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Case No. 2018-0816-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE DELL TECHNOLOGIES INC. CLASS V STOCKHOLDERS LITIGATION	Consol. C.A. No. 2018-0816-JTL

PLAINTIFF'S APPLICATION IN SUPPORT OF SETTLEMENT AND AWARD OF ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARD

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TABLE OF AUTHORITIES

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Cases

Rules and Statutes

Other Authorities

GLOSSARY

BCG	Boston Consulting Group
BlackRock	BlackRock Advisors, LLC
Blouin	Jennifer Blouin
Blount	Harry Blount
Board	The Board of Directors of Dell Technologies, Inc.
Canyon	Canyon Capital Advisors, LLC
CEO	Chief Executive Officer
Class	The class certified in the Court's February 22, 2021 Regarding Class Certification
CSC	The Capital Stock Committee of Dell Technologies, Inc.
Cohn	Jesse Cohn
Committee	The Special Committee of Dell Technologies, Inc.
Controllers	Michael Dell and SLP
D&C	Dodge & Cox
Defendants	Michael Dell, David Dorman, Egon Durban, Goldman Sachs & Co. LLC, William Green, Simon Patterson, Silver Lake Group LLC, Silver Lake Partners III, L.P., Silver Lake Technology Investors III, L.P., Silver Lake Partners IV, L.P., Silver Lake Technology Investors IV, L.P., SLP Denali Co-Invest, L.P.
Dell	Dell Technologies, Inc.
Deloitte	Deloitte & Touche LLP
Discern	DISCERN Analytics, Inc.
Dorman	David Dorman
Durban	Egon Durban
DVMT	Class V Stock of Dell Technologies, Inc.
Elliott	Elliott Management Corp.
EMC	EMC Corporation
Evercore	Evercore Group L.L.C.

Farallon	Farallon Capital Management, L.L.C.
Francis	Stuart Francis
Funds	BlackRock, Canyon, D&C, Elliott, Farallon and Mason
Goldman	Goldman Sachs & Co. LLC
Green	William Green
Houlihan	Houlihan Lokey, Inc.
Hubbard	Glenn Hubbard
Initial Proposal	The potential transaction announced by Dell Technologies, Inc. on July 2, 2018, in which each share of DVMT would have been exchanged for a combination of cash and shares of Dell Class C stock
IPO	Initial Public Offering
IR	Investor Relations
ISS	Institutional Shareholder Services, Inc.
Judge Phillips	Hon. Layn R. Phillips (Ret.)
Kullman	Ellen Kullman
Lemkau	Gregg Lemkau
Little	Joseph L. Little
Mason	Mason Capital Management LLC
Morgan Stanley	Morgan Stanley & Co. LLC
NDA	Non-Disclosure Agreement
Patterson	Simon Patterson
Pivotal	Pivotal Software, Inc.
Plaintiff	Lead Plaintiff Steamfitters Local 449 Pension Plan
Proxy	The Form 424B3s filed with the SEC by Dell Technologies, Inc. on October 19, 2018 and November 28, 2018
Sacks	Benjamin Sacks
SEC	U.S. Securities Exchange Commission
SecureWorks	SecureWorks, Inc.
SLP	Silver Lake Group LLC
Supreme Court	The Supreme Court of the State of Delaware
Temasak	Temasak Holdings
Tucci	Joseph Tucci

Transaction	The transaction completed by Dell Technologies, Inc. on December 28, 2018, in which each share of DVMT was exchanged for a combination of cash and shares of Dell Class C stock
VMware	VMware, Inc.

CITATION CONVENTIONS

Description	Citation
Affidavit of Peter B. Andrews in Support of Proposed Settlement and Award of Attorneys' Fees and Expenses	"Andrews Aff."
Affidavit of Jack Ewashko Regarding: (A) Mailing of the Notice; and (B) Publication of the Summary Notice	"Ewashko Aff."
Affidavit of David Cooper in Support of Plaintiff's Application in Support of Settlement and Award of Attorneys' Fees, Expenses, and Incentive Award	"Cooper Aff."
Affidavit of Jeremy Friedman in Support of Plaintiff's Application in Support of Settlement and Award of Attorneys' Fees and Expenses, and Incentive Award	"Friedman Aff."
Affidavit of James Harding on Behalf of Steamfitters Local 449 Pension Plan in Support of Settlement and Award of Attorneys' Fees, Expenses, and Incentive Award	"Harding Aff."
Affidavit of Chad Johnson in Support of Plaintiff's Application for an Award of Attorneys' Fees and Expenses	"Johnson Aff."
Affidavit of Joseph M. Little in Support of Settlement and Award of Attorneys' Fees, Expenses, and Incentive Award	"Little Aff."

Description	Citation
Affidavit of Ned Weinberger in Support of Plaintiff's Application in Support of Settlement and Award of Attorneys' Fees, Expenses, and Incentive Award	"Weinberger Aff."
Deposition Transcript of Harry Blount	"Blount_"
Deposition Transcript of Ben Brill, 30(b)(6) Witness for BlackRock	"Blackrock_"
Deposition Transcript of Hall Butler	"Butler_"
Deposition Transcript of Jesse Cohn, 30(b)(6) Witness for Elliott	"Elliott_"
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Deposition Transcript of David Dorman	"Dorman_"
Deposition Transcript of Egon Durban	"Durban_"
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Deposition Transcript of Tom Sweet	"Sweet_"
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Joint Trial Exhibit	"JX_"
Plaintiff's Pretrial Brief	"PTB"
Stipulation and Agreement of Settlement, Compromise, and Release	"Stipulation"
Stipulated [Proposed] Joint Pretrial Order	"¶_"

INTRODUCTION

Plaintiff respectfully seeks approval of a historic, $1 billion cash settlement (the "Settlement") of class claims challenging the coercive Transaction in which DVMT stockholders surrendered their shares for unfair transaction consideration.

The Settlement—which is more than triple the dollar amount of the largest stockholder settlement ever in this Court, and eclipses even the largest post-trial class recovery in the Court's history—is the result of years of enormously complex and challenging litigation, where a Class recovery of any amount was far from assured. Plaintiff and its counsel ("Plaintiff's Counsel") first undertook a books-and-records investigation and overcame motions to dismiss. Then, over more than two-and-a-half years, Plaintiff's Counsel developed and mastered a sprawling fact and expert discovery record, including reviewing nearly 2.9 million pages of documents from over 40 parties and non-parties, and taking and defending 35 fact and expert depositions. Fully believing in the strength of their claims, Plaintiff and its Counsel then pushed the case to the brink of trial against sophisticated and well-funded Defendants, who ultimately agreed to a Class payment (i.e., the Settlement) falling within a range of what Plaintiff reasonably believed it could potentially recover at trial.

Plaintiff also seeks an all-in award of attorneys' fees and expenses to Plaintiff's Counsel equal to 28.5% of the Settlement fund

(the "Fee and Expense Award"). As explained below, the Fee and Expense Award fairly compensates Plaintiff's Counsel for the benefits conferred on the Class and is conservative when compared against other "eve of trial" settlements in this Court.

Finally, Plaintiff seeks a $50,000 incentive fee (the "Incentive Award") for Plaintiff's extraordinary efforts on behalf of the Class. If approved, the Incentive Award will be paid entirely from the Fee and Expense Award.

A Settlement hearing is scheduled for April 19, 2023. Since January, Plaintiff and its administrator have been providing the Class notice of the proposed Settlement, Fee and Expense Award, and Incentive Fee. To date, Plaintiff has received no objections to the Settlement, Fee and Expense Award, or Incentive Award.

Accordingly, the Court should approve the Settlement, along with the requested Fee and Expense Award and Incentive Award.

BACKGROUND

Plaintiff respectfully refers the Court to its Pretrial Brief ("PTB") for a comprehensive recitation of the factual background of this Action.[1] Plaintiff incorporates the PTB's facts by reference, and summarizes the relevant facts and procedural history below, which are primarily drawn from the PTB, Pretrial Order,[2] and the Stipulation and Agreement of Settlement, Compromise, and Release ("Stipulation").[3]

A. Michael Dell and SLP Controlled Dell

In 2013, Michael Dell partnered with SLP to take Dell private ("MBO")[4] with the aid of Dell's long-time financial advisor, Goldman.[5] Stockholders objected to the MBO, but Michael Dell and SLP took drastic measures to close the transaction.[6] After the MBO, Michael Dell and SLP controlled Dell.[7] Michael Dell led day-to-

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[1] Trans. ID 68357748. A minimally-redacted public version of the PTB was filed on November 16, 2022. Trans. ID 68394403.

[2] Trans. ID 68297840. An unredacted public version of the Pretrial Order was filed on November 1, 2022. Trans. ID 68332317.

[3] Trans. ID 68717679.

[4] ¶10.

[5] PTB at 7 (Lemkau_42:20-43:4; M.Dell_318:4-23). For the Court's convenience, Plaintiff has also provided the Court with a thumb drive containing: (1) the last-exchanged Joint Exhibit List; (2) the Joint Exhibits cited herein; and (3) the depositions taken in this Action.

[6] *Id.* (JX0064 at 2).

[7] *Id.* (Butler_84:14-19; Sweet_164:5-10; Dorman_489:2-3).

day operations as Chairman and CEO, while SLP handled strategic endeavors.[8] Michael Dell and SLP's Durban became close friends and business partners.[9]

B. The DVMT Tracking Stock

In September 2016, Dell acquired EMC and its "crown jewel"—an 81.9% stake in VMware.[10] Because Dell could not afford EMC's core business and its full VMware stake, Dell bought "EMC's core federated businesses excluding VMware and EMC's shareholdings in VMware for cash consideration" and issued shares of DVMT to fund the rest of the acquisition.[11]

DVMT was designed to track, on a share-for-share basis, the economic value of approximately 65% of the VMware shares Dell acquired from EMC (roughly 50% of VMware's total shares).[12] DVMT was originally touted as "the highest quality tracker in the history of trackers."[13] Dell and EMC's financial advisors predicted that DVMT would trade at little-to-no discount to VMware.[14]

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[8] PTB at 7.

[9] *Id.* at 7-8.

[10] *Id.* at 9 (JX1953 at 142).

[11] *Id.* (JX0087 at EVR_00057123).

[12] *Id.* (JX0171 at ELLIOTT_DELL_0000933).

[13] *Id.* at 10 (JX0135 at 17/23; Tucci_181:11-182:17, 196:22-24).

[14] *Id.* at 10-11.

Instead, DVMT traded at an approximately 30-50% discount to VMware.[15] That "DVMT Discount" stemmed from, among other factors, fears that the Controllers might pursue options that favored their own interests over DVMT stockholders' interests.[16] Chief among those options was a "Forced Conversion" under Dell's Charter, which permitted Dell—at any point after listing its Class C shares on a public exchange—to convert DVMT into Class C shares under a complex pricing formula that the Controllers could manipulate.[17]

C. The Controllers Seek to Capture the DVMT Discount

In August 2017, Durban discussed with Michael Dell options to capture the DVMT Discount.[18] Dell retained subsequently Goldman, its longtime financial advisor, to help the Controllers capture the DVMT Discount for themselves, whether by a Forced Conversion or another transaction.[19]

In December 2017, Goldman conducted a "strategic review" of potential transaction alternatives for the Board, including an IPO. Goldman cautioned: "The stronger Dell's statement around future conversion at IPO filing/road show, the

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[15] *Id.* at 19 (JX0162 at SLP_DVMT028607_0001).

[16] *Id.* at 17-18.

[17] *Id.* at 14.

[18] *Id.* at 20-21.

[19] *Id.* at 21 (JX1953 at 144).

tighter the expected discount," whereas "uncertain[ty as to] whether and when Dell w[ould] exercise [its] conversion right" would widen the DVMT Discount.[20]

In late January 2018, the financial press reported on leaks that Dell was considering an IPO.[21] The next day, DVMT's stock price fell 6.4%, and the DVMT Discount increased to 45.6%.[22]

D. The Conflicted and Powerless Committee

On January 31, Dell's Board adopted resolutions authorizing the Company to explore various DVMT-related strategic alternatives, including a negotiated exchange in which Dell would acquire all outstanding DVMT shares ("Negotiated Conversion").[23] The Board did *not* empower the Committee to prevent an IPO, a Forced Conversion, or any other actions permitted by Dell's Charter.[24]

The Committee was conflicted. Its chairman, Dorman, shared undisclosed ties with Durban.[25] The two were close friends who belonged to the same ultra-

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[20] *Id.* at 22 (JX0439 at DELL00622759).

