IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

3-SIGMA VALUE FINANCIAL OPPORTUNITIES LP, BRH OPPORTUNITIES FEEDER, LLC, BRH OPPORTUNITIES III, LLC, BLUEMOUNTAIN FINANCIAL HOLDINGS, LLC, TDSS EQUITY INVESTMENTS A LLC, and SCOPESII EQUITY INVESTMENTS A LLC, on Behalf of Themselves and all others Similarly Situated and Derivatively on Behalf of Nominal Defendant, CERTUSHOLDINGS, INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 11655-VCG
MILTON JONES, WALTER DAVIS, CHARLES WILLIAMS, ANGELA WEBB, J. VERONICA BIGGINS, ROBERT J. BROWN, DOUGLAS JOHNSON, WILLIAM F. PICKARD, HILDY TEEGEN, ROBERT L. WRIGHT, INTEGRATED CAPITAL STRATEGIES HOLDINGS, LLC AND INTEGRATED CAPITAL STRATEGIES, LLC,	)	**PUBLIC VERSION FILED ON: MARCH 31, 2017**
Defendants,	)	
v.	)	
CERTUSHOLDINGS, INC.,	)	
Nominal Defendant.	)	

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF APPROVAL OF DERIVATIVE AND CLASS ACTION SETTLEMENT AND AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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Plaintiffs BRH Opportunities Feeders, LLC, BRH Opportunities III, LLC, BlueMountain Financial Holdings, LLC, TDSS Equity Investments A LLC, and SCOPESII Equity Investments A LLC (collectively, "Plaintiffs"),[1] on behalf of themselves and the settlement class, and derivatively on behalf of the Nominal Defendant, Certus Holdings, Inc. (together with Certus Bank, N.A., "Certus" or the "Company") submit this brief in support of: (i) final approval of the proposed settlement resolving this class and derivative action (the "Settlement");[2] (ii) final certification, for settlement purposes, of the Settlement Class as defined in the Stipulations; and (iii) an award of attorneys' fees and expenses. A hearing is scheduled for April 10, 2017 for the Court to consider these matters.

PRELIMINARY STATEMENT

The proposed $19.2 million cash settlement in this action is an exceptional result for Certus and its current, long-suffering stockholders. This action was brought by three hedge funds that collectively invested over

[1] The parties filed the Stipulation of Withdrawal as to Plaintiff 3-Sigma Value Financial Opportunities LP on September 21, 2016.

[2] The terms and conditions of the Settlement are set forth in (i) the Stipulation and Agreement of Settlement, Compromise and Release with Individual Defendants dated February 8, 2017 (the "Individual Defendants Stipulation); and (ii) the Stipulation and Agreement of Settlement, Compromise and Release with ICS dated February 8, 2017 (the "ICS Stipulation," and together with the Individual Defendants Stipulation, the "Stipulations").

20% of the capital used to fund Certus, a private bank created with special federal support to acquire and rehabilitate failed regional banks. While Plaintiffs and other investors were putting hundreds of millions of dollars into a government-backed business venture that should have been an easy winner, the government conditioned their investment on accepting the unfettered control of the Certus board and management. The investors could not run a proxy fight to challenge the board or change the company's strategy. Unfortunately for Certus's stockholders, the bank's executives were not the responsible managers they held themselves out to be.

The insider defendants were aided by a board that would not lift a finger to protect the outside stockholders until it was too late. The Executive Defendants rapidly squandered the company's capital on related-party transactions and grandiose personal benefits for themselves. Put simply, they lived like they were running a global multinational mega-bank, but never spent the time needed to run even a viable local institution.

There is no deep-pocket defendant. Plaintiffs' counsel knew before filing suit that the only practicable means of collecting any judgment was through D&O insurance. Nevertheless, plaintiffs aggressively pursued two books and records demands and reviewed and analyzed a broad range of the

failed bank's business records before deciding to pursue this action. Recognizing that the entire board that oversaw the bank's failure had been replaced, Plaintiffs made a detailed demand on the new board, which took no position, thus effectively permitting Plaintiffs to pursue this case for the benefit of Certus's outside investors.

Before the litigation began, the D&O insurance tower was $50 million, but that amount was being quickly depleted through four sets of counsel here and ongoing regulatory investigations. Especially when seen in this context, the $19.2 million cash recovery is remarkable.

The recovery was achievable through settlement, we believe, because of the strong probability of a finding of actionable self-dealing and unauthorized transactions. After months of unrelenting discovery practice, Plaintiffs developed a persuasive documentary and testimonial record of unfair self-dealing, document destruction, and massive unauthorized transactions that crippled the bank and led directly to its collapse. At a moment of maximum leverage, when mediation discussions either would or would not succeed in salvaging any significant portion of the stockholders' investment, Plaintiffs obtained this $19.2 million cash settlement. The settlement amount will be distributed directly to current, eligible Certus

stockholders, net of attorneys' fees and other expenses, and less a $600,000 payment to Certus, which will be used to pay Certus's outstanding Delaware state tax obligations.

Plaintiffs seek approval of the proposed $19.2 million settlement and an award of attorney's fees and expenses of $4.25 million.[3]

STATEMENT OF FACTS

This litigation has always lacked a deep-pocket defendant:

- Plaintiffs challenged a wide range of reckless and improper expenditures by Certus, which is now defunct;
- Defendants Integrated Capital Strategies Holdings, LLC, and its subsidiary Integrated Capital Strategies, LLC (together, "ICS"), the entities through which Certus insiders funneled funds through a series of improper related-party transactions, are defunct;

[3] This requested amount is comprised of: (i) a request of $4.11 million in attorneys' fees, which amount was calculated pursuant to a mathematical formula agreed to between Plaintiffs' Counsel and Plaintiffs, each of which is a sophisticated institutional investor, prior to the commencement of litigation (Affidavit of Mark Lebovitch ("Lebovitch Aff.") ¶ 3); and (ii) $143,804 in necessary expenses incurred in the prosecution of this Action. (Lebovitch Aff. ¶ 5; Affidavit of Christopher Foulds ("Foulds Aff.") ¶ 88.)

- Insider individual defendants Milton Jones, Walter Davis, and Angela Webb (collectively, "JDW"), and Charlie Williams (with JDW, the "Executive Defendants"), do not appear to have sufficient assets to fund a settlement or judgment of any meaningful size.

(Foulds Aff. ¶ 4.)

Plaintiffs recognized from the outset of this representation that any significant recovery could only be expected to come from Certus's D&O insurance tower. (*Id.* ¶ 5.) The operative question from the outset of this case was whether Plaintiffs could apply sufficient pressure to extract the maximum available from the insurance tower, recognizing that the insurers had no incentive to part with any money, that the insurance would be depleting throughout the litigation, and that the defendants and the insurers faced legal exposure from other legal proceedings. (*Id.* ¶ 6.) As we understood it, JDW were the subjects of other regulatory matters, [redacted]

(*Id.*) Four teams of lawyers appeared for Defendants in this action, *plus* forwarding counsel and Delaware counsel for Certus, and a team of JDW's criminal defense lawyers who appeared at Jones's deposition. (*Id.*)

To obtain a large settlement before spending years in litigation that would sap insurance, it was important that Plaintiffs move with alacrity to press for prompt discovery. (*Id.* ¶ 8.) Plaintiffs' counsel exerted tremendous effort against four sets of defendants and multiple third parties to obtain the discovery that broke the case wide open. (*Id.*)

Plaintiffs were fully prepared to litigate the case through trial, which provided considerable settlement pressure. (*Id.* ¶ 9.) Doing so, however, would have further depleted the only realistically available source of damages. (*Id.*) If this case had been litigated through trial and the parallel regulatory matters continued, the remaining insurance proceeds would have been significantly, if not entirely, depleted. (*Id.*)

By any measure, the $19.2 million settlement here is a very large percentage of the maximum amount that could have been recovered. (*Id.* ¶ 10.)

A. Without Plaintiffs and Plaintiffs' Counsel, Certus and its Stockholders Would Have Recovered Nothing

Almost all of Certus's stockholders are highly-sophisticated, well-capitalized hedge funds. (*Id.* ¶ 11.) Any of them could have brought suit to recover the equity that the Executive Defendants wiped out a few short years

after the Company's founding. (*Id.*) None of them did, except Plaintiffs. (*Id.*)

Plaintiffs' counsel's initial understanding of the background facts included the following:

- The Executive Defendants successfully obtained a federal bank "shelf" charter;
- As a condition to investing in a bank that would enjoy extensive governmental support and guarantees against losses from the acquisition of previously failed banks, investors were required to give up the ability to remove the directors through a proxy contest;
- The bank came into formal existence in January 2011, when it acquired its first bank, South Carolina's CommunitySouth Bank & Trust, from the FDIC using a portion of the $50 million that investors had already contributed;
- Within four months, Certus acquired two failed Georgia banks, utilizing $168 million in additional stockholder commitments, for a total of roughly $218 million. By that time, Certus had 30 branches and $1.8 billion in assets;

- Following a cooling-off period imposed by the FDIC, Certus would buy two more banks with total assets of approximately $230 million;
- Despite early success, the Company faced an "explosion in non-interest expenses at Certus [that] contributed to combined pretax losses of more than $115 million in 2012 and 2013" (Ex. 1, at 2)[4];
- As these enormous losses mounted, in late 2013, several institutional stockholders began writing increasingly alarming letters to the Board, demanding immediate action;
- In March 2014, the Non-Executive Defendants formed a special committee to investigate the Executive Defendants. Shortly thereafter, the Executive Defendants either resigned or were fired. The Non-Executives Directors subsequently left the Company; and
- Under new management, Certus completed a "de-banking" process and is in the process of liquidating assets.

(*Id.* ¶ 12.)

1. Plaintiffs Pursue Section 220 and Rule 23.1 Demands

No stockholder initiated litigation, until August 7, 2015 and August 25, 2015, when BLB&G sent Section 220 demands to Certus on behalf of

[4] Exhibits to the Foulds Affidavit are cited herein as "Ex. __".

