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Transaction ID 61044649
Case No. 12481-VCL

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

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| CITY OF DAYTONA BEACH POLICE AND FIRE PENSION FUND, Individually and on Behalf of All Others Similarly Situated, | ) | |
| Plaintiff, | ) | C.A. No. 12481-VCL |
| v. | ) | **PUBLIC VERSION FILED AUGUST 29, 2017** |
| EXAMWORKS GROUP, INC., *et al.* | ) | |
| Defendants. | ) | |

**PLAINTIFF'S BRIEF IN SUPPORT OF CLASS CERTIFICATION, THE SETTLEMENT AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES**

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## PRELIMINARY STATEMENT

This class action settlement provides for an $86.5 million recovery on behalf of former stockholders of ExamWorks Group, Inc. ("ExamWorks" or the "Company") who had approximately 40 million shares cashed out for $35.05 per share in a July 26, 2016 merger (the "Merger"). The settlement is one of the largest recoveries in this Court, and is particularly notable for a third party merger. Paul Hastings LLP ("Paul Hastings"), ExamWorks' counsel, is paying $46.5 million, an unprecedented settlement for a law firm. Plaintiff asks the Court to confirm class certification, approve the settlement and award 25% of the fund, net expenses, to Plaintiff's counsel.

Defendant Leonard Green & Partners, L.P. ("LGP")[1] acquired ExamWorks in the Merger. Five ExamWorks directors and officers ("the Rollover Defendants") rolled over some of their equity: Executive Chairman and director Richard E. Perlman; Chief Executive Officer and director James K. Price; President Wesley J. Campbell; Chief Financial Officer Miguel Fernandez de Castro and director William A. Shutzer, who is a Senior Managing Director of defendant Evercore Group, L.L.C. ("Evercore"), which received a contingent fee of over $12 million from ExamWorks for arranging the Merger. Perlman, Price, Campbell and Fernandez also received

[1] LGP's Merger vehicles, Gold Parent, L.P. and Gold Merger Co., Inc. were also named as defendants.

employment agreements and most of a 9.2% profits interest in post-merger ExamWorks. ExamWorks' second financial advisor, Goldman, Sachs & Co. ("Goldman"), the Company's legal counsel, Paul Hastings, and the other ExamWorks directors (Thomas Presby, Peter B. Bach, Peter M. Graham and David B. Zenoff and together with the Rollover Defendants, the "Individual Defendants") were also defendants.[2]

The Merger was announced on April 26, 2016. After considerable factual and legal analysis, Plaintiff filed a 57-page complaint on June 17, 2016. Over defendants' strenuous objection, Plaintiff obtained an order for expedited proceedings. Plaintiff negotiated a stipulation and order that allowed the Merger to close, but preserved all Plaintiff's claims and provided for an expedited trial. Trial was originally scheduled for October 2016, but was rescheduled for March 2017.

Plaintiff doggedly pursued discovery, pressing defendants for further documents and challenging their privilege claims. After the ExamWorks Defendants eventually waived privilege, Plaintiff obtained the notes of four Paul Hastings lawyers and ExamWorks' General Counsel along with hundreds of other communications. In considering Plaintiff's motion for expedition, the Court observed that "facts" were added to the June 23, 2016 definitive proxy statement

[2] The Individual Defendants together with ExamWorks are referred to as the "ExamWorks Defendants."

(the "Proxy") that were not found in the preliminary proxy statements.[3] Discovery confirmed a pattern of Defendants making things up, deliberately misstating what happened and rewriting history. Comparison of contemporaneous notes with the final minutes and Proxy and a review of the editing and multiple revisions of the minutes and proxy materials revealed that the drafting process was not an attempt to record what actually happened, but to create a fictionalized story of what the Defendants wanted the stockholders (and this Court) to think happened. Paul Hastings even rewrote the Board resolutions creating the Special Committee -- after the Merger Agreement was signed.

Ultimately, over one million pages of documents were produced, reviewed and analyzed. Plaintiff deposed all Defendants except for Price, Campbell, Bach and Zenoff, whose depositions were about to occur when the case settled.

At the hearing on Plaintiff's motion for expedited proceedings, the Court described the Merger as "conflicts laden," observing that the number of conflicts of directors, officers, bankers and lawyers "was disconcertingly high."[4] Plaintiff's further research and discovery revealed deeper and more numerous conflicts. Directors, officers, bankers and lawyers for ExamWorks were also directors, officers, advisors and/or investors in numerous other past and current Perlman/Price

[3] *City of Daytona Beach Police and Fire Pension Fund v. ExamWorks Grp., Inc.*, C.A. No. 12481-VCL at 20 (Del. Ch. June 29, 2016) (TRANSCRIPT).
[4] *Id.* at 20.

ventures.[5] Paul Hastings represented ExamWorks and its Board, Special Committee and management. It never suggested independent counsel. Perlman and Price were the primary clients of Reinaldo Pascual of Paul Hastings' Atlanta office, who had represented and/or currently represented a dozen or more Perlman/Price related entities and had invested or was currently invested in many Perlman/Price ventures.[6]

Plaintiff submitted opening and rebuttal expert reports, deposed Defendants' four experts, and filed two motions *in limine* regarding two of Defendants' experts. While the case was advancing to trial, Plaintiff submitted extensive opening and reply mediation statements, and attended two full days of mediation. Plaintiff participated in further mediation efforts which ultimately led to the settlements. Plaintiff first reached a $40 million settlement with the ExamWorks Defendants, Goldman, Evercore and LGP (the "ExamWorks Group") on February 28, 2017, just 20 days before trial.

Final trial preparations continued against Paul Hastings. Plaintiff prepared a pre-trial brief of nearly 100 pages, drafted the pre-trial order, compiled trial exhibits and prepared trial examinations. Plaintiff opposed Paul Hastings' attempt to

[5] The conflicts of the Individual Defendants are summarized in Ex. 1.

[6] Exs. 2; 123 (at 10-11). References to "Ex.__" refer to the Transmittal Affidavit of Samuel L. Closic in Support of Class Certification, the Settlement and an Award of Attorneys' Fees and Expenses, a copy of which is being filed contemporaneously herewith.

postpone trial. Plaintiff had all but tried the case when the $46.5 million settlement with Paul Hastings was achieved on March 6, 2017, two weeks before trial.

Extended discussions ensued over disputes between Paul Hastings and the other Defendants as to how the settlements would be documented and presented. After weeks of further negotiation, a stipulation and agreement of settlement was finally achieved on May 5, 2017.

## STATEMENT OF FACTS

### A. A Preliminary Note on the Minutes and Proxy Statement

The discrepancies among the Proxy, minutes, preliminary and draft proxies, draft minutes, notes of meetings and other documents concerning what occurred and what was said at various Board and Special Committee meetings are so numerous that they cannot all be reviewed in a settlement brief. A few of the glaring fabrications, doctored "facts" and what Mark Twain called "stretchers"[7] (as in stretching the truth) are described herein. At trial, Plaintiff intended to present extensive evidence of further inconsistencies and falsehoods.

### B. Perlman Controlled the Initiation and Timing of the Sale

Perlman and Price are serial entrepreneurs who have repeatedly bought, developed and sold companies using a rollup strategy. Their team has included the same officers (Fernandez and Campbell), directors (Presby and Shutzer), lawyer (Pascual of Paul Hastings) and investment bankers (Goldman and Evercore). Pascual, Presby, Bach, Campbell, Fernandez, Shutzer and other Evercore senior managers, have invested in many other Perlman/Price ventures.

Perlman and Price founded ExamWorks in 2008 to apply their roll-up strategy to the independent medical examination industry ("IME"). ExamWorks went public in 2010, with Goldman as lead underwriter, Paul Hastings as legal counsel and

[7] Mark Twain, THE ADVENTURES OF HUCKLEBERRY FINN, p. 1.

Perlman, Price, Pascual, Shutzer and Presby as directors and stockholders. In late 2013 and early 2014 Perlman decided the rollup had been successful, so he, Goldman and Evercore marketed ExamWorks to seven private equity firms including LGP.[8] After a rise in ExamWorks' stock price in early 2014 caused discussions to terminate, Perlman, the other directors and officers and Pascual sold nearly half of their ExamWorks equity (about 8% of the outstanding shares) for over $100 million in a secondary offering at $33.90 per share.[9]

In the summer of 2015, without Board authorization, Perlman had Goldman look for a strategic merger partner. There were no logical strategic buyers so those efforts did not succeed, but Goldman recognized that Perlman was still "a seller."[10] In early September 2015, Perlman sold more than a third of his remaining stock and Campbell and other officers exercised 236,316 options and sold shares in the $35 range, causing ExamWorks' stock price to decline from $36.02 per share on August 28 to $30.63 on September 8. The Proxy made no mention of the summer 2015 efforts by Perlman, management and Goldman to sell ExamWorks or the insider sales in September.

[8] Exs. 117 (at 37-38); 9
[9] Ex. 117 (at 37-38); *See also* Exs. 10; 11; 12 (at 5-12).
[10] Ex. 13.

### C. Perlman and the Advisors Pursue a Sale to Private Equity

In October 2015, Evercore, Goldman and Perlman continued to pursue a sale of ExamWorks.[11] Evercore arranged a meeting between Perlman and LGP, and Goldman arranged for a similar meeting with another private equity firm, [redacted].[12] The Proxy's assertions that "neither the Company nor representatives of Goldman Sachs or Evercore solicited the initial outreach by [redacted] or LGP" and that the Company "was not then contemplating a sale" were false.[13]

### D. The Tangled Tale of the November 9, 2015 Board Meeting

#### 1. Defendants' Dilemma Describing the November 9, 2015 Board Meeting

Defendants faced a dilemma when they had to describe whether, to what extent and under what circumstances Perlman first disclosed to the Board his initial discussions with [redacted] and LGP. Perlman testified he informed the directors about the [redacted] and LGP discussions at the November 9, 2015 Board meeting and in later informal update calls.[14] [redacted][15]

[11] Exs. 14;15.
[12] Exs. 16, 17; 18; 19; 20.
[13] *See* Exs. 22; 23.
[14] Ex. 121.
[15] Exs. 132 (at 10); 33.

