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Case No. 2018-0056-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD NORWOOD, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	C.A. No.: 2018-0056-KSJM
v.	)	CLASS ACTION
STAN LEE, and GILL CHAMPION,	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT, APPROVAL OF PLAN OF ALLOCATION, CERTIFICATION OF THE CLASS, AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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Plaintiff Richard Norwood ("Plaintiff"), a former stockholder of POW! Entertainment, Inc. ("POW" or the "Company"), on behalf of himself and all other former stockholders of POW, through undersigned counsel, respectfully submits this brief in support of his Motion for Final Approval of the Proposed Settlement, Certification of the Class, and an Award of Attorneys' Fees and Expenses, through which Plaintiff respectfully requests that the Court approve (a) the proposed settlement (the "Settlement") between Plaintiff and Defendants (defined below, and, together with Plaintiff, the "Parties"), as set forth in the Stipulation and Agreement of Settlement dated September 7, 2022 (the "Stipulation"); (b) the proposed plan of allocation; (c) certification of the Class for Settlement purposes only; (d) an award of attorneys' fees and reimbursement of expenses; and (e) a modest service award for Plaintiff. A hearing is scheduled for December 9, 2022, for the Court to consider these matters.

I. INTRODUCTION

This is a stockholder class action ("Action") involving the Agreement and Plan of Merger entered into by POW and First Creative International Limited ("First Creative"), a Hong Kong corporation, Camsing Entertainment International, Inc. ("Merger Sub"), a Delaware corporation and wholly-owned subsidiary of First Creative (collectively, "Camsing") on May 5, 2017 (the "Merger Agreement"). Pursuant to the Merger Agreement, Camsing would acquire all outstanding shares

of POW (the "Merger") for $11.5 million less certain deductions (the "Merger Consideration"), including payments made to certain Individual Defendants.

This Action generally alleges that Defendants Stan Lee ("Lee")[1] and Gill Champion ("Champion"), in their capacities as the alleged controlling stockholders of POW and the sole members of POW's Board of Directors (the "Board" or the "Individual Defendants" or "Defendants"), breached their fiduciary duties to POW stockholders by engaging in a flawed sale process, designed to extract lucrative benefits for both the Individual Defendants and Camsing, including post-close employment, post-close equity stakes, and the transfer of Merger-related costs, to the detriment of POW stockholders. The Individual Defendants have denied liability, contending that a majority of fully informed, disinterested stockholders approved the transaction, and that alternatively, the transaction was entirely fair when POW's deteriorating financial position created a trajectory to insolvency and loss of all stockholder value.

After the close of fact discovery and before dispositive motion practice, the parties reached an arm's-length resolution with the assistance of an experienced mediator.

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[1] Joan Celia Lee, as Trustee of the Lee Family Survivor's Trust "A" Dated October 12, 1985, was substituted as a defendant in place of Stan Lee and the Estate of Stan Lee. For purposes of this Motion, references to "Defendant Lee" or "Lee" refer to Stan Lee and/or his successor.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Relevant Factual Background

1. The Origins of POW

Defendant Lee is co-creator of many famous comic book characters, including Spider-Man, Iron Man, and the Incredible Hulk. ¶ 6.[2] After Defendant Lee left Marvel Comics in 2001, the Individual Defendants and non-party Arthur Lieberman ("Lieberman")[3] co-founded POW! Entertainment LLC ("POW LLC"). ¶¶ 7, 14, 41.[4] The Company's common stock traded under the ticker symbol POWN. *Id.* at ¶ 7. POW primarily functioned as a multimedia production and licensing company "to leverage the creative output and branded image of Stan Lee and to outsource to, and work with, established production companies willing to finance and undertake the resource and labor-intensive aspects of producing entertainment projects." ¶ 42. In December 2010, POW filed a Form 10 General Form for Registration of Securities (the "Registration Statement") with the SEC, which after being amended, became effective February 2011, and POW began filing periodic reports as required by the

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[2] References in the form "¶ __" are to the Verified Class Action Complaint. For Breach of Fiduciary Duty ("CAC"), D.I. # 1.

[3] Lieberman is deceased and is not a party to this Action.

[4] Prior to the formation of POW LLC, Defendant Lee and Peter F. Paul co-founded Stan Lee Entertainment ("SLE") in 1998 to license and monetize certain intellectual property holdings of Defendant Lee. ¶ 30. In 1999, SLE merged with Stan Lee Media ("SLM"). *Id*. By the end of 2000, SLM ceased operations and entered bankruptcy. ¶ 31.

Federal securities laws. ¶ 49.

2. Lee, Champion, and Lieberman's Compensation Prior to the Merger

Defendant Lee, Defendant Champion, and Lieberman collectively owned over 65% of POW's common stock. ¶¶ 50, 51. In addition to their significant holdings, each received lucrative employment contracts from POW. ¶ 52. Additionally, the Company and Defendant Lee and Lieberman entered into deferred compensation agreements which, as of November 22, 2010, showed that POW owed Lee $1,132,500 and Lieberman $1,195,416. ¶ 53.

Compensation accounted for the majority of POW's operating costs. ¶¶ 56, 90. In 2008, the Company paid approximately $1.3 million in compensation, yet only derived revenue of approximately $468,000. ¶ 57. Similarly, in 2009, the Company expended roughly $810,000 in compensation, but derived only $113,000 in revenue. *Id.* According to the Company's first Annual Report on Form 10-K, filed with the SEC on March 28, 2011 ("2010 Annual Report"), nearly 70% of POW's operating costs were attributed to salaries and compensation. ¶ 60. Similarly, on March 23, 2012, POW filed its 2011 Annual Report on Form 10-K with the SEC ("2011 Annual Report") disclosing salary and compensation expenses of $1.7 million. ¶ 63. From 2008 through the first half of 2017, the Company recognized approximately $15.8 million in revenue and $22.4 million in operating costs, of which a majority, $14.4 million, was attributable to salaries and compensation.

¶¶ 89-90.

3. POW's Operations Leading Up to the Merger

Pursuant to the 2010 Annual Report, POW disclosed revenue of over $2 million but reported a net loss of $1.1 million largely due in part to the more than two-fold increase in salary and compensation expenses. ¶ 60. In June 2011, POW received $500,000 for the rights of a superhero character, the Annihilator, with a potential subsequent payment of $375,000. ¶ 61.

The Company's 2011 Annual Report included certain amended deferred compensation agreements for Defendant Lee, Defendant Champion, and Lieberman. ¶ 64. Pursuant to the amendments, Defendant Lee and Lieberman's deferred compensation payouts were increased to $100,000 per year and none of Defendant Champion's salary would be deferred going forward. ¶ 66. Following Lieberman's death, on June 11, 2012, POW filed a Current Report on Form 8-K with the SEC disclosing amendments to the Company's bylaws reducing the number of directors from at least three to at least one. ¶ 71.

On March 29, 2013, the Company filed its 2012 Annual Report on Form 10-K with the SEC ("2012 Annual Report"), reporting revenues of over $2 million, but a net loss of $1.8 million. ¶ 73. Similar to prior years, POW's largest operating cost was salary and compensation which amounted to nearly 60% of total operating costs. ¶ 74.