Plaintiff BRH Opportunities III, LLC. (Exs. 2 & 3.) Certus produced, and Plaintiffs' thereafter reviewed, approximately 10,000 pages of Company documents. (Foulds Aff. ¶ 13.)

Based on that production, on September 22, 2015, BLB&G sent the Board a Rule 23.1 litigation demand, detailing apparent misconduct by Company fiduciaries and demanding that the Company either pursue litigation or allow the claims to be placed into a litigation trust. (Ex. 4 (omitting 900 pages of exhibits).) On October 16, 2015, the Board informed BLB&G through outside counsel that it took no position. (Ex. 5.)

2. Plaintiffs File Suit

After the Board's declination and with the material derived from several months of investigation, on October 29, 2015, Plaintiffs filed a detailed, 149-paragraph Verified Class Action and Derivative Complaint ("Complaint"). (D.I. 1.) Plaintiffs argued (and Defendants did not contest) that "[u]nder Delaware law, if the board of directors does not object and takes no position on a derivative plaintiff's litigation demand, the plaintiff may proceed and prosecute such claims on the company's behalf." (Compl. ¶ 124 (citing *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 807-11 (Del. Ch.

2009); *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 731 (Del. 1988).)

The Complaint contained five counts: (i) breach of fiduciary duty against the Executive Defendants as officers, (ii) waste against the Executive Defendants, (iii) breach of fiduciary duty against the Executive and Non-Executive Defendants as directors, (iv) aiding and abetting against ICS, and (v) tortious interference with the Stock Purchase Agreement (the "SPA") between stockholders and Certus.

The Complaint focused on two primary areas of apparent wrongdoing: (i) unauthorized self-dealing transactions between ICS and Certus, and (ii) excessive, perhaps unapproved spending, primarily on the Company's headquarters. The Complaint detailed other conduct that was colorful, but likely amounted to nominal damages, such as certain Executive Defendants' purchases of used company cars for a few hundred dollars apiece. Plaintiffs also pleaded that other sums of money had been spent on perquisites, such as "multiple 30-minute [private jet] flights so that [the Executive Defendants] could personally try out more than 70 chairs for their offices," and condominiums replete with luxury items, such as personal gyms, hundred dollar paperweights, high-end electronics, and a wine cellar. The Complaint

alleged that the Non-Executive Defendants were aware of, but turned a blind eye to, the Executive Defendants' misconduct. (Foulds Aff. ¶ 17.)

No Defendant moved to dismiss. Even so, the allegations remained untested hypotheses based on a relatively limited Section 220 record. Plaintiffs' counsel were always aware that full document discovery could show that the ICS relationship was fair, that the headquarters lease was Board-approved, and that the other examples of lavish spending reflected nothing more than poor business judgment. Nevertheless, counsel sensed that these limited facts pointed to larger, more endemic problems at Certus. As it turned out, discovery complicated both of the initial, primary legal theories, and reformulating those legal theories involved time and creativity. It also required extraordinary effort to obtain documents and deposition testimony that would allow us to credibly threaten tens of millions of dollars in potential damages. (*Id.* ¶ 18.)

B. The ICS Claim Required Months of Party and Third-Party Discovery

Based on the Section 220 production, Plaintiffs were able to plead irregularities in ICS's hiring practices and rates, including nepotism and rates charged to Certus that greatly exceeded the cost to ICS. Plaintiffs also

understood at the time (although this later proved to be inconsistent with the full discovery record) that there had been no Board approval of the ICS relationship. (*Id.* ¶ 19.)

On February 10, 2016, Plaintiffs served document requests. (Trans. ID 58556975.) Promptly after receiving Defendants' responses and objections, we contacted Defendants for a production schedule. Plaintiffs also promptly prepared a full schedule through trial, which resulted in weeks of further negotiation. (Foulds Aff. ¶ 20.)

From March 2016 through the date the parties reached an agreement-in-principle on November 21, 2016, Plaintiffs and Defendants engaged in unrelenting discovery practice. (*Id.* ¶ 21.) We faced significant resistance in obtaining documents and deposition testimony. (*Id.*) The parties had at least four global meet and confers. (*Id.*) We exchanged hundreds of items of correspondence. (*Id.*) In particular, Plaintiffs were regularly forced to make numerous requests before receiving substantive responses to document collection and production issues – *e.g.*, "We served our discovery requests over two months ago. We've had three meet and confers. I sent an email and left a voicemail last Friday to which you did not respond. We still don't have ***any*** information about the documents in your clients' possession . . .

and what steps are being taken to complete a forensically-sound document collection and review." (Ex. 6.)

1. Plaintiffs' undertake large-scale document review and production

After months of unremitting persistence, almost all of the Defendants eventually relented, and produced a wealth of valuable information. The Executive Defendants produced 80,000 pages, the Non-Executive Defendants produced 30,000, and Certus (in large part through Grant Thornton, LLP, the Non-Executive Defendants' forensic accountant) produced over 8,500,000 documents. (Foulds Aff. ¶ 22.)

In response to Plaintiffs' document requests, Defendants unleashed their own. On March 8, 10, and 11, 2016 and then on May 27, 2016, Defendants separately served four sets of documents requests. (Foulds Aff. ¶ 23.) It bears noting that, unlike some stockholder actions, the Plaintiffs here are entities with fund managers and document management systems. Defendants sent four pages of search terms that resulted in over 10 million document hits. (*Id.*) Plaintiffs' counsel ultimately narrowed the terms, and worked diligently with a vendor and the clients to harvest over 200,000 documents. (*Id.*) Before settlement was reached, Plaintiffs had made 12

productions of 60,000 pages, double the number the produced by the Non-Executive Defendants and nearly as many as the Executive Defendants. (*Id.*)

By applying consistent effort, Plaintiffs were able to obtain requested discovery. Only on one occasion did Plaintiffs need to seek judicial intervention. (D.I. 73 & 90.)

2. With Party and Non-Party Discovery, Plaintiffs Re-Align the ICS Claim

In the spring of 2016, Plaintiffs' counsel came to believe that the strongest theory of liability was that the Executive Defendants used the ICS entities to overcharged Certus, which constituted both a breach of fiduciary duty and tortious interference with the SPA. (Foulds Aff. ¶ 25.) Based on the Section 220 production, between April 2011 and February 2014, Certus paid almost $10 million to ICS; this accounted for almost all of ICS's revenue. (*Id.*) That also meant that the damages attributable to the strongest claim were capped at about $10 million. (*Id.*) During party discovery, Plaintiffs learned that their original theory was flawed, and that the claim was likely worth less than $10 million. (*Id.*) Nonetheless, Plaintiffs hit pay dirt that allowed us to extract significant value for this claim. (*Id.*)

Based on the Section 220 production, Plaintiffs pleaded that the Board never approved the ICS engagement, which violated the SPA. The SPA that Certus stockholders had entered into with the Company contained a protection against self-dealing. Section 5.13 of the SPA provides that as of the date that Certus closed on its first bank acquisition, "the aggregate amount accrued by ICS for services provided to the Company and expenses paid by ICS on the Company's behalf may not exceed $570,000." (Ex. 9, CW00000008, at 53.) Certus could engage ICS to perform additional services following the first closing, but *only if* (i) "the terms on which such services are provided are no less favorable to the Company than the terms that could be obtained from a third party provider" and (ii) "that the engagement has been approved by a majority of the Independent Directors." (*Id.*)

Unfortunately, party discovery complicated what Plaintiffs had hoped was a rifle-shot claim. As documents subsequently produced by the Executive Defendants indicated, on February 22, 2011, the Certus board met and did approve (i) the reimbursement of ICS's fees that had already been incurred and (ii) the ongoing retention of ICS, provided its rates were at or below other third-party providers. (*See* Ex. 10, JDW00005654, 5662.)

Plaintiffs' counsel then re-aligned the claim to focus on whether the ICS transactions were at market and entirely fair. Based on a document produced by JDW, we believed that there were material issues of fair dealing because some of the supposedly "independent" Certus directors may have had interests in ICS. (Ex. 11, JDW00005650.) Further discovery showed that an undisclosed majority of the directors in attendance at the meeting approving the ICS engagement had interests in ICS. Targeted requests for admissions confirmed that Defendant Robert Brown was a part-owner of ICS, and that Defendant Wright was named as a member of ICS's advisory board. (Trans. ID 59021748.) Defendant Jones's deposition confirmed that Edward J. Brown was also a part-owner of ICS, thereby making a majority of the Board conflicted in the decision to approve the ICS engagement. (Ex. 12 ("Jones Dep."), at 70.)

In terms of price unfairness, Plaintiffs' counsel perceived two primary difficulties. One was that ICS appeared to have done actual work for Certus, albeit at inflated prices. (Foulds Aff. ¶ 29.) If so, the damages would likely be a fraction of $10 million. (*Id.*) The Defendants also argued that, just like a law firm, it was natural for ICS to charge more for its personnel than ICS paid those individuals. (*Id.*) The second hurdle was that the Board had

commissioned an accounting firm, Dixon Hughes Goodman, to prepare a report showing, according to the Executive Defendants' interpretation, that ICS's rates were not unfair (the "Dixon Hughes Report"). (*Id.*) The Dixon Hughes Report was not prepared at the time of the underlying events, and Plaintiffs believed that it relied on unverified rates from questionably comparable firms. (*Id.*) Plaintiffs' counsel therefore knew that contemporaneous documents concerning ICS's rate-setting, hiring, and billing practices were important to challenge the Dixon Hughes Report. (*Id.*)

Plaintiffs subpoenaed Certus's former financial advisors, Goldman Sachs & Co. and FBR Capital Markets, Inc., and discovered that, in connection with its efforts to raise private capital for Certus, Goldman had insisted that Certus significantly reduce its spending, including by "wind[ing] down ICS to ZERO" and by requiring Certus executives to perform an "Expense Rationalization" in furtherance of cost-cutting initiatives. (Exs.13-14.) Handwritten notes produced by the Non-Executive Defendants also reflected Certus's former CFO, German Soto, reported to the Board that it would be "cheaper to bring [ICS's services] inside" than to continue to engage ICS. (Ex. 15, NED00001792, at 1795.)

