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Case No. 2023-0993-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE WEBER, INC. STOCKHOLDER LITIGATION	CONSOLIDATED C.A. No. 2023-0993-KSJM **PUBLIC VERSION FILED: JUNE 9, 2025**

PLAINTIFFS' BRIEF IN SUPPORT OF CLASS CERTIFICATION, THE PROPOSED SETTLEMENT AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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INTRODUCTION

This proposed settlement for a cash payment of $19.25 million (the "Proposed Settlement") of this action (the "Action") arises from Weber Inc.'s ("Weber" or the "Company") take-private by its controlling stockholders, private equity firm BDT Capital Partners, LLC ("BDT") and Byron D. Trott ("Trott") (the "BDT Defendants"), for $8.05 per share (the "Transaction").[1]

BDT, which Trott controls, has controlled Weber since 2010. In 2021, BDT took Weber public in an initial public offering (the "IPO") for $14 per share, while maintaining 73% of Weber's voting control and stacking Weber's seven-member board of directors (the "Board") with directors close to BDT and Trott. Leading up to the IPO, BDT used Weber to distribute hundreds of millions of dollars to Trott and other insiders, and then used the IPO proceeds to pay down debt from those pre-IPO payments, rather than fund Weber's operations. Consequently, Weber lacked capital to weather short-term macroeconomic headwinds in late 2021 and 2022. Just one-year post-IPO, Weber's stock price dropped as a result of those post-IPO macroeconomic conditions. BDT exploited those conditions by proposing to freeze-out Weber's minority stockholders.

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[1] The Proposed Settlement terms are documented in the March 19, 2025 Stipulation and Agreement of Settlement, Compromise and Release (the "Stipulation") (Trans. ID 75895599).

In response to BDT's opportunistic proposal, Weber's Board formed a special committee whose two members had interests more closely aligned with the BDT Defendants than Weber's minority stockholders (the "Special Committee"). The Special Committee was, unsurprisingly, ineffective. The Special Committee gave away its negotiating leverage by (i) failing to immediately pursue or secure the third-party financing Weber needed to operate without additional money from BDT, (ii) letting management provide an overly conservative set of projections to BDT's Board representatives, who provided them to BDT, which insisted on negotiating the Transaction based on those projections, (iii) caving to BDT's demand to pay an unfair Transaction price in exchange for BDT providing Weber the cash it needed, and (iv) agreeing that the BDT Defendants' approval of the Transaction by written consent was the only stockholder approval required.

Upon the Transaction's announcement, Plaintiffs pursued books and records investigations and then filed their Verified Class Action Complaint against the BDT Defendants and the Board (collectively, the "Defendants") on October 3, 2023 (the "Complaint"). The Complaint established the Transaction was presumptively subject to entire fairness review. Defendants answered the Complaint. Plaintiffs then pursued discovery against the Defendants and third-parties, ultimately obtaining and reviewing approximately 86,300 documents totaling 540,000 pages.

In January 2025, the parties attended a mediation to potentially resolve the Action. The full-day mediation was unsuccessful, but the parties continued working with the mediator and ultimately accepted a double-blind mediator's recommendation, culminating in the Proposed Settlement days before Plaintiffs would depose Defendants and the Special Committee's financial advisor.

The Proposed Settlement is an excellent result that reflects the strengths of Plaintiffs' claims weighed against the challenges, obstacles, and risks of continued litigation, particularly in proving damages. The Proposed Settlement consideration comprises a significant percentage of both the Transaction price and what Plaintiffs could realistically expect to recover at trial. Thus, Plaintiffs respectfully request that the Court certify the Class (defined below) and approve the Proposed Settlement.

Plaintiffs also seek approval of a $3,830,00.00 fee award (20% of the net settlement fund) after reimbursement of out-of-pocket expenses of $99,606.30 the "Fee Award"). Plaintiffs and their counsel believe the Fee Award fairly compensates Plaintiffs' counsel for, among other things, (i) the significant financial benefit conferred on the Class by the Proposed Settlement, and (ii) Plaintiffs' counsel's investment of time and resources on a fully-contingent basis. The 20% Fee Award is also consistent with recent precedent.

STATEMENT OF FACTS[2]

A. BDT Controls and Uses Weber for Its Benefit

In 1952, the Stephen family founded Weber, the world's leading manufacturer of grills and grilling accessories.[3] The Stephens operated Weber through Weber-Stephen Products LLC ("WSP").[4] [redacted][5] [redacted][6] [redacted][7] [redacted]

[2] Plaintiffs' factual recitation is based on certain public documents and documents produced in discovery, which are attached to the contemporaneously filed Transmittal Affidavit of Kirsten Valania (cited as "Ex." herein). Plaintiffs have submitted selected exhibits, and will submit the remaining cited documents at the Court's request.

[3] Weber, Prospectus (Form 424B4) (Aug. 4, 2021) (the "IPO Prospectus") at 7.

[4] *Id.* at 20.

[5] BDT_00076915 at 2.

[6] BDT_00352150.

[7] *Id.* at 166–69.

[redacted][8] That month, in preparation for Weber's IPO, the BDT Defendants caused WSP to (i) distribute $170 million to the Pre-IPO Investors and (ii) repurchase $189 million of WSP units from the Stephens (the "April Transactions").[9] The BDT Defendants caused WSP to finance the April Transactions with debt.[10]

Four months later, in August 2021, the BDT Defendants took Weber public through the IPO for $14/share. The BDT Defendants used the IPO proceeds to repay WSP's debt-funded April Transactions.[11] The BDT Defendants effectively used the IPO to syphon cash to themselves and their co-defendant Pre-IPO Investors.

B. BDT Takes Weber Public and Maintains Control

Post-IPO, the BDT Defendants maintained control over Weber. *First*, after undersizing the IPO,[12] BDT retained 73% of Weber's voting power, which reflected [redacted][13] *Second*, the BDT Defendants stacked Weber's seven-member Board with the following

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[8] BDT_00352150.

[9] IPO Prospectus at 18; BDT_00076915 at 2.

[10] IPO Prospectus at 18.

[11] BDT_00100483.

[12] *See id*.

[13] BDT_00100213 at 219.

directors, each of whom served on WSP's board of managers, and are close to the BDT Defendants:

- **Rainko** is a BDT Partner and was a Pre-IPO Investor.[14]
- **Hill** has worked as a BDT Senior Advisor and BDT & MSD Partners[15] Operating Partner since 2020 and was a Pre-IPO Investor.[16]
- **McCourt** has worked as a BDT Operating Partner and was a Pre-IPO investor.[17]
- **Rich** has worked as a BDT Senior Advisor and was a Pre-IPO Investor.[18]
- [redacted][19] [redacted][20] [redacted] (ii) causing WSP

[14] WeberDefs_00002587 at 2764.

[15] BDT & MSD Partners is a merchant bank and BDT's sister company.

[16] Responses and Objections to Plaintiffs' First Set of Interrogatories Directed to Defendants Susan T. Congalton, Magesvaran Suranjan, Elliott Hill, Martin McCourt, Melinda R. Rich, and James C. Stephen, Response 17 (Sept. 30, 2024) (Trans. ID 74628701).

[17] *Id*.

[18] *Id*.

[19] BDT_00025372 at 380.

[20] BDT_00044305 at 318.

[redacted] and (iv) permitting the Stephens to invest in the post-Transaction entity.

