COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, S.S. **SUPERIOR COURT**

Civil No. 24-1734-BLS1

JOHN DWYER, & another[1]
Plaintiffs

vs.

ALAN TREFLER, & others [2]
Defendants

CONSOLIDATED WITH
Civil No. 24-3076-BLS1

JAYNE BIRCH, & another[3]
Plaintiffs

vs.

ALAN TREFLER, & others[4]
Defendants

DECLARATION OF RICHARD A. SPEIRS IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF DERIVATIVE SETTLEMENT AND MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

---

[1] Ray Gerber.

[2] Peter Gyenes ("Gyenes"), Richard Jones ("Jones"), Christopher Lafond ("Lafond"), Dianne Ledingham ("Ledingham"), Sharon Rowlands ("Rowlands"), Larry Weber ("Weber"), Leon Trefler ("L. Trefler"), Don Schuerman ("Schuerman"), Kerim Akgonul ("Akgonul"), and Benjamin Baril ("Baril"). Pegasystems Inc. is named as a nominal defendant.

[3] Robert Garfield.

[4] Gyenes, Jones, Lafond, Ledingham, Rowlands, Weber, L. Trefler, Schuerman, Akgonul, Baril, and Stillwell. Pegasystems Inc. is named as a nominal defendant.

I, Richard A. Speirs, declare as follows:

1. I am Of Counsel at the law firm of Cohen Milstein Sellers & Toll PLLC and a member in good standing of the New York State Bar. I respectfully submit this declaration in support of the accompanying Plaintiffs' Motion for Final Approval of Derivative Settlement and Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards (together the "Motions"). I am over the age of eighteen (18) years, am competent to testify to the matters set forth herein and have personal knowledge of the facts stated in this declaration.[5]

Factual Background and History of the Actions
Through Preliminary Approval of the Settlement

2. On April 16, 2026, the Court issued its Order Preliminarily Approving Settlement and Providing for Notice. Dkt. 59 (the "Preliminary Approval Order"). In connection with Plaintiffs' Unopposed Motion for Preliminary Approval of the Settlement, I submitted a Declaration in Support of Joint Supplemental Memorandum of Law in Support of Preliminary Approval, dated April 10, 2026. Dkt. 58 (the "April 10 Speirs Declaration"). The factual background and history of the Actions through Plaintiffs' motion for preliminary approval are set forth in detail therein and in the Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Derivative Settlement dated February 9, 2026 at pages 3-7. Dkt. 55 (the "Preliminary Approval Memorandum"). For the convenience of the Court and to avoid duplication, I have attached hereto the April 10 Speirs Declaration as **Exhibit A** in support of the Motions. I have personal knowledge of and adopt the April 10 Speirs Declaration as though it is set forth in full herein.

[5] Capitalized terms not otherwise defined here have the same meaning as in Plaintiffs' Memorandum of Law in Support of Preliminary Approval, Dkt. 55

Notice of the Settlement to PegaSystems Stockholders

3. The Preliminary Approval Order directed PegaSystems to give notice of the Settlement and Settlement Hearing as follows: (1) not later than 10 business days following the date of the order (April 30, 2026), causing the Summary Notice to be published on one occasion in the national edition of *The Wall Street Journal* and published on one occasion via the Business Wire, and posting the Stipulation and Notice on the "Investor Relations" section of Pegasystems' website, https://www.pega.com/about/investors, and (2) not later than 15 business days following the date of the order (May 7, 2026), causing the Summary Notice to be published on one additional occasion in the national edition of *The Wall Street Journal*.

4. I am informed that PegaSystems timely did so, and that a person with personal knowledge will timely submit a declaration of that effect pursuant to Section 4(c) of the Preliminary Approval Order.

5. As of the date hereof, counsel has not received and is not aware of any objections to any part of the Settlement (including with respect to attorneys' fees and expenses) and no objections have been filed on the docket.

Exhibits

6. True and correct copies of the following papers are attached hereto:

Exhibit A: Declaration of Richard A. Speirs in Support of Joint Supplemental Memorandum of Law in Support of Preliminary Approval (originally filed April 10, 2026)

Exhibit B: *City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. Foley*, No. 2020-0650-KSJM (Del. Ch. June 21, 2022) (TRANSCRIPT)

Exhibit C: *In re Tile Shop Holdings, Inc. S'holder Derivative Litig.*, No. 10884-VCG, (Del. Ch. Aug. 23, 2018) (TRANSCRIPT)

Exhibit D: *In re Terraform Power, Inc. Derivative Litig*., No. 11898-CB, Final Order and Judgment (Del. Ch. Dec. 19, 2016) & Plaintiff's Brief in Support of Its Motion to Approve Derivative Settlement and For An Award of Attorneys' Fees and Expenses (Nov. 28, 2016)

Exhibit E: *Nixon-Crenshaw v. Coley*, No. 18-cv-25289-AHS, Order Approving Derivative Settlement and Dismissing Action with Prejudice (S.D. Fla. Sep. 30, 2021)

Exhibit F: *In re Clovis Oncology, Inc. Derivative Litig*., No. 2017-0222-JRS, Order and Final Judgment (Del. Ch. May 4, 2022)

Exhibit G: *In re Conduent Inc. Stockholder Derivative Litig.*, No. 1:20-cv-10964, Order Approving Derivative Settlement and Order of Dismissal with Prejudice (S.D.N.Y. July 11, 2022)

Exhibit H: *In re Santander Consumer USA Holdings, Inc. Derivative Litig.*, No. 11614-VCG, Stipulation of Settlement (Del. Ch. Jan. 22, 2020) & Final Order and Judgment Approving Derivative Settlement (Jan. 25, 2021)

Exhibit I: *In re Opko Health, Inc. Derivative Action*, No. 2018-0740-SG (Del. Ch. Nov. 2, 2020) (TRANSCRIPT)

I declare under the pains and penalties of perjury under the laws of the State of New York that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 21 day of May, 2026.

Richard A. Speirs
Richard A. Speirs

Exhibit A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, S.S. **SUPERIOR COURT**

Civil No. 24-1734-BLS1

JOHN DWYER, & another[1]
Plaintiffs

vs.

ALAN TREFLER, & others [2]
Defendants

CONSOLIDATED WITH
Civil No. 24-3076-BLS1

JAYNE BIRCH, & another[3]
Plaintiffs

vs.

ALAN TREFLER, & others[4]
Defendants

DECLARATION OF RICHARD A. SPEIRS IN SUPPORT OF JOINT SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY APPROVAL

---

[1] Ray Gerber.

[2] Peter Gyenes ("Gyenes"), Richard Jones ("Jones"), Christopher Lafond ("Lafond"), Dianne Ledingham ("Ledingham"), Sharon Rowlands ("Rowlands"), Larry Weber ("Weber"), Leon Trefler ("L. Trefler"), Don Schuerman ("Schuerman"), Kerim Akgonul ("Akgonul"), and Benjamin Baril ("Baril"). Pegasystems Inc. is named as a nominal defendant.

[3] Robert Garfield.

[4] Gyenes, Jones, Lafond, Ledingham, Rowlands, Weber, L. Trefler, Schuerman, Akgonul, Baril, and Stillwell. Pegasystems Inc. is named as a nominal defendant.

I, Richard A. Speirs, declare as follows:

1. I am Of Counsel at the law firm of Cohen Milstein Sellers & Toll PLLC and a member in good standing of the New York State Bar. I am over the age of eighteen (18) years, I am competent to testify to the matters set forth herein, and I have personal knowledge of the facts stated in this declaration.

2. I respectfully submit this declaration in support of the Joint Supplemental Submission in further support of Plaintiffs' Unopposed Motion for Preliminary Approval of Derivative Settlement. I make this declaration in response to questions raised by the Court at the March 18, 2026 preliminary approval hearing concerning the basis for the $7 million Special Dividend, the alleged wrongdoing under investigation, the nature of potential exposure, the Company's shareholder structure and number of shareholders and shares outstanding, the composition and powers of the Board, and the significance of the three corporate governance reforms.

3. I am familiar with the facts and circumstances stated herein, based on personal knowledge, the Report of the Demand Review Committee dated October 7, 2024 (the "DRC Report"),[5] the record of the state and federal court proceedings, discussions with counsel in the derivative actions, the settlement negotiations between the Parties, and the public filings of Pegasystems Inc. ("Pegasystems" or the "Company").

A. The Arms-Length Negotiations Leading to the $7 Million Special Dividend

4. For an extended period spanning several months, the parties to the State Derivative Action and Federal Derivative Action engaged in extensive, contested, arms-length negotiations

[5] The DRC Report is attached as Ex. 1 to the Joint Supplemental Memorandum in Support of Preliminary Approval.

regarding a possible resolution of the derivative actions.[6] Throughout these negotiations, Plaintiffs insisted that any settlement would have to include a significant financial component and believed that a monetary settlement, along with corporate governance measures, would fairly resolve the dismissed claims. Defendants consistently and repeatedly refused to include any financial component in a settlement, and the negotiations reached impasse on multiple occasions, with discussions slowing or halting entirely before resuming. These negotiations were conducted at arm's length and in an adversarial posture between sophisticated counsel representing all parties. After the parties agreed upon the structure of the financial component, negotiations as to the appropriate amount ensued, and the parties eventually were able to reach agreement on the $7 million special dividend for the benefit of Pegasystems' shareholders, excepting the Individual Defendants, their immediate family members, and affiliated entities except for charitable foundations and non-profits, which the Stipulation defines as "Excluded Holders."[7]

5. The $7 million figure reflects the resolution of derivative claims brought by Plaintiffs *on behalf of* and for the benefit of nominal defendant Pegasystems against the Individual Defendants for alleged breaches of their fiduciary duties under Massachusetts law. *See* Stip. ¶ 2.2. These claims are wholly distinct from, and are not predicated upon, the civil trade secret claims that Appian Corporation ("Appian") brought directly against Pegasystems in Virginia state court. As described more fully in Section B below, the derivative claims against the Individual Defendants arise in part from the same alleged underlying conduct, but the cause of action, the nature of the claims, the applicable legal standards, and the potential defendants and their exposure

[6] Capitalized terms not otherwise defined here have the same meaning as in Plaintiffs' Memorandum of Law in Support of Preliminary Approval (the "Original Memo"), Dkt. 55.

[7] *See* Stip. ¶ 1.12.

are fundamentally different. *See* DRC Report at 74-87 (analyzing distinct legal theories underlying derivative claims versus Appian's civil claims).

6. The monetary portion of the settlement is structured specifically to benefit shareholders of Pegasystems. The Stipulation expressly carves out the "Excluded Holders" from receiving any portion of the Special Dividend and from the pro rata denominator used to calculate per-share distributions, ensuring that no Individual Defendant benefits from a settlement of claims asserted against them. *See* Stip. ¶¶ 1.12, 2.3; Original Memo at 8 n.15. Plaintiffs have been advised by counsel to Defendants that the Board has already approved both the Settlement and the Special Dividend as a contingent dividend, standing ready to formally declare it upon this Court's final approval of the Settlement. *See* Stip. ¶ 2.2; Hr'g. Tr. 13:17-23 (Mar. 18, 2026).

7. The number of outstanding shares as of January 30, 2026, was approximately 169,043,716. The number of shares to be excluded from the dividend on behalf of the "Excluded Holders" is 78,335,511.66 as of April 3, 2026, which includes fractional shares. Based on the foregoing, each eligible shareholder is expected to receive approximately $0.077 per share from the special dividend, which represents approximately 2.5 times the Company's current dividend, which is paid quarterly. *See* Stip. ¶ 2.3 (defining Record Date and pro rata distribution mechanism). Defense counsel has confirmed the precise share count and expected per-share distribution.

B. Plaintiffs' Allegations and Likelihood of Success on the Merits

8. Derivative claims are brought by shareholders on behalf of and for the benefit of the corporation. *See* DRC Report at 15-16, 74-84 (analyzing the distinct nature of derivative fiduciary duty claims). Here, Plaintiffs have asserted that the Individual Defendants' alleged breaches of fiduciary duty caused harm to the Company and asserted those claims on the Company's behalf. Potential liability (if any) for the alleged breaches of fiduciary duty would fall on the Defendants.

9. The derivative matters arose out of the same alleged underlying conduct at issue in the Appian litigation: allegations that Pegasystems employees and third-party consultants engaged in conduct between approximately 2012 and 2020 involving access to Appian's platform and alleged trade secrets. *See* DRC Report at 10-13; Consolidated Am. Compl. ¶¶ 2-3, 52-123. As relevant to the derivative claims, the Demands directed the Board to investigate and commence proceedings against the Company's current and former officers and directors for alleged breaches of fiduciary duty for allowing the alleged trade secret-related conduct at issue in the Appian litigation. The Demands further alleged the so-called *Caremark* theory of liability[8]: that the Individual Defendants failed to implement and maintain adequate oversight and compliance systems, and that this failure resulted in corporate harm. *See* Consolidated Am. Compl. at ¶¶ 4, 237-39.

10. According to the DRC Report, following extensive investigation which was conducted with the assistance of independent counsel—including the review of over 180,000 non-public documents, manual review of nearly 35,000 documents, and interviews of 17 witnesses—the DRC concluded that the conduct at issue was "*initiated and executed by lower-level employees*," and that "*none of the Independent Directors were aware of the conduct at issue before the Appian Litigation.*" DRC Report at 4-5. The DRC further found that those Fiduciaries[9] who

[8] *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996) established the framework for director oversight liability in the derivative context. Although the DRC Report does not use the term "*Caremark*," a portion of its legal analysis addresses the substance of oversight liability under Massachusetts law, which applies analogous principles. *See* DRC Report at 70-87.

[9] As used in the DRC Report and herein, "Fiduciaries" refers collectively to the Independent Directors—Gyenes, Jones, Lafond, Ledingham, Rowlands, and Weber—and the following officers of the Company: Akgonul, Schuerman, Alan Trefler, Leon Trefler, and Stillwell. *See* DRC Report at 3-4. Benjamin Baril, though named as a defendant in the Actions, was not designated as a Fiduciary in the DRC Report because he is not an officer of the Company as defined in Pegasystems' bylaws. *See* DRC Report at 3 n.1.

were aware of the conduct "*all genuinely, reasonably, and in good faith believed that the Appian information accessed by the third-party consultant or lower-level Pegasystems employees . . . did not constitute trade secrets or otherwise confidential material*." *Id.* at 5. The DRC also concluded that there were no red flags that should have put the Fiduciaries on notice of potentially unlawful behavior. *Id.* at 4-5, 37, 75. Plaintiffs disputed the DRC's conclusions and asserted them to be the product of bad faith. Those disputed issues were raised in Plaintiffs' opposition to the motion to dismiss and rejected by the Court, thus the risk of failing to overturn the dismissal on appeal were important factors in the decision to settle. Finally, the only insurance potentially available to cover a settlement in this Action was exhausted and/or is not available due to the indemnification of the directors and officers.

C. The Proposed Form of Notice Fairly and Reasonably Informs Shareholders About the Settlement

11. Under the proposed notice program, within ten business days of the Preliminary Approval Order, Pegasystems will post the Long-Form Notice and the Stipulation on its Investor Relations website at https://www.pega.com/about/investors. *See* Stip. ¶ 3.1. In addition, Plaintiffs' Counsel will ensure that the complete settlement package—including the DRC Report (so that shareholders can review the investigation and its conclusions), the MTD Order, the proposed Judgment and Order, and all briefing submitted in support of the settlement—will be posted on a dedicated public settlement website hosted by Plaintiffs' Counsel and linked on the Company's Investor Relations page in the same location as the Long-Form Notice and Stipulation. The final approval papers, including Plaintiffs' brief and supporting materials, will be filed and made similarly available on the website hosted by Plaintiffs' Counsel at least 35 calendar days before the final approval hearing, with the objection deadline set 21 calendar days before that hearing, providing shareholders 14 days to review the materials before deciding whether to object.

Plaintiffs' Counsel will also provide links to the complete settlement materials on their firm websites.

D. The Addition of an Independent Director Strengthens the Independence of the Board and Improves Oversight

12. Pegasystems' Board of Directors currently consists of eight members, of whom seven are independent directors under applicable NASDAQ standards. *See* Pegasystems Inc., Definitive Proxy Statement (Form DEF 14A), at 18 (Apr. 25, 2025). As a result of the derivative actions and the Demands, the Board appointed a new independent director in January 2025. *See* Stip. ¶ 2.5; Original Memo at 14. Defendants and Pegasystems have acknowledged that Plaintiffs' actions were a material causal factor in that appointment. *See* Stip. ¶ 2.5.

13. The new independent director, Rohit Ghai, like all members of the Board, is subject to the full scope of fiduciary duties owed to the Company and its shareholders under Massachusetts law, including the duties of care, loyalty, and good faith. *See* G.L. ch. 156D, §8.30. Mr. Ghai chairs the newly formed Risk Subcommittee (described in greater detail below). While the new independent director does not hold any separate or additional statutory powers beyond those of other Board members, each additional independent director on the Board meaningfully strengthens the Board's independence and solidifies checks and balances with Company management.

E. The Additional Reforms Enhance the Assessment of Potential Risks Facing the Company, Including Those Related to Intellectual Property

14. In addition to the new independent director, the Settlement incorporates two other meaningful corporate governance reforms that Defendants and Pegasystems acknowledge were caused in material part by Plaintiffs' Actions and the Demands. *See* Stip. ¶ 2.5.

15. First, a Risk Subcommittee of the Audit Committee (the "Risk Subcommittee") has been created and is required to remain in place for at least five years from the date of its inception. *See* Stip. ¶ 2.5; DRC Report at 112-13. The DRC recommended that the Board establish the Risk

Subcommittee upon recognizing that "even activity that participants genuinely understand to be lawful can yield unpredictable and potentially costly corporate liabilities." DRC Report at 112. The Risk Subcommittee was proposed by the DRC "in order to further mitigate this risk moving forward." *Id.* The Risk Subcommittee is responsible for: (a) reviewing the risk management policies and procedures of the Company; (b) overseeing and monitoring the operation of the Company's risk management framework; and (c) identifying material risks relating to the Company's compliance with all applicable regulations, including those concerning trade secret protection and intellectual property compliance. *Id.*

16. The Risk Subcommittee serves as the primary vehicle for Board- and Audit-Committee-level oversight of the Company's Enterprise Risk Management program. DRC Report at 113. It receives and reviews quarterly reports from the Chief Compliance Officer concerning (a) the Company's risk management framework and policies; (b) the Company's material compliance with applicable laws and regulations, including those concerning trade secrets and intellectual property; and (c) any recommendations regarding the foregoing. *See* DRC Report at 112-13. The Risk Subcommittee also provides quarterly updates to the full Board, including its assessment of senior management's contribution to the Company's culture of ethics and compliance and senior management's effectiveness and dedication to ensuring the Company's material compliance with applicable laws, rules, and regulations. *See id.* at 113. The Risk Subcommittee has free access to management and Company employees and has authority to retain independent advisors or counsel at the Company's expense. *See id.*

17. Second, the charter of the Management-Level Compliance and Risk Governing Committee (the "Compliance Committee") has been enhanced and must remain in place for at least five years from the date of adoption. *See* Stip. ¶ 2.5; DRC Report at 113. As the DRC Report

explains, these enhancements reflect the DRC's determination—grounded in the same reasoning that prompted the creation of the Risk Subcommittee —that certain enhancements to the Compliance Committee's work would further benefit the Company. *See* DRC Report at 113. Under the enhanced structure, the Compliance Committee must provide written quarterly updates to both the Risk Subcommittee and the full Board covering: (a) the Company's material compliance with applicable laws and regulations, including those concerning trade secret protection and intellectual property compliance; (b) material changes to the Company's business, strategy, and compliance risk; (c) the risks and benefits assessment for any planned material changes thereto; and (d) the effect of any material changes to the Company's business and/or its business strategy. *See id.*

18. Together, the reforms required by the Settlement directly address Plaintiffs' allegations in the derivative actions—specifically, the alleged absence of adequate Board-level controls and reporting mechanisms connecting the Board to management-level compliance activities during the period of alleged wrongdoing. *See* Consolidated Am. Compl. ¶¶ 185-189; DRC Report at 112-13.

I declare under the pains and penalties of perjury under the laws of the State of New York that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 10th day of April, 2026

Richard A. Speirs
Richard A. Speirs

Exhibit B

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CITY OF MIAMI GENERAL EMPLOYEES' AND SANITATION EMPLOYEES' RETIREMENT TRUST, Derivatively on Behalf of Nominal Defendant FIDELITY NATIONAL FINANCIAL, INC.,	:	
Plaintiff,	:	
v	:	C. A. No. 2020-0650-KSJM
WILLIAM P. FOLEY, II, DOUGLAS K. AMMERMAN, THOMAS M. HAGERTY, DANIEL D. LANE, RICHARD N. MASSEY, HEATHER H. MURREN, RAYMOND R. QUIRK, JOHN D. ROOD, PETER O. SHEA, JR., CARY H. THOMPSON, MVB MANAGEMENT, LLC, and TRASIMENE CAPITAL MANAGEMENT, LLC,	:	
Defendants,	:	
and	:	
FIDELITY NATIONAL FINANCIAL, INC., a Delaware corporation,	:	
Nominal Defendant.	:	

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, June 21, 2022
1:33 p.m.

- - -

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

- - -

SETTLEMENT CONFERENCE AND RULINGS OF THE COURT
HELD VIA ZOOM

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
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APPEARANCES:

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DOUGLAS D. HERRMANN, ESQ.
Troutman Pepper Hamilton Sanders LLP
-and-
J. TIMOTHY MAST, ESQ.
of the Georgia Bar
Troutman Pepper Hamilton Sanders LLP
for Defendant MVB Management, LLC

THE COURT: Good afternoon, everyone.

VARIOUS COUNSEL: Good afternoon, Your Honor.

THE COURT: Nice to see you all.

I'd like to start by confirming that our court reporter can hear me?

THE COURT REPORTER: I can, Your Honor. Thank you.

THE COURT: Great. Thank you.

Let's have appearances for the record.

ATTORNEY VARALLO: Good afternoon, Your Honor. Greg Varallo from Bernstein Litowitz for the plaintiffs. With me today are Mark Lebovitch and Mae Oberste from my office. Also from co-counsel at Andrews & Springer, David Sborz, Peter Andrews, and Craig Springer.

With Your Honor's permission, Mr. Lebovitch will make the presentation for us today.

ATTORNEY WALSH: Good afternoon, Your Honor. Pete Walsh of Potter, Anderson & Corroon. Also on the line with me are Mike Pittenger and Abe Schneider on behalf of the special litigation committee, and I'll be making remarks on behalf of the SLC. Thank you.

ATTORNEY ARONSTAM: Good afternoon, Your Honor. Brad Aronstam on behalf of Fidelity National and the individual defendants. With me are my co-counsel from Weil Gotshal, John Neuwirth and Evert Christensen.

ATTORNEY HERRMANN: Good afternoon, Your Honor. Doug Herrmann from Troutman Pepper on behalf of MVB Management, as well as my partner, Tim Mast.

ATTORNEY MAST: Good afternoon, Your Honor.

THE COURT: All right. I think that's everyone. Please proceed.

ATTORNEY WALSH: Good afternoon, Your Honor. Pete Walsh again on behalf of the SLC. Mr. Lebovitch and I conferred, and if it's okay with Your Honor, I was going to spend just about ten minutes giving you the perspective of the SLC in support of the settlement this afternoon, and then I would turn it over to Mr. Lebovitch.

THE COURT: Of course. Thank you.

ATTORNEY WALSH: Thank you, Your Honor.

In terms of my remarks, I thought it

would be helpful to the Court to spend a few minutes describing the claims, the work of the special litigation committee, what was really a hard-fought negotiation to bring us to the settlement, and then, finally, very briefly, I was going to touch upon the terms of the settlement. And needless to say, we believe it is a very beneficial settlement and one that merits the Court's approval.

So let me start with the complaint and the underlying transaction.

The underlying transaction challenged in this derivative action is the acquisition of FGL Holdings, Inc. by Fidelity National Financial. I'll refer to Fidelity as Fidelity or FNF. It's a leading provider in this country of title insurance and settlement services.

Bill Foley, one of the defendants, is the founder of FNF and chairman of the board. At the time of the deal, Mr. Foley owned 3.2 percent of the Fidelity shares.

He had been involved in a prior acquisition of FGL Holdings by a SPAC sponsored by him and, as a result, owned 6.7 percent of the FGL shares and was also on the FGL board at the time of the

FNF/FGL transaction.

Another defendant, Rick Massey, was similarly situated in that he was also on the FGL board and owned shares in FGL, although his economic interest was greater on the Fidelity side than in FGL.

But given these potential conflicts, a special committee was formed to consider -- and, if appropriate, recommend -- the acquisition of FGL. Negotiations commenced in the early fall of 2019, a deal was announced in February 2020, and the transaction closed in June of 2020.

The derivative action was filed in August 2020 and challenged the deal in numerous respects. Let me just recite some of those.

Plaintiff asserted that the members of the special committee were compromised or lacked independence from Mr. Foley. It alleged that Fidelity overpaid for FGL as reflected by post-announcement drop in the stock price. Plaintiff also challenged the independence of the financial advisors, specifically Bank of America, as well as defendant Trasimene Capital Management, Trasimene being a fully controlled entity formed shortly before the FGL negotiation started. And as to Trasimene, the

complaint challenged the amount of the fee paid in connection with the transaction.

The complaint also challenged an arrangement involving defendant MVB Management. MVB is an entity in which Mr. Foley indirectly owned 50 percent. And in the transaction and on the FGL side, that entity received a 50 percent subadvise -- or, excuse me, a subadvisory fee in connection with advisory services that BlackRock provided to FGL Holdings. So this arrangement was subsumed in connection with the FNF/FGL acquisition, although the subadvisory fee was reduced in connection with the FGL deal.

And finally, the complaint challenged FGL's preclosing retention of an entity called Qomplx. For the benefit of the court reporter, that's Q-O-M-P-L-X. Qomplx was retained to look into and address cybersecurity issues at FGL prior to the closing.

Counsel for the plaintiff did their homework in preparing the complaint, 85-page complaint. They had first made a books and records demand and utilized publicly available information to detail and document potential overlaps in relations

and business relations that Mr. Foley had with certain members of the board. As to the specific causes of action, the complaint contained essentially four, each centered around the FGL transaction.

Count I asserted breach of fiduciary duty claims against Mr. Foley, Mr. Massey, and a defendant, a gentleman by the name of Cary Thompson, those gentlemen being the nonmembers of the special committee. I mentioned Mr. Foley and Mr. Massey. Mr. Thompson was employed by Bank of America, one of the two financial advisors to the special committee, and it was therefore determined that he should not sit on the special committee.

Count III [sic] asserted breach of fiduciary duty claims against the members of the special committee.

Count III is an aiding and abetting claim against defendants Trasimene and MVB.

And Count IV is an unjust enrichment claim against Trasimene and MVB relating to the FLG [sic] transaction.

Let me say a little bit about the SLC. In October 2020, the Fidelity board appointed the special litigation committee, and in doing so gave it

full authority to investigate the allegations of the complaint and to determine what actions the company should take in response to the complaint. At that time the committee was composed of Sandra Morgan and Heather Murren. A third member was added in May 2021, when Justice Dhanidina joined the FNF board. He is a retired justice of the California Court of Appeals.

The SLC's credentials and a little bit about them are set forth in our brief and in their declarations, but let me just mention a couple things which I think are important for the Court's consideration.

First, Sandra Morgan, she chaired the SLC. She joined the FNF board after the events challenged in the complaint. She had no prior business or personal relationships with Mr. Foley or any other board member. So in Ms. Morgan, we had an unquestionably independent director who also was an accomplished lawyer by background.

With respect to Heather Murren, she was a member of the special committee that considered the FGL transaction, so naturally, early in the process, we took a very hard look at her independence to serve as a member of the SLC. We twice interviewed

her, once at the outset and once later as we were into the process, solely to probe her independence and to make sure that, in light of certain issues raised by the plaintiff, that she was, in fact, an appropriate member of the SLC.

We considered Delaware law, obviously, and under the precedent of this court and the Supreme Court, we felt very confident that Ms. Murren was an appropriate member of the SLC. She was also very beneficial to the process because she had been involved in the transaction, and given her background as a retired managing director and group head of global securities at Merrill Lynch, she knew business valuation very well and, therefore, was very helpful to the committee.

And lastly, I mentioned Justice Dhanidina, who joined later in the process. He, too, is a very accomplished lawyer, and so with him and Sandra Morgan, we had two very accomplished lawyers and another member who was well-skilled in business valuation, and that proved, I think, very helpful to the process as we got into the interviews and working with our expert.

Just a little bit about the process we

employed in this case. As an initial matter, we felt that it was important, given the direct challenge to the price paid by Fidelity for FGL, that we retain a valuation expert. And after interviewing several candidates, the committee selected Charles River Associates, whose team was led by Craig Elson, who has appeared in this court on a number of occasions as a valuation expert.

The committee made document requests of the defendants, all of whom, I should emphasize, cooperated fully in providing the committee documents. They amounted to almost 40,000 documents from 13 custodians.

We then proceeded to conduct 14 interviews. In some cases we interviewed members of the financial advisors, representatives of the financial advisors twice, so that Charles River could feel confident that it fully understood the processes and valuations that resulted in the transaction.

So with that information in hand, I should also note, there was tremendous participation in this process by the members of the special litigation committee. As I have noted in the brief, one or more members of the SLC participated in nearly

all of the interviews. And, similarly, a representative of Charles River participated in most of the interviews. And, of course, as we completed interviews, we would periodically meet with the SLC to confer about what we had heard, provide advice and guidance, and so, in that respect, I believe it was a very sound process employed.

The conclusions ultimately reached by the committee are set forth at pages 19 to 22 of our brief. I don't think it's necessary to go into each of those, but let me make a couple observations which I think are helpful or should be helpful to the Court.

First of all, with respect to the FGL transaction, having interviewed all the members of the special committee that considered the transaction and assessed carefully each of their ties or potential ties to Mr. Foley, the committee concluded that the FGL transaction would likely merit business judgment review.

Looking at the established precedent from this court and the Supreme Court, we didn't think that Mr. Foley could realistically be deemed a controller, holding just 3.2 percent of FNF. And so then we spent a lot of time in interviews looking

carefully at the question of beholdenness; that is, whether any given member of the special committee could be found to be beholden to Mr. Foley and therefore lack independence.

And while that -- those interviews and the information presented a lot of factual issues, we found that the special committee, the members of the special committee, were extremely -- and I emphasize the word "extremely" -- accomplished businesspersons in their own right. Their successes, many of which were extraordinary, were self-made.

And more importantly, few, if any, had any meaningful personal relationships with Mr. Foley. And as importantly, we felt their holdings in Fidelity clearly aligned them with the interests of the stockholders in connection with the FGL transaction.

So at bottom, we felt pretty confident that the record would show that the special committee was independent and supported the deal, not because Mr. Foley wanted it, but because they believed it was in the best interest of the FNF stockholders.

That said, we also considered the what-ifs, and what I mean by that is, the committee considered what if the Court elected to apply entire

fairness, and in that respect, we dug deep as well and concluded, with the assistance of Charles River, that there was a high probability that the Court would find that the price that was paid for FGL was within a range of fair value.

