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Case No. 2023-0096-LWW

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GEORGE ASSAD and CHRISTOPHER L. BEUER, Plaintiffs, v. TPG INC., TPG CANNES AGGREGATION, L.P., SHARAD S. MANSUKANI, PAUL V. CAMPANELLI, STEPHEN C. FARRELL, and W. CARL WHITMER, Defendants.	)	C.A. No. 2023-0096-LWW **PUBLIC INSPECTION VERSION FILED JUNE 20, 2024**

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

INTRODUCTION

This class action (the "Action") and its proposed settlement for a cash payment of $19.5 million (the "Proposed Settlement") arise from TPG, Inc.'s ("TPG") acquisition of the minority shares of Convey Health Solutions Inc. ("Convey" or the "Company") for $10.50 per share (the "Transaction"). The Proposed Settlement represents an 11.7% premium to the Transaction price, which is particularly noteworthy given that the Transaction consideration itself represented a 143% premium to Convey's trading price.

After acquiring Convey from New Mountain Capital ("NMC"), TPG took Convey public through an initial public offering (the "IPO") but retained 74.7% of the Company's outstanding shares and maintained control over the Company's six-member board of directors (the "Board"). Plaintiffs George Assad and Christopher Beuer (together, "Plaintiffs") alleged that after the IPO, Convey performed well but its stock price was artificially depressed due to, among other things, its low public float and complicated operating model, presenting TPG with the opportunity to acquire Convey for less than fair value.

Through a books-and-records investigation conducted pursuant to 8 *Del. C.* § 220 ("Section 220"), Plaintiffs developed evidence that both members of the special committee (the "Special Committee") that approved the Transaction—Defendants Paul Campanelli ("Campanelli") and W. Carl Whitmer ("Whitmer")—

harbored ties to TPG. For that reason, and because the Transaction was not subject to approval by a majority of Convey's public stockholders, Plaintiffs' complaint established that the Transaction was presumptively subject to entire fairness review.

After Plaintiffs filed their complaint and it became clear that Defendants would not move to dismiss the Action, Plaintiffs immediately pursued discovery. Plaintiffs (i) served requests for production and two sets of interrogatories; (ii) served eighteen subpoenas; (iii) reviewed more than 240,000 pages of documents produced by Defendants and third parties; (iv) reviewed over 1,700 privilege log entries and exchanged correspondence in connection therewith; and (v) deposed Campanelli and scheduled and prepared for additional depositions. Critically, during discovery, Plaintiffs developed evidence that TPG concealed from the Special Committee outreach by potential bidders to acquire the Company, causing the Special Committee to pursue a deal with TPG exclusively.

In January 2024, the parties attended a mediation to explore potentially resolving the Action. While the Action did not settle during the mediation, the parties continued to work with the mediator, ultimately accepting a double-blind mediator's recommendation, culminating in the Proposed Settlement.

The Proposed Settlement is an excellent result that reflects the strengths of Plaintiffs' claims weighed against the challenges, obstacles, and risks of continued

litigation. As discussed below, the Proposed Settlement consideration comprises a significant percentage of both the Transaction price and what Plaintiffs could realistically expect to recover at trial. Thus, Plaintiffs request that the Court certify the Class (defined below) and approve the Proposed Settlement.

Plaintiffs also seek approval of a $4,300,000 fee award and reimbursement of out-of-pocket expenses of $109,249.86 (the "Fee Award"). After accounting for expenses, the award of attorneys' fees represents 22.2% of the settlement fund and reflects a relatively modest multiplier of 1.29x to Plaintiffs' counsel's lodestar prosecuting this Action through February 27, 2024. Plaintiffs and their counsel believe the Fee Award fairly compensates Plaintiffs' counsel for, among other things, the significant financial benefit conferred on the Class by the Proposed Settlement, and Plaintiffs' counsel's investment of time and resources on a fully-contingent basis.

STATEMENT OF FACTS[1]

A. TPG Acquires Convey, Takes It Public, Maintains Control, Then Takes Convey Private

Convey is a specialized healthcare technology and services company that provides technology-enabled solutions and advisory services to insurance plans and pharmacy benefit managers administering benefits under government-sponsored health plans, including Medicare Advantage plans.[2] TPG acquired Convey from NMC in 2019, then took the Company public via a June 2021 IPO at $14 per share.[3] After taking Convey public, and until the Transaction, TPG controlled Convey, holding approximately 74.7% of Convey's voting power.[4]

By March 2022, it was well known that Convey's stock price was trading below its true value, as several contemporaneous emails confirm.[5] Accordingly, TPG began assessing a take-private transaction, expecting that a near-term

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[1] Plaintiffs' factual recitation is based on certain public documents as well as documents produced in discovery, which are attached to the Transmittal Affidavit of Seth T. Ford ("Ford Aff.") filed herewith. Plaintiffs submitted selected exhibits, and will submit the remaining cited documents at the Court's request.

[2] *See* Sept. 1, 2022 Information Statement (Schedule 14C) (the "Information Statement") at 1, attached hereto as Exhibit 1.

[3] Information Statement at 10. After the IPO, Convey shares never traded above the $14 per share IPO price.

[4] *Id*. at 24.

[5] Ex. 3; CONVEY_SPCOMM-0020545; TPG_CNVY_00014647 at 647-648.

acquisition at [redacted] per share could offer a 2026 exit at a price equivalent to [redacted] [last twelve months] EBITDA."[6]

Convey's six-member Board consisted of Sharad Mansukani ("Mansukani"), Steve Farrell ("Farrell"), Campanelli, and Whitmer, as well as two TPG representatives, Katherine Wood ("Wood") and Todd Sisitsky ("Sisitsky").[7] Plaintiffs developed evidence indicating that Convey's Board was either not independent from TPG or otherwise conflicted:

- Sisitsky joined TPG in 2003 and is a TPG President and board member.[8]
- Wood joined TPG in 2009 and is a TPG Partner.[9]
- Mansukani was a former TPG Partner and has been a TPG Senior Advisor since 2005.[10] He also shares a number of co-investments with TPG, sat on the board of at least seven TPG portfolio companies,[11] and self-identified as a TPG representative at a Convey Board meeting.[12]

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[6] Ex. 2 at 424.

[7] Information Statement at 19-20.

[8] *Id*. at 20.

[9] *Id*. at 19.

[10] Ex. 8 at 884; *see also* TPG_CNVY_00008465 at 466 (TPG presentation noting its "decade-long relationship" with Mansukani).

[11] Information Statement at 19.

[12] CONVEY_00042559 (Mansukani "will hold fort down" for TPG at a Board meeting).

- Convey CEO Farrell rolled over 80% of his Convey equity into the post-close company.[13]

As discussed below, the other two directors (i.e., the Special Committee members) also had significant ties to TPG.

B. The Special Committee

On May 3, 2022, TPG informed members of the Board that TPG was considering acquiring the Convey common shares that it did not already own.[14] At the same meeting, the Board formed the Special Committee, comprised of Whitmer and Campanelli.[15] The evidentiary record established that both Special Committee members had longstanding relationships with TPG.

Whitmer was recruited to join the Board by TPG Senior Advisor Mansukani.[16] Whitmer and Mansukani shared a nearly two-decade relationship that began while they worked together at a TPG portfolio company, IASIS Healthcare, which TPG acquired in 2004 (and thereafter promoted Whitmer to CEO).[17] Whitmer derived a

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[13] Information Statement at 19, 59.

[14] Ex. 8.

[15] *Id*. at 886.

[16] *See* Ex. 24; *see also* CONVEY_SPCOMM-0019962 ([redacted]).

[17] Ex. 11.

considerable portion of his net worth from TPG's[18] 2017 sale of IASIS.[19] Mansukani also lobbied to appoint Whitmer to the board of Monogram Health, another TPG portfolio company.[20] In total, Whitmer has served as a director for at least four TPG portfolio companies.[21] On numerous occasions, and as late as February 2021, he served as an advisor to TPG.[22] He also held limited partnership interests in at least three TPG-affiliated funds.[23]

Additionally, Whitmer and Mansukani have attended dinners and concerts with each other and their spouses,[24] and in 2022 alone discussed a potential golf outing,[25] hunting trip,[26] and beach trip.[27] Also in 2022, Mansukani offered to have TPG "set up [a] great couples Viking cruise" for himself and Whitmer.[28] Whitmer

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[18] Between 2014 and 2016, Whitmer earned over $10 million as IASIS CEO. Compl. ¶ 18.