- **Congalton** joined WSP's board in 2016, was a Pre-IPO Investor and received a [redacted] WSP special distribution in the April Transactions.[22] [redacted][23]
- [redacted][24] [redacted][25]

C. Weber's Temporarily Depressed Stock Price and Performance

By late 2021, Weber and its competitors faced an international supply chain crisis, rising inflation, surging freight and transportation prices, and material foreign

[21] BDT_00076915 at 2.

[22] WeberDefs_00010501.

[23] Ex. 1; BDT_00378331.

[24] *See, e.g.*, Ex. 2; BDT_00004112; WeberDefs_00005852.

[25] *See, e.g.*, Ex. 2; BDT_00004112.

exchange rate movements.[26] These macroeconomic pressures negatively impacted consumer spending and Weber's 2022 performance. Already faced with downward price pressure from BDT's controlling stake and with volatility from the low public float,[27] Weber's stock price closed below the IPO price on and after November 29, 2021. The BDT Defendants and Weber, however, remained confident in Weber's long-term prospects,[28] but needed to resolve Weber's near-term cash flow issues.

D. BDT's Opportunistic Take-Private

By July 2022, BDT was displeased with Weber's then-CEO Chris Scherzinger ("Scherzinger") and sought a new CEO. Weber's then-Chief Information Officer Alan Matula ("Matula") and Suranjan, who would soon serve on the Special Committee, threw their hats in the ring.[29]

That same month, the BDT Defendants seized on Weber's low stock trading price and liquidity needs by planning to take Weber private. Weber management understood this. By mid-July, Matula and Horton developed a [redacted]

[redacted]

[26] *See* Ex. 3 at 190–91.

[27] BDT_00198498 at 534; BDT_00112155 at 62.

[28] *See* Ex. 3 at 190–91.

[29] BDT_00378339 at 343.

[redacted].[30] [redacted]

[redacted]

[redacted].[32] [redacted]

i.e., as BDT's private company.[33] BDT rewarded Matula for positioning Weber's take-private: on July 25, Weber announced Matula's appointment as interim CEO.[34]

Also on July 25, 2022, Weber announced "preliminary" financial results, Scherzinger's departure, the dividend suspension, and other cost-cutting measures.[35] Predictably, Weber's stock dropped about 13% to $6.56 on July 25, which positioned BDT to make a lowball take-private proposal.

On July 29, 2022, BDT, through Weber, granted Matula and Horton "one time equity grants" equivalent to a year's pay.[36] This effectively neutralized Weber management in Transaction negotiations.

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[30] WeberDefs_00000504 at 506.

[31] *Id*.

[32] *Id.*

[33] *Id.* at 505.

[34] Weber, Information Statement (Schedule 14C) (Jan. 30, 2023) (the "Information Statement") at 25; WeberDefs_00027650.

[35] Information Statement at 25.

[36] WeberDefs_00001290 at 91–93.

On August 3 and August 4, 2022, Horton told the Board that Weber (i) [redacted], (ii) [redacted], and (iii) [redacted].[37]

On August 15, 2022, Weber announced quarterly financial results and held its earnings call. Horton explained that the cost savings steps were already positively impacting Q3 and would favorably impact Q4 and fiscal 2023.[38] But BDT took Weber private before Weber's minority investors could benefit from these plans.

[redacted][39] [redacted][40]

On August 23, 2022, Matula told BDT that he wanted to be promoted to CEO. Matula told Rainko (i) it was his "strong desire [] to continue as CEO of this great brand and company," and (ii) he was "appreciative of everything BDT has done over

[37] WEBR_01045 at 4, 48.

[38] *Weber Inc. (WEBR), Q3 2022 Earnings Call Transcript*, THE MOTLEY FOOL (Aug. 15, 2022) ("Q3 2022 Tr."), https://www.fool.com/earnings/call-transcripts/2022/08/15/weber-inc-webr-q3-2022-earnings-call-transcript/, at 5.

[39] Information Statement at 26; BDT_00378379.

[40] Information Statement at 26; BDT_00378379.

the years and hope that is deeply reciprocal."[41] Matula proved his loyalty to BDT during the Transaction process. BDT rewarded him with the full-time CEO position.

E. Defendants Form the Special Committee and Undermine Its Negotiating Leverage

On August 29, 2022, the Board formed the Special Committee.[42] Defendants undermined the Committee's effectiveness from the outset.

First, there was some evidence that the Special Committee—comprising Congalton (as Chair) and Suranjan—lacked independence from BDT and was compromised.[43] As discussed above, Congalton has personal, professional, and financial relationships with BDT, and Suranjan was auditioning for a role as Weber's CEO.

Second, as the Special Committee was told by its financial advisor Centerview Partners ("Centerview"), [redacted][44] But BDT undermined the Special Committee's efforts to obtain financing. For example, on August 24, 2022, after the Special Committee

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[41] Ex. 4.

[42] WEBR_00574.

[43] WeberDefs_00013030.

[44] WEBR_00199 at 216 and 219.

reached out to [redacted] as a potential financing source,[45] [redacted] contacted BDT to discuss Weber's potential "liquidity solutions."[46] BDT clarified that it did not support [redacted] proposed financing, stating that third-party financing "might not be a priority."[47]

Third, BDT directed Weber to give BDT confidential Company information that BDT then exploited to gain an upper hand in the negotiations. On September 28, 2022, Rainko spoke with Weber's outside counsel Davis Polk, who then reported back to Rainko: "Message delivered [to the Special Committee's counsel]. They are aligned on information flow and the need for the full Board to receive information."[48] Matula and Horton then delivered a set of Weber projections to the full Board, including Rainko and Flaherty (the "October Projections").[49] [redacted]

[redacted]

[45] [redacted] CENTERVIEW0003698.

[46] Ex. 5.

[47] *Id*.

[48] Ex. 6.

[49] WEBER_000068703 at attachment pages 9–11.

[redacted][50] Flaherty forwarded the October Projections to BDT,[51] which, as discussed below, insisted on negotiating based on them.

Fourth, while undermining Weber's ability to obtain third-party financing, the BDT Defendants refused to give Weber the cash it needed to operate its business until the Special Committee agreed to BDT's preferred take-private price. Thus, on October 6, 2022, BDT proposed to loan Weber $61.2 million (including a $1.2 million fee for BDT),[52] [redacted].[53] [redacted][54] [redacted] [redacted][55]

Fifth, [redacted][56] This

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[50] WeberDefs_00023572.

[51] Ex. 7.

[52] WeberDefs_00004324-28.

[53] Ex. 8 at 552.

[54] WeberDefs_00023189 at 196; BDT_00036676; BDT_00036679.

[55] CENTERVIEW0006459. BDT also refused to decrease its 2% (i.e., $1.2 million) fee.

[56] WEBR_00290 at 293.

further constrained the committee's ability to secure third-party financing for Weber that was critical to strengthening the committee's negotiating leverage.

In short, the unfair Transaction was inevitable from the outset.

F. The Special Committee Prioritizes BDT's Preferred Take-Private Over Executing Weber's Standalone Plan with [redacted]

On October 24, 2022, BDT delivered its take-private proposal, based on the October Projections, for just $6.25 per share in cash.[57] BDT also said it "would not vote in favor of any alternative sale, merger or similar transaction involving the Company."[58] The Special Committee acceded to BDT's demands and never pursued a take-private or business combination with third parties,[59] furthering undermining its negotiating leverage.

