EFiled: Jun 07 2023 04:31PM EDT
Transaction ID 70149984
Case No. 2023-0215-MTZ

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

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|---|---|
| IN RE AMC ENTERTAINMENT HOLDINGS, INC. STOCKHOLDER LITIGATION | CONSOLIDATED C.A. No. 2023-0215-MTZ |

**TRANSMITTAL AFFIDAVIT OF KEVIN M. GALLAGHER, ESQ. IN CONNECTION WITH DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF PROPOSED SETTLEMENT**

STATE OF DELAWARE )
) SS
COUNTY OF NEW CASTLE )

I, Kevin M. Gallagher, being duly sworn, depose and say:

1. I am a member of the bar of the State of Delaware and an attorney at the law firm of Richards, Layton & Finger, P.A. I represent Defendants AMC Entertainment Holdings, Inc. ("AMC"), Adam M. Aron, Denise Clark, Howard W. Koch, Jr., Kathleen M. Pawlus, Keri Putnam, Anthony J. Saich, Philip Lader, Gary F. Locke, Lee Wittlinger, and Adam J. Sussman (collectively, "Defendants") in the above-captioned action.

2. I submit this affidavit in connection with Defendants' Reply Brief in Further Support of Proposed Settlement.

3. To the best of my knowledge and belief, attached to this affidavit are true and correct copies of the following documents:

| Document | Description |
|---|---|
| Exhibit AC | *In re Snap Inc. Section 242 Litig.*, C.A. No. 2022-1032-JTL (Del. Ch. Mar. 29, 2023) (TRANSCRIPT) |
| Exhibit AD | Ex. 99.1 to May 5, 2023 AMC Form 8-K |
| Exhibit AE | May 5, 2023 AMC Form 10-Q |
| Exhibit AF | *In re Protection One, Inc. S'holder Litig.*, C.A. No. 5468-VCS (Del. Ch. Oct. 6, 2010) (TRANSCRIPT) |
| Exhibit AG | *In re Columbia Pipeline Gp., Inc. Merger Litig.*, C.A. No. 2018-0484-JTL (Del. Ch. June 1, 2022) (TRANSCRIPT) |
| Exhibit AH | *In re Columbia Pipeline Gp., Inc. Merger Litig.*, C.A. No. 2018-0484-JTL, Stipulation and Agreement of Compromise and Settlement |

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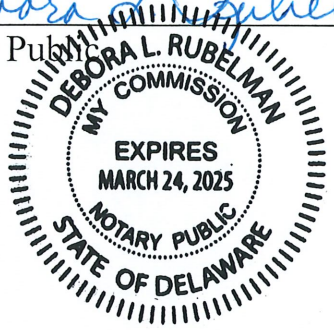
SWORN AND SUBSCRIBED before me
this 7th day of June, 2023.

Notary Public



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# EXHIBIT AC

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| ELECTRICAL WORKERS PENSION FUND, LOCAL 103, I.B.E.W., | : | |
| Plaintiff, | : | |
| v. | : | C. A. No. 2022-1007-JTL |
| FOX CORPORATION, | : | |
| Defendant. | : | |
| IN RE SNAP INC. SECTION 242 LITIGATION | : | CONSOLIDATED C.A. No. 2022-1032-JTL |

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, March 29, 2023
11:00 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

TELEPHONIC RULINGS OF THE COURT ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

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- - -

THE COURT: Good afternoon, everyone. This is Travis Laster joining. Do we have a court reporter on?

THE COURT REPORTER: It's Juli, Your Honor.

THE COURT: Great, Juli. Thank you for being here.

I'm not going to ask for appearances. Folks can deal with Juli directly. I'm going to go ahead and give you my ruling.

We're here today for a matter captioned *Electrical Workers Pension Fund Local 103, I.B.E.W. v. Fox Corporation*, Civil Action No. 2022-1007-JTL. There is a coordinated case involving Snap that is Civil Action No. 2022-1032-JTL. That case is substantively identical to the *Electrical Workers* case involving Fox, so for simplicity, I'm going to focus on the *Fox* case.

The parties have filed cross-motions for summary judgment on a discrete legal issue under Section 242(b)(2) of the Delaware General Corporation Law. There are no facts in dispute.

I am under no illusions that my ruling will be the last word on this subject. However I

rule, the adversely affected party can be expected to appeal. Under the circumstances, I think the best path is to provide you with my ruling orally. You then can move on to the Delaware Supreme Court to obtain a definitive answer.

To provide my bottom line up front, I am granting the defendant's motion and denying the plaintiff's motion. All of you can now listen without being in suspense.

I view this case as controlled by two precedents. The First Is *Hartford Accident & Indemnity Co. v. W.S. Dickie Clay Manufacturing Co.*, 24 A.2d 315 (Del. 1942), which is generally known in the corporate world as *Dickie Clay*. The second is *Orban v. Field*, 1993 WL 547187 (Del. Ch. April 1, 1997).

Fealty to those precedents dictates the outcome.

That said, I am sympathetic to the plaintiff's arguments. Were I writing on a blank slate and being asked to determine the plain meaning of Section 242(b)(2) without the interpretive glosses of *Dickie Clay* and *Orban*, I think the plaintiff's position would be a quite strong one.

But I am not writing on a blank slate. The Delaware Supreme Court interpreted 242(b)(2)'s predecessor statute in *Dickie Clay*, and this Court interpreted the current statute in *Orban*. I hew to those precedents.

Let's start with the pertinent facts, which are mercifully few. Fox Corporation has three classes of stock: high-vote stock, low-vote stock, and non-voting stock. I will call Fox Corporation the "company."

The company proposed to amend its charter to adopt an exculpation provision covering officers, as contemplated by the recent amendment to Section 102(b)(7). Let's call that the "officer exculpation amendment."

As required by Section 242(b)(1), the company secured the affirmative vote of holders of a majority of the outstanding voting power of all classes of stock entitled to vote thereon, voting together as a single class. Holders of shares carrying a majority of the outstanding voting power associated with the high-vote stock voted in favor of the amendment. So did holders of a majority of the outstanding voting power associated with the low-vote

stock. Thus if either the high-vote stock or the low-vote stock had voted separately as a class, then the class vote would have been obtained.

The company did not seek or obtain A vote from the non-voting stock, whether as a class or otherwise.

The plaintiff contends that under Section 242(b)(2) of the Delaware General Corporation Law, the officer exculpation amendment required the affirmative votes of holders of a majority of the outstanding non-voting stock, voting as a separate class. In my view, the same reasoning would mean that the amendment also required a separate class vote of the high-vote stock and a separate class vote of the low-vote stock. Had those votes been sought, they would have been obtained. But because no one polled the non-voting stock, we do not know how they would have voted.

The company argues strenuously that the officer exculpation amendment is in the best interest of the stockholders and, according to the company, quite obviously so. I personally think that reasonable minds could disagree on that question, with the outcome depending on one's empirical assumptions

about the degree to which lawsuits enforcing an officer's duty of care provide a valuable oversight mechanism, particularly for purposes of ensuring full disclosure where the officers often are more informed than the directors. Arguments can be made both ways, and the outcome would depend on empirical data that I don't think we currently have.

Regardless, in light of the company's confidence, one might wonder why the company did not simply put the issue before the non-voting stock and obtain their approval. One might also wonder why the company would not simply do so at the next convenient opportunity, such as in connection with the company's annual meeting, so as to save the costs of a separate solicitation.

But that has not happened. Instead, this case has been fought on the battle ground of Section 242(b)(2).

With that background, let's turn to the legal analysis. The parties agree that the issue can be presented on cross-motions for summary judgment, and I apply the familiar summary judgment standard contemplated by Rule 56.

Let's begin with some legal

level-setting.

A share of stock represents a bundle of rights. It is often said that a share of stock carries three basic rights: the right to vote, the right to sell, and the right to sue. As the Delaware Supreme Court discussed in *Urdan v. WR Capital Partners, LLC*, and as I have discussed previously in *In re Activision Blizzard Stockholders Litigation*, those rights are not personal to the stockholder. Those are rights that are appurtenant to and associated with the shares, that transfer with the shares when the shares are sold.

In particular, those cases make clear that the ability to sue as a stockholder under Delaware law is not a personal right of the individual owner. It is a right appurtenant to the shares that travels with the shares. That is why Delaware courts readily grant broad, class-wide releases of Delaware claims challenging mergers. The claims travel with the shares so that the class need only consist of the shares at the effective time. The *Activision Blizzard* case discusses those matters in detail.

By default, the right to sue appurtenant to a share includes the ability to sue for

breach of fiduciary duty in any jurisdiction where the defendant can be found and to seek any remedy provided by law.

As a matter of default law, a share of common stock carries other rights as well. By default, under Section 212(a) of the DGCL, a share carries voting power equal to one vote per share. By default, under Section 159 of the DGCL, a share is personal property, alienable as such, and can be transferred freely in accordance with Article 8 of the UCC. We thus have the three principal rights that everybody talks about: to vote, to sell, and to sue.

But that's not all. A basic share of common stock also carries other default rights. It carries the right to the residual distribution of the value of the corporation in a liquidation under Sections 280 or 281, after payment of creditors and the satisfaction of any liquidation preferences held by more senior stock paid out in order of priority.

It carries the right to receive dividends when and as declared by the board.

It carries the right to seek books and records under Section 220.

It carries the right under

Section 211(c) to compel an annual meeting if a corporation has not held one in the last 13 months or otherwise fulfilled the requirement through action by written consent.

It carries the right to seek a determination of the rightful directors or officers of the corporation under Section 225, to sue for a receiver or custodian under Sections 226 and 291, and to sue to enforce other provisions of the DGCL.

All those rights exist by default under the DGCL. Some of those rights may well be mandatory statutory rights that cannot be modified in the charter. I list them not to imply that they can be modified in the charter, but only to make clear that not all stockholder rights appear expressly in the charter.

In fact, under Section 102(a)(4), if the corporation is authorized to issue only one class of stock, then the charter need only specify the total number of shares of stock which the corporation shall have authority to issue and the par value of each of such shares, or a statement that all such shares are to be without par value. Even if the charter says only that, all of the foregoing rights that I have

identified remain established by law and are rights associated with the shares. They exist even if the charter states only that the corporation can issue X number of shares of stock without par value, and nothing else.

In fact, the charter need not say much, even if the corporation is authorized to issue multiple classes or series of stock. If the charter does not specify the rights of those additional classes or series, then they have the same basic rights.

Section 102(a)(4) states that "[i]f the corporation is to be authorized to issue more than 1 class of stock, the certificate of incorporation shall set forth the total number of shares of all classes of stock which the corporation shall have authority to issue and the number of shares of each class and shall specify each class the shares of which are to be without par value and each class the shares of which are to have par value and the par value of the shares of each such class."

That is all Section 102(a)(4) requires: an identification of the number of shares of each class and their par value.

A certificate of incorporation thus could provide for multiple classes of stock, such as Class A Common, Class B Common, and Class C Common, all with identical default rights. Why might someone do that? Perhaps three founders each want to a separate class of common, rather than simply participating in the ownership of a single class of common.

Let's call the rights that a share of stock carries by default the "baseline rights." In terms of our three principal rights, that means one vote per share, freely alienable in accordance with Article 8 of the UCC, and able to sue to enforce the rights the stock carries, including to sue for breach of fiduciary duty and seek any remedy available at law or in equity.

A charter can give a class of shares rights that are better than the baseline rights. These are rights generally associated with preferred shares, and this is what we usually think of when we imagine the powers, privileges, and rights of shares that are spelled out in a charter. Let's refer to those type of rights as "superior" rights.

Now let's consider some examples of

superior rights. By default, a share has voting power equal to one vote. A superior right would be voting power of more than one vote per share, like ten votes per share. The company's high-vote shares have this type of superior voting right. Or a superior voting right might be a special vote or consent, like a class vote on a merger. We often see that type of superior right associated with preferred shares.

For purposes of the right to sell, by default, a share is freely alienable. But the owner has no right to force the corporation to buy it. A superior right might be a redemption put right by which the corporation can be forced to redeem the share, assuming it had both the surplus and funds legally available to do so. Section 151(b) makes clear that a redemption put right is an attribute of the shares. We often see that type of superior right associated with preferred shares.

There can be superior versions of other default rights. By default, a share receives dividends when and if declared by the board. A superior right might be a right to a regular quarterly or annual dividend. We often see that type of superior right associated with preferred shares.

By default, a share participates *pro rata* in the residual assets available in dissolution. A superior right might be a liquidation preference that enables the share to participate in dissolution ahead of other classes of stock and then to participate with the common in the residual distribution. We often see that type of superior right associated with preferred shares, and it's called a participating preferred with a liquidation preference.

We've now talked about baseline rights and superior rights. A charter can also give a class of shares rights that are worse than baseline rights. Those rights are generally associated with classes of common stock that are deprived of some or all of their default rights. To keep things simple, let's refer to these types of rights as "inferior" rights, which creates a contrast with the superior rights.

Let's consider some examples of inferior rights. By default, a share has voting power of one vote per share. An inferior right would be no voting power per share, or voting power of a fraction of a vote per share, or the ability to exercise voting power on only certain issues. The company's

non-voting shares are an example of disfavored shares that carry inferior voting rights.

By default, a share is freely alienable and the corporation has no right to redeem the share. An inferior right would be a redemption call right by which a corporation can force the stockholder to sell at a given price such as fair market value or par value.

By default, a share receives dividends when and if declared by the board. An inferior right would be a class of shares that cannot receive dividends or can only receive dividends conditioned on other events happening, such as a prior level of payments to a more-senior class of stock.

By default, a share participates *pro rata* in the residual assets available in dissolution, however much might be available. There's no cap. An inferior right would be a liquidation cap that limited the share's ability to participate in liquidation to a maximum amount. Stock with a liquidation cap is generally called "nonparticipating preferred." The preferred only gets to participate up to the liquidation cap. Now, usually that type of preferred has a conversion right, but focusing on the rights

available in liquidation, the share has a liquidation cap.

Sections 102(a)(4) and 151(a) require that any departure from the baseline rights appear in the certificate of incorporation. Superior rights must appear in the certificate of incorporation. Inferior rights must appear in the certificate of incorporation.

In the language of Section 102(a)(4), "The certificate of incorporation shall set forth a statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, which are permitted by Section 151 of this title in respect of any class or classes of stock or any series of any class of stock of the corporation and the fixing of which by the certificate of incorporation is desired, and an express grant of such authority as it may then be desired to grant the board of directors to fix by resolution or resolutions any thereof that may be desired but which shall not be fixed by the certificate of incorporation."

That's a mouthful. But it reduces to this: Section 102(a)(4) contemplates designations,

powers, preferences, rights, qualifications, limitations, and restrictions.

From the perspective of a stockholder, there are three types of good, positive things. Those are powers, preferences, and rights. From the perspective of a stockholder, there are three types of not-so-good, negative things. Those are qualifications, limitations, and restrictions.

There's also this concept of "designations," which I think of as a neutral thing referring to a certificate of designations, which is what allows the board to implement blank-check preferred. Thus "designations" encompasses all of the types of specific things that one could put into a charter to create superior or inferior rights. They could be good things -- powers, preferences, and rights -- or they could be not-so-good things -- qualifications, limitations, and restrictions.

Section 151(a) uses similar language. It states, "Every corporation may issue 1 or more classes of stock or 1 or more series of stock within any class thereof, any or all of which classes may be a stock with par value or a stock without par value and which classes or series may have such voting

powers, full or limited, or no voting powers, and such designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the certificate of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issuance of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its certificate of incorporation."

Once again you have the types of good, positive things that lead to superior rights. You also have the types of not-so-good, negative things that lead to inferior rights.

So far we have divided the rights the shares carry into three categories: baseline rights that the share has even if the charter is silent, superior rights that are better than baseline rights, and inferior rights that are worse than baseline rights.

Section 151(a) gives us another term: "special rights." That term refers to rights that are different from baseline rights. Special rights can be superior or inferior. They can be good things, like

preferences. They can be relatively superior or inferior rights. Or they can be rights with qualifications, limitations, or restrictions thereon.

Now let's introduce a final distinction. This distinction is between express rights and unexpressed rights. Recall that shares have certain baseline rights even if the certificate of incorporation is silent. When the charter is silent, those baseline rights are unexpressed rights.

One can, however, as a drafter of a charter or a certificate of designations, make those baseline rights express. A certificate of incorporation can say that each share of stock of a class carries voting power of one vote per share, just as would be implied by Section 212(a) of the DGCL if the charter were silent. The right has been made express, but it is no different than a baseline right.

A certificate of incorporation can say that each share of stock is freely alienable, just as it is under Section 159 if the charter is silent. That right has been made express, but it is no different than the baseline right.

A certificate of incorporation can say that each share of stock participates *pro rata* in

dissolution after all the debts of the corporation and any liquidation preferences are paid, just as Delaware law implies if a charter were silent. The right has been made express, but it is no different than the baseline right.

Baseline rights, therefore, can either be unexpressed rights or express rights. Special rights are always and necessarily express rights.

With that terminology in hand, let's turn to Section 242(b)(2). The first sentence of Section 242(b)(2) provides as follows: "The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely."

The plaintiffs advance a straightforward argument based on the plain meaning of the statute. They argue that Section 242(b)(2) provides for a class vote when an amendment would

alter or change powers, preferences, or special rights. The plaintiff's reading gives meaning to each of these terms. Special rights means rights that are different than baseline rights. They can be superior rights or inferior rights, but they are special. They are not baseline.

Preferences are a type of special right. They are generally what preferred stock has. It's a type of superior right.

That leaves powers. What does "powers" mean? The plaintiffs offer a logical answer. It means baseline rights. From the plaintiff's standpoint, the analysis does not even need to go so far as to include all baseline rights. All that "powers" has to include is one particular baseline right: the power to sue.

Here, we encounter a skirmish between the parties. The company argues that the ability to sue isn't a power, it's a right. The company also says that the ability to sue doesn't belong to a share, it belongs to some type of jural actor who is the owner of the share — namely, the stockholder. The second point does not survive *Urdan*.

On the first point, my big-picture

sense of the authorities is that concepts of "rights" and "powers" are used relatively interchangeably. We live in a world today that is filled with rights talk, so rights is the logical word that a modern speaker would resort to.

Not surprisingly, the company can find cases, including some of my own, that refer to the right to sue, the right to sell, and the right to vote, rather than the power to sue, the power to sell, or the power to vote.

I don't see any meaningful distinction in those cases between those two terms. The cases don't seem to be using the terms with any intent to convey or imbue them with different legal meaning. They seem to be used interchangeably, and when I look at the scholarship on this subject, it also seems to use the terms interchangeably.

Perhaps the best example of this is the right to vote. We usually refer to that framing -- namely, the "right to vote" -- but in Section 151(a), the vote is referred to as a power. Consistent with that, we refer to the voting power associated with the shares, and when we refer to the denominator in the vote calculation, we use the word

"power," such as a majority of the outstanding voting power. We may colloquially refer to voting rights, and we usually do, but the corporate concept is really voting power.

The plaintiffs have advanced a strong argument that the right to sue associated with a share is also a power. The plaintiffs have identified a series of sections of the DGCL in which the ability to sue is referred to as a power. One is Section 122, which lists specific powers of a corporation, including under subsection (3), the power to sue or be sued. Section 291, dealing with the powers of receivers, is another example. It is true that those sections generally refer to the power of a corporation or another jural actor to sue, but those sections nevertheless support the proposition that the ability to sue is technically a power.

Section 123 suggests that, just as the rights/powers distinction isn't a major issue for the right to vote, it shouldn't be a major distinction for the right to sue. Section 123 addresses the extent to which a corporation can exercise powers, rights, and privileges associated with the shares it owns. The section states: "A corporation while owner of such

securities may exercise all the rights, powers and privileges of ownership, including the right to sue." That passage uses the words "right to sue," but it follows "rights, powers and privileges." "Sue" is one of that subset. Whether the noun is "right" or "power" just doesn't seem to be driving the analysis.

The plaintiffs thus conclude that the reference to "power" in Section 242(b)(2) at minimum means the power to sue. Once the plaintiff has framed the right to sue as a power, the officer exculpation amendment easily falls within Section 242(b)(2).

Stepping back a level, the plaintiff perceives a baseline in which the company's non-voting stock had the power to sue and to assert claims and seek remedies across a particular domain. That domain included the right to assert direct claims against officers for breach of the duty of care and to recover damages.

The officer exculpation provision reduced the scope of that right by eliminating the ability to recover damages for breach of the duty of care. However one views the extent of the area covered by the domain of the power to sue before the amendment, the domain covered after the amendment is

less than it was before.

For an analogy, imagine a football field. That domain is the original area of coverage for the right to sue. For over a hundred years, the traditional football field has been 360 feet long, including the end zones, and 160 feet wide, with a playing field that is 300 feet long. Imagine a rules change that reduces the size of that field. We can debate about the size of the area that is cut out of the field, but we know the football field no longer has its original dimensions. Maybe it's now 95 yards, maybe it's 99 yards, but something has been taken out of it.

To bring this concept home even more, let's compare the reduction in the scope of the default right to sue to amendments that reduce other default rights. Take an amendment that reduces the voting power associated with a share from the statutory default of one vote per share to a lower figure of half a vote per share, or perhaps a tenth of a vote per share. That is a reduction that is adverse. The two amendments are analogous in terms of reducing the scope of the default right.

The officer exculpation amendment is

also analogous to an amendment that reduces the default right to participate *pro rata* with all stockholders in A dissolution to a capped right TO A liquidation amount and nothing more. And it's analogous to an amendment that changes the power to sell a share freely to anyone into a power to sell subject to a redemption call right triggered by the sale that gives the corporation the ability to redeem.

Each of the rights I just discussed is a baseline power or right. In each case, the amendment is adversely affecting the baseline power or right.

An amendment can do the same thing with special rights that are either superior or inferior. It can happen with a special voting power. An amendment can reduce a superior special voting power equal to ten votes per share to five votes per share. Or an amendment can reduce an inferior special voting power, like .5 votes per share, to .1 vote per share.

It can happen with alienability. An amendment can reduce a superior power of alienability, like the ability to sell freely plus the right to exercise a redemption put right exercisable by the

stockholder by reducing the redemption price to a lower amount. Or an amendment can reduce an inferior power of alienability, like the ability to sell subject to a redemption call right exercisable by the corporation, and again reduce the redemption price to a lower amount.

Returning to the first sentence of Section 242(b)(2), the plaintiffs say that the officer exculpation amendment altered or changed a power of the shares of the non-voting stock so as to affect them adversely. I think if one were to interpret the plain language of Section 242(b)(2) on a blank slate, that would be a fairly persuasive plain-meaning analysis. It would be a strong argument.

Now let's take the other side of the argument. The problem with the plaintiff's plain-meaning theory is how the statute has evolved over time and how it has been interpreted during its evolution.

The principal authority is the Delaware Supreme Court's decision in *Dickie Clay*, which is an opinion from 1942. The company in *Dickie Clay* had three classes of stock: preferred stock that carried a mandatory dividend and a liquidation

preference, Class A stock that carried a cumulative dividend but was generally non-voting, and common stock that had no right to dividends until the preferred stock had received a specified amount of dividends and the Class A stock had been retired. Note that all three classes of stock had a mix of superior rights, inferior rights, and baseline rights.

The corporation proposed an amendment that would increase the number of authorized shares of Class A. By increasing the authorized number of Class A shares, the corporation could issue more Class A shares, and those shares would be ahead of the common stock for purposes of its ability to receive dividends. The corporation sought and obtained a vote of the preferred and common voting together plus a class vote of the Class A. The corporation did not obtain a class vote of the common.

At the time, the governing statute of was Section 26 of the DGCL. It only addressed preferred stock, and it provided for a class vote for any amendment that would alter or change "the preferences, special rights or powers given to one or more classes of stock held by the certificate of incorporation, so as to affect such class or classes

of stock adversely."

One of the common stockholders sued, arguing that the amendment adversely affected the common and required a class vote under Section 26 precisely because the increase in the authorized number of Class A shares meant that the corporation could issue more Class A that would be ahead of the common for purposes of its ability to receive dividends.

The Delaware Supreme Court rejected that argument. The Court held that increasing the authorized number of the shares of the Class A did not alter or change adversely the privileges or special rights and powers of the common. In my view, that was a relatively easy conclusion to reach, since the amendment did not make any change to the rights of the common at all.

But the Court in *Dickie Clay* did not rest on that basic point. It, rather, used language that could support three different interpretations.

The first interpretation is that a class vote is only triggered if it affects a superior right of the shares. That interpretation rests initially on the observation of the *Dickie Clay* court

that the language of Section 26 permits an amendment to change the "number, par value, designations, preferences, or relative, participating, optional, or other special rights of the shares, or the qualifications, limitations or restrictions of such rights."

Interpreting this language, the *Dickie Clay* court stated: "The statute, in listing the amendable rights, or rights and powers, attached to stock, first speaks of preferences. It then speaks of rights, and employs specific descriptive words, followed by the general and embracive words, 'other special'. Whatever may be said with respect to the necessity for the use of the word 'special', as applied to a right attached to stock, in view of the prior descriptive words, it is clear enough that the word was used in the sense of shares having some unusual or superior quality not possessed by another class of shares." That's a quote from page 318 of the decision.

The important language is the reference to some "unusual or superior quality not possessed by another class of shares." The reference to "superior quality" means, in the parlance that I am

using, a superior special right. I will call this the "superior right interpretation" or "superior right argument."

That interpretation finds support in the fact that, at the time, Section 26 was focused on preferred stock, which was understood to have superior rights. Under the superior right interpretation, a class vote is only required if the change affects a special right that is better than what the baseline right would be — i.e., only if it changes a superior right.

A second interpretation supported by *Dickie Clay* requires a special right distinct from baseline rights, but it does not matter whether the special right is superior or inferior. That interpretation fixates on the word "unusual," rather than the word "superior." So the emphasis for purposes of this interpretation is on the reference in the decision to an "unusual ... quality not possessed by another class of shares."

The *Dickie Clay* court later explained that a class vote was not required for the amendment at issue because "Where the corporate amendment does no more than to increase the number of shares of a

preferred or superior class, the relative position of subordinated shares is changed in the sense that they are subjected to a greater burden. The peculiar, or special, quality with which they are endowed, and which serves to distinguish them from shares of another class, remains the same." That's from pages 318 to 319.

Under this view, the reference to "analogous peculiar, or special, quality" with which the shares are endowed, and which serves to distinguish them from the shares of another class, means something that is different from baseline. In my parlance, I have described that as a "special right." So I will call this the "special right interpretation" or the "special right argument."

There is a third interpretation of *Dickie Clay* which reads the decision as not requiring that a right be special or superior at all, only that it be express in the certificate of incorporation. This reading is different because an express right could be the express manifestation of a baseline right. For example, instead of being silent regarding voting, a charter could say that each share of a particular class of shares carries voting power of one

vote, which is the same as the default baseline right under Section 212(a).

Or the charter could say that the class of shares is freely alienable, which is the same as the default baseline right under Section 159. What matters under this interpretation of *Dickie Clay* is that the right, whether superior, inferior, or baseline, is made express. I will call this the "express right interpretation" or "express right argument."

It bears noting that none of these interpretations represent the bottom-line holding of *Dickie Clay*. The statement that supported the actual holding is as follows: "It is entirely clear that the statute in its mention of relative rights of shares did not refer to the position of shares in the plan of capitalization, but to the quality possessed by the shares; and it is only by a refinement of interpretation that it can be said that a relative position is a relative right."

The holding of *Dickie Clay* is thus that relative position in the capital structure is not a right of the shares or, in the language of the decision, a quality of the shares such that

authorizing more of a senior class or series or adding a senior class or series does not make an adverse change to the rights of the junior class or series.

That's the holding. The superior right interpretation, the special right interpretation, and the express right interpretation all flow from various adjectives in the decision's discussion of the statute but not from the actual holding.

We now move forward 55 years to 1997 and the decision in *Orban v. Field*. In the interim, in 1969, the General Assembly amended Section 242(b)(2) to change the order of the terms. In lieu of referring to "preferences, special rights and powers," the language now refers to "powers, preferences, and special rights." Where there was ambiguity about whether "special" modified just rights or both rights and powers, the reference to "powers" now stands alone.

In *Orban*, a corporation named Office Depot had issued common stock, Series A preferred stock, and Series B preferred stock. The preferred stockholders wanted to sell Office Depot to Staples, a third-party acquirer, and to effectuate the

transaction by merger. The preferred stock carried liquidation preferences, and the value of the deal was such that the preferred stock would soak up all of the consideration and the common stockholders would receive nothing.

The merger agreement required that the merger receive the approval of holders of 90 percent of the outstanding share of each class of stock voting separately. The opinion does not dilate on why the merger agreement contained that requirement, but it did.

One common stockholder -- the plaintiff Orban -- held 96 percent of the common stock and, therefore, had the ability to block the deal. To create a path to approve the merger, the board redeemed certain outstanding notes in exchange for shares of common stock and Series C preferred stock. The issuances of those shares of common stock sufficiently diluted Orban's holdings in the common and the associated voting power from 96 percent to 42 percent of the class.

The corporation then redeemed the Series C stock for cash, and the holders used the funds to exercise warrants to purchase additional

shares of common stock. Those shares of common stock further reduced Orban's holdings in the common and his associated voting power to less than 10 percent of the class, eliminating his ability to block the deal.

Orban sued. The deal had closed and a class vote, if it had been recognized, could have required rescinding the whole ball of wax. The decision evidenced the Court's skepticism of Orban's lawsuit as a holdup play.

For his class vote theory, Orban alleged that the creation of the Series C preferred was an essential part of the recapitalization and required a class vote under 242(b)(2). As in *Dickie Clay*, that was an easy argument to reject because the creation of a senior security does not effect any change or amendment to the rights or powers of the common stock. Nothing about the legal rights or powers associated with the common stock changed in any way. The same was true for the issuance of additional shares of common stock.

But as in *Dickie Clay*, the opinion went further. The *Orban* court interpreted *Dickie Clay* to stand for the following proposition: "The language of the statute makes clear that it affords a right to

a class vote when the proposed amendment adversely affects the peculiar legal characteristics of that class of stock. The right to vote is not a peculiar or special characteristic of common stock in the capital structure of Office Mart. All classes of stock share that characteristic; the voting power of each class of stock would be pro-rata diluted by the issuance of Series C Preferred Stock and thus we're all entitled to vote equally (in one general class)."

The language in *Orban* thus appears to provide strong support for the special right interpretation of *Dickie Clay*. That interpretation focuses on the use of the words "peculiar, or special," and distinguishes those types of rights from characteristics that all classes of stock share.

The language of *Orban* also provides support for yet a fourth interpretation, or at least another aspect of the interpretation, which is that Section 242(b)(2) does not provide a class vote when all shares are affected equally by the amendment. That interpretation draws on the language in *Orban* which states "the voting power of each class of stock would be pro-rata diluted by the issuance of Series C Preferred Stock and thus all were entitled to vote

equally (in one general class)."

I will call this the "equal treatment exception" or the "same treatment exception," because the language seems to suggest that if an amendment treats all shares equally or in the same way, then there is no class vote.

As in *Dickie Clay*, the reference to the peculiar or special characteristics of the common stock was not necessary to the holding in *Orban*. The issuance of the Series C and additional shares of common stock did not alter any characteristic of the common, whether or not they were peculiar or special and whether or not they were express or implied.

The holding was thus that a class vote was not required when nothing about the rights or powers associated with the common stock was changed. But the Court went further and included language supporting the special right interpretation and the equal treatment exception.

The company did a great job canvassing all this law in their briefs. They were very thorough, and I appreciate it. As a result, however, it was not clear to me whether they were advancing the superior right argument, the special right argument,

the express right argument, or the same treatment exception.

Based on a combination of a letter I sent to the parties before argument and helpful dialogue that I had with counsel during argument, I now understand that the company is only relying on the express right argument — i.e., the express right interpretation.

They say that the officer exculpation amendment cannot trigger a class vote under Section 242(b)(2) because the right to sue is not a power or right expressly set forth in the certificate of incorporation, but rather, is a power or right established or implied by law. The generalized proposition is that Section 242(b)(2) only applies to power or rights expressly set forth in the certificate of incorporation.

Let's engage with that argument. And because *Dickie Clay* and *Orban* also provide support for the superior right argument, the special right argument, and the same treatment exception, let's engage with those arguments too and try to figure out how this statute operates.

Let's start out with the express right

argument and the two narrower versions that are included within it, because both the superior right argument and the special right argument are more specific versions of the express right argument that only apply to a subset of those express rights.

The obvious purpose of Section 242(b)(2) seems to be to protect a class of stock against having its powers, preferences, and special rights adversely affected. That's what it says.

Why would that concern only apply to express rights, and not to rights established by law when the charter is silent? And why would that concern only apply to superior rights or special rights, and not to baseline rights?

Let's start with a hypothetical that stress tests the superior right interpretation and the special right interpretation. I note at the outset that the hypotheticals that I am presenting in this ruling are not the same as the hypotheticals provided to counsel in my letter, which were intended to help focus discussion on particular issues for the hearing.

The company raised objections to aspects of those hypotheticals that introduce other

legal issues. For example, in the hypotheticals in my letter, I followed the plaintiff's lead and treated a right of first refusal that was baked into the charter as a special right of the shares.

The company cited a 2001 decision involving a nonstock member corporation, *Capano v. Wilmington Country Club*, 2001 WL 1359254 (Del. Ch. Nov. 1, 2001), to argue that a transfer restriction is not a special right of the shares even if it's baked into the charter.

There's more that could be said on that issue, but since the purpose of the hypothetical is to stress test Section 242(b)(2), objections like that are distracting. So I've shifted in these hypotheticals to using a redemption right, which, under Section 151, is necessarily and expressly by statute an attribute of a class of shares.

Before proceeding further, let me acknowledge that there may well be other arguments against the amendments that are the subject of my hypotheticals. Most notably, every corporate act is twice tested, and none of these hypotheticals address the Berle'ian second test. The point of these hypotheticals is to explore the contours of 242(b)(2),

not to issue-spot for any and all arguments that might possibly be made.

Here is Hypothetical No. 1: Assume that a certificate of incorporation provides for two classes of common stock, Class A and Class B, specifies expressly that they each carry one vote per share and is otherwise silent on the powers, preferences, and rights of each class.

Each share thus has the same number of votes that the shares would have by default under Section 212(a), which provides that "[u]nless otherwise provided in the certificate of incorporation and subject to Section 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder."

The power to vote in this hypothetical is thus not a special right. It is not a superior right. It is simply the baseline voting right made express. Assume that the corporation has issued shares of both classes of common. Assume that the corporation proposes a charter amendment to reduce the voting power of the Class B common from voting power of one vote per share to zero votes per share.

It seems to me that Section 242(b)(2)

gives the Class B common a class vote in this situation. The charter expressly gave the Class B common voting power of one vote per share. That vote is being taken away and reduced to zero. My impression at oral argument was that the company agreed that the Class B would have a class vote under an analogous hypothetical that was in my letter.

But this means that neither the superior right interpretation nor the special right interpretation can be accurate interpretations of Section 242(b)(2), because in this hypothetical, a class vote is triggered by the modification of a baseline right that has been made express. That right is not "special" in the sense of being different than baseline. It is not "superior" because it is the same as the baseline. We can thus exclude those interpretations as nonviable. That also means we have to exclude, or at least discount, the language in *Dickie Clay* and *Orban* which suggests that those interpretations are viable.

Now let's move to Hypothetical 2 and stress test the express power interpretation. Assume the same facts as in my first hypothetical, but now the voting power is not express. It is implied by law

under Section 212(a).

This scenario, therefore, does not satisfy the express power interpretation. But why should there be any difference? The amendment is still eliminating the voting power associated with the Class B common. The fact that the power is not express should not matter. Yet under the express power interpretation, no class vote is available in this instance simply because the right is not express.

It does not make sense to me why a class vote would be available in Hypothetical 1 and not in Hypothetical 2 when the amendment is exactly the same, the effect is exactly the same, and the only difference is that in Hypothetical 1 the voting power is specified in the charter, while in Hypothetical 2, it is established by default under Section 212(a).

These two hypotheticals addressed the power to vote. We can create a similar test for the power to sell.

So let's try Hypothetical No. 3. Assume the same facts as in Hypothetical 1, except that the charter provides that "[a]ll shares of stock of this corporation are freely alienable and may be transferred in accordance with Article 8 of Title 1 of

subchapter 6." For those of you who don't recognize it immediately, that was a direct quote from Section 159. In our hypothetical, that language is expressly included in the charter.

Assume that the corporation proposes a charter amendment which provides that if any share of Class B common is sold to a party that the board determines is a competitor, then the corporation can redeem the shares at 10 percent below fair market value. Again, Section 151(b) provides expressly that shares can be made redeemable as an attribute of the shares.

Section 151 also provides that a qualification, limitation, or restriction like a redemption call "may be made dependent upon facts ascertainable outside the certificate of incorporation ... provided that the manner in which such facts shall operate upon the voting powers, designations, preferences, rights and qualifications, limitations or restrictions of such class or series of stock is clearly and expressly set forth in the certificate of incorporation." Section 151(a) explains that "[t]he term 'facts,' as used in this subsection, includes, but is not limited to, the occurrence of any event,

including a determination or action by any person or body, including the corporation." A board determination that a buyer was a competitor thus could trigger a redemption right.

The analysis of the amendment in Hypothetical 3 is the same as in Hypothetical 1, but with the power to sell substituted for the power to vote. In this scenario, the power to sell is an express power, but it's not a superior power or a special power because its language tracks the language of Section 159. It is a baseline power made express.

The competitor redemption right amendment will reduce the scope of the express power to sell by imposing the competitor redemption call right in favor of the corporation. It seems to me that Section 242(b)(2) should give the Class B common a class vote in this situation. The charter expressly gave the Class B common a power to sell, and the amendment is reducing the scope of that power by adding a redemption right in favor of the corporation. An express power of the class is being adversely affected.

But now let's try Hypothetical 4, where we tweak the hypothetical so that the power to

sell is no longer express. Assume the same facts as in Hypothetical 1, but the charter is silent on the issue of alienability. The corporation's shares are nevertheless still freely alienable under Section 159 and to exactly the same degree. Assume that the corporation proposes the same charter amendment to impose a competitor redemption call right in favor of the corporation on the Class B stock.

The analysis under Section 242(b)(2) ins the same as in Hypothetical 2, but with the power to sell substituted for the power to vote. The power to sell is now no longer express. It is implied by law by Section 159.

The scenario, therefore, no longer satisfies the express right argument. But again, so what? The amendment is still reducing the scope of the Class B common's power to sell by making the shares subject to the competitor redemption call right. That is an adverse effect on a power appurtenant to a class of stock, and Section 242(b)(2) should provide the Class B common with a class vote.

We have now seen through the lenses of the power to vote and the power to sell that the express right argument, the special right argument,

and the superior right argument treat like circumstances differently. That suggests that the interpretations of the statute that they support are incoherent, because they create conflicting results in substantively identical circumstances. An incoherent interpretation of a statute should be an unpersuasive one.

Those arguments, those interpretations, should not have any more force for purposes of the power to sue, which is another right established by law.

To understand that, let's try Hypothetical 5. Assume the same facts as in Hypothetical 1. Assume that the corporation proposes to adopt an amendment which provides that any holder of Class B common stock who wishes to sue for breach of fiduciary duty, whether through an individual or derivative action, must own individually or collectively with other plaintiffs, as of the date of instituting such action, at least 2 percent of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of the corporation with a market value of at

least $2 million.

Let's call this the "litigation threshold Amendment." For those who don't immediately recognize the language, it's drawn verbatim from Section 367 of the DGCL, which includes a provision of that sort to limit the ability of stockholders to file any action to enforce the balancing-of-interests requirement found in Section 365(a) of the public benefit corporation statute.

In this hypothetical, the power to sue is being affected adversely. Before the litigation threshold amendment, any holder of Class B common stock could sue individually or derivatively. After the amendment, a Class B common stockholder could sue only by meeting the requirements of the litigation threshold amendment. For purposes of Section 242(b)(2), the amendment adversely affects a power that the Class B common stock otherwise would have. The plain language of Section 242(b)(2) would seem to call for the Class B common stock to receive a separate class vote to protect its power to sue.

The analysis of the officer exculpation amendment should be identical to the litigation threshold amendment. The restrictions on

the power to sue differ in degree, but not in kind.

I should note as an aside that when I floated a similar litigation threshold amendment with the parties, the company responded that this type of provision would be invalid. Perhaps. But as I noted, a version of the litigation threshold amendment is expressly authorized for public benefit corporations under Section 367, so it's difficult to say that it's contrary to Delaware public policy. One would have to posit some fundamental difference between C corps and public benefit corps to support an argument as to why a provision like this is warranted for a public benefit corporation but beyond the pale for a traditional C corp.

Regardless, the point of this exercise is not to ask whether some other doctrine or source of law might provide a constraint. The point is to assess whether Section 242(b)(2) provides a constraint by imposing a class vote when an amendment modifies the power to sue. And the idea is to use the concept of this amendment to pressure test the validity of the various interpretations of 242(b)(2).

Now let's talk briefly about the same treatment exception. Recall that the language of

*Orban* suggests that Section 242(b)(2) does not apply when an amendment affects all classes in the same way.

There is nothing in the plain language of Section 242(b)(2) that supports that assertion. In fact, the contrast between the first and second sentence of Section 242(b)(2) negates it. The second sentence states, "[i]f any proposed amendment would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not so affect the entire class, then only the shares of the series so affected by the amendment shall be considered a separate class for purposes of this paragraph."

For purposes of a series vote, the statute expressly includes the concept of same or different treatment. There's nothing similar for a class vote under the first sentence. If an amendment affects all classes and the effect is adverse as to each class, then each class gets a class vote.

Let's test the same treatment exception with our last hypothetical, and I'm sure you're thrilled to hear we've reached the end. It's Hypothetical 6. Start with the same facts as Hypothetical 1. This time, assume that one holder

owns all of the Class A common stock and that there are enough Class A common shares to comprise a majority of the outstanding voting power.

The Class A holder causes the corporation to propose to amend its charter to adopt a provision contemplated by 102(b)(6), which authorizes a provision "imposing personal liability for the debts of the corporation on its stockholders to a specified extent and upon specified conditions; otherwise, the stockholders of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts."

Assume that this amendment makes all stockholders liable for a *pro rata* share of the corporation's liability on a senior bank loan in the event the corporation defaults. Assume that the holder of the Class A common personally guaranteed that loan. Imposing this amendment on all shares is rational from the Class A stockholders' perspective, because the holder of the Class A common is already on the hook personally. This amendment puts all the other stockholders on the hook proportionately as well, diluting the Class A holder's potential

liability.

This amendment represents an adverse change to a baseline and unexpressed right of the shares, under which the owners are not personally liable for the debts of the corporation. Yet the amendment nominally treats all stockholders equally. If the same treatment exception were correct, then there would be no class vote in this situation. Yet the amendment is plainly and obviously adverse to each class. I would suggest that, based on this example, we can rule out the same treatment exception. In this setting, each class gets a class vote.

During oral argument, I was eventually able to discern that the company is not relying on the same treatment exception. I did have the impression at oral argument that the company agrees that if a corporation has multiple classes of stock and an amendment makes an adverse change to each of these classes, even if it is the same adverse change, then each class gets a class vote.

That's all helpful. It's nice to be on the same page as to that. But what it means is we have to discount the language in *Orban* that supports the same treatment exception, because the same

treatment exception doesn't work under Section 242(b)(2).

The company has said that it's not relying on the superior right argument or the special right argument. The company says it is only relying on the express right argument. The company is not asserting that a right must be superior, nor that the right must be special and different from the rights held by the other shares. The company agrees that all shares could have the same exact right, or even that it could be an express version of a baseline right. The company says only that to trigger a class vote, the right must appear expressly in the charter.

As I have noted, the express right argument results in the exact same charter amendment operating differently, depending on whether the right is expressed in the charter or established by law. That suggests a degree of incoherence in the express right argument that should fatally undermine it.

In response, the company argues that the express right argument is necessarily the answer under *Dickey Clay* and *Orban*. As I have discussed, there's actually language in those cases that support multiple different interpretations. The express right

interpretation is one of them, but it is not indisputably clear that *Dickey Clay* and *Orban* necessarily lead to the express right argument.

As a fallback, the company argues that the express right argument is necessarily the answer because, otherwise, how would a corporation know whether a class vote was necessary. I don't think there would be any great mystery. There are three fundamental stockholder powers: to vote, to sell, and to sue. There are other rights set forth in the DGCL. And there are express rights. If you affect any of those adversely, you trigger a class vote for the affected class.

The company argues that without the express right interpretation, more charter amendments would require class votes. That undoubtedly is true. For example, in a multi-class company, class votes could be required for charter amendments eliminating the right to act by written consent or approving a conversion to a private benefit corporation.

In my experience, corporate planners would like to avoid class votes. But that does not mean more class votes is a bad thing. By my lights, whether more class votes is good or bad is another

debatable proposition that depends on your underlying empirical assumptions.

Let's start from a theoretical standpoint. From that perspective, granting a class vote to each class in a particular setting ensures the transaction that triggers the class vote is what economists call Kaldor-Hicks efficient, because the class can block the amendment unless it receives sufficient consideration to outweigh any loss.

For anyone who doesn't immediately recall the concept of Kaldor-Hicks efficiency from your law and economics class -- and there's no reason why you necessarily should -- the idea is that a transaction is efficient if one side is sufficiently better off that it can compensate the other side for its losses so that everyone is at least not worse off.

The concept is distinct from Pareto optimality, where everyone in a transaction necessarily is made better off. The idea under Kaldor-Hicks efficiency is that, on net, the transaction makes everyone better off, so that even if one side loses, society gains. If the adversely affected side has a blocking right, it will veto transactions that are not Kaldor-Hicks efficient, and

it will withhold approval under conditions of Kaldor-Hicks efficiency until those who benefit from the transaction and want it to go forward share some of the benefit to offset the detriment.

A class vote has that effect. A class vote thus ensures that amendments go through that will be value creating rather than value destroying.

A less theoretical way of framing the problem is that midstream amendments enable both permanent and temporary majorities to impose their will on minority classes of stock and potentially reallocate value through amendments. It is easy to imagine settings where one or more classes dominate the total voting power and seek to make adverse changes to a right that one of the classes would want to preserve. Hypothetical 6 provided an example of that with the amendment that sought to impose personal liability for a corporate debt on all stockholders.

For an example, using the power to sue, envision a group of venture capital funds who own all the preferred stock and, through it, the bulk of the corporation's outstanding voting power. They might well seek to impose amendments on the common stock that alter unexpressed rights, such as the right

to sue.

For a concrete example, let's assume the preferred stockholders foresee having to engage in the type of transaction at issue in *Orban* and later in *Trados*, where their liquidation preferences will soak up all the consideration and the common will receive nothing. As an advance-planning measure, the preferred might well seek to impose something like the litigation threshold amendment. If the corporation were privately held after the amendment, only a stockholder who owned, individually or collectively with other plaintiffs, at least 2 percent of the class would be able to sue.

For purposes of Section 242(b)(2), the amendment would adversely affect a power that the common otherwise would have, and the plain language of the statute would seem to call for a class vote by the common on that type of amendment to protect its power to sue.

With a class vote, the common could reject the amendment unless the amendment was part of a transaction in which they received something in return, such as a modification of the preferred's liquidation preference.

This is not heresy. Nor is it novel. It's how restructurings happen in bankruptcy, where multiple classes in the capital structure receive class votes. It's also how bond restructurings happen, because a class of bondholders often receive some form of consideration for agreeing to modifications in their contract rights.

It is not unthinkable to envision that the same type of structure would happen in this type of setting and that 242(b)(2) would be intended to protect the powers of a class of stock so that they could not be adversely affected and value reallocated.

Now, what would the real-world consequences of this interpretation of Section 242(b)(2) actually be? I would say not much. It would have no effect on new IPOs, where the issuing company can still put whatever it wants in its charter. It would have no effect on single-class corporations. The main effect would be to provide protection for stockholders in multi-class corporations where one or more issuances dominate the voting power and another issuance is vulnerable.

Even then, if the amendment is good for all stockholders, then the class votes should be

easy to get. And if the corporation times the amendment to coincide with its annual meeting, there is no need for significant additional expense.

And, as is often the case, in Delaware there is still a workaround. Recall that the merger statute, Section 251, permits a corporation to amend its charter and does not require a class vote. That's the landmark decision of *Federated United Corporation v. Havender*, a case from 1940, decided just two years before *Dickey Clay*, as well as *Warner Communications v. Chris-Craft,* a decision from Chancellor Allen in 1989, just seven years before *Orban*. There's a nice symmetry there. The only likely real-world effect of providing a class vote would thus be to channel corporations to use mergers to amend their charters rather than charter amendments under Section 242.

Now for a contrary policy argument. During the hearing, the company argued that when stockholders purchase no-vote shares, like the non-voting shares issued by the company, the buyers know they have no right to vote and cannot object to not receiving a class vote on the officer exculpation amendment. But that begs the question. Stockholders who buy non-voting stock know they have no right to

vote unless required by law. Namely, unless required by Section 242(b)(2). If Section 242(b)(2) provides a vote in this setting, then they bought shares with that baseline understanding — in other words, the baseline expectation that they would have a vote.

This points to a larger problem with arguments about the baseline expectations of buyers. One cannot assume a baseline expectation and then use it to answer the question that the case poses which actually determines the nature of the expectation. That is circular reasoning.

To reiterate, the issue presented by the officer exculpation amendment is identical to the litigation threshold amendment. It affects a power that is not express, but that should not matter. It affects a power that is not special or superior, but that should not matter either. I personally view the officer exculpation amendment as reasonable, so it's hard to see out of the box the implications of the underlying rule. Analytically, however, the issue is the same.

Given the foregoing analysis, there's a lot to be said for the plaintiff's plain-meaning argument. But I cannot adopt it.

The company has been able to trace a textual argument that links powers, preferences, and special rights to the powers, preferences, and special rights made express in a charter under Section 102(a)(4).

My discussion has shown that the express rights interpretation breaks down for the baseline right to vote and the baseline right to sell. My discussion suggests that the law should imply a similar outcome for the baseline right to sue.

But one could address the inconsistencies created by the baseline right to vote and the baseline right to sue and steel-man the express right interpretation by framing it as not just encompassing any power or preference or special right that is stated expressly in the charter, but also, any power, preference, or special right that is stated expressly in the DGCL.

That version of the express rights argument would follow from Section 394 of the DGCL, which states -- and I'm quoting -- "[t]his chapter and all amendments thereof shall be a part of the charter or certificate of incorporation of every corporation."

The Delaware Supreme Court noted this

reality in *STAAR Surgical v. Waggoner* in 1991, when it stated: "[I]t is a basic concept that the General Corporation Law is a part of the certificate of incorporation of every Delaware company." Coincidentally, that statement also appears in *Dickey Clay*, where the Court said, at page 321, "[T]here is impliedly written into every corporate charter as a constituent part thereof the pertinent provisions of the State Constitution and statutes."

So under this steel-man version of the express rights interpretation, the power to sue for breach of fiduciary duty would be an attribute of the shares, but it would be different from the right to vote or the right to sell, because there is no express provision in the DGCL that addresses the right to sue. Except for Section 327, which imposes the contemporaneous ownership requirement for derivative claims, the DGCL says nothing about the power to sue.

It follows that, under this steel-man version of the express rights argument, the power to sue would not be protected by Section 242(b)(2).

I have to admit that if I were writing on a blank slate, I would be inclined to add in the power to sue. I think there is a strong argument that

the power to sue is the foundational power, meaning that it is the power that is essential to all others and on which the legal regime is built. Why? Because if you cannot go to court, then you cannot enforce your other rights. If you cannot obtain a judgment, backed by the power of the state, that allows you to invoke the power of the state on your behalf to enforce your other rights, such as the power to vote or the power to sell, you might as well not have those powers. Unless you have some ability to coerce compliance from the corporation on your own, whether through violence or economic power, those powers become just words on a page.

Interestingly, the company seems to acknowledge the importance of the power to sue as a foundational power. When I circulated the earlier versions of my hypotheticals to the parties by letter, the company responded to some of them by saying that a particular amendment that affected the power to sue would be invalid as a matter of public policy because Delaware law will not permit certain limitations on the power to sue.

That is doubtless true. And the superficial distinction for the officer exculpation

amendment is that the Delaware General Assembly has specifically authorized it. But while that fact makes clear that the amendment is permissible, it does not answer whether the amendment sufficiently impairs a power associated with a class of stock such that the class should receive a class vote under Section 242(b)(2).

To reiterate, an amendment that imposes a reduction in voting power is plainly permissible. Section 242(a)(3) says that. But it still may implicate a class vote under Section 242(b)(2). An amendment that imposes a redemption right is plainly permissible under Section 151(b). But it still may implicate a class vote under Section 242(b)(2). If anything, the fact that the amendment to the DGCL under 102(b)(7) was deemed necessary to validate officer exculpation suggests the limitation is a big deal. And therefore, while now permissible as a statutory matter, it could be a sufficient impairment to a power associated with stock to require a class vote under Section 242(b)(2).

If I were writing on a blank slate, therefore, I would say that the power to sue is the foundational power which, while not express, is the

most important baseline power, essential for the others to exist, and therefore, less subject to modification than other powers and preferences and special rights, not more so. Indeed, I would suggest that one could flip the argument about the power to sue being readily modifiable because it is not an express power. I would suggest that it is so important, so fundamental, that no one needed to provide for it expressly, and therefore it is not readily modifiable.

Under this approach, the power to sue would only be modifiable to the same degree as any special right appearing in the charter or identified in the DGCL. And that would mean that the officer exculpation provision would require a class vote.

That said, I do not think that such an interpretation reflects the language of *Dickey Clay* and *Orban*. I think the language of those cases supports the company's version of the express rights interpretation.

I also think, consistent with the company's showing in its briefing, that Delaware practitioners have long viewed *Dickey Clay* as supporting the express rights interpretation. The

company has cited treatise passages to that effect. The company has pointed to the absence of any commentary saying anything different over the past decades.

The company also cited the experience with the director exculpation amendments that were adopted after the original enactment of Section 102(b)(7). Those amendments pose the same issue as the officer exculpation amendments, yet there is no evidence of any commentary suggesting that in a multi-class structure, a class vote would be required.

The company has identified nine examples of multi-class companies that adopted director exculpation amendments where no class vote was required. One corporation was a New York company, true, but no one has suggested that New York's law is different from Delaware in this respect.

Another corporation, The Washington Post Company, provided a class vote voluntarily on the joint adoption of both a director exculpation amendment and a director indemnification provision, believing that the latter could be viewed as an interested transaction such that a class vote would be helpful.

In the nearly 40 years since 1986 and the adoption of Section 102(b)(7) for directors, no one has taken the position until this case that an exculpation amendment requires a class vote.

Speaking for myself, I never previously thought that an exculpation amendment required a class vote. Until I read the plaintiff's briefs, I thought this case was a no-brainer and an easy call.

Once I read the plaintiff's briefs, I decided they had a good plain-language argument. As I noted at the outset, if this were the first case to consider section 242(b)(2), then there might be a good reason to adopt it.

But this is not the first case to consider 242(b)(2). The decisions in *Dickey Clay* and *Orban* have paved the way, and there's an established understanding as to how Section 242(b)(2) works.

My deference to long-standing practitioner expectation in this case does not mean that a court will always defer to practitioner views. The Delaware Supreme Court did not do so in *CML v. Bax*. I did not do so in *Vaalco*. Then-Chancellor Strine did not do so in *Sandridge*. And the recent

SPAC apocalypse brought on by *Garfield v. Boxed* shows that the fact that many transactions deploy a particular structure does not mean it is right. Indeed, it can be fundamentally wrong.

Here, however, the company's interpretation is deeply settled, and it draws on *Dickey Clay*, which is a Delaware Supreme Court decision. I therefore do not feel at liberty to adopt a different interpretation of Section 242(b)(2). Accordingly, under *Dickey Clay* and *Orban*, the officer exculpation amendment does not require a class vote of the company's non-voting stock because the officer exculpation amendment does not affect a power, preference, or special right that appears expressly in the charter.

As I noted, there is a companion case involving *Snap* that presents the same issues. Its motion for summary judgment is granted on the same basis.

To reiterate, for the reasons that I've stated, the plaintiff's motion for summary judgment is denied, and the company's motion is granted.

I will enter an order to that effect.

It is my intention for that order to be my last act in the case, such that it constitutes a final judgment, from which the aggrieved party can appeal as of right.

Thank you for listening to this ruling. I appreciate everyone bearing with me. And I hope everyone has a good day. Goodbye.

(Proceedings concluded at 12:18 p.m.)

- - -

CERTIFICATE

I, JULIANNE LABADIA, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 70 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except as revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 30th day of March, 2023.

/s/ Julianne LaBadia
---
Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

# EXHIBIT AD

**Exhibit 99.1**

**INVESTOR RELATIONS:**
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***FOR IMMEDIATE RELEASE***

# AMC Entertainment Holdings, Inc. Reports First Quarter 2023 Results

**LEAWOOD, KANSAS - (May 5, 2023)** -- AMC Entertainment Holdings, Inc. (NYSE: AMC and APE) ("AMC" or "the Company"), today reported results for the first quarter ended March 31, 2023.

**Summary First Quarter 2023 Compared to First Quarter 2022:**

- Total revenues grew 21.5% to $954.4 million.
- Net loss improved by $101.9 million to $235.5 million.
- Adjusted net loss was $179.7 million compared to an adjusted net loss of $266.3 million.
- Diluted loss per share was $0.17 compared to a diluted loss per share of $0.33.
- Adjusted diluted loss per share was $0.13 compared to an adjusted diluted loss per share of $0.26.
- Adjusted EBITDA improved by $68.8 million to $7.1 million.
- Net cash used in operating activities for the quarter was $189.9 million.
- Non-GAAP Operating Cash Burn[1] for the quarter was $139.4 million compared to $223.9 million.
- Available liquidity at March 31, 2023 was $703.7 million, including $208.1 million of undrawn capacity under the Company's revolving credit facility.

In announcing the quarterly results, Adam Aron, Chairman and CEO of AMC said, "Our results for the first quarter of 2023 represent AMC's strongest first quarter in four full years. We kicked off 2023 by continuing on our positive glide path to recovery, with more than a 21% growth in total revenues and a $69 million improvement in Adjusted EBITDA compared to the previous year. The first quarter of 2023 and fourth quarter of 2022 mark the first two consecutive quarters of positive Adjusted EBITDA since March of 2020. This progress is a testament to the ongoing recovery in the industrywide box office, as well as AMC's enduring commitment to excellence and innovation as our guests enjoy a superb movie-going experience at our theatres."

Aron added, "AMC theatres across the globe welcomed nearly 48 million guests in the first quarter thanks to the continued strength of James Cameron's AVATAR: THE WAY OF WATER and the knockout power of first quarter releases like Marvel's ANT-MAN AND THE WASP: QUANTUMANIA, CREED III, SCREAM VI, SHAZAM! FURY OF THE GODS and JOHN WICK CHAPTER 4. All told, the first quarter North American box office easily surpassed 2022 by some 29%, totaling more than $1.7 billion. The recovery in the European box office was even stronger in getting to pre-pandemic norms than that in the U.S. As I have said for years, when our studio partners showcase their magical storytelling, there is robust demand to be realized at AMC theatres both in the U.S. and abroad."

[1] Operating Cash Burn is a non-GAAP metric that represents cash burn before debt servicing costs and before deferred rent payback

Aron continued, “We believe the first quarter of 2023 is just the tip of the iceberg for what’s to come in the remainder of the year. To that end, the second quarter of 2023 has already begun with the notable success of THE SUPER MARIO BROTHERS MOVIE, currently the highest-grossing movie of 2023 and over $1 billion in ticket sales worldwide. With so many compelling movies coming just in the next few months like GUARDIANS OF THE GALAXY VOL 3; THE LITTLE MERMAID, ELEMENTAL, FAST X, SPIDER-MAN: ACROSS THE SPIDER-VERSE, THE FLASH, INDIANA JONES AND THE DIAL OF DESTINY, MISSION IMPOSSIBLE - DEAD RECKONING PART ONE, OPPENHEIMER, BLUE BEETLE, GRAN TURISMO, HAUNTED MANSION, ABOUT MY FATHER, BARBIE, THE MEG 2: THE TRENCH, STRAYS, NO HARD FEELINGS, JOY RIDE, ASTEROID CITY, and THE EQUALIZER 3, among others, the remainder of the year promises something for everyone, and AMC stands ready to welcome movie-goers in significant numbers. We could not be more optimistic about the prospects for the 2023 box office, except to say that 2024 looks even better.”

