IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: PIVOTAL SOFTWARE, INC. STOCKHOLDERS LITIGATION,	:	C.A. No. 2020-0440-KSJM

Chancery Courtroom 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, October 4, 2022
1:30 p.m.

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BEFORE HON. KATHALEEN St.J. McCORMICK, Chancellor

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT

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THE COURT: Good morning, everyone.

ATTORNEY VARALLO: May it please the Court. Greg Varallo for the plaintiffs. I rise to make introductions.

But before I do, I want to be the first, other than the parties, to congratulate Your Honor on the successful navigation of what may, in fact, be the most difficult case to appear before this Court in many years. Congratulations on your deft handling of it.

THE COURT: No comment.

ATTORNEY VARALLO: And, Your Honor, whatever you did there, would you please do in mine as well.

I want to introduce my partner, Ed Timlin; my colleague, Thomas James. With Your Honor's permission, Mr. Timlin will be presenting the argument today. And our co-counsel, Jason Leviton and Joel Fleming from Block & Leviton in Massachusetts.

THE COURT: Excellent. Thank you.

ATTORNEY NORMAN: Good afternoon, Your Honor. Elena Norman from Young Conaway Stargatt & Taylor on behalf of defendant VMware, Inc. I'm joined by my colleague Michael Neminski. Also joining us is

our co-counsel from Gibson Dunn, Michael Celio. And with the Court's permission, to the extent we have anything to say, Mr. Celio will be presenting on behalf of VMware.

THE COURT: Of course, thank you.

ATTORNEY HENDERSHOT: Good afternoon, Your Honor. John Hendershot, Richards, Layton & Finger for Dell Technologies and Michael Dell. To the extent we have anything to say, I'll say it. But I don't expect that we will. Thank you.

THE COURT: Thank you.

ATTORNEY HOROWITZ: Good afternoon, Your Honor. Jarrett Horowitz from Connolly Gallagher on behalf of defendant Robert Mee.

THE COURT: Thank you.

Please proceed.

ATTORNEY TIMLIN: Good afternoon, Your Honor. Edward Timlin from Bernstein Litowitz Berger & Grossman for lead plaintiff Kenia Lopez and the class.

It's my privilege to be in front of Your Honor this afternoon to present the settlement that we're asking Your Honor to approve. I sense that Your Honor may be shaping up to have a busy afternoon, so I'm going to try to keep our remarks brief.

THE COURT: Hazard of the job.

ATTORNEY TIMLIN: And I think I can be brief because, of course, Your Honor is very familiar with the transaction, having adjudicated the appraisal trial a couple months ago. And also, we submit that the questions before Your Honor today are quite simple and have clear answers.

First, the unopposed, unobjected to, $42.5 million cash settlement is, we submit, excellent, fair, and should be approved. Second, the requested fees and expenses are reasonable and squarely within this Court's precedence and should also be ordered. Specifically, that's a request of 25 percent attorneys' fee, about $985,000 in expense reimbursement, and a $10,000 incentive award to Ms. Kenia Lopez for serving as a model class representative.

There are no Rule 23 issues in front of Your Honor today because we have previously stipulated to class certification.

Just a minute or two on our theory of the case because it may diverge a little bit from what you heard at the appraisal trial. From our perspective, this case is about VMware's 2019

acquisition of Pivotal. VMware, Michael Dell, and Dell Technologies worked in control group of Pivotal Software. Our theory was that VMware leveraged its commercial and competitive power over Pivotal to force through an unfair and ill-timed buyout, specifically right around the time that Mr. Dell put the merger talks into -- started the merger talks, initiated the merger talks.

VMware reneged on agreements with Pivotal to support certain Pivotal products through VMware sales pipelines and, instead, indicated that it was planning on launching several different competing enterprise software products that would have impinged on the layer of the enterprise software stack where Pivotal had been thriving.

We allege that this created a coercive overhang over the merger talks with respect to Dell, Mr. Dell and Dell Technologies. Michael Dell refused several pleas from then-Pivotal CEO Rob Mee to intercede and have the ultimate corporate parent protect Pivotal from its much stronger sibling that was bullying it and impinging upon its ability to compete.

Dell had a motive to side with VMware,

which was its economic alignment with VMware when compared with Pivotal.