On November 3, 2022, [redacted].[60] On November 6, Centerview conveyed to BDT that the Special Committee (i) made a $9.75 per share counter,[61] which reflected an $8.00

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[57] WeberDefs_00029635.

[58] *Id*.

[59] WEBR_00272 at 274.

[60] WEBR_00102 at 134; [redacted]

[61] BDT_00036676. Centerview also conveyed that the "unaffected" price BDT should use for its "premium" analysis [redacted] the closing price of Weber's stock before the market learned about BDT's potential loan to Weber, which caused Weber's stock price to drop. BDT_00036676 at 76.

midpoint, (ii) agreed to drop a request for a majority of the minority vote, and (iii) received three financing proposals. [redacted][62]

On November 7, BDT countered at $6.55 per share, a paltry increase of $0.30 that kept the $8.00 midpoint, and asked to review Weber's November 3 projections (the "November Projections") that management prepared.[63]

On November 8, 2022, the Board approved BDT's initial loan of $61.2 million.[64] On November 9, the Special Committee countered BDT's take-private proposal at $9.45, a $0.30 move that matched BDT's last move and kept the $8.00 midpoint.[65] The committee also agreed to give BDT the November Projections.[66] BDT, however, refused to negotiate based on the November Projections and continued to rely on the October Projections, highlighting that giving the October Projections to the Board, and thus BDT, hurt the Special Committee's negotiating position.[67]

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[62] *Id.* at 77.

[63] Information Statement at 33; WEBR_00265.

[64] WEBR_00578 at 79–82.

[65] WEBR_00294 at 297.

[66] Ex. 9; Information Statement at 34; WEBR_01635.

[67] Ex. 10; WEBR_00001 at 1–2.

On November 14, 2022, [redacted][69] Centerview told the Special Committee that [redacted] revised proposal would allow Weber to execute on its standalone plan without requiring new funds from BDT or a Covenant waiver.[70]

On November 21, 2022, [redacted][71] The Special Committee responded feebly. [redacted].[72] The committee continued mirroring BDT's moves. BDT countered with $7.75, and the Special Committee responded with $8.25. BDT then made a "best and final" of $8.05,[73] and the Special Committee agreed, subject to agreement on financing. On November 30, having

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[68] [redacted]

[69] Ex. 9 at 302; WEBR_00071 at 75, 78; [redacted]

[70] Ex. 9.

[71] Ex. 10.

[72] *Id*.

[73] WEBR_00010; WeberDefs_00023504.

extracted a low price from the Special Committee, BDT agreed to provide the financing Weber needed: $200 million.[74]

On December 10, 2022, the Special Committee approved the Transaction. On December 11, the Board followed suit and the parties executed the Agreement and Plan of Merger (the "Merger Agreement").

G. The Litigation

Following books and records investigations, Plaintiffs filed their Complaint on October 3, 2023.[75]

On April 25, 2024, Plaintiffs served their First Set of Interrogatories Directed to All Defendants and their First Set of Requests for the Production of Documents Directed to All Defendants.[76]

On May 16-17, 2024, the Defendants filed their Answers to the Complaint.[77]

Between May 7, 2024 and January 28, 2025, Plaintiffs served twenty-one subpoenas on third parties.[78] In total, Plaintiffs obtained and reviewed

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[74] Information Statement at 36.

[75] Stipulation ¶ J.

[76] *Id*. ¶ O.

[77] *Id*. ¶¶ P–Q.

[78] *Id*. ¶¶ R, T, V.

approximately 86,300 documents, totaling 540,000 pages.[79] The parties scheduled the depositions of Defendants and Centerview, which would commence on the heels of mediation.

H. The Parties Reach a Mediated Settlement

During fact discovery, the parties agreed to mediate (the "Mediation"). On January 21, 2025, the parties attended a full-day mediation with David M. Murphy, Esq. (the "Mediator") that did not result in a settlement.[80] The parties continued working with the Mediator, ultimately accepting a double-blind mediator's recommendation to resolve the Action for $19.25 million.[81]

On March 19, 2025, the parties executed the Stipulation.

On April 21, 2025, the Court entered the scheduling order (the "Scheduling Order") approving dissemination of the notice of settlement (the "Notice") and scheduling a hearing on approval of the Proposed Settlement for June 30, 2025.

On May 1, 2025, pursuant to the Scheduling Order, the Settlement Administrator mailed the Notice to the Class and caused the Notice and Stipulation to be posted to a settlement-dedicated website the Settlement Administrator created.

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[79] *Id.* ¶ W.

[80] *Id.* ¶ U.

[81] *Id.* ¶¶ X-Y.

ARGUMENT

I. THE CLASS SHOULD BE CERTIFIED

A. Applicable Standard

"Certification of a class under Court of Chancery Rule 23 is a two-step process, which requires that the purported class meet all four criteria within Court of Chancery Rule 23(a) and at least one of the criteria within Court of Chancery Rule 23(b)."[82]

The Scheduling Order preliminarily certified, pursuant to Rule 23, a non-opt out class (the "Class") as follows:

> All former holders of Weber Class A common stock at any time between announcement of the Merger Agreement through the closing of the Transaction, together with their successors and assigns. Excluded from the Class are (i) the Defendants herein, (ii) members of the immediate family of any of the Individual Defendants, (iii) and any entity in which any of them has a controlling interest, and the heirs, successors, or assignees of any such excluded party (the "Excluded Persons"). Excluded Persons also include any trusts, estates, entities, or accounts that held Company shares for the benefit of any of the foregoing.[83]

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[82] *In re Ebix, Inc. S'holder Litig.*, 2018 WL 3570126, at *1 (Del. Ch. July 17, 2018); Ct. Ch. R. 23(a)-(b).

[83] Scheduling Order ¶ 2.

Final certification of the Class is appropriate because this Action satisfies Rule 23(a) and fits "within the framework provided for in subsection (b) [of Rule 23]."[84]

B. The Class Satisfies the Requirements of Rule 23(a)

Under Rule 23(a), a class must meet four requirements: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (iv) the representative parties will fairly and adequately protect the interests of the class.[85]

1. Rule 23(a)(1): Numerosity Is Satisfied

Court of Chancery Rule 23(a)(1) requires that the class members be "so numerous that joinder of all members is impracticable . . . ."[86] The Court has previously held that "[t]here is no bright-line cutoffs, but numbers 'in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement.'"[87]

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[84] *Nottingham Partners v. Dana*, 564 A.2d 1089, 1095 (Del. 1989) (citation omitted).

[85] Ct. Ch. R. 23(a).

[86] Ct. Ch. R. 23(a)(1).

[87] *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *13 (Del. Ch. Mar. 31, 2009) (citing *Leon N. Weiner & Assocs. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991)).

There are likely thousands of Class members in this Action. According to the Information Statement, as of January 26, 2023, there were more than 22 million shares of Weber common stock issued and outstanding that were not owned by BDT, Trott, or the Company's officers and directors.[88] It would be impracticable to join all of the potential plaintiffs before this Court. Accordingly, the Class satisfies the numerosity requirement of Rule 23(a).

