IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE COX RADIO, INC. SHAREHOLDERS LITIGATION	))	CONSOLIDATED Civil Action No. 4461-VCP

MEMORANDUM OPINION

Submitted: January 19, 2010
Decided: May 6, 2010

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PARSONS, Vice Chancellor.

This is a class action alleging breach of fiduciary duty in connection with a transaction consisting of a tender offer by a controlling shareholder and a second-step, short-form merger (the "Transaction"). In March 2009, Cox Enterprises, Inc. ("CEI"), the controlling shareholder of Cox Radio, Inc. ("Cox Radio"), commenced a tender offer through its wholly owned subsidiary, Cox Media Group, Inc. ("CMG"), for all of the Cox Radio stock that it did not already own. The Class Action Complaint alleges that various defendants breached their fiduciary duties to Cox Radio by offering inadequate consideration and making misleading and incomplete disclosures in connection with the Transaction. Approximately a month later, plaintiffs entered into a Memorandum of Understanding ("MOU") with defendants, which constituted an agreement in principle to settle this action.[1] Under the MOU, CEI increased the consideration offered in the tender offer and provided supplemental disclosures in connection with the offer. The parties later confirmed the terms of the MOU in a Stipulation and Agreement of Compromise and Settlement (the "Settlement").

The plaintiffs now seek: (1) certification of the class put forward in the Settlement, (2) approval of the proposed Settlement, and (3) an award of attorneys' fees and costs. Two sets of Cox Radio shareholders object to the Settlement, claiming it provides only modest benefits compared to the high value of the claims it releases. For the reasons stated herein, I certify the class and approve the Settlement.

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[1] After the parties executed the MOU, the tender offer closed successfully and Cox Radio was merged into CMG via a short-form merger on May 29, 2009.

Also, the defendants challenge plaintiffs' request for $3.6 million in attorneys' fees and costs as excessive in comparison to the benefits plaintiffs' counsel provided to the class. I agree in part with defendants' assertions on this issue and award plaintiffs $1,077,038 in attorneys' fees and costs.

I. BACKGROUND

A. The Parties

There are two lead plaintiffs: George Leon Family Trust and Coral Springs Police Pension Fund (collectively, "Plaintiffs"). Plaintiffs filed this action on behalf of themselves and all other similarly situated Cox Radio shareholders against twelve defendants, including CEI, CMG, Cox Radio, and the members of Cox Radio's board of directors (the "Delaware Action").

Defendant Cox Radio is a radio broadcasting company engaged in the acquisition, development, and operation of radio stations in the United States. Cox Radio is a Delaware corporation with its principal place of business in Atlanta, Georgia. Before the completion of the Transaction, Cox Radio's common stock was traded publicly on the New York Stock Exchange and consisted of two classes, Class A and Class B. While the two classes had identical economic rights, Class B stock had ten times the voting rights of Class A stock. As of January 31, 2009, Cox Radio had over 80 million shares of common stock outstanding—roughly 21.4 million shares of Class A and 58.7 million shares of Class B.

Defendant CEI is a leading communications, media, and automotive services company. CEI is a Delaware corporation with its headquarters in Atlanta, Georgia.

Defendant CMG is a Delaware corporation and a wholly-owned subsidiary of CEI. As of March 23, 2009, CMG owned 17.3 percent of Cox Radio's outstanding Class A common stock and 100% of its outstanding Class B common stock. This amounted to 78.4 percent of the outstanding shares and 97.2 percent of the voting power of Cox Radio's common stock.

Defendant James C. Kennedy is, and has been since 2002, the Chairman of Cox Radio's board of directors. Kennedy has been a Cox Radio director since 1996. Kennedy is also the Chairman of the Board and Chief Executive Officer of CEI, positions he has held since 1988.

Defendants Juanita P. Baranco and Nick W. Evans, Jr. are the Cox Radio directors who served on the Special Committee appointed by the Cox Radio board to consider the Transaction on behalf of Cox Radio's shareholders.[2]

Defendants G. Dennis Berry, Jimmy W. Hayes, Paul M. Hughes, Marc W. Morgan, Robert F. Neil, and Nicholas D. Trigony are all members of the Cox Radio board of directors.[3]

Donald Dixon and John H. Bradley (collectively, the "Federal Objectors") have objected to the Settlement. The Federal Objectors held over 3,000 shares of Cox Radio

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[2] The Cox Radio board selected Baranco and Evans to be on the Special Committee because they were the only independent directors. Consol. Class Action Compl. ¶¶ 18-26.

[3] Cox Radio, CMG, CEI, Kennedy, Baranco, Evans, Berry, Hayes, Hughes, Morgan, Neil, and Trigony collectively are referred to herein as "Defendants."

stock at all relevant times until their shares were acquired in the Transaction.[4] Dixon is the plaintiff in a class action pending before the United States District Court for the Northern District of Georgia entitled *Dixon v. Kennedy, et al.* (the "Federal Action").[5]

Additional objections were filed by TowerView LLC, Hartz Capital Investments, LLC, Metropolitan Capital Advisors, LP, Metropolitan Capital Advisors, International, Ltd., Jeffrey E. Schwarz, and Metropolitan Capital Advisors Select Fund, L.P. (collectively, the "Appraisal Objectors"), who collectively own 1,225,200 shares of Cox Radio Class A common stock.[6] The Appraisal Objectors each demanded appraisal and filed an appraisal action in this Court entitled *TowerView LLC, et al. v. Cox Radio, Inc.* on August 14, 2009.[7]

B. Facts and Procedural History

1. Events occurring before the commencement of the Transaction

In August 2005, Cox Radio began a stock repurchase program under which it could repurchase up to $100 million of its Class A common stock in the open market or through privately negotiated transactions.[8] From the beginning of the program until

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4 Mot. to Obtain Ltd. Disc. 1.

5 Case No. 1:09-cv-938-JEC (N.D. Ga.).

6 One of the six Appraisal Objectors (TowerView LLC) is among the ten largest shareholders of Cox Radio. Defs.' Mem. in Supp. of Settlement ("Defs.' Mem.") Ex. 9.

7 C.A. No. 4809-VCP.

8 Appraisal Objectors' Statement of Objection ("Appraisal Objection") Ex. F. Cox Radio engaged in at least two separate stock repurchase programs between August

December 31, 2008, Cox Radio purchased 21.4 million shares of its Class A stock—over half the shares outstanding—at an aggregate cost of approximately $261.4 million.[9]

In May 2006, CEI amended its Form 13D, which previously had stated that CEI held Cox Radio stock only for investment purposes. The amendment disclosed that CEI periodically reviewed Cox Radio's business affairs and might determine to increase (or decrease) its ownership of Cox Radio Class A common stock in the future.[10]

Between January 2008 and March 2009, Cox Radio purchased over 11 million of its Class A shares at an average price of $10.32 per share. Over this period, the average monthly repurchase prices paid by Cox Radio ranged from a low of $4.59 to a high of $12.18.[11]

As a result of the global financial crisis, advertising spending declined, adversely affecting Cox Radio's business. In the fourth quarter of 2008, Cox Radio informed investors that it anticipated losses in that quarter and in the near term going forward, yet

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2005 and March 2009. For simplicity, I treat all stock repurchase programs as though they were a single program.

9 Fed. Objectors' Br. Ex. I at 58. The average purchase price was $12.22 per share. *Id.*

10 Fed. Objectors' Br. Ex. F, Item 4.

11 Appraisal Objection 13 (taken from "Cox Radio 10-Q's and 10-K for the period"). The average monthly repurchase prices per share for the 12 month period from March 2008 to February 2009 were: $12.10, $11.76, $12.00, $12.18, $10.24, $10.99, $10.88, $10.64, $4.66, $5.83, $5.39, and $5.30, respectively. *Id.*

expressed optimism about the company's long-term prospects, stating, "[w]e believe that the value proposition of [Cox] Radio's never been stronger."[12]

At a meeting on February 10, 2009, Cox Radio's management discussed the company's January 2009 financial results, which showed a decline in advertising revenue and operating cash flow. Cox Radio's Chief Financial Officer stated that the company could be in breach of a leverage ratio covenant under its credit facility by the end of the year if revenue continued to decline.[13] Shortly after this meeting, Cox Radio suspended purchases under the stock repurchase program effective March 6, 2009.[14]

On March 4, 2009, Cox Radio announced its 2008 fourth quarter and year-end results. This sparked a drop in its stock price from $5.15 per share on March 3 to $3.01 on March 10.[15]

On March 6, Cox Radio provided CEI with an updated 2009 forecast that took into account February 2009 financial information. This forecast showed a further decline in advertising revenue and projected that Cox Radio would be on the verge of breaching its leverage ratio covenant by year's end.[16] The revised forecast also projected that total

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[12] Fed. Objectors' Br. Ex. J at 2-3.

[13] Defs.' Mem. Ex. 2 at 12.

[14] *Id.*

[15] Defs.' Mem. Ex. 5; Appraisal Objection 17.

[16] Defs.' Mem. Ex. 2 at 12.

revenue and operating cash flow both would drop by 30 percent in 2009 and that neither indicator would approach its 2008 level by the end of 2013.[17]

On March 11, 2009, CEI began looking into a potential acquisition of the Cox Radio shares it did not already own with the help of its financial and legal advisors, Citigroup Global Markets ("Citi") and Dow Lohnes PLLC.[18]

At a March 22 special meeting, the CEI and CMG boards of directors each unanimously approved making an all-cash tender offer for all shares of Cox Radio not already beneficially owned by CEI at $3.80 share.[19] The boards determined that the tender offer price, which was 50 cents, or 13 percent, higher than Cox Radio's closing price on the last trading day before the announcement of the tender offer, was fair to Cox Radio stockholders.[20]

2. The Transaction

On March 23, 2009, CEI and CMG filed a Schedule TO with the Securities and Exchange Commission ("SEC") to announce and initiate the tender offer.[21] The tender offer was subject to several conditions, including a non-waivable majority of the minority

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[17] Appraisal Objection Ex. D at 11. The projected operating cash flow in 2013 was $85 million, whereas the actual operating cash flow in 2008 was $104 million. *Id.*

[18] Defs.' Mem. Ex. 2 at 13.

[19] The Transaction would have cost Cox Radio approximately $69.1 million.

[20] Defs.' Mem. Ex. 2 at 13-15.

[21] Stipulation and Agreement of Compromise and Settlement ("Stip. of Settlement") ¶ D.

tender condition and a waivable condition that at least 90 percent of all Cox Radio shares (after giving effect to the conversion of CMG's Class B common stock) be tendered.[22] CEI and CMG also promised to consummate a short-form merger promptly at the same price as the tender offer if the tender offer succeeded in obtaining 90 percent of the outstanding shares.[23] The tender offer initially was to expire on April 17, 2009.[24]

3. Events occurring after commencement of the Transaction

Immediately following the approval of the Transaction by the CEI and CMG boards, Defendants Baranco and Evans received a phone call informing them that, as the only two independent Cox Radio directors, they likely would constitute a Cox Radio special committee to consider the Transaction (the "Special Committee").[25] Baranco and Evans immediately began work as the Special Committee and retained DLA Piper LLP (US) ("DLA Piper") and Richards, Layton & Finger, P.A. ("RLF") as the committee's legal advisors and Gleacher Partners LLC ("Gleacher") as its financial advisor.[26]

On March 27, 2009, the George Leon Family Trust filed a Class Action Complaint in this Court. On March 30, the Coral Springs Police Pension Fund filed another Class

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[22] Defs.' Mem. Ex. 2 at 2. Each share of Class B common stock was convertible into one share of Class A common stock. Consol. Class Action Compl. ¶ 15.

[23] Defs.' Mem. Ex. 2 at 5-6.

[24] Appraisal Objection Ex. G at 1.

[25] Defs.' Mem. Ex. 2 at 2, 5-6. Baranco, Evans, and the rest of the Cox Radio board already had been informed via email that CEI would not consider any strategic transaction involving Cox Radio other than the Transaction. Defs.' Mem. Ex. 10.

[26] Defs.' Mem. Ex. 11 at 8.

Action Complaint in this Court. On April 3, I consolidated these two actions into the Delaware Action, which is captioned *In re Cox Radio, Inc. Shareholders Litigation*, C.A. No. 4461-VCP. Plaintiffs then filed a Consolidated Class Action Complaint seeking to enjoin the Transaction, alleging that Defendants breached their fiduciary duties by (1) making materially misleading and incomplete disclosures in the Tender Offer Statement and 14D-9 and (2) using CEI's control of Cox Radio to offer Cox Radio's shareholders unfair and inadequate consideration in the Transaction.[27] On April 7, Plaintiffs filed motions to expedite and for a preliminary injunction.[28]

On March 30, 2009, another complaint challenging the Transaction was filed in the Superior Court of Gwinnett County, Georgia (the "Georgia State Court") captioned *Ruthellen Miller v. James C. Kennedy, et al.* (the "Georgia State Action").[29] The Georgia plaintiff moved to expedite those proceedings the next day and filed a motion for a

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[27] Consol. Class Action Compl. ¶¶ 74-85.

[28] The parties never briefed either of these motions. The parties mooted the motion to expedite by agreeing to a case scheduling order, which I granted on April 9. Plaintiffs' opening brief in support of its motion for preliminary injunction originally was due on April 22, but was pushed back to May 4 when CEI first extended the tender offer. The preliminary injunction motion was then mooted when the parties entered into the MOU on April 29. Plaintiffs' counsel contend they did substantial work on their brief in support of a preliminary injunction, even though they never filed it, because the rescheduling and mooting of the preliminary injunction hearing both occurred immediately before Plaintiffs' brief was due.

[29] No. 09A-02921-9. On May 6, 2009, the plaintiff in the Georgia State Action informed the Georgia State Court that she was no longer pursuing that action and instead would pursue her rights as a putative class member in connection with the Settlement. Defs.' Mem. 8 n.7.

temporary restraining order on April 13. On April 14, the Georgia State Court denied the TRO and stayed the case until April 30.

On March 31, the Cox Radio board formally established the Special Committee. While Defendants contend that the written consent establishing the Special Committee gave the committee the power to negotiate the terms of the Transaction with CEI and CMG,[30] the committee evidently did not believe that it had this power until several weeks later.[31]

On April 1, 2009, after meeting with its legal and financial advisors, the Special Committee unanimously determined that $3.80 per share was a fair price for Cox Radio's Class A shares and recommended that the shareholders tender their shares.[32] The committee based its determination of the tender offer's fairness in part on the fact that $3.80 was at the upper range of the discounted cash flow ("DCF") value Gleacher had calculated for Cox Radio.[33] The Special Committee filed a Schedule 14D-9 with the SEC disclosing its recommendation and fairness determination two days later.[34]

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30 Defs.' Mem. Ex. 15.

31 Appraisal Objection Ex. G at 8.

32 Defs.' Mem. Ex. 11 at 9-10.

33 *Id.* at 19-20. Gleacher calculated a DCF range of between $0.67 and $4.32 per share. *Id.* Citi found that Cox Radio had a DCF range of between $2.23 and $3.98 per share. Defs.' Mem. Ex. 2 at 24.

34 Appraisal Objection Ex. G.

Federal Objector Dixon filed the Federal Action on April 8, 2009 and amended his complaint in that action on April 15, 2009.[35]

As the original April 17 expiration date for the tender offer approached, the Special Committee grew concerned that the non-waivable majority of the minority condition would not be satisfied.[36] Since the Transaction was announced, the closing market price for Cox Radio stock had not dropped below $4.01, more than 20 cents higher than the tender offer price.[37] Moreover, less than 500,000 shares of the approximately 8.4 million shares needed to satisfy the majority of the minority condition had been tendered.[38] During this time, Plaintiffs in the Delaware Action complained about the Special Committee's lack of negotiating power.[39]

On April 13, the Special Committee recommended that CEI and CMG consider increasing the tender offer price.[40] On April 16, CEI told the Special Committee that it

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35 While the Federal Action is still pending, discovery has been stayed since at least June 2009.

36 Defs.' Mem. Ex. 13 at 45.

37 Defs.' Mem. Ex. 18.

38 Graph entitled "Closing Prices of CXR Stock And CXR Shares Tendered March 10 through May 19, 2009," introduced in open court by Defendants on January 19, 2010 ("Defs.' Graph").

39 Tr. 128-29.

40 Defs.' Mem. Ex. 11 at 10.

was "giving serious consideration" to increasing the price to $4.20 per share, and that this increase may not be the last and final offer.[41]

On April 19, 2009, Cox Radio's board of directors adopted a resolution aimed at eliminating the Special Committee's doubt about its power to negotiate the terms of the tender offer with CEI and CMG.[42] Later that day, after being informed that CEI planned to extend the tender offer period without increasing its price, the Special Committee unanimously determined to withdraw its recommendation in favor of the tender offer and, instead, to express no opinion and remain neutral with respect to it.[43] The next day, the Special Committee filed an amendment to its 14D-9 explaining its change in position.[44]

Also on April 20, CEI publicly announced an extension of the tender offer until May 1, 2009.[45] Between April 20 and 27, CEI canvassed the thirty largest Cox Radio shareholders in an attempt to determine the price it would need to offer to obtain enough tenders to satisfy the majority of the minority provision.[46] Based on that research, CEI

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41 Defs.' Mem. Ex. 2 at 16.

42 Defs.' Mem. Ex. 19. The resolution states: "[T]he Board hereby expressly authorizes and empowers the Special Committee to negotiate . . . with CEI and CMG and their advisors, any and all terms of the Tender Offer." *Id.*

43 Stip. of Settlement ¶ T; Defs.' Mem. Ex. 11 at 12. The Special Committee did not change its view that the tender offer was fair to Cox Radio's shareholders at this time. Defs.' Mem. Ex. 11 at 12.

44 Defs.' Mem. Ex. 20.

45 Defs.' Mem. Ex. 21.

46 Defs.' Mem. Ex. 4 at 63.

concluded that it would have to offer something more than $3.80 per share.[47] Contemporaneously, CEI also engaged in vigorous negotiations with the Special Committee, which included numerous presentations of financial analyses.[48]

During an April 23 meeting, Gleacher informed Citi that the Special Committee wanted the tender offer price increased to $5.00 per share. The next day, Citi notified Gleacher that CEI was willing to increase the tender offer price to $4.42 per share if the Special Committee would recommend this price to Cox Radio's shareholders.[49]

On April 27, Gleacher informed Citi that the Special Committee had lowered its requested price to $4.82 per share.[50] Citi then told Gleacher that CEI was prepared to raise the tender offer price to $4.70 per share. The Special Committee, however, declined to recommend this price to Cox Radio's shareholders.[51]

On April 28, the Special Committee met with two senior CEI officers who indicated that CEI was prepared to increase the tender offer price to $4.80 per share, but that this would be CEI's last and highest offer. After considering this proposal, the Special Committee agreed to recommend that Cox Radio's shareholders accept the tender

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[47] Aff. of John M. Dyer 7.

[48] Defs.' Mem. Ex. 2 at 17-18, Exs. 22-23.

[49] Defs.' Mem. Ex. 11 at 13-14.

[50] Defs.' Mem. Ex. 2 at 17.

[51] Defs.' Mem. Ex. 11 at 14.

offer at $4.80 per share.[52] CEI and CMG promptly announced the $4.80 per share tender offer price, and the Special Committee publicly recommended this price on April 29.[53]

On April 27 and 28, while the final negotiations between CEI and the Special Committee were ongoing, CEI, Citi, counsel for Plaintiffs, and Plaintiffs' financial advisor discussed valuation and disclosure issues with an eye toward settling the Delaware Action. During these discussions, Plaintiffs' counsel proposed to Defendants' counsel various additional disclosures in the Schedule TO and 14D-9 and a higher tender offer price.[54]

On April 29, 2009, Plaintiffs and Defendants executed and filed a Memorandum of Understanding informing the Court that the parties had an agreement in principle to settle the Delaware Action. The MOU provided for dismissal of the Delaware Action and the release of any claims related to the Transaction, including those pending in the Georgia State Action and the Federal Action, based on the $1 per share increase in the tender offer price and an agreement for CEI and Cox Radio to make certain supplemental disclosures.[55] On April 30, after learning of the MOU, the Georgia State Court stayed the Georgia State Action indefinitely.

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[52] The $4.80 per share offer represented a 26.3 percent increase over the original $3.80 per share price.

[53] Defs.' Mem. Ex. 11 at 14.

[54] Stip. of Settlement ¶ BB.

[55] MOU 3-6.

After CEI extended the tender offer expiration date three additional times on May 1, May 14, and May 18, the tender offer expired on May 19, 2009. In all, 10.328 million shares were tendered, thus satisfying the majority of the minority condition.[56]

On May 29, ten days after the Tender Offer expired, CEI announced the consummation of the short-form merger. The merger paid nontendering, nonappraisal-seeking Cox Radio shareholders the same $4.80 per share consideration that tendering shareholders received. Upon completion of the merger, Cox Radio became an indirect, wholly-owned subsidiary of CEI.[57]

On September 4, 2009, Plaintiffs and Defendants filed the Settlement with the Court. The Settlement defined the purported class as "all record and beneficial holders of Class A common stock of [Cox] Radio, at any time during the period beginning on and including February 10, 2009, through and including May 29, 2009 . . . but excluding CEI, CMG, [Cox] Radio, and the Radio Directors" (the "Class").[58] The proposed Settlement would release all claims asserted in the Delaware Action, the Georgia State Action, and the Federal Action.[59] The Settlement also contains a comprehensive general release that would release all claims that any Class member ever had, or may have in the future,

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[56] Defs.' Mem. Ex. 27; Defs.' Graph.

[57] Defs.' Mem. Ex. 28.

[58] Stip. of Settlement 14-15.

[59] *Id.* ¶ PP.

based on any aspect of the Transaction or the events leading up to it.[60] The release contains a carve-out, however, for statutory appraisal claims under § 262 of the Delaware General Corporation Law.[61]

On November 6, 2009, the Federal Objectors filed their objection to the Settlement. The Appraisal Objectors filed their statement of objection on November 20. In their objection, the Appraisal Objectors point out, for example, that the average share price of companies comparable to Cox Radio (*i.e.*, predominantly radio-based companies) rose 255.7 percent in the six months ending October 2009.[62] Based on this

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[60] *Id.* at 15-17. The release explicitly covers "any and all claims which are based upon, arise out of, relate in any way to, or involve, directly or indirectly, (i) the Proposed Transaction or the issuance of any securities in connection therewith, (ii) any actions, deliberations, or negotiations in connection with the Proposed Transaction, including the process of deliberation or negotiation by each of CEI, CMG, [Cox] Radio and the Special Committee and any of their respective officers, directors or advisors, (iii) the consideration received by Class Members in connection with the Proposed Transaction, (iv) the Schedule TO, the Schedule 14D-9, any Schedule 13E-3, Schedule 13D or Form 8-K filings or any amendments thereto by any of the Defendants, or any other disclosures, public filings, periodic reports, press releases, proxy statements or other statements issued, made available or filed relating, directly or indirectly, to the Proposed Transaction, including claims under the federal securities laws within the exclusive jurisdiction of the federal courts, (v) actions or investments with respect to (including, but not limited to, purchases, repurchases, sales, exercises of rights with respect to and decisions to hold) securities issued by any of CEI, CMG or [Cox] Radio or their respective affiliates, (vi) the fiduciary obligations of the Released Parties in connection with the Proposed Transaction, (vii) the fees, expenses or costs incurred in prosecuting, defending, or settling the Actions, or (viii) any of the allegations in any complaint or amendment(s) thereto filed in any of the Actions." *Id.* at 16-17.

[61] *Id.* at 17.

[62] Appraisal Objection Ex. L.

data, the Appraisal Objectors suggest that, had the Transaction not occurred, Cox Radio's stock would have been worth $12 per share on the date they filed their objection.

I held settlement hearings on December 9, 2009 and January 19, 2010. The first hearing focused on the merits of the Settlement, while the second revolved around whether the attorneys' fees requested by Plaintiffs are reasonable.

C. Parties' Contentions

The Appraisal Objectors urge the Court not to approve the Settlement because doing so will prevent them from pursuing meritorious and valuable breach of fiduciary duty claims in the context of the appraisal proceeding. Specifically, the Appraisal Objectors assert that the Transaction must be reviewed for entire fairness and that Defendants cannot meet that standard, making the Appraisal Objectors' claim "potentially worth hundreds of millions of dollars."[63] Because they view the Settlement as providing only minimal consideration, the Appraisal Objectors ask the Court to reject the Settlement in its entirety.

In response, Defendants[64] contend that the Appraisal Objectors' objection should be overruled because, under the governing case law, the Transaction would not be subject

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[63] Appraisal Objection 39.

[64] Both sets of objectors oppose the Settlement because they wish to continue pursuing claims against Defendants in other actions. The text summarizes Defendants' arguments against those claims on the merits. In seeking approval of the Settlement over the objectors' objections, Plaintiffs and Defendants in this action make similar arguments as to the relative merits of the claims against Defendants that would be released if the Settlement of this class action is

to the entire fairness standard, and, thus, the Appraisal Objectors' fiduciary duty claims are worthless. Defendants also contend that, in any event, the Transaction meets the entire fairness standard.

The Federal Objectors oppose the Settlement because they contend it releases for virtually no consideration certain claims made in the Federal Action, but not the Delaware Action, relating to conduct that occurred before the Transaction. Specifically, the Federal Objectors argue that they have asserted meritorious claims that Defendants breached federal securities laws by engaging in an undisclosed going-private transaction and a creeping tender offer, claims not pursued in the Delaware Action, but that would be released in the Settlement for consideration consisting only of therapeutic disclosures. Accordingly, the Federal Objectors urge this Court to reject the Settlement so they can pursue these claims.

Defendants respond that it is proper to release the Federal Objectors' claims because these claims are valueless, as they lack merit under the relevant case law. Thus, according to Defendants, the Federal Objectors' claims can and should be released for little or no consideration.

On the issue of attorneys' fees, Plaintiffs request fees and expenses of $3.6 million, or 21 percent of the approximately $16.8 million in increased consideration

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approved. For convenience, I generally refer to the proponents of those arguments as Defendants.

secured through the Settlement. Defendants contend that this request is unreasonable and that Plaintiffs instead should receive attorneys' fees and expenses of $490,098.

II. ANALYSIS

A. Certification of the Class

Plaintiffs ask the Court to certify the proposed Class in this matter. As previously noted, that Class consists of all record and beneficial holders of Class A common stock of Cox Radio at any time during the period from February 10, 2009 to May 29, 2009, other than Defendants.

Under Court of Chancery Rule 23, certification of a class action involves a two-step analysis.[65] The first step requires that the action meet all four of the requirements set forth in subsection (a) of the rule:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[66]

If all four of these requirements are met, the next step is "to properly fit the action within the framework provided for in subsection (b)."[67]

Rule 23(b) divides class actions into three categories. Subdivision (b)(1) "applies to class actions that are necessary to protect the party opposing the class or the members

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65 *Nottingham P'rs v. Dana*, 564 A.2d 1089, 1094 (Del. 1989).

66 Ct. Ch. R. 23(a).

67 *Nottingham P'rs*, 564 A.2d at 1095.

of the class from inconsistent adjudications in separate actions."[68] Subdivision (b)(2) "applies to class actions for class-wide injunctive or declaratory relief."[69] Subdivision (b)(3) applies when common questions of law or fact predominate and a class action is the superior method of adjudicating the controversy.[70]

Certification of the Class in this matter is unopposed, and there is no real dispute that the requirements for class certification have been met. As of March 17, 2009, there were over 20 million Class A common shares of Cox Radio stock outstanding, held by hundreds, if not thousands, of individual shareholders, thus satisfying the numerosity requirement.[71] The commonality requirement is met because there are numerous questions of law and fact common to the Class, including whether Defendants breached their fiduciary duties, whether Defendants met their disclosure obligations, and to what relief the Class is entitled. Because Defendants' conduct affected all Class members in the same manner, the typicality requirement also is satisfied. Likewise, I find the adequacy of representation requirement met because Plaintiffs aggressively pursued this action through competent counsel experienced in corporate law disputes of this nature and there is no evidence of any conflict between Plaintiffs and other members of the

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[68] *Id.* (quoting Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L.R. 11, 22 (1983)).

[69] *Id.*

[70] Ct. Ch. R. 23(b)(3).

[71] Transmittal Aff. of Brian D. Long ("Long Aff.") Ex. 1 at 9.

Class.[72] Finally, Delaware courts repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2).[73] Accordingly, I certify the proposed Class under Court of Chancery Rules 23(b)(1) and (b)(2) and approve Plaintiffs and their counsel to represent the Class.

B. Approval of the Settlement

1. Standard of review for settlements

Under Court of Chancery Rule 23(e), class actions may not be dismissed or compromised without the court's approval. Thus, the court has a duty to protect the interests of absent class members who will be barred from future litigation of claims released by a proposed settlement.[74]

Delaware law favors the voluntary settlement of disputes.[75] Because of the fiduciary character of a class action, however, it is incumbent upon the court to determine the intrinsic fairness of a settlement.[76] As the Delaware Supreme Court stated in *Polk v. Good*, "the court's function is to consider the nature of the claim, the possible defenses

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[72] *See* Long Aff. Ex. 30 ¶¶ 3-4.

[73] *In re Countrywide Corp. S'holders Litig.*, 2009 WL 2595739, at *2 (Del. Ch. Aug. 24, 2009); *Turner v. Bernstein*, 768 A.2d 24, 30 (Del. Ch. 2000); *In re Mobile Commc'n Corp. of Am., Inc., Consol. Litig.,* 1991 WL 1392, at *15 (Del. Ch. Jan. 7, 1991); *Nottingham P'rs*, 564 A.2d at 1096-97.

[74] *In re Coleman Co. S'holders Litig.*, 750 A.2d 1202, 1204 (Del. Ch. 1999).

[75] *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986).

[76] *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964).

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 of these factors."[77]

Delaware courts have held that the "strength of claims raised in a class action lawsuit helps to determine whether the consideration received for their settlement is adequate and whether dismissal with prejudice is appropriate."[78] Thus, my task in reviewing the Settlement is to identify and balance the benefits secured by the Settlement against the costs it imposes in light of not only the claims asserted here, but also those asserted in the Federal Action and those the Appraisal Objectors seek to assert in the appraisal proceeding. Ultimately, I must exercise my business judgment to ascertain whether the proposed resolution is fair, adequate, and reasonable.[79]

In doing this, I am to take into account the following considerations:

> (1) the probable validity of the claims; (2) the apparent difficulties in enforcing the claims through the courts; (3) the collectibility of any judgment recovered; (4) the delay, expense and trouble of litigation; (5) the amount of the compromise as compared with the amount and collectibility of a judgment; and (6) the views of the parties involved, pro and con.[80]

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[77] *Polk*, 507 A.2d at 535.

[78] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1285 (Del. 1989).

[79] *Off v. Ross*, 2008 WL 5053448, at *6 (Del. Ch. Nov. 26, 2008).

[80] *Polk*, 507 A.2d at 536.

Nothing before me indicates that the second through fourth factors identified in *Polk*, *i.e.*, the apparent difficulties in enforcing the claims through the courts, the collectibility of any judgment recovered, and the delay, expense and trouble of litigation, are material in this case. Thus, in reviewing the Settlement, I focus on the likelihood of success of the claims of Plaintiffs and the objectors, what the Class has gained from the Settlement, and what the Class would lose by operation of the Settlement's release.

Finally, I note that the proponents of the Settlement, here Plaintiffs and Defendants, bear the burden of proving that the Settlement is fair and reasonable.[81]

2. Benefits of the Settlement to the stockholders

Cox Radio's stockholders received two benefits from the Settlement: (1) a per share increase of $1 in the tender offer price and (2) supplemental disclosures. The increase in the tender offer price from $3.80 to $4.80 per share constitutes a 26.3 percent increase in per share consideration and amounts to an increase of approximately $17 million in total consideration. The parties disagree as to the role this litigation played in causing the price increase. The evidence indicates, for example, that Cox Radio needed to increase the tender offer price in order for the tender offer to close successfully. There is also evidence, however, that the work of Plaintiffs and their counsel contributed to the price increase, as Plaintiffs' counsel first recognized the problems caused by the Special Committee's perceived lack of negotiating power and the pressure Plaintiffs put on CEI arguably led to the eventual clarification of the Special Committee's negotiating powers.

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[81] *Barkan*, 567 A.2d at 1285-86.

Moreover, CEI identified its desire to resolve the claims asserted in the Delaware Action as one of the reasons it increased the tender offer price. Defendants' counsel even admits that the Settlement contributed to the price increase.[82] While CEI almost certainly would have increased the tender offer price somewhat even if the Delaware Action had not been filed, there is sufficient evidence to find that Plaintiffs' actions contributed in some degree to the ultimate $1 per share price increase. Accordingly, I deem the increase in the tender offer price to be a benefit of the Settlement.

The other benefit provided by the Settlement is the supplemental disclosure information CEI and Cox Radio provided to Cox Radio's shareholders in the Schedule TO and Schedule 14D-9. These disclosures included the detailed financial projections Gleacher used in its financial analysis, information regarding the Special Committee's selection of Gleacher as its financial advisor, a Gleacher presentation used by the Special Committee in determining whether to recommend the Transaction, and a statement noting that CEI had proclaimed that it would not consider any proposed strategic combinations other than the Transaction.[83] Therapeutic disclosures of this nature may not be sufficient in themselves to support the release of meritorious claims.[84] Yet, in this case, they provided a clear, albeit secondary, benefit to Cox Radio shareholders who had to decide whether to tender their shares or exercise their appraisal rights. Thus, despite the modest

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82 Defs.' Mem. 35.

83 Defs.' Mem. Ex. 41 at 9, Ex. (a)(5)(K); Long Aff. Ex. 11 at 2, 7.

84 *In re MCA, Inc. S'holders Litig.*, 598 A.2d 687, 695-96 (Del. Ch. 1991).

nature of the supplemental disclosure benefits, I find that those disclosures together with the $1 per share increase in the tender offer price constitute benefits to Cox Radio's shareholders that, depending on the merits of the claims released by the Settlement, may be sufficient to justify approval of the Settlement.

3. Costs of the Settlement to the stockholders

a. The Appraisal Objectors' objection

The objection lodged by the Appraisal Objectors is premised on their fear that approval of the Settlement would prevent them from pursuing certain fiduciary duty claims in connection with the appraisal proceeding. The primary claim of interest to the Appraisal Objectors challenges the propriety of the Transaction itself.

The Settlement contains a carve-out for "claims solely for statutory appraisal with respect to the Merger pursuant to Section 262 of the Delaware General Corporation Law."[85] Defendants contend, however, that a breach of fiduciary duty claim challenging a transaction cannot be considered in an appraisal proceeding arising from the very transaction being challenged. Defendants' contention comports with settled Delaware law: fiduciary duty claims arising from a transaction must be pursued in a separate suit directly challenging the transaction and cannot be pursued in an appraisal.[86] Accordingly, the Appraisal Objectors will not be able to challenge the propriety of the

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[85] Stip. of Settlement 17.

[86] *Ala. By-Products Corp. v. Neal*, 588 A.2d 255, 257 (Del. 1991); *Gentile v. SinglePoint Fin., Inc.*, 2003 WL 1240504, at *5 (Del. Ch. Mar. 5, 2003); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 1994 WL 198726, at *3 (Del. Ch. May 16, 1994).

Transaction in the appraisal proceeding. Based on this fact, the Appraisal Objectors urge me to deny the Settlement because their claim challenging the merger is "potentially worth hundreds of millions of dollars," while, as previously discussed, they view the benefits of the Settlement as quite modest.[87] Thus, I must consider whether the Appraisal Objectors' claim is really as valuable as they say it is.

Preliminarily, I address a dispute over the applicable standard of review for determining the propriety of the Transaction. The Appraisal Objectors assert that, under the Supreme Court's holding in *Kahn v. Lynch*[88] as applied to circumstances of this case, "it is black-letter law that . . . the controlling party must prove the entire fairness of the [T]ransaction."[89] Defendants, on the other hand, deny that *Kahn v. Lynch* governs this scenario; instead, they contend that *Pure Resources* provides the applicable standard.[90]

I agree with Defendants that *Kahn v. Lynch* does not apply to the Transaction at issue here. In *Kahn v. Lynch*, the Supreme Court held that "the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominating shareholder is entire fairness."[91] But this standard only applies to transactions involving a negotiated merger between a target company and its

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[87] Appraisal Objection 39.

[88] *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994).

[89] Appraisal Objection 24.

[90] *In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421 (Del. Ch. 2002).

[91] *Kahn v. Lynch*, 638 A.2d at 1117.

controlling shareholder.[92] The Transaction regarding Cox Radio involves a tender offer by the controlling shareholder for the target company's stock followed by a second-step, short-form merger. Because *Kahn v. Lynch* does not govern situations involving a tender offer, it does not provide the standard of review for this case.

Likewise, I agree with Defendants that *Pure Resources* provides the standard applicable to the Transaction, as that case applies to tender offers made by controlling shareholders.[93] *Pure Resources* held that a court should not apply the entire fairness standard to a tender offer by a controlling shareholder when that offer is "non-coercive" and "the independent directors of the target are permitted to make an informed recommendation and provide fair disclosure."[94] A tender offer is non-coercive when: "(1) it is subject to a non-waivable majority of the minority tender condition; (2) the controlling stockholder promises to consummate a prompt § 253 [short-form] merger at the same price if it obtains more than 90% of the shares; and (3) the controlling stockholder has made no retributive threats."[95] In addition, the independent directors must be given "both free rein and adequate time to react to the tender offer, by (at the very least) hiring their own advisors, providing the minority with a recommendation as to

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[92] *Id.* at 1116-17.

[93] *Pure Res.*, 808 A.2d at 437.

[94] *Id.* at 445-46; s*ee also Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 39 (Del. 1996); *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787, at *6 (Del. Ch. June 19, 2001); *In re Aquila, Inc.*, 805 A.2d 184, 190-91 (Del. Ch. Jan. 3, 2002).

[95] *Pure Res.*, 808 A.2d at 445.

the advisability of the offer, and disclosing adequate information for the minority to make an informed judgment."[96] If a tender offer by a controlling shareholder meets all of these requirements, then the controlling shareholder is under no obligation to offer any particular price for the minority's stock.[97]

The Appraisal Objectors challenge the applicability of *Pure Resources* to this case for three main reasons. First, they argue that because *Pure Resources* was not a decision by the Delaware Supreme Court, the Supreme Court's decision in *Kahn v. Lynch* must be deemed to govern. This argument is not persuasive because *Pure Resources* is based on the Supreme Court's decision in *Solomon v. Pathe Communications Corp.*[98] Moreover, Vice Chancellor Strine's extensive analysis in *Pure Resources* of the distinctions between the *Kahn v. Lynch* line of cases and the *Solomon* line persuasively demonstrates that *Kahn v. Lynch* governs situations involving negotiated mergers, while *Solomon* governs situations involving tender offers.[99]

Next, the Appraisal Objectors dismiss *Pure Resources* as merely "extended dicta."[100] I disagree with this characterization. Although parts of the *Pure Resources* opinion may be dicta, the court articulated the relevant law as I have detailed above and

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[96] *Id.*

[97] *Siliconix*, 2001 WL 716787, at *6; *see also Solomon*, 672 A.2d at 40; *Aquila*, 805 A.2d at 190.

[98] *Pure Res.*, 808 A.2d at 438 (quoting *Solomon*, 672 A.2d at 39).

[99] *Id.* at 438-44.

[100] Tr. 62.

applied that law to the facts of the case to find that the transaction in question failed to meet the requirements for avoiding entire fairness review, thus warranting an injunction of the transaction.[101] The reasoning employed by the court was important to the outcome in *Pure Resources* and has been cited favorably and frequently by this court in later cases.[102]

Finally, the Appraisal Objectors try to distinguish *Pure Resources* by noting that it did not involve a special committee that "can't negotiate and can't function, [and] that is put under a gun, like it was here."[103] In making this argument, the Appraisal Objectors ignore the undisputed evidence that, at least after April 19, 2009, the Special Committee had full power to negotiate with CEI and, in fact, exercised this power. Moreover, under *Pure Resources*, if a company's independent directors could not function effectively and independently, the entire fairness standard would apply. The Appraisal Objectors have not adduced any evidence or made any argument that undermines my view that *Pure Resources* is the applicable standard.

It appears that the Transaction meets the requirements of *Pure Resources*. From the very start, the Transaction was subject to a non-waivable majority of the minority

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101 *Pure Res.*, 808 A.2d at 445-53.

102 *See In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *10 n.21 (Del. Ch. Oct 2, 2009); *Abrons v. Maree*, 911 A.2d 805, 812 n.7 (Del. Ch. 2006); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 623-24 (Del. Ch. 2005); *Next Level Commc'ns, Inc. v. Motorola, Inc.*, 834 A.2d 828, 845-46 (Del. Ch. 2003).

103 Tr. 62-63.

condition.[104] CEI promised to consummate a prompt short-form merger at the same price offered in the tender offer if it obtained more than 90 percent of Cox Radio's shares.[105] There also is no allegation of any retributive threats made by either CEI or CMG. Accordingly, the Transaction appears to be non-coercive under the standard set out in *Pure Resources*.

As to whether the Special Committee fulfilled its duties under *Pure Resources*, I first note the absence of any contention that the members of the Special Committee were interested or lacked independence.[106] Nor does anyone dispute that the Special Committee had the ability to, and did, hire its own advisors, Gleacher, DLA Piper, and RLF.[107] Rather, the concern revolves around the Special Committee's initial, and likely mistaken, belief that it lacked the power to negotiate with CEI over the tender offer price and its initial recommendation that Cox Radio's shareholders tender their shares at the original $3.80 price.[108]

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[104] Defs.' Mem. Ex. 39 at 2.

[105] *Id.* at 4. CEI made good on this promise by completing a merger for the un-tendered shares at the $4.80 per share tender offer price on May 29, 2009. Defs.' Mem. Ex. 28.

[106] As noted by the Appraisal Objectors, the directors on the Special Committee "were so independent that they didn't hold even one share of stock between them." Appraisal Objection 5.

[107] Defs.' Mem. Ex. 11 at 8.

[108] Appraisal Objection Ex. G at 6, 8. The effect of the Special Committee's initial recommendation in favor of tendering was negligible because very few Cox Radio shareholders tendered their shares when the tender offer price was only $3.80 per share. *See* Defs.' Graph.

If the Special Committee's perceived lack of negotiating power had continued throughout the relevant period and up to the closing of the Transaction, the Transaction probably would not be entitled to protection under *Pure Resources*, as the Special Committee would have lacked the requisite free rein to provide the minority with a meaningful recommendation on the Transaction. That did not happen, however, as the Cox Radio board clarified the committee's role on April 19, 2009 with a resolution expressly stating that the Special Committee had the power to negotiate with CEI.[109] Immediately after the adoption of this resolution, the Special Committee determined to withdraw its initial recommendation of the tender offer.[110] The Special Committee then used its newfound negotiating power robustly, going back and forth with CEI over the price for ten days and declining to recommend the tender offer until it had secured the $1 per share increase in the tender offer price.[111] Based on these facts, Plaintiffs would have had a difficult time showing that the Special Committee lacked free rein over its recommendation of the tender offer.

Finally, with the benefit of the supplemental disclosures issued in connection with the Settlement, there is no reason to doubt that the minority received adequate information to allow them to make an informed judgment. This view is enhanced by the fact that neither Plaintiffs nor either set of objectors has challenged the adequacy of the

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[109] Defs.' Mem. Ex. 19.

[110] Defs.' Mem. Ex. 11 at 12.

[111] *Id.* at 14.

disclosures, as supplemented, before this Court. Thus, because the Transaction appears to meet all of the requirements set forth in *Pure Resources*, it likely would not be subject to entire fairness review and, thus, the Appraisal Objectors' claim challenging the propriety of the Transaction probably would fail.

Even if a court found the entire fairness standard applicable here, Plaintiffs still would have to clear significant hurdles to succeed on their claim. Defendants credibly can claim, for example, that the Transaction meets the entire fairness standard. Defendants contend that the Appraisal Objectors would bear the burden of showing the absence of entire fairness due to the existence of a well-functioning Special Committee. To shift this burden to the Appraisal Objectors, Defendants must demonstrate that the Special Committee "was truly independent, fully informed, and had the freedom to negotiate at arm's length."[112] In my view, Defendants have a reasonable likelihood of making this showing.

Entire fairness has two components, fair dealing and fair price.[113] Defendants argue that the process that led to the Transaction was fair because Cox Radio appointed a Special Committee and authorized the committee to hire independent advisors, evaluate

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[112] *In re Tele-Commc'ns, Inc. S'holders Litig.*, 2005 WL 3642727, at *8 (Del. Ch. Dec. 21, 2005) (citing *Kahn v. Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *5 (Del. Ch. May 3, 2004)).

[113] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

the Transaction and issue a recommendation on it, and negotiate the tender offer price with CEI. Cox Radio also made extensive disclosures to its shareholders.

The Appraisal Objectors challenge the fairness of the process on several grounds. They allege that CEI timed the Transaction so it came at the bottom of a down market and also accuse CEI of issuing faulty projections that painted an unrealistically grim picture of Cox Radio's future, which, with the benefit of hindsight, soon proved to be too pessimistic. The Appraisal Objectors also charge CEI with creating an environment that forced the Special Committee to move too quickly and eventually panic, making a flawed decision to recommend the tender offer at the worst possible time.

This aspect of the Appraisal Objectors' argument is long on conclusions, but short on facts. There is no evidence of any conspiracy by CEI to wait until the market hit rock bottom before launching the Transaction or to manipulate Cox Radio's stock price. Instead, the evidence indicates that the Transaction likely was a reaction to the increasing risk that Cox Radio might breach its leverage ratio covenant.

There is also no evidence that CEI gave the Special Committee fraudulent data. While the Appraisal Objectors correctly note that CEI's projections proved to be overly pessimistic, so long as those projections were made in good faith, there is nothing wrong with them. The Appraisal Objectors, however, have not alleged any specific facts suggesting Defendants acted in bad faith.

Finally, Plaintiffs' claim that CEI did not give the Special Committee adequate time to react to the Transaction is weak. The tightest time constraint the committee faced was the SEC rule requiring its recommendation on the tender offer to be made within ten

business days of the tender offer's announcement.[114] Furthermore, well over a month elapsed between the announcement of the tender offer and the increase in the tender offer price. Far from being pressured into making a rushed decision, the Special Committee engaged CEI in extensive negotiations, spanning ten days, which ultimately resulted in a better price for Cox Radio's shareholders.

Defendants further contend that the price offered in the Transaction was fair because even the initial $3.80 per share offer constituted a 15 percent premium over Cox Radio's market price and was at the high end of multiple DCF analyses.[115] Defendants also emphasize that very few Cox Radio shareholders, most of whom were institutional investors, sought appraisal. The Appraisal Objectors, on the other hand, base their criticism of the price as unfair on the October 2009 stock prices of companies comparable to Cox Radio—data that post-dates the MOU by over five months. While hindsight is generally 20/20, it cannot be used to second guess the business judgment of Delaware directors; thus, this data is irrelevant in determining whether the price that Cox Radio's shareholders received was fair.

In assessing the proposed Settlement, I need not decide whether the Transaction ultimately would meet the entire fairness standard.[116] Based on the evidence presented

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[114] 17 C.F.R. § 240.14e-2.

[115] *See supra* note 33.

[116] *See Polk v. Good*, 507 A.2d 531, 536 (Del. 1986) (citing *In re Ortiz' Estate*, 27 A.2d 368, 374 (Del. Ch. 1942); *Perrine v. Pennroad Corp.*, 47 A.2d 479, 488

regarding both process and price, however, I am convinced Defendants have at least a colorable argument that the Transaction was entirely fair.

For all of these reasons, I find that the Appraisal Objectors' claim challenging the propriety of the Transaction has little, if any, value. Hence, its release does not provide a sound reason to deny the Settlement.

The Appraisal Objectors also aver that CEI breached its fiduciary duty as a controlling shareholder by causing Cox Radio to initiate the stock repurchase program, thereby reducing Cox Radio's public float and making it less expensive for CEI to acquire all of Cox Radio's stock.[117] To the extent this claim does not involve a challenge to the Transaction, it does not appear to be released in the Settlement. As previously noted, the Settlement's release contains a carve-out for "claims solely for statutory appraisal."[118] Under Delaware law, "breach of fiduciary duty claims that do not arise from the merger are corporate assets that may be included in the determination of fair value" in an appraisal proceeding.[119] Thus, even though the Appraisal Objectors' claims related to the propriety of the Transaction are released by the Settlement, any fiduciary

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(Del. 1946)) ("In examining a settlement, the Chancellor need not try the case. Indeed, he is not required to decide any of the issues on the merits.").

117 *See ATR-Kim Eng Fin. Corp. v. Araneta*, 2006 WL 3783520, at *16 (Del. Ch. Dec. 21, 2006) (controlling shareholder is "prohibited from using his position of control to extract value from the corporation to the exclusion of, and detriment to, the minority stockholders").

118 Stip. of Settlement 17.

119 *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 1994 WL 198726, at *3 (Del. Ch. May 16, 1994) (citing *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1142-44 (Del. 1989)).

duty claim they may have that is not related to the Transaction, including their claim challenging the stock repurchase program, is not subject to the Settlement's release and, thus, can be valued at appraisal.

Additionally, I note that Plaintiffs' counsel, who are experienced in handling cases of this nature, specifically considered the stock repurchase program in connection with their prosecution of this action. Although Plaintiffs' counsel determined that it did not warrant a separate claim, they made maximum use of the facts pertaining to the repurchase program in their communications with CEI and the Special Committee. Accordingly, this claim is not material to my analysis of the costs and benefits of the Settlement.[120]

b. The Federal Objectors' Objection

The Federal Objectors' complaint in the Federal Action asserts five causes of action against Defendants. All of the Federal Objectors' claims will be released if the Settlement is approved.[121] The Federal Objectors contend that several of their claims were not asserted in the Delaware Action and, because the Settlement provides no consideration for these claims, the Settlement should be rejected.

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[120] The Appraisal Objectors suggest that they may challenge the Delaware case law precluding fiduciary challenges to a merger in an appraisal action stemming from that merger. Tr. 41-42. Because I consider that position to be without merit, I assign no value to it.

[121] Stip. of Settlement ¶ PP.

Again, my task is to determine whether the Federal Objectors' claims have any validity, such that their release would impose a cost on the Class.[122] The Federal Objectors' primary claim is that the commencement of the stock repurchase program in 2005 marked the beginning of a creeping tender offer that violated federal securities law because it was unannounced[123] and in contravention of the SEC's best price rule.[124] The Federal Objectors argue that the stock repurchase program amounted to a creeping tender offer because it meets the test set forth in *Wellman v. Dickinson*.[125] Defendants, however, aver that the *Walker v. Shield Acquisition Corp.* decision from the U.S. District Court for

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[122] The Federal Objectors' brief does not mention three of the claims in their complaint; thus, I assume they do not object to the Settlement on the basis of those claims. In any event, none of the omitted claims appear meritorious. Count I alleges disclosure violations, which presumably were mooted by the supplemental disclosures Defendants made. Count IV alleges a breach of fiduciary duty based on Defendants' failure to consider alternative options to the Transaction. This claim rests on a false premise, as the Special Committee did consider the alternative of Cox Radio remaining independent, which was the only other alternative CEI was willing to pursue. Count V alleges that CEI aided and abetted the breaches of fiduciary duty alleged in Count IV and, therefore, cannot be any stronger than Count IV itself. Accordingly, I find that the release of Counts I, IV, and V of the complaint in the Federal Action will not impose any material cost on the Class.

[123] Upon commencing a tender offer, SEC Rules require the offering party to file a Tender Offer Statement on Schedule TO with the SEC and publish certain disclosures related to the tender offer. 17 C.F.R. § 240.14d-2-14d-4.

[124] SEC Rule 14d-10 provides that: "No bidder shall make a tender offer unless . . . [t]he consideration paid to any security holder for securities tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer." 17 C.F.R. § 240.14d-10.

[125] 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979).

the Northern District of Georgia (the "Georgia District Court"), in which the Federal Action is pending, expressly rejects the approach advanced by the Federal Objectors.[126]

I do not agree with Defendants' Contention that the *Walker* decision precludes the Federal Objectors' creeping tender offer claim. In *Walker*, the plaintiff alleged that a tender offer violated the SEC's best price rule because certain executives of the target company received monetary "retention and transition awards" pursuant to a merger agreement that was executed in the immediate wake of the successful completion of the tender offer.[127] In rejecting the plaintiff's claim that the merger agreement and tender offer should be viewed as one integrated transaction, the court followed relevant case law that held that a second-step statutory merger that follows a successful tender offer does not constitute a continuation of the tender offer.[128] In reaching its decision, the *Walker* court noted that the time at which a tender commences is governed by SEC Rule 14d-2,[129] but that case ultimately focused on the question of "whether awards to key executives in a merger following a successful tender offer may be deemed to constitute

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[126] 145 F. Supp. 2d 1360 (N.D. Ga. 2001).

[127] *Id.* at 1362-64.

[128] *Id.* at 1373.

[129] *Id.* at 1374. SEC Rule 14d-2 currently states: "A bidder will have commenced its tender offer for purposes of section 14(d) of the Act and the rules under that section at 12:01 a.m. on the date when the bidder has first published, sent or given the means to tender to security holders." 17 C.F.R. § 240.14d-2. This version of the rule was adopted after the dispute in *Walker* arose, and the *Walker* court relied on an earlier version. Thus, *Walker* did not address the current version of the rule, which is at issue here.

additional consideration for their shares so as to trigger a right of recovery by other tendering shareholders."[130] Because the *Walker* opinion makes no reference to a "creeping tender offer" and did not involve stock repurchases, it has only marginal relevance to the Cox Radio Transaction. *Walker* stands only for the proposition that a company can pay its executives employment-related compensation pursuant to a merger/tender offer combination and not run afoul of the SEC's best price rules and, thus, is not dispositive of the Federal Objector's creeping tender offer claim.

While the Georgia District Court would not be compelled to follow *Walker* in addressing the creeping tender offer claim, dicta in *Walker* suggests the rationale of that decision could be extended to cover the present situation. The *Walker* court disclaimed any interest in undertaking a "subjective analysis of transactions occurring outside the tender offer period to determine if they should be deemed 'integral' to the tender offer."[131] The court also cited favorably to *Hanson Trust PLC v. SCM Corp.*,[132] which held that open market purchases immediately following the termination of a tender offer did not constitute a continuation of the tender offer. *Walker* stated that "[t]he holding in *Hanson Trust* illustrates the principle that transactions near in time to the tender offer but outside it are a permissible feature in mergers and acquisitions that do not constitute a

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[130] *Walker*, 145 F. Supp. 2d at 1367.

[131] *Id.* at 1369.

[132] 774 F.2d 47 (2d Cir. 1985).

tender offer or continuation thereof."[133] Similarly, the court observed that: "Transactions or agreements made before the commencement of the Tender Offer do not, by definition, occur 'during the Tender Offer.'"[134] From this, it appears unlikely that the Georgia District Court would uphold a claim alleging that a transaction occurring near in time to, but not during, a tender offer should be treated as part of the tender offer. Because the Federal Objectors' creeping tender offer claim alleges that transactions occurring almost four years before the formal commencement of the tender offer for Cox Radio shares should be deemed to be part of the tender offer, it is unlikely that claim would succeed in the Georgia District Court.

Furthermore, even if the Georgia District Court declined to follow *Walker*, it is unlikely that the Federal Objectors would be able to show that the Transaction constitutes a creeping tender offer under *Wellman*. The court in *Wellman* identified eight elements characteristic of tender offers:

> (1) active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer's stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only a limited period of time; (7) offeree subjected to pressure to sell his stock; [and] (8) public announcements of a purchasing program concerning the target company precede

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133 *Walker*, 145 F. Supp. 2d at 1370.

134 *Id.* at 1371.

> or accompany rapid accumulation of large amounts of the target company's securities.[135]

The Federal Objectors conclusorily assert that the stock repurchase program meets three of the *Wellman* factors: (1) active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer's stock; and (3) public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of large amounts of the target company's securities. The Federal Objectors do not point to specific evidence to support their assertion that these factors were present in the stock repurchase program; instead, they conclusorily state that "the facts alleged raise issues that can only be resolved after discovery and are more than sufficient to state a claim for relief."[136]

This showing is not likely to be sufficient to prove that the stock repurchase program constitutes a tender offer under *Wellman*. Defendants deny that the stock repurchase program has any of the eight *Wellman* characteristics and support this contention with credible evidence. As to the three factors cited by the Federal Objectors, Defendants claim that Cox Radio did not engage in any solicitation of shares in connection with the stock repurchase program, let alone solicitation for a substantial portion of its stock, and also that there was no rapid accumulation of large amounts of

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[135] *Wellman*, 475 F. Supp. at 823-24.

[136] Fed. Objectors' Br. 26.

Cox Radio stock, as the stock repurchases occurred over a three-and-a-half year period.[137] The Federal Objectors have not rebutted that showing. While "in any given case a solicitation may constitute a tender offer even though some of the eight factors are absent or, when many factors are present, the solicitation may nevertheless not amount to a tender offer because the missing factors outweigh those present,"[138] here, the Federal Objectors have not presented credible, probative evidence that the stock repurchase program exhibited any of the eight *Wellman* factors. Accordingly, I find that the Federal Objectors' creeping tender offer claim has little value; thus, its release provides no basis for disapproving the Settlement.

The Federal Objectors also aver that Defendants violated Section 13(e) of the Securities Exchange Act of 1934 by engaging in a going-private transaction without filing a Schedule 13e-3 with the SEC.[139] The Federal Objectors contend that Defendants should have filed a Schedule 13e-3 because they determined to take Cox Radio private at some point during the stock repurchase program. The large number of shares repurchased, CEI's 2006 amendment to its Schedule 13D noting that it might consider increasing its Cox Radio stock holdings, and CEI's ultimate acquisition of Cox Radio all show, according to the Federal Objectors, that CEI planned to take Cox Radio private

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137 *See S.E.C. v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 952 (9th Cir. 1985) (finding rapid accumulation when defendant acquired 50 percent of issuer's outstanding stock "over the period of seven trading days").

138 *Hanson Trust*, 774 F.2d at 57.

139 *See* 17 C.F.R. § 240.13e-3.

before the actual formulation of the Transaction. While this evidence understandably could raise suspicions about CEI's intentions, there is no proof that CEI intended to take Cox Radio private before March 2009. Accordingly, I find that the Federal Objectors would have a difficult time proving that CEI violated SEC Rule 13e-3. Thus, I accord little weight to the release of this claim in evaluating the costs and benefits of the Settlement.

In their brief, the Federal Objectors also allude to a claim, not asserted in the complaint in the Federal Action, that by having Cox Radio purchase its shares with its own funds, Defendants breached their fiduciary duty by utilizing the corporate assets of Cox Radio for the benefit of CEI.[140] This conduct allegedly produced the covenant default risk that led CEI to launch the Transaction and, according to the Federal Objectors, made the tender offer coercive. This claim resembles the derivative claim for breach of fiduciary duty based on the stock repurchase program that the Appraisal Objectors seek to pursue at appraisal, which I discussed *supra* Part II.B.3.a.

While this claim on its face does have some appeal in that Cox Radio repurchased its shares for an average price of $12.22 per share in the three years before the merger, while CEI ultimately paid only $4.80 per share in the challenged Transaction, the

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[140] Fed. Objectors' Br. 18. Count IV of Federal Objectors' complaint in the Federal Action asserts a claim for breach of fiduciary duty. This claim, however, alleges only that "defendants have breached their duty of care by failing to consider any alternative whatsoever for Cox Radio other than the sale to the Company's largest shareholder, Cox Enterprises, and have failed to consider selling Cox Radio to another buyer or having it remain independent." Fed. Objectors' Mot. to Obtain Ltd. Disc. Ex. A at 46.

showing the Federal Objectors have made on this claim is weak. For one, the Federal Objectors' argument on this point is so convoluted that it is difficult to determine precisely what they allege Defendants did wrong. Furthermore, the Federal Objectors do not cite any specific facts supporting their theory, apparently believing it to be a truism that the stock repurchases solely benefited CEI. Yet, it is by no means obvious that only CEI benefited from the stock repurchases. In fact, the prevailing view regarding stock repurchases is that they benefit all shareholders by increasing the remaining shareholders' percentage of equity ownership and supporting the stock's market price.[141]

The Federal Objectors cite several cases in support of their breach of fiduciary duty claim. None of these cases, however, suggest that their claim is strong. *Braasch v. Goldschmidt* involved a motion to dismiss in which the court observed that the plaintiffs would have a difficult time ultimately proving their claim that a short form merger "was the final step of a conspiracy to accomplish an unlawful end by unlawful means."[142] While this case supports the proposition that the Federal Objectors' claim challenging the stock repurchases as part of a CEI conspiracy might survive a motion to dismiss, it does not increase the likelihood that this claim ultimately would be successful. *Seagraves*

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141 *See* William W. Bratton, *The New Dividend Puzzle*, 93 GEO. L.J. 845, 846 (2005) (explaining that profit distribution strategies have moved from dividends to stock repurchases in part because repurchases increase earnings per share, signal good news about the company, and support the company's stock price).

142 *Braasch v. Goldschmidt*, 199 A.2d 760, 764 (Del. Ch. 1964).

suffers from the same flaw, showing only that the Federal Objectors' claims potentially could survive a motion to dismiss.[143]

In *Sealy*, then-Vice Chancellor, now Justice Jacobs said of the defendants' behavior, "if one were setting out to write a textbook study on how one might violate as many fiduciary precepts as possible in the course of a single merger transaction, this case would be a good model."[144] Even if I were to accept every allegation made about Defendants' behavior here, there still would not be anywhere near the amount or degree of disloyal and unfair conduct found in *Sealy*, making that case readily distinguishable. *Nebel* is also inapposite.[145] There, the court denied a motion to dismiss the plaintiffs' claim challenging the fairness of a merger based on the absence of an independent negotiating committee and a $44 per share (or 107 percent) difference between the merger price and the appraisal value of the shares.[146] Given the presence of an independent negotiating committee in this case and the absence of any known discrepancy between an appraisal value and the tender offer price, *Nebel* provides no additional support for the Federal Objectors' claim.

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143 *Seagraves v. Urstadt Prop. Co.*, 1989 WL 137918, at *3-4 (Del. Ch. Nov. 13, 1989). The ability of a claim to survive a motion to dismiss, however, does not necessarily entitle that claim to be valued highly in considering a settlement. *See Ryan v. Gifford*, 2009 WL 18143, at *6-9 (Del. Ch. Jan. 2, 2009); *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1137-38 (Del. 2008).

144 *Sealy Mattress Co. of N.J., Inc. v. Sealy, Inc.*, 532 A.2d 1324, 1335 (Del. Ch. 1987).

145 *Nebel v. Sw. Bancorp., Inc.*, 1999 WL 135259 (Del. Ch. Mar. 9, 1999).

146 *Nebel*, 1999 WL 135259, at *7.

While the Federal Objectors conceivably could survive a motion to dismiss on their breach of fiduciary duty claim, they have produced little evidence supporting the ultimate success of this claim. If such evidence exists, I would expect it to have been uncovered in discovery. Plaintiffs' discovery efforts here were fairly comprehensive, and the results of that discovery were made available to the objectors. Nevertheless, the Federal Objectors have presented little, if any, specific evidence supporting their breach of fiduciary duty claim. Thus, I consider it unlikely that the Federal Objectors would succeed in proving this claim. Therefore, while the breach of fiduciary duty claim may be more colorable than the objectors' other claims, I find that the release of this claim would not impose a significant cost on the Class.[147]

Finally, the Federal Objectors complain that the Settlement improperly releases for no consideration the claims of certain Cox Radio shareholders who sold their shares before the commencement of the Transaction. Specifically, the Class includes all Cox Radio shareholders as of February 10, 2009, while the Transaction was not announced until March 23, 2009. Shareholders who sold their stock between those dates, according to the Federal Objectors, are being forced unfairly to give up their claims related to the creeping tender offer.

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[147] I also note that the Class only includes owners of Cox Radio stock after February 10, 2009. Anyone who sold their Cox Radio stock before that date, therefore, still could bring a claim challenging the propriety of the stock repurchase program itself, independent of the Transaction at issue here.

Having already determined that the Federal Objectors' creeping tender offer claim is likely meritless, I do not find this argument persuasive. Under Delaware law, "former shareholders [can] properly be bound to [a] settlement yet receive nothing . . . where claims are weak or of little or no probable value."[148] The creeping tender offer claims of those who sold their Cox Radio stock between February 10 and March 23, 2009 are weak; thus, the release of those claims in the Settlement for little or no consideration provides no basis for disapproving the Settlement.

c. The release of the disclosure claims

The Settlement also releases all disclosure claims brought in any of the three actions.[149] Defendants contend that all disclosure claims brought in those actions were either meritless to begin with or were mooted by the supplemental disclosures CEI provided. The disclosure claims in the Delaware Action focused on three primary issues: (1) the independence and selection of Gleacher; (2) the justification for the Transaction and the Special Committee's recommendation; and (3) the financial analysis Gleacher performed. Defendants assert that CEI has made sufficient disclosures regarding all three of these issues, either through its initial disclosures or the supplemental disclosures it made pursuant to the Settlement. Perhaps more importantly, neither set of objectors has

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148 *Phila. Stock Exch.*, 945 A.2d at 1140.

149 "'Released claims' . . . includ[e] . . . any and all claims which are based upon, arise out of, relate in any way to, or involve . . . the Schedule TO, the Schedule 14D-9 . . . or any other disclosures, public filings . . . or other statements issued, made available or filed relating, directly or indirectly, to the Proposed Transaction." Stip. of Settlement 15-17.

objected to the adequacy of the disclosures, as supplemented. Having reviewed the disclosure claims released by the Settlement in light of all the circumstances of this proceeding, I find that no one has identified any meritorious disclosure claim that is unremedied. Therefore, the cost of releasing any remaining disclosure claims is negligible.

4. The balance of the benefits and costs

Overall, I find that the benefits secured by the Settlement outweigh the costs it imposes on the Class. The Settlement's benefits are relatively modest – a handful of supplemental disclosures and, at most, a $1 per share increase in the tender offer price.[150] But, these benefits outweigh the costs of the Settlement, as none of the claims released by the Settlement appear to have any significant value. All of the released claims are either weak, difficult to prove, or both. The most colorable claim being released is the Federal Objectors' breach of fiduciary duty claim, and even that claim suffers from serious evidentiary inadequacies and is not likely to be successful. In addition, both sets of objectors vastly overstated the value of their claims. They made grandiose assertions of

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150 Only part of the $1 per share increase in the tender offer price can be attributed to the Settlement because at least some of that increase must be attributed to CEI's realization that the tender offer would not succeed without a price increase and to the efforts of the Special Committee. Based on my conclusions regarding the strength of the claims being released in the Settlement, I see no need to attempt to estimate precisely how much of the price increase can be attributed to the Settlement.

claims "potentially worth hundreds of millions of dollars," yet failed to produce either law or facts showing that these claims have any reasonable probability of success.[151]

Plaintiffs' counsel assert that they evaluated all of Plaintiffs' claims, most of which were asserted by the objectors, as well, and found that the Settlement provided a better alternative than pursuing these claims to trial. The objectors dispute this assertion, claiming Plaintiffs' counsel could not have worked very hard on this matter given the meager benefits they obtained for the Class. Plaintiffs' counsel, however, are experienced and knowledgeable in litigation of this kind, were assisted by a financial expert, and appear to have pursued Plaintiffs' claims diligently.[152] The objectors have not shown any reason I should doubt the accuracy of Plaintiffs' counsel's ultimate conclusion that Plaintiffs' claims were not very strong.

All in all, the benefits gained through the Settlement appear commensurate with the claims being released. While the benefits gained were modest, the claims released were weak, and the outcome reached here conforms to what one would expect in light of those circumstances. Thus, the parties to the Delaware Action have met their burden of showing that the Settlement merits approval. Accordingly, in the exercise of my independent business judgment, I approve the Settlement because I find that it is fair, adequate, and reasonable and the benefits it provides to the Class outweigh its costs.

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[151] Appraisal Objection 39.

[152] Stip. of Settlement ¶ BB.

C. Attorneys' Fees

Plaintiffs seek an award of their attorneys' fees and expenses in the amount of $3.6 million. Defendants object to this amount as excessive and contend that Plaintiffs should instead be awarded fees and expenses of no more than $490,098.

The general or American Rule is that a litigant must defray her own attorneys' fees and litigation costs.[153] Nevertheless, Delaware courts have long recognized the "common corporate benefit" doctrine as an exception to the American Rule and a basis for the reimbursement of attorneys' fees and expenses in corporate litigation.[154] Under this doctrine, "a litigant who confers a common monetary benefit upon an ascertainable stockholder class is entitled to an award of counsel fees and expenses for its efforts in creating the benefit."[155] This entitlement to fees may arise from a final, post-trial adjudication or when a defendant corporation takes action that settles or moots the case.[156]

Here, Plaintiffs and Defendants agree that Plaintiffs are entitled to attorneys' fees and expenses under the common corporate benefit doctrine, but disagree as to the amount. "The amount of attorneys' fees awarded lies within the sound discretion of the

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153 *Greenfield v. Frank B. Hall & Co.*, 1992 WL 301348, at *3 (Del. Ch. Oct. 19, 1992) (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).

154 *United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997); *Goodrich v. E.F. Hutton Gp., Inc.*, 681 A.2d 1039, 1044 (Del. 1996).

155 *United Vanguard*, 693 A.2d at 1079 (citing *Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1164 (Del. 1989)); *see also Chrysler*, 223 A.2d at 386.

156 *Greenfield*, 1992 WL 301348, at *3.

court and must be reasonable."[157] Delaware courts apply "rigorous scrutiny" to fee requests to ensure that they are reasonable.[158] A court's goal in setting a fee award should be to avoid windfalls to counsel while encouraging future meritorious lawsuits.[159] In determining the proper fee award, Delaware courts consider the *Sugarland* factors: (i) the amount of time and effort applied to the case by counsel for the plaintiffs; (ii) the relative complexities of the litigation; (iii) the standing and ability of petitioning counsel; (iv) the contingent nature of the litigation; (v) the stage at which the litigation ended; (vi) whether the plaintiff can rightly receive all the credit for the benefit conferred or only a portion thereof; and (vii) the size of the benefit conferred.[160] The last two elements generally are considered the most significant, with the size of the benefit being of paramount importance.[161]

Regarding the time and effort expended by Plaintiffs' counsel, I find the amount of time spent on this case excessive, especially in light of the early stage at which the litigation ended. While the parties entered into the MOU thirty-three days after the

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[157] *Julian v. E. States Const. Serv., Inc.*, 2009 WL 154432, at *2 (Del. Ch. Jan. 14, 2009) (citing *Franklin Balance Inv. Fund v. Crowley*, 2007 WL 2495018, at *8 (Del. Ch. Aug. 30, 2007)).

[158] *In re Coleman S'holders Litig.*, 750 A.2d 1202, 1212 (Del. Ch. 1999).

[159] *Seinfeld v. Coker*, 847 A.2d 330, 333-34 (Del. Ch. 2000); *Franklin Balance*, 2009 WL 154432, at *12.

[160] *In re Plains Res. Inc.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005) (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980)).

[161] *Id.*; *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 639 (Del. Ch. 2005).

commencement of the Delaware Action and the Georgia State Action was stayed a mere fifteen days after it began, the seven firms comprising Plaintiffs' counsel worked over 1,600 hours during this period.[162] That is equivalent to having ten legal professionals work more than forty hours per week for four straight weeks on this matter. From this, I conclude that Plaintiffs' counsel conducted this litigation in an inefficient or duplicative manner. Moreover, the evidence suggests that Plaintiffs' counsel allocated work in a top-heavy and inefficient manner, with partners routinely billing more hours than associates.[163] That said, Defendants, by twice effecting a postponement of the preliminary injunction hearing on its eve by pushing back the tender offer's expiration date, forced Plaintiffs' counsel to do more work than would have been necessary had some form of stand-still agreement been in place. Ultimately, however, as in a previous case involving Cox Communications, I find that because "the hours worked on the matter are excessive in relation to what was usefully done [and] involved an inefficient allocation between partners and associates, . . . I [cannot] credit the full amount of hours submitted as being reasonable."[164]

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[162] Plaintiffs' counsel worked another 833 hours after the MOU was reached. This time primarily was spent conducting confirmatory discovery. Tr. 130.

[163] For example, of the 599.75 hours billed by Faruqi & Faruqi, 477.25, or approximately 75%, were billed by partners, with partners being four of the five highest billers at that firm in terms of hours. Decl. of Emily C. Komlossy Ex. A.

[164] *Cox Commc'ns*, 879 A.2d at 642.

I consider this to have been a moderately complex case. Controlling shareholder tender offer cases are relatively straightforward, but this case featured unique facts that increased its complexity. Because initially there were questions about the nature and extent of the Special Committee's negotiating powers, it was legitimately debatable, at least until April 19 when the board clarified the Special Committee's powers, whether a court would apply the entire fairness standard to the Transaction. Also, the fact that Cox Radio repurchased almost 500,000 shares of its stock for an average price of $5.30 per share only a month before its controlling shareholder, CEI, launched the Transaction at $3.80 per share necessitated further inquiry into the stock repurchase program. Overall, these factors made the matter more complicated for Plaintiffs' counsel. In addition, I note that none of the participants in this proceeding have questioned the standing and ability of Plaintiffs' counsel.

While Plaintiffs' counsel took this case on a contingent basis, the record shows that they did not undertake much risk. Disclosure claims of the type Plaintiffs pursued are relatively safe in terms of forcing a settlement. Moreover, it became evident shortly after the Delaware Action was filed that CEI would need to increase the tender offer price to succeed, virtually guaranteeing Plaintiffs' counsel a fee in excess of what they might obtain in a disclosure-based settlement. Also, one-third of the time Plaintiffs' counsel worked, 833 hours, took place after the parties executed the MOU and, therefore, was not

done on a contingent basis.[165] Consequently, Plaintiffs' counsel are entitled to only a small risk premium.

Likewise, the size of the benefit conferred on the Class here is relatively modest. The benefit consists of the portion of the $16,840,846 in increased consideration from the $1 per share bump in the tender offer price that is fairly attributable to the efforts of Plaintiffs' counsel and a handful of supplemental disclosures. Although the disclosures on their own would support some award of attorneys' fees,[166] fee awards in cases involving a bump in the consideration paid to shareholders are usually based on a percentage of the increased consideration. This practice reflects the paramount importance of the size of the benefit among the *Sugarland* factors, especially in terms of increased monetary consideration.[167]

Three factors played a role in producing the increased tender offer price: (1) the market; (2) the Special Committee; and (3) Plaintiffs' counsel's efforts through this litigation. Of these factors, the market and the Special Committee provided the primary impetus for the price bump. The market's tepid reaction to the tender offer forced CEI to increase the tender offer price to ensure the success of the Transaction, while the Special Committee's vigorous negotiating after April 19 allowed Cox Radio's shareholders to

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[165] Tr. 130.

[166] *See In re Golden State Bancorp Inc. S'holders Litig.*, 2000 WL 62964, at *3-4 n.19 (Del. Ch. Jan. 7, 2000).

[167] *See In re Prodigy Commc'ns Corp. S'holders Litig.*, 2002 WL 1767543, at *6 (Del. Ch. July 26, 2002).

receive a full dollar more per share than CEI initially offered. But, although this litigation was not the driving force behind the bump, it did contribute to the increase in consideration. Plaintiffs' counsel's active pursuit of the litigation, through discovery and a preliminary injunction motion, put pressure on Defendants to address Plaintiffs' concerns. More importantly, Plaintiffs' counsel reinforced the efforts of the Special Committee and deserve at least some of the credit for Cox Radio's clarification that the Special Committee, in fact, was authorized to negotiate the tender offer price with CEI. Accordingly, I find that Plaintiffs' counsel, through their facilitation of the work of the Special Committee, as well as their own efforts, did make a secondary, but not insignificant, contribution to securing the increased consideration.[168]

Plaintiffs seek attorneys' fees amounting to approximately 21 percent of the $16,840,846 in increased consideration. Defendants contend that Plaintiffs should receive only $423,598 in fees, 2.52 percent of the bump in consideration. Defendants base that number on an analysis of fees awarded in recent bump cases. Specifically, Defendants looked at every case in the last decade in which a settlement was reached in exchange for aggregate increased consideration of between $10 million and $40 million.

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[168] Plaintiffs contend that they are substantially responsible for the proposed increase in the tender offer price from $3.80 to $4.20 per share informally discussed by CEI on April 16, 2009, but admit that they deserve less credit for the increase from the $4.20 per share price discussed to the $4.80 per share CEI ultimately offered. Pls.' Br. 30. This is a largely meaningless distinction, as there was only one actual increase in the tender offer price, from $3.80 to $4.80 per share. Therefore, I have not relied on this dichotomy in determining the fees to be awarded to Plaintiffs' counsel in this action.

Defendants found nine such cases, in which courts awarded fees ranging from 1.30 percent to 4.97 percent of the increased consideration.[169] Plaintiffs correctly counter, however, that many of Defendants' cases are stale, as only two of the nine cases cited are from the last six years.[170] Having considered the totality of the circumstances, including Defendants' cases and their relative age, I find that Plaintiffs' request for $3.6 million in fees and expenses reflects too high a percentage of the benefit conferred, while the amount Defendants advance reflects too low a percentage in light of the benefits reasonably secured through the work of Plaintiffs' counsel and the other *Sugarland* factors.

While Plaintiffs have not shown that they are entitled to anywhere near the 21 percent of the increased consideration they request, a percentage four times greater than the highest percentage awarded in comparable cases, they have shown that this case was sufficiently different and difficult to warrant an award slightly higher than in similar cases. Here, Plaintiffs' counsel had to navigate certain difficulties not seen in a typical bump case. The Special Committee's initial belief that they were unable to negotiate the tender offer price with CEI heightened the importance of Plaintiffs' counsel's work. Cox

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[169] Defs.' Answering Br. 23-24.

[170] These are the *Mossimo* case from 2007, in which fees amounting to 3.96 percent of the bump were awarded, and the *New Valley* case from 2006, where the court awarded fees amounting to 2.41 percent of the bump. *In re Mossimo, Inc. S'holders Litig.*, C.A. No. 1246-VCL (Del. Ch. Feb. 26, 2007) (ORDER); *In re New Valley Corp. S'holder Litig.*, C.A. No. 1678-CC (Del. Ch. Apr. 10, 2006) (ORDER).

Radio's years of stock repurchases at prices well above the later Transaction price also required further inquiry in this litigation. Accordingly, taking into account the price increase and the therapeutic benefit of the supplemental disclosures, which Defendants themselves characterized as "substantial,"[171] I award Plaintiffs' counsel attorneys' fees in the amount of $1,010,450 or approximately 6 percent of the $16,840,846 benefit obtained for the Class in the Settlement by virtue of the increase in the tender offer price.[172] Additionally, I award expenses of $66,588, the full amount of documented expenses Plaintiffs claim, as Defendants did not object to that amount and the claimed expenses appear to have been justified.[173]

III. CONCLUSION

For the foregoing reasons, I certify the Class and approve the Settlement between Plaintiffs and Defendants entered into on September 4, 2009 as fair, adequate, and reasonable. Specifically, I find that the benefits secured by the Settlement—supplemental disclosures and a $1 per share increase in the tender offer price—outweigh

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171 Defs.' Mem. 34.

172 The amount of fees I award are in line with Plaintiffs' counsel's lodestar, which may be used as a "backstop check" when assessing the reasonableness of a fee award. *In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, 1274 (Del. 2005). The seven firms comprising Plaintiffs' counsel billed 2,500 hours for this litigation. Dividing this number into the amount I have awarded in fees yields a putative, blended hourly rate of just over $400. Because I have not credited all of Plaintiffs' counsel's hours and have determined that only a small risk multiplier is warranted, this imputed rate fully comports with my analysis.

173 Defs.' Answering Br. 1.

the Settlement's costs—primarily the release of claims I view as weak and of little value. I also grant Plaintiffs attorneys' fees and expenses in the total amount of $1,077,038.

IT IS SO ORDERED.