VMware and Pivotal reached a $15 deal in mid-2019, which was the exact same as the 2018 IPO price. We allege that the timing benefited VMware and harmed stockholders of Pivotal. That's because a few months prior, in June of 2019, Pivotal announced a mixed quarter result, that was its Q1 2020. Pivotal was 11 months in front of the calendar year. And upon those mixed results, Pivotal also cut its guidance through the end of year. That guide-down cratered Pivotal's stock price well below the 2018 IPO price of $15.

Then, a couple months after that, on June 30th, Pivotal closed its Q2 2020. Those nonpublic results were flashed to VMware as part of the diligence process. And those Q2 results were significantly improved compared to the Q1 results that triggered the guide-down.

The parties -- both parties, both Pivotal and VMware and its advisors, recognized contemporaneously that the Q2 results could be expected to have a positive buoying effect on the Pivotal stock price and quite potentially push the

deal, the possible deal value up above the $15 that eventually was agreed to between the parties.

VMware immediately accelerated the process to take advantage of the temporarily depressed stock price to ensure that it could lock in a deal before those Q2 2020 results became public. We allege that the inexperienced Pivotal committee and management team capitulated to this pressure in what the case law has described as a controlled mindset.

There's contemporaneous documents supporting this theory, including committee member Madelyn Lankton's handwritten notes from August 5th of 2019, and an internal Morgan Stanley email. We discuss those in our brief at pages 6, 7, and 11.

We believe that the record shows that the Pivotal side expected that if the deal fell apart, the competitive pressure from VMware would only increase, and that it had little choice but to sell the company. That creates what we submit is the quintessential example of a controller impinging on a process such that it's not arm's-length negotiation, the sell side reaching the conclusion that it has no choice but to sell.

Specifically, the Pivotal committee

committed to negotiate within a two-week price negotiating window in August that ensured that VMware would get to its deal before those Q2 2020 results had a chance to be announced on a clear day.

And, Your Honor, we can't know what would have happened if those results had actually come out before the deal was announced. But, again, we submit that it would have made a $15 sale price a nonstarter.

We think that the committee's decision to accept the two-week window and to enter into a deal at the IPO price is best explained as a result of VMware's coercion of the process.

A few moments on how we got here today. This settlement follows almost three years of hard fought and active litigation. We sent a 220 letter on behalf of Ms. Lopez in November of 2019. We filed a 220 complaint in December of 2019. We mooted that action after successfully negotiating for a pretty substantial email production from the company at the 220 phase.

We filed a lengthy detailed 80-page 250-paragraph complaint in June of 2020. We negotiated for immediate discovery and for there not

be to a stay of discovery while the motions to dismiss that the defendants were preparing were adjudicated.

We appeared in front of Your Honor in April of 2021 to argue those motions to dismiss. Your Honor denied them in their entirety except with respect to Ms. Cynthia Gaylor, the former CFO of Pivotal.

Fact discovery closed in January of 2022. By that point, we had secured and analyzed over 500,000 pages of documents from defendants, their advisors, other subpoenaed third parties. We served dozens of interrogatories. We took 18 depositions and defended Ms. Lopez's deposition.

And when I say we took the depositions, class counsel participated in every single one of those depositions and took the majority -- the lead in the vast majority of them, including the depositions of very sophisticated, challenging adverse witnesses like Mr. Michael Dell, and Mr. Patrick Gelsinger, who at the time was VMware's CEO and now is the CEO of Intel. Very senior tech M&A bankers who know their industries incredibly well.

We also got all the way through expert

discovery. We served two rounds of damages reports, which were an aggregate of 300 pages even before you get to appendices of the exhibits. And both damages experts sat for full-day depositions.

Contemporaneously, almost exactly contemporaneous with the expert process, we also participated in a multi-month effort to try to see if we could secure a negotiated resolution to this case. That was done in front of the mediator, Bob Meyer, who is a well-respected professional mediator who has resolved many cases in front of this Court.

The sides prepared comprehensive mediation statements. We participated in a full-day Zoom mediation. And when that initial session was unsuccessful, the parties remained in near weekly or biweekly communication with Mr. Meyer up through reaching an agreement in principle.

Your Honor, this was an especially complex mediation because you had three insurance towers. Those were Dell, VMware, and Pivotal. You also had the impact of the coordinated appraisal case which obviously didn't settle when the rest of the parties in the coordinated action reached an agreement.

