IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE STRAIGHT PATH COMMUNICATIONS INC. CONSOLIDATED STOCKHOLDER LITIGATION	))))	C.A. No. 2017-0486-SG

MEMORANDUM OPINION

Date Submitted: May 16, 2022
Date Decided: June 14, 2022

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GLASSCOCK, Vice Chancellor

I have noted before that my life as a judge (or maybe simply as a human) seems subject to the Baader-Meinhof principle, or perhaps I am simply beguiled by a synchronicity assumption; nevertheless, case issues seem to run in waves—the subject of this decision and other cases currently before me is an example. After many years of addressing class action certifications, generally as a routine matter, I suddenly find myself confronted with fiercely litigated motions to certify a class. Here, both the class representative and the other statutory requirements for class action have been vigorously challenged—I resolved the first issue in favor of the appointment of Ardell Howard as lead plaintiff/class representative by bench ruling of May 16, 2022. Now before me is the remainder of the issues under the rules informing the certification of a class. Prominently, the Defendants attack commonality, on the theory that some stockholders in the proposed plaintiff class also own stock in a defendant entity. Because I find that the action here—a direct action for improper diversion of merger consideration—inheres in the loss in value of consideration for each share of stock, and is not dependent on net effect on any particular individual, I find the objection without puissance.

Upon consideration, I certify the plaintiff class. My rationale is below.

I. BACKGROUND

The path to class certification in this action has been anything but straight, although the gate to class representative proved strait. The Plaintiffs moved for class

certification in January 2020.[1] That motion was opposed following extensive discovery;[2] the parties traded briefing, including sur-reply and sur-sur-reply briefing,[3] and I heard oral argument in November 2021.[4] One applicant to serve as class representative then withdrew.[5] The day following the withdrawal, I issued a Memorandum Opinion requiring an evidentiary hearing as to the second applicant seeking to serve as class representative, and suggesting that another alternative might be the appointment of a preexisting intervenor-plaintiff to act for the class.[6]

The Plaintiffs took me up on both invitations, seeking to establish the original applicant as class representative via an evidentiary hearing, but also moving to appoint the intervenor-plaintiff as class representative.[7] Another round of briefing followed, and I held the evidentiary hearing and oral argument regarding the appointment of a class representative on May 11 and 12, 2022.[8] I then issued a

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[1] Pls.' Mot. for Class Certification, Dkt. No. 209.
[2] IDT Defs.' Opp'n Pls.' Mot. for Class Certification, Dkt. No. 433 [hereinafter "AB"].
[3] Pls.' Reply Br. Further Supp. Mot for Class Certification, Dkt. No. 472 [hereinafter "RB"]; IDT Defs.' Sur-Reply Br. Further Opp'n Pls.' Mot. for Class Certification, Dkt. No. 520 [hereinafter "Sur-RB"]; Pls.' Sur-Sur-Reply Br. Further Supp. Mot. for Class Certification, Dkt. No. 545 [hereinafter "Sur-Sur-RB"].
[4] Tr. of 11.9.21 Oral Arg. re Mot. for Class Certification, Class Representatives, and Mots. for Summ. J., Dkt. No 531.
[5] Joint Letter to Vice Chancellor Glasscock from Lead Pls. and Additional Pl. re Class Certification and Lead Pl. Issues, Dkt. No. 540.
[6] *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2022 WL 728844 (Del. Ch. Mar. 11, 2022) [hereinafter "*Straight Path III*"].
[7] Pls,' Mot. for Intervenor-Pl. Ardell Howard's Appointment as Class Representative and Co-Lead Pl., Dkt. No. 545.
[8] Tr. of 5-11-2022 Evidentiary Hr'g – Volume I, Dkt. No. 604; Tr. of 5-12-2022 Evidentiary Hr'g – Volume II, Dkt. No. 605.

bench ruling denying one applicant's motion to be appointed class representative, but granting the other.[9] Ardell Howard now stands as lead plaintiff/class representative in this action, but I have not yet certified a class.

The outstanding Defendants' arguments following this extensive meta-litigation are: that identification of all appropriate class members will constitute a "'Herculean undertaking[]'";[10] that, owing to the nature of Straight Path's becoming a public company, many potential class members possessed "cross-holdings"[11] in IDT Corporation *and* in Straight Path Communications Inc., therefore preventing those "cross-holding" stockholders from suffering any injury; that the class is not properly certified under Rule 23(b)(1) or Rule 23(b)(2), but instead must be certified as a Rule 23(b)(3) non-opt out class; and finally, whether the proposed class put forth by the Plaintiffs is appropriately defined with respect to the temporal events giving rise to the claims. In my understanding, the Defendants view each of these four arguments as sufficient to defeat the motion for class certification, though I note that these arguments have been pulled from argument and briefing that is, at least in part, no longer current. To give the fullest consideration to the opposition, I treat each as potentially motion-dispositive.

