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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE HANDY & HARMAN, LTD STOCKHOLDERS LITIGATION	:	Consol. C.A. No. 2017-0882-TMR
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LEAD PLAINTIFF'S BRIEF IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Class Representative, Matthew Sciabacucchi (the "Lead Plaintiff"), by and through undersigned Class Counsel, respectfully submits this brief in support of his motion for (i) final approval of the proposed settlement (the "Settlement") resolving the above-captioned class action,[1] as set forth in the Stipulation and Agreement of Settlement dated July 9, 2019;[2] and (ii) an award of attorneys' fees and expenses (including a modest incentive award for Lead Plaintiff).

I. INTRODUCTION

This is a certified class action on behalf of the former stockholders of Handy & Harman Ltd.[3] The Action arises from a tender offer and merger in which H&H's controlling stockholder, Steel Partners Holdings LP,[4] acquired the remaining 30% of the shares of H&H common stock that it did not already own in exchange for 1.484 shares of newly issued shares of Steel's publicly traded 6.0% Series A Preferred Shares[5]—consideration worth approximately $32.63 per share of H&H.[6]

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[1] The "Action."

[2] The "Stipulation."

[3] "H&H."

[4] "Steel."

[5] "Series A Preferred" and the "Transaction."

[6] Based on the unaffected market price of the Series A Preferred.

The proposed Settlement will create a common fund of $30 million for the benefit of 2.78 million Class shares ($10.76 per share before fees and expenses). That is a 33% premium to the deal price—one of largest sell-side premiums ever achieved for stockholders through Delaware litigation.

The Settlement should be approved.

II. FACTS AND PROCEDURAL BACKGROUND

A. Steel Buys The 30% of H&H That It Does Not Own

H&H is a Delaware-incorporated, New York-headquartered corporation that manufacturers engineered niche industrial products. Steel owned a majority stake in H&H[7] ever since it emerged from a Chapter 11 restructuring in 2005. As of March 2017, Steel owned 70% of the Company's outstanding shares.

On March 3, 2017, Steel announced that it had made a proposal to the Board of H&H to acquire the remaining 30% of H&H shares that it did not already own through a tender offer of shares of Series A Preferred per share of H&H common stock—consideration that Steel valued at $29 per share of H&H. Steel's proposal was conditioned on approval by a special committee and required that a majority of minority stockholders tender their shares.

[7] Including its predecessor, WHX Corporation.

In response to Steel's proposal, the H&H board—which included Steel's controlling unitholder, Warren Lichtenstein, as well as Steel employees, Jack Howard, John McNamara, and Jeffrey Svoboda[8]—formed a Special Committee of purportedly independent directors: Robert Frankfurt, Patrick DeMarco, and Garen Smith.[9] The Special Committee retained Duff & Phelps and Graubard Miller as its financial and legal advisors, respectively.[10]

After several months of negotiations, Steel and H&H agreed to the Transaction. On June 26, 2017, the parties announced that Steel and H&H had signed a definitive merger agreement, pursuant to which Steel would acquire, via a tender offer, the remaining shares of H&H that it did not own, in exchange for 1.484 shares of Series A Preferred for each share of H&H. Based on the 30-day volume-weighted-average price of the Series A Preferred ($21.99/share),[11] this represented consideration of $32.63 per share of H&H.

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[8] Collectively, Lichtenstein, Howard, McNamara, and Svoboda are the "Steel Directors."

[9] Ex. 1 ("Proxy") at 9. The exhibits cited herein are attached to the accompanying transmittal affidavit of Aaron Nelson.

[10] *Id*. at 9-10.

[11] Ex. 2 at SC000142.

A majority of minority stockholders tendered their shares and the Transaction closed on October 11, 2017.

B. There Was Early Multi-Forum Skirmishing

H&H did not have a forum-selection clause in its certificate of incorporation or bylaws. So the early stages of this action followed, to some extent, a pattern from the days of pre-*Boilermakers*, multi-forum litigation.

The full history is recounted in Lead Plaintiff's briefing on class certification and a motion to intervene by certain out-of-state plaintiffs. In short, certain former H&H stockholders filed complaints in New York without access to internal books-and-records (the "New York Plaintiffs").[12] The consolidated complaint in the New York action named Frankfurt and Steel as the only two defendants.[13] With cooperation from those two defendants, the New York Plaintiffs agreed to a fast briefing schedule on a motion to dismiss. The New York court denied Steel's motion to dismiss but granted Frankfurt's motion, leaving the New York action without any director defendants or access to certain insurance policies.[14]

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[12] *Paskowitz v. Handy & Harman Ltd.*, No. 654747/2017 (N.Y. Sup. Ct.) and *Pill v. Steel Partners Holdings, L.P., et al*., Index No. 657304/2017E (N.Y. Sup. Ct. Dec. 11, 2017).

[13] *In Re Handy & Harman LTD. Stockholder Litigation*, No. 654747/2017 (N.Y. Sup. Ct.).

[14] Ex. 3.

Meanwhile, the Lead Plaintiff here sought books and records through a Section 220 demand. H&H ultimately agreed, on the eve of the Transaction closing, to produce banker books and board minutes.[15] It took another six weeks for H&H to produce the 220 Documents. After finally obtaining the 220 Documents, Lead Plaintiff filed suit in Delaware against all of the H&H Board members and Steel.

Defendants moved to dismiss in Delaware but refused to adopt a briefing schedule. Instead, they sought to stay this Action in deference to the New York Action.[16] The Court denied Defendants' motion to stay, holding that Lead Plaintiff's complaint was superior to the New York complaint because of key allegations "directly relat[ing] to the special committee's independence and the adequacy of Defendants' disclosures with respect to the merger" gleaned from the 220 Documents.[17] Defendants then agreed to answer the Delaware complaint.

As soon as Defendants agreed to answer, Lead Plaintiff quickly moved to certify a class in Delaware, arguing that "a prompt grant of class certification is necessary to protect H&H stockholders from a reverse-auction dynamic."[18] After

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[15] The "220 Documents."

[16] Trans. ID 61541684.

[17] Trans. ID 61829008.

[18] Trans. ID 61984047 at 2.

taking Lead Plaintiff's deposition, Defendants conceded that they had "no basis to oppose class certification."[19]

The New York Plaintiffs also sought to certify a class. Lead Plaintiff intervened in New York to oppose certification there on the grounds that overlapping class litigation would give Defendants additional shots at a dispositive ruling and create a reverse-auction dynamic. Lead Plaintiff's intervention was successful. The New York court denied the New York Plaintiffs' motion for class certification, conditioned on this Court (i) permitting the New York Plaintiffs to intervene here; and (ii) modifying its class certification order to allow Class members to submit opt-out requests.[20] At Lead Plaintiff's request, the Court modified its class certification order to allow opt-outs.[21]

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[19] Ex. 4 at 6.

During this period, Lead Plaintiff, the New York Plaintiffs, Defendants, and their insurance carriers attended an unsuccessful mediation on June 26, 2017. The Court also resolved a Delaware leadership dispute, appointing Lead Plaintiff and Class Counsel to lead the Delaware action.

[20] Ex. 5.