Under the guidance of Mr. Meyer, after many months of negotiation and following a mediator's recommendation, we were able to get to the $42.5 million in principle settlement that's before Your Honor today. That term sheet was signed on May 2nd, just two months before the trial started.

Turning to the fairness of the settlement. As Your Honor of course knows, the most important inquiry is analyzing the "give" versus the "get." Here, the "give" is obviously a class release. The "get" is $42.5 million in cash.

When weighing the strengths and weakness of the claims, Your Honor is to deploy Your Honor's own business judgment in assessing the settlement. That's, for example, from the *Goodrich* case that's cited in our papers. And we submit that when Your Honor does that exercise here, it strongly supports approval.

I just want to highlight two factors that animated our decision-making when we came to the decision to support the settlement. First, the class counsel that's before Your Honor today are not afraid to invest in cases with significant risks or to take them to trial. We have a track record in this Court

of trying cases where the outcome is extremely uncertain from very, very significant to a big zero after years and years of effort.

We only try cases to this Court when, in our professional judgment, there isn't a settlement offer on the table that would justify myself or one of my colleagues looking Your Honor or one of Your Honor's colleagues in the eye and asking Your Honor to enter a class-wide release. That's not the case here. We think we have a settlement that justifies asking that request of Your Honor. And we're very comfortable making that request.

The second factor that I want to mention is that we put in the work to develop this case and make that reasoned judgment whether to support the settlement. We took the case deep, past fact and expert discovery. The team that you see before you and our many colleagues who aren't here today spent nearly 15,000 hours learning this case. We understood the key questions for trial. We continuously assessed our valuation of the case and were in regular consultation with Ms. Lopez while doing that.

And it's through that lens that I want

to just walk Your Honor through what we saw as a couple of the key strengths and weaknesses of the case as we were approaching the eve of trial.

Starting with liability. We believed we had a very compelling record on liability. The evidence was clear that VMware was intentionally impeding on Pivotal's business, the area of the stack in which it had been operating and that Pivotal thought it had an agreement with VMware that VMware was going to support it within that layer.

We also think the evidence is very compelling that this competitive infringement had a real effect on the decision-making process at the Pivotal committee, amongst Pivotal management, and amongst the Pivotal advisors. This really impacted how the negotiations played out. And we submit that the negotiation no longer resembled arm's-length bargaining and it was unfair.

We also think that there's no credible dispute that VMware did take advantage of the timing of the Q2 2020 results to put through a deal. Very clear evidence that Pivotal knew what the non-public results were. Very clear evidence that Lazard advised the VMware committee that it could expect a Pivotal

stock price would rebound if those results became public.

But, you know, there's, of course, serious risks. And I just want to highlight two of them. The first was VMware's argument that it had an absolute right to compete with Pivotal. VMware is a publicly traded company with its own commercial and competitive interests.

The defendants would argue that what we call controller coercion was really just VMware going about its business for its stockholders and it had no obligation not to do so. I don't believe that this Court has squarely addressed whether there is a degree to which a corporate controller's regular course commercial interactions with a sister company or a subsidiary can be constrained by fiduciary obligations. You know, for example, because there's a deal process or an impending deal process.

As I said, while the evidence that VMware's conduct was affecting Pivotal is quite strong, the evidence that VMware was doing that intentionally to create deal pressure on Pivotal was much more circumstantial.

So we viewed it as a real risk that

the Court would find that VMware's decision to launch competing products to stop supporting Pivotal products was well within its rights and unrelated to any fiduciary obligations it had as a controller, maybe akin to a controller's right to vote its share no in a transaction.

The second risk that I want to highlight is that Your Honor likely recalls from the pleading stage that we believe that former Pivotal CEO Rob Mee was operating under a significant conflict. There was evidence in the 220 production and also in the proxy that during the deal process, Patrick Gelsinger invited Rob Mee to dinner where one of the topics was to discuss whether or not Rob Mee would roll over into the new company with some kind of executive role in the *pro forma* company.

We also identified from the internet a Dell Technologies website that suggested that Mr. Mee had, in fact, rolled over.

You combine those two facts with the guide-down that happened only about a month after the dinner, and we were extremely suspicious that that guide-down might have been effectuated for a corrupt process because the Pivotal management team wanted to

make the deal less expensive for VMware to execute the transaction.

Your Honor, we took vigorous discovery in this case. We have a large email and text production. We have lots of communications where people may have felt that they could speak freely than they might if they knew they were under scrutiny.