Both the 2011 Annual Report and the 2012 Annual Report stated that the Company's disclosure controls and procedures were not effective. ¶¶ 69, 76. However, after receiving a letter from the SEC which requested that the Company provide further information regarding its evaluation of its internal controls and procedures, the Company filed an Amended 2012 Annual Report disclosing that a material weakness existed with regard to the design or operation of its internal control over financial reporting which was initially identified at the beginning of 2010. ¶¶ 77, 78. During the years that followed, 2013 through 2015, the Company's financial struggles continued, and POW continued to be plagued by ineffective internal controls, all of which remained unaddressed. ¶¶ 79–86.

4. The Board Explores the Sale of POW and Enters into a Merger Agreement with Camsing

In 2015, the Board, comprised only of the Individual Defendants Lee and Champion, sought to sell the Company to an unrelated third party, Ricco Media (Holdings) Limited ("Ricco"), at a price of $0.07 per share. ¶ 108; Proxy Statement.[5] However, the 2015 sale did not materialize due to certain cash flow issues by Ricco. *Id.*

In 2016, the Company entered into an exclusivity agreement with a Chinese company, Tianjin Cameron Culture and Technology Co. Ltd. ("Tianjin"). ¶ 111.

[5] "Proxy Statement" or "Proxy" refers to the proxy statement disseminated by the Company on September 7, 2017.

According to the Proxy Statement, the exclusivity agreement was for a period of four months, but, due to purported foreign investment limitations imposed by the People's Republic of China, the deal did not materialize. ¶¶ 111–14.

On November 9, 2016, Champion was introduced to Camsing via Rick Licht of BackEast.[6] ¶ 115. Following the initial introduction, the Individual Defendants met with Camsing, and shortly thereafter, due diligence and negotiations regarding the sale of POW to Camsing commenced. *Id.*

In early May 2017, media reports surfaced that POW and Camsing entered into the Merger Agreement after Camsing filed a notice of a Disclosable Transaction with the Hong Kong Stock Exchange (the "Camsing Filing"). ¶ 94. The Camsing Filing disclosed that POW was being purchased for $11.5 million. ¶ 95. The Camsing Filing also disclosed that the Merger was conditioned upon Lee and Champion entering into employment agreements and equity agreements, which would allow Lee and Champion to collectively purchase 15% (7.5% each) of the post-merger entity. ¶ 96.

The Merger Agreement contained a number of provisions; for example, potential dissenting shareholders who sought to exercise their appraisal rights were not only required to pay the costs related to the exercise of their rights, but also the

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[6] BackEast Entertainment, Inc. ("BackEast") operates as a consulting firm and stood to derive $500,000 as a fee when the Merger was completed.

costs associated with the Company's defense against that shareholder. ¶ 134. Similarly, the Merger Agreement also provided for a more than $1 million reserve[7] to be subtracted from the total Merger Consideration which would be used to cover certain, potential contingent liabilities that may arise from the Merger, including but not limited to, payments due to dissenting stockholders who exercised their appraisal rights. ¶¶ 129, 135–37. Third, the Board agreed to an $800,000 termination fee, which amounted to 13% of the Merger Consideration. ¶ 141. Based on the foregoing and the Company's deteriorating financial condition, it seems unlikely that POW could have afforded to pay the $800,000 termination fee if it decided to walk away from the Merger. *Id.*

Despite the foregoing, the Board – consisting of Lee and Champion – approved the Merger Agreement and represented to shareholders that the Merger was "advisable, fair to and in the best interests of the Company's stockholders . . . ." ¶ 125.

On September 7, 2017, POW disseminated the Proxy Statement recommending that POW shareholders vote in favor of the Merger and setting September 28, 2017 for the special meeting of stockholders. ¶ 98. As aforementioned, the Proxy discussed the Board's attempt to sell POW at a purported price of $0.07 per share in 2015 and the Board's subsequent attempts to sell POW.

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[7] The total amount withheld as a reserve is $1.1 million. *See* Proxy 7.

¶ 108. The Proxy further disclosed that Lee and Champion failed to obtain a fairness opinion relating to the merger with Camsing to assess POW's true value. ¶ 117. Similarly, the Individual Defendants did not retain an investment banking firm (or similar entity) to help facilitate a sale of the Company. *Id.*

On September 28, 2017, the stockholder vote relating to the Merger was held, the stockholders approved the Merger, and the Merger was consummated shortly thereafter. ¶¶ 164, 171.

5. POW Shareholders Learn of the Actual Merger Consideration

While the Proxy stated that the total Merger Consideration was $11.5 million and each shareholder would receive approximately $0.05 per share, it was not until October 2017, after shareholders had cast their votes on the Merger, when the shareholders learned that the remainder of the Merger Consideration available for distribution, after deductions for various POW expenses and debt, was approximately $6.2 million, or $0.04691 per share. Proxy 6-7; ¶¶ 128, 172. The decrease in Merger Consideration available to POW shareholders is attributable to certain terms of the Merger Agreement (some of which are discussed above), negotiated by the Individual Defendants, which shifted certain costs and risks to POW's minority shareholders. ¶ 129. Additionally, at least $3.1 million of the Merger Consideration was paid to Defendants Lee and Champion as controlling stockholders. ¶ 173. Similarly, approximately $1 million was deducted from the

Merger Consideration to pay certain deferred compensation to Lee and the children of Lieberman. ¶ 140. Defendants have disputed these allegations from the CAC.

B. Relevant Procedural History

This litigation began on January 24, 2018, when Plaintiff filed the CAC in the Court of Chancery of the State of Delaware, naming as defendants Chairman of the Board and Chief Creative Officer of POW Lee; President, Chief Executive Officer ("CEO") and director of the Company Champion; and Chief Financial Officer ("CFO") Bick Le ("Bick Le").[8] D.I. # 1.

On May 14, 2018, Defendant Champion filed his Answer to the CAC. D.I. # 18. On June 28, 2018, Defendant Lee filed his Answer to the CAC. D.I. # 24. Both Defendant Champion and Defendant Lee denied liability in their respective Answers. On November 1, 2018, the Action was reassigned to the Honorable Kathaleen St. Jude McCormick. D.I. # 25.

As a result of the death of Defendant Lee, on July 7, 2020, Plaintiff filed a Motion to Substitute the Lee Family Trustee for Defendant Lee, which the Court granted on July 8, 2020. D.I. # 30.

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[8] Following Defendant Bick Le's filing of a motion to dismiss, on October 30, 2020, the Court entered an order granting Plaintiff's Notice of Voluntary Dismissal of Defendant Bick Le. D.I. # 39. As such, this Motion solely focuses on the alleged misconduct by Defendants Lee and Champion.

On January 13, 2021, the Court entered an Order granting, with modifications, the parties' Stipulation Governing Case Schedule. D.I. # 41. Thereafter, the parties began engaging in written discovery.

On June 28, 2021, the Court entered an Order Governing the Production and Exchange of Confidential and Highly Confidential Information. D.I. # 51. Over the next several months, counsel for Plaintiff and Defendant Champion met and conferred via telephone and letters to discuss certain outstanding discovery issues raised by both parties. The parties ultimately agreed that they would supplement any deficient responses within 60 days from the completion of the Parties' document production. On November 16, 2021, the Court entered an Order granting the parties' Amended Stipulation Governing Case Schedule ("Amended Stipulation") which provides for the completion of all fact discovery by February 28, 2022. D.I. # 55. The Amended Stipulation also informed the Court that the parties agreed to mediate the Action on January 13, 2022. *Id*.