[21] *Id.* & n.84.

[22] *Id.* at 23 (JX2840 (Ex. 1) ¶21; *see also* JX0506 at DELL00085572.

[23] *Id.* (¶48; JX0565 at DELL00000105).

[24] *Id.* (JX0565 at DELL00000105-00000106).

[25] *Id.* at 25.

exclusive golf clubs and social circles, and frequently fraternized.[26] Dorman also had undisclosed financial ties to Michael Dell and Durban.[27]

The other Committee member, Green, was also conflicted. Green had served as a director of Dell portfolio company Pivotal since 2015, receiving millions of dollars in compensation, and Michael Dell reappointed him to Pivotal's board during the Transaction negotiations.[28] Green was also a close friend, business associate for over 30 years, and business partner with Dell senior advisor Tucci.[29]

On February 15, the Committee hired Evercore as its financial advisor.[30] The week before, Dorman—a close friend of Evercore's lead banker, Francis—informally hired Evercore, without telling his fellow Committee members, when the two met at a golf tournament.[31] There, Francis golfed alongside Durban's wife, and spoke with Durban about the engagement.[32] Evercore also had extensive ties to the Controllers.[33]

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[26] *Id.* at 25-26.

[27] *Id.* at 26-27.

[28] *Id.* at 27.

[29] *Id.* at 27-28.

[30] *Id.* at 28 (JX0603 at SpecialCommittee00000807).

[31] *Id.* (JX0624).

[32] *Id.* (JX0650; Francis_97:6-25).

[33] *Id.* (JX0686 at EVR_00143873-00143874; Francis_99:6-21, 100:7-101:5).

E. Dell Pivots to a Negotiated Conversion and Coerces the Committee and DVMT Stockholders

The Committee largely sat idle until April 2018 while Goldman and SLP discussed with VMware's special committee the possibility of a Dell/VMware transaction. When talks with VMware fell apart, Dell focused on a Negotiated Conversion.

Evercore and the Committee observed that DVMT was a one-of-a-kind financial instrument that was difficult to value for several reasons:[34] *First*, tracking stocks were rare instruments that, by the mid-2010s, had largely fallen out of favor[35] and traded, on average, at discounts of 16%.[36] *Second*, DVMT tracked a separate, publicly traded company (VMware), which was virtually unprecedented.[37] *Third*, Dell—a privately-owned company with no public market price—had issued DVMT.[38] That meant, *inter alia*, DVMT was subject to everything that might affect Dell's value, including a debt load so "substantial" that Dell was not rated investment-grade.[39] It also meant DVMT did not have precisely the same abilities

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[34] JX0818 at DELL00000336.

[35] JX0726 at VMW_CLASSV_0018724.

[36] JX0818 at DELL00000336.

[37] *Id.*

[38] *Id.*

[39] *Id.*

to access VMware's cash flows, such as through dividends.[40] *Fourth*, 80% of VMware's stock was privately held by Dell, leaving only around 20% publicly traded.[41]

As the Controllers began to pursue DVMT and the Discount's value, they used the cudgel of a Forced Conversion and other alternatives to coerce the Committee and DVMT stockholders. For example:

- Goldman contacted DVMT stockholders in early April 2018 without Committee authorization (and before the Committee was publicly announced) to threaten an IPO.[42]
- The Controllers refused to publicly disclose the Committee's existence until May 17, 2018, despite multiple requests by the Committee, and despite knowing the Committee was "concerned" about its inability "to communicate with DVMT shareholders"[43] and the "selective" feedback it was getting from Goldman.[44]
- The Controllers threatened to "begin a parallel path for Plan B"[45]—*i.e.*, an IPO and manipulated Forced Conversion—if the Committee negotiated too hard.[46]

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[40] *Id.*

[41] *Id.*

[42] PTB at 36-37.

[43] *Id.* at 36 (JX0890).

[44] *Id.* at 37 (JX0977 at DELL00000250).

[45] *Id.* at 35 (JX0931 at SpecialCommittee00023355); *see also id.* at 42-43.

[46] *Id.* at 38-39 (JX1042 at DELL00129846).

Beyond a Forced Conversion, the Controllers also threatened DVMT stockholders and the Committee with other coercive actions, including:[47]

- Pursuing an IPO of Class C Stock *without* converting DVMT, leaving DVMT as an "orphan tracker."
- Pursuing a "low float" Class C IPO, making Dell's stock price (and thus the Forced Conversion's conversion ratio) particularly volatile and manipulable.
- Buying as much of DVMT's public float through IPO proceeds or a VMware dividend as it could (even if it could not buy it all), capturing the DVMT Discount, and then forcibly converting the rest at a still-wide Discount.
- Using IPO or VMware-dividend proceeds to buy-in VMware's public float, eliminating DVMT's reference security, and then converting a less-protected DVMT.

On May 22, Goldman proposed acquiring DVMT for $100-$107/share,[48] even though VMware closed at $136.80/share that day.[49] Goldman's proposal rested on an inflated $50 billion Dell valuation.[50] In May and June 2018, the Controllers pressed the Committee for a counteroffer.[51] The Committee—having been denied access by the Controllers to a report prepared by VMware's financial advisor, BCG,

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[47] *See id.* at 38-41.

[48] *Id.* at 38 (JX1953 at 157; JX1042 at DELL00129845–00129846).

[49] *Id.* (JX2844 (Ex. 2) App. D at 18).

[50] *Id.* (JX1953 at 157; JX1042 at DELL00129845–00129846).

[51] *Id.* at 41 (JX1074 at DELL00000263; JX1087 at DELL00126866 (Lemkau noting that the Committee felt "exposed/at risk on the [BCG Report] in the absence of being able to see it" and decided to hire a consultant).

that showed how much Goldman had overvalued Dell—scrambled to find an industry consultant to evaluate Dell's projections.[52]

On June 4, the Committee retained Discern to assess Dell's revised financial projections.[53] Discern consisted solely of Blount, a former colleague of Evercore's Francis.[54] Discern had never consulted for a public company before and was in dire financial straits.[55] Faced with the time pressures the Controllers imposed, the Committee promised a $25,000 "bonus for fast" if Blount completed his work in just four days.[56]

On June 27, following a series of revised proposals, Goldman relayed an offer of $109/share in either cash—capped at $9 billion—or 1.3665 shares of Class C Stock valued at $79.77/share, based on a $48.4 billion Dell valuation.[57] That day, the Committee met to discuss the proposal.[58] Relying on Evercore's fairness opinion, which "took into account *all* of the ways in which the conversion

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[52] *Id*.

[53] *Id.* at 43 (¶69; McBean_248:14-24, 285:22-25).

[54] *Id.* (JX1586 at D&C-00123966; Blount_232:2-7).

[55] *Id.* (JX1583 at DISCERN_0004082; Blount_306:3-6).

[56] *Id.* at 44 (JX1132 at DISCERN_0002662; JX1092 at EVR_00054956).

[57] *Id.* at 45-46.

[58] *Id.* at 46 (JX1239; JX1264 at SpecialCommittee00002311; JX1256).

right would be exercised or timed,"[59] and Discern's report,[60] which was delivered only one day earlier,[61] the Committee accepted the Initial Proposal.[62]

F. DVMT Stockholders Object to the Initial Proposal, and the Controllers and Goldman Respond Forcefully

On July 2, Dell announced the Initial Proposal.[63] The purported $109/share price represented a 32.7% discount to VMware's $162/share trading price (before accounting for the drastic overvaluation of Class C stock).[64] DVMT stockholders "were disappointed with the terms of the Conversion," "express[ing] concerns about the $48.4 billion [Dell] valuation," and predicting the transaction's "cash portion would be oversubscribed[.]"[65]

In response, the Controllers and Goldman dubbed dissenting stockholders "terrorists" and declared "war" on them.[66] The day Dell announced the Initial Proposal, Goldman "reminded [DVMT Stockholders] of the alternative in no[-]deal

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[59] *Id.* (Francis_390:13-391:4).

[60] *Id.* (*See* McBean 285:22-25).

[61] *Id.* (JX1239).

[62] *Id.* (JX1953 at 162; JX1256).

[63] *Id.*

[64] *Id.* at 47 (JX2840 (Ex. 1) ¶21(d)).

[65] *Id.* (JX1424 at DELL00010431-00010432).

[66] *Id.* at 47-48.

scenario. Dell skinny IPO. One way call option at declining prices. No cash. No need to exercise call option."[67]

Stockholders understood the Controllers' and Goldman's threats. As Dell's IR team explained to Goldman and SLP: "[I]nvestors we are talking to are unhappy with the [IPO] 'rumors' and feel they are being threatened."[68]

G. The Controllers Reach Agreement with Elliott by Bypassing the Committee to Divide and Conquer DVMT Stockholders

With the Initial Proposal in jeopardy, the Controllers bypassed the Committee, negotiating directly with select asset managers, again threatening harmful alternatives.[69] Goldman took the lead with the Funds.[70] In October 2018, one of those Funds emailed Green to complain that "[w]hile Dell and its investment banks have indeed reached out to us, we have not heard from our (DVMT) representatives. Should we expect to hear from you or Evercore?"[71]

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[67] *Id.* at 48 (JX1379 at SLP_DVMT007772_0002).

[68] *Id.* at 53 (JX1808 at GS-CLASSV-0255176).

[69] *Id.* at 55 (JX2201 at 82:2-84:12; JX1417 at BRK_00003164 ("[Dell] also casually mentioned that they seriously looked at the IPO path, which is essentially a threat.")).

[70] *Id.* (JX2094; JX1635 at EVR_00150026 ("[B]y far the lead role should be taken by SLP and Michael, rather than our SC."); JX1923 at EVR_00132530 ("[D]ell is best suited to make the value case for the security and then we validate the process. That is why I think [D]ell should lead.")).

[71] *Id.* (JX1957).

The Committee's abdication forced the Funds to negotiate directly with the Controllers.[72] Between November 4-6, Dell entered into NDAs with the Funds.[73] The siloed Funds negotiated only for themselves;[74] were hamstrung by the Initial Proposal, which "weakened [the Funds'] position to garner a higher price";[75] and recognized that a well-functioning Committee would have been better positioned to negotiate given its superior access to information and ability to present a unified front on behalf of *all* stockholders.[76] As Durban explained to Goldman's lead banker, Lemkau, "part of the tactics" was to "break [the Funds] relationship[s]" with each other and with their own investors.[77]

The Committee belatedly tried to involve itself. On November 8, it "spoke with Egon Durban to note that…an increase in the value of DVMT shares from $109 to $125 per share and Board Representation would be needed."[78] But the Controllers

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[72] *Id.* at 56 (*See* Canyon_150:10-18).

[73] *Id.* (JX2286 at S-59; JX2058 at DELL00010413).

[74] *Id.* at 57 (D&C_287:16-289:8; BlackRock_68:3-70:8, 71:14-72:2).

[75] *Id.* (D&C_335:10-336:5; *see also, e.g.*, Canyon_133:13-134:1; Elliott_207:2-208:20).

[76] *Id.* (BlackRock_67:25-71:11; D&C_288:16-18; D&C_288:6-289:15; Canyon_131:5-132:19, 239:18-240:4).

[77] *Id.* at 83 (JX1700 at SLP_DVMT017797).

