I compare the two? I think you need to subtract those out to use it as a comparison.

Do you understand what I'm saying?

ATTORNEY BAKER: Yes.

THE COURT: So why weren't they subtracted out?

ATTORNEY BAKER: I think because in

the complaint, we allege total compensation and compensation awarded as an average of all the directors as a whole. So the terms of the settlement are a little bit different than the compensation that was awarded as alleged in the complaint. But --

THE COURT: But then how can I compare them? I'm comparing one that includes the initial director stock option grants, which increases the average significantly to figures that don't include that. So wouldn't it make more sense to take that out? I didn't see this discussed in the expert report.

ATTORNEY BAKER: We can take it out, but I still don't think it will make a meaningful distinction on the valuation. It will --

THE COURT: I assure you, it will.

ATTORNEY BAKER: Okay.

THE COURT: And then what does that do for your claim in terms of the peer group? Does the peer group include these one-time awards of stock option grants no new directors?

ATTORNEY BAKER: Well, the peer group is based on the metrics discussed in the --

THE COURT: I understand that, but if

I'm comparing $660,000, which is a higher average because it includes those initial grants, to the chart of companies that you put in the peer group, how should I be thinking about that?

ATTORNEY BAKER: You're talking about the peer group that we included in the complaint?

THE COURT: Yeah. You're saying that $660,000 well exceeds the peer group, but again, if I take out those initial one-time grants to new directors, it's really not much above the median.

ATTORNEY BAKER: We included the one-time initial grants in all of the averages for the peer groups too.

THE COURT: That does include them.

ATTORNEY BAKER: It does include them.

THE COURT: Where does it say that in the complaint?

ATTORNEY BAKER: I don't know that it does, but I think that we --

THE COURT: So the chart of the peer group -- the company's peer group, I think it's in paragraph 32, if I'm remembering correctly.

ATTORNEY BAKER: Right.

THE COURT: The 2021 director comp,

you're saying, does include grants to new directors, one-time grants?

ATTORNEY BAKER: Right. So the average director compensation figures that we were including throughout the complaint included both. They were just the total compensation awarded in the year divided by the number of directors that were on the board.

So I do -- I understand your point about why that's different than the valuation in the expert report, but it was consistent throughout the complaint. And I think that, you know, the allegations in the complaint and the claims, it doesn't affect them a whole lot.

THE COURT: Okay. So if I were to -- never mind. You can continue. I think you understand my concern with the expert report.

ATTORNEY BAKER: I do.

So plaintiff filed a meritorious action on behalf of Reata, and through the substantial efforts of his counsel, was directly responsible for reaching the settlement that imposes a substantial and quantifiable corporate benefit to Reata and its stockholders. And this alone loan justifies the fee award sought by plaintiff's counsel.

I would submit that even with the reduction of two or -- two initial grants per year in the figure, because the fee and expense award that we requested was only between 3.9 and 4 percent -- and 4.6 percent of the estimated quantifiable benefit, it would still stand to support our requested fee and expense award.

THE COURT: How would it?

ATTORNEY BAKER: Because the average wouldn't be reduced such that our fee and expense award would exceed the 10 to 15 percent range that's usually awarded in early-stage settlements like this one.

Further, the requested fee and expense award represents a multiplier of 2.5 times our lodestar net of expenses. And we requested a discounted fee originally because we considered the defendants' prompt and forthcoming efforts in resolving this matter and the cross-check provided by our lodestar.

And the requested fee and expense award also falls toward the bottom of the range of attorneys' fees awarded by the Court in recent excessive compensation cases involving similar settlement terms.

Therefore, we think that the fee request is reasonable and we would respectfully ask Your Honor to approve it.

I am happy to answer any further questions you have.

THE COURT: I have no further questions. Thank you.

ATTORNEY BAKER: Thank you.

THE COURT: Mr. Teklits, is there anything you would like to add.

ATTORNEY TELKITS: Nothing to add other than defendants obviously support the settlement and join in the request that the Court approve the settlement.

