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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE HARVEST CAPITAL CREDIT CORPORATION STOCKHOLDER LITIGATION	C.A. No. 2021-0164-JTL **PUBLIC VERSION** **FILED JUNE 18, 2024**

PLAINTIFFS' BRIEF IN SUPPORT OF SETTLEMENT APPROVAL, CLASS CERTIFICATION, AND FOR AN AWARD OF FEES AND EXPENSES

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Abbreviation	Defined Term
Alvarez	Defendant William Alvarez, Jr., HCAP's former CFO, CCO, and Secretary
Board	The former Board of Directors of HCAP: Defendants Jolson and Buckanavage and non-Defendants Klein, Levin, and Sebastiao
Company (a/k/a, HCAP)	Harvest Capital Credit Corporation
Complaint	The Verified Consolidated Amended Class Action Complaint, filed December 13, 2022
Controlling Stockholder Defendants	Defendants Jolson, Buckanavage, and JMP Group, LLC
Defendants	Defendants Jolson, Buckanavage, JMP Group, LLC, and Alvarez
HCAP (a/k/a, the Company)	Harvest Capital Credit Corporation
HCAP Advisors	HCAP's External Advisor responsible for managing the Company's day-to-day operations
JMP Group	Defendant JMP Group, LLC
JMP Securities	JMP Securities, LLC, an investment bank, HCAP's long-time financial advisor, and wholly-owned subsidiary of JMP Group
Merger	The transaction provided for in the Merger Agreement through which PTMN indirectly acquired HCAP
Merger Agreement	The December 23, 2020 Agreement and Plan of Merger
Merger Consideration	The cash and stock consideration provided for by the Merger Agreement, which implied a value per HCAP share of $7.71 on December 22, 2020
PTMN	Portman Ridge Finance Corporation, the indirect acquirer of HCAP in the Merger
Sierra Crest	PTMN's external manager
Special Committee ("Committee" or "SC")	Defendants Klein, Levin, and Sebastiao

Plaintiffs Stewart Thompson and Ronald Tornese ("Plaintiffs"), former stockholders of Harvest Capital Credit Corporation ("HCAP" or the "Company"), on behalf of themselves and the proposed settlement Class, through undersigned counsel, respectfully submit this brief in support of their Motion for Settlement Approval, Class Certification, and for an Award of Fees and Expenses, through which Plaintiffs respectfully request that the Court (a) approve the proposed settlement (the "Settlement"), as set forth in the Stipulation and Agreement of Settlement, Compromise, and Release dated February 23, 2024 (the "Stipulation"); (b) certify, for settlement purposes, the settlement Class defined in the Stipulation of Settlement (ECF No. 149 at ¶1.1); (c) approve an award of attorneys' fees and reimbursement of expenses; and (d) approve a modest incentive award for Plaintiffs.

I. INTRODUCTION

This case arises out of the sale of HCAP to PTMN for cash and stock consideration impliedly valued at $7.71 per share. ¶¶4-7, 135.[1] In that sale, HCAP's Controlling Stockholder Defendants used their control to secure different consideration and six unique benefits:

- HCAP Advisors (an affiliate of the Controlling Stockholder Defendants) received a transition services agreement ("TSA") with PTMN's manager,

[1] All "¶_" cites are to the Verified Consolidated Amended Class Action Complaint (the "Complaint," ECF No. 55). All undefined capitalized terms have the same meaning as in the Complaint, Plaintiffs' Omnibus Brief in Opposition to Defendants' Motion to Dismiss the Complaint (the "MTDO" or "MTD Opposition," ECF No. 88), and the above Table of Defined Terms.

pursuant to which it was paid $3.85 million (the "Transition Payment").

- JMP Securities (an affiliate of the Controlling Stockholder Defendants) received [redacted]

- Jolson, Buckanavage, and their larger family of JMP entities received the benefit of potentially participating in PTMN's [redacted]

- The sale of HCAP paved the way for the sale of JMP Group (the "Wind Down"), which the Controlling Stockholder Defendants had previously tried and failed to sell, but were thereafter able to complete with the assistance of Keefe, Bruyette & Woods, Inc. ("KBW") – the allegedly independent banker called in to take over as a result of JMP Securities' conflicts, and who JMP Group retained *just* one month after the HCAP Merger Agreement was signed.

- JMP Securities received $100,000 in additional fees because PTMN was originally identified as a buyer by JMP Securities in the initial JMP Process (the "Securities Payment").

- And Jolson received PTMN stock with respect to 894,273 shares of the HCAP stock he owned (the "Stock Receipt"), which may have inured to his benefit and to the detriment of common stockholders in the amount of ~$118,000.

As detailed below, the Controlling Stockholder Defendants arranged these unique benefits by having HCAP Advisors (which they controlled) recommend to the Board (which they dominated) that JMP Securities (which they also controlled) conduct all initial outreach to potential parties. In this way, the Controlling Stockholder Defendants were able to set the field of play before the Special Committee – belatedly formed to attempt to sterilize the obvious conflicts – could hire a second financial advisor to conduct the second half of the process. Then, even

after the Special Committee was formed and another advisor ostensibly took over, Jolson and Buckanavage attended *virtually every* Special Committee meeting and provided both input and direction to the Special Committee – ultimately expressing a preference for PTMN due to the unique benefits it offered to the Controlling Stockholder Defendants. Even worse, during this process, [redacted] and extracted their unique benefits directly from PTMN's President and CEO.

In so doing, the Controlling Stockholder Defendants caused the Board to pursue a sale to PTMN in which they received unique benefits [redacted], and [redacted] (a competing bidder) was offering potentially greater consideration – but less unique benefits for the Controlling Stockholder Defendants. Finally, to convince stockholders to vote for the Merger, the Individual Defendants authorized the filing of a materially incomplete and misleading proxy.

Based on lesser allegations uninformed by pre-mediation discovery, this Court denied Defendants' motions to dismiss as to the Controlling Stockholder Defendants and CFO Alvarez, granted it as to the members of the Special Committee, and found that "[t]his is an entire fairness…[,] controlling stockholder transaction in which the controller received differential consideration in the form of

side benefits…[with] a reasonably conceivable inference that the controller was incented to sell [HCAP] to simplify the capital structure to facilitate a follow-on sale," and that there are viable disclosure claims. *In re Harvest Capital Credit Corp. Stockholder Litig.*, No. 2021-0164-JTL (June 7, 2023), Tr. ("Opinion") at 51-61. However, the Court also warned that (i) **the "real issue here is the pricing of the [TSA]"**; (ii) market evidence may well substantiate and validate the Transition Payment; (iii) many of the unique benefits alleged would otherwise likely be unactionable standing on their own; (iv) as a result, "this is one of the[] rare fiduciary duty cases where summary judgment might well be available" because "[i]t's a fairly finite issue in terms of what is triggering entire fairness"; and, (v) even if summary judgment was not available, "in the scheme of Court of Chancery litigation, this is a relatively small-dollar case" without "a lot of value even if everything goes the [P]laintiffs' way." *Id.* at 58-59, 61-62. Accordingly, the Court suggested that the parties "ought to mediate early." *Id.* at 62.

Plaintiffs heeded those warnings – which proved prescient – and agreed to mediate. In the lead up to mediation, Plaintiffs conducted discovery – in addition to the expedited discovery they had previously received – on the unique benefits received by the Controlling Stockholder Defendants and their value. Based on that discovery, Plaintiffs' Counsel drafted a 51-page mediation statement that wove a compelling narrative of knowing wrongdoing. They also discovered, however, that

the primary measure of damages at trial would almost certainly be some portion of the $3.85 million Transition Payment. By leveraging the remaining, less concrete, potential unique benefits, Plaintiffs persistently and forcefully targeted the full Transition Payment. And, after a comprehensive mediation before Judge Rocanelli, the parties accepted a mediator's recommendation to settle this matter for $3.85 million (subject to carriers' approval, which was obtained on December 15, 2024).

That Settlement represents a <u>100% recovery</u> of the $3.85 million Transition Payment, and is therefore commensurate with <u>a near total victory</u> at trial. It is therefore fair, reasonable, and adequate, and should be approved.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. RELEVANT FACTUAL BACKGROUND

Plaintiffs documented the relevant factual background of this case in length in their Complaint and MTD Opposition, and this Court indicated a strong familiarity with those facts at the motion to dismiss hearing. Accordingly, for the sake of judicial economy, Plaintiffs provide below a summary of the major relevant facts and the new facts uncovered in discovery.[2]

[2] Also for the sake of judicial efficiency, and so as not to inundate the Court with unnecessary exhibits, Plaintiffs cite to the documents produced in discovery by Bates number and do not attach them as exhibits. Plaintiffs can provide any document the Court wishes to have in short order.

1. Relevant Parties and Non-Parties

Prior to the Merger, HCAP was an externally managed BDC. ¶¶26, 29. HCAP's predecessor was founded by members of HCAP Advisors and JMP Group, and HCAP was externally managed and administered by HCAP Advisors pursuant to Advisory and Administration Agreements. ¶¶30-31. PTMN is a publicly traded BDC that is externally managed by Sierra Crest, an affiliate of BC Partners ¶27.

Defendant JMP Group was a publicly traded investment banking and asset management firm. ¶22. JMP Group was Jolson's umbrella entity and operated through the following subsidiaries: Harvest Capital Strategies, an investment adviser; JMP Securities, an investment bank; and HCAP Advisors, an asset manager. ¶22. At the time of the Merger, JMP Group was HCAP's largest shareholder, the majority owner/controller of HCAP Advisors, and the parent of JMP Securities, and HCAP was HCAP Advisors' only client. ¶23.

