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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE TILE SHOP HOLDINGS, INC. LITIGATION	Consol. C.A. No. 2019-0892-SG

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR APPLICATION FOR APPROVAL OF THE SETTLEMENT, AN AWARD OF ATTORNEYS' FEES AND EXPENSES, AND PLAINTIFFS' INCENTIVE AWARDS

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Plaintiffs K-BAR Holdings, LLC ("K-BAR") and Wynnefield Capital, Inc. ("Wynnefield," and together with K-BAR, "Plaintiffs") by and through their undersigned counsel and on behalf of themselves, the Class identified below and nominal defendant Tile Shop Holdings, Inc. ("Tile Shop," "Nominal Defendant" or the "Company"), submit this brief in support of their motion for: (a) final approval of the proposed settlement (the "Proposed Settlement" or "Settlement") resolving the above-captioned class and derivative action (the "Action"), as set forth in the Stipulation and Agreement of Settlement, dated August 7, 2020 (the "Stipulation"); (b) certification of the Settlement Class as defined in the Stipulation; and (c) an award of attorneys' fees and expenses, including (i) a requested attorneys' fee award equal 25% of the monetary recovery to the Class (the "Class Fee Request"), (ii) a separate award of $2.7 million to be paid by the Company's insurers with respect to the substantial governance changes to be made as part of this Settlement (the "Derivative Fee Request"), (iii) $25,000 incentive awards to be paid to Plaintiffs out of any amounts awarded to counsel (the "Plaintiff Incentive Award Request"); and (iv) reimbursement of expenses actually incurred of $625,000 (the "Expense Reimbursement Request" and, collectively, the "Fee Applications"). The Court has set this motion for hearing on October 12, 2020.

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PRELIMINARY STATEMENT

Sometimes a corporate law fact pattern is so unusual that despite objectively causing stockholder harm, it goes unchallenged. Other times, the investors and their counsel commit the time and resources needed to take action—despite uncertainty and risks—and they develop an evidentiary record that substantiates their claims and achieve an outcome that benefits all investors. This case is the latter.

The Settlement provides substantial benefits for the Class and the Company. Investors in a company with an enterprise value of only $80 million at the time of the mediator's recommendation will share in a common fund of $12 million ***and*** Defendants agreed to a variety of governance enhancements that Vice Chancellor McCormick described as "excellent" and "substantial and tailored to prevent recurrence of the wrongs identified in the plaintiffs' complaint."[1]

The Settlement was achieved only because Plaintiffs and their counsel fought for and won a motion for temporary restraining order, conducted expedited proceedings over the 2019 holiday season, prepared and filed extensive preliminary injunction briefing, engaged in hard-fought trial discovery, class certification

[1] Ex. 1 at 4, 7. For the Court's convenience, the Unsworn Affidavit of Christopher J. Orrico Pursuant to 10 *Del. C.* § 3927 in Support of Settlement, an Award of Attorneys' Fees and Expenses, and Plaintiffs' Incentive Awards ("Orrico Aff.") attaches selected documents, which will be cited herein as "Ex.___.").

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briefing, multiple rounds and hundreds of pages of expert report submissions, two rounds (plus numerous calls and video sessions) of a complex mediation overseen by Vice Chancellor McCormick, and preparation until the eve of trial.

* * *

Plaintiffs, both of whom are experienced investors in the small cap space, contacted counsel upon the seemingly inexplicable decision by the Tile Shop Board of Directors (the "Board") to go dark ("Go Dark" or "Going Dark") by delisting and deregistering the Company's common stock from NASDAQ and the SEC, respectively, despite there being no evident economic justification for doing so. The path to challenge the decision was unclear, as Delaware law generally defers to board decisions to "go dark." Then, new facts emerged when certain Defendants filed Form 4s reflecting their rapid and aggressive accumulation of Tile Shop stock after news of the Go Dark cratered the stock price.

The situation raised an important policy issue. Corporate fiduciaries should not be coercing their stockholders to sell stock in order to facilitate a management-led change of control. Recognizing the importance of acting despite the risk, Plaintiffs commenced this Action to stop certain Defendants' open market street sweep and to hold Defendants accountable for their scheme.

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As Plaintiffs alleged,[2] following a failed effort to identify preferred partners to take the Company private, the Board engaged in a scheme (the "Go Dark Scheme" or "Scheme") that began with Defendants simultaneously disclosing, on October 22, 2019, the Board's decisions to: (i) Go Dark; (ii) suspend the Company's quarterly dividend; (iii) discontinue the Company's share repurchase program; and (iv) belatedly announce the resignation of an outside director who had tendered his resignation a month earlier (the "Go Dark Announcement"). Defendants Peter Kamin and Peter Jacullo then purchased over 6 million shares of the Company's common stock on the open market, bringing their collective stake with the other Defendants from roughly 30% to 42% of the Company's outstanding stock. The rest of the Board sat idly by as these insiders executed the Scheme.

Plaintiffs sought a temporary restraining order, logically inferring that Defendants would be chastened (having been caught with their hands in the proverbial cookie jar), and the case would resolve itself promptly. Instead, Defendant Kamin continued purchasing shares right up until this Court granted

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[2] This brief sets forth Plaintiffs' view of the record developed before trial. We recognize that Defendants have a decidedly different view of the evidentiary record. By settling, the parties have "agreed to disagree" about what actually happened, as well as its legal import.

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Plaintiffs' motion for a temporary restraining order (the "TRO Order"). (Trans ID 64435862).

Instead of abandoning their Scheme after the Court granted the TRO Order, Defendants executed a scorched earth litigation strategy. Defendants refused to proceed to a streamlined trial, insisting that Plaintiffs first litigate a preliminary injunction on a highly expedited schedule over the holidays. Defendants personally attacked Plaintiffs and their counsel, violated basic discovery norms, and made numerous factual representations and tactical shifts that Plaintiffs had to methodically challenge. Over time, through dogged persistence, including numerous motions to compel and resourceful use of discovery tools, Plaintiffs and their counsel assembled a record positioning the Settlement Class to prevail at trial.

Despite a strong liability record, Plaintiffs still faced two principal risks to a meaningful recovery. Having changed counsel during the expert discovery stage, Defendants aggressively challenged both Plaintiffs' class certification motion and damages analyses. While the stock decline upon the Go Dark Announcement was an objective fact, the way Delaware law would handle issues like the concurrent disclosure of genuinely weak earnings, and the eligibility of Class members who sold their stock after the TRO but before the end of the case to receive a damages award could materially alter any trial award. While Plaintiffs believe they would

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ultimately prevail in proving liability at trial, narrow sub-rulings in Defendants' favor regarding damages and class certification could render any such win pyrrhic.

Defendants would not seriously engage in settlement negotiations until replacement counsel reviewed the record, which by then included stockbroker tapes subpoenaed by Plaintiffs' counsel that undermined Defendants' credibility and supported Plaintiffs' allegations that Defendants had caused the Company to Go Dark while planning to buy Tile Shop shares in the ensuing market chaos. With the evidentiary record well-developed (albeit hotly contested) but facing uncertainty about how the Court would address numerous novel questions of law, the parties agreed to mediation before Vice Chancellor McCormick.

Words can hardly do justice to the mediator's determination, dedication and effectiveness, despite an exceedingly convoluted dynamic among the parties, including Defendants' uncooperative insurers. By the time the parties reached agreement to settle Plaintiffs' claims, fact discovery and expert reports were complete. All parties and Vice Chancellor McCormick alike deeply understood the relative strength and weaknesses of the parties' claims and defenses.

Accepting the mediator's recommendation, Defendants agreed to pay $12 million to the Class and implement substantial non-monetary governance measures that empower the Company's public stockholders. The Settlement is an outstanding

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result for the Class, Tile Shop's current stockholders, and the Company. Despite strongly believing in the merits of this action, Plaintiffs were also cognizant of the high bar for proving breaches of the duty of loyalty and their damages claims. Moreover, the substantial non-monetary benefits achieved from the Settlement likely would not be available with a trial verdict in Plaintiffs' favor.

On August 12, 2020, the Court approved the proposed notice of settlement and entered a scheduling order that scheduled the final settlement hearing for October 12, 2020. (Trans. ID 65843207). The Class and Tile Shop's stockholders have been given notice of the Settlement.[3] Any objections to the Settlement or requested fee, expense, and incentive awards are due no later than October 2, 2020. To date, Plaintiffs have received no objections.

For Plaintiffs' efforts and the work and achievement of their counsel, Plaintiffs seek: (i) an award of $2.7 million in connection with the governance terms achieved through the derivative claims, which amount reflects a decision by the mediator when the parties requested help bridging a gap when their negotiations hit a standstill; (ii) an award of $3 million, representing 25% of the monetary recovery on the class claims; (iii) $25,000 incentive awards for Plaintiffs, paid exclusively out

[3] Affidavit of Luiggy Seguera Regarding: (A) Mailing of the Notice and Claim Form; and (B) Publication of the Summary Notice ("Seguera Aff.").

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of any fee award; and (iv) $625,000 in reimbursement of litigation expenses, almost all of which constitutes expert fees paid by Plaintiffs' counsel.[4] Neither Defendants nor the Company contest the Fee Applications, all components of which are consistent with this Court's precedents.

For the reasons set forth herein and to be shown at the final approval hearing on October 12, 2020, the Settlement should be approved, the Settlement Class certified, and the Fee Applications granted.

STATEMENT OF FACTS

This case settled just weeks short of trial. Plaintiffs presented much of the record evidence in their Brief in Support of the Application for Preliminary Injunction, accompanied by ninety-two exhibits (the "PI Brief" or "PI Br. Ex.__") (Trans. IDs 64668129 and 64686291), and in the expert reports prepared by the two experts retained by Plaintiffs' counsel. (PI Br. Exs. YY, AAA). Below is an abbreviated recitation of the extensive record developed in the litigation.

A. The Go Dark Scheme

In mid-2019, unable to convince their preferred partners to help them take the Company private, certain directors of Tile Shop, Defendants Kamin, Jacullo, and

[4] Orrico Aff.; Affidavit of Jonathan Kass in Support of Settlement and Plaintiffs' Application for Attorneys' Fees and Expenses ("Kass Aff.").

