

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE VIACOM INC. : Consolidated  
STOCKHOLDERS LITIGATION : C.A. No. 2019-0948-SG

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Court of Chancery Courthouse  
Courtroom No. 1  
34 The Circle  
Georgetown, Delaware  
Tuesday, July 25, 2023  
11:00 a.m.

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BEFORE: HON. SAM GLASSCOCK III, Vice Chancellor

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SETTLEMENT HEARING AND PARTIAL RULINGS OF THE COURT

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CHANCERY COURT REPORTERS  
Leonard L. Williams Justice Center  
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## 1 APPEARANCES:

2 GREGORY V. VARALLO, ESQ.  
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3 -and-

4 EDWARD G. TIMLIN, ESQ.  
of the New York Bar  
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5 -and-

6 CHAD JOHNSON, ESQ.  
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8

9 BLAKE ROHRBACHER, ESQ.  
Richards, Layton & Finger, PA

10 -and-

11 ROBERT H. BARON, ESQ.  
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Cravath, Swaine & Moore LLP  
12 for Viacom Special Committee Defendants

13

14 JACQUELINE A. ROGERS, ESQ.  
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16 VICTOR L. HOU, ESQ.  
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18 PETER L. WELSH, ESQ.  
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Ropes & Gray LLP  
19 for Defendants National Amusements, Inc.,  
Sumner M. Redstone National Amusements Trust,  
20 Shari E. Redstone, and Robert N. Klieger

21

22 OTHER COUNSEL PRESENT

23

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1 THE COURT: Welcome, Counsel.

2 ATTORNEY ROHRBACHER: Good morning,  
3 Your Honor. Blake Rohrbacher, Richards Layton &  
4 Finger, for the Viacom Special Committee Defendants.  
5 And from Cravath, Swaine & Moore, Robert Baron.

6 ATTORNEY ROGERS: Good morning, Your  
7 Honor. Jacqueline Rogers, Potter Anderson & Corroon,  
8 on behalf of the Nai parties. With me today is Peter  
9 Welsh from Ropes & Gray and Victor Hou from Cleary  
10 Gottlieb.

11 THE COURT: Good morning. I do  
12 welcome you. Although, if you'll notice, my clerk's  
13 chair is absent thanks to Ropes & Gray. So I'm on my  
14 own.

15 ATTORNEY WELSH: I apologize for that,  
16 Your Honor.

17 THE COURT: Mr. Varallo, you are the  
18 only person with enough sense in this whole courtroom  
19 to be wearing a seersucker suit. So I congratulate  
20 you.

21 ATTORNEY VARALLO: Thank you, Your  
22 Honor. I hope there are other bases for  
23 congratulations, but I'll take what I can get.

24 Good morning, may it please the Court.

1 Greg Varallo from Bernstein Litowitz Berger &  
2 Grossmann for the plaintiffs, main plaintiff CalPERS.  
3 Your Honor, I have with me my partner today from New  
4 York, David Timlin, and co-counsel from Robbins Geller  
5 Rudman & Dowd, Chad Johnson and Desiree Cummings.

6 THE COURT: Welcome. And as we go  
7 through, there are two objections. They may be both  
8 problematic for different reasons. But one relates to  
9 the certification of the class. And I guess we should  
10 address it when you speak to that, Mr. Varallo. The  
11 other, I think, is best addressed at the attorneys'  
12 fee request stage.

13 ATTORNEY VARALLO: Your Honor, I had  
14 planned to do that. And for the record, Mr. Louis  
15 Wilen, one of the two individuals who submitted a  
16 communication to the Court, is with us in the court  
17 today and prepared to address the Court.

18 THE COURT: Welcome. Thank you.

19 ATTORNEY VARALLO: Your Honor, this is  
20 the time the Court has set down to consider the  
21 settlement reached in the Viacom Inc. Stockholders  
22 Litigation. I am especially pleased to present the  
23 settlement, which is \$122,500,000 in cash.

24 THE COURT: Very significant,

1 Mr. Varallo.

2 ATTORNEY VARALLO: Thank you, Your  
3 Honor. It's an amount we believe to be the second  
4 largest settlement of a breach of fiduciary duty in a  
5 class action in Delaware.

6 As we noted in our submission, counsel  
7 for the plaintiffs have received two communications,  
8 which I'll talk about, as Your Honor has suggested.  
9 And I think generally, with the Court's permission,  
10 I'll briefly address the facts which may be pertinent  
11 to the issues before the Court today.

12 THE COURT: And I will note that  
13 neither of those objections have raised any unfairness  
14 of the settlement amount, which I think is  
15 significant. And how many shares altogether are in  
16 the class?

17 ATTORNEY VARALLO: I believe we're at  
18 about 350 million shares, Your Honor.

19 THE COURT: That's significant, as  
20 well.

21 ATTORNEY VARALLO: So I'll talk a  
22 little bit about the facts, talk about the class  
23 certification issues, address the settlement itself,  
24 including the proposed plan of allocation, and then

1 attorneys' fees finally and address the two  
2 communications as we go.