Defendant Jolson was HCAP's Chairman and CEO; co-founder, Chairman, and CEO of JMP Group; principal and founder of HCAP Advisors; and CEO of Harvest Capital Strategies and JMP Asset Management. ¶14. Defendant Buckanavage was co-founder, director and President of HCAP; and co-founder, principal, and President of HCAP Advisors. ¶15. Through their stock holdings and the Advisory and Administration Agreements, the Controlling Stockholder Defendants (Jolson, Buckanavage, and JMP Group) controlled HCAP. ¶¶32-38.

Defendant Alvarez was HCAP's CFO, CCO, and Secretary; and Managing Director of HCAP Advisors. ¶19. Non-Defendants Klein, Levin, and Sebastiao were directors of HCAP; the three members of the Special Committee; and, along with Defendants Jolson and Buckanavage, formed HCAP's Board. ¶¶16-18, 20.

2. The Controlling Stockholder Defendants Fail to Sell JMP Group, Use the Pandemic Drop to Increase Their Holdings, and Then Pressure the Board to Launch a Sales Process

KBW – the same supposedly independent banker that the Special Committee would later hire to take over the process from JMP Securities – was engaged by JMP Group in 2019 in connection with JMP Group's consideration of a sale. ¶24. That process failed, apparently due in part to the complexity of JMP Securities' holdings. ¶24. Not long thereafter, as part of an industry-wide downturn caused by the pandemic, HCAP began having issues with its lenders and credit facility, which caused its stock price to fall between February and March 2020 from $8.92 to $2.72 per share. ¶¶39-44.

Potentially looking for a way to offload HCAP to simplify JMP Securities for a sale, and aware that HCAP's stock had fallen below fair value, the Controlling Stockholder Defendants used this drop to increase their holdings and then push through a sale of HCAP for personal gain. ¶45. Beginning in March 2020, Jolson began purchasing stock in significant and unusual amounts, ultimately acquiring 137,134 shares at ~$4.09 per share. ¶45. Two months later, in May and June 2020,

the Board received two presentations from JMP Securities (HCAP's financial advisor that was controlled by JMP Group/Jolson) that were prepared at the direction of HCAP Advisors (which was controlled by JMP Group/Jolson), [redacted] ¶¶47-50, 53. After these presentations, [redacted] the independent directors to allow JMP Securities to explore a sale and the Board, on the recommendation of HCAP's management (*i.e.*, Jolson) agreed to permit HCAP Advisors (Jolson and Buckanavage) to coordinate with JMP Securities (also Jolson and Buckanavage) to proceed with a process. ¶54.

Notably, [redacted] ¶52. [redacted] ¶52.

3. As the Controlling Stockholder Defendants Set the Table for the Merger They Want With the Buyer They Prefer, the Board Recognizes (But Ignores) Crippling Conflicts

Over the next several months, JMP Securities engaged potential counterparties, including PTMN and BC Partners (the "JMP Process"). ¶55. During this time, the Board [redacted] ¶¶56-57.

The Controlling Stockholder Defendants' preference for a sale over standalone options and the obvious conflicts implicated by their and JMP Securities' involvement in the JMP Process were apparent to the Board – yet the Board *repeatedly* took no action and instead allowed the Controlling Stockholder Defendants to continue to conduct the JMP Process and vet buyers for the one they preferred. ¶¶58-59, 65-66. During that process, HCAP's management met with representatives of BC Partners and PMTN, and potential bidders were made to understand that they had to provide unique benefits to the Controlling Stockholder Defendants as part of their bids. ¶¶60-61. As a result, early bids all included unique benefits for the Controlling Stockholder Defendants. ¶¶61-65.

Among the unique benefits offered by PTMN was a TSA (for HCAP Advisors), employment discussions, and [redacted]. ¶¶62, 64. Discovery also revealed that [redacted] Because the unique benefits offered by PTMN were the most attractive to the Controlling Stockholder Defendants of the offers to date, and PTMN had already committed to

providing them with a TSA, they quickly elevated PTMN [redacted] ¶¶50, 53, 65.

In the interim, [redacted] . ¶85. [redacted] *Id.* [redacted]

[redacted] *Id.* [redacted]

[redacted]

[redacted]

[redacted]

4. Having Already Allowed the Controlling Stockholder Defendants to Set the Field of Play, the Board Belatedly Forms the Special Committee, which Allows the Controlling Stockholder Defendants Unfettered Access to the Process

Only after JMP Securities had set the field of play did the Board finally establish the Special Committee to run a purportedly [redacted] ¶67. Even then, though, the Committee failed to exercise independence from the Controlling Stockholder Defendants and the JMP Process they ran. *See* ¶69 [redacted] ¶¶70, 76 (retaining KBW, recent advisor to JMP Group during its failed pursuit of a sale, and negotiating compensation agreement with JMP Securities for JMP Process that would incentivize Controlling Stockholder Defendants to favor transaction with counterparty identified by JMP Securities); ¶¶71-72 (at same meeting where Committee asked Controlling Stockholder Defendants for permission to contact other bidders and to pay themselves $50,000 each, [redacted] ¶¶75, 80, 82, 84, 100, 103 (allowing Jolson and Buckanavage to participate in Committee meetings and deliberations concerning the KBW Process).

For *seven* days in October 2020, KBW contacted seven *total* parties, including PTMN and Party C – in other words, precious few new parties not already contacted by JMP Securities. ¶78. In late October and early November, 2020, Party A ([redacted]) submitted proposals that offered greater value for shareholders, but provided a shorter, less valuable TSA for the Controlling Stockholder Defendants. ¶83; [redacted]

On November 13, 2020, when the Special Committee met to consider the proposals received, again with Jolson and Buckanavage present, the Committee directed KBW to provide a comparison of [redacted] proposal ($8.51 per share) against PTMN's proposal ($6.66 per share), [redacted] ¶¶84, 86. Immediately after this request was made, [redacted] ¶84.

[redacted] ¶85.

[redacted]

[redacted] The Proxy disclosed only that management had arrived at a liquidation value of $6.23 per share; [redacted] ¶90; [redacted]

In the meantime, [redacted] ¶86. [redacted] ¶88. [redacted] ¶89. However, because Jolson and Buckanavage had been in virtually every Committee

meeting and were privy to every incoming bid, [redacted], they were already aware of the terms of the unique benefits being offered to the Controlling Stockholder Defendants by the three remaining bidders. ¶89. Even worse, as outlined below, [redacted]

In the meantime, HCAP's stock began to recover from its pandemic low, rising from $3.10 per share on November 23, 2020 to $5.75 per share on November 30, 2020. ¶95. [redacted]

Throughout late November and December 2020, as the Special Committee received revised proposals, only PTMN indicated a willingness to significantly negotiate the TSA to be received by HCAP Advisors by shifting value – in zero-sum fashion – from the Merger Consideration to be received by shareholders to the Transition Payment to be received by HCAP Advisors. ¶¶91-94, 98, 100-107.

[redacted]

[redacted] *Id.* [redacted]

Id.

[redacted] PTMN proposed to (a) *decrease* the cash payment to stockholders and (b) *increase* the consideration to be paid to HCAP Advisors for the TSA to $4.475 million. [redacted] ¶102. By contrast, [redacted] proposed TSA was just $400,000 for the first quarter post-closing and $250,000 for the second quarter post-closing, with an option to terminate services prior to the second quarter post-closing for a payment of *just $75,000*. ¶103.

On December 7, 2020, with Jolson and Buckanavage again present, KBW

reviewed the bids, noting that (1) the PTMN offer implied a value of $7.70 per share of HCAP stock, and (2) the [redacted] offer now implied a value of just $7.60 per share ($0.10 per share less than previously, [redacted] ¶¶103-04; [redacted]. The Special Committee was told that [redacted] proposal was worth as much as [redacted] ¶104. [redacted] ¶104. Because the proposed TSA offered by [redacted] was just $650,000 compared to the $4.475 million offered by PTMN, Jolson noted his support for PTMN's proposal "as a significant stockholder of the Company." ¶105.

Upon the Special Committee's urging, PTMN revised its proposal by (a) *increasing* the proposed cash payment to HCAP stockholders, and (b) *decreasing* the consideration to be paid by Sierra Crest to HCAP Advisors for the TSA to $3.85 million (from $4.475 million). ¶106. [redacted]

[redacted]

In light of Jolson's support for PTMN – [redacted] – on December 8, 2020, the Special Committee approved exclusivity with PTMN, after which attention turned to HCAP Advisors' interests. *See* ¶¶110-13 [redacted]

[redacted]

On December 23, 2020, [redacted] a meeting of Board and proposed that the Board approve the Merger Agreement, and it did so. ¶¶116, 118. In connection with the Merger Agreement, HCAP entered into a letter agreement with Jolson, pursuant to which he agreed to receive PTMN stock (and not cash or cash and stock) with respect to 894,273 shares of his HCAP stock. ¶121. Also in connection with the Merger, HCAP Advisors and PTMN executed the TSA [redacted]

[redacted]

[redacted]

5. Events Following the Merger Agreement

Less than one month after the HCAP Merger Agreement was signed, JMP Group began discussing a sale with KBW. ¶125. These discussions continued throughout early 2021, while the HCAP Merger was pending shareholder approval and consummation. ¶125. The special meeting of shareholders to vote on the Merger was held on June 7, 2021. ¶126. Inadequately informed, shareholders approved the Merger, but *not* with a majority-of-the-minority. ¶126. The Merger closed on June 9, 2021. ¶127. Between September and November 2021, JMP Group entered into additional transactions with PTMN and agreed to sell itself to Citizens Financial Group. ¶¶130-132.

