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Case No. 2024-1314-MTZ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARLES BRYANT	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No.: 2024-1314-MTZ
	:	
THE COLUMN GROUP, LP,	:	
DAVID V. GOEDDEL, and	:	Original Filing: August 22, 2025
DAVID J. WOODHOUSE,	:	Public Version Filed: August 26, 2025
	:	
Defendants.	:	

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF CLASS CERTIFICATION, FINAL APPROVAL OF SETTLEMENT, AWARD OF ATTORNEYS' FEES AND EXPENSES, AND INCENTIVE AWARD

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GLOSSARY

Action	The above-captioned action
Board	The board of directors of NGM
Class	All record holders and beneficial holders of shares of NGM common stock who either received $1.55 per share in cash at the closing of the take-private transaction between NGM and TCG on or about April 5, 2024, or who dissented from the Transaction, including each such Class Member's heirs, successors in interest, successors, transferees, and assigns. Excluded from the Class are: (i) Defendants, (ii) any other director or officer of the Company as of the date of the Closing, (iii) the spouses and minor children of Defendants and the Company's other directors and officers as of the date of the Closing, (iv) any trusts or other entities controlled by any Defendant or other director or officer of the Company as of the date of the Closing, and (v) the Rollover Stockholders.
Complaint	The Verified Class Action Complaint filed by Plaintiff in this Action on December 19, 2024
Defendants	The Column Group, LP, David V. Goeddel, and David J. Woodhouse
Demand	The Section 220 books and records demand letter that Plaintiff served on the Company on March 26, 2024
Fee and Expense Award	An award to Plaintiff's Counsel of fees and expenses, to be paid from the Settlement Fund, for their work on this Action
Incentive Award	An award to Plaintiff, to be paid from the Fee and Expense Award, for Plaintiff's work on this Action

NGM or the Company	NGM Biopharmaceuticals, Inc.
Plaintiff	Plaintiff Charles Bryant
Plaintiff's Counsel	Heyman Enerio Gattuso & Hirzel LLP, Equity Litigation Group LLP, and The Schall Law Firm
Rollover Stockholders	The former Company stockholders whose NGM shares were rolled over when the Transaction closed
Settlement	The $6 million cash settlement intended to be a full and final disposition of the claims asserted against Defendants in the Action
Special Committee	Shelly D. Guyer, Carole Ho, M.D., and Suzanne Sawochka Hooper
TCG	The Column Group, LP
Transaction	The 2024 acquisition of NGM by affiliates of TCG for $1.55 per share

INTRODUCTION

Plaintiff moves for approval of a $6 million cash settlement resolving this action challenging TCG's 2024 take-private of the Company on behalf of a Class of public stockholders who accepted $1.55 per share in cash or dissented. At the time of the Transaction, TCG was the Company's largest stockholder—owning approximately 26% of the Company's outstanding shares—and had significant ties to several board members. The Transaction was negotiated by a Special Committee of independent directors and approved by a majority-of-the-minority tender by stockholders. At times, however, TCG seemed to circumvent the Special Committee by negotiating directly with large stockholders. Plaintiff further alleged that the stockholder tender was not fully informed.

The parties settled before a decision on Defendants' motion to dismiss. The Settlement—which reflects an 8.8% premium to the deal price—is an excellent result when balanced against the risks of further litigation, including, in particular, the significant risk of a pleading-stage dismissal, given recent cases that appear to raise the bar for pleading control.

Plaintiff asks that the Court confirm certification of the Class for settlement purposes, approve the Settlement, award Plaintiff's Counsel an "all-in" award of 17.5% of the common fund and award Plaintiff an Incentive Award of $5,000 (to be paid from the Fee and Expense Award to Plaintiff's Counsel).

STATEMENT OF FACTS

I. BACKGROUND OF NGM

NGM is a biopharmaceutical company focused on discovering and developing medicines for people whose health and lives have been disrupted by disease.[1] The Company has a drug research pipeline covering solid tumors and retinal diseases, as well as liver and metabolic disorders.[2] The Company was founded in 2007, commenced operations in 2008, and went public in the spring of 2019.[3]

II. THE COLUMN GROUP'S CONTROL OVER NGM

From the Company's inception through its IPO, TCG was NGM's lead and largest investor, investing nearly $100 million over the years.[4] TCG's principals also invested in the Company with personal funds.[5] At all relevant times, TCG owned or controlled more than 26% of NGM's outstanding common stock,[6] and the Company's public filings acknowledged TCG's "ability to significantly influence

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1 Ex. 4 at 19.

2 *Id*. at 19-20.

3 Ex. 9 at 85, 102.

4 Ex. 2 at 14-15.

5 Between January 2008 and November 2009, TCG's principal, Goeddel, purchased 300,000 shares of Series A Shares for $300,000, and between March 2010 and November 2011, Goeddel purchased 80,000 shares of Series B Shares for $200,000. Svennilson purchased 20,000 shares of common stock in the Company's IPO for $320,000. Tim Kutzkey, a TCG managing partner, purchased 15,000 shares of common stock in the Company's IPO for $240,000. *Id*. at 15.

6 Ex. 8 ("Solicitation Statement") at 2.

all matters submitted to our stockholders for approval at a meeting of our stockholders, including the approval of any significant transaction."[7]

At the time of the Transaction, the Company's operative certificate of incorporation[8] imposed supermajority requirements for a variety of corporate actions, which increased TCG's influence by giving it a near-unilateral veto over important corporate actions. These included requirements in the Charter to secure a two-thirds vote to: (i) remove a director for cause;[9] (ii) amend the bylaws;[10] and (iii) alter, amend, or repeal certain provisions of the Charter.[11]

Plaintiff further alleged that TCG exercised transaction-specific control over a majority of NGM's Board in connection with the Transaction and that four of the seven Board members had disabling conflicts:

- David V. Goeddel was a dual fiduciary. At all relevant times, he served as a Managing Partner of TCG.[12]
- Roger Perlmutter was also a dual fiduciary. He is the CEO of Eikon Therapeutics, a TCG portfolio company, and is a Science Partner at TCG. [13]

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7 Ex. 9 at 70.

8 The "Charter."

9 Ex. 1 § V(C)(2).

10 *Id*. § V(E)(1).

11 *Id*. § VIII(B).

12 Ex. 4 at 9.

13 *Id*.

- William Rieflin, the Company's Chair and former CEO, had a near 30-year relationship with Goeddel, dating back to his employment at Goeddel's company Tularik in 1996. Rieflin also served on the board of directors of two TCG portfolio companies: Rapt Therapeutics and Kallyope.[14]

- David J. Woodhouse, the Company's CEO, was originally hired as the Company's CFO in 2015 and promoted to CEO in 2018 when Goeddel, Svennilson, and Rieflin sat on the Board.[15] Plaintiff alleged that Woodhouse could not act independently of TCG, the Company's largest investor.

Despite these conflicts, two of those directors—Goeddel and Woodhouse—were at the center of Transaction negotiations. Woodhouse participated directly in the negotiations, attended nearly all Special Committee meetings (except for the initial meeting immediately after the Special Committee was formed), and acted as an intermediary for the Special Committee and TCG.[16] Additionally, each of Goeddel, Rieflin, and Woodhouse were permitted by TCG to continue to invest in the Company's upside and roll over their shares in the private company.[17]

TCG also influenced the Transaction by hand-picking other Company stockholders who would be afforded the option to roll over their shares.[18] These

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14 *Id*. at 8.

15 *Id*. at 10.

16 *See* discussion *supra* Sections IV-VII.

17 Ex. 16 (Goeddel and Rieflin Rollover Agreement); Ex. 17 (Woodhouse Rollover Agreement).

18 *See* discussion *supra* Sections IV-VII.

stockholders—many of which had long-standing personal and business relationships with TCG—ultimately comprised nearly 50% of the Company's total outstanding stock.[19]

III. NGM'S PRODUCTS LEADING UP TO THE TRANSACTION

In October 2022, NGM announced that its then-lead product candidate did not meet its primary endpoint.[20] Following a sharp decline in share price, NGM pivoted to immuno-oncology.[21] The Company's efforts and resources shifted to four solid-tumor oncology programs.[22] The Company also had four additional programs without significant resource allocation.[23] As of the third quarter of 2023, NGM had cash, cash equivalents, and marketable securities of $166 million, which were expected to be sufficient to fund planned operations into mid-2025.[24]

[19] *i.e.*, inclusive of TCG. Ex. 12 at 2.

[20] Ex. 3.

[21] Ex. 19 ("2023 key priority to advance signal-seeking trials of myeloid checkpoint inhibitor immuno-oncology programs….").

[22] Ex. 9 at 89 ("In 2023, our execution efforts and resources were focused on our solid tumor oncology programs, NGM707, NGM438, NGM831 and NGM120.").

[23] *Id.*

[24] Ex. 5.

IV. TCG INITIATES THE TRANSACTION

On December 28, 2023, TCG submitted a letter to the Board,[25] affirming its interest in "explor[ing] and evaluat[ing] a potential acquisition of all of the outstanding shares … [in the Company] … not already owned by [TCG] in a going-private transaction …."[26] TCG indicated that it would not pursue a transaction that resulted in the sale of its holdings in the Company or resulted in an "alternative change of control."[27] The next day, TCG publicly filed an amendment to its Schedule 13D, disclosing its interest in acquiring all shares in the Company not already owned by TCG and its affiliates.[28]

The Board held a special meeting on December 30, 2023, to discuss the EOI Letter and the formation of a special committee.[29] Leading the discussion, Rieflin and Woodhouse proposed a compensation of $50,000 and $30,000 for the chair and committee members, respectively.[30] The Board also discussed a willingness to "revisit such compensation if the scope and time commitment of service of the

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25 The "EOI Letter."

26 Ex. 38 at 1.

27 *Id*.

28 Ex. 6.

29 Ex. 37.

30 *Id*. at NGM_220_0000283.

Special Committee changes in any material respect."[31] Rieflin and Woodhouse's proposal was approved, and the Board appointed Hooper, Guyer, and Ho to serve on the Special Committee with Hooper as Chair.[32] The Special Committee was given the power to evaluate and negotiate alternative transactions but its enabling resolutions did not give the Special Committee the unilateral ability to enter into an alternative transaction.[33]

A Hogan Lovells partner, Keith Flaum, then joined the Board meeting.[34] "Rieflin … noted that Mr. Flaum was being considered as potential independent counsel to the Special Committee."[35] Rieflin may have recommended Flaum because they had a pre-existing relationship: Rieflin was on the Board of Xenoport when Xenoport was sold to Arbor Pharmaceuticals.[36] Flaum (at the time, a partner at Weil Gotshal) was the lead attorney representing Xenoport in that transaction.[37]

Immediately following the Board meeting, the Special Committee held its first meeting, with Flaum in attendance.[38] This is the only Special Committee meeting

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31 *Id*. at NGM_220_0000284.

