IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN CUMMING, derivatively on behalf of NEW SENIOR INVESTMENT GROUP, INC., Plaintiff, v. WESLEY R. EDENS, SUSAN GIVENS, VIRGIS W. COLBERT, MICHAEL D. MALONE, STUART A. MCFARLAND, CASSIA VAN DER HOOF HOLSTEIN, FIG LLC, FORTRESS OPERATING ENTITY I LP, FIG CORPORATION, HOLIDAY ACQUISITION HOLDINGS LLC, and FORTRESS INVESTMENT GROUP LLC, Defendants, and NEW SENIOR INVESTMENT GROUP, INC., Nominal Defendant.	C.A. No. 13007-VCS **PUBLIC VERSION** **FILED ON: JULY 17, 2019**

PLAINTIFF'S APPLICATION FOR APPROVAL OF THE SETTLEMENT, AN AWARD OF ATTORNEYS' FEES AND EXPENSES, AND A PLAINTIFF'S INCENTIVE AWARD

FRIEDLANDER & GORRIS P.A.

Jeffrey Gorris (Bar No. 5012)
Christopher M. Foulds (Bar No. 5169)
Christopher P. Quinn (Bar No. 5823)
1201 N. Market Street, Suite 2200
Wilmington, DE 19801
(302) 573-3500

Counsel for Plaintiff

OF COUNSEL:

Mark Lebovitch
David Wales
Edward Timlin
Tamara Gavrilova
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

Adam Warden
SAXENA WHITE P.A.
150 E. Palmetto Park Road, Suite 600
Boca Raton, FL 33432
(561) 394-3399

Steven B. Singer
Joshua H. Saltzman
SAXENA WHITE P.A.
10 Bank Street, 8th Floor
White Plains, New York 10604
(914) 437-8551

J. Elazar Fruchter
WOHL & FRUCHTER LLP
570 Lexington Avenue, 16th Floor
New York, NY 10022
(212) 758-4000

Dated: July 10, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(s)**

OTHER AUTHORITIES

> "I wanted to alert someone that these budget numbers rely upon these properties jumping over 10 percentage points in occupancy and revenue for June and remaining elevated (in addition to growing slightly) above May's low numbers. At best this looks like extreme optimism and at worst [others] could interpret our numbers as intentionally misleading."
>
> -Email from former Fortress analyst

PRELIMINARY STATEMENT

By taking fifteen fact depositions, analyzing over 800,000 pages of documents, submitting five expert reports, and filing a summary judgment opposition brief, Plaintiff's counsel plumbed the depths of the conflicts of interest embedded in the challenged self-dealing transaction. Wesley Edens and the private equity firm that he controls, Fortress Investment Group, LLC ("Fortress"), arranged for one Fortress-managed company, nominal defendant New Senior Investment Group, Inc. ("New Senior" or the "Company"), to buy a real estate portfolio owned by another Fortress-controlled company, Holiday Retirement, at an inflated and unfair price.

New Senior's stockholders immediately suspected that the deal was unfair. The stock price plummeted by approximately 10% within days of the announcement, and continued falling for years in the midst of a historic bull market. Numerous large institutional stockholders complained to Fortress and New Senior's Board. Research analysts downgraded the stock and discontinued coverage. Stockholders

voiced their displeasure by withholding votes for directors at annual meetings in massive numbers. Yet, Fortress and the Board did nothing.

New Senior's only hope of a recovery was this litigation, and Plaintiff's counsel delivered. We used the "tools at hand" to obtain documents under Section 220, went toe-to-toe with several of the world's leading defense firms, litigated through a motion to dismiss, relentlessly pursued discovery in the shadow of a threatened merger that could have extinguished standing, filed six motions to compel, made five oral arguments before the Court and the Special Master, deposed over a dozen witnesses, served three opening and two rebuttal expert reports, amended the complaint twice to exert additional leverage, and filed a 71-page opposition to summary judgment with 135 exhibits that exposed rampant fiduciary misconduct at the Company. On the eve of the summary judgment hearing and after a four-month mediation process conducted by a nationally recognized mediator, Defendants and their insurers agreed to pay $53 million.

By any measure, a $53 million recovery, enhanced by certain governance actions agreed to be taken by the Board (the "Settlement"), is a substantial benefit for New Senior and its long-suffering stockholders.[1] To the best of Plaintiff's

[1] The terms and conditions of the settlement are set forth in the Stipulation and Agreement of Compromise, Settlement and Release, dated April 23, 2019 (the "Stipulation") (D.I. 282).

counsel's knowledge, the $53 million payment would be, if approved, one of the ten largest derivative settlements in the history of the Delaware Court of Chancery. The $53 million payment is particularly significant to New Senior, which had a market capitalization of approximately $450 million at the time the parties agreed to settle.

Discovery uncovered a vast record of unfair dealing, but significant challenges remained. Plaintiff was aware that Defendants would rely on the special committee that they formed, that they would argue they may not have acted perfectly but that they acted in good faith, and that they were advised by bulge-bracket investment bankers and outside counsel. Plaintiff was also mindful that Defendants retained three blue chip experts who argued that New Senior not only paid a fair price but actually underpaid (and benefited) by up to $80 million.

Plaintiff respectfully submits that the $53 million recovery is an excellent result, and respectfully requests that the Court approve the Settlement and award $14.5 million in attorneys' fees and expenses. The requested award represents approximately 27% of the cash settlement amount inclusive of expenses of approximately $1.1 million. The fees and expenses are consistent with this Court's precedents in light of the significant benefits conferred by the Settlement, and the extensive litigation and special set of skills required to achieve it. Plaintiff John

Cumming, who was deposed, respectfully requests a modest incentive award of $4,500, which is to be paid out of counsel's fee award.

New Senior's stockholders were provided with notice of the Settlement in accordance with the scheduling Order entered by the Court on April 26, 2019. To date, Plaintiff's counsel have not received any objections to the Settlement. A hearing is scheduled for July 31, 2019 for the Court to consider these matters.

STATEMENT OF FACTS

Because the case settled shortly before trial, Plaintiff presented much of the record evidence in his Corrected Answering Brief in Opposition to the Outside Directors' Motion for Summary Judgment, accompanied by 135 exhibits ("Plaintiff's Summary Judgment Brief") (D.I. 278), and in the five opening and rebuttal expert reports prepared by the three experts Plaintiff's counsel retained.[2] The background provided below is an abbreviated recitation of the extensive history of the litigation.

I. The Company's Problematic Management Structure

New Senior is a publicly-traded real estate investment trust that owns senior housing properties. On November 6, 2014, New Senior was spun off from

[2] For the Court's convenience, the Affidavit of Christopher M. Foulds in Support of the Settlement and Plaintiff's Application for Attorneys' Fees and Expenses ("Foulds Aff.") attaches those and other selected documents, which will be cited herein as "Ex. __."

Newcastle Investment Corp., another Fortress permanent capital vehicle – *i.e.*, a publicly traded company that was externally managed by Fortress pursuant to a management and advisory agreement (the "Fortress Management Agreement"), which Fortress unilaterally imposed on New Senior. (Foulds Aff. ¶ 7.)