3           As for the facts, the case arises from  
4 a 2019 stock-for-stock merger between two controlled  
5 entities: Viacom Inc. and CBS Corporation. Both  
6 Viacom and CBS had the same controlling stockholders:  
7 National Amusements, Inc., or "NAI," NAI Entertainment  
8 Holdings LLC, and Shari Redstone. We brought suit on  
9 behalf of a class of former stockholders of Viacom  
10 Incorporated alleging breach of fiduciary duty against  
11 the controller and the board.

12           At base, our claim was that this was  
13 an entire fairness case and that the board of  
14 directors of Viacom traded away economic consideration  
15 to achieve certain noneconomic governance demands of  
16 the controlling stockholder specifically relating to  
17 the identity of the combined companies' CEO,  
18 Mr. Bakish, which we claim resulted in a price that  
19 was too low for Viacom and also resulted from an  
20 unfair process.

21           The fact that I think makes this case  
22 a bit unusual -- not *sui generis*, but unusual -- arose  
23 when the other side of this stock-for-stock merger,  
24 the CBS stockholders, brought their own lawsuit,

1 alleging that the exchange ratio received by the CBS  
2 side of the exchange was unfair to CBS stockholders.  
3 Thus, the case proceeded in the somewhat unusual  
4 posture where stockholders on both sides of the  
5 transactions claimed that they were both treated  
6 unfairly. Of course, this presented practical issues  
7 not only with the day-to-day management of the case,  
8 but also with respect to discovery and the scheduled  
9 back-to-back trials, which Your Honor was kind enough  
10 to set.

11 As we noted in our brief, our experts  
12 were prepared to argue that the exchange ratio paid to  
13 Viacom stockholders was unfairly low. But, of course,  
14 CBS stockholder's experts would claim just the  
15 opposite.

16 As for the record developed in the  
17 case, we laid it out in our brief in support of the  
18 settlement. Your Honor, the Viacom stockholders  
19 developed a record which showed that when the same  
20 parties negotiated an ultimately unsuccessful merger a  
21 year earlier, CBS had agreed to an exchange ratio  
22 which would have given Viacom stockholders a larger  
23 share in the combined companies than agreed to here.

24 The record also showed that when the

1 discussions of this transaction reemerged in 2019, the  
2 parties ultimately agreed to a lower ratio from the  
3 point of view of Viacom stockholders even though on a  
4 relative basis Viacom's performance had improved and  
5 CBS's performance had deteriorated.

6           Moreover, we believe that the record  
7 showed that the Viacom special committee had ceded to  
8 the controller's wishes in negotiating governance  
9 before price and was then met with the CBS contention  
10 that since CBS had agreed to the controller's demands  
11 for Mr. Bakish to serve as CEO, Viacom would have to  
12 agree to a lesser price than it desired in the  
13 transaction.

14           In any event, Your Honor, while we  
15 believe that the record assembled here was a strong  
16 one, we also faced challenges, many of which are set  
17 forward in our brief. But the most obvious one being  
18 that we were really trying the case against two sets  
19 of adversaries, both the various defendants, as one,  
20 and the CBS plaintiffs, as the other.

21           To be clear, the litigation was long  
22 and hard-fought. We had to fight for leadership. We  
23 had to fight to win the motion to dismiss brought at  
24 the outset. We developed a complete record, settling



1 only four months before the scheduled trial.

2 As to that record, we took and  
3 defended a total of 40 fact depositions against some  
4 of the best law firms at the defense bar and fought  
5 for and received roughly 3 million pages of documents,  
6 which we reviewed and utilized in the case.

7 Since discovery was coordinated with  
8 the CBS case discovery, many of the depositions were  
9 multi-day depositions and often involved questioning  
10 from numerous constituencies, at times as many as six  
11 different groups: the Viacom plaintiffs, the CBS  
12 plaintiffs, the NAI defendants, the Viacom defendants,  
13 the CBS committee defendants, and Mr. Ianniello.

14 As the case developed, the parties  
15 engaged in mediation, which spanned an astounding  
16 14 months before the Honorable Daniel Weinstein, a  
17 former federal judge, and his colleague, Jed Melnick.  
18 That mediation was not concluded until after the  
19 discovery record closed in this case and the parties  
20 had exchanged a total of seven extensive expert  
21 reports. The mediation ended based on the mediator's  
22 recommendation, which all sides accepted.

23 Your Honor, I can turn to class  
24 certification. I can do it in as much depth as you

1 want, or I can move on. What is Your Honor's  
2 preference?

3 THE COURT: If you would just address  
4 class certification briefly and in the context of the  
5 untimely objection which was received. I'll note that  
6 the objection seeks to opt out, but doesn't give a  
7 reason, certainly doesn't oppose the fairness of the  
8 settlement, nor anything else. It's just a notice  
9 that the individual would like not to be bound.

10 ATTORNEY VARALLO: Indeed, Your Honor.  
11 So let me briefly address class certification.

12 The class proposed here is a  
13 non-opt-out class, which I think is important, as Your  
14 Honor has just noted, which consists of all holders of  
15 Viacom common stock at any time from August 13, 2019,  
16 the date the merger agreement was signed, through and  
17 including December 4, 2019, the date it closed,  
18 excluding defendants and their families, affiliates.