2. Rule 23(a)(2): Commonality Is Satisfied

Rule 23(a)(2) requires that "there are questions of law or fact common to the class . . . ."[89] Commonality will be met "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated."[90]

The factual and legal issues in this Action are common for all members of the Class. They include: (i) whether Defendants breached their fiduciary duties in connection with the Transaction; and (ii) the extent of damages arising from any such misconduct. Because this Action asserts claims that "implicate the interests of

[88] *See* Information Statement at 102-03.

[89] Ct. Ch. R. 23(a)(2).

[90] *Leon N. Weiner & Assocs.*, 584 A.2d at 1225 (citation omitted).

all members of the proposed class of shareholders," it meets the commonality requirement of Rule 23(a)(2).[91]

3. Rule 23(a)(3): Plaintiffs' Claims Are Typical

Rule 23(a)(3) requires that the proposed class representatives' claims are "typical of the claims or defenses of the class . . . ."[92] The Court will generally find typicality where, as here, the class representatives' claims "arise[] from the same event or course of conduct that gives rise to the claims [or defenses] of other class members and [are] based on the same legal theory."[93]

Plaintiffs' claims arise from Defendants' breaches of fiduciary duty in connection with the Transaction. All Class members were affected by Defendants' conduct in a similar manner to Plaintiffs. Thus, Plaintiffs' legal and factual positions are consistent with, and do not create conflicts among, the Class. Accordingly, the typicality requirement is met.

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[91] *In re Lawson Software, Inc. S'holder Litig*., 2011 WL 2185613, at *2 (Del. Ch. May 27, 2011).

[92] Ct. Ch. R. 23(a)(3).

[93] *N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, 2013 WL 610143, at *3 (Del. Ch. Feb. 13, 2013) (citation omitted).

4. Rule 23(a)(4): Plaintiffs Have Fairly and Adequately Protected the Interests of the Class

Rule 23(a)(4) requires that the class representatives will "fairly and adequately protect the interests of the class."[94] Class representatives are generally adequate if (i) there is no "economic antagonism[] between the representative and the class," and (ii) the class representatives are represented by "qualified, experienced, and competent" counsel capable of prosecuting the litigation.[95] This Court has previously noted that "the requirements for an 'adequate' class representative are not onerous."[96]

Here, there are no conflicts between Plaintiffs' interests and those of the Class. Plaintiffs are typical members of the Class they seek to represent. Furthermore, Plaintiffs selected counsel with significant experience litigating stockholder class actions, as demonstrated by their efforts litigating this Action and the excellent Proposed Settlement secured on behalf of the Class.

C. The Class Satisfies the Requirements of Rule 23(b)(1) and (b)(2)

In addition to the requirements of Court of Chancery Rule 23(a), a class will be certified if "it fits into one of the three categories specified in Court of Chancery

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[94] Ct. Ch. R. 23(a)(4).

[95] *N.J. Carpenters Pension Fund*, 2013 WL 610143, at *3 & n.24.

[96] *O'Malley v. Boris*, 2001 WL 50204, at *5 (Del. Ch. Jan. 11, 2001).

Rule 23(b).”[97] “Delaware courts ‘repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2).’”[98]

1. Certification Under Rule 23(b)(1) Is Appropriate

Rule 23(b)(1) provides for class certification where (i) the prosecution of separate actions by or against individual members of the class would create a risk of “inconsistent or varying adjudications . . . that would establish incompatible standards of conduct for the party opposing the class,” and (ii) “adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.”[99]

Absent certification, there is a significant risk that incompatible standards would be created for Company stockholders.[100] Among other things, if Class members were forced to individually pursue their claims, identical members could

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[97] *In re Ebix*, 2018 WL 3570126, at *4.

[98] *In re Celera Corp. S’holder Litig.*, 59 A.3d 418, 432-33 (Del. 2012) (citation omitted).

[99] Ct. Ch. R. 23(b)(1)(A)–(B).

[100] *Turner v. Bernstein*, 768 A.2d 24, 35 (Del. Ch. 2000).

be awarded different per-share damages, producing inequitable results and establishing incompatible standards for Defendants.[101]

Furthermore, if no class is certified, adjudication of claims held by individual plaintiffs would, as a practical matter, prejudice non-parties with identical claims and substantially burden the Court with an inefficient means of resolving the action.[102]

2. Certification Pursuant to Rule 23(b)(2) Is Appropriate

When particular facts of any one stockholder would have no bearing on the appropriate remedy, Rule 23(b)(2) certification is appropriate.[103] If defendants are alleged to have engaged in a single course of conduct generally applicable to the class, certification under Rule 23(b)(2) is appropriate even if there is simply monetary recovery.[104]

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[101] *In re Ebix*, 2018 WL 3570126, at *5 ("[C]lass certifications under Rules 23(b)(1) and (2) permit damages recoveries as long as adjudication is uniform and the primary relief sought is equitable in nature.").

[102] *See In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1095 (Del. Ch. 2001) ("Class certification under Rule 23(b)(1) is proper in this case because the multiple lawsuits that would follow were this motion denied would be both prejudicial to nonparties and inefficient.").

[103] *See Hynson v. Drummond Coal Co.*, 601 A.2d 570, 575-77 (Del. Ch. 1991).

[104] *See In re Del Monte Foods Co. S'holders Litig.*, C.A. No. 6027-VCL, at 48-49 (Del. Ch. Dec. 1, 2011) (TRANSCRIPT) ("The idea that a court can't certify a class under (b)(2) simply because it involves money damages is . . . based on an overly cramped and unpersuasive reading of *Shutts* and *Wal-Mart*.").

In the context of this Action, Plaintiffs alleged Defendants breached their fiduciary duties and all Class members were harmed by Defendants' conduct. Thus, certification under Rule 23(b)(2) is appropriate because Defendants' conduct was generally applicable to the Class, and the application of final relief is appropriate with respect to the Class as a whole.

D. The Remaining Requirements of Rule 23 Are Satisfied

Plaintiffs and Plaintiffs' counsel meet the remaining requirements of Rule 23. Plaintiffs executed affidavits in compliance with Rule 23 stating their support for the Proposed Settlement.[105] Notice was mailed to potential Class members on or about May 1, 2025 and posted to the settlement website in the manner directed by the Scheduling Order.[106] As of the date of this filing, no objections have been received.

The Proposed Settlement also meets the requirements of Rule 23(f)(5)(A)-(D). Rule 23(f)(5)(A) is satisfied because, for the reasons set forth herein, Plaintiffs and their Counsel have adequately represented the Class. Rule 23(f)(5)(B) is satisfied because the Notice includes and provides adequate notice of the Settlement hearing. Rule 23(f)(5)(C) is satisfied because, as set forth at page 41, the Proposed

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[105] Ct. Ch. R. 23(f)(2)(A). *See* Affidavits of Richard J. Bishop Micah Marshall II in Support of Proposed Settlement and Award of Attorneys' Fees and Expenses.

[106] Ct. Ch. R 23(f)(3). On or before June 20, 2025, Plaintiffs will file with the Court proof of mailing and publication of the Notice, as Paragraph 13 of the Scheduling Order requires.

Settlement was negotiated at arm's-length with the assistance of a skilled Mediator. Rule 23(f)(5)(D) is satisfied because, as set forth at pages 31-42, the relief provided for the Class falls within a reasonable range of reasonableness.