32 *Id*. at NGM_220_0000285.

33 *Id*. at NGM_220_0000285-88.

34 *Id*. at NGM_220_0000284.

35 *Id*.

36 Ex. 13 at 2, 3.

37 Ex. 14 at 1.

38 Ex. 24.

that Woodhouse did not attend.[39] The Special Committee discussed the engagement of Guggenheim as a financial advisor.[40] No other financial advisor was mentioned or discussed.[41] Once Flaum departed the meeting, the Special Committee resolved to engage Hogan Lovells as its legal counsel.[42]

The Special Committee met again on January 2, 2024.[43] Woodhouse was present and took an active role in the discussion.[44] The Special Committee tasked Woodhouse with negotiating terms with Guggenheim.[45]

On January 3, 2024, Woodhouse called Svennilson to discuss the TCG's letter.[46] Woodhouse told Svennilson that the Special Committee intended to move expeditiously.[47] Svennilson reported that "he had had discussions with certain stockholders of the Company, with which TCG had long-standing relationships, about TCG's expression of interest, and that he believed that TCG, together with

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39 *See* discussion *supra* Sections IV-VII.

40 Ex. 24 at NGM_220_0000146.

41 *Id*.

42 *Id*.

43 Ex. 30.

44 *Id*. at NGM_220_0000169-70.

45 *Id*.

46 Solicitation Statement at 19-20.

47 *Id*. at 20.

certain of these stockholders, currently owned approximately 50% of the Company's outstanding common stock."[48]

Later that day, the Special Committee and its advisors met with Company management, including Woodhouse.[49] Woodhouse relayed to the Special Committee that Svennilson stated that he had been having discussions with stockholders that own approximately 50% of the Company.[50]

On January 4, 2024, TCG submitted a written proposal to the Board, offering to acquire the outstanding shares of NGM's common stock for $1.45 per share in cash.[51] The First Proposal was conditioned on the recommendation of the Special Committee and approval by a majority of the unaffiliated stockholders and was set to expire at 5:00 p.m. PT on January 10, 2024.[52]

V. THE PARTIES NEGOTIATE THE TERMS OF THE TRANSACTION

On January 5, 2024, Guggenheim delivered a conflicts disclosure to the Company, noting that Guggenheim was "currently engaged by certain entities in which TCG is a significant shareholder to provide investment banking and financial advisory services that are unrelated to the Transaction, and for which, if

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48 *Id*.

49 Ex. 35.

50 *Id*. at NGM_220_0000180.

51 The "First Proposal." *See* Ex. 39.

52 *Id*. at NGM_220_0000311.

consummated, we would expect to receive an agreed upon fee."[53] This was presumably a reference to a TCG portfolio company called Surrozen that Guggenheim had been retained to represent while the Transaction was being negotiated.[54]

On January 9, 2024, Hooper wrote to TCG, acknowledging receipt of the First Proposal.[55]

The Special Committee held another meeting on January 12, 2024 and formally approved the Guggenheim engagement.[56] The terms of the engagement agreement were such that a sale of the Company would earn Guggenheim a fee that was at least 4.25 times greater than other alternatives.[57] Specifically, Guggenheim was contractual entitled to fees in four different scenarios:

(i) A "Milestone Fee" of $1 million payable upon the earlier of:

  (a) Guggenheim issuing an "Opinion" (defined as an opinion as to the fairness of a "Transaction"); or

  (b) The signing of a definitive agreement providing for the consummation of a "Transaction";

(ii) A "Transaction Fee" payable upon the consummation of a "Transaction," calculated as 2.2% of the "Transaction's" value

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53 Ex. 42 at NGM_220_0000436.

54 Ex. 20.

55 Solicitation Statement at 20-21.

56 Ex. 23.

57 Ex. 41 at NGM_220_0000410-11.

but in no event less than $4.25 million (subject to crediting of any Milestone Fee);

(iii) A "Break-Up" fee in the amount of 15% of the amount of any break-up payment made to the Company in connection with a "Transaction" in excess of actual costs (subject to crediting of any Milestone Fee); and

(iv) A "Just-Say-No Fee" of $1 million in the event that the Company neither consummated nor entered into a definitive agreement for the consummation of a "Transaction" within a year of the date of TCG's initial proposal.[58]

The Special Committee met again on January 19, 2024.[59] The Company's CFO attended and discussed the financial forecasts that had been provided to the Special Committee prior to the meeting.[60] Notably, NGM management did not prepare financial forecasts in the ordinary course. Rather, these forecasts were prepared specifically for the Transaction.[61]

VI. THE SPECIAL COMMITTEE REJECTS THE FIRST PROPOSAL

On January 23, 2024, the Special Committee met with Woodhouse, Pierce, and representatives of Guggenheim and Hogan Lovells also in attendance.[62] Guggenheim discussed the Company's valuation and the potential Transaction, and

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58 *Id*. at NGM_220_0000410. Additionally, the engagement agreement defined "Transaction" to mean a sale of the Company or a majority of its assets. *Id*. at NGM_220_0000409.

59 Ex. 29.

60 *Id*. at NGM_220_0000167.

61 *See id*. at NGM_220_0000167-68; Solicitation Statement at 21-22.

62 Ex. 31.

the Special Committee directed Guggenheim to inform TCG that the First Proposal was "inadequate" and "the Special Committee has rejected TCG's proposal, but is open to continuing discussions with TCG at a higher valuation."[63]

The next day, on January 24, 2024, Guggenheim delivered the Special Committee's message to Svennilson.[64] Svennilson replied that TCG knew that the Company was in need of financing, but TCG preferred to fund the Company as a private company and was unwilling to pay an additional premium.[65] Guggenheim then asked whether TCG would instead be interested in participating in a financing of the Company if certain programs were eliminated and overall expenses were reduced.[66] Svennilson claimed that it would depend on many factors, but that TCG was "currently focused on acquiring the Company on the terms previously articulated."[67] Svennilson also reported that TCG had spoken to stockholders with which TCG has long-standing relationships and again expressed the "expectation based on recent conversations that approximately 55% of the existing stockholders

63 *Id*. at NGM_220_0000172.

64 Solicitation Statement at 22.

65 *Id*.

66 *Id*.

67 *Id*.

of the Company (inclusive of TCG) would rollover their shares of the Company for shares of the buyer entity."[68]

Later that day, the Special Committee met with Woodhouse, Pierce, and representatives of Guggenheim and Hogan Lovells also in attendance.[69] Guggenheim reported the conversation with Svennilson, including Svennilson's message that TCG wanted to fund the Company as a private entity and was focused on an acquisition.[70] The Special Committee asked Hogan Lovells to contact TCG's lawyers from Paul Weiss and clarify some of Svennilson's comments.[71]

Hogan Lovells spoke with Paul Weiss on January 25, 2024 to discuss and clarify the conversation between Svennilson and Guggenheim that had occurred the previous day.[72] Paul Weiss clarified "that, under TCG's contemplated plan, some of the TCG entities with direct holdings in the Company, along with other stockholders with whom TCG had long-standing relationships, would contribute their shares to a newly-formed entity that would act as the buyer in the tender offer and receive equity in the buyer in exchange.[ ] The arrangement would be memorialized in a separate

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68 Ex. 32.

69 *Id*.

70 *Id*.

71 *Id*.

72 Solicitation Statement at 23.

rollover agreement among the buyer and such stockholders. The buyer would then conduct an all-cash tender offer for the remaining shares."[73]

On January 26, 2024, the Special Committee met with Woodhouse, Pierce, and representatives of Guggenheim and Hogan Lovells in attendance.[74] Guggenheim summarized its conversation with TCG, including: (i) telling TCG that TCG's offer was inadequate; and (ii) TCG's response, including with respect to TCG's unwillingness to pay a premium in excess of the substantial premium already implied by TCG's offer of $1.45 per share and TCG's expectation that approximately 55% of the existing stockholders of the Company (inclusive of TCG) would roll over their Company shares.[75]

Woodhouse then informed the Special Committee that Goeddel had contacted him and Rieflin to schedule a call, which the Special Committee approved.[76] The Special Committee discussed the future financing needs of the Company, the views of Company management and the members of the Special Committee about TCG's offer, and any related messages that should be delivered to TCG.[77] The Special Committee determined that, assuming no new information was delivered by Goeddel

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73 *Id*.

74 Ex. 33.

75 *Id*. at NGM_220_0000175.

76 *Id*. at NGM_220_0000176.

77 *Id*.

during the telephone call, it would be willing to recommend an offer from TCG that exceeded $2.00 per share.[78] The Special Committee then temporarily adjourned the meeting so Woodhouse could call Goeddel.[79]

While the Special Committee meeting was adjourned, Woodhouse spoke to Goeddel and Rieflin.[80] Goeddel expressed concern about "the length of time it was taking the Special Committee to respond to TCG's proposal" and reiterated that TCG's offer remained at $1.45 per share.[81] Woodhouse, in an apparent attempt to appease TCG, told Goeddel that the Special Committee had asked Guggenheim to reach out to Svennilson with another proposal.[82]

The Special Committee then reconvened its meeting with the same participants, other than Ho.[83] Woodhouse summarized his call.[84]

On January 28, 2024, representatives of Guggenheim contacted Svennilson by telephone and relayed the Special Committee's position.[85] Later that day,

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78 *Id*.

79 *Id*.

80 Solicitation Statement at 23.

81 *Id*.

82 *Id*.

83 Ex. 33 at NGM_220_0000176.

84 *Id*.

85 Solicitation Statement at 24.

Svennilson told Guggenheim that TCG would not raise its offer from $1.45 per share.[86]

Goeddel sent an email to Woodhouse and Rieflin the same day, writing that they must have heard that the Special Committee had turned down TCG's offer and instead had proposed a price which TCG believed was "completely unreasonable."[87] Goeddel wrote that TCG had been very clear that it was not going to negotiate its initial offer and proposed that the Board hold a full meeting that week, so that "the Special Committee could explain its decision."[88] The Special Committee, Guggenheim, and Woodhouse then discussed Goeddel's email, yet no minutes were taken to memorialize the meeting.[89]

On January 29, 2024, Svennilson communicated via email to Guggenheim that, after a long discussion with TCG's partners, TCG had decided to raise its bid to $1.50 per share.[90] Given that the Special Committee requested a deal at about $2.00 per share, Guggenheim asked Svennilson for a further increase in the offer

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86 *Id*.

87 *Id*.

88 *Id*.

89 *Id*.