We also, of course, looked at the other aspects of the transaction challenged in the complaint. The Trasimene fee, for example, as we set forth in the brief, we believe that fee, in particular, presented potentially a litigable issue, but, to be clear, we felt it was also very clear that Trasimene added substantial value as an advisor.

As I said, we looked at some of the other claims to evaluate them, and there clearly were procedural challenges to the plaintiffs pursuing some of those claims. But at the end of the day, the committee's view with respect to all of this was there were risks to both sides, and we felt it was in the interests of the company to see whether a settlement of the case could be achieved.

And so with that, let me speak very, very briefly to the settlement negotiations. Having gotten our arms around the facts and potential litigation outcomes, the committee recognized, with

the authority granted to it, that it could and should exercise the leverage available to it to see whether a settlement could be achieved.

As for plaintiff's counsel, they, of course, recognized that the SLC could move to dismiss all or part of the complaint under *Zapata*, as often happens in these types of cases.

As for defendants' counsel, they certainly recognized, although they were adamant that their clients had acted entirely appropriately, and we believe they did, they were zealous in their defense of the case, but they, too, recognized ultimately that there were potential risks to any ongoing litigation, as did the SLC, of course. We certainly were carefully considering the *Zapata* test and fully appreciated that that, too, presented risk to the SLC.

Accordingly, with the committee's blessing, we engaged both sides in a settlement discussion over the course of several months. It was essentially a three-way negotiation in which the SLC -- and we, as counsel, engaged in very frank and open discussions with both the plaintiff's counsel and the defendants' counsel. And at one point, we even had a face-to-face meeting with Mr. Lebovitch and

Mr. Springer in our office. The two members of the special committee listened in by phone. We discussed each and every claim. We debated each and every claim. To their credit, they came with very constructive approaches to a potential settlement, and ultimately we were able to get a settlement done.

I will say there were times when I think all parties were very frustrated by the slow progress, but ultimately all parties in good faith hung in there and we eventually got it done.

So with that, let me speak very briefly to the settlement. I think what the negotiations ultimately yielded is a proposed settlement that plainly benefits the company and, as importantly, I think it squarely addresses the plaintiff's primary grievance in the case.

Again, they complained and challenged certain incidental related-party transactions that they contended allowed Mr. Foley and others to extract nonratable benefits. So, in that regard, one of the things achieved in the settlement are the related-person transaction committee charter and policies, and, specifically, the defendants cooperated fully in negotiating two documents.

As I mentioned, the first is a related-person transaction committee charter. The charter provides for an independent committee of board members to, among other things, review and consider proposed transactions under a separately negotiated related-person transaction policy. Those two documents can be found at Exhibits 6 and 7 of our brief, and, essentially, going forward, any proposed transaction between the company and a related party -- and that term, "related party," is broadly defined to include significant stockholders, directors, officers, and family members, and in an amount exceeding 120,000 in value must go through a multi-step process. Ultimately, it can be approved, modified, or rejected by this independent related-person transaction committee.

So that, in my view, is sort of the centerpiece. It achieves exactly what plaintiffs complained about. And as we both, I think, noted in the briefs, the charter and policy working in tandem present a benefit to the company that would not have been achieved if there had been further litigation.

Then, of course, the settlement also provides for a $20 million payment to FNF funded by

the defendants and the insurance carriers. And finally, the settlement credits plaintiff with having caused, in part, the addition of Ms. Morgan and Justice Dhanidina to the FNF board. All agree that they are truly independent directors. And I can say, having worked with both of them, they are excellent additions to the FNF board.

So let me conclude where I started, which is to say that the SLC believes that the proposed settlement is extremely beneficial to the company, it is the product of a hard-fought three-way negotiation by all the parties, and it is, most importantly, presented without objectors or objection of any kind, and therefore we respectfully request that it be approved.

Unless Your Honor has any questions, I'll turn it over to Mr. Lebovitch.

THE COURT: No questions. Thank you, Mr. Walsh.

ATTORNEY WALSH: Thank you, Your Honor.

ATTORNEY LEBOVITCH: I have to unmute first. Thank you, Your Honor.

I just want to start by acknowledging

my colleague, Tom James. I called him into the office. He's not on the camera, but I'd be remiss to not acknowledge his presence here for the Court's sake and also his material presence and contributions throughout the case.

So first, it's really great to see Mr. Walsh make such an effective presentation of -- in support of a derivative suit settlement.

I think, Your Honor, when -- I knew that partnering with Mr. Varallo could open a Pandora's box. I didn't really realize what that meant until Mr. Walsh called me last week and said he wanted to go first today and he wanted to present. So we appreciate that. And looking forward to, you know, the next step in evolution. Maybe Your Honor will be applying the *Hirt* factors to -- you know, like a leadership dispute amongst Bills Lafferty, Chandler, and Savitt, something like that.

But I'm not going to repeat what Mr. Walsh presented. I actually want to kind of use this to make one big-picture comment about SLC practice, which I think Your Honor and the other judges on the court have seen more often, make a discrete point about the case we filed beyond that.

Mr. Walsh said -- and I'll turn to answer any questions you may have about the settlement and then address some fee requests.

Focusing first on the SLC practice, you know, truth is, what we saw from this SLC, even advised by Messrs. Walsh and Pittenger, really does stand out from the norm of what we've seen, you know. And, like I said, we are seeing more SLCs recently, and, you know, it's -- I think this court has been living with and understands the logic behind *Zapata* and has for decades, but I will say, practicing across the country, it's a concept that is challenging for judges in other jurisdictions, and I think it's because even when a court has to learn the demand futility standards at bottom, they still make the final choice and make judgments to ensure that they're comfortable justice is being done.

And, you know, the idea that a case that typically has survived a motion to dismiss can be, you know, not only stayed, but essentially dismissed forcibly by what are often, you know, compatriots of the defendants is something that I think jurists outside of Delaware often find foreign, if not counterintuitive. I don't know that there's

another analogue to the SLC in any other aspect of our judicial system, where you can have a viable claim that someone other than the judge or the parties can put an end to.

And I think that, you know, the reality is that, because of the powers that *Zapata* gives SLCs and whatnot, we approach an SLC with a fair amount of skepticism. It's from experience. You know, we -- if you've represented investors -- and I'm sure every other lawyer on this call has experienced situations where, you know, the plaintiffs' counsel are invited to, you know, make an early presentation, and, you know, they do so in good faith and they walk out of that meeting with a clear sense that they were kind of just part of a box-checking exercise and the SLC and its counsel have already decided to move to dismiss all claims, and I think it's unfortunate, but that is a reality because of the power that Mr. Walsh touched on that *Zapata* can give SLCs. So we're always ready to kind of trust but fight if we have to.

This really was different. It's hard to describe, but from the first communication, this SLC and their counsel set a different tone and I think did earn a certain amount of trust.

Mr. Walsh, Mr. Pittenger, they didn't call us and ask us to just present the results of our investigation and make our arguments to them. They didn't forbid their clients from, you know, doing anything other than just sitting there and listening quietly during the meeting and the presentation. They asked for a meeting to make clear it was going to be so that they could update us, we're going to have an exchange of ideas and we're going to discuss the strengths and weaknesses of the case and explore what would be a beneficial outcome.

In fact, the SLC participated directly. There was no objection, and we spoke directly with them and they, in turn, responded and they spoke directly with us. I can assure you, we did not always agree. In fact, early on, I think there was a lot of areas of disagreement, but it did become, you know, clear early on that everyone was focused on the company's best interests and were approaching with an open mind.

You know, it was arm's length, it was adversarial you know, I don't agree with everything Mr. Walsh just said about the nature of the claims. You know, they told us the aspects of our case that

they thought we could not prove and would not hold up at trial, but we respected their presentation because they were I don't think trying to win an argument for the sake of doing so. They weren't being needlessly adversarial. They were, I think, being frank with us about points they thought maybe we didn't take into account. We listened to some, and when we disagree, we did so on points that we genuinely thought they should miss-- you know, they might have miscalculated, they should try to reassess.

But ultimately, it was all parties focusing on the issues that, you know, were arguably, if not clearly, present at the company and that warranted at least the forward-looking relief, and that's how these meetings evolved. And so what you had was an SLC and plaintiffs' lawyers who, I guess, metaphorically, we always kept one hand on the sword and were ready to go do battle, but over time and over a frank and merits-driven exchange, were able to close the gap and come to something that we do think is very beneficial to the -- to this company in particular.

With that, I mean, I want to -- before I go too far in praise for our friends on the SLC side here, I want to also recognize, you know, how they

were created and what's, I think, atypical in the practice. You know, normally Your Honor's only going to see an SLC created, I think, in two instances, right. There's a Rule 23.1 motion that was already denied, or you have a case that's entire fairness *ab initio*. I don't think it's often you have a case like ours where, you know, there's not a controlling shareholder on the face of the -- Bill Foley owned, you know, under 5 percent of the shares, so we could allege he was conflicted because of various side payments, the Trasimene payments, you know, his marginally larger FGL stake, but, actually, when we started the case assessment here, we absolutely anticipated a motion to dismiss. Who wouldn't?

And I think that just touches on what I think I want to add to Mr. Walsh's comments. The work that, you know, my colleagues here did to make these defendants choose to go the SLC route rather than even making a motion to dismiss I think is a credit to them. I think that the complaint in this action did get around the business judgment rule, and it did so by presenting such exceptional detail, some of which came through a 220, a lot of it came through old-school "roll up your sleeves" investigation.

To show that, despite Mr. Foley's fairly low equity stake, a majority of the board was allegedly beholden to Bill Foley. These are allegations that I think would have held up. We showed the complex relationships with respect to FNF and in other transactions where directors who seem nominally independent were benefiting through their Foley relationship.

We talked about other related-party transactions involving Foley and his entities, and, you know, again, I guess one area of disagreement is there were a lot of points that were well-taken from Mr. Walsh. We sure never agreed that down the road this would become a business judgment rule case. I think that our complaint showed that, sure, people were very successful on their own, but they made a lot of money through their relationship with Mr. Foley. And last I checked, even rich people care about money. And so I think we would have -- might have had a tough time getting around the business judgment rule.

You know, that said, our reward for hopefully pleading the claim that made a motion to dismiss futile was not plenary discovery, it was an SLC, and that led to the process that I think we both

discussed, and, you know, really in a world where we understood some of the points that Mr. Walsh and Mr. Pittenger and the SLC made about where we should reconsider. We also disputed some. I'll just give one example, from our perspective. I don't want to violate any confidence.

You know, the Trasimene payments, right, that was 27 million. I mean, in a world where there was Citigroup there, we've had this in some other cases with controlling shareholders, it just seemed like it was problematic. And so if you look at how this case could play out, we felt very strongly that the Trasimene fee, it was hard to believe they would really justify getting paid that much money where it's basically Bill Foley just doing his thing anyway.

That said, the other aspects of the transaction, if we tried it, even if there's never a business judgment rule problem, these were complex transactions and showing damages on a transaction that, you know, in a lot of ways was about side payments that were convoluted. You know, there would be complexities, you know. And, again, Blackstone, you know, we had to confront the reality that, you

know, Blackstone is a big advisor. They don't need to be paying off Bill Foley to get business.

So when we're challenging the management agreement, we call it a side payment, I think we had a good basis to do so, but ultimately I'm sure defendants would have come in and said, are you really going to believe Blackstone would kind of look the other way at, you know, skimming for the benefit of Foley? And that is something we would have litigated if we had to, but obviously a harder claim to win over than something like the Trasimene fee.

With that, I don't want to repeat the terms of the settlement. Unless the Court has a question about the settlement, I would just turn to the fee application.

THE COURT: No questions. Thank you.

ATTORNEY LEBOVITCH: Thank you, Your Honor.

So with that, our fee request is for a $4.4 million fee award, and that includes expenses of approximately $9,000.

Before I get into the *Sugarland* factors, I just want to comment on, I guess, the pertinence of this being a negotiated fee request. So

we obviously acknowledge that, you know, the negotiated amounts is hardly binding and the Court has to at least be comfortable that any fee that's negotiated is in a range of reasonableness.

I just want to touch on, if it's okay, I guess maybe policy reasons why I think the Court, you know, should trust a fee that appears to be negotiated by adversarial parties acting at arm's length.

You know, I want to highlight not only where we are in the settlement with the SLC. Notwithstanding all of the kind words being shared today, we -- our relationship with the defendants here, again, people we have great respect for, you know, at least their counsel, but it was somewhere between cold war and simmering hostilities, right, so this was a three-way, complex negotiation. This wasn't, you know, easy Kumbaya.

I think that, you know, the deference the Court gives to a negotiated fee to me is almost a corollary to the very wise policy the Court seems to have adopted, the verse and concept of baseball arbitration. I think, fundamentally, that's the best way to get parties to not present needless fee

disputes or other disputes to the Court, because, you know, when people know that they're going to be taken to task for being unreasonable in their offers and demands, they get reasonable, and then it's more likely you're going to have agreements.

And I think that, you know, the corollary of that is, hey, we have a law -- a rule that makes you get reasonable, and so within that, once you are being reasonable, the Court, you know, I think typically would have some deference for the agreements that are reached.

Real quickly, you know, I started out by thinking about the plight of defense counsel when they're negotiating a fee and deciding whether to put it to a fight or a negotiated outcome. You know, frankly, it's a bit of a leap of faith when defense counsel who think, you know, hey, this is not an unreasonable fee to pay, they have to recommend it to a client.

And in the end, if the Court imposes a fee on the defendants, you know, the defense counsel can always say, yeah, the judge got it wrong, the defense counsel don't have to own it. I think in a negotiated context, defense counsel run the risk of

recommending a fee and then having the Court say, God, you did a terrible job negotiating. That's too high.

You know, I think -- and so I think that, again, unless there's a sign of something wrong, you know, I wouldn't want my counterparty in negotiations to lose credibility with their client. At the same time, plaintiffs, in a *Versum* world, have an even stronger incentive to compromise their own positions, and I think that translates itself here.

Just speaking for my firm -- and I think this applies for Mr. Springer as well -- you know, we kind of want the Court to know that if we are presenting a fee fight, it's really because we think the other side was unreasonable. They didn't get in a range of reasonableness.

And so I think, you know, at the margins, we'll always compromise more than what we think we can justify in the briefing, you know, and, frankly, we have a stronger incentive. We know some people will be unreasonable, not only on fees, but in litigation.

And, you know, part of what we have going for us is letting people know if you're professional and you're just engaging on the merits

the way Mr. Walsh and Mr. Pittenger did, we are going to compromise, we're not going to be too stubborn. And the corollary is if people just don't engage, they should know that we could be as hard as we have to be.

And so, you know, I think that here what we have, if the analysis is range of reasonableness, if we didn't have a negotiated outcome, you know, if we had a hypothetical defendant just say, oh, this was just a garbage complaint, we set up an SLC to shut this down and the settlement's worth nothing, and we knew they were coming in with like a pittance of an offer on a fee and the settlement here, I hope the Court, you know, agrees and wouldn't be offended by it, but I actually think we would come in, under a *Versum* world, with a higher number. We wouldn't be unreasonable. I think there's plenty of room for us to justify a higher fee within the range. And I think I want to prove that by now applying the *Sugarland* factors, because I think, under current law, I don't know if I can stop that this is in a range of reasonableness.

So with that, *Sugarland* factors, you know, focus first on the benefits achieved. I won't repeat Mr. Walsh's analysis, but I will note there's

multiple ways to add to a fee, and I don't think the Court, whether this was contested or not, has to actually pin down the answer to every single item. $20 million is $20 million. That's something, you know -- you know, that we brought to the table here. It's a benefit warranting a fee, and the Court would have some range of a percentage that it could award, you know, the higher that percentage, the less gap there is between that and $4.4 million.

The next, you know, kind of element is the independent directors. There's case law on what adding the independent director is worth, you know, 1 to 2 million for an independent director. Here we have two. At the same time we acknowledged that this was not part of the negotiation *per se*, this was something the company was doing and it was part of the consideration, but it's part of a mootness type thing.

You know, again, I think that where our requests after negotiation is 4.4 million, it just gives plenty of room for the Court to essentially discount to the value of the two independent directors based on whatever factors the Court thought was reasonable. And then, to borrow Mr. Walsh's word, the centerpiece of the settlement is the related-person

transaction committee and the complementary, you know, amendments to the related-person policy. An implementation of really a new policy.

So that is the cornerstone. And, you know, I think that the heart of this case, again, it's not *de jure* control, it's not *de facto* control, it's really, this is a company with such a history of related-person transactions that it led to the rebutting of the business judgment rule, and there's this common pattern of deals that, you know, are probably, you know, arguable, but there's always something off the top. I mean, that was our pitch in the complaint. There's always something off the top for Foley, affiliated entities, and possibly other directors, either of the company at issue or even directors of other Foley entities.

And so I think that's what triggered the suit and that's really what's being targeted here. I can't say there's not going to be other related-person transactions because I think that would be naive.

When you look at the history of these companies, the idea of the committee that we, together with the SLC, negotiated and structured and the policy

was that, you know, we're not just limiting the amount of money that is, you know, making its way, you know, into Mr. Foley's pocket, but the transactions really should be more fair, meaningfully more fair, and so I think that's very helpful, and even after the fact there's this annual review of all related-party transactions. I think that's valuable. It makes directors sit down and look in the mirror and say, are we fighting hard enough for the other shareholders?

So, you know, again, in many a context, I would be arguing what is that worth, and I think I would -- could easily argue for significant numbers just for the committee and the policy and, you know, that would make the fee on the 20 million and two independent directors perhaps irrelevant, but here we negotiated, and I think that the reality is because the SLC and defendants, you know, got into the range of reasonableness appropriately and in a fair way, we did too, and so we got to a number that I hope is very easy for the Court to approve.

Moving on to the other elements, the supporting elements, there were risks that were real. Obviously, it's a complaint that we could not take for granted would face a motion to dismiss, but we got

over it. And then once an SLC is created, we not only have to survive a partial or complete dismissal motion from an SLC under *Zapata*, we then potentially have to survive summary judgment post-discovery from all defendants. We have to prove liability at trial, prove damages, and, again, like I mentioned, while some aspects, you know, we really have a lot of confidence would have held up, there's others that would be very hard-fought and challenging.

So I think settlement now makes sense. Standing of counsel, you know, that Your Honor is familiar with folks, Mr. Harrison's firm and Weil and the SLC counsel and hopefully trust that we try to do the right thing.

And then there's the lodestar cross-check. Again, we acknowledge that, you know, there was -- when SLC is created, we're not going to go run the hours, you know, run the clock. The hours here are not large. The implied hourly rate comes to about $8,500 an hour. That is a lot. As defense firm rates go higher and higher, that's, I guess, becoming less eye-popping, but that said, it's a big implied hourly rate. You know, we list examples of implied hourlies being approved at higher levels, that's

note 176 on page 53 of our settlement brief.

But, again, I think it's well-earned. And Your Honor knows all too well that for every case that's like this, we seem to find ourselves in cases that are the impossible-to-extract-yourself, it's just headed to trial, and we could win everything and the implied hourly rate is not going to be $8,500 an hour. So we think that that's fair.

This was contingent, and as Mr. Walsh said, there has been no objection, I'll verify. We've checked our mail, our emails, everything, we're not aware of any objections from anyone.

So with that, hopefully the settlement and the fee can be approved. And just thank Your Honor for your time and consideration.

THE COURT: Thank you, Mr. Lebovitch.

Does anyone else wish to speak for or against the pending motions?

(No response.)

THE COURT: All right. Hearing no one, I will turn now to my bench ruling. Give me one moment.

I'll note for the record that no one has appeared today to object to any portion of the

pending motions. No one has submitted anything in writing to the Court or, to my knowledge, to any of the parties involved opposing the pending motions, and that weighs heavily in favor of approving the motions here. And to spare you the suspense, I am granting both motions.

I'll begin with a summary of the factual background as alleged, which I draw from the stockholder derivative complaint dated August 4th, 2020, and also from the stipulation and agreement of settlement, compromise, and release dated April 1st, 2022.

Fidelity National Financial, Inc. which I'll refer to as "FNF," is a title insurance and settlement services business. In September 2019, FNF's founder and board chairman raised the possibility of a potential acquisition of FGL Holdings, Inc., which I'll refer to as "FGL," a Cayman Islands entity. At the time, the founder and board chairman, Mr. Foley, owned 6.7 percent of the outstanding ordinary shares of FGL and approximately 3.2 percent of the outstanding shares of FNF.

The FNF board established a special committee to evaluate the potential transaction. The

committee retained Bank of America Securities and Trasimene Capital Management, LLC as its financial advisors. The special committee oversaw negotiations and approved a deal to acquire FGL at a value of 12.50 per FGL share, and the FNF board approved the transaction. The market reacted poorly to the deal announcement, causing FNF's market cap to decrease by $843 million.

The transaction closed on June 1st, 2020, with FNF issuing 27 million shares of FNF common stock and paying approximately $1.8 billion in cash to former holders of FGL ordinary and preferred shares.

The plaintiff, City of Miami General Employees' and Sanitation Employees' Retirement Trust, who I'll refer to as "plaintiff," made a demand on FNF under Section 220 of the Delaware General Corporation Law on April 17th, 2020, to inspect books and records to investigate possible wrongdoing in connection with the FGL acquisition.

FNF produced records in response to the demand, and plaintiff's counsel reviewed those documents to identify business dealings and connections between Mr. Foley or Foley-related entities and some of the members of the special

committee.

Plaintiff then filed an 85-page complaint on August 4th, 2020. The complaint named Mr. Foley and all other board members of FNF, and two Foley-affiliated entities as defendants. The complaint alleged four derivative counts: Count I for breach of fiduciary duty against Mr. Foley and two other FNF directors; Count II for breach of fiduciary duty against seven FNF directors on the special committee; Count III for aiding and abetting against Trasimene and the other Foley-affiliated entity named as a defendant; and Count IV for unjust enrichment against the two Foley-affiliated entities.

The complaint alleges that Mr. Foley engineered the transaction before the special committee was formed, that the special committee was conflicted from the start, and that the special committee abdicated its role by rubber-stamping the transaction. According to the plaintiff, this resulted in an unfair transaction process where Mr. Foley was able to extract a nonratable benefit in a number of ways.

First, by causing FNF to overpay for FGL, which Foley owned a larger stake in, relatively

speaking.

Second, through various side deals that supposedly benefited Mr. Foley.

And third, through fee arrangements with advisors to the special committee that indirectly benefited Mr. Foley, including $57.5 million in fees to MVB and $27 million in fees to Trasimene.

On October 27th, 2020, the FNF board established a special litigation committee to investigate the plaintiff's claims and determine how to best proceed in the interest of FNF and its stockholders. Mr. Walsh gave a detailed presentation today concerning the special litigation committee process, and many of the details that Mr. Walsh highlighted today really reflect best practices in terms of a special litigation committee representation.

The SLC, as I'll call it, was comprised of two independent directors: Sandra Morgan, an attorney at Covington & Burling and a former chair of the Nevada Gaming Control Board, and Heather Murren, a private investor and former managing director at Merrill Lynch.

The SLC later expanded to add a newly

appointed independent director, a retired California appeals justice, Justice Dhanidina. The SLC was advised throughout by independent legal and financial advisors.

On December 15th, 2020, I stayed the action pending the SLC's investigation. Between March 2021 and November 2021, I extended the stay a number of times and received a number of status reports from the SLC.

The SLC investigation was extensive. Again, I refer persons reviewing a transcript of this bench ruling to Mr. Walsh's presentation. The SLC investigation encompassed over 37,000 documents, 14 witnesses, and 17 formal SLC meetings. The SLC issued its findings as to the viability of plaintiff's claims and ultimately concluded that exploring a possible settlement was in the best interests of FNF stockholders.

Between August 2021 and January 2022, the SLC engaged in an extensive and hard-fought three-way settlement negotiation with parties to the litigation. On January 24th, 2022, the parties reached terms of an agreement to settle this action and executed a memorandum of understanding

memorializing those terms.

On April 1st, 2022, the parties submitted the terms of settlement to me by filing a stipulation and agreement of compromise, settlement, and release for the Court's review and consideration.

In exchange for dismissal of this action and a release of the plaintiff's claims, the defendants agreed to pay a monetary settlement of $20 million and adopt two corporate governance measures, which the stipulation of settlement refers to as the related-party transaction committee and the related-person transaction policy. The committee will include at least two independent directors who will review and approve related-party transactions. The policy will involve providing a clear definition of "related-person" and "related-party transaction," as well as a process for the submission, review, and approval of the related-party transactions by independent directors.

Also, the decision to add two independent directors to FNF's board can be attributed, at least in part, everyone agrees, to this litigation. The committee and the policy will remain in place for no less than three years.

On April 4th, 2022, I entered a scheduling order that had the effect of approving the form, mailing, and publication of the notice to stockholders of the pending settlement.

On June 7th, 2022, plaintiff submitted a declaration of Lance Cavallo, detailing the efforts of his company, Kurtzman Carson Consultants, LLC, to administer notice to stockholders. Notice involved mailing 187,789 notices to record and beneficial owners, remailing 36 returned notices, publishing a notice in the Depository Trust Company's Legal Notice System, and maintaining a toll-free hotline to provide stockholders with information. I've reviewed the details of the declaration, and I'm satisfied that notice was effective.

I'll turn now to my legal analysis of the pending motions.

The parties have asked me to decide whether the terms of the proposed settlement are fair and reasonable and also whether the requested attorneys' fees are fair and reasonable and should be granted.

The Delaware Supreme Court explained in *Barkan v. Amsted Industries*, "The Court of Chancery

plays a special role when asked to approve the settlement of a class or derivative action. It must balance the policy preference for settlement against the need to insure that the interests of [those not present in the litigation] have been fairly represented." In approving a settlement, the Court's function is to make an independent determination through the exercise of its own business judgment that the settlement is intrinsically fair and reasonable.

As Vice Chancellor Laster explained in *Activision*, the Court must ultimately "determine whether the settlement falls within a range of results, that a reasonable party in the position of the plaintiff, not under any compulsion to settle and with the benefit of the information then available, reasonably could accept." To make this determination, the Court considers a variety of factors, including, but not limited to, the nature of the claims, the risks of continued litigation, the circumstances through which the settlement was achieved, and other legal and factual circumstances of the case.

In evaluating these considerations, the Court frequently focuses on the "give" and the "get," comparing the value of the benefits achieved

against the strength of the claims being released.

Here, the give is the release of plaintiff's claims, and I reviewed the release, and I view it to be customary and not overly broad in scope.

The get is substantial, in my view. It includes a $20 million payment, appointment of two independent directors, and I'll note that those were achieved through a mootness process, but I'll address that later, and implementation of two corporate governance measures.

We need not dilate too extensively on the nature of the settlement because it should be obvious to all that it is an excellent settlement for the company. The independent directors and committee will improve the integrity of the board process. The policy will impose beneficial standards and processes for reporting, reviewing, and approving or ratifying transactions with related persons, including a multi-step process for transactions within the policy will first be reviewed by the chief legal officer or general counsel who will then report to the committee.

And the power to approve these sorts of transactions can only be delegated in narrow circumstances. So the policies collectively impose a

robust and beneficial system of checks and balances to monitor for the precise sort of risks and problems identified by plaintiff in the complaint. This is all great. Plus, the settlement secured $20 million in cash.

The process by which the settlement terms were negotiated further confirms the fairness of the result. The settlement was achieved through extensive arm's-length negotiations with the SLC and the parties with experienced counsel on all sides. The involvement and approval of the SLC as well as the opinion of both parties as to the fairness of the settlement are all indicia of fairness, in my opinion.

The settlement is particularly beneficial when considered in light of the continued risks of litigation. There are risks on all sides, of course. To highlight those to plaintiff, the SLC conducted a thorough investigation. The SLC comprised independent directors, capable advisors. There was a meaningful risk that the SLC would recommend dismissal and that I would review that motion under *Zapata*.

Plaintiff would also face risks in defending against the SLC's motion to dismiss or motion for summary judgment, proving the aiding and

abetting claims against various parties, and being unable to prove potentially the full extent of damages sought. Plaintiff would have incurred significant costs from continued litigation which could have eaten into any value that the company recovered in an ultimate fee award. This litigation would also impose costs on a nominal defendant for whom the litigation was being pursued.

So for all of these reasons, I view the settlement as more than reasonable and fair, and it is approved.

Let's turn now to evaluating the application for attorneys' fees and expenses.

Plaintiff's counsel has requested a fee award of $4.4 million, including expenses for monetary and therapeutic benefits conferred in connection with this litigation. Plaintiff advances two distinct bases to support the fee award. First, they point to the mootness doctrine for the appointment of the two directors, and second, they look to the monetary and therapeutic benefits obtained by the settlement to justify the award. And I'll discuss those standards briefly separately.

Under the mootness doctrine, the

plaintiff's counsel is entitled to mootness fees when (1) the suit is meritorious when filed; (2) the action producing the benefit to the corporation was taken by the defendants before judicial resolution was achieved; and (3) the resulting corporate benefit was causally related to the lawsuit.

In determining an appropriate award of attorneys' fees and expenses generally for a common benefit, Delaware looks to the *Sugarland* factors which are (1) the results achieved; (2) the time and efforts of counsel; (3) the relative complexities of litigation; (4) the contingency factor; and (5) the standing and ability of counsel. Of these factors, the results achieved, the benefit achieved, is given the most weight.

I'll clear some of the clutter here first. The elements of the mootness fee request are met, the complaint was meritorious when filed, FNF acted by appointing two new independent directors before I resolved this case, and FNF acknowledged that the pendency of this action was a consideration in appointing the two independent directors. So those elements are met here.

The question of how to value the

benefit provided by the appointment of two independent directors is slightly more nettlesome, as decisions of this court reflects the extreme swings in values ascribed to this benefit. In *EMAK Worldwide v. Kurz*, for example, this court awarded $400,000 for retaining independent board members by invalidating a consent that would have reduced a board from seven members to three members, thereby allowing a controller to control the board. And in *Liberty Tax*, Chancellor Bouchard found it reasonable to award 350,000 to $500,000 to ensure board independence by eliminating a controller for the company, and I view those as somewhat comparable benefits.

By contrast, in the context of a much larger cap company, in *Google*, then-Chancellor Strine awarded 8.5 million in fees for a similar benefit, a corporate governance settlement that resolved a challenge to a stock plan that plaintiffs alleged would allow the controller to issue new classes of stock but maintain control without paying for it. The primary benefit of the settlement was that each time the controller sought to issue nonvoting stock, they would need approval of every independent director on Google's board.

And in discussing the significance of this result, Chancellor Strine suggested that there are a network of facts that make independent directors conscious of their reputations, not only in this court, but in their professional circles, and then the Chancellor awarded 8.5 million in fees.

So I discussed these cases solely to illustrate the swings in value previously ascribed to similar benefits presented to this court. Plaintiff contends that the addition of two independent directors here confers a minimum benefit of $2 million, and plaintiffs hone in on briefing on two decisions of this court approving settlement and fees. That's *Tile Shop* and *Activision*.

In *Tile Shop*, Vice Chancellor Glasscock stated that a million dollars was an appropriate fee for the appointment of an independent director.

And in *Activision*, this court views fees in the realm of 5 to 10 million as reasonable for the installation of two independent directors and the reduction of a controller's controlling stake in a large cap company.

In *FrontFour*, I concluded that an

appropriate fee award for the appointment of two independent directors after surveying these precedents aside from *Tile Shop* and numerous others was approximately $1 million.