[redacted] If Perlman did not disclose his discussions with [redacted] and LGP until the January 22, 2016 Board meeting, despite four intervening Board meetings, he would have breached his fiduciary duties. [redacted] (ii) discussions with [redacted] broke off in late November and (iii) [redacted] This cover story was not plausible.

By October 28, 2015, Pascual was aware that Perlman had met with and expected an offer from [redacted] and was also in contact with another firm.[16] Paul Hastings analyzed issues arising from a change of control and Pascual was hunting around Paul Hastings for lawyers to help with a sale of ExamWorks.[17] Though [redacted] indicated in late November 2015 that it could not make an attractive offer then, Goldman was still confident that [redacted] would come back and ExamWorks would be sold in early 2016.[18]

[16] Ex. 21.
[17] *Id.* (at PH_EXAM_266844); Exs. 24; 25.
[18] Exs. 29; 30.

### 2. The November 9, 2015 Board Minutes

The first draft of the November 9, 2015 minutes, [redacted]

[redacted][19] [redacted]

[redacted][20]

However, Pascual never produced any notes of the November 9 Board meeting. [redacted]

[redacted][21]

[redacted]

[redacted]

[redacted][22]

[redacted]

[19] Ex. 59 (at PH_EXAM_16189, 91-92)
[20] *Id.* (at PH_EXAM_169187)
[21] [redacted]
[22] [redacted]

[redacted]

The final minutes of the November 9, 2015 meeting changed two sentences from the draft minutes regarding potential strategic opportunities to say that potential strategic "transactions," and "opportunities to enhance stockholder value" were discussed and "the Company should explore" these opportunities.[23] In other words, the minutes were changed to indicate that the Board had authorized management to pursue a sale of the Company.

### 3. The January 22, 2016 Board Meeting and Minutes

Based on a comment by Perlman, a draft of the January 22, 2016 Board minutes circulated by Paul Hastings stated that Perlman noted that the directors were already aware of his discussions with private equity firms based on the November 9, 2015 Board meeting and informal update calls.[24] [redacted]

[redacted][25]

[23] *Compare* Ex. 59 (at PH_EXAM_169191-92) *with* Ex. 67 (at EXAM127282-83); Ex. 27.
[24] Exs. 96 (at EXAM209157); 95 (at EXAM206572-3); 94.
[25] [redacted]

[redacted] Pascual and Paul Hastings set about "clarifying what was discussed in November" by deleting the reference to Perlman saying that the Blackstone and LGP discussions had been previously disclosed to the Board.[26]

#### 4. The Proxy's Description of the November 9, 2015 Board Meeting

Early proxy drafts said nothing about the November 9, 2015 Board meeting.[27] Later drafts added a description similar to the final minutes, but added that Perlman had reported on his discussions with [redacted].[28] Goldman and Evercore indicated that at the November 9 meeting, Perlman reported on his discussions and LGP's interest.[29] [redacted][30] Discussions with LGP had continued after October 28, 2015 and on November 24, 2015, the day before Pascual made his first share purchase, Perlman set a "fireside chat" with LGP for the first week in January 2016.[31]

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[26] Exs. 102 (at PH_EXAM_104046); 103 (at EXAM20985-86); 110 (at EXAM208329).
[27] Exs. 93; 95
[28] Exs. 108 (at EVREXM129325); 93; 95.
[29] Ex. 104 (at EVREM128539).
[30] [redacted]
[31] Exs. 31; 32; 28.

Moreover, the Proxy says that the purpose of the January 22, 2016 Board meeting was "to discuss whether ExamWorks should **continue its dialogue** with LGP," thereby acknowledging that the Board was already aware of the "dialogue with LGP" before the January 22 meeting.[32]

[redacted]

### E. Perlman, Pascual, Evercore and Goldman Manipulate the Sale Process

Pascual called his Paul Hastings partner, Kevin Logue on January 19, 2016 and reported that Goldman and Evercore would likely be engaged and that an Evercore Senior Managing Director was an ExamWorks director.[33] Logue responded "Create Committee."[34] Pascual ignored this advice.

In a January 20, 2016 email, Arguedas advised that if Evercore was working on the sale of ExamWorks, Shutzer must resign from the Audit and Compensation Committees because he is a related party.[35] Perlman replied, "Rey [Pascual] is all over this" and had spoken to Shutzer about "recusing himself from the transaction

[32] Ex. 117. (Emphasis added).
[33] Ex. 3.
[34] Ex. 35.
[35] *Id.* Pascual had earlier stated that using Evercore would create a conflict for Shutzer and require creating a special committee that excluded him. Ex. 34.

process."[36] [redacted]

[redacted][37]

On January 20, 2016, Perlman emailed the Individual Defendants, Arguedas, Pascual, Goldman and Evercore stating that at the January 22, 2016 Board meeting the directors would discuss "creation of a board committee" to lead the sale process.[38] However, Perlman and Pascual later decided not to create a Special Committee at that meeting.[39]

The Proxy claimed that at the January 22, 2016 Board meeting Perlman, Goldman and Evercore discussed other potential buyers, but the Board concluded not to pursue other parties based on "its past unsuccessful experience with private equity acquirers."[40] However, the minutes and the notes of the meeting from [redacted], Pascual and Goldman reflect no such discussion or conclusion.[41] [redacted]

[redacted][42]

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[36] Ex. 35.
[37] Exs. 53; 63; 81; 41; 42; 48; 37.
[38] Exs. 36; 38.
[39] *See* Exs. 44 (at EXAM222); 39; *but see* Ex. 47.
[40] Ex. 117 (at 39).
[41] Exs. 44; 40; 8 (at PH_EXAM_TR_01-03); 43.
[42] [redacted]

The January 22, 2016 minutes claim that Perlman suggested formation of a special committee, but that Pascual advised it was premature to discuss formation of a special committee, formal engagement of bankers or the bankers' potential conflicts.[43] The Proxy, preliminary and draft proxies, and the notes of Pascual, [redacted] and Goldman of the January 22, 2016 meeting do not indicate that these subjects were discussed at the January 22 meeting.[44]

In an email exchange shortly after the January 22 meeting Graham and Bach confirmed that Perlman was "done and wants out."[45]

### F. LGP's February 8, 2016 Offer

On February 8, 2016, Perlman received a written proposal from LGP to acquire ExamWorks for $32 to $35 per share.[46] An explicit condition of LGP's offer was "reaching an agreement with the management of the Company with respect to their investments in, and ongoing role as managers of, the Company."[47] Goldman, Evercore and Paul Hastings all recognized that LGP's offer required a management

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[43] Ex. 444 (at EXAM22). The reference to "potential conflicts" in the description of the closing speech Pascual supposedly gave at the January 22, 2016 Board meeting was added in a May 28, 2016 revised draft of the January 22 minutes. Ex. 114 (at EXAM20916).

[44] Exs. 117 (at 39); 40; 8 (at PH_EXAM_TR_01-03); 43; 93 (at PH_EXAM_38432).

[45] Ex. 45.

[46] Ex. 49.

[47] [redacted]

rollover.[48] Paul Hastings concluded that a special committee that excluded management should be created "sooner than later."[49] Yet Pascual and Perlman continued to put off creation of a special committee.

On February 12, 2016, Pascual acknowledged that Delaware law required Shutzer's exclusion from any special committee process.[50] However, after Perlman suggested "it would be great Not to have to disclose any of this," Paul Hastings investigated how "to avoid disclosure" that Shutzer was not independent.[51] Perlman and Pascual also delayed "formally engaging" the bankers, pretending that justified delaying consideration of the bankers' conflicts.[52]

### G. The February 19, 2016 Board Meeting

In a February 19, 2016 email to all the directors, Graham said his presumption was that Perlman and Price wanted to sell ExamWorks, so he was willing to go along.[53] He emailed Perlman and Price, copying Shutzer, saying

> I view this is your gig, so I will follow your lead.
>
> ****
>
> If you both have had enough, I get it and that's fine….[54]

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[48] Exs. 51; 52; 55; 56 (at EVREXM51241).
[49] Ex. 50.
[50] Ex. 54.
[51] Ex. 57.
[52] Exs. 58; 61.
[53] Ex. 66.
[54] Ex. 64.

[redacted][55]

In the minutes and the Proxy, the Individual Defendants omitted events that did occur at the February 19, 2016 meeting and made up events that did not. Eight sentences of the February 19 Board meeting minutes describe a lengthy discussion Pascual supposedly conducted concerning Shutzer's conflict.[56] [redacted] and the Proxy do not reference any such dissertation by Pascual.[57] The Proxy failed to disclose that at the February 19 meeting, management lobbied for a narrow process to restrict sale discussions to LGP, and rely on a post-signing go-shop.

The February 19, 2016 Board minutes made up a Board instruction that was never given:

> The Board also instructed management not to negotiate terms of any potential employment following a potential transaction in an effort for the Board to manage and mitigate conflicts.[58]

Five sets of notes of the Board meeting, proxy drafts and drafts of the February 19 minutes do not indicate that such an instruction was given.[59] Paul Hastings only

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[55] [redacted]

[56] Ex. 65.

[57] [redacted]

[58] Ex. 65 at EXAM00024.

[59] Ex. 4; 5; 6 (at PH_EXAM_TR000005-6); 92 (at PH_EXAM_00045579); 93; 96 (at EXAM209162); 100; 109 (at EXAM20957); 110 (at EXAM208334); 97 (at GS00123294); 107 (at PH_EXAM_159628).

inserted the sentence concerning the supposed Board instruction into the draft minutes on May 25, 2016.[60]

The Proxy's description of the February 19, 2016 Board meeting includes other fabricated Board instructions:

> In order to manage and mitigate conflicts, the Board also instructed management not to negotiate terms of any potential employment following any potential transaction. A potential investment or equity rollover by management was not discussed at this time as LGP had yet to specify any details of such an investment or rollover and the executive management team did not desire or expect to participate in any investment or rollover in a meaningful manner, if at all.[61]

The supposed Board instructions and non-discussion of the rollover were not mentioned in the initial preliminary proxy filed with the SEC on May 20, 2016, ("The First Proxy")[62] or in earlier drafts of the proxy, drafts of the minutes [redacted] The sentence concerning a non-discussion of the rollover admits that LGP had required a rollover and is illogical because the Board would have to discuss the rollover to decide not to discuss the rollover.