On November 19 and November 20, 2021, Defendant Champion and Plaintiff respectively confirmed that they had completed their document production. On January 13, 2022, following the submission of confidential mediation statements, the Parties participated in a virtual mediation session with Robert A. Meyer, Esq. of JAMS. At the mediation, the Parties reached an agreement in principle to settle their claims for a payment of $950,000, to be distributed among the Class (as defined

herein) and agreed to cooperate to prepare definitive documentation memorializing the terms of the proposed settlement.

On January 18, 2022, the Parties agreed to extend the deadline to supplement any deficient discovery responses by 30 days while counsel worked to draft an agreeable binding term sheet ("Term Sheet"). On February 4, 2022, counsel for the Parties executed the Term Sheet setting forth the general terms on which the Parties agreed to resolve the Action subject to Court approval.

Thereafter, the Parties collectively drafted the Stipulation which was executed on September 7, 2022. The Stipulation is intended to fully, completely, finally, and forever release, relinquish, settle and discharge the Released Plaintiff Claims by Plaintiff and the Class Members (as defined herein) with prejudice, and it is the intention of the Parties that the Settlement will release all Released Plaintiff Claims by Plaintiff and the Class Members that were alleged or could have been alleged in this Action.

C. Defendants Deny Liability

From their Answers, the Individual Defendants have denied all liability. Defendants have contended that: (i) they each were protected by 102(b)(7) charter provisions and that neither was beholden to each other; (ii) that a majority of (including a majority of the minority) fully informed, disinterested stockholders approved the Merger; and (iii) the Merger was entirely fair.

III. ARGUMENT

Plaintiff respectfully seeks (A) final approval of the Settlement, (B) certification of the Class, (C) approval of the Plan of Allocation, (D) Class Counsel's Fee and Expense Award, and (E) a Service Award. All such relief should be approved.

A. The Settlement Is Fair, Reasonable, and Adequate and Should Be Approved by the Court

1. Applicable Standard

Delaware law has long favored the voluntary settlement of contested claims. *See, e.g.*, *In re Celera Corp. S'holder Litig.* No. 6304-VCP, 2012 WL 1020471, at *8 (Del. Ch. Mar. 23, 2012) *aff'd in part, rev'd in part*, 59 A.3d 418 (Del. 2012); *In re Cox Radio, Inc. S'holders Litig.*, No. CIV.A. 4461-VCP, 2010 WL 1806616, at *8 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010), and *aff'd*, 9 A.3d 475 (Del. 2010); *In re Triarc Cos., Inc., Class & Derivative Litig.*, 791 A.2d 872, 876 (Del. Ch. 2001); *Lewis v. Hirsch*, No. CIV.A. 12,532, 1994 WL 263551, at *2 (Del. Ch. June 1, 1994) ("The law of Delaware favors the voluntary settlement of class actions and shareholder derivative suits.").

In considering the proposed settlement of a class action, the Court is called upon to determine, in the exercise of its own judgment, whether the settlement is fair, reasonable, and adequate. *See, e.g., In re Cox Radio*, 2010 WL 1806616, at *9; *Marie Raymond Revocable Tr. v. MAT Five LLC*, 980 A.2d 388, 402 (Del. Ch.

2008), *judgment entered*, No. CIV.A. 3843-VCL, 2008 WL 5352169 (Del. Ch. Dec. 19, 2008), and *aff'd sub nom. Whitson v. Marie Raymond Revocable Tr.*, 976 A.2d 172 (Del. 2009). The Court's duty in reviewing a settlement agreement is to consider the nature of the claims asserted, the possible defenses, and the legal and factual circumstances of the case. *See, e.g., In re Celera*, 2012 WL 1020471, at *20.[9]

Of particular import is the balancing of the strength of the claims being compromised against the benefits secured by the settlement for Class members. *See In re Cox Radio*, 2010 WL 1806616, at *9. In determining whether to approve a settlement, the Court weighs the "give" and the "get" obtained in the settlement to "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." *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1043, 1064 (Del. Ch. 2015) (citations omitted). To make this determination, the Court need not "decide any of the issues on the merits." *Polk*, 507 A.2d at 536; *see also Rome v. Archer*, 197 A.2d 49, 53

[9] In so doing, the Court may consider several factors, including "(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 collectability of a judgment, and (6) the views of the parties involved, pro and con." *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986).

(Del. 1964) ("To do so would defeat the basic purpose of the settlement of litigation.").

Here, this analysis weighs strongly in favor of approval of the Settlement. The Settlement is a product of years of intense litigation, the result of hard-fought negotiations, and an all-day virtual mediation session overseen by an experienced mediator. The Settlement provides substantial cash consideration and reflects Plaintiff's well-informed judgment regarding the strength of the claims and defenses at issue, the potential damages award, and the benefits of a guaranteed recovery.

2. The Settlement Provides a Significant Financial Benefit for the Class

This litigation conferred a substantial benefit on the Class: a common fund of $950,000. The significance of the Settlement here is highlighted by its proportion in relation to the actual Merger Consideration received by former POW shareholders.[10] At the time of the Merger, approximately 66,043,632 shares were held by minority shareholders, and each received $0.04691 per share for a total of $3,098,106.78. The $950,000 settlement (prior to the payment of the administrative costs, requested attorney's fees, and service award) amounts to a per share increase in Merger Consideration of $0.01438, or a 30.65% increase in Merger Consideration for

[10] As noted above, the Proxy statement indicated that the total Merger Consideration was $11.5 million; however, former POW shareholders later learned that the actual Merger Consideration available for distribution was approximately $6.2 million.

minority shareholders. The Settlement Amount is an "obvious and self-pricing benefit." *In re Orchard Enters., Inc. Stockholder Litig.*, No. CIV.A. 7840-VCL, 2014 WL 4181912, at *5 (Del. Ch. Aug. 22, 2014), *judgment entered sub nom. In re Orchard Enters. Inc. S'holders Litig.*, No. 7840-VCL, 2014 WL 4248096 (Del. Ch. Aug. 27, 2014).

The monetary benefit provided by the Settlement merits approval, exceeds the premium obtained in other recent settlements approved by this Court, and represents a substantial benefit on a percentage basis to POW's former minority stockholders. *See, e.g., In re Sauer-Danfoss, Inc. S'holders Litig.*, C.A. No. 8396-VCL, 2017 WL 2654832 (Del. Ch. June 19, 2017) (approving settlement, which was an approximately 1.46% price increase in an entire fairness case); *In re HomeFed Corp. Stockholder Litig.*, C.A. No. 2019-0592-LWW, 2022 WL 489484 (Del. Ch. Feb. 15, 2022) (approving settlement, which was an approximately 9.6% price increase to merger consideration).

3. Nature of the Claims and Difficulties of the Litigation

A comparison of the benefits provided by the Settlement to the challenges Plaintiff would have faced at trial supports approval of the Settlement. Although Plaintiff hoped to prevail at trial and beyond, he and Class Counsel submit that, in light of the risks outlined below, and elsewhere in this brief, the Settlement is in the best interests of the Class.

At the heart of the difficulties Plaintiff faced is his claims for breach of fiduciary duty against the Board. In agreeing to the Settlement, Plaintiff considered the arguments that Defendants asserted or could assert as to why they did not breach their fiduciary duty of loyalty. Plaintiff was nonetheless relatively confident that he would be able to prove a non-exculpated breach of the duty of loyalty by Lee and Champion. However, Plaintiff's confidence necessarily carries a risk that at trial the Court may disagree. Plaintiff and his counsel were well aware of Defendants' defenses and the risk that any of the Defendants could have successfully obtained dismissal on summary judgment. Plaintiff further faced the risks that: (i) the Board could succeed on a 102(b)(7) defense; and (ii) that it would be determined that Lee and Champion were not beholden to each other, did not elevate their personal interests above those of the minority shareholders, or otherwise did not act in a manner subjecting them to liability.

Moreover, Plaintiff was also forced to consider the relatively uncommon issue of collectability and enforceability in this case. While POW had limited insurance coverage applicable to Plaintiff's claims, further litigation would erode or significantly reduce the chance of any possible recovery. Further, the Merger at issue here was between POW (a domestic company) and Camsing (a foreign company). As such, any damage award or monetary judgment in Plaintiff's favor to be derived from Camsing in excess of the policy limits of POW's directors' and officers'

insurance would need to be enforced against a foreign entity in a foreign country. Consequently, any monetary payment to the former POW shareholders would hinge on the ability of counsel (and others) to collect payment from an overseas entity. Plaintiff and Class Counsel respectfully submit that enforcing and collecting any such judgment in China is a near impossibility.

Weighing the benefit of the certain $950,000 gross Settlement Amount ($0.01438 per minority share) against (1) the possibility that any such judgment would not be fully collectable and enforceable, (2) the possibility of losing on liability at trial, and (3) the very real possibility of securing a lesser amount of damages, or none at all, at trial, Plaintiff and Class Counsel determined that the Settlement was a fair and reasonable resolution for the Class.

4. The Settlement Is the Result of Arm's-Length Negotiations Between Experienced Counsel Before an Experienced and Well-Respected Mediator

When evaluating the fairness of a settlement, Delaware courts also scrutinize the negotiations that led up to the settlement, and heavily favor settlements that resulted from arm's-length negotiations. *See Ryan ex rel. Maxim Integrated Prods., Inc. v. Gifford*, Civ. A. No. 2213-CC, 2009 WL 18143, at *5 (Del. Ch. Jan. 2, 2009) (noting that the settlement there was "fair, reasonable and adequate" when reached after "vigorous arms-length negotiations following meaningful discovery"). Here, the Parties arrived at the Settlement only after months of negotiations, the exchange

of discovery requests, Plaintiff's review of more than 20,000 pages of documents produced during discovery, an all-day virtual mediation session overseen by Robert Meyer, a respected and experienced mediator, multiple rounds of remote discussions and exchange of draft settlement terms, and a mediator's proposal.

5. Class Counsel's Experience and Opinion Likewise Weigh in Favor of Approval

Delaware Courts recognize that the opinion of a representative plaintiff and their experienced counsel is entitled to weight in determining the fairness of a settlement. *See Polk*, 507 A.2d at 536 (stating that the Court considers "the views of the parties involved" when determining the "overall reasonableness of the settlement"). Class Counsel possess substantial experience in negotiating settlements of complex derivative and class actions, as well as a lengthy track record of advocacy in this Court. Class Counsel believe that the Settlement is fair and in the best interests of the Class. Furthermore, Defendants were represented by counsel with the requisite experience and skill necessary to evaluate the proposed terms of the Settlement.

By entering into the Stipulation, Class Counsel and Defendants' counsel believe that the Settlement is fair, adequate, and reasonable. The opinion of counsel to both Plaintiff and the Class, as well as Defendants, is shaped not only by their experience, but by their deep knowledge of this case through significant discovery, mediation preparation, and the mediation. This opinion further weighs in favor of

approving the Settlement. *See, e.g., Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 99-100 (Del. 1979) (approving settlement where plaintiff's counsel concluded that the settlement was fair and in the best interests of the stockholders based on pretrial discovery).

6. The Plan of Allocation is Fair

As part of the settlement process, the Court must also review the plan of allocation to ensure that it is fair, reasonable and adequate. *CME Grp., Inc. v. Chicago Bd. Options Exch., Inc.*, No. CIV.A. 2369-VCN, 2009 WL 1547510, at *7 (Del. Ch. June 3, 2009). Here, the proposed Plan of Allocation treats all Class Members equally and provides that the Net Settlement Fund will be allocated and distributed on a pro rata per-share basis to Class Members who held shares of POW common stock on October 23, 2017 (the date the Merger closed); provided, however, that no distribution or payment shall be made to any Excluded Persons.[11] Stipulation ¶ 3.4.ii.

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[11] The Stipulation defines the Excluded Persons as Defendants, members of the immediate family of any Defendant, any entity in which a Defendant has or had a controlling interest, and legal representatives, heirs, successors-in-interest, transferees and assigns of any such excluded person or entity; and any Person who exercised their appraisal rights under Section 262 of the General Corporation Law of the State of Delaware and their respective successors-in-interest, successors, predecessors-in-interest, predecessors, representatives, trustees, executors, administrators, estates, heirs, assigns and transferees, immediate and remote, and any person or entity acting on behalf of, or claiming under, any of them. Stipulation ¶ 1.11.

The Plan of Allocation is based on the plan in *In re Dole Food Co., Inc.*, C.A. No. 8703-VCL, 2017 WL 624843, at *1 (Del. Ch. Feb. 15, 2017), which was modified by *In re PLX Technology Inc. Stockholders Litigation*, C.A. No. 9880-VCL, 2022 WL 1133118, at *5 (Del. Ch. Apr. 18, 2022). With respect to payments intended for Class Members who held their shares through Depository Trust Company ("DTC") participants, the Plan of Allocation would allow the Settlement Administrator to obtain from the DTC certain additional information which would enable the Settlement Administrator to send payments directly to the DTC participants.[12] *Id.* Such additional information includes:

1. An allocation report used by DTC to distribute the Merger Consideration,

2. Any additional information necessary to identify all DTC participants who received the Merger Consideration in exchange for their shares of POW common stock,

3. The number of shares as to which each DTC participant received payment or the amount of consideration each DTC participant received, and

4. The correct address or other contact information used to communicate with the appropriate representatives of each DTC participant that received the Merger Consideration.

Id.

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[12] This Plan of Allocation was recently approved in *Garfield v. BlackRock Mortg. Ventures, LLC, et al.*, No. 2018-0917-KSJM, 2022 WL 2077910 (Del. Ch. June 8, 2022).

For all other record holders, settlement funds will be paid directly to those record holders. In light of the foregoing, redline and clean versions of the Amended [Proposed] Order and Final Judgment, attached as Exhibits 3 and 4 to the Transmittal Affidavit of Blake Bennett, are being submitted herewith.[13]

7. The Reaction of the Class Supports Approval

On September 19, 2022, the Court approved the Notice and entered a Scheduling Order setting the Settlement Hearing for December 9, 2022. D.I. 57. Pursuant to the Scheduling Order, on October 7, 2022, the Notice was mailed to all former POW stockholders of record that are members of the Class at their last known address appearing in the stock transfer records maintained by or on behalf of the Company and was posted online at www.POWEntertainmentMerger Settlement.com, along with the Stipulation and the Scheduling Order. Additionally, on October 10, 2022, the Summary Notice was published in *Investor's Business Daily* and via *PR Newswire*. The Notice advised Class members of their right to object to any part of the Settlement, including the request for fees, reimbursement of expenses, and a service award. To Class Counsel's knowledge, to date, no Class Member has filed an objection or contacted Class Counsel to express an intention to

[13] It was recently brought to Class Counsel's attention that the DTC cannot directly mail checks to POW Class Members. The redlined changes to the previously filed [Proposed] Order and Final Judgment were made to allow the DTC to provide the Settlement Administrator with the information needed to send checks to Class Members.

do so.[14] A positive reaction by the Class likewise supports approval. *See generally Rome*, 197 A.2d at 58.

B. The Class Definition is Appropriate

Plaintiff and Class Counsel respectfully request that the Court approve the Class proposed by Plaintiff.

1. This Action Satisfies the Requirements of Rule 23(a)

Class certification is appropriate if the action satisfies the four requirements of Rule 23(a), and fits "within the framework provided for in subsection (b)" of Rule 23.[15]

Delaware Court of Chancery Rule 23(a) provides that the following requirements be satisfied for an action to proceed as a class action:

1. "The class is so numerous that joinder of all members is impracticable;
2. There are questions of law and fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. The representative parties will fairly and adequately protect the interests of the class."

Id.

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[14] The deadline to serve objections to the Settlement is November 24, 2022, and Plaintiff will respond if any objections emerge.

[15] *Nottingham Partners v. Dana*, 564 A.2d 1089, 1094-95 (Del. 1989).

If Rule 23(a) is satisfied, at least one of the sub-sections of Court of Chancery Rule 23(b) must also be satisfied for the action to be maintained as a class action.

Under Rule 23(b)(1), a class action may be brought if the prosecution of separate or individual actions would create a risk of varying or inconsistent adjudications, or if an individual adjudication would be dispositive of the interests of other class members. Del. R. Ch. Ct. 23(b)(1)(A)-(B). Under 23(b)(3), a class action may be brought where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Del. R. Ch. Ct. 23(b)(3).

As demonstrated below, the claims asserted in this action satisfy the requirements of Rules 23(a), 23(b)(1) and (b)(3). Accordingly, Plaintiff respectfully requests that the Court certify this action as a class action.

a. Numerosity is Satisfied

Del. R. Ch. Ct. 23(a)(1) requires that a proposed Class be "so numerous that joinder of all members is impracticable . . ." Impracticability does not mean impossibility, but rather only difficulty or inconvenience in joining all members of the Class.[16] Here, the class of stockholders for whose benefit this action is brought is so numerous that joinder of all Class members is impracticable. According to the

[16] *Leon N. Weiner & Assoc. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991).

documents produced to Plaintiff and Class Counsel, the former minority shareholders of POW held approximately 66 million shares on the effective date of the Merger. Notice of the Settlement was provided to holders of more than 66 million shares. This number of stockholders easily satisfies the numerosity requirement. In fact, courts have permitted actions to proceed as class actions with far fewer members.[17]

b. Commonality is Satisfied

Del. R. Ch. Ct. 23(a)(2) requires that there be "questions of law or fact common to the class." The commonality requirement is satisfied by demonstrating that a single question of law or fact is common to the class.[18] Here, Plaintiff predicated his claims on the Defendants' breaches of duties in connection with the Merger. Indeed, all factual and legal questions concerning Defendants' liability are common to all members of the Class, including: (1) whether the Defendants breached their duties owed to Plaintiffs and the Class by agreeing to the Merger; and

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17 *See Zimmerman v. Home Shopping Network, Inc.*, C.A. No. 10911 & 10919, slip op. at 3, Jacobs, V.C. (Del. Ch. Oct. 25, 1990) (numerosity is often inferred where claims involve holders of nationally traded securities); *see also Marie Raymond Revocable Tr.*, 980 A.2d at 400 ("numbers in the proposed class in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement.") (external citations omitted).

18 *See Emerald Partners v. Berlin*, CIV. A. No. 9700, 1991 WL 244230, at *3 (Del. Ch. Nov. 15, 1991).

(2) whether Plaintiff and the other members of the Class suffered damages as a result of Defendants' misconduct, and if so, the proper measure of damages.

These claims, involving a class of investors who are all affected similarly by the acts of Defendants, provide a classic case for class certification.[19] Since Plaintiff's claims arise out of the same nucleus of operative facts and are based on the common legal theory of breach of fiduciary duties, and because the relief sought to rectify these violations, *i.e.*, damages, will affect the entire Class, the existence of common questions of law and fact cannot be refuted. Accordingly, Plaintiff has satisfied the requirements of Rule 23(a)(2).

c. The Proposed Class Representative's Claims Are Typical

Del. R. Ch. Ct. 23(a)(3) requires that the claims of the proposed representatives be typical of the claims or defenses of the class that he seeks to represent. Delaware courts have held that in order for typicality to be satisfied, "the

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[19] *Hynson v. Drummond Coal Co., Inc.,* 601 A.2d 570, 575 (Del. Ch. 1991) ("An action seeking to prove a breach of [fiduciary] duty is inescapably a true class action" because "[r]elief whether it be by injunction, rescission or an award of money will be determined by reference to the effects of the fiduciary's wrong on . . . the corporation or all of its stockholders as a class") (emphasis omitted); *Turner v. Bernstein,* 768 A.2d 24, 26 (Del. Ch. 2000) (certifying a class in a case alleging breach of fiduciary duty in connection with a merger, finding common questions of law and fact including "whether corporate fiduciaries have committed breaches of fiduciary duty in connection with a corporate transaction and, if so, what the appropriate class-wide remedy should be.").

legal and factual position of the Class representative must not be markedly different from that of the members of the Class."[20]

Plaintiff's claims and the claims of all other members of the Class arise out of the same course of misconduct by Defendants. Therefore, Plaintiff's claims are typical of the claims of the other members of the Class. Moreover, Plaintiff's prior holdings of common stock of POW further bolsters the conclusion that his claims are typical of the other members of the Class.

d. Plaintiff Fairly and Adequately Protected The Interests of the Class

Del. R. Ch. Ct. 23(a)(4) requires that the proposed class representative fairly and adequately protect the interests of the class. Rule 23(a)(4) is satisfied where, as here: (1) the named plaintiff's interests are not antagonistic to other members of the

[20] *Leon N. Weiner & Assocs.*, 584 A.2d at 1225. However, absolute identity of claims is not necessary. *Odmark v. Mesa Ltd. P'ship.*, Civ. A. No.: 3:91-CV-2376-X, 1992 WL 203541, at *3 (N.D. Tex. June 5, 1992) *aff'd*, 59 F.3d 1241 (5th Cir. 1995); *see also Deutschman v. Beneficial Corp*., 132 F.R.D. 359, 373 (D. Del. 1990); William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3.29 (6th ed. June 2022) (typicality requirement is usually met when "the named representatives' claims share the same essential characteristics as the claims of the class at large."); *see also New Jersey Carpenters Pension Fund v. infoGROUP, Inc*., C.A. No. 5334VCN, 2013 WL 610143, at *6 (Del. Ch. Feb. 13, 2013) (finding that the institutional plaintiff's sale of most (but not all) of its stock prior to the consummation of the merger did not make its claims or defenses atypical).

class, and (2) plaintiff's attorneys are qualified, experienced and generally able to conduct the litigation.[21]

Plaintiff's claims are not substantively different from those claims of other Class Members.[22] In pursuing and establishing his own claims, Plaintiff necessarily protected and promoted the interests of other members of the Class. Indeed, Plaintiff has already undertaken measures to prosecute the claims of the putative Class, including: retaining counsel, researching and filing the CAC, reviewing the mediation statement and reviewing the proposed Settlement. Through counsel, Plaintiff has also engaged in motion practice, reviewed discovery material, conferred with Defendants' counsel and participated in mediation and settlement negotiations. Accordingly, Plaintiff is an adequate representative of the Class who has and will fairly and fully protect the interests of the Class. Plaintiff is represented by counsel experienced in class action litigation, and particularly class actions involving the rights of stockholders. Class Counsel have successfully prosecuted numerous class action suits on behalf of injured investors throughout the country and in this Court.

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[21] *Emerald Partners*, 564 A.2d at 673-74; *Frazer v. Worldwide Energy Corp*., Civ. A. No. 8822, 1990 WL 61192, at *1 (Del. Ch. May 3, 1990); *infoGROUP*, 2013 WL 610143, at *3.

[22] *See Holton v. Rothschild, Unterberg, Towbin*, 118 F.R.D. 280, 282 (D. Mass. 1987).

Finally, Plaintiff has no interests adverse or antagonistic to those of the Class he seeks to represent and has already demonstrated a commitment to the prosecution of the action. For these reasons, Plaintiff submits that the proposed Class and Class Counsel have and will fairly and adequately protect the interests of the Class.

2. Certification Is Proper Under Court of Chancery Rule 23(b)(1) and (b)(3)

Under Rules 23(b)(1) and (3) a class action is certifiable if:

> An action may be maintained as a class action if the prerequisites of paragraph (a) are satisfied, and in addition:
>
> > (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
> >
> > > (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > > (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> >
> > (3) The Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Del. R. Ch. Ct. 23(b)(1); Del. R. Ch. Ct. 23(b)(3).

Del. R. Ch. Ct. 23(b)(1) "applies to class actions that are necessary to protect the party opposing the class or the members of the class from inconsistent adjudications in separate actions."[23] Actions such as this, challenging the exercise of fiduciary responsibility, are properly certifiable under Rule 23(b)(1).[24] Further, "Rule 23(b)(1) clearly embraces cases in which the party is oblig[ated] by law to treat the class members alike, including claims seeking money damages."[25] In this instance, if Class Members filed separate actions against Defendants alleging breach of fiduciary duty claims in connection with the Merger, there is a risk of varying adjudications. Thus, Rule 23(b)(1) is satisfied because the claims in this Action apply equally to all Class Members and the Net Settlement Fund will be distributed equally among the Class Members, preventing against "inconsistent or varying adjudications."[26]

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23 *Nottingham Partners*, 564 A.2d at 1095.

24 *See, e.g.*, *In re Riverbed Tech., Inc. Stockholders Litig.*, C.A. No. 10484-VCG, 2015 WL 5458041, at *2 (Del. Ch. Sept. 17, 2015), *judgment entered sub nom. In re Riverbed Tech., Inc.*, 2015 WL 5471241 (Del. Ch. Sept. 17, 2015) ("this Court has recognized that actions challenging the exercise of fiduciary duties in corporate transactions are properly certifiable under Rule 23(b)(1) . . ."); *O'Malley v. Boris*, No. CIV. A. 15735, 2001 WL 50204, at *7-8 (Del. Ch. Jan. 11, 2001) (finding class certification appropriate under Rule 23(b)(1) in a fiduciary duty suit brought by clients against a brokerage firm).

25 *Turner*, 768 A.2d at 32 (quotations and citations omitted).

26 *Id.* at 30-31; *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, No. CV 2017-0486-SG, 2022 WL 2236192, at *10 (Del. Ch. June 14, 2022) (certifying class under Rule 23(b)(1) because "the pertinent facts . . . will be equally applicable

Rule 23(b)(3) has been referred to as the "damage class action" because it has been typically applied in "class actions primarily seeking relief in the form of damages."[27] Further, because "the essential elements are [now] the predominance of common questions and the superiority of the class action as the method of adjudication, variations in the relief sought by particular class members will not necessarily prevent class certification."[28] Certification under 23(b)(3) is also proper in class actions where "many individuals have small damage claims" because "absent a class suit, it is unlikely that any of the claimants will be accorded relief."[29]

As discussed *supra*, here, common questions of law or fact predominate over individual ones and, given the number of relatively small amounts likely to be recovered by Class Members, a class action is superior to other methods for fairly and efficiently adjudicating the claims. Therefore, certification of this action under Rule 23(b)(1) or (b)(3) is proper.

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to all stockholders.").

27 *See Nottingham*, 564 A.2d at 1095-96.

28 *Id.* at 1096, n.11.

29 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 4:47 (6th Ed. 2022).

C. The Requested Fee and Expense Award Should be Approved

1. The Applicable Standard

Delaware Courts award fees and costs to counsel whose efforts have created a common fund. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1253-55 (Del. 2012). In so doing, Delaware courts "examine the totality of the circumstances" on a case-by-case basis. *Rowe v. Everett*, No. CIV. A. 1967-S, 2001 WL 1019366, at *8 (Del. Ch. Aug. 22, 2001) (quotation marks omitted). Delaware Courts look to the factors set forth in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980):

1. "[T]he results achieved;
2. [T]he time and effort of counsel;
3. [T]he relative complexities of the litigation;
4. [A]ny contingency factor; and
5. [T]he standing and ability of counsel involved."

Americas Mining Corp., 51 A.3d at 1254 (citing *Sugarland*, 420 A.2d at 149). Of these factors, "Delaware courts have assigned the greatest weight to the benefit achieved in litigation." *Id.* at 1254; *In re PAETEC Holding Corp. S'holders Litig.*, Civ. A. No. 6761-VCG, 2013 WL 1110811, at *7 (Del. Ch. Mar. 19, 2013) (same).

Here, Class Counsel respectfully request that the Court approve their request for a Fee and Expense Award in the aggregate amount of $237,500, which is

inclusive of $16,128.06 in out-of-pocket expenses that directly benefited the Class. This request is fully supported by the *Sugarland* factors.

2. The Requested Fee Award Is Fair and Reasonable

a. Counsel Obtained a Substantial Benefit for the Class

The most important factor in setting an appropriate attorneys' fee is the benefit achieved by the litigation. *Americas Mining Corp*., 51 A.3d at 1254. Where, as here, there is a monetary recovery, Delaware Courts typically award a percentage of the recovery. *Id.*

This case settled after years of hard-fought litigation, discovery, negotiations, and mediation. Moreover, the Parties successfully handled the death of Defendant Lee, which further complicated the ability or probability that Plaintiff and the Class would be able to pursue their claims, let alone recover thereupon. Plaintiff's tenacity and willingness to push forward toward to trial is what created a gross settlement fund of $950,000.00, which represents a substantial and certain increase from the Merger Consideration – approximately 30% for former minority shareholders of POW. Of that, Plaintiff respectfully requests an award of attorneys' fees of $237,500 (the "Fee and Expense Award"), which represents 25% of the gross recovery (23.3% after deduction of expenses) and is reasonable.