B. RELEVANT PROCEDURAL HISTORY

Following the December 23, 2020 announcement of the Merger Agreement, PTMN and HCAP filed a materially misleading and omissive preliminary Form N-14 Registration Statement and Definitive Schedule 14A Proxy Statement ("Proxy"). On February 25, 2021, Plaintiffs commenced separate actions seeking to enjoin the then-proposed Merger, in connection with which they sought and received expedited discovery. After receiving and reviewing the expedited discovery, Plaintiffs determined that money damages were potentially available and amended their

complaint to pursue post-close damages against the Controlling Stockholder Defendants, the Special Committee members, and Alvarez.

On February 10, 2022, all then-named defendants filed motions to dismiss the Complaint. After briefing and oral argument, this Court denied the motions to dismiss as to the Controlling Stockholder Defendants and Alvarez and granted them as to the Special Committee. In so doing, the Court determined that entire fairness applied *ab initio* because the Merger was "a controlling stockholder transaction in which the controller received differential consideration in the form of side benefits." Opinion at 51. The Court likewise held that "the disclosure claims are viable, both in their own right and as part of the entire fairness analysis." *Id.* at 59.

However, the Court also warned that many of the unique benefits alleged by Plaintiffs would otherwise likely be unactionable standing on their own, identified the "real issue here [a]s the pricing of the [TSA]," warned that summary judgment in favor of Defendants could potentially be available, and suggested that the parties "ought to mediate early," noting the "[lack] of value even if everything goes the plaintiffs' way at the end of the case." *Id.* at 58-63.

The parties thereafter engaged in discovery, pursuant to which Plaintiffs received and reviewed (on an expedited basis) nearly 80,000 pages of additional documentation. In total, throughout the course of this Action, Plaintiffs obtained, reviewed, and incorporated into their briefing and analysis more than 81,600 pages

of documents produced by Defendants and their affiliates. Based on that discovery, Plaintiffs' Counsel drafted a 51-page mediation statement detailing Defendants' wrongdoing. The parties also submitted *ex parte* statements to the mediator.

In late November 2023, the parties engaged in a comprehensive mediation before former Judge Rocanelli, after which the parties accepted a mediator's recommendation to settle this matter for $3.85 million, conditioned upon resolution of coverage issues among the insureds and their insurers by December 15, 2023. On December 15, 2023, the coverage condition was satisfied. The parties executed the term sheet on January 24, 2024, and the Stipulation of Settlement was executed and thereafter submitted to this Court on February 26, 2024.

On February 29, 2024, the Court (i) preliminarily approved the proposed Class, appointed Plaintiffs as Class representatives, and approved Plaintiffs' Co-Lead Counsel as counsel for the Class, (ii) approved the Notice of Pendency of Class Action, Proposed Settlement, and Settlement Hearing (the "Notice"), and (iii) entered a Scheduling Order setting the Settlement Hearing for July 2, 2024 at 11:00 a.m. Pursuant to the Scheduling Order, on March 21, 2024, the Notice was mailed.

III. ARGUMENT

Plaintiffs respectfully seek (A) approval of the Settlement, (B) certification of the settlement Class, (C) approval of Plaintiffs' Counsel's Fee and Expense Award, and (D) approval of a modest incentive award for Plaintiffs.

A. THE SETTLEMENT SHOULD BE APPROVED BY THE COURT

1. Applicable Standard

"Delaware law favors the voluntary settlement of corporate disputes," *In re Triarc Cos., Inc., Class & Derivative Litig.*, 791 A.2d 872, 876 (Del. Ch. 2001), and particularly "favors the voluntary settlement of class actions and shareholder derivative suits." *Lewis v. Hirsch*, C.A. No. 12,532, 1994 Del. Ch. LEXIS 68, at *6 (Del. Ch. June 1, 1994); *see also In re Celera Corp. S'holder Litig.*, No. 6304-VCP, 2012 Del. Ch. LEXIS 66, at *28 (Ch. Mar 23, 2012), *rev'd in part on other grounds*, 59 A.3d 418 (Del. 2012) (same); *In re Cox Radio, Inc. S'holders Litig.*, No. 4461-VCP, 2010 Del. Ch. LEXIS 102, at *29 (Ch. May 5, 2010) (same). In considering the proposed settlement of a class action, the Court is called upon to determine, in the exercise of its own judgment, whether the settlement is fair, reasonable, and adequate. *In re Cox Radio,* 2010 Del. Ch. LEXIS 102, at *68; *Marie Raymond Revocable Trust v. Mat Five LLC*, 980 A.2d 388, 401-02 (Del. Ch. 2008). The Court's duty in reviewing a settlement agreement is to consider the nature of the claims asserted, the possible defenses, and the legal and factual circumstances of the case. *In re Celera*, 2012 Del. Ch. LEXIS 66, at *75.[3]

[3] In so doing, the Court may consider several factors, including "(1) the probable validity of the claims, (2) the apparent difficulties in enforcing the claims through the courts, (3) the collectability of any judgment recovered, (4) the delay, expense and trouble of litigation, (5) the amount of the compromise as compared with the collectability of a judgment, and (6) the views of the parties involved, pro

Of particular import is the balancing of the strength of the claims being compromised against the benefits secured by the settlement for Class members. *In re Cox Radio*, 2010 Del. Ch. LEXIS 102, at *29. In determining whether to approve a settlement, the Court weighs the "give" and the "get" obtained in the settlement 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 settle and with the benefit of the information then available, reasonably could accept." *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1064 (Del. Ch. 2015). To make this determination, the Court need not "decide any of the issues on the merits." *Polk*, 507 A.2d at 536; *see also Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964) ("To do so would defeat the basic purpose of the settlement of litigation.").

Here, this analysis weighs strongly in favor of approval. The Settlement is a product of years of litigation, the result of this Court's "strongly encourage[d]" mediation before an experienced mediator, provides substantial cash consideration, and reflects Plaintiffs' well-informed judgment regarding the potential "[lack] of value even if everything [went] the [P]laintiffs' way" and the very real possibility of "a pretrial out for the [D]efendants because of the nature of the factors that [] animat[ed] the pleading-stage denial." Opinion at 62-63.

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and con." *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986).

2. The Settlement Provides a Significant Financial Benefit

The Settlement represents a substantial benefit for the Class: a common fund of $3,850,000.00. A monetary fund is both the gold standard and uncommon in merger-related stockholder litigation. *See, e.g., Lerman v. Calamos*, C.A. No. 17-0058-JTL, Tr. at 24-25 (Del. Ch. Feb. 1, 2017) (Ex. A[4]) (denying motion to expedite disclosure claims because, "if the plaintiffs can succeed on any of their claims, they can actually get something that will directly benefit the class of stockholders that they purport to represent -- namely, they can get money.").

The significance of the Settlement here is evidenced both by what it represents and its proportional size. First, the Settlement represents the *full* amount of the Transition Payment that diverted consideration on a dollar-for-dollar basis from the Merger Consideration to be received by stockholders to the Controlling Stockholder Defendants.

Second, based on all outstanding shares (including those held by Defendants and their related entities, which are excluded from recovery), the Merger Consideration implied an enterprise value in the Merger of just $46 million, such that the Settlement represents an **8% premium** to the total Merger value. Standing alone, such a premium would merit approval. The Settlement is even more

[4] All transcripts and orders are provided as lettered exhibits in Plaintiffs' Compendium of Unreported Decisions.

impressive, though, in light of the fact that Defendants and their related entities – who owned ~32% of HCAP'S outstanding shares – will not receive any portion of the common fund. As a result of their exclusion, the Settlement represents a striking **$0.95 per share increase** – **a 12% premium** – to the $7.71 per share value implied by the Merger Consideration.

Whether viewed on an enterprise value basis or on a per share basis, the premium represented by the Settlement exceeds the premium obtained in other recent settlements approved by this Court, represents a substantial benefit on a percentage basis to stockholders, and therefore merits approval. *See, e.g., In re Sauer-Danfoss, Inc. S'holders Litig.*, C.A. No. 8396-VCL (Del. Ch. June 19, 2017) (Order) (Ex. B) (approving settlement that was ~1.46% price increase); *In re TD Banknorth S'holders Litig.*, C.A. No. 2557-VCL, 2009 WL 1834308 (Del. Ch. June 25, 2009) (Order) (Ex. C) (approving settlement that was ~1.6% price increase); *In re El Paso Corp. S'holder Litig.*, C.A. No. 6949-CS, 2012 WL 6057331 (Del. Ch. Dec. 3, 2012) (Order) (Ex. D) (approving settlement that was ~0.5% price increase); *In re Delphi Fin. Grp. S'holder Litig.*, C.A. No. 7144-VCG, 2012 WL 3113652 (Del. Ch. July 31, 2012) (Order) (Ex. E) (approving settlement that was ~2.0% price increase); *In re Del Monte Foods Co. S'holder Litig.*, C.A. No. 6027-VCL, 2011 WL 6008590 (Del. Ch. Dec. 1, 2011) (Order) (Ex. F) (approving settlement that was

~2.4% price increase); *Riche v. Pappas*, No. 0177-JTL (Del. Ch. Sep. 16, 2020) (Tr.) (Ex. G) (approving settlement that was ~7.7% price increase).

3. Nature of the Claims and Difficulties of the Litigation

A comparison of the benefits provided by the Settlement to the challenges Plaintiffs would have faced – both before and at trial – and the most likely recovery after trial also strongly supports approval of the Settlement.