And while the unsupervised dinner between Pat Gelsinger and Rob Mee seems inconsistent with best practices and was not adequately disclosed in our view, it's clear that Mr. Mee did not roll over into the *pro forma* company and was not offered a material role in the *pro forma* company.

With respect to the guide-down itself, we believe that later events and performance of the company showed that it was an overreaction to a single bad quarter, but there was never any evidence that it was effectuated by the Pivotal management team for a corrupt purpose or that the Pivotal management team didn't believe that it was the best indication of how the company was going to perform for the rest of the year.

So we viewed that as making this a pretty different case than the one that we initially

pled.

With respect to damages, we believe that Pivotal was worth well more than the $15 per share that it sold for, based largely on common sense. Pivotal traded above a 6X forward revenue multiple for virtually its entire publicly traded life. The bankers analyses support that this was something of a natural floor for software companies like Pivotal at the time. And that multiple would strongly support the $20 valuation that our expert had in his damages report.

We would argue at trial that the guide-down hadn't changed anything intrinsic about Pivotal, and that 6X remained a natural floor for where the company should be valued, even if at the moment the market wasn't ascribing that multiple.

And we would have argued that had the Q2 2020 results come out and the market would have seen that the mixed Q1 was something of an aberration, we would have argued that it would have gotten back up to that 6X valuation floor.

However, getting up from that common sense impression that this company remained the same company after the guide-down to approve a damages

number that Your Honor would be comfortable awarding was challenging and would also require something of a departure from precedent of this Court. By that, I mean our damages analysis was very reliant on forward revenue multiples as an indicator of value of Pivotal Software.

As Your Honor is surely aware, historically this Court has not been that open to crediting revenue multiples as a indicator of corporate value in cases like this one. We would have made a very strong pitch, I think, that Pivotal is the exception that proves the rule because it is customary for preprofitability companies like Pivotal with immature cash flows to look at multiples over a DCF. But that would have been something that we were swimming upstream to argue against the precedent of this Court.

Of course, even if Your Honor were to accept the revenue multiple analysis, Your Honor would also have to feel comfortable saying that Pivotal was still a 6X company even though it wasn't trading like one at the time the deal was announced.

Those are our reasons why we believe that the settlement is fair and reasonable.

I'd like to pause to see if Your Honor has questions before I turn to fees and expenses.

THE COURT: No questions. Thank you.

ATTORNEY TIMLIN: Thank you. Your Honor, the 25 percent fee award and the $985,000 expense reimbursement should both be approved under *Sugarland*. With respect to fees, of course the benefit achieved is the most important factor. Here, it's easy to value, it's $42.5 million.

And I believe that the risks that I've just gone through regarding how we viewed the case at the eve of trial show why it was a good recovery, a strong recovery pretrial in this case.

The 25 percent that we're requesting is comfortably within recent precedent for similar cases at a similarly advanced stage. You can see that precedent in our brief, the chart that we put in on pages 33 and 34.

I think all of the cases are analogous, but I do think that this case perhaps has the most in common with Your Honor's recent fee award in *Arkansas Teachers v. Alon Energy*. There, the recovery was 44.75 million; here it's 42.5. And, similarly, that case was between summary judgment and

trial.

Further supporting the award, we invested substantially in this case on a fully contingent basis. I've already gone through the details of the work that went into this case. We invested almost 15,000 hours, which implies an hourly rate of $715, which we submit is highly appropriate for the benefit achieved here.

Just touching on the expenses, it is predominantly bills paid to our damages expert, Mr. Murray Beach. We think it's clear that the class benefited from class counsel advancing and funding the cost of Mr. Beach's analysis in this case.

So in light of the large economic recovery, the significant investment, the lack of any objections, we think that the fee and expense award should be granted.

Do you have any questions for me on that, Your Honor?

THE COURT: I do not. Thank you.

ATTORNEY TIMLIN: If I could quickly touch on the incentive award.

THE COURT: That's fine, thank you. You don't need to touch on it too greatly. But go

ahead.

ATTORNEY TIMLIN: I would just like to say that Ms. Lopez was a model class representative. She participated in the process graciously and openly. She submitted to a forensic collection of her email account, her personal cell phone. She sat for a four-hour deposition. She put in the work. And was sufficiently convincing that she was an appropriate representative that the defendants stipulated to class certification. So I think that's an indication that she should get the incentive award that we requested.