[21] Trans. ID 62329684. When the class was certified, notice was issued consistent with the Court's order. Approximately a dozen stockholders—including certain Defendants and other Steel officers who were already excluded from the Class definition—submitted opt-out forms.

The New York Plaintiffs then moved to intervene in Delaware and asked the Court to appoint the New York Plaintiffs and their counsel to lead the Delaware action. The Court allowed them to intervene, but denied the request to replace Lead Plaintiff and Class Counsel in their lead role.[22] The New York Plaintiffs and their counsel have not participated in this Action since.

C. The Parties Engage In Significant Discovery Targeting Both Process and Price

Throughout the course of the litigation, Lead Plaintiff and Class Counsel sought and obtained significant document productions from Defendants, their financial advisors, and other third parties.[23] The meet-and-confer negotiations were lengthy and frequently contentious. Through those efforts, including several threats of motion practice, Class Counsel was able to obtain, among other things, a costly retrieval, from backup tapes, of critical Excel models that had been deleted by Duff & Phelps. In total, Lead Plaintiff and Class Counsel obtained and reviewed over 230,000 pages of documents.

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[22] Trans. ID 62415286.

[23] Other targets of third-party discovery included H&H's actuarial firm, Willis Towers Watson, Frankfurt's fund, Myca Partners, and a startup company called Gooroo in which Frankfurt and Lichtenstein had co-invested shortly after the Transaction closed.

After document productions were substantially complete, the parties embarked upon an aggressive (and compressed) schedule of depositions. Before agreeing to the Settlement, Class Counsel took seven depositions of key fact witnesses, including:

- two of the three members of the Special Committee (DeMarco and Smith);
- three investment bankers (two from Steel's advisor, Corporate Fuel; and one from Duff & Phelps);
- Steel's CFO (Douglas Woodworth); and
- Steel's Senior VP Finance (Sharon Korinek).[24]

Lead Plaintiff and Class Counsel had also received—and incurred the expenses for—first drafts of expert reports from a corporate finance expert and an expert in the valuation of pension obligations.

D. The Parties Engage In Hard-Fought Negotiations And Ultimately Agree To Resolve The Action

All of the Director Defendants were covered by a directors and officers insurance policy obtained by H&H that provided $[redacted] in coverage. The Steel-

[24] Counsel had also prepared for—and were literally driving to the airport to attend—three additional depositions that were postponed, at the last minute, to preserve as much insurance money as possible to fund the Settlement. The deponents scheduled for that week included Frankfurt, Svoboda, and McNamara.

Depositions for Lichtenstein, Howard, and the leader of the Towers Watson team were scheduled to take place shortly thereafter and preparations for those depositions were also well underway.

affiliated Directors (and, arguably, Steel) were covered by four additional policies, obtained by Steel, which provided a total of $[redacted] in coverage (including for claims against them in their capacity as H&H directors). All of the policies were wasting policies, meaning that Defendants' litigation expenses were draining the policies and reducing the sums available to contribute to any settlement. The carriers also asserted various coverage defenses.

While depositions were ongoing, the parties agreed to a second mediation with a new mediator—JAMS mediator Robert Meyer—which was originally scheduled to take place on April 8, 2019. The parties engaged in settlement communications with Mr. Meyer and each other leading up to that date. As a result of those communications, on April 6, 2019, Class Counsel decided that the Lead Plaintiff would not participate in the mediation scheduled for April 8, although Defendants and their insurance carriers did attend.

As depositions continued, the parties and Mr. Meyer continued to speak. Ultimately, the parties agreed to attend yet another mediation in Los Angeles on May 7, 2019. Around 11:00 p.m. PST on May 7, 2019, the parties executed a term sheet providing for a $30 million settlement, contingent on Defendants' ability to secure adequate funding within a short time period. After further negotiations amongst

Lead Plaintiff, Defendants, and their carriers, Defendants confirmed that they had secured adequate funding for the Settlement.[25]

The parties then negotiated and executed a formal Stipulation of Settlement. Notice of the Settlement was issued to the Class consistent with the Court's scheduling order of July 31, 2019. To date, Lead Plaintiff and Class Counsel have not received any objections.

III. ARGUMENT

A. The Applicable Standard

"The settlement of a class … action requires court approval."[26] To approve a class settlement, the Court "must make an independent determination, through the exercise of its own business judgment, that the settlement is intrinsically fair and reasonable."[27] In evaluating the fairness of the settlement, the critical inquiry is weighing the "give" (*i.e.*, the value of the claims released) against the "get" (*i.e.*, the value of the consideration obtained).[28] "[T]he court's role … is to determine whether

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[25] Class Counsel understand that the $30 million common fund reflects significant contributions from both Steel and its carriers, as substantially less than $30 million in coverage was available by the time of the Settlement.

[26] *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1042 (Del. Ch. 2015).

[27] *Goodrich v. E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1045 (Del. 1996).

[28] *Activision*, 124 A.3d at 1043.

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."[29] Other factors that must be considered include the fairness of the allocation amongst class members and the process by which the Settlement was reached.

B. The Settlement Represents A 33% Premium To The Deal Price

The "get" is remarkable. There are approximately 2.78 million shares in the Class.[30] $30 million divided by 2.78 million is $10.76 per share, which is a 33% premium to the deal price of $32.63/share.

This is one of largest premiums achieved for stockholders in Delaware litigation in recent memory. Class Counsel are aware of only two cases with a larger premium: *Southern Peru*, a buyer-side case, in which "[t]he Plaintiff's attorneys established at trial that Southern Peru had agreed to overpay its controlling

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[29] *Id.* at 1064 (cleaned up).

[30]

12,221,431	Shares outstanding at the time the Transactions closed
(8,560,592)	Shares owned by Steel
(737,326)	Shares owned by the Individual Defendants
(142,617)	Shares owned by stockholder that sought appraisal, released all claims in a private settlement and is excluded from the Class
2,780,896	**Total Shares in the Class**

shareholder by more than fifty percent"[31] and *Chaparral*, a sell-side case in which counsel obtained a 45% premium.[32]

The 33% premium achieved here is a larger premium than those obtained at trial in *Rural Metro* (24%),[33] or *Dole* (20%),[34] or through settlements in *Calamos* (23%),[35] *ExamWorks* (6.1%),[36] *Del Monte* (2.6%),[37] *Starz* (2.1%),[38] or *El Paso* (less than 1%).[39] Cornerstone Research has published analyses of every cash settlement

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[31] *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1256 (Del. 2012).

[32] Plaintiff's Brief In Support of Proposed Settlement, *In re Chaparral Resources, Inc. S'holders Litig.*, Consol. C.A. No. 2001-VCL (Del. Ch. Mar. 6, 2008) (Trans. ID 18892498).

[33] *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 226 (Del. Ch. 2014) ("The members of the Class received $17.25 in the Merger and … suffered damages of $4.17 per share.").

[34] *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *2 (Del. Ch. Aug. 27, 2015) ($13.50 deal price; damages of $2.74 per share).

[35] *In re Calamos Asset Mgmt., Inc. S'holder Litig.*, Consol. C.A. No. 2017-0058-JTL-KSJM, Tr. at 93-94 (Del. Ch. Apr. 25, 2019) (Ex. 6) ("the amount of cash to the class achieved as a result of the settlement is 23 percent of the buyout price. That is an excellent result.").