So putting it all together, as we have to do in these scenarios, we look really to precedent to inform the value of the benefits conferred, and for good reason. I think the appropriate ballpark here is 1 to $2 million for the appointment of independent directors, and so for the present purposes, just to move on, to evaluate the fairness of the overall fee requested, I'll call it a million.

That's lower than the value plaintiff counsel ascribes to this benefit, but I haven't reduced the value of the overall amount requested. So I'll move on to explain my thinking concerning the value of the cash component and the fees that it should generate.

Obviously, the value of the cash components is quantifiable, and in these sorts of circumstances, the Court will often gauge reasonableness of the fee award with reference to the percentage of the amount achieved.

As the Delaware Supreme Court

explained in *Americas Mining*, this court considers the stage of litigation when gauging the reasonableness of the requested fee. In that range, "33% is the very top." "When a case settles early, the Court of Chancery tends to award 10-15% of the monetary benefit conferred. When a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically" the percentage conferred will be somewhere in between. "Higher percentages are warranted when cases progress to a post-trial adjudication," generally. The benefit again is quantifiable, $20 million, and the case settled early in the litigation process, which typically would put us in the 10 to 15 percent range.

So you can do the math. 15 percent, I think, of 20 is short of what the plaintiffs ascribed to it. This case was stayed before any motion practice or answer to the complaint, and ultimately the case was settled while the stay was in effect. So based on the limited involvement of counsel, I think, again, an award of 10 to 15 percent would ordinarily be appropriate here based solely on the cash component.

I will say that plaintiffs point to a

number of precedent rulings granting larger percentage of cash benefits for comparable efforts to argue that their efforts justify a fee award of up to 25 percent. I acknowledge that the greater percentages have been granted by this court in comparable circumstances or where -- I think the traditional ballpark is appropriate here, again, 15 percent or 3 million, approximately, for this portion of the benefit makes sense. But that brings us to 4 million total in fees so far, and I'll address now the last component of the settlement, which is the governance measures achieved.

Mr. Walsh earlier called these the centerpiece of the settlement terms because they strike at exactly the sort of harm that the plaintiffs identified in their complaint. I'd note that they're only in place for a period of three years. That's not uncommon in these sorts of settlements. It doesn't mean that the board can't extend these measures to benefit the corporation.

But I do view these sorts of corporate governance benefits as meaningful. I think the process that's been imposed is likely to improve the integrity of board processes for the benefit of the company. And I think it's obvious that the value of

fees connected to this particular benefit achieved is at least $400,000, and probably more.

And I'll point to established precedent, including *Ebix*, *Liberty Tax*, and *Ledger* as helpful benchmarks in valuing this component of the settlement.

So for these reasons, I think the value of the benefits conferred justify the $4.4 million requested in fees.

And for completeness, I'll just address the remaining *Sugarland* factors, all of which confirm the propriety of the amount requested.

This case was litigated on a fully contingent basis. Delaware public policy supports rewarding that risk-taking behavior. The ability of counsel weighs in favor of approving the fee award, and that's the ability of all counsel involved. Plaintiff, the defendants, and the SLC were all represented by experienced advocates who hold the esteem of this court.

The time and effort of counsel weighs in favor of approving the fee award, but that does require some explanation because the lodestar is a bit high. Plaintiff invested over 500 hours into the

abbreviated litigation before the SLC swooped in. Throughout the investigation and early stages of the litigation, plaintiff's counsel showed skill and positioned themselves to achieve substantial benefits that were ultimately obtained in the settlement.

The fee, of course, represents a 14X multiple on plaintiff's counsel's hourly rate. The total lodestar, $313,654 total lodestar amount and effective hourly rate and expenses of $8,748 per hour. That's high. That would be a high hourly rate. Although high, this hourly rate is within the realm of hourly rates approved by this court when a plaintiff attains a substantial benefit along the lines achieved in this settlement. I'll point to *Sciabacucchi v. Salzberg* as one example where the court approved and awarded fees with an implied hourly rate of much more.

Generally, this court is reticent to punish plaintiff for achieving an exceptional result without extensive litigation efforts, and we always favor litigants working with special litigation committees to resolve claims efficiently and, as Mr. Lebovitch argued in his presentation today, the $4.4 million fee was negotiated. This was not opposed by the parties that have to pay it, and that does

counsel heavily in favor of approving it and does speak to the indicia of fairness and the appropriateness of the fee and the value that the parties themselves placed on it.

Of course, the complexity of litigation supports approving the fee as well. In sum, the fee requested is reasonable and the motions are all granted in their entirety.

Mr. Lebovitch, I'll look to you to submit a form of order that fills in the blanks, the kind you would normally hand up at a settlement hearing, and I will grant it on the docket.

With that, are there any questions?

ATTORNEY WALSH: No, Your Honor. Thank you.

ATTORNEY LEBOVITCH: Thank you very much, Your Honor. We'll get the order in promptly.

THE COURT: Thank you all very much, and congratulations on this outcome. We are adjourned.

(Proceedings concluded at 2:37 p.m.)

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CERTIFICATE

I, DOUGLAS J. ZWEIZIG, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 56 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 1st day of July, 2022.

/s/ Douglas J. Zweizig

Douglas J. Zweizig
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter

Exhibit C

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE TILE SHOP HOLDINGS, INC. STOCKHOLDER DERIVATIVE LITIGATION	:	Civil Action No. 10884-VCG

- - -

Court of Chancery Courthouse
Courtroom No. 1
34 The Circle
Georgetown, Delaware
Thursday, August 23, 2018
1:30 p.m.

- - -

BEFORE: HON. SAM GLASSCOCK III, Vice Chancellor.

- - -

SETTLEMENT HEARING AND RULING OF THE COURT

CHANCERY COURT REPORTERS
414 Federal Street
Dover, Delaware 19901
(302) 735-2113

APPEARANCES:

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-and-
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Levi & Korsinsky, LLP
-and-
JUDITH S. SCOLNICK, ESQ.
of the New York Bar
Scott & Scott
for Plaintiffs City of Haverhill Retirement System and Christopher Couch

BROCK E. CZESCHIN, ESQ.
Richards, Layton & Finger, P.A.
-and-
WENDY J. WILDUNG, ESQ.
of the Minnesota Bar
Faegre Baker Daniels, LLP
for Nominal Defendant Tile Shop Holdings, Inc.

- - -

THE COURT: Welcome.

MR. ANDREWS: Good afternoon, Your Honor. Peter Andrews, Andrews & Springer. We're here today for the settlement approval hearing in The Tile Shop. Joining me is Nicholas Porritt from Levi & Korsinsky. He's going to be making the presentation.

THE COURT: I'll he happy to hear from Mr. Porritt.

MR. ANDREWS: And also Judy Scolnick of Scott & Scott is also here with us today.

THE COURT: Welcome, Ms. Scolnick. Pleasure to see you.

MR. CZESCHIN: Good afternoon, Your Honor. Brock Czeschin of Richards Layton & Finger. With me is Wendy Wildung from Faegre Baker Daniels. She will be doing the presentation today.

THE COURT: I'll be happy to hear from Ms. Wildung.

Before we begin, let me ask whether there's anyone here who opposes either the settlement or the award of attorneys' fees In Re Tile Shop Holdings, Inc.?

(No response)

THE COURT: The record should reflect

no response, but I'll ask Madam Clerk to call the matter in the well of the courthouse.

THE COURT CLERK: No response, Your Honor.

THE COURT: Thank you, Madam Clerk.

The matter has been called in the well and no one has appeared to respond. The only objection I have to the settlement of The Tile Shop litigation is from a Mr. Steven Buckman. It has been provided to me in letter form. I'm going to ask, has this been made a part of the record, Madam Clerk?

THE COURT CLERK: Yes, Your Honor.

THE COURT: This is a matter of record. I will say about Mr. Buckman's objection that it is not a specific objection to this particular settlement but is, in fact, an objection to the entire system of policing corporate action by entrepreneurial lawyers. That is certainly a view that others hold as well. It's not the view of our common law. And if Mr. Buckman wishes it addressed, he'll have to do in a different forum, such as the Delaware General Assembly, and not here. But I have read it, I note it, and it's in the record.

Would you like to go ahead, Counsel?

I'm ready to hear you.

MR. PORRITT: Thank you very much, Your Honor.

There are three issues, really, before the Court this afternoon: One is approval of the settlement, the second is the award of attorneys' fees, and third is the approval of awards, incentive awards to the --

THE COURT: Well, let's do those separately. I assume there is no objection, I saw in the paper, to the incentive awards; is that correct?

MS. WILDUNG: That's correct, Your Honor.

THE COURT: Then I suspect strongly that you don't need to tell me anything about the incentive awards, assuming I approve the settlement. I think it will follow that I will approve the modest, but probably appropriate, incentive awards.

So why don't we start with the settlement. Then once we dispense with that, we can turn to the fee.

MR. PORRITT: Very good, Your Honor. So --

THE COURT: That was your plan all

along, I assume.

MR. PORRITT: That was my plan all along, Your Honor. Great minds think alike. What can I say?

So I'm not going to belabor the standard. The Court is well aware of the standard settlement here. We think the settlement presented here falls well within a fair, reasonable, and adequate standard followed by this Court. The claims here were derivative claims focusing, really, on sort of three areas. One is sort of a general area. We're really looking at related-party transactions, looking at allegations of insider selling on behalf of the named defendants, and also the general, as we allege, lack of adequate internal controls on the part of The Tile Shop.

The Tile Shop is a company that started as a private company, went public and, we think, shows all the somewhat conventional growing pains of a private company becoming public. So the settlement presented, even though it has no monetary component, we think, is a very strong settlement and I think it really is addressed to all three of those areas.

Most importantly, and the one we would emphasize the most, is the addition of an extra independent director. As Your Honor is aware, we think it's a very strong benefit to shareholders, to get an independent director. It's not a benefit that the Court would be able to order if we were to go to trial in this matter and it's also a benefit that's very rarely obtained. We looked and we could only find maybe three or four cases where, in the course of a settlement, shareholders have ever been able to obtain the addition of a director to the board. So we think that's a very strong settlement -- benefit and probably is sufficient consideration for the settlement in and of itself.

We would also note, in particular, that at the time that the new director was added, the board was -- there were six members of the board. In our view, three of those members would not be viewed as fully independent for management. Two of them were members of management, and then the other one, we think, was a longstanding director with a longstanding history with that management. I know the company certified him as independent. We would respectfully disagree. We now have four irreproachably independent

directors added to the board. We think that's a very strong benefit that this case has added.

In terms of the other corporate governance, we've added -- the next probably most important benefit is adding a more robust related-party-transactions policy, increased reporting, increased definition of who the related parties are, whose transactions have to be reviewed, and a much more robust method for which the audit committee reviews these transactions once they are brought to their attention.

And I think in our reply brief we highlighted -- these policies have already substantially been adopted by the company, although after we agreed to them in the course of this settlement. And we think that shows -- sort of took the Court through kind of how we see the improvement, because we have almost a very similar transaction to what was the heart of the case, which was a transaction with a relative of the president. And previously it got about three lines in the audit committee minutes and got a, we would say, very brief and trivial and not a proper review. And the new minutes -- most recently, the new transaction got a

proper review from the CFO and an economic analysis of the benefits and whether it was a reasonable and fair transaction on behalf of the company. And the whole discussion took almost two pages of minutes. So we think that shows the benefit to the company from the new related-party-transaction policy that was put in place as a result of this case.

We've also improved the insider trading policy -- we think those are meaningful changes -- again, making it more robust. And these changes were proposed by us. We retained an expert from Boston University in corporate governance and he helped guide what he thought here was appropriate for a company like Tile Shop.

The third important benefit, I think, is establishing a formal compliance officer role within the company, even though that will be formally shared by the chief financial officer initially. Nonetheless, we think it is important to build up a proper compliance structure within the company. And although the company has said that these changes are kind of modest and sort of tangential, I think that substantially undersells them and I think that underplays the importance of some of these controls.

That's why we have, and the SEC continues to build and build and build upon the need of public companies, the sort of internal controls required going back through the Sarbanes-Oxley reforms in 2002 and through Dodd-Frank. And we continue to see the need for these.

So the other factors that the Court looks at in terms of the claims, the complexity of the claims brought, the complexity of the litigation, we think, all supports approval of the settlement.

Unless the Court has any further questions on the settlement itself, I'll stop there.

THE COURT: My only question is your view of the strength of the initial complaint, given the exculpation clause that this company had in its charter.

MR. PORRITT: So, obviously, that was never decided. There was a motion to dismiss filed and then we stayed and we responded. I think, absent discovery -- I mean, I think it was going to be -- the nature of the claims, I think, was still strong, certainly reasonably brought, the nature of the related-private transactions, considering who the person was on the other side, which was the

brother-in-law. So the suggestion that that was not known, I think, certainly is a reasonable claim. Obviously, full discovery would have been necessary to fully flesh it out, but I think it is a reasonable inference. And also the materiality. Bear in mind that I think in the final year about 32 percent of the supplies were coming through the sort of related-party transactions. That's obviously highly material to the company. So again, both of those suggest that this wasn't some sort of accidental oversight but actually was willful in terms of engaging in these transactions. So that would have been our view. We obviously didn't explore it fully in discovery.

THE COURT: But in your view, this was a meritorious win filed, viewed from the lens of likely to have survived a motion to dismiss?

MR. PORRITT: I think it would have survived a motion to dismiss on both demand futility reasons as well as on the actual merits of the claim itself.

THE COURT: Thank you. Did you have anything else? I didn't mean to cut you off.

MR. PORRITT: Nothing further, Your Honor.

THE COURT: I assume, because it is not opposed -- I know the defendants have a different view of the strength of the case, but I assume that you are not going to make a presentation on the settlement itself; is that correct?

MS. WILDUNG: Nothing other than what's in our papers, Your Honor.

THE COURT: And I've looked through your papers. Thank you.

Let me say this. I think this case gets by the meritoriously filed barrier. I think there would have been some strong defenses, given the exculpation clause. I do think it had a low chance of a monetary recovery or any kind of ultimate positive outcome. So that's the give that I am releasing by this, which is to say, this was not a frivolous claim, but there are some serious barriers to recovery here.

Given that, I think the results achieved have worked a definite benefit on the corporation. And so it is an easy choice for me to approve the settlement in that context, and I do so here. And I also approve, based not on what you said here today, but based on the briefing, the incentive awards that you have suggested are appropriate -- and

I agree -- for the plaintiffs here.

So let's turn to the contested attorneys' fee request, please.

MR. PORRITT: Thank you, Your Honor. Again, I won't belabor the standard, which I'm sure this Court has heard many, many times.

So we think the fee request here is very reasonable and firmly within the range of Delaware precedent. The fee request is approximately $1.7 million. Now, again, without a monetary benefit, the Court is then required to somehow -- is still justified in awarding a fee based upon the nonmonetary benefits that the settlement presents to the company. We think, here, the benefits are substantial. And I've already highlighted them in the context of the settlement -- in support of the settlement. But I will just, again, repeat that the additional benefit of an independent director, Your Honor, again, is a very rare outcome for a settlement in any case. As I said, we found three or four cases. All of those cases resulted in fees far north of the fee request that we presented here. So we think that provides substantial support for a fee award well north of $1 million here.

We also provided -- we also think the other corporate benefits, in terms of the additions of compliance function, the addition of related-party transactions, where the benefits can already be seen, and the benefits of the insider trading policies, all, likewise, support a substantial fee award. They themselves would fully not support a fee award of $1.7 million. But combined with the addition of a director, we think $1.7 million is well within the range supported here.

The lodestar cross-check, likewise -- I know defendants have criticized the lodestar. But at the moment, the lodestar is 1.5 times, which is on the low side. Lodestar multipliers of 3 to 4 times are routinely approved. So even if you take defendants' view, which we disagree with, that the hours -- there was some duplication of effort -- you are still going to be at the 3 times multiplier, which, again, is well within the range.

THE COURT: Would you explain to me the process? because, I must admit, even after reading the papers, it is not entirely clear to me what litigation effort went into the 220, what litigation effort went into the substantive claims, and what

effort went into the mediation. So if you could kind of break that out. I don't need hour breakdowns. I just want you to describe the process.

MR. PORRITT: Certainly, Your Honor.

So we started off -- we observed, you know, the public announcements. And we had a client who was concerned, so we, following the guidance from this Court, filed -- submitted a 220 letter or demand. There was considerable back-and-forth and drawn-out process. The initial documents that were produced by the company, we thought, were not adequate and not meeting their requirements under 220, so there was, I think, fairly lengthy discussions along those lines and letters went back and forth and ultimately resulted in us having to file a complaint in this Court under 220 to seek additional documents. Only after filing that complaint were documents then more -- a more reasonable production of documents produced by the company. So --

THE COURT: There was never litigation of the 220 complaint, though, past the --

MR. PORRITT: Past the filing of the complaint, no, Your Honor. There was no trial. But just simply having to go through that process -- most

220 demands, in my experience, didn't tend to be resolved reasonably by the parties. And this was not. The initial production was very small and nowhere near acceptable to us, so we had to file the complaint. So in some degree, defendants claiming that too much time was spent in the 220, well, we would agree, but that was because defendants were unreasonable, we thought, in responding to the initial demand. So it is somewhat, I think, ironic that they now claim that too much time was spent on the 220 when it was really driven by their conduct, not by us.

Following review of the 220 documents, a complaint was drafted, further work was done to investigate whether we had meritorious claims or not, and then the complaint was filed. There was some -- and at the same time, Scott & Scott, co-counsel, also undertook a 220. And I think my firm was the first to file the 220, so we kind of led the effort a little bit on the 220 side of things. But they also had to get through the documents and review those.

Then we filed a complaint. We filed it actually in Minnesota, in District Court in Minnesota. The forum selection clause required them filing complaints down here in Chancery Court. The

complaint was filed and then a motion to dismiss was filed. And then there was a discussion, because, at that point, the securities class action, which of course overlapped factually, took place. It was agreed to stay this litigation because discovery was ongoing in that case, with the idea that we would participate meaningfully, to the extent necessary, to conduct that discovery. That's what we did. So we reviewed documents that were produced in the securities class action.

And once again, I would say -- and then, finally, Your Honor, I guess after that process and then when the mediation process was beginning for the securities class action, it made sense to then expand upon it and include this case in that mediation effort. And the mediation effort was considerable. There was lengthy mediation statements drafted, which were probably more detailed than, say, a motion to dismiss brief would have occasioned, and then one mediation session, then -- in person in Minnesota, then numerous, numerous sessions with the mediator on the telephone back and forth, both on the question of the substantive corporate governance settlement and then on the fee after that.

So I don't know if that's more detail than you needed or sufficient detail.

THE COURT: That's what I needed. That was very helpful. Thank you.

Anything else you want to tell me?

MR. PORRITT: I would like to make two comments in response to some of the points made by the defendants. On the hours point, I think they gave you the hours that they've recorded in connection with this matter. Again, I think that's somewhat disingenuous because they obviously have two other matters, the securities class action and the SEC investigation, which is substantially overlapped. They don't provide the hours on those matters, which I suspect strongly dwarf the hours spent on this case by any party, and obviously they could use that work. And, of course, we had to do a lot of the work that they would otherwise do in that matter. So I don't think that's a fair comparison.

The second thing I would just like to add is concerning the -- they challenged the fact that there was any contingency risk here. Again, I think that's improper. The cases pursued in parallel with securities class actions, as you know, get dismissed

all the time. This is not similar to -- I think they are drawing analogy to cases filed in the merger context where there was an actual path and an actual pressure for everyone to kind of resolve and the contingency risk is viewed by some members of the bench as lower in those circumstances. I don't believe that's appropriate here. This was obviously a case we took on a full contingency basis. There was no obvious path or definite -- you know, 100 percent chance or even 90 percent chance or 80 percent chance of settlement when we filed this case. So I think we did take on the contingency risk.

Lastly, just in anticipation of response to their brief, I don't think the cases they have cited, the *Emerson* case or the *Sutherland* case, are even remotely analogous to these particular circumstances. I don't think you could look at the relief in those cases and compare it to the corporate governance or forms we received here and say that they are at all analogous.

So with that, I conclude my presentation.

THE COURT: That was helpful. Thank you.

Ms. Wildung, I'm happy to hear you.

MS. WILDUNG: Good afternoon, Your Honor. Wendy Wildung. It's a privilege to be here.

As Your Honor has noted, The Tile Shop had a disagreement with plaintiffs' counsel about what amount of fees would be appropriately awarded in this case. I'm happy to answer your questions. My thought was to focus on points raised in their reply brief --

THE COURT: That would be helpful.

MS. WILDUNG: -- because I hadn't had an opportunity to do that.

THE COURT: I'll tell you -- and I might as well say it now as any other time -- I always find this difficult, because there is no reasonable formula or rubric that I can directly apply to come out with a number in a therapeutic benefit case, and unpleasant because I am going to reach a decision that is always, in my view, somewhat arbitrary by necessity of process. That was a very parenthetical sentence and I don't mean to be parenthetical.

But what I'm saying is, I often wonder if there isn't some other way to do this. And I wonder what counsel would say if fee awards were done baseball arbitration style so the plaintiff put in

what they were requesting, the defendants put in their number, and I had to pick one or the other, not some number of my own, whether we wouldn't get closer than 1.7 million and .3 million. At any rate, having said all that, please proceed.

MS. WILDUNG: Thank you, Your Honor.

The company's view is that plaintiffs' counsel continued to overstate the effort that was reasonably required of them to achieve this result and that they continued to overstate the relief they've achieved. There's no doubt there was some effort involved and relief was achieved, but it's the overstatement of it that's at issue.

Now, plaintiffs' counsel, in their briefing and in the argument today, tried to paint a picture of a struggle on their part to achieve documents in a settlement. I would suggest to you, that's not entirely accurate. The company's attitude toward these derivative -- the books and records demand and the derivative case was essentially this: Give the plaintiffs what they are entitled to; protect the company from any overreaching on their behalf; avoid fights, because the company doesn't want to be spending money on legal fees for directors, for

company counsel or ultimately plaintiffs' counsel, on matters that don't need to be spent on.

So here is the sequence of events. And I think when I lay this out, you'll see that the so-called struggles were nothing like has been portrayed to Your Honor. The short-seller report that started all this was released on November 13th, 2013. On November 14th, 2013, the company was sued in the first securities case. Also on that same date, the audit committee launched its investigation with independent counsel and independent outside auditing firm PricewaterhouseCoopers, who worked extensively for several months, at the cost of millions of dollars, to reach their result. That result was announced by the company on January 27th, 2014. And although the actual report itself has not been publicly released, we did provide it to plaintiffs' counsel in response to the books and records demand. So they had that information.

You heard claims in here that the company had internal control deficiencies. As part of that process, if you understand that it was kind of near the end of 2013 that this all came out, the company was finishing its yearend and its audits. So

the company's independent outside auditors also looked at this and their ultimate conclusion was that the financial statements in the past were not misstated and that there had been no internal control deficiencies, even with respect to related parties. So plaintiffs' lawyers can say there were internal control deficiencies, but that was not the conclusion of the company's auditors.

With regard to the inspection demand, the company received the first inspection demand from shareholder Mok on February 21st, 2014. That was from Mr. Porritt's firm. The company produced documents to Mr. Mok in June of 2014. Also in June of 2014, it received an inspection demand from the Haverhill Retirement System, represented by Scott & Scott. The company produced documents in response to that.

On August 14th, 2014, Mr. Mok filed his 220 complaint, which, as Your Honor said, went nowhere because that was quickly resolved. On December 19th, 2014, the company got another inspection demand from Mr. Mok, which the company produced documents in response to in the early part of 2015. As it turned out, all this was kind of a holding pattern because on March 4th, 2015, the

company got the decision on its motion to dismiss in the securities case, which is, I think, what all the plaintiffs' lawyers were waiting for, and that was a partial dismissal and a partial denial of a motion to dismiss.

Within two weeks later, plaintiff Mok filed a derivative case in Minnesota Federal Court. That was a foot fault because The Tile Shop had a forum selection clause and it should have been filed in Delaware, but it got filed in Minnesota. So it took us 45 days to get Mr. Mok to voluntarily dismiss his case and refile it in Delaware.

In the meantime, Haverhill had filed in Delaware. So in April 2015, the Haverhill complaint was filed. May 1st, 2015, the Mok complaint was filed in Delaware. July 3rd, 2015, the consolidated complaint was filed in Delaware. November 2nd, 2015, defendants filed their motion to dismiss and we promptly agreed to a stay.

Now, plaintiffs try to suggest the company is faulting them for agreeing to the stay. We are not faulting them. That was the proper outcome, is to have a stay of this tag-along derivative case until the securities case was resolved. It would be

not in Tile Shop's best interest that any side in a derivative case was spending money until the securities case was resolved. So what's questionable to us is not the stay but how plaintiffs' counsel managed to rack up 1,921 hours of time on a case that was stayed since 2015.

Your Honor, *Emerson* is a case we've pointed Your Honor to for purposes of a fee analysis, but there's some other aspect of that case I'd like to highlight today. That was a derivative settlement that achieved both monetary and nonmonetary relief after litigation. And in that, Vice Chancellor Laster awarded the plaintiff $750,000 as a percentage of the monetary relief, plus some money for the nonmonetary relief. But in connection with a portion of the award for the monetary relief that that settlement achieved, Vice Chancellor Laster talks about the work that those lawyers did to achieve that relief. He says they did full document discovery, they did third-party discovery, they prosecuted successfully two motions to compel discovery, and they took 11 depositions. And he says in there that the total hours for their lodestar was 2,136 hours. And he said that was reasonable for that work.

Your Honor, 1,921 hours is not a reasonable number of hours for a case that proceeded the way this one did and was settled when it was. They may have recorded the time, but it was not all usefully spent and the company shouldn't have to pay for all those hours.

The plaintiffs also overstate the accomplishments of their settlement. There are three things I'd like to address:

Number one is the independent director issue. They place a lot of weight on that, both in their papers and in their remarks today. And their argument is that Mr. Livingston, Philip Livingston, who is an independent director, was elected in July 2017 as a result of this settlement and that he tipped what they say was a six-person board divided equally between interested directors and independent directors to the independent side. So that's their argument. The problem is, that's inaccurate factually.

And Your Honor, if I may, I'd like to approach you with an exhibit that I've prepared.

THE COURT: Sure.

MS. WILDUNG: Let me hand out copies.

So what this is, Your Honor -- the

first page is a list of The Tile Shop directors who have been directors since the company became public in August of 2012 and the dates of their tenure. And this is information from The Tile Shop's proxy statements that are public documents. The names in green are directors that, at least for purposes of today, no one disputes were independent directors. The two names in red are individuals who were the company's CEOs. And at least for purposes of today, we are not going to dispute that they were inside directors. And then the name in blue, Mr. Jacullo, is the director that the plaintiffs allege was not independent and tipped the balance.

So let me talk about what was inaccurate about their position. First of all, they say Mr. Jacullo is not independent because he was a long-time associate of the CEO, Bob Rucker. But they never tell Your Honor what they mean when they say he was a long-time associate of Bob Rucker. You can see from the proxy statement, he was an angel investor in the company before it became public. He was an angel investor. He has no other relationship with Mr. Rucker, no familial relationship, no personal relationship, no other business relationship. And I

am unaware of any law in Delaware, or elsewhere for that matter, that would suggest an angel investor in a company that became public is not an independent outside director.

The other part of their statement that's inaccurate is that they say when Mr. Livingston was elected in July of 2017, he tipped the board. Well, Mr. Livingston was actually elected in August of 2016. So if you look at these -- the first page, Your Honor, you'll see that there were two directors who left the board in the summer of 2016: One was Adam Suttin, who chose not to stand for re-election, and the other was Mr. Watts. And Mr. Watts' decision to resign was unexpected in August of 2016. So they had an empty seat to fill, and the remainder of the board elected Mr. Livingston. He then ran for re-election in 2017 and was elected. But he actually was on the board since August of 2016.

So what does this mean for the size of the board? And the other error they make is with regard to the size of the board. Take a look at the second page of the exhibit, if you will. This shows the board membership at points in time in this case. The events on the first part of this chart are the

filings of the complaints, the Haverhill complaint, the Mok complaint, and the consolidated complaint. At that time, the board didn't have six members. It had eight members. Three of the -- excuse me -- five of the eight members were undisputed independent directors, two were inside directors, and the third, the last, was Mr. Jacullo, who we believe was independent.

At the time of the Thomson complaint in September of 2016, we have now had -- Mr. Watts and Mr. Suttin have left the board. Mr. Livingston has been elected to the board. At the time of the Thomson complaint, there's a seven-person board, four of whom are clearly independent directors, a few are inside directors, and Mr. Jacullo, who we think is an independent director. So it's not the case, and it never was the case, that Mr. Livingston tipped the balance of the board.

THE COURT: So what was the agreement in the settlement regarding Mr. Livingston?

MS. WILDUNG: The agreement was that Mr. Livingston's election to the board or appointment to the board was motivated in substantial part by the lawsuit. And we agree with that.

THE COURT: The initial appointment in August of '16?

MS. WILDUNG: Correct. So there were -- just to be clear, at the time, the company had securities litigation, it had a number of other things going on. It thought it would be beneficial for a lot of reasons, because of a lot of allegations in various situations, to have another person on the board, in particular, somebody with --

THE COURT: I understand that. But you are not reneging on the agreement that the adding of Mr. Livingston to the board was motivated in substantial part by this litigation, are you?

MS. WILDUNG: No, we're not. But we're saying it wasn't as a result of the settlement per se.

THE COURT: That's fine.

MS. WILDUNG: Thank you, Your Honor.

So another area that I'd like to address is the claims in the reply brief that the related-person-transaction policy that will be adapted -- hasn't yet, but will be adapted -- as a result of this settlement represents a sea-change in what the company had before. Your Honor can see the

redline from the exhibits to the settlement agreement. You'll see those are incremental changes. But among the, what I will say, misstatements that are made in the reply brief is -- they say that the expanded policy will now include transactions with family members, directors, senior management, and significant shareholders. That's not accurate. The policy has always covered those transactions. What it expands to now do is to say that people who were in those capacities for the previous 12 months will now be covered. So it spans the time period, but it doesn't -- this is not a situation where that policy didn't cover those people before.

Another thing the plaintiffs claim is the new policy requires employees to self-report. It's true that the expanded related-person policy will say employees need to self-report, but they already had to self-report under the code-of-conduct policy that previously existed. We've now just duplicated that and put it in the related-person-transaction policy as well, which is a good thing. But, again, it's an incremental improvement. It's not a major change. And I direct Your Honor to the Code of Business Conduct, Exhibit E, page 2, which talks about

the duty of employees to self-report and has always been the company's code of conduct.

They say that the expanded policy will require audit committee approval of all related-party transactions. That's also inaccurate. The existing policy requires approval of related-party transactions worth $50,000 or more. The expanded policy requires the same approval of related-party transactions worth $50,000 or more. That didn't change. What changed is expanding the duration of the covered people.

They say in their papers that the new policy will require disclosure of all related-party transactions. Well, what the policy says -- what the expanded policy will say is that it requires approval of related-party transactions consistent with SEC disclosure guidelines. That's a good thing to have in the policy. But even when it wasn't in the policy, the company still had those obligations.