90 Ex. 34 at NGM_220_0000178.

price and requested that TCG provide an updated offer in writing.[91] Svennilson then delivered to Guggenheim a revised offer of $1.55 per share.[92]

On January 29, 2024, the Special Committee met with Woodhouse, Pierce, and representatives of Guggenheim and Hogan Lovells in attendance, to consider TCG's updated offer.[93] Guggenheim summarized the discussions with Svennilson, including that TCG reiterated that it was "only a buyer and not a seller."[94]

On January 30, 2024, Hogan Lovells contacted Paul Weiss via telephone to discuss the revised offer from TCG and certain questions that had been raised during the prior day's Special Committee meeting.[95] During that conversation, Paul Weiss clarified that TCG would not vote in favor of any alternative transaction, nor would TCG support a higher bid from a third party.[96]

On February 8, 2024, the Special Committee met with Woodhouse, Pierce, and representatives of Guggenheim and Hogan Lovells in attendance.[97] Woodhouse summarized for the Special Committee several communications that he had received

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91 Solicitation Statement at 24.

92 Ex. 40 at NGM_220_0000316.

93 Ex. 34 at NGM_220_0000178.

94 *Id*.

95 Solicitation Statement at 25.

96 *Id*.

97 Ex. 28.

from a number of parties that could be interested in providing financing to the Company.[98] The Special Committee requested a further discussion with Guggenheim about potential financing options for the Company at the next meeting of the Special Committee.[99] But these financing options were never pursued.

On February 22, 2024, the Special Committee met with Woodhouse, Pierce, and representatives of Guggenheim and Hogan Lovells in attendance.[100] The Special Committee discussed the increase in the Company's stock price, which had increased since the First Proposal and was trading well above TCG's latest offer of $1.55 per share (closing at $1.92 per share on February 21, 2024).[101]

VII. THE BOARD AND SPECIAL COMMITTEE AGREE TO A TAKE-UNDER

On February 23, 2024, the Special Committee held a meeting, with Woodhouse, Pierce, Guggenheim, and Hogan Lovells also in attendance.[102] Guggenheim discussed the closing price of the Company's common stock that day, which was $1.91 per share—*i.e.*, above the deal price.[103] The Special Committee recognized that this meant that stockholders would likely be unhappy and asked

98 Ex. 28 at NGM_220_0000165.

99 *Id*.

100 Ex. 25.

101 *Id*. at NGM_220_0000148-49.

102 Ex. 26.

103 *Id*.

Guggenheim to contact TCG to discuss the recent increase in the Company's stock price and the possible impact that such increase could have on the satisfaction of the minimum tender condition.[104]

The next day, Guggenheim contacted Svennilson by phone and asked whether TCG was willing to increase the offer price.[105] Svennilson stated that "TCG was not interested in resetting the discussions about the transaction and was not willing to increase its offer price[.]"[106]

The Special Committee agreed to the $1.55 per share price. On February 25, 2024, the Special Committee held its final meeting, with Woodhouse in attendance.[107] Guggenheim reviewed its financial analysis of Transaction and rendered its oral fairness opinion,[108] which was confirmed by a written opinion dated February 25, 2024.[109] The Special Committee then unanimously determined to recommend that the Board approve the transaction.[110] The final price was less than

104 *Id*.

105 Solicitation Statement at 28.

106 Ex. 27 at NGM_220_0000152.

107 *Id*.

108 *Id*.

109 Ex. 36.

110 Ex. 27 at NGM_220_0000153.

the value of the cash on NGM's balance sheet and less than its trading price immediately prior to the announcement of the Transaction.[111]

Later on February 25, 2024, the Board held a meeting.[112] Goeddel, Perlmutter, and Rieflin recused themselves from the meeting—meaning, the same four directors from the Special Committee meeting—Hooper, Guyer, Ho, and Woodhouse—were the same directors at the full Board meeting.[113] Those four Board members then unanimously voted to approve the Transaction.[114]

Following the Board meeting, on the evening of February 25, 2024, the Merger Agreement and related documents were executed, and on February 26, 2024, prior to the opening of trading of the Company's shares on Nasdaq, the Company issued a press release announcing the Transaction.[115]

Pursuant to the Rollover Agreement and the Joinder thereto, TCG and certain other Company stockholders, who in collectively held approximately 48% of the Company's shares, agreed to roll over their shares into the new private company.[116] Rieflin and Goeddel entered into the Rollover Agreement on the date of the Merger

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111 Ex. 5.

112 Ex. 21.

113 *Id*. at NGM_220_0000065.

114 *Id*. at NGM_220_0000066.

115 Ex. 7.

116 Ex. 16; Ex. 17.

Agreement;[117] Woodhouse entered into a joinder to the Rollover Agreement on March 6, 2024.[118]

VIII. NGM SOLICITS STOCKHOLDER SUPPORT

The tender offer commenced on March 8, 2024.[119] The Board solicited stockholder support for the Transaction through the Solicitation Statement, which was filed on March 8, 2024 and supplemented on March 22, 2024, and March 29, 2024.[120] Plaintiff alleged that the Solicitation Statement failed to disclose a number of material facts, including: (i) the terms of Guggenheim's engagement letter and, specifically, the fact that Guggenheim would earn a 4.25X greater fee by recommending a sale of the Company instead of a licensing transaction, PIPE investment, or other financing transaction;[121] (ii) the concurrent conflicts of the Company's legal advisor (Cooley) and Special Committee's financial advisor (Guggenheim) created by their work with TCG's portfolio company, Surrozen;[122] (iii) that Hogan Lovells was proposed to the Special Committee (and likely invited to its first meeting) by Rieflin, who inferably had a preexisting relationship with the

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117 Ex. 16.

118 Ex. 17.

119 Solicitation Statement at 1.

120 *See id*. at 1; Ex. 10; Ex. 11.

121 Complaint ¶129. References to "¶__" are to the Complaint.

122 ¶130.

lead Hogan Lovells lawyer, Flaum;[123] (iv) that Special Committee members were paid fees for their work, with the Board signaling a willingness to revisit the compensation;[124] (v) TCG's conversations with approximately 55% of the existing stockholders of the Company (inclusive of TCG) who TCG expected to roll over their shares of the Company for shares of the buyer entity;[125] (vi) how Woodhouse was able to participate in the Rollover Agreement;[126] and (vii) material information regarding alternative financing options for the Company.[127]

IX. THE TENDER OFFER CLOSES

The tender offer expired on April 5, 2024.[128] Approximately 27% of the Company's stockholders needed to tender to their shares to satisfy the minimum tender condition. The Company barely hit that mark: approximately 27% of the unaffiliated shares were tendered (with the remainder squeezed out in a second-step merger).[129] Accordingly, each outstanding share of NGM, other than the shares

123 ¶131.

124 ¶132.

125 ¶133.

126 ¶134.

127 ¶¶135-37.

128 Ex. 12.

129 *Id*.

owned TCG or those subject to the Rollover Agreement, was canceled and converted into the right to receive $1.55.[130]

On July 17, 2024—approximately 3.5 months after the Transaction closed—NGM issued a press release announcing that it had raised $122 million in Series A financing that was "led by TCG with participation from a select group of investors."[131] The press release did not disclose the pre-money valuation ascribed to the Company in the Series A financing.

PROCEDURAL HISTORY

On March 26, 2024, Plaintiff served the Company with a books-and-records demand.[132] Plaintiff and the Company entered into a standing agreement preserving Plaintiff's ability to enforce his books-and-records demand after closing. The Company ultimately produced core materials, including board minutes, presentations, and director and officer questionnaires.

On December 19, 2024, Plaintiff filed his Complaint.[133]

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130 *Id*. Two related stockholders owning approximately 4.2 million shares dissented. *Giffuni v. NGM Biopharmaceuticals, Inc.*, C.A. No. 2024-0423-MTZ (Del. Ch.). The appraisal action settled quickly with a carve-out preserving the dissenters' right to recover *pro rata* alongside other Class members in the event of a class settlement of fiduciary claims. Those dissenters are included in the class definition.

131 Ex. 18.

132 *See* Ex. 15.

133 Trans. ID 75270588.

On January 21, 2025, the Court entered a briefing schedule for Defendants' response to the Complaint.[134] The Court granted stipulated amendments to the briefing schedule while the Parties conducted arm's-length negotiation to explore a settlement.[135] During the course of those negotiations, Defendants produced to Plaintiff (on a Rule 408 basis) additional confidential discovery materials relating to the valuation ascribed to the Company in the Series A financing that took place shortly after closing.

On June 3, 2025, the Parties executed a Settlement Term Sheet and notified the Court of their agreement-in-principle that same day.[136] On July 23, 2025, the Parties filed the Stipulation of Settlement with the Court.[137] On July 25, 2025, the Court granted the Scheduling Order and scheduled the final approval hearing for October 21, 2025.[138] Pursuant to the Scheduling Order, notice will be issued by today, which is 60 calendar days before the hearing.

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134 Trans. ID 75479538.

135 Trans. ID 75716066; Trans. ID 75950690; Trans. ID 76058849; Trans. ID 76113511; Trans. ID 76205060; Trans. ID 76294812.

136 Trans. ID 76386927.

137 Trans. ID 76714674 ("Stip. of Settlement").

138 Trans. ID 76730220 ("Scheduling Order").

ARGUMENT

I. THE CLASS SHOULD BE PERMANENTLY CERTIFIED

"Certification of a class under Court of Chancery Rule 23 … 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)."[139]

Here, the Class is defined as follows:

> All record holders and beneficial holders of shares of NGM Biopharmaceuticals, Inc. common stock who either received $1.55 per share in cash at the closing of the take-private transaction between NGM and The Column Group, LP (the "Transaction"), on or about April 5, 2024 (the "Closing"), or who dissented from the Transaction, including each such Class Member's heirs, successors in interest, successors, transferees, and assigns.
>
> Excluded from the Class are: (i) Defendants, (ii) any other director or officer of the Company as of the date of the Closing, (iii) the spouses and minor children of Defendants and the Company's other directors and officers as of the date of the Closing, (iv) any trusts or other entities controlled by any Defendant or other director or officer of the Company as of the date of the Closing, and (v) the Rollover Stockholders.[140]

Final certification of the Class is appropriate because the Class meets all requirements of Rule 23(a) and satisfies Rule 23(b)(1) and (b)(2).

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139 *In re Ebix, Inc. S'holder Litig.*, 2018 WL 3570126, at *1 (Del. Ch. July 17, 2018).

140 *See* Scheduling Order ¶3.