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[9] Tr. of 5.16.22 Telephonic Post-Evidentiary Hr'g Rulings of the Ct. 31:12–13, Dkt. No. 60 [hereinafter "May 16 Bench Ruling"].
[10] AB 56. The litigation heretofore, I note, if Herculean as the Defendants suggest, has perhaps been more of the Augean variety than otherwise.
[11] Sur-RB 1.

I find that none of these arguments is persuasive, and that the class should be certified. The Plaintiffs'[12] motion for class certification is hereby granted.

Readers are referred to my Memorandum Opinions of February 17, 2022[13] and June 25, 2018[14] for a full explication of the facts. Those outlined below are only those necessary to a certification of the class.

A. Factual Overview

The Lead Plaintiff in this action is Ardell Howard, a Straight Path Communications Inc. ("Straight Path") stockholder as of the closing date of its merger with Verizon Communications, Inc. ("Verizon") on February 28, 2018 (the "Merger").[15]

Continuing to oppose the Class Certification Motion are the "IDT Defendants" (a collective of the separate defendants IDT Corporation, Howard Jonas, and The Patrick Henry Trust).[16] Davidi Jonas, a separately represented defendant in the matter, joined in the IDT Defendants' opposition.[17] I refer

[12] Hereinafter I refer to the Plaintiff in the singular, as Ardell Howard has been established as the singular fiduciary for the class. Prior to my bench ruling of May 16, movants on behalf of the class were plural.
[13] *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.,* 2022 WL 484420 (Del. Ch. Feb. 17, 2022) [hereinafter "*Straight Path II*"].
[14] *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.,* 2018 WL 3120804 (Del. Ch. June 25, 2018), *aff'd*, 206 A.3d 260 (Del. 2019) [hereinafter "*Straight Path I*"].
[15] *See Straight Path III*, 2022 WL 728844, at *1, *3; May 16 Bench Ruling.
[16] *Straight Path III,* 2022 WL 728844, at *2.
[17] *Id.*

collectively to the IDT Defendants and Davidi Jonas as the "Defendants" throughout.

IDT Corporation ("IDT") is the former parent of Straight Path; IDT consummated a spin-off of Straight Path on July 31, 2013 (the "Spin-Off").[18] The amended complaint describes that the Spin-Off occurred "through a pro rata distribution of Straight Path common stock to IDT stockholders of record."[19]

The documentation achieving the Spin-Off included a separation and distribution agreement between Straight Path and IDT, pursuant to which the parties owed each other certain indemnification obligations.[20]

As a result of the Spin-Off, Straight Path became a publicly traded company; the company ultimately had in excess of 11 million common shares outstanding as of November 2017.[21]

The proposed class is defined as "[a]ll record and beneficial holders of Straight Path Class B Common Stock, as of February 28, 2018 (the date of the consummation of the Merger), who received Merger consideration, together with their respective successors and assigns," subject to certain exceptions (the "Proposed Class").[22]

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[18] *See Straight Path I,* 2018 WL 3120804, at *2.
[19] Verified Consolidated Am. Class Action and Derivative Compl. ¶ 36, Dkt. No. 62.
[20] *See Straight Path II*, 2022 WL 484420, at *3.
[21] Pls.' Opening Br. Supp. Mot. for Class Certification 21, Dkt. No. 209 [hereinafter "OB"].
[22] OB 3–4.

The Proposed Class's recovery is predicated upon pending claims of breach of the duty of loyalty and aiding and abetting a breach of the duty of loyalty.[23] In short, post-Spin-Off, Straight Path was investigated by the Federal Communications Commission (the "FCC") for improprieties with respect to certain spectrum license assets the company had come into possession of *prior to* the Spin-Off.[24] Straight Path and the FCC entered into a Consent Decree to resolve the investigation, the practical result of which was that, among other things and to oversimplify, Straight Path was obliged to sell itself to a third party and pay 20% of the proceeds affiliated with the sale of the spectrum license assets to the FCC.[25]

Straight Path realized that, based on the separation and distribution agreement described above, it might be able to raise an indemnification claim against IDT for the 20% fine (the "Indemnification Claim").[26] The company considered how to preserve this claim while moving forward with a company sale.[27] Howard Jonas, the controlling stockholder of Straight Path and also the founder of IDT,[28] discovered that a special committee of Straight Path had determined to preserve the Indemnification Claim, and stated that he would block any sale of Straight Path if

[23] *See Straight Path II*, 2022 WL 484420, at *7.
[24] *Id.* at *4.
[25] *Id.*
[26] *Id.* at *4–5.
[27] *Id.*
[28] *Id.* at *2.

the Indemnification Claim was so preserved.[29] Straight Path ultimately sold the Indemnification Claim to IDT for $10 million via binding term sheet dated April 9, 2017.[30] By comparison, the fine paid in connection with the Merger was *$614 million*.[31]