[19] Ex. 11 at 684-85.

[20] CONVEY_00053006 at 011, 018; Information Statement at 20.

[21] Ex. 11 at 684.

[22] Ex. 8 at 884; TPG_CNVY_00030066 at 109.

[23] Ex. 11 at 685.

[24] Ex. 26 at Response 12.

[25] CONVEY_00053021.

[26] CONVEY_00053077.

[27] CONVEY_SPCOMM-0019885.

[28] CONVEY_00053044 at 046; *see also* CONVEY_SPCOMM-0019891; CONVEY_SPCOMM-0019903 (Whitmer to Mansukani: [redacted]).

has also worked so closely with TPG's Sisitsky and Wood as an IASIS executive that Whitmer sent Wood a gift when her child was born.[29]

Campanelli was recruited to the Board by Mansukani and Whitmer in February 2022.[30] Campanelli has known Mansukani for at least a decade and considers Mansukani a friend.[31] Their longstanding relationship arose from Campanelli's service as CEO of Par Pharmaceutical ("Par"), which TPG acquired in 2012.[32] After TPG sold Par to Endo Pharmaceuticals ("Endo"), and named Campanelli as Endo's CEO, Campanelli solicited Mansukani and Whitmer's interest in joining Endo's board of directors, on which Sisitsky served.[33] Mansukani joined.[34] The consideration Campanelli received in connection with Par's sale to Endo was a material source of his net worth.[35]

Moreover, Mansukani and Campanelli have socialized together on dozens of occasions, including golfing (with Whitmer) and vacationing together with their

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[29] Ex. 26 at Response 12.

[30] Ex. 27 at 45:3-23; Ex. 25 at Response 12.

[31] *Id*. at 43:25-44:7; Ex. 25 at Response 12; *see also* CONVEY_00053040 (Mansukani referring to Campanelli as a "dear friend").

[32] Ex. 27 at 21:2-4, 36:10-15; Ex. 25 at Response 12.

[33] *Id*. at 39:7-40:11.

[34] *Id*. at 40:21-24.

[35] *Id*. at 37:19-38:8; Ex. 11 at 684.

spouses.[36] Campanelli also has a longstanding relationship with Sisitsky since 2010 when the pair worked closely together at Par. Campanelli and Sisitsky have socialized, including dining and attending TPG-sponsored events together.[37]

When pressed at his deposition, Campanelli described the Special Committee's selection process as a "process of elimination" because Convey's other directors were *more* conflicted than he and Whitmer.[38] Plaintiffs' counsel also secured testimony revealing that the Special Committee's independence remained an open, debated question less than three weeks before they approved the Transaction.[39]

C. The Special Committee Negotiates Only with TPG

On May 4, 2022, TPG offered to acquire Convey for $9.00 per share.[40] TPG explained that it had no interest in selling its stake and intended to "announce a transaction by the end of May, with the preference to announce a transaction as soon as possible."[41]

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[36] Ex. 27 at 41:20-42:20; Ex. 25 at Response 12; *see also* CONVEY_00053037.

[37] *Id*. at 35:5-9; Ex. 25 at Response 12.

[38] Ex. 27 at 113:21–114:8.

[39] *Id*. at 250:4–251:2; 253:18–254:5; 258:12–20.

[40] Information Statement at 24; Ex. 10.

[41] Ex. 10 at 742.

Although the Special Committee retained qualified advisors, Plaintiffs developed evidence of potential conflicts. Convey's counsel—Cravath, Swaine & Moore LLP ("Cravath")—picked Simpson Thacher & Bartlett LLP ("Simpson Thacher") as the Special Committee's legal advisor.[42] Simpson Thacher had recently represented [redacted], another TPG portfolio company.[43] Then, following urging from Convey management,[44] the Special Committee accepted Simpson Thacher's recommendation to retain Centerview Partners LLC ("Centerview") as its financial advisor.[45] Centerview's conflicts included that: (i) [redacted];[46] (ii) it was actively seeking—then secured—an engagement with another TPG portfolio company;[47] (iii) it [redacted];[48] and (iv) Centerview's fee was largely contingent on the Transaction closing.[49]

[42] Ex. 7.

[43] Ex. 11 at 685-86.

[44] Ex. 9; CONVEY_SPCOMM-0019958.

[45] CENTERVIEW_00015558 at 559.

[46] CENTERVIEW _00003861 at 862.

[47] *Id*. at 861.

[48] CENTERVIEW_00015558 at 558.

[49] *See* Ex. 12 at 788–89.

Although the Special Committee identified twelve potential strategic acquirers, it worried that a formal market check via "public disclosure [of TPG's offer] could adversely impact TPG's willingness to proceed," and thus determined to forgo any pre- or post-signing market check.[50] In his deposition, Campanelli admitted his belief that the Special Committee was hamstrung by the restrictions TPG imposed,[51] which "created some challenges for the special committee"[52] and resulted in process "imperfections," such that the Special Committee could only "d[o] the best that we could" with the "unusual situation."[53]

On June 6, 2022, the Special Committee countered with $12 per share, conditioned on a majority vote of Convey's outstanding minority shares.[54] TPG objected to the vote and "stressed their preference . . . [to] move quickly and possibly sign within the next seven days."[55]

The evidentiary record indicates that the Special Committee wrongly assumed that no third parties were seriously interested in acquiring Convey. On June 8, 2022,

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[50] Ex. 11 at 688.

[51] Ex. 27 at 162:24–163:20.

[52] *Id*. at 158:13–25.

[53] *Id*. at 27 at 267:10–268:4.

[54] Ex. 11 at 697.

[55] *Id*. at 697-98.

[redacted]—contacted Farrell to disclose [redacted] interest in acquiring Convey.[56] Farrell instructed [redacted] and [redacted] to discuss their interest directly with TPG.[57] [redacted], emailed Sisitsky a few hours after [redacted] call with Farrell, requesting a call to discuss their interest.[58] Sisitsky, [redacted] then held a joint Zoom call on Saturday, June 11.[59] During that call, TPG evidently shut down [redacted] interest.[60]

On Monday, June 13, 2022, TPG increased its offer to $10 a share and rejected a majority of the minority vote requirement.[61] The same day, the Special Committee countered at $10.50 per share, and instructed its advisors to discuss a potential modified majority of the minority vote that would permit TPG to vote a portion of its shares alongside Convey's minority stockholders.[62]

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[56] Ex. 14.

[57] Ex. 11 at 702.

[58] Ex. 16; [redacted]_00001101; Ex. 17.

[59] [redacted]_00001113.

[60] Ex. 22 ([redacted]).

[61] Ex. 11 at 699.

[62] *See Id*. at 700.

On June 15, 2022, TPG extended a final offer pursuant to which it agreed to pay $10.50 per share but rejected the modified majority of the minority vote.[63] TPG's offer also included a request that the Special Committee immediately approve the transaction, so TPG could "ge[t] the roll overs [in place] in time for the Tuesday announcement" less than a week away.[64]

The following day, the Special Committee belatedly learned from its counsel that [redacted] approached Farrell about their acquisitive interest and that Farrell directed [redacted] to TPG, but it was not clear "whether [redacted] was simply looking for information[,]" and Simpson Thacher advised the Special Committee that "if [redacted] genuinely desired to make an offer" it "would have reached out to TPG[.]"[65] The Special Committee also learned that TPG had purportedly not "received any contacts related to the prior inquiry by [redacted]"[66] With this information, the Special Committee determined that it was not within the Company's "best interests . . . to have direct communications with [redacted]"[67]

Instead, the Special Committee approved TPG's $10.50 offer.

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[63] Information Statement at 30; Ex. 18.

[64] Ex. 18; SP-COMM-STB-0020708.

[65] Ex. 11 at 702.

[66] *Id*. at 703.

[67] *Id*. at 702.