Plaintiffs' claims for breach of fiduciary duties against Defendants would have required Plaintiffs to prove that Defendants favored their personal financial interests or acted in bad faith in approving the Merger and that the Class suffered damages as a result. In agreeing to the Settlement, Plaintiffs considered the arguments that Defendants asserted as to why they did not breach their fiduciary duties. For the reasons outlined in Plaintiffs' MTD Opposition and above, Plaintiffs were relatively confident that they would be able to prove a non-exculpated breach of the duty of loyalty by, at least, the Controlling Stockholder Defendants, for diverting Merger Consideration to themselves, and potentially against all Defendants, for their actions in the sales process.

Damages, on the other hand, as they often are, were where the proverbial rubber met the road. Going into mediation, Plaintiffs were acutely aware of this Court's guidance – and warning – that (i**) the "real issue here is the pricing of the [TSA]"**; (ii) market evidence may well substantiate and validate the Transition

Payment; (iii) many of the unique benefits alleged by Plaintiffs "would otherwise likely be inactionable standing on their own"; (iv) as a result, "this is one of the[] rare fiduciary duty cases where summary judgment might well be available" because "[i]t's a fairly finite issue in terms of what is triggering entire fairness here"; and, (v) even if summary judgment was not available, "in the scheme of Court of Chancery litigation, this is a relatively small-dollar case" without "a lot of value even if everything goes the [P]laintiffs' way." Opinion at 56-59, 61-63. As outlined below, this guidance proved prescient, and Plaintiffs ultimately determined that the $3.85 million settlement represented a near total victory at trial, in light of the unique benefits alleged, the damages models available, and the likelihood of succeeding on each. A summary of Plaintiffs' Counsel's analysis of these issues is below.

a. The Unique Benefits Alleged

The Transition Payment. At trial, Plaintiffs were confident that they would be able to prove that the TSA was over market, potentially worthless based on the specific facts of *this* case, and specifically intended to be a diversion of consideration. The Transition Payment was more than 1.8x HCAP Advisors' 2020 management fee and provided HCAP Advisors with a payoff equivalent to 8.3% of the Merger's implied value. ¶¶8, 96, 101, 108-09. [redacted]

[redacted] *Supra*.

Defendants, in response, argued that bidders raised the issue of a TSA first, such that it was, "from the potential acquirors' perspectives…a necessary part of the deal"; virtually all other bidders offered a TSA as well; other BDC mergers did in fact have similar TSAs; [redacted] suggesting that BC Partners in particular valued such TSAs; and the Transition Payment of $3.85 million was not excessive because it was for three-years' worth of services, and thus at a discount. While Plaintiffs had responses to each of these assertions, the simple truth is that some BDC mergers do in fact include TSAs and that BC Partners specifically regularly seeks them.

Accordingly, while Plaintiffs were confident that they could prove at trial that the TSA was beyond market, they were not confident that they could prove that it was *entirely* worthless, such that any trial recovery would likely be for less than all of the Transition Payment. Plaintiffs' Counsel ultimately concluded that this Court would likely value the TSA somewhere between $192,500 [redacted]

[redacted] and $650,000 (the TSA offered by [redacted], resulting in realistic damages for this unique benefit of approximately $3,200,000 to $3,657,500.

[redacted] While Defendants would have argued [redacted] was ultimately *de minimus*, Plaintiffs were again confident that they could prove that [redacted] was meant as another diversion of funds, most notably because [redacted]

[redacted]. The offer of [redacted] was included in every offer from PTMN and was thus clearly intended to induce the Controlling Stockholder Defendants to support a sale to PTMN, as this Court noted. ¶¶8, 64, 94, 98, 102, 134; Opinion at 58-59. However, [redacted] discovery targeted specifically at the [redacted] offer revealed no evidence that JMP Securities took part in the [redacted] or otherwise valued it. Accordingly, Plaintiffs concluded that this unique benefit likely had little

to no value at trial. *Accord* Opinion at 58-59 (noting potential that [redacted] opportunity that PTMN used as an "inducement" would otherwise likely be unactionable standing on its own).

The Wind Down. As noted, just one month after the HCAP Merger Agreement was signed, JMP Group began discussing a sale again with KBW, and the sale of HCAP ultimately paved the way for the sale of JMP Group. ¶¶22, 24, 125, 130-32. While discovery revealed some post-sale evidence that identified the HCAP sale as contributing to the "simplification of JMP," it did not reveal any contemporaneous communications that identified the sale of HCAP as a focus during the HCAP sales process. Accordingly, like the [redacted] Plaintiffs concluded that this unique benefit likely had little to no value at trial. *Accord* Opinion at 58-59 (other unique benefits otherwise likely unactionable on their own).

The Increased Securities Payment. As noted, JMP Securities received $100,000 in additional fees because PTMN was originally identified as a buyer by JMP Securities in the JMP Process. Defendants argued convincingly that other buyers – including [redacted] – would have likewise implicated this payment, and Plaintiffs thus concluded that this unique benefit too likely had little to no value at trial. *Accord* Opinion at 58-59.

The Stock Receipt. Finally, as noted, as part of the Merger, HCAP and Jolson entered into a letter agreement pursuant to which Jolson received PTMN stock with

respect to 894,273 shares of the HCAP stock he owned. ¶121. As a result of this arrangement, Plaintiffs' expert calculated that, because of a proration mechanism in the Merger Agreement, 475,806 shares of HCAP held by non-insiders received only cash. These shares that were denied to minority shareholders accounted for 3.1% of the stock portion of the consideration and, while the recipients of stock captured some or all of the benefit of the bargain Merger Consideration, recipients of cash lost out, to the tune of ~$118,000. Defendants would have argued that this stock receipt was actually requested by PTMN, and it was not clear when the stock receipt was agreed to what value PTMN would trade at. Plaintiffs concluded that this unique benefit too likely had little to no value at trial. *Accord* Opinion at 58-59.

b. Damages Models

At trial, Plaintiffs would likely have put forth three damages models based on disgorgement, the Process Claims, and the standalone Disclosure Clams.

Disgorgement. Subject to the disgorgement remedy would be the Transition Payment, the [redacted] the Securities Payment, and the Stock Receipt. As noted, Plaintiffs ultimately concluded that, of these potential benefits, they were most likely to recover the [redacted] payment and most (but not necessarily all) of the Transition Payment. Plaintiffs' Counsel concluded that realistic trial damages for these two diversions ranged from approximately $3,350,000 to $3,807,500.

Process Damages. When the Merger Agreement was executed, the Merger Consideration implied a value for the Company of approximately $46 million, or $7.71 per share. By contrast, the value of [redacted] per share offer was materially higher, and could have potentially supported damages of [redacted] As also noted, [redacted] liquidation could fetch [redacted] per share for shareholders, which is [redacted] per share more than the PTMN Merger Consideration, representing a second avenue of process damages of [redacted].

Plaintiffs' Counsel concluded that both measure of process damages were unlikely to gain traction at trial, because (i) Defendants would have argued (convincingly and with factual support) that the [redacted] offer had to be discounted because [redacted] (which was internally-managed) was proposing a reverse merger and the combined HCAP [redacted] post-merger company (as an externally managed BDC) would likely trade at a discount to an internally managed entity (as most externally managed BDCs did); (ii) liquidations rarely (if ever) provide full value, such that a liquidation discount is also appropriate; and (iii) both damages were likely cumulative of the disgorgement damages outlined above.[5]

[5] Plaintiffs' Counsel were also cognizant that attempting to cumulate damages models could result in a damages model that was beyond reasonable belief. *See In re PLX Tech. Stockholders Litig.*, C.A. No. 9880-VCL, 2018 Del. Ch. LEXIS 336, at *111-12 (Del. Ch. Oct. 16, 2018) (noting "lack of reliability" of a damages model that "yielded a result that was 40% over the deal price").

Disclosure Damages. Finally, nominal damages for the independent Disclosure Claims were possible. *In re Columbia Pipeline Grp.*, C.A. No. 2018-0484-JTL, 2023 Del Ch. LEXIS 162, at *233 (Del. Ch. June 30, 2023). Most such awards are $1 per share, *id.* at *236, equating to ~$4,044,117 here. Again, though, Plaintiffs' Counsel concluded that such damages would likely be viewed as cumulative of the disgorgement damages outlined above.

c. The Give and the Get

In sum, and guided by this Court's warnings, Plaintiffs' Counsel believed that a $3.85 million recovery represented a near total victory at trial. By leveraging the remaining, less concrete, potential unique benefits, Plaintiffs recovered the *full* $3.85 million value of the Transition Payment, the "real issue" in this action, which represents a near total victory at trial. Weighing the benefit of the certain $0.95 per share, $3.85 million Settlement against (1) the potential value of the $0.95 per share, $3.85 million Transition Payment plus the remaining, less concrete, potential unique benefits, (2) the possibility that expert "market evidence shows [the TSA] to be normal and customary and appropriately priced, both in terms of the length of time and in terms of the total amount," potentially entitling Defendants to summary judgment, (3) the possibility of losing on liability at trial, (4) the very real possibility of securing a lesser amount of damages, or none at all, at trial, and (5) the traditional scope of the release contemplated by the Settlement, Plaintiffs and Plaintiffs'

Counsel determined that the Settlement was a fair and reasonable resolution for the Class. This Court should similarly conclude.

4. The Settlement Is the Result of Arm's-Length Negotiations Between Experienced Counsel Before an Experienced and Well-Respected Mediator

When evaluating the fairness of a settlement, Delaware courts also scrutinize the negotiations that led up to the settlement and heavily favor settlements that resulted from arm's-length negotiations. *Ryan ex rel. Maxim Integrated Prods. v. Gifford*, No. 2213-CC, 2009 Del. Ch. LEXIS 1, at *18-19 (Ch. Jan. 2, 2009). Here, the Parties arrived at the Settlement after a Court recommended, two-day mediation before the highly respected former Judge Rocanelli. The contentious litigation that led to the Settlement and the involvement of a well-respected mediator, who was forced to resort to a mediator's proposal, reinforce the fairness of the Settlement.