The Court of Chancery has often approved fee requests of approximately 25% where the settlement benefits are attributable solely to the litigation. *See, e.g., In re*

Physicians Formula Holdings, Inc. S'holder Litig., C.A. No. 7794-VCL, 2017 WL 319058, at *4 (Del. Ch. Jan. 20, 2017) (awarding attorneys' fees representing 23.2% of the settlement fund, plus $354,021.78 in expenses); *In re Primedia Inc. Stockholders Litig.*, C.A. No. 6511-VCL, 2015 WL 3401283, at *4 (Del. Ch. May 26, 2015) (awarding 25% of the settlement fund); *In re Moneygram Int'l, Inc. S'holder Litig.*, C.A. No. 6387-VCL, 2013 WL 68603, at *2 (Del. Ch. Jan. 7, 2013) (awarding 25% of the benefit); *In re CNX Gas Corp. S'holders Litig.*, No. 5377-VCL, 2013 WL 4521799, at *4 (Del. Ch. Aug. 23, 2013) (awarding 27.5% of settlement fund); *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL, 2011 WL 6382523, at *25 (Del. Ch. Dec. 9, 2011) (awarding 25% of the benefit); *In re Tibco Software Inc. S'holder Litig.*, C.A. No. 10319-CB (Del. Ch. Sept. 7, 2016) (Order) (awarding 24.3% of the settlement fund); *In re Jefferies Group, Inc. Shareholders Litig.*, No. CV 8059-CB, 2015 WL 3540662, at *4 (Del. Ch. June 5, 2015) (awarding 23.5% of gross settlement fund); *Kleinman vs. Couchman, et al.*, C.A. No. 10552-CB, 2017 WL 3091094, at *4 (Del. Ch. July 19, 2017) (awarding attorneys' fees representing 30% of the settlement fund plus expenses); *Ponzio v. Preston*, C.A. No. 8672-VCG, 2015 WL 3922386, at *6 (Del. Ch. June 22, 2015) (awarding 25% of the benefit plus expenses).

Plaintiff submits that the amount of and percentage represented by the requested Fee and Expense Award are appropriate in this case for three reasons.

First, the request is appropriate in light of the fact that the Settlement was not reached until the Parties engaged in extensive discovery, briefing, submission of confidential mediation statements, and attendance at an all-day virtual mediation session overseen by an experienced mediator. Had the Parties not agreed to the proposed Settlement, Plaintiff and Class Counsel were ready, willing, and able to pursue trial and a judgment on the merits. As the Court has acknowledged, "[t]he incentive effect of using percentages that increase depending on the stage of the litigation counteracts a natural human tendency towards risk aversion." *Activision Blizzard*, 124 A.3d at 1070.

Second, as noted above, Plaintiff demonstrated vigor from inception. After filing the CAC, Plaintiff sought discovery from Defendants, addressed the complications arising from the death of Defendant Lee, and at all times pursued the interests of the Class in achieving a recovery on behalf of former POW minority shareholders.

Third, the request is appropriate in light of the relatively small nature of the case. As noted above, the total Merger Consideration here was $11.5 million, but the actual consideration available for distribution was much less, $6.2 million. Given that the minority shareholders only received $0.04691 per share, the proposed Settlement provides for a nearly 30% increase in actual Merger Consideration received by minority shareholders. Indeed, this Court has previously noted that

smaller recoveries in smaller cases merit a higher percentage attorney fee to incentivize counsel to take on such cases; otherwise, smaller mergers and cases simply will not garner the skilled counsel class members deserve. *See, e.g., Goodrich v. E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1048 (Del. 1996) (noting the "emerging judicial consensus" that "the percentage of recovery awarded should decrease as the size of the [recovery] increases."); *Chen v. Howard-Anderson*, No. 5878-VCL, 2017 WL 2842185, at *2 (Del. Ch. June 30, 2017) ("In [*In re Trados*], as between the lawyers who generated the benefit and the class that passively received it, I concluded that the incentive award should be borne by the class. In the bigger picture, doing so should help mitigate the problem of underenforcement in smaller companies, where counsel litigating on contingency may not be able to foresee a sufficient recovery to warrant pursuing meritorious claims."). In light of this jurisprudence, Plaintiff's requested Fee and Expense Award is reasonable; indeed, it represents a negative multiplier to Class Counsel's lodestar.

For the aforementioned reasons, the requested Fee and Expense Award is reasonable.

b. Counsel Expended Significant Time and Resources to Secure the Settlement

The requested fee and expense award is also consistent with – and reasonable in comparison to – the amount of time and effort expended by Class Counsel on this case. Class Counsel's efforts here have been considerable. During the course of this

litigation, Class Counsel conducted an extensive pre-suit investigation, devoted time and resources to the drafting and filing of the CAC, received and reviewed thousands of pages of discovery, prepared a confidential mediation statement, attended an all-day virtual mediation session overseen by an experienced mediator, and successfully negotiated the proposed terms of the Settlement.

Their time reflects that effort. While the hourly rate represented by a fee and expense award is a secondary consideration in any fee and expense determination, courts often look to the rate as a so-called "sanity check." *In re Abercrombie & Fitch Co. S'holders Derivative Litig.*, 886 A.2d 1271, 1274 (Del. 2005) (noting the "use of hours invested, per the lodestar method," as an acceptable "'backstop check,' or as a means to evaluate the propriety of the amount of the award against the [amount] asked for by plaintiffs"); *In re AXA Fin., Inc.*, No. 18268, 2002 WL 1283674, at *7 (Del. Ch. May 22, 2002) ("[T]he hourly rate represented by a fee award is a secondary consideration, the first issue being the size of the benefit created."). In this case, that sanity check reveals the Fee and Expense Award to be both reasonable and appropriate – especially in light of Class Counsel's efficient prosecution of this case and their aggregate lodestar amount.

Here, from inception through the Stipulation, Class Counsel expended a total of 1,351.4 hours, for a combined lodestar of $750,087.75.[30] The requested Fee and Expense Award represents a -0.32 lodestar multiplier (indeed, a steep discount) and an implied hourly rate of just $175.74.

These metrics are comparable to – and, indeed, well below – those awarded in other cases and are thus fair and reasonable, especially given the substantial benefit conferred and the complexity of the issues presented. *See, e.g., Franklin Balance Sheet Inv. Fund v. Crowley*, No. CIV. A. 888-VCP, 2007 WL 2495018, at *14 (Del. Ch. Aug. 30, 2007) (fee award represented an hourly rate of $4,023 per hour); *In re NCS Healthcare, Inc. S'holders Litig.*, No. CIV. A. 19786, 2003 WL 21384633, at *3 (Del. Ch. May 28, 2003) (fee award represented an hourly rate of approximately $3,030 per hour).

c. Counsel Worked on an Entirely Contingent Basis

The contingent nature of the attorneys' representation is the "second most important factor considered by this Court" in awarding attorneys' fees. *Dow Jones & Co. v. Shields*, No. 184,1991, 1992 WL 44907, at *2 (Del. Ch. Jan. 10, 1992). In

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30 *See* Transmittal Affidavit of Blake A. Bennett in Support of Plaintiff's Motion for Final Approval of Settlement Approval and for an Award of Fees and Expenses ("Bennett Aff."), Ex. 1 (Affidavit of Nina M. Varindani on Behalf of Faruqi & Faruqi, LLP in Support of Application for an Award of Fees and Expenses) ¶ 3; *Id.*, Ex. 2 (Affidavit of Blake A. Bennett on Behalf of Cooch and Taylor P.A. in Support of Application for an Award of Attorneys' Fees and Expenses) ¶ 3.