The plaintiffs try to take credit for the process that the audit committee followed in July, last month, when they reviewed the related-party traction of Nanyang. I specifically told plaintiffs' counsel that the new policy hadn't been adopted and that that transaction was reviewed under the old

policy, which really doesn't make a difference because the old policy required the audit committee to review it anyway. Everything that the audit committee did in July of 2018 was required under the old policy as well as under the expanded policy.

Plaintiffs claim in their reply brief that the reason this all came up is because the expanded related-person policy that will be adopted in this settlement requires employees to self-report and Mr. Nishi self-reported. Mr. Nishi is not an employee. The expanded policy requiring all employees to self-report is not what motivated Mr. Nishi to report. It wouldn't have covered him anyway in July of 2018.

So I'm not trying to suggest that the expansions have no value. They do. But there's an overstatement about the import of that.

There's also an overstatement about -- maybe I would say it's an understatement about how the company's compliance function worked previously. In plaintiffs' reply brief, they say that the company didn't previously have anyone overseeing the compliance function. That's inaccurate. I direct Your Honor's attention to the Code of Business

Conduct, which is Exhibit E to the stipulation of settlement -- you can see the old one and then the redline -- and you'll see from the Code of Business Conduct that the company had an appointed compliance officer -- it was the vice president of human resources -- and that that policy was overseen by the governance and nominating committee. Among the improvements that have been made and will be made as a result of the settlement is that function will be moved to the chief financial officer, who I think we agree is a better person to hold that responsibility, and that he will report to the audit committee instead of to the corporate governance and nominating committee, also an improvement. But it's not a -- it's an incremental improvement. It's not a sea-change from what the company had before.

And, finally, there's a statement in the plaintiffs' reply brief that the new policy has required the company to hire a new chief compliance officer. Just to be clear, the new function appoints the chief financial officer in that role. And the company's chief financial officer will fulfill that role. There will not be a new hire. We think that's unnecessary, but we think the change is an

improvement.

So we think there are improvements to the corporate governance of the company that make this a fair settlement and that entitle the plaintiffs to the award of a fee but not a fee that's anywhere near the one that they are asking.

If Your Honor has questions, I'm happy to answer them.

THE COURT: No. That was very helpful. Thank you for the presentation.

Would you like to make a response, Mr. Porritt?

MR. PORRITT: Yes, Your Honor. And I'll be brief.

I don't want to go over or belabor the timeline. I do take issue with the suggestion that the 220 process was simply plaintiffs just marking time until the result in the securities class action. That was absolutely -- I can represent, that was not the case, especially in 220. There was always -- depending on what the 220 process delivered, there was always likely to be a case filed irrespective of what the actual outcome was in the securities class action. So the timeline that counsel for defendants outlined,

I think, showed that we were diligently pushing through the 220 process. And I think it's also somewhat misleading to state that the 220 complaint "went nowhere," whereas it was instrumental in producing any documents, really, that were meaningful under the 220 process. The idea that they were always going to produce that certainly wasn't apparent at the time. That's why we had to file the 220 complaint.

Turning to the point on the question of director, just the appointment of an independent director itself, regardless of how it affected the balance, is a substantial benefit, as Chancellor Bouchard recently described in the *TerraForm* case. In that case, it didn't change the balance of that board and he recognized the benefit. So the fact that we think it substantially tipped the board over to the benefit of the majority independence versus not independent is like an extra plus, if you like, but our record isn't dependent on that. And I think the critical time, based upon their chart, is really when Mr. Livingston was appointed and thought to be appointed rather than when particular complaints were filed.

Finally, counsel for defendants went

through, in some detail, the compliance policy or the change in the related-party-transaction policy. She overlooked one, which is probably perhaps the most substantive change, which is the standard that the audit committee is meant to apply in reviewing that. Previously, under the old policy, they were just meant to see if the terms were comparable to other policy -- to other transactions. Now it makes clear that the related-party transaction must be no less favorable to the company. Now, that may be dismissed as mere wordsmithing, but I think that's a very substantive change, which I hope the Court will appreciate.

Now, I didn't talk about the proposed amount of the fee by defendants, but the amount of the fee is basically the same as in the case that they cite, the *Sutherland* case, where the fee was roughly the same, 275,000 in that case. It was 300,000 proposed here. That, of course, was a case where the majority of the claims were dismissed and the changes, in fact, achieved were modest changes to an employment agreement. So to suggest that adding a whole new independent director as well as what we think are substantive changes to the related-party-transaction policy, to the insider trading policy, to elevating

the compliance function up a level to the highest level within the company, the chief financial officer level, an independent assessment by a consultant -- to suggest that's the same as simply losing most of your claims and having some changes to an employment policy, I think, is strongly -- is, once again, an overstatement by the defendants. As they criticize us for overstatement, I think that can be said to them in that case.

The corporate governance changes in *Emerson* were far removed. There's no new independent director, for instance, appointed in *Emerson*. The change went from mainly just commitments to maintaining existing policies with no real substantial changes in that case. So we don't think *Emerson* or *Sutherland* are remotely applicable, Your Honor, and we think *TerraForm* and the cases we cite are far more relevant benchmarks for this Court.

THE COURT: All right. Thank you, Counsel.

The $1.7 million fee request is inclusive of costs?

MR. PORRITT: Yes, Your Honor.

THE COURT: Anything else you want to

tell me? I didn't mean to cut you off.

MS. WILDUNG: No, Your Honor. Thank you very much for hearing me out.

THE COURT: It was helpful. It confirmed my view from reading the briefing, frankly.

I'm going to give you a decision on the fee, but let me just finish what I had started to say. This is a difficult task. And it's difficult because it is necessarily arbitrary, to an extent. Our entrepreneurial system of policing corporate wrongdoing obviously involves plaintiff's firms undertaking a lot of cases where they receive nothing. That's just a function of the system. If they are not adequately compensated on those cases where they achieve something, then the system doesn't function. The question that arises is, well, what is an amount that is fair to the stockholders and adequately encourages appropriate, but not overweening, investigation and activity on the part of plaintiff firms and plaintiff stockholders? That's a difficult enough question where there is a monetary fee. It's a much more difficult question where a therapeutic result only is obviously beneficial to the corporation. And I think both sides agree that the

result was beneficial here, mandating a departure from the American Rule and a shifting of fees so that the plaintiffs' counsel are compensated. But how do you evaluate that?

I have the *Sugarland* factors before me. Our Supreme Court has mandated them. They are helpful, but they are certainly not a matrix upon which facts can be placed and a number derived. They are suggestions of factors that are important. And each of the factors, particularly in this kind of a therapeutic benefit case, has its own problems.

For instance, relying on a lodestar number and a multiple is appealing, but it tends to encourage too much litigation, if that were the rule. Looking at the benefit is the most important of the factors to us. But, for instance, if I were to place too high a value on getting an independent director -- and I think that's an important concession, an important improvement -- then the incentive on the next corporation would be to absolutely refuse to appoint another director because that's going to cost either them or their insurers an enormous amount of money. All these incentives -- I mean, if I were a professor of game theory instead of a judge, I'm sure

I would enjoy playing with this for some time. And I already mentioned the temptation to use some kind of baseball-style arbitration to derive a number. But that's not appropriate either, because this is a task that falls on me, as the judge, in a class action matter where I have to take into account the incentive effects on plaintiffs' counsel, the rights of the plaintiffs, the rights of stockholders generally, and the effect on the corporation.

This is how I look at this. And as I say, there's a certain amount of arbitrariness to it. I think that's unavoidable. But to the best of my ability, as I looked at this last night, it seems to me that getting an independent director is a substantial benefit to the corporation. And I understand the argument by the defendants that this did not tip the corporation from a nonindependent board to an independent board, but it's a pretty close run thing either way. The effect of having an independent director on a board that is even close, I think, is magnified and it is a very substantial improvement for the corporation.

I can't, however, award the kind of fees that I've seen in other cases where there was

hard-fought substantive litigation leading to that result, because I don't find that here. I look at the number of hours that have been reported -- and I have no doubt they were incurred -- but I don't think that this matter, given the division of labor among firms in the substantive actions and given the additional labor that went into the securities action, is really a model of efficiency. When I examined that, it seemed to me that about a million dollars was a proper plaintiff firm recovery for achieving the independent director alone.

The other reforms, it seems to me, are helpful. They are helpful not so much because they substantively changed what the corporation's responsibilities were or how it was going to undertake those responsibilities but to make them prominent before the members of the board. That really, to me, is the benefit of those various reforms. And I think that is probably reflected by -- and his name has already slipped my mind, but the individual that you just described reporting. Whether it was required by the changes or not, I think this is front and center for this board now. And that's a good thing, given the history. Those modest but appreciable changes to

the structure of controls before the board seem, to me, to be worth about a quarter of a million dollars.

I am not going to tell you what I think a reasonable number of hours is for this action. But I've thought about it, and it seems to me that the $1,250,000 award that I have roughly arrived at, based on the benefit, is not out of line with compensation under the lodestar system, with a modest multiplier for the fact that this is -- and I acknowledge the fact that it is -- an action taken on a contingency basis. I won't go through all the *Sugarland* factors. I've discussed the most important. The rest do not direct me away from the figure that I have in mind. And so I am going to award $1,250,000 in fees and costs to the plaintiffs based on that calculation. Is that a perfect calculation? It absolutely is not. It's an arbitrary calculation, arbitrary but informed by my experience in these matters. And looking at various cases and the awards they have generated, I think it is appropriate here. So that's my ruling.

Was that understandable, Counsel?

MS. WILDUNG: Yes.

THE COURT: Was that clear enough?

MR. PORRITT: Yes. Thank you, Your

Honor.

THE COURT: I have the form of order here before me. Let me make sure I understand it.

MR. PORRITT: We have a blank here, if Your Honor ...

THE COURT: I have it, yes. Thank you.

It's somewhat of a rounding error, but that fee-and-cost award is inclusive of the $5,000 each to the plaintiffs for the plaintiffs' incentive award.

MR. PORRITT: Yes, Your Honor. I think that's paragraph 12 of the ...

THE COURT: It is. I just wanted to make it clear that was my intent.

I've signed the order. I'm handing it to the clerk for filing. What else can we profitably do here this afternoon?

MR. ANDREWS: Your Honor, I think that's it.

THE COURT: Pleasure to have you here.

From the defendants' point of view, anything else we can do?

MR. CZESCHIN: No, Your Honor.

THE COURT: Thank you for your time and your presentations and briefing. They were all very helpful.

(Court adjourned at 2:23 p.m.)

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CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 45 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 12 through 13 and 39 through 45, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Dover, this 15th day of September, 2018.

/s/ Dennel Niezgoda

Dennel Niezgoda
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter

Exhibit D

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE TERRAFORM POWER, INC. DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 11898-CB

FINAL ORDER AND JUDGMENT

A hearing having been held before this Court on December 19, 2016, pursuant to this Court's Scheduling Order With Respect to Notice dated September 30, 2016 (the "Scheduling Order"), and upon a Stipulation of Settlement and Compromise dated September 27, 2016 (the "Stipulation")[1] filed in the above-captioned action (the "Consolidated Action"), which is incorporated herein by reference; it appearing that due notice of such hearing has been given in accordance with the Scheduling Order; the respective parties to the Stipulation having appeared by their attorneys of record; this Court having heard and considered evidence in support of the proposed settlement (the "Settlement") set forth in the Stipulation; the attorneys for the respective parties to the Stipulation having been heard; an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the Scheduling Order; this Court having determined that notice to the Current TERP Stockholders was adequate and sufficient; and the entire matter of the proposed Settlement having been heard and considered by this Court;

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

IT IS ORDERED, ADJUDGED, AND DECREED THIS 19th DAY OF December, 2016, AS FOLLOWS:

1. The Notice of Derivative Action Settlement on Behalf of TerraForm Power, Inc., and its Shareholders (the "Notice") has been provided pursuant to and in the manner directed by the Scheduling Order; proof of dissemination of the Notice was filed with the Court; and full opportunity to be heard has been offered to all parties, the Current TERP Stockholders, and persons in interest. The form and manner of the Notice is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with each of the requirements of due process, Delaware Court of Chancery Rule 23.1, and applicable law. It is further determined that all Current TERP Stockholders are bound by this Final Order and Judgment.

2. The Settlement is found to be fair, adequate and reasonable and in the best interests of TERP, and is hereby approved pursuant to Delaware Court of Chancery Rule 23.1. The parties to the Stipulation are hereby authorized and directed to comply with and to consummate the Settlement in accordance with its terms and provisions, and the Register in Chancery is directed to enter and docket this Final Order and Judgment.

3. The Consolidated Action is hereby dismissed with prejudice in its entirety as to Defendants and against Plaintiff and all other Current TERP

Stockholders and without costs, except with regard to any award of attorneys' fees and expenses set forth in Paragraph 11 below.

4. As provided for in the Stipulation, the Court hereby fully, finally and forever bars, releases, extinguishes, and discharges, on behalf of Plaintiff (derivatively on behalf of TERP), Plaintiff's Counsel, TERP, and each and every Current TERP Stockholder claiming by, through, in the right of, derivatively, or on behalf of TERP, any and all shareholder derivative claims for relief or causes of action, debts, demands, rights, or liabilities whatsoever, known or unknown, fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law or in equity, that (i) were asserted in the Consolidated Action, or (ii) otherwise in any way relate to the subject matter of the Consolidated Action, including, without limitation, the Challenged Transactions; changes to the membership of the Board of Directors and the Conflicts Committee on November 20, 2015; or the creation, operation, or dissolution of the Office of the Chairman (the "Released Claims"), against TERP, the Individual Defendants and SunEdison, together with their insurers, predecessors, successors, subsidiaries, affiliates, agents, attorneys, and each of their past or present officers, directors, and employees (the "Released Persons").

5. Released Claims do not include any claims if brought directly (rather than derivatively by a stockholder) by TERP against anyone, including SunEdison. Released Claims also do not include any claims asserted by TERP against

SunEdison and/or its affiliates in bankruptcy proceedings or any claims of SunEdison. Furthermore, nothing contained herein shall be construed to bar, release, extinguish or discharge (i) any claims against the Released Persons arising from conduct occurring after July 15, 2016; or (ii) any claims directed against the Released Persons arising from conduct unrelated to the claims asserted in the Consolidated Action or otherwise in any way unrelated to the subject matter of the Consolidated Action.

6. As provided for in the Stipulation, the Court hereby fully, finally and forever bars, releases, extinguishes, and discharges, on behalf of the Individual Defendants and TERP, any and all claims for relief or causes of action, debts, demands, rights, or liabilities whatsoever, known or unknown, fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law or in equity, (i) arising from or relating in any way to Plaintiff's prosecution of and participation in the Consolidated Action or its conduct as derivative Plaintiff in the Consolidated Action, or (ii) that otherwise in any way relate to the subject matter of the Consolidated Action, including, without limitation, the Challenged Transactions; changes to the membership of the Board of Directors and the Conflicts Committee on November 20, 2015; or the creation, operation, or dissolution of the Office of the Chairman (the "Appaloosa Released Claims"), against Plaintiff and Palomino Master Ltd., together with their predecessors, successors, subsidiaries, affiliates,

partners, agents, attorneys and each of their past or present officers and employees (the "Appaloosa Released Persons").

7. Nothing contained herein shall be construed to bar, release, extinguish or discharge (i) any claims against the Appaloosa Released Persons arising from conduct occurring after July 15, 2016; or (ii) any claims directed against the Appaloosa Released Persons arising from conduct unrelated to the claims asserted in the Action or otherwise in any way unrelated to the subject matter of the Action.

8. With respect to any and all of the Released Claims or Appaloosa Released Claims, Plaintiff and its counsel, as well as TERP, the Individual Defendants, and their counsel, shall be deemed to have waived and relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits of California Civil Code § 1542 (and equivalent, comparable, or analogous provisions of the laws of the United States or any state or territory thereof, or of the common law). California Civil Code § 1542 provides that:

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

9. Plaintiff (derivatively on behalf of TERP), Plaintiff's Counsel, TERP, and each and every Current TERP Stockholder are hereby permanently barred and

enjoined from asserting any Released Claim against any Released Persons in any jurisdiction or forum.

10. TERP and the Individual Defendants are hereby permanently barred and enjoined from asserting any Appaloosa Released Claim against any Appaloosa Released Persons in any jurisdiction or forum.

11. Plaintiff is hereby awarded attorneys' fees, costs and expenses in the aggregate sum of $ 3,000,000.—, which the Court finds to be fair and reasonable and which shall be paid by TERP and/or its successor(s) in interest or insurer(s) within ten (10) business days after the entry of this Final Order and Judgment. Except as provided herein, the Released Persons shall bear no other expense, costs, damages, or fees incurred by Plaintiff in the Consolidated Action or by any of its attorneys, experts, advisors, agents, or representatives.

12. The effectiveness of this Final Order and Judgment and the obligations of Plaintiff and Defendants under the Stipulation shall not be conditioned upon or subject to the resolution of any appeal from this Final Order and Judgment that relates solely to the issue of Plaintiff's application for an award of attorneys' fees, costs, and expenses.

Chancellor Andre G. Bouchard

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE TERRAFORM POWER, INC. DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 11898-CB

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION TO APPROVE DERIVATIVE SETTLEMENT AND FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

Dated: November 28, 2016

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Plaintiff Appaloosa Investment Limited Partnership I ("Appaloosa" or "Plaintiff"), respectfully submits this brief in support of its motion to approve the Stipulation of Settlement and Compromise, dated September 27, 2016 (the "Proposed Settlement"), and for an award of $3,000,000 in attorneys' fees and expenses to reimburse Plaintiff for a portion of the amounts it has spent in pursuing this stockholder derivative suit. As set forth herein, Plaintiff's motion should be granted.

INTRODUCTION

Appaloosa filed this derivative lawsuit to protect Nominal Defendant TerraForm Power, Inc. ("TERP") from unlawful self-dealing at the hands of TERP's controlling, shareholder, SunEdison, Inc. (together with SunEdison Holdings Corp., "SunEdison"). Plaintiff alleged that, as SunEdison's balance sheet deteriorated, it used TERP's liquidity as a life preserver to finance a merger that stood to benefit only SunEdison.

The transaction required approval of the TERP Board's ostensibly independent Corporate Governance and Conflicts Committee (the "Conflicts Committee" or the "Committee"), which initially sanctioned it but balked at authorizing a modification SunEdison needed in order to secure funding. SunEdison suborned the Committee's independence by removing its existing members and replacing them with hand-picked SunEdison loyalists. The new

Committee members promptly approved the revised transaction even though the Committee's own financial advisors were unwilling to issue a fairness opinion and instead raised concerns that the transaction (especially its "Take/Pay Arrangement" component) could leave TERP with a substantial liquidity deficit by the end of 2017.

In part as a result of Plaintiff's efforts – including the Proposed Settlement – the transaction (including the Take/Pay Arrangement) was abandoned, and numerous corporate governance changes were, or soon will be, implemented that enhance TERP's independence from SunEdison. Among other things, SunEdison's CFO was removed from his position as TERP's CEO; the Committee strengthened its own independence; and the Committee abolished the Office of the Chairman, which had conferred officer authority on Committee members and thereby rendered them not independent under NASDAQ rules in violation of the Committee's charter. Indeed, SunEdison is now in bankruptcy, while TERP avoided a similar fate largely because it did not have to consummate the Take/Pay Arrangement. All of these benefits were achieved before the Proposed Settlement was even reached.

The Proposed Settlement for which Plaintiff seeks approval will further strengthen TERP and enhance its independence by (1) separating TERP's IT systems from SunEdison, (2) empowering an independent COO to run TERP's

day-to-day affairs, and (3) adding another independent director to TERP's Board. Given the substantial benefits of the Proposed Settlement, and the elimination of significant litigation risk, the Proposed Settlement is fair, adequate and reasonable.

The Court should also approve Appaloosa's request for reimbursement of $3,000,000 (out of a total of $3,546,781.01) in attorneys' fees and costs it has spent in connection with this lawsuit on behalf of its fellow stockholders. Plaintiff engaged in extensive expedited discovery and motion practice at the outset of this litigation, and continued pushing aggressively for lasting corporate governance changes after the original aim of the suit – enjoining the most egregious features of the transaction – was mooted. Plaintiff's counsel did so, and achieved substantial results against preeminent law firms representing the Defendants.

Plaintiff, a substantial TERP stockholder, financed this litigation out of its own pocket with no assurance its legal fees would be reimbursed. It seeks reimbursement for only a portion of the amounts it spent. Given the beneficial results achieved on behalf of TERP and its public stockholders, and the effort required to achieve those results, the Court should approve Plaintiff's requested fee award.

FACTUAL BACKGROUND

A. SunEdison's Control of TERP

Appaloosa initially brought this derivative lawsuit in order to enjoin unlawful self-dealing by TERP's financially desperate controlling stockholder. Defendant SunEdison, a Delaware corporation, is one of the largest clean and renewable energy companies in the world. SunEdison acquires and develops energy projects, selling them off to TERP and another controlled subsidiary. TERP is a Delaware corporation that owns and operates clean power generation assets it acquires primarily from SunEdison. As a subsidiary and "yieldco" of SunEdison, TERP's business model is to distribute most of its cash flows to stockholders via dividend payments. (Second Am. Compl. ("SAC") ¶¶ 33-34.)

At all times relevant, SunEdison exercised absolute control over TERP. Although SunEdison owned approximately 43% of TERP's equity, its interest consisted of all outstanding shares of super-voting Class B common stock, which gives SunEdison 91% of the stockholder votes. Ownership of the Class B gave SunEdison power to appoint two members of the TERP Board, while its voting majority gave it power to elect the other directors unilaterally. (*Id.* ¶¶ 37-38.) In addition, on a management level, SunEdison ran TERP through contractual provisions and its executives also served as TERP's senior manager tier. (*Id.* ¶ 36.)

Despite SunEdison's absolute control over TERP's "yieldco" business model, investors were attracted to TERP. The completed projects generated huge amounts of cash, as well as energy, most of which was distributed to stockholders through dividend payments. To ensure investors they would be treated fairly in any dealings between SunEdison and TERP, TERP required that all related-party transactions be approved by the Conflicts Committee composed of directors who are independent under applicable law, SEC regulations, and NASDAQ standards. (*Id.* ¶¶ 40-41.) The Committee is empowered to veto any material transaction between SunEdison and TERP that unfairly favors SunEdison.

B. SunEdison Looks to TERP to Finance Its Acquisition of Vivint

On July 20, 2015, TERP and SunEdison announced a series of transactions (the "July Vivint Transaction") through which SunEdison would acquire Vivint Solar, Inc. ("Vivint") from the Blackstone Group ("Blackstone"). (*Id.* ¶ 49.) SunEdison was substantially over-leveraged and could not afford to buy Vivint with its own financial resources. It lacked a balance sheet strong enough to allow it to borrow money or access the capital markets.

Accordingly, SunEdison proposed to use TERP's cash and balance sheet to fund the vast majority of the cash merger consideration. (*Id.* ¶ 49.) To do so, SunEdison devised a plan to simultaneously sell to TERP the residential rooftop assets it was acquiring from Vivint for $922 million (the "Initial Dropdown") and

use the proceeds of that sale to pay Vivint. (*Id.* ¶ 49); Affidavit of Elizabeth Sloan ("Sloan Aff."), Ex. A (Transcript of Decision) at 9:3-11.

In addition, to provide collateral for $500 million in merger-related financing from a group of banks led by Goldman Sachs ("Goldman"), SunEdison sought to force TERP to agree in advance to buy future projects generated from the Vivint platform. This multi-billion dollar "put" right was described as a separate "Take/Pay Arrangement," under which a TERP subsidiary, Terra LLC, would be committed to purchase (sight unseen) 450 MW of assets in 2016 and 500 MW per year for the following four years. The total of 2,450 MW was larger than TERP's total existing portfolio and nearly five times the quantity of Vivint assets it was supposed to purchase initially. (SAC ¶ 50); Sloan Aff., Ex. A at 9:12-17. Under the Take/Pay Arrangement, TERP would be required to pay the price set by a formula in the agreement – even if TERP did not have (or could not obtain) the money to purchase the assets and even if it had a cost of capital that exceeded the return on the assets. (*See* SAC ¶ 50.) Every financial advisor retained by the Conflicts Committee (either in July or later) to review the Take/Pay Arrangement found itself unable to express an opinion that such an arrangement was fair to TERP. Sloan Aff., Ex. A at 12:3-4, 19:15-24.

The market reacted poorly to the announcement of the Vivint acquisition. SunEdison's stock price dropped more than 46% by August 6, 2015, and TERP's

stock price declined throughout the summer and fall. (SAC ¶ 51.) After reopening negotiations with Vivint and successfully obtaining more favorable terms, in October 2015 SunEdison presented the revised transaction to TERP's Conflicts Committee, demanding immediate approval. At the time, the Committee consisted solely of non-parties Mark Lerdal ("Lerdal") and Hanif Dahya ("Dahya"). (*Id.* ¶¶ 53-55.) Apparently stung by the public reaction of the initial transaction, the Committee refused to be stampeded. Lerdal and Dahya resisted SunEdison's pressure to quickly approve the amended deal terms, re-engaged their counsel and financial advisor, and requested additional documents and information from SunEdison in order to evaluate the impact of the Vivint transaction on SunEdison and TERP. Concerned about the negative economic impact the Take/Pay Arrangement could have on TERP, the Committee attempted to re-negotiate it. Sloan Aff., Ex. A at 15:20-17:11.

C. The November Board Replacements and Approval of the Previously Challenged Transactions

SunEdison was unwilling to allow the Conflicts Committee to act independently. As this Court noted in its ruling on Appaloosa's motion for a preliminary injunction, the "conflicts committee's November 19 minutes reflect that Dahya had heard that SunEdison 'desired a more agile committee,' and it appears from the record that SunEdison set out to get one." *Id.* at 17:14-17.

Frustrated by the Committee's non-compliance, SunEdison's board of directors formulated a plan to eliminate the resistance posed by TERP and its Conflicts Committee by, among other things, replacing the Committee with newly-appointed directors loyal to SunEdison. SunEdison's Board resolved at a November 19 meeting to call a November 20 meeting of the TERP Board with the purpose of replacing the Conflicts Committee. *See id.* at 17:18-21. Also on November 19, SunEdison informed the TERP Board of SunEdison's exercise of its right to appoint two additional directors, Peter Blackmore and Jack Jenkins-Stark, to TERP's Board. *Id.* at 17:21-18:2. Blackmore and Jenkins-Stark both had substantial business ties to SunEdison. Blackmore resigned from his longtime position on SunEdison's board on the same day he was designated a TERP director. Jenkins-Stark is the CFO of Imergy, of which SunEdison owned 30.7 million preferred shares, representing 3.3% of the outstanding equity of that company, and with which it did substantial business.

During the November 20 TERP Board meeting, after adding Blackmore and Jenkins-Stark as directors, the SunEdison-dominated TERP Board voted to expand the Board by one seat and designated Christopher Compton to fill the seat. *Id.* at 18:2-4. The SunEdison-loyal directors then removed the Conflicts Committee members and replaced them with Blackmore, Jenkins-Stark, and Compton (the "November Board Replacements"). *Id.* at 18:7-9. Finally, the SunEdison loyalists

completed their takeover by terminating TERP's CEO and replacing him with SunEdison's CFO, Wuebbels, and also terminating TERP's CFO and replacing him with Rebecca Cranna, an executive with a SunEdison subsidiary. (SAC ¶ 77.)

At the conclusion of this meeting, Lerdal and non-parties Mark Florian and Francisco Perez Gundin each resigned from the TERP Board in protest. (SAC ¶ 79); Sloan Aff., Ex. A at 18:10-11. Lerdal and Florian each issued open letters of resignation that were publicly disclosed a week later, stating that they each felt that as a result of the November Board Replacements, they were no longer able to independently protect the interests of TERP's public stockholders. (SAC ¶ 79.)

SunEdison's actions were widely viewed as undertaken solely to advance SunEdison's interests and to allow SunEdison to unfairly exploit TERP's financial strength. On November 23, 2015, Moody's downgraded its rating of TERP's debt. (*Id.* ¶¶ 85-86.) In its release announcing the downgrade, Moody's expressly cited the changes to TERP's management team and Board as reinforcing "the connection to [SunEdison]" and explained that "[i]n our view, the stronger ties between TERP . . . and [SunEdison] arguably increase the likelihood that [TERP] could be drawn into a [SunEdison] bankruptcy, if it were to occur . . . ." (*Id.* ¶ 85.)

The new Committee retained new financial and legal advisors and negotiated incremental changes to SunEdison's proposals over the course of approximately one week. Sloan Aff., Ex. A at 19:7-10; 21:4-5. As had been the

case with Lazard (the Committee's first financial advisor), the new financial advisor, Centerview, would not (because it could not) opine that the Take/Pay Arrangement was fair to TERP. In fact, Centerview did not believe TERP could raise capital or sell assets under current market conditions, as a result of which its liquidity could be driven by the Take/Pay Arrangement into a $112 million deficit in 2017. *Id.* at 19:11-24; 20:1-21.

Nevertheless, on December 9, 2015, the new Committee approved and TERP entered into the Take/Pay Arrangement and related transactions with SunEdison (the "Previously Challenged Transactions"). *See id.* at 24:19-25:3. Standard & Poor's then announced that it was lowering its corporate credit rating on TERP to B- from B+, with a negative outlook, based on the "aggressive financing" of the Vivint deal. (SAC ¶ 94.)

D. Appaloosa Commences This Action and Is Appointed Lead Plaintiff

Following the announcement that the Previously Challenged Transactions were approved by the Conflicts Committee and by TERP, Appaloosa, on January 12, 2016, initiated this derivative suit on behalf of TERP against SunEdison and the newly appointed members of the Conflicts Committee, alleging that both SunEdison and the new Committee members breached their fiduciary duties to TERP and to its stockholders by causing TERP to enter into the Previously Challenged Transactions for the sole benefit of SunEdison. (*Id.* ¶ 95.) In its

Verified Complaint (the "Initial Complaint") Appaloosa sought to enjoin, preliminarily and permanently, the Previously Challenged Transactions. (*Id.*) Although another shareholder filed suit seeking only damages, Appaloosa believed that injunctive relief was necessary to protect TERP and its public stockholders from the harm they would suffer if the Take/Pay Arrangement was consummated.

Thus, immediately upon initiating this action, Appaloosa moved for temporary restraints to prevent the Take/Pay Arrangement from closing, as well as for expedited discovery and an expedited hearing on its motion for a preliminary injunction. The parties shortly thereafter agreed to an expedited schedule and further agreed that the Previously Challenged Transactions would not be consummated prior to a hearing on the preliminary injunction motion.[1] (*Id.* ¶ 96.)

E. The Preliminary Injunction Hearing

Though discovery in this action was expedited, it was extensive. Pursuant to the stipulated scheduling order entered by the Court on January 27, 2016, the parties had 17 days from the exchange of document demands until Appaloosa was to submit its brief in support of its motion for a preliminary injunction. Sloan Aff., Ex. D. During that truncated time period, the parties exchanged more than 10,000

[1] On January 28, 2016, the Court consolidated the derivative action commenced by Appaloosa with another action, arising from substantially the same facts, brought by two pension funds holding a nominal stake in TERP. *See* Sloan Aff., Ex. B. The Court also, in a January 26, 2016, order, appointed Appaloosa lead plaintiff. *Id.*, Ex. C.

documents and took 14 depositions. Appaloosa also retained a financial expert, J.T. Atkins of Cypress Associates LLC. Atkins submitted a detailed affidavit in which he opined that the Take/Pay arrangement created a significant risk to TERP because of the foreseeable difficulty the Company will have raising the funding necessary to meet its obligations.