5. Counsel's Experience and Opinion Likewise Weigh in Favor of Approval

Delaware Courts recognize that the opinion of a representative plaintiff and their experienced counsel is entitled to weight in determining the fairness of a settlement. *Polk*, 507 A.2d at 536 (Court considers "the views of the parties involved" when determining the "overall reasonableness of the settlement"). The Court is familiar with all of Plaintiffs' Counsel's firms, which have substantial experience in negotiating settlements of complex securities class actions, as well as a lengthy track record of advocacy in this Court. Plaintiffs' Counsel believe that the

Settlement is fair and in the best interests of the Class. That opinion is shaped not only by their experience, but by their knowledge of this case in particular, informed by two rounds of discovery, briefing, and preparation for oral arguments and mediation. Their opinion further weighs in favor of approving the Settlement. *Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 99-100 (Del. 1979) (approving settlement where plaintiff's counsel concluded that the settlement was fair and in the best interests of the stockholders based on pretrial discovery).

6. The Reaction of the Class Supports Approval

Pursuant to the Scheduling Order, on March 21, 2024, the Notice was mailed to former HCAP stockholders. Transmittal Affidavit of Blake A. Bennett ("Bennett Aff."), Ex. 1 (Declaration of Tina Chiango ("Chiango Dec.")) at ¶5. The Notice advised Class members of their right to object to any part of the Settlement, including the request for fees, reimbursement of expenses, and an incentive award. Bennet Aff., Ex. 1-A (Notice). To Plaintiffs' Counsel's knowledge, to date, no Class member has filed an objection or contacted Plaintiffs' Counsel to express an intention to do so.[6] A positive reaction by the Class likewise supports approval. *Rome*, 197 A.2d at 58.

[6] The deadline to serve objections to the Settlement is June 18, 2024, and Plaintiffs will respond if any objections emerge.

7. The Plan of Allocation is Fair, Reasonable, and Adequate

"An allocation plan must be fair, reasonable, and adequate." *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009), overruled on other grounds by *Urdan v. WR Cap. P'rs, LLC*, 244 A.3d 668 (Del. 2020). As set forth in the Stipulation and Notice, the Plan of Allocation provides that the Net Settlement Amount be distributed among Eligible Class Members on a *pro rata*, per-share basis, and requires Defendants and their counsel to cooperate to ensure that no payments are made to any Excluded Person. Stipulation at ¶¶2.1, 10.1-10.8. The Plan of Allocation avoids the potentially high administrative costs of a claims process by providing for a direct payment by the Settlement Administrator to registered stockholders and DTC participants (for transmittal and distribution to beneficial holders) through information obtained from DTC. This Court has approved substantially similar plans of allocation in other actions, and should do so again here. *See, In re PLX Tech. Inc. S'holders Litig.*, C.A. No. 9880-VCL, 2022 Del. Ch. LEXIS 88, at *3, *15-16 (Del. Ch. Apr. 18, 2022); *Riche v. Pappas,* No. 0177-JTL (Del. Ch. Oct. 8, 2020) (Order) (Ex. Q).

B. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

Court of Chancery Rule 23(a) provides four criteria that must be satisfied for certification of a class: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Moreover, a class action must comport with at least

one of the subsections of Rule 23(b). *See* Del. Ch. Ct. R. 23; *Nottingham Partners v. Dana*, 564 A.2d 1089, 1094-95 (Del. 1988). Each requirement is easily satisfied.

1. THE REQUIREMENTS OF RULE 23(A) ARE SATISFIED

a. Numerosity

Rule 23(a)(1) requires that a proposed class be "so numerous that joinder of all members is impracticable. . . ." Del. Ch. Ct. R. 23(a)(1). Impracticability does not mean impossibility, but rather only difficulty or inconvenience in joining all members of the Class, and "[n]umbers in the proposed class in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement." *Leon N. Weiner & Assocs, Inc. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991); *see also Dubroff v. Wren Holdings, LLC*, C.A. No. 3940-VCN, 2010 Del. Ch. LEXIS 178, at *15 (Del. Ch. Aug. 20, 2010) (class of 45 members).

Here, the numerosity requirement is readily satisfied. Prior to the Merger, HCAP was publicly traded on the NASDAQ; at all relevant times, the proposed Class had more than 4 million shares of issued and outstanding common stock; and the Notice Administrator mailed 4,442 Notices to potential Class Members. *See* Bennett Aff., Ex. 2 (excerpts from Definitive Proxy) at 11 (NASDAQ) and 1 (5,968,296 shares as of April 16, 2021); Bennett Aff., Ex. 1 (Chiango Dec.) at ¶7. The Class is thus comprised of hundreds or thousands of record and beneficial holders. Numerosity is therefore satisfied. *See Oliver v. Boston Univ.*, C.A. No.

16570-NC, 2002 Del. Ch. LEXIS 21, at *15 n.17 (Del. Ch. Feb. 28, 2002) (numerosity requirement met where plaintiff alleged that class consisted of '"hundreds and perhaps thousands'" of stockholders); *Zimmerman v. Home Shopping Network, Inc*., Nos. 10911, 10919, 1990 Del. Ch. LEXIS 136, at *38 (Del. Ch. Aug. 14, 1990) (numerosity inferred where claims involve holders of nationally traded securities).

b. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class…." Del. Ch. Ct. R. 23(a)(2). Commonality is met "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." *Krapf*, 584 A.2d at 1225. The requirement is satisfied by demonstrating that a question of law or fact is common to the class. *Emerald Partners v. Berlin*, C.A. No. 9770, 1991 Del. Ch. LEXIS 189, at *7 (Del. Ch. Nov. 15, 1991).

Because this Action is predicated on Defendants' breaches of fiduciary duty in connection with the Merger, all factual and legal questions concerning Defendants' liability are common to all members of the Class, including whether Defendants breached their fiduciary duties and whether Plaintiffs and the Class are entitled to damages as a result. *In re Countrywide Corp. S'holders Litig.*, Consol. C.A. No. 3464-VCN, 2009 Del. Ch. LEXIS 44, at *51 (Del. Ch. Mar. 31, 2009)

(Commonality satisfied where "Plaintiffs allege injuries which all investors share in proportion to their holdings stemming from a common course of action by the Defendants in the alleged breaches of fiduciary duties owed to the class in connection with the merger."); *In re Cox Radio*, 2010 Del. Ch. LEXIS 102, at *27 (Commonality satisfied where "there are numerous questions of law and fact common to the Class, including whether Defendants breached their fiduciary duties, whether Defendants met their disclosure obligations, and to what relief the Class is entitled."); *Turner v. Bernstein*, 768 A.2d 24, 26 (Del. Ch. 2000) (certifying class in case alleging breach of fiduciary duty in merger); *In re Wm. Wrigley Jr. Co. S'holders Litig.*, C.A. No. 3750-VCL, 2009 Del. Ch. LEXIS 12, at *14 (Del. Ch. Jan. 22, 2009) ("[T]he claims of all…stockholders other than the defendants are identical in challenging the process by which the merger was approved and the proxy materials used to solicit the stockholders to vote in favor of it."). Commonality is thus satisfied.

c. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Del. Ch. Ct. R. 23(a)(3). This requirement is satisfied when the named plaintiff's interests arise from the same events or course of conduct that gives rise to the claims of the absent class members and the claims are based on the same legal theories. *Krapf*, 584 A.2d at 1226. In

short, typicality exists where "all Class members face the same injury flowing from the defendants' conduct." *In re Talley Indus., Inc. S'holder Litig.*, C.A. No. 15961-VCL, 1998 Del. Ch. LEXIS 53, at *29 (Del. Ch. Apr. 9, 1998).

Here, Plaintiffs' claims and the claims of all other members of the Class arise out of the same course of wrongdoing by Defendants (*i.e.*, breaches of fiduciary duty in the Merger) and the same injury caused thereby (inadequate Merger Consideration). Because both Plaintiffs' claims and those of the absent Class members arise out of a transformative transaction like a merger, "[a]ll claims grow out of the same events and courses of conduct and the same legal theories would apply." *In re Lawson Software, Inc. S'holder Litig.*, No. 6443-VCN, 2011 Del. Ch. LEXIS 81, at *6 (May 27, 2011). What is more, Plaintiffs are not subject to any known unique defenses.[7] Typicality is thus likewise satisfied.

d. Adequacy

Rule 23(a)(4) requires that the proposed class representatives "fairly and adequately protect the interests of the class." Del. Ch. Ct. R. 23(a)(4). Rule 23(a)(4) is satisfied where the named plaintiffs' interests are not antagonistic to other members of the class and plaintiffs' attorneys are qualified, experienced, and generally able to conduct the litigation. *Emerald Partners v. Berlin*, 564 A.2d 670,

[7] Both Plaintiffs held HCAP stock continuously through the closing of the Merger. Bennett Aff., Exs. 3-4 (Plaintiffs' Affidavits) at ¶2.

673-74 (Del. Ch. 1989); *Frazer v. Worldwide Energy Corp*., C.A. No. 8822, 1990 Del. Ch. LEXIS 61, at *4-6 (Del. Ch. May 3, 1990).