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Rucker, devised a scheme to coerce their own investors to sell their stock, allowing these fiduciaries to effect an "open market street sweep" at fire-sale prices. (PI Br. at 17-19 and PI Brief Exhibits cited therein).

The first step of the Scheme involved Defendants simultaneously disclosing, on October 22, 2019, the Board's decisions to: (i) Go Dark; (ii) suspend the Company's quarterly dividend; (iii) discontinue the Company's share repurchase program; and (iv) belatedly announce the resignation of an outside director who had tendered his resignation a month earlier (the "Go Dark Announcement"). (PI Brief Ex. BB). Discovery demonstrated that Defendants knew these negative disclosures would crater the Company's share price because institutional investors comprising a large portion of the Company's stockholder base cannot hold unlisted shares.

As expected, the Company's stock price plummeted over 60% after the Go Dark Announcement. (Trans. ID 65688749, Ex. 8 ¶61). Defendants Kamin and Jacullo promptly executed step two of the Scheme, purchasing over 6 million shares of the Company's common stock on the market between October 23 and November 8, 2019, bringing their collective stake (when combined with founder, Defendant Rucker) from roughly 30% to 42% of the Company's outstanding stock. (PI Br. Ex. X; Ex. Y; Ex. Z; Ex. RRR; Ex. SSS; Ex. TTT). The rest of the Board sat idly by as these insiders executed the Scheme.

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B. Plaintiffs Commence this Action and Obtain the TRO

While the Company's October 22, 2019 announcements caused the stock decline and left stockholders outraged, it was the public disclosure of Kamin and Jacullo's rapid open market accumulation of Tile Shop stock after the Go Dark Announcement that triggered this action. Plaintiffs moved for a TRO and expedited proceedings on November 5, 2019, to restrain Defendants from deregistering the Company's stock and purchasing further control of the Company. (Trans. IDs 64386615 and 64388758).[5] Defendant Kamin continued to purchase shares right up to the TRO Hearing. (Trans. ID 64522871 at 9).

Plaintiffs briefed and successfully argued their motions for a TRO and expedited proceedings on November 8, 2019. The Court held that both the street sweep and the deregistration threatened irreparable harm, and enjoined Defendants and their affiliated entities "from purchasing stock going forward." (*Id*. at 43, 45-46).

After granting the TRO, the Court gave Defendants a choice: they could move to a prompt final trial or litigate a preliminary injunction hearing. (*Id.* at 43-44).

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[5] On November 13, 2019, the Court consolidated the K-BAR and Wynnefield actions. (Trans ID 64424000).

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Defendants' counsel immediately insisted on a preliminary injunction hearing, which the Court scheduled for January 21, 2020. (*Id.* at 46-47).

C. Plaintiffs Develop An Extensive Expedited Discovery Record and Defendants Consent to Continuing the TRO

After the Court entered the TRO, Plaintiffs' counsel vigorously litigated this action on an extremely expedited schedule over the 2019 holiday season. Plaintiffs pressed for prompt yet comprehensive document productions from the Company, Defendants, former director Christopher T. Cook ("Cook"), JWTS, Inc., 3K Limited Partnership, and Morningside Private Investors. Plaintiffs served thirty-nine document requests and seven interrogatories as well as four separate subpoenas. Through truly extensive discovery correspondence, Plaintiffs' counsel pushed Defendants and third parties to run comprehensive searches, provide hit reports, agree to discovery protocols, answer interrogatories, and produce documents on a rolling basis to meet the demands of expedited discovery.

Although Plaintiffs' actions should not have been at issue, instead of seeking to quash what appeared to be retaliatory discovery demands, Plaintiffs responded on an expedited basis to over 100 document requests and interrogatories.[6]

[6] Defendants later produced an email in which Defendants spoke of using a "Donald Trump approach to legal warfare and attack from every angle possible with the objective of destroying the opponent." PI Br. Ex. VVV.

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By mid-November 2019, Defendants' production was deficient, and Plaintiffs moved to compel. We deposed former director Cook as well as Defendants Kamin and Jacullo before the Court heard Plaintiffs' motion to compel on December 17, during which Defendants conceded their production was incomplete. (*See generally*, Trans ID 64566880). After ordering further production, the Court accepted a joint request to move the preliminary injunction hearing to February 21, 2020. (Trans ID 64661505).

During their first depositions, Defendants Kamin and Jacullo testified and offered as a defense that their attorney at Thompson Hine LLP ("Thompson Hine") confirmed that Defendants would be able to buy stock upon the Go Dark Announcement and "wouldn't be violating any rule with respect to either company's blackout periods or anything related to any other laws that might be in place." (PI Br. Ex. E at 276:3-277:19; Ex. I at 162:13-23). Plaintiffs promptly sought additional discovery from Defendants and Thompson Hine to test the truth of these assertions of legal reliance.

Unsurprisingly, Defendants and Thompson Hine fiercely resisted this additional discovery. On January 7, 2020, Plaintiffs moved to compel discovery from Defendants and Thompson Hine concerning the purported "advice that Defendants could buy Tile Shop stock after the Company's Going Dark

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announcement" and Thompson Hine moved to quash the subpoena on January 8. (Trans. ID 64587606; Trans. ID 64597748). Defendants also filed what we believed to be a retaliatory motion to compel against Plaintiffs on January 10. (Trans. ID 64607560). All three discovery motions were fully briefed. On January 17, the morning of the hearing on these discovery disputes, Defendants agreed not to introduce evidence or argument of reliance on legal advice to show a belief that their stock purchases after October 22, 2019 were in compliance with their fiduciary duties and the parties withdrew their respective motions. (Trans. ID 64632869).

On January 10, 2020, in what appeared to be a creative effort to undermine Plaintiffs' request for injunctive relief, Defendants unilaterally entered into certain director standstill commitments (the "Director Standstill Commitments"). (PI Br. Ex. YYY). Plaintiffs challenged this tactic, arguing that the Commitments included a number of carve-outs that would still permit Defendants to continue a creeping takeover of the Company. (Trans. ID 64751767, Ex. A).

In late January 2020, Plaintiffs deposed Defendant Rucker and the Company's former CFO, Kirk Geadelmann. Plaintiffs filed the 62-page PI Brief on February 7, 2020, laying out the extensive preliminary injunction record and included 91 exhibits. The PI Brief included a 46-page expert report by Erik Himan, CFA, who opined on: "(a) whether Tile Shop had generated in 2019 and is forecasting to

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generate in 2020 sufficient cash flow to pay its debts as they become due; (b) whether the claimed cost savings from delisting and deregistration were necessary for Tile Shop to generate free cash flow in 2019 and 2020 to execute its strategy and pay its debts as they become due; and (c) the size of the claimed cost savings from delisting and deregistration compared to Tile Shop's other expenses." (PI Brief Ex. AAA, ¶3). The PI Brief also included a six-page report by Professor Tracy Wang, which concluded:

> Based on the insights of my own research and my analysis of TTS's governance and going-dark deregistration decision, I believe that the cost savings motive is unlikely to be the only reason or even the main reason behind the decision. Instead, TTS appears to be closer to those companies that I studied where the going-dark decision was more highly correlated with poor governance and insiders' attempts to arrogate to themselves the private benefits of control.

(PI Br. Ex. YY, ¶14).

By the time Plaintiffs filed the PI Brief, they had deposed five witnesses[7] and obtained and reviewed the following documents from Defendants and third parties:

Producing Party	Documents	Pages
Defendants and Non-Parties 3K Limited and JWTS[8]	66,649	387,308
Christopher T. Cook	1,597	7,733

[7] Plaintiffs also participated in the deposition of non-party, Brian Kahn, a Tile Shop stockholder from whom Defendants sought discovery and deposed.

[8] Defendants, 3K Limited, and JWTS were all represented by the same counsel.

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Morningside Private Investors	163	481
Vintage Capital	173	1,502

Plaintiffs K-Bar and Wynnefield had produced 1,029 and 275 documents, respectively.

The expedited phase of the litigation unearthed, among other things, the following evidence:

- In mid-2019, Defendants concluded that they "should never have been involved with a public company" (PI Br. Ex. D at TTS00351474) and began "thinking about taking the company private, buying the whole company." *Id.* Ex. E at 222:3-13.

- Without Board authorization, Jacullo, Kamin, and Rucker commenced an "initiative to take the company private." *Id.* Ex. F. Doing so would let them avoid what they described as the "public company nonsense." *Id.* Ex. G at TTS00002391.

- Kamin and Jacullo vetoed any buyout support from investors unwilling to defer to their control. *Id.* Ex. H at TTS00008913; Ex. E at 188-189; 191-195; 222.

- Struggling to find an acceptable buyout partner, Jacullo asked Kamin, "[i]f we go it alone, and you and I are interested in buying more of TTS at current levels, what is the best way to do that? Do we just continue to buy small increments in the market or is there another approach we should consider?" *Id.* Ex. H at TTS00008913.

- Unable to find an acceptable buyout partner, Kamin and Jacullo conceived the Go-Dark-Scheme in mid-September, just as Kamin learned he was about to receive $11 million in cash from another investment. *Id.* Ex. E at 224:17-225:9; Ex. I at 137:21-138:15.

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- Jacullo brought Rucker into the Scheme: "I decided to chat with Kamin, and ***we came up with an approach that may just work that would require little to no new organized capital from outside."*** *Id*. Ex. J (emphasis added).

- Upon learning of the Scheme, Krasnow worried about "legal liability from outside shareholders," asking Jacullo: "What if a shareholder claims we are trying to squeeze them out unfairly (***by not providing information, buying them out cheap and then selling the company***)." Jacullo responded that "[s]ome shareholders may be concerned about the reduction in liquidity and choose to sell but that is their decision." *Id.* Ex. K at TTS00323483 (emphasis added).

- Defendants knew institutional investors would be forced to liquidate their positions following the Go-Dark announcement. *Id.* Ex. E at 203:11-20; Ex. L at 181:12-15; 188:12-189:9; Ex. M at 27.

- Before commencing their creeping takeover, Jacullo asked Kamin: "We are confirmed to be able to step in to buy shares tomorrow, correct?" *Id.* Ex. N.