[78] *Id.* at 58 (JX2180 at DELL00010322; *see also* JX2067).

ignored the Committee's $125/share proposal, having reached a handshake agreement with Elliott at $120/share.[79]

The Controllers used their agreement with Elliott to coerce other Funds. Between November 12-14, the Controllers struck a deal with other Funds for $120/share, with a $14 billion aggregate cash cap and the potential to slightly adjust the Class C exchange ratio to reflect changes in DVMT's trading price before closing.[80] As with the Initial Proposal, the inflated $48.4 billion Dell valuation valued Class C Stock at $79.77/share.[81]

On November 14, Evercore provided an oral fairness opinion, and the Committee approved the Transaction.[82] In doing so, the Committee achieved its key objective, which was:

> [G]iving DVMT shareholders the opportunity to vote on a deal, rather than subject them to the risk inherent in the status quo where DVMT shareholders ultimately would be subject to the contractually stipulated conversion call right that Dell has following an inevitable IPO, which most likely would have occurred in the following 12 months.[83]

That same day, the Board approved the Transaction.[84]

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[79] *Id.* (JX2083; JX2084). Defendants maintained the Committee never made a $125/share proposal.

[80] *Id.* at 59 (JX2200 at DELL00010177; JX2286 at S-65-68).

[81] *Id.* (JX2200 at DELL00010180; JX2180 at DELL00010346, n.2.).

[82] *Id.* at 60 (JX2180 at DELL00010305).

[83] *Id.* (JX2326 at JFWBK_0000014).

[84] *Id.* (JX2199 at DELL00010131).

H. Defendants Cause Dell to Issue a False and Materially Misleading Proxy

To secure Transaction approval, Defendants issued a false and misleading Proxy that failed to disclose, *inter alia*: the Committee's and its advisors' conflicts; the Committee's knowledge of a Deloitte valuation prepared in April 2018 that showed Dell's Class C stock was worth far less than $79.77/share; Dell's failed attempt to secure sovereign-wealth funding; and the Committee's $125/share proposal.[85]

The Proxy also falsely disclosed that the Committee successfully advocated for a price increase to $120/share, when the Controllers actually reached an agreement with Elliott and ignored the Committee's belated reengagement. Further, the Proxy falsely asserted Discern was an "independent industry expert,"[86] when Discern lacked relevant experience and its dire financial situation rendered it anything but independent. Although each Defendant reviewed and commented on the Proxy, they failed to correct those material misstatements and omissions.[87]

Despite the Proxy painting a falsely rosy picture of the Transaction, just 61% of outstanding DVMT shares voted to approve it.[88]

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[85] *Id.* at 61.

[86] *Id.*

[87] *Id.* at 62 (JX3015 at GS-CLASSV-0252530; JX3016 at DellClassV_Latham000066007).

[88] *Id.* (JX2347 at Ex. 99.1).

When the Transaction closed on December 28, 2018, VMware stock closed at $158.38/share,[89] and DVMT stockholders received just $104.27/share in the Transaction because Dell's Class C Stock had been overvalued.[90] Touting the Controllers' windfall, Lemkau boasted to the *Financial Times* on background: "All I know is that Dell just bought 50% of something valued at ~$160+/share [*i.e.*, VMware shares] for ~$120/share."[91]

PROCEDURAL HISTORY

A. Plaintiff Files its Complaint, Is Appointed Lead Plaintiff, and Overcomes Motions to Dismiss

After the Initial Proposal's announcement, Plaintiff made a books-and-records demand of Dell and conducted a thorough investigation.[92] Dell completed its books-and-records productions on January 25, 2019,[93] and Plaintiff filed its initial complaint on February 14.[94] Four related actions were later consolidated.[95]

On March 18, the Court entered an Order designating Steamfitters as Lead Plaintiff and designating Labaton Sucharow LLP ("Labaton") and Quinn Emanuel

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[89] *Id.* (JX2840 (Ex. 1) ¶35).

[90] *Id.* at 63 (JX2839 (Ex. 3) ¶5; JX2840 (Ex. 1) ¶35).

[91] *Id.* at 62-63 (JX2317 at GS-CLASSV-0095253).

[92] Trans. ID 63053875.

[93] *Id.* at 7.

[94] Stipulation at 3.

[95] *Id.*

Urquhart & Sullivan, LLP ("Quinn") as co-lead counsel. Friedman Oster & Tejtel PLLC ("FOT") and Andrews & Springer LLC ("A&S") were designated as additional counsel.[96] Robbins Geller Rudman & Dowd LLP ("RGRD") was later added as additional counsel.[97] As Plaintiff's Counsel predicted,[98] Defendants hired an army of attorneys from the nation's best "white shoe" defense firms: Alston & Bird LLP; Simpson Thacher & Bartlett LLP; Latham & Watkins LLP; Wachtell, Lipton, Rosen & Katz LLP; Williams & Connolly LLP; Abrams & Bayliss LLP; Richards, Layton & Finger, P.A.; Young Conaway Stargatt & Taylor, LLP; and, ultimately, Skadden, Arps, Slate, Meagher & Flom LLP (representing Goldman). Nearly 100 lawyers from those firms entered appearances, with presumably dozens more providing additional assistance.

On April 17, Plaintiff filed a 129-page Verified Amended and Consolidated Stockholder Class Action Complaint.[99] On June 14, 2019, Defendants moved to dismiss that Complaint.[100]

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[96] *Id.*

[97] Stipulation at 6-7.

[98] *In re Dell Techs. Inc. Class V S'holders Litig.*, Consol. C.A. No. 2018-0816-JTL, Tr. at 30-31 (Del. Ch. Mar. 15, 2019) (TRANSCRIPT).

[99] Stipulation at 4.

[100] *Id.*

In response to those motions, Plaintiff filed a 162-page Verified Second Amended Consolidated Stockholder Class Action Complaint.[101] On September 30, Defendants moved to dismiss that Complaint.[102] After extensive briefing and oral argument, the Court entered an Order on June 11, 2020, substantially denying the motions to dismiss, dismissing only Kullman.[103] Plaintiff later amended its complaint a third time to add as Defendants certain SLP entities that held Dell stock, in response to an answer filed by SLP.[104]

B. Plaintiff Pursues Extensive Fact Discovery

Fact discovery was necessarily extensive, given the size and scope of the Transaction, the potential alternative transactions involved, the number of individuals and entities that played a significant role, and fierce resistance from defense counsel at every turn. Between June 2020 and March 2022, Plaintiff propounded to Defendants 66 document requests, 710 interrogatories, and 179 requests for admission.[105] Plaintiff also served 41 non-party subpoenas—an undertaking that required significant professional time even beyond party discovery.

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[101] Trans. ID 64084379.

[102] Trans. ID 64253139; Trans. ID 64255426.

[103] Stipulation at 5.

[104] Trans. ID 65923272.

[105] Stipulation at 7.

Plaintiff methodically pursued discovery, demanding the production of not only emails, but hard-copy files and text and other instant messages, to ensure all relevant and candid communications would be captured. Plaintiff's diligence in the face of Defendants' litigiousness and their counsel's savvy meant that even negotiating the logistical details of discovery, such as determining the identities of relevant custodians and the scope and time parameters of document requests, lasted from July-December 2020.

Defendants' aggressive tactics also required Plaintiff to make extensive efforts to dig further, even after those initial negotiations ended. For example, Plaintiff uncovered evidence of reckless preservation failures involving, for example, contemporaneous text messages among Dell's Board members and Goldman.[106] That not only prejudiced Plaintiff's case, but required more-than-five months of negotiations to determine ways to plug crucial evidentiary gaps through, *inter alia*, additional document requests and productions, interrogatories, requests for admission, and responses thereto once Goldman became a Defendant.

Plaintiff also uncovered post-complaint documents critical to the case, which Plaintiff aggressively pursued in discovery despite Defendants' stiff resistance. For example, Michael Dell published a book in 2021 containing behind-the-scenes

[106] *See* Trans. ID 67502664.

accounts of many events at issue[107]—including critical admissions that the Controllers brandished certain alternatives to coerce stockholders into approving the Transaction. Defendants put Plaintiff through months of negotiations to obtain complete transcripts of Michael Dell's revealing conversations with his ghostwriter—first providing only cherrypicked excerpts and then providing more complete transcripts after months of delay.[108] Dell also announced a transaction crucial to Plaintiff's damages arguments in April 2021—Dell's VMware Spinoff—not long after Defendants represented that their productions were substantially complete.[109] That too required discovery efforts that Defendants initially resisted, with even more discovery negotiations, productions, and review.

Through diligent negotiations—and by overcoming Defendants' attempts to delay and frustrate discovery—Plaintiff's Counsel built a robust record *without* recurring discovery motions. Plaintiff filed two motions to compel,[110] one of which resulted in Defendants producing important photographic evidence of Durban and Dorman's close friendship that underscored the depth of the conflicts of interest among the Controllers, the Committee, and their advisors.[111]

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[107] JX2722.

[108] JX2776, JX2794.

[109] JX2680.

[110] Trans. IDs 66738050; 66410250.

[111] PTB at 25-26.

Plaintiff's Counsel ultimately secured—and diligently reviewed—2,872,934 pages of documents:[112]

Producing Party	Documents	Pages
Defendants		
Committee	6,709	47,045
SLP[113]	40,301	268,299
Goldman	39,935	311,492
Third Parties		
Dell[114]	101,103	994,974
MSD Partners	2,345	20,532
Ellen Kullman	796	2,991
Accenture	76	944
AT&T	5	370
Bank of America	2,384	20,501
Blackrock	608	3,529
CamberView	2,097	15,467
Citigroup	3,120	25,056
Credit Suisse	15,226	63,491
Deloitte	1,450	29,053
Discern	722	4,265
Evercore	20,990	159,014
Gladstone Place Partners	8,896	56,432
Houlihan	2,208	12,050
Innisfree	6,255	26,072
J.P. Morgan Securities	26,587	115,373
Joele Frank	707	7,544
Tucci	425	2,911
Latham & Watkins	4,039	31,536
Lazard	6,748	98,543
Mackenzie Partners	870	9,631
Morgan Stanley	9,551	64,341
Okapi Partners	948	4,682

[112] Stipulation at 7-8.

[113] SLP's productions included all productions from Durban and Patterson.

[114] Dell's productions included all productions from Michael Dell.

Producing Party	Documents	Pages
Parella Weinberg	1,286	5,734
Solebury Trout	1,502	5,560
Temasek	2,063	12,823
VMware	7,597	40,384
Canyon	2,071	7,842
D&C	16,854	157,751
Elliott	886	8,639
Farallon	22,475	234,884
Mason Capital	868	3,178
Vanguard	1	1
	Total	**Total**
	360,704	**2,872,934**

Plaintiff's Counsel also deposed 32 fact witnesses, four of whom (Michael Dell, Durban, Dorman, and Lemkau) sat for two days of Plaintiff's Counsel's questioning:

Name	Affiliation	Date
Michael DeLuke	30(b)(6) Witness, Houlihan	June 17, 2021
Dan Moore	30(b)(6) Witness, Joele Frank	June 24, 2021
Hall Butler	30(b)(6) Witness, Dell	June 28, 2021
Christopher Muirhead	30(b)(6) Witness, Winslow Asset Management	June 28, 2021
Kullman	Dell Board Member	July 15, 2021
Patterson	Board Member & SLP Managing Director	July 28, 2021
Cohn	30(b)(6) Witness, Elliott	July 30, 2021
Tucci	Former CEO, EMC	July 30, 2021
Joerg Adams	Managing Director, SLP	November 11, 2021
John Gnuse	30(b)(6) Witness, Lazard	November 19, 2021
Troy Sharp	30(b)(6) Witness, Dell	November 19, 2021

Name	Affiliation	Date
Rod Reed	30(b)(6) Witness JPMorgan Securities	December 9, 2021
Francis	30(b)(6) Witness, Evercore	December 9, 2021
Paul Frantz	30(b)(6) Witness, Dell	December 14, 2021
Tom Sweet	30(b)(6) Witness, Dell	December 16, 2021
Ryan Weninger	30(b)(6) Witness, Dell	January 7, 2022
Blount	CEO, Discern	January 7, 2022
Paritosh Somani	30(b)(6) Witness, D&C	January 12, 2022
Dorman	Committee Member	January 12-13, 2022
Ben Brill	30(b)(6) Witness, Blackrock	January 14, 2022
Green	Committee Member	January 20, 2022
Courtney McBean	30(b)(6) Witness, Evercore	January 25, 2022
Kyle Paster	30(b)(6) Witness, Silver Lake	January 28, 2022
Daniel Knappenberger	30(b)(6) Witness, Deloitte	February 2, 2022
Michael Dell	CEO and Founder, Dell	February 2-3
Jonathan Heller	30(b)(6) Witness, Canyon	February 3, 2022
Stefan Green	30(b)(6) Witness, Perella Weinberg	February 4, 2022
Durban	Managing SLP& Dell Board Member	February 8-9, 2022
Lemkau	30(b)(6) Witness, Goldman	February 10-11, 2022
Alex Wang	30(b)(6) Witness, VMware	February 25, 2022
Ben Campbell	30(b)(6) Witness, Dell	February 28, 2022
Avram Kornberg	30(b)(6) Witness, SLP	March 8, 2022

Plaintiff likewise defended against Defendants' overly-expansive discovery demands. Plaintiff is a pension fund that had no direct involvement in the Transaction other than as a passive, outside investor that, like a majority of the Class,

voted its shares and accepted the Transaction consideration.[115] Plaintiff is overseen by a board of trustees that delegates *all* investment decisions, including proxy voting decisions, to outside investment professionals.[116] Plaintiff has no employees, and full responsibility for this litigation rested with Steamfitters' then-Chairman, Little.[117]

Defendants' counsel nonetheless aggressively pursued unduly broad discovery as though Plaintiff were an active investor with direct and extensive involvement in both Dell and the challenged Transaction, serving 46 document requests, 173 interrogatories, and 59 requests for admission on Plaintiff (excluding subparts).[118] Among other things, Defendants demanded that Plaintiff search for documents dating back to Plaintiff's origins, and demanded that Plaintiff undertake personal collections from multiple members of Plaintiff's board of trustees that Defendants knew—based on meet-and-confers and documents produced by Plaintiff—had no involvement in Plaintiff's DVMT investment or this Action.[119] Rather than run to the Court and try to block Defendants' burdensome and overbroad

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[115] Little Aff. ¶2; ¶6; *see also* Harding Aff. ¶4.