Here, there is no indication that Plaintiffs have any interests adverse or antagonistic to the Class. Bennett Aff., Exs. 3-4 (Plaintiffs' Affidavits) at ¶¶2, 5-6. Rather, no substantive difference exists between Plaintiffs' claims and those of the other Class members: they suffered the same underlying injury as other Class members, possesses the same economic interest as other Class members, and pursued a resolution in the interests of the Class. *Id.* Finally, as this Court is aware, Plaintiffs' Counsel are experienced in class action litigation, particularly M&A class actions; have successfully prosecuted numerous such actions throughout the country and in this Court; and have exhibited dedication to obtaining a class recovery here. Bennett Aff., Exs. 5-A and 6-A (firm resumes). Adequacy is therefore satisfied. *Marie Raymond Revocable Trust*, 980 A.2d at 400-01 (adequacy satisfied where there appears to be no conflict between representative plaintiffs and other class members and plaintiffs retained competent counsel, experienced in class and corporate litigation); *Frazer*, 1990 Del. Ch. LEXIS 61, at *3-4 (adequacy satisfied where plaintiffs affirmed their intent to fulfill their fiduciary obligations and counsel's representation had been diligent and zealous).

2. The Requirements of Rule 23(b) Are Satisfied

Where, as here, the requirements of Rule 23(a) are satisfied, at least one of the

subsections of Rule 23(b) must also be satisfied. Del. Ch. Ct. R. 23(b). This action satisfies both Rule 23(b)(1) and 23(b)(2). *BVF Partners (In re Celera Corp. S'holder Litig.*), 59 A.3d at 432-33 ("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).'").

a. Rule 23(b)(1)

Certification under Rule 23(b)(1) is appropriate because, if separate actions were commenced by members of the settlement Class, Defendants and Class members would be subject to the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct and would, as a practical matter, be dispositive of the interests of other Class members. Because the underlying allegations of wrongdoing and the law applicable to those allegations are the same for all Class members, the only issue individual to each Class member is the amount of damages. However, separate actions by similarly situated Class members would likely result in different per-share damages awards, which would create both varying or inconsistent adjudications with respect to individual Class members and incompatible standards for Defendants. *Turner*, 768 A.2d at 32 ("Rule 23(b)(1) 'clearly embraces cases in which the party is obliged by law to treat the class members alike…[,]' including claims seeking money damages."); *Noerr v. Greenwood*, C.A. No. 14320-NC, 2002 Del. Ch. LEXIS 134, at *22 (Del. Ch. Nov.

22, 2002) (certification under Rule 23(b)(1) appropriate because "any damages to which class members would be entitled would be based solely upon the number of shares that they own."). Certification under Rule 23(b)(1) is thus appropriate.

b. Rule 23(b)(2)

Rule 23(b)(2) provides for certification where the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole. Del. Ch. Ct. R. 23(b)(2). Actions challenging the exercise of fiduciary duties are properly certified under Rule 23(b)(2) when (as outlined above) the rights and interests of the class members are homogeneous. *Nottingham*, 564 A.2d at 1094-96; *In re Celera*, 2012 Del. Ch. LEXIS 66, at *69 (Rule 23(b)(2) applicable to claims for damages where "monetary relief flows directly from a finding of liability to the class as a whole").

Because this Action arises out of a single course of conduct by Defendants that created a uniform impact upon all members of the Class and who are thus identically situated with respect to liability and damages, particular facts pertaining to any individual class member will have no bearing on the appropriate remedy. *See Turner*, 768 A.2d at 31; *Hynson v. Drummond Coal Co.*, 601 A.2d 570, 575-79 (Del. Ch. June 14, 1991) (Rule 23(b)(2) certification appropriate where "particularities of any holder would have no bearing on the appropriate remedy"). Accordingly,

certification under Rule 23(b)(2) is also proper.

3. The Requirements of Rule 23(f) Are Satisfied

Plaintiffs have submitted the affidavit required by Delaware Chancery Court Rules 23(f)(2)(A) and 23(aa)(2). Bennett Aff., Exs. 3-4 (Plaintiffs' Affidavits); ECF. Nos. 58-59 (Plaintiffs Verifications). A copy of the Stipulation was also filed with the Court on February 26, 2024, in compliance with Chancery Court Rule 23(f)(2)(C). ECF No. 149.

What is more, as required by the Scheduling Order, and in compliance with Chancery Court Rule 23(c)(2) and (f)(3), Plaintiffs mailed the Notice, published the Summary Notice (via *PR Newswire*, a national wire service), and published a settlement website on March 21, March 27, and March 19, 2024, respectively. *See* Preliminary Approval Order (ECF No. 155) (deadlines of March 21 for notice and website and April 4 for summary notice); Bennett Aff., Ex. 1 (Chiango Dec.) at ¶¶4-7. As of June 7, 2024, 4,442 Notices have been mailed or distributed to brokers or other nominees for mailing to potential class members. *Id.* at ¶7. To date, although the objection deadline has not passed, no objections have been received by Plaintiffs' Counsel or filed with the Court. *Id.* at ¶10.

4. Plaintiffs' Counsel Should Be Appointed Class Counsel

Delaware Chancery Court Rule 23(d)(3) requires that "the Court must appoint class counsel when certifying a class." Plaintiffs' Counsel are experienced

stockholder advocates who regularly appear before this Court (Bennett Aff., Exs. 5-A and 6-A (firm resumes)), and Plaintiffs respectfully submit that they have fairly and adequately represented the Settlement Class. It is through their actions that the Settlement was reached, and the Settlement Class will, if the Court approves the Settlement, receive a 12% increase in the Merger Consideration. Plaintiffs therefore request that the Court appoint Plaintiffs' Counsel as Class Counsel.

C. THE REQUESTED FEE AND EXPENSE AWARD SHOULD BE APPROVED

1. The Applicable Standard

Delaware Courts award fees and costs to counsel whose efforts have created a common fund. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1253-55 (Del. 2012). In determining an appropriate award of attorneys' fees and expenses, Delaware Courts look to the factors set forth in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980):

1. "[T]he results achieved;
2. [T]he time and effort of counsel;
3. [T]he relative complexities of the litigation;
4. [A]ny contingency factor; and
5. [T]he standing and ability of counsel involved."

Americas Mining Corp., 51 A.3d at 1254 (citing *Sugarland*, 420 A.2d at 149). Of these factors, "[t]his Court has traditionally placed greatest weight upon the benefits

achieved by the litigation." *Id.* at 1254 n.89 (citing *In re Anderson Clayton S'holders Litig.*, C.A. No. 8387, 1988 Del. Ch. LEXIS 127, at *3 (Del. Ch. Sept. 19, 1988)); *In re PAETEC Holding Corp. S'holders Litig.*, C.A. No. 6761, 2013 Del. Ch. LEXIS 72, at *23 (Del. Ch. Mar. 19, 2013) (same).

Plaintiffs respectfully request that the Court approve their request for an all-in award of attorneys' fees and expenses in the aggregate amount of $1,155,000.00 (the "Fee and Expense Award"), which is inclusive of $93,264.21 in out-of-pocket expenses that benefited the Class. This request is supported by the *Sugarland* factors.

2. The Requested Award Is Fair and Reasonable

a. Counsel Obtained a Substantial Benefit for the Class

The most important factor in setting an appropriate attorneys' fee is the benefit achieved. *Americas Mining Corp*., 51 A.3d at 1254. Where, as here, there is a monetary recovery, Delaware Courts typically award a percentage of the recovery. *Id.* The Settlement of $3,850,000 – the *full* amount of the Transition Payment – represents a near total victory at trial and a 12% increase to the Merger Consideration. Of that, Plaintiffs respectfully request a $1,155,000.00 all-in Fee and Expense Award, which represents 30% of the gross recovery. *See Riche*, Tr. at 24-26 (Ex. G) (noting preference for all-in fee and expense award where cases settle early and expenses are limited).[8]

[8] The fee portion of the requested Fee and Expense Award is $1,061,735 and

This Court has often approved fee requests of 30% or more. *See, e.g., Marie Raymond*, 980 A.2d at 410 (collecting the following cases, all of which approved fee awards of at least 30%: *In re Intek Global Corp. S'holders Litig.,* C.A. No. 17207 (Del. Ch. Apr. 24, 2000) [Order]; *In re Home Shopping Network, Inc. S'holder Litig.,* Cons. C.A. No. 12868, Chandler, V.C. (Del. Ch. Jan. 24, 1995) [Order]; *In re USA Cafes, L.P. Litig., Cons.* C.A. No. 11146, Jacobs, V.C. (Del. Ch. June 22, 1994) [Order]; *Wiegand v. Berry Petroleum Co.,* C.A. No. 9316, Jacobs, V.C. (Del. Ch. Nov. 25, 1991) [Order]; *In re Corporate Software, Inc. S'holder Litig.,* Cons. C.A. No. 13209, Allen, C. (Del. Ch. Nov. 15, 1994) [Order]; *In re Berkshire Realty Co., Inc. S'holder Litig.,* C.A. No. 17242, Chandler, C. (Del. Ch. Aug. 10, 2004) [Order]; *In re UnitedGlobalCom, Inc. S'holders Litig.,* Cons. C.A. No. 1012-VCS, 2008 Del. Ch. LEXIS 202 (Del. Ch. May 16, 2008) [Order]); *Adam Kleinman vs. Jonathan Couchman et al*, C.A. No. 10552-CB (Del. Ch. Nov. 13, 2017) (Order) (Ex. H) (awarding fees representing 30% of settlement fund, plus $179,719 in expenses); *Riche*, Tr. at 26 (Ex. G) (approving fee that was 30% of net recovery); *Ryan*, 2009 Del. Ch. LEXIS 1, at *12, *40 (awarding 33% of gross recovery, inclusive of expenses, and approximately 32% of net recovery).