Then I'd just like to make two quick comments in closing, if that's okay.

THE COURT: Actually, I'm curious, what goes into your analysis of the appropriate incentive award? We obviously see a lot of these. It would be nice to get some inside baseball.

ATTORNEY TIMLIN: Yeah, so there's precedent at 5,000. There's precedent at 7,500. There's some precedent at 10,000. And you see some outlier numbers much higher than that.

When picking 10,000, what we were considering is Ms. Lopez did two rounds of discovery. She sat for the deposition. She answered dozens of

interrogatories. She had her phone forensically imaged. We have a citation in our brief by Vice Chancellor Laster in the *Voigt v. Metcalf* case where he points out that having that invasion of privacy, having someone collect your private cell phone when you are a retail investor is something that Vice Chancellor Laster doesn't think that he would do for $5,000.

So we think that supports a number that is higher than that for Ms. Lopez.

THE COURT: He's less of a defeatist. He assumes there's privacy in a world. I'm perhaps more of a defeatist.

ATTORNEY TIMLIN: I hope that answers the question.

THE COURT: It does. Thank you.

ATTORNEY TIMLIN: Two quick thoughts to wrap this up. I submit that the way this case unfolded is the way that this Court should want cases like this to unfold.

First, it was fought hard, but it was also fought fairly. Both sides deployed really talented litigation teams, fought really hard, advocated for their clients' positions. But the

conflict between us remained focused on the merits. And I think the parties did a good job at working professionally and efficiently through this.

And I mention this because a lot of the key events in this case happened at the outset of this practice and the Court figuring out how to operate within the COVID pandemic. And there was a number of occasions where we needed to adjust deadlines, we needed to be flexible because witnesses, counsel teams, clients, had COVID exposures, sick family members, et cetera. And I thought we always did a really good job of working through those issues efficiently.

The second reason is that the settlement was really the product of careful and fully informed deliberation. This case only resolved after the parties put in thousands -- tens of thousands of hours worth of effort and engaged in a really detailed arm's-length negotiation in front of a mediator.

So I'm the one who has the good fortune of being the one to present the settlement, but I know that it enjoys broad support from all the parties involved, including the class, which having mailed 188,000 notices, not a single class member,

potential class member, someone who thought they might be a class member, sent in an objection.

So for those reasons and the ones in our brief, we ask that Your Honor approve the settlement.

THE COURT: Thank you.

ATTORNEY CELIO: Good afternoon, Your Honor. I will be brief. This is an unopposed motion, and I learned long ago that you don't talk long when there's no opposition.

There are a couple comments from the defense side we need to make. I agree with what Mr. Timlin said, that this was reached through hard-fought litigation; hard-fought negotiations with the professional; that the settlement is a fair compromise in light of the risks that both sides faced at trial. It's roughly $15.45 a share. In our view, that's quite generous considering the evidence.

I have only two specific points I want to make. First, there are a great many assertions about the facts of the case that Mr. Timlin made.

THE COURT: You deny them all. Got it.

ATTORNEY CELIO: Yeah, you got it.

Ms. Norman and I wouldn't be doing our job if we didn't say: We don't agree with any of that.

And obviously we sat through a week of trial, and we know we have very different views. And rather than tick through the 75 things --

THE COURT: No need.

ATTORNEY CELIO: Got it. Appreciate that.

We do, however, agree with the fact that class counsel candidly acknowledged that one of the key reasons to approve the settlement is that the valuation case really wasn't strong. And I think that part, at least, I agree. So I didn't disagree with everything my friend on the other side.

THE COURT: Just the parts that support your case.

ATTORNEY CELIO: It's amazing how that happens, right, Your Honor. The first half I was like, "Oh, he's wrong about that." But by the end, he really turned me around in the second half, which I appreciate.

I'll just state that in light of these rather significant issues, I think that this was a good result for everybody involved. At trial, we

certainly would have advocated for much less. We, therefore, strongly support the settlement, take no position on the incentive award or the fee.

THE COURT: Thank you. Anything further?

All right. Excellent.

I do have a bench ruling prepared. I've tried to cut it down in light of the thoroughness of the presentation made today. I appreciate that, Mr. Timlin.

The parties in this case have presented a proposed settlement of claims. The plaintiffs have also moved for an award of attorneys' fees and expenses, inclusive of an incentive fee to the lead plaintiff.