Straight Path stockholders voted in favor of the Merger on August 2, 2017; after securing regulatory approvals, the Merger closed on February 28, 2018.[32]

Liability here is based on the theory that the sale of the Indemnification Claim diverted, at least in part, the benefit the stockholders would otherwise have derived from the Merger. The viability of the Indemnification Claim remains to be proven at trial.[33]

B. Procedural History

The original complaint in this matter was filed on July 5, 2017, containing four counts, three of which remain current.[34] The fourth count, dismissed in *Straight Path I* as moot,[35] was an in-the-alternative derivative claim for a declaratory judgment and imposition of a constructive trust.[36] *Straight Path I* engaged with the

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[29] *Id.* at *6.
[30] *Id.* at *7.
[31] *Id.*
[32] *Straight Path I*, 2018 WL 3120804, at *7–8; *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2017 WL 5565264, at *3 (Del. Ch. Nov. 20, 2017).
[33] *See generally Straight Path II*, 2022 WL 484420.
[34] *Straight Path I*, 2018 WL 3120804, at *8.
[35] *Id.* at *20.
[36] Verified Class Action and Derivative Compl. for Breach of Fiduciary Duties ¶¶ 111–16, Dkt. No. 1.

direct-or-derivative nature of the complaint's counts at length before determining that the other three counts were direct in nature against the various Defendants for diverted merger consideration.[37]

The instant action has survived motions to dismiss[38] and motions for summary judgment.[39] Following my bench ruling on May 16, 2022,[40] the parties engaged in a confidential mediation; that mediation was unsuccessful.[41] This case is scheduled for a five-day trial beginning on August 29, 2022, with reserve trial days if necessary to follow.[42]

II. ANALYSIS

Before I can grant a motion for class certification, I must assess whether the Proposed Class satisfies both Rule 23(a) and Rule 23(b). Each rule breaks down into multiple subparts. I address the rules individually below.

A. The Rule 23(a) Factors

There are four Rule 23(a) factors, generally summarized as numerosity, commonality, typicality and adequacy.[43] The text of the Rule indicates that these latter two elements, typicality and adequacy, pertain to the "representative parties"—

[37] *Straight Path I*, 2018 WL 3120804, at *9–13.
[38] *See generally Straight Path I*, 2018 WL 3120804.
[39] *See generally Straight Path II*, 2022 WL 484420.
[40] May 16 Bench Ruling.
[41] Letter to Vice Chancellor Glasscock from Vice Chancellor Fioravanti Regarding the Outcome of the Mediation, Dkt. No. 603.
[42] *See, e.g.*, Tr. of 4-12-2022 Telephonic Scheduling Conference 39:12–16, Dkt. No. 578.
[43] Ct. Ch. R. 23(a).

i.e., the class representatives.[44] A squids' shoal of ink has already been spilled in this matter regarding the typicality and adequacy of various purported class representatives, and my bench ruling on May 16 resolved the issue, appointing Ms. Howard as an adequate and typical class representative.[45] As such, this Memorandum Opinion does not spend further time addressing these two elements.

The Defendants' papers do not contest numerosity.[46] The Plaintiff states that the class is composed of "approximately 170 holders of record according to publicly available information."[47] This easily meets the Rule's requirement that the class be "so numerous that joinder of all members is impracticable."[48] Numerosity is therefore satisfied.

Commonality, however, is contested. I discuss this element in detail below.

1. Commonality

The commonality element is met "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated."[49] A class still satisfies the commonality requirement even where its members have different interests and views, "so long as

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[44] *Id.*; *see also Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991).
[45] *See generally* May 16 Bench Ruling.
[46] *See generally* AB; Sur-RB.
[47] OB 21.
[48] Ct. Ch. R. 23(a).
[49] *Weiner & Assocs.*, 584 A.2d at 1225 (citing *Gordon v. Forsyth Cty. Hosp. Auth., Inc.*, 409 F. Supp. 708, 717–18 (M.D.N.C. 1976), *aff'd in part, vacated in part*, 544 F.2d 748 (4th Cir. 1976)); *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1140–41 (Del. 2008) (citation omitted).

the common legal questions are not dependent on divergent facts and significant factual diversity does not exist among the individual class members."[50]

The Plaintiff's original motion pleads four common factual and legal issues in this class, summarized as follows: whether Howard Jonas "abused his control over Straight Path to extract unique benefits for himself and IDT" during the Straight Path sale process; whether Howard and Davidi Jonas both breached fiduciary duties by prioritizing personal interests above the interests of Straight Path stockholders; whether IDT aided and abetted the purported breaches of fiduciary duty by the Jonases; and whether Straight Path stockholders were harmed by the alleged breaches of duty.[51]

To my read, these issues sufficiently establish the element of commonality *prima facie*. The questions of law are common among all stockholders. This is not disputed. However, the facts attending each stockholder, and the definition of the Proposed Class, in the Defendants' view, would thwart a finding of commonality.