[116] *See* Little Aff. ¶¶3-4.

[117] *Id.* ¶¶4-5.

[118] Stipulation at 8.

[119] *See* Little Aff. ¶15.

campaign, Plaintiff indulged Defendants' requests to leave no possible question about Plaintiff's adequacy as Class representative.[120]

In total, Plaintiff made ten separate document productions, comprising 48,620 pages.[121] Plaintiff collected documents from three custodians whose devices were imaged by an e-discovery specialist retained by Plaintiff's Counsel.[122] Plaintiff also undertook multiple collections from various physical and electronic repositories maintained by Plaintiff's non-party benefits administrator, Central Data Services, also with help from an e-discovery vendor.[123]

Plaintiff also met the challenges posed by Defendants' month-long letter-writing campaign to drum-up purported deficiencies in Plaintiff's document productions and interrogatory responses.[124] In response, Plaintiff, *inter alia*, served three separate sets of verified supplemental and/or amended interrogatory responses, revising (at Defendants' insistence) responses to 32 separate interrogatories and sub-parts in total (some multiple times) to avoid needlessly burdening the Court with discovery disputes.[125]

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[120] *See id.* ¶¶13-16.

[121] *See id.* ¶15.

[122] *Id.* ¶14.

[123] *Id.*

[124] *Id*. ¶¶11-16.

[125] *Id*. ¶16.

Defendants likewise barraged Plaintiff's third-party money managers and advisors with broad discovery demands.[126] As a result, Plaintiff facilitated 15 separate productions from outside money managers C.S. McKee, the Philadelphia Trust Company, and Winslow Asset Management, as well as Plaintiff's outside investment consultant, Segal Marco Advisors.[127]

Plaintiff also defended the deposition of Steamfitters' representative, Little,[128] and participated in a full-day deposition of a representative from Winslow Asset Management.[129]

C. The Court Certifies the Class

Despite its burdensome discovery campaign, Defendants did not challenge Plaintiff's request to certify the Class. On February 22, 2021, the Court entered a stipulated Order certifying the Action as a class action under Rules 23(a), 23(b)(1), and 23(b)(2), without opt-out rights.[130] The Order appointed Plaintiff as class representative; Labaton and Quinn as Co-Lead Counsel; and RGRD, FOT, and A&S as Additional Counsel.[131]

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[126] *Id.* ¶9.

[127] *See supra* at 22-23.

[128] Little Aff. ¶17.

[129] Muirhead_146:5-24.

[130] Stipulation at 6.

[131] *Id.* at 6-7.

D. Plaintiff Adds Goldman as an Aider-and-Abettor; Goldman Withdraws its Motion to Dismiss at the Eleventh Hour

After negotiations that Goldman and its counsel sought to stymie at every step—*e.g.*, it took Goldman until September 2021 to complete its productions under a July 2020 subpoena, and did not reveal its lead banker's failure to preserve any of his text messages until May 2021[132]—Plaintiff's Counsel at last began receiving and diligently reviewing Goldman's sizeable productions, which ultimately exceeded 300,000 pages. Upon analyzing the depth of Goldman's knowing participation in Defendants' fiduciary duty breaches, Plaintiff filed its operative Verified Fourth Amended Consolidated Stockholder Class Action Complaint on August 10, 2021, which added Goldman as a Defendant.[133] That 183-page Complaint cited dozens of documents that Plaintiff obtained in discovery to substantiate its aiding-and-abetting claim against Goldman, and added dozens more paragraphs of discovery-aided allegations that detailed the extent of *all* the Defendants' fiduciary breaches.

On September 15, Goldman moved to dismiss that Complaint, arguing, *inter alia*, that its financial-advisor status entitled it to a form of quasi-immunity from aiding-and-abetting liability because it merely followed the Controllers' orders.[134] Plaintiff opposed Goldman's motion. On April 12, 2022, after the parties completed

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[132] Lemkau_790:3-791:17; JX2790.

[133] Stipulation at 7.

[134] *See* Trans. ID 66934021 at 3.

briefing and just nine days before the scheduled argument,[135] Goldman withdrew its motion,[136] evidently because of the strength of the case that Plaintiff's Counsel had built against Goldman in discovery.

Thereafter, Plaintiff pursued additional discovery from Goldman, which required months of further negotiations to obtain. Those requests yielded further evidence bolstering Plaintiff's claims against all Defendants.

E. The Parties Engage in Extensive Expert Discovery

Plaintiff also expended significant effort and resources on expert discovery. On March 4, 2022, Plaintiff disclosed Sacks, a principal at The Brattle Group, as its valuation and damages expert while Defendants disclosed Hubbard, the Dean of Columbia Business School, to testify on the same topic.[137] On April 25, the parties served Sacks's and Hubbard's opening expert reports.[138] Sacks's report was 136 pages (plus 15 pages of substantive and well-sourced appendices), contained 437 footnote citations, and took more-than-a year to prepare. Hubbard's report was 119 pages and contained 431 footnote citations. Both experts also produced large volumes of workpapers.

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[135] Trans. ID 67473747.

[136] Stipulation at 7.

[137] Trans. ID 67367441. Plaintiff also retained a consulting expert on financial projections.

[138] JX2839 (Ex. 3); JX2840 (Ex. 1).

On May 17, Plaintiff identified Sacks as its rebuttal witness. Defendants identified Hubbard and Blouin, a tax professor at the Wharton School, who opined on tax-free corporate spin-offs and tax treatment of tracking stocks.[139] Blouin asserted that various tax laws, regulations, and positions taken by the Treasury Department on tracking stocks undermined Sacks's conclusion that DVMT should have commensurate value with its underlying VMware shares.[140] To help rebut Blouin's positions and prepare for her deposition, Plaintiff retained two consulting experts on tax law and policy.

On June 27, 2022, the parties exchanged rebuttal reports.[141] Sacks's rebuttal report was 87 pages, with 310 footnote citations. Hubbard's rebuttal report was 81 pages, with 302 footnote citations. Blouin's rebuttal report was 31 pages, with 137 footnote citations. Sacks and Hubbard produced a large volume of backup workpapers.

Sacks's opening and rebuttal reports required extensive work, including because, as Defendants repeatedly noted, DVMT was a one-of-a-kind security: not just a tracking stock (which are extremely rare), but a tracking stock issued by a privately held company, which was supposed to track the share price of a different

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[139] JX2845 (Ex. 4).

[140] *Id.* ¶12.

[141] JX2844 (Ex. 2); JX2845 (Ex. 4); JX2848 (Ex. 5).

public company, only 20% of which shares traded publicly.[142] As both experts acknowledged, DVMT could not be reliably valued using traditional discounted-cash-flow or sum-of-the-parts analyses (which, therefore, neither expert performed).

Accordingly, Sacks needed to develop a damages model that was well-supported, yet largely novel and very nuanced. As both sides' experts agreed, there was no way to directly measure DVMT's minority discount—*i.e.*, a discount driven by the market's justifiable fears that the Controllers would expropriate the DVMT Discount for themselves. Sacks therefore presented a dual-perspective analysis, examining how much Dell received and surrendered, and how much DVMT stockholders received and gave up, while analyzing and largely eliminating all potential sources of the DVMT Discount other than a minority discount (*e.g.*, credit risk).[143] Sacks further explained potential alternative transactions (*e.g.*, a Forced Conversion), and the factual and economic basis for the size of the minority discount.[144]

In August and September, the parties deposed Sacks, Hubbard, and Blouin.[145] During Hubbard's deposition, Plaintiff's counsel extracted damaging admissions

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[142] *See supra* at 8-9.

[143] JX2840 (Ex. 1); JX2848 (Ex. 5).

[144] JX2840 (Ex. 1); JX2848 (Ex. 5).

[145] Trans. IDs 67983000; 67903332; 67936603.

following months of intensive preparation, including detailed mathematical analysis of Hubbard's workpapers. Those admissions formed the basis of a motion *in limine*, filed on October 10, to exclude three of Hubbard's most-important opinions: (i) that Dell's credit risk drove roughly half the DVMT Discount; (ii) that a conglomerate discount caused the other half of that Discount; and (iii) his articulation of DVMT's "unaffected" price as of the Transaction.[146]

The strength of Plaintiff's motion ultimately forced Defendants to submit an eleventh-hour affidavit from Hubbard along with their opposition on October 24, which sought to undo Hubbard's deposition testimony with trial just a few weeks away.[147] Plaintiff filed its reply on November 2, 2022.[148]

F. The Parties Mediate with Judge Phillips

On September 15, after fact and expert discovery had closed, counsel for the parties participated in a full-day mediation session before Judge Phillips ("Mediation").[149] The parties exchanged detailed opening and reply mediation statements and exhibits, which thoroughly addressed both liability and potential damages. The Action was not resolved during the Mediation.[150]

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[146] *See* Trans. IDs 68231718 (Opening) ¶1; 68335477(Reply) ¶¶2-3.

[147] Trans. ID 68293760.

[148] Trans. ID 68335477.

[149] Stipulation at 8.

[150] *Id*.

G. The Parties Settle on the Eve of Trial

After the in-person Mediation, the parties prepared for trial, which was scheduled for five days, to commence on December 5 and end on December 9.[151] Seventeen live witnesses, including three expert witnesses, were scheduled to testify.[152]

On October 24, the parties filed their 51-page PTO and the initial Joint List of Trial Exhibits, which contained 2,887 joint trial exhibits.[153] On November 7, Plaintiff and Defendants filed pretrial briefs.[154] Collectively, the parties filed 225 pages (exceeding 44,000 words) of pretrial briefing—with Plaintiff's brief alone encompassing 134 pages and nearly 23,000 words—which thoroughly addressed anticipated issues of liability and damages.

On November 8, after further discussions following the Mediation, Judge Phillips made a mediator's recommendation to settle the Action for $1 billion in cash.[155] The parties agreed in principle on November 13 to settle the Action on those terms, subject to further documentation and Court approval.[156]

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[151] Stipulation at 9.

[152] ¶¶127-29.

[153] Stipulation at 9.

[154] *Id.*

[155] Stipulation at 9.