Plaintiffs are aware that the Requested Fee and Expense Award may represent a departure from the strict application of the stage-of-the-case paradigm discussed

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represents 27.5% of the gross recovery and 28.2% of the net recovery.

by this Court in *Class v. Stockholders Litig. (In re Dell Techs. Inc.)*, Consol. C.A. No. 2018-0816-JTL, 2023 Del. Ch. LEXIS 820 (Del. Ch. July 31, 2023). Plaintiffs submit that the amount of and percentage represented by the requested Fee and Expense Award are consistent with *Americas Mining* and *Sugarland* and appropriate in this case in particular, for four reasons.[9]

First, while this litigation settled at a comparatively early juncture, the Settlement nonetheless represents a **full, 100% recovery of the $3.85 million Transition Payment diverted to the Controlling Stockholder Defendants at shareholders' expense and, as such, is commensurate with a near total victory at trial**. Simply put, Plaintiffs and Plaintiffs' Counsel secured a post-trial result – without wasting time and Class resources on the expenses typical of trial. Indeed, had Plaintiffs secured the exact same settlement just before trial or after trial, the Class would ultimately have received less as a result of those expenses, and they would have received it years later.

Public policy favors the early successful resolution of class actions litigation, and Plaintiffs' Counsel surely should not be penalized for successfully securing a post-trial victory, early. *See Seinfeld v. Coker*, 847 A.2d 330, 333-34 (Del. Ch. 2000) (noting benefits of awarding large fees for efficient resolution of cases, which should

[9] In the alternative, for the same reasons outlined below, Plaintiffs submit that any award should be the top-end of the stage-of-the-case sliding scale.

have effect of encouraging meritorious lawsuits and efficient prosecution of those suits). Indeed, this Court specifically noted this concern:

> The stage-of-case method is vulnerable to the criticism that it undercompensates counsel who achieve everything they might have obtained after trial through an early-stage settlement. Counsel can rightly argue that they should not receive only 10% of a recovery if they settled at an early stage for everything that the court could have awarded. Counsel can also rightly argue that Delaware law should not provide incentives for over-litigating a case. Those are valid points, and there always will be edge cases that put stress on a system…. In a case where it is clear that counsel achieved *everything* that they sought in their complaint, then perhaps an upward adjustment in the percentage might be warranted….

In re Dell, 2023 Del. Ch. LEXIS 820, at *25 n.7.

Second, as noted, Plaintiffs devoted more than three years to this litigation. While the case is technically settling after the denial of a motion to dismiss, the case is nonetheless at a more advanced stage. After filing their original complaints, Plaintiffs moved for expedited discovery and a preliminary injunction; following review of the expedited discovery, Plaintiffs determined that a potential money-damages recovery was available for the Class, and, rather than settle for the certainty of disclosures, pressed on. Thereafter, they filed a Consolidated Class Action Complaint, amended that Complaint into the operative Complaint (a total of four complaints), and then successfully defeated Defendants' motions to dismiss. They then received and reviewed an additional 80,000 pages of discovery, drafted a voluminous 51-page mediation brief, and engaged in the Court-recommended

mediation. Simply put, this case is more advanced than simply surviving a motion to dismiss.

Third, the request is appropriate in light of the relatively small nature of the case. The enterprise value of the Merger to the Class was just $30 million, and this Court acknowledged that "this is a relatively small-dollar case" without "a lot of value even if everything goes the [P]laintiffs' way." Opinion at 62. Plaintiffs' Counsel nonetheless litigated the case for more than three years without concern for its size, ultimately achieving a significant recovery for the Class.

As Plaintiffs' Counsel has previously argued to this Court, public policy supports the award of fees at the high end of the range in smaller representative actions to ensure counsel is compensated appropriately, recovers its lodestar, and is incentivized to prosecute smaller actions to ensure that corporate wrongdoing in such transactions does not get ignored. Indeed, this Court has previously noted that smaller recoveries in smaller cases merit a higher percentage fee to incentivize counsel to take on such cases; otherwise, smaller mergers and cases simply will not garner the skilled counsel class members deserve. *See, e.g., Goodrich v. E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1048 (Del. 1996) (noting "emerging judicial consensus" that "percentage of recovery awarded should decrease as the size of the [recovery] increases"); *Chen v. Howard-Anderson*, C.A. No. 5878-VCL, 2017 Del. Ch. LEXIS 734, at *7 (Del. Ch. June 30, 2017) ("In the bigger picture, doing so should help

mitigate the problem of underenforcement in smaller companies, where counsel litigating on contingency may not be able to foresee a sufficient recovery to warrant pursuing meritorious claims."); *see also In re Dell*, 2023 Del. Ch. LEXIS 820, at *5 ("[O]ur [] law depends on private litigation for enforcement…. Plaintiff's counsel deserves to be well compensated for identifying real cases, investing real money in those cases, and obtaining real results."). Again, in *Dell*, this Court noted that the thrust of *Americas Mining* was that the court "can reduce an *excessive* fee," which (as outlined below) is not an issue here (as the requested fee is a negative multiplier), and, as a result, that the stage-of-the-case test "is not a mechanical one." *In re Dell*, 2023 Del. Ch. LEXIS 820, at *8, *25.

Finally, the requested Fee and Expense Award is also appropriate when considering this Court's prior precedent, the expenses in this case, and the percentages represented by aggregate fee and expense awards in this Court's prior cases. As outlined in Appendix A, although some of the settlements cited therein involved larger transactions with higher lodestar multipliers, the percentage overall fee and expense recovery ranged from 25% to 36.2%. Plaintiffs' requested Fee and Expense Award is also within this range.[10]

[10] The Company also issued Supplemental Disclosures in response to Plaintiffs' motion for preliminary injunction, which included the attendance of Controlling Stockholder Defendants at meetings of the Special Committee, conflicts faced by KBW, the contents of confidentiality agreements, and certain projections. Bennett

Accordingly, for the aforementioned reasons, the requested Fee and Expense Award is reasonable and in line with this Court's past precedent, especially in light of the results achieved in *this* case.

b. Counsel Expended Significant Time and Resources to Secure the Settlement

The requested Fee and Expense Award is also consistent with – and reasonable in comparison to – the amount of time and effort expended by Plaintiffs' Counsel on this case. The Court places more weight on effort than time, *In re Del Monte Foods Co. S'holders Litig.*, No. 6027-VCL, 2011 Del. Ch. LEXIS 94, at *38 (Del. Ch. June 27, 2011), and Plaintiffs' Counsel's efforts here have been considerable. Over more than three years, Plaintiffs' Counsel commenced this action to enjoin the Merger; reviewed pre-Merger public filings and expedited discovery; determined that post-close damages were potentially available; filed a total of four complaints; briefed and successfully defeated three sets of dispositive motions; obtained more discovery; reviewed and synthesized more than 81,600 pages of discovery; drafted a comprehensive mediation brief; prepared for and engaged in a

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Aff., Ex. 8 (Supplemental Disclosures); *see also In re Sauer-Danfoss Inc. S'Holders Litig.*, 65 A.3d 1116, 1136 (Del. Ch. 2011) (fees of $400,000 to $500,000 for one or two meaningful disclosures, such as previously withheld projections or undisclosed conflicts faced by fiduciaries or their advisors). Plaintiffs' Counsel would also be entitled to a fee for those disclosures, which is subsumed in the requested Fee and Expense Award.

comprehensive mediation process; and then drafted and negotiated settlement papers.

Their time reflects that effort. While the hourly rate represented by a fee and expense award is a secondary consideration, courts often look to the rate as a so-called "sanity check." *In re Abercrombie & Fitch Co. S'holders Derivative Litig. v. Jeffries*, 886 A.2d 1271, 1273 (Del. 2005) (lodestar a "backstop check"); *In re AXA Fin., Inc. S'holders Litig.*, C.A. No. 18268, 2002 Del. Ch. LEXIS 57, at *26 (Del. Ch. May 16, 2002) ("hourly rate represented by a fee award is a secondary consideration, the first issue being the size of the benefit created"). In this case, that sanity check reveals the Fee and Expense Award to be reasonable.

Here, from inception through the December 15, 2023 agreement in principle to the Settlement, Plaintiffs' Counsel expended a total of 1,265 hours, for a combined lodestar of $996,895; and, from December 16, 2023 to the present, Plaintiffs' Counsel expended an additional 148.95 hours, representing an additional $111,947.50 in lodestar, negotiating and revising the Term Sheet and Stipulation, administering notice, and drafting this motion. Bennett Aff., Exs. 5-7 (Firm Time and Expense Affidavits) at ¶¶4-5. The fee portion of the Fee and Expense Award represents a 1.065 lodestar multiplier and an implied rate of just $839 per hour for counsel's pre-Settlement work, and a 0.96 lodestar multiplier and an implied rate of just $751 per hour for all of Plaintiffs' Counsel's work.