The Defendants make, to my understanding, three separate arguments targeting commonality: first, they argue that as a result of the Spin-Off, the Proposed Class includes many holders in *both* Straight Path *and IDT*—they term the dual holdings "cross-holdings"—which precludes commonality due to lack of injury, or

[50] *Phila. Stock Exch.*, 945 A.2d at 1141 (citing *Weiner & Assocs.*, 584 A.2d at 1225).
[51] OB 22.

diminished injury, suffered by a significant proportion of the Proposed Class; second, they argue that the Proposed Class is improperly defined as of February 28, 2018, rather than the date of the settlement of the Indemnification Claim; and third, they argue that the Proposed Class is unascertainable, an argument which appears to derive largely from the cross-holdings argument. Each is considered below.

a. Defense Argument #1: The Cross-holdings Issue

The cross-holdings issue is pivotal to the Defendants' arguments, as it appears both to influence the suggestion that the Proposed Class is unascertainable, and to color the arguments the Defendants make under Rule 23(b). Put simply, the Defendants argue that dual stockholders in both IDT and Straight Path—of which there were many due to nature of the Spin-Off—face unique defenses that are fatal to commonality.[52] The Defendants posit that some of the dual stockholders may have in fact *benefitted* from the Indemnification Claim—for instance, where the dual stockholders held more stock in IDT than in Straight Path.[53] That is, if IDT had been responsible for paying the $614 million fine under the Consent Decree, IDT stockholders by way of IDT would have suffered that monetary loss. Individuals who held more shares in IDT than in Straight Path, therefore, may have benefitted from the alleged settlement of the Indemnification Claim for too little value.

[52] AB 19.
[53] *Id.*

Individuals who held equal amounts of IDT and Straight Path shares would have "netted out," with no injury being suffered at all, according to the Defendants.

The Defendants also argue that the Plaintiff cannot adequately represent those stockholders who held more IDT stock than Straight Path stock, as their interests are not aligned.

I do not find the cross-holdings argument compelling, for a few reasons. I first note that the precedent cited by the Defendants in support of their position—that I should decline to certify the Proposed Class on this basis—is almost entirely federal.[54] Federal class action law is of course informative of Delaware's treatment of class actions,[55] but federal circuit caselaw is persuasive, not controlling. And Delaware caselaw does not, in my understanding, generally even address this question. Finding that cross-holdings here defeat class certification would almost certainly run afoul of precedential caselaw wherein *at least one* stockholder held in both the plaintiff and defendant entities, particularly in the context of publicly traded companies.

Second, the right to participate as a member of the Proposed Class is necessarily a right that arises from the divestiture by merger of partial value of the Straight Path stock *itself*—from which consideration was allegedly converted on a

[54] *See id.* at 18–19; Sur-RB 1–3.
[55] *See Weiner & Assocs.*, 584 A.2d at 1224.

per share basis, and the right to damages for which inures on a per share basis. Just as with injury to a security which inheres in the stock, recovery for which is not dependent on the net effect to the stockholder,[56] the direct claim here arises from the diverted consideration due upon divestiture of the shares themselves via the Merger. The right of recovery here is thus tied to the stock in connection with which the stockholder derived a right to consideration, and from which that consideration was, at least in part, diverted. Again, any recovery here derives directly from stockholders on a per share basis. There is no need to "net" any benefit that a stockholder may have otherwise derived from the faithless transaction in which the stockholder is not implicated. The fact that a benefit may have resulted to cross-holdings of IDT due to the self-interest of faithless Straight Path fiduciaries is not a reason in equity to diverge from this analysis.

Finally, a requirement that the effect of the improper conversion on the net worth of each Plaintiff-class stockholder must be considered, to determine whether the stockholder was incidentally benefited thereby, would be inimical to the efficiency the class action is designed to bring to the court system, and therefore detracts from what this Court has called "the most important of all efforts: the protection and advancement of all potential plaintiffs' (typically, the shareholders')

[56] *E.g. Urdan v. WR Cap. Partners, LLC*, 244 A.3d 668, 677 (Del. 2020).

interests."[57] The stockholders comprising the Proposed Class, in large part, have not put themselves forward as class representatives. Engaging in such individualized assessment of each potential plaintiff does not serve interests of judicial economy.[58] Disqualifying potential classes upon this rationale does not seem, to me, to serve any greater interest that would compel such a shift in our case law.[59]

I do not find the cross-holdings issue to be preclusive of certification of the Proposed Class.[60] I consider next the Defendants' arguments regarding the definition of the Proposed Class.