The Court heard oral argument on Appaloosa's motion for a preliminary injunction on February 16, 2016, and denied the motion on February 25, 2016, finding that Appaloosa had not clearly demonstrated that TERP faced imminent, irreparable harm. (SAC ¶¶ 96-97.) Nonetheless, the Court noted that there were "many troubling aspects of the record that cast doubt on the fairness of the process that led to the amended deal terms" and "the circumstances surrounding the creation of the new committee are inherently suspect …." Sloan Aff., Ex. A at 36:18-23. Furthermore, the Court noted "serious doubts concerning the independence of at least one of the new committee's members, namely, its chairman[,]" Blackmore. *Id.* at 37:8-10. The Court indicated it would entertain holding an expedited trial on the merits of Plaintiff's claims. *Id.* at 39:6-9.

In arguing its motion for a preliminary injunction, Appaloosa argued that the Take/Pay Arrangement may be impossible to undo after closing because it would implicate the rights of Goldman and other third parties that would advance loans collateralized by TERP's obligations. The Court, however, concluded that the

concern "underestimate[ed] this Court's power to grant relief in the future if it is warranted." *Id.* at 32:17-19. The Court further warned Goldman that its reliance on the Take/Pay Arrangement would be at its own risk, explaining "[a]s for Goldman, which undoubtedly is monitoring these proceedings, it should consider itself on notice of the possibility of relief being granted in plaintiff's favor at a future date, if it is warranted, after a full record is developed." *Id.* at 33:1-6.

F. The Vivint Deal Collapses After the Banks Withdraw Financing

Four days after the ruling on Appaloosa's motion for a preliminary injunction, extensive financial problems at SunEdison continued to surface. On February 29, 2016, SunEdison filed a Form 12b-25 with the SEC, explaining that it would not file its Form 10-K on time because of "ongoing inquiries and investigation by the Audit Committee of the Company's Board of Directors (the "Audit Committee"), and the need to complete those inquiries and investigations prior to the finalization of the Company's annual financial statements for the periods covered by the Form 10-K." (SAC ¶ 98.) According to the disclosure, the investigation was precipitated by allegations by former executives that SunEdison misrepresented its financial position to its board of directors. (*Id.* ¶ 99.)

On March 2, the *Wall Street Journal* reported that several banks, including Goldman, Barclays, Citigroup, and UBS had "balked at providing loans they had committed to fund" the Vivint merger. (*Id.* ¶ 102.) A few days later, on March 8,

2016, Vivint announced it was terminating the merger agreement with SunEdison and sued SunEdison for breach of contract. (*Id.* ¶ 105.)

G. Appaloosa Amends Its Complaint To Seek Corporate Governance Changes To Protect TERP From Further SunEdison Interference

Although the Take/Pay Arrangement had been averted due to the banks' unwillingness to finance the Vivint merger, SunEdison's precarious financial position, along with the replacement of TERP's management and the Committee, left TERP vulnerable to further self-dealing by SunEdison, or worse, being dragged into bankruptcy with SunEdison. As SunEdison's troubles spiraled out of control, Appaloosa amended its complaint to seek injunctive relief restoring TERP's independence and necessary corporate governance protections for the Company and its public stockholders and reducing SunEdison's ability to self-deal, as well as damages from the defendants who planned and executed the November Board Replacements. (*See generally* First Am. Compl. "FAC".) Plaintiff was concerned that SunEdison would continue trying to use TERP's financial resources to save itself, including by compelling TERP to file for bankruptcy.

On March 16, 2016, SunEdison again delayed filing its 10-K for the year ended December 31, 2015. In a press release and an 8-K filed March 16, 2016, SunEdison disclosed that it was unable to file its 10-K within the 15-day extension period it was allowed from February 29, 2016, because it had uncovered "material weakness in its internal controls over financial reporting, primarily resulting from

deficient information technology controls in connection with newly implemented systems." (SAC ¶ 106.) This delay damaged TERP directly by delaying TERP's ability to certify its own financials. (*Id.* ¶ 107.) On March 16, 2016, TERP also issued a press release and filed an 8-K explaining that it must assess whether SunEdison's control deficiencies affect TERP's financial reporting because, "[d]ue to [TERP's] management services arrangement with SunEdison under the Management Services Agreement, [TERP's] financial reporting and control processes rely to a significant extent on SunEdison systems and personnel." (*Id.*)

Given these developments, Appaloosa filed its first amended complaint (the "FAC") on March 22, 2016, amending its claim for breach of fiduciary duty to add Defendants Chatila, Wuebbels, Truong and Tesoriere and to reflect that the Vivint acquisition was now likely moot. Despite the collapse of the Vivint merger, the Amended Complaint alleged that SunEdison's replacement of the Conflicts Committee and TERP management with SunEdison loyalists, an action taken solely to benefit SunEdison, was itself a breach of fiduciary duty by Defendants. (*See, e.g.*, FAC Counts I, II.)

The FAC also sought injunctive relief aimed at restoring effective corporate governance and undoing the continuing threat to TERP posed by the installation of SunEdison loyalists as officers and Committee-member directors as part of the November Board Replacements. Among other relief, Appaloosa sought:

- Removal of Blackmore, Jenkins-Stark and Compton from the Conflicts Committee (FAC ¶ 147);
- Removal of Wuebbels (who, at the time, was still SunEdison's CFO) as TERP's CEO (*Id.*);
- An order preventing SunEdison from selecting the members of the Conflicts Committee and instead requiring that the members of the Committee be chosen by a majority vote of TERP's public stockholders (*Id.* ¶ 148);
- Appointment of a monitor to observe the TERP Board's proceedings and report back to the public stockholders (*Id.* ¶ 149); and
- Appointment of a director to the TERP Board chosen by the public stockholders (*Id.*).

Following the filing of the FAC, on March 25, 2016, Blackmore, Compton, Jenkins-Stark, and Dahya, in their capacity as TERP Board Members, passed a resolution authorizing the Conflicts Committee to act independently and with the power of the Board with respect to matters involving SunEdison. TERP has acknowledged that the existence of this suit was a factor in determining whether to pass this resolution. Sloan Aff., Ex. D (Stipulation of Settlement) ¶ E.

H. TERP Improperly Creates the Office of the Chairman, and Appaloosa Once Again Amends Its Complaint In Response

On March 31, 2016, TERP announced that Wuebbels was resigning as CEO of TERP (as well as a member of its Board) and CFO of SunEdison, effective immediately, handing Appaloosa one of the key items of relief it requested in the FAC. (SAC ¶ 110.) Rather than appoint a new TERP CEO, however, the Board instead created an "Office of the Chairman" to lead the company on a temporary basis. This new Office included Blackmore, Compton, and Jenkins-Stark, along with non-party Dahya. (*Id.* ¶ 111.) As TERP's April 4, 2016 8-K explained, "[t]he Board vested Mr. Blackmore with all of the powers and authority currently vested in the Chief Executive Officer of the Company, and the ability to delegate all or part of such authority to the other members of the Office of the Chairman …."

While the resignation of Wuebbels was a step in the right direction, the appointment of Blackmore, Compton, and Jenkins-Stark to the Office of the Chairman disqualified each of them from membership on the Conflicts Committee. (*Id.* ¶ 112.) NASDAQ provides that a director is not independent "while serving as an interim officer." *See* NASDAQ R. IM-5605, Definition of Independence – Rule 5605(a)(2). By incorporating this rule into the Charter, TERP's Board required that members of the Committee be independent of both SunEdison (as controlling shareholder) and TERP's management. (*Id.*) However, by virtue of their

appointment to the Office of the Chairman, Blackmore, Compton, and Jenkins-Stark were serving as interim officers and were not independent. (*Id.* ¶ 113.)

Therefore, on April 20, 2016, Appaloosa filed the Second Amended Complaint (the "SAC"), alleging, among other things, that the appointment of Blackmore, Compton, and Jenkins-Stark to the Office of the Chairman disqualified them from membership on the Conflicts Committee pursuant to NASDAQ rules. (*See id.* ¶¶ 110-114.) In addition to the relief sought in the FAC (with the exception of Wuebbels' removal, which had already been accomplished), the SAC sought the removal of Blackmore, Jenkins-Stark, and Compton from the Conflicts Committee. (*See id.* Counts III, IV.)

I. SunEdison Files For Bankruptcy and the Office of the Chairman is Dismantled

One day after the filing of the Second Amended Complaint, SunEdison filed a voluntary petition for Chapter 11 bankruptcy protection. As set forth in the Suggestion of Bankruptcy and Notice of Stay filed contemporaneously with this Court, Appaloosa's claims against SunEdison were automatically stayed pursuant to 11 U.S.C. § 362(a). Sloan Aff., Ex. E (Suggestion of Bankruptcy).

Also on April 21, 2016, TERP once again provided a measure of the relief Appaloosa sought when the TERP Board abolished the Office of the Chairman. Blackmore resigned from the Conflicts Committee and was replaced by Dahya, with Jenkins-Stark serving as the Committee's chairman. *Id.*, Ex. D, ¶ I. On May

26, 2016, Chatila resigned from the TERP Board and was replaced by David Ringhofer, a SunEdison attorney. *See id.* ¶ K. Thus, the Office of the Chairman was abolished, the Committee no longer has any members who are functioning in a management capacity, and Blackmore, who conceived the November Board Replacements as a member of SunEdison's Board, is no longer a member of the Committee.

TERP has acknowledged that this suit was a factor in causing it to abolish the Office of the Chairman and re-appoint Dahya to the Committee. It further admits that the reappointment of Dahya to the Committee provided a benefit to TERP's stockholders. *Id.* ¶ I.

J. The Proposed Settlement and Its Terms

On May 4, 2016, the Defendants moved to dismiss the SAC. While those motions were being briefed, and following extensive negotiations lasting more than a month, Appaloosa and the Defendants agreed in principle on settlement terms. Given the termination of the Take/Pay Arrangement, the improvements to TERP's corporate governance that occurred before the Proposed Settlement was reached and the terms of the Proposed Settlement itself, Plaintiff believes the litigation's principal objectives have been achieved. On September 27, 2016, the parties executed a Stipulation of Settlement and Compromise (the "Stipulation") setting forth the complete terms of the Proposed Settlement.

The Proposed Settlement provides three principal benefits to TERP's public stockholders:

First, pursuant to the timeline and subject to the conditions set forth in the Stipulation, TERP agreed to separate key information technology ("IT") systems (e.g., those for accounting and human resources) from SunEdison with the objective of the Company achieving direct control and oversight of such systems. *Id.* ¶ 2.1. Substantial completion of the IT separation is targeted for July 2017. The separation of TERP's IT systems from SunEdison's will reduce TERP's dependence on SunEdison significantly, decrease SunEdison's control over TERP and improve TERP's ability to operate independently of its controlling stockholder for the benefit of its public stockholders.

Second, subject to the conditions set forth in the Stipulation, TERP agreed that the authority of its acting Chief Operating Officer, Tom Studebaker, a Partner of Alix Partners, shall be enhanced such that Mr. Studebaker (or any successor thereto as Chief Operating Officer) shall, subject to the authority of the CEO, have management responsibility for the ordinary course commercial operations of the Company and shall have equivalent authority with the Company's CFO, Chief Legal Officer and other senior executive officers, including a direct reporting line to the CEO. *Id.* Vesting responsibility for the Company's ordinary course commercial operations in its independent COO will strengthen TERP's day-to-say

operational management and enhance its ability to conduct its business independently from SunEdison.

Third, TERP agreed, subject to consultation with SunEdison and applicable regulatory requirements, to identify and appoint an additional independent director to its Board (who will ***not*** be proposed or nominated by Appaloosa). *Id.* The Settlement Agreement required TERP to use reasonable best efforts to effect this appointment within 90 days of the Effective Date (as defined in the Stipulation). TERP complied with this provision on or about November 21, 2016, when its Board voted to elect and appoint three new independent directors. *Id.*, Ex. F. The appointment of these additional independent directors will further reduce SunEdison's control over TERP's Board and will likely further enhance the quality of TERP's corporate governance.

In exchange for these benefits, Defendants will receive the releases described in the Stipulation.

Finally, the Stipulation provides that Plaintiff may apply to the Court for an award of attorneys' fees and expenses which, in the aggregate, does not exceed $3,000,000, which is significantly less than the approximately $3.6 million in fees and expenses that Appaloosa actually incurred. Defendants agreed not to oppose any application for an award of fees and expenses that does not exceed that sum. *Id.* ¶ 3.1.

ARGUMENT

I. THE SETTLEMENT SHOULD BE APPROVED AS FAIR, REASONABLE, AND ADEQUATE

A. The Standard For Approving the Settlement

Delaware law favors the voluntary settlement of contested corporate disputes. *See, e.g.*, *Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991); *In re Triarc Cos., Inc. Class & Deriv. Litig.*, 791 A.2d 872, 876 (Del. Ch. 2001). In reviewing a proposed settlement in a class or derivative action, the Court "is not required to decide any of the issues on the merits." *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986). Rather, "the Court must determine, using its business judgment, whether the settlement terms are fair, reasonable, and adequate." *Ryan v. Gifford*, 2009 WL 18143, at *5 (Del. Ch. Jan. 2, 2009).

> In balancing the policy in favor of settlement and the concern for fairness to all shareholders, the Court considers six factors: "(1) the probable validity of the claims, (2) the apparent difficulties in enforcing the claims through the courts, (3) the collectability of any judgment recovered, (4) the delay, expense and trouble of litigation, (5) the amount of the compromise as compared with the amount and collectability of a judgment, and (6) the views of the parties involved, pro and con."

Id. (quoting *Polk v. Good*, 507 A.2d at 536). "'The Court must especially balance the value of all the claims being compromised against the value of the benefit to be conferred on the Class by the settlement.'" *Brinckerhoff v. Texas Eastern Prods.*

Pipeline Co., LLC, 986 A.2d 370, 383 (Del. Ch. 2010) (quoting *In re MCA, Inc.*, 598 A.2d 687, 691 (Del. Ch. 1991)).

1. Analysis of the Proposed Settlement

From the inception of this action, Appaloosa sought various forms of equitable relief: *first*, to prevent TERP from entering into the Previously Challenged Transactions, which threatened its very existence; and *second*, to strengthen TERP's independence and its defenses against SunEdison's abuse of its position as controlling stockholder. Appaloosa's first goal was achieved in March when the Vivint deal was terminated. The circumstances demonstrate that SunEdison's lenders balked at least in part as a result of this Court's expressed views regarding the strength of Appaloosa's claims and its admonition that it could fashion an appropriate remedy in the event Appaloosa prevailed at a trial on the merits. Given the devastating risks to TERP posed by the Take/Pay Arrangement, the termination of the Vivint deal is a material benefit to TERP and its public stockholders.

TERP, however, remained intertwined with and vulnerable to interference from a gravely wounded SunEdison. Appaloosa continued this litigation in order to address the ongoing threat posed by SunEdison and its continued domination of TERP's management and Board. The Proposed Settlement, while not achieving all of the relief Appaloosa sought (as settlements never do), benefits TERP's public

stockholders by strengthening the Company's independence through significant corporate governance changes. Although Appaloosa is compromising its damages claim in agreeing to the Proposed Settlement, the corporate governance changes it achieves provide significant and immediate value to TERP and its public stockholders while the outcome of the compromised damages claim would have been uncertain. Plaintiff agreed to the Proposed Settlement because the principal objectives of the litigation had been achieved.

2. The Proposed Settlement Provides TERP's Stockholders With Significant Relief

As discussed above, Appaloosa's goal throughout this litigation has been to protect TERP from SunEdison's harmful interference. In addition to the termination of the Take/Pay Arrangement, TERP, in whole or in part as a result of Appaloosa's pursuit of stockholder claims, implemented numerous modifications of its policies and practices that reduced SunEdison's control. These include:

- The replacement of Wuebbels, a conflicted SunEdison senior executive, as TERP's CEO;
- The TERP Board's March 25, 2016 resolution authorizing the Committee to act independently and with the power of the Board in all dealings with SunEdison; and

- The abolition of the Office of the Chairman, removal of Blackmore from the Committee and the re-appointment of Dahya thereto following Appaloosa's filing of the SAC.

The Proposed Settlement furthers this same goal by providing TERP and its stockholders with additional corporate governance improvements that enhance TERP's independence from SunEdison. In particular, the Proposed Settlement will cause TERP to separate its information technology systems from SunEdison; it empowers TERP's independent COO with authority and responsibility for TERP's ordinary course commercial operations; and it has already resulted in the addition of an additional independent director to TERP's Board (along with two other independent directors) rendering the Board majority independent. Sloan Aff. ¶ 2.1.

Each of the Proposed Settlement's reforms benefits TERP's stockholders. Separation of key IT functions, such as accounting and human resources, from SunEdison will reduce TERP's dependence on its controlling shareholder for such functions, which, among other things, has left TERP unable to file its required public filings with the SEC. This reduced dependence will improve the quality of TERP's operations.

In addition, although the independent COO will still report directly to CEO Blackmore, the expansion of the COO's authority over day-to-day commercial

operations, and his independence, will improve TERP's ability to act independently of SunEdison.

Particularly significant is the addition of a new independent director on TERP's Board. Prior to November 21, 2016, TERP's Board consisted of seven directors, three of whom (David Ringhofer, Gregory Scallen and David Springer) are SunEdison employees. The Board's Chairman (and the Company's interim CEO), Blackmore, was a SunEdison director for nine years until he both resigned that position and joined the TERP Board on the day of the November Board Replacements. The required addition of a new independent director (along with the two additional independent directors TERP recently appointed) has resulted in six independent directors (Dahya, Compton, Jenkins-Stark and the three new directors) to balance out the group of directors comprised of CEO Blackmore and the three SunEdison employees, meaning a majority of independent directors is now in control of TERP's Board.

In sum, the Proposed Settlement provides, and has already provided, significant benefits to TERP and its public stockholders and eliminates the risk that the continuation of this suit could have resulted in few or no further measures enhancing TERP's independence. This weighs in favor of approving the Proposed Settlement.

3. The Outcome of Further Litigation Was Uncertain

Although Appaloosa believes the remaining claims[2] were viable, it faced significant risks if it chose to continue litigating the claims. Motions to dismiss were pending when the parties agreed to settle. While Appaloosa intended to argue vigorously in its opposition to the motions to dismiss that the SAC stated viable claims against the defendants, it was uncertain whether and to what extent the SAC's claims would survive this motion. If they did survive, Appaloosa would face further hurdles at both the summary judgment and trial stages.

As an initial matter Appaloosa believes the SAC stated viable claims against the Defendants. Having accepted appointment to the TERP Board, Defendants simultaneously accepted "an uncompromising duty of loyalty" to TERP and to its shareholders. *Weinberger v. UOP*, 457 A.2d 701, 710 (Del. 1983). As described by the Delaware Supreme Court:

> A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule

[2] Not including those claims arising from the creation of the Office of the Chairman, which were mooted when TERP abolished the Office.

> that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.

Id. (quoting *Guth v. Loft, Inc.* 5 A.2d 503, 510 (Del. 1939)). This foundational precept of Delaware law remains unaltered in the context of parent-subsidiary relationships, as with Defendants who served simultaneously on the boards of SunEdison and TERP. *See id.* ("[I]ndividuals who act in a dual capacity as directors of two corporations, one of whom is parent and the other subsidiary, owe the same duty of good management to both corporations . . . ."); *see also McMullin v. Beran*, 765 A.2d 910, 912 (Del. 2000) (stating that directors owe minority shareholders "an uncompromising duty of loyalty" and that "[t]here is no dilution of that obligation in a parent subsidiary context").

Taken as a whole, the Second Amended Complaint alleged that the Defendants breached their duties by participating in a scheme, devised by SunEdison's Board of Directors and management, to eliminate the independence of the Conflicts Committee in order to force TERP to enter into transactions benefitting SunEdison at the expense of TERP. *See* Statement of Facts, *supra*. This advancement of SunEdison's interests ahead of TERP's is the very essence of a breach of the duty of loyalty. *See Guth*, 5 A.2d at 510.

As the Defendants pointed out in their motions to dismiss, however, the SAC's breach of fiduciary duty claims were unusual in that they did not challenge

a transaction, either pending or completed. In moving to dismiss, the Defendants argued, correctly, that there is no *per se* requirement that a corporation maintain any independent committee, or even that it utilize one in related-party transactions. Although there is no such requirement, Appaloosa would have argued that reconstituting the Committee in order to benefit SunEdison was itself a breach of the duty of loyalty, regardless of the necessity of maintaining an independent committee or of whether the doing so resulted in an unfair transaction. Nevertheless, Appaloosa faced uncertainty as to whether its claims would have been allowed to proceed beyond the motion to dismiss stage, let alone whether the claims would ultimately be proven at trial.

Furthermore, in moving to dismiss, Defendants argued that certain items of equitable relief sought by Appaloosa "would seemingly require a judicially ordered expansion of TERP's board, and would be without precedent (to counsel's knowledge) in Delaware law." (Blackmore, Compton, and Jenkins-Stark Br. at 41.) By obtaining TERP's agreement to appoint an independent director, the Proposed Settlement achieves that remedy without the necessity of testing Defendants' legal arguments.

In the absence of a disputed transaction, proving monetary damages also would have been difficult, uncertain, and costly. In the SAC, Appaloosa alleged that Moody's downgraded TERP's debt, in part, because of the replacement of the

Conflicts Committee, and that the downgrade damaged TERP by increasing its cost of capital and depressing its stock price. (SAC ¶¶ 84-86, 183.) Although Appaloosa believes the Defendants' actions harmed TERP, there were a number of significant hurdles standing in the way of obtaining a damages award in this action. Issues of causation and quantification of the harm to TERP would have required extensive discovery and expert testimony, with no certainty as to how they would be resolved at trial. At the very least, fashioning a remedy would have required speculation about the impact of future events, such as the extent to which TERP would have to access the markets and the prevailing conditions at that time.

In short, further litigation would have been costly and the outcome would have been far from certain. Thus, the factors relating to the strength of Appaloosa's claims and the expense and risk of continuing to pursue them weigh in favor of approving the Proposed Settlement.

4. The Opinion of Counsel Who Vigorously Prosecuted This Case Favors Approving the Proposed Settlement

In determining "the overall reasonableness of the settlement," this Court considers, among the other above factors, "the views of the parties involved …." *Polk*, 507 A.2d at 536. Here, Plaintiff, a substantial TERP shareholder and sophisticated investor, along with its experienced counsel, have carefully negotiated reviewed the terms of the Proposed Settlement. After weighing the benefits of the Proposed Settlement against the risk of continued litigation,

Plaintiff and its counsel have determined that the Proposed Settlement is fair, reasonable, and in the best interests of TERP and its public stockholders. Accordingly, this factor also supports approval.

II. THE REQUESTED FEE AWARD IS REASONABLE AND SHOULD BE APPROVED BY THE COURT

The benefits achieved on behalf of TERP and its stockholders through this lawsuit, both through the terms of the Proposed Settlement and through the actions both of TERP and third-parties that have mooted certain of Appaloosa's claims, have been achieved at Appaloosa's sole expense. As part of the negotiated settlement of this action TERP and the Defendants have agreed not to contest Appaloosa's request for a fee award of $3,000,000, to be paid by TERP and/or its insurers. Because Appaloosa's actual attorneys' fees and expenses (which it has paid from its own pocket) were significantly higher, at $3,546,781.01, the requested award for fees and expenses will merely reimburse Appaloosa for a portion of its out-of-pocket costs in connection with prosecuting this action on behalf of TERP and its public stockholders. The Court should grant the requested fee award as fair and reasonable.

A. Appaloosa Is Entitled to Have Its Fees and Expenses Reimbursed

Although litigants must "generally bear the burden of paying their own attorneys' fees and expenses," Delaware courts recognize an exception where "'the Court may order the payment of counsel fees and related expenses to a plaintiff

whose efforts result in … the conferring of a corporate benefit.'" *San Antonio Fire & Police Pension Fund v. Bradbury*, 2010 WL 4273171, at *7 (Del. Ch. Oct. 28, 2010) (quoting *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989)). "Such results need not be pecuniary, so long as the litigation produces a substantial benefit to the corporation or its stockholders." *Id.*

> Where a defendant corporation or board settles or moots some or all of the plaintiff's claims, attorneys' fees may still be awarded; an award may be granted if (1) the suit was meritorious when filed, (2) the action producing the corporate benefit was taken by the defendant corporation prior to judicial resolution, and (3) the resulting corporate benefit was causally related to the lawsuit. Under such circumstances, the defendant corporation bears the burden of demonstrating that no causal link exists between the benefit produced and the filing of the lawsuit.

Id.

Under the above standards, Appaloosa is entitled to a fee award, reimbursing it for its out-of-pocket-expenses, for the numerous corporate benefits achieved both through the settlement and through actions mooting its claims during the prosecution of the lawsuit. Appaloosa's suit has been remarkably successful. The suit sought to stop a transaction that was likely to bankrupt TERP, and to thereafter put controls in place to prevent TERP from willingly entering into similarly damaging transactions. This suit accomplished both missions. Indeed, had the

Take/Pay Arrangement not been terminated, TERP may have found itself sharing SunEdison's fate by having to file for Chapter 11 protection.

1. The Benefits Obtained Through the Proposed Settlement Justify a Fee Award

The significant benefits obtained through the Proposed Settlement justify a fee award as they were clearly agreed to by TERP "prior to judicial resolution" and, because they are part of an agreement to settle this lawsuit, the benefit bestowed by the items in the Settlement Agreement is "causally related to the lawsuit." *Id.* As discussed above, under the terms of the Proposed Settlement (and subject to the conditions and timelines set forth in the Stipulation):

- TERP has agreed to segregate key IT systems from SunEdison according to a timetable set forth in the Stipulation;
- TERP's independent COO, a Partner with Alix Partners, will be given management authority over the ordinary course commercial operations of TERP subject to the authority of the CEO;
- TERP agreed to identify and appoint an additional independent director, and it recently did so, along with two additional independent directors.

These are substantial changes that enhance TERP's ability to act independently of SunEdison for the benefit of TERP's public stockholders.

In addition, the lawsuit was meritorious when filed. A suit is meritorious when filed where "'it can withstand a motion to dismiss on the pleadings if, at the

same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success.'" *Id.* at *8 (quoting *Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966)). This determination is made as of the time the suit is commenced, without regard to later developments. *Id.*

There is no question this lawsuit was meritorious under this standard. As explained above, the parties engaged in expedited discovery in this matter and argued Appaloosa's motion for a preliminary injunction approximately one month after the action was commenced. Defendants made no argument that the allegations in the complaint, even if true, would fail to state a claim. In denying Appaloosa's motion for a preliminary injunction, the Court nonetheless noted there were "many troubling aspects of the record that cast doubt on the fairness of the process that led to the amended deal terms" and "the circumstances surrounding the creation of the new committee are inherently suspect …." Sloan Aff., Ex. A at 36:18-23. Simply put, no serious argument can be made that this suit was not meritorious when filed.

Accordingly, Appaloosa is entitled to a fee award for the benefits that were obtained through the Proposed Settlement.

2. Appaloosa Is Entitled to a Fee Award For the Benefits Obtained As a Result Of the Suit During the Pendency Of the Suit

In addition to the benefits obtained through the Settlement, numerous actions taken during the pendency of this suit have bolstered TERP's independence and/or mooted certain relief sought by Appaloosa. As explained above, Appaloosa is entitled to a fee award for actions taken by the defendants during the lawsuit that create a corporate benefit and are causally related to the lawsuit. *See San Antonio Fire & Police Pension Fund*, 2010 WL 4273171, at *7. The Defendants bear the burden of demonstrating that beneficial actions undertaken during the lawsuit were not causally related to the suit. *Id.* Appaloosa is entitled to recoup its fees for the following benefits that were obtained during the pendency of this suit. This is so where, as here, the Defendants' actions mooted certain of Appaloosa's claims during the pendency of the lawsuit. *See, e.g.*, *In re Sauer-Danfoss Inc. S'holder Litig.*, 65 A.3d 1116, 1123 (Del. Ch. 2011) (explaining that, in determining whether plaintiff is entitled to fee award for producing corporate benefit, "the benefit need not have resulted from a litigated judgment or settlement. If the defendants take action to moot the dispute, then the plaintiff can seek an award.") (internal citation omitted); *see also San Antonio Fire & Police Pension Fund*, 2010 WL 4273171, at *7 (setting forth standard for awarding fees where claims are mooted).

Prevention of the Take/Pay Arrangement - Most importantly, this suit helped put a stop to the Take/Pay Arrangement, which the Committee's own financial advisor opined could render TERP insolvent. The Court did not preliminarily enjoin the Take/Pay Arrangement primarily because it appeared the most grave consequences would not accrue before the Court could adjudicate the merits on an expedited basis. In rendering its decision on the preliminary injunction motion, the Court specifically warned, however, that Goldman "should consider itself on notice of the possibility of relief being granted in plaintiff's favor at a future date, if it is warranted, after a full record is developed." Sloan Aff., Ex. A at 33:2-6. Within two weeks, Goldman, and the conglomerate of banks that were to finance the Vivint merger with the Take/Pay Arrangement as collateral, withdrew their financing. The timing of Goldman's withdrawal is compelling evidence that it was motivated, in part, by the possibility of an adverse judgment after a trial on the merits.

Wuebbels' Departure as CEO – One of the more egregious ongoing conflicts created by the November Board Replacements was the installation of SunEdison's CFO as TERP's CEO. From the November Board Replacements until his departure on or about March 30, 2016, Wuebbels simultaneously held both positions. Given the obvious conflicts inherent in having a SunEdison

executive run TERP, Appaloosa sought his removal as TERP's CEO in the FAC. Eight days later, TERP announced Wuebbels' departure.

Enhanced Powers of the Conflicts Committee – On March 25, 2016, the TERP Board authorized the Conflicts Committee "to act independently and with the power of the Board of Directors with respect to matters involving SunEdison." Sloan Aff., Ex. D (Stipulation) ¶ E. While Appaloosa continued to seek to change the composition of the Committee, granting the Committee the power to act with the power of the Board with respect to matters involving SunEdison unquestionably enhanced TERP's ability to act independently. TERP acknowledged that this suit "was a factor in determining whether to pass this resolution." Sloan Aff., Ex. D ¶ E.

Dissolution of the Office of the Chairman and Blackmore's Replacement on the Conflicts Committee With Dahya – As described above, TERP's creation of an "Office of the Chairman" consisting of Conflicts Committee members precluded those members from continuing to serve on the Committee. Because maintaining the independence of the Committee's members under NASDAQ's rules is a requirement for TERP, the creation and staffing of the Office of the Chairman was impermissible. The Office of the Chairman was abolished immediately after Appaloosa raised a claim based on its impermissibility in the SAC, at which time the Board also reappointed Dahya to the Conflicts

Committee. TERP acknowledged that Dahya's reappointment to the Committee provided a benefit to TERP's stockholders, and that this suit was a factor in causing the abolition of the Office of the Chairman and the re-appointment of Dahya to the Committee. Sloan Aff., Ex. D ¶ I.