- The admitted "end game" and "goal" of the Go Dark Scheme was to profit when the Defendants sell the Company in a year or two. *Id.* Ex. K TTS00323484; Ex. O at 134:7-13.

- The non-purchasing directors prioritized the interests of the purchasing insiders because, as Cook testified, "***if it facilitated the process of taking it private then, so be it. If it reduced the number of outstanding shareholders, then that served the purpose of helping us to focus management to not be a public company***." *Id.* Ex. L at 213:2-12 (emphasis added).

Plaintiffs' deposition of Defendant Rucker in late January and filing of their PI Brief on February 7, 2020, appeared to have helped educate him about the mess his support of Kamin and Jacullo had created. On February 12, Defendant Rucker resigned from the Board "under protest," complaining "of the way the board is destroying the company" and the Board's "cynical financial manipulation not for the

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benefit of the employees of the company and not for the stockholders of the company." (Trans. ID 64730868, Ex. A).

On February 14, 2020, Defendants filed their preliminary injunction opposition brief. Defendants concealed Rucker's resignation, which was not publicly disclosed until February 19. Having imposed substantial burden on Plaintiffs and the Court over the holidays,[9] Defendants' did not contest the entry of an injunction and offered no legal argument. (Trans. ID 64730868). Instead, they simply purported to "correct the record," and otherwise consented to "continuing the terms of" the TRO "pending the trial of this matter" and cancelling the hearing on the PI Motion." (*Id*. at 1).

Soon thereafter, Defendant Krasnow resigned and Defendant Livingston announced he would not seek reelection. (Tile Shop Holdings, Inc. (Form 8-K) (Mar. 24, 2020) (Ex. 2); Tile Shop Holdings, Inc., (Form 8-K) (Apr. 20, 2020) (Ex. 3)).

[9] Discovery showed Defendants sought to wage "legal warfare" with the objective of "destroying the opponent," even going so far as trying to "dig up dirt" on Plaintiffs. PI Br. Ex. VVV.

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D. Plaintiffs Engage in Extensive Trial Discovery and Uncover the Broker Tapes

After consenting to "continuing the terms of" the TRO Order, the parties agreed to, and the Court scheduled, a three-day trial commencing on April 13, 2020. (Trans. ID 64661505). The global pandemic required rescheduling to a four-day trial commencing on August 11, 2020. (Trans. ID at 65700214). Additional party and third-party discovery resulted in the production of 1,338 additional documents.

Senior lawyers from Defendants' counsel deposed representatives from K-BAR and Wynnefield. Plaintiffs deposed Defendants Rucker, Jacullo, and Kamin for a second time. (Trans. ID 65688749, Exs. 5, 6, 12). During this second round of discovery, Plaintiffs uncovered further strong supporting evidence that Defendants Kamin and Jacullo planned to depress the Company's stock to effectuate a street sweep.

During their first depositions and in filings to the Court, Defendants Kamin and Jacullo insisted that they swooped in with unplanned stock purchases to support the stock in the face of a supposedly surprising negative reaction.[10] Plaintiffs subpoenaed Defendant Kamin and Jacullo's investment brokers, who produced 27

[10] Trans. ID 64730868 at 19; Trans. ID 64613670, at Exs. B and C ("In my testimony, I also made clear that prior to the announcement of earnings and delisting, I had no intention of buying shares."); PI Br. Ex. E at 276:25, 277:12-19, 279:7-13; Trans. ID 65688749, Ex. 5 at 271:12-15.

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documents and audio recordings of phone conversations with Defendants Kamin and Jacullo. The audio tapes undermined their assertions to the Court that they "had no intention to buy stock" before the Go Dark Announcement. (Trans. ID 65688749, at 6-8 and Exs. 1-4 thereto).

E. The Parties Engage in Court of Chancery Mediation and Settle on the Eve of Trial

Shortly after Plaintiffs obtained the broker tapes and deposed Defendants Kamin and Jacullo for a second time, Defendants replaced their non-Delaware counsel.[11] Thereafter, Defendants proposed a potential mediation process. Agreeing that deep knowledge of the law and governance norms was essential, the parties agreed to mediation conducted by Vice Chancellor McCormick.

On March 24, 2020, the Court accepted the parties' request for Chancery Court mediation. (Trans. ID 65534267). The parties and Vice Chancellor McCormick scheduled a full day mediation for June 17, 2020. Between March 24 and June 17, 2020, the parties engaged in numerous telephone and Zoom calls with each other and with Vice Chancellor McCormick.

Plaintiffs continued vigorously litigating, both to maximize leverage during the settlement discussions and to be prepared for trial absent a settlement, which

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[11] Defendant Rucker hired his own counsel upon his resignation.

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remained far from reach. Plaintiffs had previously moved for class certification on February 24, 2020 (Trans. ID 64753214), and the parties completed the briefing on that motion June 12. (Trans. IDs. 65640112, 65688749).

Plaintiffs submitted an additional 59-page damages report from Erik D. Himan, CFA, on April 3, 2020, containing another fifteen exhibits in which Mr. Himan, among other things, identified the various types of economic harms suffered by the Company and its stockholders and identified two classes of stockholders who suffered harm that could be remedied through money damages. (Trans. ID 65688749, Ex. 8). As to stockholders who "were effectively coerced into selling their shares as a result of the Go-Dark Announcement," Mr. Himan opined that damages were equal to the "difference between the value of the shares sold absent the Go-Dark-Scheme and the price at which the shares were actually sold," an amount that could be up to $1.83 per share. *Id*. ¶¶10, 71-78 & Ex. V10. As to non-insider stockholders who owned shares the day before the Go Dark Announcement and held those shares after the last day of public trading, Himan opined that damages were "equal to the difference between the value of the shares absent the Go-Dark-Scheme and the closing price of the shares" on the last day of public trading, *i.e.*, $1.44 per share. *Id*. ¶¶10, 79-81.

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Defendants resisted Plaintiffs' efforts by submitting two lengthy rebuttal expert reports from Jason Frankl and Sanjay Unni, PhD. Frankl opined that the Board "appropriately considered a number of factors" before deciding to Go Dark, while Dr. Unni opined on damages (broadly attacking Mr. Himan's analysis).

Defendants also moved to amend their answer to the complaint to include an affirmative defense of exculpation for duty of care violations by Defendants. (Trans. ID 65630068). Plaintiffs opposed the motion to amend on June 11, 2020. (Trans. ID 65685864). The Court granted leave to amend.

Before the June 17, 2020 mediation, Plaintiffs submitted two mediation statements and numerous exhibits. Despite the full-day mediation, the parties were unable to reach a settlement, but continued discussions, including numerous conferences with the mediator.

Meanwhile, trial deadlines approached, including the June 26, 2020 deadline to identify trial witnesses. Defendants identified 9 additional party and non-party witnesses including Tile Shop's current CFO and auditor, Ernst & Young LLP. Plaintiffs began scheduling those depositions and served additional discovery.

On June 30, 2020, days before Plaintiffs were to commence the depositions of the additional trial witnesses, Vice Chancellor McCormick and the parties participated in another mediation session. Vice Chancellor McCormick

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recommended the parties settle this action for $12 million for the Class claims. The parties also negotiated, with the mediator's oversight and assistance, meaningful governance enhancements, including:

- Mirror voting provisions for all shares purchased by Defendants Kamin and Jacullo after October 22, 2019, which effectively neutralizes any voting power they gained through those shares;
- Standstill provisions that comprehensively prevent Defendants from accumulating control of the Company in open-market purchases;
- "Majority of the Public Stockholder" voting provisions to empower public stockholders for a variety of material transaction;
- The addition of two independent directors and the creation of an Independent Transaction Committee with broad decision-making powers: and
- Modifications to the Company's Insider Trading Policy.

Counsel for the parties did not discuss the amount of any application for an award of attorneys' fees and expenses until after the parties accepted the mediator's proposal.

As discussed below, Plaintiffs are seeking—and Defendants do not oppose—an award equal to 25% of the cash Settlement Fund to be paid to the Class, plus reimbursement of expenses. After agreeing to the mediator's proposal, the parties negotiated for several weeks concerning attorney's fees for the non-monetary settlement terms and benefits for the derivative claims. Unable to reach agreement, the parties submitted the issue to Vice Chancellor McCormick for a decision within

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an agreed-upon bid and ask spread. On August 5, 2020, Vice Chancellor McCormick recommended a fee award of $2.7 million for the non-monetary benefits. (Ex. 1 at 9).[12] In doing so, the Vice Chancellor noted the following:

- "The non-monetary benefits achieved in the proposed settlement are substantial and tailored to prevent recurrence of the wrongs identified in the plaintiffs' complaint."
- "There is good argument that the suite of non-monetary benefits achieved through the proposed settlement is more impressive than the non-monetary benefits achieved in [*Mudrick Capital Management v. Globalstar*, C.A. 2018-0699-TMR (Del. Ch.), *Williams v. Ji*, C.A. No. 12729-VCMR (Del. Ch.) , and *Minneapolis Firefighters' Relief Assoc. v. Ceridian Corp.*, C.A. No. 2996-CC (Del. Ch.)]."

(*Id*. at 4, 7).

ARGUMENT

I. THE COURT SHOULD APPROVE THE SETTLEMENT AS FAIR, REASONABLE AND ADEQUATE

A. Delaware Favors Representative Action Settlements

Delaware law favors voluntary settlements of corporate derivative actions. *See, e.g., Forsythe v. ESC Fund Mgmt. Co. (U.S.) Inc.,* 2012 WL 1655538, at *2 (Del. Ch. May 9, 2012). While the Court's role in approving the settlement requires it to "insure that the interests [of the corporation] have been fairly represented," the approval process "does not require a definitive evaluation of the case on its merits,"

[12] The parties inquired of the Vice Chancellor and received her permission to submit her private letter ruling on fees to the Court in connection with this filing.

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as doing so "would defeat the basic purpose of the settlement of litigation." *Id.* at *2-3 (quoting *Barkan v. Amsted Indus., Inc.,* 567 A.2d 1279, 1283 (Del. 1989)). Instead, the Court "must consider the nature of the claims, possible defenses, the legal and factual circumstances of the case, and then apply its own business judgment in deciding whether the settlement is reasonable." *Id.* at *3 (citing *Polk v. Good,* 507 A.2d 531, 535 (Del. 1986)).