D. The Board Approves the Transaction

On June 20, 2022, the Special Committee discussed the Transaction's "key terms," which included equity rollovers for management and members of the Board, separate and apart from the Rollover and Support Agreements.[68]

At the June 20 meeting, Centerview delivered its fairness presentation and opined that the Transaction consideration was fair to Convey's public stockholders.[69] At the end of the meeting, the Special Committee recommended the Transaction.[70] The Board met immediately thereafter and approved the Transaction.

E. TPG Delivers the Written Consent, Shuts Down Third-Party Interest, and the Transaction Closes

TPG delivered the written consent on June 21, 2022, the day the Transaction was announced, foreclosing any potential superior offers to acquire Convey.

Nevertheless, [redacted] continued to signal potential interest in a transaction with Convey.[71] [redacted] contacted Convey several times between June 27 and July 8, 2022, but was rebuffed.[72] [redacted] similarly [redacted]

[redacted]

[68] *Id*. at 705.

[69] *Id*. at 707.

[70] *Id*. at 710-715.

[71] Ex. 23; [redacted]_0000094.

[72] Ex. 11 at 717-18.

[redacted].”[73] Internal analyses shared between [redacted] reflected a potential bid of [redacted] per Convey share.[74]

On October 7, 2022, the Transaction closed.

F. Procedural History

1. Plaintiffs Initiate the Action

On August 2, 2022 and August 17, 2022, Plaintiffs Beuer and Assad initiated their books and records investigations pursuant to Section 220.[75] Because TPG already approved the Transaction by written consent and could close the Transaction within twenty days of the Information Statement's publication, Beuer quickly filed a complaint to enforce his books and records rights under Section 220.[76] Assad shortly followed suit, filing a books and records complaint on September 19, 2022.[77]

On January 27, 2023, Plaintiffs jointly filed the Verified Class Action Complaint (the “Complaint”) asserting claims for breach of fiduciary duty against TPG, as Convey's controlling stockholder, and the Director Defendants.

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[73] [redacted] 0000090 [redacted] ”).

[74] Ex. 23; [redacted]_0000094.

[75] Settlement Stipulation ¶¶ B & E.

[76] *Id.* ¶ C.

[77] *Id.* ¶ H.

2. The Evidentiary Record

On February 23, 2023, Plaintiffs propounded their first set of interrogatories and requests for production on Defendants. Thereafter, the parties negotiated ESI protocols.[78]

In March 2023, the parties negotiated a stipulation dismissing defendants Wood and Sisitsky (the "Former Defendants") from the Action—given their recusal from the Transaction vote—in exchange for their agreement to participate in fact discovery as though they were parties, including document and deposition discovery. The Court granted the stipulation on March 27, 2023.[79]

Also on March 27, 2023, (i) Campanelli and Whitmer and (ii) TPG, Mansukani and Farrell filed Answers to the Complaint.[80]

Plaintiffs' continued discovery efforts included (i) serving a second set of interrogatories on Defendants and the Former Defendants; (ii) serving eighteen subpoenas;[81] (iii) reviewing more than 240,000 pages of documents from

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[78] Trans. ID 69209322.

[79] Trans. ID 69649167.

[80] Trans. ID 69652700; Trans. ID 69662274.

[81] Plaintiffs subpoenaed (1) Ares Capital Management LLC, (2) Centerview Capital Technology Fund A (Delaware) LP, (3) Centerview, (4) Centerview Capital Technology Fund (Delaware) LP, (5) EIR, (6) NMC, (7) PSP Investments Credit USA LLC, (8) Evercore Group LLC, (9) Sauce Labs Inc., (10) Deloitte Touche Tohmatsu Ltd., (11) Simpson Thacher, (12) Davis Polk & Wardwell LLP ("Davis Polk"), (13) Cravath, (14)

Defendants and third parties;[82] and (iv) reviewing over 1,700 privilege log entries and exchanging correspondence in connection therewith. Plaintiffs also worked with a financial expert to develop damages analyses.

Throughout 2023, Plaintiffs responded to Defendants' interrogatories and requests for production, and produced 1,206 pages of documents. On December 20, 2023, Plaintiffs deposed Campanelli.

3. The Parties Reach a Mediated Settlement

After preliminary attempts at counsel-to-counsel settlement discussions were unsuccessful, the parties agreed to mediate (the "Mediation"). The parties retained David M. Murphy, Esq. (the "Mediator") for an in-person mediation on January 17, 2024. Prior to the Mediation, Plaintiffs submitted two mediation statements along with seventy-two exhibits addressing liability and damages. The nearly ten-hour Mediation failed to result in a settlement. However, the parties continued to work with the Mediator and ultimately received a double-blind mediator's recommendation to resolve the Action in exchange for a $19.5 million cash payment, which the parties accepted.

Convey, (15) Deloitte Tax LLP, and (16) Deloitte & Touche LLP. Plaintiffs later served a second subpoena on each of Simpson Thacher and Davis Polk.

[82] Settlement Stipulation ¶ W.

The parties executed the Stipulation and Agreement of Settlement, Compromise, and Release (the "Settlement Stipulation") on March 29, 2024, and submitted it to the Court on April 1, 2024.[83]

On April 5, 2024, the Court entered the scheduling order (the "Scheduling Order") approving dissemination of the notice of settlement (the "Notice") and scheduling a hearing on approval of the Proposed Settlement for July 12, 2024. On May 13, 2024, pursuant to the Scheduling Order, the settlement administrator mailed the Notice to the Class, and also caused the Notice and the Stipulation to be posted to a website created for the Action by the settlement administrator.

[83] Trans. ID 72263773.

ARGUMENT

I. THE CLASS SHOULD BE CERTIFIED

A. Applicable Standard

"Certification of a class under Court of Chancery Rule 23 is a two-step process, which requires that the purported class meet all four criteria within Court of Chancery Rule 23(a) and at least one of the criteria within Court of Chancery Rule 23(b)."[84]

On April 5, 2024, the Court entered the Scheduling Order, which, among other things, preliminary certified, pursuant to Rule 23, a non-opt out class (the "Class") as follows:

> All former holders of Convey common stock at any time between announcement of the June 20, 2022 Agreement and Plan of Merger between Convey and TPG through the closing of the Transaction, together with their successors and assigns (the "Class"). Excluded from the Class are (i) Defendants and Former Defendants in this Action; and (ii) any Person, firm, trust, corporation or other entity related to or affiliated with any of Defendants or Former Defendants.

Final certification of the Class is appropriate because this Action satisfies Rule 23(a) and fits "within the framework provided for in subsection (b) [of Rule 23]."[85]

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

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

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

Under Rule 23(a), a class must meet four requirements: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (iv) the representative parties will fairly and adequately protect the interests of the class.[86]

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

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

There are likely thousands of Class members in this Action. Indeed, as of June 30, 2022, there were more than 15.8 million shares of Convey common stock issued and outstanding that were not owned by the Company's officers and directors or rollover participants (according to the Information Statement).[88] It would be

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

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

[88] *See* Information Statement at 59, 95.

impracticable to join all of the potential plaintiffs before this Court. Accordingly, the Class satisfies the numerosity requirement of Rule 23(a).

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

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

The factual and legal issues in this Action are common for all members of the Class. They include: (i) whether Defendants breached their fiduciary duties in connection with the Transaction; and (ii) the extent of damages arising from any such misconduct. Because this Action asserts claims that "implicate the interests of all members of the proposed class of shareholders," it meets the commonality requirement of Rule 23(a)(2).[91]

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

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

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

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

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

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

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

Rule 23(a)(4) requires that the class representatives will "fairly and adequately protect the interests of the class."[94] Class representatives are generally adequate if (i) there is no "economic antagonism[] between the representative and

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[92] *Nottingham Partners*, 564 A.2d at 1094.