19 Of course, the Court's consideration  
20 of certification involves a two-step analysis. First,  
21 the Court must be satisfied that we've met all four  
22 requirements of Rule 23(a) and, second, it must  
23 satisfy at least one of the categories of  
24 Rule 23(b)(1) and (b)(2).

1           As for Rule 23(a), there are four  
2 requirements. They are numerosity, commonality,  
3 typicality, and adequacy.

4           As for numerosity, as I mentioned  
5 earlier, there were the 350 million shares in the  
6 class held by at least thousands of individual and  
7 record holders. Precedence made clear that we've got  
8 numerosity here.

9           As for commonality, the decision for  
10 the Court is whether there are common questions of law  
11 and fact linking the class members which are  
12 substantially related to the resolution of the matter.  
13 Here, common questions of law and fact include whether  
14 defendants breached their fiduciary duties to the  
15 class and whether the class is entitled to damages.  
16 Since we allege injuries to all class members in  
17 proportion to their prorated ownership of Viacom  
18 stock, there's no real question that commonality is  
19 satisfied.

20           As to typicality, the question is  
21 whether the claims or defenses of the representative  
22 parties are typical of the claims and defenses of the  
23 class. Here, they are the same.

24           As to adequacy, the issue for the

1 Court is whether the representative plaintiff held  
2 interests antagonistic to the class, retained  
3 competent and experienced counsel, and had a basic  
4 familiarity with the facts and issues involved. And  
5 as set forth in the affidavits of the two plaintiffs  
6 submitted with our opening brief, plaintiffs held  
7 Viacom common stock at all material times,  
8 participated actively in the action through regular  
9 communications with counsel, in the case of CalPERS  
10 actually attended the mediation in person, reviewed  
11 and approved filings, sat for depositions, and  
12 provided documents. These plaintiffs lacked conflicts  
13 with the class and hired counsel to vigorously and,  
14 hopefully Your Honor will conclude, expertly prosecute  
15 the claims. Thus, adequacy should be met here as  
16 well.

17 Which brings us to the substance of  
18 (b)(1) and (b)(2). (b)(1) provides for certification  
19 where the prosecution of separate actions would create  
20 a risk of inconsistent or varying adjudications or  
21 would be dispositive of the interests of other class  
22 members. As with all cases of this type, plaintiffs  
23 are challenging a single course of conduct that  
24 affected all class members in the same way. And if

1 this case were prosecuted in multiple independent  
2 actions, there's a real risk of varying adjudications,  
3 which could dispose of or impede the rights of other  
4 class members. We contend, Your Honor, that  
5 Rule 23(b)(1) is, therefore, satisfied.

6 Rule 23(b)(2) is also satisfied since  
7 the actions here were on grounds generally applicable  
8 to the class as a whole.

9 Finally, Your Honor, we've met the  
10 requirements of 23(e). And we put in mailing  
11 notifications and certifications.

12 In short, Your Honor, we think we've  
13 met the standards for non-opt-out class. So let me  
14 address at this point, if I can, the communication  
15 from Mr. Mayer, which we submitted as Exhibit A to our  
16 reply brief in support of the settlement.

17 As the Court has noted, Mr. Mayer's  
18 communication does not set forth an objection to the  
19 substance of the settlement or the request for fees  
20 but, instead, appears to object because the settlement  
21 would be certified as an opt-out, and he wants the  
22 right to opt out.

23 Your Honor, put most plainly, this is  
24 the type of case that almost invariably involves

1 non-opt-out class for the very reasons that  
2 Rules 23(b)(1) and (b)(2) exist. These cases all  
3 pertain to a single course of conduct which gives rise  
4 to identical claims by all members of the class.

5           When Your Honor granted certification  
6 in the *Straight Path* case not too long ago, this Court  
7 found that it was properly a Rule 23(b)(1) class  
8 because individual cases would -- and I'm quoting Your  
9 Honor's decision now -- "necessarily be predicated  
10 upon nearly identical facts" and because "principles  
11 of issue preclusion could therefore substantially  
12 impair or impede other plaintiff-stockholders' or the  
13 Defendants' rights." That's at the opinion from  
14 pages 7 and 11.

15           So here and in almost every deal case,  
16 Your Honor, there is no basis to depart from  
17 established precedent. And while we wish Mr. Mayer  
18 the best, we think this is properly an opt-out class.  
19 We've got years and years of precedent, including Your  
20 Honor's recent precedent on the point, and to depart  
21 from that precedent in a case that fits perfectly  
22 within the mold of 23(b)(1) and (b)(2) would be a  
23 significant error, we respectfully suggest.

24           THE COURT: Thank you, Mr. Varallo.

1                   Is Mr. Mayer here?

2                   (No response.)

3                   THE COURT: I note that his objection  
4 was late-filed, but I'm going to address it out of an  
5 abundance of caution and in the interest of equity.