Neither the defendants nor any other party opposed the terms of the settlement or any aspect of the motion. This weighs heavily in favor of approval.

To save you the suspense, I'm granting the motion in its entirety.

To frame the analysis of whether a settlement should be approved, I would normally begin with a recitation of the allegations at issue. For

posterity and for a variety of reasons, but given the work that's been done to date in parallel litigation and the posture of at least one of those lawsuits, I'll skip that. I assume that you-all are familiar, and the rest of the world will just have to dig to figure out what this case is about.

I'll turn to the posture.

Lead plaintiff Kenia Lopez began investigating the allegations that she ultimately pursued in this case through a books and records demand under Section 220 of the Delaware General Corporation Law. Her purpose in pursuing that demand was to investigate possible mismanagement in connection with the merger at issue. The Section 220 action that ultimately followed was completed in February of 2020 upon the parties' settlement and the company's agreement to provide access to certain books and records.

Ms. Lopez then filed a class action complaint in June of 2020. A second shareholder stepped forward with a separate class action complaint. Pursuant to a stipulation, the actions were consolidated and I appointed Ms. Lopez as lead plaintiff and Bernstein Litowitz and Block & Leviton

as co-lead counsel in August of 2020.

The defendants filed motions to dismiss. I largely denied those motions except I granted dismissal in a bench ruling of the breach of fiduciary duty claim against Ms. Gaylor.

Extensive discovery proceeded. Class counsel took 18 depositions I believe, reviewed over 500,000 pages of documents. Per their brief and the presentation today, that number might actually be low.

I entered a stipulation and order certifying the class on November 4, 2021.

The parties proceeded to mediation before Bob Meyer. His mediation was, at first, unsuccessful. The parties continued litigating. At the same time, they attempted to continue settlement discussions facilitated by Mr. Meyer. They ultimately executed a term sheet on May 2nd, 2022, containing the terms of an agreed-upon settlement which involved a cash bump of $42.5 million.

The parties filed a form of stipulation settlement on June 2nd, 2020, and I entered a scheduling order on June 13th. With that order, I approved dissemination in the form of a notice to the class and set a hearing for today.

The scheduling order defined the class as all former record holders and beneficial owners of Class A Pivotal stock who received the $15 per share for their stock in connection with the acquisition by VMware, Inc, along with their heirs, assigns, transferees, successors-in-interest, subject to some exceptions, which were typical. They excluded former defendant Cynthia Gaylor and defendants VMware, Dell, Michael Dell, Robert Mee, and any entities in which they had direct or indirect controlling interests, and their immediate family, affiliates, legal representatives, heirs, estates, successors, or assigns. Everyone but the family pets.

Second, the class also excludes HBK Master Fund L.P. and HBK Merger Strategies Master Fund L.P. Those entities have pursued a separate appraisal action with respect to their Class A stock. That is Civil Action 2020-0165.

I'll turn now to the merits of the settlement.

Rule 23 requires some form of notice to the class as a matter of due process. The form of notice, however, is largely discretionary according to the Delaware Supreme Court's decision in *Nottingham*

Partners v. Dana.

When entering the scheduling order on June 13th, I reviewed and approved, in form and substance, a notice to the class. Plaintiffs retained JND Legal Administration, or "JND," as settlement administrator to provide notice. Luiggy Segura, vice president of JND, submitted an affidavit that detailed JND's efforts to provide notice. That's Docket No. 244.

As of September 26, 2022, a total of 188,428 notices had been mailed to potential class members. I actually understand notice efforts were more extensive than that from today's presentation.

Mr. Segura further averred that on or about July 12, 2022, JND established a toll-free telephone contact center to address questions. Despite adequate notice, no objections were received, no class members appeared today to object, and I haven't heard that anyone even called the number.

So I'll evaluate now whether the terms of the settlement are fair and reasonable.

As 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. [The Court] must balance the policy preference for settlement against the need to insure that the interests of the class have been fairly represented."

In approving a settlement, my function is to make an independent determination, through the exercise of my own business judgment, that the settlement is intrinsically fair and reasonable.

As Vice Chancellor Laster explained in *Activision*, the Court must "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 certain factors, including the nature of the claims, the possible defenses thereto, and the legal and factual circumstances of the case. But I will not dilate in detail on those factors due to the presentation today which I think adequately covered all of the issues.

I'll turn to a brief overview.