B. The Requested Fee and Expense Award Is Fair And Reasonable

Neither Appaloosa nor its attorneys pursued this action seeking a fee award. Unlike the bulk of reported cases in this jurisdiction seeking a fee award, the Plaintiff here paid attorneys' fees out-of-pocket on an hourly basis, with no guaranty it would ever be reimbursed. Appaloosa, and not its counsel which has already been paid, now seeks reimbursement – and nothing more – for the significant value it has provided TERP's shareholders. Appaloosa also spent $3,546,781.01 in attorneys' fees and costs in connection with this matter, significantly more than the $3,000,000 amount for which it is seeking reimbursement. Its request for reimbursement is fair and reasonable.

"The determination of any fee award is a matter within the sound judicial discretion of the Court of Chancery." *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1255 (Del. 2012). In exercising its discretion in determining a fee award, the Court considers (1) the benefits achieved, (2) the time and effort expended by counsel, (3) the complexity of the litigation and the skills applied by counsel to resolve those complexities, (4) the contingency risk taken on by

counsel, and (5) counsel's standing and ability. *See Sugarland Indus. v. Thomas*, 420 A.2d 142, 149 (Del. 1980). "Where, as here, the fee is negotiated after the parties have reached an agreement in principle on settlement terms and is paid in addition to the benefit to be realized by the class, [the] court will also give weight to the agreement reached by the parties in relation to fees." *In re AXA Fin., Inc.*, 2002 WL 1283674, at *7 (Del. Ch. May 22, 2002).

1. The Litigation Achieved Substantial Benefits

The benefits achieved by the litigation is the factor afforded the greatest weight in determining whether a fee award is reasonable. *See Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000). This litigation has achieved significant benefits for TERP, both through TERP's actions during the pendency of the litigation, and through the settlement. Among other things, when Appaloosa commenced this action, (1) TERP was facing the existential threat of the Take/Pay Arrangement, (2) TERP's CEO was simultaneously serving as SunEdison's CFO, (3) the Conflicts Committee was chaired by Blackmore, who served on SunEdison's Board of Directors for nine years leading up to his sudden appointment to TERP's Board on November 20, 2015, (4) TERP's IT systems were so intertwined with SunEdison's that it prevented TERP from timely reporting its financial condition, and (5) the majority of TERP's Board was not independent from SunEdison. As explained in greater detail above, this litigation

brought about significant changes that, once the Proposed Settlement is fully implemented, will have remedied or greatly mitigated each of these threats to TERP and its independent stockholders. Given those benefits, it is appropriate to reimburse Appaloosa for a significant portion of its out-of-pocket attorneys' fees and costs. *See, e.g.*, *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A. 3d 1025, 1071 (Del. Ch. 2015) (in a case where derivative plaintiff obtained both monetary and non-monetary relief, explaining that non-monetary relief including addition of two independent directors, rendering board majority independent, and reduction of insiders' voting power from 24.9% to 19.9%, could justify a fee award of $5-$10 million based on applicable precedent); *see also id.*, n. 30 (citing cases where non-monetary benefits resulted in fee awards of $5.4 million to $8.5 million).

2. The Time and Effort Expended By Counsel and the Complexity of the Matter

The time and effort of counsel serves as a "backstop check" on the reasonableness of a fee award. *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *14 (Del. Ch. Aug. 30, 2007). This factor has two components – time and effort – with effort being the more important factor of the two. *See In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *12-13 (Del. Ch. June 27, 2011).

Here, Plaintiff's counsel undertook a Herculean effort, within approximately three weeks, to develop an extensive record that allowed it to bring the preliminary

injunction motion. Following the motion, counsel twice responded quickly to ongoing events by amending the complaint to bring viable claims seeking further corporate governance protections for TERP. In the relatively short time this action has been pending, Plaintiff's counsel and paraprofessionals have expended 5838.8 hours at a blended hourly rate of $570.92 to prosecute and settle this action. *See* Affidavit of Lawrence M. Rolnick; Affidavit of David Margules. These hours were well spent performing, among others, the following tasks: researching and drafting a complaint and emergent application; negotiating an expedited schedule with defendants; propounding discovery on defendants; negotiating the scope of discovery with several groups of defendants; drafting and filing expedited motions to compel discovery; responding to discovery; rapidly reviewing 10,000+ documents; preparing for, taking and defending 14 depositions within the course of less than a week in several cities; coordinating with experts; drafting briefs in support of and arguing in support of Plaintiff's motion for a preliminary injunction; reviewing the rapid changes in TERP's situation and drafting amended complaints to bring about corporate governance changes; preparing to respond to multiple motions to dismiss; and negotiating settlement. *See generally, Del Monte*, 2011 WL 2535256 (awarding $2.75 million in fees to lead counsel where counsel expended 4,708 hours litigating merger case, engaged in expedited discovery, discovered wrongdoing with regard to merger transaction, and obtained

meaningful supplemental disclosures, while reserving on awarding additional fees for brief preliminary injunction delaying merger transaction).

As explained in *Del Monte*, more important than the number of hours is what counsel actually did with those hours. *Id.* at *13. In this case, Plaintiff's counsel did "quite a bit" with those hours. *Id.* Counsel respectfully submits here that it performed high quality work under great time constraints with great efficiency. The expedited discovery period gave plaintiff approximately three weeks to develop and make its case. While the Court ultimately did not agree the threatened harm was imminent, it did provide plaintiff with the opportunity to expedite an adjudication on the merits while noting "many troubling aspects of the record that cast doubt on the fairness of the process that led to the amended deal terms" and "the circumstances surrounding the creation of the new committee are inherently suspect …." Sloan Aff., Ex. A at 36:18-23.

Given the extraordinary work performed by counsel, at an efficient blended hourly rate, this factor weighs in favor of the requested award reimbursing Appaloosa's out-of-pocket expenditures on attorneys' fees and costs.

3. The Non-Contingent Nature of the Fee

Unlike in the vast majority of reported Delaware fee application decisions counsel prosecuted this case on an hourly-fee basis and Appaloosa, therefore, bore the risk that it would not recoup the fees it paid out-of-pocket on behalf of TERP.

Here, Appaloosa seeks no premium above the actual fees and expenses it has incurred and paid, as this case was not brought on a contingency-fee basis. In fact, even if the Court grants Appaloosa's fee request, Appaloosa will still have spent $641,020.53 more on this matter than it recoups. Given the benefits conferred on TERP, and the time and effort of counsel, an award of a portion of the actual fees incurred by Appaloosa is appropriate. *See, e.g.*, *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 727 A.2d 844, 855 (Del. Ch. 1998) (finding that, where shareholder suit conferred a benefit, and plaintiffs retained counsel on an hourly basis, "plaintiffs are entitled to recover from the class the amount of attorneys' fees they paid to their counsel in connection with the litigation.").

4. Counsel's Standing and Ability

Plaintiff's counsel are well-known and prominent litigators with decades of experience prosecuting claims on behalf of investors, including in this Court. The fees sought reflect their standing, experience, and the substantial benefits they were able to deliver to TERP and its public stockholders through this difficult and contentious litigation. Counsel had to, and did, employ the full breadth of their skills in achieving substantial results against an array of counsel from preeminent law firms.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court approve the Proposed Settlement as fair, adequate, and reasonable, and that it award $3,000,000 in attorneys' fees and expenses to reimburse Plaintiff for amounts incurred in prosecuting this action on behalf of TERP and its public stockholders.

Dated: November 28, 2016

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Exhibit E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SHARON NIXON-CRENSHAW, Derivatively on behalf of DYCOM INDUSTRIES, INC., Plaintiff, v. STEPHEN C. COLEY, DWIGHT B. DUKE, EITAN GERTEL, ANDERS GUSTAFSSON, PATRICIA L. HIGGINS, STEVEN E. NIELSON, PETER T. PRUITT, JR., RICHARD K. SYKES, LAURIE J. THOMSEN, and CHARLES B. COE, Defendants, and DYCOM INDUSTRIES, INC., Nominal Defendant.	Case No. 18-25289-CIV-SINGHAL/GOODMAN
TERRY WHITE AND CHRIS PERKINS, Derivatively on behalf of DYCOM INDUSTRIES, INC., Plaintiff, v. STEVEN E. NIELSEN, H. ANDREW DEFERRARI, DWIGHT B. DUKE, EITAN GERTEL, ANDERS GUSTAFSSON, PATRICIA L. HIGGINS, RICHARD K. SYKES, LAURIE J. THOMSEN, CHARLES B. COE, and STEPHEN C. COLEY, Defendants, and DYCOM INDUSTRIES, INC., Nominal Defendant.	Case No. 20-21952-CIV-SINGHAL/GOODMAN

ORDER APPROVING DERIVATIVE SETTLEMENT AND DISMISSING ACTION WITH PREJUDICE

THIS CAUSE is before the Court on Plaintiff's Unopposed Motion for Final Approval of Derivative Settlement (DE [62]). Plaintiffs ask the Court to give final approval of the settlement ("Settlement") set forth in the Stipulation of Settlement, dated May 21, 2021 ("the Stipulation") (DE [44]). The Court held a settlement fairness hearing on September 30, 2021, and has considered all supporting documentation in the record. Of note, no objections to the settlement have been filed in this action, nor did any party appear at the hearing to object. Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Unopposed Motion for Final Approval of Derivative Settlement (DE [62]) is **GRANTED** as follows:

1. This District Court Approval Order incorporates by reference the definitions in the Stipulation, and all capitalized terms used herein shall have the same meanings as set forth in the Stipulation (in addition to those capitalized terms defined therein).

2. This Court has jurisdiction over the subject matter of the above-captioned Actions, including all matters necessary to effectuate the Settlement, and over all parties to the Derivative Matters, including, but not limited to, the Plaintiffs, Dycom Industries, Inc. ("Dycom"), current Dycom stockholders, and the Settling Defendants.

3. The Court finds that the notice provided to Dycom stockholders was the best notice practicable under the circumstances of these proceedings and of the matters set forth therein, including the Settlement set forth in the Stipulation, to all Persons entitled to such notice. The notice fully satisfied the requirements of Federal Rule of Civil Procedure 23.1 and due process.

4. The Actions and all claims contained therein, as well as all of the Released Claims, are **DISMISSED WITH PREJUDICE**. As among Plaintiffs, Stockholders, the Settling Defendants, and Dycom, the parties are to bear their own costs, except as otherwise provided in the Stipulation.

5. The Court finds that the terms of the Stipulation and Settlement are fair, reasonable, and adequate as to each of the Settling Parties, and hereby finally **APPROVES** the Stipulation and Settlement in all respects, and orders the Settling Parties to perform its terms to the extent the Settling Parties have not already done so.

6. Upon the Effective Date, as defined in ¶ 7.1, the Stockholders (acting on their own behalf and derivatively on behalf of Dycom and its stockholders), all other stockholders of Dycom, and Dycom, for good and sufficient consideration, the receipt and adequacy of which are hereby acknowledged, shall be deemed to have, and by operation of law and of the Judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged and dismissed with prejudice each and every one of the Released Claims against the Released Persons.

7. Upon the Effective Date, as defined in ¶ 7.1, the Stockholders (acting on their own behalf and derivatively on behalf of Dycom and its stockholders), all other stockholders of Dycom, and Dycom, for good and sufficient consideration, the receipt and adequacy of which are hereby acknowledged, shall be forever barred and enjoined from commencing, instituting or prosecuting any of the Released Claims against any of the Released Persons. Nothing herein shall in any way impair or restrict the rights of any Settling Party to enforce the terms of the Stipulation.

8. Upon the Effective Date, as defined in ¶ 7.1, each of the Released Persons, for good and sufficient consideration, the receipt and adequacy of which are

hereby acknowledged, shall be deemed to have, and by operation of law and of the Judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged each and all of the Stockholders and Stockholders' Counsel and all current Dycom stockholders (solely in their capacity as Dycom stockholders) from all claims (including Unknown Claims) arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the Derivative Matters or the Released Claims. Nothing herein shall in any way impair or restrict the rights of any Settling Party to enforce the terms of the Stipulation.

9. The Court hereby **APPROVES** the Fee and Expense Amount in accordance with the Stipulation and finds that such fee is fair and reasonable in light of the substantial benefit conferred upon Dycom by the Settlement.

10. Neither the Stipulation nor the Settlement, including the Exhibits attached thereto, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement: (a) is or may be deemed to be or may be offered, attempted to be offered, or used in any way as a concession, admission, or evidence of the validity of any Released Claims, or of any fault, wrongdoing, or liability of the Released Persons or Dycom or (b) is or may be deemed to be or may be used as a presumption, admission, or evidence of any liability, fault, or omission of any of the Released Persons or Dycom in any civil, criminal, administrative, or other proceeding in any court, administrative agency, tribunal, or other forum. Neither the Stipulation nor the Settlement shall be admissible in any proceeding for any purpose, except to enforce the terms of the Settlement, and except that the Released Persons may file or use the Stipulation, the District Court Approval Order and/or the Judgment, in any action that may be brought against them to support a defense or counterclaim based on principles

of *res judicata*, collateral estoppel, full faith and credit, release, good-faith settlement, standing, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

11. During the course of the Derivative Matters, the parties and their respective counsel at all times complied with the requirements of Federal Rule of Civil Procedure 11, and all other similar laws relating to the institution, prosecution, defense of, or settlement of the Derivative Matters.

12. Without affecting the finality of this District Court Approval Order and the Judgment in any way, this Court hereby retains continuing and exclusive jurisdiction over the Actions and the parties to the Stipulation to enter any further orders as may be necessary to effectuate, implement, and enforce the Stipulation and the Settlement provided for therein and the provisions of this District Court Approval Order.

13. This District Court Approval Order and the Final Judgment is a final and appealable resolution in the Actions as to all claims. Final Judgment will be entered separately.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 30th day of September 2021.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished to counsel of record via CM/ECF

Exhibit F

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CLOVIS ONCOLOGY, INC. DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 2017-0222-JRS

ORDER AND FINAL JUDGMENT

A hearing having been held before this Court on May 4, 2022, pursuant to the Court's Order of March 10, 2022 (the "Scheduling Order"), upon the Stipulation and Agreement of Compromise, Settlement, and Release (the "Stipulation"), entered into in the above-captioned derivative action (the "Derivative Litigation"), which is incorporated herein by reference, it appearing that due notice of the hearing has been given in accordance with the Scheduling Order, the Parties to the Derivative Litigation having appeared by their respective attorneys of record, the Court having heard and considered evidence in support of the proposed Settlement, the attorneys for the Parties having been heard, an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the Scheduling Order, the Court having determined that notice to Company Stockholders was adequate and sufficient, and the entire matter of the proposed Settlement having been heard and considered by the Court,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, this 4th day of May, 2022, that:

1. Except for terms defined herein, the capitalized terms used herein shall have the same meanings as they have in the Stipulation.

2. The Court having jurisdiction over the subject matter of the Derivative Litigation, and all matters relating to the Settlement of the Derivative Litigation, as well as personal jurisdiction over all of the Parties and each of the Company Stockholders, and it is further determined that the Parties and Company Stockholders, as well as their heirs, executors, successors, and assigns, are bound by this Order and Final Judgment.

3. Notice has been given to the Company Stockholders, pursuant to and in the manner directed by the Scheduling Order, proof of dissemination of the Notice was filed with the Court, and full opportunity to be heard has been offered to all Parties and to all other persons and entities in interest with respect to all matters relating to the Settlement. The form and manner of the Notice is hereby determined to have provided due and sufficient notice of the Settlement and to have been given in full compliance with the requirements of Court of Chancery Rule 23.1 and due process.

4. Based on the record of this Action, each of the provisions of Court of Chancery Rule 23.1 has been satisfied and the Derivative Litigation has been properly maintained according to the provisions of Court of Chancery Rule 23.1.

5. The Settlement is found to be fair, reasonable, adequate, and in the best interests of the Company and the Company Stockholders, and is hereby approved pursuant to Court of Chancery Rule 23.1. The Parties are hereby authorized and directed to comply with and to consummate the Settlement in accordance with its terms and provisions, and the Register in Chancery is directed to enter and docket this Order and Final Judgment.

6. The Action is hereby dismissed with prejudice. The Parties shall bear their own fees, costs, and expenses, except as provided in paragraph 14 below or as otherwise provided in the Stipulation and the Scheduling Order.

7. Upon Final Approval of the Settlement, Plaintiff Releasing Parties, by operation of the Settlement and to the fullest extent permitted by law, shall completely, fully, finally and forever release, relinquish, settle and discharge each and all of the Released Defendants from any and all of Plaintiffs' Released Claims.

8. Upon Final Approval of the Settlement, Defendant Releasing Parties, by operation of the Settlement and to the fullest extent permitted by law, shall completely, fully, finally and forever release, relinquish, settle and discharge each and all of the Released Plaintiffs from any and all of Defendants' Released Claims.

9. Plaintiffs, Clovis, or any Company Stockholder derivatively on behalf of Clovis waives and relinquishes, to the fullest extent permitted by law, the

provisions, rights, and benefits of any state, federal, or foreign law or principle of common law, which may have the effect of limiting the Released Claims.

10. Plaintiffs acknowledge, and the Company Stockholders shall be deemed to acknowledge, that he, she, they, or it as been advised and/or is familiar with the provisions of California Civil Code § 1542, which provides:

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

11. The Parties acknowledge, and the Company Stockholders shall be deemed to acknowledge, that he, she, they, or it may hereafter discover Released Claims that he, she, they, or it did not know or suspect to exist in his, her, their, or its favor at the time of the Released Claims as against the Released Parties, including without limitation those which, if known, might have affected his, her, their, or its decision to enter into or object to the Settlement. Nevertheless, the Parties acknowledge, and the Company Stockholders shall be deemed to acknowledge, that the Stipulation has been negotiated and agreed upon in light of such possible Unknown Claims, and each expressly waives, or shall be deemed to have waived, any and all rights under California Civil Code § 1542 and under any other federal or state statute or law of similar effect. The Parties acknowledge, and the Company

Stockholders shall be deemed to have acknowledged, that this waiver was expressly bargained for and is an integral element of the Settlement.

12. The Parties are hereby authorized, without further approval from the Court, to agree to adopt such amendments and modifications of the Stipulation that are consistent with this Order and Final Judgment and that do not limit the rights of the Parties or the Company Stockholders under the Stipulation. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

13. In the event that the Settlement is terminated pursuant to the terms of the Stipulation or if the Settlement does not obtain Final Approval for any reason, then: (i) the Settlement and the Stipulation shall be null and void and of no force and effect; (ii) this Order and Final Judgment and related orders entered by the Court shall in all events be treated as vacated, *nunc pro tunc*; and (iii) the Settlement and Stipulation shall not be deemed to prejudice in any way the respective positions of the Parties with respect to the Derivative Litigation, nor shall it be interpreted, construed, deemed, invoked, offered, or received in evidence or otherwise used by any person in the Derivative Litigation, or in any other action or proceeding.

14. Plaintiffs' Counsel are awarded attorneys' fees and expenses in the amount of $2,325,000.00 (inclusive of costs), which award the Court finds to be

fair and reasonable, and which shall be paid to Plaintiffs' Counsel in accordance with the Stipulation.

15. No proceedings or Court order with respect to the award, if any, of attorneys' fees, costs, or expenses to Plaintiffs' Counsel shall in any way disturb or affect this Order and Final Judgment (including precluding it from obtaining Final Approval or otherwise being entitled to preclusive effect), and any such proceedings or Court order shall be considered separate from this Order and Final Judgment.

16. Without affecting the finality of this Order and Final Judgment in any way, this Court reserves jurisdiction over all matters relating to the implementation and enforcement of the terms of the Stipulation, this Order and Final Judgement, and allocation of any Fee Award.

/s/ Joseph R. Slights III
Vice Chancellor

Exhibit G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CONDUENT INCORPORATED STOCKHOLDER DERIVATIVE LITIGATION

Lead Case No. 1:20-cv-10964-MKV
(consolidated with No. 1:21-cv-00239-MKV)

This Document Relates To:

ALL ACTIONS.

ORDER APPROVING DERIVATIVE SETTLEMENT AND ORDER OF DISMISSAL WITH PREJUDICE

This matter came before the Court for hearing pursuant to the Order of this Court, dated May 25, 2022 ("Order"), on Plaintiffs' motion for final approval of the settlement ("Settlement") set forth in the Stipulation of Settlement, dated February 16, 2022 (the "Stipulation"). Due and adequate notice having been given of the Settlement as required in said Order, and the Court having considered all papers filed and proceedings had herein, and otherwise being fully informed in the premises and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This Approval Order incorporates by reference the definitions in the Stipulation, and all capitalized terms used herein shall have the same meanings as set forth in the Stipulation (in addition to those capitalized terms defined therein).

2. This Court has jurisdiction over the subject matter of the Actions, including all matters necessary to effectuate the Settlement, and over all parties to the Derivative Matters, including, but not limited to, Plaintiffs, Conduent Incorporated ("Conduent"), all current Conduent stockholders, and the Settling Defendants.

3. The Court finds that the notice provided to Conduent stockholders was the best notice practicable under the circumstances of these proceedings and of the matters set forth therein, including the Settlement set forth in the Stipulation, to all Persons entitled to such notice.

The notice fully satisfied the requirements of Federal Rule of Civil Procedure 23.1 and due process.

4. The Federal Action and the State Action (collectively, the "Actions"), and all claims contained therein, as well as all of the Released Claims, are dismissed with prejudice. As among Plaintiffs, stockholders, the Settling Defendants, and Conduent, the parties are to bear their own costs, except as otherwise provided in the Stipulation.

5. The Court finds that the terms of the Stipulation and Settlement are fair, reasonable, and adequate as to each of the Settling Parties, and hereby finally approves the Stipulation and Settlement in all respects, and orders the Settling Parties to perform its terms to the extent the Settling Parties have not already done so.

6. Upon the Effective Date, as defined in ¶7.1 of the Stipulation, Plaintiffs (acting on their own behalf and derivatively on behalf of Conduent and its stockholders), all other stockholders of Conduent, and Conduent, for good and sufficient consideration, the receipt and adequacy of which are hereby acknowledged, shall be deemed to have, and by operation of law and of the Judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged and dismissed with prejudice each and every one of the Released Claims against the Released Persons.

7. Upon the Effective Date, as defined in ¶7.1 of the Stipulation, Plaintiffs (acting on their own behalf and derivatively on behalf of Conduent and its stockholders), all other stockholders of Conduent, and Conduent, for good and sufficient consideration, the receipt and adequacy of which are hereby acknowledged, shall be forever barred and enjoined from commencing, instituting or prosecuting any of the Released Claims against any of the Released

Persons. Nothing herein shall in any way impair or restrict the rights of any Settling Party to enforce the terms of the Stipulation.

8. Upon the Effective Date, as defined in ¶7.1 of the Stipulation, each of the Released Persons, for good and sufficient consideration, the receipt and adequacy of which are hereby acknowledged, shall be deemed to have, and by operation of law and of the Judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged each and all of the Plaintiffs and Plaintiffs' Counsel and all current Conduent stockholders (solely in their capacity as Conduent stockholders) from all claims (including Unknown Claims) arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the Derivative Matters or the Released Claims. Nothing herein shall in any way impair or restrict the rights of any Settling Party to enforce the terms of the Stipulation.

9. The Court hereby approves the Fee and Expense Amount in the amount of two million, two hundred thousand dollars ($2,200,000.00) in accordance with the Stipulation and finds that such fee is fair and reasonable in light of the substantial benefit conferred upon Conduent by the Settlement.

10. The Court hereby also approves a service award of three thousand dollars ($3,000.00) for each of the 4 Plaintiffs, to be paid solely out of the Fee and Expense Amount.

11. Neither the Stipulation nor the Settlement, including the Exhibits attached thereto, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement: (a) is or may be deemed to be or may be offered, attempted to be offered or used in any way as a concession, admission or evidence of the validity of any Released Claims, or of any fault, wrongdoing, or liability of the Released Persons or Conduent or (b) is or may be

deemed to be or may be used as a presumption, admission, or evidence of, any liability, fault, or omission of any of the Released Persons or Conduent in any civil, criminal, administrative, or other proceeding in any court, administrative agency, tribunal, or other forum. Neither the Stipulation nor the Settlement shall be admissible in any proceeding for any purpose, except to enforce the terms of the Settlement, and except that the Released Persons may file or use the Stipulation, the District Court Approval Order and/or the Judgment, in any action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, full faith and credit, release, good faith settlement, standing, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

12. During the course of the Derivative Matters, the parties and their respective counsel at all times complied with the requirements of Federal Rule of Civil Procedure 11, and all other similar laws relating to the institution, prosecution, defense of, or settlement of the Derivative Matters.

13. ~~Without affecting the finality of this District Court Approval Order and the Judgment in any way, this Court hereby retains continuing and exclusive jurisdiction over the Actions and the parties to the Stipulation to enter any further orders as may be necessary to effectuate, implement, and enforce the Stipulation and the Settlement provided for therein and the provisions of this District Court Approval Order.~~

14. This District Court Approval Order and the Judgment is a final and appealable resolution in the Actions as to all claims, and the Court respectfully requests immediate entry of the annexed Judgment forthwith by the Clerk in accordance with Rule 58 of the Federal Rules of Civil Procedure, dismissing the Actions with prejudice.

SO ORDERED, THIS 11th **DAY OF** July **, 2022.**

Mary Kay Vyskocil

HONORABLE MARY KAY VYSKOCIL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CONDUENT INCORPORATED STOCKHOLDER DERIVATIVE LITIGATION	Lead Case No. 1:20-cv-10964-MKV (consolidated with No. 1:21-cv-00239-MKV)
This Document Relates To: ALL ACTIONS.	**JUDGMENT AND FINAL ORDER**

Plaintiffs, having moved for final approval of the Settlement set forth in the Stipulation of Settlement, dated February 16, 2022, and the matter having come before the Honorable Mary Kay Vyskocil, United States District Judge, and the Court, on July 11, 2022, having issued its Order Approving Derivative Settlement and Order of Dismissal with Prejudice, and having directed the Clerk of the Court to enter judgment, it is

ORDERED, ADJUDGED AND DECREED:

1. This Judgment incorporates by reference the Court's Order Approving Derivative Settlement and Order of Dismissal with Prejudice dated July 11, 2022; and

2. That for the reasons stated in, and pursuant to the terms set forth in, the Court's Order Approving Derivative Settlement and Order of Dismissal with Prejudice dated July 11, 2022, Plaintiffs' Motion for Final Approval of Derivative Settlement is granted; accordingly, this case, and all related cases, are closed.

Dated: _____, 2022 By:_____
Clerk of Court

Exhibit H

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SANTANDER CONSUMER USA HOLDINGS, INC. DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 11614-VCG

FINAL ORDER AND JUDGMENT APPROVING DERIVATIVE ACTION SETTLEMENT

A hearing having been held before the Court on January 20, 2021 (the "Settlement Hearing"), pursuant to the Court's Orders of January 28, 2020 and December 7, 2020 (together, the "Scheduling Orders"), upon the Stipulation and Agreement of Settlement, Compromise, and Release, dated as of January 21, 2020 (the "Stipulation"), entered into in the above-captioned consolidated derivative action (the "Action"), which is incorporated herein by reference, it appearing that due notice of the Settlement Hearing has been given in accordance with the Scheduling Orders, the Parties having appeared by their respective attorneys of record, the Court having heard and considered evidence in support of the proposed Settlement, the attorneys for the Parties having been heard, an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the Scheduling Orders, the Court having determined that notice to Santander Stockholders was adequate and sufficient, and the entire matter of the proposed Settlement having been heard and considered by the Court,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, this 20th day of January, 2021, as follows:

1. **Definitions:** Unless otherwise defined, all capitalized terms used herein shall have the same meanings as those set forth in the Stipulation.

2. **Jurisdiction:** The Court has jurisdiction over the subject matter of the Action and all matters relating to the Settlement, as well as personal jurisdiction over all of the Parties and Santander Stockholders, and in any dispute arising out of or relating in any way to the Settlement. It is further determined that all of the Parties, and all Santander Stockholders, as well as their heirs, executors, successors, and assigns, are bound by this Final Order and Judgment.

3. **Incorporation of Settlement Documents:** This Final Order and Judgment incorporates and makes a part hereof: (a) the Stipulation filed with the Court on January 21, 2020; and (b) the Notice, which was approved by the Court in the Scheduling Orders.

4. **Derivative Actions Properly Maintained; Adequacy of Plaintiffs and Plaintiffs' Counsel:** Based on the record in the Action, the Court finds that each of the provisions of Rule 23.1 of the Rules of the Court of Chancery ("Rule 23.1") has been satisfied and the Action has been properly maintained according to Rule 23.1. Plaintiffs in the Action have continuously held stock in Santander since the time of the conduct complained of in the Action and otherwise have standing to

prosecute the Action derivatively on behalf of Santander; the Action was properly instituted as a derivative action on behalf of Santander; and Plaintiffs and Plaintiffs' Counsel have adequately represented the interests of Santander and Santander Stockholders, both in terms of litigating the Action and for purposes of entering into and implementing the Settlement.

5. **Notice:** The Court finds that the manner of giving the Notice: (a) was implemented in accordance with the Scheduling Orders; (b) constituted notice that was reasonably calculated, under the circumstances, to apprise Santander Stockholders of: (i) the pendency of the Action; (ii) the effect of the proposed Settlement (including the Releases to be provided thereunder); (iii) Plaintiffs' Counsel's application for an award of attorneys' fees, reimbursement of litigation expenses, and for incentive awards to Plaintiffs ("Fee and Expense Application"); (iv) their right to object to the Settlement and/or to the Fee and Expense Application; and (v) their right to appear at the Settlement Hearing; (c) constituted due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the proposed Settlement; and (d) satisfied the requirements of Rule 23.1, the U.S. Constitution (including the Due Process Clause), and all other applicable law and rules.

6. **Final Settlement Approval and Dismissal of Claims:** Pursuant to, and in accordance with, Rule 23.1, the Court hereby fully and finally approves the

Settlement set forth in the Stipulation in all respects (including, without limitation, the Settlement consideration; the Releases, including the release of the Released Plaintiffs' Claims, as against the Released Defendants; and the dismissal with prejudice of the Action) and finds that the Settlement is, in all respects, fair, reasonable, and adequate to Plaintiffs, Santander, and Santander Stockholders. The Parties are directed to implement, perform, and consummate the Settlement in accordance with the terms and provisions contained in the Stipulation.

7. **Claims Asserted Against Defendants Dismissed; Costs:** The Action and all of the claims asserted in the Action are hereby dismissed with prejudice. The Parties shall bear their own costs and expenses, except as otherwise expressly provided in the Stipulation.

8. **Binding Effect:** The terms of the Stipulation and of this Final Order and Judgment shall be forever binding on the Defendants, Santander, Plaintiffs, and all other Santander Stockholders, as well as their respective successors and assigns.

9. **Releases:** The Releases, as set forth in ¶¶6-7 of the Stipulation, together with the definitions contained in ¶1 of the Stipulation relating thereto, are expressly incorporated herein in all respects. Accordingly, this Court orders that:

(a) Upon the Effective Date, Plaintiffs and each and every other Santander Stockholder, derivatively on behalf of Santander, and on behalf of themselves and their respective agents, spouses, heirs, executors,

administrators, personal representatives, predecessors, successors, transferors, transferees, representatives, and assigns, in their capacities as such, and Santander directly, shall be deemed to have, and by operation of law and this Final Order and Judgment shall have, completely, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, discharged, and dismissed with prejudice the Released Plaintiffs' Claims, and shall be forever enjoined from pursuing or prosecuting any and all Released Plaintiffs' Claims, and any other litigation or demands, including books and records demands, arising out of or relating to the Released Plaintiffs' Claims, excluding claims relating to the enforcement or effectuation of the Settlement or this Final Order and Judgment.