A. The Class Satisfies Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires that the class members be "so numerous that joinder of all members is impracticable." While "[t]here is no bright-line cutoffs," "numbers in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement."[141]

Here, NGM had approximately 83.4 million outstanding shares at the time of the Transaction. After excluding the 39.5 million shares rolled over by TCG and the other Rollover Stockholders, plus certain additional shares owned by NGM directors excluded from the Class, there are approximately 43.8 million shares in the Class.[142] Accordingly, there are likely hundreds, if not thousands, of potential Class members, satisfying the numerosity requirement.

2. Commonality

Rule 23(a)(2) requires there be at least one "question[] of law or fact common to [members of the] class." Commonality is satisfied "where the question of law

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

[142] Notice ¶15.

linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated."[143]

The factual and legal issues in this Action are common to all Class members, including: (i) whether TCG controlled NGM; (ii) whether TCG owed fiduciary duties to Plaintiff and the Class; (iii) whether entire fairness or enhanced scrutiny is the applicable standard of review; (iv) whether Plaintiff and the Class had received all material information when making their decision whether to tender their shares; (v) whether Defendants breached their fiduciary duties to Plaintiff and the Class; and (vi) whether Defendants injured Plaintiff and other Class Members through their conduct.

Because this Action involves claims that "implicate the interests of all members of the proposed class of [stock]holders," commonality is satisfied.[144] Finally, it is appropriate to include the dissenters in the Class definition.[145]

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143 *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1141 (Del. 2008).

144 *In re Lawson Software, Inc.*, 2011 WL 2185613, at *2 (Del. Ch. May 27, 2011); *see also Hynson v. Drummond Coal Co.*, 601 A.2d 570, 575 (Del. Ch. 1991) ("An action seeking to prove a breach of [fiduciary] duty is inescapably a true class action" because "[r]elief whether it be by injunction, rescission or an award of money will be determined by reference to the effects of the fiduciary's wrong on ... the corporation or all of its stockholders as a class.").

145 *See, e.g.*, *In re Columbia Pipeline Group, Inc. Merger Litig.*, C.A. No. 2018-0484-JTL (Del. Ch. June 1, 2022) (Transcript) at 78 ("There's nothing wrong with including the appraisal petitioners in the class. The plaintiffs have cited the *Orchard Enterprise* cases, which I think are on point."); *JB Capital Partners, L.P. v. Stevens*, C.A. No. 2022-0327-

3. Typicality

The Court will generally find typicality where the class representative's 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."[146]

Typicality is satisfied here. Plaintiff is similarly situated to the other Company stockholders unaffiliated with TCG who either received the Transaction Consideration at the Closing or dissented from the Transaction, because their claims arise out of Defendants' actions in connection with the Transaction. All members of the Class were affected by Defendant's alleged conduct in a manner similar to Plaintiff. Accordingly, Plaintiff's legal and factual positions are typical of the Class.

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." 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.[147]

NAC (Del. Ch. Dec. 4, 2024) (Transcript) at 5-6 (approving class settlement that included appraisal petitioners and provided them with incremental consideration above other class members).

146 *New Jersey Carpenters Pension Fund v. infoGROUP, Inc.*, 2013 WL 610143, at *3 (Del. Ch. Feb. 13, 2013).

147 *Id*. at *3 & n.24.

Here, there is no divergence of interests, economic or otherwise, between Plaintiff and absent Class members. The recovery achieved demonstrates that Plaintiff's interests were aligned with those of absent Class members and is indicative of the effectiveness of Plaintiff's Counsel, who have extensive experience litigating stockholder class actions in this Court.[148]

B. The Class Satisfies The Requirements of Rule 23(b)(1) And (b)(2)

A proposed class must "fit[] into one of the three categories specified in Court of Chancery Rule 23(b)."[149] A class may be certified under Rule 23(b)(1) where (i) the prosecution of separate actions by or against individual members of the class would create a risk of "inconsistent or varying adjudications" which would create incompatible standards of conduct for the opposing party; or (ii) "adjudications with respect to individual members of the Class" would as a practical matter be dispositive of the interests of the other members not parties to this Action.[150]

The Class satisfies Rule 23(b)(1). All Class members are unaffiliated former record holders and beneficial holders of shares of NGM common stock who suffered the same harm because of Defendants' conduct with respect to the Transaction.

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148 *See Haverhill Ret. Sys. v. Kerley*, C.A. No. 11149-VCL (Del. Ch. Sept. 28, 2017) (Transcript) at 20-21 ("Given that I am approving the settlement as fair and adequate, it follows that I necessarily believe that the class representatives, as well as the derivative action representatives, provided adequate representation in this matter.").

149 *Ebix*, 2018 WL 3570126, at *4.

150 Ct. Ch. R. 23(b)(1).

Other actions challenging this same conduct would risk inconsistent or varying adjudications and may create incompatible standards of conduct for Defendants. Additionally, for the same reasons, individual actions by members of the Class would be dispositive of the interests of the other Class members.

The Class also satisfies Rule 23(b)(2). Defendants' actions impacted Class members in the same fashion, and the Settlement will afford final relief with respect to the Class as a whole.[151]

C. The Remaining Requirements Of Rule 23 Are Satisfied

Plaintiff and Plaintiff's Counsel meet the remaining requirements of Court of Chancery Rule 23. Plaintiff has filed an affidavit contemporaneously with this brief, complying with Rule 23(f)(2)(A) and stating his support for the Settlement.[152] Plaintiff has sworn that he has not received, been promised or offered, and will not accept any form of compensation, directly or indirectly, for prosecuting or serving as a representative party in this Action, except for: (i) such damages or other relief that the Court may award him as a Class member; (ii) any fees, costs, or other payments that the Court expressly approves to be paid to him (*i.e.*, the Incentive

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151 *See generally Nottingham P'rs v. Dana*, 564 A.2d 1089, 1096-97 (Del. 1989) (affirming class certification under Rule 23(b)(2) where primary relief in settlement was declaratory, injunctive, and rescissory and thus afforded "similar equitable relief with respect to the class as a whole").

152 *See* Bryant Aff.

Award); or (iii) reimbursement, paid by attorneys, of actual and reasonable out-of-pocket expenditures incurred in prosecuting the Action.[153]

Plaintiff's Counsel has coordinated with the Settlement Administrator to ensure that Notice will be provided consistent with the Scheduling Order (the deadline for which is the same as the date of this filing). Specifically, Notice will be issued (i) through U.S. first-class mail, with the Settlement Administrator mailing the Notice to each potential Class member identified through reasonable effort at the corresponding last known address appearing in the stock transfer records maintained by or on behalf of NGM; (ii) posting the Notice on a website established by the Settlement Administrator for the Settlement; (iii) publication of the Summary Notice in Investor's Business Daily; and (iv) transmission of the Summary Notice over the PR Newswire.[154] Plaintiff will also file the required proof of mailing of the Notice and publication of the Summary Notice at least seven calendar days prior to the Settlement hearing.[155]

As set forth herein, the Settlement also meets the requirements of Rule 23(f)(5):

- Rule 23(f)(5)(A) is satisfied because Plaintiff and Plaintiff's

[153] *Id*. ¶5.

[154] Scheduling Order ¶¶8(a)-(d).

[155] *Id*. ¶8(e).

Counsel have adequately represented the Class;[156]

- Rule 23(f)(5)(B) is satisfied because, as will be detailed and confirmed in a forthcoming affidavit of mailing and publication, adequate notice of the Settlement hearing will be provided;[157]

- Rule 23(f)(5)(C) is satisfied because the Settlement was negotiated at arm's length;[158] and

- Rule 23(f)(5)(D) is satisfied because the relief provided to the Class falls within a range of reasonableness taking into account (i) the strength of the claims; (ii) the costs, risks, and delay of trial and appeal; (iii) the scope of the release; and (iv) any objections to the Settlement.[159]

II. THE SETTLEMENT IS FAIR AND REASONABLE

A. The 'Get' Justifies The 'Give'

"This Court generally favors settlement of complicated litigation" but the fiduciary nature of a class action requires the Court to "appl[y] its own sound judgment in deciding whether to approve a class action settlement as fair and reasonable."[160] "The Court's role is to act as a fiduciary, applying a range-of-reasonableness review that is one step removed from the litigant's business judgment

156 *See supra* Section I(A)(4).

157 *See supra* Section I(C).

158 *See supra* Procedural History.

159 *See infra* Section I(A).

160 *Gatz v. Ponsoldt*, 2009 WL 1743760, at *2 (Del. Ch. June 12, 2009).

to accept the settlement" and "to weigh the 'give' against the 'get' to ensure the class is reaping a reasonable benefit alongside the representative plaintiff."[161]

The "get," of course, is $6 million in cash. In comparing that "get" to the "give"—a standard classwide release of claims arising from the Transaction—the Court can weigh a number of factors, including "(1) the probable validity of the claims, (2) the apparent difficulties in enforcing the claims through the courts, (3) the collectibility of any judgment recovered, (4) the delay, expense and trouble of litigation, (5) the amount of the compromise as compared with the amount and collectibility of a judgment, and (6) the views of the parties involved, pro and con."[162] Here, the most important factors are the strength of the claims and the likely damages. There are a couple of different ways to evaluate those factors.

First, the Court often "considers the premium to the deal price as a rough proxy for the strength of the settlement."[163] In *Calamos*, the Court observed that stockholder settlements usually reflect a premium to deal price of 5% or less

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161 *In re AMC Entm't Holdings, Inc. S'holder Litig.*, 2023 WL 5165606, at *18 (Del. Ch. Aug. 11, 2023), *aff'd sub nom. In re AMC Entm't Holdings, Inc.*, 319 A.3d 310 (Del. 2024).

162 *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986).

163 *Garfield v. BlackRock Mortgage Ventures, LLC,* C.A. No. 2018-0917-KSJM (Del. Ch. Feb. 11, 2021) (Transcript) at 24; *see also In re Dell Techs. Inc. Class V S'holders Litig.* ("*Dell Fee Opinion I*"), 300 A.3d 679, 724 (Del. Ch. 2023) ("A less noisy proxy for the strength of a settlement in an M&A case is the magnitude of the recovery as a percentage of the equity value of the transaction."), *aff'd* 326 A.3d 686 (Del. 2024).

and often fall in the range of 1% to 2%.[164] In *Dell Fee Opinion I*, the Court assembled a sample of fifteen settlements in merger cases with premia to deal prices ranging from 0.12% to 12.24% with a median premium of 2.95%.[165] As noted above, there are approximately 43.8 million Class shares, so the $6 million settlement reflects a recovery of approximately $0.137 per share—an 8.8% premium to the $1.55 per share deal price. Adding the 8.8% premium achieved here to the list from *Dell* would rank this Settlement in the top quartile (fourth of sixteen).[166]

Second, another way to value the 'give' is to begin with the likely damages if Plaintiff succeeded, then discount for the risks of proving liability. This too shows that the settlement represents an excellent risk-adjusted result. We begin with damages, which would most likely be measured by a quasi-appraisal remedy.[167]

There are two relatively contemporaneous and objective measures of the

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164 *In re Calamos Asset Management, Inc. S'holder Litig.,* Consol. C.A. No. 2017-0058-JTL (Del. Ch. Apr. 25, 2019) (Transcript) at 4-5 (Plaintiffs' counsel: "I recalled the *ExamWorks* argument where Mr. Hanrahan was presenting to Vice Chancellor Laster .... And what Mr. Hanrahan said was, 'Look, I've been practicing a long time. My sense is most stockholder settlements are under 5 percent [of the deal price] and often in the 1 to 2 percent range.'"); *id.* at 93 (Court: "I was intrigued by the idea that we all can have a Hanrahan gut check in these actions, that we can all look to see whether the relative result was 5 percent or less of the total settlement amount in determining whether it's on par...").

165 *Dell Fee Opinion I*, 300 A.3d at 725.

166 *Id.*

167 *Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC*, 2014 WL 4374261, at *20 n.177 (Del. Ch. Sept. 4, 2014) ("Entire fairness inquiries often rely on quasi-appraisal remedies, though the measure of damages is not strictly limited to a corporation's fair value as determined by an appraisal.").

Company's value. The most objective measure—reflecting an unconflicted, third-party, arm's-length negotiation—is the pre-money valuation ascribed to the Company in the Series A financing that closed in July 2024, soon after the Transaction closed.[168] As discussed above, Plaintiff insisted that Defendants produce documents on a Rule 408 basis showing the valuation ascribed to the Company in that financing. Those documents show that the Series A financing ascribed a pre-money valuation of [redacted],[169] which is [redacted] higher than the $135 million equity value for the Company implied by the deal price.[170] If the Court determined that the fair value of the Company was [redacted], then classwide damages would have been approximately [redacted]. The $6 million settlement is approximately [redacted] of that figure.

Another, contemporaneous measure of value is the Company's trading price, after TCG had filed a Schedule 13D and right before the Transaction was announced. Plaintiff would have argued that this reflected the market's expectations of a fair price for a take-private. That price—$1.91 per share—reflected an implied equity

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168 *See* Ex. 43 (Series A Term Sheet); Ex. 44 (Series A Stock Purchase Agreement).

169 Ex. 43 at 1.

The Stock Purchase Agreement confirmed that there were no material changes to the Company's assets or liabilities since March 31, 2024 (*i.e.*, shortly before the Transaction closed). Ex. 44 §§ 2.14, 2.15.

170 Ex. 7 ("This price per share corresponds to a total equity value of $135 million on a fully diluted basis[.]").

value for the Company of approximately $159.4 million, which is $24.4 million higher than the equity value implied by the deal price. Classwide damages under this scenario would have been $12.8 million. The $6 million settlement is approximately 47% of that number.

Plaintiff's odds of successfully litigating through trial and collecting on a final judgment in that amount were almost certainly less than [redacted] and very likely less than 47%, which means that the expected value of the claim (effectively: expected damages * likelihood of liability) was less than the $6 million that Plaintiff obtained. Plaintiff would have faced significant hurdles at the pleadings, trial, and on appeal.

Pleadings Stage. The most critical question at the pleadings stage was likely the standard of review. Plaintiff's primary theory was that TCG was a controller, meaning that the Transaction would be subject to entire fairness review (and likely non-dismissible) unless Defendants could establish that the process "follow[ed] all *MFW*'s requirements."[171] The Transaction was negotiated by a special committee and approved by a majority-of-the-minority tender. But as Plaintiff alleged, it appears that, at times, TCG cut out the Special Committee and negotiated directly with large stockholders.[172] This undermined the Special Committee's ability to act as an independent bargaining agent and likely would have vitiated Defendants'

171 *In re Match Grp., Inc. Derivative Litig.*, 315 A.3d 446, 451 (Del. 2024).

172 ¶¶93-94.

ability to rely on *MFW* cleansing.[173] This path to defeating a motion to dismiss was viable, however, only if TCG was a controller. Plaintiff alleged that TCG was a controlling stockholder based on:

- Its 26% ownership stake;[174]
- Statements about TCG's "significant influence" in the Company's public filings;[175]
- Charter provisions requiring a supermajority vote (giving TCG a near-unilateral veto) over important corporate actions;[176]
- Board-level conflicts;[177] and
- Other indicia of transaction-specific control.[178]

When Plaintiff filed his Complaint, counsel believed that these facts were sufficient to state a claim that TCG was a controller. "Historically, Delaware decisions supported a presumption of control when a stockholder could exercise 20-

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173 *In re Dell Techs. Inc. Class V Stockholders Litig*. ("*Dell MTD Opinion*"), 2020 WL 3096748, at *17 (Del. Ch. June 11, 2020) ("The complaint also supports a reasonable pleading-stage inference that the Company failed to respect the twin-*MFW* conditions when it bypassed the Special Committee and negotiated directly with the Stockholder Volunteers.").

174 ¶36.

175 *Id.*

176 *Id.* ¶39.

177 *Id.* ¶¶41-47.

178 *Id.* ¶48.

25% of the voting power."[179] There was a "period from 2006 to 2018," in which "some Delaware Court of Chancery decisions sough to ratchet the threshold upward,"[180] but the Court seemed to be returning to a more traditional approach that recognized the overwhelming mathematical odds stacked against anyone challenging a blockholder of that size.[181] The idea that transactional control could suffice for controlling-stockholder status also seemed well-established.[182]

The ground shifted quickly after Plaintiff filed his Complaint. "Whether Delaware law has or should have recognized transaction-specific control" became

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179 J. Travis Laster, *The Distinctive Fiduciary Duties That Stockholder Controllers Owe*, 20 N.Y.U. J. L. & BUS. 461, 509 (2024).

180 *Id.* at 510-11.

181 *Id.* at 515 n.161 ("A presumption of control at 20% makes sense, because with a block of that size, the voting power math tilts heavily in favor of the blockholder."); *see, e.g.*, *Tornetta v. Musk*, 310 A.3d 430, 502–03 & n.581 (Del. Ch. 2024) ("Musk owned approximately 21.9% of Tesla's outstanding common stock. ... It is ... no surprise that this court has found that holders of similar or lesser percentages of stock are controlling stockholders.") (collecting cases); *In re Pattern Energy Gp. Inc. S'holders Litig.*, 2021 WL 1812674, at *41–46 (Del. Ch. May 6, 2021) (reasonably conceivable that stockholder owning "slightly more than 10%" was a controller); *Skye Mineral Invs., LLC v. DXS Cap. (U.S.) Ltd.*, 2020 WL 881544, at *24–29 (Del. Ch. Feb. 24, 2020) (reasonably conceivable that a group of stockholders collectively owning 28.07% was a control group); *FrontFour Cap. Gp. LLC v. Taube*, 2019 WL 1313408, at *21–24 (Del. Ch. Mar. 11, 2019) (finding post-trial that stockholders who collectively owned "less than 15%" of the company's stock were controllers); *In re Tesla Motors, Inc. Stockholder Litig.*, 2018 WL 1560293, at *19 (Del. Ch. Mar. 28, 2018) (reasonably conceivable that stockholder who owned 22% was a controller).

182 *In re Oracle Corp. Derivative Litig.* ("*Oracle II*"), 2025 WL 249066, at *12 n.92 (Del. Jan. 21, 2025) (collecting cases).

"subject to a lively debate before the judiciary and in academia,"[183] including an article published by Vice Chancellor Will arguing that Delaware should "jettison the concept of transactional control as a distinct concept."[184]

Three decisions issued between the time that Plaintiff filed his complaint and the time of settlement appeared to raise the bar for pleading either general or transactional control more broadly. In January 2025, this Court held in *Klein* that it was not reasonably conceivable that a stockholder that held "25.7% of [the Company's] common stock, as well as warrants, notes and preferred stock that, if converted or exercised, could have increased [its] voting power to 40.2%" was a controller.[185] In March 2025, the Supreme Court affirmed this Court's decision in *AstraZeneca* that a 26.7% stockholder with board representation was not a

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183 *Frank v. Mullen*, 2025 WL 1294078, at *7 n.141 (Del. Ch. May 5, 2025).

184 Elizabeth Pollman & Lori W. Will, *The Lost History of Transaction-Specific Control*, ___ J. CORP. L. ___ (forthcoming 2025), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5138377.

In *Oracle II*, decided shortly after Plaintiff filed suit, the Supreme Court acknowledged and applied the concept of transactional control. *Oracle II*, 2025 WL 249066, at *12 ("A minority stockholder can be a controlling stockholder by exercising actual control over the corporation's business and affairs or by exercising actual control over a specific transaction."). As Defendants would, no doubt, have argued, however, the *Oracle II* defendants never disputed that transactional control was a viable path to proving control.

185 *Turnbull v. Klein*, 2025 WL 353877, at *1 (Del. Ch. Jan. 31, 2025).

controller.[186] Then, in early May 2025, this Court held in *Mullen* that it was not reasonably conceivable that a 46.4% stockholder was a controller.[187]

Then there was Senate Bill 21—announced in late February 2025 and enacted in late March 2025—in which the General Assembly made significant changes to Section 144, including adopting a statutory definition of "controlling stockholder" with a minimum floor of one-third voting power.[188] Senate Bill 21's constitutionality has been challenged[189] and it is expressly non-retroactive to plenary actions, like this one, that were pending as of February 17, 2025.[190] Yet the *Tornetta* appellants have argued that the Supreme Court should give Senate Bill 21's constrained definition of "control" "great weight" as a legislative expression of public policy.[191] It remains an open question whether the Supreme Court will accept that invitation.

On balance, Plaintiff's Counsel read the shifting doctrinal tides to mean Plaintiff had a less-than-even chance of convincing the Court that TCG was a

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186 *Sciannella v. AstraZeneca UK Ltd.*, 2024 WL 3327765, at *23 (Del. Ch. July 8, 2024), *aff'd,* 2025 WL 946148 (Del. Mar. 26, 2025).

187 *Mullen*, 2025 WL 1294078, at *1. Notably, however, the plaintiff's counsel in *Mullen* had inexplicably abandoned the general control theory at oral argument. *Id.* at *7 n.141.

188 8 *Del. C.* § 144(e)(2)(c).

189 *Rutledge v. Clearway Energy Group LLC*, No. 248, 2025 (Del.) (Supreme Court to decide certified questions regarding the constitutionality of Senate Bill 21).

190 Laws of Delaware, vol. 85 ch. 6 (2025) (session law adopting Senate Bill 21) § 3.

191 *See, e.g.*, Brief of Individual Director-Appellants in *In re Tesla, Inc. Derivative Litigation*, No. 534, 2024 (Del. May 16, 2025) (Filing ID 76285307**)** at 10-11.

controller.[192] If the Court held that TCG was not a controller, Plaintiff could still have defeated a motion to dismiss by showing that the stockholder tender was not fully informed and that Plaintiff had, thus, stated enhanced scrutiny claims against the individual defendants.[193] But Plaintiff's disclosure claims[194] were relatively weak and most would have been vulnerable to a defense argument that they were of the "tell me more" variety.[195]

Plaintiff's strongest disclosure claim was likely the Solicitation Statement's failure to disclose that "Guggenheim would earn a 4.25X greater fee by recommending a sale of the Company instead of a licensing transaction, PIPE investment, or other financing transaction."[196] Plaintiff would have argued that this was akin to *Foundation Building Materials* where the Court held that it was

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[192] Last week's decision in *Witmer v. Armistice Capital, LLC*, obviously did not influence Plaintiff's decision to settle. 2025 WL 2350799 (Del. Ch. Aug. 14, 2025). But it further suggests that Plaintiff's Counsel read the tides correctly. *Id.* at *8-12 (holding that 41% stockholder was not a controller, although, as in *Mullen*, the *Armistice* plaintiff apparently did not argue general control).

[193] *Firefighters' Pension Sys. of City of Kansas City, Missouri Tr. v. Presidio, Inc.*, 251 A.3d 212, 254 (Del. Ch. 2021) ("[D]efendants sold the Company for cash. Accordingly, enhanced scrutiny provides the standard of review for evaluating the Merger.").

[194] ¶¶128-38.

[195] *Salladay v. Lev*, 2020 WL 954032, at *12 (Del. Ch. Feb. 27, 2020) ("A complaint does not state a disclosure violation by noting picayune lacunae or 'tell-me-more' details left out.").

[196] ¶129.

insufficient to disclose only the amount of a fee and that it was contingent.[197] But the Court has rejected similar arguments in other cases.[198]

Trial. Even if Plaintiff survived a motion to dismiss, he would have faced significant risk at trial. Even an imperfect process can be fair.[199] And plaintiffs regularly leave empty-handed after trial, even where this Court finds that defendants have breached their fiduciary duties.[200] Here, Defendants would have relied heavily

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197 *Firefighters' Pension Sys. of City of Kansas City v. Found. Bldg. Materials, Inc.*, 318 A.3d 1105, 1158 (Del. Ch. 2024).

198 *In re Paramount Gold & Silver Corp. Stockholders Litig.*, 2017 WL 1372659, at *13 (Del. Ch. Apr. 13, 2017) ("Because the Registration Statement disclosed the total amount and the contingent nature of Scotia's compensation in connection with the merger, Paramount's stockholders were made aware of the full magnitude and nature of Scotia's financial interest in the transaction."); *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *21 (Del. Ch. Dec. 11, 2017) ("the failure to disclose the specifics of Moelis's compensation does not constitute a material omission under the circumstances of this case because there was no potential for a conflict of interest, and directors do not have an obligation to disclose information about the *non-existence* of misaligned incentives."); *Cnty. of York Employees Ret. Plan v. Merrill Lynch & Co., Inc.*, 2008 WL 4824053, at *11 (Del. Ch. Oct. 28, 2008) ("This Court has held that ... simply stating that an advisor's fees are partially contingent on the consummation of a transaction is appropriate.").

199 *In re Tesla Motors, Inc. S'holder Litig.*, 2022 WL 1237185, at *2 (Del. Ch. Apr. 27, 2022) (defense verdict even though "[t]he process employed by the Tesla Board to negotiate and ultimately recommend the Acquisition was far from perfect."), *judgment entered sub nom. In re Tesla Motors, Inc.* (Del. Ch. 2022), *aff'd sub nom. In re Tesla Motors, Inc. Stockholder Litig.*, 298 A.3d 667 (Del. 2023); *In re BGC Partners, Inc. Derivative Litig.*, 2022 WL 3581641, at *18 (Del. Ch. Aug. 19, 2022) (defense verdict; the process, while "imperfect[,] was ultimately fair."), *judgment entered sub nom. In re BGC Partners, Inc.* (Del. Ch. 2022), *aff'd sub nom. In re BGC Partners, Inc. Derivative Litig.*, 303 A.3d 337 (Del. 2023).

200 *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *2 (Del. Ch. Oct. 16, 2018) (defense verdict even though "[t]he plaintiffs proved that the directors breached their

on the fact that the Transaction was negotiated by a Special Committee comprised of directors whose independence Plaintiff did not challenge, which bargained and obtained meaningful concessions from TCG.[201] And the deal price ($1.55 per share) represented a substantial, 80% premium to the Company's unaffected trading price ($0.86 per share).[202]

Appeal. Even when stockholder-plaintiffs succeed at trial, they have—in recent years—faced a steep climb to defend their victory before the Delaware Supreme Court. At the time of the *Dell* fee opinion, "since *Americas Mining*, the Delaware Supreme Court ha[d] heard appeals from six post-trial damages awards in which representative plaintiffs obtained cash recoveries and the defendants

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fiduciary duties by engaging in a sale process without knowing critical information about Avago's communications with Deutsche Bank in December 2013. ... Potomac, through Singer, knowingly participated in the directors' breaches of duty."), *aff'd,* 211 A.3d 137 (Del. 2019); *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2023 WL 6399095, at *32 (Del. Ch. Oct. 3, 2023) (only nominal damages awarded (parties later agreed to payment of $100 to the Delaware Combined Campaign for Justice as payment) even though "the transaction was tainted by [the controller's] flagrant breach of duty, and was not entirely fair.").

201 *Compare with BGC*, 2022 WL 3581641, at *1 ("The evidence presented by the defendants ... carried the day. The special committee and its advisors were independent. Though the process was marred by Lutnick and Moran's actions, Lutnick extracted himself from the special committee's deliberations after it was fully empowered. Moran pushed back on Lutnick when needed and worked tirelessly on the committee's behalf. The special committee's diligence requests were met and it had the information it needed to negotiate on a fully informed basis. The committee members—each engaged and diligent—bargained with Cantor and obtained meaningful concessions.").

202 Ex. 7.

challenged the liability determination. The high court affirmed the first two [in 2014 and 2016] and reversed the next four [*i.e.*, in every decision since 2016]."[203]

Since the *Dell* fee opinion, the Supreme Court has decided *Mindbody* (affirming the Court of Chancery's post-trial holding that a CEO breached his fiduciary duties but reversing its holding that the acquirer aided and abetted that breach)[204] and *Columbia Pipeline* (reversing the Court of Chancery's post-trial holding that an acquirer aided and abetted breaches of fiduciary duty by corporate officers who had previously settled).[205] In other words, since 2016, representative stockholder plaintiffs who *won* a trial verdict in this Court have succeeded in preserving that victory on appeal only once in six tries (a 16% success rate).[206]

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203 *Dell Fee Opinion I*, 300 A.3d at 710.

204 *In re Mindbody, Inc., Stockholder Litig.*, 332 A.3d 349 (Del. 2024).

205 *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 2025 WL 1693491 (Del. June 17, 2025). The Supreme Court acknowledged that it was applying a different, "actual knowledge" standard to the scienter element than the standard in effect at the time of the Court of Chancery's post-trial decision. *Id.* at *1. "The Supreme Court thus had the option of resolving the appeal with a single sentence remanding the case for further consideration[.] ... But the Supreme Court did the very opposite, delving deeply into the record in its 100-page opinion, and applying the new knowledge standard to the facts in the first instance." Robin Wechkin, *With a Fresh Look at the Facts in Columbia Pipeline, the Delaware Supreme Court Continues to Narrow Aiding and Abetting Liability for Acquirers*, SIDLEY AUSTIN LLP: ENHANCED SCRUTINY (July 28, 2025), https://ma-litigation.sidley.com/2025/07/with-a-fresh-look-at-the-facts-in-columbia-pipeline-the-delaware-supreme-court-continues-to-narrow-aiding-and-abetting-liability-for-acquirers/.

206 And, even then, only partially. *Mindbody*, 332 A.3d at 412.

B. The Timing of the Settlement and the Views of the Parties Further Support Approval

While the balance of the 'give' and the 'get' are the most important factors, there are other factors that further support the settlement. For one, there is the timing of the settlement. By reaching a resolution early, Plaintiff increased the value to the class in two respects. First, Plaintiff's Counsel are seeking a lower fee than the fee to which they be entitled if the case went deeper into discovery (and are not seeking any separate reimbursement of expenses, which would increase significantly if the case proceeded). Second, Class members will get paid promptly. Because of the time value of money, a $6 million settlement today is worth more than a $6 million settlement two years from now.

This Court has previously encouraged counsel to read a law review article about how "lawyers' intuitions prolong litigation."[207] As that article recognizes, "cases can ... settle too early. Settlements consummated before the litigants possess adequate information, whether of factual or a legal nature, may be premature."[208] But "settlements can [also] occur too late. Delay in achieving a settlement can entail

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[207] *In re Pilgrim's Pride Corp. Deriv. Litig.*, 2019 WL 1310463, ¶12 (Del. Ch. Mar. 18, 2019) ("On the subject of settlement, counsel may be interested in the following article: Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571 (2013).").

[208] Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 573 (2013).

several undesirable consequences," including "postpon[ing] compensation for victims[.]"[209] "Late settlements appear to be a more common mistake than premature settlements because a significant percentage of cases settle after most or all discovery has been completed, on the eve of trial, or on the courthouse steps."[210]

Here, Plaintiff and the Class faced substantial risk on the motion to dismiss, which could have resulted in a complete loss. Through the settlement, Defendants were offering an 8.8% premium to deal price, which, as discussed above, compares favorably to settlements in other cases—including many that were not achieved until the eve of trial. In Plaintiff's Counsel's judgment, settlement value was unlikely to increase meaningfully after a denial of a motion to dismiss and was highly unlikely to increase significantly *enough* to compensate for the significant risk of a loss.

Nonetheless, Plaintiff's Counsel were unwilling to resolve the matter unless Defendants agreed to produce—on a Rule 408 basis—evidence of the value ascribed to the Company in the post-closing Series A financing. Only after Defendants produced that documentation—which provided strong, contemporaneous evidence of the value ascribed to the Company in an arm's-length transaction—were Plaintiff and his counsel comfortable in agreeing to the settlement.

The Court can take further comfort from the fact that Plaintiff's Counsel are

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209 *Id.* at 574-75.

210 *Id.* at 575-76.

experienced litigators with a track record of maximizing value for stockholders and they have demonstrated a willingness to take cases deep when necessary. The lawyers representing Plaintiff have, in their past cases working together as co-lead counsel, recovered over $235 million for stockholders,[211] including $87.5 million in *Charter*, which settled on the eve of trial after more than eight years of litigation.[212]

III. THE PLAN OF ALLOCATION SHOULD BE APPROVED

Plaintiff also seeks approval of the Plan of Allocation. A proposed "allocation plan must be fair, reasonable, and adequate."[213] As detailed in the Stipulation and Notice, the Settlement Amount, plus any interest that accrues after being deposited

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[211] *Witmer v. H.I.G. Capital, L.L.C.* ("*Surgery Partners*"), C.A. No. 2017-0862-LWW ($42.5 million settlement on eve of summary judgment hearing); *In re Pilgrim's Pride Corp. Deriv. Litig.*, C.A. No. 2018-0058-JTL ($42.5 million settlement); *In re Handy & Harman, Ltd. S'holder Litig.*, C.A. No. 2017-0882-TMR ($30 million settlement, reflecting a 33% premium to deal price); *Lao v. Dalian Wanda Group Co. Ltd.* ("*AMC I*"), C.A. No. 2019-0303-JTL ($17.1375 million settlement, the largest cash recovery ever obtained in Delaware after an SLC recommended dismissal); *In re Tangoe, Inc. S'holders Litig.*, C.A. No. 2017-0650-JRS ($12.5 million settlement); *Garfield v. BlackRock Mortgage Ventures, LLC* ("*PennyMac*"), C.A. No. 2018-0917-KSJM ($6.85 million settlement of novel challenge to first-ever transaction collapsing an "Up-C" structure).

[212] *Sciabacucchi v. Malone* ("*Charter*"), C.A. No. 11418-VCG (Del. Ch. June 22, 2023) (Transcript) at 12-13 (approving settlement led by the same lawyers from Equity and HEGH, along with one other firm; "I think this is an excellent result that you have achieved, and ... an example of how our system, if it's going to work, must work."); *id.* at 25 ("I will say before you leave that I'm absolutely sincere that this is the way litigation should run. I am spoiled as a member of the Delaware Court of Chancery in having very good attorneys appear before me consistently. Nonetheless, I sometimes see litigation that just makes me cringe. But for the most part, I am very lucky. And when I see a result like this after eight or nine years of effort, it renews my faith in the system as we have structured it.").

[213] *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).

in the Escrow Account (*i.e.*, the "Settlement Fund"), will first pay notice costs and administrative costs, any Fee and Expense Award (including any Incentive Award), and any taxes and tax expenses.[214] The remaining balance of the Settlement Fund (*i.e.*, the "Net Settlement Fund") will be distributed on a *pro rata* basis to all record holders and beneficial holders of shares of NGM common stock who either received $1.55 per share in cash at the closing of the Transaction or dissented from the Transaction, excluding Defendants and their affiliates and any stockholders who rolled their shares over into the combined company.[215]

The Plan of Allocation contemplates a *PLX*-style distribution.[216] That is, with respect to shares held of record by the DTC (including its nominee Cede), distribution of the Net Settlement Fund will be paid directly by the Settlement Administrator to DTC Participants, and from there, the DTC Participants will make a *pro rata* payment to each Class member based on the number of shares beneficially owned by each Class member.[217] For the shares not held of record by the DTC, payment will be made by the Settlement Administrator directly to the holder.[218] This

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214 Stip. of Settlement Section III(3); Ex. B to Stip. Of Settlement ("Notice") ¶23.

215 Notice ¶¶26-32.

216 *In re PLX Tech. Inc. S'holders Litig.*, 2022 WL 1133118 (Del. Ch. Apr. 18, 2022) (Opinion); *In re PLX Tech. Inc. S'holders Litig.*, 2022 WL 1227170 (Del. Ch. Apr. 25, 2022) (Order).

217 Notice ¶32(a).

218 *Id*. ¶32(b).

manner of distribution, which has been approved in similar class actions by this Court following *PLX*,[219] 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.[220]

In addition, consistent with Rule 23(f)(6), the Plan of Allocation provides that residual settlement funds be "redistributed to identifiable Class Members" unless "redistribution would not be cost-effective," in which case funds are to be "transferred to the Combined Campaign for Justice."[221]

Accordingly, the Plan of Allocation should be approved.

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[219] *See, e.g.*, *In re Lordstown Motors Corp. S'holders Litig*., C.A. No. 2021-1066-LWW (Del. Ch.) (Trans. ID. 75671982; Motion for Class Distribution) (Trans. ID 75676136; Class Distribution Order); *Newbold v. McCaw*, C.A. No. 2022-0439-LWW (Del. Ch.) (Trans. ID. 75611005; Motion for Class Distribution) (Trans. ID 75625131; Class Distribution Order); *Fishel v. Liberty Media Corp.*, C.A. No. 2021-0820-KSJM (Del. Ch.) (Trans. ID. 75070813; Motion for Class Distribution) (Trans. ID 75283757; Class Distribution Order); *Bass v. Geneve Holdings*, Inc., C.A. No. 2022-0778-JTL (Del. Ch.) Trans. ID. 76188001; Motion for Administrative Order) (Trans. ID 76190062; Administrative Order).

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

[221] Notice ¶32(d). *See* Ct. Ch. R. 23(f)(6); *see also PLX*, 2022 WL 1227170, at *2 (modifying proposed order to state that funds that would be uneconomic to redistribute to class members may be distributed to the Delaware Combined Campaign for Justice).

IV. PLAINTIFF'S APPLICATION FOR A FEE AND EXPENSE AWARD SHOULD BE GRANTED

Where, as here, a "settlement creates a common fund, counsel may apply to the court for an award of attorneys' fees and expenses from the fund."[222] The familiar, *Sugarland*[223] factors are "the yardstick to measure whether a fee award is reasonable: (1) the results achieved; (2) the time and effort of counsel; (3) the relative complexities of the litigation; (4) any contingency factor; and (5) the standing and ability of counsel involved."[224] Here, Plaintiff's Counsel seek an "all-in" award[225] of 17.5% of the $6 million common fund, which is $1,050,000.

A. The Benefit Achieved Supports the Requested Fee and Expense Award

"Delaware courts have assigned the greatest weight to the benefit achieved in litigation."[226] Here, the benefit is self-pricing: $6 million in cash. In determining what percentage to award, the Court will often, though not invariably, employ a stage-of-case approach, as first discussed in *Americas Mining*, which noted that the

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222 *In re Dell Techs. Inc. Class V Stockholders Litig.* ("*Dell Fee Opinion II*"), 326 A.3d 686, 697 (Del. 2024).

223 *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).

224 *Dell Fee Opinion II*, 326 A.3d at 698.

225 *i.e.*, counsel are not seeking separate reimbursement of their expenses.

226 *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012).

Court of Chancery "tend[ed] to award 10–15%" when a case settles early and 15%-25% when a case settled after "meaningful litigation efforts."[227]

The meaning of "early" has shifted over time. *Americas Mining* was surveying fee awards from the so-called "sue-on-every-deal era."[228] In this pre-*MFW*[229] era, it was "impossible for a controlling stockholder ever to structure a transaction in a manner that [would] enable it to obtain dismissal of a complaint challenging the transaction."[230] Similarly, before *Corwin*,[231] it was generally believed that enhanced-scrutiny claims challenging a cash-out merger could not be resolved on a motion to dismiss either.[232]

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227 *Id.* at 1259-60.

228 *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2024 WL 4115729, at *13 (Del. Ch. Sept. 9, 2024).

229 *Kahn v. M & F Worldwide Corp.* ("*MFW*"), 88 A.3d 635 (Del. 2014).

230 *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 605 (Del. Ch. 2005).

231 *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015).

232 *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995) ("As the terminology of enhanced judicial scrutiny implies, boards can expect to be required to justify their decisionmaking, within a range of reasonableness, when they adopt defensive measures with implications for corporate control. This scrutiny will usually not be satisfied by resting on a defense motion merely attacking the pleadings."); J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1470–71 (2014) ("An aggressive interpretation of *Gantler* might suggest that if a stockholder vote is required organically by the DGCL, it cannot alter the standard of review."); Joel Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAWYER 623, 629 (2017) ("Counsel for stockholder plaintiffs were able to file suits indiscriminately and settle them, knowing that ... enhanced judicial scrutiny of certain forms of transactions made the cases hard to dismiss.").

During this time, many "plaintiff's lawyers pursued business models that involved filing cases indiscriminately against virtually every transaction. They settled those cases quickly, [often] for supplemental disclosures and a fee. Sometimes they obtained other easy gives, such as a reduction in the termination fee after it was obvious that no overbidder would emerge."[233] Plaintiffs rarely, if ever, made books-and-records demands in merger cases because there was no need. Even conflicted-controller transactions were typically resolved through the "*Cox Communications* Kabuki dance" in which plaintiffs sued as soon as a potential deal was announced, then did nothing and waited for the special committee to negotiate a price bump for which plaintiff's counsel would take partial credit.[234] Even when plaintiffs sought to litigate post-closing claims, the early work was extremely limited. In *Americas Mining* itself, the plaintiff's initial complaint was 13 pages long—five pages of which consisted solely of a block quote of the proxy.[235] There was no books-and-records investigation or threat of dispositive motion practice.

Times have changed. Here, Plaintiff's Counsel conducted a significant books-and-records investigation and drafted a seventy-nine-page complaint that was carefully crafted to try to navigate the shoals of *MFW* and *Corwin*. Where, as here,

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233 *Dell Fee Opinion I*, 300 A.3d at 694.

234 *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 945 (Del. Ch. 2010).

235 Trans. ID 4893808.

an initial complaint reflects the fruits of a significant books-and-records investigation, the Court often awards fees of more than 15%, even where the action settles before a decision on the motion to dismiss. Some illustrative examples:

- *China Integrated Energy* where Vice Chancellor Laster awarded counsel 26% of a $1 million recovery in an action that settled after an extensive books-and-records action (including litigation to enforce the demand) but before a decision on the motion to dismiss or any fact discovery;[236]

- *RMG* where Chancellor Bouchard awarded counsel 25% of a $1.5 million settlement, plus their expenses, in an action that settled after a books-and-records investigation but before a decision on the motion to dismiss or any fact discovery;[237]

- *Twenty-First Century Fox* where Chancellor Bouchard awarded counsel 25% of a $90 million recovery in an action that settled after an extensive books-and-records investigation but before a plenary complaint was filed; [238]

- *TD Ameritrade I* where Vice Chancellor Slights awarded counsel 20% of a $17.95 million settlement reached after a books-and-records investigation but before a decision on the motion to dismiss or any fact discovery; [239] and

- *Akcea* where Vice Chancellor Will awarded counsel 17% of a $12.5 million recovery where the settlement was reached after a

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236 *In re China Integrated Energy, Inc. S'holder Litig.*, C.A. No. 6625-VCL (Dec. 2, 2015) (Order).

237 *Weinstein v. RMG Networks Holding Corp.*, C.A. No. 2018-0120-AGB (Del. Ch. Jul. 10, 2020) (Order).

238 *City of Monroe Emps.' Ret. Sys. v. Murdoch* ("*Twenty-First Century Fox*"), C.A. No. 2017-0833-AGB (Del. Ch. Feb. 9, 2018) (Order).

239 *Vero Beach Police Officers' Retirement Fund v. Bettino*, C.A. No. 2017-0264-JRS (Del. Ch. Dec. 3, 2018) (Order).

> books-and-records investigation but before a decision on the motion to dismiss or any fact discovery. [240]

There is particularly strong justification for an above-15% award here because the challenged Transaction was small. The total Transaction consideration paid to the Class was just $67.9 million ($1.55/share * 43.8 million Class shares). In *Harvest Capital*, the Court recognized that "it's important to provide some incentive for plaintiffs to bring cases involving small cap issuers situations"—which the Court defined as transactions valued at less than $100 million—because, on the one hand, "that's where most of the bad things happen" but, on the other hand "[t]he money is in big-dollar deals because a small change in a big-dollar deal can support a much larger fee."[241]

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[240] *Makris v. Ionis Pharmaceuticals, Inc.* ("*Akcea*"), C.A. No. 2021-0681-LWW (Del. Ch. Oct. 11, 2022) (Order).

[241] *In re Harvest Capital Credit Corp. S'holder Litig.*, C.A. No. 2021-0164-JTL (Del. Ch. July 2, 2024) (Transcript) at 29-31 ("*Harvest Capital* Tr."); *see also Carter v. B. Riley Securities, Inc.*, C.A. No. 2024-0605-KSJM (Del. Ch. May 13, 2025) (Transcript) at 56 (observing that "there's ample reason to adjust the guideline range up" for fee awards in "litigation involving companies with small capitalizations" because "these companies do not face a high level of market scrutiny. And there's less of an incentive for capable counsel to investigate fiduciary breaches and governance issues in this context[.]"); *In re Dell Technologies Inc. Class V S'holder Litig.*, C.A. No. 2018-0816-JTL (Del. Ch. April 19, 2023) (Transcript) at 89 ("you have real incentive problems in small cap cases, because the size of the company isn't large enough such that even a full *Sugarland* stage of the case fee can either support or properly incentivize, from a discounted risk perspective, the type of lawyering that is needed."); *Baker v. Sadiq*, 2016 WL 4375250, at *6 (Del. Ch. Aug. 16, 2016) ("situations, involving small companies and large-scale acts of expropriation, are ... the cases where enforcement mechanisms are most needed.").

As the Court concluded in *Harvest Capital*, there "ought to be some countervailing incentive where the Court awards relatively greater amounts in small cap cases than it might otherwise award because of the need ... to compensate counsel for the beneficial results that they have produced and for the monetary benefit conferred on the class."[242] To create that incentive, *Harvest Capital* "elevate[d]" the stage-of-case factor by "one level" from the 10% to 15% range to the 15% to 25% range and then awarded a fee at the top of the latter range: $962,500 (25% of the $3.85 million settlement).[243] The 17.5% fee that Plaintiff's Counsel seeks here is modest by comparison.

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

1. Plaintiff's Counsel Litigated This Action On Contingency

The contingent nature of the representation is the "second most important factor considered by this Court" in awarding attorneys' fees.[244] It is the "public policy of Delaware to reward this risk-taking in the interests of shareholders"[245] so "[t]his Court has recognized that an attorney may be entitled to a much larger fee

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242 *Harvest Capital* Tr. at 31.

243 *Id.* at 31-32.

244 *Dow Jones & Co. v. Shields*, 1992 WL 44907, at *2 (Del. Ch. Mar. 4, 1992).

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

when the compensation is contingent than when it is fixed on an hourly or contractual basis."[246]

Plaintiff's Counsel litigated this post-closing Action on a fully contingent basis and "did not enter the case with a ready-made exit or obvious settlement opportunity."[247] Notably, no other stockholder filed a complaint challenging this Transaction. The "[l]ack of competition ... suggests that most members of the securities bar saw this litigation as too risky for their practices."[248] This factor weighs in favor of the requested Fee and Expense Award.

2. Complexity Of The Litigation

This Action was relatively complex. Plaintiff's Counsel's investigation involved intense fact-finding from confidential documents received in response to the Demand, as well running a fine-tooth comb through public documents, to plead around *MFW* and *Corwin*. This supports approval.

3. The Efforts Of Plaintiff's Counsel

"The time and effort expended by counsel serves [as] a cross-check on the reasonableness of a fee award."[249] Here, Plaintiff's Counsel spent months

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

247 *Sciabacucchi v. Salzberg*, 2019 WL 2913272, at *6 (Del. Ch. July 8, 2019) *rev'd on other, unrelated grounds*, 227 A.3d 102 (Del. 2020).

248 *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013).

249 *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1138 (Del. Ch. 2011).

investigating the Transaction, negotiated the Demand, drafted the Complaint with the materials received in response to the Demand, spent another several months negotiating with Defendants' counsel regarding a potential settlement of the Action, and analyzed complicated valuation documents to understand, realistically, what the Class's upside would be if the case was litigated through trial.

In total, Plaintiff's Counsel spent 429.5 hours litigating the Action from inception to June 3, 2025—the date the Parties informed the Court that an agreement in principle to settle the Action had been reached, totaling $381,264 in lodestar at their currently applicable hourly rates.[250] Plaintiff's Counsel incurred an additional 90.8 hours and $87,543.50 in lodestar in finalizing the Settlement.[251] The requested Fee and Expense Award represents a 2.2 lodestar multiple, with an implied hourly rate of $2,018. These figures are reasonable when considering lodestar multiples and implied hourly rates in similar settlements approved by this Court.[252]

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250 *See* Crawford Aff. ¶2; Nelson Aff. ¶2.

251 *See* Crawford Aff. ¶3.

252 *See, e.g.*, *Salzberg*, 2019 WL 2913272, at *6 (awarding $11,262.26 hourly rate); *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1252, 1257–58 (Del. 2012) (affirming award of $35,000 hourly rate); *In re Versum Mat'ls, Inc. S'holder Litig.*, 248 A.3d 105 (Del. 2021) (affirming fee award representing hourly rate of $10,676.15 per hour); *In re Jefferies Grp. Inc. S'holder Litig*., 2015 WL 1121518 (Del. Ch. Mar. 10, 2015) (7.5x multiplier); *Vladimir Gusinsky Rev. Trust v. Crenshaw*, C.A. No. 2020-0716-KSJM (Del. Ch. Apr. 15, 2021) (Order and Final Judgment) (over $4,800 implied hourly rate and 7.2x lodestar multiplier); *In re Clear Channel Outdoor Holdings, Inc. Deriv. Litig.*, C.A. No. 7315-CS (Del. Ch. Sept. 10, 2013) (Order and Final Judgment) (over $5,700 implied hourly rate and 10.5x lodestar multiplier).

4. The Standing And Ability Of Plaintiff's Counsel

Under *Sugarland*, the Court should also consider the "standing and ability of plaintiffs' counsel."[253] Plaintiff's Counsel are well known to this Court and this factor favors granting the requested Fee and Expense Award.

V. THE INCENTIVE AWARD SHOULD BE APPROVED

"The decision of whether to grant an incentive award to a named plaintiff in a class action following conclusion of the litigation is within a court's discretion."[254] An incentive award "rewards a named plaintiff for contributing meaningfully to a successful outcome."[255] "The payment is therefore risk-based compensation that is contingent on success, just like the attorneys' fee."[256] This Court has recognized that it is "important to incentivize stockholders to serve as engaged representatives."[257]

"In typical baseline circumstances, an incentive award of $5,000 rewards competent participation."[258] Here, Plaintiff's participation as class representative in

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253 *Sauer-Danfoss*, 65 A.3d at 1140.

254 *Chen v. Howard-Anderson*, 2017 WL 2842185, at *3 (Del. Ch. June 30, 2017) (Order).

255 *Id*. at *2.

256 *Id*.

257 *In re HomeFed Corp. S'holder Litig.*, C.A. No. 2019-0592-LWW (Del. Ch. Feb. 15, 2022) (Transcript) at 30.

258 *AMC Entm't*, 2023 WL 5165606, at *41; *see also In re Pivotal Software, Inc. S'holders Litig.*, 2022 WL 5185565 (Del. Ch. Oct. 4, 2022) (Order and Final Judgment)

an action that reached a successful resolution for the Class warrants the modest $5,000 incentive award, which is to be paid exclusively from the Fee and Expense Award. Plaintiff was the lone stockholder to recognize this Action. Nobody else saw the potential for a recovery. No one else filed a plenary complaint. This Court has recognized that a modest incentive fee is appropriate where, as here, Plaintiffs have "step[ed] forward and take[n] the risk" of getting involved in representative litigation in a culture in which people increasingly are unwilling to "do things for the benefit of others."[259]

Plaintiff was also an active participant in the litigation and oversaw the Action from inception through settlement. He conducted a pre-suit investigation, received Section 220 documents to evaluate the Transaction and facts underlying the case, used those documents to prepare the Complaint, and received additional discovery relating to valuation to help negotiation positioning. Without these efforts by Plaintiff, the outcome for the benefit of the Class would not be achieved. Therefore, the requested Incentive Award is appropriate.

(awarding $10,000 incentive award); *In re HomeFed Corp. S'holder Litig.*, 2022 WL 489484, at *4 (Del. Ch. Feb. 15, 2022) (Order and Final Judgment) (awarding a $5,000 incentive award to each named plaintiff); *Ryan v. Gifford*, 2009 WL 18143, at *14 (Del. Ch. Jan. 2, 2009) (same); *In re GeneDX De-SPAC Litig.*, C.A. No. 2023-0140-PAF, at 6 (Del. Ch. Dec. 2, 2024) (Order and Final Judgment) (same).

[259] *In re EZCorp Inc. Consulting Agreement Derivative Litig.*, C.A. No. 9962-VCL (Del. Ch. Apr. 3, 2018) (Transcript) at 22.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court permanently certify the Class, approve the Settlement, approve the requested Fee and Expense Award, and approve the requested Incentive Award.

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