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

[94] *Nottingham Partners*, 564 A.2d at 1094-95.

the class," and (ii) the class representatives are represented by "qualified, experienced, and competent" counsel capable of prosecuting the litigation.[95] This Court has previously noted that "the requirements for an 'adequate' class representative are not onerous."[96]

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

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

In addition to the requirements of Court of Chancery Rule 23(a), a class may be certified only if "it fits into one of the three categories specified in Court of Chancery Rule 23(b)."[97] "Delaware courts 'repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2).'"[98]

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

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

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

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

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

Rule 23(b)(1) provides for class certification (i) where the prosecution of separate actions by or against individual members of the class would create a risk of "inconsistent or varying adjudications which would create incompatible standards of conduct for the opposing party," and (ii) "adjudications with respect to individual members of the Class which would as a practical matter be dispositive of the interests of the other members not parties to this action."[99]

Absent certification, there is a significant risk that incompatible standards would be created for Company stockholders.[100] Among other things, if Class members were forced to individually pursue their claims, identical members could be awarded different per-share damages, producing inequitable results and establishing incompatible standards for Defendants.[101]

Furthermore, if no class is certified, adjudication of claims held by individual plaintiffs would, as a practical matter, prejudice non-parties with identical claims

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[99] *In re Countrywide S'holders Litig.*, 2009 WL 846019, at *13.

[100] *Turner v. Bernstein*, 768 A.2d 24, 35 (Del. Ch. Aug. 11, 2000).

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

and substantially burden the Court with an inefficient means of resolving the action.[102]

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

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

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

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

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

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

D. The Remaining Requirements of Rule 23 Are Satisfied

Plaintiffs and Plaintiffs' counsel meet the remaining requirements of Rule 23. Plaintiffs executed affidavits in compliance with Rule 23 stating their support for the Proposed Settlement.[105] Notice was mailed to Company stockholders on or about May 13, 2024.[106] Notice was also posted to the settlement website.[107] No objections have been received.

The Proposed Settlement also meets the requirements of Rule 23(f)(5):

- Rule 23(f)(5)(A) is satisfied because, for the reasons set forth throughout, Plaintiffs and their Counsel have adequately represented the Class;
- Rule 23(f)(5)(B) is satisfied because adequate notice of the Proposed Settlement hearing was provided;[108]
- Rule 23(f)(5)(C) is satisfied because, as set forth at pp. 18 and 46-47, the Proposed Settlement was negotiated at arm's-length; and
- Rule 23(f)(5)(D) is satisfied because, as set forth *infra* at pp. 29-48, the relief provided for the Class falls within a reasonable range of reasonableness, taking into account (i) the strength of the claims; (ii) the costs, risks, and delay of trial

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[105] *See* Affidavits of Christopher L. Beuer and George Assad in Support of Proposed Settlement and Award of Attorneys' Fees and Expenses.

[106] At least ten calendar days prior to the Settlement Hearing, Plaintiffs will file with the Court the appropriate proof of mailing and publication of the Notice as required by the Scheduling Order. *See* Scheduling Order ¶ 13.

[107] *See* Notice of Pendency and Proposed Settlement of Class Action, https://conveystockholderlitigation.com.

[108] *See supra* n.106.

and appeal; (iii) the scope of the release; and (iv) any objections to the Proposed Settlement.

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

A. Applicable Standard

Delaware favors the voluntary settlement of contested claims.[109] When deciding whether to approve a proposed settlement of a stockholder class action, the Court need not decide any of the issues on the merits but rather looks to the facts and circumstances upon which the plaintiff's claims are based and exercises its informed judgment as to whether the proposed settlement is fair and reasonable.[110] The "facts and circumstances" to be considered by the Court include the (i) probable validity of the claims; (ii) apparent difficulties in enforcing the claims through the courts; (iii) collectability of any judgment recovered; (iv) delay, expense and trouble

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

[110] *Prezant v. De Angelis*, 636 A.2d 915, 921 (Del. 1994); *see also Wayne v. Utilities & Indus. Corp.*, 1979 WL 2699, at *3 (Del. Ch. July 19, 1979) ("The function of this Court in reaching a decision as to whether or not to approve a proposed settlement of a derivative stockholders' action in a situation in which the intrinsic fairness of the settlement must be tested, is to exercise its business judgment.").

of litigation; (v) amount of the compromise as compared with the amount of any collectible judgment; and (vi) views of the parties involved.[111]

In evaluating the fairness of a proposed settlement, the Court's "principal focus" is to compare the benefits achieved against the nature and merits of the released claims.[112] Effectively, the Court will weigh the "give" (i.e., the value of the claims released) against the "get" (i.e., the value of the consideration obtained) to "determine whether the settlement falls within a range of results that a reasonable party in the position of the plaintiff, not under any compulsion to settle and with the benefit of the information then available, reasonably could accept."[113]

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

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

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

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

B. The Proposed Settlement Confers Substantial Benefits

The all-cash $19.5 million Proposed Settlement consideration is an "obvious and self-pricing benefit" for the Class.[114] It equates to approximately $1.23 per share[115] for each Class Member (before accounting for administrative costs and attorneys' fees), representing an 11.7% premium to the $10.50 per share value of the Transaction consideration.[116] This is especially noteworthy considering that the Transaction consideration itself represented a 143% premium to Convey's trading price.[117] Nonetheless, Plaintiffs were able to secure a significant additional premium for the Class in the Proposed Settlement.

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

[115] Based on a Class of approximately 15.8 million shares, after excluding Defendants' Former Defendants' and their affiliates' (including rollover participants) shares, the $19.5 million Settlement Consideration would amount to approximately $1.23 per share.

[116] The $1.23 per share Settlement consideration is equivalent or superior to other per share valuations of settlement funds approved in recent cases. *See, e.g.*, *Ark. Teacher Ret. Sys. v. Alon USA Energy, Inc.*, C.A. No. 2017-0453-KSJM (Del. Ch. Oct. 1, 2021) (Brief) (Trans. ID 66983705); (Del. Ch. Oct. 29, 2021) (Transcript) (approving settlement of $1.40 per share in case involving transaction prices valued at either $12.13 or $13.39); *Chester Cty. Emps.' Ret. Fund v. KCG Holdings, Inc., et al.*, C.A. No. 2017-0421-KSJM (Del. Ch. Mar. 31, 2020) (TRANSCRIPT), at 30-31 (approving settlement of $0.47 per share in case involving transaction price of $20 per share).

[117] Convey Health Solutions Holdings, Inc., Press Release, *Convey to Be Taken Private by TPG* (Form 8-K, EX-99.1) (June 21, 2022).

This Court "considers the premium to the deal price as a rough proxy for the strength of the settlement,"[118] and has held that while settlements approximating "1 to 2 percent of equity value" are fair, "[a]n exceptional result is at around the 5 percent level[.]"[119] Here, the 11.7% premium to the Transaction price is an "exceptional result" for the Class,[120] and compares extremely favorably to numerous recent settlements approved by this Court, including:

- *Dell* (4.2% premium to transaction price);[121]
- *MSGE* (9% premium to transaction price);[122]
- *GCI Liberty* ($1.5% premium to transaction price);[123]
- *Starz* (2.1% premium to transaction price);[124]

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[118] *Garfield*, C.A. No. 2018-0917-KSJM, Tr. at 24.

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

[120] *See id.*

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

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

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

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

- *AVX* (4.8% premium to transaction price);[125]

- *NCI* (8% premium to transaction price);[126]

- *New Senior* (8.2% premium to transaction price);[127]

- *AmTrust* (3.8% premium to transaction price);[128]

- *Pivotal* (3% premium to transaction price);[129]

- *Nutraceutical* (5.8% premium to transaction price);[130]

- *ExamWorks* (6.2% premium to transaction price);[131]

- *Alon* (premium to transaction price between 10.4% and 11.6%);[132] and

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

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

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

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

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

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

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

[132] *Ark. Teacher Ret. Sys. v. Alon USA Energy, Inc. et al.*, C.A. No. 2017-0453-KSJM (Del. Ch. Oct. 1, 2021) (BRIEF) (Trans. ID 66983705); (Del. Ch. Oct. 29, 2021) (TRANSCRIPT).

- *KCG* (2.3% premium to transaction price).[133]

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

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

1. Plaintiffs' Liability Case

Plaintiffs believed that the evidence they developed in discovery gave them solid arguments at trial to establish Defendants' liability in connection with the Transaction. Because TPG undisputedly controlled the Company[134] and stood on both sides of the Transaction, the Court would have presumptively applied the entire fairness standard of review to the Transaction.[135] Since TPG approved the Transaction by written consent without a stockholder vote,[136] the best that Defendants could have hoped for was a burden shift to Plaintiffs to prove the

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

[134] *See* Non-Committee Defendants' Answer and Affirmative Defenses to Verified Class Action Compl. ¶ 27 (Mar. 27, 2023) (Trans. ID. 69662274).

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

[136] *See* Ex. 11 at 701.

Transaction was entirely fair, assuming that the Special Committee was independent and properly functioning in approving the Transaction.[137]

Plaintiffs, however, uncovered evidence indicating that the entire Board, including the Special Committee members, likely lacked independence from TPG and/or had disabling conflicts of interest, suggesting that the burden of proving entire fairness would have remained with the Defendants. Indeed, deposition testimony elicited and documents adduced in discovery demonstrated that each member of the Board was likely conflicted in connection with the Transaction.[138] For example, Plaintiffs obtained documentary evidence revealing that Special Committee member Whitmer derived a considerable portion of his net worth from TPG, and has a decades-long friendship with TPG Senior Advisor Mansukani, who recruited Whitmer to serve on Convey's Board.[139] Indeed, until Campanelli intervened,

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

[138] *See* Ex. 8 at 884 (listing directors' ties to TPG); Ex. 11 at -683–85 (Board minutes discussing special committee members' connections to TPG); Ex. 27 (stating that the Special Committee members were chosen through a "process of elimination" to be the "most appropriate" members since Convey's other directors were *more conflicted*) (emphasis added).

[139] *See* Ex. 11 at 684–85; Ex. 26 at 21–22; Ex. 24; CONVEY_SPCOMM-0019962; CONVEY_00053021; CONVEY_SPCOMM-0019885.

Whitmer was subject to removal from the Special Committee because of his conflicts.[140]

Plaintiffs likewise obtained deposition testimony and documentary evidence revealing that Special Committee member Campanelli also had a longstanding friendship and vacationed with Mansukani, was part of a social group with TPG and Cravath employees, and obtained a considerable portion of his net worth through TPG's acquisition and subsequent sale of Par, where Campanelli served as CEO.[141]

Under the entire fairness standard, Defendants are required to affirmatively prove "to the court's satisfaction that the transaction was the product of *both* fair dealing and fair price."[142] Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained."[143] "Fair price relates to the economic and financial considerations of the proposed merger[.]"[144]

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[140] Ex. 27 at 254:6–20.

[141] *See* Ex. 25 at 21–22; Ex. 11 at 684–85; CONVEY_00052585 at 586; Ex. 27 at 41:20–42:20; 43:25–44:7; 50:15–51:29; 54:13–55:3; 60:5–17; 70:21–71:12.

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

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

[144] *Match*, 2024 WL 1449815, at *7 (citation omitted).

At trial, Plaintiffs would have argued that Defendants could not show that the Transaction was the result of a fair process.[145] As discussed above, Plaintiffs developed strong evidence indicating that the Special Committee members were conflicted by virtue of their ties to TPG. Plaintiffs also obtained evidence indicating that the Special Committee's financial advisor, Centerview, was also conflicted, because: (i) [redacted].;[146] (ii) it was actively seeking—and ultimately secured—an engagement with another TPG portfolio company while the Transaction was being negotiated;[147] (iii) [redacted];[148] (iv) Centerview's fee was largely contingent on the Transaction closing;[149] and (v) [redacted][150]

[145] *See Frederick Hsu*, 2020 WL 2111476, at *36 ("[F]air process. . . includes examining the source of the idea [behind the transaction] and who was the driving force behind it.").

[146] *See* CENTERVIEW_00003861 at 862.

[147] *See id.* at 861.

[148] *See* CENTERVIEW_00015558.

[149] *See* Ex. 12 at 788–89.

[150] Ex. 27 at 137:22–138:4; 142:8–18, 148:15–149:6. [redacted] *See id.* at 50:23–51:3, 51:15–19, 71:2–12.

Plaintiffs also would have argued that the Special Committee process was deficient. Plaintiffs would have argued that the Special Committee unduly yielded to TPG's unilaterally imposed expedited timeline for completing the Transaction, which, certain evidence suggests, TPG timed to exploit a depression in Convey's stock price.[151] Plaintiffs would also have argued that the Special Committee was unable to adequately consider alternative transactions because of TPG's efforts to stonewall any other bidders. Indeed, Plaintiffs developed critical evidence revealing that TPG concealed from the Special Committee and/or its counsel that after [redacted] reached out to Farrell, [redacted] immediately reached out to TPG to discuss a potential transaction.[152] The Special Committee, after being told that [redacted] did *not* reach out to TPG after contacting Farrell, concluded that [redacted] was not a serious bidder and decided to forgo any outreach and complete the deal with TPG at a price below what [redacted] were valuing the Company.[153] As such, the Special Committee never engaged in any market check and/or a go-

[151] *See* Ex. 5 at 155, 170; TPG_CNVY_00021694 at 695, 698.

[152] *See* Ex. 16; [redacted]_00001101; Ex. 17; [redacted]_00001113; [redacted]_00001274.

[153] *See* Ex. 11 at 702-703; Ex. 27 at 293:14-294:11.

shop process,[154] despite having identified twelve potential strategic acquirers,[155] and [redacted] were functionally precluded from submitting a topping bid because of TPG's delivery of written consent approving the deal shortly after the Board approved the Transaction.[156]

Defendants likely would have countered that the Transaction was the result of a fair process, arguing, among other things, that: (i) the Special Committee did not accept TPG's rushed timeline, including because it repeatedly informed TPG that it would take as much time as it needed to consider TPG's offers; (ii) the Special Committee and its advisors had no *material* conflicts with TPG, and any potential conflicts were disclosed, considered, and discussed with counsel; (iii) the Special Committee secured a 17% increase in the Transaction consideration via vigorous negotiations while Convey's performance and stock price worsened; (iv) no third party had made an actual written offer in any amount, let alone a superior one; (v) even if a third party might have theoretically been willing to submit a topping bid,

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[154] *See* Ex. 11 at 688, 691–92.

[155] Ex. 13 at 702.

[156] *See* TPG_CNVY_00034990; Information Statement at 37, 64 ("The Company's rights to engage in negotiations or discussions with third parties ceased upon obtaining the Written Consent on June 21, 2022 in accordance with the terms of the Merger Agreement."); [redacted] 0000090 [redacted]).

TPG indicated from the outset that its refusal to sell its Convey shares, and as Convey's controlling stockholder it could have rejected any third-party offer; and (vi) the Special Committee chose to forgo a market check or communicating directly with [redacted], since doing so would publicize the Special Committee process and risk TPG retracting its premium offer. Notwithstanding these arguments, Plaintiffs reasonably were confident that the Court would have found that the Transaction process was not entirely fair given the factual record that Plaintiffs developed, including facts evidencing that Committee members suffered from conflicts of interest and that TPG misled the Committee regarding [redacted].[157]

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

2. Plaintiffs' Damages Case

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

First, Defendants would have highlighted that the $10.50 per share Transaction consideration represented a 143% premium[158] to Convey's unaffected trading price of $4.32 per share on June 17, 2022 (the last business day before the Transaction was announced). Tellingly, Centerview explained to the Special

[157] *See supra* 6-14.

[158] *See* Ex. 20 at 638.

Committee that the median premium paid across fifteen precedent transactions was only 42% and the 75th percentile premium was 54.8%.[159] Defendants would likely argue that the market price for the Company's stock was indicative of the Company's intrinsic value.[160] Accordingly, to establish that Convey's fair price significantly exceeded the Transaction consideration, Plaintiffs would have to argue that Convey did not trade efficiently such that Convey was trading *between a third and a quarter* of its actual intrinsic value.

While Plaintiffs had arguments that Convey's stock price was artificially depressed, establishing that Convey was grossly mispriced by the market would have been an uphill battle. Plaintiffs would have argued that the market evidence was unreliable because confounding issues—such as TPG's overhang, the limited public

[159] Ex. 21 at 975.

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

float and low trading liquidity,[161] macroeconomic conditions,[162] and the complexity of Convey's business[163]—depressed Convey's stock price and therefore, the premium that TPG touted was overstated.[164] Plaintiffs would have supported their arguments with evidence that TPG informed its lender that it believed Convey's share price was undervalued,[165] and that TPG provided *its lenders* with projections higher than those Centerview used in its fairness analysis.[166] Plaintiffs would also

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[161] *See*, *e.g.*, Ex. 10 ("[T]he Company currently has a limited public float and low trading liquidity. . . that has in turn hurt the Company's ability to attract new public investors."); TPG_CNVY_00006925 at 926 (TPG IC presentation: "we have heard the market cap and float are too small to attract large institutional investors and the multiple segments of the business require investors to lean in more to fully appreciate the opportunity").

[162] Ex. 27 at 223:12–15 (confirming that "Convey was contending with a challenging macroeconomic environment").

[163] *See, e.g.*, [redacted] 0000219 at 219 ([redacted]); TPG_CNVY_00011497 (stating that "[v]aluation [was] weighed down by 1) sub-scale and 2) complicated business with multiple segments.").

[164] *Cf. DFC Glob. Corp.*, 172 A.3d at 369–70 (relying on market price as persuasive evidence of value where there was a "well-informed liquid trading market") (citation omitted), *aff'd*, 236 A.3d 313 (Del. 2020); *In re Appraisal of Jarden Corp.*, 2019 WL 3244085, at *2, 26–31 (Del. Ch. July 19, 2019) (finding market price was a "reliable indicator" of value where factors at play here, including but not limited to controller overhang and the low trading liquidity, were not present); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1163 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995) (explaining market price was indicative of fair value in a transaction that did not involve a controller or conflicted directors).

[165] *See* Ex. 15 at 008; PSP-CONVEY-00000001 at 002.

[166] *Compare* Ex. 15 at 015 *with* Ex. 19, at tab Mgmt. Summary) (projecting [redacted] of additional revenue and [redacted] of additional gross profit between 2022 and 2026 (the last year of the model in Centerview's analysis)). Defendants would likely argue that

have argued that [redacted]—who had intimate knowledge of Convey—believed that Convey's market price did not fully reflect its intrinsic value, as evidenced by [redacted] expressions of interest before, during and after negotiation of the Transaction in which [redacted] were contemplating a bid in the [redacted] per share range.[167] If, however, Plaintiffs did not successfully rebut Defendants' market evidence arguments, Defendants' ability to establish fair price had a high likelihood of succeeding, effectively foreclosing damages to the Class.

Second, Defendants would have relied on Centerview's fairness opinion. Centerview's DCF analysis produced a price range of $7.00 to $11.65 per share.[168] The $10.50 per share Transaction consideration falls at the high end of that range. Centerview also found that comparable companies and precedent transactions suggested fair value ranges of $6.00 to $9.45 and $5.65 to $6.70 per share, well below the Transaction consideration.[169] Houlihan Lokey, which Convey retained to perform analyses in connection with the Company's impairment testing in early 2022, conducted its own valuations that further supported the fairness of the

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Convey's poor financial performance at the time of (and after) the Transaction undermined these projections.

[167] *See* Ex. 23; [redacted]_0000094; [redacted]_0000129; [redacted]_0000233.

[168] *See* Ex. 20 at 634.

[169] *See id*.

Transaction price.[170] For example, Houlihan Lokey calculated that Convey's WACC was [redacted] (above Centerview's 11.0% WACC) and derived an implied equity value range for the Company of between [redacted] per share pursuant to its impairment analysis—this too falls below the Transaction consideration.[171]

Plaintiffs would have countered Defendants' reliance on Centerview's fairness opinion by arguing that (i) Centerview's valuation analyses were flawed and (ii) Centerview was relying on management projections that were below what TPG was simultaneously providing to its lenders. Specifically, Plaintiffs would have contended that Centerview made miscalculations and utilized incorrect inputs in its DCF analysis. For example, Plaintiffs and their damages expert would have argued that Centerview used the wrong equity risk premium and applied a 2.1% size premium to overstate Convey's weighted average cost of capital at 10-12%.[172] Correcting Centerview's errors would result in an 8.4% WACC for Convey. Centerview also erred in applying an exit multiple instead of a terminal growth rate

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[170] *See* Ex. 4.

[171] *See id*. at 511.

[172] *See* Ex. 20 at 640; *In re Orchard Enters., Inc.*, 2012 WL 2923305, at *19 (Del. Ch. July 18, 2012) (endorsing use of supply side equity risk premium over historical equity risk premium); *HBK Master Fund L.P. v. Pivotal Software, Inc.*, 2023 WL 10405169, at *39 (Del. Ch. Aug. 14, 2023) (rejecting use of size premium).

to calculate terminal value.[173] Adjusting Centerview's analysis in its WACC calculation and applying a 4% perpetuity growth rate resulted in valuation of $13.69 per share.

Plaintiffs and their expert also analyzed these adjusted discount rate and growth rate assumptions with the projections that TPG provided to its lenders, which resulted in a price for Convey of $15.28 per share. This range was similar to the [redacted] per share that [redacted] contemplated in bidding to acquire the Company. However, whether the Court would have accepted *TPG*'s projections provided to its lenders, which were not created by Convey management, as reliable was an open question.[174] While these were projections provided to a lender, these projections were not ordinary course projections created by Company management that this Court has found to be reliable.[175] As such, Plaintiffs necessarily believed that they

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[173] *See In re Appraisal of Columbia Pipeline Grp., Inc.*, 2019 WL 3778370, at *51 n.49 (Del. Ch. Aug. 12, 2019) (criticizing use of exit multiple).

[174] *See Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *5 (Del. Ch. May. 20, 2004) ("Delaware law clearly prefers valuations based on contemporaneously prepared management projections because management ordinarily has the best first-hand knowledge of a company's operations."); *Gilbert v. MPM Enters., Inc.*, 709 A.2d 663, 669 (Del. Ch. 1997), aff'd, 731 A.2d 790 (Del. 1999) (noting that "management was in the best position to forecast [the company]'s future before the merger").

[175] *In re Emerging Commc'n, Inc. S'holders Litig.*, 2004 WL 1305745, at *15 (Del. Ch. June 4, 2004) ("When management projections are made in the ordinary course of business, they are generally deemed reliable."); *Gearreald v. Just Care, Inc.*, 2012 WL 1569818, at *4 (Del. Ch. Apr. 30, 2012) (finding that management projections prepared outside the

needed to apply some measure of a discount to Plaintiffs' calculation of potential damages flowing from the TPG lender projections.

Third, Defendants would argue that Convey's deteriorating financial performance and condition—exacerbated by financial headwinds related to talent acquisition, competitive pricing pressures, rising delivery and procurement costs, the loss of a big customer and other supply chain impacts—contributed to its languishing stock price.[176] Defendants would point to evidence showing that it was not expected that Convey's financial outlook would turn around anytime in the near future.[177] Indeed, Campanelli testified that TPG's offer was particularly appealing in the wake of Convey's missed earnings announcements during the Transaction's negotiations.[178] Plaintiffs would counter that this evidence was inconsistent with the projections that TPG prepared and provided to its lenders, and that the Court should not look to post-signing performance of the Company.[179]

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ordinary course of business were "not entitled to the same deference usually afforded to contemporaneously prepared management projections").

[176] Ex. 6; CONVEY_00016243 at 244; CENTERVIEW_00004575; TPG_CNVY_00003560-61; TPG_CNVY_00042096.

[177] *See, e.g.*, TPG_CNVY_00014566 at 569 [redacted]).

[178] Ex. 27 at 195:19-196:10, 196:17-197:12.

[179] *See In re Rural Metro Corp. S'holders Litig.*, 2013 WL 6634009, at *5–6 (Del. Ch. Dec. 17, 2013) (noting that evidence of post-closing performance "would carry a powerful risk of hindsight bias" and explaining that "performance and fate of that [post-closing] entity

It is difficult to assess how the "battle of the experts" would have played out at trial.[180] Plaintiffs identified substantial risk in being able to establish damages in excess of the Settlement consideration. Regardless of Plaintiffs' confidence in their analysis, they acknowledge that Defendants' arguments could have substantially impacted the Class's ability to recover in this Action.

Ultimately, if Plaintiffs were able to defeat Defendants' market evidence, Plaintiffs would have relied on their expert's DCF analysis to support that a fair price for Convey shares was in the range of $14 to $15/share. This represented damages between $55.3 million and $71.1 million, assuming 15.8 million shares in the Class.

Even assuming Plaintiffs were to secure—and defend through appeal—their best-case damages award,[181] the Proposed Settlement represents between 35% and 27% of the realistic potential damages they could have recovered at trial. This is a great result for the Class, exceeding the historical precedent average settlement recoveries discussed in *Dell*,[182] particularly in light of the significant challenges

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has at best tangential relevance to the pre-merger, less highly leveraged, and less aggressively managed [pre-closing company]").

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

[181] *Id.* at 722.

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

confronting Plaintiffs in presenting their highest damages estimates detailed herein. Plaintiffs were particularly concerned that receiving the full amount of damages sought required the Court to accept that the market was undervaluing Convey stock by *3x-4x its trading* price. Because the Court accepts that market prices "distill the collective judgment of the many based on all the publicly available information about a given company and the value of its shares,"[183] Plaintiffs faced an uphill climb to convince the Court that the market was undervaluing Convey by that magnitude. Plaintiffs' damages arguments would have also been further complicated by the fact that Convey never traded above its $14 per share IPO price.

Although Plaintiffs believed in their arguments, they also recognized the risk that Plaintiffs and the Class could receive nothing even if a breach was proven.[184]

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

In assessing whether a proposed settlement is fair, Delaware courts place considerable weight on whether it was reached through arm's-length negotiations.[185]

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

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

[185] *See, e.g.*, *In re Activision Blizzard*, 124 A.3d at 1067 ("The diligence with which plaintiffs' counsel pursued the claims and the hard fought negotiations process weigh in favor of approval of the Settlement") (citation omitted).

Here, the parties attended a full-day mediation with a highly-esteemed and sophisticated mediator. After the mediation failed, the parties continued their arms-length negotiations that ultimately led to the Mediator's proposal.[186]

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

Delaware courts recognize that the opinion of representative plaintiffs and their experienced counsel is entitled to weight in determining the fairness of a settlement.[187] Here, Plaintiffs' counsel are experienced stockholder advocates who are known to the Court. Through their experience, as well as the discovery conducted in the Action, Plaintiffs' counsel fully appreciated the strengths and weaknesses of Plaintiffs' claims when they negotiated the Proposed Settlement.

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[186] *Cumming v. Edens*, C.A. No. 13007-VCS, at 17 (Del. Ch. July 31, 2019) (TRANSCRIPT) ("I'm always comforted when settlements presented to me are the product of mediation. I think that suggests a vigorous vetting of risk, which is what a good mediation is all about, especially when qualified counsel is involved on both sides of the V").

[187] *See, e.g.*, *Polk*, 507 A.2d at 536 (noting the court's consideration of "the views of the parties involved" when determining the "overall reasonableness of the settlement"); *Jane Doe 30's Mother v. Bradley*, 64 A.3d 379, 396 (Del. Super. 2012) ("It is appropriate for the Court to consider the opinions of experienced counsel when determining the fairness of a proposed class action.").

Plaintiffs' counsel's view that the Proposed Settlement is in the best interests of the Class supports final approval.[188]

No objections to the Proposed Settlement have been received.

F. The Plan of Allocation Should Be Approved

A proposed "allocation plan must be fair, reasonable, and adequate."[189] The plan of allocation here—which adheres to guidance from *In re PLX Technology Inc. Stockholders Litigation*[190]—entails distributing settlement proceeds, *pro rata*, directly to the Class members, excluding Defendants, Former Defendants and their affiliates. The plan avoids the "relatively high administrative costs" and "unknown distributional effects" of a claim process by providing for a direct distribution to Class members through the Settlement Administrator, which the Court has endorsed.[191]

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[188] *See Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 99 (Del. 1979) (approving settlement based, in part, on plaintiff's counsel's conclusion, reached after conducting pretrial discovery, that the settlement was fair and in the best interests of the class).

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

[190] 2022 WL 1133118 (Del. Ch. Apr. 18, 2022).

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

III. THE FEE AWARD SHOULD BE GRANTED

A. Legal Standard

It is well-established that this Court may award attorneys' fees and expenses to counsel whose efforts have created a common fund.[192] In awarding attorneys' fees and expenses, the Court is guided by the factors set forth in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142, 147-50 (Del. 1980). Of the *Sugarland* factors, Delaware courts have assigned the greatest weight to the benefit achieved in the litigation.[193] Secondary factors are the contingent nature of the litigation, the complexity of the litigation, the time and effort expended by counsel, the quality of the work performed, and the standing and ability of the lawyers involved.[194] "When the benefit is quantifiable . . . by the creation of a common fund, *Sugarland* calls for an award of attorneys' fees based upon a percentage of the benefit."[195]

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[192] *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1255 (Del. 2012) ("When the efforts of a plaintiff on behalf of a corporation result in the creation of a common fund, the Court should award reasonable attorneys' fees and expenses incurred by the plaintiff in achieving the benefit.") (citation omitted).

[193] *Ams. Mining*, 51 A.3d at 1255 ("[T]he first and most important of the *Sugarland* factors [is] the benefit achieved.").

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

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

Accordingly, Plaintiffs' counsel seek reimbursement of $109,249.86[196] in expenses and an award of attorneys' fees of $4.3 million, which equates to 22.2% of the remaining common fund.[197]

B. The Proposed Settlement Confers a Substantial Benefit

The $19.5 million Proposed Settlement is a significant benefit achieved for the Class. As discussed above, the $19.5 million Settlement consideration reflects an 11.7% premium to the $10.50 per share Transaction price. This $19.5 million benefit to the Class is an excellent outcome that is solely attributable to the litigation efforts of Plaintiffs' counsel and that merits approval of the requested Fee Award.

An award equal to 22.2% of the remaining common fund is an appropriate fee for a mid-stage settlement like the Proposed Settlement. As detailed above, Plaintiffs' counsel undertook significant litigation activity to secure the benefit for the Class in the Proposed Settlement, which included, *inter alia*: (i) using the "tools at hand," including pre-suit investigations under Section 220, to draft a strong Complaint that Defendants could not move to dismiss; (ii) serving document requests and two sets of interrogatories on Defendants, as well as eighteen

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[196] The expenses are identified in paragraph 5 of the Affidavit of Eric J. Juray in Support of An Award of Attorneys' Fees and Expenses ("Juray Aff.") and Exhibits A-D thereto.

[197] *See Dell*, 300 A.3d at 732 ("If plaintiff's counsel had asked for it, then this decision would have deducted out-of-pocket costs first, then calculated a fee based on a net award.").

subpoenas; (iii) reviewing more than 27,000 documents (240,000 pages) produced by Defendants and third parties; (iv) reviewing over 1,700 privilege log entries and challenging many of the privilege claims made therein; (v) responding to Defendants' interrogatories and document requests, and producing 1,206 pages of documents; (vi) deposing Campanelli and preparing for numerous other depositions; (vii) retaining a valuation expert to assess potential damages; (viii) serving two additional third-party subpoenas and investigating whether to amend the Complaint to [redacted]; (ix) conducting a ten-hour mediation after extensive preparation and submission of two pre-mediation statements; and (x) negotiating the term sheet and preparing the Stipulation.

The requested Fee Award compares favorably to fee awards in settlements that arose at roughly the same stage of the case:

Case Name	Settlement Amount	Awarded Fee Percentage	Stage of Litigation
The MH Haberkorn 2006 Trust, et. al. v. Kien Huat Realty III Limited, et. al., C.A. No. 2020-0619-KSJM (Del. Ch. Sep. 15, 2022) (Transcript)	$12 million	25% (including expenses)	Took 8 *Del. C.* § 220 action to trial, and engaged in plenary discovery (including review of approx. 175,000 pages of documents), but did not conduct any depositions
City of Monroe Emps.' Ret. Sys. v. Murdoch, et al., C.A. No. 2017-0833-AGB (Del. Ch. Feb. 9, 2018) (Transcript); (Order) (Trans. ID 61674847)	$90 million	25% (including expenses)	Discovery (in connection with plaintiff's Section 220 demand) and simultaneously filed the complaint with the settlement stipulation
In re China Agritech, Inc. S'holders Deriv. Litig., C.A. No. 7163-VCL (Del. Ch. Feb. 13, 2015)	$3,250,000	23.8%	Filed complaint, survived motion to dismiss, engaged in party and non-party discovery, no depositions taken

Asbestos Workers' Phila. Pension Fund v. Avril, C.A. No. 2019-0633-SG (Del. Ch. Apr. 16, 2021)	$5,600,000	23.5%[1]	Filed complaint and amended complaint, engaged in discovery and some motion practice, reviewed 12,000 pages of documents, no depositions taken
Lee v. Pincus, C.A. No. 8458-CB (Del. Ch. Mar. 1, 2017) (Brief) (Trans. ID 60276882); (Del. Ch. Mar. 27, 2017) (Order) (Trans. ID 60390451)	$10 million	23.5% (including expenses)	Discovery (including review of approx. 15,000 documents)
Verma v. Costolo, C.A. No. 2018-0509-PAF (Del. Ch. July 27, 2021)	$38,000,000	23.0%	Filed complaint, fully briefed motion to dismiss (undecided), engaged in two mediations
In re Tangoe, Inc. S'holder Litig., Consol. C.A. No. 2017-0650-JRS (Del. Ch. Jan. 29, 2020)	$12,500,000	23.0%	Filed complaint, survived motion to dismiss, reviewed approximately 250,000 pages of documents, engaged in some motion practice, no depositions taken

Garfield v. Blackrock Mortg. Ventures, LLC, C.A. No. 2018-0917-KSJM (Del. Ch. Feb. 26, 2021)	$6,850,000	23.0%	Filed complaint and amended complaint, survived motion to dismiss, reviewed over 38,000 pages of documents, engaged in some motion practice, no depositions taken

The circumstances here are also more compelling than in *In re HomeFed Corp. Stockholder Litig.*, C.A. No. 2019-0592-LWW ("*HomeFed*"), where the Court awarded a fee of 20%, primarily based on a stage of the litigation analysis where plaintiffs' counsel reviewed approximately 170,000 pages of documents without taking formal depositions.[198] In contrast, in this Action, Plaintiffs (i) pursued books and records, (ii) reviewed 240,000 pages of documents from defendants and third parties, (iii) responded to, collected, reviewed and produced documents in response to Defendants' discovery requests, (iv) deposed Special Committee member Campanelli, and had noticed and were preparing for numerous scheduled depositions before the close of fact discovery on February 26, 2024. In addition, certain of the Proposed Settlement's objective metrics are better than the *HomeFed* settlement, as the consideration represents an 11.7% premium to the Transaction

[198] Tr. at 27-28. The *HomeFed* plaintiffs interviewed two of HomeFed's largest stockholders who were involved in the merger negotiations at issue.

price versus a 9.6% premium in *HomeFed* (where the merger premium was only 16% as opposed to 143%). However, as no two cases are identical, it follows that the Court should evaluate each settlement based on its own merits within the fee percentage range set forth in *Americas Mining*, without adhering too rigidly to specific comparable case precedents to ensure appropriate flexibility in awarding reasonable fees to incentivize plaintiffs' counsel in future litigation.

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

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

The contingent nature of the representation is the "second most important factor considered by this Court" in awarding attorneys' fees.[199] "It is consistent with the public policy of Delaware to reward [] risk-taking in the interests of shareholders."[200] Accordingly, "[t]his Court has recognized that an attorney may be entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis."[201] For Court of Chancery litigation

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

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

[201] *Ryan v. Gifford*, 2009 WL 18143, at *13 (Del. Ch. Jan. 2, 2009) (finding that counsel may be "entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis."); *Seinfeld v. Coker*, 847 A.2d 330, 337 (Del. Ch. 2000) (recognizing that when the compensation of plaintiffs' counsel is contingent on recovery, an award of a risk premium and an incentive premium on top of their standard hourly rates is appropriate).

challenging M&A transactions, meaningful trial judgments for plaintiffs are rare,[202] and frequently get reversed.[203] The Court assesses litigation contingency risk as of the outset of the litigation.[204]

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

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

"The time and effort expended by counsel serves [as] a cross-check on the reasonableness of a fee award.[205] "[M]ore important than hours is 'effort, as in what Plaintiffs' counsel actually did[,]'"[206] and counsel is not to be punished for achieving victory efficiently.[207]

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[202] *Basho Techs. Holdco B, LLC v. Georgetown Basho Investors, LLC*, 2018 WL 3326693, at *35 (Del. Ch. July 8, 2018) ("While the reverberations of isolated plaintiffs' victories continue to echo in the collective consciousness, scholarly research establishes that only exceptional entire fairness cases result in meaningful damages awards.").

[203] *See Dell*, 300 A.3d at 710 ("[P]laintiffs who have prevailed at trial continue to face significant risk on appeal. . . . The risk of a post-trial loss is real, and the risk of reversal is high.").

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

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

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

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

Plaintiffs' counsel collectively devoted 5,931.60 hours to litigating the Action from inception to February 27, 2024, the date of the execution of the term sheet, with a total lodestar of $3,311,830.00 at their currently applicable hourly rates.[208] The combined implied hourly rate of the fee award is $725 per hour. This implied hourly rate is reasonable in comparison to the non-contingent hourly rates of experienced and qualified counsel who practice before this Court, and is below hourly rates approved by this Court in comparable cases.[209]

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

Under *Sugarland*, the Court should also consider the "standing and ability of plaintiffs' counsel."[210] Plaintiffs' counsel are well known to this Court and have been counsel to stockholders who have received many of the largest monetary judgments and settlements in this Court.

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[208] *See* Juray Aff. ¶¶ 4, 7-10.

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

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

The standing and ability of opposing counsel should also be considered in determining an award of attorneys' fees.[211] Defendants in the Action were represented by numerous highly-experienced and effective defense firms, including: Cravath; Davis Polk; Simpson Thacher; Morris, Nichols, Arsht & Tunnell LLP; Richards, Layton & Finger, P.A.; and Ross Aronstam & Moritz LLP.

4. Public Policy Supports the Fee Award

This Court has recognized that there are public policy reasons for the Court to award higher fee percentages in smaller cases to incentivize capable counsel to devote the necessary time and resources to provide stockholders of smaller companies the same access to representation that stockholders of larger companies receive, because the economics for plaintiffs' counsel might otherwise not warrant pursuing these smaller cases. Chancellor McCormick endorsed this principle in awarding a 25% fee (inclusive of expenses) in the *Empire Resorts* litigation,[212] stating:

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

[212] While the class in *Empire Resorts* was comprised of approximately 3.6 million shares and the Class here is comprised of approximately 15.8 million shares, this is still a very small transaction as the total minority equity float at the Transaction price was only $145 million. Notably, in *Empire* the premium to market for the merger consideration of $9.74 was only 15%. Here, however, the Transaction premium was 143%, and the value of the total minority equity float pre-Transaction announcement was below $60 million.

> So here again, the fee -- inclusive of costs -- represents exactly 25 percent of the amount. That's a high percentage when compared to the stage at which this case was settled. But I don't view it as unreasonable, for all the policy reasons that Mr. Albert expressed during his presentation today.
>
> We want to incentivize class counsel to invest as much into the smaller matters as they do into the larger matters. That's appropriate and that has a beneficial effect on stockholders of multiple different types of companies incorporated under Delaware law.
>
> So despite the fact that 25 percent is on the high end, I'm approving it here.[213]

Plaintiffs respectfully submit that the Court should adopt the Chancellor's logic, which further supports approving the Fee Award.

[213] Settlement Hearing and Rulings of the Court, *The MH Haberkorn 2006 Trust, et. al. v. Kien Huat Realty III Limited, et. al.*, C.A. No. 2020-0619-KSJM, at 31 (Del. Ch. Sep. 15, 2022) (Transcript).

CONCLUSION

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

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CERTIFICATE OF SERVICE

I, Seth T. Ford, do hereby certify on this 20th day of June, 2024, that I caused a copy of the ***Public Version of Plaintiffs' Opening Brief in Support of Class Certification, the Proposed Settlement and an Award of Attorneys' Fees and Expenses*** to be served via File & Serve*Xpress* upon the following counsel:

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