(b) Upon the Effective Date, Defendants, Santander, and each of the other Released Defendants shall be deemed to have, and by operation of law and this Final Order and Judgment shall have, fully, finally, and forever released, relinquished, and discharged the Released Defendants' Claims against the Released Plaintiffs and any and all claims (including Unknown Claims) arising out of, relating to, or in connection with the prosecution, Settlement, or resolution of the Action against the Released Plaintiffs, and shall be forever enjoined from prosecuting the Released Defendants' Claims,

excluding claims relating to the enforcement or effectuation of the Settlement or this Final Order and Judgment.

(c) Nothing in this Final Order and Judgment shall bar any action by any of the Parties to enforce or effectuate the terms of the Stipulation or this Final Order and Judgment.

10. **No Admissions:** Neither the Term Sheet, Stipulation, including the exhibits thereto, or negotiations leading to the execution of the Term Sheet or the Stipulation nor any act or omission in connection therewith is intended, or shall be deemed or construed to be, a presumption, concession, or admission by: (a) any of the Released Defendants, as to the validity of any claims, causes of action, or other issues that were, might be, or have been raised in the Action or in any other litigation, or to be evidence of or constitute an admission of wrongdoing or liability by any of them, and each of them expressly denies any such wrongdoing or liability; or (b) Plaintiffs, as to the infirmity of any claim or the validity of any defense, or to the amount of any damages. The existence of the Term Sheet and Stipulation, their contents, or any negotiations, statements, or proceedings in connection therewith shall not be offered or admitted in evidence or referred to, interpreted, construed, invoked, or otherwise used by any Person for any purpose in the Action or otherwise, except as may be necessary to effectuate the Settlement. This provision shall remain in full force and effect in the event that the Settlement is terminated for any reason

whatsoever. Notwithstanding the foregoing, any of the Released Parties may file the Stipulation or any judgment or order of the Court related hereto in any other action that may be brought against them, in order to support any and all defenses or counterclaims based on *res judicata*, collateral estoppel, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

11. **Award of Attorneys' Fees and Expenses and Incentive Awards:** Plaintiffs' Counsel are hereby awarded attorneys' fees and litigation expenses in an aggregate amount of $1,500,000, to be paid by Santander in accordance with the terms of the Stipulation. Of that amount, Plaintiffs' Counsel shall pay $5,000 to each Plaintiff as an incentive award. No proceedings or court order, with respect to the award to Plaintiffs' Counsel, shall in any way disturb or affect this Final Order and Judgment (including precluding the Final Order and Judgment from being appealable or becoming Final or otherwise being entitled to preclusive effect), and any such proceedings or court order shall be considered separate from this Final Order and Judgment.

12. **Retention of Jurisdiction:** Without affecting the finality of this Final Order and Judgment in any way, the Court retains continuing and exclusive jurisdiction over the Parties and all Santander Stockholders for purposes of the administration, interpretation, implementation, and enforcement of the Settlement.

13. **Modification of the Stipulation:** Without further approval from the Court, the Parties are hereby authorized to agree to and adopt such amendments or modifications of the Stipulation or any exhibits attached thereto to effectuate the Settlement that: (a) are not materially inconsistent with this Final Order and Judgment; and (b) do not materially limit the rights of the Parties or Santander Stockholders in connection with the Settlement. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any provision of the Settlement.

14. **Termination of Settlement:** If the Settlement is terminated as provided in the Stipulation, this Final Order and Judgment shall be vacated, rendered null and void, and be of no further force and effect, except as otherwise provided by the Stipulation, and this Final Order and Judgment shall be without prejudice to the rights of Plaintiffs, Defendants, Santander, and its stockholders, and the Parties shall each revert to their respective litigation positions in the Action as of immediately prior to the execution of the Term Sheet on or around July 18, 2019, as provided in the Stipulation.

15. **Entry of Final Order and Judgment:** There is no just reason to delay the entry of this Final Order and Judgment as a final judgment in the Action. Accordingly, the Register in Chancery is expressly directed to immediately enter

this Final Order and Judgment in the Action.

Vice Chancellor Sam Glasscock III

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SANTANDER CONSUMER USA HOLDINGS, INC. DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 11614-VCG

STIPULATION AND AGREEMENT OF SETTLEMENT, COMPROMISE, AND RELEASE

This Stipulation and Agreement of Settlement, Compromise, and Release (the "Settlement") is entered into between and among the following parties, by and through their respective counsel, in the above-captioned Action[1]: (i) Plaintiffs; (ii) Defendants; (iii) and Santander Consumer USA Holdings, Inc. ("Santander" or the "Company"), as the Nominal Defendant. This Stipulation sets forth the terms and conditions of the Settlement of the Action and is intended by the Parties to fully, finally and forever resolve, discharge, and settle all Released Claims as against the Released Parties, subject to the approval of the Court.

WHEREAS:

A. On October 15, 2015, Plaintiff Feldman filed a derivative complaint, captioned *Feldman v. Kulas*, No. 11614-VCG (Del. Ch.) (the "*Feldman* Action"), on behalf of the Company against certain directors and officers of Santander for

[1] All terms with initial capitalization not otherwise defined herein shall have the same meanings as those ascribed to them in ¶1 below.

breaches of fiduciary duty, alleging, among other things, that Defendants made false and misleading statements to the investing public. On September 27, 2016, Plaintiff Jackie888 filed a separate derivative complaint, captioned *Jackie888, Inc. v. Kulas*, No. 12775-VCG (Del. Ch.) (the "*Jackie888* Action"), asserting similar allegations. The complaints in the Action alleged, among other things, that Santander, which specializes in the subprime auto lending business, suffered deficiencies in oversight, risk management, and internal controls.

B. Plaintiffs commenced the Action after several civil suits, including putative federal securities class actions, involving Santander and its leadership regarding alleged wrongdoing, and after several governmental investigations of Santander, including through subpoenas and civil investigative demands ("CIDs").

C. Prior to filing the complaint in the Action, by letter dated October 3, 2014, Plaintiff Feldman made a demand on the Company pursuant to 8 *Del. C.* §220 to inspect certain of the Company's books and records (the "Demand"). The Company produced certain documents pursuant to the Demand, which Plaintiff Feldman reviewed prior to filing his complaint.

D. On December 29, 2015, by stipulation of the Parties, the *Feldman* Action was stayed pending resolution of the motions to dismiss filed in a related federal action, captioned *Deka Investment GmbH v. Santander Consumer USA Holding Inc.*, No. 3:15-cv-02129 (N.D. Tex.) (the "*Deka* Action").

E. On April 13, 2017, Plaintiff Jackie888 also stipulated to stay the *Jackie888* Action pending resolution of the *Deka* Action.

F. On March 23, 2018, pursuant to stipulation of the Parties, the Court consolidated the *Feldman* and *Jackie888* Actions.

G. The Parties discussed resolution of the Action and, to that end, Plaintiff Feldman sent a settlement demand letter to Defendants on February 19, 2018. Subsequently, the Parties agreed to mediate the Action. The Parties retained Robert A. Meyer of JAMS to mediate their dispute. The Parties exchanged mediation statements. Prior to the mediation, the Parties separately had multiple phone calls and email correspondence with Mr. Meyer to discuss the merits of their allegations and their respective positions. On June 14, 2018, the Parties attended a mediation session before Mr. Meyer. After a full day session, the Parties made progress on several important issues, but were unable to reach a comprehensive settlement agreement. Over the following months, in continued consultation with Mr. Meyer, the Parties made several proposals and counter-proposals and agreed to hold a second full-day mediation session before Mr. Meyer, which took place on December 12, 2018. While the Parties did not reach a resolution that day, they continued to negotiate with the assistance of Mr. Meyer and reached an agreement-in-principle on substantive terms to settle the Action. On or around July 18, 2019, the Parties

executed a term sheet to that effect (the "Term Sheet"). This Stipulation memorializes the terms of the Parties' agreement to settle the Action.

H. In connection with the above-described mediation and settlement discussions, counsel for the Parties did not discuss the appropriateness or amount of any application by Plaintiffs' Counsel for an award of attorneys' fees and expenses until the substantive terms of the Settlement were negotiated and agreed upon. Subsequently, the Parties discussed and have agreed on attorneys' fees. Plaintiffs intend to submit a Fee and Expense Application and also intend to request an incentive award for Plaintiffs.

I. Plaintiffs have owned Santander common stock since the outset of the Action and continue to do so. Plaintiffs, having thoroughly considered the facts and law underlying the Action, and based upon the investigation and prosecution of the Action and the mediation that led to the Settlement, and after weighing the risks of continued litigation, have determined that it is in the best interests of Santander and its stockholders that the Action be fully and finally settled in the manner and upon the terms and conditions set forth in this Stipulation and that these terms and conditions are fair, reasonable, and adequate to Santander and its stockholders.

J. Defendants have denied, and continue to deny, each and all of the claims and contentions alleged by Plaintiffs in the Action, including any and all allegations of wrongdoing, allegations of liability, and the existence of any damages

asserted in or arising from the Action. Without limiting the generality of the foregoing, Defendants have denied, and continue to deny, that they acted improperly in connection with the allegations asserted in the Action, or that any misstatements or materially misleading omissions were made. Further, Defendants believe that they have substantial defenses to the claims alleged against them in the Action. Defendants have further asserted that, at all relevant times, they acted in good faith and in a manner they reasonably believed to be in the best interests of Santander and its stockholders. Nevertheless, Defendants have concluded that further litigation in connection with the Action would be time-consuming and expensive. After weighing the costs, disruption, and distraction of continued litigation, they have determined, solely to eliminate the risk, burden, and expense of further litigation, and without admitting any wrongdoing or liability whatsoever, that the Action should be fully and finally settled in the manner and upon the terms and conditions set forth in this Stipulation.

NOW THEREFORE, IT IS STIPULATED AND AGREED, by and among the Parties, by and through their undersigned counsel, and subject to the approval of the Court, that the Action shall be fully and finally compromised and settled, the Released Claims shall be released, as against the Released Parties, and the Action shall be dismissed with prejudice, upon and subject to the terms and conditions of the Settlement, as follows:

DEFINITIONS

1. The following terms, as used in this Stipulation, have the meanings specified below:

(a) "Action" means the consolidated derivative actions, captioned *In re Santander Consumer USA Holdings, Inc. Derivative Litigation*, C.A. No. 11614-VCG, currently pending before the Court.

(b) "Court" means the Court of Chancery of the State of Delaware.

(c) "Defendants" means Jason A. Kulas, Stephen A. Ferriss, William Rainer, Jose Doncel Razola, Brian Gunn, Victor Hill, Javier Maldonado, Robert McCarthy, Gerald P. Plush, Wolfgang Schoellkopf, Heidi Ueberroth, Mark Hurley, Thomas G. Dundon, Blythe Masters, Roman Blanco, John Corston, Jose Garcia Cantera, Monica Lopez-Monis Gallego, William Hendry, Gonzolo de las Heras Milla, Mathew Kabaker, Tagar Olson, Alberto Sanchez, Javier San Felix, Juan Andres Yanes, and Daniel Zilberman.

(d) "Effective Date" means the first date by which all of the conditions precedent set forth in ¶14 below have been met and occurred or have been waived in writing by the Parties.

(e) "Fee and Expense Application" means the application by Plaintiffs' Counsel to be filed with the Court for an award of attorneys' fees, reimbursement of litigation expenses, and incentive awards for Plaintiffs.

(f) "Final," with respect to the judgment approving the Settlement or any other court order, means: (i) if no appeal from an order or judgment is taken, the date on which the time for taking such an appeal expires; or (ii) if any appeal is taken, the date on which all appeals, including petitions for rehearing or reargument, have been finally disposed of (whether through expiration of time to file, denial of any request for review, affirmance on the merits, or otherwise).

(g) "Final Order and Judgment" means the Final Order and Judgment Approving Derivative Action Settlement, substantially in the form attached hereto as Exhibit A, approving the Settlement and dismissing the Action with prejudice without costs to any Party (except as provided in this Stipulation).

(h) "Notice" means the Notice of Pendency of Derivative Action, Proposed Settlement of Derivative Action, Settlement Hearing, and Right to Appear, substantially in the form attached hereto as Exhibit B.

(i) "Parties" means Plaintiffs, Defendants, and Nominal Defendant Santander.

(j) "Person" means any individual, corporation, professional corporation, limited liability company, partnership, limited partnership, limited liability partnership, association, joint stock company, estate, legal

representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or entity and their respective agents, consultants, spouses, heirs, predecessors, successors, personal representatives, representatives, and assigns.

(k) "Plaintiffs" means Brett Feldman ("Feldman") and Jackie888, Inc. ("Jackie888").

(l) "Plaintiffs' Counsel" means the law firms of Rosenthal, Monhait & Goddess, P.A., deLeeuw Law LLC, Biggs & Battaglia, Scott+Scott Attorneys at Law LLP, Vianale & Vianale LLP, and Sarraf Gentile LLP.

(m) "Released Claims" means all Released Plaintiffs' Claims and all Released Defendants' Claims.

(n) "Released Defendants' Claims" means any and all manner of claims, demands, rights, liabilities, losses, obligations, duties, damages, costs, debts, expenses, interest, penalties, sanctions, fees, attorneys' fees, actions, potential actions, causes of action, suits, judgments, defenses, counterclaims, offsets, decrees, matters, issues, and controversies of any kind, nature, or description whatsoever, whether known or unknown, disclosed or undisclosed, accrued or unaccrued, apparent or not apparent, foreseen or unforeseen, matured or not matured, suspected or unsuspected, liquidated or not liquidated, fixed or contingent, including Unknown Claims, which were

or which could have been asserted by any of the Defendants in any court, tribunal, forum, or proceeding, whether based on state, local, foreign, federal, statutory, regulatory, common, or other law or rule, and which are based upon, arise out of, relate in any way to, or involve, directly or indirectly, the commencement, prosecution, defense, mediation, or settlement of the Action, including, but not limited to, discovery produced in the Action; provided, however, for the avoidance of doubt, that the Released Defendants' Claims shall not include any claims to enforce this Stipulation, the Settlement, Final Order and Judgment, or any other document memorializing the Settlement of the Action and shall not include claims, if any, that any Party may have against any insurer with respect to any payment obligations under this Stipulation or the Settlement.

(o) "Released Defendants" means, whether or not each or all of the following Persons were named, served with process, or appeared in the Action: (i) Defendants, Defendants' counsel, and Santander; (ii) the current and former parents (including general or limited partners), affiliates, subsidiaries, successors, predecessors, assigns, and assignees of each of the Defendants, Defendants' counsel, and Santander; and (iii) all of the former or current agents, controlling persons, principals, members, managers, managing members, direct or indirect equity holders, employees, officers, directors,

trustees, predecessors, successors, attorneys, heirs, insurers, reinsurers, co-insurers, underwriters, accountants, auditors, consultants, other representatives, servants, respective past or present family members, spouses, agents, fiduciaries, corporations, bankers, estates, and advisors of each Person listed in (i) and (ii), in their capacities as such, and each of their current and former officers, directors, employees, parents, affiliates, subsidiaries, successors, predecessors, assigns, and assignees, in their capacities as such.

(p) "Released Parties" means the Released Defendants and the Released Plaintiffs.

(q) "Released Plaintiffs' Claims" means any and all claims, demands, rights, liabilities, losses, obligations, duties, damages, costs, debts, expenses, interest, penalties, sanctions, fees, attorneys' fees, actions, potential actions, causes of action, suits, judgments, defenses, counterclaims, offsets, decrees, matters, issues, and controversies of any kind, nature, or description whatsoever, whether known or unknown, disclosed or undisclosed, accrued or unaccrued, apparent or not apparent, foreseen or unforeseen, matured or not matured, suspected or unsuspected, liquidated or not liquidated, fixed or contingent, including Unknown Claims, that were asserted, or that could have been asserted, by any stockholder on behalf of Santander, or by Santander, against any Released Party (or any of their current and prior parents, affiliates,

subsidiaries, predecessors, officers, directors, employees, agents, successors, assigns, creditors, administrators, heirs, and legal representatives) in connection with, arising out of, related to, based upon, in whole or in part, directly or indirectly, any action or omission or failure to act alleged or which could have been alleged either in the Action, Verified Stockholder Derivative Complaints, or any demand letter related to the subject matter referenced in the Action or Verified Stockholder Derivative Complaints, including, without limitation, any such claims based, in whole or in part, on any allegations made in any of the following actions or proceedings: (1) *Steck v. Santander Consumer Holdings Inc.*, No. 1:14-cv-06942 (S.D.N.Y.); (2) *Deka Investment GmbH v. Santander Consumer USA Holding Inc.*, No. 3:15-cv-02129 (N.D. Tex.), (3) *Parmelee v. Santander Consumer USA Holdings Inc.*, No. 3:16-cv-00783 (N.D. Tex.); or (4) any government investigations, actions, or proceedings referenced in the Action or Verified Stockholder Derivative Complaints; provided, however, for the avoidance of doubt, that the Released Plaintiffs' Claims shall not include: (i) any direct claims, including, without limitation, any direct claims that any Santander Stockholder has or could assert under the federal securities laws; (ii) any claims to enforce this Stipulation, the Settlement, or Final Order and Judgment; or (iii) any claims,

if any, that any Party may have against any insurer with respect to any payment obligations under this Stipulation or the Settlement.

(r) "Released Plaintiffs" means Plaintiffs, Plaintiffs' Counsel, Santander, Santander Stockholder(s), and any and all of their former or current agents, parents, controlling persons, general or limited partners, members, managers, managing members, direct or indirect equity holders, subsidiaries, affiliates, employees, officers, directors, predecessors, successors, attorneys, heirs, assigns, insurers, reinsurers, consultants, other representatives, servants, respective past or present family members, spouses, agents, fiduciaries, partners, corporations, direct or indirect affiliates, bankers, estates, and advisors, in their capacities as such.

(s) "Releases" means the releases set forth in ¶¶6-7 below.

(t) "Scheduling Order" means the scheduling order to be entered pursuant to Rule 23.1 of the Rules of the Court of Chancery ("Rule 23.1"), substantially in the form attached hereto as Exhibit C.

(u) "Settlement" means the settlement and resolution of the Action on the terms and conditions contained in this Stipulation.

(v) "Settlement Hearing" means a hearing required under Rule 23.1 at or after which the Court will review the adequacy, fairness, and

reasonableness of the Settlement and determine whether to issue the Final Order and Judgment.

(w) "Santander" means Santander Consumer USA Holdings, Inc.

(x) "Santander Stockholder(s)" means any and all persons and entities who hold of record, or beneficially own, shares of Santander as of the close of business on the date of this Stipulation.

(y) "Stipulation" means this Stipulation and Agreement of Settlement, Compromise and Release, dated January 21, 2020.

(z) "Unknown Claims" means any Released Claims that a Person granting a Release hereunder does not know or suspect to exist in his, her, or its favor at the time of the Release, including, without limitation, those that, if known, might have affected the decision to enter into or object to the Settlement. With respect to any and all Released Claims, the Parties stipulate and agree that, upon the Effective Date, Plaintiffs, Defendants, and Santander shall have expressly waived, and Santander Stockholders shall be deemed to have, and by operation of the Final Order and Judgment by the Court shall have, waived, relinquished, and released any all provisions, rights and benefits conferred by or under Cal. Civ. Code §1542 (and equivalent, comparable, or analogous provisions of the laws of the United States or any state or territory thereof, or of the common law). Cal. Civ. Code §1542 provides that:

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

Plaintiffs, Defendants, and Santander acknowledge, and all other Santander Stockholders by operation of law shall be deemed to have acknowledged, that they may discover facts in addition to or different from those now known or believed to be true with respect to the Released Claims, but that it is the intention of Plaintiffs, Defendants, and Santander, and all other Santander Stockholders by operation of law, to completely, fully, finally, and forever extinguish any and all Released Claims without regard to the subsequent discovery of additional or different facts. Plaintiffs, Defendants, and Santander acknowledge, and all other Santander Stockholders by operation of law shall be deemed to have acknowledged, that this waiver and the inclusion of "Unknown Claims" in the definition of "Released Claims" was separately bargained for and was a material element of the Settlement and was relied upon by each and all of the Parties in entering into this Stipulation and agreeing to the Settlement.

(aa) "Verified Stockholder Derivative Complaints" means the Verified Stockholder Derivative Complaints filed by Plaintiffs Feldman and Jackie888 on October 15, 2015, and September 27, 2016, respectively.

SETTLEMENT CONSIDERATION

2. In consideration of the full settlement, satisfaction, compromise, and release of all of the Released Plaintiffs' Claims, as against the Released Defendants, and the dismissal with prejudice of the Action, the Parties agree as specified below.

3. Santander and the Defendants agree that the filing and pendency of the Action preceded the decision by Santander to implement certain initial corporate governance reforms (the "Initial Reforms"), the enumerated governance enhancements (the "Governance Enhancements") were agreed to in settlement of and as a result of the Action, and the Settlement confers a substantial benefit on Santander.

4. This Settlement has been approved by those Santander director(s) who have not been named as defendants in the Action as being in the best interests of the Company.

5. The Board of Directors of Santander (the "Board") has adopted or shall adopt resolutions and amend committee charters to the extent necessary for the implementation of the corporate governance changes set forth below. The governance reforms set forth herein shall be maintained for a period of at least four

years, unless any provision (or part of any provision) is rendered unlawful or ill-advised under any statute or regulation. The Board may exercise its discretion in deciding whether to continue any of the corporate governance changes after four years.

Initial Reforms

(a) Improved oversight over accounting and financial reporting by hiring experienced accounting staff, including:

(i) appointing an additional independent director to the Audit Committee of the Board;

(ii) hiring a new Chief Accounting Officer;

(iii) hiring a new Vice President of Accounting Policy;

(iv) hiring a new Vice President of Financial Analytics; and

(v) hiring a new Head of Internal Controls.

(b) Improved management documentation, review controls, and oversight of accounting and financial reporting activities to ensure accounting practices conform to the Company's policies and U.S. GAAP, including:

(i) completed a comprehensive design effectiveness review and augmentation of the controls;

(ii) implemented a more comprehensive monitoring plan for the credit loss allowance with a specific focus on model inputs, changes in model assumptions, and model outputs;

(iii) implemented improved controls over the development of new models or changes to models used to estimate credit loss allowance; and

(iv) implemented enhanced on-going performance monitoring procedures.

(c) Developed and implemented additional documentation, controls, and governance for the credit loss allowance and accretion processes, including:

(i) newly required quarterly accounting memorandum that provides a detailed explanation of how the Company's Allowance for Loan and Lease Losses ("ALLL") complies with GAAP;

(ii) newly required quarterly SAB 102 analysis that documents compliance with GAAP; and

(iii) newly required quarterly ALLL Methodology memo prepared by the Risk Department that includes a full analysis of prior quarter ALLL, including a summary of results, any changes in key assumptions or model inputs, detailed analysis of reserves,

management adjustments and evidence, analysis of all qualitative factors, and industry comparisons.

Governance Enhancements

(d) *Executive-Level Accounting and Credit Loss Committee*

(i) Santander commits to forming and maintaining, for no less than four years, a new, executive-level Accounting and Credit Loss Committee, which shall consist of the new Chief Accounting Officer; Vice President of Accounting Policy; Vice President of Financial Analytics; and Head of Internal Controls.

(e) *Formalizing and Monitoring of the Initial Reforms*

(i) Santander will maintain the Initial Reforms for a period of no less than four years.

(ii) The Accounting and Credit Loss Committee shall monitor and document the effectiveness of the Initial Reforms on a quarterly basis and ensure that its newly implemented key controls for financial reporting, credit loss allowance, and accretion processes are reviewed and tested by independent parties on an annual basis; and

(iii) The Accounting and Credit Loss Committee shall oversee quarterly audits to ensure that the Initial Reforms have been established and are being maintained and shall provide the Audit Committee with

a quarterly report regarding the establishment and maintenance of the Initial Reforms.

(f) *Training*

(i) Santander will develop and conduct, on an annual basis, broad-based Sarbanes-Oxley training for all accountable executives and control owners at Santander to ensure an understanding of the control program and employees' roles in ensuring the accuracy and completeness of the Company's financial statements and disclosures. Such training shall include a section on compliance with GAAP and federal and state securities laws applicable to Santander's operations, as well as Santander's policies and codes, including those detailed in Santander's Code of Conduct.

(g) *Board Diversity*

(i) Santander agrees to interview at least one woman for every new Board position until Santander has at least four women on its Board.

(h) *Revisions to Code of Conduct*

(i) The Company's Code of Conduct shall be revised to provide:

> If you become aware of a failure by the Company to comply with accounting procedures mandated by the

> federal securities laws and SEC rules, regulations, or guidance, or if you, or anyone else you are aware of, are asked to discharge your/their respective duties in a manner that fails to comply with any such rules, regulations, or guidance, you shall immediately report the event to the legal and compliance department.

(ii) The following clause shall be added to the Code of Conduct and the Supplemental Code of Ethics for the Chief Executive Officer ("CEO") and Senior Financial Officers:

> You are expected to be familiar with legal and regulatory provisions that relate to the performance of your job and you must follow the spirit, as well as the letter, of such laws and regulations in your business dealings. No officer, employee, and/or director of Santander has any authority to engage in conduct inconsistent with applicable U.S. laws and regulations or to authorize, direct, or condone such conduct by any other person.

(i) *Reporting to the Board*

(i) The Chairpersons of the Risk and Audit Committees shall report to the full Board at least quarterly regarding the areas of risk oversight and corporate governance in their purview.

(j) *Whistleblower Program*

(i) Santander employees shall be advised that they need not report concerns directly to the Company and have the right to report concerns directly to applicable regulatory agencies (and have the right

to hire their own lawyer to represent them in any such proceeding, at their own cost, if they so choose);

(ii) If a whistleblower brings his or her complaint to an outside regulator or other governmental entity, he or she will be protected by the terms of the Whistleblower Program, just as if he or she had reported the complaint internally;

(iii) Santander shall remind employees of whistleblower options and whistleblower protections in employee communications provided at least twice a year and via the Company's intranet; and

(iv) Santander's Chief Legal Officer shall meet at least annually with the Audit and/or Risk Committee to discuss the current Whistleblower Policy and consider any amendments thereto.

(k) *Revisions to Compensation Committee Charter*

(i) The Compensation Committee charter shall be amended to state that a majority of the Compensation Committee shall be comprised of independent directors.

RELEASES

6. Upon the Effective Date, Plaintiffs and each and every other Santander Stockholder, derivatively on behalf of Santander, and on behalf of themselves and their respective agents, spouses, heirs, executors, administrators, personal

representatives, predecessors, successors, transferors, transferees, representatives, and assigns, in their capacities as such, and Santander directly, shall be deemed to have, and by operation of law and Final Order and Judgment shall have, completely, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, discharged, and dismissed with prejudice the Released Plaintiffs' Claims and shall be forever enjoined from pursuing or prosecuting any and all Released Plaintiffs' Claims, and any other litigation or demands, including books and records demands, arising out of or relating to the Released Plaintiffs' Claims, excluding claims relating to the enforcement or effectuation of the Settlement or the Final Order and Judgement.

7. Upon the Effective Date, Defendants, Santander, and each of the other Released Defendants shall be deemed to have, and by operation of law and Final Order and Judgment shall have, fully, finally, and forever released, relinquished, and discharged the Released Defendants' Claims against the Released Plaintiffs and any and all claims (including Unknown Claims) arising out of, relating to, or in connection with the prosecution, settlement, or resolution of the Action against the Released Plaintiffs and shall be forever enjoined from prosecuting the Released Defendants' Claims, excluding claims relating to the enforcement or effectuation of the Settlement or Final Order and Judgement. Nothing herein shall in any way impair or restrict the rights of any Party to enforce the terms of this Stipulation.

SCHEDULING ORDER; STAY OF PROCEEDINGS

8. Promptly after the execution of this Stipulation, the Parties shall jointly request entry of the Scheduling Order: (a) approving the form and manner of notice to Santander Stockholders of the pendency of the Action, the Settlement, and their right to object; (b) establishing the procedure and schedule for the Court's consideration of the Settlement, dismissal of the Action with prejudice, and Plaintiffs' anticipated Fee and Expense Application; and (c) staying all further proceedings in the Action except as may be necessary to implement the Settlement.

NOTICE

9. The Scheduling Order will provide that notice of the Settlement be given in the following manner: (a) disclosure of the terms of Settlement through the filing by Santander of a Form 8-K with the U.S. Securities and Exchange Commission, which filing shall include a copy of the Notice and this Stipulation; (b) mailing of an agreed upon form of notice to Santander Stockholders of record, as further described in ¶10 below; and (c) posting of the Notice and Stipulation on the investor relations page of Santander's corporate website, which documents shall remain posted on the corporate website through the Effective Date of the Settlement. The Scheduling Order will also provide that the Notice and this Stipulation be posted on the respective websites maintained by Plaintiffs' Counsel.

10. Santander shall mail, or cause to be mailed, the Notice to each person who was a stockholder of record of Santander common stock, as of the date that the Stipulation is executed (other than the Individual Defendants), at his, her, or its last known address appearing in the stock transfer records maintained by or on behalf of Santander. All stockholders of record who are not also beneficial owners of the shares held by them shall be requested to forward the notice to such beneficial owners of the shares.

11. Santander shall fund all costs and expenses related to providing notice of the Settlement irrespective of whether the Court approves the Settlement, as well as any costs and expenses related to the administration of the Settlement, and in no event shall Plaintiffs, Plaintiffs' Counsel, Defendants, or Defendants' counsel be responsible for any Notice costs.

FINAL ORDER AND JUDGMENT; DISMISSAL OF THE ACTION

12. If the Court approves the Settlement at or following the Settlement Hearing, the Parties shall jointly and promptly request that the Court enter the Final Order and Judgment in the Action.

13. Upon entry of the Final Order and Judgment, the Action shall be dismissed in its entirety with prejudice, with Plaintiffs, Defendants, and Santander each to bear his, her, or its own fees, costs, and expenses, except as expressly provided in this Stipulation.

CONDITIONS OF SETTLEMENT AND TERMINATION

14. The Effective Date of the Settlement shall be deemed to occur on the occurrence or waiver in writing by all Parties of all of the following events:

(a) the Court has approved the Settlement, following notice to Santander Stockholders and a hearing, and entered the Scheduling Order, substantially in the form attached hereto as Exhibit C;

(b) the Court has entered the Final Order and Judgment, substantially in the form attached hereto as Exhibit A;

(c) the Final Order and Judgment has become Final; and

(d) the Action is dismissed with prejudice.

15. Plaintiffs and Defendants (provided Defendants unanimously agree amongst themselves) shall each have the right to terminate the Settlement and this Stipulation, by providing written notice of their election to do so ("Termination Notice") to the other Parties within 30 calendar days of: (a) the Court's final refusal to enter the Scheduling Order in any material respect; (b) the Court's final refusal to approve the Settlement or any material part thereof; (c) the Court's final refusal to enter the Final Order and Judgment in any material respect, as to the Settlement; or (d) the date upon which an order vacating, modifying, revising, or reversing the Final Order and Judgment becomes Final. However, any decision or proceeding, whether in this Court or any appellate court, solely with respect to an application for an award

of attorneys' fees or litigation expenses shall not be considered material to the Settlement, shall not affect the finality of the Final Order and Judgment, and shall not be grounds for termination of the Settlement.