b. Defense Argument #2: The Timing Element of the Proposed Class Definition

The Defendants take issue with the temporal element of the Proposed Class definition, which requires that a potential class member have owned stock as of the time of the Merger's close, rather than the date on which the Indemnification Claim was sold to Howard Jonas. The Defendants posit that this second date—the date the Indemnification Claim was sold—is the appropriate time-anchor, because the sale of the Indemnification Claim was publicized, and stockholders purchasing Straight

[57] *In re Siliconix Inc. S'holders Litig.*, 2001 WL 618210, at *2 (Del. Ch. May 25, 2001).
[58] *Cf. id.* ("[S]erious questions of judicial economy are raised if extensive discovery must be refereed and a 'mini trial' held to identify the appropriate representatives.").
[59] It might, of course, work a benefit on equitable tortfeasors, as a group.
[60] I note that I am in good company in so finding, as Vice Chancellor Laster rejected very similar arguments scant weeks ago in the *In re Columbia Pipeline* case. *See generally In re Columbia Pipeline Grp., Inc. Merger Litig.*, C.A. No. 2018-0484-JTL, Tr. of 6.1.22 Settlement Hr'g and Rulings of the Ct., Dkt. No. 405 (Del. Ch. June 1, 2022).

Path shares after the publicization were buying stock that already had the injury (if any) priced in.[61]

But, as I noted in *Straight Path I*, the remaining actions in this matter are direct claims regarding *deprivation of merger consideration.*[62] Howard Jonas indicated that he would not support any sale of Straight Path—necessary in order for the company to survive following the Consent Decree—unless the Indemnification Claim was eliminated.[63] "[T]he side benefits Howard Jonas extracted from the sales process were directly related to the Verizon merger."[64] That is, the injury suffered was suffered by the stockholders of Straight Path via their ownership of Straight Path stock, and arising as it did from the loss of consideration in the Merger with Verizon, it could not have ripened into a cognizable injury until the Merger was actually consummated.

The Defendants' theory also presupposes that any purchasers of Straight Path stock between the sale of the Indemnification Claim on April 9, 2017[65] and the closing of the Merger on February 28, 2018[66] had the benefit of a perfectly efficient stock market, and could have suffered no injury, as the market had absorbed and reflected the information regarding the sale of the Indemnification Claim. This

[61] AB 14.
[62] *Straight Path I*, 2018 WL 3120804, at *12.
[63] *Id.*
[64] *Id.*
[65] *Id.* at *7.
[66] *Id.* at *8.

cannot be the case. The fine to be paid, and therefore the value of the Indemnification Claim (supposing its viability), was due as a percentage of the proceeds of any sale of Straight Path.[67] Indeed, a bidding war erupted in April and May 2017, with Verizon ultimately topping a prior offer from AT&T.[68] The value attributable to the *loss* of the Indemnification Claim could not be known until the Merger was finalized, even if the fact of its settlement was known. And as I have noted previously, even the Straight Path stockholder vote on August 2, 2017 approving the Merger did not finalize the Merger[69]—regulatory approvals first had to be cleared.[70] I found by Letter Opinion on November 20, 2017, that this matter was not ripe for judicial action until the Merger closed.[71] The wrongdoing—that is, the diversion of the Merger consideration—had not yet crystallized, as the Merger had not yet been consummated.[72]

Looked at another way, of course, presuming an efficient market, the market recognized some potential diminution in Straight Path stock value due to loss of the

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[67] *Id.* at *4.
[68] *Id.* at *7.
[69] *Id.*
[70] *In re Straight Path*, 2017 WL 5565264, at *3 ("The Plaintiffs' contention that their cause of action is, in fact, direct relies on the view that the transfer of the corporate assets to IDT was really a part of the merger itself, and was extra consideration for the merger extorted by the controller in return for his consent, not shared by the other stockholders. The Plaintiffs contend that the vast majority of the harm—measured by the payment of 20% of the merger consideration to the FCC—will be sustained only when the merger closes. The merger closure is contingent on regulatory approval.").
[71] *Id.* at *4–5.
[72] *See generally id.*

indemnification asset; presumably that loss was offset by a litigation asset inuring in the stock, and which became this litigation.

The date included in the Proposed Class definition aligns with this reasoning and is, in light of the direct nature of this action, the appropriate temporal limitation for the class.

This objection thus fails.

c. Defense Argument #3: The "Herculean Undertaking" Required to Certify the Proposed Class

The Defendants' final Rule 23(a) challenge to the motion for class certification is partially bound up in their arguments that cross-holdings in IDT and Straight Path pose irreconcilable class conflicts, and that the Proposed Class is defined inappropriately temporally.[73] They state that identification of potential class members holding offsetting IDT stock would be impracticable, and make the same argument with respect to identifying potential class members who purchased their stock following the announcement that the Indemnification Claim had been sold.[74]

I have discarded both of these theories above, so the impracticability or otherwise of such identifications is no longer of concern.