[36] Brief in Support of Final Approval, *City of Daytona Beach Police and Fire Pension Fund v. ExamWorks Grp., Inc.*, C.A. No. 12481-VCL (Del. Ch. Aug. 29, 2017) (Trans. ID 61044649).

[37] *In re Del Monte Foods Company S'holders Litig.*, C.A. No. 6027-VCL, Tr. at 44, 54 (Del. Ch. Dec. 1, 2011) (Ex. 7) (settlement amount was "slightly under $0.50 a share" and deal price was $19 per share).

[38] *In re Starz S'holder Litig.*, Consol. C.A. No. 12584-VCG, Tr. at 6 (Del. Ch. Dec. 10, 2018) (Ex. 8).

[39] Brief In Support of Motion for Final Approval, *In re El Paso Corp. S'holder Litig.*,

of merger litigation from 2010 through the first half of 2016. As set forth in Appendix A, the Settlement appears to reflect a larger premium than any of the settlements identified by Cornerstone Research.

To be sure, many of these settlements—with the exception of *Dole*, *Calamos*, and *Starz*—were not controlling-stockholder transactions, but as the Cornerstone Research data demonstrates, there are not many comparable data points for settlements of controller acquisitions. Prior to *MFW*, almost all controller buyouts were resolved through the so-called "*Cox Communications* Kabuki dance" in which lawsuits were filed before the merger agreement was signed and plaintiffs' counsel signed off on whatever the special committee was able to negotiate.[40] Post-*MFW*,

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A. No. 6949-CS, at 2, 6, 21 (Del. Ch. Nov. 8, 2012) (Trans. ID 47625483) ($110 million settlement, 773 million shares outstanding, $26.87/share deal price).

[40] *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 945 (Del. Ch. 2010).

In the *Cox Communications* dance, "instead of suing once a controller actually sign[ed] up a merger agreement with a special committee of independent directors, plaintiffs [would] sue as soon as there [was] a public announcement of the controller's intention to propose a merger. … After the suits [we]re filed, the special committee [would begin to negotiate,]" while the "litigation [would] remain[] dormant for the obvious reason that there [was] no agreed-upon transaction to challenge, by way of injunction or otherwise." *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 620–21 (Del. Ch. 2005).

Then, "the controller [would] frame[] the negotiation with the special committee in a manner so that it [could] assure itself that the special committee [was] likely to accept a particular price subject to the negotiation of an acceptable merger agreement and the delivery of a final fairness opinion from the special committee's financial advisor. When that price [was] known but before there [was] a definitive deal,

suits challenging controller buyouts are often dismissed on the pleadings.[41]

In addition to *Dole, Starz,* and *Calamos,* Class Counsel are aware of two other recent examples of settlements of controller buyouts: *CNX Gas,* which resulted in a 7% premium to the deal price,[42] and *Cornerstone Therapeutics,* which resulted in a 25% premium to deal price.[43] At the settlement hearing in *Cornerstone*, plaintiffs' counsel suggested that the 25% premium was "almost unique" in terms of "a percentage increase of the merger consideration," and Vice Chancellor Glasscock agreed that the result was "exceptionally fine," and "almost nothing short of the best

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defense counsel (who by now [had] a sense of the plaintiffs' bargaining position) ma[de] its 'final and best offer' to plaintiffs' counsel. The plaintiffs' counsel then accept[ed] via an MOU … subject to confirmatory discovery." *Id.*

"[I]n every instance, the plaintiffs' lawyers … concluded that the price obtained by the special committee was sufficiently attractive, that the acceptance of a settlement at that price was warranted." *Id.*

[41] *See, e.g., Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 755 (Del. 2018); *In re Books-A-Million, Inc. S'holders Litig.*, 2016 WL 5874974 (Del. Ch. Oct. 10, 2016), *aff'd,* 164 A.3d 56 (Del. 2017).

[42] *In re CNX Gas Corp. S'holders Litig.*, C.A. No. 5377-VCL, Tr. at 6 (Del. Ch. Aug. 23, 2013) (Ex. 9) ("We believe that the settlement is remarkable in the sense that we've achieved a $42.73 million cash payment to the class, which represents a 7.2 percent increase in the tender offer consideration which, based on our calculations, is the highest that we could find of recent vintage in the Court of Chancery.").

[43] Brief in Support of Final Approval, *In re Cornerstone Therapeutics, Inc. S'holder Litig.*, C.A. No. 8922-VCG, at 2 (Del. Ch. Jan. 17, 2017) (Trans. ID 60076677).

that could have been hoped for."[44]

C. The Class Had Strong Liability Claims But Faced Serious Risks Regarding Damages

The near-record "get" supports the "give": a global release of the Class's claims. In evaluating the "give," Class Counsel focused on two key variables: the likelihood of establishing liability and the likely recoverable damages.

1) This Was Probably An Entire Fairness Case and Defendants Probably Could Not Have Proved That The Process Was Fair

The most significant driver of liability was the standard of review.

Defendants asserted that the applicable standard of review was business judgment, arguing that they complied with the requirements of *MFW*, insofar as Steel's offer was conditioned on special committee approval and a majority of minority stockholders tendering their shares. To obtain entire-fairness review, Lead Plaintiff and the Class would have had to prove that (i) the Special Committee was not independent or adequately empowered or (ii) the stockholders who tendered their shares were coerced or not fully informed.[45]

In Class Counsel's judgment, Lead Plaintiff likely would have been able to make this showing. Discovery (including the 220 Documents produced before the

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[44] *In re Cornerstone Therapeutics, Inc. S'holder Litig.*, C.A. No. 8922-VCG, Tr. at 7, 25, 26 (Del. Ch. Jan. 26, 2017) (Ex. 10).

[45] *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014).

complaint was filed) revealed several serious disclosure and process problems.

i. Undisclosed Error in Duff & Phelps' DCF Model. The Schedule 14D-9 issued to stockholders (the "Proxy")[46] stated that in its discounted cash flow analysis, "Duff & Phelps calculated HNH's terminal value in 2021 using a perpetuity growth formula."[47]

In fact, due to an error in the perpetuity growth formula in Duff & Phelps' model, Duff & Phelps actually calculated H&H's terminal value [redacted][48]

[redacted][49]

ii. Undisclosed Duff & Phelps Conflicts. The Proxy disclosed that Duff & Phelps had previously represented the special committees of three Steel affiliates in transactions with Steel: Steel Excel Inc., DGT Holdings Corp. and CoSine Communications, Inc.[50]

What the Proxy failed to disclose was that in the weeks prior to its offer, Steel

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[46] Proxy.

[47] *Id.* at 24.

[48] Ex. 11 ("Gregory Tr.") at 131.

[49] *Id.* at 132.