The primary factors to be considered in the approval process are: (i) the strength of the claims; (ii) the difficulties that would arise in enforcing the claims through the courts; (iii) the delay, expense and trouble of litigation; (iv) the amount of the compromise as compared with the amount of any collectible judgment; and (v) the views of the parties involved. *Polk,* 507 A.2d at 536. Most critical is balancing the benefits achieved against the strength of the claims compromised. *See Barkan,* 567 A.2d at 1284; *Polk,* 507 A.2d at 535.

Plaintiffs respectfully submit that the Settlement is exceptional, especially when balancing the strength of the claims and defenses, the probabilities of success at summary judgment, trial, and on appeal, the total damages available assuming success in proving liability, and the benefits to the Class and Tile Shop of the significant monetary recovery and governance enhancements achieved. The Settlement is thus fair, reasonable, and adequate, and should be approved.

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B. Plaintiffs Achieved Significant Benefits for the Class and the Company

The Settlement provides two categories of benefits: (i) a $12 million cash payment into the Settlement Fund, less Court-approved attorneys' fees and reimbursement of expenses; and (ii) valuable non-monetary reforms to overhaul and improve Tile Shop's corporate governance.

Plaintiffs' settlement negotiations reflected their informed judgment regarding the strength of their claims and the defenses thereto, the probabilities of success at the trial stage, the damages and equitable relief if successful, and the benefits to the Class and the Company from certainty of a significant monetary recovery and improvements to the Company's corporate governance. In evaluating these factors, Plaintiffs' counsel concluded that obtaining $12 million in cash paid directly to the Company's public investors, plus significant and economically valuable corporate governance improvements and protections were in the Class's and Company's best interests. Although Plaintiffs hoped to prevail at trial, the risk of loss made the certainty of achieving a substantial settlement compelling.

i. <u>The Significant Benefits Achieved for the Class</u>

Plaintiffs achieved their goal of conferring a significant monetary benefit on the Class. The Settlement provides for a $12 million cash payment to the Class, less Court-approved attorneys' fees and expenses.

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The Settlement Fund represents approximately 15% of the $81.8 million in market cap lost by Tile Shop's stockholders over the two-day period following the Go Dark Announcement. (Trans. ID 65688749, Ex. 8 ¶65). It also represents approximately 15% of Tile Shop's post-breach enterprise value of approximately $80 million. (Ex. 1 at 7). Most importantly, the $12 million contrasts favorably with Defendants' expert damages calculations, which concluded that even assuming a liability finding at trial), Plaintiffs could receive only about $7 million if damages were limited to Defendants' value gained from their street sweep purchases and about $38 million if damages reflected Class member value-adjusted losses on sales between October 22 and November 8.

To assure an equitable distribution of the Net Settlement Fund to Class Members, Plaintiffs have devised and ask the Court to approve the Plan of Allocation, which is detailed at paragraphs 44-47 of the Notice. In short, there are two classes of investors eligible to collect from the Settlement Fund, and they will collect their *pro rata* share of the Net Settlement Fund (based on total shares eligible to participate and included on a valid claim form), subject to a cap such that no investor will receive more than their full potential damages at trial.

First, investors who can show that they were stockholders before the Go Dark Announcement (*i.e.*, as of October 18, 2019) and who were actually or effectively

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coerced into selling in its aftermath, *i.e.*, they sold some or all of their shares between October 22 and November 8, 2019 (when the TRO Order was issued), will receive a cash payout. Plaintiffs' expert opined that the economic damages suffered by these stockholders are equal to the difference between the price of the shares on the date the shares were sold absent the Go Dark Scheme and the price at which the shares were actually sold. Plaintiffs' expert opined that these damages measured $1.83 per share as of the Go Dark Announcement and $1.44 per share as of November 8, 2019. Class members in this category will be eligible to receive up to $1.44 per share, except for investors who can show that they actually sold at a loss larger than $1.44 per share, in which case they can receive up to $1.83 per share (*i.e.*, the difference between the value of the shares sold absent the Go-Dark-Scheme and the adjusted value at which those shares were actually sold).

The second category of Class Member that will receive a cash payout are those who were stockholders as of the Go Dark Announcements and who remained stockholders until the memorandum of understanding was reached on June 30, 2020. These investors remained stockholders during the functional pendency of the litigation, are assumed to have known about the litigation and are assumed to have remained investors in part to ensure they enjoy the fruits of the litigation. Such Class

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Members are assumed to have suffered damages (and thus be eligible to recover) up to $1.44 per share, pursuant to Plaintiffs' damages analysis.

As described above, this Settlement Fund was achieved through hard-fought litigation, and protracted negotiations and mediations in which Plaintiffs and Defendants were at loggerheads. Absent the Settlement, the Class members may have received nothing to compensate them for the alleged breaches of duty by Defendants if Plaintiffs were unsuccessful at trial. The Plan of Allocation compensates the investors who suffered in the immediate aftermath of the Go Dark Scheme and provides a recovery for those who did not sell all of their shares and who held so as to receive the monetary fruits (if any) of this litigation.

Balancing the significant monetary recovery against the risk and delay of further litigation strongly supports approval of the proposed Settlement.[13]

ii. The Significant Benefits Achieved for the Company

The Settlement also provides significant and in some respects unique corporate governance reforms that will benefit the Company and its current and future stockholders. The Settlement broadly overhauls the allocation of power within Tile Shop in ways that a trial verdict could not.

[13] *See Kahn v. Sullivan*, 594 A.2d 48, 59 (Del. 1991); *Barkan*, 567 A.2d at 1285-86; *In re MAXXAM, Inc.*, 659 A.2d 760, 768 (Del. Ch. 1995).

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Plaintiffs' focus in crafting the governance reforms was to prevent the very wrongdoing alleged and uncovered in discovery, including preventing Defendants from advancing their own personal interests at the expense of the Company's public stockholders, nullifying the voting power Defendants purchased in connection to the Go Dark Scheme, empowering Tile Shop's public stockholders to effect greater control over the Company's future, and ensuring that the Company continues to provide transparency to its public stockholders.

These governance measures are detailed at Paragraphs 3(b)-(g) of the Stipulation. These are contractual obligations enforceable through the Settlement, and will be reflected in amendments to the Company's Certificate of Incorporation and Bylaws, thereby providing every public stockholder with the independent ability to enforce these terms in the event of future breaches by Defendants. In short, Plaintiffs obtained the following substantial corporate governance benefits:

1. Mirror Voting: to nullify the voting power of the shares purchased by Kamin and Jacullo after the Go-Dark Announcement, Kamin and Jacullo agreed to vote such shares in the same proportion as the vote of shares held by public stockholders for three years.

2. Standstill Agreements: to prevent them from accumulating control of the Company in open-market purchases, Kamin, Jacullo, and Rucker agreed to

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supplemental standstill agreements such that they are definitively prohibited from directly or indirectly purchasing additional Tile Shop stock (except in the context of a fair buyout offer for all outstanding shares approved by the Independent Transaction Committee and a majority of public stockholders).

3. Majority of the Public Stockholder Vote: to empower public stockholders, Defendants will amend the Company's Certificate of Incorporation and Bylaws (subject to a stockholder vote) to include a "majority of the public stockholders" vote that applies to any later change to the Certificate of Incorporation or Bylaws affecting the rights or interests of any directors differently from those of public stockholders.

4. Creation of Independent Transaction Committee: Defendants agreed to create an Independent Transaction Committee, subject to stockholder approval (for which Defendants and Plaintiffs shall vote in favor), empowered to review, assess, and negotiate certain Company transactions requiring Board approval, including changes to the Company's capitalization or corporate structure, changes to the Board, or certain transactions with related persons.

5. Two Independent Directors to Support Key Committees: to ensure improved Board and Committee independence, Plaintiffs interviewed three potential board candidates, two of whom (Mark Bonney and Linda Solheid) met Plaintiffs'

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qualifications for independence. Bonney shall serve as the chair of the Audit and Independent Transaction Committees for three years and Solheid shall serve on the Audit, Nominating and Corporate Governance, and Independent Transaction Committees for one year.

6. Modifications to Insider Trading Policy: to prevent insiders from initiating Tile Shop stock trades, Defendants agreed to modify the Company's Insider Trading Policy such that after a public announcement of material information, at least two full trading days must elapse before persons with prior knowledge of the material information may initiate trades in Tile Shop stock. In addition, the Company's Insider Trading Policy will require that the Company's Chief Financial Officer: (i) maintain written records of requests by Designated Persons (as defined in the Insider Trading Policy and includes all members of the Board) for confirmation of a trading window, including the time such confirmation is provided; and (ii) limit any confirmation of a trading window to a maximum of two business days following such confirmation.

7. Continuing Public Disclosures: to ensure improved transparency to public stockholders, Defendants agreed to provide OTC disclosure at or above the level characterized as "Pink Sheet: Current Tier," including quarterly financial

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reporting and investor conference calls, and reporting insider transactions in Tile Shop stock within two business days.[14]

* * *

In sum, through the corporate governance enhancements, the Settlement achieves Plaintiffs' goals in the litigation of nullifying the control Defendants obtained through the Go Dark Scheme, restraining Defendants' future control of the Company, empowering the Company's public stockholders, and ensuring transparency to the Company's public stockholders. (Ex. 1 at 4-5). Plaintiffs have secured greater levels of board independence and minority stockholder empowerment than are the baselines required by Delaware law.

Thus, the corporate reforms provided by the Settlement confer significant benefits for Tile Shop and its public stockholders and justify Court approval.

C. Analysis of the Strength of the Claims

Plaintiffs believe that their breach of fiduciary duty claims were more than borne out by the discovery record, as discussed above. Moreover, Plaintiffs would have presented five doctrinal frameworks in which the Court could have found Defendants to have breached their fiduciary duties.

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[14] Plaintiffs initially sought to require re-listing on the NASDAQ as a condition of the Settlement. Such relisting became all but impossible given the Company's current market capitalization.