The Defendants also argue that there is no administratively feasible way for the Plaintiff to identify (1) beneficial holders of Straight Path stock at the pertinent

[73] *See* Sur-RB 16–18.
[74] *Id.*

time, who would be allowed to participate in the class recovery or (2) holders of Straight Path stock on February 28, 2018 that held stock "borrowed as part of a short sale transaction," who would *not* be allowed to participate in the class recovery, as short sellers are excluded from the Proposed Class.[75] But *In re Dole Food Company, Inc.*, a Court of Chancery decision dealing with these issues, demonstrates that settlement proceeds can be distributed via a *pro rata* distribution through a payment agent.[76] As in *Dole*, the record holders of the shares at the time of the Merger's close held the class claims, and the consideration therefore should logically flow to the record holders at that time.[77] *Dole* held that, with respect to beneficial holders and short sellers, the payment agent participants and their client institutions should "resolve in the first instance any issues over who should receive the settlement consideration," which is efficient because "they already had to address these issues for purposes of allocating the merger consideration."[78] This case is no different, and I find that any difficulties inherent in the class structure are outweighed by the efficiency gains of class certification.

[75] AB 57–59 (internal quotations omitted).
[76] 2017 WL 624843, at *4–5 (Del. Ch. Feb. 15, 2017).
[77] *Id.* at *5.
[78] *Id.* at *6.

I deny each of the Defendants' arguments relating to the administrative infeasibility of making a class award in this case. The class is sufficiently ascertainable and this opposition does not defeat the Plaintiff's motion.

* * *

I have rejected the Defendants' arguments with respect to Rule 23(a), and I am satisfied that commonality has been appropriately established here. I turn now to the final challenge to class certification: whether the Proposed Class satisfies any of the three prongs of Rule 23(b).

B. The Application of Rule 23(b)

Rule 23(b) is tripartite in nature, but for a class to be certified, the class need satisfy only one of the three avenues available under Rule 23(b). The three options for maintaining an action as a class action (assuming Rule 23(a)) is satisfied) are as follows:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
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> > (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) The Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[79]

Plaintiffs' counsel moved for the Proposed Class to be certified under Rule 23(b)(1) or Rule 23(b)(2).[80] The Defendants opposed, arguing that certification under Rule 23(b)(1) or Rule 23(b)(2) is impermissible where the *primary* relief sought is not equitable in nature—i.e., where a plaintiff is seeking solely compensatory damages.[81] In their view only certification under Rule 23(b)(3) would be appropriate. I address this argument first, ultimately finding that the Proposed Class need not be certified under Rule 23(b)(3), before turning to an analysis of Rule 23(b)(1).

1. The Defendants' Challenge to Rule 23(b) Certification

As I have said, the Defendants attack the Plaintiff's ability to have the Proposed Class certified under Rule 23(b)(1) or Rule 23(b)(2) because, in their view,

[79] Ct. Ch. R. 23(b).
[80] *See* OB 25–29.
[81] AB 62.

the predominant relief sought in the event of the Plaintiff's success is compensatory damages—i.e., purely monetary in nature.[82]

In support of their position, the Defendants cite *Wal-Mart Stores, Inc. v. Duke*, a United States Supreme Court case dealing with Federal Rule of Civil Procedure 23(b)(3).[83] *Wal-Mart* dealt with allegations of gender discrimination, a civil rights matter allegedly arising from violations of Title VII of the Civil Rights Act of 1964.[84] The Supreme Court ultimately found that claims for monetary relief could not be certified under Federal Rule of Civil Procedure 23(b)(2) ("FRCP 23(b)(2)"), where "the monetary relief is not incidental to the injunctive or declaratory relief."[85] The opinion clarified:

> One possible reading of [FRCP 23(b)(2)] is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule.[86]

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[82] *Id.* at 62–63.
[83] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361–62 (2011). Delaware law "often looks to federal decisions interpreting [Rule 23] for precedent that may help to construe and apply its Court of Chancery counterpart." *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *12 n.62 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part on other grounds*, 59 A.3d 418 (Del. 2012) (citing *O'Malley v. Boris*, 2001 WL 50204, at *4 (Del. Ch. Jan. 11. 2001)).
[84] *Wal-Mart*, 564 U.S. at 343.
[85] *Id.* at 360.
[86] *Id.* (emphasis in original).

Per the *Wal-Mart* Court, FRCP 23(b)(2) does not apply where individualized findings would be necessary as to each class member (but, notably, the Supreme Court did not foreclose the possibility that FRCP 23(b)(2) could still apply where a singular judgment would provide relief to each member of the class, even though the relief sought was purely monetary). "Similarly, [FRCP 23(b)(2)] does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."[87] The Supreme Court concluded that "*individualized* monetary claims belong . . . in [Federal] Rule 23(b)(3)."[88] The Defendants take the position that the Proposed Class, if it is to be certified, must be certified under Rule 23(b)(3), because any recovery should be assessed on an individualized basis (owing to their cross-holdings argument), and that the class therefore must be an opt-out class.