In the First Proxy, the description of an April 13, 2016 Special Committee meeting contained a reference by Perlman to a Board instruction at the February 19

[60] Exs. 112 (at PH_EXAM_136860); 113 (at EXAM20918).
[61] Ex. 117 at 39-40.
[62] Ex. 111.

meeting that management should not have discussions with LGP about employment terms or the rollover.[63] Pascual's notes of the April 13 meeting and the draft and final minutes of the April 13 meeting do not reflect that Perlman made any reference to any prior Board instructions.

The SEC pointed out that the First Proxy's discussion of the April 13 Special Committee meeting referred to Board instructions given at the February 19 meeting, but the description of the February 19 meeting did not mention those instructions. In response, Defendants added a sentence in the second preliminary proxy filed June 14, 2016 stating that at the February 19 meeting, the Board instructed management not to discuss employment terms. After Plaintiff's original complaint[64] pointed out that the additional sentence did not mention any instruction not to discuss the rollover, Defendants' added the concluding sentence to the Proxy.

### H. The March 8, 2016 Board Meeting

At a March 8, 2016 Board meeting, the conflicted bankers told the Board that LGP's revised March 7, 2016 $35 offer was the best they were going to get and Pascual again said the Board should wait to discuss creation of a special committee and formal engagement of the bankers.[65] [redacted]

[63] *Id.* (at 36).
[64] Verified Class Action Complaint, C.A. No. 12481-VCL (Del. Ch.) at ¶¶39, 41 (Del. Ch. June 17, 2015) [Transaction I.D. No. 59162259].
[65] Exs. 122 (at 89-90); 70 (at EXAM228).

[redacted]

[redacted] After the March 8 meeting, Graham raised management's conflict because of the rollover but Pascual again claimed they could ignore the conflict as long as they avoided discussing the rollover with LGP.[67]

### I. The March 23, 2016 Board Meeting

At the March 23, 2016 Board meeting, the Board dismissed Goldman's conflict arising from receipt of nearly $85 million in fees from LGP in the past two years, persuading itself that the involvement of Evercore, which had its own conflict, somehow "mitigated" Goldman's "more significant conflicts."[68]

[redacted][69] The Special Committee's authority was limited to evaluating and negotiating the LGP "Proposal" and "Proposed Acquisition." Incredibly, Perlman and Price were put on the Special Committee.

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[66] [redacted]

[67] Ex. 72.

[68] Ex. 73 (at EXAM_230).

[69] [redacted]

The resolutions purportedly adopted at the March 23 meeting creating the Special Committee were knowingly falsified after the fact by Paul Hastings. On April 30, 2016, four days after the Board had approved the Merger, Pascual's associate suggested that they "[c]onsider whether [the March 23 resolutions] should be revised to more clearly show the committee's power to say no to transaction."[70] Pascual directed her to "make the committee resolutions stronger."[71]

Pascual's associate drafted "updated committee related resolutions."[72] Three of the four original resolutions were substantially altered. Six entirely new paragraphs were added, including resolutions providing that the Board could not approve the "Proposed Acquisiton" without a favorable recommendation of the Special Committee and resolutions relating to retaining "independent legal counsel" and financial advisors.[73]

Pascual also directed his associate to add a resolution that Graham had been elected chairman of the Special Committee at the March 23 meeting.[74] However, Pascual and the Special Committee knew Graham had not been elected chairman at

[70] Exs. 90; 89.
[71] Ex. 91.
[72] Ex. 101.
[73] *Id.* (at 37-38).
[74] Ex. 99.

the March 23 meeting because much later (on April 11, 2016), Pascual had recommended that Graham serve as "acting chairman" of the Special Committee.[75]

On May 30, 2016, [redacted]

[redacted][76]

Yet not one of the 14 recipients questioned why the four limited resolutions adopted by the Board on March 23 had been substantially altered and six new resolutions had been added.

The Proxy[77] misrepresented the resolutions creating the Special Committee by asserting that:

> At the time of the formation of the Special Committee of the Board of ExamWorks, the Board delegated to the Special Committee the full power and authority to evaluate and make such a determination on whether or not to proceed with any sale of ExamWorks which would include, without limitation any alternative proposal.

### J. The Rollover and Management Equity, Not a Higher Price, Becomes the Focus

Though there was supposedly a Board instruction not to discuss the rollover with LGP, Campbell and Fernandez discussed the rollover at an April 5, 2016 meeting with LGP. On April 12, 2016, LGP's counsel provided a draft merger

[75] Ex. 77.
[76] Ex. 128.
[77] Ex. 117.

agreement which, consistent with LGP's two offers, required a rollover.[78] On April 15, 2016, Pascual talked to Shutzer who then talked to LGP about the rollover.[79] On April 19, 2016, a week before the signing of the Merger Agreement, Pascual finally told Perlman and Price to resign from the Special Committee because of the rollover.[80] By the afternoon of April 20, 2016, LGP believed they were close to a deal including: "Mgmt Rollover -- $40mm, consisting of $29mm from the 4 guys who visited our office and $11mm from Bill Shutzer."[81] Pascual was negotiating rollover issues for management and Shutzer.[82]

On April 21, 2016, Graham reported to Bach, Presby and Zenoff that the issue of price still had not been discussed.[83] Late Sunday evening, April 24, 2016, Pascual advised the Board there would be a Board meeting 36 hours later at 8:00 a.m. on Tuesday so a deal could be announced before the market opened on Wednesday.

Prior to an April 25, 2016 Special Committee meeting, Graham told Pascual that some Board members were concerned that "this deal is becoming unusual and a bit funky."[84] The minutes of the April 25 Special Committee meeting show that all the Rollover Defendants were present along with Paul Hastings and Arguedas.

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[78] Exs. 76; 78; 79.
[79] Ex. 80.
[80] Ex. 82.
[81] Exs. 73, 83.
[82] Ex. 84.
[83] Ex. 85.
[84] Ex. 86.

Shutzer told the Special Committee that "his conversations [with LGP] were limited to the rollover and [LGP's] willingness to go forward with a transaction" and "he did not have any price or other deal-related conversations with [LGP.]"[85] These representations were false. In the Proxy, [86] a sentence was added to the description of Shutzer's April 24, 2016 conversation with LGP regarding the rollover, stating:

> At this point, Mr. Shutzer and Mr. Baumer also discussed Mr. Shutzer potentially joining the board of the surviving company.[87]

ExamWorks' July 18, 2016 8-K ("July 8k") confirmed that the ExamWorks Board only learned that Shutzer would be on the surviving board "in connection with the drafting of the proxy statement."[88]

At the April 26, 2016 meeting, the Special Committee decided that while Graham would ask LGP for a higher price, the Special Committee would accept $35.[89] Pascual's notes indicate Graham suggested "50 cents $22 million" as a "Reasonable ask."[90] Zenoff stated: "Shutzer's motivation – views it as another good investment. Knows that Richard wants to do a deal. A week ago leading price discussion + now on other side."[91]

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[85] Ex. 87 (at 25).
[86] Ex. 117.
[87] Ex. 97 (at 49).
[88] Ex. 119 (at 4).
[89] Ex. 87 (at 49-50).
[90] Ex. 8.
[91] *Id.*

On the evening of April 25, 2016 Graham finally had his "price call" with LGP. The April 26, 2016 Special Committee minutes say that Graham told LGP the Special Committee would agree to $35.50.[92] Pascual's notes reflect: "Shouldn't budge much from .50 cents. Management package reduce."[93] Thus, the Special Committee believed management's compensation package should be reduced, rather than the Special Committee's 50¢ ask.

When Graham called LGP back during the April 26, 2016 Board meeting, LGP offered "$35.05 as his best and final offer." The Special Committee meekly agreed to a 5¢ ($2 million) increase to the Merger consideration. The Special Committee and the Board approved the Merger on April 26, 2016.

**K. Rewriting the Proxy**

In response to Plaintiff's June 17, 2016 Complaint, Defendants made numerous changes to the Proxy. This revisionist history was intended to improve Defendants' litigation stance.

The June 23, 2016 minutes of a joint Board and Special Committee meeting say the Proxy was approved unanimously by all directors present.[94] Bach however

[92] Ex. 88 (at 51).
[93] Ex. 8 (at 25).
[94] Ex. 115 (at EXAM152181).

had not voted in favor Pascual convinced him afterward to change his vote to yes.[95] Displaying again his disregard for truthful minutes, Pascual told Bach:

> We will just reflect in the minutes that you voted yes, like nay never happened.[96]

### L. The July 8-K

On July 18, 2016, only eight days before the July 26, 2016 stockholder vote, ExamWorks filed an 8-K with the SEC "to supplement certain disclosures regarding the Merger."[97] The July 8-K was not mailed to the ExamWorks stockholders and was not filed as additional definitive 14A materials.[98] The July 8-K recited that none of its contents should be deemed legally necessary or material, and that it "should be read alongside the Definitive Proxy Statement," which contained numerous materially misleading disclosures.[99] The July 8-K did not include any proxy card or instruction for revoking a prior proxy. Moreover, information in the July 8-K was misleading and incomplete. The Merger closed on July 27, 2016.

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[95] Ex. 116.
[96] *Id.*
[97] Ex. 119 at 2.
[98] *Compare* Ex. 118 *and* Ex. 119.
[99] Ex. 119.

## ARGUMENT

## I. THE CERTIFIED CLASS SHOULD BE RECONFIRMED

In reviewing a proposed settlement, the Court must determine whether the action may be certified as a class action under Court of Chancery Rule 23.[100] Here, the Court has already certified a class under Court of Chancery Rules 23(a), 23(b)(1) and 23(b)(2).[101] Plaintiff requests entry of a final order confirming certification of the Class consisting of owners of ExamWorks common stock from April 20, 2016 through July 27, 2016. The requirements of Rule 23 are also satisfied. Plaintiff has submitted a Rule 23(e) affidavit in support of the proposed Settlement.[102] The Settlement Notice was mailed on July 14, 2017. Therefore, the Court should certify the Class.

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

### A. The Applicable Standard

Delaware favors the voluntary settlement of representative litigation. *See Kahn v. Sullivan*, 594 A.2d 48, 58 (Del. 1991). In evaluating a class action settlement, the Court's task is to "consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then to apply its own business judgment in deciding whether the settlement is reasonable in light

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[100] *Prezant v. De Angelis*, 636 A.2d 915,925 (Del. 1994).
[101] *City of Daytona Beach Police and Fire Pension Fund v. ExamWorks Grp, Inc.,* C.A. No. 12481-VCL at ¶5 (Del. Ch. Feb. 17, 2017)(ORDER).
[102] Ex. 138.

of these factors." *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986). "[T]he principal focus is upon the benefits provided in the settlement, in light of the nature of the claims and the likelihood of success on the merits." *Baupost Ltd. P'ship 1983 A-1 v. Providential Corp.*, 1993 WL 401866, at *2 (Del. Ch. Sept. 3, 1993).

### B. The Settlement Benefit Is $86.5 Million in Cash

The settlement benefit is easily measured–$86.5 million in cash: $40 million by or on behalf of the ExamWorks Group and $46.5 million by or on behalf of Paul Hastings.

Based on a Class of 39,864,416 shares,[103] the fund equates to approximately $2.17 per share to the Class, a larger or comparable per share recovery to those secured in recent cases involving larger settlement funds, including *In re El Paso Corp. S'holder Litig.* (approximately $0.14 per share recovery),[104] *In re Del Monte Foods Co. S'holder Litig.* (approximately $0.44 per share recovery),[105] *In re*

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[103] This is derived by subtracting all of the restricted shares and common stock held by each of the Individual Defendants (1,895,369) from the total outstanding shares as of June 15, 2016 (41,759,785). *See* Ex. 117 at 121-123.

[104] Plaintiff's Brief in Support of Motion for Final Approval of Proposed Settlement and Plan, C.A. No. 6949-CS (Del. Ch. Nov. 8, 2012) *available at* 2012 WL 5557882, at *12, 14 ("773 million shares outstanding" and "$110 million common fund").

[105] Plaintiff's Brief in Support of Motion for Final Approval of Proposed Settlement and Plan, C.A. No. 6247-VCL (Del. Ch. Nov. 10, 2011) *available at* 2011 WL 5825873, at *3, 6 ("200 million shares outstanding" and "$89.4 million settlement payment").

*Freeport-McMoran Copper & Gold, Inc. Deriv. Litig.*($0.13 per share)[106] and *In re Dole Food Co., Inc. S'holder Litig.* ($2.74 per share).[107] Based on the annual Cornerstone M&A class action litigation analyses which covers 2010 to mid-2016, the $86.5 million settlement would be the sixth largest cash settlement of its kind.[108]

### C. The Settlement Amount Fully Justifies the Release of all Claims Relating to the Merger

#### 1. Strengths and Weaknesses of Plaintiff's Case Against the ExamWorks Defendants

Plaintiff was confident of proving a breach of fiduciary duty by the ExamWorks Defendants, but some claims were not as strong and recovering damages against certain Individual Defendants could be difficult. Plaintiff's case against the ExamWorks Defendants relied primarily on two theories: (1) entire

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[106] *In re Freeport-McMoran Copper & Gold, Inc. Deriv. Litig.*, Consol. C.A. No. 8145-VCN at 7-8 (Del. Ch. Apr. 7, 2015)(TRANSCRIPT) (derivative settlement of $137.5 million which, after deduction of $29.4 million in attorneys' fees and expenses, amounted to payment of $0.11 per share special dividend).

[107] Plaintiffs' Brief in Support of Motion for Final Settlement Approval and Award of Attorneys' Fees and Expenses, C.A. No. 8703-VCL (Del. Ch. Jan. 20, 2016) *available at* 2016 WL 297931 at 7 & n.12 (36,793,758 shares in class and $100,814,896.92 settlement payment). The settlement in *Kinder Morgan* was approved in Kansas state court. The estimated recovery per share was about $1.89 per share. *See* Brief in Support of Final Approval of Class Settlement and Plan of Allocation of Settlement Proceeds, *In re Kinder Morgan, Inc. S'holders Litig.*, Consol. Case No. 06 C 801 at 20 & n. 59 (Kan. Dist. Ct. Oct. 13, 2010) (noting 106 million public shares and $200 million recovery).

[108] Only *Dole* ($148.2 million), *Plains Exploration* ($137.5 million), *El Paso* ($110 million), *Del Monte* ($89.4 million) and *Kinder Morgan* ($200 million) were higher. The *Cornerstone* M&A Class Action Litigation analyses for the period of 2010-Mid-2016 are included as Exs. 131-135.

fairness and (2) duties imposed under *Revlon*. The factual support for both theories was based on a flawed process that was manipulated by insiders and conflicted advisors who created a false narrative to obtain stockholder approval.

### a. Duty of Loyalty Claims Against the Individual Defendants

Plaintiff contended the transaction was subject to the entire fairness standard because a majority of the seven-member Board was conflicted and/or lacked independence. Perlman and Price (who were inside directors) and Shutzer (tainted by the Evercore conflict) stood on both sides of the transaction because of the rollover and financial benefits not equally shared with the stockholders. *See Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 594-96 (Del. Ch. 1986). Plaintiff contended that at least two of the remaining four directors (primarily Presby and Graham) were not disinterested and independent.

Presby was: (i) a professional director who has served on nine public company boards, (ii) a director and investor in various private Perlman entities, and (iii) working for at least two Perlman/Price entities during the consideration of the Merger.[109] *See Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 739, 747 (Del. Ch. 2007) (directors not disinterested when negotiating consulting agreements at the same time they were considering payment of bonuses to CEO).

[109] Exs. 120 (at 18-19); 46 (at EXAM129138-39); 60 (at EXAM129132).

Graham was: (i) a professional director, as director of ten public companies, and (ii) admitted that he considered the Company to be Perlman's "gig" and would "follow [Perlman's] lead" in selling the Company, even though the Company was stronger than ever.[110] *See In re CNX Gas Corp. S'holders Litig.*, 2010 WL 2705147, at *12 (Del. Ch. July 5, 2010) ("the best transaction reasonably available … may be no transaction at all."); *accord In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 36 (Del. Ch. 2014).

Defendants argued Presby and Graham were accomplished businessmen with impressive backgrounds who met Perlman outside of ExamWorks and that their ties to his other entities were insufficient to overcome the presumption of independence. *Orman v. Cullman*, 794 A.2d 5, 27 (Del. Ch. 2002); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 980-81 (Del. Ch. 2000).

The evidentiary record showed that the ExamWorks insiders did not want a significant rollover. In addition, Defendants and one of their experts, Daniel R. Fischel argued that because the Rollover Defendants cashed out most of their equity in the Merger, they were "net sellers" whose interests were aligned with the public stockholders. *See In re Ancestry.com Inc. S'holder Litig.,* Consol., C.A. No. 7988-CS at 81-95 (Del. Ch. Sept. 27, 2013) (TRANSCRIPT) (granting motion to dismiss where management rolled over an equity interest and an "influential" 31%

[110] Ex. 64 (at EXAM068284).

stockholder reluctantly rolled over a minority of its equity interest, finding there was no improper motivation or conflict of interest). Therefore, Defendants contended the transaction was subject to the business judgment standard of review.

### b. The *Revlon* Claims Were Strong, But Still Presented Risk

Plaintiff had strong *Revlon* claims that were well supported by a documentary record that showed that the decision to sell ExamWorks and the sale process were not reasonable and did not maximize value, particularly because of the undue influence of highly conflicted management, lawyers and financial advisors. The directors were required to "provid[e] active and direct oversight [by] acting reasonably to learn about actual and potential conflicts faced by directors, management, and their advisors." *In re Rural Metro Corp.*, 88 A.3d 54, 90 (Del. Ch. 2014); *see also MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *17 n.103 (Del. Ch. May 5, 2010) (observing that board members are "duty bound to make reasonable inquiry into inadequacies" of reports or statements presented to them by the corporation's officers, employees and lawyers).

The Special Committee was: (i) formed too late to be effective, (ii) not properly empowered and (iii) unduly influenced by conflicted management, lawyers and financial advisors. *See Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 669-70 (Del. Ch. 2006) (the cleansing effect of a special committee requires that "the board majority must have acted in an informed manner" and a conflicted insider

cannot benefit from taking advantage of directors who fail to understand the conflicts at issue in the transaction). The documentary record would also show that the supposedly independent directors were uninformed and failed to act independently throughout the sale process.

Plaintiff's liability case was also supported by numerous instances where Board Minutes and Proxy disclosures had been doctored or made up. The Special Committee resolutions were revised and expanded after the Special Committee had approved the Merger. The Proxy was materially misleading and incomplete, including disclosures the directors knew to be false. *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998) ("directors who knowingly disseminate false information that results in corporate injury or damage to an individual stockholder violate their fiduciary duty" even "in the absence of a request for shareholder action"); *In re Nine Sys. Corp. S'holders Litig.*, 2013 WL 771897, at *9 (Del. Ch. Feb. 28, 2013) (same); *see also ATR-Kim Eng. Fin. Corp. v. Araneta*, 2006 WL 3783520, at *17 (Del. Ch. Dec. 21, 2006) (explaining a stockholder may carry its burden by establishing that a director breaches his or her "fiduciary duty of loyalty … by knowingly disseminating to the stockholders false information") (quoting *Malone*, 722 A.2d at 10).

Under *Revlon* a board is not required to follow a particular blueprint and the process need not be perfect. *Barkan v. Amsted Indus., Inc.,* 567 A.2d 1279, 1286 (Del. 1989). The ExamWorks Defendants asserted that despite flaws in the process,

they could not be held liable for monetary damages because Plaintiff could not show an unexculpated breach of duty. *See Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009). At least as to the non-Rollover Defendants, there was a reasonably plausible exculpation defense under 8 *Del. C.* §102(b)(7). Plaintiff planned to try to show that the conduct of the directors fell outside the protective zone of §102(b)(7) because (i) Perlman, Price and Shutzer were interested in the transaction, (ii) the other directors' failure to investigate and mitigate the multiple conflicts established a loyalty breach, and (iii) the disclosure violations and other director actions involved deliberate misconduct. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006). Although Campbell and Fernandez could not be exculpated, the evidence supporting a claim for breach of fiduciary duty against them was not particularly strong.

The ExamWorks Defendants claimed they reasonably relied on Paul Hastings and their financial advisors both as to process and disclosure, and that it was the advisors' obligation to fully disclose all of their potential conflicts at the outset. Plaintiff contended that a reliance on experts defense (8 *Del. C.* §141(e)) was not available because the advisors were not selected with reasonable care, there was no documentary evidence that other advisors were considered, and Paul Hastings was selected by management. *See Valeant*, 921 A.2d at 751 (rejecting Section 141(e) defense as to advisor retained at the direction of conflicted management). Moreover,

the directors' blind reliance on advice of obviously conflicted advisors was not in good faith. *See Smith v. Van Gorkom,* 488 A.2d 858, 875 (Del. 1985).

Defendants asserted that Plaintiff's disclosure claims were rendered moot by the July 8-K and, therefore, stockholder approval of the Merger brought the transaction within the business judgment rule. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 308 (Del. 2015). Plaintiff contended the July 8-K was insufficient to correct any disclosure violations because it was (i) too late, (ii) not mailed to the stockholders and (iii) materially misleading and incomplete. *See In re Nat'l City Corp. S'holders Litig.*, 2009 WL 2425389, at *6 (Del. Ch. July 31, 2009) (discounting the value of statements made in a Form 8-K); *State of Wis. Inv. Bd. v. Bartlett*, 2000 WL 193115, at *1 (Del. Ch. Feb. 9, 2000) (temporarily enjoining stockholder vote because it was not clear shareholders received supplemental materials in time for thoughtful consideration); *La. Mun. Pol. Emps.' Ret. Sys. v. Crawford*, 2007 WL 625006, at *1 (Del. Ch. Feb. 13, 2007).

### 2. Aiding and Abetting Claims

Aiding and abetting requires a predicate breach of fiduciary duty.[111] Thus, Plaintiff faced the same obstacles to proving a fiduciary duty claim, plus the additional challenge of proving that Paul Hastings, Goldman, Evercore and/or LGP "knowingly participate[d]" in the Board's fiduciary breaches, a requirement that "makes an aiding and abetting claim among the most difficult to prove."[112]

#### a. Paul Hastings

Plaintiff built a strong case that Paul Hastings knowingly assisted the Individual Defendants in (i) running a sales process rife with conflicts, (ii) drafting false Merger-related documents and (iii) making false and misleading disclosures in the Proxy. Plaintiff would have argued that Paul Hastings knew its conduct and advice were improper.[113]

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[111] *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015).
[112] *Id*. at 861, 866 & n.192 (collecting cases).
[113] *Id*. at 862 (third party liable for aiding and abetting when it has "'actual or constructive knowledge that [its] conduct was legally improper'").

### i. Sales Process

Plaintiff had several arguments regarding Paul Hastings' improper advice regarding conflicts of interest. First, Paul Hastings failed to fully disclose to and advise the Board concerning Paul Hastings' own conflict and thereby knowingly participated in the Board's fiduciary breach to run a clean sales process.[114] Paul Hastings never even mentioned that the Special Committee should consider independent counsel.

Second, Paul Hastings failed to address known management and director conflicts with the Board, thereby knowingly participating in the Board's failure to conduct a reasonable, conflict-free sales process. Paul Hastings repeatedly advised the Board to delay forming the Special Committee, allowed Perlman, Price and Shutzer to participate in the process, and ignored the conflicts of interest of Presby and other directors with substantial ties to Perlman and his entities.

[114] *Rural Metro*, 88 A.3d at 99 & n.24 (third party aids and abets a fiduciary breach when, "for improper motives of its own, [it] misleads the directors into breaching their duty of care").

Third, Paul Hastings failed to advise the Board to identify and address the bankers' conflicts, and, therefore, knowingly participated in a breach of the Board's duty to conduct a reasonable sales process.[115]

Fourth, Paul Hastings knowingly participated in the Board's failure to address and neutralize known conflicts, particularly the Evercore/Shutzer conflict [116] and Shutzer's purported wall-off from the Evercore deal team, which Pascual knew was violated.[117]

Finally, Paul Hastings knowingly assisted Perlman in steering the Company's sale to LGP.[118] Paul Hastings supported the directors' repeated failure to approach other potential bidders and never advised the Board to consider continuing ExamWorks as a standalone business.[119]

Plaintiff recognized that Paul Hastings had several defenses. Paul Hastings would have argued that Perlman and Price had no conflict because they had no desire

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[115] *See In re PLX Tech., Inc. S'hlders Litig.* C.A. No. 9880-VCL at 31 (Del. Ch. Sept. 3, 2015) (TRANSCRIPT) (failure by the board to inform itself of advisor conflicts until too late into transaction's approval process tainted the sales process).

[116] *Rural Metro*, 88 A.3d at 100, 107 (third party liable for aiding and abetting the board's breach when it creates the informational vacuum that results in the breach).

[117] Ex. 129.

[118] *In re PLX Tech.*, C.A. No. 9880-VCL, at 24 (Del. Ch. Sept. 3, 2015) (TRANSCRIPT) (undue favoritism toward particular bidder is unreasonable); *In re Comverge, Inc*., 2014 WL 6686570, at *18 (Del. Ch. Nov. 25, 2014) ("steer[ing] the board's sale process toward its favored private equity buyer, at the stockholders' expense" establishes aiding and abetting).

[119] Ex. 75.

to rollover any equity in the Merger and were net sellers.[120] Therefore, Paul Hastings did not have any conflict either, as there were no divergent interests among the parties that Paul Hastings represented or vis-à-vis the stockholders.[121] Paul Hastings would also have claimed that even if the rollover posed a conflict, failing to immediately form a conflict-free Special Committee was not necessarily a breach of the Board's fiduciary duty.[122] Paul Hastings would have further argued that there was no "informational vacuum" as to its conflicts[123] because the Board generally knew about Pascual's ties to Perlman/Price entities.

Paul Hastings would also have pointed out that it required Goldman and Evercore to respond to conflict questionnaires. Paul Hastings also would have said that its purported assistance in steering the Company to LGP was irrelevant because no other potential acquirer ever offered more than $35 per share to acquire the Company, no higher bidder emerged from the go-shop and one of LGP's co-financiers dropped out of the process because it thought the price was too rich.

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[120] *In re Ancestry.com Inc. S'holder Litig*., Del. Ch. C.A. No. 7988-CS at 82-86, 95 (Sept. 27, 2013) (TRANSCRIPT); *Crescent/Mach I Partnership, L.P. v. Turner*, 2005 WL 3618279, at *2 (Del. Ch. Dec. 23, 2005).
[121] *Rural Metro*, 88 A.3d at 99 & n.24, *Chen v. Howard-Anderson,* 87 A.3d 648, 670-671 (Del. Ch. 2014).
[122] *See, e.g., In re Trados Inc. S'holder Litig*., 73 A.3d 17, 76, 78 (Del. Ch. 2013).
[123] *Cf. Id.* at 100.

### ii. Falsifying Corporate Documents

Plaintiff would have proven that Paul Hastings assisted the Board in attempting to cover-up its breaches of fiduciary duty (and Paul Hastings' aiding and abetting thereof) by falsifying minutes, resolutions and Proxy disclosures to create the impression that the Board ran a reasonable sales process designed to maximize stockholder value.

Paul Hastings argued that the numerous discrepancies in the documents were merely inconsistencies that were immaterial and were not an attempt to obfuscate the facts. Paul Hastings claimed that the re-drafted Special Committee resolutions reflected the discussion at the March 23 meeting, though the record does not back up that claim.

### iii. Disclosures

Paul Hastings knowingly participated in the Board issuing materially misleading and incomplete disclosures. It drafted the various proxy statements and the July 8-K, leaving out material facts and misrepresenting what actually occurred. The Proxy failed to fully disclose the conflicts of directors, officers, and others because of their affiliations with various Perlman/Price entities. Paul Hastings attempted to "fix" these omissions in the July 8-K which provided some information

on investments in Perlman/Price entities,[124] but failed to provide a full and accurate summary.

The Proxy also failed to disclose that Paul Hastings was representing Company management and the Rollover Defendants in their employment and rollover negotiations while simultaneously representing the Board and Special Committee. Instead, the July 8-K falsely claimed that Paul Hastings never represented management.[125]

The Proxy misrepresented the scope of the Special Committee's authority, claimed that Graham was appointed Chairman of the Special Committee weeks earlier than he was and said that Perlman and Price left the Special Committee earlier than they did.

Paul Hastings would have defended against these allegations by arguing that any inconsistencies or omissions in the Proxy were immaterial or that Plaintiff's factual assertions were wrong. For example, Paul Hastings has argued that management was represented by a separate law firm in connection with the rollover negotiations.[126] If Paul Hastings' arguments prevailed, the standard of review could shift to business judgment and Plaintiff may have failed to establish the predicate

[124] Ex. 119 (at 3-4).
[125] *Id.* (at 4).
[126] Ex. 117 (at 45). However, this law firm was not retained until April 25, 2016 and even then Paul Hastings remained part of the rollover negotiations.

breach of fiduciary duty necessary to support its aiding and abetting claim against Paul Hastings.[127]

**b. Goldman and Evercore**

Plaintiff would have asserted that Goldman and Evercore knowingly assisted the Board in failing to run a reasonable sales process and issuing a materially misleading and incomplete Proxy. Plaintiff would have argued that Goldman and Evercore's conflicts caused them to steer ExamWorks' sale to LGP, thereby aiding and abetting the Board's failure to maximize stockholder value.[128]

Goldman and Evercore advised the Board not to broaden the sales process by claiming there were no other potential bidders that would acquire ExamWorks for more than $35 per share.[129] They also shared their financial analyses with each other so the Board did not receive independent advice from either firm. Goldman and Evercore also assisted ExamWorks and LGP in announcing the Merger before a rise in ExamWorks' stock price thwarted the deal, as happened in 2014.

Through their comments on the draft proxies, Goldman and Evercore "promoted the failure of [] required disclosure[s]" and the inclusion of misleading disclosures.[130]

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[127] *Corwin,* 125 A.3d at 312-14.
[128] *Comverge, Inc*., 2014 WL 6686570, at *18.
[129] Exs. 73 (at EXAM000231); 70.
[130] *Houseman v. Sagerman*, 2014 WL 1600724, at *9 (Del. Ch. Apr. 16, 2014).

Goldman and Evercore contested facts and asserted defenses which made proving Plaintiff's aiding and abetting claim against them difficult. Goldman and Evercore would rebut Plaintiff's steering allegations by pointing to their work over a period of years contacting potential acquiror on ExamWorks' behalf as well as their substantial efforts in the go-shop. Goldman and Evercore would also have argued that their edits to the Proxy were immaterial and could not support an aiding and abetting claim. Considering the difficulty in proving an aiding and abetting claim against a financial advisor, Plaintiff would have faced an uphill battle.[131]

**c. LGP**

Plaintiff's aiding and abetting claim against LGP was relatively weak. Plaintiff would have had to prove that LGP knew about and exploited the conflicts of the Individual Defendants and/or conspired in or agreed to the Individual Defendants' fiduciary breaches.[132] Plaintiff recognized the difficulty of proving aiding and abetting by a third-party acquirer.[133]

**D. Damages Analysis**

There was, unsurprisingly, a substantial difference in the parties' valuations of ExamWorks. Plaintiff's expert William Jeffers ("Jeffers") opined that

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[131] *Singh v. Attenborough*, 137 A.3d 151, 152 (Del. 2016) ("Delaware has provided advisors with a high degree of insulation from liability from employing a defendant-friendly standard that requires plaintiff to prove scienter").
[132] *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 837 (Del. Ch. 2011).
[133] *See, e.g.*, *Frank v. Elgamal*, 2012 WL 1096090, at *12 (Del. Ch. Mar. 30, 2012). *In re Telecommunications, Inc.*, 2003 WL 21543427, at *3 (Del. Ch. July 7, 2003).

ExamWorks' fair value was $47.92 per share on July 27, 2016, when the Merger closed (the "Merger Date").[134] Defendants' expert Gregg Jarrell ("Jarrell") opined that ExamWorks' fair value was $31.13 per share on April 26, 2016, when the Board approved the Merger ("Approval Date"), and $34.96 per share on the Merger Date.[135] Both experts placed 100% weight on a DCF analysis, which was sensitive to even minor input adjustments. For example, in his rebuttal report, Jarrell stated that if Jeffers had used Jarrell's beta and terminal period plowback calculation, Jeffers' valuation would have been $35.00 per share.[136] In assessing its damages prospects, Plaintiff considered numerous inputs that the experts disagreed upon, the most significant of which are summarized below.

**1. The Risk Free Rate of Return ("RFR")**

While the experts agreed that the 20-year U.S. Treasury bond rate was the appropriate RFR, they disagreed on the appropriate valuation date. Jeffers used 1.84%, the rate on the Merger Date.[137] Jarrell used 2.3%, the rate on the Approval Date, for his Approval Date valuation, but used 1.84% for his Merger Date

[134] Ex. 124 (at 2).
[135] Ex. 125 (at 1, 75-76).
[136] Ex. 127 (at 3). Defendants also submitted an expert report from Fischel, who opined that market data and other evidence contradicted Plaintiff's claim that the Merger price was unfair. Ex. 126 (at 7). Fischel also opined that the Rollover Defendants were "net sellers" in the Merger because they sold most of their equity for $35.05. *Id.* (at 24-26).
[137] Ex. 124 (at 36).

valuation.[138] Because of the significant change in the RFR, the valuation date was a serious risk for Plaintiff. Defendants would have argued the Approval Date should be used to determine if they breached their fiduciary duties by agreeing to sell ExamWorks for an unfair price. They would have further argued that since ExamWorks is not a financial institution, the reduction in RFR was insignificant to its business and should be treated differently than other changes between board approval and closing that the Court has considered in assessing a company's operative reality.[139]

Plaintiff would have argued that the Merger was subject to entire fairness and stockholders were entitled to the fair value of their stock on the day it was taken. Plaintiff would have further argued that Jarrell conceded 1.84% was the right RFR to use to value ExamWorks on the Merger Date. Nevertheless, if Plaintiff lost on this point, it would have reduced its fair value calculation by several dollars per share.

**2. Tax Rate**

The Management Projections that both experts relied on used a 40% tax rate. Jeffers thought this too high and used 35% because (i) ExamWorks has international

[138] Ex. 125 (at 37, 74). Plaintiff also expected Defendants to point out at trial that the reduction in the 20-year U.S. treasury bond rate below 2.0% was temporary and possibly the result of the Brexit vote.

[139] The Board could not have changed its recommendation or terminated the Merger because the RFR dropped by several basis points.

operations in jurisdictions with lower tax rates than in the U.S. and no intention to repatriate any profits and (ii) ExamWorks has historically paid a tax rate of less than 35%.[140] Jarrell used 40% and in rebuttal pointed out that ExamWorks "checks the box" on most of its foreign operations.[141] This means that ExamWorks pays U.S. income tax on income generated by foreign operations but receives a credit against its U.S. federal income tax obligations for the amount paid to foreign jurisdictions.[142] While 40% was higher than ExamWorks had paid in the past, Plaintiff concluded, after consulting tax and accounting experts, that there was a serious risk the Court would accept the tax rate determined by management and used by Jarrell.

### 3. Terminal Period Adjustments

The experts differed in their approach to normalizing terminal period cash flows. Jeffers made separate adjustments for net working capital ("NWC"), depreciation and amortization ("D&A") and capital expenditures ("CAPEX").[143] Jarrell made an adjustment for NWC and another adjustment he called a "plowback ratio" to cover the other reinvestment in the Company into perpetuity.[144] Both experts' methodologies have been accepted in other cases but the differences here had a significant impact on valuation. Jeffers' reductions collectively were ($13)

[140] Ex. 124 (at 30-33).
[141] Ex. 127 (at 34-40).
[142] *Id.*
[143] Ex. 124 (at 43-46).
[144] Exs. 125 (at 60-65); 4.

million while Jarrell's were ($40.8) million.[145] Given the differences in aggregate amounts and methodologies, it was difficult to predict which adjustments the Court would likely make, but if Defendants prevailed, Jeffers' valuation would have been reduced by $5.85 per share.[146]

#### 4. Beta

Beta was a critical input to the experts' DCF analyses. In his opening report, Jeffers selected an unlevered beta of 0.70, which was the average unlevered beta for the 2-, 3-, 4-, and 5-year weekly, and 3-, 4-, and 5-year monthly measurement periods.[147] Jeffers unlevered the historical betas using the average of year-end amounts of debt and equity. Jeffers then relevered the 0.70 beta, which resulted in a beta of 0.90 which he used to calculate his WACC.[148] Jarrell used a beta of 1.053, which was ExamWorks' 5-year daily beta.[149] Jarrell did not unlever and relever this beta because he found historical leverage to be consistent with the leverage he used in his WACC. If the Court used Jarrell's beta, Jeffers' valuation would have been reduced by $7.07 per share. In preparing for his deposition, Jeffers discovered an error in his historical leverage calculations, which caused his average unlevered beta

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[145] Jeffers' adjustment for terminal period NWC in his opening report likely understated the amount ExamWorks needed, which increased his valuation, because, as Jarrell pointed out, Jeffers miscalculated working capital.
[146] Ex. 127 (at 3).
[147] Ex. 124 (at 36-39).
[148] *Id.*
[149] Ex. 125 (at 38-44).

(0.70) to be too low. While any correction would have been small, even small adjustments to beta had a significant effect on value.

**5. Other Valuation Issues**

Plaintiff had other valuation arguments it would have made to rebut attacks on Jeffers' analysis and undermine Jarrell's opinions. For example, Jeffers conservatively valued ExamWorks without including projected acquisitions. If he had included them like Jarrell did, it would have increased his valuation. Similarly, Jeffers used a conservative terminal growth rate of 3.5% while Jarrell used 4.1%. Plaintiff would have attacked, among other things, Jarrell's plowback methodology, beta, terminal EBIT margin adjustments and capital structure which reduced his value of ExamWorks. Moreover, if the Court used the RFR as of the Merger Date, Defendants would have had to run the table on every issue as Jarrell's $34.96 per share valuation left little margin for error.

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The disputed valuation issues were numerous and interrelated, and Plaintiff did not expect to win on every one. Moreover, the effect of winning on a particular issue varied depending on whether Plaintiff won or lost on other issues. The disputed issues all had the potential to substantially decrease Jeffers' valuation. Given the sensitivity of the valuation model, the Court might consider significant the support of the Merger by the insiders who knew the business well, sold most of their equity

at $35.05, were reluctant to roll over any equity and fought to roll over as little equity as possible. Convincing the Court that these sophisticated businessmen left substantial money per share on the table would have been difficult. Plaintiff also considered the risk that the Court could find the Merger price represented fair value, as it has numerous times in appraisal actions when the buyer is a third party and insiders sell most or all of their equity. While the sale process was far from perfect, no higher bid emerged from [redacted] during the go-shop process.

Plaintiff believed the maximum potential damages was $200 million ($5.00/share) but there was a very low probability of anything above $120 million ($3.00/share). Plaintiff believed damages in the range of $30 to $90 million ($0.75 to $2.25/share) was a realistic target and would be an excellent outcome for the Class. Plaintiff's assessment of damages was based not only on the multiple expert reports and depositions, [redacted] In agreeing to the two settlements, Plaintiff considered that the combined $86.5 million for the Class [redacted]

As part of the initial settlement, Plaintiff obtained an assignment of ExamWorks' potential malpractice claim against Paul Hastings. However, the doctrine of *in pari delicto* operates to make such a claim difficult to prosecute successfully. *Stewart v. Wilmington Trust SP Srvs., Inc.*, 112 A.3d 271, 302-03 (Del.

Ch. 2015) (explaining that by application of in *pari delicto*, a "company is generally barred from stating a legal or equitable claim against a third party that participated in the scheme of wrongdoing"). Nevertheless, Plaintiff believed holding the malpractice claim, along with the power to release the claim, would be useful in negotiations with Paul Hastings.

### E. The Plan of Allocation Is Fair and Reasonable

Approval of a plan of allocation is part of the process of approving the settlement. *CME Grp., Inc. v. Chicago Bd. Options Exch., Inc.*, 2009 WL 1547510, at *7 (Del. Ch. June 3, 2009). "An allocation plan must be fair, reasonable and adequate." *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009). In determining whether to approve a plan of allocation, the Court gives substantial weight to counsel's opinion. *See CME Grp.*, 2009 WL 1547510, at *10.

The plan for distributing the Settlement Fund is direct payment to Eligible Class Members. All Eligible Class Members are treated exactly the same. The Plan of Allocation provides for a pro rata, per share distribution of the Net Settlement Fund to Eligible Class members based on the number of shares of ExamWorks common stock they held at the closing of the Merger for which they received or were entitled to receive the Merger Consideration. This includes ExamWorks common stock for which Eligible Class Members properly perfected a claim for appraisal pursuant to 8 *Del. C.* §262. The Plan of Allocation provides for a pro rata

distribution plan through the Depository Trust Company ("DTC") that the Court adopted in *In re Dole Food Co., Inc. S'holder Litig*., 2017 WL 624843 (Del. Ch. Feb. 15, 2017). The plan is fair and reasonable and should be approved.

## III. PLAINTIFF'S REQUEST FOR ATTORNEYS' FEES AND EXPENSES SHOULD BE GRANTED

Plaintiff requests reimbursement of expenses, which as of August 17, 2017 are $575,479.21, and an award of attorneys' fees of 25% of the balance of the Settlement Fund, which equals $21,481,130.

### A. Expenses Should Be Reimbursed Before An Attorneys' Fee Percentage Is Applied

When a case settles late in the litigation process and a plaintiff has incurred substantial expenses, including for experts, this Court has deducted expenses and then awarded a fee based on the net benefit achieved.[150] "This approach recognizes that class counsel's claim to fees is analogous to a carried interest that shares *pari passu* in the recovery with members of the class. Counsel's claim to fees is effectively a residual claim, and expenses paid to third parties logically take priority over the residual claim."[151]

Plaintiff's expenses are reasonable and comport with the needs of the case. The expenses were spent efficiently on experts (56%) discovery hosting and

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[150] *In re Appraisal of Dell Inc.*, 2016 WL 6069017, at *9 (Del. Ch. Oct. 17, 2016) (collecting authorities).

[151] *Chen v. Howard-Anderson*, C.A. No. 5878-VCL (Del. Ch. June 30, 2017) (ORDER) (citing *Dell*, 2016 WL 6069017 at *10).

reproduction (16%), mediation (13%), filing and deposition and hearing transcript costs (6%) and only 5.5% for travel expenses. The very high percentage of expenses paid to third parties by Plaintiff's counsel supports Plaintiff's request that expenses be reimbursed before an attorneys' fee percentage is applied to the net benefit.

### B. The Legal Standards for an Award of Attorneys' Fees

The decision to award attorneys' fees is committed to the sound discretion of the Court.[152] The Court considers multiple factors in exercising its discretion, including the benefit achieved, complexity of the issues, time and effort expended by counsel, contingent nature of the representation and standing and ability of counsel.[153] When a benefit is quantifiable, then a fee award should be "based on a percentage of the benefit."[154] In applying the *Sugarland* factors, this Court also considers the stage of the litigation when the settlement occurred and awards an increasing percentage of quantifiable benefits for cases that advance closer to trial.[155] The Court may also consider awards in similar cases.[156] These factors all support Plaintiff's request for a fee award of 25%.

#### 1. The Benefits Achieved Support the Requested Award

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[152] *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980).
[153] *See Sugarland*, 420 A.2d at 149; *In re Talley Indus., Inc. S'holders Litig.*, 1998 WL 191939, at *15 (Del. Ch. Apr. 13, 1998).
[154] *Ams. Mining Corp. v. Theriault,* 51 A.3d, 1025, 1029 (Del 2012).
[155] *In re Emerson Radio S'holder Deriv. Litig.*, 2011 WL 1135006, at *6 (Del. Ch. Mar. 28, 2011).
[156] *Dow Jones & Co. v. Shields*, 1992 WL 44907, at *3 (Del. Ch. Jan. 10, 1992).

Delaware Courts have repeatedly stressed that the benefits achieved are the primary factor in determining the reasonableness of a requested fee.[157] Indeed, "the dollar amount of the fund created … is the heart of the *Sugarland* analysis."[158] The Settlement Fund of $86.5 million is substantial and one of the largest recoveries ever for stockholders in Delaware, both in terms of the total and per share amount. It represents a 6.2% premium to the $35.05 Merger consideration and is over 43 times the meager $0.05 increase the Special Committee obtained. The recovery is especially remarkable considering the acquiror was a third-party and insider directors and officers collectively held less than 5% of ExamWorks outstanding stock, did not want a rollover and were "net sellers" in the Merger.

[157] *Ams. Mining*, 51 A.3d at 1259; *Gatz v. Ponsoldt*, 2009 WL 1743760, at *3 (Del. Ch. June 12, 2009).
[158] *Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000).

### 2. The Stage of the Litigation Supports the Requested Award

The requested attorneys' fee of 25% of the net Settlement Fund is supported by the late stage at which the case was resolved. Plaintiff filed this action on June 17, 2016 and obtained an expedited trial for March 20-23, 2017. Plaintiff initially signed a term sheet to settle the action with the ExamWorks Defendants and LGP on February 23, 2017, but an amended term sheet that included Goldman and Evercore was not executed until February 28, 2017, just 20 days before trial. Plaintiff continued its full speed ahead preparations for trial, parallel with further settlement negotiations with Paul Hastings. Paul Hastings signed a term sheet on March 6, 2017, just 14 days before trial.

This Court has awarded a greater percentage of the monetary benefit when counsel presses the case further. The Court has found "[t]he incentive effect of using percentages that increase depending on the stage of the litigation counteracts a natural human tendency towards risk aversion."[159] A fee of 25% of the monetary benefit is within the range that the Court has awarded when a case settles shortly before trial.[160] For example:

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[159] *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1070 (Del. Ch. 2015)

[160] *In re Rural Metro Corp. S'holders Litig.* Consl. C.A. No. 6350-VCL (Del. Ch. Nov. 19, 2013) (TRANSCRIPT); *In re Orchard Enters., Inc. S'holders Litig.*, 2014 WL 4181912 (Del. Ch. Aug. 22, 2014); *In re Moneygram Int'l, Inc. S'holder Litig.*,

- Plaintiff in *CNX* settled for $42.73 million ($2.75 per share, 7.2% increase in the merger consideration) 10 days before trial.[161] The Court awarded a fee of 27.5% of the gross settlement ($11.75 million), inclusive of $838,196 of expenses.[162]
- Plaintiffs in *Rural Metro*[163] settled with one defendant 10 days and several other defendants six days before trial for $11.6 million ($0.53 per share or a 3.1% premium to the merger price).[164] The Court, citing *CNX*, awarded reimbursement of expenses and a fee of $2.9 million, which was slightly above 27.5% of the net settlement fund.[165] Plaintiffs successfully objected to a prior disclosure only settlement, reviewed 1,830,000 pages of documents, took 14 depositions, engaged in motion

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2013 WL 68603, C.A. No. 6387-VCL (Del. Ch. Jan. 7, 2013) (ruling an award of 25% of settlement fund is appropriate for a settlement reached on the eve of trial).

[161] *In re CNX Gas Corp. S'holders Litig.*, Consl. C.A. No. 5377-VCL at 6, 24 (Del. Ch. Sept. 11, 2013) (TRANSCRIPT).

[162] *Id.* at 32. This is the equivalent of a fee of $10.91 million, which is 25.5% of the net settlement fund ($41.89 million) after deducting $838,196 in expenses from the $11.75 million fee award and $42.73 million gross settlement fund.

[163] *In re Rural/Metro Corp. S'holders Litig.*, Consl. C.A. No. 6350-VCL (Del. Ch. Nov. 19, 2013) (TRANSCRIPT).

[164] Opening Brief in Proposal Settlement and Application for an Award of Attorney's Fees and Reimbursement of Expenses, *In Re Rural Metro Corp. S'holders Litig.,* C.A. No. 6350 VCL at 16 (Del. Ch. Oct. 17, 2013) ("Rural Metro Brief").

[165] *Rural Metro,* Transcript at 37.

practice, exchanged expert reports and expended a total of 6,639 attorney hours.[166]

- Plaintiff in *Orchard* settled two months before trial.[167] The Court ruled that "[w]hile there are outliers, a typical fee award for a case settling at this stage of the proceeding ranges from 22.5% to 25% of the benefit conferred."[168] The Court awarded a fee of $2,250,000 or approximately 24% of the amount it credited the litigation with creating ($9,368,904), even though the case was not filed until two years after the merger and after the Court had awarded more than twice the merger consideration in an appraisal action.[169] Plaintiff reviewed 180,000 pages of documents, took and defended eight depositions, briefed and argued a motion to compel and motion for summary judgment, served opening and rebuttal expert reports and expended 3,197 attorney hours.[170]
- Plaintiff in *Jefferies* settled five weeks before trial for $70 million ($0.50 per share) to the class plus defendants' agreement to pay any award of attorneys' fees' separately.[171] Plaintiff requested an award of

[166] Rural Metro Brief at 2, 8, 22.
[167] *Orchard.*, 2014 WL 4181912, at *8.
[168] *Id.*
[169] *Id.* at *9.
[170] *Id.* at *1.
[171] *In re Jefferies Group, Inc. S'holders Litig.*, 2015 WL 3540662, at *2-3 (Del. Ch. June 5, 2015)

> $27.5 million plus approximately $1 million of expenses. The Court awarded $21.5 million, inclusive of expenses, or 23.5% of the gross value of the settlement ($91.5 million).[172] The Court noted that plaintiff's efforts were meaningful but "not Herculean" and the issues in the case "were not overly complex and … the core legal issues in the case were fairly straightforward."[173] Plaintiff litigated the case on a non-expedited basis, reviewed 72,000 pages of documents, took seven fact depositions, one expert deposition and defended their expert.[174]

Plaintiff here settled at approximately the same stage as *Rural Metro* and *CNX* and the complexity of the case, expedited schedule and efforts of counsel were more substantial than those in *Orchard* and *Jefferies*.

Under the particular circumstances of this case, the stage of the litigation supports a fee of 25%. Indeed, there are numerous cases that were resolved at an earlier stage where the awarded fee was approximately 25% or more of a settlement fund.[175] "This court has often approved fee requests of 30% or more of the benefits

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[172] *Id* at *4.
[173] *Id.*
[174] *Id*.
[175] *See e.g. In re Talecris Biotherapeutics Holdings S'holder Litig.*, C.A. No. 5614-VCL (Del. Ch. Dec. 5, 2011) (ORDER) (ruling settlement in expedited proceedings merited an award of 25% of increased merger consideration); *In re Delphi Fin. Grp. S'holder Litig.*, C.A. No. 7144-VCG (Del. Ch. July 31, 2012) (ORDER) (awarding 24.5% of $49 million settlement reached after hearing on plaintiffs' motion for a preliminary injunction); *In re TD Banknorth S'holders Litig.*, C.A. No. 2557-VCL

where the settlement benefits are attributable solely to the litigation."[176] Plaintiff did not settle early, but pressed the case to the eve of trial. Counsel's efforts and the result merit an award of 25% of the net Settlement Fund.

### 3. The Complexity of the Litigation Supports the Requested Award

The challenges and complexities in this case also support an award at the top end of the range. The Merger was not with a controlling stockholder or led by management so entire fairness review did not automatically apply. To the contrary, LGP was a third-party buyer and the Court could have found the Rollover Defendants were "net sellers."[177]

Plaintiff built its case by establishing the Merger was tainted by numerous conflicts among directors, officers, bankers and lawyers of ExamWorks and Perlman's and Price's other ventures. Plaintiff pressed for more information on those conflicts in discovery. Plaintiff caused the ExamWorks Defendants to waive attorney-client privilege. Plaintiff then fought to obtain privileged documents, including multiple attorneys' contemporaneous notes, emails and drafts of minutes

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(Del. Ch. June 25, 2009) (ORDER) (awarding attorneys' fees of 27.5% of $50 million settlement reached after discovery but prior to pre-trial briefing).

[176] *Marie Raymond Revocable Trust v. Mat Five LLC*, 980 A.2d 388, 410 (Del. Ch. 2008) (collecting cases); *see also Chen v. Howard-Anderson*, C.A. No. 5878-VCL (Del. Ch. June 30, 2017) (ORDER) (awarding expenses of $1.96 million plus 30% of net settlement fund of $33 million where settlement was reached with one defendant on the eve of trial and the remaining defendants on the third day of trial.

[177] Ex. 126.

and the Proxy. Plaintiff's counsel did an exhaustive analysis of more than a million pages of documents.

In the usual merger case, most of the facts about the initiation, negotiation, director consideration and documentation of the transaction are not in dispute and the minutes and proxy statement provide a generally accurate and complete account, even if there are claims regarding certain disclosures. This case was different. When Defendants filed the definitive Proxy which changed or added key "facts" in response to Plaintiff's complaint, Plaintiff realized that Defendants' story was suspect. With discovery, Plaintiff learned that the Proxy and minutes could not be trusted and often were inconsistent with contemporaneous notes and other documents. To make sense of the extensive, highly complex and often inconsistent factual materials, Plaintiff had to organize and analyze in detail the documents and testimony on a meeting by meeting, event by event basis. Often relevant documents such as emails, draft minutes, or draft proxies would be from a different time frame than the meeting or event, necessitating assembly of materials from different dates and sources. Finding inconsistences and reconciling the different stories took extensive analysis. Only through this sustained and enormous effort could Plaintiff arrive at some realistic estimate of what had actually happened and the nature and scope of Defendants' conduct.

Plaintiff did not simply pursue a claim that enhanced scrutiny review under *Revlon* applied to the Merger. Rather, Plaintiff used the evidence it wrestled to obtain to build a claim that the Merger was subject to entire fairness review and was not the product of fair timing, structure, approval and disclosure and was not at a fair price. Plaintiff developed a very strong claim for aiding and abetting against Paul Hastings despite the enormous difficulty of establishing such a claim against a law firm. Indeed, Plaintiff's unprecedented recovery of $46.5 million from Paul Hastings, which was paid $2 million in connection with the Merger, is confirmation that Plaintiff's claims were unique.

Plaintiff's contingency risk must be viewed in the context of the current litigation environment. Stockholder plaintiffs and their counsel face much greater risks today due to changes in the legal doctrines that govern representative litigation. Cases such as *C&J Energy Servs., Inc. v. City of Miami Gen. Employees' & Sanitation Employees' Retirement Trust*, 107 A.3d 1049, 1053 (Del. 2014), and *Corwin,* 125 A.3d at 312, are often cited as eliminating the *Revlon* doctrine when there is no competitive bidder and even foreclosing a post-closing damages remedy. The fact that no other stockholder and no others lawyers challenged the Merger shows that the two firms that litigated this case bore all the substantial risk and expense of challenging a third party merger on an entirely contingent basis. Considering the significant monetary recovery in light of the serious risk of litigating

a post-closing M&A case that might not be subject to the entire fairness standard, an award of 25% of the fund is merited.

#### 4. The Other *Sugarland* Factors Support the Requested Award

Plaintiff's extraordinary efforts were substantial and merit an award of 25%. Plaintiff filed a 57-page complaint on June 17, 2016, and obtained pre-closing expedited proceedings over defendants' vigorous opposition. Plaintiff used that victory to negotiate a stipulation and order that allowed the Merger to close but preserved all Plaintiff's claims and provided for an expedited trial. Plaintiff filed a 107-page Amended Complaint in September 2016.

Plaintiff extracted 1,037,636 pages of documents from Defendants by (i) serving Defendants with four document requests and three sets of interrogatories, (ii) sending dozens of discovery emails, (iii) holding numerous meet-and-confers to obtain documents that were missing from production or withheld as privileged, and (iv) filing two motions to compel (both of which were resolved before a hearing). Plaintiff's relentless approach led the ExamWorks Defendants to waive privilege, which Plaintiff used to get unprecedented access to attorney notes and emails, including notes of four Paul Hastings lawyers and ExamWorks' General Counsel from multiple meetings. Plaintiff also drafted 212 pages of responses to Defendants' detailed interrogatories.

Plaintiff deposed nine fact witnesses and prepared for seven last-minute depositions of additional trial witnesses Defendants identified shortly before trial. Plaintiff served detailed opening and rebuttal expert reports and faced a total of five expert reports from Defendants' four experts. Plaintiff deposed Defendants' four experts and filed two motions *in limine*. The only remaining expert discovery was the deposition of Plaintiff's expert, which had been twice rescheduled the day before it was scheduled because of settlement developments. [redacted]

Plaintiff had the case ready for trial. By the time the case settled, Plaintiff had (i) prepared a pre-trial brief of nearly 100 pages, (ii) drafted the pre-trial order, (iii) compiled its pre-trial exhibits, and (iv) was preparing trial examination for Defendants and their representatives. After the $40 million settlement with the ExamWorks Group was reached, Plaintiff pressed on and opposed Paul Hastings' motion to postpone the trial before agreeing to settle with Paul Hastings for $46.5 million.

All of these efforts were performed by only two firms and by attorneys that worked nearly full-time on the case to prepare for trial in less than nine months. The

streamlined structure was efficient and eliminated the duplication of effort that sometimes occurs when many firms litigate a case together.

Plaintiff invested $575,429.21 so far in expenses and 11,745 hours with a value of $6,119,422.50.[178] The requested award is $1,829 per hour, which amount is reasonable and consistent with awards where a substantial benefit is achieved.[179]

Finally, the standing and ability of counsel support the requested award. This Court is familiar with Plaintiff's counsel's successful track record in representing stockholders. Defendants were represented by eight law firms, each of which is an experienced, skilled and well-respected firm.

## CONCLUSION

For the foregoing reasons, the Court should confirm Certification of the Class, approve the Settlement and Plan of Allocation and award Plaintiff's counsel the full amount of counsel fees and expenses requested.

[178] Exs. 130; 137. Plaintiff will update its expenses prior to the settlement hearing.
[179] *See CNX Gas Corp., S'holders Litig.,* C.A. No. 5377-VCL (Del. Ch. Sept. 11, 2013) (TRANSCRIPT) at 19 (award equal to about $1900 per hour).

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## CERTIFICATE OF SERVICE

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