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

A. Applicable Standard

Delaware favors the voluntary settlement of contested claims.[107] When deciding whether to approve a proposed settlement of a stockholder class action, the Court looks to the facts and circumstances upon which the plaintiff's claims are based and exercises its informed judgment as to whether the proposed settlement is fair and reasonable.[108] The "facts and circumstances" include the (i) probable validity of the claims; (ii) apparent difficulties in enforcing the claims through the courts; (iii) collectability of any judgment recovered; (iv) delay, expense and trouble of litigation; (v) amount of the compromise as compared with the amount of any collectible judgment; and (vi) views of the parties involved.[109]

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[107] *See, e.g.*, *Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991); *In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 265-66 (Del. 1990).

[108] *Prezant v. De Angelis*, 636 A.2d 915, 921 (Del. 1994); *see also Wayne v. Util. & Indus. Corp.*, 1979 WL 2699, at *3 (Del. Ch. July 19, 1979).

[109] *Polk v. Good*, 507 A.2d 531, 535-36 (Del. 1986) (citing *In re Ortiz' Estate*, 27 A.2d 368, 374 (Del. Ch. 1942); *Perrine v. Pennroad Corp*., 47 A.2d 479, 488 (Del. 1946); *Krinsky v. Helfand*, 156 A.2d 90, 94 (Del. 1959)).

In evaluating the fairness of a proposed settlement, the Court's "principal focus" is to compare the benefits achieved against the nature and merits of the released claims.[110] Effectively, the Court will weigh the "give" (i.e., the value of the claims released) against the "get" (i.e., the value of the consideration obtained) 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."[111]

Under this standard, the Proposed Settlement is fair, reasonable, and adequate.

B. The Proposed Settlement Confers Substantial Benefits

An all-cash settlement like the Proposed Settlement provides an "obvious and self-pricing benefit" for the Class.[112] This Court, therefore, "considers the premium to the deal price as a rough proxy for the strength of the settlement."[113] The Court

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[110] *Baupost Ltd. P'ship 1983 A-1 v. Providential Corp.*, 1993 WL 401866, at *2 (Del. Ch. Sept. 3, 1993).

[111] *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1043, 1064 (Del. Ch. 2015) (quoting *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, 2013 WL 458373, at *2 (Del. Ch. Feb. 6, 2013)).

[112] *In re Orchard Enters., Inc. S'holder Litig.*, 2014 WL 4181912, at *5 (Del. Ch. Aug. 22, 2014); *see also Garfield v. BlackRock Mortg. Ventures, LLC*, C.A. No. 2018-0917-KSJM (Del. Ch. Feb 11, 2021) (TRANSCRIPT) ("*Garfield* Tr."), at 24; *In re Calamos Asset Mgmt., Inc. S'holder Litig.*, Consol. C.A. No. 2017-0058-JTL (Del. Ch. Apr. 25, 2019) (TRANSCRIPT), at 93-94.

[113] *Garfield* Tr., at 24.

has held that settlements approximating "1 to 2 percent of equity value" are fair, and "[a]n exceptional result is at around the 5 percent level[.]"[114]

Here, the all-cash $19.25 million Proposed Settlement constitutes approximately $0.87 per share for each Class Member (before administrative costs and attorneys' fees),[115] representing a 10.8% premium to the $8.05 per share Transaction consideration. The 10.8% premium cash recovery is an "exceptional result"[116] that compares favorably to recent settlements approved by this Court, including:

- *Convey* (11.7% premium to transaction price);[117]
- *Dell* (4.2% premium to transaction price);[118]
- *MSGE* (9% premium to transaction price);[119]

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[114] *See In re Dell Techs. Inc. Class V S'holders Litig.*, Consol. C.A. No. 2018-0816-JTL (Del. Ch. Apr. 19, 2023) (TRANSCRIPT) ("*Dell* Tr."), at 41 ("I think it's fair to say that 1 to 2 percent of equity value, particularly as the deal sizes get larger, is where things settle out. An exceptional result is at around the 5 percent level[.]").

[115] Based on a Class of approximately 22,150,097 million shares, the $19.25 million Settlement Consideration would amount to approximately $0.87 per share.

[116] *See Dell* Tr., at 41 ("An exceptional result is at around the 5 percent level[.]").

[117] *Assad v. TPG, Inc.* ("*Convey*"), C.A. No. 2023-0096-LWW (Del. Ch. July 12, 2024) (TRANSCRIPT) ("*Convey* Tr."), at 14, 34.

[118] *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 725 (Del. Ch. 2023), *as revised* (Aug. 21, 2023).

[119] *In re Madison Square Garden Consol. Ent. Corp. S'holders Litig.* ("*MSGE*"), Consol. C.A. No. 2021-0468-LWW (Del. Ch. Aug. 14, 2023) (TRANSCRIPT), at 50.

- *GCI Liberty* ($1.5% premium to transaction price);[120]
- *Starz* (2.1% premium to transaction price);[121]
- *AVX* (4.8% premium to transaction price);[122]
- *NCI* (8% premium to transaction price);[123]
- *New Senior* (8.2% premium to transaction price);[124]
- *AmTrust* (3.8% premium to transaction price);[125]
- *Pivotal* (3% premium to transaction price);[126]
- *Nutraceutical* (5.8% premium to transaction price);[127]

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[120] *Hollywood Firefighters' Pension Fund v. Malone* ("*GCI Liberty*"), C.A. No. 2020-0880-SG (Del. Ch. Sept. 21, 2021) (Brief) (Trans. ID 66951808).

[121] *In re Starz S'holder Litig.*, C.A. No. 12584-VCG (Del. Ch. Nov. 28, 2018) (Trans. ID 62702942).

[122] *In re AVX Corp. S'holders Litig.*, C.A. No. 2020-1046-SG (Del. Ch. Dec. 27, 2022) (Order) (Trans. ID 68736272); 2022 WL 17415255 (Del. Ch. Dec. 1, 2022) (Brief).

[123] *Voigt v. Metcalf* ("*NCI*"), C.A. No. 2018-0828-JTL (Del. Ch. Dec. 30, 2021) (Trans. ID 67202331).

[124] *Cumming v. Edens* ("*New Senior*"), C.A. No. 13007-VCS (Del. Ch. July 17, 2019) (Trans. ID 63556560).

[125] *In re AmTrust Fin. Servs., Inc. Appraisal & S'holder Litig.*, 2021 WL 5495707 (Del. Ch. Nov. 22, 2021) (Order); 2021 WL 5277639 (Del. Ch. Nov. 5, 2021) (Brief).

[126] *In re Pivotal Software, Inc. S'holders Litig.*, 2022 WL 5185565 (Del. Ch. Oct. 4, 2022) (Order); 2022 WL 4119857 (Del. Ch. Sept. 6, 2022) (Brief).

[127] *Weiss v. Burke, et. al.* ("*Nutraceutical*"), C.A. No. 2020-0364-PAF (Del. Ch. Jun. 15, 2021) (TRANSCRIPT), at 34.

- *ExamWorks* (6.2% premium to transaction price);[128]
- *Alon* (10.4% to 11.6% premium to transaction price);[129] and
- *KCG* (2.3% premium to transaction price).[130]

As such, the Proposed Settlement consideration reflects an excellent "get," particularly when compared to other recent settlements.