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First, Plaintiffs believe they developed a strong record that Defendants implemented the Go-Dark Scheme "for inequitable purposes." Although deregistration is not itself an actionable breach of fiduciary duty, "corporate fiduciaries commit an actionable breach of fiduciary duty if for self-interested reasons they cause the corporation's stock to be deregistered and delisted and as a result, cause the market for the stockholders' investment to become significantly impaired or eliminated." *Hamilton v. Nozko*, 1994 WL 413299, at *6 (Del. Ch. July 27, 1994). Here, the record supported that the Going-Dark Scheme "was taken for inequitable purposes and resulted in a personal benefit to" Defendants. *Berger v. Scharf*, 2006 WL 825171, at *8 (N.Y. Sup. March 29, 2006) (citing *Nozko*).

The record demonstrated that Defendants knew the Go Dark Announcement would "adversely affect[] the minority (public) shareholders' ability to liquidate their shares at a fair price" by forcing an institutional investor exodus at an artificially depressed price, thus allowing Defendants to "enlarge their majority control" and "eliminat[e] [the] public market for shares," which "would facilitate their acquisition of the publicly-owned shares at an unfair price." *Nozko*, 1994 WL 413299, at *7. The record further demonstrated that "[D]efendants' suggested

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motivation for delisting, to eliminate the cost of reporting, was pretextual" and the purported cost savings from going-dark could be achieved without going-dark.[15]

Second, Defendants' aborted attempt to sell Tile Shop and subsequent attempts to shift control to themselves by squeezing-out public stockholders and conducting a street sweep triggered *Revlon*[16] scrutiny. The trial record would have demonstrated that Defendants failed to act reasonably to maximize share value, as they got no independent financial or legal advice about either a sale or going-dark, let Jacullo and Kamin run a secret sale process with no oversight, and approved the Go Dark without regard to how it exposed the public stockholders to an under-market control change.

Third, Defendants' failure to prevent Kamin and Jacullo's creeping takeover would have triggered enhanced scrutiny under *Unocal*.[17] The trial record would have amply demonstrated Defendants' "apparent and inexplicable impotence in the face of [Kamin and Jacullo's] obvious intention to engage in a creeping takeover"

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[15] *Scharf*, 2006 WL825171, at *8; *see also Berger v. Spring P'rs, L.L.C.*, 2005 WL 2807415, at *6 (N.Y. Sup. Ct. Oct. 24, 2005) (denying motion to dismiss where "the decision to delist was for self-interested reasons rather than 'to avoid the continuing expense of complying with the reporting requirements of the [Securities] Exchange Act'") (quoting *Nozko*, 1994 WL 413299, at *6).

[16] *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986).

[17] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

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and "failure to act in the face of an obvious threat to the corporation and the minority stockholders." *La. Muni. Police Emps.' Ret. Sys. v. Fertitta*, 2009 WL 2263406, at *7, *8 (Del. Ch. July 28, 2009). Indeed, non-party Cook and Defendant Rucker effectively testified that they simply did not care whether Kamin and Jacullo consolidated control over Tile Shop at the expense of minority stockholders.

Fourth, the trial record would have demonstrated that Defendants were motivated to entrench themselves by squeezing-out stockholders to allow Defendants to control and ultimately sell the Company. Defendants' conduct had an entrenchment effect. Indeed, Kamin and Jacullo's post-announcement street sweep increased their combined ownership with Rucker from approximately 27% to over 40% of the Company's shares. *See MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1131 (Del. 2003).

Finally, the trial record would have demonstrated that Defendants acted with reckless disregard for their duties. Indeed, the record would have demonstrated that "the board's own lack of oversight … afforded [Kamin and Jacullo] the opportunity to indulge in the misconduct which occurred." *Mills Acq. Co. v. MacMillian, Inc.*, 559 A.2d 1261, 1279 (Del. 1989). Despite their awareness that going-dark would force an institutional investor sell-off and knowledge that Kamin and Jacullo were purchasing shares on the open market, the Board did nothing. Nor did the Board

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ever fully assess (much less retain independent advisors to assist it in assessing) the pros and cons of going-dark and the effect it would have on the Company, its stock value, and public stockholders.

Nonetheless, Plaintiffs would have faced many hurdles in proving their case. Where, as here, only two of five directors are personally interested, overcoming the business judgment presumption remains a high bar.

Moreover, Defendants would have pointed to several factors that could have limited liability or mitigated damages: (i) the COVID-19 pandemic, which challenged the retail space Tile Shop operates in; (ii) Rucker's resignation from Tile Shop and public break with Kamin and Jacullo, which complicates the theory that Rucker acted in concert with Kamin and Jacullo; and (iii) the so-called "Director Commitment Letters," which purported to limit Kamin and Jacullo's ability to purchase shares on the open market.

Even had Plaintiffs successfully proved up Defendants' breaches of fiduciary duty, Plaintiffs would not necessarily have succeeded in recovering money damages. Plaintiffs believe both law and logic support their damages theory, but recognize the wide range of possible post-trial rulings. *See, e.g.*, *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *2 (Del. Ch. Oct. 16, 2018) ("post-trial decision find[ing] that the plaintiffs proved all but one of the elements of their [aiding and

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abetting] claim against Potomac," namely "causally related damages"), *aff'd*, 211 A.3d 137 (Del. 2019). This is especially true of the unusual fact pattern here, which raises questions about the proper form of relief considering the varying forms of harm that befell the Company and its public stockholders.

Moreover, Plaintiffs sought varying forms of equitable relief in addition to money damages to address these varying harms to varying corporate constituencies, including affirmative equitable relief. Again, Plaintiffs believe both law and logic support the relief sought, but recognize the wide range of possible post-trial rulings, and believe the Settlement and Plan of Allocation reflect the ideal balance of the facts, law and equitable principles.

D. Arm's-Length Negotiation, Mediator's Recommendation, and Experience of Plaintiffs' Counsel Favor Approval

In assessing whether a proposed settlement is fair, Delaware courts place considerable weight on whether it was reached through adversarial, arm's-length negotiations. *See, e.g., Ryan v. Gifford*, 2009 WL 18143, at *5 (Del. Ch. Jan. 2, 2009) ("The diligence with which plaintiffs' counsel pursued the claims and the hard-fought negotiations process weigh in favor of approval of the Settlement."). The Settlement is the product of serious, informed, non-collusive, and often contentious negotiations following a thorough analysis of the strengths and weaknesses of the legal and factual issues in this Action.

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The parties engaged in a mediation overseen by Vice Chancellor McCormick. The first full day mediation session failed, and the continuing negotiations overseen by Vice Chancellor McCormick lasted for almost seven weeks, until the parties accepted the Vice Chancellor's ultimate settlement recommendation. The mediation process provides further evidence of the reasonableness of the proposed Settlement. *See In re Activision Blizzard, Inc. S'holder Litig.,* 124 A.3d 1025, 1067 (Del. Ch. 2015) (giving weight to mediator's role in approving settlement); *Ryan,* 2009 WL 18143, at *5 (same). The mediator's view of the outcome is summarized in the letter addressing the dispute as to a fee award for the governance elements of the Settlement. (Ex. 1).

Delaware courts also consider the opinion of experienced counsel in determining the fairness of a settlement. *Polk,* 507 A.2d at 536-537. Plaintiffs' counsel—experienced investor advocates—did not settle until shortly before trial was to commence in this action. Moreover, since Defendants brought in new trial counsel after discovery, they got the benefit of a "fresh look" at the record that helped inform their own assessment of the strengths and weaknesses of the action. Defendants' counsel brought their own experience to bear in negotiating the governance enhancements and financial recovery, and recommending that their clients settle this Action.

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Finally, to date, no Tile Shop stockholder has filed an objection regarding any aspect of the Settlement. The absence of any such objection also weighs in favor of approving the Settlement. The deadline to serve objections to the Settlement is October 2, 2020, and Plaintiffs will address any objections that are filed.

II. CLASS CERTIFICATION IS APPROPRIATE

Delaware courts liberally interpret Rule 23's requirements to favor class certification. *See Parker v. Univ. of Del.,* 75 A.2d 225, 227 (Del. Ch. 1950). This is especially so in stockholder litigation. As the Court explained in *Shapiro v. Nu-West Industries, Inc.*, "class certification … serves judicial efficiency since it allows a single court to determine claims involving one set of actions by defendants that have a uniform effect upon a class of identically situated shareholders." 2000 WL 1478536, at *4 (Del. Ch. Sept. 29, 2000).

On August 12, 2020, the Court preliminarily certified a Settlement Class consisting of all record and beneficial holders of Tile Shop Common Stock as of October 18, 2019, subject to typical exclusions for Defendants and their affiliates and related parties. (Trans. ID. 65843207, ¶3). Because Plaintiffs have met the requirements of Rules 23(a) and (b), the preliminarily certified Class should receive final approval for settlement purposes.

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A. Plaintiffs Satisfy Court of Chancery Rule 23(a)

Rule 23(a) is satisfied where, as here: (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. Ct. Ch. R. 23(a).

i. <u>Numerosity</u>

Rule 23(a)(1) requires that a proposed class be "so numerous that joinder of all members is impracticable."[18] As of October 18, 2019, Tile Shop had over 50 million shares outstanding (Trans. ID 65688749, Ex. 8 at Ex. V-3), held by hundreds of individuals and entities dispersed throughout the United States. Accordingly, Plaintiffs have satisfied Rule 23(a)(1)'s numerosity requirement.

ii. <u>Commonality</u>

Rule 23(a)(2) is satisfied because there are common questions of law and fact. *Emerald P'rs v. Berlin,* 1991 WL 244230, at *3 (Del. Ch. Nov. 15, 1991).

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[18] *See, e.g., Leon N. Weiner & Assocs., Inc. v. Krapf,* 584 A.2d 1220, 1225 (Del. 1991) ("Numbers in the proposed class in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement.") (citation omitted), *rev'd on other grounds,* 623 A.2d 1085 (Del. 1993); *In re Cox Radio, Inc. S'holders Litig.,* 2010 WL 1806616, at *8 (Del. Ch. May 6, 2010) (20 million shares, held by hundreds, if not thousands, of individual shareholders, satisfies the numerosity requirement), *aff'd,* 9 A.3d 475 (Del. 2010).