3. ICS resists discovery

Plaintiffs had extreme difficulty, however, getting discovery about ICS from ICS, JDW, and their confederate, Jonathan Charleston, Certus's former General Counsel and corporate secretary. (Foulds Aff. ¶ 31.) Ultimately, Plaintiffs discovered why: ICS had destroyed documents. Uncovering this spoliation took an enormous amount of time, energy, and persistence.

For months after serving requests in February 2016, Plaintiffs pressed for document collection information and productions from JDW. (*Id.* ¶ 32.) JDW refused to produce documents created after June 1, 2014 on relevance and burden grounds. (*Id.*) Plaintiffs met and conferred with JDW, who were cagey about disclosing the devices they used or the hit counts of documents after June 1, 2014. (*Id.*) JDW nevertheless assured us that they had "preserved Certus-related materials from April 2014 on." (*Id.*)

For its part, ICS could not identify where its documents were or what happened to them. (*Id.* ¶ 33.) ICS made several troubling statements that Plaintiffs discovered were contradicted by documents produced by other parties. (*Id.*) For example, Plaintiffs asked ICS for all responsive documents in Jonathan Charleston's possession. (*Id.*) ICS reported to

Plaintiffs: "I do not believe that Mr. Charleston has ICS-related documents that are responsive to Plaintiffs' requests for production. During the relevant time period, he was not involved in the management of ICS, but was instead solely a member." (*Id.*) Discovery revealed that statement was inaccurate. The Master Services Agreement and the operative Statements of Work between ICS and Certus were signed by Jonathan Charleston as ICS's "Managing Partner." (Exs. 16, at PL0001241, 1251 & PL0001259, 1263.)

A second example was an April 6, 2014 letter authored by ICS's CEO, Sammy Hicks. (*See* Ex. 18.) Plaintiffs only found this letter because it happened to be available on the internet.[5] Sammy Hicks wrote to the Charlotte City Council "in support of former City Council member, James 'Smuggie' Mitchell, and his desire, passion and quest to be Mayor of the City of Charlotte." Sammy Hicks explained that Smuggie Mitchell worked for ICS, but insisted that Mitchell did not work in ICS's "Asset Management division, which serviced Certus," and "did not do any work for the Certus' [sic] Master Servicing Agreement." (*Id.*)

These representations demonstrated that ICS overbilled Certus and that ICS had other relevant documents. Despite Sammy Hicks's

[5] (*See* http://media.bizj.us/view/img/2373241/ics-letter-charlotte.pdf.)

unequivocal, public representation that Smuggie Mitchell did no work for Certus, several invoices reflect that ICS billed Certus for work attributed to Mitchell. (*See* Ex. 19.) The letter was also drafted on ICS letterhead, listing its Charlotte headquarters. Plaintiffs asked on numerous occasions where the computers and hard copy documents from ICS's Charlotte office were. No Defendant could answer. (*See, e.g.*, 20 ("We've also asked several times where all the computers and documents from the Charlotte office are, and have not gotten a response.").)

4. Creative Detective Work Uncovers Document Destruction at ICS

After repeated inquires of ICS, on April 27, 2016, Plaintiffs noticed ICS's Rule 30(b)(6) deposition for the purpose of finding out what ICS documents existed and how they were destroyed. (Foulds Aff. ¶ 36.) ICS continuously delayed the deposition, claiming to need until June (four months after the discovery had been served) to discuss the locations of responsive documents. (*Id.*) To forestall the deposition, on May 11, ICS produced a cherry-picked email chain from May 28, 2014 (Ex. 21), and then created the impression in an email that JDW had preserved ICS documents:

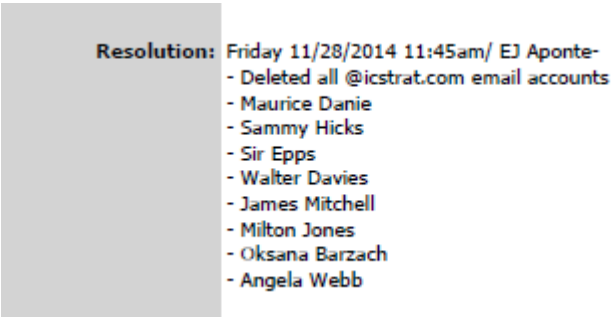
> With respect to the status of the emails, in approximately May 2014, Walter Davis learned that NetEffect [ICS's email vendor] was

> claiming that it had been advised by Mr. Hicks to delete Oksana Barzach's data. (Ms. Barzach was ICS's senior accountant.) Mr. Davis immediately contacted Mr. Hicks and said "As you know, there is a document hold on everything." Mr. Hicks disputed that he had had contact with NetEffect, and that the source of information at NetEffect was incorrect."

ICS also claimed that ICS was effectively "wound up by July 2014." (Foulds Aff. ¶ 36.) At the same time, JDW continued to refuse to produce documents created after June 1, 2014. (*Id.*)

Based on these and other inconsistencies, including the false statements concerning Charleston's involvement in the ICS-Certus engagement, Plaintiffs' counsel tracked down two of ICS's former IT vendors, including neteffect technologies, LLC ("Neteffect"). (*Id.* ¶ 37.) Plaintiffs subpoenaed them. (D.I. 59 & 61.) Both vendors disclaimed responsibility, and pointed the finger at each other (one of which would not speak on the phone and blocked emails requesting a meet and confer). Neteffect eventually produced documents.

In those documents, Plaintiffs' counsel found the following entry included within a log of service tickets:



(Ex. 22.) With this lead, Plaintiffs made additional targeted requests with Neteffect, and used the documents Defendants had produced in discovery (combined with a search for litigation filings in the South Carolina state court system) to piece together exactly why ICS had no documents and why JDW were refusing to produce documents after June 1, 2014. (Foulds Aff. ¶ 38.) The answer was that ICS had destroyed documents after being ordered by a South Carolina court to produce them in June 2014 in response to a subpoena by the South Carolina Attorney General. (*Id.*) This detective work was painstaking:

a. ICS had a duty to preserve documents

As early as late 2013, the Executive Defendants knew or should have known that they had a duty to preserve documents, when stockholders began sending increasingly alarming letters to the Board to take immediate action. (*Id.* ¶ 39.) In early 2014, the Non-Executive Defendants formed a special committee to investigate wrongdoing. (*Id.*) On March 21, 2014, counsel for

the committee sent the Executive Defendants a legal hold notice, instructing them "to identify and hold in place all records in your possession or control regarding or relating to the business and affairs of the Company, whether in paper or electronic form and wherever it may reside, including but not limited to email, paper correspondence, voicemail, notes, and documents. With respect to electronically stored information, you have a duty to not alter or delete such information." (*Id.*)[6]

b. The South Carolina Attorney General obtains an order compelling ICS documents

Shortly thereafter, the Executive Defendants were terminated, and on April 9, 2014, the South Carolina Attorney General's office subpoenaed ICS concerning its overbilling of Certus. (*See* Ex. 23, PL002097, at 2101.) On May 23, 2014, the Attorney General sought to enforce the subpoena after ICS objected, and on the same day, the South Carolina trial court issued a Rule to Show Cause why ICS should not be ordered to produce documents. (*Id.* at 2102.)

[6] On April 23, 2014, Defendants Davis, Jones and Webb filed a complaint in federal court against 3-Sigma, Ben Weinger (3-Sigma's Portfolio Manager) and Certus for defamation and wrongful termination, and thus were in active litigation, and therefore would be deemed to know that they needed to preserve all Certus-related documents.

c. **Plaintiffs piece together the document destruction**

By May 28, 2014, ICS had already requested that data from 20 ICS employee emails be purged and deleted forever, and that ICS's CEO, Sammy Hicks, knew it. (Foulds Aff. ¶ 42.) As described in the May 28, 2014 email sent by ICS to delay the deposition, Sammy Hicks also requested that Neteffect delete Oksana Barzach's email account specifically, and not back up the data. (*Id.*)

What ICS did not disclose to Plaintiffs was that, at around the same time in May 2014, the remaining email accounts at ICS, which had previously used the domain icsllc.us.com, were transitioned to a new domain, icsstrat.com. (*Id.* ¶43.) The icsstrat.com domain included email accounts for JDW, along with Sammy Hicks, Oksana Barzach, Smuggie Mitchell, and Sir Epps (an ICS manager, who billed time to Certus). (*Id.*) Neteffect's documents indicated that the existing data from the isclls.us.com emails for these individuals was kept intact and transferred to their icsstrat.com email accounts. (*Id.*)

On June 25, 2014, the South Carolina trial court ordered ICS to comply with the Attorney General's subpoena and to turn over its documents. (Ex. 23, PL002097 at 2102.) On July 9, 2014, JDW's IT agent,

named Bob Simons, began a bizarre email exchange with Neteffect. He asked for the login information for the icstrat.com email accounts, and said: "Please act like you never gave it to me before," and then asked that it not be sent by email, but rather "by text message." (Foulds Aff. ¶ 44.) Shortly thereafter, on July 29, Sammy Hicks told Neteffect that he had resigned and that he was "turning in all equipment." (*Id.*)

Neteffect's Director of Managed Service wrote to the technician:

[redacted] (*Id.* ¶ 45.) He added that [redacted] (*Id.*) One day later, on July 30, Neteffect's technical support personnel alerted their managers that [redacted] (*Id.*)

The same day, ICS appealed the court order requiring it to turn over its documents to the Attorney General. (*Id.* ¶ 46.) Shortly thereafter, on September 15, 2014, Defendant Webb wrote to Neteffect, copying Defendants Jones and Davis, and ordered the document purge: "[W]e would like to terminate our services with Neteffects **immediately**." (Ex. 24,

Neteffect0000233 (emphasis in original).)[7] ICS's email services were terminated, and the icstrat.com emails and data for Angela Webb, Walter Davis, Milton Jones, Oksana Barzach, James Mitchell, Sammy Hicks and Sir Epps were, by all accounts, permanently destroyed. (Foulds Aff. ¶ 46.)

The email account that Webb had used to write the "terminate our services" email was not apparent in the Bates-stamped document. (*Id.* ¶ 47.) We were, however, able to determine from the native version of the file that Webb wrote the email from her @icstrat.com email account and copied Davis's and Jones's @icstrat.com email accounts, knowing that she was covering her tracks because the email would itself be deleted from their accounts when the services were terminated and the accounts purged. (*Id.*) What Webb did not realize was that Neteffect kept a copy of the inbound email and that years later Plaintiffs would doggedly pursue the truth.

[7] Defendants Webb, Jones, and Davis knew that the termination of Neteffect's services meant the emails would no longer be hosted and would be destroyed. Defendants Webb and Davis were on an earlier email chain in which Neteffect told ICS that, unless ICS requested a backup, the termination of an email account would result in the documents being "purged." (*See* Ex. 25, at Neteffect00000246.)

5. After Plaintiffs Obtain a Court Order, Defendant Jones Sits for Deposition on Behalf of ICS

Following an unsuccessful mediation in July, Plaintiffs renewed their efforts get someone at ICS under oath and on the record, but this proved to be a challenge. (*Id.* ¶ 48.) On August 22, 2016, Plaintiffs requested a deposition date in September. (*Id.*) Thereafter, Plaintiffs sent two follow-up emails. (*Id.*) ICS did not respond. (*Id.*) On September 14, 2016, Plaintiffs re-noticed the Rule 30(b)(6) deposition for September 28, 2016. (Trans. ID 59558643.) Thereafter, Plaintiffs sent three emails related to the deposition's logistics. (Foulds Aff. ¶ 48.) ICS did not respond. (*Id.*)

On September 21, 2016, a week before the noticed deposition, ICS's counsel filed a motion to withdraw. (D.I. 68.) Shortly thereafter, ICS's counsel mistakenly reported to the Court that Plaintiffs had consented to the withdrawal, and Plaintiffs promptly filed an emergency motion because the Rule 30(b)(6) deposition we had been requesting for months could not go forward without counsel. After expedited briefing and argument, this Court ordered ICS to obtain counsel and appear at the deposition. (D.I. 73, 77, 81, 86, and 90.)

Defendant Jones appeared at the deposition on behalf of ICS. (Foulds Aff. ¶ 50.) Despite the attendance of five of his own lawyers, Jones was conspicuously uneducated about the events concerning Webb's "terminate all services" email. (*Id.*) After numerous further requests, ICS eventually agreed to re-produce Jones in Delaware for deposition. (*Id.*)

Jones's testimony was nevertheless valuable for building the entire fairness case respecting the ICS engagement. Jones testified that Jonathan Charleston acted for ICS by signing the Master Services Agreement and Statements of Work between ICS and Certus, even though he was simultaneously (i) an ICS owner and its lawyer, and (ii) Certus's General Counsel and corporate secretary. (Jones Dep. at 67, 167, 169; Ex. 26, JDW0000183 at 214.) Defendant Jones testified that "it never occurred" to him that this might be an issue. (*Id.*)

Jones confirmed that a majority of the directors (Jones, Davis, Williams, Edward J. Brown, and Robert J. Brown) in attendance at the 2011 Board meeting approving the ICS engagement were owners of ICS. (Jones Dep. at 70.) Jones also confirmed that, even though a majority of the directors were conflicted, Certus did not put in place any procedural protections. (Jones Dep. at 82.)

The testimony allowed Plaintiffs to build a record that the failure to put in place any procedural protections allowed the Executive Defendants to upcharge Certus for employees and independent contractors that Certus could (and in some cases later did) hire itself. Among other similar examples, Tony Oglesby charged ICS $100 an hour as an independent contractor, but ICS then billed Ogelsby to Certus for $335 per hour. (Jones Dep. at 92-93.) Jones admitted that ICS could not explain "the details of how the rates were determined." (*Id.* at 262.) When asked why Certus could not have hired Oglesby itself for $100 per hour, Mr. Jones testified that "Certus didn't have the awareness of Mr. Oglesby like ICS did," but Jones readily admitted that statement was inaccurate. (*Id.* at 94-95.) Defendant Williams, a Certus executive, was the individual that was aware of, met with, and hired Ogelsby. (*Id.* (Q: "You said that Certus didn't have the awareness to hire Mr. Oglesby, but Charlie Williams is the one who was aware of Mr. Oglesby, right?" A: "Right.").)

Defendant Jones also stated that the inflated pricing could be accounted for by "overhead" like the rent for ICS's office and "benefits," but then conceded that Oglesby never used any space in ICS's offices and, as an independent contractor, did not receive any benefits. (Jones Dep. at 261-262

(Q: "You said Mr. Oglesby got benefits. What benefits did he receive?" A: "Well, I'll take the word 'benefits' back."). Jones also testified that in 2012 Webb caused Certus to assume most of the payment obligations on ICS's Charlotte office lease. Dispensing with any pretense of fair dealing, Webb negotiated on behalf of, and signed for, both ICS and Certus:

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed as of the day and year first above written.

LANDLORD:

REXFORD PARK INVESTORS, LLC, a Delaware limited liability company

By: _____
Jeffrey A. Safchik, as President

TENANT:

INTEGRATED CAPITAL STRATEGIES, LLC, a Delaware limited liability company

By: _____
K. Angela Webb,
President

CERTUSHOLDINGS, INC., a Delaware corporation (formerly known as BLUE RIDGE HOLDINGS, INC.)

By: _____
K. Angela Webb,
~~Senior Executive Vice President~~
President

(Jones Dep. at 110-14.) Jones also conceded that ICS did not have its own human resources department because Certus personnel did the hiring for ICS. (*Id.* at 177-78; 262-63.)

The deposition also revealed that the Executive Defendants used a Certus employee, Janet Kahl, to handle ICS's accounting and financial reports, even though she was being paid by Certus. (*Id.* at 170-71.) When Janet Kahl attempted to have Certus pay for ICS's furniture, a Certus manager balked, and said that someone at Certus should be approving the purchase. (*Id.* at 265-66.) Defendant Webb interceded and approved the purchase, even though Webb was an owner of ICS. (*Id.*) Defendant Jones again testified that he thought this self-dealing was "fine." (*Id.*)

* * * * *

In sum, Plaintiffs' counsel turned what could easily have been a vacuum of information about ICS into substantial evidence of disloyalty. Moreover, based on the document destruction, Plaintiffs could now argue that any absence of evidence should be construed against ICS and JDW. Plaintiffs could argue that the Court should enter a default judgment for the entire $10 million or, at least, award an adverse inference that the absence of documents meant that ICS was hiding evidence that it bilked Certus. The

document destruction also created collateral pressure on the Executive Defendants due to the parallel regulatory investigations. Indeed, the litigation respecting the South Carolina Attorney General's subpoena was still making its way through the appellate courts, and the Office of the Comptroller of the Currency was apparently still investigating. (Foulds Aff. ¶ 56.)

C. The Lease Claim Develops into Tens of Millions of Dollars in Potential Damages

The second main area of wrongdoing pleaded in the Complaint involved extraordinary lease and renovation costs. The Complaint described an extraordinary lease expenditure for a new headquarters building in Greenville, S.C. (Foulds Aff. ¶ 57.) Based on an absence of evidence in the Section 220 production, we asserted that 140,000 leased square feet were not authorized by the Board. Plaintiffs' initial theory was that the leasing of the excess square footage was a self-interested act because the Executive Defendants used the 20,000 square feet that had been approved for their own palatial offices, including a personal fitness center and other luxury accoutrement, including (among many other examples) over $1million in artwork for the executive floor, fine china for the conference room, items

like a $1,000 caviar spoon, high-end furniture, including a $19,000 chair, and $46,000 on first edition volumes of poetry. (*See generally* Ex. 35.)

1. Plaintiffs develop and unusual legal theory respecting the lease claim

One difficulty with this theory was that the lease was not a classically self-dealing act; the Executive Defendants did not, for example, transfer the lease to themselves, or buy the art, sell it, and pocket the proceeds. Plaintiffs' counsel was also particularly mindful that excessive spending cases are often unsuccessful. *See Kahn v. Sullivan*, 594 A.2d 48, 61 (Del. 1991) (approving settlement respecting construction of museum to house Armand Hammer's art collection).

Plaintiffs then pivoted to a slightly different and unusual theory. (Foulds Aff. ¶ 59.) Based on case law from the 1940s and 1950s, we argued that, absent board authority, executive officers have no actual authority to bind the corporation to "unusual and extraordinary contract[s]." *Colish v. Brandywine Raceway Ass'n*, 119 A.2d 887, 891 (Del. Super. 1955) ("[T]he president of a private corporation is presumed to have, by virtue of his office, certain more or less limited powers in the transaction of the usual and ordinary business of the corporation. . . .") (citing *Italo-Petroleum Corp. of*

Am. v. Hannigan, 14 A.2d 401, 406, (Del. 1940)). We then combined that concept with principles of agency law: "If an agent takes action beyond the scope of the agent's actual authority, the agent is subject to liability to the principal for loss caused the principal." RESTATEMENT (THIRD) OF AGENCY § 8.09(b), cmt. b (AM. LAW. INST. 2006)*; see also* RESTATEMENT (SECOND) OF AGENCY § 383, cmt. e (AM. LAW. INST. 1958) ("The agent may be subject to liability to his principal because he has made an unauthorized contract for which his principal is liable. . . ."); 3 Am. Jur. 2d Agency § 217 (same).

Plaintiffs could not be sure that Executive Defendants, in fact, had no such authority. (Foulds Aff. ¶ 60.) In a very real sense, this claim was always one potential document away from collapsing. It was also uncertain whether the Court would agree that these cases applied in the modern world and on these facts.

2. Plaintiffs develop a factual record of unauthorized transactions

Plaintiffs' counsel contacted a former Certus executive and interviewed him about the lease. (*Id.* ¶ 61.) This individual explained that he could never entirely figure out what had happened, but that he believed that the Executive Defendants had not received approval and that they had

not been forthright with the Board about the ultimate costs. (*Id.*) Plaintiffs' counsel then engaged in a lengthy and detailed review of the discovery record to develop a timeline that showed that the Executive Directors lacked authority, failed to fully inform their fellow board members, and were therefore liable for tens of millions of dollars in damages:

In resolutions dated February 22, 2011, the Certus board resolved that "the ***officers*** of the Bank . . . ***are hereby authorized to*** prepare, ***execute*** and deliver in the name and on behalf of the Bank such agreement, ***contracts*** and other instruments with aggregate annual costs ***of less than $750,000*** as may be necessary to commence operations of the bank." (*Id.* ¶ 62.) According to a May 25, 2011 press release, Walter Davis got out ahead of the Board when he committed to "occupy 26,000 square feet" in the "Greenville One" building.[8]

[8] (*See* South Carolina Department of Commerce Press Release, *Certus Bank to Locate Corporate Headquarters and Create 350 New Jobs in Greenville County*, May 25, 2011 ("'We couldn't be happier to be establishing our new home in Greenville, especially in such an iconic development as the ONE project,' said CertusBank Vice Chairman Walter Davis, who is a Greenville native."), *available at* http://sccommerce.com/news/press-releases/certusbank-locate-corporate-headquarters-and-create-350-new-jobs-greenville-coun.)

It was not until June 23, 2011, however, that "Management recommended [to the board] that the Bank locate its corporate offices in the 'One Building.'" (*Id.* ¶ 63.) It was also not until June 2011 that the board resolved that "the officers of the bank are hereby authorized and directed in the name and on behalf of the Bank, to negotiate, execute, and deliver a lease agreement with Greenville One . . . for the purpose of leasing ***20,000 square feet*** of office space to accommodate the corporate operations and Main Office of the Bank." (*Id.*)

On October 31, 2011, Walter Davis executed a lease for 20,851 square feet. On the same day, Walter Davis also executed a separate lease for an additional 7,356 square feet also in the "Greenville One" building. (*Id.* ¶ 64.)

Over a year later, on December 21, 2012, Walter Davis as co-CEO entered into the 140,000 square foot lease. (*Id.* ¶ 65.) Based on the Company's accounting records, Plaintiffs calculated the lease liability at approximately $150 million: almost $100 million in lease costs, $30 million in renovation costs, and $25 million for five years of operational costs, such as furniture. (*See* Ex. 27.) That figure was consistent with a $150 million

increase in the Company's long-term lease liabilities in its financial statements from year-end 2011 to year-end 2012. (Foulds Aff. ¶ 65.)

Davis's lack of authority to enter into a $150 million lease is evident from a subsequent February 20, 2013 board resolution to increase the officers' "signature authority to approve execute and deliver . . . contracts and instruments (including but not limited to . . . ***real estate agreements and leases*** . . .) up to ***$2,000,000***." (*Id.* ¶ 66.)

3. Plaintiffs expand the number of unauthorized leases

In the accounting documents, Plaintiffs' counsel also discovered that there were other large lease and renovation projects about which we had not known, including the penthouse of a tony Atlanta office building, called the Proscenium, and another multi-million dollar office project in Charleston, S.C. (*Id.* ¶ 67.) After requesting and analyzing these additional lease documents and Company records, Plaintiffs determined that they too were never Board-approved. (*Id.*)

4. Plaintiffs develop a damages theory to threaten tens of millions of dollars in damages

The next challenge was what could be claimed as damages. Further targeted document discovery of the Company and an analysis of reports filed

with banking regulators reflected that (i) in 2014, Certus recorded a $27.42 million "loss on vacated leased space and impairment of fixed assets"; (ii) in the first quarter of 2015, Certus announced that it took a $21.7 million charge for "losses on improvements and leased vacant space"; and (iii) in the third quarter of 2015, Certus's Office of the Comptroller of the Currency call report reflected a $20 million "loss on leased vacant space." (*Id.* ¶ 68.) Complicating matters further, in the same quarter, Certus converted to "liquidation accounting," which resulted in a $45 million loss. (*Id*.)

In terms of damages, these figures were large, but there were disaggregation and tracing issues because it was uncertain whether these figures related to the specific leases at issue. (*Id.* ¶ 69.) These figures were also "accounting" losses, and it was unclear whether they fairly represented actual damages. (*Id*.) Moreover, there were no longer any full-time employees at Certus that we could depose to testify about how the accounting was done. (*Id.*)

By mining the email productions, Plaintiffs located communications about accounting impairments that led to the underlying documents that the accountants had used. (*See* Ex. 28.) Those documents provided details of "fixed assets" and "leased facility operating costs," and other documents that

contained what we understood were the remaining lease obligations after the Company had mitigated damages and negotiated resolutions with landlords. Looking at the amounts that the Company had actually spent allowed Plaintiffs to credibly argue for tens of millions of dollars in damages.

The extraordinary lease renovation and fit out costs (*i.e.*, the "fixed assets") for five of the leases alone totaled over $50 million:

Source of Damages	**Fixed Assets**
Greenville One West Tower (Seven Floors)	$29,300,000
Greenville One North Tower (Executive Floor)	$11,500,000
Proscenium Atlanta (Penthouse Floor for Milton Jones)	$3,200,000
Greenville One Flagship Branch (Ground Floor)	$3,500,000
Charleston (Branch with Offices)	$3,800,000
TOTAL:	**$51,300,000**

Certus's rent for its high-end, bespoke office space, much of which the Company never used and almost all of which sat empty for years, was reflected in "Operating Costs." For only two years for just five leases alone, the total was $18 million:

Source of Damages	Annual Amount
Greenville One West Tower (Seven Floors)	$5,200,000
Greenville One North Tower (Executive Floor)	$1,200,000
Proscenium Atlanta (Penthouse Floor)	$900,000
Greenville One Flagship Branch (Ground Floor)	$500,000
Charleston (Two Floors)	$1,200,000
ONE YEAR TOTAL:	$9,000,000
TWO-YEAR TOTAL:	**$18,000,000**

The remaining lease obligations were as follows:

Source of Damages	Amount
Greenville One West Tower (Two of Seven Floors)	$461,000
Greenville One North Tower (Executive Floor)	$12,249,000
Greenville One Flagship Branch (Ground Floor)	$4,274,000
TOTAL:	**$16,984,000**

5. Seven Months of Negotiations Over Investigative Materials Produced Key Documents That Undermined Defendants' Primary Defense

As expected, the Executive Defendants had a defense. The Executive Defendants asserted that, even if the Board did not provide pre-approval, the full Board subsequently "ratified" all of these lease expenditures. (*Id.* ¶ 74.)

Specifically, at the April 10, 2013 Board meeting, the Executive Defendants presented a budget that listed "Capital Projects" on the last page, which included several lease projects. (*Id.*)

The true costs were obscured in the budget. The rental payments on the leases were not included, and the "2013 P&L Impact" was only $1 million (presumably due to the capitalization and amortization of the fixed assets over the life of the leases). (*Id.* ¶ 75.) Further analysis of the discovery record revealed a key counterargument that provided us with the confidence to stick to the position that this case needed to settle for something close to $20 million.

a. Plaintiffs study the tax incentive agreement and statutes to find a hole in the "ratification" defense

When the Former Executives obtained the limited authority to lease 20,000 square feet in June 2012, they "advised the Board that Management negotiated and received approval of $22 million in job development incentives from the South Carolina Department of Commerce," which the Former Executives stated were "based upon the bank creating 350 jobs in the State of South Carolina over the next five years." (Ex. 29.) Plaintiffs' counsel then studied that tax incentive agreement, which required an

analysis of complicated statutory provisions, and determined that the potential benefit to Certus was never close to $22 million. (Foulds Aff. ¶ 76.)

Incredibly, the Executive Defendants never did the work that Plaintiffs' counsel had. They never read the agreement, never understood it, or ignored the actual terms, so they could build an executive palace for themselves. Importantly for purposes of their ratification defense, they never informed the Board in April 2013 that the tax agreement would not provide $22 million. Without being provided full information by the Executive Defendants, the Board could not have "ratified" the leases.

b. Plaintiffs overcome a potential reliance on counsel defense after seven months of negotiation leads to unprecedented access to discovery

The Executive Defendants then belatedly produced a memorandum from Jonathan Charleston that also advised the Board that Management negotiated and received approval of $22 million in job development incentives. (Ex. 30.) Given that the Executive Defendants willingly produced a memorandum authored by a lawyer, it appeared that the Executive Defendants were setting up a reliance on counsel defense.

Plaintiffs then obtained the documents that the Non-Executive Defendants collected as part of their investigation, which Plaintiffs believed would squarely rebut the ratification defense. (Foulds Aff. ¶ 79.) It took seven months to negotiate with multiple parties and non-parties to get these documents.

The Non-Executive Defendants had asserted the so-called "bank examiner privilege" over the investigative materials they had gathered and created after the Executive Defendants left the Company. (*Id.* ¶ 80.) Plaintiffs undertook to coordinate a waiver from the legal department of the OCC, which controlled the privilege. (*Id.*) That effort involved numerous telephonic and written requests over the course of many months, and which culminated in a formal, written request to the OCC by the Non-Executive Defendants. (*Id.*)

The OCC began calling to obtain updates on this litigation. (*Id.* ¶ 81.) Through that process, [redacted] (*Id.*) That created another pressure point because Defendants (and the carriers) knew the work that Plaintiffs were doing uncovering wrongdoing could be used by the government to bring charges or other actions against the Defendants. More

importantly for discovery purposes, the OCC agreed with Plaintiffs' position that, although the investigative report might have been subject to a privilege, the underlying documents that formed the basis of the report were not. (*Id.*)

That allowed Plaintiffs to obtain unprecedented access to Company documents that had been collected by Grant Thornton, the forensic accountant that the Non-Executive Defendants had hired as part of their investigation. (*Id.* ¶ 82.) Grant Thornton had collected ***5 terabytes*** of data, which included all the Executive Defendants' work email accounts, computers, cell phones, and other devices. (*Id.*) The production included hundreds of email accounts with approximately ***8.7 million messages***. (*Id.*)

Five months after we made the initial request for Rule 510 Quick-peek Order (including a month of heavy drafting and negotiation over terms), we filed the Order and pressed for prompt production of the documents. (*Id.* ¶ 83.) At around the same time, we were informed that the Non-Executive Defendants would no longer be producing the documents, but instead we would need to subpoena Grant Thornton, which Plaintiffs promptly served. (*Id.*)

Ultimately, after seven months of effort, Plaintiffs obtained four hard drives with over 8.5 million Company documents created during the relevant

period. (*Id.* ¶ 84.) Among those documents, Plaintiffs located the drafting history of Charleston's memorandum to the Board, which revealed that it had been edited in a way that obfuscated the square footage the Executive Directors intended to lease. (Ex. 31.) The documents also included emails to Defendant Webb in January 2013, three months before the supposed "ratification" occurred, that stated in no uncertain terms that the maximum Certus could expect to receive from the tax credits was about $6 million, not $22 million. (Ex. 32.) The Executive Defendants either authored the documents or received them. Thus, once we had full access to all of their documents, they knew that it was only a matter of time until their "ratification" defense unraveled. Shortly thereafter, the parties reached the settlement.

D. Mediation of the Dispute with Robert A. Meyer, Esq.

The settlement was the result of a months-long mediation effort that culminated in a mediator's proposal by Robert A. Meyer, Esq. (Foulds Aff. ¶ 85.) Meyer is a nationally-recognized complex litigation dispute resolution specialist. He is a Fellow of the American College of Trial Lawyers and has served as a mediator or assisted in the mediation of dozens of securities and derivative actions, including (i) 21 Institutional Investors/JP

Morgan, which involved repurchase and securities claims against RMBS trusts that resulted in a $4.5 billion settlement; and (ii) *In re AOL Time Warner Securities Litigation* (S.D.N.Y.), which resulted in a $2.5 billion settlement. (*See* Exs. 33-34.)

The mediator's proposal issued after months of settlement negotiations, including a full-day mediation on July 14, 2016, between Plaintiffs, Defendants, and the entire insurance tower in San Francisco, CA, and a separate mediation amongst Defendants and the carriers in New York, NY in August 2016. (Foulds Aff. ¶ 85.) After the initial mediation sessions were unsuccessful, Mr. Meyer conducted numerous telephonic conferences and oversaw direct party negotiations over settlement terms that extended from the initial July mediation session through the presentation of the filing of the settlement papers on February 8, 2017. (*Id.*)

If the $19.2 million settlement (the "Settlement Amount") is approved by the Court, the Settlement Amount, plus any and all interest earned on that amount while held in the settlement escrow account (the "Settlement Fund"), less the $600,000 payment to Certus for its outstanding Delaware state tax obligations and less any attorneys' fees and expenses awarded by Court to Plaintiffs' counsel, any Notice and Administration Costs, and any Taxes (the

"Net Settlement Fund"), shall be allocated among and distributed directly to all "Eligible Stockholders," which are the current stockholders of record excluding Defendants and certain other former officers and directors.

E. The Settlement Hearing

On February 20, 2017, the Court approved the proposed notice of settlement to stockholders (the "Notice") and entered a Scheduling Order that scheduled a settlement hearing for April 10, 2017, at 10:00 a.m.[9] As the Notice stated, objections to the Settlement or the requested award of attorneys' fees and costs are due no later than March 31, 2017. To date, Plaintiffs' counsel has received no objections.

Plaintiffs respectfully request that the Court certify the Class, approve the Settlement and award Plaintiffs' counsel $4.25 million in attorneys' fees and expenses for the benefits conferred by the Settlement.

[9] An affidavit regarding mailing of the notice is filed concurrently with this brief.

ARGUMENT

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

Delaware law has long favored the voluntary settlement of contested claims. *See, e.g., In re Triarc Cos., Inc. Class & Deriv. Litig.*, 791 A.2d 872, 876 (Del. Ch. 2001); *Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991). In reviewing a proposed class or derivative settlement, "the Court must determine, using its business judgment, whether the settlement terms are fair, reasonable, and adequate." *Ryan v. Gifford*, 2009 WL 18143, at *5 (Del. Ch. Jan. 2, 2009).

The factors to be considered are: "(1) the probable validity of the claims, (2) the apparent difficulties in enforcing the claims through the courts, (3) the collectability of any judgment recovered, (4) the delay, expense and trouble of litigation, (5) the amount of the compromise as compared with the amount and collectability of a judgment, and (6) the views of the parties involved, pro and con." *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986); *Kahn*, 594 A.2d at 58-59. The Court's most important inquiry is the balance between the value of the benefits achieved and the strength of the claims being compromised. *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1284 (Del. 1989); *Polk*, 507 A.2d at 535.

The Settlement here reflects Plaintiffs' and Plaintiffs' counsel's informed judgment regarding the strength of the claims and defenses, the probabilities of success at summary judgment, trial, and appeal, the collectability of any potential judgment, and the benefits to Certus's stockholders of a significant monetary recovery before the materialization of any risks to Plaintiffs' claims or further depletion of D&O insurance. For the reasons set forth below, Plaintiff and Plaintiffs' counsel respectfully submit that the Settlement is in the best interests of the Class and the Company and ask that it be approved.

A. The Significant Benefits Achieved for the Settlement Class and the Collectability of Any Potential Judgment

The benefit provided by the Settlement here is clear and significant, a monetary recovery of $19.2 million. Plaintiffs respectfully submit that this is an outstanding outcome in light of the difficulties that would have been faced in collecting any judgment. Through extensive pre-filing investigatory efforts and post-filing discovery efforts, Plaintiffs' counsel developed a strong record that showed how the Former Executives abused their fiduciary positions to skim money, fund lavish lifestyles, and create the patina of success, and in the process caused the decimation of the Company.

As detailed in the Statement of Facts, Plaintiffs' counsel developed a record that indicated, among other things, (i) the Former Executives falsely represented to the Board that Certus obtained $22 million in tax credits to build a new headquarters; (ii) the Former Executives exceeded their Board granted authority when they authorized several massive transactions, including the catastrophic headquarters' lease, which crippled the Company and directly led to its collapse; (iii) the Former Executives caused the Company to retain ICS, their separate private Company, without proper controls in violation of the Stock Purchase Agreement; and (iv) ICS (and/or the Executive Defendants) engaged in document destruction.

Although Plaintiffs developed a powerful record of wrongdoing, there was a real risk that litigating the case through trial would have depleted any recovery. Four of Delaware's top defense firms, each of which fought Plaintiffs' counsel strenuously throughout the discovery process, represented the Defendants.

The $19.2 million settlement recovery is an especially favorable outcome based on the amount of money reasonably available to satisfy any eventual judgment. *See In re Coleman Co. Inc. S'holders Litig.*, 750 A.2d 1202, 1208 (Del. Ch. 1999), *as revised* (Nov. 22, 1999) ("Thus, even though

plaintiffs raise colorable claims, the delay, expense, and trouble of litigation coupled with serious collectability problems seem to justify the proposed settlement agreement.").

Based on their knowledge of the Company and the Defendants, Plaintiffs and Plaintiffs' counsel had strong reason to believe that none of the Defendants had significant personal assets and most, if not all of them, were judgment proof. Certus and ICS are defunct, and the primary wrongdoers, the Executive Defendants, would understandably have had difficulty returning to any banking position, given their involvement in Certus's collapse. As a result, even if Plaintiffs had litigated these claims through trial and prevailed, Plaintiffs would have faced great difficulty collecting on any judgment from the Defendants.

The only significant pot of money available to compensate Plaintiffs for the harms suffered by the Defendants was the Company's D&O insurance policies, which had an aggregate limit of approximately $50 million. The settlement fund of $19.2 million represents more than 38% of the maximum amount of theoretical insurance available. In reality, that percentage is far higher because the insurance was being quickly dissipated through four teams of defense counsel in this action and the defense of other

regulatory investigations, which easily could have reduced or wiped out the insurance.

Following further discovery, the Court could have ultimately dismissed each of their claims. Plaintiffs' counsel expected the Defendants to argue, among other things, that (i) the lavish spending of the Defendants was on behalf of Certus and Certus received at least some value from the items and services bought and retained; (ii) the Board knew of and subsequently ratified the leases for the Company facilities; (iii) the full Board did approve the retention of ICS; (iv) ICS charged Certus market rates for the services it provided; and (v) Certus's collapse was attributable to unforeseen market conditions and intervening events beyond their control. Therefore, while Plaintiffs believe they had strong claims, there was a risk that they would not have been able to prevail at trial or, even if successful at trial, collect large-scale damages.

Thus, given the difficulties Plaintiffs would have faced in collecting a judgment on their claims, the $19.2 million settlement recovery is a terrific result for the Company and its stockholders.

B. The Experience and Opinion of Counsel, their Clients, and the Company's Independent Board Favor Settlement Approval

Delaware Courts recognize that the opinion of representative plaintiffs and their experienced counsel is entitled to weight in determining the fairness of a settlement. *See, e.g.*, *Polk*, 507 A.2d at 536 (noting the court's consideration of "the views of the parties involved" when determining the "overall reasonableness of the settlement"); *Jane Doe 30's Mother v. Bradley*, 64 A.3d 379, 396 (Del. Super. 2012) ("It is appropriate for the Court to consider the opinions of experienced counsel when determining the fairness of a proposed class action").

Here, Plaintiffs' counsel negotiated this settlement after (i) conducting an extensive pre-filing investigation into the Company and the Defendants' wrongdoing, which included serving a Section 220 Demand and reviewing over 6,000 pages of documents; (ii) pursuing extensive discovery, including the receipt of millions of documents, eight third-party subpoenas and the testimony of three Defendants through the 30(b)(6) deposition of ICS; and (ii) engaging in a long and thorough arm's-length mediation under the guidance of Mr. Meyer, an experienced and well-known mediator of stockholder disputes.

Plaintiffs' Counsel expended extraordinary efforts to extract documents, then piece together the factual record from numerous sources of information, and fill in gaps that resulted from certain Defendants' destruction of documents. *See In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1073 (Del. Ch. 2015), *as revised* (May 21, 2015). ("Piecing together the chronology required mixing and matching documents from multiple sources. … Lead Counsel had to engage in careful detective work to understand what happened, given the wholesale assertions of privilege and the contemporaneous destruction of documents.").

Plaintiffs' counsel aggressively pursued discovery from Defendants who retained four sets of lawyers from distinguished Delaware firms that resisted producing documents and testimony for months. By creatively pursuing third party subpoenas, including one directed towards ICS's former external IT vendor, Plaintiffs' counsel learned that certain of the Executive Defendants had secretly ordered the destruction of ICS's documents. Plaintiffs' counsel then pressed for a Rule 30(b)(6) deposition of ICS and were forced to move the Court for an order forcing ICS to appear for such deposition. After the Court ordered ICS to sit for the deposition, Plaintiffs deposed Defendant Milton Jones, who appeared with five of his own

attorneys, but was still not educated about many of the topics contained in the 30(b)(6) deposition notice.

Plaintiffs' counsel's discovery efforts also involved a months' long coordination effort with the OCC to seek a waiver of the so-called "bank examiner privilege" and a subpoena directed towards the Former Executives' forensic accounting firm that resulted in the production of all of the documents that remained in the Former Executives' Certus devices and Company e-mail accounts.

With the benefit of this tremendous effort, Plaintiffs' counsel – experienced stockholder advocates well known to this Court – considered the strengths and weaknesses of the case and negotiated terms that they believed were fair, reasonable, adequate, and in the best interest of the Class. *See, e.g.*, *Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 99, 100 (Del. 1979) (approving settlement where plaintiff's counsel concluded that the settlement was fair and in the best interests of the stockholders based on substantial pretrial discovery).

The Settlement was the result of a mediator's proposal by Mr. Meyer, who has served as a mediator in numerous complex businesses litigations throughout the United States. *See Activision*, 124 A.3d at 1067 ("The

manner in which the Settlement was reached provides further evidence of its reasonableness. It resulted from a protracted mediation conducted by a highly respected former United States District Court Judge, with the negotiations taking place in the shadow of an impending trial"); *see also Ryan*, 2009 WL 18143, at *5 ("The Settlement was reached after ... hard fought motion practice before this court, and ... a mediation session with Judge Weinstein. The diligence with which plaintiffs' counsel pursued the claims and the hard fought negotiation process weigh in favor of approval of the Settlement.") (Internal citations omitted).

Furthermore, the Plaintiffs in this Action are sophisticated hedge funds that were intimately involved in the prosecution of this case and the decision to agree to the Settlement. The support of sophisticated institutional plaintiffs is a further factor that supports approval of the Settlement.[10]

This case also presented the rare situation where the board of directors of the company at issue consists of entirely new and independent directors who had no involvement in the alleged misconduct. This independent Board

[10] Each of the Plaintiffs has submitted affidavits filed contemporaneously herewith.

consented to and signed on to the Settlement, thus indicating its support for its terms, which supports its approval.

Finally, to date, no current or former Certus stockholder has filed an objection or contacted Plaintiffs' counsel to express disagreement or concerns with the Settlement. The absence of any such objection also weighs in favor of approving the Settlement. *See Spen v. Andrews Grp., Inc*., 1992 WL 127512, at *1 (Del. Ch. June 5, 1992). The deadline to serve objections to the Settlement is March 31, 2017, and Plaintiff will respond and inform the Court if anything emerges.

As such, these factors further support approval of the Settlement.

C. The Proposed Plan of Allocation is Fair

In considering a class action settlement, the Court must also determine whether the allocation plan for settlement proceeds is fair, reasonable and adequate. *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009); *CME Grp., Inc. v. Chicago Bd. Options Exch., Inc.*, 2009 WL 1547510, at *7 (Del. Ch. June 3, 2009) ("Approval of the allocation is part of the process of approving the Settlement.").

Under the terms of the Individual Defendants Stipulation, the $19.2 million settlement fund will be split between the Company and certain

eligible stockholders, with the vast majority of the recovery going to the stockholders. So that the Company is able to satisfy its outstanding Delaware state tax and other obligations, Certus will receive $600,000. (*See* Individual Defendants Stipulation ¶ 6.) The rest, after the deduction of any awarded attorneys' fees and expenses and administrative costs, will be distributed pro rata to Certus's current stockholders, other than certain "Excluded Stockholders," so long as they submit a signed IRS Form W-9.

The Excluded Stockholders who will not share in the recovery are Certus, Defendants, and all officers, directors, and managing partners of Certus or ICS prior to April 1, 2014 (the "Excluded Officers, Directors and Partners").[11] This cut-off date ensures that none of the individuals implicated in the wrongdoing alleged by Plaintiffs participates in the recovery.

[11] The following persons are also considered Excluded Stockholders and will not share in the recovery: members of the immediate family of each of the Individual Defendants and of each of the Excluded Officers, Directors and Partners; any person or entity in which any Defendant, Certus, or any of the Excluded Officers, Directors and Partners has a controlling interest; and the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded party.

Therefore, the only persons who will participate in the recovery are innocent Certus stockholders who have suffered as a result of the Defendants' misconduct, as well as their transferees. *See In re Activision Blizzard, Inc.*, 124 A.3d 1025 (Del. Ch. May 21, 2015) (holding that the right to participate in any recovery travels with the shares). The current independent Certus Board has received the advice of its own counsel and passed a resolution approving this plan of allocation. (*See* Individual Defendants Stipulation ¶ 6.) For these reasons, Plaintiffs respectfully submit that the Court should have no difficulty approving the plan of allocation.

II. CLASS CERTIFICATION

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

On February 20, 2017, the Court preliminarily certified the following class:

> any and all signatories to the Stock Purchase Agreement and their transferees, successors or assigns. Excluded from the Settlement Class are Certus and Defendants; members of the Immediate Family of each of the Individual Defendants; any person or entity in which any Defendant or Certus has a controlling interest; and the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded party.

(Scheduling Order ¶ 2, dated Feb. 20, 2017.)

Because Plaintiffs have met the requirements of Court of Chancery Rules 23(a) and (b)(1), the preliminarily certified Class should receive final certification for settlement purposes.

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

Court of Chancery Rule 23(a) sets forth the threshold requirements for class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Ct. Ch. R. 23(a).

1. Numerosity

Rule 23(a)(1) requires that a proposed class be "so numerous that joinder of all members is impracticable . . . ." *See, e.g.*, *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991) ("Numbers in the proposed class in excess of forty . . . have sustained the numerosity requirement.") (internal citation omitted). Based on stock ownership records provided to Plaintiffs' Counsel by the Company, approximately forty-six stockholders are in the class. Accordingly, Plaintiffs have satisfied Rule 23(a)'s numerosity requirement. *Id.*

2. Commonality

Rule 23(a)(2) is satisfied because there are common questions of law and fact. *See Emerald Partners v. Berlin*, 1991 WL 244230, at *3 (Del. Ch. Nov. 15, 1991). Commonality exists "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Leon N. Weiner & Assocs., Inc.*, 584 A.2d at 1225 (internal citations omitted). Here, questions common to all class members include:

- Whether the terms upon which ICS performed services for the Company following the closing of the first failed bank

acquisition were no less favorable to the Company than the terms that could have been obtained from a third party provider;

- Whether a majority of the members of the board of directors of Certus who qualified as independent directors properly approved the engagement of ICS following the closing of the first failed bank acquisition;

- Whether a majority of the members of the board of directors of Certus who qualified as independent directors properly approved reimbursing ICS for certain expenses incurred on the Company's behalf;

- Whether the Executive Defendants' and ICS's actions constitute tortious interference of the SPA; and

- Whether Plaintiffs and the other members of the Class are entitled to damages as a result of the Executive Defendants' actions.

These questions of law and fact are common to all Class members. Plaintiffs, therefore, have satisfied Rule 23(a)(2)'s "commonality" element.

3. Typicality

Rule 23(a)(3) requires a class representative's claims to be typical of—but not necessarily identical to – those of the class. As the Court explained in *In re Talley Industries, Inc. Shareholders Litigation*, typicality exists where "all Class members face the same injury from the defendants' conduct." 1998 WL 191939, at *9 (Del. Ch. Apr. 13, 1998). Here, all of the Class members, including Plaintiffs, suffered the same harm resulting from

the Executives decision to retain ICS to provide services to the Company without proper approval from independent directors. Thus, Rule 23(a)(3)'s typicality requirement is met. *Leon N. Weiner & Assocs., Inc.*, 584 A.2d at 1225-26; *In re Cox Radio, Inc. S'holder Litig.*, 2010 WL 1806616, at *8 (Del Ch. May 6, 2010) ("Because Defendants' conduct affected all Class members in the same manner, the typicality requirement also is satisfied.").

4. Adequacy

Rule 23(a)(4) requires a representative party to fairly and adequately protect the interests of the class. "In order to meet the adequacy requirements . . . a representative plaintiff must not hold interests antagonistic to the class, retain competent and experienced counsel to act on behalf of the class and, finally, possess a basic familiarity with the facts and issues involved in the lawsuit." *Oliver v. Boston Univ.*, 2002 WL 385553, at *7 (Del. Ch. Feb. 28, 2002) (citing *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 127 (Del. Ch. 1999).

Plaintiffs are adequate representatives of the Class under Rule 23(a)(4). Plaintiffs' interests coincide with those of the Class. There is no suggestion of any conflict between Plaintiffs and any Class member. Plaintiffs retained competent counsel, who are highly experienced in

stockholder litigation and well-known to this Court. *See Emerald Partners v. Berlin*, 564 A.2d 670, 673-74 (Del. Ch. 1989)*; In re TD Banknorth S'holders Litig.*, 2008 WL 2897102, at *3 (Del. Ch. July 29, 2008). In addition, Plaintiffs have a more than basic familiarity with the facts and issues of the case. They are sophisticated hedge funds that were intimately aware of the facts underlying the Action, actively monitored the Action, and received regular reports from Plaintiffs' counsel. Therefore, Rule 23(a)(4)'s adequacy requirement has been met.

* * *

As stated above, Plaintiffs satisfy each element of Rule 23(a) and certification of the Class is appropriate on this basis

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

Rule 23(b)(1) is satisfied here because there is a risk to Defendants of inconsistent adjudications and a risk that separate adjudications may impair the interests of Class members. A ruling on one Class member's claim "would prove generally dispositive as to all of them." Ct. Ch. R. 23(b)(1). In *Turner v. Bernstein*, 768 A.2d 24 (2000), then-Vice Chancellor Strine explained that certification under Rule 23(b)(1) is appropriate in breach of fiduciary duty actions where a recovery "will be calculated on a per share,

rather than a per shareholder basis." *Id.* at *31. That is exactly the case here.

Breach of contract actions are properly certifiable under Court of Chancery Rule 23(b)(1). *Allen v. El Paso Pipeline GP Co., L.L.C.*, 2014 WL 2086371, at *2 (Del. Ch. May 19, 2014). Thus, certification of the proposed Class is appropriate under Rule 23(b)(1).

C. The Remaining Requirements of Rule 23 Are Satisfied

Plaintiffs submit affidavits herewith in compliance with Court of Chancery Rule 23(e), and have stated their support of the Settlement. The Notice to the Class has been mailed and the requisite affidavit of mailing will be filed on or before April 10, 2017.

III. THE REQUESTED FEE AWARD IS FAIR AND SHOULD BE APPROVED

Delaware Courts award attorneys' fees and expenses to counsel whose efforts have created a common fund. *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1255 (Del. 2012). In determining an appropriate award of attorneys' fees and expenses, Delaware Courts look to the factors set forth in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980). The Sugarland factors are "1) the results achieved; 2) the time and effort of

counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved." *Americas Mining Corp.*, 51 A.3d at 1254 (citing *Sugarland*, 420 A.2d at 149). Plaintiffs' counsel's request of $4.11 million in attorneys' fees plus $4,253,804 in expenses is fully supported by the *Sugarland* factors.

In *Americas Mining*, the Supreme Court held that "fee awards in the Court of Chancery range from 15–25% of the monetary benefits conferred" when "a case settles after the plaintiffs have engaged in meaningful litigation efforts," including large-scale document discovery, depositions, and motion practice. 51 A.3d at 1259–60. Here, Plaintiffs' counsel's efforts created a settlement fund of $19.2 million. The $4,253,804 in requested attorneys' fees and expenses together amounts to approximately 22.1% of the common fund. If expenses are considered separately, the requested $4.11 million fee award amounts to approximately 21.4% of the common fund.

Such a request is squarely within the range of reasonableness and is consistent with prior decisions of this Court. *See, e.g.*, *In re Gardner Denver, Inc. S'holder Litig.*, C.A. No. 8505–VCN, tr. (Del. Ch. Sept. 3, 2014) (awarding 25% for a $29 million settlement); *In re Delphi Fin. Grp. S'holder Litig.*, C.A. No. 7144-VCG, at 8 (Del. Ch. July 31, 2012) (Order)

(awarding 24.5% of $49 million settlement); *In re Del Monte*, tr. at 57-58 (acknowledging that an award of 25% of $89.4 million settlement fund would be appropriate); *In re GSI Commerce, Inc. S'holders Litig*., C.A. No. 6346-VCN (Del. Ch. Nov. 15, 2011) (Order) (awarding 21% of $23.7 million settlement fund); *In re ACS S'holders Litig*., C.A. No. 4940-VCP, at 8 (Del. Ch. Aug. 24, 2010) (Order) (awarding 25% of $69 million settlement fund plus expenses); *In re TD Banknorth S'holders Litig*., C.A. No. 2557-VCL, at 5 (Del. Ch. June 25, 2009) (Order) (awarding attorneys' fees of 27.5% of $50 million settlement fund).

The amount of Plaintiffs' counsel's requested fee award here was determined by the application of a mathematical formula that Plaintiffs and Plaintiffs' counsel agreed to before the filing of the complaint in this Action. (Lebovitch Aff. ¶ 3.) This Court has routinely deferred to the product of arm's-length negotiation between plaintiffs and defendants in approving attorney fee awards. *See, e.g.*, *Forsta AP-Fonden v. News Corp.*, C.A. No. 7580-CS, tr. at 10 (Del. Ch. Apr. 26, 2013) ("I give credit to the arm's length bargaining."); *Forsythe v. ESC Fund Mgmt. Co.*, 2012 WL 1655538, at *7 (Del. Ch. May 9, 2012) ("The fee falls within a reasonable range, warranting deference to the parties' negotiated amount."); *In re J. Crew Grp., Inc.*

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

Plaintiff's had every incentive to limit the amount of Plaintiffs' counsel's fees as any such fees directly reduce their recovery, this agreement deserves even greater deference than that typically given to agreement between plaintiffs and defendants. *See, e.g. In re Cendant Corp. Litig.*, 264 F.3d 201, 220 (3d Cir. 2001) ("[C]ourts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel."); *In re Lucent Tech. Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) ("Significantly, the Lead Plaintiffs, both of whom are Institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel's fees and expenses request.").

While "the hourly rate represented by a fee award is a secondary consideration, the first issue being the size of the benefit created," *In re AXA Fin., Inc. S'holder Litig.*, 2002 WL 1283674, at *7 (Del. Ch. May 22, 2002), this Court looks to the implied hourly rate as a "backstop check" when assessing reasonableness. *In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, 1274 (Del. 2005). Plaintiffs' counsel is requesting

attorneys' fees (not including expenses) that correspond to an implied hourly rate of approximately $811, which does not include hundreds of non-lawyer professional and para-professional hours. This implied hourly rate is orders of magnitude lower than the implied hourly rates in other cases.[12]

[12] *See, e.g.*, *In re Clear Channel Outdoor Holdings Inc., Deriv. Litig.*, C.A. No. 7315-CS, tr. at 7 (Del. Ch. Sept. 9, 2013) (awarding fee that represented over $5,700 per hour; "The fee, it's a nice hourly wage that's requested, but I'm not going to quibble with it"); *In re Genentech, Inc. S'holder Litig*., C.A. No. 3911-VCS, tr. at 56 (Del. Ch. July 9, 2009) (awarding a $24.5 million fee where "the multiple of the lodestar is something like 11.3" and the implied hourly rate was "something like $5,400" in a case that resulted in minority shareholders receiving increased consideration in corporate acquisition); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *13-14 (Del. Ch. Aug. 30, 2007) (awarding a fee that represented an effective rate of $4,023 per hour, in a breach of fiduciary duty case that created a $37.25 million common fund); *Louisiana Mun. Police Emps' Ret. Sys. v. Crawford*, C.A. No. 2635-CC (Del. Ch. June 8, 2007) (Order) (awarding fees of $20 million, representing a lodestar multiple of 6.5, in case where merger consideration was increased following institution of litigation); *In re Fox Entm't Grp., Inc. S'holders Litig*., C.A. No. 1033-CC, tr. at 70 (Del. Ch. Sept. 19, 2005) (litigation resulted in increased consideration in exchange offer; fee represented effective rate of $3,000 per hour); *In re NCS Healthcare, Inc. S'holders Litig*., 2003 WL 21384633, at *3 (Del. Ch. May 28, 2003) (litigation resulted in enhanced merger consideration; fee represented an effective hourly rate of approximately $3,030); *Dagron v. Perelman*, C.A. No. 15101-CC, tr. at 48-51 (Del. Ch. Aug. 29, 1997) (litigation resulted in improvement of merger consideration; fee represented an effective hourly rate of approximately $3,500); *In re Lin Broad. Corp. S'holders Litig*., C.A. No. 14039-CA (Del. Ch. Sept. 15, 1995) (Order) (litigation resulted in enhanced consideration; fee represented an effective hourly rate of more than $3,800).

In addition, "[m]ore important than hours is 'effort, as in what plaintiffs' counsel actually did.' In this case, the answer is 'quite a bit.'" *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *13 (Del. Ch. June 27, 2011) (quoting *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.33 1116, 1139 (Del. Ch. 2011)). This case presented a complex fact pattern and litigation posture. As described above, Plaintiffs' counsel put tremendous effort into litigating this case to a successful conclusion, including two Section 220 demands, a Rule 23.1 demand, a detailed Complaint, months of heavy party and third-party document discovery and deposition practice, and months of settlement negotiations overseen by Mr. Meyer.

Contingent representation also entitles plaintiffs' counsel to both a "risk" premium and an "incentive" premium on top of the value of their standard hourly rates. *Seinfeld v. Coker*, 847 A.2d 330, 337 (Del. Ch. 2000). Plaintiffs' Counsel handled this matter on a fully contingent basis. Given the high degree of uncertainty regarding the collectability of any judgment that the risks on the merits of Plaintiffs' claims as discussed above, Plaintiffs' counsel took significant risk.

The Court knows the standing and ability of Plaintiffs' counsel. *See Sugarland*, 420 A.2d at 149-50. Plaintiffs' counsel are highly experienced law firms in the field of stockholder class and corporate governance litigation, and their achievements and reputations are often the subject of favorable comments by the courts of this state and other state and federal courts.

CONCLUSION

For all of these reasons, Plaintiffs and their counsel, respectfully request that the Court: (i) certify the Class; (ii) approve the Settlement as fair and reasonable; and (iii) award Plaintiff's counsels' requested and agreed-upon fees and expenses.

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DATED: March 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017, I caused a copy of **Public Version of Plaintiffs' Opening Brief in Support of Approval of Derivative and Class Action Settlement and an Award of Attorneys' Fees and Expenses** to be served upon the following counsel by File & Serve*Xpress*:

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