Delaware caselaw has tackled, and squarely rejected, this argument before.[89] Chancellor Allen, in *In re Mobile Communications*, wrote:

> Typically an action challenging the propriety of director action in connection with a merger transaction is certified as a (b)(1) or (b)(2) class [1] because plaintiff seeks equitable relief (injunction); [2] because all members of the stockholder class are situated precisely similarly with respect to every issue of liability *and* damages; and [3] because to litigate the matters separately would subject

[87] *Id.* at 360–61.
[88] *Id.* at 362 (emphasis added).
[89] *See, e.g.*, *Turner v. Bernstein*, 768 A.2d 24, 30–31 (Del. Ch. 2000).

> the defendant to the risk of different standards of conduct with respect to the same action.[90]

Chancellor Allen identified the second and third concerns as the driving force behind Delaware's rejection of the defendants' argument in *Mobile Communications*, which is functionally identical to the argument before me now.[91]

Mobile Communications also addressed the potential need for an opt-out right if the Court were to certify the class under Rule 23(b)(2), indicating that the Court must consider the nature of the claims stated in considering whether an opt-out right is constitutionally necessary.[92] In that case, both federal and state law claims had been brought; the Court identified and followed *Nottingham Partners*, a Delaware Supreme Court precedent which held that members of a class certified under Rule 23(b)(2) do not have a constitutional due process right to opt out of the class.[93] In *Nottingham Partners*, the Delaware Supreme Court noted that the Court of Chancery has the discretionary power to provide for an opt-out right if it believes one is necessary to protect the interests of absent class members.[94] But, the Court noted, the ability to opt out of the class "always involves the potential for a multiplicity of

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[90] *In re Mobile Commc'ns Corp. of Am., Inc. Consol. Litig.*, 1991 WL 1392, at *15 (Del. Ch. Jan. 7, 1991) (citations omitted).
[91] *Id.*
[92] *Id.*
[93] *Id.* (citing *Nottingham Partners v. Dana*, 564 A.2d 1089, 1101 (Del. 1989)).
[94] *Nottingham Partners*, 564 A.2d at 1101 (citing Ct. Ch. R. 23(d)(2)).

lawsuits and variations in adjudication which class actions are intended to prevent."[95]

Ultimately, in *Mobile Communications*, the Court found that providing an opt-out right would subject the defendants to potentially inconsistent adjudications, and that the defendants had acted on grounds generally applicable to the class, such that class relief was appropriate.[96] The claims at issue were not "of the type that meld somewhat dissimilar individual claims together for efficient common adjudication," as might best be treated by Rule 23(b)(3); instead, the claims "involve[d] one set of actions by defendants creating a uniform type of impact upon the class of stockholders."[97] The class was ultimately certified.[98]

Then-Vice Chancellor Strine opined similarly and at length in *Turner v. Bernstein*, certifying a class under Rule 23(b)(1) where the "only question left is the remedy for the defendant-directors' . . . breach of fiduciary duties and . . . the plaintiffs' preferred remedy is . . . monetary damages."[99] The *Turner* Court addressed Rule 23(b)(3) as considered in the context of corporate mergers specifically, noting that where corporate mergers are challenged via class action, "it is virtually never the case that there is any legitimate basis that a defendant might be

[95] *Id.* (citation omitted).
[96] *Mobile Commc'ns*, 1991 WL 1392, at *16.
[97] *Id.*
[98] *See generally id.*
[99] *Turner*, 768 A.2d at 30.

found liable to some plaintiffs and not to others."[100] By contrast, for example, diversity class actions arising under state tort law might stem from significantly different facts, such that "the individual circumstances of each class member are typically of material importance."[101] Because none of the legal or factual issues in *Turner* depended upon issues individual to class members, the Court certified the class under Rule 23(b)(1).[102]

I find that the reasoning of the *Turner* and *Mobile Communications* cases applies here, and that the *Wal-Mart* case is not controlling. In *Wal-Mart*, the circumstances applicable to each individual were necessarily different—this much was shown by the opinion's very fact section, which identified the background of each of three named plaintiffs.[103] The pertinent facts here—Howard Jonas's alleged behavior with respect to a forced settlement of the Indemnification Claim—will be equally applicable to all stockholders.[104] Unlike in *Wal-Mart*, any compensatory damages recovered at the conclusion of this matter will not be *individualized*, in that they stem from individual circumstances; instead, "basically only one recovery is sought and the determination of the overall amount and the sum due each class

[100] *Id.* at 33 (internal quotations omitted).
[101] *Id.*
[102] *Id.* at 34–35.
[103] 564 U.S. at 344.
[104] I note that this context varies slightly from that championed in *Turner*, in that the corporate Merger itself was not challenged; the *diversion of Merger consideration* was. I do not find this to be a distinction with a difference under the facts at hand.

member is not difficult."[105] I have discarded the allegations to the contrary—the Defendants' arguments that the Proposed Class as a whole lacked commonality, both because some Straight Path stockholders held stock in IDT, and because in the Defendants' view class members who purchased after the settlement of the Indemnification Claim suffered no injury. Again, I have rejected both of these arguments above, and to the extent necessary I reject them as disabling in the context of the Rule 23(b)(3) analysis too.

Finally, as in *Mobile Communications*, to provide an opt-out right either in the context of certification under Rule 23(b)(3) or by exercise of discretion following certification under Rule 23(b)(1) or Rule 23(b)(2) would likely create a risk of inconsistent judgments, and would, as the *Turner* Court noted, require "devotion of scarce judicial resources" to a relatively repetitive exercise.[106]

In sum, I find that certification of the Proposed Class need not satisfy Rule 23(b)(3). The Plaintiff is free to request certification under Rule 23(b)(1) or Rule 23(b)(2), and has in fact done so. I now consider her request.

2. Application of Rule 23(b)(1)

As I have likely previewed above, I find that the Proposed Class is appropriately certified under Rule 23(b)(1), which again allows for certification,

[105] *Turner*, 768 A.2d at 33 (internal quotations omitted).
[106] *Id.* at 34.

broadly speaking, (1) where there might otherwise be a risk of inconsistent adjudications which would establish "incompatible standards of conduct" for the party opposing the class, or (2) where adjudications with respect to an individual members of the class would be practically dispositive of the interests of other non-party members, or might substantially impair or impede those non-party members' abilities to protect their interests.[107]

In my view, both of these possibilities are satisfied here. If the Proposed Class is not certified, and the instant facts are sued upon across multiple matters, a risk of inconsistent adjudications certainly would arise. Similarly, if I deny certification here, and lawsuits are brought by multiple individuals, those lawsuits would necessarily be predicated upon nearly identical facts. Principles of issue preclusion could therefore substantially impair or impede other plaintiff-stockholders' or the Defendants' rights.

As such, the Proposed Class is appropriately certified under Rule 23(b)(1). I need not address Rule 23(b)(2). Because I have found that the Rule 23(a) factors have been met by the Proposed Class and the Lead Plaintiff, and because the matter satisfies Rule 23(b)(1), the pending motion for class certification is granted.

[107] Ct. Ch. R. 23(b)(1).

III. CONCLUSION

The Plaintiff's motion for class certification is GRANTED. An appropriate Order is attached.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE STRAIGHT PATH COMMUNICATIONS INC. CONSOLIDATED STOCKHOLDER LITIGATION	C.A. No. 2017-0486-SG

ORDER GRANTING
MOTION FOR CLASS CERTIFICATION

WHEREAS, on January 24, 2020, plaintiffs JDS1, LLC ("JDS1") and The Arbitrage Fund ("TAF") moved for class certification and for appointment as class representatives (the "Class Certification Motion");

WHEREAS, on October 14, 2020, Ms. Ardell Howard moved to intervene as an additional plaintiff under Rule 24 or, alternatively, for permissive joinder under Rule 20(a) (the "Intervention Motion");

WHEREAS, on July 20, 2021, the Court granted the Intervention Motion;

WHEREAS, on November 9, 2021, the Court heard oral argument on the Class Certification Motion;

WHEREAS, on March 10, 2022, JDS1 withdrew from the case as Co-Lead Plaintiff and as a proposed class representative;

WHEREAS, on March 16, 2022, Ms. Howard filed a Motion for Appointment as Class Representative and Co-Lead Plaintiff (the "Howard Appointment Motion");

WHEREAS, on May 11, 2022, the Court heard oral argument on the Howard

Appointment Motion;

WHEREAS, on May 11 and 12, 2022, the Court held an evidentiary hearing regarding TAF's adequacy to serve as a class representative;

WHEREAS, on May 16, 2022, the Court issued a bench ruling that (i) granted the Howard Appointment Motion and appointed Ms. Howard as Lead Plaintiff and Class Representative, and (ii) denied TAF's motion for appointment as a class representative;

WHEREAS, the Court finds that the Class satisfies the requirements of Court of Chancery Rules 23(a) and 23(b)(1).

NOW, THEREFORE, IT IS HEREBY ORDERED that the Proposed Class, as defined in the Class Certification Motion, is certified pursuant to Court of Chancery Rule 23(a) and 23(b)(1) without opt-out rights.

IT IS SO ORDERED this 14th day of June, 2022.

/s/ Sam Glasscock III
Vice Chancellor