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Commonality exists "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." *Leon N. Weiner & Assocs., Inc.,* 584 A.2d at 1225. Here, questions common to all class members include:

- whether Defendants breached their fiduciary duties to Plaintiffs and the Class in connection to the Go Dark Scheme; and
- whether the Class was harmed by the alleged breaches of duty.[19]

Delaware Courts consistently find that breach of fiduciary duty allegations are sufficiently common to warrant class certification. *See, e.g., Nottingham P'rs v. Dana,* 564 A.2d 1089 (Del. 1989); *Zirn v. VLI Corp.,* 1991 WL 20378 (Del. Ch. Feb. 15, 1991). Plaintiffs have satisfied Rule 23(a)(2)'s "commonality" element.

iii. Typicality

Rule 23(a)(3) requires a class representative's claims to be typical of those of the class at large. Typicality exists where "all Class members face the same injury

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[19] *Id.* (commonality exists where there is no "significant factual diversity"); *see also In re Wm. Wrigley Jr. Co. S'holders Litig.,* 2009 WL 154380, at *3 (Del. Ch. Jan. 22, 2009) (observing that commonality exists where "stockholders other than the defendants are identical in challenging the process by which the merger was approved and the proxy materials used to solicit the stockholders to vote in favor of it"); *In re AXA Fin., Inc., S'holders Litig.,* 2002 WL 1283674, at *5 (Del. Ch. May 22, 2002) (holding that the commonality requirement is satisfied where the action "focuses on the question whether the defendants breached their fiduciary duties owed equally to all members of the class").

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flowing from the defendants' conduct." *In re Talley Indus., Inc. S'holders Litig.*, 1998 WL 191939, at *9 (Del. Ch. Apr. 13, 1998). Here, Tile Shop's stockholders, including Plaintiffs, would suffer sufficiently similar injuries from the Go Dark Scheme (the amount of harm could differ based on when or whether stockholders sold their shares). Thus, Rule 23(a)(3)'s typicality requirement is met. *Leon N. Weiner & Assocs., Inc.,* 584 A.2d at 1225-26; *Cox Radio,* 2010 WL 1806616, at *8 ("Because Defendants' conduct affected all Class members in the same manner, the typicality requirement also is satisfied.").

iv. Adequacy

Rule 23(a)(4) requires a representative to fairly and adequately protect the interests of the class. "A representative plaintiff must not hold interests antagonistic to the class, retain competent and experienced counsel to act on behalf of the class and, finally, possess a basic familiarity with the facts and issues involved in the lawsuit." *Oliver v. Boston Univ.,* 2002 WL 385553, at *7 (Del. Ch. Feb. 28, 2002).

Plaintiffs are more than adequate Class representatives under Rule 23(a)(4). There is no suggestion of any conflict between Plaintiffs and any Class member. Plaintiffs retained competent counsel who are highly experienced in stockholder litigation and well-known to this Court. *Emerald P'rs v. Berlin,* 564 A.2d 670, 673-

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74 (Del. Ch. 1989); *In re TD Banknorth S'holders Litig.,* 2008 WL 2897102, at *3 (Del. Ch. July 29, 2008).

To be sure, Plaintiffs were integral in the initiation and prosecution of this Action and regularly communicated with Plaintiffs' counsel to receive updates and discuss litigation strategy.[20]

B. Plaintiffs Satisfy Court of Chancery Rule 23(b)(1) and (b)(2)

Actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2). *In re Celera Corp. S'holder Litig.,* 59 A.3d 418, 432-33 (Del. 2012) (quoting *Cox Radio,* 2010 WL 1806616, at *8); *see also Nottingham P'rs,* 564 A.2d at 1094-97. Rule 23(b)(1) applies because there is a risk to Defendants of inconsistent adjudications and a risk that separate adjudications may impair the interests of Class members. Rule 23(b)(2) applies because Plaintiffs sought class-wide injunctive and declaratory relief. *Nottingham P'rs,* 564 A.2d at 1095. Thus, certification of the proposed Class is proper under Rule 23(b)(1) and (b)(2).

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[20] *See* the Affidavits of K-Bar and Wynnefield filed in connection herewith.

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C. The Remaining Requirements of Rule 23 Are Satisfied

Plaintiffs submitted affidavits complying with Rule 23(e), and have stated their support of the Settlement. *See* note 20, *supra*. The Notice to the Settlement Class was mailed to the Class. *See* Seguera Aff.

III. PLAINTIFFS' FEE APPLICATIONS SHOULD BE GRANTED

The novelty of the fact pattern, the complexity of the legal theories on which this case would rest, Tile Shop's relatively small size when the suit was initiated, and the broader benefit to small cap company stockholders of successfully challenging the conduct alleged here all support a judicial policy of incentivizing counsel to bring a suit like this one even if doing so did not trigger a veritable scorched earth battle. But here, the filing of the suit did just that, making it all the more appropriate to reward counsel.

Plaintiff's counsel in class and derivative actions are entitled to awards of attorneys' fees and expenses if their efforts confer separate benefits upon the class and corporation, respectively. The amount of such awards are committed to the sound discretion of the Court under the well-known factors established in *Sugarland Industries v. Thomas*. 420 A. 2d 142 (Del. 1980). Under the *Sugarland* factors, the Court considers: (i) the results achieved; (ii) the amount of time and effort invested by plaintiff's counsel; (iii) the relative complexity of the issues; (iv) whether counsel

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worked on a contingency basis; and (v) the standing and ability of the attorneys involved. *Id.* at 149. The Court may also consider prior fee awards in similar cases as guidance for the exercise of its discretion. *In re Sauer-Danfoss Inc. S'holders Litig.,* 65 A.3d 1116, 1136 (Del. Ch. 2011).

The benefits achieved through litigation are accorded the greatest weight in determining an appropriate fee award. *Seinfeld v. Coker,* 847 A. 2d 330, 336 (Del. Ch. 2000); *Ams. Mining Corp. v. Theriault,* 51 A.3d 1213, 1254 (Del. 2012); *Franklin Balance Sheet Inv. Fund v. Crowley,* 2007 WL 2495018, at *8 (Del. Ch. Aug. 30, 2007) ("courts assign the greatest weight to the benefit achieved by the litigation"); *Cox Radio,* 2010 WL 1806616, at *20 ("the size of the benefit being of paramount importance").

The Fee Application, consisting of the Derivative Fee Request, the Class Fee Request, the Expense Reimbursement Request to cover complex and detailed expert reports and preparation of a case that settled just short of trial, and the $25,000 Plaintiffs' Incentive Award Request, are amply supported.

Importantly, Defendants and Nominal Defendant Tile Shop do not oppose the Fee Applications generally, and Vice Chancellor McCormick, with full knowledge of the Class Fee Request, recommended the Derivative Fee Request, which will be paid entirely through Defendants' insurers.

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A. The Benefits Achieved Support the Derivative Fee Request

Plaintiffs' counsel requests an award of $2.7 million for the benefits achieved for the Company. As discussed in Section I.B.ii, above, Plaintiffs obtained significant corporate governance reforms precisely tailored to prevent a future recurrence of the breaches of fiduciary duties alleged by Plaintiffs and uncovered in discovery. Plaintiffs believe these corporate governance measures will go a long way to preventing the breaches of fiduciary duty alleged to have occurred here and enhancing value for the Company's public stockholders.

The $2.7 million Derivative Fee Request Plaintiffs seek for these corporate governance measures is consistent with and supported by fee awards in comparable cases in this Court. For example, *Mudrick Capital Management v. Globalstar*, *Inc.*, C.A. 2018-0699-TMR (Del. Ch.) ("*Globalstar*"), involved a proposed merger between two entities under common control, which would have increased the controller's grip on the entities at the expense of minority investors. In the *Globalstar* settlement, plaintiffs obtained substantial governance measures, including: (i) a requirement that public stockholders elect two of Globalstar's seven directors until the controller and its affiliates held less than 45% of Globalstar's stock; (ii) a requirement that minority stockholders approve certain related party transactions with the controller and its affiliates; and (iii) the establishment of a

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"Strategic Review Committee" comprised of independent directors required to review corporate transactions to curb the controller's ability to execute related-party transactions. For these corporate governance benefits, the Court granted plaintiffs a $4.5 million fee award.

Similarly, in *Williams v. Ji*, C.A. No. 12729-VCMR (Del. Ch.) ("*Sorrento*"), the Sorrento board issued stock options and warrants in valuable Sorrento subsidiaries to themselves and their affiliates without stockholder approval and used new stock issuance to cement their control over the company. In the *Sorrento* settlement, plaintiffs obtained substantial corporate governance measures, including: (i) the cancellation of the challenged stock options and warrants; (ii) the modification of an agreement with an investor to require public disclosure of any rights exercised thereunder; (iii) the creation of an independent committee and processes for future stock awards and related-party transactions; and (iv) the submission of future stock plans of Sorrento's subsidiaries to a vote of all Sorrento stockholders. In consideration for these corporate governance benefits, plaintiffs obtained a $3.2 million fee award.

Finally, in *Minneapolis Firefighters' Relief Assoc. v. Ceridian Corp.*, C.A. No. 2996-CC (Del. Ch.) ("*Ceridian*"), the Ceridian board fought off a proxy fight by announcing a merger, but embedded into the merger agreement terms which:

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(i) defined "Superior Proposal" in a way that purposely blocked off the already-known and identified stockholder-supported alternative to the buyout; and (ii) permitted the buyers to terminate the merger agreement in the event that a majority of the board's previously announced board nominees were not elected at the next annual stockholder meeting. In the *Ceridian* settlement, plaintiffs obtained corporate governance measures, including: (i) the amendment of the merger agreement to delete the buyers' right to terminate the merger agreement in the event that a majority of the board's previously announced board nominees were not elected at the next annual stockholder meeting; (ii) the amendment of the merger agreement so that the term "superior proposal" also included proposals to purchase f at least 40% of Ceridian's assets or common stock; (iii) amendments to standstill provisions with potential acquirers; (iv) that plaintiffs' counsel would be provided information concerning any alternative transaction proposal; and (v) additional disclosures in the company's proxy statement concerning the merger. In consideration for these corporate governance benefits, plaintiffs obtained a $5.1 million fee award.

Plaintiffs respectfully submit that the corporate governance measures Plaintiffs achieved here are comparable or superior to those achieved in *Globalstar*, *Sorrento*, and *Ceridian*. Like in those cases, the corporate governance measures here serve to unwind and prevent reoccurrence of the alleged breaches of fiduciary

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duty. Plaintiffs believe that the $2.7 million fee award requested here, in comparison to the $4.5 million, $3.2 million, and $5.1 million fee awards in *Globalstar*, *Sorrento*, and *Ceridian*, respectively, is fair and proper for these governance measures.

Importantly, Plaintiffs did not arrive at a $2.7 million Derivative Fee Request arbitrarily, or even with Defendants' express agreement. Rather, after the Settlement was reached, the parties (including D&O insurance counsel) negotiated, but could not reach a firm agreement on the fee to be paid by Defendants' insurers on account to the governance terms of the Settlement. Thus, the parties presented the mediator with a range of fee outcomes that each side would accept for purposes of the Fee Applications. Based on her knowledge of all pertinent facts, including review of supplemental submissions, Vice Chancellor McCormick concluded "that a fee award of $2.7 million for the non-monetary benefits is appropriate." (Ex. 1 at 9). In so concluding, Vice Chancellor McCormick described the corporate governance measures as "substantial and tailored to prevent a recurrence of the wrongs identified in plaintiffs' complaint" and arguably "more impressive than the non-monetary benefits achieved in" *Globalstar*, *Sorrento*, and *Ceridian*. (*Id*. at 4, 7). Plaintiffs respectfully submit that Vice Chancellor McCormick's recommended award is well-informed and there is no reason to depart from that recommendation.

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B. The Benefits Achieved Support the Class Fee Request

Plaintiffs' counsel achieved a $12 million fund to be distributed to the Class. This is a very significant recovery by any measure. As noted above, the Company was only valued at $80 million at the time of Settlement (*Id*. at 7), the entire market cap drop in the two days following the Go Dark Announcement was about $81.8 million (Trans. ID 65688749, Ex. 8 ¶65), and Defendants' damages expert opined that even if Plaintiffs' prove liability at trial, the proper damage award had to be no greater than $46 million. The $12 million Settlement Fund thus represents an outsize recovery by any measure.

Plaintiffs' Class Fee Request of $3 million represents 25% of the Settlement Fund. This is within the range of fees awarded by this Court on a percentage-of-the-benefit basis, particularly for cases like this one that settled well into discovery and near trial. Typical fee awards in cases settled after multiple depositions and some motion practice range from 22.5% to 33% of the common fund or benefit obtained.[21]

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[21] *See, e.g.*, *In re Starz S'holder Litig.*, C.A. No. 12584-VCG (Del. Ch. Dec. 10, 2018) (awarding attorneys' fees in the amount of 30% of the settlement fund); *In re Emerson Radio S'holder Deriv. Litig.,* 2011 WL 1135006, at *3 & n.4 (Del. Ch. Mar. 28, 2011) (awarding fee of 31.5% where "lengthy & thorough litigation by counsel … resulted in a final judgment and not a quick settlement"); *Berger v. Pubco Corp*., 2010 WL 2573881, at *2 (Del. Ch. June 23, 2010) (awarding 26% and noting that this was "at the bottom of the 25-33% range that is found in many Court of Chancery cases"); *Gatz v. Ponsoldt*, 2009 WL 1743760, at *3 (Del. Ch. June 12, 2009) (awarding 33% and finding that it was "within the range of reasonable fee

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The requested award is justified by the excellent financial result obtained in this difficult and hotly litigated merger case. The Settlement was reached only after extensive expedited litigation, on the eve of trial. Such a fee encourages counsel to take on challenging cases requiring creative claims and involving high risk, litigate those claims heavily, and hold out for substantial monetary consideration. Indeed, although Delaware law has become increasingly more challenging for plaintiffs, Delaware has rewarded Class counsel who have achieved substantial benefits after truly taking on significant litigation risk.

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awards in other class action cases"); *Ryan*, 2009 WL 18143, at *5 (awarding 33% of cash amount where plaintiffs' counsel engaged in "meaningful discovery" and survived "significant, hard fought motion practice")' *In re Freeport McMoran Sulphur Inc. S'holder Litig.*, C.A. No. 16729-VCN (Del. Ch. Apr. 20, 2006) (TRANSCRIPT) (awarding 33 1/3% fee for monetary fund obtained just before trial); *In re Berkshire Realty Co. Inv. S'holder Litig.*, 2004 WL 5367910 (Del. Ch. Apr. 27, 2004) (Stipulation) & 2004 WL 5174889 (Del. Ch. Aug. 10, 2004) (ORDER) (fee equal to 30% of fund, plus expenses); *In re Telecorp. PCS, Inc. S'holder Litig*, C.A. No. 19260-VCS (Del. Ch. Aug. 20, 2003) (TRANSCRIPT, at 3 and ORDER at 101) (fees of 30% of cash settlement on eve of trial); *In re Home Shopping Network, Inc. S'holder Litig*., C.A. No. 12868-CC, at 6 (Del. Ch. Jan. 24, 1995) (ORDER) (fee equal to 30% of fund); *In re Best Lock Corp. S'holders Litig.,* C.A. No. 16281-CC, at 5 (Del. Ch. Oct. 16, 2002) (ORDER and FINAL JUDGMENT) (30% of projected fund).

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C. The Other *Sugarland* Factors Also Support the Derivative and Class Fee Requests

i. The Contingency Nature of the Litigation Supports the Requested Fee and Expense Awards

The contingent nature of the representation is the "second most important factor considered by this Court" in awarding attorneys' fees. *Dow Jones & Co. v. Shields,* 1992 WL 44907, at *2 (Del. Ch. Jan. 10, 1992). "It is the 'public policy of Delaware to reward risk-taking in the interests of [stock]holders.'" *Activision*, 124 A.3d at 1073 (quoting *In re Plains Res. Inc.,* 2005 WL 332811, at *6 (Del. Ch. Feb. 4, 2005)). Delaware courts have repeatedly recognized that an attorney may be entitled to a much larger fee when the compensation is contingent rather than paid on an hourly or contractual basis. *Chrysler Corp. v. Dann,* 223 A.2d 384, 389-90 (Del. 1966); *accord Ryan,* 2009 WL 18143, at *13.

This case was litigated on an entirely contingent basis, and could easily have gone unprosecuted but for Plaintiffs' counsel's willingness to take on risk in a novel situation where the prospect of any recovery was truly uncertain. Plaintiffs' counsel have not been paid for their work, nor have any of their costs or expenses been reimbursed, and litigating this action required the allocation of a substantial amount of Plaintiffs' counsel's resources, including considerable out-of-pocket expenses.

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Plaintiffs' counsel litigated this case against skillful adversaries from highly reputable and aggressive defense firms through fact discovery, expert discovery, and briefing on summary judgment. Accordingly, Plaintiffs' counsel took on substantial contingency risk in pursuing Plaintiffs' claims, a factor supporting the requested Fee and Expense Awards.

The fact that the Fee and Expense Awards were agreed to after arm's-length negotiations between the parties further supports their reasonableness. As Vice Chancellor Laster harmonized the law on this point:

> The Delaware Supreme Court has held that the Court of Chancery must make an independent determination of reasonableness on behalf of the common fund's beneficiaries, before making or approving an attorney's fee award…. Notwithstanding these statements, some of this court's decisions speak of giving deference to a negotiated fee agreement. In my view, any apparent tension can be harmonized by differentiating between evaluating a range of reasonableness and determining a specific amount. ***Under Delaware Supreme Court precedent, the court must determine that the award falls within a reasonable range. If it does, then a court can defer to the parties' negotiated amount . . .***

Activision, 124 A.3d at 1074-75 (internal quotations and citations omitted) (emphasis added); *see also Forsta AP-Fonden v. News Corp.,* C.A. No. 7580-CS, at 10 (Del. Ch. Apr. 26, 2013) (TRANSCRIPT) ("I give credit to the arm's length bargaining."); *Forsythe,* 2012 WL 1655538, at *7 ("The fee falls within a reasonable range, warranting deference to the parties' negotiated amount."); *In re J. Crew Grp.,*

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Inc. S'holders' Litig., C.A. No. 6043-CS, at 78 (Del. Ch. Dec. 14, 2011) (TRANSCRIPT) ("I'm not going to quibble with what was negotiated.").

ii. The Significant Efforts of Plaintiffs' Counsel Support the Requested Fee Awards

In applying *Sugarland,* Delaware courts should "look at the hours and efforts expended" as a cross-check. But "[m]ore important than hours is 'effort, as in what plaintiffs' counsel actually did.' In this case, the answer is 'quite a bit.'" *In re Del Monte Foods Co. S'holders Litig.,* 2011 WL 2535256, at *13 (Del. Ch. June 27, 2011) (citations omitted); *see also* Michael J. De La Merced, *A Rare Peek Into How Wachtell Bills,* The New York Times (Jan. 9, 2015) (describing a leading defense firm's staffing and billing procedures) ("[S]taffing is designed to provide the highest quality representation. In order to operate in this manner we must base our fees not on time but on the intensity of the firm's efforts, the responsibility assumed, the complexity of the matter and the result achieved.").

Plaintiffs vigorously litigated this complex case to a successful conclusion, including for example:

- Filing the complaints and the motions for TRO and expedited proceedings;
- Briefing, arguing and obtaining the TRO and order for expedited proceedings;
- Significant expedited discovery efforts, including the briefing of three motions to compel, the review of over 397,024 pages of documents, the

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production of over 1,304 documents, and taking five depositions during the expedited phase of litigation;

- Submitting two expert reports in support of Plaintiffs' preliminary injunction application;
- Briefing the preliminary injunction application at Defendants' insistence and obtaining a continuation of the TRO from Defendants;
- Significant trial phase discovery efforts, including the review of over 4,687 pages of additional documents and three depositions;
- Submitting another pre-trial expert report;
- Unsealing dozens of documents for the benefit of the Class and public stockholders;
- Briefing Plaintiffs' class certification motion and Defendants' motion to amend their answer;
- Months of adversarial settlement negotiations, including two days of mediation overseen by Vice Chancellor McCormick

Counsel's affidavits submitted herewith contain a breakdown of Plaintiffs' counsel's time and expenses in this Action. From inception through the date the parties entered into the Stipulation on August 7, 2020, Plaintiffs' counsel and support staff devoted a total of 5,733.10 hours to this litigation. (Orrico Aff. ¶3; Kass Aff. ¶3). Plaintiffs' counsel's total requested attorney's fees (*i.e.*, not including the Expense Reimbursement Request) reflects an implied hourly rate of $994.23.

These measures demonstrate that the Derivative and Class Fee Requests, individually and collectively, are reasonable and well within the ranges typically

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awarded by this Court. This Court frequently awards attorneys' fees with higher implied hourly rates.[22] The implied hourly rate Plaintiffs' counsel seek here is reasonable and appropriate. *See* Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 An Hour,* Wall St. J. (Feb. 9, 2016).

iii. The Complexity of the Litigation

In determining the award of Class counsel's fees and expenses, the Court also will consider the relative complexities of the litigation. "All else equal, litigation that is challenging and complex supports a higher fee award." *Activision*, 124 A.3d at 1072. This case was not just hard-fought, it was intellectually challenging.

Courts generally recognize that stockholder class and derivative action litigation is notoriously difficult. This case is exceptionally complex, involving the multistep Go Dark Scheme, the novel questions of whether Defendants' decision to

[22] *See, e.g.*, *Globalstar*, C.A. No. 2018-0699-TMR (fee represented hourly rate of $1,832.21 per hour); *In re Jefferies Grp., Inc. S'holders Litig.,* 2015 WL 3540662, at *4 (Del. Ch. June 5, 2015) (fee represented rate of more than $2,200 per hour); *Franklin Balance Sheet,* 2007 WL 2495018, at *14 n.73 (fee represented an hourly rate of $4,023 per hour); *In re Fox Entm't Grp., Inc. S'holder Litig.,* C.A. No. 1033-N, at 70 (Del. Ch. Sept. 19, 2005) (TRANSCRIPT) (fee represented hourly rate of $3,000 per hour); *In re NCS Healthcare, Inc. S'holder Litig.,* 2003 WL 21384633, at *3 (Del. Ch. May 28, 2003) (fee represented an hourly rate of approximately $3,030 per hour); *Dargon v. Perelman,* C.A. No. 15101-VCL, at 48-51 (Del. Ch. Aug. 29, 1997) (TRANSCRIPT) (fee represented an hourly rate of approximately $3,500).

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Go Dark was motivated by disloyalty, and how to value the harm (if any) suffered by the Class and the Company from the Scheme.

Plaintiffs faced those complexities head-on by aggressively and creatively pursuing their liability and damages theories and skillfully attacking Defendants' defenses. This effort required lengthy and painstaking analysis, resilience, creativity, resourcefulness, and intense focus.[23]

iv. Standing and Ability of Counsel

Under *Sugarland,* the Court should also consider the standing and ability of Plaintiffs' counsel. Here, Plaintiffs' counsel are experienced law firms in the field of stockholder litigation.

The standing of opposing counsel may also be considered in determining an award of attorneys' fees. Defendants were and are represented by an army of experienced and aggressive defense teams from two prestigious and high-profile national firms (Sperling & Slater, P.C. and Fox Rothschild LLP) and two of Delaware's preeminent defense firms (Morris, Nichols, Arsht & Tunnell LLP, and

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[23] *See, e.g., Ams. Mining*, 51 A.3d at 1256 (upholding $304 million fee award, representing 15% of fund, noting that "[t]he Court of Chancery carefully considered the difficulty and complexity of the case" in which "Plaintiff's attorneys had succeeded in presenting complex valuation issues in a persuasive way before a skeptical court"); *Del Monte*, 2011 WL 2535256, at *13 (awarding fees of 33% of fund, noting that the case "was not cookie-cutter deal litigation…The relative complexity of the litigation supports an award at the higher end of the range").

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Richards, Layton & Finger, P.A.). Moreover, they were represented initially by Thompson Hine, which brought a particularly volatile form of litigation tactics to bear. As such, this factor also militates in favor of approval of the Fee Applications.

D. The Expense Reimbursement Request Is More Than Reasonable Given The Circumstances of This Case

Plaintiffs' counsel seeks reimbursement of $625,000 in in out-of-pocket expenses.[24] These expenses were reasonably and necessarily incurred in the pursuit of this litigation on behalf of Plaintiffs and the Class. Approximately 75% of these expenses ($466,725.52) were expert fees paid to Plaintiffs' experts. The remaining costs include such items as mediation expenses, duplication costs, computerized research costs, electronic filing fees, costs associated with maintaining an electronic database, travel and lodging expenses, court reporting services, postage and telephone charges.

As discussed above, Plaintiffs were forced to incur additional costs as a result of Defendants' insistence on a preliminary injunction hearing, rather than going directly to trial, as well as the hard-nosed nature of how this case was litigated. Nevertheless, the total expenses incurred here compares favorably to the expenses

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[24] Although, Plaintiffs' counsel incurred more than $625,000 in out-of-pocket expenses, (Orrico Aff. ¶4; Kass Aff. ¶4), Plaintiffs' counsel agreed to seek "reimbursement of Litigation Expenses in an amount not to exceed $625,000." Notice ¶56.

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reported in cases that similarly resolved before or near trial. *See, e.g.*, *In re Rural/Metro S'holders Litig.*, C.A. No. 6350-VCL, at 35-38 (Del. Ch. Nov. 19, 2013) (TRANSCRIPT) (awarding 28% of net common fund (after deduction of expenses), plus $1,296,211.86 in expenses where "plaintiffs' counsel settled deep in the case, after full discovery, on the eve of trial"); *see also Handy & Harman, Ltd. S'holder Litig.*, C.A. No. 2017-0882-TMR, at 55 (Del. Ch. Nov. 14, 2019) (TRANSCRIPT) ("awarding $7.5 million in attorneys' fees, which equates to 25 percent [of the settlement fund], plus … the out-of-pocket expenses of $280,239.08."); *In re Saba Software, Inc. S'holder Litig.*, C.A. No. 10697-VCS, at 23-24 (Del. Ch. Sept. 24, 2018) (TRANSCRIPT) (awarding $226,335 in expenses and observing that "there is no absolute rule" regarding "all-in fee and expenses requests").[25] Plaintiffs and Plaintiffs' counsel respectfully submit that reimbursement of all of those expenses out of the Settlement Fund should be approved.

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[25] Plaintiffs' counsel has applied for a separate award from the Settlement Fund of fees and costs. Even if the application for costs were considered as a unitary part of the Fee Application, an award of the full amounts would still be roughly 30% of the Settlement Fund, which is well within the range of awards made for cases which settle on the eve of trial. *See, e.g.*, *Forsythe*, 2012 WL 1655538, at *7 (awarding all-in fees and expenses representing 29% of the total monetary recovery); *Freeport McMoran*, C.A. No. 16729-VCN (awarding 33 1/3% fee for monetary fund obtained just before trial).

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Considering all the *Sugarland* factors Plaintiffs respectfully submit that the Court should approve the Derivative Fee Request in the mediator-recommended amount of $2.7 million (all of which will come from Defendants' insurers), the Class Fee Request of $3 million, and the Expense Reimbursement Request of $625,000.00.

IV. A $25,000 INCENTIVE FEE AWARD TO EACH PLAINTIFF IS APPROPRIATE

Plaintiffs request that the Court award Plaintiffs' Incentive Award Request in the amount of $25,000 for each Plaintiff to be paid out of any attorney fee award granted by the Court. The Court has broad discretion in deciding "whether to grant an incentive award to a named plaintiff" following the "conclusion of the litigation." *Chen v. Howard-Anderson,* 2017 WL 2842185, at *3 (Del. Ch. June 30, 2017) (citation omitted).

The Court has previously awarded incentive fee awards in class or derivative litigation when the plaintiff has contributed meaningfully to the litigation.[26] The

[26] *See, e.g., Handy*, C.A. No. 2017-0882-TMR, at 56-57 (awarding $10,000 incentive fee to lead plaintiff who "gathered and produced documents on an expedited basis" and "spent a day in preparation for his deposition and provided testimony at that deposition"); *In re Saba Software, Inc. S'holder Litig.,* C.A. No. 10697-VCS (Del Ch. Sept. 26, 2018) (ORDER) (awarding $100,000 incentive fee to plaintiff); *In re CytRx Corp. S'holder Deriv. Litig. II,* C.A. No. 11800-VCMR (May 17, 2018) (ORDER) (awarding $2,500 incentive fee to each plaintiff); *see also In re Orchard Enters. S'holder Litig.,* 2014 WL 4181912, at *13, n.8 (Del. Ch. Aug. 22, 2014)

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Court has explained that these awards incentivize stockholders, like Plaintiffs, to bring meritorious lawsuits. *In re Dunkin' Donuts S'holder Litig.,* 1990 WL 189120, at *10 (Del. Ch. Nov. 27, 1990).

As Plaintiffs explain in their respective affidavits, Plaintiffs were the only Tile Shop stockholders to take the risk of filing an action, actively monitored the action's prosecution through regular contact and collaboration with counsel, and maintained continuous ownership of Tile Shop stock at all relevant times. Plaintiffs reviewed and/or provided input to the drafts of the complaints, the motions for TRO and expedited proceedings, the PI Motion, the motion for class certification, the discovery motions, and expert reports. Plaintiffs had their documents collected and produced, responded to over one-hundred discovery requests and interrogatories, and were interrogated by senior members of Defendants' legal team during two, full day depositions. Plaintiffs also attended and participated in the Court's November 8, 2019, hearing on the motions for TRO and expedited proceedings and the mediation sessions.

(awarding $12,500 to co-lead plaintiffs, and collecting cases); *Ryan*, 2009 WL 18143 (awarding $5,000 each to two plaintiffs).

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In accordance with this Court's practice, the Incentive Fee Awards Requests were fully disclosed in the notice to Tile Shop stockholders and, as of the date of this Motion, no stockholder has objected.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve the Settlement and the Fee Applications and certify the Settlement Class.

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