THE COURT: Okay. Thank you very much.

I'm going to take 5 minutes, check over my notes, and then I'll come back and deliver my ruling on the settlement.

(A brief recess was taken.)

THE COURT: Thank you for your presentation today and your papers, which I reviewed carefully before the hearing. And thank you for your patience while I checked over my notes. I can deliver my ruling on the settlement now. Today, I heard from the parties regarding the proposed settlement of the matter captioned *Solak v. Huff et al.*, Civil Action No. 2022-0040-LWW. The action was brought derivatively on behalf of Nominal Defendant Reata Pharmaceuticals, Incorporated.

I have three matters on the agenda for today's hearing. The first is to consider whether the Rule 23.1 requirements are met, the second is to determine whether to approve the settlement, and the third is to assess whether the plaintiff's counsel is entitled to a fee and expense award and if the plaintiff is entitled to an incentive award.

I'll start by briefly summarizing the factual allegations in the complaint and the events leading up to this settlement for the sake of the record. I note that the facts I'm going to discuss have not been proven, and I'm not making any findings of fact today.

The nominal defendant is, as I mentioned a moment ago, Reata Pharmaceuticals, a Delaware corporation. The individual defendants are the current members of its eight-person board of directors. Seven of these defendants are nonemployee directors and the eighth is the company's CEO.

The plaintiff is a stockholder of the company who alleges that the defendants breached their fiduciary duties by awarding the nonemployee directors excessive compensation and that the defendants were unjustly enriched.

According to the complaint, the nonemployee directors awarded themselves compensation that exceeded what an average director at peer companies or even a significantly larger company is paid. The average total compensation of the company's seven nonemployee directors in fiscal years of 2019, 2020, and 2021, was, according to the complaint, $567,005, $759,910, and $660,541, respectively.

The plaintiff states that this was more than two times higher than median compensation of nonemployee directors at similar-sized pharmaceutical, biotechnology, and life sciences companies. Here, I'm referring to paragraph 22 of the complaint, which is based on a peer group in a third-party report that the plaintiff has cited.

In December 2020, the compensation

committee and board adopted a policy that reduced the annual grant of stock options and the initial grant of stock options awarded to nonemployee directors. The annual grant of stock options was reduced from 6,300 to 5,000, and the initial grant of stock options for new directors was reduced from 10,000 to 7,500. That change led to lower total annual compensation. Still, the plaintiff alleges that this policy fails to constrain compensation within reasonable limits.

I note that stockholders have not voted on any of the director compensation policies. The plaintiff thus asserts that the plaintiff would be required to prove the fairness of the compensation to the nominal defendant.

The plaintiff alleges that five of the eight current board members approved the compensation plan at issue here. The plaintiff also alleges that all seven nonemployee directors received the challenged compensation at some point. Thus, according to the plaintiff, demand on the board would have been futile.

Settlement discussions began shortly after the complaint was filed. The parties reached an agreement in principle to settle this action on

August 8, 2022. The defendants subsequently produced 706 pages of documents in confirmatory discovery. The stipulation of settlement was entered into on October 12th. And it's that settlement that brings us together today, which brings me back to the three matters on my agenda.

I'll start with the Rule 23.1 requirements. And I find that they've been met.

The representative plaintiff properly filed an affidavit in the form required by Rule 23.1(b). As to notice, Rule 23.1 requires notice of the proposed settlement be given to stockholders by mail, publication, or otherwise, in such a manner as the Court directs.

I determined that the proposed form of notice was adequate when I entered a scheduling order to that effect on November 2nd. I also find that the provision of notice was adequate. It followed the manner providing notice that I ordered on November 2nd. An affidavit from the company's CFO details that a Form 8-K attaching the notice was filed with the SEC and that the notice and stipulation were posted on the company's website. The 8-K told stockholders the website address of where the stipulation could be found. Notice was also mailed to all stockholders of record. Between that mailing, the Form 8-K with website information, and the posting on the company's website, I believe that this was appropriate notice in this case.