16. If Plaintiffs or Defendants exercise their right to terminate the Settlement pursuant to ¶15 above, then: (a) the Settlement and the relevant portions of this Stipulation shall be canceled; (b) Plaintiffs, Defendants, and Santander shall revert to their respective litigation positions in the Action as of immediately prior to the execution of the Term Sheet on or around July 18, 2019; and (c) the terms and provisions of the Term Sheet and this Stipulation, with the exception of this ¶16 and ¶26 below, shall have no further force and effect with respect to the Parties and shall not be used in the Action or in any other proceeding for any purpose, and the Parties shall proceed in all respects as if the Term Sheet and this Stipulation had not been entered.

17. Pending approval of the Settlement, the Parties agree to stay this Action and not to initiate any and all other proceedings other than those incident to the Settlement itself. The Parties will request the Court to order in the Scheduling Order that, pending approval of the Settlement, Plaintiffs and all other Santander Stockholders are barred and enjoined from commencing, prosecuting, instituting, or in any way participating in the commencement, institution, or prosecution of any action asserting any of the Released Plaintiffs' Claims, either directly,

representatively, derivatively, or in any other capacity, against any of the Released Defendants. In the event that any of the Released Plaintiffs' Claims are commenced against any of the Released Defendants prior to the Effective Date of the Settlement, Plaintiffs agree to cooperate and use reasonable best efforts to assist Defendants and Santander in securing the dismissal (or a stay in contemplation of dismissal following approval of the Settlement) of such claims.

ATTORNEYS' FEES AND EXPENSES

18. Plaintiffs' Counsel intends to submit to the Court a Fee and Expense Application based upon the benefits provided to Santander and its stockholders from the Settlement and the prosecution of the Action. The Fee and Expense Application shall be the only petition for attorneys' fees and expenses allowed on behalf of Plaintiffs, Plaintiffs' Counsel, or counsel purporting to represent any other Santander Stockholder in connection with the Action or Settlement.

19. Subsequent to the execution of the Term Sheet, and after all of the material terms of the Settlement were agreed upon by the Parties, Plaintiffs' Counsel engaged in arm's-length negotiations with the Defendants and Santander concerning an appropriate award of attorneys' fees and litigation expenses for Plaintiffs' Counsel. Robert Meyer of JAMS assisted the Parties with the negotiations.

20. As a result of those negotiations, Defendants and Santander have agreed to pay to Plaintiffs' Counsel an attorneys' fee and litigation expenses award of

$1,500,000.00, which includes a service award to each of the Plaintiffs in the amount of $5,000. The above-referenced fee and expense award shall constitute the full amount that Santander and Defendants shall be required to pay to Plaintiffs' Counsel, or any other counsel, in connection with the Action and Settlement of the claims asserted in the Action.

21. It is not a condition of this Stipulation, the Settlement, or the Final Order and Judgment that the Court award any attorneys' fees or expenses to Plaintiffs' Counsel. In the event that the Court does not award attorneys' fees or expenses, or in the event that the Court makes an award in an amount that is less than the amount requested by Plaintiffs' Counsel or is otherwise unsatisfactory to Plaintiffs' Counsel, or in the event that any such award is vacated or reduced on appeal, this Stipulation and the Settlement, including the effectiveness of the Releases and other obligations of the Parties under the Settlement, nevertheless shall remain in full force and effect.

22. Santander shall pay, or cause to be paid, the attorneys' fees and expenses as awarded by the Court in response to the Fee and Expense Application within five business days after the Court issues such an order to an account designated by Plaintiffs' Counsel, notwithstanding the existence of any timely filed objections thereto, potential for appeal therefrom, or collateral attacks on the Settlement or any part thereof. Notwithstanding anything herein to the contrary, no

individual Defendant is or will be making any payment in connection with the Settlement or Fee and Expense Application, and the individual Defendants shall have no responsibility to fund, contribute to, or otherwise make any payment in connection with the Fee and Expense Application and shall have no personal monetary obligations to any person in connection with the Settlement or Fee and Expense Application.

23. Plaintiffs' Counsel shall allocate the attorneys' fees awarded amongst themselves in a manner which they, in good faith, believe reflects the contributions of such counsel to the institution, prosecution, and settlement of the Action. The Released Defendants and their counsel shall have no responsibility for, or liability whatsoever with respect to, the allocation of the attorneys' fees and expenses award amongst Plaintiffs' Counsel.

24. If, after payment of the award for attorneys' fees and expenses, the Settlement is terminated pursuant to the terms of this Stipulation or the award is reversed, vacated, or reduced by Final order, Plaintiffs' Counsel shall, within 30 calendar days after: (a) receiving from Defendants' counsel notice of the termination of the Settlement; or (b) any order of a court of appropriate jurisdiction reversing, vacating, or reducing the award becomes final, make appropriate refunds or repayments to Santander or Defendants.

COOPERATION

25. In addition to the actions specifically provided for in this Stipulation, the Parties agree to use their best efforts from the date hereof to take, or cause to be taken, all actions, and to do, or cause to be done, all things reasonably necessary, proper or advisable under applicable laws, regulations, or agreements, to consummate and make effective this Stipulation and the Settlement. The Parties and their attorneys agree to cooperate fully with one another in seeking the Court's approval of the Settlement and to use their best efforts to effect the consummation of this Stipulation and the Settlement, including, but not limited to, resolving any objections raised with respect to the Settlement.

STIPULATION NOT AN ADMISSION

26. Neither the Term Sheet, Stipulation, including all exhibits thereto, or negotiations leading to the execution of the Term Sheet or the Stipulation nor any act or omission in connection therewith is intended or shall be deemed or construed to be a presumption, concession, or admission by: (a) any of the Defendants or any of the Released Defendants as to the validity of any claims, causes of action, or other issues that were, might be, or have been raised in the Action or in any other litigation, or to be evidence of or constitute an admission of wrongdoing or liability by any of them, and each of them expressly denies any such wrongdoing or liability; or (b) Plaintiffs as to the infirmity of any claim or the validity of any defense, or to the

amount of any damages. The existence of the Term Sheet and this Stipulation, their contents, or of any negotiations, statements, or proceedings in connection therewith shall not be offered or admitted in evidence or referred to, interpreted, construed, invoked, or otherwise used by any Person for any purpose in the Action or otherwise, except as may be necessary to effectuate the Settlement. This provision shall remain in full force and effect in the event that the Settlement is terminated for any reason whatsoever. Notwithstanding the foregoing, any of the Released Parties may file this Stipulation, or any judgment or order of the Court related hereto in any other action that may be brought against them, in order to support any and all defenses or counterclaims based on *res judicata*, collateral estoppel, good faith settlement, judgment bar or reduction, any other theory of claim preclusion or issue preclusion, or similar defense or counterclaim.

NO WAIVER

27. Any failure by any Party to insist upon the strict performance by any other Party of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof and such Party, notwithstanding such failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions in this Stipulation by such other Party. All waivers must be in writing and signed by the Party against whom the waiver is asserted.

28. No waiver, express or implied, by any Party of any breach or default in the performance by any other Party of its obligations under this Stipulation shall be deemed or construed to be a waiver of any other breach, whether prior, subsequent, or contemporaneous, under this Stipulation.

AUTHORITY

29. This Stipulation will be executed by counsel to the Parties, each of which represents and warrants that he, she, or it has been duly authorized and empowered to execute this Stipulation on behalf of such Party, and that it shall be binding on such Party in accordance with its terms.

SUCCESSORS AND ASSIGNS

30. This Stipulation is, and shall be, binding upon, and inure to the benefit of, the Parties and their respective agents, spouses, heirs, predecessors, successors, personal representatives, representatives, and assigns; provided, however, that no Party shall assign or delegate its rights or responsibilities under this Stipulation without the prior written consent of the other Parties.

BREACH

31. The Parties agree that in the event of any breach of this Stipulation, all of the Parties' rights and remedies at law, equity or otherwise, are expressly reserved.

GOVERNING LAW AND FORUM

32. This Stipulation shall be governed by, and construed in accordance with, the laws of the State of Delaware, without regard to conflict of laws principles. Any action relating to this Stipulation will be filed exclusively in the Court. Each Party: (a) consents to personal jurisdiction in any such action (but no other action) brought in the Court; (b) consents to service of process by registered mail upon such Party and/or such Party's agent; and (c) waives any objection to venue in the Court and any claim that Delaware or the Court is an inconvenient forum.

REPRESENTATIONS AND WARRANTIES

33. Plaintiffs and Plaintiffs' Counsel represent and warrant that: (a) Plaintiffs are stockholders of Santander and were stockholders of Santander at all relevant times for purposes of maintaining standing in the Action; (b) none of the Released Plaintiffs' Claims has been assigned, encumbered, or in any manner transferred, in whole or in part, by Plaintiffs or Plaintiffs' Counsel; and (c) neither Plaintiffs nor Plaintiffs' Counsel will attempt to assign, encumber, or in any manner transfer, in whole or in part, any of the Released Plaintiffs' Claims.

34. Each Party represents and warrants that the Party has made such investigation of the facts pertaining to the Settlement provided for in this Stipulation, and all of the matters pertaining thereto, and has been advised by counsel, as the Party deems necessary and advisable.

ENTIRE AGREEMENT

35. This Stipulation and the attached exhibits constitute the entire agreement among the Parties with respect to the subject matter hereof and supersede all prior or contemporaneous oral or written agreements, understandings, or representations. All Parties agree that no representations, warranties, or inducements have been made to any Party concerning this Stipulation or its exhibits other than the representations, warranties, and covenants contained and memorialized in such documents. All Parties further agree that they are not relying on any representations, warranties, or covenants that are not expressly contained and memorialized in this Stipulation or its exhibits. All of the exhibits hereto are material and integral parts hereof and are fully incorporated herein by reference; provided, however, that in the event there exists a conflict or inconsistency between the terms of this Stipulation and the terms of any exhibit attached hereto, the terms of this Stipulation will control.

INTERPRETATION

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

37. Section and/or paragraph titles have been inserted for convenience only and will not be used in interpreting the terms of this Stipulation.

38. The terms and provisions of this Stipulation are intended solely for the benefit of the Parties, and their respective successors and permitted assigns, and it is not the intention of the Parties to confer third-party beneficiary rights or remedies upon any other Person, except with respect to: (a) any attorneys' fees and expenses to be paid to Plaintiffs' Counsel pursuant to the terms of this Stipulation; and (b) the Released Parties who are not signatories hereto, who shall be third-party beneficiaries under this Stipulation and entitled to enforce it in accordance with its terms, but the consent of such third-party beneficiary shall not be required to amend, modify, or terminate this Stipulation.

AMENDMENTS

39. This Stipulation may not be amended, changed, waived, discharged, or terminated (except as explicitly provided herein), in whole or in part, except by an instrument in writing signed by counsel to all of the Parties to this Stipulation on behalf of each such Party.

COUNTERPARTS

40. This Stipulation may be executed in any number of actual, telecopied, or electronically mailed counterparts and by each of the different Parties on several counterparts, each of which when so executed and delivered will be an original. This Stipulation will become effective when the actual, telecopied, or electronically mailed counterparts have been signed by each of the Parties to this Stipulation and

delivered to the other Parties. The executed signature page(s) from each actual, telecopied, or electronically mailed counterpart may be joined together and attached and will constitute one and the same instrument.

CONTINUING JURISDICTION

41. The administration and consummation of the Settlement, as embodied in this Stipulation, shall be under the authority of the Court, and the Court shall retain exclusive jurisdiction for the purposes of entering orders providing for awards of attorneys' fees and expenses to Plaintiffs' Counsel and the administration, interpretation, implementation, and enforcement of this Stipulation.

NOTICE TO PARTIES

42. If any Party is required to give notice to any other Party under this Stipulation, such notice shall be in writing and shall be deemed to have been duly given upon receipt of hand or courier delivery or facsimile transmission with confirmation of receipt. Notice shall be provided as follows:

If to Plaintiffs:

P. Bradford deLeeuw
deLEEUW LAW LLC
1301 Walnut Green Road
Wilmington, DE 19807

Geoffrey M. Johnson
SCOTT+SCOTT
ATTORNEYS AT LAW LLP
12434 Cedar Road, Suite 12
Cleveland Heights, OH 44118

If to Defendants or Nominal Defendant:

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WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019

Christopher N. Kelly
POTTER ANDERSON & CORROON LLP
1313 N. Market Street, 6th Floor
Wilmington, DE 19801

IN WITNESS WHEREOF, the Parties hereto have caused this Stipulation to be executed by their duly authorized counsel, as of January 21, 2020.

P. Bradford deLeeuw
deLEEUW LAW LLC
1301 Walnut Green Road
Wilmington, DE 19807

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Attorneys for Plaintiffs

Exhibit I

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE OPKO HEALTH, INC. : Civil Action
DERIVATIVE ACTION : No. 2018-0740-SG

- - -

Court of Chancery Courthouse
Courtroom No. 1
34 The Circle
Georgetown, Delaware
Monday, November 2, 2020
1:30 p.m.

- - -

BEFORE: HON. SAM GLASSCOCK III, Vice Chancellor

- - -

TELEPHONIC SETTLEMENT HEARING AND RULINGS OF THE COURT

- - -

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0533

APPEARANCES:

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-and-
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-and-
BRIAN P. MILLER, ESQ.
SAMANTHA KAVANAUGH, ESQ.
of the Florida Bar
Akerman LLP
for Defendants OPKO Health, Inc., Jane H. Hsiao, Steven D. Rubin, Richard M. Krasno, Richard A. Lerner, John A. Paganelli, Richard C. Pfenniger, Alice Lin-Tsing Yu, and Robert S. Fischel

SUSAN M. HANNIGAN, ESQ.
Richards, Layton & Finger, P.A.
-and-
EDWARD M. SPIRO, ESQ.
of the New York Bar
Morvillo Abramowitz Grand Iason & Anello, P.C.
for Defendant Phillip Frost

- - -

THE COURT: Counsel, who do I have on the line, please?

MR. TUCKER: Good afternoon, Your Honor. This is Scott Tucker with Chimicles Schwartz Kriner & Donaldson-Smith on behalf of plaintiffs. And with me today I have my co-counsel, Michael Barry from Grant & Eisenhofer, James Notis and Jennifer Sarnelli from Gardy & Notis, and Stephen Schwartz from Kohn, Swift & Graf.

THE COURT: Welcome all.

MR. TEKLITS: Good afternoon, Your Honor. David Teklits of Morris, Nichols, Arsht & Tunnell for all of the defendants other than Dr. Frost. And with me on the line is my co-counsel, Brian Miller of Akerman LLP.

THE COURT: Welcome.

MS. MILLER: Good afternoon, Your Honor, Mr. Miller. Also my colleague, Samantha Kavanaugh from Akerman on behalf of the OPKO defendants.

THE COURT: Welcome.

MS. HANNIGAN: Good afternoon, Your Honor. This is Susan Hannigan from Richards, Layton & Finger on behalf of defendant Phillip Frost. I'm

joined by my co-counsel, Edward Spiro from Morvillo Abramowitz.

MR. SPIRO: Good afternoon, Your Honor.

THE COURT: Thank you for doing that roll call.

And I'm happy -- Mr. Tucker, I assume you're going to present the proposed settlement?

MR. TUCKER: That's correct, Your Honor.

THE COURT: Before you do, let me ask Madam Clerk to call the matter in the well of the courthouse. I will note for the record there's no one in the courtroom. So unless there's someone who's a late arrival -- I'm starting five minutes late on purpose in case someone is coming through our security. But I've asked that the matter be called in the well.

THE COURT CLERK: No response, Your Honor.

THE COURT: Thank you, Madam Clerk. There's no response, so no one has appeared to object.

Mr. Tucker, have you received any late objections?

MR. TUCKER: No, Your Honor. We have not received any objections.

THE COURT: All right. Would you like to go ahead and present the proposed settlement then?

MR. TUCKER: Yes, Your Honor.

As Your Honor has noted, this is the time the Court has set aside to consider the proposed settlement in the *In re OPKO Health, Inc. Derivative Litigation*. This was a stockholder derivative case arising from an unlawful pump-and-dump scheme alleged by the Securities & Exchange Commission against OPKO and its founder, Dr. Phillip Frost, and other co-conspirators.

The action alleged breaches of fiduciary duties against Dr. Frost for using OPKO to enrich himself through related-party transactions and breaches of fiduciary duty against OPKO directors, which plaintiffs allege consist of individuals who are Dr. Frost's longtime friends and coinvestors, for approving interested transactions and failing to exercise effective oversight.

The efforts in this case and the parties' mediation and negotiation ultimately resulted in the proposed settlement consisting of $3.1 million

in cash payable to OPKO, and significant corporate governance reforms specifically designed to address the claims brought in this action.

Notice was provided to OPKO stockholders in accordance with the Court's August 26, 2020, scheduling order. That is reflected by the affidavit regarding mailing submitted by Shaleen Johnson. Objections were due 21 days ago on October 12th. No objections were received to the terms of the settlement or the fee request.

I'd just like to note for Your Honor that the lack of objections is a good indicator of the quality of the settlement achieved here and the reasonableness of plaintiffs' fee request. As Your Honor may recall, there were eight derivative actions filed in Florida -- five in federal court and three in the state court -- which were challenging the same conduct as plaintiffs alleged in this action.

And it was a while ago, I'm not sure, Your Honor may recall, some of those derivative actions fought the efforts to stay and allow us to take supremacy of the action. So these aren't derivative plaintiffs who just kind of stayed and sat by the wayside. Surely if there was an issue with the

terms of the settlement or the fee request, some of those plaintiffs would have objected, and none have.

From here, does the Court have a preference for the order in which I should address the settlement or the request for attorneys' fees and expenses?

THE COURT: Let's do the settlement and then I'll give you a decision on that, and then we can turn to the fees and expenses.

MR. TUCKER: Okay. Co-lead counsel represents to the Court with complete confidence that the settlement constitutes an excellent result in compromise of the claims. The settlement consists of two portions, the $3.1 million cash component and corporate governance.

The cash component was extracted from insurance carriers that previously disclaimed coverage for the claims brought in this action and the securities class action pending in federal court. Plaintiffs believe this was a significant "get" for purposes of the settlement.

As reflected in the affidavit of Jed Melnick, the mediator in this action, plaintiffs were not willing to settle this case for governance terms

only, and required the inclusion of a monetary component. This required significant telephone calls, negotiations, including calls with OPKO's coverage counsel.

Through these efforts, plaintiffs were able to obtain the $3.1 million fund from an insurance carrier that had previously disclaimed coverage and was not putting up any funds for the class settlement. So the source of funds is separate and unique just for this case.

On top of this cash fund, plaintiffs were also able to extract corporate governance enhancements, which are not generic reforms but were specifically tailored to address the allegations that led to this action.

The reform that was subject to the most vigorous negotiations back and forth was the election of a new independent director to the OPKO board who had no current or former connections with any 5 percent stockholder or officer or director of OPKO. This was extremely important to plaintiffs. This is not a case where the board consists of several truly independent directors in plaintiffs' position, but consists of individuals who have some sort of

personal and professional ties with Dr. Frost going back multiple years.

By way of example, in January of 2020, OPKO added a new director that it deemed independent under standards set forth by NASDAQ and applicable law. However, even this new director had ties to Dr. Frost as an art dealer that has used the Frost Art Museum for exhibits and promotions for his gallery.

Under the facts alleged in plaintiffs' complaint, which were aided by the Section 220 demand conducted by plaintiffs prior to filing, obtaining a pure -- a truly independent director on this board is an excellent result and very important, very beneficial for OPKO and its stockholders.

In addition, the settlement required the maintenance of an independent investment committee which was created after the institution of this action. Our case was filed in October of 2018, and this independent investment committee was created in February of 2019.

The importance of this is prior to the creation of this committee and the institution of our action, all of the transactions that were subject to this case were approved by the audit committee. Now

there is a committee that is required to remain in place that consists of independent directors, is charged with reviewing all of the sorts of minority investments that were subject to this case. And it must include that independent director that the parties negotiated as part of this settlement.

In addition, as additional governance reforms the company must maintain a lead independent director, which did not come into existence until 2020. And this independent director has significant oversight in setting, reviewing, and approving meeting agendas, is required to convene independent sessions without company management and regularly scheduled board meetings. It really helps to increase the independence of the board.

In addition, there was another provision that plaintiffs really wanted to make sure we could receive in this settlement. Previously, the chair of the audit committee could independently approve related-party transactions that were below a $250,000 threshold. Plaintiffs thought that that was an area that needed to be fixed so that smaller investments with interested parties just didn't pass through. As part of the settlement that provision has

been removed.

There are a multitude of other corporate governance benefits. They're attached as Exhibit A to the stipulation of settlement. Many of them relate to disclosures of director independence, which led to actually the disclosure of two related-party transactions for two directors that plaintiffs learned from the Section 220 demand. Those requirements will be ongoing.

The terms also include policies designed to better align the interests of directors and shareholders, including the implementation of manual mandatory training of directors and officers, board nomination and board compensation reforms, and use of independent auditors, among other things.

We have confidence in the excellence of the settlement based on the participation of Mr. Melnick, with his lengthy career and is well-known to the Court as a mediator. It was a ten-month-long mediation process. And even after the parties agreed to the $3.1 million settlement fund, it still took additional time to get all the negotiations of the governance terms wrapped up.

I would just like to highlight how

proud co-lead counsel are of the results achieved here. The case that was originally filed is not how the case turned out. When the case was filed, the SEC action alleged that through the pump-and-dump scheme OPKO, along with other defendants in the SEC action, had been enriched by millions of dollars and OPKO faced massive potential liabilities in associated costs, including advancement and indemnification obligations in both the SEC action and the securities class action.

However, as our case progressed, OPKO settled with the SEC rather quickly for $100,000. And the class action also settled way below the initial estimate of a billion dollars in damages for $16.5 million, using mostly insurance proceeds. And, as a result, the initial estimates of damage from both the SEC and class actions due to indemnification and legal fees did not materialize.

However, despite the changes to the case and the difficulties obtaining coverage from OPKO's insurance carriers, plaintiffs stood firm and refused to settle the case for corporate governance change alone and continued to press and did receive the $3.1 million in cash.

I know Your Honor has read the papers and is familiar with all the arguments of why plaintiffs would have been successful and the challenges that plaintiffs were likely to face in motion practice and on the road to trial. Unless Your Honor prefers that I discuss each of those challenges, we would rest on our papers. And I can turn to the fees and expenses.

THE COURT: Let me address the settlement at this point.

Mr. Teklits or Ms. Hannigan, do you have anything you wish to interject at this point?

MR. TEKLITS: Nothing from me, Your Honor, other than we support the settlement and request Your Honor approve it as well.

THE COURT: All right. Thank you.

MS. HANNIGAN: And the same for me Your Honor. Thank you.

THE COURT: All right. Thank you, Counsel.

When addressing the settlement of a derivative action, the Court is forced to consider the "give" and the "get" of any settlement. The "get" here are corporate governance improvements. And I

shouldn't just leave it at that, because it is sometimes the case that we get rather generic corporate governance settlements that are not particularly helpful.

I think, given the nature of this company, these tailored therapeutic benefits are of substantial benefit to the corporation. And, in addition, a $3.1 million cash settlement. That's a "get."

I'm not going to go through all of the governance improvements. They're listed as Exhibit A and Mr. Tucker went through most of them. But, as I say, I think they, in addition to the not-insignificant $3.1 million recovery, are of significant benefit.

So I turn to the "give," which obviously is settlement of the outstanding claims. I'm not going to spend a great deal of time going through them, because it is significant that there are no objections here. But it is clear that whatever the strengths of this case -- and I think there were some -- there were significant defenses as well. And the statute of limitations alone was somewhat of a formidable bar, I think, to damages.

I also note the fact that this case went through a really wide-ranging and long-fought mediation in front of Mr. Melnick, who I know to be an excellent mediator, and so that gives me confidence as well.

Taking all those things into account, I have absolute confidence that the "get" here is, in light of what is being given, fair to the corporation and its fiduciaries and appropriate and I approve the settlement.

So now we can turn to the fee request, Mr. Tucker.

MR. TUCKER: Thank you, Your Honor.

Plaintiffs' counsel seek an all-in award of $1 million for attorneys' fees and expenses to be taken from the settlement fund that plaintiffs believe is a fair and reasonable compensation for counsel in this case, especially when viewed under the *Sugarland* guidelines.

Under the *Sugarland* factors, the Court assigns the benefit achieved the greatest weight in determining fee awards. Here, the action not only produced a real monetary benefit to the company, but also significant improvements to OPKO's corporate

governance.

The Court of Chancery has long recognized that nonmonetary benefits are properly considered in determining plaintiffs' counsel's fee award. And we submit that the -- plaintiffs submit that the governance changes alone support the awarding of the entire fee and expense request.

The $1 million request is in line with amounts awarded by the Court in similar cases where the benefits are hard to value due to the therapeutic nature of the benefits.

For example, in *San Antonio Fire v. Bradbury*, the court awarded $2.9 million for the elimination of continuing director provisions in credit agreements and allowing stockholders to elect new directors. And in *Buch v. Filo*, the Court awarded $2.385 million for governance changes to the processes utilized by the operative compensation committee in making compensation decisions. Notably, in those settlements, they did not include a cash component like we have here.

Plaintiffs believe that governance terms alone support the fee and expense request. However, even if the Court were to find the governance

reforms achieved in this litigation did not support a full $1 million, we've valued them at a fee award in the amount of $600,000. The $3.1 million monetary component, in addition to the corporate governance, would support plaintiffs' entire request.

Under this approach, the fee award for the cash component would amount to $400,000 which is 13 percent of the monetary recovery which is in line with the percentages awarded in early stages of litigation and the 600,000 for governance benefits for the total million dollar request.

Moreover, if the Court were to look at a lodestar crosscheck, such a test would further demonstrate the reasonableness of the requested fee amount. The implied hourly rate of the requested fee here is $437 per hour, well in line with prior court precedent. And, after deducting counsel's expenses, the fee request is actually a 38 percent discount to counsel's lodestar.

The result in this case could not have been achieved but for the time, effort and risk of co-lead counsel. Any way you look at it, plaintiffs believe that this all-in request should be easy to approve.

The next *Sugarland* factor is the contingent nature of the fee. Plaintiffs' counsel pursued this case on a fully contingent basis and litigated the case against skillful adversaries from highly reputable defense firms.

Throughout the action, plaintiffs' counsel faced a real risk that they would not obtain any recovery. In light of these facts, plaintiffs believe the contingent nature aspect of the *Sugarland* test has been met.

As to the complexity and difficulty *Sugarland* test, this case was not an easy, straightforward case. It took a lot of pre-suit investigation, not only with the Section 220 demand but the independent investigation counsel conducted into the other minority stock investments, such as VBI, Chromadex, and Sevion that OPKO had invested in over the years.

And prosecuting the action to trial would have required to prove both the underlying misconduct by Dr. Frost and the directors in the pump-and-dump schemes, as well as these other investments, the VBI, Chromadexes, as well as the conduct of the audit committee in approving the

transaction and whether or not the actions taken by the audit committee were sufficient to cleanse the transaction.

With the challenges of uncertainty of litigating the claims, plaintiffs believe that the request is reasonable.

And standing and ability of counsel, the last *Sugarland* factor. I will not belabor this point with Your Honor, as plaintiffs' counsel is well-known to this court and has practiced in Delaware and achieved significant results throughout the time in front of the Court.

For the reasons stated today and in our briefs, co-lead counsel submit that the full amount of the request is reasonable and deserved and should be granted.

THE COURT: Thank you for that.

Ms. Hannigan, anything you want to add? Ms. Hannigan, is there anything you wanted to add?

MS. HANNIGAN: No. Thank you, Your Honor. I have nothing to add.

THE COURT: Thank you.

Mr. Teklits, anything you want to add?

MR. TEKLITS: Nothing further, Your Honor. Thank you.

THE COURT: Thank you.

Counsel, in addressing a fee request in a corporate benefit case, I'm mindful that the default in Delaware is the American Rule, that each side bears its own fees and costs, but that it would be inequitable to abide by that rule in a case where there is a corporate benefit worked by some of the stockholders or their counsel but shared by all. And, therefore, it is appropriate that I consider a fee award here.

And I am guided in considering the fee award by the *Sugarland* factors adopted by our Supreme Court. The most important of those, as Mr. Tucker has pointed out, is the recovery. Here, there is a $3.1 million cash recovery. If that were the only recovery, the requested fee would be a little under a third of that, which is at the very upper range that can be successfully asserted for this court, I think it's fair to say.

But this is not a case that involves only a fee, a cash recovery. As I described when talking about the fairness of the settlement, there

are substantial corporate governance improvements that are tailored here to the specific situation that this corporate entity found itself in. I'm not going to go through those again, other than to state that I think they are significant and do support a rather substantial fee award on their own.

I do note, as a check, the lodestar amount indicates that the fee request here is actually at a somewhat significant discount and not, as is often the case, a multiple of the *quantum meruit* suggested amount. So, under the *Sugarland* factors, I think the benefit strongly supports the fee requested; the contingent nature of the action supports the fee requested.

I am not going to go through all of the *Sugarland* factors other than to say they all support or are at least not opposed to the fee requested.

And I do note that counsel on both sides in this action are well-known to the Court, very well-respected, and that there were some unusual and difficult issues here.

It's also, I think, significant that while this case did not go through case-dispositive

motion practice, there was some significance to the litigation here, including a 220 demand, review of documents, participation in a motion to stay and then, as I noted when I talked about the fairness of the settlement, an extraordinary long and effort-filled mediation process that went on over a period of months.

And just as I could say with confidence that I felt that the proposed settlement was fair, I can say with equal confidence that the requested fee is reasonable and is fair to all concerned. And I have entered it in the order and I have now signed the order.

So other than to congratulate you, Mr. Tucker, for the job that you and your co-counsel have done here, what else can we do this afternoon?

MR. TUCKER: Thank you, Your Honor. We have nothing further.

THE COURT: All right.

Ms. Hannigan?

MS. HANNIGAN: Nothing further, Your Honor. Thank you very much.

THE COURT: Thank you.

Mr. Teklits?

MR. TEKLITS: Nothing further, other than to thank you, Your Honor, for your time.

THE COURT: All right. Well, I'll say one more thing: I wish we were here in person. I'm hoping the next iteration of some similar settlement we're here in person. But I appreciate you bearing with me while we did this by phone.

And this is the second time I have been in my courtroom since March. So I thank you for giving me the opportunity to visit my old hunting grounds. It has become so unusual that we use a courtroom that one of our employees was surprised to find that what she considers, I'm sure, to be a wide hallway between the chambers portion of the courthouse and the remainder was actually being used for something so that she had to walk around. So it's nice to get to use the equipment anyway.

And I appreciate the briefing, the argument, and most of all the efforts that went in here, the result that you obtained. And I thank you and appreciate your attention. Good-bye.

COUNSEL: Thank you, Your Honor.

(Proceedings concluded at 2:01 p.m.)

- - -

CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 24 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 13-15 and 20-22, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 10th day of November, 2020.

/s/Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter