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RE: *Edward Deane, et al. v. Robert Maginn, Jr.*,
C.A. No. 2017-0346-LWW

Dear Counsel:

This decision—the sixth I have rendered in this long-pending case—ties up several loose ends. The remaining issues before me are the non-party members' entitlement to a share of the damages awarded after trial, the implementation of that remedy, and the plaintiffs' counsel's entitlement to a fee award. The parties should (after eight years of litigation) now be positioned to prepare a final order bringing the trial court stage to a close.

I. RELEVANT BACKGROUND

The factual predicate for this decision is set out in my March 2, 2022 and November 1, 2022 memorandum opinions.[1] I found after trial that defendant Robert Maginn, Jr. breached his duty of loyalty by usurping a business opportunity from New Media Investors II-B, LLC ("New Media II-B"). The opportunity concerned warrants to purchase shares of Jenzabar common stock (the "II-C Warrant"). I calculated New Media II-B's damages to be $25,451,992.[2]

Given the "unique circumstances of this case," I concluded that the damages should be distributed pro rata to the members of New Media II-B.[3] The identity of New Media II-B's rightful manager is unclear (and may be Maginn).[4] A recovery by New Media II-B could disproportionately benefit Maginn, leading to "further

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[1] *Deane v. Maginn* ("*Maginn II*"), 2022 WL 16557974 (Del. Ch. Nov. 1, 2022); *see also Deane v. Maginn* ("*Maginn I*"), 2022 WL 624415 (Del. Ch. Mar. 2, 2022).

[2] *Maginn II*, 2022 WL 16557974, at *29.

[3] *Id.* at *31; *see also In re El Paso Pipeline P'rs, L.P. Deriv. Litig.*, 132 A.3d 67, 124-25 (Del. Ch. 2015) (observing that an investor-level recovery on a derivative claim may be appropriate where "an entity-level recovery would benefit 'guilty' stockholders" or where "the entity is no longer an independent going concern, such that channeling the recovery through the corporation is no longer feasible or a pro rata recovery is more efficient"), *rev'd on other grounds sub nom. El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016).

[4] *Maginn II*, 2022 WL 16557974, at *30 (explaining that the court could not find that the plaintiffs validly elected themselves managers of New Media II-B or that Maginn was removed as the Managing Member).

deceit and inequity."[5] New Media II-B is not an operating entity but was formed as a vehicle to invest in Jenzabar, Inc. "If the opportunity of the II-C Warrant had been given, in part, to New Media II-B, then its members would have ultimately benefitted in the form of distributions."[6] For these reasons, I concluded that New Media II-B investors can most efficiently and effectively recover through a pro rata distribution of damages.[7]

As the Court of Chancery has recognized, fashioning a direct recovery for a derivative claim requires great "care."[8] To assess any potential snags with this approach, I allowed the parties to make submissions outlining proposed next steps to identify the New Media II-B members who should receive a distribution. Like all things in this matter, however, it was an arduous process made more challenging by the parties' lack of cooperation—as detailed in my June 30, 2023 letter opinion and other correspondence.[9]

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[5] *Id.* at *29-30.

[6] *Id.* at *29.

[7] *See* Adolf A. Berle, Jr., *"Control" In Corporate Law*, 58 COLUM. L. REV. 1212, 1221 (1958) ("Yet in stockholders' derivative actions the court can mold its remedy and, where it will save time and trouble, can order payment of a ratable portion of the recovery to the minority shareholders rather than payment of the total into the corporate treasury." (citing *May v. Midwest Ref. Co.*, 121 F.2d 431 (1st Cir. 1941), *cert. denied*, 314 U.S. 668 (1941))).

[8] *See In re Happy Child World, Inc.*, 2020 WL 5793156, at *2 (Del. Ch. Sept. 29, 2020).

[9] *See Deane v. Maginn*, 2023 WL 4305049 (Del. Ch. June 30, 2023); *see infra* note 10 (citing letters).

One overarching problem is that the number and identity of the New Media II-B members who could be entitled to a recovery is presently unknown. As I have previously outlined, the parties have self-interests animating their positions on this issue.[10] The plaintiffs believe that they should be given the full quantum of damages, while Maginn would prefer that no damages be distributed. Maginn also insists that I cannot press forward with a remedy without all non-party members being joined.[11] He further avers that I cannot assess which members can recover without resolving a threshold matter of whether the 2013 "Payment Acknowledgement and Release" agreement (the "Release") that Maginn sent to New Media II-B members is legally valid.[12] To allay these concerns, I appointed Christine Mackintosh, Esquire to serve as Special Counsel. The Special Counsel was asked to address "the legal validity of

[10] *See* Order Appointing Special Counsel and Setting Briefing Schedule (Dkt. 347) ("Special Counsel Order") 2; Letter to Counsel Regarding Appointment of Special Counsel (Dkt. 346) ("May 15 Letter") 2-3; Letter to Counsel Regarding Special Counsel (Dkt. 344) 1-2.

[11] Maginn failed to carry his burden to prove that there are persons necessary or indispensable to this action under Rule 19. *See Maginn II*, 2022 WL 16557974, at *30 n.331; *Maginn I*, 2022 WL 624415, at *12-13; May 15 Letter 5 ("As the party relying on Rule 19, the defendant had the burden to show there exist persons that are necessary or indispensable to the action. At the summary judgment stage, I held that the defendant fell 'well short' of meeting this burden because he cited only to documents from 2013 and an 'undated and uncontextualized' spreadsheet. At trial, no additional evidence was presented. After trial, the defendant opted not to brief his Rule 19 arguments, thereby waiving them.").

[12] *Maginn*, 2023 WL 4305049, at *2.

the Release from the perspective of current and former New Media II-B members, other than the plaintiffs and defendant in this action (the 'Non-Party Members')."[13] At my request, the parties and Special Counsel filed briefs regarding the applicability of the Release.[14] At the same time, the plaintiffs moved for an award of attorneys' fees, which Maginn opposes.[15]

II. LEGAL ANALYSIS

I begin by considering the application of the Release and conclude that New Media II-B members during the relevant period—even those who signed the Release—should receive a pro rata distribution of damages. Next, I address how the distribution of a proportionate recovery to the members will be effectuated. Finally, I award the plaintiffs' counsel a fee award equal to 26% of the net damages and certain expenses.

A. Applicability of the Release

On December 19, 2013, Maginn sent a letter to New Media II-B members (the "II-C Solicitation") informing them of the "conclusion" of their "New Media

[13] Special Counsel Order ¶ 3.

[14] Dkts. 354, 356, 360, 365, 366.

[15] Dkts. 353, 364, 367; Dkt. 368 Ex. A. The plaintiffs' counsel also filed a separate petition for fees. Dkt. 352.

Investment."[16] He told the investors that their "final check(s)" were enclosed "together with a payment acknowledgement that indicates the[] checks complete[d]" their investments.[17] He also invited recipients "to participate" in "another Jenzabar opportunity" through a new entity—New Media Investors II-C, LLC.[18] Investors were asked to sign an attached non-disclosure agreement if they wanted to explore that opportunity.

The referenced "Jenzabar opportunity" involved the II-C Warrant that Maginn purchased with New Media II-B's funds. The II-C Solicitation left out this crucial fact. It gave no indication that the "opportunity" was "intended for the benefit of New Media II-B and its members."[19] It also omitted that Maginn had himself exercised the II-C Warrant six months earlier.[20]

The II-C Solicitation enclosed a document entitled "Payment Acknowledgement and Release" (previously defined as the Release).[21] The Release stated that "acceptance of the redemption payment would represent a repurchase of

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[16] *Maginn II*, 2022 WL 16557974, at *6 (citing JX 133 at 1).

[17] *Id.*

[18] *Id.*

[19] *Id.* at *10.

[20] *Id.*

[21] *Id.* at *6 (citing JX 133 at 2).

the members' equity and termination of their membership in New Media II-B."[22] It also provided for a broad release of claims relating to any New Media II-B investment.[23]

Of New Media II-B's 88 members at the time, some (including the three plaintiffs) neither cashed their redemption checks nor signed the Release.[24] The plaintiffs argue that any members who signed the Release cannot share in the post-trial damages award.[25] Maginn, for his part, contends that the import of the Release cannot be resolved given that the non-party members are not before me.[26] And the Special Counsel argues that the Release should not bar innocent New Media II-B members from a pro rata distribution.[27] I agree with the Special Counsel's assessment.

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[22] *Id.*

[23] *Id.*

[24] *Id.* (citing Maginn Tr. 238-42).

[25] Pls.' Br. Setting Forth Their Position on Whether the Release is Valid as a Matter of Law (Dkt. 356). Of course, if this were so, the plaintiffs would receive a bigger piece of the pie.

[26] Def.'s Opening Br. Regarding Whether the "Release" is Enforceable as a Matter of Law with Certificate of Service (Dkt. 354). Maginn continues to argue that the court cannot resolve these issues without joining additional members. This is surprising, since he has repeatedly failed to carry his burden on this issue. *See supra* note 11 and accompanying text. In any event, the Special Counsel was appointed to represent these very interests.

[27] Special Counsel's Br. Regarding the Legal Validity of the Release (Dkt. 360) ("Special Counsel Br.").

First, Delaware law applies. New Media II-B is a Delaware limited liability company. Its Limited Liability Company Agreement specifies that Delaware law governs "the rights of the parties" thereunder.[28] This dispute involves the purported resignations of (and distributions to) members of New Media II-B. It seemingly implicates the internal affairs of a Delaware entity insofar as it "pertain[s] to the relationships among or between the [LLC] and its officers, directors, and [members]."[29]

I previously found that the II-C Solicitation did not disclose that the referenced "'Jenzabar opportunity' was intended for the benefit of New Media II-B and its members."[30] As New Media II-B's Managing Member, Maginn owed "fiduciary duties akin to those owed by directors of a corporation."[31] "[D]irectors owe a fiduciary duty to 'fully and accurately disclose all material information to stockholders when seeking stockholder action,' which duty arises out of a director's duties of both loyalty and care."[32]

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[28] JX 1 at 6.

[29] *Miramar Police Officers' Ret. Plan v. Murdoch*, 2015 WL 1593745, at *12 (Del. Ch. Apr. 7, 2015) (citation omitted). Here, the analogous relationships are between New Media II-B, its managing member, and its members.

[30] *Maginn II*, 2022 WL 16557974, at *10.

[31] *Id.* at *13.

[32] *Raul v. Astoria Fin. Corp.*, 2014 WL 2795312, at *8 (Del. Ch. June 20, 2014) (quoting *Ehlen v. Conceptus, Inc.*, 2013 WL 2285577, at *2 (Del. Ch. May 24, 2013)); *see also*

Nonetheless, Maginn's II-C Solicitation omitted that he had used New Media II-B's funds to buy the II-C Warrant as a replacement for New Media II-B's expired warrant to purchase Jenzabar shares. The II-C Solicitation did not explain that although the special committee of Jenzabar directors determined to issue the II-C Warrant to a "successor entity" of New Media II-B, the entity that obtained the II-C Warrant was owned solely by Maginn and his ex-spouse. It also neglected to mention that Maginn had already exercised the II-C Warrant.[33]

The validity of the Release is therefore questionable—at best.[34] But even if it were valid, it would be inequitable to prevent the New Media II-B members who

Orman v. Cullman, 794 A.2d 5, 41 (Del. Ch. 2002) ("[T]he duty of directors to observe proper disclosure requirements derives from the combination of the fiduciary duties of care, loyalty and good faith." (citation omitted)).

[33] *See Maginn II*, 2022 WL 16557974, at *19 n.226.

[34] The Special Counsel makes a strong argument that any members who cashed their final checks were fraudulently induced to do so. Special Counsel Br. 11-15. *See Innovate 2 Corp. v. Motorsport Games Inc.*, 2022 WL 903801, at *5 (D. Del. Mar. 28, 2022) ("And when a general release is itself fraudulently induced, the party alleging fraud may elect rescission, setting aside that release." (citing *E.I. Dupont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 465 (Del. 1999) (cleaned up))); *Am. Life Ins. Co. v. Parra*, 63 F. Supp. 2d 480, 500 (D. Del. 1999), *aff'd in part, rev'd in part*, 265 F.3d 1054 (3d Cir. 2001) (TABLE) (upholding jury finding that the acceptance of a general release was fraudulently induced). She also raises the important point that the Release may not have been supported by consideration since the "final checks" were a return of the members' own funds. Special Counsel Br. 20. Whether the Release was fraudulent or without consideration, however, are not matters I must resolve in order to conclude that members who signed it may equitably share in the post-trial remedy.

signed it from recovering.[35] Indeed, the funds of these members were used to purchase the II-C Warrant in the first place. Maginn's disloyalty to New Media II-B harmed these members just as it harmed the plaintiffs.

I decline to grant the plaintiffs a windfall by shutting out the innocent New Media II-B members deceived by Maginn. The II-C Warrant was for the benefit of New Media II-B and *all* of its then-members. Any individual or entity that was a member of New Media II-B between the dates of June 29, 2013 (the date that Maginn exercised the II-C Warrant) and December 19, 2023 (the date of the II-C Solicitation) is entitled to share pro rata in the damages award.[36]

B. Distribution of Damages

The court quantified New Media II-B's damages from Maginn's disloyal conduct to be $25,451,992. Based on the evidence presented at trial, it appears that Maginn owned approximately 4.58% of New Media II-B.[37] Accordingly,

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[35] It bears noting that there is shaky evidence on which members never received nor cashed a "final check." The plaintiffs have asserted that there are only a handful of such individuals, but the true number is unknown. I choose to err on the side of inclusion.

[36] *See El Paso*, 132 A.3d at 121-22 ("[C]ourts will grant pro rata recovery [in a derivative action] where the equities demand it."). Should the Special Counsel believe that a different time period is more apt, she is invited to inform the court by letter before any final order is entered. My intention is to capture the approximately 88 New Media II-B members during the relevant time period, including the members who either cashed their "final" checks and/or signed the Release.

[37] *Maginn II*, 2022 WL 16557974, at *18 (citing JX 196 at 5). I do not know whether this was the exact stake that Maginn owned at the time of the II-C Solicitation. Nor do I know

$24,286,291, plus pre- and post-judgment interest, must be placed into an escrow account administered by the Special Counsel.[38] Pre- and post-judgment interest will be at the legal rate, compounded quarterly and fluctuating with changes in the underlying rate, beginning on June 29, 2013 through the date of payment—excluding the time period from August 2018 to August 2020 during which the plaintiffs failed to press this matter.[39]

The escrow must be funded by Maginn via wire transfer within thirty days of the entry of a final order in this case. Fees and expenses for the Special Counsel and the plaintiffs' counsel will be subtracted from the total fund. Upon the conclusion of her process, the Special Counsel will make an application to recover the fees and

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whether there are other New Media II-B members who were affiliated with Maginn. I ask that the Special Counsel endeavor to confirm the appropriate percentage as part of her process of locating the members entitled to a pro rata recovery.

[38] *Cf. El Paso*, 132 A.3d at 128-129 (ordering the defendant to contribute the percentage of an entity level recovery proportionate to the interests it did not own so that a pro rata recovery could be distributed to the unaffiliated limited partners).

[39] *See Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 486 (Del. 2011) ("[P]rejudgment interest in Delaware cases is awarded as a matter of right . . . ."). June 29, 2013 is the date on which Maginn exercised the II-C Warrant. *See Maginn II*, 2022 WL 16557974, at *6. This is the appropriate starting period since he has retained the funds since then. The time period excluded is that during which the case laid dormant due to the plaintiffs' inaction. *See Maginn I*, 2022 WL 624412, at *3; *see also Williams Cos., Inc. v. Energy Transfer LP*, 2022 WL 3650176, at *7 (Del. Ch. Aug. 25, 2022) (observing that the court has discretion to reduce pre-judgment interest for "delay that is the 'fault' or 'responsibility' of a plaintiff or his attorney" (quoting *Bishop v. Progressive Direct Ins. Co.*, 2019 WL 2009331, at *5 (Del. Super. May 3, 2019))). If the parties or Special Counsel believe that another start date is apt, they may inform me by letter before a final order is entered.

expenses incurred in completing her charge.[40] The plaintiffs' counsel's fees and expenses, as set forth below, will be paid before any distribution to the members is made.

The remainder of the fund will be distributed pro rata to the members of New Media II-B as of 2013, with a fixed sum retained in escrow to compensate the Special Counsel. The limited evidence in the record reflects that the approximately 88 New Media II-B members were located or domiciled in eight states and ten foreign locations.[41] As an initial matter, Maginn must provide to the Special Counsel the information in his possession reflecting the addresses of these members and their respective membership interests in New Media II-B during the relevant period.[42] The Special Counsel will then work to locate the non-party individuals or entities.

The Special Counsel is asked to file a proposed plan of allocation to distribute the damages pro rata to these New Media II-B members (excluding Maginn and any

[40] *See* Special Counsel Order ¶¶ 7-8. If the Special Counsel prefers, she may receive an interim fee pre-distribution and retain in escrow an estimated amount to cover additional expenses for a post-distribution payment.

[41] JX 193. According to Maginn, there were 22 members in Massachusetts, 6 in Texas, 5 in California, 5 in New York, 4 in Connecticut, 3 in Georgia, 2 in Illinois, and 1 in Florida. Of the 38 international members, 9 were in Germany, 8 in France, 5 in UK, 3 in China, 3 in Japan, 3 in Mexico, 3 in Republic of Singapore, 2 in Switzerland, 1 in Brazil, and 1 in Canada. *See* Maginn Br. 6.

[42] This includes an unredacted version of JX 193. Maginn presumably has the necessary information since he sent the II-C Solicitation to these members.

affiliates). The parties and Special Counsel are also asked to confer on a form of final order and judgment to implement the court's post-trial opinion and this letter decision, with a proposed order to be filed within 30 days.

C. Plaintiffs' Counsel's Fee Request

The final matter before me concerns the plaintiffs' counsel's entitlement to an award of fees and expenses. Oddly, the plaintiffs have filed two petitions for fees and expenses.[43] The first was filed by Shlansky Law Group, LLP, seeking a fee award of "$8,483,997.00 (one-third [of the total award]) plus any interest" as well as costs of $117,504.45 under the corporate benefit or common fund doctrine.[44] The second was filed by the individual plaintiffs, asking for the same fee for their counsel under the bad faith exception to the American Rule (or, alternatively, under 6 *Del. C.* § 18-1004).[45] They ask that any fee award be paid directly by Maginn and not out of the damages fund. Because the petitions seek the same fees for the same counsel in the same suit, I will consider them as a single request.

"The starting principle is recognition of the so-called American Rule, under which a prevailing party is responsible for the payment of his own counsel fees in

[43] *See* Dkts. 352, 353.

[44] Shlansky Law Group, LLP's Pet. for Fees and Costs (Dkt. 352) ¶¶ 4, 18-21.

[45] Mot. for Attorneys' Fees and Costs (Dkt. 353) ("Pls.' Mot.") ¶¶ 2, 4-5.

the absence of statutory authority or contractual undertaking to the contrary."[46] One exception to the American Rule is the common fund doctrine, under which "a litigant who confers a common monetary benefit upon an ascertainable class is entitled to an allowance for fees and expenses to be paid from the fund or property which his efforts have created."[47] That exception is applicable since the litigation conferred a monetary recovery that will be shared pro rata among New Media II-B members.[48]

The court retains "considerable discretion when deciding the appropriate fee award."[49] The exercise of this discretion is guided by the *Sugarland* factors, "including: (1) the results achieved; (2) whether counsel was working on a contingent basis; (3) the time and effort of counsel; [(4) the relative complexity of the litigation; and (5)] counsel's standing and ability."[50] "Delaware courts generally

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[46] *Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1164 (Del. 1989).

[47] *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990).

[48] The bad faith exception does not provide grounds for a fee here. The plaintiffs cite no litigation conduct by Maginn amounting to bad faith. *See eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 47 (Del. Ch. 2010). They merely say that he was "obfuscat[ing]" by failing to admit wrongdoing. Pls.' Mot. ¶¶ 35-37; *but see Brody v. Zaucha*, 697 A.2d 749, 754 (Del. 1997) ("[A] director need not make self-accusatory statements nor engage in 'self-flagellation' by confessing to wrongdoing that has not been formally adjudicated.").

[49] *Griffith v. Stein*, 283 A.3d 1124, 1139 (Del. 2022).

[50] *Assad v. Botha*, 2023 WL 7121419, at *8 (Del. Ch. Oct. 30, 2023) (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980)).

assign 'the greatest weight to the benefit achieved in litigation.'"[51] The benefit achieved here is significant and easily quantified: the $24,286,291 cash recovery.[52]

"When the value of [a] benefit is quantifiable, *Americas Mining* calls for calculating an indicative fee as a percentage of the benefit."[53] Generally, the maximum percentage of 33% is available for matters that—like this action—progressed through a post-trial adjudication.[54] Although the plaintiffs achieved an outcome that ultimately benefitted New Media II-B and its members after years of litigation, the maximum figure is unwarranted here.

The case proceeded in fits and starts since 2017 (2016 if I were to consider related books and records litigation).[55] There were multi-year periods where it sat dormant until the plaintiffs attempted to inject additional, stale claims—yielding further delay and complication.[56] Even through trial, the plaintiffs' theories were

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[51] *Id.* (quoting *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012)).

[52] *E.g.*, *Ryan v. Gifford*, 2009 WL 18143, at *13 (Del. Ch. Jan. 2, 2009) (noting that a $28,000,000 settlement in favor of stockholders evidenced a "significant benefit"); *In re Orchard Enters., Inc. S'holder Litig.*, 2014 WL 4181912, at *5 (Del. Ch. Aug. 22, 2014) (describing a cash recovery of $10,725,000 as an "obvious" benefit).

[53] *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 692 (Del. Ch. 2023) (citing *Ams. Mining*, 51 A.3d at 1259).

[54] *Ams. Mining*, 51 A.3d at 1259 (observing that 33% is "the very top of the range of percentages" (quoting *In re Emerson Radio S'holder Deriv. Litig.*, 2011 WL 1135006, at *3 (Del. Ch. Mar. 28, 2011))).

[55] *See Maginn I*, at *3.

[56] *See id.* at *3-4.

amorphous, requiring the court to untangle a mess of evidence and analysis. Thus, a fee award of 26%—the low end of the applicable range—will be applied.[57]

The secondary *Sugarland* factors indicate that this is more than fair to the plaintiffs. The litigation proceeded through trial due to the plaintiffs' efforts and counsel worked on a contingency. Yet counsel pressed their case at a snail's pace. The case was made complex not because of the legal theories presented but because counsel on both sides repeatedly threw up roadblocks.

The plaintiffs' counsel may recover $57,504.45 of expenses from the gross fund.[58] They are entitled to an award totaling 26% of the net fund (i.e., the amount remaining after the application of pre-judgment interest, subtracting the plaintiffs' recoverable expenses, an amount for the Special Counsel's fees, and an estimated amount for the administration of the pro rata distribution). The Special Counsel is asked to determine what amount to set aside for the latter two expenses, with a cushion for unanticipated costs.

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[57] *See Berger v. Pubco Corp.*, 2010 WL 2573881, at *1 (Del. Ch. June 23, 2010) (awarding a fee worth 26% of the cash recovery). Without interest, this would support an award of about $6,299,484.50 and an implied hourly rate of about $1,791.15. *See* Holloway Aff. (Dkt. 352) ¶ 18 (stating that 3,517 hours were incurred in this litigation).

[58] The $57,504.45 of recoverable expenses is the total requested by the plaintiffs ($117,504.45), less $60,000 that they are attempting to recover for fees that were shifted in favor of Jenzabar on a discovery motion. *See Deane v. Maginn*, 2022 WL 16825351, at *3-5 (Del. Ch. Nov. 7, 2022) (shifting fees). It is unclear to me why the plaintiffs' counsel believe that they should be reimbursed for a sanction.

III. CONCLUSION

For the reasons described above, the Release is not a basis to prevent the innocent members of New Media II-B from sharing in the recovery. The Special Counsel shall locate and provide a pro rata recovery to these members. The plaintiffs' counsel is entitled to a fee and expense award, as set forth above.

The parties and the Special Counsel are asked to confer on a form of final order and judgment consistent with this decision and the court's post-trial decision. That proposed order must be filed within 30 days.

Sincerely yours,

/s/ Lori W. Will

Lori W. Will
Vice Chancellor