I'll next consider the merits of the settlement and whether to approve it. The Court's function is to "consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and will apply its own business judgment in deciding whether the settlement is reasonable in light of those factors." That's from *In re Philadelphia Stock Exchange*, which is 945 A.2d 1123 at page 1137.

My task is to evaluate whether the settlement is fair and reasonable as noted by the Delaware Supreme Court's *Polk v. Good* decision, focusing on the give and the get. That means that I must compare the value of the benefit achieved by the settlement against the strength of the claims being released.

In terms of the give, the plaintiff is agreeing to release all claims, known or unknown, that have been asserted or could have been asserted by the plaintiff or any other stockholder acting on the company's behalf arising out of the allegations in the complaint, including nonemployee director compensation from January 1, 2019, to the effective date, and any nonemployee director compensation plans or policies. See paragraph 1.7 of the settlement stipulation for the complete definition of "Released Claims."

That release is appropriately tailored to the factual predicate of the complaint. In terms of the claims being released, the case is one of many filed in our court in recent times challenging nonemployee director compensation. After the Supreme Court's *Investors Bancorp* decision, these cases have become fodder for quick settlements, given that the entire fairness standard will often apply absent ratification. But I want to talk a bit about the claims in this particular case.

The complaint is focused on nonemployee director compensation in 2019, 2020, and 2021. But as I mentioned earlier, there was a change in policy in December 2020 that lowered the total compensation in 2021. In effect, that change mooted certain aspects of the plaintiff's claims. But that change had nothing to do with this lawsuit. The amendment took effect before the case was filed.

The plaintiff says that 2021 compensation is still high. But as I'll talk about shortly, the 2021 figure uses as an average that includes one-time grants of options of shares for two new directors. When I adjust for that, the compensation, on average, is about $492,700 per nonemployee director in that year.

There's still a claim about the self-interested nature of the compensation process, but the compensation after the 2020 policy change isn't particularly excessive on its face compared to the prior two years.

Now, the plaintiff says the 2020 policy change did nothing to recover excess compensation in 2019 and 2020, but as I'll address next, the settlement doesn't do so either.

That brings me to the other side of the coin, the get, which consists of certain forward-looking governance changes the plaintiff submits will benefit the nominal defendant. Specifically, the company's nonemployee director compensation policy will be amended to reflect five changes that will remain in effect until December 31, 2026.

First, the average annual compensation for nonemployee directors is capped at 375,000 for 2022, 405,000 for 2023, 430,000 for 2024, 455,000 for 2025, and 480,000 for 2026.

The second governance change relates to the one-time equity awards a new director is entitled to receive upon joining the board. Under the change, the value of this award cannot exceed the annual equity grant awarded or to be awarded to incoming new directors in that year.

Third, all equity grants are to be issued in terms of value rather than as fixed share amounts. The value for stock options will be based on the Black-Scholes value of the option, using the closing price of the company's common stock on the date of the grant. And the value of restricted stock units is based on the closing price of the common stock on the date of the grant.

Fourth, the compensation committee will be required under its charter to review nonemployee directors compensation with the advice of an independent compensation consultant that will assess the company's peer group. The settlement sets out parameters for the selection of those peers.

Finally, the company will disclose in its 2023 annual proxy materials information about nonemployee directors compensation.

In my view, these terms provide some benefits to the nominal defendant, some terms more than others.

The disclosure terms don't seem to add meaningfully to what the company is already disclosing or needs to disclose.

The retention of a compensation consultant is positive, but it doesn't limit the compensation committee's discretion in any way. And it's not clear to me why this is different from what the compensation committee was doing before. It does, however, put the requirement into the committee's charter.

The value-based changes to the equity grants seem potentially useful, but the claims didn't especially focus on that issue, and I have no information to put that change in context. And so the most significant "get" in my view is the effective cap on average annual compensation for nonemployee directors.

I have some concerns here that I want to raise. First of all, 2022 is over. The plaintiff can't get credit for changes to 2022 compensation today in terms of whether it is a benefit of the settlement. It happened regardless of whether I approve this settlement.

Second of all, the proposed change calculates average annual total compensation by subtracting out the value of any new director one-time sign-on grant. But the figures I discussed before from 2019 to 2020 are old news after the December 2020 policy change, which the plaintiffs had nothing to do with. And the 2021 compensation figures in the complaint are high because the plaintiff included the value of one-time stock option grants for two new directors.

So if I take 2021 compensation, since it's the only year after the December 2020 policy change occurred, the complaint alleges that the average total annual director compensation of the nonemployee directors was $660,541 per director. If I look to the 2022 proxy at page 56, there were two directors who received over a million dollars in cash plus options because they were awarded one-time initial grants of 10,000 stock options. The other five nonemployee directors made between $473,000 and $516,000. I'll come back to this shortly when I talk about the value of the benefit.

For purposes of the reasonableness of this settlement, there is at least some limit to and a moderate decrease in the total compensation being paid for 2023 to 2026. That limit removes some of the inherent conflicts at play when directors have discretion to set their own compensation. But it's not a major change compared to 2021, which is the only useful year for comparison at this point for the reasons I explained. It's a mild benefit for the release of a claim that isn't particularly strong. Because of that, the give and the get are roughly even. I therefore find that the settlement is fair and reasonable, and I approve it on that basis.

Finally, I turn to the plaintiff's counsel's request for an award of attorneys' fees and expenses. Plaintiff's counsel requests fee and expenses of $350,000, inclusive of an incentive award to the plaintiff of $2,500.

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

The role of the Court in setting a fee award is to exercise its own business judgment in determining reasonableness. Traditionally, the *Sugarland* factors guide this analysis. Of the *Sugarland* factors, the most important is the benefit conferred in the litigation, and so I'll begin there.

The benefit conferred, as I discussed earlier in this case, is therapeutic rather than monetary, and is represented by the five amendments to the company's nonemployee director compensation policy that I described before.

The plaintiff's expert, Andrew Restaino of Technical Compensation Advisors, Incorporated, calculates the first amendment setting a ceiling on the average total nonemployee director compensation to confer a benefit of at least 7.6 million to the company over five years. Using a less conservative projected compensation model, specifically applying a 3 percent growth rate, the plaintiff's expert calculates a benefit of $8.9 million.

The expert took the three-year average

of the total annual pay to nonemployee directors in 2019 to 2021, which he calculated to be $662,485, and he used that figure to project compensation annually on average that would be paid absent the settlement in 2022 to 2026. Next, he compared that figure to the average pay limits contemplated by the settlement from $375,000 in 2022 to $480,000 in 2026. I laid out those numbers for each year earlier in this ruling. And he calculated a net present value of the pay differences for each of the years and multiplied the sum of these present values by seven for each current nonemployee director. In aggregate, that leads to a value of 7.612 million.

There are several problems with this method from my standpoint, and they are concerning to me. First and most critically, the three-year average total compensation from 2019 to 2021 of $662,485 is not a figure that I can rely on. Again, there was a change in the compensation policy after December 2020 that lowered the total, as I described before. So in my view, 2019 and 2020 are no longer useful comparisons, given that policy change.

Second, the figure used for 2021 includes the one-time grant for new directors, which significantly raises the average for that year. And those one-time grants are not included in the limits set by the settlement, so it's not an apples-to-apples comparison.

And third, again, 2022 is over. The changes occurred before this settlement hearing, and so that benefit isn't one that I can value for purposes of today's settlement.

These problems lead to a proposed value that simply isn't credible. Had I not done my own digging and reviewed the proxy, I would not have realized that the plaintiff's expert was comparing a prior figure including one-time grants to a settlement figure that does not. The plaintiff's brief and the plaintiff's expert report did not alert me to that fact. So to make a more meaningful comparison, I need to make several adjustments.

First, I'm only going to look at 2021 compensation, not 2019 or 2020, since, again, a meaningful reduction in total average compensation occurred with the December 2020 policy change, as I discussed.

If I look at the nonemployee director compensation listed at page 56 of the 2021 proxy and I use the total compensation paid to the directors who were not given one-time stock option grants for new directors, the average compensation for the five nonemployee directors who were not new is $492,701. That seems to be a more appropriate comparator versus the inflated figure the plaintiff's expert used. And because 2022 is over, I am only going to compare that figure to the compensation the directors will be paid after the settlement, from 2023 to 2026.

So in 2023, I'll compare $492,701 to $405,000. That's an average savings of $87,701, not the $257,485 per director the plaintiff's expert cites.

Applying a 4.73 percent discount rate used by the plaintiff's expert yields a present value of $83,740. Applying that same method leads to the following present values per director in the following years: $57,593 in 2024, $33,448 in 2025, $10,898 in 2026. That is a total net present value over the four years of $185,679 per director. Multiplied by seven directors, it is a reduction of $1,299,754.

Now, this is using a zero percent growth rate, which I agree is conservative. If I apply the 3 percent growth rate that the plaintiff's expert discussed, that gets me an aggregate savings of $1,855,566. If I average the two figures to find the middle ground, it's $1,577,660.

The requested $350,000 in fees and expenses would amount to 22.2 percent of what I calculate to be the rough quantifiable value of the settlement.

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

Here, the settled claims did not even have to hurdle a motion to dismiss. In cases like this, where a case settles early, the Court typically applies an award approximately 10 to 15 percent of the monetary benefit conferred. See the *Americas Mining* decision at page 1259.

This case falls at the bottom of that range at 10 percent. It settled right out of the gate. 10 percent of $1.577 million indicates an award of $157,700. Because there were a few other slightly helpful reforms that I described earlier, I will bump it up to an even $160,000.

After quantifying the settlement and applying the *Americas Mining* factors, the Court typically conducts a cross-check to ensure its fairness by evaluating the lodestar.

Plaintiff's counsel claims a total of 193.4 hours in professional time from the investigation stage to the settlement, which indicates a lodestar of $142,292.50. Delaware counsel incurred 4.7 hours of time, for a lodestar of $3,760. That is a total of 198.1 hours and $146,052.50.

Plaintiff's counsel also incurred $6,390.08 of unreimbursed expenses from the beginning of the litigation through the submission of the stipulation and agreement of settlement. That's a total of about $152,442.58. I don't think this case supports a multiplier, so that seems quite consistent with my views on an appropriate fee.

For the sake of thoroughness, I'll look briefly to the other *Sugarland* factors next to consider whether some further adjustment is necessary.

In terms of complexity, this case wasn't complex or novel. As I said before, these cases have become ones we see quite frequently, since they're fairly low-hanging fruit after *Investors Bancorp*. I would say that cuts in favor of the downward adjustment.

I don't question the standing or experience of counsel. That doesn't require any adjustment one way or another.

The case was brought on a contingent basis, but I think it was low risk, given that entire fairness would almost certainly apply. The case was ripe for settlement, given recent patterns that we're seeing in court. The case was at its earliest stage when it settled. A complaint was filed and settlement was reached. And in terms of the time and effort of counsel, I discussed that earlier. It totals about 200 hours of attorney time.

When I take all of that together, a $350,000 fee out of the nominal defendant's funds was quite high. The $160,000 fee award I estimated earlier, though, is consistent with the 10 percent fees awarded supported by *Americas Mining* and the lodestar cross-check.

I'll also note that the expert report was unhelpful to me and potentially misleading. It created more work for me to figure out what was going on. And beyond that, several *Sugarland* factors indicated a downward adjustment.

But I don't think the plaintiff's counsel should need to come out-of-pocket here, which is what would essentially happen if I cut the fee down any further, and so I'm going to award the $160,000 fee and expense award, which I calculated earlier. That fully covers the plaintiff's fees and expenses in this case.

I also think it's an appropriate fee, given the number of similar claims and cases we're seeing on repeat, which causes the Court to consider whether the sort of fees sought continue to be appropriate.

I'm going to decline to award an incentive fee. I see no basis to do that here.

In conclusion, I am going to approve the settlement as reasonable and award the plaintiff's counsel a fee and expense award of $160,000.

I believe there's a proposed final order on the docket, which I can modify and grant later today with these revisions.

That concludes my ruling. I thank you for bearing with me as I worked through it. And I thank you for coming here in person. It was nice to see you all, and I wish you safe travels home.

Thank you.

VARIOUS COUNSEL: Thank you.

(Court adjourned at 2:25 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 39 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 January, 2023.

/s/ Jeanne Cahill

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

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**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: March 6, 2009
Decided: March 6, 2009

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Re: *In Re Yahoo! Shareholders Litigation*
Civil Action No. 3561-CC

Dear Counsel:

This case contemplates a fee award arising out of a settlement entered into by Yahoo! Inc. to significantly curtail its employee severance plan. I conclude that the settlement, obtained by plaintiffs, amounted to a substantial benefit to Yahoo's shareholders because the key terms of the settlement made it less expensive to sell Yahoo, making the company a more attractive target to potential suitors. Plaintiffs' seek a total award of $12 million. Defendants insist that the settlement warrants a fee of only $1 million. For the reasons set forth in the order and final judgment entered on this date, I approved the settlement of this class and derivative action as fair, reasonable and in the best interests of the class and Yahoo. In addition, for the reasons briefly stated below, I award plaintiffs $8,400,000, plus expenses.

The Court typically considers a number of factors when setting a fee in connection with a settlement, including: "(1) the results accomplished for the benefit of the shareholders; (2) the efforts of counsel and the time spent in connection with the case; (3) the contingent nature of the fee; (4) the difficulty of the litigation; and (5) the standing and ability of counsel involved."[1] Furthermore, as consistently noted, the most important factor in determining a fee award is the size of the benefit achieved.[2]

I conclude that plaintiffs have met the *Sugarland* factors. Plaintiffs spent over 5,500 attorney hours in hotly contested litigation. They based their compensation entirely on a contingent basis, risking both their own capital and their time, and the case presented what I consider a difficult and complex set of issues.

I also conclude that plaintiffs have bestowed a sufficient benefit on Yahoo's shareholders to warrant their fee. Although somewhat unique, this case substantially parallels the factual circumstances in *Minneapolis Firefighters' Relief Ass'n v. Ceridian*.[3] In *Ceridian*, plaintiffs were awarded attorneys' fees and expenses amounting to $2,110 per attorney hour, for obtaining a settlement that empowered a potential buyer to present a leveraged recapitalization proposal, and eliminating a termination right for the merger partner in the event a new slate of directors was elected before the merger closed. In this case, plaintiffs' settlement resulted in the elimination of the dead-hand provision that, similar to *Ceridian*, would have prevented a new slate of directors from changing the severance plan, and effectively curtailed the employee severance plan, significantly lowering the cost to acquire Yahoo of any potential buyer. Thus, like *Ceridian*, "given what plaintiffs were able to achieve," the benefit bestowed upon Yahoo's shareholders was significant and sufficient to meet the first *Sugarland* factor. I conclude that an award of $8.4 million, similar to that awarded in *Ceridian*, is appropriate in this case.

For the foregoing reasons, I grant plaintiffs an award of $8,400,000 plus expenses.

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[1] *In re Abercrombie & Fitch Co. S'holders Derivative Litigation*, 886 A.2d 1271, 1273 (Del. Supr. Oct. 26, 2005) (citing *Sugarland Indus. Inc. v. Thomas*, 420 A.2d 142 (Del. 1980)).
[2] *See, e.g., Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. Dec. 4, 2000).
[3] C.A. No. 2996-CC, tr. at 27 (Del. Ch. Feb. 25, 2008).

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

William B. Chandler III

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