These metrics are comparable to – and, indeed, well below – those awarded in other cases and are thus fair and reasonable, especially given the substantial benefit conferred and the complexity of the issues presented. *See* Appendix A; *Franklin Balance Sheet Inv. Fund v. Crowley*, C.A. No. 888-VCP, 2007 Del. Ch. LEXIS 133, at *46 (Del. Ch. Aug. 30, 2007) (fee award represented hourly rate of $4,023 per hour); *In re NCS Healthcare, Inc. S'holder Litig.*, C.A. No. 19786, 2003 Del. Ch. LEXIS 56, at *12 (Del. Ch. May 28, 2003) (fee award represented hourly rate of $3,030 per hour).

c. Counsel Worked on an Entirely Contingent Basis

The contingent nature of the attorneys' representation is the "second most important factor considered by this Court" in awarding attorneys' fees. *Dow Jones & Co. v. Shields*, No. 184, 1991, 1992 Del Ch. LEXIS 24, at *6 (Del. 1992). In this case, Plaintiffs' Counsel undertook representation in this case on a wholly contingent basis for more than three years, which required the allocation of considerable resources. In such circumstances, a premium over counsel's normal hourly rate is appropriate. *Seinfeld v. Coker*, 847 A.2d 330, 333-34 (Del. Ch. 2000) ("If the fee is large enough to cover both their lost opportunity costs and the risks associated with bringing the suit, as well as provide a premium, it should induce monitoring behavior."); *Ryan*, 2009 Del. Ch. LEXIS 1, at *42 ("attorney may be entitled to a much larger fee when the compensation is contingent than when it is fixed on an

hourly or contractual basis"); *In re Plains Res., Inc. S'holders Litig.*, C.A. No. 071-N, 2005 Del. Ch. LEXIS 12, at *22 (Del. Ch. Feb. 4, 2005) ("[P]laintiffs' counsel were all retained on a contingent fee basis, and stood to gain nothing unless the litigation was successful. It is consistent with the public policy of Delaware to reward this risk-taking in the interests of shareholders.").

That is all the more true in a case like this, where, in light of the relatively small deal value, the potential recovery was small, but the expenses of litigation were nonetheless significant. Indeed, Plaintiffs' Counsel advanced almost $100,000 in unreimbursed expenses for litigation, discovery, and mediation costs – without reimbursement, on a fully contingent basis, and without any guarantee of recovery. Bennett Aff., Exs. 5-7 (Firm Time and Expense Affidavits) at ¶6. They were also prepared to undertake the considerable expenses of further discovery, motion practice, and trial, if necessary. Plaintiffs' Counsel had to advance these funds with the knowledge that they might not be repaid. In addition, the resources devoted here could have been devoted elsewhere through the acceptance of other engagements. Accordingly, the contingent nature of this case and the preclusion of other work support the full award of fees and expenses.

d. Counsel's Standing Supports the Requested Award

The standing and ability of counsel is another factor this Court considers when determining the reasonableness of a fee and expense award. *Sugarland*, 420 A.2d at

149-50. The standing of Plaintiffs' Counsel is well known to the Court – as is that of counsel for Defendants. Plaintiffs' Counsel have recently achieved significant recoveries for stockholders and changed the law in favor of stockholders. By way of example:

- In *Murphy v. Inman, et al,* Case No. 2017-159571-CB (Oakland Cty, MI) (Covisnt merger), one of Plaintiffs' Counsel devoted seven years to hard-fought litigation through an appeal to the Michigan Supreme Court, won a landmark decision recognizing direct claims in change in control transactions like mergers, and secured a $9 million settlement (pending approval), 5 weeks before the start a jury trial.

- In *Kurt Ziegler, et al. v. GW Pharm., PLC, et al.,* No. 3:21-cv-01019-BAS-MSB (S.D. Cal), Plaintiffs' Counsel secured a $7.75 million post-close, merger-related settlement for the class.

- In *Helen Moore v. Macquarie Infrastructure and Real Assets, et al*. (*Cleco Corporation Merger*), No. 251,417 c/w Nos. 251,456; 251,515; 252,446; 252,458; and 252,459, (9th JDC, Louisiana), one of Plaintiffs' Counsel secured a $37 million post-close, merger related settlement for the class, just one month from trial, and also secured a landmark Louisiana appellate decision finding that merger-related challenges are direct, and not derivative, in nature.

- In *Kenneth Riche v. James C. Pappas, et al*., No. 0177-JTL (Del. Ch. 2018), Plaintiff's Counsel secured a $6.5 million post-close, merger-related settlement after litigating the matter to the eve of trial.

- In *In re Am. Capital S'holder Litig.*, Case No. 422598-V (Montgomery Cir. Ct., MD, Feb. 16, 2018), Plaintiffs' Counsel secured a $17.5 million post-close settlement.

- In *Varjabedian v. Emulex Corp.*, 888 F.3d 399 (9th Cir. Apr. 20, 2018), one of Plaintiffs' Counsel obtained a landmark victory for stockholders in the 9th Circuit by lowering the standard of liability under Section 14(e) of the Exchange Act from scienter to negligence to better protect stockholders.

Plainly, Plaintiffs' Counsel could have focused their time and resources on other, potentially larger cases, but instead devoted their time and resources to this case, despite the relatively small damages model, just as they would larger cases, which likewise supports the full award of fees and expenses.

e. This Litigation Implicates Complex Issues

"All else equal, litigation that is challenging and complex supports a higher fee award." *Activision Blizzard*, 124 A.3d at 1072; *see also Del Monte*, 2011 Del. Ch. LEXIS 94, at *41. While all litigation is complex and inherently risky, class action stockholder litigation is notoriously so. Its outcome is less than certain, success at trial is far from guaranteed, and the risk of total loss – and, thus, no recovery of any kind – is very real. *Air Prods. and Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011) (plaintiffs' counsel received no recovery after judgment for defendants following two trials); *PLX Tech.*, 2018 Del. Ch. LEXIS 336, at *121 (finding liability after trial, but entering judgment in favor of defendant because plaintiffs failed to show damages). This case was unusually complex because it involved novel issues relating to closed-end investment funds operating as BDCs, whose values were based in part on and measured against the net asset value of the companies' assets under management, including the evaluation and analysis of the Company's corporate structure and governance, advisory and administration agreements, and the TSA relative to industry standards and market practices, and an

analysis of the Company's Credit Facility, leverage, and liquidity as it related to its ability to continue as a going concern. The relative complexities of the litigation further support the requested Fee Award.

3. The Expenses Incurred Are Reasonable

An award of out-of-pocket expenses is warranted where those expenses helped produce a benefit. Here, Plaintiffs request, as part of the all-in Fee and Expense Award, reimbursement of $93,264.21 in out-of-pocket expenses incurred by Plaintiffs' Counsel. The vast majority of these expenses were incurred in connection with experts and mediation. Bennett Aff., Exs. 5-7 (Firm Time and Expense Affidavits) at ¶6. In light of the stage of this litigation, these expenses are reasonable, and the Court should order their reimbursement.

* * *

Taking into account all of the *Sugarland* factors, Plaintiffs respectfully request that the Court exercise its discretion to award Plaintiffs' Counsel the requested all-in Fee and Expense Award of $1,155,000.00.

D. THE INCENTIVE AWARD SHOULD BE APPROVED

Finally, Class representatives like Plaintiffs are deserving of additional compensation for advocating on behalf of similarly situated stockholders and bearing the burdens associated with litigating, not just for themselves, but on behalf of other aggrieved stockholders. *See Raider v. Sunderland*, No. 19357 NC, 2006 Del.

Ch. LEXIS 4 (Del. Ch. Jan. 4, 2006) (citing the following cases: *In re Brooke Grp. Ltd. Litig.*, Del. Ch., C.A. No. 11838-VCC (May 26, 1992) ($10,000 payment to one plaintiff); *In re Intek Global Corp. S'holder Litig.*, Del. Ch., Consol. C.A. No. 17207-VCS (Apr. 24, 2000) (payments ranging from $5,000 to $10,000 to four named plaintiffs); *In re Commercial Assets Inc. S'holder Litig.*, Del. Ch., C.A. No. 17402-VCS (Aug. 3, 2000) ($5,000 to one plaintiff)); *In re IMH Secured Loan Fund Unitedholders Litig.*, C.A. No. 5516-VCS) (Del. Ch. July 26, 2013) (Order) (Ex. I ($2,500 to named plaintiff); *In re Atlas Energy, Inc. S'holders Litig.*, C.A. No. 5990-VCL (Del. Ch. Sept. 22, 2011) (Transcript) (Ex. J) ($10,000 and $5,000 to named plaintiffs); *In re Sauer-Danfoss, Inc. S'holders Litig.*, C.A. No. 8396-VCL (Del. Ch. June 19, 2017) (Order) (Ex. B) ($5,000 to named plaintiff).

The Supreme Court has noted that incentive awards usually are modest and should be supported by the factors outlined in *Raider*. *Isaacson v. Niedermayer*, 200 A.3d 1205, n.1 (Del. 2018) (citing *Raider*, 2006 Del. Ch. LEXIS 4 at *2). Pursuant to *Raider*, an incentive award to a class representative can be justified by two factors: (1) the time and effort of the class representative; and (2) the benefit to the class. *Raider*, 2006 Del. Ch. LEXIS 4, at *2.

Here, the modest requested incentive award of $2,500 each is warranted. Plaintiffs spent considerable time in connection with their role as Class Representatives by overseeing and participating in the litigation, including

discussing the case with counsel, reviewing pleadings, discussing discovery, and conferring with counsel regarding settlement negotiations and the Settlement. Bennett Aff., Exs. 3-4 (Plaintiffs' Affidavits) at ¶4. Plaintiffs played an integral role in procuring the benefit of the Settlement to the Class, and this willingness to devote their time and effort for the benefit of the Class and their contribution to the effective presentation of the claims warrants the $2,500 requested incentive award, *which will be paid from the Fee and Expense Award and will not reduce the Class recovery.*[11]

IV. CONCLUSION

For the foregoing reasons outlined above, Plaintiffs respectfully request that the Court (A) approve the Settlement, (B) certify the settlement Class, (C) approve Plaintiffs' Counsel's Fee and Expense Award, and (D) approve the Incentive Award.

[11] Finally, after providing the Notice to the Class, to date, not a single objection to the Settlement or the requested Fee and Expense Award or Incentive Award has been received. This silence confirms the quality of the Settlement and the propriety of application for the Fee and Expense Award and Incentive Award.

Dated: June 11, 2024

Respectfully submitted,

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