[156] *Id.*

On November 15, the parties executed a term sheet for the Settlement.[157] The parties did not discuss any Fee and Expense or Incentive Award before agreeing on the Settlement's terms.[158] That day, counsel for the parties informed the Court of the Settlement and requested a stay of further proceedings pending formal submission of the Settlement for Court approval.[159]

On December 22, 2022, the parties filed the Stipulation, which reflects the final-and-binding agreement among the Settling Parties, as well as ancillary supporting papers.[160] When the parties negotiated the Stipulation, they specifically considered, discussed, and sought to follow the Court's recent guidance in *Firefighters' Pension System of the City of Kansas City, Missouri Trust v. Presidio Inc.*, C.A. No. 2019-0839-JTL (Del. Ch. Nov. 7, 2022) (TRANSCRIPT) and *Hedgepath, LLC v. Magrab*, C.A. No. 2019-0529-JTL (Del. Ch. Nov. 10, 2022) (TRANSCRIPT).

On December 29, 2022, the Court asked Plaintiff to provide, in its Settlement briefing, a comparison of the "size of a settlement payment and the equity value of the challenged transaction, together with a comparison of the percentage yielded by

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[157] *Id.*

[158] *Id.*

[159] *Id.* at 10.

[160] Trans. ID 68717679.

the settlement under consideration with the percentages yielded by precedent settlements" as well as "a comparison between the settlement amount and the potential damages recovery (or recoveries, where multiple damages theories are in play)" in this Action and in prior cases to facilitate comparing the cash settlement amount in this Action with those prior settlements.[161]

On January 3, 2023, the Court directed counsel to consider the Court's discussion in *Presidio* as it relates to the Stipulation and be prepared to discuss the same at the Settlement hearing.[162]

On January 20, 2023, Plaintiff began providing the Class formal notice of the Settlement.[163] To date, no Class member has objected to any aspect of the Settlement, proposed Fee and Expense Award, or proposed Incentive Award.

ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

When deciding whether to approve a class action settlement, the Court looks to the facts and circumstances underlying the claims and exercises its informed judgment as to whether the proposed settlement is fair and reasonable.[164] Such "facts and circumstances" include: (i) the probable validity of the claims; (ii) the

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[161] Trans. ID 68765856.

[162] Trans. ID 68784668.

[163] *See* Ewashko Aff. ¶¶3-9.

[164] *Prezant v. De Angelis*, 636 A.2d 915, 921 (Del. 1994).

apparent difficulties in enforcing the claims through the courts; (iii) the collectability of any judgment recovered; (iv) the delay, expense, and trouble of litigation; (v) the amount of the compromise compared with the amount of any collectible judgment; and (vi) the views of the parties involved.[165]

The Court's role is "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."[166] The Court need not "decide any of the issues on the merits"; it determines from the totality of the circumstances whether the settlement is fair, reasonable, and adequate.[167]

The $1 billion cash Settlement is fair, reasonable, and adequate by any measure.

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[165] *Polk v. Good*, 507 A.2d 531, 535-36 (Del. 1986) (citing *Rome v. Archer*, 197 A.2d 49, 53-54 (Del. 1964)).

[166] *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1064 (Del. Ch. 2015) (quoting *Forsythe v. ESC Fund Mgmt. Co. (U.S.) Inc.*, 2013 WL 458373, at *2 (Del. Ch. Feb. 6, 2013)).

[167] *See Polk*, 507 A.2d at 536.

A. The $1 Billion Cash Settlement Will Provide a Substantial Benefit to the Class

The Settlement, which amounts to $5.01/share, is an "obvious and self-pricing benefit."[168] If approved, the Settlement would be the largest stockholder class or derivative settlement in the history of the Court of Chancery or any other state court in America.[169] Indeed, the Settlement is nearly four times the dollar amount of the largest negotiated stockholder recovery ever achieved in this Court or any other state court.[170] Even including federal settlements, the Settlement would be the 17th largest stockholder settlement ever.[171]

A testament to the strength of Plaintiff's claims and effective prosecution of the Action, the Settlement also dwarfs all but one trial outcome in this Court's

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[168] *In re Orchard Enters., Inc. S'holder Litig.*, 2014 WL 4181912, at *5 (Del. Ch. Aug. 22, 2014).

[169] *See* ISS Insights, *Dell Agrees to $1 Billion Payout –To Become a Top 20 All-Time Shareholder-Related Settlement* (Nov. 28, 2022) (Ex. 6).

[170] *Id.* (citing *Activision* (Del. Ch.) ($275 million) and *Caremark Rx* (Al. Cir.) ($310 million)).

[171] *Id.*

history—the $1.347 billion recovered in *Southern Peru*[172]—though that was a derivative action, and the judgment there was paid in stock, not cash.[173]

B. The Settlement Reflects the Strength of Plaintiff's Claims Weighed Against the Risks of Seeking a Post-Trial Judgment and Appeal

The $1 billion cash Settlement reflects the strength of Plaintiff's claims as well as Plaintiff's candid and informed assessment of the potential outcomes at trial and on appeal.

Plaintiff believes that had it tried its claims, it likely would have proven liability (particularly against the Controllers) because the Defendants would not have been able to establish that the Transaction *process* was entirely fair.[174] As detailed above and in Plaintiff's PTB, Plaintiff developed a damning record of unfair dealing,

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[172] *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 819 (Del. Ch. 2011) ($1.347 billion); *Bandera Master Fund LP v. Boardwalk Pipeline P'rs*, *LP*, 2021 WL 5267734, at *3 (Del. Ch. Nov. 12, 2021) ($690 million) *rev'd and remanded*, 2022 WL 17750348 (Del. Dec. 19, 2022); *In re El Paso Pipeline P'rs, L.P. Deriv. Litig.*, 2015 WL 1815846, at *2 (Del. Ch. Apr. 20, 2015) ($171 million); *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *2 (Del. Ch. Aug. 27, 2015) ($148 million); *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 226 (Del. Ch. 2014) ($91.3 million).

[173] *S. Peru*, 52 A.3d at 819 ("Grupo Mexico may satisfy the judgment by agreeing to return to Southern Peru such number of its shares as are necessary to satisfy this remedy.").

[174] *In re Trados Inc. S'holder Litig.,* 73 A.3d 17, 44 (Del. Ch. 2013) ("Once entire fairness applies, the defendants must establish to the [C]ourt's satisfaction that the transaction was the product of *both* fair dealing and fair price." (internal citations and quotations omitted) (emphasis added)).

including documents and testimony evidencing coercion of both the Committee and DVMT stockholders.[175]

Fair price and damages, however, were uncertain. A recovery at trial would come down to a battle of the experts, the outcome of which was unpredictable given the novelty of the DVMT tracking stock and Plaintiff's damages theories.[176] Indeed, unlike typical pretrial briefs, the parties collectively devoted nearly 40 pages to fair price and damages, drawing extensively from expert reports and deposition testimony. And that was on top of dozens more pages submitted exclusively on expert and damages issues through Plaintiff's motion to exclude certain of Hubbard's opinions.

Both sides proffered well-respected experts who took parallel approaches, but reached diametrically opposed opinions on DVMT's fair value. For the reasons explained in Plaintiff's PTB and motion to exclude, Plaintiff believes Hubbard's trial testimony would not have been as compelling as Sacks's. But Plaintiff was also acutely aware that similar issues to those raised in the motion (and Sacks's rebuttal) were on appeal in *Boardwalk* when Plaintiff decided to settle.

Unlike with liability under entire fairness, it was Plaintiff's burden to prove damages. Sacks opined the Class suffered $10.7 billion in damages through the

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[175] *See* PTB §II.A.

[176] *See supra* §II.B.

Transaction, reflecting the difference between the market prices of DVMT and VMware (less a slight adjustment of $500 million to account for Dell's credit risk) when the Transaction closed.[177] Plaintiff faced uncertainties at trial because it could not predict how this Court or the Supreme Court would resolve the $11 billion gap between the experts' opinions on damages.

For several reasons, Plaintiff discounted the likelihood of the Court awarding the Class the full $10.7 billion in damages. To do so, the Court would need to credit fully, with no qualifications, Sacks's opinions that Dell's credit risk was nearly zero; that virtually all of the DVMT Discount was instead a minority discount attributable to DVMT stockholders' fear that the Controllers would exercise their control to the minority's detriment; and that DVMT's value suffered from no conglomerate discount.[178]

Sacks also acknowledged the fact that virtually every tracking stock in history has typically traded at a significant discount to the underlying tracked assets (here, VMware)—albeit a discount less than the DVMT Discount—to account for the issuer's credit risk or other structural differences.[179] Thus, for the Court to award the full $10.7 billion in damages, it would have had to find DVMT was effectively

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[177] PTB at 92-93.

[178] *Id.* at 102-104.

[179] JX2839 (Ex. 3) § VIII.F.

equivalent to VMware—even though neither DVMT nor any other tracking stock had ever traded on par with the assets it was designed to track, and despite the Court's holding that they were fundamentally different securities.[180] The tracking stock that Hubbard, Goldman, Evercore, and others deemed the closest analogue to DVMT—Liberty Media's SiriusXM tracking stock—also traded at a significant discount to its publicly traded reference security.[181] Indeed, when the Transaction closed, that tracking stock's 34% discount closely resembled DVMT's roughly 30% discount.[182]

Thus, Plaintiff and Sacks would have had to persuade the Court that DVMT was a unicorn security that, but for the Controllers' control, would have traded evenly with shares of VMware *even with* Dell's debt-laden, non-investment-grade balance sheet. Plaintiff acknowledges that, at trial, Defendants would have presented evidence (both contemporaneous documents and deposition testimony) from the Funds—several of which signed Voting and Support Agreements for the Transaction—reflecting their belief that Dell's credit risk and other structural differences between DVMT and VMware accounted for a larger percentage of the

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[180] *Ford v. VMware, Inc.*, 2017 WL 1684089, at *19 (Del. Ch. May 2, 2017).

[181] JX2839 (Ex. 3) ¶¶31, 161-63.

[182] *Compare id.*, *with* PTB at 16.

DVMT Discount than Sacks had calculated.[183] That evidence created material trial and appellate risks for Plaintiff's damages theories.

Hubbard's analysis presented challenges to convincing the Court that DVMT should have traded on par with VMware. Hubbard opined DVMT stockholders were entitled to *no portion* of the DVMT Discount, which he attributed to Dell's significant credit risk and the market legitimately discounting DVMT given its structural differences to VMware stock and Dell's conglomerate structure.[184] Hubbard's opinions found some support in the record in analyst commentary pre- and post-dating Dell's announcement of strategic alternatives that described the DVMT Discount as a conglomerate discount.[185]

Had the Court discounted or rejected any of the many essential premises undergirding Plaintiff's damages theories, the Class's potential recovery would have been reduced considerably. For example, Hubbard opined Dell's credit risk accounted for around half of the DVMT Discount; if the Court accepted Hubbard's calculation of the effect of Dell's credit risk and rejected Sacks's, the Class's recoverable damages would have been halved.[186] So too for Hubbard's and Sacks's

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[183] JX2844 (Ex. 2) ¶¶43-89.

[184] JX2844 (Ex. 2) ¶¶24-42.

[185] JX2844 (Ex. 2) ¶¶166-171; JX2839 (Ex. 3) ¶¶26-27, 78, 188-89.

[186] Sacks opined that the Class was entitled to nearly all the DVMT Discount as damages, save for $500 million of the Discount attributable to Dell's credit risk,

opinions on Dell's asserted conglomerate discount.[187] That risk was especially salient because several Funds contemporaneously attributed part of the DVMT Discount to Dell's credit risk and/or conglomerate discount.

Hubbard also asserted that a number of other DVMT characteristics purportedly limited the rights of DVMT stockholders compared to VMware stockholders and thus contributed to the DVMT Discount.[188] Those factors, which derived from DVMT's status as a Dell security, and not a VMware security, included: (i) DVMT had no direct access to VMware's considerable cash flows, such as via dividends; (ii) DVMT had no right to vote on actions taken by VMware, such as on transactions subject to "majority-of-the-minority" approval; (iii) DVMT was exposed to Dell's non-investment-grade, debt-laden balance sheet, thereby increasing DVMT's credit risk compared to VMware, which had sizeable cash reserves; (iv) neither DVMT stockholders nor the Committee had the unilateral power to require Dell to exchange their DVMT shares for VMware stock; (v) DVMT, but not VMware, was subject to Dell's unilateral right to convert DVMT

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which he opined was a legitimate basis for the discount and did not factor into his damages calculations. *See* JX2840 (Ex. 1) ¶¶35, 49. Hubbard, by contrast, opined that Dell's credit risk accounted for 15-26 percentage points of on-average 33% DVMT Discount. JX2839 (Ex. 3) ¶136.