this case, Class Counsel undertook representation on a wholly contingent basis, which required the allocation of considerable resources to prosecute the litigation. In such circumstances, a premium over counsel's normal hourly rate is appropriate. *See Seinfeld v. Coker*, 847 A.2d 330, 333-34 (Del. Ch. 2000) ("If the fee is large enough to cover both their lost opportunity costs and the risks associated with bringing the suit, as well as provide a premium, it should induce monitoring behavior."); *Ryan*, 2009 WL 18143, at *13 (Where plaintiffs' attorneys undertook the case on an entirely contingent basis and faced the possibility of receiving no consideration for their efforts if they were not successful in obtaining a recovery, the Court noted that it "has recognized that an attorney may be entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis."); *In re Plains Res. Inc.*, No. CIV. A. 071-N, 2005 WL 332811, at *6 (Del. Ch. Feb. 4, 2005) ("[P]laintiffs' counsel were all retained on a contingent fee basis, and stood to gain nothing unless the litigation was successful. It is consistent with the public policy of Delaware to reward this risk-taking in the interests of shareholders.").

That is all the more true in a case like this, where, in light of the relatively small deal value, the potential recovery was small, the expenses of litigation were nonetheless significant, such that Class Counsel incurred thousands of dollars in unreimbursed expenses. Indeed, in this case, Class Counsel advanced – without

reimbursement, on a fully contingent basis, and without any guarantee of recovery – some $16,000 in expenses, and they were prepared to undertake the considerable expenses of trial as well. Class Counsel advanced these funds with the knowledge that they might not be repaid at all. In addition, the resources devoted here could have been devoted elsewhere through the acceptance of other engagements. Accordingly, the contingent nature of this case and the preclusion of other work support the full award of attorneys' fees and expenses.

d. Counsel's Standing Supports the Requested Award

The standing and ability of counsel is another factor this Court considers when determining the reasonableness of a fee and expense award. *See Sugarland*, 420 A.2d at 149-50. Plainly, Class Counsel could have focused their limited attention and resources on other cases, some with potentially larger damages, and their prosecution of this relatively small case supports the full award of attorneys' fees and expenses.

e. This Litigation Implicates Complex Issues

"All else equal, litigation that is challenging and complex supports a higher fee award." *Activision Blizzard*, 124 A.3d at 1072; *see also In re Del Monte Foods Co. S'holders Litig.*, C.A. No. 6027-VCL, 2011 WL 2535256, at *13 (Del. Ch. June 27, 2011) ("The relative complexity of the litigation supports an award at the higher end of the range."). While all litigation is complex and inherently risky, class action

stockholder litigation is notoriously so. Its outcome is less than certain, success at trial is far from guaranteed, and the risk of total loss – and, thus, no recovery of any kind – is very real. The relative complexities of the litigation further support the requested Fee and Expense Award and reveal it to be reasonable.

3. The Expenses Incurred Are Reasonable in Light of the Litigation

An award of out-of-pocket expenses is warranted where those significant out-of-pocket expenses helped produce a meaningful benefit. Here, Plaintiff requests reimbursement of $16,128.06 in out-of-pocket expenses incurred by Class Counsel. The vast majority of these expenses were incurred in connection with research, filing/service fees, cloud-based eDiscovery and mediation. *See* Bennett Aff., Ex. 1 ¶ 4, and Ex. 2 ¶ 4. In light of the stage of this litigation, these expenses are reasonable, and the Court should order their reimbursement.

Taking into account all of the *Sugarland* factors, the Court should exercise its discretion to award Class Counsel the requested Fee and Expense Award of $237,500, inclusive of expenses.

D. The Service award Should be Approved

Class representatives like Plaintiff are deserving of additional compensation for advocating on behalf of similarly situated stockholders and bearing the burdens associated with litigating, not just for themselves, but on behalf of other aggrieved stockholders. *See In re Palantir Techs. Inc. Class F Stock Litigation*, C.A. No. 2021-

0275-SG, 2022 WL 4236633, at *4 (Del. Ch. May 13, 2022) ($5,000 incentive award to one plaintiff); *In re Pivotal Software, Inc. Stockholders' Litigation*, C.A. No. 2020-0440-KSJM, 2022 WL 5185565, at *3 (Del. Ch. Oct. 4, 2022) ($10,000 to plaintiff); *Brett Hawkes v. The Toronto-Dominion Bank et al.*, C.A. No. 2020-0360-PAF, 2022 WL 4378531, at *4 (Del. Ch. Sept. 21, 2022) ($5,000 incentive award to plaintiff); *In re Tile Shop Holdings, Inc. Litigation*, C.A. No. 2019-0892-SG, 2020 WL 6044639, at *4 (Del. Ch. Oct. 12, 2020) ($25,000 incentive award to each of two named plaintiffs); *In re HomeFed Corp.*, 2022 WL 489484, at *4 ($5,000 incentive award to each co-lead plaintiff); *Ryan v. Mindbody, Inc.*, C.A. No. 2019-0061-KSJM, 2020 WL 7385814, at *2 (Del. Ch. Dec. 15, 2020) ($5,000 award to plaintiff); *In re Sauer-Danfoss, Inc.*, 2017 WL 2654832, at *3 ($5,000 to named plaintiff).

The Supreme Court has noted that service awards usually are modest and should be supported by the factors outlined in *Raider v. Sunderland*, No. CIV. A. 19357, 2006 WL 75310 (Del. Ch. Jan. 4, 2006). *Isaacson v. Niedermayer, et al.*, 200 A.3d 1205, at *1 n.1 (Del. 2018). Pursuant to *Raider*, a service award to a class representative is supported by the record and can be justified by two factors: (1) the time and effort of the class representative; and (2) the benefit to the class. 2006 WL 75310, at *1.

Here, the modest requested incentive award of $4,000 is warranted. Plaintiff spent considerable time in connection with his role as Class Representative in the Action by overseeing and participating in the litigation, including discussing the case with counsel, reviewing pleadings, gathering documents for production, discussing such production with counsel, reviewing the mediation statements and certain confidential exhibits attached thereto, and conferring with counsel regarding the multiple rounds of potential settlement negotiations and the Settlement. He played an integral role in procuring the ultimate benefit of the Settlement to the Class, and this willingness to devote his time and effort for the benefit of the Class and his contribution to the effective presentation of the claims warrants the $4,000 requested service award, *which will be paid from the Fee and Expense Award and thus will not reduce the Class's recovery.*[31]

IV. CONCLUSION

For the foregoing reasons outlined above, Plaintiff respectfully requests that the Court grant (A) final approval of the Settlement, (B) approval of the Plan of Allocation, (C) Certification of the Class, (D) Class Counsel's Fee and Expense

[31] Finally, after providing the Notice to the Class, to date, not a single objection to the Settlement or the requested Fee and Expense Award or Service Award has been received. This silence confirms the quality of the Settlement and the propriety of application for the Fee and Expense Award and Service Award. As noted above, the deadline to serve objections is November 24, 2022, and Plaintiff will respond if any objections emerge.

Award, and (E) a Service Award. All such relief should be approved.

Dated: November 9, 2022

Respectfully submitted,

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