Under the Fortress Management Agreement, Fortress managed New Senior exclusively using Fortress personnel, including New Senior CEO Susan Givens. (*Id.* ¶ 8.) Wes Edens made himself the Chairman of the New Senior Board. At the time of the challenged transactions, Edens was Fortress's largest stockholder, one of its three "Principals," the co-chairman of its Board, and a member of its Management Committee. (D.I. 240 ¶ 37.) Fortress's exclusive use of its own personnel to manage New Senior created a potential for conflicts in related-party transactions.

The Fortress Management Agreement also entitled Fortress to an annual management fee equal to 1.5% of New Senior's gross equity. This compensation arrangement created a further potential conflict because, by issuing more equity, Fortress's annual management fee increased regardless of the price at which the individual shares were issued and regardless of the effect of such issuances on New Senior. (Foulds Aff. ¶ 9.)

II. The Public Story of the Challenged Transactions

On June 22, 2015, New Senior issued a short press release announcing that it had purchased 28 senior housing properties (the "Timber Portfolio") for $640

million (the "Asset Purchase") from Holiday Retirement, a company controlled by Fortress private equity funds. (Foulds Aff. ¶¶ 10-14; Ex. 7.) The press release touted the high quality of the properties and described numerous purported benefits. (*Id.*)

New Senior financed the Asset Purchase with a $266 million secondary offering (the "Secondary Offering"), and a $464.7 million loan from Walker & Dunlop, Inc. (the "W&D Loan," and together with the "Asset Purchase" and the "Secondary Offering," the "Challenged Transactions"). New Senior ultimately issued 19,938,446 million new shares for total proceeds of $266 million, at $13.75 per share, although only $170 million was needed to finance the Timber Portfolio. (Ex. 4 at 8-9.)

The press release emphasized that a committee of "independent" directors, advised by Greenhill & Co. ("Greenhill") and Davis, Polk & Wardell LLP, had unanimously approved the transaction. (Ex. 7.)

III. Stockholders Express Concern, But Were Powerless

Despite the rosy picture painted by the Company of the benefits of the Challenged Transactions, numerous market participants and analysts criticized the deal, complaining about conflicts of interest, New Senior's high leverage resulting from the transactions, and Fortress's management fee structure. (Foulds Aff. ¶¶ 15-18; Ex. 1 at 37-41)

During the one-day marketing period for the Secondary Offering, New Senior's stock price declined from $15.25 to $14.14 and then fell to $13.75 when the offering closed, a staggering 10% drop. (*Id.*) A cavalcade of institutional investors complained to Fortress and New Senior about the harm done by the transaction, including reputational damage and effects on the Company's cost of capital. (*Id.*)

Analysts were also critical. For example, in September 2015, the analyst at one of the lead underwriters on the Secondary Offering, Juan Sanabria of Bank of America, downgraded New Senior to underperform. (*Id.*) Sanabria noted that New Senior's cost of capital had deteriorated due to (i) capital allocation and (ii) the external management agreement with Fortress. (*Id.*) Sanabria further noted that SNR's implied capitalization rate of 7.2% was above market prices of 6-6.5%, making it a challenge for New Senior to grow via new acquisitions. (*Id.*) Sanabria eventually discontinued coverage. (*Id.*)

Because the Board did not insist that stockholders approve the Challenged Transactions, stockholders had no recourse other than this litigation. Indeed, New Senior and its stockholders would never have recovered anything, much less $53 million, had Plaintiff's counsel not taken the large, undiversified risk of pursuing this case on a contingency basis.

IV. Plaintiff Is the Only Stockholder That Investigates

On February 16, 2016, Plaintiff's counsel sent a detailed Section 220 demand to the Company on behalf of Plaintiff John Cumming. (Foulds Aff. ¶¶ 19-20.) As Mr. Cumming explained in his affidavit filed contemporaneously herewith, he "was extremely troubled by the negative impact that the Holiday Acquisition and the secondary offering had on New Senior's stock price." (Affidavit of John Cumming ¶ 6.) Mr. Cumming is the only stockholder known to have sent a Section 220 demand or to have otherwise investigated.

After an exchange of correspondence, the Company eventually produced a set of 21 documents mainly consisting of board minutes and materials, as well as a privilege log.[3] (Foulds Aff. ¶¶ 19-20.) From these limited materials, Plaintiff's

[3] Plaintiff ultimately discovered that the Section 220 production was defective and reflected an endemic problem of under-inclusivity. To take one example, the Company had included one free-floating document that was not a Board minute or referenced in any board materials. The Company apparently broke that document, which was an attachment to an email, from its parent email, and then stripped its metadata before production. Defendants then relied heavily on their interpretation of that free-floating document in their motion to dismiss papers, claiming that it had been "incorporated by reference" and could be used for any purpose. (*See* Foulds Aff. ¶ 20 n.1; *see also, e.g.*, D.I. 21, at 20, 49).) The privilege log was also defective because it obscured the fact that Fortress's and Holiday's counsel had simultaneously been advising New Senior about the Asset Purchase, which took weeks of calls and correspondence for Defendants to admit. (D.I. 221.)

counsel was able to piece together a compelling story that CEO Susan Givens had gotten out in front of the Board and that the Board then allowed Givens to be the sole negotiator against her own employer, using what appeared to be questionable projections and financial analyses.

V. Plaintiff Files a Detailed Initial and Amended Complaint

On December 27, 2016, after scouring publicly available information concerning director non-independence and engaging in an intensive review of the materials in the Section 220 production, Plaintiff filed a detailed 65-page complaint. (D.I. 1.)

On June 8, 2017, Plaintiff filed an amended complaint to add additional factual detail and to streamline the claims. (D.I. 12.) Defendants later commended Plaintiff's counsel for the investigatory "diligence," even calling some of the photographic evidence we had unearthed "terrific." (D.I. 33, at 30-31.)

The Amended Complaint alleged, among other things, that the Challenged Transactions constituted self-dealing, that the Asset Purchase was unfair to New Senior because the price paid for the properties was too high and was based on unreasonable projections, that the Secondary Offering was unfair to New Senior because it was too large and the members of the pricing committee for the Secondary Offering were conflicted, that the directors were not independent of Fortress and

Edens, and that Fortress and Holiday aided and abetted those alleged breaches of fiduciary duty. (D.I. 12, ¶¶1, 3, 6-7, 12-17, 146-165.)

VI. The Court Denied Defendants' Motion to Dismiss in Full

After briefing and oral argument on Defendants' motion to dismiss, the Court denied Defendants' motion in full. *See Cumming v. Edens*, 2018 WL 992877, at *23 (Del. Ch. Feb. 20, 2018) (the "Opinion"). The Court held that Plaintiff pleaded unfair process and price and that the Challenged Transactions would be subject, at least initially, to review under the entire fairness standard. The Court also held that Plaintiff had pleaded particularized facts that each member of the Board at the time of the Timber Transaction was interested or not independent:

> [A] majority of the New Senior directors approved the self-dealing Acquisition at an excessive price, allowed New Senior to issue stock to finance the Acquisition at an unreasonable discount, declined to exercise their independent judgment when making those decisions and let Givens (and Edens), who stood on both sides of the deal, control the negotiation and sale process. According to Plaintiff, these pled facts make "[t]his [an] entire fairness case." I agree.

Id. at *23.

VII. Plaintiff Engages in Extensive Discovery in the Face of Unusually Heavy Resistance by Defendants

Plaintiff's counsel knew that we needed to move with alacrity to get documents and that Defendants would, as defendants almost always do, delay. (Foulds Aff. ¶ 28.) Even so, Plaintiff's counsel faced unusually fierce resistance in

this case, and had to fight through significant discovery barriers to obtain the facts that broke the case wide open. (*Id.* ¶¶ 28-41.)

Within days after the Opinion issued, New Senior announced that it had begun a strategic review, which included a potential sale of the Company. Had such a sale occurred, Plaintiff's counsel expected Defendants to argue that Plaintiff lost standing to pursue the derivative claims.[4] (*Id.*) Plaintiff immediately pressed for prompt production of documents, which led to another oral argument before the Court on March 13, 2018, and thereafter secured an Order directing Defendants to produce "low-hanging" documents and to prioritize document productions promptly. (*Id.*)

The Court later described the trial schedule Plaintiff requested as "ambitious." (D.I. 128, at 48.) We knew, however, that the best way to extract real value from Defendants was to press the case to trial as soon as possible and not let up. Throughout the summer of 2018, we applied sustained pressure on Defendants. (Foulds Aff. ¶¶ 28-41.) We served three sets of document requests and three sets of interrogatories. In hundreds of items of discovery correspondence, Plaintiff's counsel doggedly pushed Defendants to run comprehensive searches, to provide hit

[4] Discovery revealed that the Strategic Review Committee had initially included most of the individual Defendants, despite the extensive conflicts Plaintiff had already alleged and their self-interest in doing a deal that could eliminate Plaintiff's standing.

reports, to answer interrogatories, and to produce documents promptly on a rolling basis. (*Id.*)

Although Defendants eventually relented on numerous issues, we were ultimately forced to file six motions to compel:

(i) Plaintiff's Motion to Compel Citigroup, Inc., filed on May 31, 2018 (D.I. 97);

(ii) Plaintiff's Motion to Compel Non-Independence Discovery, filed on July 19, 2018 (D.I. 115);

(iii) Plaintiff's Motion to Compel Fortress to Produce Documents, filed on July 25, 2018 (D.I. 117);

(iv) Plaintiff's Motion to Compel and Response to Defendant Fortress Investment Group LLC's Motion For Protective Order, filed on October 15, 2018 (D.I. 205);

(v) Plaintiff's Motion to Compel, filed on October 16, 2018 (D.I. 216); and

(vi) Plaintiff's Motion to Compel Withheld Documents, filed on October 16, 2018 (D.I. 221).

In total, Plaintiff's counsel made five oral arguments to the Court and/or the Special Master during the case, including three arguments concerning discovery

motions. (*See* D.I. 33, 82, 128 & Exs. 10-11.) Plaintiff's counsel prevailed in whole or in large part in each. The Court granted Plaintiff's motion to compel against Citigroup, including shifting fees, and all of the other motions to compel were largely mooted by the production of documents or interrogatory answers, except for the Motion to Compel Withheld Documents, which was fully briefed and scheduled for argument at the time the parties settled.

The document review burden was substantial. (Foulds Aff. ¶¶ 28-41.) Between April and October 2018, Plaintiff received over 800,000 pages of documents from the parties and third parties, and reviewed and analyzed the vast majority of those documents:

Producing Party	**Pages**
Holiday	411,829
Fortress	247,347
Greenhill	55,843
Bank of America	28,488
Citigroup	34,168
Outside Directors	9,170
Harvard	4,897
Walker Dunlop	12,882
Partners in Health	1,267
New Senior	1,047
Total	**806,938**

The review required not just looking at the documents but actually understanding them to synthesize the information into a coherent story. (Foulds Aff. ¶¶ 28-41.) It took ingenuity and persistence to piece together information in glancing emails and massive financial spreadsheets. (*See, e.g.*, Ex. 1 at 29-30; Ex. 2 ¶¶ 48-87; Ex. 3 ¶¶ 32-34.) That analysis required considerable time and focus by senior attorneys, which paid dividends at the depositions, in the expert reports, and ultimately in having the courage of our convictions to hold out for a settlement of this size. (Foulds Aff. ¶¶ 28-41.)

From August 17 to October 15, 2018, we deposed 15 witnesses, and defended Plaintiff's deposition.[5] As happens all too often in stockholder litigation, the Defendants back-end loaded almost all of the depositions into the last three weeks of what was supposed to be a two-and-a-half month deposition period, requiring Plaintiff's counsel to do 12 depositions in the last 14 business days of the period, which then meant that Plaintiff's counsel also had to file two motions to compel and make two oral arguments to the Special Master based on information learned in the depositions in the last week of the period. (Foulds Aff. ¶¶ 28-41.) The deponents and dates of depositions were as follows:

[5] Unlike most stockholder plaintiff depositions, which are generally handled by relatively junior attorneys, a senior defense lawyer took Mr. Cumming's deposition.

NAME	ORGANIZATION	DATE/TIME
Cassia van der Hoof Holstein	Director Defendant	August 17, 2018
Ivy Hernandez	Fortress Investment Group	September 7, 2018
Virgis W. Colbert	Director Defendant	September 14, 2018
Matthew Edward Lucas	Fortress Investment Group	September 20, 2018
Michael D. Malone	Director Defendant	September 27, 2018
John Cumming	Plaintiff	September 27, 2018
Jason Patterson	Fortress Investment Group	September 28, 2018
Justine Cheng	Fortress Investment Group	October 1, 2018
Susan Givens	Director Defendant	October 3, 2018
Wesley R. Edens	Director Defendant	October 9, 2018
Christopher Falkowski	Fortress Investment Group	October 10, 2018
Stuart McFarland	Director Defendant	October 10, 2018
Jens Thomas Jung	Citigroup Global Markets, Inc.	October 11, 2018
Joshua Li	Citigroup Global Markets, Inc.	October 12, 2018
Richard Lieb	Greenhill & Co., Inc.	October 16, 2018
Scott Allen Shanaberger	Holiday Acquisition Holdings LLC	October 16, 2018

The discovery record quickly became worse for Defendants once we were able to elicit testimony from current (and, perhaps more importantly, former) Fortress personnel under oath. (*See* Ex. 1 at 1-39, 45-68.) Plaintiff's counsel developed a vast record of unfair dealing, including by way of example:

- that in late 2014, when Edens was handpicking the New Senior Board, he informed Givens that he was "trying to find people [he] can have multiple sources of contact with";
- that the Outside Directors each had deep and disabling connections to Edens (the extent of which were not disclosed in the Section 220 documents or even in interrogatory responses) that caused them to favor Fortress or, at a minimum, to look the other way and not push back against Fortress;
- that there were no informational walls or other procedural protections to separate Fortress personnel from working on both sides of the deal;
- that highly material information was not presented to the full Board, such as the fact of different sets of projections (including a set of far lower projections aptly called the "Closest to the Pin Projections"), the relative lack of quality of the Timber Portfolio and its dramatic deterioration in the months leading up to the Board's approval, and several whistles blown by junior Fortress personnel warning that Challenged Transactions were unfair and potentially fraudulent;

- that the "auction" was designed by Givens and Edens to ensure that Fortress would receive at least $640 million and that New Senior would purchase the Timber Portfolio;
- that Edens did not recuse himself, contrary to what was stated in the Board minutes and what he testified to at his deposition, but rather worked throughout the process to design, structure, initiate, and obtain approval for the Challenged Transactions, as reflected in numerous emails and the testimony of other Fortress personnel; and
- that the Asset Purchase was not, as we had initially pleaded, ineffectively negotiated by Givens against her employer, but rather that she did not negotiate at all.

(Foulds Aff. ¶ 56.)

VIII. Plaintiff Amends His Complaint To Increase Leverage

The day after the last deposition, on October 17, 2018, Plaintiff moved for leave to file a Verified Second Amended Derivative Complaint (the "Second Amended Complaint") to add a claim for declaratory judgment seeking a determination that "New Senior is and was entitled to terminate the Management Agreement for cause and not pay anything to Fortress" based on Fortress's

wrongdoing. (D.I. 218.) Plaintiff filed the Second Amended Complaint on October 25, 2018. (D.I. 240.)

Shortly thereafter, Defendants moved to dismiss, and then the Strategic Review Committee, which at this point was comprised only of two New Senior new directors added to the Board following the Challenged Transactions, and FIG LLC formalized an agreement to terminate the Fortress Management Agreement and internalize management (the "Internalization") and to terminate the Fortress Management Agreement (the "Termination"). (Foulds Aff. ¶ 43.) The Company agreed to make a cash payment and issue shares of preferred stock to FIG LLC in return for the avoidance of what the committee calculated would be far larger future payments to Fortress in the ordinary course and in exchange for Fortress's cooperation and commitment of resources for the transition. (*Id.* ¶¶ 43; 75-79.) Edens also resigned.

IX. The Parties Exchanged 10 Opening and Rebuttal Expert Reports

Between November 9 and December 14, 2018, the parties exchanged a total of five opening and five rebuttal expert reports. Plaintiff's three experts identified three sources of substantial damages to New Senior: (i) overpayment for the Asset Purchase, (ii) damages flowing from the Secondary Offering and W&D Loan, and (iii) damages to New Senior from reputational harm and the inability of New Senior to execute on its business plan. (*See* Foulds Aff. ¶¶ 45-46, 58-73; Exs. 2, 4, 6.)

Defendants countered with three of their own blue chip experts, each of whom raised serious arguments that the damages were either non-existent or far lower than what Plaintiff's experts had concluded. (*Id.*; Exs. 3, 5.)

X. The Parties Mediate and Settle in the Midst of Summary Judgment Briefing

On January 9, 2019, following the exchange of mediation statements, Michael D. Young, Esq. of JAMS conducted a mediation in New York, NY. (Foulds Aff. ¶¶ 47-53.) Mr. Young has been a mediator for 30 years, and has handled more than 1,850 mediations and arbitrations. Among other accomplishments, Mr. Young has been elected as a Fellow of the College of Commercial Arbitrators, and received the 2019 Best Lawyers' award for "Mediator of the Year" in New York City. In each of 2016-2019, Mr. Young has been listed as a "Band One" mediator by *Chambers and Partners* (1 of 7 in the U.S.). Despite a full-day mediation, the parties were unable to reach a settlement, but continued discussions, including numerous conferences with the mediator and direct exchanges of information with New Senior's counsel, for four months after the initial mediation session. (*Id.*)

Meanwhile, between January 16 and April 3, 2019, the four outside director Defendants and Plaintiff briefed the outside directors' motion for summary judgment. (D.I. 248-278.) Plaintiff filed his Summary Judgment Brief, and then filed a supplemental letter attaching even more evidence of unfairness after the

outside directors opened the door to another submission in their reply papers. (D.I. 279.)

On Saturday, April 6, 2019, two days before the summary judgment argument that was scheduled for Monday morning, the parties accepted Mr. Young's mediator recommendation to settle this action for $53 million, and certain governance enhancements, including the Board's commitment to recommend a stockholder vote on a proposal to de-classify New Senior's Board and "if necessary for implementation" a stockholder vote to adopt majority voting for stockholder elections. (Foulds Aff. ¶¶ 47-53.)[6]

In connection with settlement discussions and negotiations leading to the proposed Settlement, counsel for the parties did not discuss the appropriateness or amount of any application by counsel for Plaintiff for an award of attorneys' fees and expenses until after the parties accepted the mediator's proposal. (*Id.*) Plaintiff then negotiated for several weeks with counsel for nominal defendant New Senior. All parties eventually agreed, subject to the Court's review and approval, that

[6] At the 2019 annual meeting, New Senior's stockholders overwhelmingly endorsed these proposed changes by landslide votes of 55,683,337 to 285,783 to de-classify the Board, and 53,165,976 to 746,913 to adopt majority voting. Implementing these stockholder votes will need to await the 2020 meeting, at which the Board has committed to proposing the elimination of the 80% super-majority voting condition that Fortress imposed on New Senior at the time of its incorporation.

Plaintiff's counsel would seek a combined fee and expense award of $14.5 million (the "Fee and Expense Award"). (*Id.*)

ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. Delaware Law Strongly Favors Settlements

Delaware law strongly favors voluntary settlements of corporate derivative actions. *See, e.g.*, *Forsythe v. ESC Fund Mgmt. Co. (U.S.) Inc.*, 2012 WL 1655538, at *2 (Del. Ch. May 9, 2012). While the Court's role in approving the settlement requires it to "insure that the interests [of the corporation] have been fairly represented," the approval process "does not require a definitive evaluation of the case on its merits," as doing so "would defeat the basic purpose of the settlement of litigation." *Id.*, at *2-3 (quoting *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1283 (Del. 1989)). Instead, the Court "must consider the nature of the claims, possible defenses, the legal and factual circumstances of the case, and then apply its own business judgment in deciding whether the settlement is reasonable." *Id.* at *3 (citing *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986)).

The primary factors to be considered in the approval process are (i) the strength of the claims; (ii) the difficulties that would arise in enforcing the claims through the courts; (iii) the delay, expense and trouble of litigation; (iv) the amount of the compromise as compared with the amount of any collectible judgment; and

(v) the views of the parties involved. *Polk*, 507 A.2d at 536. The Court's most critical inquiry is the balance between the value of the benefits achieved and the strength of the claims being compromised. *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1284 (Del. 1989); *Polk*, 507 A.2d at 535.

For the reasons discussed below and in the Foulds Affidavit, the Settlement is more than fair and reasonable. (Foulds Aff. ¶¶ 54-79.) The Settlement reflects Plaintiff's and his counsel's informed judgment regarding the strength of the claims and defenses, the probabilities of success at summary judgment, trial, and on appeal, the damages available, if successful, and the benefits to New Senior of a certain and significant monetary recovery before the materialization of any risks to Plaintiff's claims. Applying these standards here, the Settlement is fair, reasonable, and adequate, and should be approved.

B. Plaintiff Achieved a Significant Benefit for the Company, Fully Reflecting the Strength of Plaintiff's Claims Weighed Against the Risks and Costs of Continued Litigation

Plaintiff achieved his goal of conferring a significant monetary benefit on New Senior. The Settlement provides for a $53 million cash payment to the Company, less Court-approved attorneys' fees and expenses. As noted above, at the time the parties agreed to the Settlement on April 6, 2019, New Senior's market capitalization was roughly $450 million. Thus, the cash portion of the Settlement was equivalent to more than 10% of the Company's market capitalization. If

approved, the Settlement will provide a significant boost to the Company's financial health.

The $53 million proposed payment constitutes a substantial percentage of the damages calculated by Plaintiff's experts. Plaintiff's core damages theory was that New Senior overpaid for the Timber Portfolio by approximately $100 million, meaning that the cash portion of the settlement amounts to more than 50% of Plaintiff's most viable damages theory. Even including all of the possible damages from the Plaintiff's experts, which were sharply contested by Defendants, the Settlement is an excellent result for the Company, given that damages beyond the excess payment for the Timber Portfolio would have been especially challenging to prove. *See De Angelis v. Salton/Maxim Housewares, Inc.*, 641 A.2d 834, 839 (Del. Ch. 1993), *rev'd on other grounds sub nom., Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994) (difficulty proving damages a factor in settlement fairness); s*ee also Ryan v. Gifford*, 2009 WL 18143, at *8 (Del. Ch. Jan. 2, 2009) (approving settlement as fair where "the calculation of damages [was] particularly difficult to predict"). The $53 million cash benefit is enhanced by the Board's agreement to provide stockholders with the opportunity to increase Board accountability.[7] *See In re*

[7] *See* Jay B Kesten, *Managerial Entrenchment and Shareholder Wealth Revisited: Theory and Evidence from A Recessionary Financial Market*, 2010 B.Y.U. L. Rev. 1609, 1611 (2010) (citing classified boards and supermajority voting requirements as two of the "most impactful entrenchment devices").

Activision Blizzard, Inc. Stockholder Litig., 124 A.3d 1025, 1067 (Del. Ch. 2015) ("The non-monetary consideration provided important additional benefits," which "was a form of relief that Lead Counsel could not have obtained at trial").

Plaintiff believed, and continues to believe, that the claims against Edens, Givens, and Fortress were especially strong. Plaintiff's counsel developed a massive factual record indicating that Defendants ignored any purported boundaries between Fortress and New Senior, with Fortress, Edens, and Givens predetermining the sale price and terms for the Timber Portfolio, and then controlling the "negotiation" process that led to the sale, using a sham auction process to mask the predetermined outcome. The other Defendants' ties to Edens and their actions—or lack thereof—during the "negotiation" process removed any procedural protection from liability that might otherwise have existed.

Nevertheless, ongoing litigation would have posed several significant risks to Plaintiff's claims and ultimate success. First, without the Settlement, Plaintiff would have had to litigate the summary judgment motion, which disputed a number of key factual issues critical to Plaintiff's claims. The outside directors, protected by the exculpatory clause, argued that they did not personally benefit from the transaction, set up a Transaction Committee, were advised by a respected law firm and

investment bank, conducted at least some form of process, could not be held liable for being duped by Fortress, and received a fairness opinion. (D.I. 249, at 21-53.) *See, e .g.*, *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. 2009) (noting that only if the outside director defendants had "knowingly and completely failed to undertake their responsibilities would they [have] breach[ed] their duty of loyalty."); *see also Chen v. Howard-Anderson*, 87 A.3d 648, 683 (Del. Ch. 2014) ("As long as a board attempts to meet its duties, no matter how incompetently, the directors did not consciously disregard their obligations.").

As explained in more detail in the Foulds Affidavit, Plaintiff's damages theories were disputed by Defendants' experienced experts. (Foulds Aff. ¶¶ 58-73.) Delaware precedent has shown that it is by no means an easy task or a foregone conclusion to establish damages even after prevailing on claims for breaches of duty. For example, in *In re PLX Tech. Inc. Stockholders Litig.*, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018), the Court recently found breaches of fiduciary duty but no damages. Here, too, there was a risk that this Court would find no damages or limit the damages significantly.

Ongoing litigation would have continued to drain the insurance funds available to pay any settlement or judgment, and, given the high percentage recovery that the Settlement provides compared to potential damages, it is not clear that even

a successful outcome at trial would have led to a substantially better result for the Company, particularly in light of the costs and risks presented by protracted litigation, trial, and post-trial motions and appeals. *See Ryan*, 2009 WL 18143, at *9 ("Uncertainty is costly to Maxim and its shareholders, and by entering into the Settlement, Maxim's shareholders have obtained a significant and certain recovery. Although it is possible that there could have been a larger recovery after a trial, it is also possible that any recovery would have been smaller than the recovery under the Settlement.").

C. Arm's-Length Negotiation, the Recommendation of an Experienced Mediator, and the Experience of Plaintiff's Counsel Favor Approval of the Settlement

In assessing whether a proposed settlement is fair, Delaware courts place considerable weight on whether it was reached through adversarial, arm's-length negotiations. *See, e.g.*, *Ryan*, 2009 WL 18143, at *5 ("The diligence with which plaintiffs' counsel pursued the claims and the hard-fought negotiations process weigh in favor of approval of the Settlement."). The Settlement is the product of serious, informed, non-collusive, and often contentious negotiations following a thorough analysis of the strengths and weaknesses of the legal and factual issues in this Action. The in-person mediation in January failed, and the negotiations with the mediator continued for almost four months, until the parties accepted the mediator's settlement recommendation.

Delaware courts also consider the opinion of experienced counsel in determining the fairness of a settlement. *Polk*, 507 A. 2d at 536-537. Plaintiff's counsel, Bernstein Litowitz, Friedlander & Gorris P.A., Saxena White P.A., and Wohl & Fruchter LLP are experienced investor advocates that have litigated numerous lawsuits on behalf of companies and stockholders in this Court and others. Plaintiff's counsel held out and did not settle until a time of maximum leverage, shortly before oral argument on the outside directors' summary judgment motion.

The mediation process provides further evidence of the reasonableness of the proposed Settlement. *See 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 former United States District Court Judge, with the negotiations taking place in the shadow of an impending trial"); *see also Ryan*, 2009 WL 18143, at *5 ("The Settlement was reached after ... hard fought motion practice before this court, and ... a mediation session with Judge Weinstein. The diligence with which plaintiffs' counsel pursued the claims and the hard fought negotiation process weigh in favor of approval of the Settlement.") (internal citations omitted).

Finally, to date, no New Senior stockholder has filed an objection or expressed any dissatisfaction or concern to Plaintiff's counsel regarding any aspect of the

Settlement. The absence of any such objection also weighs in favor of approving the Settlement. The deadline to serve objections to the Settlement is July 17, 2019, and Plaintiff will address any objections if any are filed.

II. AN AWARD OF ATTORNEYS' FEES AND EXPENSES IS WARRANTED

Plaintiff's counsel requests an award of attorneys' fees and expenses totaling $14,500,000 (previously defined as the "Fee and Expense Award"). Defendants do not oppose the Fee and Expense Award, and nominal defendant New Senior, which is the beneficiary of the cash payment, agreed that Plaintiff's counsel would request the Fee and Expense Award. For the reasons set forth below, each of the applicable factors support the approval of the requested Fee and Expense Award.

A. The Applicable Standard

Plaintiff's counsel in a derivative action are entitled to an award of attorneys' fees and expenses if the efforts confer a benefit upon the corporation. The amount of such an award is committed to the sound discretion of the Court under the well-established *Sugarland* factors. *Sugarland Indus. v. Thomas*, 420 A. 2d 142, 147-50 (Del. 1980). Under *Sugarland*, the Court considers multiple factors, including: (i) the results achieved by the litigation; (ii) the amount of time and effort by plaintiff's counsel; (iii) the relative complexity of the issues; (iv) whether counsel was working on a contingency fee basis; and (v) the standing and ability of the attorneys involved.

Id. at 149. The Court may also consider prior fee awards in similar cases as guidance for the exercise of its discretion. *In re Sauer-Danfoss Inc. S'holders Litig*., 65 A.3d 1116, 1136 (Del. Ch. 2011).

B. The Results Accomplished in Light of the Risks and Costs of Continued Litigation Warrants Approval of the Requested Fee and Expense Award.

The benefits achieved through litigation are accorded the greatest weight in determining an appropriate fee award. *Seinfeld v. Coker*, 847 A. 2d 330 at 336 (Del. Ch. 2000); *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *8 (Del. Ch. Aug. 30, 2007) ("courts assign the greatest weight to the benefit achieved by the litigation"); *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *20 (Del. Ch. May 6, 2010) ("the size of the benefit being of paramount importance"). Here, Counsel achieved a $53 million settlement, plus corporate governance enhancements. The consideration is a significant recovery by any measure.

As discussed above, the $53 million settlement was a large percentage of the possible damages, especially where damages were sharply contested. The $53 million settlement is, we believe, a top ten settlement of a derivative action in

Delaware, and is unique in that all of the other derivative settlements of this size have involved far larger companies.[8]

The combined Fee and Expense Award represents approximately 27% of the Cash Settlement Amount. This is within the range of fees awarded by this Court on a percentage-of-the-benefit basis. Typical fee awards in cases settled after multiple depositions and some motion practice range from 22.5% to 33% of the common fund or benefit obtained with an increasing percentage as the case moves closer to trial.[9]

---

[8] *See* Kevin LaCroix, *Largest Derivative Lawsuit Settlements*, The D&O Diary (Dec. 5, 2014), *available at* https://www.dandodiary.com/2014/12/articles/shareholders-derivative-litigation/largest-derivative-lawsuit-settlements/ (including several non-Delaware derivative settlements and one primarily direct action); *see also The Chancery Daily*, The Long Form, Apr. 24, 2019 ("[The Settlement] is perhaps noteworthy in a way that may not be facially apparent. In terms of dollar value, … the Largest Derivative Lawsuit Settlements maintained by The D&O Diary … involve large and likely household-name companies. Here, nominal defendant New Senior is a comparatively small Real Estate Investment Trust, and the settlement fund represents more than 10% of its, as of this writing, approximately $450 million market capitalization.").

[9] *See, e.g.*, *In re Starz Stockholder Litigation*, C.A. No. 12584-VCG, at ¶ 12 (Dec. 10, 2018) (Order) (awarding fee and expenses of 30% of a $92.5 million settlement); *In re Emerson Radio S'holder Deriv. Litig.*, 2011 WL 1135006, at *3 & n.4 (Del. Ch. Mar. 28, 2011) (awarding fee of 31.5% where "lengthy & thorough litigation by counsel … resulted in a final judgment and not a quick settlement") (internal quotations and citation omitted); *Berger v. Pubco Corp.*, 2010 WL 2573881 at *1 (Del. Ch. June 23, 2010) (awarding 26% and noting that this was "at the bottom of the 25-33% range that is found in many Court of Chancery cases"); *Gatz v. Ponsoldt*, 2009 WL 1743760, at *3 (Del. Ch. June 12, 2009) (awarding 33% and finding that it was "within the range of reasonable fee awards in other class action cases"); *Ryan*, 2009 WL 18143, at *5 (awarding 33% of cash amount where plaintiffs' counsel engaged in "meaningful discovery" and survived "significant, hard fought motion

The requested award is warranted by the excellent financial result obtained in this difficult, hotly litigated, and lengthy case. An appropriate award encourages counsel to take on challenging cases requiring creative claims and involving high risk, to litigate those claims heavily, to front substantial out of pocket expenses, and to hold out for substantial monetary consideration.

C. The Contingent Nature of the Litigation Supports the Requested Fee and Expense Award.

The contingent nature of the representation is the "second most important factor considered by this Court" in awarding attorneys' fees. *Dow Jones & Co. v. Shields*, 1992 WL 44907, at *2 (Del. Ch. Jan.10, 1992). "It is the 'public policy of Delaware to reward risk-taking in the interests of [stock]holders.'" *See In re Activision Blizzard, Inc. Stockholder Litig*., 124 A.3d 1025, 1073 (Del. Ch. 2015), as revised (May 21, 2015), *judgment entered sub nom. In re Activision Blizzard, Inc.*

---

practice"); *In re Freeport McMoran Sulphur Inc. S'holder Litig.*, C.A. No. 16729-N (Del. Ch. Apr. 20, 2006) (TRANSCRIPT) (awarding 33 1/3% fee for monetary fund obtained just before trial); *In re Berkshire Realty Co. Inv. S'holder Litig.*, 2004 WL 5367910 (Del. Ch. Apr. 27, 2004) (Stipulation) & *In re Berkshire Realty Co. Inv. S'holder Litig.*, 2004 WL 5174889 (Del. Ch. Aug. 10, 2004) (ORDER) (fee equal to 30% of fund, plus expenses); *In re Telecorp. PCS, Inc. S'holders Litig*, C.A. No. 19260-VCS, Tr. at 3 (Del. Ch. Aug. 20, 2003) and *In re Telecorp. PCS, Inc. S'holders Litig*, C.A. No. 19260-VCS, at 101 (Del. Ch. Aug. 20, 2003) (ORDER) (fees of 30% of cash settlement on eve of trial); *In re Home Shopping Network, Inc. S'holder Litig*., 1995 WL 17830889, at *3 (Del. Ch. Jan. 24, 1995) (fee equal to 30% of fund); *In re Best Lock Corp. S'holders Litig.*, C.A. No. 16281-CC, at 5 (Del. Ch. Oct. 16, 2002) (ORDER) (30% of projected fund).

Stockholder Litig., 2015 WL 2415559 (Del. Ch. May 20, 2015) (quoting *In re Plains Res. Inc.*, 2005 WL 332811, at *6 (Del.Ch. Feb. 4, 2005). Delaware courts have repeatedly recognized that an attorney may be entitled to a much larger fee when the compensation is contingent rather than paid on an hourly or contractual basis. *Chrysler Corp. v. Dann*, 223 A.2d 384, 389-90 (Del. 1966); *accord Ryan*, 2009 WL 18143, at *13.

This case was litigated on an entirely contingent basis. Counsel for Plaintiff have not been paid for their work, nor have any of their costs or expenses been reimbursed, and litigating this action required the allocation of a substantial amount of Plaintiff's counsel's resources, including considerable out-of-pocket expenses. Plaintiff's counsel litigated this case against skillful adversaries from highly reputable defense firms through fact discovery, expert discovery, and briefing on summary judgment. Accordingly, Plaintiff's counsel took on substantial contingency risk in pursuing Plaintiff's claims, a factor supporting the requested Fee and Expense Award.

Additionally, the fact that the Fee and Expense Award was agreed to after arm's-length negotiations between the parties further supports its reasonableness. As Vice Chancellor Laster harmonized the law on this point:

> The Delaware Supreme Court has held that the Court of Chancery must make an independent determination of reasonableness on behalf of the

> common fund's beneficiaries, before making or approving an attorney's fee award…. Notwithstanding these statements, some of this court's decisions speak of giving deference to a negotiated fee agreement. In my view, any apparent tension can be harmonized by differentiating between evaluating a range of reasonableness and determining a specific amount. ***Under Delaware Supreme Court precedent, the court must determine that the award falls within a reasonable range. If it does, then a court can defer to the parties' negotiated amount***….

In re Activision, 124 A.3d 1074-75 (Del. Ch. 2015) (internal quotations omitted) (footnote and citations omitted) (emphasis added). *See also Forsta AP-Fonden v. News Corp.*, C.A. No. 7580-CS, tr. at 10 (Del. Ch. Apr. 26, 2013) ("I give credit to the arm's length bargaining."); *Forsythe v. ESC Fund Mgmt. Co.*, 2012 WL 1655538, at *7 (Del. Ch. May 9, 2012) ("The fee falls within a reasonable range, warranting deference to the parties' negotiated amount."); *In re J. Crew Grp., Inc. S'holders' Litig.*, C.A. No. 6043-CS, tr. at 78 (Del. Ch. Dec. 14, 2011) ("I'm not going to quibble with what was negotiated.").

D. The Significant Efforts of Plaintiff's Counsel Support the Requested Fee Award.

In applying *Sugarland*, Delaware courts should "look at the hours and efforts expended" as a cross-check. But "[m]ore important than hours is 'effort, as in what plaintiffs' counsel actually did.' In this case, the answer is 'quite a bit.'" *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *13 (Del. Ch. June 27, 2011) (citations omitted); *see also* Michael J. De La Merced, *A Rare Peek Into How*

Wachtell Bills, The New York Times (Jan. 9, 2015) ("[S]taffing is designed to provide the highest quality representation. In order to operate in this manner we must base our fees not on time but on the intensity of the firm's efforts, the responsibility assumed, the complexity of the matter and the result achieved.").

As discussed in more detail above, Plaintiff vigorously litigated this complex case to a successful conclusion, including:

- serving a 220 request and reviewing documents received pursuant to that request;
- filing a complaint and two amended complaints;
- briefing (and defeating) Defendants' motion to dismiss;
- significant discovery efforts, including over 800,000 pages of documents and sixteen depositions;
- the filing of six motions to compel;
- five oral arguments before the Court and/or the Special Master;
- the retention of three testifying experts, who each submitted an expert report, and the submission of two expert rebuttal reports;
- briefing summary judgment; and
- a full-day mediation with an experienced mediator followed by four months of subsequent negotiations.

Counsel's affidavits submitted herewith contain a breakdown of Plaintiff's counsel's time and expenses in this Action. From inception through the date the parties entered into the Stipulation on April 23, 2019, Plaintiff's counsel and support staff devoted a total of 15,873.35 hours to this litigation.[10] Counsel for Plaintiff incurred total expenses of $1,111,553.42.[11] After subtracting these expenses, the net requested fee award is $13,388,446.58 (which is approximately 25% of the total settlement). Plaintiff's counsel's requested attorney's fees (after deduction of expenses and 149.15 hours incurred in connection with the Citigroup motion to compel for which Plaintiff's counsel received all of the $83,677.30 in fees we sought from the Special Master) corresponds to an implied hourly rate of $851.

These measures demonstrate that the fee request is reasonable and well within the ranges typically awarded by this Court. This Court frequently awards attorneys' fees with higher implied hourly rates. *Compare In re Jefferies Group, Inc. Shareholders Litigation*, 2015 WL 3540662, at *4 (Del. Ch. June 5, 2015) (fee represented rate of more than $2,200 per hour); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *14 n.73 (Del. Ch. Aug. 30, 2007) (fee represented

[10] *See* Foulds Aff. ¶ 81 (3,985.35); Affidavit of David Wales ¶ 3 (7,041.25); Affidavit of Steven Singer ¶ 4 (4,574.5); Affidavit of Joshua Elazar Fruchter ¶ 3 (272.25).

[11] Foulds Aff. ¶ 82 ($354,725.42); Affidavit of David Wales ¶ 5 ($474,337.88); Affidavit of Steven Singer ¶ 4 ($282,490.12).

an hourly rate of $4,023 per hour); *In re Fox Entm't Grp., Inc. S'holder Litig*., C.A. No. 1033-N, tr. at 70 (Del. Ch. Sept. 19, 2005) (fee represented hourly rate of $3,000 per hour); *In re NCS Healthcare, Inc. S'holder Litig*., 2003 WL 21384633, at *3 (Del. Ch. May 28, 2003) (fee represented an hourly rate of approximately $3,030 per hour); *Dargon v. Perelman*, C.A. No. 15101-VCL, tr. at 48-51 (Del. Ch. Aug. 29, 1997) (fee represented an hourly rate of approximately $3,500). The implied hourly rate Plaintiff's counsel seek here is reasonable and appropriate. *See* Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 An Hour*, Wall St. J. (Feb. 9, 2016).

E. Relative Complexity of the Litigation

In determining the award of Plaintiff's counsel's fees and expenses, the Court should also consider the relative complexities of the litigation. "All else equal, litigation that is challenging and complex supports a higher fee award." *In re Activision*, 124 A.3d at 1072. Courts generally recognize that stockholder derivative litigation is notoriously difficult. This was a highly complex case, involving the valuation of a portfolio of twenty-eight senior living properties and assessing the damages resulting from a secondary stock offering. The case had numerous interrelated components, requiring Plaintiffs' counsel to, among other things: (i) disentangle the complex relationship between the various Fortress, Holiday, and New Senior Entities, (ii) learn how to value senior independent living facilities; (iii)

analyze and compare a plethora of financial spreadsheets and other documents in order to discover subtle differences and changes in various metrics over time that were used to engineer the "valuation" of the Timber Portfolio; and (iv) analyze the process used by investment banks to set the value for the Secondary Offering. This effort required lengthy and painstaking analysis, creativity, and intense focus.

F. The Standing and Ability of Counsel Supports the Requested Fee and Expense Award

Under *Sugarland*, the Court should also consider the standing and ability of Plaintiff's counsel. Here, Plaintiff's counsel are experienced law firms in the field of stockholder litigation.

The standing of opposing counsel may also be considered in determining an award of attorneys' fees. Defendants are represented by an army of experienced and aggressive defense teams from three of the most prestigious and high-profile firms in the world (Skadden, Arps, Slate, Meagher & Flom LLP, Davis, Polk, & Wardell LLP, and Ropes & Gray LLP) and three of Delaware's preeminent defense firms (Morris, Nichols, Arsht & Tunnell LLP, Potter Anderson & Corroon LLP, and Richards, Layton & Finger, P.A.). As such, this factor militates in favor of approval of the requested Fee and Expense Award.

G. The Expenses Incurred Were Reasonable Given the Circumstances Of This Case

Plaintiff's counsel's out-of-pocket expenses of $1,111,553.42 were reasonably and necessarily incurred in the pursuit of this litigation. Approximately 68% of these expenses, $754,553.95, were expert fees. The remaining costs include such items as Special Master fees, mediation expenses, computerized research costs, electronic filing fees, costs associated with maintaining an electronic database, travel and lodging expenses, court reporting services, and postage and telephone charges. Plaintiff and Plaintiff's counsel respectfully submit that reimbursement of all of those expenses should be approved.

* * *

Taking all of the *Sugarland* factors into account, Plaintiff respectfully submits that an award in the amount of $14,500,000, inclusive of expenses, is warranted.

III. A $4,500 INCENTIVE FEE AWARD IS APPROPRIATE

In addition to the Fee and Expense Award, Plaintiff requests that the Court award a modest incentive fee award to Plaintiff (the "Incentive Fee Award") in the amount of $4,500 to be paid out of any attorney fee award granted by the Court. The Court has broad discretion in deciding "whether to grant an incentive award to a named plaintiff" following the "conclusion of the litigation." *Chen v. Howard-Anderson*, 2017 WL 2842185, at *3 (Del. Ch. June 30, 2017) (citation omitted). The

Court has routinely awarded incentive fee awards in class or derivative litigation when the plaintiff has contributed meaningfully to the litigation. *See, e.g.*, *In re Saba Software, Inc. Stockholder Litig.*, C.A. No. 10697-VCS (Sept. 26, 2018) (ORDER) (awarding incentive fee to plaintiff in the amount of $100,000); *In re CytRx Corp. Stockholder Deriv. Litig. II*, C.A. No. 11800-VCMR (May 17, 2018) (ORDER) (awarding incentive fee to each plaintiff in the amount of $2,500). *See also In re Orchard Enters. Stockholder Litig.*, 2014 WL 4181912, at *13, n. 8 (Del. Ch. Aug. 22, 2014), *judgment entered sub nom. In re Orchard Enterprises Inc. Stockholders Litig*. (Del. Ch. 2014) (awarding $12,500 to co-lead plaintiffs, and collecting cases); *Ryan v. Gifford*, No. CIV. A. 2213-CC, 2009 WL 18143 (Del. Ch. Jan. 2, 2009) (awarding $5,000 each to two plaintiffs). The Court has explained that these awards incentivize stockholders, like Plaintiff, to bring meritorious lawsuits. *In re Dunkin' Donuts S'holder Litig.*, 1990 WL 189120, at *10 (Del. Ch. Nov. 27, 1990).

As Plaintiff explained in his affidavit, Plaintiff was the only stockholder to take the risk of filing an action, monitored the action's prosecution through regular contact with his counsel, and maintained continuous ownership of his New Senior shares over a three-year period. Plaintiff reviewed drafts of the original complaint as well as each of the amended complaints, had his documents collected and produced, and was interrogated at deposition by a senior member of Defendants'

team. In accordance with this Court's practice, the requested Incentive Fee Award was fully disclosed in the notice to New Senior stockholders and, as of the date of this Motion, no stockholder has objected.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court approve the Settlement, the Fee and Expense Award, and the Incentive Fee Award.

FRIEDLANDER & GORRIS, P.A.

/s/ Christopher M. Foulds
Jeffrey Gorris (Bar No. 5012)
Christopher M. Foulds (Bar No. 5169)
Christopher P. Quinn (Bar No. 5823)
1201 N. Market Street, Suite 2200
Wilmington, DE 19801
(302) 573-3500

Counsel for Plaintiff

Words: 7,889

OF COUNSEL:

Mark Lebovitch
David Wales
Edward Timlin
Tamara Gavrilova
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

Adam Warden
SAXENA WHITE P.A.
150 E. Palmetto Park Rd., Suite 600
Boca Raton, FL 33432
(561) 394-3399

Steven B. Singer
Joshua H. Saltzman
SAXENA WHITE P.A.
10 Bank Street, 8th Floor
White Plains, New York 10604
(914) 437-8551

J. Elazar Fruchter
WOHL & FRUCHTER LLP
570 Lexington Avenue, 16th Floor
New York, NY 10022
(212) 758-4000

DATED: July 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on July 17, 2019, I caused a copy of the foregoing **Public Version of Plaintiff's Application for Approval of the Settlement, an Award of Attorneys' Fees and Expenses, and a Plaintiff's Incentive Award** to be served upon the following counsel of record by File & Serve*Xpress*:

William M. Lafferty, Esquire
S. Mark Hurd, Esquire
MORRIS NICHOLS ARSHT & TUNNELL LLP
1201 North Market Street, 16th Floor
P.O. Box 1347
Wilmington, DE 19899

Rudolf Koch, Esquire
Anthony M. Calvano, Esquire
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801

Robert S. Saunders, Esquire
Ronald N. Brown, III, Esquire
Sarah R. Martin, Esquire
Elisa M.C. Klein, Esquire
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, DE 19899

Stephen C. Norman, Esquire
Jaclyn C. Levy, Esquire
POTTER ANDERSON & CORROON LLP
Hercules Plaza, 6th Floor
1313 North Market Street
Wilmington, DE 19801

/s/ Christopher M. Foulds
Christopher M. Foulds (Bar No. 5169)