[50] Proxy at 33.

and Duff & Phelps (led by the same lead banker) had discussed the potential for [redacted] [51] Previously, that same banker had also had discussions with Steel about Duff & Phelps [redacted] [52]

iii. Undisclosed Change To Duff & Phelps' Pension Valuation. With the Proxy, stockholders were given a copy of Duff & Phelps' final banker book. Steel told the SEC—in a document publicly filed before the tender closed—that earlier versions of the Duff & Phelps banker books "included the same valuation methodologies[,] ... were substantially identical in form to the final presentation," and "present[ed] the same analyses[.]"[53]

As the lead Duff & Phelps banker conceded at his deposition, however, Duff & Phelps did not use the same valuation methodology in its final presentation [redacted]

[51] Ex. 12 at DP0006487; Gregory Tr. at 28-31.

[52] Gregory Tr. at 25-26.

[53] Ex. 13 at 6.

[54] Gregory Tr. at 87.

[redacted][55] But in the final presentation—at the urging of Steel and its advisor, Corporate Fuel—Duff & Phelps estimated the impact of H&H's unfunded liability by using the "Termination Method": estimating the after-tax cost of terminating the pension plan.[56] Using the Termination Method [redacted].

iv. Problems With The Advisor-Selection Process. The Proxy told stockholders that "in consultation with the other special committee members, [the Chair of the Special Committee] Mr. Frankfurt identified, interviewed and negotiated retention terms with potential independent financial advisors and legal counsel to the special committee."[57]

In fact, the potential financial and legal advisors were identified not by Frankfurt [redacted]

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[55] Gregory Tr. at 87; Ex. 14 at SPLP0000066.

[56] Gregory Tr. at 76; Ex. 2 at SC000108.

The "Background of the Offer" narrative in the Proxy did describe some of the back-and-forth between Corporate Fuel and Duff & Phelps regarding the impact of H&H's underfunded pension liability, but only mentioned a disagreement about whether the pension liability should be treated on a pre-tax or after-tax basis. [redacted].

[57] Proxy at 9.

[redacted].[58] [redacted]

[redacted].[59] Shortly after, he hired Duff & Phelps.

v. Undisclosed Relationship Between Frankfurt and Lichtenstein. The Proxy stated that the Chair of the H&H Special Committee, Robert Frankfurt, was "independent."[60]

In fact, Frankfurt has a long-standing relationship with Warren Lichtenstein (the founder, CEO, Chairman, and largest stockholder of Steel Partners) and describes Lichtenstein as [redacted][61] Less than a week after Steel Partners made the initial offer to H&H, Lichtenstein emailed Frankfurt [redacted]

[58] Ex. 15 at SPLP0018861; Ex. 16 at SC000557. *Compare with Kahn v. Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997) ("the selection of professional advisors for the Special Committee doesn't give comfort; it raises questions. Notably, Tremont's General Counsel suggested the name of an appropriate legal counsel to the Special Committee, and that individual was promptly retained. The Special Committee chose as its financial advisor a bank which had lucrative past dealings with Simmons-related companies") (cleaned up); *Kahn v. Dairy Mart Convenience Stores, Inc.*, 1996 WL 159628, at *8 (Del. Ch. Mar. 29, 1996) (similar).

[59] Ex. 17 at SC001734.

[60] Proxy at 9.

[61] Ex. 18 at SC002591.

[redacted][62] [redacted] Frankfurt replied.[63] Shortly after the Transaction closed, [redacted][64]

Earlier in their relationship, Frankfurt and Lichtenstein met in college, briefly lived together after college, and worked together at Steel Partners for many years after that. [redacted].[65]

2) The Class Faced Serious Risks Regarding Damages

Given the serious process and disclosure problems outlined above, Class Counsel believed that there was a strong likelihood that *MFW* would not apply and that Defendants would bear the burden of proving a fair price. Class Counsel had serious concerns, however, about whether it would be possible to obtain a damages award larger than the Settlement.

i. H&H's Market Price and Deal Price Would Have Been A Drag On Our Ability To Obtain A Larger Damages Award. In a string of recent cases,[66] the

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[62] Ex. 19 at SC001813. [redacted]

[63] *Id.* [redacted]

[64] Ex. 20 at GooRoo_0000123; Ex. 21 at GooRoo_0001863.

[65] Ex. 22 (Smith Tr.) at 72; Ex. 23 (DeMarco Tr.) at 56.

[66] *Aruba*, *Dell*, and *DFC* were appraisal cases, but "the fair price inquiry in a

Supreme Court has emphasized that courts should give significant weight to "real-world" evidence of fair value, including the unaffected market price and the deal price.[67] To be sure, neither *Aruba* nor *Dell* nor *DFC* involved a buyout by a majority stockholder. But even in cases with a controller or significant process problems, the Court has given significant weight to unaffected market price and deal price as a "reality check."[68]

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fiduciary duty claim is largely equivalent to the fair value determination in an appraisal proceeding[.]" *Owen v. Cannon*, 2015 WL 3819204, at *31 (Del. Ch. June 17, 2015).

[67] *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2019 WL 1614026, at *6 (Del. Apr. 16, 2019) ("the price a stock trades at in an efficient market is an important indicator of its economic value."); *see also Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 24 (Del. 2017) ("The price produced by an efficient market is generally a more reliable assessment of fair value than the view of a single analyst, especially an expert witness who caters her valuation to the litigation imperatives of a well-heeled client."); *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 369–70 (Del. 2017) ("Market prices are typically viewed superior to other valuation techniques because, unlike, *e.g.*, a single person's discounted cash flow model, the market price should distill the collective judgment of the many based on all the publicly available information about a given company and the value of its shares.").

[68] *See, e.g.*, *Blueblade Capital Opportunities LLC v. Norcraft Companies, Inc.*, 2018 WL 3602940, at *39 (Del. Ch. July 27, 2018) ("the Merger Price is not a reliable indicator of … fair value…, however, … it is appropriate to consider the Merger Price as a 'reality check' on the Court's DCF valuation[.]"); *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *56 (Del. Ch. Oct. 16, 2018) ("The real-world market evidence from the sale process provides another reason to reject the plaintiffs' damages case.") *aff'd*, 2018, 2019 WL 2144476 (Del. May 16, 2019); *In re AOL Inc.*, 2018 WL 1037450, at *21 (Del. Ch. Feb. 23, 2018) ("While the deal process was not *Dell* Compliant and thus not entitled to deference as a reliable

The Transaction was not "*Dell* Compliant" and the market for H&H stock was not efficient, so the market price and deal price would not have been dispositive. But Class Counsel believed there was a significant risk that the Court would be reluctant to credit a DCF analysis that yielded a value for H&H reflecting a premium much higher than the 55% premium to unaffected market price achieved through the Settlement.[69]

ii. Other Key Variables In the Damages Analysis. Because this was a controller buyout, Class Counsel believed that the Court would perform a discounted cash flow analysis—subject to a reality check against real-world market evidence—to determine a fair price for H&H. "The basic premise underlying the DCF methodology is that the value of a company is equal to the value of its projected future cash flows, discounted at the opportunity cost of capital. Put simply, the DCF

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indicator of fair value, it was sufficiently robust that I use the deal price as a 'check' on my analysis, while granting it zero explicit weight."); *ACP Master, Ltd. v. Sprint Corporation*, 2017 WL 3421142, at *28 (Del. Ch. July 21, 2017), *aff'd*, 184 A.3d 1291 (Del. 2018).

[69] H&H's unaffected market price (the closing price on March 6, 2017—the day before Steel's offer was made public) was $28.05. The deal price was $32.63. The Settlement provides an additional $10.76 per share, meaning the total consideration for Class members (before fees and expenses) reflects a 55% premium to H&H's unaffected market price and a 33% premium to deal price.

method involves three basic components: (i) cash flow projections; (ii) a terminal value; and (iii) a discount rate" to calculate enterprise value.[70]

(a) *Cash Flow Projections.* "When performing a DCF analysis to determine the fair value of stock, Delaware courts tend to place great weight on contemporaneous management projections because management ordinarily has the best first-hand knowledge of a company's operations."[71] Here, Class Counsel made a strategic choice to obtain testimony that locked Defendants into the projections that Duff & Phelps used because those projections would support significant damages once the other changes discussed below were made.[72]

(b) Discount Rate. The discount rate is usually calculated "based upon the subject company's [weighted average] cost of capital [("WACC")]. WACC is the sum of: (1) the percentage of the company's capital structure that is financed with equity, multiplied by the company's cost of equity capital, *plus* (2) the percentage of the company's capital structure that is financed with debt, multiplied by its after-tax

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[70] *In re Orchard Enterprises, Inc.*, 2012 WL 2923305, at *12 (Del. Ch. July 18, 2012).

[71] *Cannon*, 2015 WL 3819204, at *18.

[72] We would have also argued that the Court should consider the (slightly higher and more recent) projections that Corporate Fuel used.

cost of debt."[73]

While Class Counsel believed it might be possible to convince the Court to make certain marginal adjustments to various inputs to the cost-of-equity-capital calculation, the most significant variable in this case related to the choice of capital structure.[74] (The greater the weight given to H&H's cost of debt, the lower the WACC, and, thus, the higher the value of the Company.)

Defendants' position—which mirrored Duff & Phelps' approach—was that the Court should use the Company's projected capital structure, in which debt made up 10% to 20% of the capital structure. Lead Plaintiff would have tried to persuade the Court to use the Company's actual capital structure, in which debt made up almost 40% of the capital structure. Under the former approach, Duff & Phelps calculated a midpoint WACC of 12%. The latter approach would yield a WACC of approximately 11%, which would have increased H&H's value by over $10 per share relative to Duff & Phelps' analysis.

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[73] *In re Emerging Commc'ns, Inc. S'holders Litig.*,2004 WL 1305745, at *16 (Del. Ch. May 3, 2004).

[74] This is frequently true. *See, e.g.*, *Crescent/Mach I P'ship, L.P. v. Turner*, 2007 WL 2801387, at *12 (Del. Ch. May 2, 2007) ("The goal of the discount rate is to capture the effects of the company's capital structure (and all that that encompasses) on its fair value.").

Although a number of cases endorse the use of actual capital structure,[75] the Court has also suggested that a target/expected capital structure can be appropriate, where, as here, the capital structure is in flux or projected to change.[76] Based on the evidence in this case—including H&H's management projections, which showed declining leverage over time—Class Counsel believed there was a strong likelihood that the Court would rely on H&H's expected capital structure.

(c) *Terminal Value.* The Court typically uses the Gordon Growth method

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[75] *See, e.g.*, *Cede & Co. v. JRC Acq. Corp.*, 2004 WL 286963, at *7 (Del. Ch. Feb. 10, 2004) ("the fact that the merger did not enhance JR Cigar's ability to borrow does not condone ignoring its actual capital structure in favor of some 'optimal capital structure.'"); *MacLane Gas Co., P'ship v. Enserch Corp.*, 1992 WL 368614, at *22 n.13 (Del. Ch. Dec. 11, 1992) ("I employ EP's actual debt to equity ratio in making the WACC calculation. … [P]laintiff is entitled to the value of EP, not some theoretical entity…"), *aff'd sub nom. Enserch Corp. v. MacLane Gas Co.*, L.P., 633 A.2d 369 (Del. 1993); *In re Radiology Assocs. Inc. Litig.*, 611 A.2d 485, 493 (Del. Ch. 1991) ("the use of the industry average rather than Radiology's actual capital structure was improper. The entire focus of the discounted cash flow analysis is to determine the fair value of Radiology. I am not attempting to determine the potential maximum value of the company. Rather, I must value Radiology, not some theoretical company.").

[76] *See Blueblade*, 2018 WL 3602940, at *35 ("[T]here are instances where using a target capital structure … would be appropriate, especially where the target's capital structure is in flux[.]"); *Gearreald v. Just Care, Inc.*, 2012 WL 1569818, at *8 (Del. Ch. Apr. 30, 2012) ("I find that the correct capital structure for an appraisal of Just Care is the theoretical capital structure it would have maintained as a going concern."); *In re Emerging Commc'ns, Inc. S'olders Litig.*, 2004 WL 1305745, at *17 (Del. Ch. May 3, 2004) ("One treatise instructs that the appropriate weights to use to define the firm's capital structure in calculating the WACC ... are the firm's long run target weights[.]") (cleaned up).

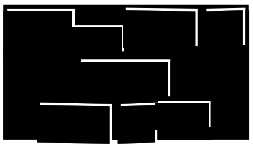
to calculate the terminal value in a DCF.[77] Duff & Phelps used that method, but, as noted above, made a critical error. The correct formula for calculating the present value of the terminal value is:

$$\frac{FCF_n(1+g)}{\frac{k-g}{(1+k)^n}}$$

Where:

FCF_n:	Normalized free cash flows in the last period of the discrete cash flow projections
n:	the number of periods in the discrete cash flow projections
g:	The expected long-term sustainable growth rate in free cash flows, starting with the last period of the discrete projections as the base year
k:	Discount rate (cost of capital)

The formula that Duff & Phelps used, however, was:[78]



[77] *Crescent/Mach I P'ship, L.P. v. Turner*, 2007 WL 2801387, at *14 (Del. Ch. May 2, 2007) ("Appraisal actions have used the Gordon Growth method to determine the appropriate terminal value in a DCF calculation.").

[78] *See* Gregory Tr. at 205 ("[redacted]

By [redacted]

[redacted][79] At trial, however, Defendants would likely have been able to mitigate the impact of this change by arguing for a lower perpetuity growth rate (*g*) than the 3.25% rate used by Duff & Phelps.[80]

(d) *Pension Liability.* After calculating H&H's enterprise value via a DCF analysis, the Court would have then been required to make additional adjustments to determine the Company's equity value. Often, this is a simple exercise, in which

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[redacted]

[79] Gregory Tr. at 131-132.

[80] In recent cases, the Court has calculated a perpetuity growth rate by calculating the midpoint of the expected inflation rate and GDP growth. *Sprint*, 2017 WL 3421142, at *36 (Del. Ch. July 21, 2017) (adopting perpetuity growth rate of 3.35% rate, "which represents the mid-point of inflation rate and GDP growth."); *In re Appraisal of SWS Grp., Inc.*, 2017 WL 2334852, at *16 (Del. Ch. May 30, 2017) (adopting a 3.35% terminal growth rate "derived from the midpoint of the long term-expected inflation rate of 2.3% and the long-term expected economic growth rate of the economy at large of 4.4%.").

Here, the midpoint between expected inflation of 2.20% (at the low-end) and expected nominal U.S. GDP growth of 3.92% was 3.06%.

the equity value is the enterprise value minus debt plus cash.[81] In this case, however, there was another significant variable that would have been a major battleground in the fair-price fight at trial: the impact of H&H's underfunded pension liability.

As discussed above, [redacted]

The Termination Method valued H&H's pension liabilities using an analysis by H&H's actuary (Willis Towers Watson) of the projected cost to terminate the pension plan outright (through lump-sum payments and annuity purchases).[83] This [redacted].[84]

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[81] *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 503 n.41 (Del. Ch. 2010).

[82] Ex. 14 at SPLP0000066.

[83] Gregory Tr. at 68-69.

[84] Based on the midpoint of that range.

Class Counsel believed it was likely that the Court would reject the Termination Method. Both of Lead Plaintiff's experts would have opined that the Termination Method was an inappropriate method of valuing H&H's underfunded pension liability. The lead investment bankers for both Duff & Phelps and Corporate Fuel conceded [redacted][85] And [redacted][86]

Lead Plaintiff would have argued that the Court should value the impact of H&H's underfunded pension using either the GAAP Method or the "ERISA

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[85] Gregory Tr. at 80-81 [redacted]

[86] Ex. 25 ("Luczyk Tr.") at 34 [redacted]; Gregory Tr. at 120-121.

Method," which is the method used to determine long-term funding requirements pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA").[87]

If Lead Plaintiff convinced the Court to use the ERISA Method, that would have increased H&H's value by another $6.15 per share (relative to the GAAP Method). But many of the same criticisms that applied to the Termination Method would apply equally to the ERISA Method. Class Counsel could not identify precedents for the use of either method to value underfunded pension obligations in a sale transaction.

(e) *Value of the Series A Preferred.* The final key variable in calculating damages was the value of the Steel Series A Preferred that was offered as consideration for Class members' common stock in H&H.[88] Class Counsel did not think that there was a serious risk that the Court would value the Preferred Stock by reference to the $25.00 per share liquidation price that Steel referenced in various public filings.[89] Lead Plaintiff would have argued that the Series A Preferred units

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[87] The primary difference between the GAAP Method and the ERISA Method is the method used to select the rate at which projected future contributions are discounted.

[88] Class members received 1.484 shares of Steel's Series A Preferred in exchange for each share of H&H.

[89] *In re Orchard Enterprises, Inc.*, 2012 WL 2923305, at *8 (Del. Ch. July 18, 2012) ("The value of the company under appraisal is not determined on a liquidated basis[.]"), *aff'd sub nom. Orchard Enterprises, Inc. v. Merlin Partners LP*, 2013 WL 1282001 (Del. Mar. 28, 2013)

should be valued based on their trading price: $21.99.[90] But the market for the Series A Preferred did not bear all of the hallmarks of efficiency: the shares were relatively thinly traded and not widely covered by analysts. Class Counsel believed there was a significant possibility that the Court would accept the $23.62/share intrinsic valuation for the Series A Preferred calculated by Duff & Phelps.[91]

iii. Total Recoverable Classwide Damages Would Likely Have Ranged From $37.6 Million To $62.7 Million. Based on the factors identified above, our experts advised us that classwide damages would, most likely, range from $37.6 million to $62.7 million depending on the approach that the Court used to value the Series A Preferred shares (market price vs. "intrinsic" value) and H&H's underfunded pension liability (GAAP Method vs. ERISA Method):

		Series A Preferred	
		"Intrinsic Value"	**Market Price**
Pension Liability	**GAAP**	$37.6M	$48.7M
	ERISA	$51.7M	$62.7M

The $30 million settlement, therefore, reflects a recovery of 48 to 79 cents on the dollar compared to the maximum realistically possible recovery—a remarkable result for Class members by any measure.

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[90] Ex. 2 at SC000142.

[91] Proxy at 32.

3) Class Counsel Considered Bringing Duff & Phelps Into The Case As A Defendant But Determined That Doing So Would Create Complications and Delays Without Increasing The Class' Recovery

Given Duff & Phelps' [redacted], Class Counsel gave serious consideration to bringing claims against Duff & Phelps but ultimately determined not to do so.

Most importantly, Class Counsel did not think that a claim against Duff & Phelps would succeed. To bring an aiding-and-abetting claim, Lead Plaintiff would have had to show "knowing" participation—in other words, that Duff & Phelps acted with scienter.[92] Class Counsel's thorough investigation—including successful demands that Duff & Phelps take extraordinary steps to recover and restore earlier versions of its DCF model that had been deleted—uncovered no evidence that the error was intentional. And Duff & Phelps' lead banker testified—credibly, in Class Counsel's judgment—that Duff & Phelps [redacted][93]

Even if Lead Plaintiff could have convinced Steel to assign its negligence

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[92] *In re Rural Metro Corp.*, 88 A.3d 54, 97 (Del. Ch. 2014) ("The adjective 'knowing' modifies the concept of 'participation,' not breach. It is not the fiduciary that must act with scienter, but rather the aider and abettor.").

[93] Gregory Tr. at 133.

claim against Duff & Phelps to the Class,[94] Lead Plaintiff would have faced obstacles that were likely insurmountable. For one thing, under the law of New York [redacted],[95] the doctrine of *in pari delicto* prevents "a willful wrongdoer [*i.e.*, Steel] [from] suing someone who is alleged to be merely negligent [*i.e.*, Duff & Phelps]."[96] Moreover, Duff & Phelps' engagement agreement [redacted][97] Under New York law, "'gross negligence' … is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing."[98] Class Counsel did not believe that Duff & Phelps' error satisfied that demanding standard.

Given the strong likelihood that a claim against Duff & Phelps would fail and the delays and complications that adding Duff & Phelps would have caused, Class Counsel determined that the Class' interests were best served by maintaining the existing trial date and pushing forward against Steel and the Director Defendants.

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[94] *i.e.*, H&H's negligence claim, which Steel acquired along with the other assets of the Company.

[95] Ex. 26 at SC002170.

[96] *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464 (N.Y. Ct. App. 2010)

[97] Ex. 26 at SC002168.

[98] *Colnaghi, U.S.A., Ltd. v. Jewelers Prot. Servs., Ltd.*, 81 N.Y.2d 821, 823–24 (N.Y. Ct. App. 1993).

D. The Negotiation Process Further Supports The Settlement

Although the "give" and the "get" are the primary factors that the Court should consider in deciding whether to approve the Settlement, the Court must also carefully scrutinize the course of negotiations. The dangers of deal litigation in which plaintiffs obtain immaterial "additional disclosures [that] … are valueless to the shareholders,"[99] are well-known, but even in a case with a monetary recovery, the Court must ensure that the proposed settlement is not collusive or the product of a "reverse auction,"[100] and that plaintiff's counsel have not "shirk[ed]" their duty to "conduct[] a meaningful assessment of the claims before offering to settle."[101]

Here, Lead Plaintiff and Class Counsel went to great lengths to eliminate any reverse-auction dynamic—defeating Defendants' Motion to Stay, then quickly moving to certify a class in Delaware and intervening to defeat certification in New York (which soon led to the New York Plaintiffs dismissing that action). When the

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[99] *Rosenfeld v. Time Inc.*, 2018 WL 4177938, at *4 (S.D.N.Y. Aug. 30, 2018); *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1139 (Del. Ch. 2011) (describing typical disclosure-only litigation in which plaintiffs "filed fast, sat idle, then shifted into settlement mode. They conducted no adversarial discovery and obtained only the standard package of documents that defendants routinely provide to facilitate a disclosure-only settlement.").

[100] *In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011).

[101] *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 957 (Del. Ch. 2010).

parties sat down for the final mediation, Lead Plaintiff was the only person who could speak for the Class and Defendants had no ability to play one set of plaintiffs off another. The final two mediations were conducted with the assistance of Robert Meyer, a respected and experienced mediator who has helped resolve a number of major stockholder actions in this Court.[102] Even after the term sheet was signed, Defendants continued to attempt to negotiate the settlement amount.

Class Counsel are experienced and competent lawyers with a track record of success in stockholder litigation on both sides of the "v." They performed a careful investigation of the facts and a thoughtful assessment of the case's value. By the time of the mediation, document discovery was complete and Class Counsel had deposed the bankers, a majority of the Special Committee, and the key financial witnesses at Steel. The Court can appropriately give weight to Class Counsel's considered judgment that this Settlement is an excellent result for the Class.[103]

E. The Court Should Approve The Proposed Tweak To The Class Definition and Approve The Proposed Plan of Allocation

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[102] *Activision*, 124 A.3d at 1067 ("The manner in which the Settlement was reached provides further evidence of its reasonableness. It resulted from a protracted mediation conducted by a highly respected" mediator).

[103] *Doe v. Bradley*, 64 A.3d 379, 396 (Del. Sup. Ct. 2012) ("It is appropriate for the Court to consider the opinions of experienced counsel when determining the fairness of a proposed class action.").

Prior to the Settlement, Steel had reached a private settlement with a stockholder who had made an appraisal demand, in which that stockholder released all claims arising from the Transaction. For the avoidance of doubt, the parties asked the Court, in the Scheduling Order, to clarify the Class definition to make clear that the settling stockholder is excluded from the Class definition. The Court granted that request and there is no reason to revisit the Class definition again.

The Court should also approve the proposed plan of allocation, which contemplates distribution through record holders and the Depository Trust Company ("DTC"), rather than a process requiring the submission of claims forms and trading records to facilitate payments directly to beneficial holders. As Vice Chancellor Laster explained in *Dole*, "[d]istributing the [settlement] consideration through the record holders and DTC … makes sense because that is how the merger consideration was distributed. The settlement consideration can be viewed as incremental merger consideration that the class should have received. From that perspective, it should be distributed the same way. That outcome makes all the more sense because DTC … has an established procedure for distributing settlement payments for mergers that DTC has processed."[104]

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[104] *In re Dole Food Co., Inc.*, 2017 WL 624843, at *6 (Del. Ch. Feb. 15, 2017); *see also Chen v Howard-Anderson*, 2017 WL 944989, at *3 (Del. Ch. Mar. 09, 2017) ("[F]or future cases, distributing the settlement consideration in merger cases to

F. The Court Should Grant The Requested Fees, Expenses, and Incentive Award

1) The Sugarland Standard

In considering a fee award, the Court must apply the familiar factors: "1) the results achieved; 2) the time and effort of counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved."[105]

2) Counsel Achieved A Significant Benefit

"Delaware courts have assigned the greatest weight to the benefit achieved in litigation."[106] Here, this Settlement reflects one of largest premiums ever achieved in merger litigation. Counsel should be rewarded with a fee award of $8.1 million, which is 27% of the common fund before expenses.

This Court has very recently awarded 27% or more of the common fund in at least two cases at a similar stage. In *Cornerstone,* the Court approved an award of 27.5% of the common fund where class counsel had taken four depositions; engaged

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record holders from the outset would mitigate both pathologies and reduce overall administrative expenses, which in turn will benefit the class.") (cleaned up).

[105] *Ams. Mining*, 51 A.3d at 1254 (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980)).

[106] *Id.*

in some motion practice; and briefed an (unsuccessful) interlocutory appeal.[107] In *Southern Copper*, the Court awarded 27% of the common fund where counsel had taken four depositions and retained and begun working with damages experts.[108]

These are only the most recent examples. "This court has often approved fee requests of 30% or more of the benefits where," as here, "the settlement benefits are attributable solely to the litigation."[109]

3) Counsel Faced Contingent Risk Because Of The Complexities of Multi-Forum Litigation

Counsel are "entitled to a much larger fee" where, as here, "the compensation is contingent[.]"[110] To be sure, the Class had a strong liability case, which reduced the contingent risk. But this was still a highly complicated, multi-forum litigation with the ever-present threat of a reverse auction. Class Counsel faced a serious risk that Defendants would be able to obtain a cheaper settlement through the New York

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[107] *In re Cornerstone Therapeutics, Inc. S'holder Litig.*, No. 8922-VCG (Del. Ch. Jan. 26, 2017) (Transcript) (Ex. 10).

[108] *Lacey v. Larrea Mota-Velasco*, No. 11779-VCG, Order (Del. Ch. Jan. 4, 2019).

[109] *Marie Raymond Revocable Tr. v. MAT Five LLC*, 980 A.2d 388, 410 & n.71 (Del. Ch. 2008) (collecting cases) *aff'd sub nom. Whitson v. Marie Raymond Revocable Tr.*, 976 A.2d 172 (Del. 2009).

[110] *Ryan v. Gifford*, 2009 WL 18142, at *13 (Del. Ch. 2009).

action, leaving Class Counsel empty-handed.[111]

4) Counsel Invested Significant Time and Effort

"The time and effort expended by counsel is considered as a cross-check to guard against windfalls, particularly in therapeutic benefit cases."[112] Delaware has "explicitly disapproved the … lodestar method. Therefore, Delaware courts are not required to award fees based on hourly rates that may not be commensurate with the value of the common fund created by the attorneys' efforts."[113]

Here, Class Counsel spent 3,516.1 hours on this action through the date of the Stipulation and an initial 62.4 hours after that in finalizing the Settlement.[114] An additional supporting firm contributed 152.6 hours prior to the Stipulation.[115] The

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[111] *See, e.g.*, *In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 294 (Del. 2002) (refusing to award fees to counsel in competing out-of-state action); *In re Jefferies Grp., Inc S'holders Litig.*, 2015 WL 3540662, at *6 (Del. Ch. June 5, 2015) (same); *Allion*, 2011 WL 1135016, at *8 (same); *In re William Lyon Homes S'holder Litig.*, 2007 WL 270428, at *2 (Del. Ch. Jan. 18, 2007) (same).

[112] *In re Emerson Radio S'holder Deriv. Litig.*, 2011 WL 1135006, at *2 (Del. Ch. Mar. 28, 2011).

[113] *Theriault*, 51 A.3d at 1254.

[114] Leviton Aff. ¶¶11-13; Heyman Aff. ¶2.

[115] Garber Aff. ¶6.

requested fee award reflects an implied hourly rate of $2,263.52—generous, but hardly exorbitant given the success that Class Counsel achieved.[116]

5) Counsel Are Respected In This Court

Class Counsel are known to and have a significant track record of success representing stockholder plaintiffs in this Court.[117] Their standing and ability fully justify the fee award.[118]

6) Counsel's Expenses Were Reasonable And Should Be Reimbursed

In disclosure-only settlements and cases of that ilk, this Court frequently awards a single all-in figure for fees and expenses. But where, as here, counsel litigate for years and obtain a large common-fund recovery, the Court will

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[116] *Id.* at 1257 (affirming fee award of "approximately $35,000 an hour, if you look at it that way"); *Sciabacucchi v. Salzberg* ("*Salzberg II*"), 2019 WL 2913272, at *6 (Del. Ch.) ($11,262.26 per hour); *Activision*, 124 A.3d at 129 ($9,685 per hour); *City of Monroe Employees' Retirement System v. Murdoch*, 2018 WL 822498, at *3 (Del. Ch. Feb. 09, 2018) (order), 2018 WL 565520 (brief) ($3,979.15 per hour).

[117] *See, e.g.*, *In re Pilgrim's Pride Corp. Deriv. Litig.*, Consol. C.A. No. 2018-0058 (Del. Ch.) ($42.5 million settlement; final approval pending); *In re Tangoe, Inc. S'holder Litig.*, Consol. C.A. No. 2017-0650 (Del. Ch.) ($12.5 million settlement; final approval pending); *Sciabacucchi v. Salzberg* ("*Salzberg I*"), 2018 WL 6719718 (Del. Ch. Dec. 19, 2018); *Klein v. H.I.G. Capital, L.L.C.*, 2018 WL 6719717 (Del. Ch. Dec. 19, 2018); *Sciabacucchi v. Liberty Broadband Corp.*, 2018 WL 3599997 (Del. Ch. July 26, 2018); *Baker v. Sadiq*, 2016 WL 4375250 (Del. Ch. Aug. 16, 2016); *In re Google Inc. Class C S'holder Litig.*, Cons. C.A. No. 7469–CS (Del. Ch. Oct. 28, 2013) (Transcript) (Ex. 27).

[118] *Salzberg II*, 2019 WL 2913272, at *8 (same firms; "Plaintiff's counsel is well known to the court. Their skill and experience support the requested award.").

frequently—though not invariably—calculate the fee as a percentage of the gross common fund and award expenses separately.[119]

Counsel incurred a total of $280,239.08 in out-of-pocket expenses. Those expenses were reasonably and necessarily incurred in pursuit of this litigation on behalf of Lead Plaintiff and the Class.[120] Approximately 56% of the total expenses were expert fees paid or owed to Lead Plaintiff's experts. The remaining costs include mediation expenses, research costs, filing fees, travel expenses, and court reporting services and were all necessary to the successful prosecution of the Action.

7) The Court Should Approve A Modest Incentive Award For the Lead Plaintiff

Finally, the Court should approve the payment of a $10,000 incentive award to the Lead Plaintiff, to be paid out of the fees awarded to Class Counsel. The requested award is "reasonable and will be paid out of [Class] Counsel's fee, so [it will] not harm the class. [The requested award has] been fully disclosed and [is] not so large as to raise specters of conflicts of interest or improper lawyer-client

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[119] *See, e.g.*, *Ryan v. Gifford*, 2009 WL 18143, at *13–14 (Del. Ch. Jan. 2, 2009) (awarding one-third of the monetary portion of the settlement in fees plus $398,100.79 in expenses); *In re TD Banknorth S'holders Litig.*, 2009 WL 1834308 (Del.Ch. June 25, 2009) (approving fees of 27.5% of the gross common fund, plus expenses of $964,086.61); *In re TeleCommunications, Inc. S'holder Litig.*, C.A. No. 16470-CC (Del. Ch. Jan. 30, 2007) (awarding 30% of gross common fund, plus $827,658 in expenses).

[120] *See* Leviton Aff. ¶ 14; Heyman Aff. ¶ 3; Garber Aff. ¶ 8.

entanglements."[121]

The Supreme Court has recently re-affirmed that lead plaintiffs may be paid modest incentive awards, where justified by the factors identified in *Raider v. Sunderland*: (i) the time, effort, and expertise expended by the class representative, and (ii) the benefit to the class.[122]

Here, the Lead Plaintiff, Matthew Sciabacucchi, is a financial advisor who holds a bachelor's degree in accounting as well as an MBA. He is employed as a financial advisor by a subsidiary of Prudential Financial. In connection with this Action, in which class certification was briefed on an accelerated schedule, Mr. Sciabacucchi gathered and produced documents on an expedited basis. He spent a day in preparation for his deposition and provided testimony at that deposition. After reviewing Mr. Sciabacucchi's document production and taking his deposition, Defendants conceded that they had "no basis to oppose class certification."[123]

In *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, the Court awarded $20,000 to a

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[121] *In re Orchard Enterprises, Inc. S'holder Litig.*, 2014 WL 4181912, at *13 (Del. Ch. Aug. 22, 2014).

[122] *Isaacson v. Niedermayer*, 200 A.3d 1205, 1205 n.1 (Del. 2018) (citing *Raider v. Sunderland*, 2006 WL 75310, at *1 (Del. Ch. Jan. 4, 2006)).

[123] Ex. 4 at 6. Nonetheless, Mr. Sciabacucchi was required to endure scurrilous and utterly unsupported attacks on his integrity from a competing lead plaintiff candidate—allegations that the Court easily rejected.

class representative who "traveled to New Jersey to meet with counsel and to Wilmington to be deposed."[124] The Court has recently approved awards ranging from $5,000 to $100,000.[125] Given the significant benefit to the Class and Mr. Sciabacucchi's efforts on the Class's behalf, an award of $10,000 is appropriate.

IV. CONCLUSION

For all the foregoing reasons, the Court should approve the Settlement and award the requested fees, expenses, and incentive award.

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[124] 2012 WL 1655538, at *8 (Del. Ch. May 9, 2012).

[125] *Mesirov v Enbridge Energy Co., Inc.*, 2019 WL 690410, at *1 (Del. Ch. Feb. 18, 2019) (award of $7,500 to plaintiff); *Hignett v. Adams*, 2018 WL 4922098, at *3 (Del. Ch. Oct. 9, 2018) ($5,000 incentive awards to each of two lead plaintiffs); *In re Saba Software, Inc. S'holder Litig.*, 2018 WL 4620107, at *4 (Del.Ch. Sep. 26, 2018) ($100,000 award to lead plaintiff); *Doppelt v. Windstream Hldgs., Inc.*, 2018 WL 3069771, at *3 (Del. Ch. June 20, 2018) (awards of $15,000 and $7,500 to lead plaintiffs); *In re Physicians Formula Hldgs., Inc.*, 2017 WL 319058, at *4 (Del. Ch. Jan. 20, 2017) ($25,000 award to one lead plaintiff; $5,000 to the other).

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Dated: October 23, 2019

CERTIFICATE OF SERVICE

Aaron M. Nelson, Esquire, hereby certifies that on October 25, 2019, a copy of the foregoing Public Version of the Brief in Support of Final Approval of Settlement and Petition for an Award of Attorneys' Fees and Expenses was served electronically upon the following:

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