C. The Proposed Settlement Fully Reflects the Strength of Plaintiffs' Claims Weighed Against the Risk of Further Litigation

1. Plaintiffs' Liability Case

Plaintiffs believed that the evidence they developed in discovery gave them solid arguments at trial to establish Defendants' liability in connection with the Transaction. Because BDT controlled the Company and stood on both sides of the Transaction, the Court would have presumptively applied the entire fairness standard of review to the Transaction.[131] Since BDT approved the Transaction by written

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[128] *City of Daytona Beach Police & Fire Pension Fund v. ExamWorks Grp., Inc.*, C.A. No. 12481-VCL (Del. Ch. Sept. 12, 2017) (TRANSCRIPT), at 26.

[129] *Ark. Teacher Ret. Sys. v. Alon USA Energy, Inc. et al.*, C.A. No. 2017-0453-KSJM (Del. Ch. Oct. 8, 2021) (Trans. ID 66983705) ("*Alon* Br."); (Del. Ch. Oct. 29, 2021) (TRANSCRIPT), at 29.

[130] *Chester Cty. Emps.' Ret. Fund v. KCG Holdings, Inc., et al.*, C.A. No. 2017-0421-KSJM (Del. Ch. Mar. 31, 2020) (TRANSCRIPT), at 30-31.

[131] *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994) ("A controlling or dominating shareholder standing on both sides of a transaction, as in the parent-subsidiary context, bears the burden of proving its entire fairness.").

consent, the best that Defendants could have hoped for was a burden shift to Plaintiffs to prove the Transaction was entirely fair, assuming the Special Committee was independent and properly functioning in approving the Transaction.[132]

Under the entire fairness standard, Defendants would have been required to affirmatively prove "to the court's satisfaction that the transaction was the product of *both* fair dealing and fair price."[133] Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained."[134] "Fair price relates to the economic and financial considerations of the proposed merger[.]"[135] Plaintiffs' liability case at trial would have been strong but not guaranteed.

Plaintiffs would have argued that the Transaction was initiated, timed, negotiated and approved for BDT's benefit, while Weber was feeling the effects of

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[132] *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997) ("The burden, however, may be shifted from the defendants to the plaintiff through the use of a well functioning committee of independent directors.") (citation omitted).

[133] *Palkon v. Maffei*, 311 A.3d 255, 269 (Del. Ch. 2024) (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995)).

[134] *Tornetta v. Musk*, 310 A.3d 430, 527 (Del. Ch. 2024) (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983)).

[135] *In Re Match Grp., Inc. Deriv. Litig.*, 2024 WL 1449815, at *7 (Del. 2024) (citation omitted).

BDT's conduct, made worse by economic factors outside of Weber's control. When BDT launched its take private proposal, (i) BDT had already drained Weber of its IPO proceeds to enrich insiders, contributing to post-IPO cash flow constraints,[136] (ii) BDT had undersized the IPO, resulting in an overhang on Weber's stock price,[137] and (iii) Weber was facing short-term macroeconomic pressures.[138] BDT knew that Weber was not sufficiently capitalized and exploited the situation to create artificial pressure for Weber to reach a deal on BDT's preferred terms. BDT offered Weber insufficient band-aid financing, interfered with Weber obtaining better financing terms from [redacted] and others and refused to provide sufficient financing until the Special Committee agreed to BDT's Transaction terms. The entire Transaction was negotiated while Weber's trading price was artificially depressed and an inaccurate measure of the Company's true value.[139]

Plaintiffs would have argued that the Special Committee was not independent of BDT because Congalton has financial and personal ties to BDT and Suranjan was angling to become Weber's CEO. Plaintiffs would have argued that the Special

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[136] *See supra* p. 5.

[137] *See supra* p. 8.

[138] *See id.*

[139] *See supra* p. 9.

Committee did not act independently of, nor negotiate at arm's-length with, BDT either. Instead, they rolled over to the pressure that BDT created. For example, the Special Committee ignored Centerview's advice that [redacted][140] by (i) never pursuing a Covenant waiver, even though BDT's October 6 loan proposal would only support Weber for a limited period,[141] (ii) abandoning [redacted] proposed financing, given BDT's views,[142] and (iii) giving into BDT's pressure to maintain focus on negotiating the take-private, rather than pursuing alternative financing.[143] The Special Committee also rolled over negotiating the Transaction price. By maintaining the $8.00 midpoint in each of its counter-offers, the Special Committee signaled it would agree to an $8.00 price, [redacted][144]

[140] WEBR_00199 at 216 and 219.

[141] CENTERVIEW0026551 at 52-53; WEBR_00290-293.

[142] *See supra* pp. 14–17 (discussing [redacted] offers and the Special Committee's effective termination of any deal with [redacted]

[143] *See supra* p. 12. The negotiations were also skewed in favor of BDT because of its control over the flow of information from the management team, such as BDT's early access to the low-ball October Projections that it used throughout the negotiation process. *See supra* pp. 12-13.

[144] BDT_00036676 at 77.

Defendants likely would have countered that the Transaction was the result of a fair process, arguing, among other things, that: (i) the Special Committee was independent, as (a) Congalton's ties to BDT were not material and (b) Suranjan was not seeking to become CEO (nor did he become CEO); (ii) the Special Committee negotiated for a 29% price bump to BDT's opening $6.25 offer; (iii) the Transaction price represented a 60% premium to the $5.03 closing price that BDT maintained was Weber's unaffected trading price; (iv) the Special Committee's financial advisor pursued myriad financing alternatives for Weber, which the Special Committee used as leverage with BDT; and (v) market conditions—which only became more pronounced after the Transaction—affected Weber's performance. Notwithstanding these arguments, Plaintiffs reasonably were confident that the Court would have found the Transaction process to not be entirely fair.

That said, Plaintiffs' arguments concerning fair price were less certain.

2. Plaintiffs' Damages Case

Defendants would have raised several arguments going to the core of Plaintiffs' damages theory.

First, Defendants would have highlighted that the $8.05 per share Transaction price represented a 60% premium to Weber's $5.03 closing price the day before BDT made its opening $6.25 per share offer. Defendants would likely argue that

Weber's $5.03 closing price reflected Weber's intrinsic value.[145] To establish that Weber's fair price significantly exceeded the Transaction consideration, Plaintiffs would have had to argue that Weber did not trade efficiently such that Weber was trading well below its actual intrinsic value.

While Plaintiffs had arguments that Weber's stock price was artificially depressed, establishing that the market grossly mispriced Weber's stock would have been an uphill battle. Plaintiffs would have argued that market evidence was unreliable because confounding issues—such as BDT's overhang, the limited public float and low trading liquidity, and macroeconomic conditions[146]—depressed Weber's stock price and, therefore, the premium that BDT touted was overstated. Plaintiffs also would have relied on the Court's expressed skepticism about the

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[145] *See DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 369-70 (Del. 2017) ("Market prices are typically viewed superior to other valuation techniques because, unlike, e.g., a single person's discounted cash flow model, the market price should distill the collective judgment of the many based on all the publicly available information about a given company and the value of its shares."); *Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313, 323-27 (Del. 2020) (reaffirming case law endorsing the probative value of market evidence and crediting use of company's unaffected market price to determine fair value).

[146] *See supra* pp. 7-8.

propriety of deferring to deal price as a reliable indicator of fair value in the context of a take-private transaction that was not *MFW*-compliant.[147]

Second, Defendants would have relied on Centerview's fairness opinion. Centerview's DCF analysis produced a price range of $5.92 to $9.79 per share.[148] The $8.05 per share Transaction consideration falls at the higher end of that range. Centerview also found that a comparable companies analysis yielded results ranging from $4.31 to $7.96 per share—all below the Transaction price.[149]

Plaintiffs would have countered that Centerview's valuation analyses were flawed. Specifically, Plaintiffs would have contended that Centerview made miscalculations and utilized incorrect inputs in its DCF analysis. For example, Plaintiffs and their damages expert would have argued that Centerview (i) erred by using [redacted]

These arguments were not without risk. Setting aside that the Court would have had to accept Plaintiffs' adjustments to Centerview's work to have any prospect

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[147] *HBK Master Fund L.P. v. Pivotal Software, Inc.*, 2023 WL 10405169, at *22-25 (Del. Ch. Aug. 14, 2023).

[148] Information Statement at 51.

[149] *Id.* at 51-52.

of proving damages, Plaintiffs would have needed the Court to accept that the higher November Projections were the appropriate set to use. Those projections, however, were created during negotiations.[150] If the Court accepted that the more conservative October Projections were the appropriate set on which to rely, Plaintiffs had little chance of recovering anything for the Class. Defendants would have supported the argument for the use of the lower October Projections by highlighting that Weber's post-Transaction performance suffered and was below the November Projections. While Plaintiffs would have argued against the reliability of post-Transaction performance, Defendants would have explained that Weber continued to perform poorly throughout Transaction negotiations,[151] which continued post-Transaction.

It is difficult to assess how the "battle of the experts" would have played out at trial.[152] Plaintiffs identified substantial risk in being able to establish damages in

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[150] *See In re PetSmart, Inc.*, 2017 WL 2303599, at *33 (Del. Ch. May 26, 2017).

[151] By the end of fiscal year September 30, 2022 (as reported on December 14, 2022), Weber's net sales had fallen to $1.586 billion, a 20% decrease from the prior year. Gross profit was down to $434 million, roughly half of the prior year's figure. Overall, Weber reported a net loss of $330 million, compared to a net income of $6 million in the prior year. Adjusted EBITDA painted a more dire picture, with a loss of $1 million for the fiscal year-ended 2022, compared to a positive $307 million in the prior year. *See* Weber Inc. Reports Fiscal Year 2022 Results, Business Wire (Dec. 14, 2022), https://www.businesswire.com/news/home/20221213006100/en/Weber-Inc.-Reports-Fiscal-Year-2022-Results?

[152] *Dell*, 300 A.3d at 721-22.

excess of the Proposed Settlement consideration. Regardless of Plaintiffs' confidence in their analysis, they acknowledge that Defendants' arguments could have substantially impacted the Class's ability to recover in this Action.

Ultimately, if Plaintiffs were able to defeat Defendants' market evidence, Plaintiffs would have relied on their expert's DCF analysis. [redacted] Damages at these valuations range between $39 to $76 million, with a midpoint of approximately $57 million.

Even assuming Plaintiffs were to secure—and defend through appeal—their most realistic damages award,[153] the Proposed Settlement represents between 15% and 48% of the realistic potential damages they could have recovered at trial. This is a great result for the Class, exceeding the historical precedent average settlement recoveries discussed in *Dell*,[154] particularly in light of the significant challenges confronting Plaintiffs in prevailing on their highest damages estimates. Because the

[153] *Id.* at 722.

[154] *Id.* at 723-24 (observing that the mean and median of entire fairness cases over the last decade settled for 34.34% and 16.5%, respectively, of potential maximum damages recoverable).

Court accepts that market prices "distill the collective judgment of the many based on all the publicly available information about a given company and the value of its shares,"[155] Plaintiffs faced an uphill climb to convince the Court that the market was undervaluing Weber by that magnitude.

Thus, while Plaintiffs believed in their arguments, they recognized the risk that Plaintiffs and the Class could receive nothing even if a breach was proven.[156]

D. The Proposed Settlement Was Reached Through Arm's-Length Negotiations

In assessing whether a proposed settlement is fair, Delaware courts place considerable weight on whether it was reached through arm's-length negotiations,[157] as well as mediation.[158] Here, the parties attended a full-day mediation with a highly-esteemed mediator. After the mediation failed, the parties continued their arm's-length negotiations that ultimately led to the Mediator's proposal.

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[155] *DFC Glob. Corp.*, 172 A.3d at 369-70.

[156] *See In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2018 WL 2254706, at *2, *18–25 (Del. Ch. May 17, 2018), *aff'd sub nom. Levine v. Energy Transfer L.P.*, 223 A.3d 97 (Del. 2019).

[157] *See, e.g.*, *In re Activision Blizzard*, 124 A.3d at 1067.

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

E. The Experience and Opinion of Plaintiffs' Counsel—And the Absence of Any Objection—Favor Approval

Delaware courts recognize that the opinion of representative plaintiffs and their experienced counsel is entitled weight in determining the fairness of a settlement.[159] Here, Plaintiffs' counsel are experienced stockholder advocates who are known to the Court. Through their experience, as well as the discovery conducted in the Action, Plaintiffs' counsel fully appreciated the strengths and weaknesses of Plaintiffs' claims when they negotiated the Proposed Settlement. Plaintiffs' counsel's view that the Proposed Settlement is in the best interests of the Class supports final approval.[160]

No objections to the Proposed Settlement have been received.

F. The Plan of Allocation Should Be Approved

A proposed "allocation plan must be fair, reasonable, and adequate."[161] The plan of allocation here—which adheres to guidance from *In re PLX Technology Inc. Stockholders Litigation*[162]—entails distributing settlement proceeds, *pro rata*,

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[159] *See, e.g.*, *Polk*, 507 A.2d at 536; *Jane Doe 30 v. Bradley*, 64 A.3d 379, 396 (Del. Super. Ct. 2012); *Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 99 (Del. 1979).

[160] *See id.*

[161] *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).

[162] 2022 WL 1133118 (Del. Ch. Apr. 18, 2022).

directly to the Class members, excluding Defendants, Former Defendants and their affiliates. The plan avoids the "relatively high administrative costs" and "unknown distributional effects" of a claim process by providing for a direct distribution to Class members through the Settlement Administrator, which the Court has endorsed.[163]

III. THE FEE AWARD SHOULD BE GRANTED

A. Legal Standard

It is well-established that this Court may award attorneys' fees and expenses to counsel whose efforts have created a common fund.[164] In awarding attorneys' fees and expenses, the Court is guided by the factors set forth in *Sugarland*.[165] Of the *Sugarland* factors, Delaware courts have assigned the greatest weight to the benefit achieved in the litigation.[166] Secondary factors are the contingent nature of the litigation, the complexity of the litigation, the time and effort expended by counsel, the quality of the work performed, and the standing and ability of the lawyers involved.[167] "When the benefit is quantifiable . . . by the creation of a

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[163] *See Montgomery v. Erickson Inc.*, C.A. No. 8784-VCL (Del. Ch. Sept. 12, 2016) (TRANSCRIPT), at 16; *PLX*, 2022 WL 1133118, at *5-6.

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

[165] *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142, 147-50 (Del. 1980).

[166] *Ams. Mining*, 51 A.3d at 1255.