[187] *See, e.g.*, JX2844 (Ex. 2) ¶32 (opining that DVMT suffered from a conglomerate discount that accounted for as much as 25 percentage points of the DVMT Discount, which, if accepted, would reduce the Class's damages by more than half).

[188] JX2839 (Ex. 3) ¶¶68-74.

forcibly into Dell Class C Stock at any time; and (vi) DVMT stockholders had no right to VMware's assets in a liquidation and would be deprioritized behind Dell's many creditors in a Dell liquidation and would therefore likely receive nothing.[189] Plaintiff thus faced the very real possibility that the Court would find that these features accounted for a meaningful portion of the DVMT Discount.

Although Sacks rebutted each of those arguments in support of his position that only a minority discount could explain the DVMT Discount,[190] these debates implicated complex and novel questions about the details of DVMT's unique structure and the relevant players' economic incentives in hypothetical scenarios (*e.g.*, any attempt by the Controllers to exchange assets underlying DVMT for other assets) that could have resulted in the Court's rejection of Sacks's opinions. So too could the Court have found that the existence of uncertainty itself regarding these scenarios justified some of the DVMT Discount. Plaintiff also recognized that, although Hubbard did not calculate dollar figures for the effect that the structural differences between DVMT and VMware stock had on the Discount between

[189] *Id.* §II.C.1.

[190] JX2848 (Ex. 5) ¶¶75-88.

them,[191] support for their financial impact did exist in the record, including because tracking stocks had historically traded, on average, at significant discounts.[192]

Plaintiff also recognized that the Court might generally adopt Sacks's view that a component of the DVMT Discount was attributable to a minority discount, but still disagree with Sacks as to the *extent* of the discount attributable to the Controllers. Plaintiff harbored concern that in this scenario, the Court might lack the tools necessary to fashion a reliable damages remedy, including because Sacks had not offered a methodology for quantifying DVMT's minority discount *directly* with mathematical precision.

Plaintiff thus needed to weigh the possibility that the Class could recover nothing or that any post-trial recovery could be reversed on appeal.[193] In light of the potentially "all or nothing" posture of the parties' damages theories, with an "all" recovery potentially representing by far the largest cash damages judgment in the Court's history, Plaintiff could not dismiss the possibility of a take-nothing recovery after trial or on appeal, or of a recovery less than Plaintiff sought.

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[191] Hubbard_446:17-23, 449:3-12, 450:6-13.

[192] *See supra* nn.34-36.

[193] *In re Tesla Motors, Inc. S'holder Litig.*, 2022 WL 1237185, at *40 (Del. Ch. Apr. 27, 2022) (entering judgment for defendants where "Plaintiffs went 'all in' on insolvency, arguing that SolarCity was worthless when Tesla acquired it, so any price paid by Tesla was too high."); *id*. ("[A]s is often the case when one swings for the fences, [Quintero] failed to make contact altogether." (citation and internal quotations omitted) (alteration in original)).

Plaintiff, of course, would have forcefully advocated at trial for imposition of the "wrongdoer rule" and the disgorgement of the Controllers' profits, which Sacks opined were one-in-the-same with the fair value of DVMT.[194] But Plaintiff had to discount that prospect given that the Court has often declined to impose such penalties even when plaintiffs proved fraud or other willful or intentional misconduct at trial.[195]

Plaintiff also considered the $1 billion cash Settlement against other potential remedies that the Court, in its broad equitable discretion, could have fashioned post-trial.[196] Plaintiff believed these potential alternative remedies could result in a damages range of between $400 million to $3.1 billion:

- ***$122/share***. Evidence suggests that Goldman tried to bargain to a $122/share price (in cash and Class C stock) because Dell would support that price, but ultimately secured support from the Funds at

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[194] *See, e.g.*, *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1132 (Del. 2015); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184-85 (Del. Ch. 1999).

[195] *See, e.g.*, *Boardwalk*, 2021 WL 5267734, at *88 (finding willful breach of partnership agreement but declining to apply wrongdoer rule); *Dole*, 2015 WL 5052214, at *45 (finding defendant fiduciaries committed fraud but declining to apply wrongdoer rule).

[196] *See, e.g.*, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) (noting that the Court's "powers are complete to fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages"); *see also Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996) ("Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly....The strict imposition of penalties under Delaware law are designed to discourage disloyalty.").

$120/share.[197] If the Court were to award the incremental consideration ($2/share) as damages, it would result in a ***$398.6 million*** award, exclusive of prejudgment interest.

- ***$125/share***. Similarly, there is evidence that the Special Committee requested (or considered requesting) $125/share (in cash and Class C stock).[198] If the Court were to award the incremental consideration ($5/share) as damages, it would result in a ***$996.6 million*** award, exclusive of prejudgment interest.

- ***Midpoint of Unaffected DVMT and VMware Stock Prices***. Although Evercore likened the DVMT Discount to a synergy to be shared by the parties,[199] the Committee began its negotiations with a price below the midpoint of DVMT and VMware's then-current trading prices—ensuring a result well below that.[200] If the Court were to award the difference between the deal price ($104.27/share) and the mid-point of the unaffected stock prices of DVMT ($88.44/share) and VMware ($137.63/share), it would result in a ***$1.6 billion*** damages award, exclusive of prejudgment interest.

- ***Difference Between Headline Price and Deal Price***. Sacks and Hubbard agreed that, while the Funds bargained for a $120/share headline price consisting of cash and Class C stock, DVMT stockholders only received $104.27/share in the Transaction. Plaintiff attributed the difference in value to Dell purposely inflating its valuation of Class C at the Controllers' behest. If the Court were to award the difference between the headline price and the deal price

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[197] *See* JX2125 at SpecialCommittee00000097 (Nov. 11, 2018 email noting: "If they had universal support at $122, GS thinks Dell would likely move."); JX2147 at GS-CLASSV-0095028 (Nov. 11, 2018 Goldman email noting the "[m]ission is to try to get these guys at $122.").

[198] PTB at 85-88 & n.379 (JX2068 at EVR_00053696 (talking points for Committee's call with Durban and Goldman) & JX2112 (reflecting $125/share offer)) n.380 (JX2180 at DELL00010322, DELL00010324 (each showing $125/share offer)).

[199] *Id.* at 45 (citing McBean_116:21-24, 118:4-13).

[200] *Id.* (JX1180; JX1953 at 159).

> as the measure of damages, it would result in a ***$3.1 billion*** award, exclusive of prejudgment interest.

Considering the continued risk of litigation through trial and appeal, including all of the foregoing considerations, Plaintiff submits the Settlement is a superb result for the Class. Indeed, the $1 billion cash Settlement roughly equates to the incremental value of the $125/share offer that the Committee either made, had rejected and failed to disclose, or, according to Defendants, failed to make altogether.[201] And it achieves that result with none of the risks that a trial *and* appeal would present, including the material risk of a take-nothing judgment.

Finally, the $1 billion cash Settlement provides even more value to the Class in that it reflects a recovery well above DVMT's market price at any time DVMT traded. Defendants and Hubbard focused on the importance of market prices under Supreme Court precedent and characterized any award to the Class as a windfall.[202] Plaintiff disagrees with that characterization because, *inter alia*, the market expectations incorporated an improper minority discount.[203] Nonetheless, there was a risk that this Court (or the Supreme Court on appeal) could accept this "windfall" argument to reduce or eliminate any damages award. As a practical matter, the

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[201] *See supra* at 14-15 & nn.78-79.

[202] Dell Director Defs. PTB at 32-35; JX2839 (Ex. 3) ¶¶31-36.

[203] PTB at 102-104; JX2848 (Ex. 5) ¶5.

Settlement provides a $1 billion benefit to the Class beyond the market price and market expectations, which further supports the Settlement's fairness to the Class.

C. The Settlement Compares Favorably to Prior Settlements

Prior settlements likewise support the Settlement's fairness. As this Court noted, plaintiffs sometimes present an analysis of how a settlement compares to precedent settlements in terms of percentage of equity value or as percentage of alleged damages.[204] The Settlement—reflecting a 4.8% premium to equity value and between 33% and 250% of Plaintiff's most plausible damages outcomes assuming victory at trial—is eminently fair when viewed against other settlements of direct M&A class actions that this Court has approved in the past ten years.

1. The Settlement Compares Favorably to Prior Settlements as a Percentage of Equity Value

The Court often "considers the premium to the deal price as a rough proxy for the strength of the settlement."[205] As discussed in *Calamos*, the traditional rule of thumb has been that most stockholder M&A settlements typically fall within a range of 1-2% of equity value, with exceptional results nearing or exceeding 5% of equity

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[204] *See supra* n.160.

[205] *Garfield v. BlackRock Mortg. Ventures, LLC*, C.A. No. 2018-0917-KSJM, Tr. at 24 (Del. Ch. Feb. 11, 2021) (TRANSCRIPT); *see also In re Calamos Asset Mgmt., Inc. S'holder Litig.*, Consol. C.A. No. 2017-0058-JTL, Tr. at 93-94 (Del. Ch. Apr. 25, 2019) (TRANSCRIPT).

value.[206] The Settlement, which reflects a 4.8% premium to equity value ($20.7 billion), is an excellent result according to this metric.

This record-breaking Settlement also passes muster under other analytical metrics. Plaintiff conducted a comprehensive review of cash settlements of direct class action M&A challenges approved by this Court since January 1, 2012. Exhibit 7 groups the settlements—47 in total—into "Transactions where Entire Fairness Would Presumably Apply" ("EF Transactions") and "Transactions Where Enhanced Scrutiny Would Presumably Apply" ("ES Transactions") by deal value (largest to smallest). Plaintiff's Counsel used that data to calculate the mean and median settlement values (as a percentage of equity value) for the EF and ES Transactions.[207]

As deal size increases above $1 billion, the dataset generally confirms the accuracy of *Calamos*'s rule of thumb. Indeed, for transactions with an equity value exceeding $1 billion, the mean and median settlement values were 1.78% and 1.54%, respectively.[208] Settlements of EF Transactions yielded slightly higher returns (2.32% mean and 2.30% median) than ES Transactions (1.24% mean and 0.77% median).[209] Only one settlement exceeded 5% of equity value,[210] and as deal size

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[206] *In re Calamos Asset*, Tr. at 4-5, 93 (TRANSCRIPT).

[207] Ex. 7.

[208] *See id.* §§A(i)&B(i).

[209] *Compare id.* §A(i) *with* §B(i).

[210] *Id.* at 10 (*Examworks* (6.8%)).

increased above $10 billion, settlement percentages were far lower—averaging just 0.41% of transaction equity value.[211]

Plaintiff notes that the mean and median premiums for *all* settlements regardless of transaction size were 13.96% and 5.9%, respectively, with settlements of EF Transactions again yielding slightly higher returns than ES Transactions.[212] That aggregate increase is primarily driven by two factors. *First*, the dataset shows that, as transaction value decreases, settlement value, as a percentage yield, increases. Indeed, settlements of transactions under $100 million have the highest percentage yields.[213] *Second*, the overall dataset is influenced by a handful of small settlements involving small transactions that nevertheless reflect a significant percentage of equity value.[214] For transparency's sake, Plaintiff has not excluded

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[211] *See id.* (*Columbia Pipeline* (0.61%); *El Paso* (0.5%); *TD Ameritrade* (0.12%)).

[212] *Id.* §C.

[213] *Id.* §§A(iv); §§B(iv).

[214] *See id. Buttonwood* ($2.1 million settlement reflecting 58.5% of $3.6 million equity value); *Calamos* ($22 million settlement reflecting 22.86% of $134.2 million equity value); *Chen v. Howard Anderson* ($35 million settlement reflecting 27% of $130.1 million equity value); *Cornerstone* ($17.9 million settlement reflecting 25.3% of $70.8 million equity value); *CVR* ($78.5 million settlement reflecting 33% of $240.5 million equity value); *Handy & Harman* ($30 million settlement reflecting 32.9% of $90.71 million equity value); *Orchard* ($10.73 million settlement reflecting 195% of $5.3 million equity value); *Salladay v. Lev* ($9 million settlement reflecting 20.32% of $44.3 million equity value); *Schuff* ($22.92 million settlement reflecting 114.13% of $22.7 million equity value); *Weinstein v. RMG* ($1.4 million settlement reflecting 27% of $5.12 million equity value).

any of those settlements (*see supra* n.214) from the data set, but had Plaintiff done so the overall mean and median figures would be reduced to 3.69% and 2.39%, respectively.[215]

2. The Settlement Compares Favorably to Prior Settlements as a Percentage of Likely Damages Outcomes

The Settlement is also an excellent result when viewed as a percentage of Plaintiff's plausible damages recovery. Plaintiff reviewed the same set of M&A settlements described above to calculate the mean and median settlement values (as a percentage of alleged damages) for the EF and ES Transactions. The mean and median settlement values for all transactions were 30.64% and 24%, respectively,[216] with settlements of EF Transactions yielding higher returns (mean of 34.65% and median of 21.69%)[217] than those of ES Transactions (mean of 26.64% and median of 26.90%).[218]

Plaintiff considers this data less reliable than the average deal premia described above for several reasons. In many cases, reliable public data concerning alleged damages is unavailable. Many cases settle before expert reports are

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[215] The settlement returns on EF Transactions (mean of 3.99% and median of 2.90%) and ES Transactions (mean of 3.39% and median of 1.89%) would likewise be significantly reduced.

[216] *Id.* §C.

[217] *Id.* §A.

[218] *Id.* §B.

submitted, leaving Plaintiff to rely on less-precise allegations in pleadings or briefing. And even when the parties have submitted expert reports, references to the quantum of alleged damages are often redacted.[219]

Further, counsel seldom present settlements as a percentage of maximum possible damages, but rather compare settlements to plausible, risk-adjusted damages estimates, consistent with how the Court itself evaluates litigation value.[220] Because "[t]rials involve risk and…the judicial system cannot make litigation risk-free,"[221] the Court looks not only to what "plaintiff's counsel might have achieved on their best day at trial," but also to what a realistic "risk-adjusted outcome" would have been, "given the challenges that plaintiff faced in this case."[222]

Applying those well-established principles here, as explained above, Plaintiff's Counsel heavily discounted the prospect that the Court would issue the

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[219] *Id.* (*Calamos*, *DreamWorks*, *Searles*, *Gardner Denver*, *Starz*, *Tangoe & TD Ameritrade*).

[220] *See, e.g.*, *In re Oracle Corp. Deriv. Litig.*, 2019 WL 6522297, at *16 (Del. Ch. Dec. 4, 2019) ("It is an accepted principle of Delaware law that the value of a derivative claim is derived primarily from the risk-adjusted recovery sought by the plaintiff."); *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 483 (Del. Ch. 2013) ("If I assume prevailing on the *Brophy* claim was a toss-up, or even a 1-in-5 proposition, the risk-adjusted, pre-interest recoveries for the minority of $40 million and $16 million…").

[221] *Savage v. Cooke*, 1995 WL 945563, at *1 (Del. Super. Oct. 27, 1995).

[222] *Cumming v. Edens*, C.A. No. 13007-VCS, Tr. at 17 (Del. Ch. July 31, 2019) (TRANSCRIPT).

largest class judgment in its history (by a factor of *nearly 15*),[223] and that such a judgment would withstand an appeal. Importantly, had this Court or the Supreme Court rejected *any* of the essential premises of Plaintiff's damages theories—*e.g.*, that credit risk and conglomerate discount were *de minimis*, despite sophisticated investors attributing significant amounts to both; that the different rights of DVMT and VMware stockholders were of no economic consequence, despite the significant discounts for almost all tracking stocks; and that the seeming windfall to DVMT stockholders should be ignored, even though the DVMT Discount existed from the very start—the Class's recovery would have been significantly diminished or eliminated altogether.[224]

Thus, for Plaintiff to reach its upper-end damages figure of $10.7 billion, it would have had to pitch a perfect game at trial—and then repeat that performance on appeal. For example, under the "1-in-5" probability applied in *Primedia* (which involved claims that were much more straightforward than the claims here),[225] the Settlement would amount to 46.7% of the expected value of the case—far exceeding the mean and median outcomes in prior cases calculated above.[226] The percentage

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[223] *See supra* n.172.

[224] *See supra* §1(B).

[225] 67 A.3d at 483.

[226] *See supra* at 52 & nn.216-218.

is also very favorable when compared against Plaintiff's alternative (and likelier) avenues of recovery, which ranged from $400 million to $3.1 billion.[227] Even without risk adjustment (and notwithstanding that even these lower amounts were far from certain), the Settlement represents 33% to 250% of these likelier outcomes.

D. The Parties Negotiated the Settlement at Arm's Length with the Assistance of a Preeminent Mediator

"[T]he manner in which the Settlement was reached provides further evidence of its reasonableness."[228] Here, settlement negotiations began "in the shadow of an impending trial" with the assistance of a "a highly respected former United States District Court Judge and former United States Attorney."[229]

This was the antithesis of an early settlement. Plaintiff completed fact and expert discovery before mediating, and was prepared to try its claims both before

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[227] *See supra* at 46-47.

[228] *Activision*, 124 A.3d at 1067.

[229] *Id. See also Voigt v. Metcalf*, C.A. No. 2018-0828-JTL, Tr. at 48 (Del. Ch. Jan. 19, 2022) (TRANSCRIPT) ("I also take into account that the settlement was achieved with the assistance of an outstanding mediator, which I think is an important bona fide."); *Cumming v. Edens*, C.A. No. 13007-VCS, Tr. at 17 (Del. Ch. July 31, 2019) (TRANSCRIPT) ("I'm always comforted when settlements presented to me are the product of mediation. I think that suggests a vigorous vetting of risk, which is what a good mediation is all about, especially when qualified counsel is involved on both sides of the V[.]"); *Vero Beach Police Officers' Ret. Fund v. Bettino*, C.A. No. 2017-0264-JRS, Tr. at 25 (Del. Ch. Dec. 3, 2018) (TRANSCRIPT) (noting that the mediator's involvement provided the Court "comfort that the litigation risks for all parties here have been vetted and accounted for in the final negotiated settlement.").

and after the Mediation in September 2022, which ended without any agreement between the parties. Only several weeks later, after Judge Phillips made a mediator's recommendation that the parties settle for $1 billion in cash—an amount Plaintiff determined fell within a range of favorable trial outcomes for the Class—did Plaintiff agree to settle shortly before the scheduled pretrial conference.

E. The Experience and Opinion of Plaintiff's Counsel and Absence of Objections Favor Settlement Approval

The opinion of experienced counsel also supports the Settlement.[230] Plaintiff's Counsel include stockholder advocates who are well-known to the Court, have significant experience prosecuting fiduciary misconduct under Delaware law, and have substantial experience trying complex claims like these. Counsel were also fully informed when approaching settlement, having completed all fact and expert discovery before even discussing a possible resolution of Plaintiff's claims.

Moreover, the absence of objections here "strongly" supports the Settlement's fairness.[231] Indeed, it has long been the case that when (as here) a settlement is

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[230] *See, e.g.*, *Polk*, 507 A.2d at 536 (noting the court's consideration of "the views of the parties involved" when determining the "overall reasonableness of the settlement").

[231] *In re DaimlerChrysler AG*, 2004 WL 7351531, at *16 (D. Del. Jan. 28, 2004) (Seitz, Jr., Special Master) ("The Notice of Settlement was widely distributed to many different investors, including large sophisticated institutional investors. Not a single valid objection to the settlement or proposed fee request remained at the time of the fairness hearing. The absence of objections strongly supports the fee award requested by Lead Counsel.").

noticed to a class of sophisticated investors who have large interests at stake, the lack of objections creates a "strong presumption that the agreement is fair."[232]

II. THE PLAN OF ALLOCATION SHOULD BE APPROVED

Plaintiff also seeks approval of its allocation plan. "An allocation plan must be fair, reasonable, and adequate."[233] Here, the plan of allocation entails distributing, *pro rata*, Settlement proceeds directly to stockholders that held at the close of the Merger (excluding Defendants and their affiliates).[234] The plan avoids the "relatively high administrative costs" and "unknown distributional effects"[235] of a claim process by providing for a direct distribution to Class members through Plaintiff's Settlement Administrator, A.B. Data.[236] The plan also specifically adheres to this Court's most-recent guidance in *In re PLX Technology Inc. Stockholders Litigation*.[237]

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[232] *Developments in the Law: Class Action*, 89 HARV. L. REV. 1536, 1567-68 (1976) ("If each class member has a large interest at stake, the judge can legitimately rely upon absentees to respond to notice and appear before the court if they have any significant objections to the settlement. If no objectors appear, there should be a strong presumption that the agreement is fair.").

[233] *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009), *overruled on other grounds by Urdan v. WR Cap. P'rs, LLC*, 244 A.3d 668 (Del. 2020).

[234] Ex. A to Ewashko Aff. ¶¶46-49.

[235] *See Montgomery v. Erickson Inc.*, C.A. No. 8784-VCL, Tr. at 16 (Del. Ch. Sept. 12, 2016) (TRANSCRIPT).

[236] *See, e.g.*, *In re PLX Tech. Inc. S'holders Litig.*, 2022 WL 1133118 (Del. Ch. Apr. 18, 2022).

[237] *Id.* at *1.

III. THE FEE AND EXPENSE AWARD SHOULD BE GRANTED

"The determination of any attorney fee award is a matter within the sound judicial discretion of the Court of Chancery."[238] In evaluating a fee and expense application, this Court considers the factors enumerated in *Sugarland Industries v. Thomas*, 420 A.2d 142 (Del. 1980): (i) the results achieved; (ii) the contingent nature of counsel's fee; (iii) the litigation's relative complexities; (iv) counsel's efforts, including time and expenses; and (v) counsel's standing and ability. *Id*.

Here, Plaintiff seeks an all-in Fee and Expense Award of 28.5% of the Settlement Fund, or $285 million. Each *Sugarland* factor supports Plaintiff's request.

A. The $1 Billion Cash Settlement is a Substantial Monetary Benefit

"Delaware courts have assigned the greatest weight to the benefit achieved in litigation."[239] The Class's recovery "is the heart of the *Sugarland* analysis."[240] Here, Plaintiff obtained an unprecedented benefit for the Class: $1 billion in cash.

"When the benefit is quantifiable, as in this case, by the creation of a common fund, *Sugarland* calls for an award of attorneys' fees based upon a percentage of the

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[238] *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1255 (Del. 2012) (citation omitted).

[239] *Id.* at 1254 (citation omitted).

[240] *Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000).

benefit."[241] "Delaware case law supports a wide range of reasonable percentages for attorneys' fees" with 33% at "'the very top of the range of percentages.'"[242]

The 28.5% all-in award Plaintiff seeks is well in line with the percentages this Court has historically awarded for "eve of trial" settlements, and is conservative under the relevant Court precedents.

In *In re TeleCorp PCS, Inc. Shareholders Litigation*, for example, then-Vice Chancellor Strine held that *Sugarland* compels a "very substantial award" when, as here, a settlement is reached "on the eve of trial after very extensive pretrial proceedings, including full discovery."[243] The Court awarded 30% of the settlement fund, all-in, noting that for a plaintiff to achieve a settlement at such an advanced stage of litigation is "not common" and does not "happen a lot in Court in fiduciary duty cases."[244]

Similarly, in *In re Rural/Metro Corporation Shareholders Litigation*, this Court held that "an aggregate deduction of approximately 35 percent [from the settlement fund]" was not "unreasonable" when the plaintiff had reached a

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[241] *Ams. Mining*, 51 A.3d at 1259.

[242] *Id*. (citation omitted).

[243] Consol. C.A. No. 19260, Tr. at 91 (Del. Ch. Aug. 20, 2003) (TRANSCRIPT).

[244] *Id.* at 91, 101.

settlement "deep in the case, after full discovery, on the eve of trial."[245] There, the Court awarded counsel 36.2% all-in, equating to 28% of the settlement fund after subtracting counsel's expenses.[246]

In *In re Starz Stockholder Litigation*, Vice Chancellor Glasscock reasoned that an award of 30% of the settlement fund all-in, or 28.17% net of expenses, was "appropriate" where plaintiffs' counsel "litigated right up until the brink of trial."[247]

In *Riche v. Pappas*, this Court awarded 30% all-in where "[t]he parties settled just before trial."[248] As the Court held: "This litigation settled just before trial, so that warrants an upper-end award."[249]

Most recently, in *In re Mindbody, Inc. Stockholder Litigation*, Chancellor McCormick awarded "30 percent of the [settlement] fund…net of the expenses" for a settlement reached on the eve of trial.[250] There, the plaintiffs agreed in principle

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[245] Consol. C.A. No. 6350-VCL, Tr. at 37-38, 35 (Del. Ch. Nov. 19, 2013) (TRANSCRIPT).

[246] *Id*. at 36-37.

[247] Consol. C.A. No. 12584-VCG, Tr. at 10, 56-57 (Del. Ch. Dec. 10, 2018) (TRANSCRIPT).

[248] C.A. No. 2018-0177-JTL, Tr. at 23-24 (Del. Ch. Sept. 16, 2020) (TRANSCRIPT).

[249] *Id*. at 23.

[250] C.A. No. 2019-0442-KSJM, Tr. at 32 (Del. Ch. June 8, 2022) (TRANSCRIPT).

to settle certain of their claims approximately six weeks before trial.[251] The Court held that 30% of the common fund was reasonable given the stage at which plaintiffs had agreed to settle.[252]

Plaintiff agreed to settle after nearly three years of hard-fought litigation against elite defense counsel representing litigious and well-funded clients, after full discovery, and less than one month before trial. Thus, Plaintiff submits that its 28.5% all-in request is eminently reasonable.

B. The Secondary *Sugarland* Factors Support the Fee and Expense Award

1. Counsel Faced Substantial Contingency Risk

The contingent nature of the litigation is the "second most important factor considered by this Court in awarding the counsel fee."[253] "It is the 'public policy of Delaware to reward risk-taking in the interests of shareholders.'"[254] Accordingly, "[t]his Court 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."[255]

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[251] *Compare* Trans. ID 67349508 at 4 (agreement-in-principle January 18, 2022) *with* Trans. ID 67388909 (Trial commenced February 28, 2022).

[252] *Mindbody*, Tr. at 32-33.

[253] *Dow Jones & Co. v. Shields*, 1992 WL 44907, at *2 (Del. Ch. Jan 10, 1992).

[254] *Activision*, 124 A.3d at 1073 (citation omitted).

[255] *Ryan v. Gifford*, 2009 WL 18143, at *13 (Del. Ch. Jan. 2, 2009).

"This case involved true contingency risk."[256] Plaintiff's Counsel expended tens of thousands of hours, and over $4 million in out-of-pocket expenses, on an entirely contingent basis with no "ready-made exit or obvious settlement opportunity."[257] The parties did not even broach settlement until Plaintiff had fully developed its case, including completing fact and expert discovery and demonstrating that it was prepared to see its claims through trial. Thus, Plaintiff's Counsel did not engage in the sort of "risk aversion [that] manifests itself as a natural tendency to favor an earlier bird-in-in-the-hand settlement that will ensure a fee, rather than pressing on for a potentially larger recovery for the class at a cost of greater investment and with the risk of no recovery."[258]

Here, Plaintiff's Counsel pressed the case forward to the brink of trial, settling only after Defendants agreed to a record-setting, 10-figure cash payment to the Class. Plaintiff's Counsel should be rewarded for making the most of the considerable financial risk they shouldered.

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[256] *Activision*, 124 A.3d at 1074.

[257] *Sciabacucchi v. Salzberg*, 2019 WL 2913272, at *8 (Del. Ch. July 8, 2019), *vacated on unrelated grounds in Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

[258] *Orchard*, 2014 WL 4181912, at *8.

2. The Litigation Was Extraordinarily Complex

Another "secondary *Sugarland* factor[ ] is the complexity of the litigation. All else equal, litigation that is challenging and complex supports a higher fee award."[259] This case was enormously challenging and complex. Defendants and their army of able counsel—which include some of the best firms in the world—fought tooth-and-nail at every turn. Fact discovery was not only extraordinarily broad—consisting of the review of nearly 2.9 million pages of documents and Plaintiff's Counsel taking or defending 35 depositions—but also extraordinarily complex. It required hard-fought efforts, overcoming both intransigent opponents and spoliation issues, to obtain valuable documents and concessions, as discussed *supra* at 20-21.

In addition, Plaintiff and its expert had to develop novel valuation approaches in relation to a one-of-a-kind security (DVMT), another uniquely structured security (VMware), and a privately-held company (Dell). Plaintiff could not rely on well-established discounted-cash-flow or sum-of-the-parts analyses, or fall back on market prices. Rather, Plaintiff had to develop a bespoke damages approach while also analyzing complicated tax issues, alternative transactions like the Forced Conversion that baffled even the most sophisticated investors, and novel questions about how market expectations and minority discounts should be treated as both a

[259] *Activision*, 124 A.3d at 1072.

legal and economic matter. In short, this case required the highest level of commitment from Plaintiff's Counsel.

3. Counsel's Efforts Were Substantial

"The time and effort expended by counsel is another secondary, or even tertiary, consideration to the benefits achieved."[260] "Delaware courts regard this consideration as a crosscheck to guard against windfall awards, 'because the real measure of a fee award lies in the results achieved.'"[261] Indeed, "[m]ore important than hours is 'effort, as in what Plaintiffs' counsel actually did.'"[262]

Here, Plaintiff's Counsel litigated this Action aggressively and settled mere weeks before trial. As promised to the Court when Plaintiff sought and obtained leadership, Plaintiff's Counsel fully committed their time and resources to thoroughly and diligently prosecuting this Action to the eve of trial.[263] Plaintiff's Counsel did not follow a boilerplate approach; instead, they aggressively litigated this Action by, *inter alia*, (i) fighting for documentary discovery by filing discovery motions and pushing for more and better documents at every turn; (ii) adding Goldman as a Defendant after discovery revealed its central role (which required a

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[260] *Garfield v. Boxed, Inc.*, 2022 WL 17959766, at *15 (Del. Ch. Dec. 27, 2022) (citation omitted).

[261] *Id*. (citation omitted).

[262] *Ams. Mining*, 51 A.3d at 1258 (citation omitted) (alteration in original).

[263] *See supra* n.98.

robust amended complaint, significant additional motion-to-dismiss briefing, and oral argument preparation that Goldman mooted by withdrawing that motion at the last minute); (iii) taking more than 30 depositions; (iv) conducting expert discovery on novel damages issues involving a one-of-a-kind security (DVMT); (v) briefing and preparing to argue a motion *in limine* that, if granted, would have undercut several key premises of Defendants' damages arguments; and (vi) preparing this case over many months for an intricate, week-long trial, up until the eve of trial.[264]

From the start of the Action through the date of the Settlement, Plaintiff's Counsel collectively logged more than 53,000 hours and incurred $4,284,608.04 in expenses.[265] The requested Fee and Expense Award therefore represents an implied hourly rate of approximately $5,268.49 per hour (after deducting expenses), which is fair and reasonable under the relevant precedents.[266]

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[264] *See supra* at 17-35.

[265] Weinberger Aff. ¶¶7-8; *see also* Andrews Aff. ¶5; Cooper Aff. ¶4; Friedman Aff. ¶5; Johnson Aff. ¶4.

[266] *See, e.g.*, *In re Versum Materials, Inc. S'holder Litig.*, 2020 WL 639486 (Del. Ch. Feb. 5, 2020) (Brief); C.A. 2019-0206-JTL, Tr. at 81 (Del. Ch. July 16, 2020) (TRANSCRIPT) Trans. ID 65817799 (awarding hourly rate of over $10,000); *Sciabacucchi*, 2019 WL 2913272, at *6 (awarding $11,262.26 hourly rate and stating that a $6,000 hourly rate would be reasonable); *In re Medley Cap. Corp. S'holders Litig.*, Consol. C.A. No. 2019-0100-KSJM, Tr. at 67-68 (Del. Ch. Nov. 19, 2019) (TRANSCRIPT) Trans. ID 64511321 (finding a $5,989 hourly rate would not be "beyond the bounds of reasonableness").

4. Counsel's Standing and Ability Supports the Fee and Expense Award

Finally, under *Sugarland*, the Court considers the "standing and ability of plaintiffs' counsel."[267] Plaintiff's Counsel include highly experienced stockholder advocates who have some of the largest recoveries in this Court and who have taken multiple high-stakes cases through trial and appeal. Put simply, a record-breaking $1 billion recovery could not have been achieved against these Defendants and their counsel without the skill and experience of Plaintiff's entire team.

Plaintiff's Counsel were also matched against veritable armies of defense counsel from several of the top "white shoe" defense firms, representing clients whose resources, sophistication, and litigiousness are well-known to this Court.[268] Their standing and ability should also be considered in determining an award of attorneys' fees.[269]

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[267] *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1140 (Del. Ch. 2011).

[268] *In re Appraisal of Dell Inc.*, 2016 WL 3186538 (Del. Ch. May 31, 2016), *aff'd in part, rev'd in part, Dell, Inc. v. Magnetar Glob. Event Driven Master Fund, Ltd*, 177 A.3d 1 (Del. 2017).

[269] *Hollywood Firefighters' Pension Fund v. Malone*, 2021 WL 5179219, at *11 (Del. Ch. Nov. 8, 2021) (noting, in evaluating the *Sugarland* factors, that the "standing and ability of both the Plaintiffs' and the Defendants' counsel are well known to this Court to be exemplary").

IV. THE COURT SHOULD GRANT THE INCENTIVE AWARD

Finally, Plaintiff requests that the Court approve a $50,000 incentive award to Plaintiff, to be paid out of the Fee and Expense Award as compensation for the considerable time and effort Plaintiff devoted to this Action. The Supreme Court has recognized that an incentive fee for a class representative is appropriate based on the factors identified in *Raider v. Sunderland*: (i) the time, effort, and expertise expended by the class representative, and (ii) the benefit to the class.[270] Public policy favors such an award in appropriate circumstances: "Compensating the lead plaintiff for efforts expended is not only a rescissory measure returning certain lead plaintiffs to their position before the case was initiated, but an incentive to proceed with costly litigation (especially costly for an actively participating plaintiff) with uncertain outcomes."[271] In "the current environment" a stockholder who files plenary litigation faces "the very real possibility of having their computer and other electronic devices imaged and searched, sitting for a deposition—perhaps more than one if they also institute [§] 220 litigation—and then perhaps testify at trial."[272]

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[270] 2006 WL 75310, at *1 (Del. Ch. Jan. 4, 2006), *cited in Isaacson v. Niedermayer*, 200 A.3d 1205, 1205 n.1 (Del. 2018).

[271] *Raider*, 2006 WL 75310, at *1.

[272] *Verma v. Costolo*, C.A. No. 2018-0509-PAF, Tr. at 52-53 (Del. Ch. July 27, 2021) (TRANSCRIPT); *see also Voigt v. Metcalf*, C.A. No. 2018-0828-JTL, Tr. at 44-45 ("I will tell you, if you told me that I was going to have to image all my devices, produce a bunch of documents, spend a day with you-all, and then have a full-day

The requested incentive award is modest given the time and effort expended by Plaintiff, including its Chairman, Little, to represent the Class.[273] Moreover, the requested award is "reasonable and will be paid out of [] Counsel's fee" and has "been fully disclosed [in the notice] and [is] not so large as to raise specters of conflicts of interest or improper lawyer-client entanglements."[274]

deposition where any one of the excellent defense lawyers on this team was going to go into all my potentially tangentially related decisions that might touch on something about my ability to act in a fiduciary capacity or be in this litigation, I wouldn't do it for $5,000.").

[273] *See* Little Aff. ¶¶8-19.

[274] *See Orchard*, 2014 WL 4181912, at *13.

CONCLUSION

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

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Dated: March 20, 2023

CERTIFICATE OF SERVICE

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