6                   Let me first say, this is the  
7 quintessential class action and the quintessential  
8 non-opt-out class action under Rule 23(b). It  
9 involves a transaction which affected each of the  
10 stockholders in the class in precisely the same way.  
11 Each of those stockholders would have the same claim.  
12 It would, here, lead to potentially thousands of  
13 litigations.

14                  The whole reason that Rule 23 exists  
15 is for this kind of case. And our courts over many  
16 years have found that this is a Rule 23(a) and 23(b)  
17 situation, which requires a non-opt-out class if  
18 either the litigation is going to be rational and  
19 efficient or settlement is to be achieved.

20                  Mr. Mayer has failed to state anything  
21 that indicates to me that it would be unfair to  
22 include him in the class, and he has raised no  
23 objections to the settlement itself.

24                  I'm not going to go through the

1 statutory factors. I think that has been more than  
2 adequately presented by Mr. Varallo. I will simply  
3 say that I find Rule 23(a), 23(b)(1), and 23(b)(2)  
4 satisfied. And because of that, and to the extent it  
5 was an appropriate objection, Mr. Mayer's objection is  
6 overruled.

7 And so we can proceed.

8 ATTORNEY VARALLO: Thank you, Your  
9 Honor. With your permission, I'll turn now to the  
10 settlement itself and the plan of allocation.

11 THE COURT: Yes, please.

12 ATTORNEY VARALLO: Your Honor, I think  
13 it's not an overstatement to say the settlement is a  
14 robust one. As I mentioned earlier, it was agreed  
15 only after extensive mediation by highly regarded  
16 mediators, Judge Weinstein and Judge Melnick, and only  
17 after the close of discovery and exchange of expert  
18 reports. At the time it was agreed, it would have  
19 been the largest reported class action settlement in  
20 Delaware, although it's now been eclipsed by the *Dell*  
21 settlement. It remains, to our knowledge, the second  
22 largest class action settlement in the State's  
23 history.

24 On its face, it's easy to quantify



1 since we're talking about a fixed dollar amount. It's  
2 \$122.5 million, less any fees and expenses awarded by  
3 the Court.

4                   Moreover, as we noted in our brief,  
5 the settlement was the result of the mediator's  
6 recommendation, which was offered after more than a  
7 full year of medication. We contend the settlement  
8 recovery fairly reflects both the strengths of our  
9 claims and the risks of continued litigation.  
10 Although the parties would have argued at trial  
11 whether entire fairness applied, we believe the Court  
12 would have concluded it did.

13                   Specifically, we would have presented  
14 evidence that the controller, Ms. Redstone, used the  
15 merger to consolidate her control at the expense of  
16 Viacom stockholders and that this would have  
17 demonstrated the receipt of a non-ratable benefit in  
18 addition to the presence of a controller on both sides  
19 of the transaction.

20                   However, the claims would have been  
21 more challenging on damages than on liability, at  
22 least from the plaintiffs' point of view. Although we  
23 believe we would have been able to convince the Court  
24 that we had damages of no less than \$165 million

1 measured by the decline in the exchange ratio from the  
2 2018 merger exchange ratio, an environment where the  
3 evidence would show that Viacom was doing relatively  
4 better than CBS, we know well that the Court has  
5 addressed price in the entire fairness cases by  
6 seeking to determine whether the deal price falls  
7 within a range of fairness. And it is possible, given  
8 the large numbers we're talking about, that the damage  
9 amount we were most likely to be able to prove could  
10 be erased were the Court were to conclude that the  
11 range was broad enough to encompass it.

12 I would point to the *BGC* case, a case  
13 which I helped try a number of -- I guess about a year  
14 ago to Vice Chancellor Will. And the Vice Chancellor  
15 in her ruling concluded that we had, in fact, proved  
16 \$70 million of damages and that the other side's  
17 expert was not to be awarded any credibility.  
18 However, the Court said at a range of fair prices,  
19 which subsumed our \$70 million. Now, that's on  
20 appeal, and I hope that the Supreme Court agrees with  
21 me when it issues its ruling soon. But as of right  
22 now, the law is it is possible for us to prove damages  
23 and still be within a range of fairness. I don't get  
24 it, Your Honor. I don't understand it, but I'm not

1 here arguing that case.

2 THE COURT: You'll need to save that  
3 for Dover, Mr. Varallo.

4 ATTORNEY VARALLO: Yes indeed, Your  
5 Honor.

6 Our DCF damages numbers ran as high as  
7 \$917 million. But proving those would have required  
8 the Court to accept that the CBS projections for  
9 itself were incorrect, but that the CBS projections  
10 for Viacom were reliable and vice versa, that Viacom's  
11 projections for CBS were reliable.

12 Finally, we would have also presented  
13 a \$720 million value destruction damages model. But  
14 to prove that, we would have had to overcome and win  
15 fights relating to whether the model was a proper  
16 damages model at all and if so, whether the negative  
17 stock price movement shown in our event studies could  
18 be attributed to, indeed should be attributed to the  
19 merger rather than other macroeconomic developments as  
20 well as more narrowly focused issues relating to the  
21 proper window for assessing damages -- that is one,  
22 two, or three days -- and how to account for leaks  
23 within the model.

24 In short, we faced challenges of

1 proving damages. We believe that the settlement  
2 represents almost 75 percent of our most provable  
3 damages model, 17 percent of the value destruction  
4 damages model, and about 13 1/3 percent of the DCF  
5 damages models, a recovery that is substantially  
6 higher than often seen in this type of case,  
7 especially with respect to exchange ratio damages.

8 Put in the language of recent  
9 settlement cases, we believe the "get" is an excellent  
10 one here and far exceeds the value of the "give,"  
11 which are the typical releases in a transactional  
12 case.

13 As to the plan of allocation, should  
14 the Court determine to approve the settlement, the  
15 Court should determine whether the proposed plan of  
16 allocation is fair, reasonable, and adequate.

17 Here, the proposed plan of allocation  
18 treats all eligible class members equitably and  
19 allocates the net amount of the settlement on a *pro*  
20 *rata* basis to class members that held shares of Viacom  
21 at the close of the merger on December 4, 2019.

22 Moreover, the plan avoids the costs  
23 and burdens of the claim process and instead calls for  
24 providing distributions directly to class members by

1 the settlement administrator. In other words, if you  
2 were a holder at the closing and the Court approves  
3 the settlement, you'll simply be paid the amount of  
4 consideration without the need to take any further  
5 action whatsoever.

6 This brings me, Your Honor, to  
7 Mr. Wilen's communication. With Your Honor's  
8 permission, I'll address that now.

9 THE COURT: Let me address the  
10 settlement, if I could.

11 ATTORNEY VARALLO: Certainly.

12 THE COURT: I have one question. And  
13 it's because I've never really thought about it  
14 before. But there is a California anti-release  
15 statute that's being waived. Could you explain how  
16 that waiver works, Mr. Varallo.

17 ATTORNEY VARALLO: Yes, Your Honor.

18 THE COURT: If it works.

19 ATTORNEY VARALLO: I believe that's  
20 Section 1542 of the California General Corporations  
21 Law.

22 Your Honor, that's been in these  
23 documents since I began practicing law or soon  
24 thereafter. I have to be careful because it's been a

1 long time. But the idea that was developed a very  
2 long time ago is that that statute purports to say you  
3 can't waive unknown claims, period. And the purpose  
4 for including it in these papers and in our settlement  
5 practice is simply to say that to the extent it is  
6 waivable, to the extent it is a statute which may be  
7 addressed by contract and by court order, we are doing  
8 it. And the reason for that is if you couldn't do  
9 that by contract and/or court order, then any  
10 settlement we entered in the State of Delaware would  
11 have effectively an asterisk next to it and the  
12 asterisk would say: Applies except to any resident of  
13 California.

14 THE COURT: And I'm assuming that the  
15 theory of the waiver has never been tested in the  
16 California courts.

17 ATTORNEY VARALLO: I'm unaware of it  
18 being tested in the California courts.

19 THE COURT: Well, I've seen that  
20 before and meant to ask about it, but I've never  
21 really asked anyone to address it. And I'm thankful  
22 that you have done so here.

23 Let me ask, before I address the  
24 settlement terms and the fairness thereof, if anyone

1 on behalf of any of the defendants wishes to say  
2 anything? Typically the answer is no, but now is your  
3 chance.

4 (No response.)

5 THE COURT: All right. I agree,  
6 Mr. Varallo, that this is a relatively straightforward  
7 case on liability, at least given the allegations of  
8 the negotiation of the future management of the  
9 successor company before the exchange ratio. I think  
10 that supports certainly a nonratable benefit. It's an  
11 entire fairness case. The devil is in the damages.  
12 And it is clear that there would have been a battle of  
13 the experts, complicated, if it had gone forward  
14 with -- and you said it's not *sui generis*, but it  
15 would be for me -- the existence of the other side  
16 also claiming a conflicted transaction resulting from  
17 an unfair process at an unfair price.

18 I think, given the fact that there  
19 were range-of-reasonableness questions, given the fact  
20 that there would be experts who would be calling the  
21 amount of the exchange fair from the point of view of  
22 the plaintiffs here, and given the typical troubles  
23 with a battle of the experts, that it certainly was  
24 prudent to settle this matter for an amount

1 substantially below the highest imaginable -- I  
2 wouldn't say possible -- the highest imaginable  
3 recovery. That was pursued here with the best of  
4 counsel on both sides because the defendants had quite  
5 a bit of risk too, given the nature of this  
6 litigation. There was an extensive mediation before  
7 an esteemed retired judge. And I didn't realize until  
8 I started looking at this that Jed Melnick was  
9 involved as well, who I have had contact with and is  
10 an excellent and tough mediator. So the fact that  
11 this was achieved after mediation weighs in my  
12 decision.

13                   Also weighing in my decision is the  
14 fact that there are thousands of investors in the  
15 company, none of whom has appeared to oppose the  
16 fairness of the settlement. And the sheer size of  
17 this settlement in light of the potential range of  
18 damages is very impressive, and I think it's well to  
19 the good of the stockholder class. I congratulate you  
20 on achieving what I think is an excellent settlement,  
21 and I am pleased to accept it. I think that the  
22 "give" and the "get" analysis fully supports  
23 settlement here.

24                   And so we can move on, then, to the



1 fee award. And if you want to address -- is it  
2 Mr. Wilen or Mr. Wilen?

3 LOUIS WILEN: Yes, Your Honor,  
4 Mr. Wilen.

5 THE COURT: Okay, Mr. Wilen.

6 Go ahead, and then I'm going to let  
7 Mr. Wilen speak if you wish to address the question of  
8 the incentive of awards.

9 ATTORNEY VARALLO: Yes, Your Honor.  
10 Would you like me to do fees first and then our  
11 position on Mr. Wilen?

12 THE COURT: Why don't you do that.  
13 And we'll hear from Mr. Wilen at the end of the  
14 process.

15 ATTORNEY VARALLO: Your Honor, we're  
16 requesting that the Court grant just a little bit  
17 under 22 percent of the recovery. When I say "a  
18 little bit under," what I mean is 22 percent of the  
19 recovery less \$27,500. And let me tell you about  
20 where that comes from because it's kind of a strange  
21 request.

22 THE COURT: This is CalPERS turning  
23 down an incentive award?

24 ATTORNEY VARALLO: You bet. That's

1 exactly what happened.

2           First of all, CalPERS negotiated with  
3 us as to the amount of settlement it was willing to  
4 allow us to apply for. And to be quite blunt, if  
5 CalPERS didn't engage in that negotiation, we would  
6 have proposed a higher percentage of the settlement.  
7 We think it was well supported by applicable  
8 precedent. But CalPERS and the firm agreed that we  
9 would not apply for any more than 22 percent.

10           As part of that negotiation, the  
11 question arose whether CalPERS would like us to apply  
12 on behalf of the Detroit Fund, CalPERS, and Mr. Wilen  
13 for incentive fees. And what CalPERS said is, look,  
14 we don't do any better whether we get incentive fees  
15 or not. We are focused on our retirees and our  
16 pensioners. Thank you very much for offering to share  
17 your fee with us, if approved by the Court. No dice.  
18 Tell you what? Reduce the fee you are asking for by  
19 the amount you would otherwise ask for an incentive  
20 fee so that it flows back to the class. And we  
21 quantified that at 27,500, specifically with respect  
22 to each of the three plaintiffs we would have asked  
23 for. We negotiated that number with CalPERS and came  
24 to a request for fees in the amount of -- hopefully, I

1 get this right -- \$26,922,500 plus expenses of  
2 \$2,167,079.67, for a total of \$29,089,579.67.

3 THE COURT: I'm sorry, say that again.

4 ATTORNEY VARALLO: 29,089,579.67, all  
5 in, including costs.

6 I should note as well that in our  
7 submission to the Court, we had overstated our  
8 expenses by the amount of \$16,717.50 due to an expert  
9 invoice issue, which we resolved in the class's favor.  
10 Having sorted that out in the class's favor, we're  
11 today requesting \$16,717 less than we put in our  
12 papers. The number I gave you is net of that mistake  
13 in the expert's fee.

14 THE COURT: Thank you.

15 ATTORNEY VARALLO: Your Honor, unlike  
16 in many cases, in this matter, our client had a very  
17 specific view. And we contend that they played -- not  
18 only played an important part throughout the entire  
19 case, working with us, overseeing us, consulting as to  
20 the theory and strategy of the case, but when it came  
21 time for us to make our fee award, played a valuable  
22 role in connection with what we were permitted by the  
23 client to ask the Court.

24 Of course, Your Honor, the *Sugarland*

1 factors guide the Court's discretion here and are  
2 well-known. The Court considers the results achieved,  
3 the time and effort of counsel, the relative  
4 complexities of the litigation, any contingency  
5 factor, and the standing ability of counsel. Case law  
6 is unanimous that of these factors, the result  
7 achieved is clearly the most important factor. And as  
8 I've mentioned previously, you have an outstanding  
9 result here. Indeed, the second highest in Delaware  
10 history for this type of litigation.

11 THE COURT: I hope you don't feel  
12 upset with the plaintiffs in *Dell* for easing you out.

13 ATTORNEY VARALLO: Not at all, Your  
14 Honor. You know, I applaud the folks at *Dell*. One of  
15 my dear friends was going to be one of the lead trial  
16 counsel for the defendants, a fellow by the name of  
17 Gerson Zweifach. He's at Williams & Connolly and had  
18 been for years the general counsel for one of Rupert  
19 Murdoch's companies. I got to know him very well  
20 representing those companies. And one of the things I  
21 know about Gerson Zweifach is he is an outstanding  
22 world-class litigator. And the fact that the  
23 plaintiff group was able to settle for such an  
24 outstanding result against such an outstanding group

1 of defense counsel really speaks highly to their hard  
2 work. So I applaud them. I don't feel badly about it  
3 at all.

4 THE COURT: I certainly shouldn't kid  
5 around about this stuff.

6 ATTORNEY VARALLO: Your Honor, it's a  
7 fair point. We had the lead. But we got to the turn  
8 and we got edged out before we got to the clubhouse,  
9 for sure. But, Your Honor, you know that gives us an  
10 incentive to shoot for the stars again next time we  
11 have a large case.