[167] *See Sugarland*, 420 A.2d at 147-50.

common fund, *Sugarland* calls for an award of attorneys' fees based upon a percentage of the benefit."[168]

Accordingly, Plaintiffs' counsel respectfully request approval of a $3,830,000 fee award (20% of the net settlement fund) after reimbursement of out-of-pocket expenses of $99,606.30.[169]

B. The Proposed Settlement Confers a Substantial Benefit

The $19.25 million Proposed Settlement is a significant benefit achieved for the Class. As discussed above, the $19.25 million Settlement consideration reflects a 10.8% premium to the $8.05 per share Transaction price. This $19.25 million benefit to the Class is an excellent outcome that is solely attributable to the litigation efforts of Plaintiffs' counsel and that merits approval of the requested Fee Award.

An award equal to 20% of the net settlement fund is an appropriate fee for a settlement, like the Proposed Settlement, achieved after significant document discovery and on the eve of fact witness depositions. As detailed above, Plaintiffs' counsel undertook significant litigation activity to secure the benefit for the Class in the Proposed Settlement, which included, among other things: (i) conducting a

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

[169] The expenses are identified in paragraphs 6-11 of the contemporaneously filed Affidavit of Eric J. Juray in Support of An Award of Attorneys' Fees and Expenses ("Juray Aff.") and Exhibits A-D thereto.

Section 220 pre-suit investigation; (ii) utilizing the Company's Section 220 books and records to draft a Complaint with claims that Defendants Answered, instead of moving to dismiss; (iii) serving Defendants with interrogatories through which Plaintiffs obtained, among other things, evidence and information to prove and strengthen Plaintiffs' claim that the Special Committee was not independent; (iv) obtaining and reviewing over 86,000 documents from Defendants and third parties; (v) challenging the sufficiency of Defendants' interrogatory responses and privilege assertions; (vi) mediating the Action; and (vii) securing Defendants' agreement to a $19.25 million cash settlement just days before Plaintiffs were scheduled to depose Defendants and Centerview.

The requested Fee Award is squarely in line with two recent precedents. In *Convey*, the Court awarded a 20% fee (after deducting expenses) where the plaintiffs (i) reviewed 240,000 pages of documents from defendants and third parties, (ii) responded to, collected, reviewed and produced documents in response to Defendants' discovery requests, and (iii) took one deposition.[170] Similarly, in *In re HomeFed Corp. Stockholder Litigation*, C.A. No. 2019-0592-LWW (Del. Ch.), the Court awarded a fee of 20%, primarily based on a stage-of-the-litigation analysis

[170] *Convey* Tr., at 38.

where plaintiffs' counsel reviewed approximately 170,000 pages of documents without taking formal depositions.[171]

Plaintiffs' counsel respectfully submit that a 20% Fee Award is likewise appropriate in this case.

C. The Secondary *Sugarland* Factors Support the Fee Award

1. The Contingent Nature of the Litigation Supports the Requested Fee Award

The contingent nature of the representation is the "second most important factor considered by this Court" in awarding attorneys' fees.[172] "It is consistent with the public policy of Delaware to reward [] risk-taking in the interests of shareholders."[173] 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."[174] For Court of Chancery litigation challenging M&A transactions, meaningful trial judgments for plaintiffs are rare,[175]

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[171] C.A. No. 2019-0592-LWW (Del. Ch. Feb. 15, 2018) (TRANSCRIPT), at 27-28. The *HomeFed* plaintiffs interviewed two of HomeFed's largest stockholders who were involved in the merger negotiations at issue.

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

[173] *In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *6 (Del. Ch. Feb. 4, 2005).

[174] *Ryan v. Gifford*, 2009 WL 18143, at *13 (Del. Ch. Jan. 2, 2009); *Seinfeld v. Coker*, 847 A.2d 330, 337 (Del. Ch. 2000).

[175] *Basho Techs. Holdco B, LLC v. Georgetown Basho Investors, LLC*, 2018 WL 3326693, at *35 (Del. Ch. July 6, 2018).

and frequently get reversed.[176] The Court assesses litigation contingency risk as of the outset of the litigation.[177]

Plaintiffs' counsel initiated and vigorously prosecuted this case on a fully contingent basis. Plaintiffs' counsel's efforts resulted in substantial benefits to Weber's stockholders, so the Fee Award should reflect their decision to undertake the representation without any guarantee of success or assurance of payment.

2. The Time and Efforts of Plaintiffs' Counsel Support the Requested Fee Award

"The time and effort expended by counsel serves [as] a cross-check on the reasonableness of a fee award.[178] "[M]ore important than hours is 'effort, as in what Plaintiffs' counsel actually did[,]'"[179] and counsel is not to be punished for achieving victory efficiently.[180]

Plaintiffs' counsel collectively devoted 5,059.95 hours to litigating the Action from inception to January 31, 2025, the date the parties agreed to the Mediator's proposal, with a total lodestar of $3,247,280.50 at their current hourly rates.[181] The

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[176] *See Dell*, 300 A.3d at 710.

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

[178] *Id*. at 1138 (citation omitted).

[179] *Ams. Mining*, 51 A.3d at 1258.

[180] *See Olson v. ev3, Inc.*, 2011 WL 704409, at *15 (Del. Ch. Feb. 21, 2011).

[181] *See* Juray Aff. ¶¶ 5-11.

fee award represents a combined implied hourly rate of $756.93 per hour and a 1.18x lodestar multiplier. This implied hourly rate is reasonable in comparison to the non-contingent hourly rates of experienced and qualified counsel who practice before this Court, and it and the lodestar multiplier are below hourly rates and multipliers approved by this Court in comparable cases.[182]

3. The Standing and Ability of Plaintiffs' Counsel Support the Requested Fee Award

Under *Sugarland*, the Court should also consider the "standing and ability of plaintiffs' counsel."[183] Plaintiffs' counsel are well known to this Court and have been counsel to stockholders who have received many of the largest monetary judgments and settlements in this Court.[184]

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[182] *See, e.g.*, *Alon* Br., at 62; *Alon*, C.A. No. 2017-0453-KSJM (Del. Ch. Oct. 29, 2021) (ORDER) ¶ 13, (awarding $860.43 hourly rate and a 1.59x multiplier); *KCG*, C.A. No. 2017-0421-KSJM (Del. Ch. Mar. 17, 2020) (Brief) (Trans. ID 64831437), at 51; *KCG*, C.A. No. 2017-0421-KSJM (Del. Ch. Apr. 2, 2020) (ORDER) ¶ 10 (awarding $1,162.04 hourly rate and 1.93x multiplier).

[183] *Sauer-Danfoss*, 65 A.3d at 1140.

[184] *See, e.g.*, *In re CBS Corp. S'holder Class Action & Deriv. Litig.*, C.A. No. 2020-0111-SG (Del. Ch. Sept. 6, 2023) (ORDER); *In re Facebook, Inc. Class C Reclassification Litig.*, C.A. No. 12286-VCL (Del. Ch. Oct. 24, 2018) (ORDER); *ExamWorks*, C.A. No. 12481-VCL (Del. Ch. Sept. 12, 2017) (ORDER); *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761 (Del. Ch. 2011), *aff'd*, *Ams. Mining*, 51 A.3d 1213.

The standing and ability of opposing counsel should also be considered in determining an award of attorneys' fees.[185] Defendants in the Action were represented by numerous highly experienced and effective defense firms.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court approve the Proposed Settlement, certify the Class, and grant the Fee Award.

[185] *See Joseph v. Shell Oil Co.*, 1985 WL 150466, at *5 (Del. Ch. Apr. 22, 1985), *aff'd sub nom. Selfe v. Joseph*, 501 A.2d 409 (Del. 1985).

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