Sometimes the analysis we must

undertake at this stage is boiled down to balancing the "give" and the "get." Here, the "give" is the form of release, which I've reviewed and view to be customary, and the "get" was $42.5 million. It's pretty good. It represents approximately 45 cents per class share, which is about a 3 percent premium to the $15 per class share. This amount compares favorably to other recent large settlements of similar actions approved by this Court.

I'll note that both sides faced not insubstantial risk were the action to continue. In any event, I find the settlement to be fair and reasonable and it is approved.

I'll turn now to the application of attorneys' fees and expenses. Plaintiffs' counsel has requested a fee of award of $10,625,000, which is about 25 percent of the fund. They also request expenses of $984,891.13, resulting in a total sum of about $11.6 million. This amount is inclusive of a requested $10,000 incentive award to the lead plaintiff.

The role of the Court in setting a fee award is to exercise its own sound business judgment. Traditionally, the factors of *Sugarland* guide this

analysis. Of those factors, the most important is the benefit conferred in this litigation. The other factors are the standing and ability of counsel, the complexity of the litigation, and the time and effort of counsel, along with the contingent nature of the representation.

The benefit here is quantifiable; again, a $42.5 million cash payment. In *Americas Mining*, the Delaware Supreme Court stated that, "when the benefit is quantifiable ... by the creation of a common fund, *Sugarland* calls for an award of attorneys' fees based upon a percentage of the benefit." Thus, the inputs for calculating fee awards based on quantifiable benefits are the appropriate percentage and the amount of the benefit.

Here, the fees exclusive of cost represent 25 percent of the settlement amount, which becomes slightly north of 27 percent once costs are included. This is on the upper end of percentages awarded in cases that have settled at this posture.

As this Court explained in *Orchard Enterprises*, in cases that settle close to trial, a typical fee award ranges from 22.5 percent to 25 percent. Higher percentages, however, are

warranted when cases progress to post-trial or they're particularly complicated.

Despite the relatively high percentage, the award requested appears reasonable due to several factors. One, this case underwent significant discovery prior to settlement, which is both time and resource intensive. Two, plaintiffs' counsel engaged in presuit investigation in the form of Section 220, a prelitigation measure encouraged by this court typically. Also, precedent supports the amount of fee award, and I refer to pages 33 and 34 of the plaintiffs' excellent settlement brief.

For completeness, I'll address the remaining *Sugarland* factors, which confirm the propriety of the amount requested.

Counsel took this action on a purely contingent basis. They took on 100 percent of the risk. The issues presented in this litigation were complex. Standing and ability of counsel weighs in favor of approving a request. The time and effort was significant. Plaintiffs' counsel initiated this action after undertaking an active Section 220 action. And the action involved extensive discovery, mediation, motion practice, ultimately settlement.

I often look to the lodestar as a cross-check on the reasonableness of the fee requested and to get a sense of time and investment of counsel. And here, the lodestar reflects, inclusive of fees, the multiplier is approximately 1.4 by our math, certainly within reason and keeping with court precedent. So the lodestar supports the reasonableness of the amount requested.

In sum, the award is reasonable and it's granted.

I'll turn briefly to the incentive award of $10,000. I think that's more than appropriate. You know, incentive awards of more than that amount have been awarded and granted to a lead plaintiff who've undertaken far less effort than Ms. Lopez has here. She was, in fact, the model plaintiff.

As a last and final matter, I just want to commend everyone involved for navigating the complexities of a pandemic while litigating zealously on behalf of your clients in a fair and reasonable and civil manner as this Court expects. I'm grateful. Congratulations.

Are there any questions?

ATTORNEY TIMLIN: Thank you, Your Honor.

ATTORNEY CELIO: Thank you.

THE COURT: If you want to submit a form of order with the blanks filled in, either now or on the docket, I'll grant it.

ATTORNEY TIMLIN: If I may approach?

THE COURT: Yes, you may approach. Instant relief.

Have the blanks been filled in?

ATTORNEY TIMLIN: They have not been but I flagged the pages.

THE COURT: Don't trust me. Fill them in and hand it back up.

ATTORNEY TIMLIN: I didn't want to be presumptuous.

THE COURT: I've transposed numbers, so it's best that you do it.

Congratulations. We'll make sure this gets to the Register in Chancery. We are adjourned.

(Court adjourned at 2:13 p.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 37 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 at pages 27 through 36, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington this 12th day of October 2022.

/s/Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter