**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

JB CAPITAL PARTNERS, L.P.,

Petitioner,

v.

GAIN CAPITAL HOLDINGS, INC., a Delaware corporation,

Respondent.

C. A. No. 2020-0644-NAC

PUBLIC VERSION FILED:
November 12, 2024

JB CAPITAL PARTNERS, L.P.,

Plaintiff,

v.

GLENN STEVENS, THOMAS BEVILACQUA, JOHN DOUGLAS RHOTEN, VANTAGEPOINT VENTURE ASSOCIATES IV, L.L.C., VANTAGEPOINT MANAGEMENT, INC., VANTAGEPOINT VENTURE ASSOCIATES IV, L.L.C., VANTAGEPOINT VENTURE PARTNERS IV (Q), L.P., VANTAGEPOINT VENTURE PARTNERS IV, L.P., VP NEW YORK VENTURE PARTNERS, L.P., VANTAGEPOINT VENTURE PARTNERS IV PRINCIPALS FUND, L.P., IPGL LTD. AND FOX & TROT LTD.,

Defendants.

C. A. No. 2022-0327-NAC

PUBLIC VERSION FILED:
November 12, 2024

**JB CAPITAL PARTNERS, L.P.'S BRIEF IN SUPPORT OF THE SETTLEMENT, CLASS CERTIFICATION AND APPLICATION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES**

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Dated: November 3, 2024

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JB Capital Partners, L.P. ("JB Capital"), on behalf of itself and the Class, by its undersigned counsel, Prickett, Jones & Elliott, P.A. ("Prickett Jones"), respectfully submits this Brief in Support of the Settlement, Class Certification, and an Award of Attorneys' Fees and Expenses.[1]

## PRELIMINARY STATEMENT

### A. The Settlement Merits Approval

After its more than four-year challenge of the Merger – *in the public market, through the exercise of its appraisal rights, and in the prosecution of fiduciary claims on behalf of the Class* – JB Capital respectfully submits this global settlement of parallel appraisal and fiduciary claims for Court approval under Rule 23. The Settlement will result in the Class receiving an additional $1.15 per share, before fees and expenses, on a $6.00-per-share deal, an excellent result for the Class.

The more-than-19% premium to the deal price for fiduciary claims challenging a strategic, third-party merger between two public companies, approved by a board comprised of a majority of independent directors is extraordinary. The formidable defenses faced included:

[1] All terms of the Settlement are set forth in the September 11, 2024 Stipulation and Agreement of Settlement, Compromise and Release (the "Stipulation") (Trans. ID 74270846). Capitalized terms not defined herein have the meanings ascribed to them in the Stipulation.

- ***Business Judgment Rule Dismissal of Loyalty Claims***. It is undisputed that a majority of the directors on the Board were independent. Nevertheless, duty of loyalty claims survived dismissal based on fraud-on-the-board allegations concerning the CEO's failure to apprise the Board of the Company's 2020 financial performance prior to the Board's approval of the Merger Agreement. At trial, Defendants would show that while Board material did not include information regarding the Company's 2020 financial performance, each of the directors had electronic access to the information and the Company's CEO would testify that he discussed this performance with the Board orally.

- ***Timing of Board Determination***. Even if the Court reviewed the Merger under the entire fairness standard, it could have still concluded the Merger was entirely fair if the "fair price" of the analysis prong was tested against the value of the Company at the time the Merger Agreement was approved rather than the date the Merger closed. Timing was critical to the potential value of the fiduciary claims because the most compelling valuation arguments concerned value that accrued after the Merger Agreement was executed.[2]

- ***Dismissal of Revlon Claim***. The *Revlon* claim at issue was unique in that it challenged the Board's decision to sell the Company in the first place, more than whether the process by which the Board sold the Company was reasonable or was tilted towards a favored bidder. A ruling in JB Capital's favor on this issue would have been unprecedented.[3]

- ***Dismissal of Disclosure Claims***. While this Court has awarded "nominal damages" to remedy a fiduciary's failure to disclose material information to stockholders, in those instances, the fiduciary (or aider and

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[2] *See, e.g.*, *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 298-99 (Del. 1996) ("value added to the going concern . . . during the transient period . . . accrues to the benefit of all shareholders and must be included in the appraisal process on the date of the merger.").

[3] *But see In re Answers Corp. S'holder Litig.*, 2012 WL 1253072, at *6 (Del. Ch. April 11, 2012) ("[I]f a board chooses to compare sale options to the option of keeping the company's current control structure and determines that the company's current control structure will yield the company's shareholders more value than any available change of control transaction, the board should keep the company's current control structure.").

abettor) acted with *scienter*. In this case, the Director Defendants' plausible reliance on experts pursuant to Section 141(e) of the DGCL regarding what information was material[4] was likely to be another obstacle to recovery for the Class.

- ***Limitation of Nominal Damages***. Finally, even with respect to the strongest claims – the Director Defendants' failure to disclose material information – there was risk only nominal damages would be awarded, ranging from 2-5% of the value of the equity at issue to a maximum of $1.00 per share as has been awarded in other cases.[5] The percentage-base lower end amounted to only $0.12 to $0.30 per share. Even this limited measure of damages could be unavailable come trial, should the Delaware Supreme Court determine that such a measure of nominal damages is improper.[6]

By the time the fiduciary claims were brought, document discovery for all claims was virtually complete and depositions had begun. One of the dissenters, Alex Goor ("Goor"), a former director of the Company (also represented by Prickett Jones) who was "in the room" and voted against the Merger was lined up to testify

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[4] *See*, *e.g.*, *In re Trustwave Holdings, Inc. S'holder Litig.*, Del. Ch., C.A. No. 2017-0576-JTL, Settlement Hearing and Rulings of the Court (Sept. 7, 2023) (TRANSCRIPT) at 12 (discussing 141(e) defense: "What I worry about is I think it creates an incentive for lawyers to take the fall on things that they may not have really taken the fall on, because they are not in the target zone of the lawsuit. They're not going to be sued for malpractice when their testimony actually solves the problem and avoids the liability. And so it creates this weird incentive of lawyers becoming fall guys.").

[5] *See*, *e.g.*, *In re Columbia Pipeline Group, Inc. Merger Litig.*, 299 A.3d 393, 409, 496-98 (Del. Ch. 2023) (awarding nominal damages equal to 1.96% of the deal price); *In re Mindbody, Inc. S'holder Litig.*, 2023 WL 2518149, at *47 (Del. Ch. Mar. 15, 2023) (awarding $1 per share nominal damages, equal to only 2.7% of the deal price).

[6] There are currently two appeals challenging nominal damages awards before the Delaware Supreme Court. *See In re Columbia Pipeline Group, Inc. Merger Litigation*, No. 281, 2024 and *In re Mindbody, Inc. Stockholder Litigation*, No. 484, 2023.

against the Defendants. Genuine issues of fact were expected to turn on witness credibility. Trial on the appraisal claim was inevitable, involving the same presentation of evidence as the fiduciary claim, and JB Capital's theory on damages was fully developed. JB Capital was able to leverage the unique posture of the case once the fiduciary claims survived dismissal by taking the position that the appraisal and fiduciary claims needed to proceed on a consolidated basis to trial unless a settlement was reached.[7]

Settlement negotiations were hard fought, resulting in value to the Class that significantly exceeds potential trial outcomes – *even if the fiduciary claims were successful* – and unlikely to be available later if litigation continued. To secure the favorable settlement value for the Class, Prickett Jones and JB Capital revised the terms of Prickett Jones's engagement with dissenters, limiting the 25% contingency fee to recovered value exceeding the $6.00 per share merger price plus interest at the statutory rate through November 30, 2024 (an anticipated outside date of approval

[7] This was an advantage over other cases involving similar claims where the Court has bifurcated liability and damage phases. *See*, *e.g.*, *In re Baker Hughes Inc. Merger Litig.*, 2022 WL 2693031, at *1, 3-4 (Del. Ch. July 11, 2022); *In re GGP, Inc. S'holder Litig.*, Del. Ch., C.A. No. 2018-0267-NAC, Letter Ruling on Bifurcation (Oct. 7, 2022) (Trans. ID 68226039).

of the settlement).[8] Prior to the revision, Prickett Jones's 25% contingency fee was based on recovered value exceeding the $6.00 Merger price.[9] The revision ensures dissenters are treated equitably if the Settlement is approved, paying no more in attorneys' fees than the other Class members.

The Settlement provides modest consideration to the dissenters beyond their *pro rata* participation in the Class recovery and payment of the $6.00 Merger price plus interest. Under the terms of the Settlement, each dissenter will be paid $8.66 per share to settle their appraisal claim.[10] The $6.00 Merger price plus interest at the statutory rate through November 30, 2024 is $8.41 per share, meaning the dissenters will receive an additional $0.25 per share. As discussed below, the additional consideration is well supported both by the appraisal claim's value and the risk of delay and approval of the Settlement. Only Gain Capital, and not any Defendant of the fiduciary claims, will pay the $8.66 per share to the dissenters.

In sum, the Settlement is an excellent result for the Class and treats the dissenters fairly. It is fair and reasonable and should be approved under Rule 23.

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[8] Affidavit of Marcus E. Montejo in Support of Application for Award of Attorneys' Fees and Expenses ("Montejo Aff.") ¶ 5. Prickett Jones also agreed that its 25% contingency fee will be inclusive of expenses. *Id*.

[9] Montejo Aff., Ex. A. Prickett Jones's revised terms of engagement were disclosed in the Stipulation (at Paragraph FF on page 9-10) and in the Notice (at Paragraph 35 on page 7).

[10] Stipulation § III.5.

### B. The Class Should Be Certified

Class certification should be granted. Requirements of numerosity, commonality of issues of law and fact, and the typicality of JB Capital's claims are readily met. While the Court has raised concerns regarding the potential for conflicts of interest, as set forth below, JB Capital and Prickett Jones prosecuted the Actions with the issue in mind and worked to achieve an extraordinary result for the Class.

### C. The Requested Fee Award Should Be Granted

Prickett Jones respectfully requests that it be awarded attorneys' fees, inclusive of the reimbursement of expenses, in an amount equal to 25% of the Class recovery. This is the same contingency fee it contracted for in its engagement by JB Capital and other dissenters. Prickett Jones respectfully submits its fee agreements with the dissenters is compelling evidence that the requested fee is reasonable. The reasonableness of the request is also supported by *Sugarland*, including the achievement of an extraordinary benefit for the Class by litigation taken on an entirely contingent basis.

* * *

As of the date of this submission, no Class member has objected to the approvals requested herein.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

### A. The Parties

#### 1. JB Capital

JB Capital first purchased Company stock in June 2018. At the time of the Merger, JB Capital held 2,878,807 shares, representing approximately 7.7% of the Company's outstanding voting power. JB Capital opposed the Merger. On May 21, 2020, in advance of ISS issuing its timid recommendation for the Merger, JB Capital met with ISS to discuss its opposition to the Merger. On May 27, 2020, JB Capital delivered a letter to the Board (and also filed publicly with the SEC) urging the Board to reconsider the Merger.[11] JB Capital voted against the Merger and demanded appraisal pursuant to 8 *Del. C.* § 262. JB Capital filed its appraisal petition on July 31, 2020. Using information discovered during the appraisal litigation, JB Capital pursued the fiduciary claims for the benefit of the Class.

This is not the first time JB Capital has advanced the interests of its fellow stockholders. In October 2010, JB Capital commenced a class action challenging an exchange offer of Remy International Inc. preferred stock. The case was mooted

[11] Gain Capital Holdings., Inc. Schedule 13D/A (May 27, 2020) (available at sec.gov/Archives/edgar/data/1138532/000121390020013549/ea122408-sc13dajbcap_gaincap.htm#a_001) (last visited Nov. 3, 2024).

when the offer was terminated by the company.[12] Shortly thereafter, JB Capital was forced to file another class action against the same defendants challenging a consent solicitation relating to a new rights offering by the company. JB Capital obtained a TRO enjoining the solicitation.[13]

From 2012 through 2015, JB Capital was a lead plaintiff in a stockholder class action challenging a controlling stockholder squeeze out of minority stockholders of Bluegreen Corporation.[14] This resulted in a $37 million settlement, an approximately 20% premium to the $10-per-share merger price for the class of minority stockholders.

Prickett Jones has represented JB Capital for approximately 20 years.

**2. The Director Defendants**

Defendant Glenn S. Stevens ("Stevens") served as one of the Company's managing directors from February 2000 until May 2007. Since 2007, Stevens served as the Company's president and Chief Executive Officer and as a director of the

[12] *JB Capital Partners L.P. v. Remy International, et al.*, Del. Ch., C.A. No. 5874-VCP, Stipulation and Order (Nov. 12, 2010) (Trans. ID 34316386).

[13] *JB Capital Partners L.P. v. Remy International, et al.*, Del. Ch., C.A. No. 6025-VCP, Order Granting Temporary Restraining Order (Dec. 17, 2010) (Trans. ID 34929916).

[14] *In re Bluegreen Corp. S'holder Litig.*, Fl. Cir. Ct, Case No. 502011CA018111.

Company. Stevens held 2,072,068 shares of Company stock, approximately 5.48% of the Company's voting power.[15]

With respect to Stevens's future with the Company, as the Court noted in denying Defendants' motions to dismiss, "[i]t frankly could not be made plainer – if Stevens was unsuccessful in pushing through a deal, he would be fired, potentially for cause, which would deprive him of millions of dollars."[16] Stevens was a lead merger negotiator and the Proxy omitted that his job was on the line, which the Court determined was material information. In denying Defendants' motions to dismiss, the Court held that *Corwin* was unavailable because of Defendants' failure to disclose this information.[17]

Defendant Thomas Bevilacqua ("Bevilacqua") was a Company director and the Board representative of VantagePoint.[18] Defendant Doug Rhoten ("Rhoten") was a Company director and the Board representative of IPGL.[19]

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[15] Compl. ¶ 24.

[16] *JB Capital Partners, L.P. v. Glenn Stevens, et al.*, Del. Ch., C.A. No. 2022-0327, Telephonic Rulings of the Court on Defendants' Motions to Dismiss (Aug. 30, 2023) (Trans. ID 70928466) (referred herein as "Transcript") at 32.

[17] Transcript at 33.

[18] Compl. ¶ 25.

[19] *Id*. ¶¶ 37-39.

### 3. The Aiding and Abetting Defendants

The VantagePoint entities controlled approximately 24.48% of the Company's outstanding voting power.[20] VantagePoint Fund IV, the primary fund holding VantagePoint's interest in Gain Capital, was in dissolution,[21] "focused solely on monetizing all of the positions as swiftly and efficiently as possible without jeopardizing the ultimate value."[22] Because VantagePoint Fund IV was in dissolution, VantagePoint was not earning any management or administrative fees in connection with the fund.[23]

The IPGL entities controlled approximately 14.77% of the Company's outstanding voting power.[24] IPGL also held $60 million of convertible notes that matured on April 1, 2020.[25] Unbeknownst to all the directors on the Board, IPGL traded securities in a margin account on the Company's trading platform. By February 5, 2020, two weeks prior to the Board's approval of the Merger Agreement, Stevens advised IPGL that its short position on 80,000 shares of Tesla stock risked up to a $50 million margin charge, dwarfing IPGL's economic interest in its common

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[20] *Id*. ¶ 27.

[21] *Id*. ¶ 28.

[22] Transcript at 6.

[23] Compl. ¶ 28.

[24] *See id*. ¶ 29.

[25] *Id*. ¶¶ 18, 30.

shares in the Company. Stevens also advised IPGL that because the Company's cash collateralized the account, the Company's available cash to redeem IPGL's notes was threatened.[26]

**B. The Complaint and Motion to Dismiss**

JB Capital's prosecution of the appraisal action revealed that, *inter alia*, the Proxy issued in connection with the Merger omitted material information regarding the background to the Merger. The claims in the Complaint were discovered and developed through (i) the review of 395,186 pages of documents produced in response to multiple document requests, 15 subpoenas and two motions to compel; and (ii) multiple interviews with Goor and the collection, review and production of thousands of pages of documents on his behalf.

The Complaint alleges that the ill-timed Merger was the culmination of VantagePoint's self-interested, undisclosed need to liquidate its investment in the Company and Stevens's self-interested desire to continue his lucrative employment or at least cash in on his lucrative change-of-control payments rather than being forced to "voluntarily" resign;[27] and that IPGL's late support for the Merger was

[26] *Id*. ¶ 18.

[27] *Id*. ¶ 3.

secured through an undisclosed *quid pro quo* with Stevens that allowed IPGL to avoid a $50 million margin call.[28]

The Complaint contains four counts:

Count I is against Stevens for breach of his duty of loyalty to the Company and its stockholders by (i) pursing a sale of the Company during the most challenging market conditions the Company had ever experienced solely to avoid being fired; (ii) engaging in secret meetings with Sean O'Connor ("O'Conner"), StoneX's CEO, in connection with the sale of the Company; (iii) directing Company management to prepare projections that were unrealistic and misleading; (iv) violating his duty to act candidly and honestly with the Board by withholding material information regarding the current financial performance of the Company and his dealings related to IPGL's margin account; and (v) causing the Company to issue a materially misleading Proxy.[29]

Count II is against Bevilacqua for breach of his duty of loyalty to the Company and its stockholders by (i) pursuing the sale of the Company during the most challenging market conditions the Company had ever experienced solely to obtain

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[28] *Id*.

[29] *Id*. ¶¶ 210-216.

needed liquidity for VantagePoint; and (ii) causing the Company to issue a materially misleading Proxy.[30]

Count III is against Rhoten for breach of his duty of loyalty to the Company and its stockholders by abandoning the best interest of the Company and its stockholders and instead voting in line with IPGL's immediate need to support Stevens and the Merger so that Stevens would assist IPGL in avoiding an immediate $50 million margin charge.[31]

Count IV is against both VantagePoint and IPGL for aiding and abetting the alleged Director Defendants' breaches of fiduciary duty.[32]

Defendants moved to dismiss each of the Counts against them. On August 30, 2023, the Court issued its telephonic rulings denying Defendants' motions.

### C. The Mediation and Settlement Strategy

On February 28, 2024, after the exchange of opening and reply mediation statements, the Parties began mediating both the appraisal and fiduciary claims in an effort to negotiate a global settlement. JB Capital and Prickett Jones knew and understood any allocation of a global settlement that did not pay Class members on

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[30] *Id*. ¶¶ 217-222.

[31] *Id*. ¶¶ 223-228.

[32] *Id*. ¶¶ 229-234.

a *pro rata* basis created conflict between the dissenting and non-dissenting members of the Class, and that conflict needed to be monitored by the Court.[33] JB Capital also needed to know that the Court would approve a proposed allocation before a release of its appraisal claims could become effective.

Accordingly, throughout negotiations, JB Capital advised Defendants that any global settlement needed to be contingent on Court approval of both the settlement and plan of allocation. In dealing with the allocation throughout negotiations, and in assessing how global settlement offers and counter-offers could be allocated, JB Capital understood that the allocation should reflect the range of potential risk-adjusted outcomes at trial.[34] Under that guidance, in advance of mediation, JB Capital and Prickett Jones assessed potential outcomes for both claims to determine a risk-adjusted value to target in negotiates.

**1. The Appraisal Claim**

The appraisal claim was strong. The Company was an online provider of foreign exchange trading, and market volatility was a key driver of its profits.[35] Market volatility sank to historic lows in 2019. The Company projected such

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[33] *Ryan v. Mindbody, Inc.*, 2019 WL 4805820, at *3 (Del. Ch. Oct. 1, 2019) (ORDER).

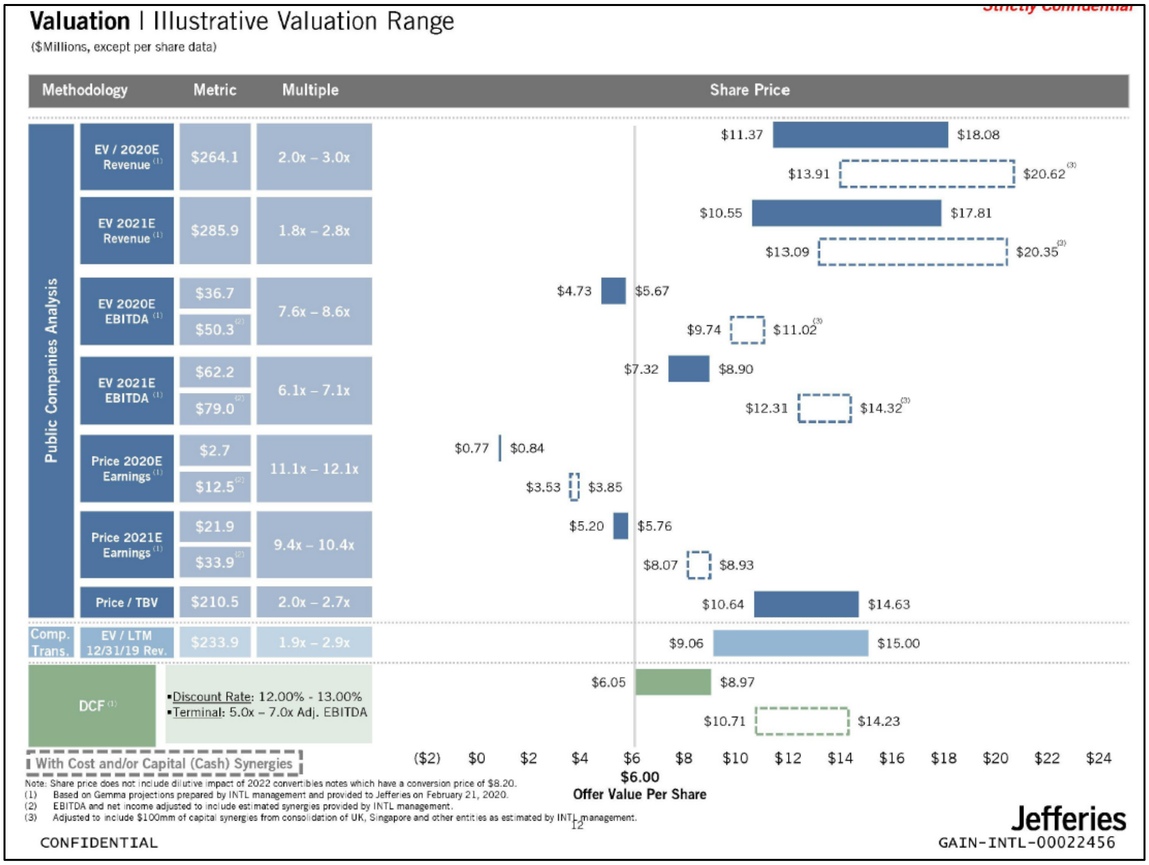
[34] *In re Oracle Corp. Deriv. Litig.*, 2019 WL 6522297 at *16 (Del. Ch. Dec. 4, 2019) ("[T]he value of a [stockholder] claim is derived primarily from the risk-adjusted recovery sought by the plaintiff.").

[35] Compl. ¶¶ 4, 35.

conditions would continue. When StoneX made its $6-per-share offer in December 2019, it expected to pay 1.10x the Company's June 30, 2020 projected tangible book value. But volatility increased in January 2020, then soared with the onset of the COVID-19 pandemic, both before and after the signing of the Merger Agreement in February 2020. The Company experienced windfall profits, increasing its tangible book value to $7.66 per share by the time the Merger closed, implying a value for the Company of $8.43 per share on the terms StoneX expected to pay. StoneX recognized its windfall:

> On Apr 14, 2020, at 20:02, Sean O'Connor <Sean.OConnor@intlfcstone.com> wrote:
>
> I will get on with Snezana on Attorney Client
>
> The way I think of it - hopefully most informed people will do the same - Gain is the same business it always was except for $2-3 windfall gain.

There was other evidence that the Company's fair value was greater than $6.00 per share. Every analysis performed by Jefferies, StoneX's financial advisor, not solely based on the Company's 2019 earnings (the Company's worst performing year in its history) or projected 2020 earnings (the projections challenged in the Complaint), indicated a value higher than $6.00 per share for the Company:




There was also compelling evidence that StoneX did not share synergistic value expected from the Merger. Jefferies' fairness opinion presentation to StoneX included a stand-alone discounted cash flow valuation of the Company that implied a value of $7.49 per share, and a value range of sensitivities (shown above) of $6.05 - $8.97 per share. The presentation also included a *pro forma* discounted cash flow valuation of the Company that implied a value of $12.44, and a value range of sensitivities (shown above) of $10.71 - $14.29 per share. More striking was that approximately 50% of StoneX's expected synergistic value was solely derived from its estimated $100 million release of capital on the Company's balance sheet. While this arguable "break-up" value did not all necessarily flow to "fair value" under the appraisal going-concern valuation standard, this was clearly not a "deal price minus synergies" appraisal claim.

The best defense Gain Capital had to the appraisal claim was also undercut during the course of this litigation. The Merger Agreement allowed for a topping-bid,[36] but provided StoneX with an unlimited matching right. A month before mediation, the post-trial opinion in *Sears Hometown* was issued, criticizing this structure of deal protection.[37]

Given the evidence, JB Capital and Prickett Jones risked potential outcomes:

| Outcome | Recovery | Weight | Risk-Adjusted Value |
|---|---|---|---|
| Merger Price | $6.00 | 5% | $0.30 |
| Merger Price + Windfall Profits | $8.00 | 35% | $2.80 |
| 1.1 x TBV | $8.43 | 45% | $3.79 |
| Jefferies Stand-alone DCF + Windfall Profits | $9.48 | 15% | $1.42 |
| Total | | 100% | $8.31 |

Notwithstanding the risk-adjusted values, JB Capital's redline in prior settlement discussions was $8.00 per share. For purposes of mediation, JB Capital stuck to that

[36] A topping bid in ordinary market conditions is a unicorn. For Gain Capital to believe one could have occurred in the midst of the market chaos created by the pandemic seemed like a stretch.

[37] *In re Sears Hometown & Outlet Stores, Inc. S'holding Litig.*, 309 A.3d 474, 523-24 (Del. Ch. 2024) (criticizing unlimited match rights: "[s]ophisticated parties . . . consider not only the value of the target relative to the deal price, but also whether they have a path to success. . . Participating in a sale process is not free, so without a realistic path to success, it is irrational to try.").

redline. After accounting for interest for a settlement that could be approved as early as the May 2024 or as late as November 2024,[38] JB Capital and Prickett Jones targeted a range of $10.65 to $11.21 per share.

### 2. The Fiduciary Claims

The success and the amount of any recovery on the fiduciary claims faced significant litigation risks. The best-case scenario for the Class was an award of damages based on the Company's value as of the Merger date. As noted above, the most compelling valuation arguments related to the Company's windfall profits which accumulated between the time the Merger Agreement was signed and the date the Merger closed. Rescissory damages or disgorgement recovering synergistic value was unlikely. None of the Defendants retained that value.[39] Accordingly, it seemed reasonable to incorporate the risk-adjusted value of the appraisal claim, less the $6.00 Merger price, *i.e.*, $2.31 per share, as the best-case scenario value for the fiduciary claims.

[38] JB Capital and Prickett Jones assumed no change in the Federal Reserve interest rate through November 30, 2024. As it turned out, the Federal Reserve reduced the discount rate by 0.5% on September 19, 2024. The difference to the interest factor is nominal: 1.4004 (actual) vs. 1.4018 (estimated).

[39] *See Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 468 (Del. Ch. 2011) (explaining an award other than fair value required defendants to "extract value rapaciously" from the class or "capture the value of opportunities that the corporation was on the verge of achieving").

To obtain that recovery, the Court had to determine at least one Defendant breached his duty of loyalty under either entire fairness or *Revlon* review.[40] Timing was critical. It was very possible the Court could conclude, whether the process was fair or not, that the price was fair as of the date the Merger Agreement was signed. Similarly, if the Court's *Revlon* review concluded with the signing of the Merger Agreement, it was very possible that notwithstanding a problematic sales process, the Court could conclude that a sale process resulting in a 70% premium to the Company's unaffected stock price was reasonable.

The disclosure claims were much stronger, as the Court indicated when denying Defendants' motions to dismiss. But how much damages the Court would award on the claims was an open question. Notwithstanding the Court's recent turn towards 2-5% of the equity when awarding nominal damages, caselaw still suggested a $1.00 per share may be possible,[41] so both scenarios were weighted.

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[40] Under *Revlon* review, however, the Court could have also awarded lower damages based on a perception that StoneX would not have paid the full value of the windfall profits in a negotiated higher price. *See*, *e.g.*, *Mindbody*, 2023 WL 2518149 at *45 (discussing lost-transaction theory of damages).

[41] *See, e.g., id.* at *47 ("It is clear, however, that a $1 increase in the per share price would not have rendered the deal undesirable for Vista, nor would it represent a windfall to the class."). The evidence here supported that StoneX would have also paid $1.00 more per share for the Company.

Finally, notwithstanding the strength of the disclosure claims, there was still risk all claims would be dismissed, particularly with the protection that Sections 102(b)(7) and 141(e) provided the Director Defendants. Given the evidence, JB Capital and Prickett Jones risked the potential outcomes of the fiduciary claims:

| Outcome | Recovery | Weight | Risk-Adjusted Value |
|---|---|---|---|
| Dismissal | $0.00 | 25% | $0.00 |
| 2% Nominal Damages | $0.12 | 30% | $0.04 |
| $1.00 Nominal Damages | $1.00 | 25% | $0.25 |
| Complete victory: | $2.31 | 20% | $0.46 |
| Total | | 100% | $0.75 |

JB Capital and Prickett Jones respectfully submit that their weighting of the potential outcomes of the fiduciary claims was reasonable.[42] Based on the risk-adjusted values, and accounting for interest for a settlement that could be approved as early as the end of May 2024 or as late as the end of November 2024, JB Capital and Prickett Jones targeted a range of $1.00 to $1.05 per share.

### 3. The Mediator's Recommendation

As mediation progressed, on April 16, 2024, JB Capital communicated a "best offer" global settlement of $61.5 million, allocating (in dollar amounts) $40 million to dissenters and $21.5 million to non-dissenters. The per share math behind the offer was as follows:

[42] Defendants would contend that the risk of dismissal either on summary judgment or post-trial was significantly higher than 25%.

| | Dissenters | Non-Dissenters | Total |
|---|---|---|---|
| Allocated by Class Members: | $40,000,000 | $21,500,000 | $61,500,000 |
| Per Share Math: | $11.22 | $1.24 | |
| Less Interest thru Nov ‘24: | $8.00 | $0.88 | |

For the fiduciary claims, the offer implied a 44% chance of success in recovering the same value above the Merger price as dissenters at trial ($0.88 per share/$2.00 per share).

After receiving JB Capital’s April 16 offer, Defendants asked the mediator to inquire whether JB Capital’s allocation could be viewed differently: approximately $34.5 million for the appraisal claims, and $27 million for the fiduciary claims, in which dissenters would participate *pro rata* with the rest of the Class in the fiduciary claims. The math behind Defendants’ inquiry was:

| | Appraisal | Fiduciary | Total |
|---|---|---|---|
| Allocated by Claim: | $34,500,000 | $27,000,000 | $61,500,000 |
| Per Share Math: | $9.67 | $1.29 | |
| Less Interest thru Nov '24: | $6.90 | $0.92 | |

Prickett Jones told the mediator that conceptually, this was fine,[43] but that Defendants’ math was wrong; JB Capital’s allocation would be approximately $35.5 million to settle the appraisal claims, and $26 million to settle the fiduciary claims:

[43] Prickett Jones’s determination was based on the fact that this was not a “double-recovery,” as shown by the math above. Rather, dissenters would receive the same settlement value (*i.e.*, $8.00 per share plus interest) from two different sources, both of which faced liability for one claim or the other. *See*, *e.g.*, *In re Columbia Pipeline Group,*

| | Appraisal | Fiduciary | Total |
|---|---|---|---|
| Allocated by Claim: | $35,500,000 | $26,000,000 | $61,500,000 |
| Per Share Math: | $9.95 | $1.24 | |
| Less Interest thru Nov '24: | $7.10 | $0.89 | |

Prickett Jones told the mediator JB Capital would not settle the appraisal claim independently for $35.5 million but since Defendants were proposing dissenters receive additional consideration as Class members, the total amount it would receive was acceptable. Prickett Jones also told the mediator that if Gain Capital would not pay the $35.5 million to settle the appraisal claims, JB Capital would still present a settlement of the fiduciary claims to the Court for approval.

In Exhibit B to Defendants' Motion to Enforce Settlement, Defendants disclosed how the mediator communicated that message to them:[44]

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*Inc. Merger Litig.*, 316 A.3d 359, 404-405 (Del. Ch. 2024) (discussing dissenters' participation in fiduciary recovery).

[44] *JB Capital Partners, L.P. v. Gain Capital Holdings, Inc.*, Del. Ch., C.A. No. 2020-0644-NAC, Gain Capital's Motion to Enforce Settlement (June 24, 2024) (Trans. ID 73469600) ("Motion to Enforce").

> **From:** David Murphy <dmurphy@phillipsadr.com>
> **Sent:** Monday, April 22, 2024 4:55:50 PM
> **To:** Brown III, Ronald N. <Ronald.Brown@us.dlapiper.com>
> **Subject:** Following up
>
> Dictated but not read
>
> Marcus confirmed your understanding — this is all Defs, the appraisal/fid split behind the dissenter/non-dissenter allocation is as you posit (he said the per share is very very close to your numbers), and obviously carriers were willing to pay 27M (which they won't do) for a partial settlement of the just the fiduciary claims, he'd have to present that to the class. So, as I see it, in a real sense, his proposal is sort of setting a ceiling on the appraisal claims of 35m.

Not exactly JB Capital's message, but the mediator told Defendants that under their alternative allocation (*i.e.*, by claim rather than Class member), JB Capital would allocate approximately $35 million to the appraisal claims. Neither JB Capital nor Prickett Jones ever communicated with the mediator or Defendants about this allocation, or any other allocation, using percentages.[45]

On April 29, 2024, the mediator communicated to JB Capital Defendants' "final unilateral offer is $50 million, with the understanding that JB Capital's allocation presented to the Court will remain consistent with its most recent offer." JB Capital determined that the counter-offer was insufficient to support a fair and reasonable settlement for both the appraisal and fiduciary claims and rejected it.

On May 9, 2024, the mediator made his recommendation. In describing the Parties' negotiations, he referenced JB Capital's $61.5 million offer, which was

[45] Motion to Enforce, Ex. C.

"conditioned on court approval of Class Plaintiffs' proposed plan of allocation as between Dissenting and Non-Dissenting stockholder [sic]."[46] In describing Defendants' $50 million counteroffer, he noted: "For purposes of this counter, Defendants have acquiesced to Class Plaintiffs [sic] proposed allocation plan . . . ."[47]

The mediator's recommendation comes two paragraphs later: "I am recommending that this Class Plaintiffs settle this case with all Defendants (including Vantage Point and IPGL) for $55 million."[48] The recommendation required the parties to respond "stating 'yes, we accept' or 'no, we reject' by 5:00 pm (Eastern time) on Monday, May 20, 2024."[49]

As settlements often go, it was not as much as JB Capital had hoped. But JB Capital determined $55 million could be fairly and reasonably allocated between the two claims:

| JB Capital's Alloc. of Recommendation: | Aggregate | Per Share | Less Interest |
|---|---|---|---|
| Appraisal Claims Allocation | $35,500,000 | $9.95 | $7.10 |
| Pro Rata Participation in Fiduciary Allocation | $19,500,000 | $0.93 | $0.66 |
| Total: | $55,000,000 | | |

[46] *Id*., Ex. D.

[47] *Id*.

[48] *Id*.

[49] *Id*.

The allocation missed the targets for both claims, but would still recover approximately 93% of what we hoped to recover for the non-dissenting members of the Class and provided a 15.5% bump to the Merger price. The allocation also implied that the fiduciary claims had a 37.5% chance to recover the same value above the Merger price as the appraisal claims at trial ($0.66 per share/$1.76 per share). Given the risk fiduciary claims challenging third-party strategic mergers of public companies approved by boards comprised of a majority of independent directors have for no recovery at all, and a lesser recovery than the recommendation provided even if the claims prevailed, JB Capital decided to accept the recommendation. At 4:40 pm on Monday, May 20, 2024, Prickett Jones responded to the mediator stating "yes, we accept."

Eleven minutes later, Defendants also responded to the mediator but qualified their acceptance on "confirmations," including a "56/44 allocation" of the settlement, funding details and that Gain Capital could deduct $1,786,159.55 from the $55 million as a "credit" for Merger consideration purportedly paid to Goor (which was not paid). The mediator did not communicate these qualifications to JB Capital. Notwithstanding Defendants' qualified acceptance, later that evening, the mediator communicated the Parties accepted his recommendation.

### 4. Dispute Respecting the Allocation

As the Parties met to paper the settlement, a dispute immediately arose respecting the allocation of the $55 million. Defendants' counsel was surprised their percentage-based allocation had not been communicated to JB Capital prior to the mediator telling the parties that his recommendation was accepted. Defendants' counsel explained he calculated those *implied* percentages from JB Capital's previous $61.5 million settlement offer, with the understanding from the mediator that approximately $35 million would be allocated to the appraisal claims.

Prickett Jones responded, stating JB Capital never proposed a fixed-percentage allocation, which made no sense considering the different risk profiles of the claims and the fact that the dissenters were paid nothing in the Merger.[50] Prickett Jones further advised Defendants' counsel the allocation term was material and, with no meeting of the minds on the term, there was no settlement. Defendants' counsel responded threatening to enforce the settlement. In that correspondence, Defendants for the first time disclosed how they planned to fund the $55 million settlement,

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[50] Even if the same risk profiles are assumed, to put everyone on the same footing, $29,995,157 (the Merger price plus interest through November 30, 2024, an anticipated outside date for settlement approval) had to be accounted for in any allocation between the claims. Because this value is fixed, the percentage allocation between the claims had to change with changes to the total settlement amount.

revealing that insurance providers were contributing $23,752,080.[51] Defendants had refused to disclose the information previously.

On June 6, 2024, in an effort to resolve the dispute, JB Capital offered two paths forward: (i) to present the Court with a settlement of the fiduciary claims for $24,101,280, the amount for which the insurers and the IPGL and VantagePoint entities intended to pay to settle the fiduciary claims, that provided a participation election to dissenting members of the Class (that likely would save the insurers money); or (ii) a global settlement that would include (i) above and require Respondent to pay an additional $3,837,374 to settle the appraisal claims. Certain other Defendants' counsel inquired whether JB Capital would agree to move forward with a $55 million settlement "regardless of the allocation between two actions," suggesting Defendants were willing to compromise on the allocation to the Class.[52] Prickett Jones made clear it would not present a settlement to the Court that allocated less than $24,101,280 to the Class, as it was now aware that Defendants (without Respondent) were willing to pay that amount to settle the fiduciary claims.[53]

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[51] Motion to Enforce, Ex. I at 4.

[52] Motion to Enforce, Ex. H.

[53] *Id*.

As reflected in the correspondence, at no time during the course of this litigation did JB Capital refuse to settle or try to block a settlement of the fiduciary claims, or in any way condition the settlement of the fiduciary claims on the settlement of the appraisal claims.

On June 14, 2024, JB Capital's alternative offers to settle expired and were withdrawn.

On June 24, 2024, Defendants filed their Motion to Enforce.

### 5. Meeting with Court and Settlement

On July 16, 2024, the Court held an in-chambers meeting with Delaware counsel for all Parties. After the meeting, the Parties continued to discuss whether the impasse could be broken. JB Capital and Prickett Jones considered Defendants' allocation of the $55 million settlement as fundamentally unfair.

The allocation flipped the claims' risk profiles upside down. After accounting for interest, the allocation results in dissenters receiving $7.01 per share – only $1.01 above the merger price – while the non-dissenting members of the Class recovered $0.82 per share. That implies: (i) the dissenters had only a 43% chance to recover the appraisal claim's risk-adjusted value ($1.01/$2.31); (ii) that the Class had a 35% chance for their best day in Court ($0.82/$2.31); (iii) that the Class had more than a 100% chance to recover the fiduciary claims' risk-adjusted value ($0.82/$0.75); and

(iv) that the Class had an 81% chance to recover the same value above the Merger price as the dissenters from the litigation. As discussed above, this was not realistic.

Moreover, the Motion to Enforce sought to enforce an allocation term that JB Capital never offered or accepted and an agreement that Defendants never accepted.[54]

At the same time, JB Capital and Prickett Jones recognized that the allocation exceeded the risk-adjusted value for the fiduciary claims and realized it was highly unlikely such a favorable settlement for those claims would be available if the litigation continued. Searching for a resolution, Prickett Jones pointed out to JB Capital that while Defendants' allocation was fundamentally unfair to the dissenters, a revision to the terms of Prickett Jones's engagement would put the dissenters almost in the same position as they expected to be in under their intended allocation.

Under the original terms of Prickett Jones's engagement, Prickett Jones was entitled to a 25% contingency fee for value recovered that exceeded the $6.00 merger price, which would have included the value of any interest awarded.[55] Limiting the

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[54] Defendants' response to the mediator's proposal with "confirmations" is not an acceptance. It is black letter law that "[a] reply to an offer, although purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer." *Friel v. Jones*, 206 A.2d 232, 234 (Del. Ch. 1964) (quoting Restatement (First) of Contracts § 60 (1932)), *aff'd*, 212 A.2d 609 (Del. 1965).

[55] *See*, *e.g.*, Montejo Aff., Ex. A.

25% contingency fee instead to value recovered that exceeded the $6.00 merger price plus interest at the statutory rate through November 30, 2024 allowed for a comparable net recovery for the dissenters:

| **Orig. Engagement Terms:** | | |
|---|---|---|
| | **Allocation** | |
| | **Plaintiff's** | **Defendant's** |
| Appraisal Claim: | $9.95 | $8.66 |
| Fiduciary Claim: | $0.93 | $1.15 |
| Total: | $10.88 | $9.81 |
| *Less Merger Price:* | $4.88 | $3.81 |
| *Less Contingency Fee:* | $1.22 | $0.95 |
| **Net Recovery:** | **$9.66** | **$8.86** |

| **Revised Engagement Terms:** | |
|---|---|
| Appraisal Claim: | $8.66 |
| Fiduciary Claim: | $1.15 |
| Total: | $9.81 |
| *Less Merger Price plus Interest:* | $1.40 |
| *Less Contingency Fee:* | $0.35 |
| **Net Recovery:** | **$9.46** |

Prickett Jones also offered to make the 25% contingency fee inclusive of expenses. JB Capital and the other dissenters were agreeable to the proposal, which allowed the Parties to confer and come to agreement on the Settlement and present it to the Court.

## ARGUMENT

### I. THE CLASS SHOULD BE CERTIFIED

Pursuant to Rules 23(a), 23(b)(1), and 23(b)(2), the Parties seek to permanently certify the following non-opt-out class:

> All record holders and beneficial owners of Gain Capital common stock (except for Excluded Persons, as defined herein) who held such shares as of July 31, 2020 (the date of the Merger's closing), together with their heirs, assigns, transferees, and successors-in-interest. All Excluded Persons are excluded from the Class. For the avoidance of doubt, the "Class" includes the Dissenters.[56]

Certification of the proposed Class is proper.

#### A. Legal Standard

This Court conducts a two-step analysis to determine whether an action may be certified as a class action under Court of Chancery Rule 23. First, the Court determines whether the action meets all four requirements of Rule 23(a). Those four requirements are: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[57] Second, the Court determines whether the action meets at

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[56] Stipulation § I.1.(f).

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

least one of the prongs of Rule 23(b).[58] Finally, the procedural requirements of Rule 23 must be satisfied.

### B. The Requirements of Rule 23(a) Are Met

#### 1. Numerosity

Numerosity under Rule 23(a)(1) is satisfied when the class is "so numerous that joinder of all members is impracticable."[59] The numerosity test is "not impossibility of joinder, but practicality."[60] Here, the Class is comprised of 20,956,028 shares of Company common stock issued and outstanding to record and beneficial owners residing in many States and around the world.[61] Thus, joinder of these Class members would be impracticable, and the numerosity requirement is satisfied.[62]

#### 2. Commonality

Commonality under Rule 23(a)(2) is satisfied "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated."[63] Commonality exists in

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[58] Ct. Ch. R. 23(a)-(b).

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

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

[61] Compl. ¶ 204.

[62] *Dubroff v. Wren Hldgs., LLC,* 2010 WL 3294219, at *5 (Del. Ch. Aug. 20, 2010).

[63] *Leon N. Weiner & Assocs.*, 584 A.2d at 1225.

actions questioning "whether [d]efendants breached their fiduciary duties, whether [d]efendants met their disclosure obligations, and to what relief the Class is entitled."[64]

Here, the common questions of law and fact include whether: (1) Stevens, Bevilacqua and Rhoten breached their fiduciary duties in connection to pursuing and approving the Merger; whether they breached their fiduciary duty of candor in connection with issuing a false and misleading Proxy; whether VantagePoint and IPGL aided and abetted in the Director Defendants' breaches of fiduciary duty; and whether JB Capital and the other members of the Class are entitled to damages. Where, as here, JB Capital alleges injuries that all Class members sustained in proportion to their *pro rata* share of Gain Capital stock, the commonality requirement is satisfied.[65]

### 3. Typicality

Typicality under Rule 23(a)(3) is satisfied when the claims or defenses of the representative parties are typical of the claims or defenses of the class. The Court must determine that "the legal and factual position of the class representative [is] not

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[64] *In re Cox Radio, Inc. S'holders Litig.,* 2010 WL 1806616, at *8 (Del. Ch. May 6, 2010).

[65] *See In re AXA Fin., Inc., S'holders Litig.,* 2002 WL 1283674, at *5 (Del. Ch. May 22, 2002).

[] markedly different from that of the members of the class."[66] The test for typicality is "relatively non-stringent,"[67] and is satisfied if the representative's claim "arises from the same event or course of conduct that gives rise to the claims [or defenses] of other class members and is based on the same legal theory."[68]

Here, JB Capital's claims are typical of the Class's claims. They arise from the same event (the Merger) and conduct (Defendants' breaches of fiduciary duty). JB Capital and all Class members were Gain Capital stockholders, and affected in the same way by Defendants' merger-related conduct. Thus, JB Capital's "claims are identical to the legal theories of other members," and typicality is satisfied.[69]

#### 4. Adequacy

A determination of the adequacy representation requirement of Rule 23(a)(4) is within its "sound discretion . . . and will be reviewed only for abuse of discretion."[70] Over the years, this Court has considered more than a dozen factors in determining the adequacy of a class representative, but one of the primary factors is

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[66] *Leon N. Weiner & Assocs.*, 584 A.2d at 1125-26.

[67] *Regal Entm't Grp. v. Amaranth LLC,* 894 A.2d 1104, 1112 & n.12 (Del. Ch. 2006).

[68] *Id.*

[69] *N.J. Carpenters Pension Fund v. info GROUP, Inc.,* 2013 WL 610143, at *3-4 (Del. Ch. Feb. 17, 2013).

[70] *Prezant v. De Angelis*, 636 A.2d 915, 925 (Del. 1994).

whether a putative representative suffers from a conflict of interest towards the members of the class.[71] This is the issue the Court has questioned here.

The concern for a potential conflict is based on JB Capital's status as both the named petitioner in the appraisal action and the representative plaintiff for the Class. Delaware law and policy allow for, and encourage, such common representation.[72] This Court, however, has also considered how an appraisal claimant's interests could potentially diverge from the interest of a class.[73] Those hypothetical scenarios have

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[71] Donald J. Wolfe, Jr. & Michael Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY (2d ed.) § 12.02[b][5] at 12-19:12-22.

[72] *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1188-89 (Del. 1988) ("[P]olicy considerations militate against foreclosing a shareholder electing appraisal rights from later bringing a fraud action based on after-discovered wrongdoing in the merger. Experience has shown that the great majority of minority shareholders in a freeze-out merger accept the cash-out consideration, notwithstanding the possible existence of a claim of unfair dealing, due to the risks of litigation. With the majority of the minority shareholders tendering their shares, only shareholders pursuing discovery during an appraisal proceeding are likely to acquire the relevant information needed to pursue a fraud action if such information exists. Such shareholders, however, would not have any financial incentive to communicate their discovered claim of wrongdoing in the merger to the shareholders who tendered their shares for the consideration offered by the majority and, by tendering, have standing to file suit. Thus, to bar those seeking appraisal from asserting a later-discovered fraud claim may effectively immunize a controlling shareholder from answering to a fraud claim."); *In re Columbia Pipeline Group, Inc.*, 2018 WL 4182207, at *3 (Del. Ch. Aug. 30, 2018) ("[B]ecause the high court viewed appraisal actions as serving this important public policy, the justices held that a stockholder who had demanded appraisal and pursued an appraisal proceeding could subsequently file and simultaneously litigate a breach of fiduciary action based on information uncovered during discovery in the appraisal proceeding").

[73] *See*, *e.g.*, *In re Orchard Enterprises, Inc. S'holder Litig.*, 2014 WL 4181912, at *10-11 (Del. Ch. Aug. 22, 2014).

not prevented this Court from appointing dissenters as lead plaintiffs.[74] Rather, the Court has held that "[t]he common representation of class action plaintiffs and appraisal petitioners does not present an automatically disqualifying conflict."[75] But the hypothetical concerns require monitoring, particularly in the context of a settlement.[76]

As explained above, the Settlement contemplates that JB Capital will participate in the Class recovery on a *pro rata* basis. JB Capital will also receive \$8.66 per share to settle its appraisal claims (as will each dissenter who has not withdrawn its appraisal demand). A fiduciary's receipt of disparate value from a transaction (here, the Settlement), warrants heightened judicial scrutiny.[77] The Court examined the focus of this scrutiny in *OptimisCorp v. Atkins*:

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[74] *See*, *e.g.*, *Ryan*, 2019 WL 4805820 at *2-3 (noting the advantages dual representation can provide to class members); *In re Emerging Communications, Inc. S'holder Litig.*, 2004 WL 1305745 (Del. Ch. June 4, 2004) (where dual representation led to a very successful post-trial recovery for the class); *see also Dieter v. Prime Computer, Inc.*, Del. Ch., Cons. C.A. No. 12025 (where Prickett Jones provided joint representation to class members who received junk bonds with a \$22 face value in the backend of a coercive two-tiered \$20 tender offer and dissenters who demanded appraisal; a complicated post-trial settlement paid dissenters \$18 per share and cash and stock worth \$4 to \$6 per share to the class, in which dissenters participated). Montejo Aff., Ex. B (Notice of Pendency of Appraisal and Class Action, Proposed Settlement, Settlement Hearing and Right to Appear in the *Dieter* action).

[75] *Ryan*, 2019 WL 4805820 at *2.

[76] *Id*. at *3.

[77] *But see*, *e.g.*, *In re Match Group, Inc. Deriv. Litig.*, 315 A.3d 446, 461 (Del. 2024) (explaining in the context of controlling stockholder transactions that "[a]lthough close

> In undertaking to assert rights of others, a representative plaintiff assumes an obligation to such persons to act with respect to the claims asserted loyally and not to seek or to obtain a private benefit by reason of the power resulting from such representative status. What is forbidden to such a person is that he exercise any power conferred upon him by reason of his representative capacity for his personal benefit at the expense of the class members (the corporation and its shareholders in a derivative case). Specifically, that means a class representative may not trade any aspect of the claims asserted derivatively for a strictly personal benefit. Nor can he profit as a fiduciary to the expense, or to the prejudice of, the Company and its stockholders. The focus is on whether the plaintiff has proceeded in a manner designed to benefit the plaintiff individually—rather than the class as a whole, and whether the plaintiff took steps to benefit other stockholders or the entity. However, while a fiduciary must act with complete loyalty, self-sacrifice of legitimate personal interests is ordinarily not required. [78]

JB Capital has a legitimate personal interest in its appraisal claim. Its fiduciary duties to the Class do not require JB Capital to sacrifice that interest, but prohibit JB Capital from leveraging its status as the Class representative to extract a personal benefit.

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scrutiny is required for transactions where the controlling stockholder receives a non-ratable benefit, it is important to recognize that an interest conflict is not in itself a crime or a tort or necessarily injurious to others.") (citation omitted).

[78] 2021 WL 2961482, at *7 (Del. Ch. July 15, 2021) (cleaned up).

This standard is illustrated by the conduct alleged in *In re MPM Holdings Inc. Appraisal and Stockholder Litigation*.[79] There, an appraisal petitioner who was also a co-lead plaintiff in the consolidated fiduciary action was alleged to have tried to leverage its control over settlement discussions as a representative plaintiff to extract additional settlement value for its appraisal claim, refusing to consent to the exploration of "a possible [c]lass-only" settlement after negotiations for a global settlement reached an impasse.[80] By contrast, JB Capital has never acted to block a possible recovery for the Class. To the contrary, throughout settlement negotiations JB Capital consistently communicated its willingness to present a fair and reasonable Class-only settlement to the Court, and critically, has based its determination of whether a settlement for either the appraisal or the fiduciary claims was fair and reasonable on the respective value of the claim.[81]

JB Capital and Prickett Jones have fully disclosed their settlement strategy and thought process in valuing the claims so that the Court may exercise its own business judgment in monitoring the inherent conflict created by the allocation of a global settlement. JB Capital and Prickett Jones respectfully submit that their

[79] C.A. No. 2019-0519-NAC (Del. Ch.).

[80] *MPM Holdings*, Co-Lead Plaintiff Frank Funds' Motion to Amend Order Designating Lead Plaintiffs and Lead Counsel ¶¶ 10, 14-15 (Trans. ID 70283649).

[81] *Oracle*, 2019 WL 6522297 at *16.

approach and steps taken to reach the Settlement provided the Class with adequate representation, consistently advancing the interests of the Class and creating a substantial benefit for its members.

### C. The Requirements of Rule 23(b)(1) and (b)(2) Are Satisfied

JB Capital's claims are certifiable under Court of Chancery Rules 23(b)(1) and 23(b)(2).[82] Under Rule 23(b)(1), class certification is proper where the prosecution of separate actions by individual class members would risk: (1) inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class; or (2) adjudications by individual class members that would be dispositive of the interests of the other class members. Here, JB Capital is challenging the Merger and Defendants' conduct, which affected all Class members the same way. As such, Defendants are liable to all or none of the Class.[83] If the prosecution of separate actions were allowed to proceed, a risk of inconsistent or varying adjudications would exist. An adjudication on JB Capital's claims regarding whether Defendants breached their fiduciary duty to stockholders

[82] *See, e.g., In re Celera Corp. S'holder Litig.,* 59 A.3d 418, 432–33 (Del. 2012).

[83] *Turner v. Bernstein,* 768 A.2d 24, 33 (Del. Ch. 2000).

would necessarily be dispositive of the rights of other Class members.[84] Rule 23(b)(1) is satisfied.

Rule 23(b)(2) is also satisfied because Defendants "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole." The fiduciary claims challenge "the propriety of director conduct in carrying out corporate transactions" which is "properly certifiable under both subdivisions (b)(1) and (b)(2)."[85] Rules 23(b)(1) and 23(b)(2) are satisfied.

### D. The Remaining Requirements of Rule 23 Are Satisfied

JB Capital has provided an affidavit in compliance with Rule 23(f), attesting that it has not received or been promised any compensation for the litigation. The Notice was mailed in advance of the deadline set forth in the Scheduling Order.[86] To date, no proposed Class member has objected to the certification of the Class (or the Settlement or any of counsel's requests).

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[84] *See, e.g.*, *Buttonwood Tree Value Partners, L.P. v. R. L. Polk & Co., Inc.*, 2022 WL 2255258, at *11 (Del. Ch. June 23, 2022).

[85] *Celera*, 59 A.3d at 418, 432-33.

[86] In accordance with the Scheduling Order, an affidavit of notice mailing and website publication will be filed on or before November 22, 2024.

## II. THE SETTLEMENT SHOULD BE APPROVED AS FAIR AND REASONABLE

### A. The Legal Standard

Delaware law favors the voluntary settlement of claims, particularly in representative actions.[87] In reviewing the proposed settlement, the Court does not "decide any of the issues on the merits."[88] Instead, its function "is to consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then to apply its own business judgment in deciding whether the settlement is reasonable in light of these factors."[89] "The principal focus is upon the benefits provided in the settlement, in light of the nature of the claims and the likelihood of success on the merits."[90]

### B. The Settlement Provides a Significant Financial Benefit to the Class

The Settlement benefit for the Class is $24,101,280. Before fees and expenses, members of the will receive $1.15 per share, a more-than-19% premium to the $6.00 Merger price. This is an excellent result and exceeds the range of potential risk-adjusted outcomes at trial.

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[87] *Kahn v. Sullivan*, 594 A.2d 48, 58 (Del. 1991).

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

[89] *Id.* at 535; *accord In re TD Banknorth S'holders Litig.*, 938 A.2d 654, 657 (Del. Ch. 2007).

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

As discussed above, the Class held breach of fiduciary duty of loyalty claims against Stevens, Bevilacqua and Rhoten and aiding and abetting claims against the VantagePoint and IPGL entities. The duty of loyalty claims against Stevens, Bevilacqua and Rhoten were two-pronged, alleging they caused the Company to be sold at an unfair price to advance their own self-interest and that they had caused the Company to issue a materially misleading Proxy. The aiding and abetting claims against the VantagePoint and IPGL were limited to the sale of the Company.[91]

As discussed above regarding the risk-adjusted value of the fiduciary claims, complete success for the Class would have entitled the Class to compensatory damages, likely based on the fair value of the Company as of the date of the Merger; a partial win for the Class on only the disclosure claims and a recovery of nominal damages set a floor recovery, but would not be cumulative to economic compensatory damages[92] and could range from 2% of the $6.00 Merger price to a best-case scenario of $1.00 per share.

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[91] Neither of the VantagePoint nor IPGL entities reviewed or had a right to review the Proxy in advance of it being issued. *Cf. Columbia Pipeline Merger Litig.*, 299 A.3d at 448, 494 (holding buyer liable for aiding and where buyer knew about misleading proxy statements by reviewing, but not correcting, the draft proxy).

[92] *See id*. at 500 (explaining that "[i]f economic damages exceed disclosure damages, then the plaintiff receives economic damages. Otherwise, the plaintiff receives disclosure damages. The plaintiff does not receive both.").

Each of these scenarios would have included an award of pre-judgment interest.[93] For purposes of presenting an apples-to-apples comparison to the $1.15 per share settlement value, an interest factor of 1.4x needs to be applied to account for an award of interest from the date of the Merger through (for illustrative purposes) November 30, 2024. A complete victory would recover $3.23 per share ($2.31 per share plus interest) and a partial win and award of nominal damages would recover anywhere from $0.16 per share on the low-end (2% of deal price plus interest) to a maximum of $1.40 per share ($1.00 per share plus interest).

The Settlement therefore provides Class members with 35.5% of their best day in Court, 82% of a pretty good day in Court, and 146% of a win but an award of the low-end of potential damages.

But that does not account for collectability risks. There was risk the Class would have been unable to collect tens of millions of dollars in a post-trial judgment, if one was ever achieved. The insurance towers maxed out at $30 million and would have been severely depleted if the litigation continued through trial and appeal. Though Stevens has recently earned significant wages with StoneX since the Merger, none of the Director Defendants have vast fortunes to fall back on. The

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[93] *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *46 (Del. Ch. Aug. 27, 2015).

[redacted] and IPGL is located outside the United States. There is doubt that the Class could have recovered all of a judgment if they had their best day in Court. On a fully risked basis, the Settlement therefore easily provides more than 100% of the value of the claims at issue.

### C. Strength of Defenses

#### 1. Stevens and the Standard of Review

In denying Defendants' motions to dismiss, the Court considered the competing arguments for the applicable standard of review. JB Capital argued for entire fairness review, based on its theory that Stevens perpetrated a fraud on the Board in failing to disclose year-to-date 2020 financial performance to the Board prior to the Board's approval of the Merger Agreement. Defendants argued business judgment applied because (i) the Board was comprised of a majority of independent directors and/or (ii) the claims were subject to *Corwin* cleansing. The Court expressed reservations as to whether the pleaded facts supported a fraud on the board, but determined it did not need to decide the question because JB Capital had pleaded a *Revlon* claim.[94]

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[94] Transcript at 26.

JB Capital remains convinced that the documented evidence supports that Stevens knew the Company had materially exceeded its projected 2020 performance prior to the February 26 Board approval of the Merger Agreement, and he did not inform the Board of this.[95] JB Capital also believes the January 2020 Flash Report would have been material to the Board's decision, but was not presented to the whole Board. Tellingly, the Flash Report was front and center in StoneX's Board presentation:

[95] *Id*. at 15-16.

# GCAP January Flash Results

INTL FCStone®

## Summary Statistics

| | Jan 2020 | Dec 2019 | MoM % Change | Jan 2019 | YoY % Change |
|---|---|---|---|---|---|
| Retail ADV ($bn) | $7.2 | $6.2 | 16% | $8.4 | (14%) |
| Retail RPM | $206 | $135 | 53% | $19 | 981% |
| Retail Trading Revenue ($mm) | $32.6 | $17.6 | 85% | $3.5 | 829% |
| GVIX [1] | 0.78% | 0.69% | 0.09% | 1.02% | (0.24%) |
| VIX | $13.6 | $13.8 | (1%) | $19.6 | (31%) |

## Monthly Retail RPM


## January 2020 Flash Results by Segment

| $ Millions, except where noted otherwise | Retail / Corp | Futures | Total |
|---|---|---|---|
| Trading Revenue | $32.6 | $2.7 | $35.4 |
| Other Revenues [2] | | | 1.5 |
| Total Revenue | $32.6 | $2.7 | $36.8 |
| Compensation & Benefits | $6.3 | $0.8 | $7.1 |
| Marketing | 2.5 | 0.1 | 2.6 |
| Referral Fees | 1.4 | 1.0 | 2.4 |
| Other OpEx | 6.3 | 1.1 | 7.4 |
| Operating Costs [3] | $16.6 | $2.9 | $19.5 |
| EBITDA | $16.1 | ($0.2) | $17.4 |
| *EBITDA Margin* | *49%* | *(6%)* | *47%* |
| D&A | | | $2.0 |
| Interest Expense | | | 1.2 |
| Pre-Tax Income | | | $14.3 |
| Tax [4] | | | ($4.0) |
| Net Income | | | $10.3 |
| *Net Income Margin* | | | *28%* |
| EPS [5] | | | $0.27 |
| Additional TBVPS | | | 0.29 |

1) *Absolute change for GVIX.*
2) *Other Revenue includes Net Interest Revenue and "Other" Revenue (inactivity fees etc.).*
3) *Operating costs as per budget.*
4) *Tax rate assumed as 28%.*
5) *Share count of 37.4mm.*

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Yet each of the directors had electronic access to Sharepoint, where management loaded flash reports and Board material. Though documents suggest these directors relied on email for Board materials, the directors still knew they could look at current performance whenever they chose to. There are documents that show directors, including Rhoten and Goor, had trouble accessing Sharepoint from time-to-time. But there are also documents that show when directors raised the problems with Company management, the problems were resolved.

The fact that the directors had access, but may have failed to use it, generally weakened the claim against Stevens, who would have argued it was not his fault if the other directors did not review the information that was available to them. Also problematic for JB Capital's fraud-on-the-board theory is an early February 2020 email where Stevens tells Rhoten that January showed improved performance. At trial, JB Capital would work to establish Stevens was conveying that improved performance would secure the $6 per share Merger price, not that the Company wildly exceeded the projections management had just prepared the prior week. JB Capital would argue that the context of the communication was Rhoten trying to determine the risk of StoneX retrading the $6 per share Merger price as it wrapped up its due diligence. But the combination of directors having access to the flash reports and Stevens discussing current performance with at least one director in writing, regardless of context, puts directly at issue Defendants' argument that the information a director decides he or she needs to make a decision is itself subject to business judgment deference. And the more control the directors had over obtaining the information they wanted to review risked turning an uninformed decision to approve the Merger Agreement into an exculpated duty of care claim rather than one for fraud on the board.

Without fraud on the board, prevailing under the *Revlon* standard of review was difficult. Stevens would testify that he only had a few meetings with O'Connor and that he did discuss the meetings with Joseph Schenck, the Chairman of the Board whose independence was not challenged.[96] Defendants will also point to StoneX's internal meeting notes summarizing key takeaways from a January 7-8, 2020 due diligence meeting analyzing Stevens's potential departure and separation costs as evidence that Stevens's continued employment was never guaranteed. Davis Polk would testify that it concluded its investigation of Stevens and found no grounds to terminate Stevens for cause.[97] Despite JB Capital's view that the sales process was haphazardly conducted and poorly timed and documented, well-paid experts would testify that it was not an "unreasonable process" as reflected by its 70% premium to the Company's unaffected trading price; and in any event, Defendants will argue the Merger was approved by a Board comprised of a majority of independent directors.

### 2. Bevilacqua and VantagePoint

The claims against Bevilacqua and VantagePoint present just as many challenges. The main problem is that even if VantagePoint needed liquidity, there is ample evidence that all the other directors knew it. The best evidence of the conflict

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[96] *Id*. at 7.

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

was a letter to the Board.[98] While the Board's failure to cabin the conflict is not aspirational, the expected testimony of each of the directors besides Goor and Peter Quick was that they knew VantagePoint needed liquidity but that it did not influence how the Board approached the sale of the Company.

### 3. Rhoten and IPGL

The claims against Rhoten were always difficult, requiring the Court to draw all inferences in JB Capital's favor to survive the motions to dismiss. Even then, the Court stated that the "question is arguably close to the line as to Rhoten and IPGL"[99] and in Defendants' view, invited motions for summary judgment. Ultimately, no documents show an explicit *quid-pro-quo* or that Rhoten had actual knowledge of the Tesla trade. The correspondence shows that the Company communicated directly with others within IPGL on that topic. The internal memo prepared by IPGL documenting reasons for supporting the Merger does not reference its margin accounts. With no documented evidence of a *quid-pro-quo*, it seems doubtful that allegations and inferences that were a close-call on a motion to dismiss would be found to actually support a conflict of interest for Rhoten at trial.

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[98] Compl. ¶ 123.

[99] Transcript at 49.

IPGL's aiding and abetting claim was premised on Stevens breach of fiduciary duty. If his defense was successful, IPGL would also succeed at trial.[100]

#### 4. Damages

If JB Capital established liability for compensatory damages, JB Capital was confident damages equal to its recovery in the appraisal action (less the $6.00 merger price) could be proven. At stated above, that would have resulted in damages of $2.31 per share plus interest, or approximately $67 million as of November 30, 2024. But as discussed above, establishing liability faced significant challenges and risk.

The most likely trial outcome was that JB Capital prevailed on the strong disclosure claims. The fact that Stevens's job on the line was material information and should have been disclosed; Playtech's higher $10.00 bid was material and should have been disclosed; VantagePoint's need for liquidity was material and should have been disclosed; Bevilacqua and VantagePoint's involvement in the sales process, including their referral of GCA Advisors, was material and should have been disclosed. JB Capital was confident it would show material omissions were so blatant they were intentional, at least on Stevens's part. But, to the extent the Director Defendants credibly claimed they did not intentionally set out to mislead the

[100] *Id*. at 53-55.

Company's stockholders, that it was just an oversight, the Company's exculpation charter provision would foreclose damages.

Alternatively, under Section 141(e), the Director Defendants would avoid liability if Davis Polk credibly testified that it reviewed these issues and determined they were not material and the Director Defendants claimed to rely on that advice.

And finally, as noted above, it was very plausible that the remedy for the most likely trial outcome would be nominal damages closer to 2% of the $6.00 Merger price than $1.00 per share, assuming decisions awarding nominal damages that are under appeal are not overturned.[101]

### D. Experience and Opinion of Mediator and Prickett Jones

The Settlement is the result of extended mediation before David Murphy, a retired partner from Wachtell, Lipton, Rosen & Katz. While how his recommendation would be allocated to the Class was interpreted differently by the Parties, the Settlement was still a product of Murphy's recommendation, evidencing its overall fairness.[102]

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[101] *See Columbia Pipeline Merger Litig*, No. 281, 2024 Del.; *Mindbody, Inc. S'holder Litig.*, No. 484, 2023 Del.

[102] *Kistenmacher v. Atchison*, Del. Ch. C.A. No. 10437-VCS, Settlement Hearing and Rulings of the Court (May 21, 2020) (TRANSCRIPT) at 18 ("I also take comfort in the fact that this settlement was facilitated by a skilled mediator."); *Cumming v. Edens*, Del. Ch. C.A. No. 13007-VCS, Settlement Hearing and Rulings of the Court (July 31, 2019)

This Court also considers the opinion of experienced counsel in weighing the adequacy of a proposed settlement. Prickett Jones is an experienced, skilled stockholder advocate well known to the Court, and believes the Settlement is fair and adequate and supports final approval.

### E. The Plan of Allocation is Fair, Reasonable and Adequate

Approval of a plan of allocation is part of the process of approving the settlement.[103] Here, approval of the proposed allocation is a condition of the Settlement.[104] The reasons for this are two-fold: (i) the Parties knew there would be heightened scrutiny by the Court to monitor this aspect of the Settlement; and (ii) JB Capital and the other dissenters needed to know with certainty what they would receive in settling their appraisal claims. Accordingly, the Parties agreed that the proposed allocation and its approval is a condition of the Settlement.[105]

"An allocation plan must be fair, reasonable, and adequate," but it "does not need to compensate Class members equally to be accepted."[106] "A reasonable plan

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(TRANSCRIPT) at 17 ("I'm always comforted when settlements presented to me are the product of mediation. I think that suggests a vigorous vetting of risk . . . .").

[103] *CME Grp., Inc. v. Chicago Bd. Options Exch., Inc.*, 2009 WL 1547510, at *10 (Del. Ch. June 3, 2009).

[104] Stipulation § III.3.

[105] *Id*.

[106] *Schulz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009).

may consider the relative values of competing claims."[107] In determining whether to approve a plan of allocation, the Court gives substantial weight to counsel's opinion.[108] A common situation is requiring an allocation of settlement proceeds is when the action involves both direct and derivative claims. *In re Activision Blizzard, Inc. Stockholder Litigation* is an example.[109] The allocation between the claims was made on the strength of the claims and prospect of recovery.[110] The Court determined the plan of allocation was reasonable even though the class was not receiving any direct payment for the class claims.[111] The Court explained this was reasonable because, in reality, "the prospects for a corporate recovery were much stronger than the prospects for a stockholder-level recovery."[112]

Similarly, in *In re Xencor, Inc.*, a recapitalization of a the company was challenged on a class wide basis. The class was made up of members who held different series of preferred stock (with different rights and preferences) and

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[107] *Id.*

[108] *See CME Grp.*, 2009 WL 1547510 at *10 ("Class counsel, in the Court's judgment, came to a fair and reasonable balancing of the various interests of all class members.").

[109] 124 A.3d 1025 (Del. Ch. 2015).

[110] *Id.* at 1068.

[111] *Id.* at 1069.

[112] *Id.*

members who held no or differing amounts of notes.[113] The Court approved a plan of allocation that allocated settlement funds between class members based on the number of different classes of preferred stock each class member held and the amount of notes, if any, owned by each class member. The formula was complicated, but critically, for formula was modeled to take into account plaintiff's central allegation that the notes were overvalued in the recapitalization. Notwithstanding the disparate treatment of class members, the Court approved the settlement and plan of allocation.[114] These cases show an allocation between different claims is fair, reasonable and adequate when it is based on the strength and weaknesses of the claims.

The global Settlement fund is $55 million: $30,898,720 ($8.66 per share) to the appraisal claims; $24,101,280 ($1.15 per share) to the fiduciary claims. It is being allocated between the appraisal and fiduciary claims based on (i) the fact that non-dissenting Class members were paid the $6.00 Merger price more than four years ago and the dissenters were not; and (ii) the strength and weaknesses of each of the claims.

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[113] Del. Ch., Cons. C.A. No. 10742-CB.

[114] *Xencor,* C.A. No. 10742-CB, Final Order and Judgment (Apr. 4, 2017) (Trans. ID 60423570).

The allocation to the appraisal claims is only 43% of the adjusted value of the claim above the Merger price, despite having a direct path to recovery as they are not subject to dispositive motions or a requirement to prove a non-exculpated breach of fiduciary duty. Approximately 97% of the funds allocated to the appraisal claims ($29,225,157, or $8.41 per share) is equal to the $6.00 merger price plus interest at the statutory rate through November 30, 2024. The value allocated to the appraisal claims, exclusive of the fiduciary duty claims, is therefore only $0.25 per share. This equates to an additional $0.17 per share plus interest, *i.e.*, a "fair value" determination of $6.17 per share. The risk-adjusted value of the appraisal claim easily exceeds that amount. And normally, when an appraisal action is settled, the settlement is not subject to the risk and delay of a class action settlement. Here, the inclusion of the fiduciary claim in the global settlement created additional delay and risk that the settlement of appraisal claims fails because the Class settlement is rejected. The monthly interest on $8.41 per share at the statutory rate is approximately $0.07 per share. Moreover, the entirety of the appraisal claims allocation is being funded by Gain Capital, which is not a defendant in the fiduciary action. In sum, the circumstances of the funding, recovery and the strength of the appraisal claim justifies the appraisal allocation.

The allocation to the fiduciary claims exceeds their risk-adjusted value. Considering that the fiduciary claims could have succeeded at trial but easily recovered less in damages, or been dismissed in their entirety recovering nothing at all, the plan of allocation is exceedingly fair to the non-dissenting members of the Class. As discussed above, while JB Capital did not intend for this allocation in accepting the mediator's proposal, JB Capital has agreed to support it, recognizing it is a very favorable outcome for the Class.

## III. THE FEE REQUEST MERITS APPROVAL

Counsel may apply to the Court for an award of attorneys' fees and expenses from a common fund created by a settlement.[115] Delaware law "commit[s] the fee award to the discretion of the Court of Chancery."[116] The Court's role to play in reviewing such an application is to set a fair and reasonable fee.[117] The task is not cursory; it is subject to the same heightened judicial scrutiny that applies to the approval of a class action settlement.[118]

Prickett Jones respectfully requests an award of attorneys' fees and expenses equal to 25% of the Class recovery, which amounts to $6,025,320.[119]

### A. Prickett Jones's Fee Agreements Are Compelling Evidence that the Fee Request is Reasonable

Before addressing the *Sugarland* factors, stepping back to consider why the Court is reviewing the fee application in the first place is important. As it is almost always under Delaware law, the heightened review is to police a conflict-of-interest.

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115 *In re Dell Tech. Inc. Class V S'holders Litig.*, -- A.3d --, 2024 WL 3811075, at *7-8 (Del. Aug. 14, 2024).

116 *Id.*

117 *Id.*

118 *Id.*

119 This amount is all-in, inclusive of $96,615.09 expenses. Montejo Aff. ¶ 8. As disclosed in the Notice (¶60), if the Settlement is approved, Prickett Jones will also receive $222,895.88 ($0.06 per share) in attorneys' fees from the $0.25 above the $8.41 per share value of the Merger price plus interest the dissenters recover ($0.25*25%*3,566,334 dissenting shares).

Just as corporate fiduciary self-interested transactions are reviewed for entire fairness, fee applications are reviewed with heightened judicial scrutiny because "the plaintiffs' attorney's role changes from one of fiduciary for the clients to that of a claimant against the fund created for the clients' benefit."[120] "This divergence of interests requires a court to continue its 'third-party' role in reviewing common fund fee applications. There is no one to argue for the interests of the class, because class members with small claims often do not file objections to proposed settlements and fee applications."[121]

Delaware law concerning the judicial standard of review for conflicted fiduciary transactions has evolved over the last twenty years, placing greater weight on procedural safeguards and market evidence. Controlling stockholder transactions may be reviewed under business judgment deference;[122] disclosure to stockholders can cleanse problematic transactions;[123] even traditional methods used by this Court

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[120] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1045 (Del. 1996) (citations omitted).

[121] *Id*.

[122] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014).

[123] *See*, *e.g.*, J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1471–77 (2014); *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015); *In re Anaplan, Inc. S'holder Litig.*, 2024 WL 3086013, at *6 (Del. Ch. June 21, 2024) (explaining that *Corwin* cleansing is not intended to be applied narrowly).

to meet its statutory obligation to make an independent determination of "fair value" under Section 262 have given way to market evidence of value.[124] The indicia of reasonableness or fairness that have worked their way into these other contexts should also inform the Court's review of a fee application in representative litigation.

In deciding when entire fairness review should give way to the deferential business judgment rule, our Supreme Court explained that the adoption of *MFW* provided "the transactional structure that respected scholars believe will provide them the best protection, a structure where stockholders get the benefits of independent, empowered negotiating agents to bargain for the best price . . . plus the critical ability to determine for themselves whether to accept any deal that their negotiating agents recommend to them."[125]

Class members in representative litigation are also best protected with an analogous transactional structure. More than twenty years ago this Court noted that while a fee agreement does not absolve the Court of its duty to determine a reasonable fee, the "arm's-length agreement, particularly with a sophisticated client, as in this instance, can provide an initial 'rough cut' of a commercially reasonable

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[124] *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*, 177 A.3d 1 (Del. 2017); *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019).

[125] *M&F Worldwide Corp.*, 88 A.3d at 644.

fee."[126] With the greater emphasis now placed on market evidence in other contexts, it should be true that an arm's-length fee agreement negotiated by a sophisticated client is afforded even greater weight when setting a fee award today.

Sophisticated class representatives with significant "skin-in-the-game" negotiate reasonable attorney fees.[127] Indeed, this Court recently underscored a "client-driven" "negotiated cap on the fee award" that plaintiff's counsel could seek in appointing leadership in a derivative action.[128] The logical end of that reasoning is for this Court to deem negotiated terms by sophisticated litigants as compelling evidence that the fee is reasonable.

Class members also receive notice and have a right to object. If a class member is dissatisfied with the terms on which a sophisticated representative

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[126] *State of Wisconsin Investment Bd. V. Bartlett*, 2002 WL 568417, at *6 (Del. Ch. Apr. 9, 2002), *aff'd*, 808 A.2d 1205 (Del. 2002); *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 715 (Del. Ch. 2023) ("A separate source of evidence for determining an appropriate percentage of the results obtained comes from privately negotiated contingency fee agreements"), *aff'd*, 2024 WL 3811075 (Del. Aug. 14, 2024).

[127] *See*, *e.g.*, *Meyers v. Quiz-DIA LLC*, 2018 WL 1363307, at *10 (Del. Ch. Mar. 16, 2018) ("Courts give deference to decisions made by individuals who potentially must bear their own expenses precisely because they have skin in the game and an incentive to act rationally and efficiently.").

[128] *In re Fox Corporation Derivative Litig.*, 307 A.3d 979, 987 (Del. Ch. 2023).

plaintiff has engaged counsel, a class member may voice his or her concerns to the Court.[129]

Prickett Jones respectfully submits that under the facts of this case and the evolution of Delaware law concerning judicial review of conflicted transactions, its fee agreements with JB Capital and other dissenters – forged in "the crucible of objective market reality"[130] – is a better "yardstick" to determine the reasonableness of a fee and should be given considerable weight.

Prickett Jones is seeking the same 25% contingency fee that it contracted for with JB Capital. JB Capital is a sophisticated fund that manages assets worth over $180 million. JB Capital is a sophisticated litigant that has previously appeared in this Court, and other courts throughout the United States. Prickett Jones has

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[129] Class members are capable of making objections. *See*, *e.g.*, *In re AMC Entertainment Holdings, Inc. S'holder Litig.*, 299 A.3d 501, 507 (Del. Ch. 2023) (appointing special master to review "more than 3,500 communications from approximately 2,850 purported stockholders" concerning the proposed settlement). There even seems to be a highly sophisticated cottage-industry of professional objectors. *See*, *e.g.*, *In re Riverbed Technology, Inc. S'holder Litig.*, 2015 WL 5458041, at *2 (Del. Ch. Sept. 17, 2015) (where a law school professor who writes academically on class action settlement agency problems bought stock in the corporation for the specific purpose of making an objection.); *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016) (same); *Griffith v. Stein on behalf of Goldman Sachs Group, Inc.*, 214 A.3d 943 (Del. 2019) (same).

[130] *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991) ("The fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidable subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair.").

represented JB Capital for more than twenty years. Other dissenters negotiated with Prickett Jones for the same terms, including Goor, a former director of Gain Capital. Together, the dissenters hold 18% of the shares in the Class. Prickett Jones respectfully submits that the negotiated 25% fee should be awarded as a reasonable fee for the Class recovery.

### B. Application of the *Sugarland* Factors

The fee request is also supported by the *Sugarland* factors: (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.[131]

The benefit achieved is the "first and most important of the *Sugarland* factors."[132] As discussed above, the results achieved here are extraordinary: a 19% premium to the deal price for claims challenging a third-party public company merger approved by a board comprised of a majority of independent directors. The high-premium recovery confirms that JB Capital maximized its leverage and left nothing on the negotiating table. Successfully prosecuting difficult claims in a third-

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[131] *Dell Tech. Class V*, 2024 WL 3811075 at *8; *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).

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

party merger and achieving a significant percentage recovery on the transaction price should be rewarded with a higher fee award.

The time and effort of counsel has been referred to as a "cross-check" for the reasonableness of a fee award, but the factor relates to what was achieved not the hours that counsel worked.[133] Here, the time and effort of counsel extends more than four years, going back to JB Capital's public challenge to the Merger, through the prosecution of the appraisal action, the development of the fiduciary claims and surviving the dismissal of the Class fiduciary claims. Each of the phases culminate in the benefit achieved. Without JB Capital's pursuit of appraisal, the misleading narrative in the Proxy would not have been discovered, and without JB Capital's public challenge, including meeting with ISS, the disclosure claims as they relate to ISS's timid recommendation for the Merger would not have been as forceful.

Under the time and effort rubric, the Court also considers the stage of litigation in which the Settlement was reached. The Court does not, however, "encourage[e] the churning of wheels and devoting unnecessary hours to litigation in order to be able to present larger numbers to the Court."[134] Here, the Settlement came about after

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[133] *See id.* at 1258.

[134] *Seinfeld v. Coker*, 847 A.2d 330, 333 (Del. Ch. 2000).

meaningful litigation.[135] As set forth above, document discovery was essentially complete, with hundreds of thousands of pages produced in response to multiple document requests, third-party subpoenas and motions to compel. JB Capital was deposed, and other depositions would have commenced had a settlement not been reached. While limited resources were expended on experts, JB Capital is a highly skilled and experienced investor and Prickett Jones is an expert in business valuation litigation, capable of performing complicated financial analysis. And while parties engaged in mediation in advance of Defendants' depositions, unlike other cases where depositions could move the needle or provide leverage, Prickett Jones's joint-representation of Goor provided unique insight and knowledge from someone that was "in the room" objecting to the Merger and allowing Defendants to depose Goor in advance of mediation posed a reciprocal risk to the Class. Since its engagement by JB Capital through the time of the Stipulation, Prickett Jones expended 1,720 lawyer hours on the case.[136] If the Settlement is approved and the fee award is

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[135] *See Americas Mining*, 51 A.3d at 1260 (supporting a range of 15-25%).

[136] Montejo Aff. ¶ 7.

granted, Pricket Jones would be paid a total of $6,248,215.99,[137] amounting to an average hourly rate of $3,574,[138] well within this Court's precedents.[139]

The complexities of the litigation are Prickett Jones's bailiwick. That probably does not enhance a fee award, but it should not detract from one either.

The contingency factor, however, should weigh heavily towards a higher fee award. As noted above, Prickett Jones took on this engagement on an entirely contingent basis at a time when the law was stacking against the claims and the financial markets were in chaos. There was no certain outcome, no certain upside; indeed, even bankruptcy of the Company was a possibility. Very few cases present this level of risk. From it came a $24 million benefit for the Class. The risk should be rewarded with a higher fee award.

Finally, Prickett Jones leaves it to the Court to consider its standing and ability, as well as counsel for the Defendants, all of whom are well known to the Court.

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[137] 25% of Class recovery ($6,025,320) + 25% of dissenter recovery above Merger price plus interest ($222,895.88).

[138] ($6,025,320 + $222,895.88 - $96,615.09 (expenses)) / 1,720.75 hours.

[139] *See Dell Techs. Inc. Class V*, 300 A.3d at 726 ("multiplier of seven times lodestar" is not "excessive under this court's precedents").

## CONCLUSION

For the reasons stated above, JB Capital and Prickett Jones respectfully request that the Court certify the Class, enter the Final Order approving the Settlement as fair, reasonable and in the best interests of the Class and grant the requested award of attorneys' fees and expenses.

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