12 Your Honor, as I mentioned, the  
13 result, we think, is an outstanding one. When viewed  
14 as a percentage of potentially provable damages, we  
15 assert it's quite strong. We have rate data on  
16 pages 59 and 60 of our brief. In that data, I think  
17 it demonstrates that the fee percentage requested was  
18 lower than all but one of the precedents, and  
19 substantially so in several cases.

20 Turning to the other factors,  
21 obviously, this was a fully contingent case and  
22 required substantial efforts. Measured in hours,  
23 plaintiffs' counsel spent 27,309 hours of time, which  
24 was fully at risk against an array of the very best

1 lawyers the defense bar could field. We personally  
2 were responsible for more than 2.1 million in  
3 out-of-pocket expenses. And as noted at the outset,  
4 we took and defended a total of 40 fact depositions,  
5 reviewed 3 million pages of documents, and presented  
6 or were prepared to deal with a total of seven expert  
7 reports. The complexity of the litigation was  
8 enhanced given the overhang of the CBS case, Your  
9 Honor, which made it a chess match not just against  
10 the many outstanding defense lawyers here, but also  
11 against the other plaintiffs' group who were well  
12 represented by outstanding counsel.

13 Thinking about it as an hourly  
14 crosscheck, 27,309 hours gets you a requested fee  
15 award implying an hourly rate of \$985.84 an hour, well  
16 within the range of implied hourly rates from  
17 precedent collected at Footnote 224 of our brief.  
18 And, Your Honor, I'll say as well less than two times  
19 our lodestar, which was about \$15,900,000 here.

20 Finally, as to the standing and  
21 ability of counsel, I trust that the Court knows the  
22 lawyers involved on both sides.

23 THE COURT: I think I've already  
24 addressed that point.

1                   ATTORNEY VARALLO: Thank you, Your  
2 Honor. We contend the Court should exercise its  
3 discretion, having approved the settlement, to award  
4 the fee and expense award, both because it reflects  
5 active involvement and negotiated approval of a large  
6 institutional client and because it falls comfortably  
7 within the lower side of the range of precedent and  
8 fairly compensates purely contingent counsel for what  
9 we contend was an outstanding result in a complex  
10 case.

11                   THE COURT: All right. Let me address  
12 the fee award, and then we'll turn to the incentive  
13 award requested by Mr. Wilen.

14                   This case illustrates why we have to  
15 make contingent fee awards in settlements of this type  
16 that are large enough although still wholesome in  
17 comparison to the whole so that the system will work.  
18 The 27,000 hours is an investment without a guarantee  
19 at the end. The \$2.1 million in expenses was an  
20 investment without a guarantee at the end. If  
21 entrepreneurial lawyers are going to continue to  
22 advocate on behalf of stockholder classes, there has  
23 to be an award, in this case, substantial enough to  
24 justify that kind of investment. It's really kind of

1   staggering to think about 27,000 hours invested. So  
2   what is requested here is, all in, around \$29 million.  
3   Nobody would say that that is a modest amount. But  
4   looked at as a percentage of the result, which I have  
5   already described as excellent, it is rather modest.  
6   And it is modest in light of the fact that this matter  
7   was litigated through discovery. Trial was looming.  
8   It was a hard-fought case.

9                   I am not going to go through every one  
10   of the *Sugarland* factors, but if I don't mention them,  
11   they don't augur against the result here.

12                  The unusual nature of the case made it  
13   complex. As has already been noted, among the best of  
14   corporate counsel in the country were involved here on  
15   both sides. There is no question this matter got the  
16   litigation attention it deserved. And I don't find a  
17   22 percent recovery here, given the contingent nature  
18   of the action and the result achieved, to be anything  
19   other than justified.

20                  So again, I congratulate you on the  
21   settlement, and I am pleased to award a fee in the  
22   amount requested.

23                  ATTORNEY VARALLO: Thank you, Your  
24   Honor. I have a form of order I can hand up.



1 THE COURT: That would be helpful.

2 ATTORNEY VARALLO: I brought one with  
3 the numbers filled in and one without.

4 THE COURT: If you have one with the  
5 numbers filled in, please, that would be helpful.

6 ATTORNEY VARALLO: And, Your Honor, it  
7 differs from what we submitted with the settlement  
8 papers because the settlement papers contemplated the  
9 possibility of incentive awards. And so we took out  
10 the references to incentive awards.

11 THE COURT: And you backed out the  
12 overstatement of costs?

13 ATTORNEY VARALLO: Exactly, Your  
14 Honor.

15 THE COURT: Thank you.

16 Now why don't we have Mr. Wilen  
17 address whatever it is he wants to address, and then  
18 you can respond, Mr. Varallo.

19 ATTORNEY VARALLO: Thank you, Your  
20 Honor.

21 THE COURT: Come on up to the lectern,  
22 Mr. Wilen.

23 LOUIS WILEN: Thank you, Your Honor.  
24 Good morning. Thank you for allowing me to address

1 the Court.

2 THE COURT: Tell me whatever it is you  
3 want to tell me.

4 LOUIS WILEN: I was, of course, one of  
5 the representative plaintiffs. And I greatly respect  
6 the Court's time, so I've already submitted a written  
7 objection with my reasons.

8 THE COURT: And if you want to rely on  
9 that, you certainly may. I've read it, and I will  
10 take account of it. And if you want to add to it here  
11 or amplify anything, fine. If you don't want to, you  
12 can just rest on the papers.

13 LOUIS WILEN: I'd just like to  
14 reiterate just one point.

15 THE COURT: Absolutely.

16 LOUIS WILEN: And I appreciate the  
17 fact that you have read it, Your Honor. And that is  
18 that while it's reasonable to assume that the other  
19 plaintiffs have dedicated far more time than I have to  
20 the case, I'd ask that the Court consider that the  
21 representatives and the experts from CalPERS and  
22 Chicago Park were compensated for their time as part  
23 of their normal job. I'm just a private individual,  
24 and I have not received any compensation for my work

1 on the case. My work on the case, admittedly, was  
2 about 26 or 28 hours. But I would hope that the Court  
3 would still recognize that and just issue at least  
4 some compensation.

5 Thank you, Your Honor.

6 THE COURT: Thank you, Mr. Wilen.

7 Did you want to respond, Mr. Varallo?

8 ATTORNEY VARALLO: Your Honor, I guess  
9 I should say a couple things.

10 First of all, Mr. Wilen has discharged  
11 our firm as counsel so as to be able to present *pro se*  
12 to the Court. So he's a former client and I'm  
13 therefore constrained to what I can say about this  
14 matter.

15 THE COURT: There has been no motion  
16 to withdraw from Mr. Wilen either. So I wanted him to  
17 speak because the decisions I have to make regarding  
18 settlement are equitable decisions. But I am not sure  
19 just exactly what his status is here and who  
20 represents him or who doesn't. So I am aware that you  
21 are constrained, and I think it's appropriate that you  
22 not divulge attorney-client privileged matters.

23 ATTORNEY VARALLO: Your Honor, with  
24 that as context, let me say, Mr. Wilen and his

1 original counsel, Mr. Bottini, did add value to this  
2 case. They got 220 documents. They provided those  
3 documents to us; they shared them with us. Mr. Wilen  
4 was very active in the case, especially at the outset.  
5 I'm constrained because of my concurrent  
6 representation of CalPERS, who has decided not to seek  
7 incentive fees for any of the plaintiffs, to take no  
8 position either for or against. But it's fair and I  
9 think it's factual to say that Mr. Wilen played a part  
10 in the process.

11 THE COURT: Thank you.

12 ATTORNEY VARALLO: Thank you, Your  
13 Honor.

14 THE COURT: What I am going to do,  
15 Mr. Wilen, is I am going to reserve on this and think  
16 about it. There are various incentives and  
17 counterincentives that play in the question of  
18 incentive awards. I'll get you a written decision  
19 soon.

20 But I appreciate your appearing here  
21 today. I appreciate your service on behalf of the  
22 plaintiff class and your willingness to come forward  
23 and to make a statement here. Thank you.

24 LOUIS WILEN: Thank you, Your Honor.

1                   THE COURT:   What else can we do here  
2 this morning?

3                   ATTORNEY VARALLO:   Nothing from the  
4 plaintiffs' perspective, Your Honor.

5                   THE COURT:   The defendants?

6                   ATTORNEY ROHRBACHER:   Nothing, Your  
7 Honor.

8                   THE COURT:   Well, let me just say  
9 this.   Maybe a half a dozen times in my tenure on the  
10 bench I've had occasion to say what I am about to say.  
11 There are various ways you can construct protections  
12 for stockholders.   You could have a system, as in  
13 Europe, I suppose, which has some type of government  
14 oversight of mergers outside the antitrust arena that  
15 we don't have.   But our system is an entrepreneurial  
16 plaintiff system.   It relies on learned counsel being  
17 willing to take entrepreneurial risks to protect the  
18 plaintiff class, and it also requires defense counsel  
19 who are willing to vigorously represent their clients  
20 in order to present either litigation in front of the  
21 court or a settlement that the court can consider.  
22 And as I say, about half a dozen times in my career  
23 I've had the opportunity to say this litigation is how  
24 this is supposed to work.   Vigorous litigation,

1 vigorous negotiation, a settlement which I can  
2 enthusiastically support both in the interest of the  
3 class and -- although I'm not looking out after the  
4 interest of the defendants, I believe in their  
5 interest as well.

6                   So it's a happy thing to have a  
7 hearing like this. Most of my hearings are not full  
8 of good feelings. But I am very happy to be able to  
9 approve this settlement. I appreciate your  
10 accommodating me by coming all the way down. Hope you  
11 have a good trip home. Thank you for your attention.

12                   (Court adjourned at 11:45 a.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 38 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 15 through 16, pages 23 through 24, and pages 31 through 32, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 31st day of July, 2023.

/s/ Denzel Niezgoda

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Denzel Niezgoda  
Official Court Reporter  
Registered Merit Reporter  
Certified Realtime Reporter