Aron highlighted, “Of particular note, food and beverage spending per patron of $6.90 globally and $7.99 in the U.S., continued at a blistering pace compared to pre-pandemic levels. This is especially welcome given the high-margin nature of our food and beverage activity.”

Aron concluded, “During the first quarter of 2023, we continued to strengthen our balance sheet by raising more than $155 million of cash through the sale of APE units, and by reducing the principal balance of our debt by more than $200 million in repurchasing debt or exchanging APE units for debt. Our optimism about a clearly increasing industrywide box office notwithstanding, we have been very transparent that it will take a few more years for the industry box office to return near to pre-pandemic levels, and our ability to raise additional capital during this extended recovery period will be a crucial component of our success. We will continue our fight to preserve our agility and to remain on our recovery trajectory, as we work hard to position AMC for long-term success.”

**Key Financial Results** (presented in millions, except operating data)

| | Quarter Ended March 31, | | |
|---|---|---|---|
| | 2023 | 2022 | Change |
| **GAAP Results** | | | |
| Revenue | $ 954.4 | $ 785.7 | 21.5 % |
| Net loss | $ (235.5) | $ (337.4) | $ 101.9 |
| Net cash used in operating activities | $ (189.9) | $ (295.0) | $ 105.1 |
| Diluted loss per share | $ (0.17) | $ (0.33) | $ 0.16 |
| **Non-GAAP Results*** | | | |
| Total revenues (2022 constant currency adjusted) | $ 974.0 | $ 785.7 | 24.0 % |
| Net loss (2022 constant currency adjusted) | $ (236.8) | $ (337.4) | $ 100.6 |
| Adjusted EBITDA | $ 7.1 | $ (61.7) | $ 68.8 |
| Adjusted EBITDA (2022 constant currency adjusted) | $ 6.5 | $ (61.7) | $ 68.2 |
| Free cash flow | $ (237.3) | $ (329.8) | $ 92.5 |
| Adjusted net loss | $ (179.7) | $ (266.3) | $ 86.6 |
| Adjusted diluted loss per share | $ (0.13) | $ (0.26) | $ 0.13 |
| **Operating Metrics** | | | |
| Attendance (in thousands) | 47,621 | 39,075 | 21.9 % |
| U.S. markets attendance (in thousands) | 32,362 | 25,792 | 25.5 % |
| International markets attendance (in thousands) | 15,259 | 13,283 | 14.9 % |
| Average screens | 9,998 | 10,099 | (1.0)% |

* Please refer to the tables included later in this press release for definitions and full reconciliations of non-U.S. GAAP financial measures.

**AMC Preferred Equity Unit At-The-Market Equity Program**

In September 2022, AMC launched an at-the-market ("ATM") equity program to sell up to 425 million shares of its AMC Preferred Equity Units ("APE units").

Since the inception of the ATM in September 2022, as of March 31, 2023, AMC had raised gross proceeds of approximately $309.1 million, before commissions and fees, from the sale of approximately 257.0 million APE units.

During the first quarter of 2023, AMC raised gross proceeds of $80.3 million through the sale of approximately 49.3 million APE units.

During the second quarter of 2023, AMC has raised additional gross proceeds of approximately $34.2 million, before commission and fees, from the sale of approximately 21.2 million shares of APE units.

There are currently no APE units available to be issued under the September ATM equity program and board authorization.

**Balance Sheet, Cash and Liquidity**

During the first quarter 2023, AMC:

- Repurchased $99.4 million aggregate principal amounts of the Second Lien Notes due 2026 for $54.8 million or a 45% discount.

- Repurchased $4.1 million aggregate principal amount of the 5.875% Senior Subordinated Notes due 2026 for

$1.7 million, or a 59% discount.

- Issued approximately 91.0 million shares of APE units on a private basis to extinguish $100.0 million aggregate principal amount of the Company's 10%/12% Cash/PIK Toggle Second Lien Notes due 2026.

- Raised $75.1 million through the private sale of approximately 106.6 million APE Units.

- Received $30 million from Saudi Entertainment Ventures, AMC's Saudi joint venture partner, as AMC begins to transition from a management and investment role to a pure licensing relationship.

Cash at March 31, 2023 was $495.6 million excluding restricted cash of $23.1 million. AMC currently has liquidity availability of $703.7 million (including cash and undrawn capacity under the Company's revolving credit facility).

**Webcast Information**

The Company will host a webcast for investors and other interested parties beginning at 7:30 a.m. CST/8:30 a.m. EST on Friday, May 5, 2023. To listen to the webcast, please visit the investor relations section of the AMC website at www.investor.amctheatres.com for a link. Investors and interested parties should go to the website at least 15 minutes prior to the call to register, and/or download and install any necessary audio software.

An archive of the webcast will be available on the Company's website after the call for a limited time.

**About AMC Entertainment Holdings, Inc.**

AMC is the largest movie exhibition company in the United States, the largest in Europe and the largest throughout the world with approximately 920 theatres and 10,300 screens across the globe. AMC has propelled innovation in the exhibition industry by: deploying its Signature power-recliner seats; delivering enhanced food and beverage choices; generating greater guest engagement through its loyalty and subscription programs, web site and mobile apps; offering premium large format experiences and playing a wide variety of content including the latest Hollywood releases and independent programming. For more information, visit www.amctheatres.com.

**Website Information**

This press release, along with other news about AMC, is available at www.amctheatres.com. We routinely post information that may be important to investors in the Investor Relations section of our website, www.investor.amctheatres.com. We use this website as a means of disclosing material, non-public information and for complying with our disclosure obligations under Regulation FD, and we encourage investors to consult that section of our website regularly for important information about AMC. The information contained on, or that may be accessed through, our website is not incorporated by reference into, and is not a part of, this document. Investors interested in automatically receiving news and information when posted to our website can also visit www.investor.amctheatres.com to sign up for email alerts.

**Forward-Looking Statements**

This communication includes "forward-looking statements" within the meaning of the federal securities laws, including the safe harbor provisions of the Private Securities Litigation Reform Act of 1995. In many cases, these forward-looking statements may be identified by the use of words such as "will," "may," "could," "would," "should," "believes," "expects," "anticipates," "estimates," "intends," "indicates," "projects," "goals," "objectives," "targets," "predicts," "plans," "seeks," and variations of these words and similar expressions. Examples of forward-looking statements include statements we make regarding our expected revenue, net loss, capital expenditure, Adjusted EBITDA and estimate cash and cash equivalent. Any forward-looking statement speaks only as of the date on which it is made. These forward-

looking statements may include, among other things, statements related to AMC's current expectations regarding the performance of its business, financial results, liquidity and capital resources, and the impact to its business and financial condition of, and measures being taken in response to, the COVID-19 virus, and are based on information available at the time the statements are made and/or management's good faith belief as of that time with respect to future events, and are subject to risks, trends, uncertainties and other facts that could cause actual performance or results to differ materially from those expressed in or suggested by the forward-looking statements. These risks, trends, uncertainties and facts include, but are not limited to: the sufficiency of AMC's existing cash and cash equivalents and available borrowing capacity; availability of financing upon favorable terms or at all; AMC's ability to obtain additional liquidity, which if not realized or insufficient to generate the material amounts of additional liquidity that will be required unless it is able to achieve more normalized levels of operating revenues, likely would result with AMC seeking an in-court or out-of-court restructuring of its liabilities; the impact of the COVID-19 virus on AMC, the motion picture exhibition industry, and the economy in general; increased use of alternative film delivery methods or other forms of entertainment; the continued recovery of the North American and international box office; AMC's significant indebtedness, including its borrowing capacity and its ability to meet its financial maintenance and other covenants and limitations on AMC's ability to take advantage of certain business opportunities imposed by such covenants; shrinking exclusive theatrical release windows; the seasonality of AMC's revenue and working capital; intense competition in the geographic areas in which AMC operates; risks relating to impairment losses, including with respect to goodwill and other intangibles, and theatre and other closure charges; motion picture production and performance; general and international economic, political, regulatory and other risks; AMC's lack of control over distributors of films; limitations on the availability of capital, , including on the authorized number of common stock; dilution of voting power through the issuance of preferred stock; AMC's ability to achieve expected synergies, benefits and performance from its strategic initiatives; AMC's ability to refinance its indebtedness on favorable terms; AMC's ability to optimize its theatre circuit; AMC's ability to recognize interest deduction carryforwards, net operating loss carryforwards, and other tax attributes to reduce future tax liability; supply chain disruptions, labor shortages, increased cost and inflation; the ongoing stockholder litigation preventing AMC from implementing its 1:10 reverse stock split of Class A common stock and conversion of the AMC Preferred Equity Units into Class A common stock; and other factors discussed in the reports AMC has filed with the SEC. Should one or more of these risks, trends, uncertainties, or facts materialize, or should underlying assumptions prove incorrect, actual results may vary materially from those indicated or anticipated by the forward-looking statements contained herein. Accordingly, we caution you against relying on forward-looking statements, which speak only as of the date they are made. Forward-looking statements should not be read as a guarantee of future performance or results and will not necessarily be accurate indications of the times at, or by, which such performance or results will be achieved. For a detailed discussion of risks, trends and uncertainties facing AMC, see the section entitled "Risk Factors" in AMC's 2022 Form 10-K for the year ended December 31, 2022 and Form 10-Q for the quarter ended March 31, 2023, each as filed with the SEC, and the risks, trends and uncertainties identified in AMC's other public filings. AMC does not intend, and undertakes no duty, to update any information contained herein to reflect future events or circumstances, except as required by applicable law.

(Tables follow)

**AMC Entertainment Holdings, Inc.**
**Consolidated Statements of Operations**
**Quarter Ended March 31, 2023 and March 31, 2022**

(dollars in millions, except share and per share data)
(unaudited)

| | Quarter Ended March 31, | |
|---|---|---|
| | **2023** | **2022** |
| Revenues | | |
| Admissions | $ 534.1 | $ 443.8 |
| Food and beverage | 328.7 | 252.5 |
| Other theatre | 91.6 | 89.4 |
| Total revenues | 954.4 | 785.7 |
| | | |
| Operating costs and expenses | | |
| Film exhibition costs | 246.2 | 189.8 |
| Food and beverage costs | 61.4 | 42.6 |
| Operating expense, excluding depreciation and amortization below | 383.2 | 344.8 |
| Rent | 205.7 | 223.2 |
| General and administrative: | | |
| Merger, acquisition and other costs | 0.2 | 0.4 |
| Other, excluding depreciation and amortization below | 72.3 | 53.1 |
| Depreciation and amortization | 93.6 | 98.7 |
| Operating costs and expenses | 1,062.6 | 952.6 |
| | | |
| Operating loss | (108.2) | (166.9) |
| Other expense: | | |
| Other expense | 39.2 | 136.3 |
| Interest expense: | | |
| Corporate borrowings | 90.7 | 82.0 |
| Finance lease obligations | 0.9 | 1.2 |
| Non-cash NCM exhibitor services agreement | 9.5 | 9.2 |
| Equity in (earnings) loss of non-consolidated entities | (1.4) | 5.1 |
| Investment income | (13.5) | (63.4) |
| Total other expense, net | 125.4 | 170.4 |
| | | |
| Net loss before income taxes | (233.6) | (337.3) |
| Income tax provision | 1.9 | 0.1 |
| Net loss | $ (235.5) | $ (337.4) |
| | | |
| Diluted loss per share | $ (0.17) | $ (0.33) |
| | | |
| Average shares outstanding diluted (in thousands) | 1,373,947 | 1,031,820 |

**Consolidated Balance Sheet Data (at period end):**
(dollars in millions)
(unaudited)

| | As of March 31, 2023 | As of December 31, 2022 |
|---|---|---|
| Cash and cash equivalents | $ 495.6 | $ 631.5 |
| Corporate borrowings | 4,882.0 | 5,140.8 |
| Other long-term liabilities | 104.2 | 105.1 |
| Finance lease liabilities | 58.5 | 58.8 |
| Total AMC Entertainment Holdings, Inc.'s stockholders' deficit | (2,590.3) | (2,624.5) |
| Total assets | 8,847.6 | 9,135.6 |

**Consolidated Other Data:**
(in millions, except operating data)
(unaudited)

| | Quarter Ended March 31, | |
|---|---|---|
| Consolidated | 2023 | 2022 |
| Net cash used in operating activities | $ (189.9) | $ (295.0) |
| Net cash used in investing activities | $ (16.6) | $ (54.9) |
| Net cash provided by (used in) financing activities | $ 68.9 | $ (76.3) |
| Free cash flow | $ (237.3) | $ (329.8) |
| Capital expenditures | $ (47.4) | $ (34.8) |
| Screen additions | - | 7 |
| Screen acquisitions | 2 | 30 |
| Screen dispositions | 208 | 118 |
| Construction (closures) openings, net | (4) | 12 |
| Average screens | 9,998 | 10,099 |
| Number of screens operated | 10,264 | 10,493 |
| Number of theatres operated | 920 | 938 |
| Screens per theatre | 11.2 | 11.2 |
| Attendance (in thousands) | 47,621 | 39,075 |

**Segment Other Data:**
(in millions, except per patron amounts and operating data)
(unaudited)

| | Quarter Ended March 31, | |
|---|---|---|
| | 2023 | 2022 |
| **Other operating data:** | | |
| **Attendance (patrons, in thousands):** | | |
| U.S. markets | 32,362 | 25,792 |
| International markets | 15,259 | 13,283 |
| Consolidated | 47,621 | 39,075 |
| | | |
| **Average ticket price (in dollars):** | | |
| U.S. markets | $ 11.87 | $ 12.05 |
| International markets | $ 9.84 | $ 10.01 |
| Consolidated | $ 11.22 | $ 11.36 |
| | | |
| **Food and beverage revenues per patron (in dollars):** | | |
| U.S. markets | $ 7.99 | $ 7.52 |
| International markets | $ 4.60 | $ 4.40 |
| Consolidated | $ 6.90 | $ 6.46 |
| | | |
| **Average Screen Count (month end average):** | | |
| U.S. markets | 7,513 | 7,622 |
| International markets | 2,485 | 2,477 |
| Consolidated | 9,998 | 10,099 |

**Segment Information:**
(unaudited, in millions)

| | Quarter Ended March 31, | |
|---|---|---|
| | 2023 | 2022 |
| **Revenues** | | |
| U.S. markets | $ 704.5 | $ 563.1 |
| International markets | 249.9 | 222.6 |
| Consolidated | $ 954.4 | $ 785.7 |
| | | |
| **Adjusted EBITDA** | | |
| U.S. markets | $ 10.9 | $ (43.4) |
| International markets | (3.8) | (18.3) |
| Consolidated | $ 7.1 | $ (61.7) |
| | | |
| **Capital Expenditures** | | |
| U.S. markets | $ 34.6 | $ 21.1 |
| International markets | 12.8 | 13.7 |
| Consolidated | $ 47.4 | $ 34.8 |

**Reconciliation of Adjusted EBITDA (1):**
(dollars in millions)
(unaudited)

| | Quarter Ended March 31, | |
|---|---|---|
| | 2023 | 2022 |
| Net loss | $ (235.5) | $ (337.4) |
| Plus: | | |
| Income tax provision | 1.9 | 0.1 |
| Interest expense | 101.1 | 92.4 |
| Depreciation and amortization | 93.6 | 98.7 |
| Certain operating expense (2) | 1.1 | 2.3 |
| Equity in (earnings) loss of non-consolidated entities | (1.4) | 5.1 |
| Cash distributions from non-consolidated entities (3) | - | 0.7 |
| Attributable EBITDA (4) | 0.5 | 0.2 |
| Investment income (5) | (13.5) | (63.4) |
| Other expense (6) | 42.8 | 139.8 |
| Other non-cash rent benefit (7) | (9.6) | (7.1) |
| General and administrative expense-unallocated: | | |
| Merger, acquisition and other costs (8) | 0.2 | 0.4 |
| Stock-based compensation expense (9) | 25.9 | 6.5 |
| Adjusted EBITDA (1) | $ 7.1 | $ (61.7) |

1) We present Adjusted EBITDA as a supplemental measure of our performance. We define Adjusted EBITDA as net earnings (loss) plus (i) income tax provision (benefit), (ii) interest expense and (iii) depreciation and amortization, as further adjusted to eliminate the impact of certain items that we do not consider indicative of our ongoing operating performance and to include attributable EBITDA from equity investments in theatre operations in International markets and any cash distributions of earnings from other equity method investees. These further adjustments are itemized above. You are encouraged to evaluate these adjustments and the reasons we consider them appropriate for supplemental analysis. In evaluating Adjusted EBITDA, you should be aware that in the future we may incur expenses that are the same as or similar to some of the adjustments in this presentation. Our presentation of Adjusted EBITDA should not be construed as an inference that our future results will be unaffected by unusual or non-recurring items. Adjusted EBITDA is a non-U.S. GAAP financial measures commonly used in our industry and should not be construed as an alternative to net earnings (loss) as an indicator of operating performance (as determined in accordance with U.S. GAAP). Adjusted EBITDA may not be comparable to similarly titled measures reported by other companies. We have included Adjusted EBITDA because we believe it provides management and investors with additional information to measure our performance and estimate our value. The preceding definition of Adjusted EBITDA is broadly consistent with how Adjusted EBITDA is defined in our debt indentures.

Adjusted EBITDA has important limitations as an analytical tool, and you should not consider it in isolation, or as a substitute for analysis of our results as reported under U.S. GAAP. For example, Adjusted EBITDA:

- does not reflect our capital expenditures, future requirements for capital expenditures or contractual commitments;
- does not reflect changes in, or cash requirements for, our working capital needs;
- does not reflect the significant interest expenses, or the cash requirements necessary to service interest or principal payments, on our debt;
- excludes income tax payments that represent a reduction in cash available to us; and

- does not reflect any cash requirements for the assets being depreciated and amortized that may have to be replaced in the future.

2) Amounts represent preopening expense related to temporarily closed screens under renovation, theatre and other closure expense for the permanent closure of screens, including the related accretion of interest, disposition of assets and other non-operating gains or losses included in operating expenses. We have excluded these items as they are non-cash in nature or are non-operating in nature.

3) Includes U.S. non-theatre distributions from equity method investments and International non-theatre distributions from equity method investments to the extent received. We believe including cash distributions is an appropriate reflection of the contribution of these investments to our operations.

4) Attributable EBITDA includes the EBITDA from equity investments in theatre operators in certain International markets. See below for a reconciliation of our equity in loss of non-consolidated entities to attributable EBITDA. Because these equity investments are in theatre operators in regions where we hold a significant market share, we believe attributable EBITDA is more indicative of the performance of these equity investments and management uses this measure to monitor and evaluate these equity investments. We also provide services to these theatre operators including information technology systems, certain on-screen advertising services and our gift card and package ticket program.

**Reconciliation of Attributable EBITDA**
(dollars in millions)
(Unaudited)

| | Quarter Ended March 31, | |
|---|---|---|
| | **2023** | **2022** |
| Equity in (earnings) loss of non-consolidated entities | $ (1.4) | $ 5.1 |
| Less: | | |
| Equity in (earnings) loss of non-consolidated entities excluding International theatre joint ventures | (1.1) | 0.3 |
| Equity in earnings (loss) of International theatre joint ventures | 0.3 | (4.8) |
| Income tax benefit | (0.1) | - |
| Investment expense | 0.1 | - |
| Impairment of long-lived assets | - | 4.2 |
| Depreciation and amortization | 0.2 | 0.8 |
| Attributable EBITDA | $ 0.5 | $ 0.2 |

5) Investment income during the quarter ended March 31, 2023 primarily includes deterioration in estimated fair value of our investment in common shares of Hycroft Mining Holding Corporation of $2.3 million, deterioration in estimated value of our investment in warrants to purchase common shares of Hycroft Mining Holding Corporation of $2.3 million, a $(15.5) million gain on the sale of our investment in Saudi Cinema Company, LLC, and interest income of $(2.3) million.

Investment income during the quarter ended March 31, 2022 included appreciation in estimated fair value of our investment in common shares of Hycroft Mining Holding Corporation of $28.8 million and appreciation in estimated fair value of our investment in warrants to purchase common shares of Hycroft Mining Holding Corporation of $35.1 million.

6) Other expense during the quarter ended March 31, 2023 includes a non-cash litigation contingency reserve charge of $116.6 million, partially offset by foreign currency transaction gains of $(8.7) million and gains debt extinguishment of $(65.1) million.

Other expense during the quarter ended March 31, 2022 included a loss on debt extinguishment of $135.0 million and

foreign currency transaction losses of $4.8 million.

7) Reflects amortization expense for certain intangible assets reclassified from depreciation and amortization to rent expense due to the adoption of ASC 842, Leases and deferred rent benefit related to the impairment of right-of-use operating lease assets.

8) Merger, acquisition and other costs are excluded as they are non-operating in nature.

9) Non-cash expense included in General and Administrative: Other.

**Reconciliation of Operating Cash Burn (1) and Free Cash Flow (1)**
(dollars in millions)
(unaudited)

| | Quarter Ended March 31, | |
|---|---|---|
| | **2023** | **2022** |
| Net cash used in operating activities | $ (189.9) | $ (295.0) |
| Plus: total capital expenditures | (47.4) | (34.8) |
| Less: Cash interest paid | 77.3 | 62.5 |
| Non-recurring lease receipts (3) | (13.0) | - |
| Repayment of deferred lease amounts (2) | 33.6 | 43.4 |
| Operating cash burn (1) | $ (139.4) | $ (223.9) |

| | Quarter Ended March 31, | |
|---|---|---|
| | **2023** | **2022** |
| Net cash used in operating activities | $ (189.9) | $ (295.0) |
| Plus: total capital expenditures | (47.4) | (34.8) |
| Free cash flow (1) | $ (237.3) | $ (329.8) |

| | | |
|---|---|---|
| Reconciliation of Capital Expenditures: | | |
| Capital expenditures | | |
| Growth capital expenditures (5) | $ 14.0 | $ 9.5 |
| Maintenance capital expenditures (4) | 19.4 | 14.5 |
| Change in construction payables (6) | 14.0 | 10.8 |
| Total capital expenditures | $ 47.4 | $ 34.8 |

1) We present “Operating Cash Burn” and “Free Cash Flow” as supplemental measures of our liquidity. Free Cash Flow is an important financial measure for use in evaluating our liquidity, as it measures our ability to generate additional cash from our business operations. Free Cash Flow should be considered in addition to, rather than as a substitute for, net cash used in operating activities as a measure of our liquidity. Additionally, our definition of Operating Cash Burn is limited and does not represent residual cash flows available for discretionary expenditures due to the fact that the measure does not deduct the payments required for interest expense and the deferral or repayment of lease amounts that were due and not paid during the COVID-19 pandemic. Therefore, we believe it is important to view Operating Cash Burn and Free Cash Flow as supplemental to our entire statement of cash flows. The term Operating Cash Burn and Free Cash Flow may differ from similar measures reported by other companies.

2) Repayment of deferred lease amounts represent those lease amounts that were due and not paid during the COVID-19 pandemic. Their impact is excluded from operating cash burn to provide a more normalized cash rent payment stream.

3) Non-recurring lease receipts represent lease termination cash payments received during the three months ended March 31, 2023. Their impact is excluded from operating cash burn to provide a more normalized cash rent payment stream.

4) Maintenance capital expenditures are amounts required to keep our existing theatres in compliance with regulatory requirements and in a sustainable good operating condition, including expenditures for repair of HVAC, sight and sound systems, compliance with ADA requirements and technology upgrades of existing systems.

5) Growth capital expenditures are investments that enhance the guest experience and grow revenues and profits and include initiatives such as theatre remodels, acquisitions, newly built theatres, premium large formats, enhanced food and beverage offerings and service models and technology that enable efficiencies and additional revenue opportunities.

6) Change in construction payables are changes in amounts accrued for capital expenditures that fluctuate significantly from period to period based on the timing of actual payments.

**Select Consolidated Constant Currency Financial Data (see Note 10):**
**Quarter Ended March 31, 2023**
(dollars in millions) (unaudited)

| | Quarter Ended March 31, 2023 | | |
|---|---|---|---|
| | Constant Currency (10) | | |
| | US | International | Total |
| Revenues | | | |
| Admissions | $ 384.0 | $ 161.9 | $ 545.9 |
| Food and beverage | 258.5 | 75.7 | 334.2 |
| Other theatre | 62.0 | 31.9 | 93.9 |
| Total revenues | 704.5 | 269.5 | 974.0 |
| | | | |
| Operating costs and expenses | | | |
| Film exhibition costs | 188.5 | 62.1 | 250.6 |
| Food and beverage costs | 44.0 | 18.8 | 62.8 |
| Operating expense | 278.3 | 113.3 | 391.6 |
| Rent | 150.7 | 59.2 | 209.9 |
| General and administrative: | | | |
| Merger, acquisition and other costs | 0.2 | - | 0.2 |
| Other | 53.4 | 20.3 | 73.7 |
| Depreciation and amortization | 74.9 | 20.3 | 95.2 |
| Operating costs and expenses | 790.0 | 294.0 | 1,084.0 |
| | | | |
| Operating loss | (85.5) | (24.5) | (110.0) |
| Other expense (income) | 47.7 | (9.2) | 38.5 |
| Interest expense | 85.7 | 15.5 | 101.2 |
| Equity in earnings of non-consolidated entities | (0.9) | (0.5) | (1.4) |
| Investment expense (income) | 2.0 | (15.5) | (13.5) |
| Total other expense (income), net | 134.5 | (9.7) | 124.8 |
| Loss before income taxes | (220.0) | (14.8) | (234.8) |
| Income tax provision | 0.4 | 1.6 | 2.0 |
| Net loss | $ (220.4) | $ (16.4) | $ (236.8) |
| | | | |
| Attendance | 32,362 | 15,259 | 47,621 |
| Average Screens | 7,513 | 2,485 | 9,998 |
| Average Ticket Price | $ 11.87 | $ 10.61 | $ 11.46 |
| Food and Beverage Revenues per patron | $ 7.99 | $ 4.96 | $ 7.02 |
| Other Revenues per patron | $ 1.92 | $ 2.09 | $ 1.97 |

**Select Consolidated Constant Currency Financial Data (see Note 11):**
**Quarter Ended March 31, 2023**
(dollars in millions) (unaudited)

| | Quarter Ended March 31, 2023 | | |
|---|---|---|---|
| | Constant Currency (11) | | |
| | US | International | Total |
| Revenues | | | |
| Admissions | $ 384.0 | $ 161.7 | $ 545.7 |
| Food and beverage | 258.5 | 75.6 | 334.1 |
| Other theatre | 62.0 | 32.0 | 94.0 |
| Total revenues | 704.5 | 269.3 | 973.8 |
| | | | |
| Operating costs and expenses | | | |
| Film exhibition costs | 188.5 | 62.1 | 250.6 |
| Food and beverage costs | 44.0 | 18.8 | 62.8 |
| Operating expense | 278.3 | 112.9 | 391.2 |
| Rent | 150.7 | 59.1 | 209.8 |
| General and administrative: | | | |
| Merger, acquisition and other costs | 0.2 | - | 0.2 |
| Other | 53.4 | 20.2 | 73.6 |
| Depreciation and amortization | 74.9 | 20.2 | 95.1 |
| Operating costs and expenses | 790.0 | 293.3 | 1,083.3 |
| | | | |
| Operating loss | (85.5) | (24.0) | (109.5) |
| Other expense (income) | 47.7 | (9.1) | 38.6 |
| Interest expense | 85.7 | 15.5 | 101.2 |
| Equity in earnings of non-consolidated entities | (0.9) | (0.5) | (1.4) |
| Investment expense (income) | 2.0 | (15.5) | (13.5) |
| Total other expense (income), net | 134.5 | (9.6) | 124.9 |
| Loss before income taxes | (220.0) | (14.4) | (234.4) |
| Income tax provision | 0.4 | 1.6 | 2.0 |
| Net loss | $ (220.4) | $ (16.0) | $ (236.4) |
| | | | |
| Attendance | 32,362 | 15,259 | 47,621 |
| Average Screens | 7,513 | 2,485 | 9,998 |
| Average Ticket Price | $ 11.87 | $ 10.60 | $ 11.46 |
| Food and Beverage Revenues per patron | $ 7.99 | $ 4.95 | $ 7.02 |
| Other Revenues per patron | $ 1.92 | $ 2.10 | $ 1.97 |

**Reconciliation of Consolidated Constant Currency Adjusted EBITDA (see Note 10):**
**Quarter Ended March 31, 2023**
(dollars in millions) (unaudited)

| | Quarter Ended March 31, 2023 |
|---|---|
| | Constant Currency (10) |
| Net loss | $ (236.8) |
| Plus: | |
| Income tax provision | 2.0 |
| Interest expense | 101.2 |
| Depreciation and amortization | 95.2 |
| Certain operating expense (2) | 1.0 |
| Equity in (earnings) of non-consolidated entities | (1.4) |
| Cash distributions from non-consolidated entities (3) | - |
| Attributable EBITDA (4) | 0.5 |
| Investment income (5) | (13.5) |
| Other expense (6) | 42.2 |
| Other non-cash rent benefit (7) | (10.0) |
| General and administrative expense-unallocated: | |
| Merger, acquisition and other costs (8) | 0.2 |
| Stock-based compensation expense (9) | 25.9 |
| Adjusted EBITDA (1) | $ 6.5 |
| | |
| Adjusted EBITDA (in millions) (1) | |
| U.S. markets | $ 10.9 |
| International markets | (4.4) |
| Total Adjusted EBITDA (1) | $ 6.5 |

1) We present Adjusted EBITDA as a supplemental measure of our performance. We define Adjusted EBITDA as net earnings (loss) plus (i) income tax provision (benefit), (ii) interest expense and (iii) depreciation and amortization, as further adjusted to eliminate the impact of certain items that we do not consider indicative of our ongoing operating performance and to include attributable EBITDA from equity investments in theatre operations in International markets and any cash distributions of earnings from other equity method investees. These further adjustments are itemized above. You are encouraged to evaluate these adjustments and the reasons we consider them appropriate for supplemental analysis. In evaluating Adjusted EBITDA, you should be aware that in the future we may incur expenses that are the same as or similar to some of the adjustments in this presentation. Our presentation of Adjusted EBITDA should not be construed as an inference that our future results will be unaffected by unusual or non-recurring items. Adjusted EBITDA is a non-U.S. GAAP financial measure commonly used in our industry and should not be construed as an alternative to net earnings (loss) as an indicator of operating performance (as determined in accordance with U.S. GAAP). Adjusted EBITDA may not be comparable to similarly titled measures reported by other companies. We have included Adjusted EBITDA because we believe it provides management and investors with additional information to measure our performance and estimate our value. The preceding definition of Adjusted EBITDA is broadly consistent with how Adjusted EBITDA is defined in our debt indentures.

Adjusted EBITDA has important limitations as analytical tools, and you should not consider it in isolation, or as a substitute for analysis of our results as reported under U.S. GAAP. For example, Adjusted EBITDA:

- does not reflect our capital expenditures, future requirements for capital expenditures or contractual commitments;
- does not reflect changes in, or cash requirements for, our working capital needs;

- does not reflect the significant interest expenses, or the cash requirements necessary to service interest or principal payments, on our debt;

- excludes income tax payments that represent a reduction in cash available to us; and

- does not reflect any cash requirements for the assets being depreciated and amortized that may have to be replaced in the future.

2) Amounts represent preopening expense related to temporarily closed screens under renovation, theatre and other closure expense for the permanent closure of screens, including the related accretion of interest, disposition of assets and other non-operating gains or losses included in operating expenses. We have excluded these items as they are non-cash in nature or are non-operating in nature.

3) Includes U.S. non-theatre distributions from equity method investments and International non-theatre distributions from equity method investments to the extent received. We believe including cash distributions is an appropriate reflection of the contribution of these investments to our operations.

4) Attributable EBITDA includes the EBITDA from equity investments in theatre operators in certain International markets. See below for a reconciliation of our equity in loss of non-consolidated entities to attributable EBITDA. Because these equity investments are in theatre operators in regions where we hold a significant market share, we believe attributable EBITDA is more indicative of the performance of these equity investments and management uses this measure to monitor and evaluate these equity investments. We also provide services to these theatre operators including information technology systems, certain on-screen advertising services and our gift card and package ticket program.

**Reconciliation of Constant Currency Attributable EBITDA**

(dollars in millions) (unaudited)

| | Quarter Ended March 31, 2023 |
|---|---|
| | Constant Currency |
| Equity in (earnings) of non-consolidated entities | $ (1.4) |
| Less: | |
| Equity in (earnings) of non-consolidated entities excluding international theatre joint ventures | (1.1) |
| Equity in earnings of International theatre joint ventures | 0.3 |
| Income tax benefit | (0.1) |
| Investment expense | 0.1 |
| Depreciation and amortization | 0.2 |
| Attributable EBITDA | $ 0.5 |

5) Investment income during the quarter ended March 31, 2023 primarily includes deterioration in estimated fair value of our investment in common shares of Hycroft Mining Holding Corporation of $2.3 million, deterioration in estimated fair value of our investment in warrants to purchase common shares of Hycroft Mining Holding Corporation of $2.3 million, a $(15.5) million gain on the sale of our investment in Saudi Cinema Company, LLC, and interest income of $(2.3) million.

6) Other expense during the quarter ended March 31, 2023 included a non-cash litigation contingency reserve charge of $116.6 million, partially offset by foreign currency transaction gains of $(9.3) million and gains on debt extinguishment of $(65.1) million.

7) Reflects amortization of certain intangible assets reclassified from depreciation and amortization to rent expense due to the adoption of ASC 842, Leases and deferred rent benefit related to the impairment of right-of-use operating lease

assets.

8) Merger, acquisition and other costs are excluded as it is non-operating in nature.

9) Non-cash expense included in General and Administrative: Other.

10) The International segment information for the quarter ended March 31, 2023 has been adjusted for constant currency. Constant currency amounts, which are non-GAAP measurements were calculated using the average exchange rate for the corresponding period for 2022. We translate the results of our International operating segment from local currencies into U.S. dollars using currency rates in effect at different points in time in accordance with U.S. GAAP. Significant changes in foreign exchange rates from one period to the next can result in meaningful variations in reported results. We are providing constant currency amounts for our International operating segment to present a period-to-period comparison of business performance that excludes the impact of foreign currency fluctuations.

11) The International segment information for the quarter ended March 31, 2023 has been adjusted for constant currency. Constant currency amounts, which are non-GAAP measurements were calculated using the average exchange rate for the corresponding period for 2019. We translate the results of our International operating segment from local currencies into U.S. dollars using currency rates in effect at different points in time in accordance with U.S. GAAP. Significant changes in foreign exchange rates from one period to the next can result in meaningful variations in reported results. We are providing constant currency amounts for our International operating segment to present a period-to-period comparison of business performance that excludes the impact of foreign currency fluctuations.

**Reconciliation of Adjusted Net Loss and Adjusted Loss Per share:**
**Quarter Ended March 31, 2023 and March 31, 2022**
(dollars in millions, except share and per share data)
(unaudited)

| | Quarter Ended | |
|---|---|---|
| | March 31 2023 | March 31 2022 |
| **Numerator:** | | |
| Net loss attributable to AMC Entertainment Holdings, Inc. | $ (235.5) | $ (337.4) |
| Calculation of adjusted net loss for diluted loss per share: | | |
| (Gain) Loss on extinguishment of debt | (65.1) | 135.0 |
| Loss (Gain) on investments | 4.3 | (63.9) |
| Non-cash shareholder litigation expense | 116.6 | - |
| Adjusted net loss for diluted loss per share | $ (179.7) | $ (266.3) |
| | | |
| **Denominator (shares in thousands):** | | |
| Weighted average shares for diluted loss per share | 1,373,947 | 1,031,820 |
| | | |
| Adjusted diluted loss per share | $ (0.13) | $ (0.26) |

We present adjusted net loss for diluted loss per share and adjusted diluted loss per share as supplemental measures of our performance. We have included these measures because we believe they provide management and investors with additional information that is helpful when evaluating our underlying performance and comparing our results on a year-over-year normalized basis. Adjusted net loss for diluted loss per share eliminates the impact of certain items that we do not consider indicative of our underlying operating performance. These adjustments are itemized above. Adjusted diluted loss per share is adjusted net loss for diluted purposes divided by weighted average diluted shares outstanding. Weighted average shares for diluted purposes include common equivalents for restricted stock units ("RSUs") and performance stock units ("PSUs"). The impact of RSUs and PSUs was anti-dilutive in each period. You are encouraged to evaluate the adjustments itemized above and the reasons we consider them appropriate for supplemental analysis. In evaluating adjusted net loss and adjusted net loss per share, you should be aware that in the future we may incur expenses that are the same as or similar to some of the adjustments in this presentation. Our presentation of adjusted net loss and adjusted diluted loss per share should not be construed as an inference that our future results will be unaffected by unusual or non-recurring items. Adjusted net loss for diluted loss per share and adjusted diluted loss per share are non-U.S. GAAP financial measures and should not be construed as alternatives to net loss and net loss per share (basic and diluted) as indicators of operating performance (as determined in accordance with U.S. GAAP). Adjusted net loss for diluted loss per share and adjusted diluted loss per share may not be comparable to similarly titled measures reported by other companies.

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# EXHIBIT AE

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# UNITED STATES
# SECURITIES AND EXCHANGE COMMISSION
# WASHINGTON, D.C. 20549

## FORM 10-Q

**(Mark One)**

☒ **QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**
**For the quarterly period ended March 31, 2023**
**OR**

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

**For the transition period from to**

**Commission file number 001-33892**

## AMC ENTERTAINMENT HOLDINGS, INC.

(Exact name of registrant as specified in its charter)

| **Delaware** | **26-0303916** |
|---|---|
| (State or other jurisdiction of incorporation or organization) | (I.R.S. Employer Identification No.) |
| **One AMC Way** | |
| **11500 Ash Street, Leawood, KS** | **66211** |
| (Address of principal executive offices) | (Zip Code) |

Registrant's telephone number, including area code: **(913) 213-2000**

Securities registered pursuant to Section 12(b) of the Act:

| **Title of each class** | **Trading Symbol** | **Name of each exchange on which registered** |
|---|---|---|
| Class A common stock | AMC | New York Stock Exchange |
| AMC Preferred Equity Units, each constituting a depositary share representing a 1/100th interest in a share of Series A Convertible Participating Preferred Stock | APE | New York Stock Exchange |

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulations S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). Yes ☒ No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," and "smaller reporting company" and "emerging growth company" in Rule 12b-2 of the Exchange Act.

Large Accelerated Filer ☒ Accelerated filer ☐ Non-accelerated filer ☐ Smaller reporting company ☐

Emerging growth company ☐

If an emerging growth company, indicate by checkmark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standard provided pursuant to Section 13(a) of the Exchange Act. ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date.

| **Title of each class of common stock** | **Number of shares outstanding as of May 4, 2023** |
|---|---|
| Class A common stock | 519,192,389 |
| AMC Preferred Equity Units, each representing participating voting and economic rights in the equivalent of one (1) share of Class A common stock | 995,406,413 |

**AMC ENTERTAINMENT HOLDINGS, INC.**

**INDEX**

## PART I-FINANCIAL INFORMATION

**Item 1. Financial Statements. (Unaudited)**

### AMC ENTERTAINMENT HOLDINGS, INC.

### CONDENSED CONSOLIDATED STATEMENTS OF OPERATIONS

| (In millions, except share and per share amounts) | Three Months Ended March 31, 2023 | Three Months Ended March 31, 2022 |
|---|---|---|
| | (unaudited) | |
| Revenues | | |
| Admissions | $ 534.1 | $ 443.8 |
| Food and beverage | 328.7 | 252.5 |
| Other theatre | 91.6 | 89.4 |
| Total revenues | 954.4 | 785.7 |
| Operating costs and expenses | | |
| Film exhibition costs | 246.2 | 189.8 |
| Food and beverage costs | 61.4 | 42.6 |
| Operating expense, excluding depreciation and amortization below | 383.2 | 344.8 |
| Rent | 205.7 | 223.2 |
| General and administrative: | | |
| Merger, acquisition and other costs | 0.2 | 0.4 |
| Other, excluding depreciation and amortization below | 72.3 | 53.1 |
| Depreciation and amortization | 93.6 | 98.7 |
| Operating costs and expenses | 1,062.6 | 952.6 |
| Operating loss | (108.2) | (166.9) |
| Other expense, net: | | |
| Other expense | 39.2 | 136.3 |
| Interest expense: | | |
| Corporate borrowings | 90.7 | 82.0 |
| Finance lease obligations | 0.9 | 1.2 |
| Non-cash NCM exhibitor services agreement | 9.5 | 9.2 |
| Equity in (earnings) loss of non-consolidated entities | (1.4) | 5.1 |
| Investment income | (13.5) | (63.4) |
| Total other expense, net | 125.4 | 170.4 |
| Net loss before income taxes | (233.6) | (337.3) |
| Income tax provision | 1.9 | 0.1 |
| Net loss | $ (235.5) | $ (337.4) |
| Net loss per share attributable to AMC Entertainment Holdings, Inc.'s common stockholders: | | |
| Basic | $ (0.17) | $ (0.33) |
| Diluted | $ (0.17) | $ (0.33) |
| Average shares outstanding: | | |
| Basic (in thousands) | 1,373,947 | 1,031,820 |
| Diluted (in thousands) | 1,373,947 | 1,031,820 |

See Notes to Condensed Consolidated Financial Statements.

**AMC ENTERTAINMENT HOLDINGS, INC.**

**CONDENSED CONSOLIDATED STATEMENTS OF COMPREHENSIVE LOSS**

| (In millions) | Three Months Ended March 31, 2023 | Three Months Ended March 31, 2022 |
|---|---|---|
| | (unaudited) | |
| Net loss | $ (235.5) | $ (337.4) |
| Other comprehensive loss: | | |
| Unrealized foreign currency translation adjustments | (7.2) | (6.0) |
| Pension adjustments: | | |
| Net gain (loss) arising during the period | (0.1) | 0.2 |
| Other comprehensive loss: | (7.3) | (5.8) |
| Total comprehensive loss | $ (242.8) | $ (343.2) |

See Notes to Condensed Consolidated Financial Statements.

**AMC ENTERTAINMENT HOLDINGS, INC.**

**CONDENSED CONSOLIDATED BALANCE SHEETS**

**(Unaudited)**

| (In millions, except share data) | March 31, 2023 | December 31, 2022 |
|---|---|---|
| **ASSETS** | | |
| Current assets: | | |
| Cash and cash equivalents | $ 495.6 | $ 631.5 |
| Restricted cash | 23.1 | 22.9 |
| Receivables, net | 105.7 | 166.6 |
| Other current assets | 116.1 | 81.1 |
| Total current assets | 740.5 | 902.1 |
| Property, net | 1,670.2 | 1,719.2 |
| Operating lease right-of-use assets, net | 3,740.3 | 3,802.9 |
| Intangible assets, net | 147.4 | 147.3 |
| Goodwill | 2,342.7 | 2,342.0 |
| Other long-term assets | 206.5 | 222.1 |
| Total assets | $ 8,847.6 | $ 9,135.6 |
| **LIABILITIES AND STOCKHOLDERS' DEFICIT** | | |
| Current liabilities: | | |
| Accounts payable | $ 257.0 | $ 330.5 |
| Accrued expenses and other liabilities | 490.6 | 364.3 |
| Deferred revenues and income | 391.7 | 402.7 |
| Current maturities of corporate borrowings | 20.0 | 20.0 |
| Current maturities of finance lease liabilities | 6.5 | 5.5 |
| Current maturities of operating lease liabilities | 546.5 | 567.3 |
| Total current liabilities | 1,712.3 | 1,690.3 |
| Corporate borrowings | 4,862.0 | 5,120.8 |
| Finance lease liabilities | 52.0 | 53.3 |
| Operating lease liabilities | 4,172.2 | 4,252.7 |
| Exhibitor services agreement | 502.5 | 505.8 |
| Deferred tax liability, net | 32.7 | 32.1 |
| Other long-term liabilities | 104.2 | 105.1 |
| Total liabilities | 11,437.9 | 11,760.1 |
| Commitments and contingencies | | |
| Stockholders' deficit: | | |
| AMC Entertainment Holdings, Inc.'s stockholders' deficit: | | |
| Preferred stock, $.01 par value per share, 50,000,000 shares authorized; including Series A Convertible Participating Preferred Stock, 10,000,000 authorized, 9,741,909 issued and outstanding as of March 31, 2023; 7,245,872 issued and outstanding December 31, 2022, represented by AMC Preferred Equity Units, each representing a 1/100th interest in a share of Series A Convertible Participating Preferred Stock, of which 1,000,000,000 is authorized; 974,190,794 issued and outstanding as of March 31, 2023; 724,587,058 issued and outstanding as of December 31, 2022 | 0.1 | 0.1 |
| Class A common stock ($.01 par value, 524,173,073 shares authorized; 519,192,389 shares issued and outstanding as of March 31, 2023; 516,838,912 shares issued and outstanding as of December 31, 2022) | 5.2 | 5.2 |
| Additional paid-in capital | 5,322.1 | 5,045.1 |
| Accumulated other comprehensive loss | (84.6) | (77.3) |
| Accumulated deficit | (7,833.1) | (7,597.6) |
| Total stockholders' deficit | (2,590.3) | (2,624.5) |
| Total liabilities and stockholders' deficit | $ 8,847.6 | $ 9,135.6 |

See Notes to Condensed Consolidated Financial Statements.

**AMC ENTERTAINMENT HOLDINGS, INC.**

**CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS**

| (In millions) | Three Months Ended March 31, 2023 | Three Months Ended March 31, 2022 |
|---|---|---|
| | (unaudited) | |
| **Cash flows from operating activities:** | | |
| Net loss | $ (235.5) | $ (337.4) |
| Adjustments to reconcile net loss to net cash used in operating activities: | | |
| Depreciation and amortization | 93.6 | 98.7 |
| (Gain) loss on extinguishment of debt | (65.1) | 135.0 |
| Deferred income taxes | 0.6 | (0.1) |
| Unrealized loss (gain) on investments Hycroft | 4.6 | (63.9) |
| Amortization of net premium on corporate borrowings to interest expense | (15.2) | (15.5) |
| Amortization of deferred financing costs to interest expense | 2.3 | 3.5 |
| Non-cash portion of stock-based compensation | 25.9 | 6.5 |
| Gain on disposition of Saudi Cinema Company | (15.5) | - |
| Equity in (gain) loss from non-consolidated entities, net of distributions | (1.1) | 5.8 |
| Landlord contributions | 6.4 | 0.6 |
| Other non-cash rent benefit | (9.6) | (7.1) |
| Deferred rent | (38.6) | (48.7) |
| Net periodic benefit income | 0.4 | - |
| Non-cash shareholder litigation expense | 116.6 | - |
| Change in assets and liabilities: | | |
| Receivables | 67.0 | 63.6 |
| Other assets | (28.5) | (30.6) |
| Accounts payable | (65.2) | (80.4) |
| Accrued expenses and other liabilities | (21.0) | (32.8) |
| Other, net | (12.0) | 7.8 |
| Net cash used in operating activities | (189.9) | (295.0) |
| **Cash flows from investing activities:** | | |
| Capital expenditures | (47.4) | (34.8) |
| Proceeds from disposition of Saudi Cinema Company | 30.0 | - |
| Proceeds from disposition of long-term assets | 0.8 | 7.2 |
| Investments in non-consolidated entities, net | - | (27.9) |
| Other, net | - | 0.6 |
| Net cash used in investing activities | (16.6) | (54.9) |
| **Cash flows from financing activities:** | | |
| Repurchase of Senior Subordinated Notes due 2026 | (1.7) | - |
| Proceeds from issuance of First Lien Notes due 2029 | - | 950.0 |
| Principal payments under First Lien Notes due 2025 | - | (500.0) |
| Principal payments under First Lien Notes due 2026 | - | (300.0) |
| Principal payments under First Lien Toggle Notes due 2026 | - | (73.5) |
| Premium paid to extinguish First Lien Notes due 2025 | - | (34.5) |
| Premium paid to extinguish First Lien Notes due 2026 | - | (25.6) |
| Premium paid to extinguish First Lien Toggle Notes due 2026 | - | (14.6) |
| Repurchase of Second Lien Notes due 2026 | (54.8) | - |
| Scheduled principal payments under Term Loan due 2026 | (5.0) | (5.0) |
| Net proceeds from AMC Preferred Equity Units issuance | 146.6 | - |
| Principal payments under finance lease obligations | (1.6) | (2.5) |
| Cash used to pay for deferred financing costs | (1.5) | (17.7) |
| Cash used to pay dividends | - | (0.7) |
| Taxes paid for restricted unit withholdings | (13.1) | (52.2) |
| Net cash provided by (used in) financing activities | 68.9 | (76.3) |
| Effect of exchange rate changes on cash and cash equivalents and restricted cash | 1.9 | (5.5) |

| | | | | |
|---|---|---|---|---|
| **Net decrease in cash and cash equivalents and restricted cash** | | (135.7) | | (431.7) |
| **Cash and cash equivalents and restricted cash at beginning of period** | | 654.4 | | 1,620.3 |
| **Cash and cash equivalents and restricted cash at end of period** | $ | 518.7 | $ | 1,188.6 |
| **SUPPLEMENTAL DISCLOSURES OF CASH FLOW INFORMATION:** | | | | |
| **Cash paid during the period for:** | | | | |
| Interest | $ | 77.3 | $ | 62.5 |
| Income taxes paid, net | $ | 2.1 | $ | 1.5 |
| **Schedule of non-cash activities:** | | | | |
| Investment in NCM | $ | - | $ | 15.1 |
| Construction payables at period end | $ | 26.8 | $ | 27.7 |
| Other third-party AMC Preferred Equity Units issuance costs payable | $ | 3.8 | $ | - |
| Extinguishment of Second Lien Notes due 2026 in exchange for share issuance | $ | 118.6 | $ | - |

See Notes to Condensed Consolidated Financial Statements.

**AMC ENTERTAINMENT HOLDINGS, INC.**

**NOTES TO CONDENSED CONSOLIDATED FINANCIAL STATEMENTS**

**March 31, 2023**
**(Unaudited)**

## NOTE 1-BASIS OF PRESENTATION

AMC Entertainment Holdings, Inc. ("Holdings"), through its direct and indirect subsidiaries, including American Multi-Cinema, Inc. and its subsidiaries, (collectively with Holdings, unless the context otherwise requires, the "Company" or "AMC"), is principally involved in the theatrical exhibition business and owns, operates or has interests in theatres located in the United States and Europe.

**Liquidity.** The Company believes its existing cash and cash equivalents, together with cash generated from operations, will be sufficient to fund its operations, satisfy its obligations, and comply with the minimum liquidity covenant requirement under its Senior Secured Revolving Credit Facility for at least the next twelve months. Pursuant to the Twelfth Amendment to Credit Agreement, the requisite revolving lenders party thereto agreed to extend the suspension period for the financial covenant applicable to the Senior Secured Revolving Credit Facility under the Credit Agreement through March 31, 2024. The current maturity date of the Senior Secured Revolving Credit Facility is April 22, 2024; since the financial covenant applicable to the Senior Secured Revolving Credit Facility is tested as of the last day of any fiscal quarter for which financial statements have been (or were required to have been) delivered, the financial covenant has been effectively suspended through maturity of the Senior Secured Revolving Credit Facility. As of March 31, 2023, the Company was subject to a minimum liquidity requirement of $100 million as a condition to the financial covenant suspension period under the Credit Agreement.

The Company's current cash burn rates are not sustainable long-term. In order to achieve net positive operating cash flows and long-term profitability, the Company believes that operating revenues will need to increase significantly to levels in line with pre-COVID operating revenues. Until such time as the Company is able to achieve positive operating cash flow, it is difficult to estimate the Company's liquidity requirements, future cash burn rates, future operating revenues, and attendance levels. Depending on the Company's assumptions regarding the timing and ability to achieve significantly increased levels of operating revenue, the estimates of amounts of required liquidity vary significantly.

There can be no assurance that the operating revenues, attendance levels, and other assumptions used to estimate our liquidity requirements and future cash burn rates will be correct, and our ability to be predictive is uncertain due to limited ability to predict studio film release dates, the overall production and theatrical release levels and success of individual titles. Further, there can be no assurances that the Company will be successful in generating the additional liquidity necessary to meet the Company's obligations beyond twelve months from the issuance of these financial statements on terms acceptable to the Company or at all.

The Company may, at any time and from time to time, seek to retire or purchase its outstanding debt through cash purchases and/or exchanges for equity (including AMC Preferred Equity Units) or debt, in open-market purchases, privately negotiated transactions or otherwise. Such repurchases or exchanges, if any, will be upon such terms and at such prices as it may determine, and will depend on prevailing market conditions, its liquidity requirements, contractual restrictions and other factors. The amounts involved may be material and to the extent equity is used, dilutive.

On December 22, 2022, the Company entered into a forward purchase agreement (the "Forward Purchase Agreement") with Antara Capital LP ("Antara") pursuant to which the Company agreed to (i) sell to Antara 106,595,106 AMC Preferred Equity Units for an aggregate purchase price of $75.1 million and (ii) simultaneously purchase from Antara $100.0 million aggregate principal amount of the Company's 10%/12% Cash/PIK Toggle Second Lien Notes due 2026 in exchange for 91,026,191 AMC Preferred Equity Units. On February 7, 2023, the Company issued 197,621,297 AMC Preferred Equity Units to Antara in exchange for $75.1 million in cash and $100.0 million aggregate principal amount of the Company's 10%/12% Cash/PIK Toggle Second Lien Notes due 2026. The Company recorded $193.7 million to stockholders' deficit as a result of the transaction. The Company paid $1.4 million of accrued interest in cash upon exchange of the notes. See Note 7-Stockholders' Equity for more information.

During the three months ended March 31, 2023 the Company raised gross proceeds of approximately $80.3 million and paid fees to a sales agent and incurred other third-party issuance costs of approximately $2.0 million and $7.8 million, respectively, through its at-the-market offering of approximately 49.3 million shares of its AMC Preferred Equity Units. The Company paid $6.8 million of other third-party issuance costs during the three months ended March 31, 2023. See Note 7-Stockholders' Equity and Note 13-Subsequent Events for further information regarding at-the-market offerings.

The below table summarizes the cash debt repurchase transactions during the three months ended March 31, 2023, including related party transactions with Antara, which became a related party on February 7, 2023. See Note 6-Corporate Borrowings and Finance Lease Liabilities for more information.

| (In millions) | Aggregate Principal Repurchased | Reacquisition Cost | Gain on Extinguishment | Accrued Interest Paid |
|---|---|---|---|---|
| Related party transactions: | | | | |
| Second Lien Notes due 2026 | $ 41.9 | $ 24.4 | $ 25.3 | $ 0.7 |
| 5.875% Senior Subordinated Notes due 2026 | 4.1 | 1.7 | 2.3 | 0.1 |
| Total related party transactions | 46.0 | 26.1 | 27.6 | 0.8 |
| Non-related party transactions: | | | | |
| Second Lien Notes due 2026 | 57.5 | 30.4 | 37.5 | 1.1 |
| Total non-related party transactions | 57.5 | 30.4 | 37.5 | 1.1 |
| Total debt repurchases | $ 103.5 | $ 56.5 | $ 65.1 | $ 1.9 |

**Use of Estimates.** The preparation of financial statements in conformity with U.S. generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the condensed consolidated financial statements and the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

**Principles of Consolidation.** The accompanying unaudited condensed consolidated financial statements include the accounts of AMC, as discussed above, and should be read in conjunction with the Company's Annual Report on Form 10-K for the year ended December 31, 2022. The accompanying condensed consolidated balance sheet as of December 31, 2022, which was derived from audited financial statements, and the unaudited condensed consolidated financial statements have been prepared in accordance with accounting principles generally accepted in the United States of America for interim financial information and in accordance with the instructions to Form 10-Q. Accordingly, they do not include all of the information and footnotes required by the accounting principles generally accepted in the United States of America for complete consolidated financial statements. In the opinion of management, these interim financial statements reflect all adjustments (consisting of normal recurring adjustments) necessary for a fair presentation of the Company's financial position and results of operations. All significant intercompany balances and transactions have been eliminated in consolidation. Due to the seasonal nature of the Company's business, results for the three months ended March 31, 2023 are not necessarily indicative of the results to be expected for the year ending December 31, 2023. The Company manages its business under

two reportable segments for its theatrical exhibition operations, U.S. markets and International markets.

**Cash and Cash Equivalents.** At March 31, 2023, cash and cash equivalents for the U.S. markets and International markets were $383.9 million and $111.7 million respectively, and at December 31, 2022, cash and cash equivalents were $508.0 million and $123.5 million, respectively.

**Restricted Cash.** Restricted cash is cash held in the Company's bank accounts in International markets as a guarantee for certain landlords. The following table provides a reconciliation of cash, cash equivalents and restricted cash reported in the condensed consolidated balance sheets to the total of the amounts in the condensed consolidated statements of cash flows.

| | Period Ended | |
|---|---|---|
| (In millions) | March 31, 2023 | December 31, 2022 |
| Cash and cash equivalents | $ 495.6 | $ 631.5 |
| Restricted cash | 23.1 | 22.9 |
| Total cash and cash equivalents and restricted cash in the statement of cash flows | $ 518.7 | $ 654.4 |

**Accumulated Other Comprehensive Loss.** The following table presents the change in accumulated other comprehensive loss by component:

| (In millions) | Foreign Currency | Pension Benefits | Total |
|---|---|---|---|
| Balance December 31, 2022 | $ (78.8) | $ 1.5 | $ (77.3) |
| Other comprehensive loss | (7.2) | (0.1) | (7.3) |
| Balance March 31, 2023 | $ (86.0) | $ 1.4 | $ (84.6) |

**Accumulated Depreciation and Amortization.** Accumulated depreciation was $2,915.9 million and $2,853.8 million at March 31, 2023 and December 31, 2022, respectively, related to property. Accumulated amortization of intangible assets was $16.8 million and $22.2 million at March 31, 2023 and December 31, 2022, respectively.

**Other Expense.** The following table sets forth the components of other expense:

| | Three Months Ended | |
|---|---|---|
| (In millions) | March 31, 2023 | March 31, 2022 |
| Decreases related to contingent lease guarantees | $ - | $ (0.1) |
| Governmental assistance due to COVID-19 - International markets | - | (2.3) |
| Governmental assistance due to COVID-19 - U.S. markets | - | (1.1) |
| Foreign currency transaction (gains) losses | (8.7) | 4.8 |
| Non-operating components of net periodic benefit income | 0.4 | - |
| Gain on extinguishment - Senior Subordinated Notes due 2026 | (2.3) | - |
| Loss on extinguishment - First Lien Notes due 2025 | - | 47.7 |
| Loss on extinguishment - First Lien Notes due 2026 | - | 54.4 |
| Loss on extinguishment - First Lien Toggle Notes due 2026 | - | 32.9 |
| Gain on extinguishment - Second Lien Notes due 2026 | (62.8) | - |
| Derivative stockholder settlement | (14.0) | - |
| Shareholder litigation contingency | 126.6 | - |
| Total other expense | $ 39.2 | $ 136.3 |

**NOTE 2-LEASES**

The Company leases theatres and equipment under operating and finance leases. The Company typically does not believe that exercise of the renewal options is reasonably certain at the lease commencement and, therefore, considers the initial base term as the lease term. Lease terms vary but generally the leases provide for fixed and escalating rentals, contingent escalating rentals based on the Consumer Price Index and other indexes not to exceed certain specified amounts and variable rentals based on a percentage of revenues. The Company often receives contributions from landlords for renovations at existing locations. The Company records the amounts received from landlords as an adjustment to the right-of-use asset and amortizes the balance as a reduction to rent expense over the base term of the lease agreement. Equipment leases primarily consist of sight and sound and food and beverage equipment.

The Company received rent concessions from lessors that aided in mitigating the economic effects of COVID-19 during the pandemic. These concessions primarily consisted of rent abatements and the deferral of rent payments. As a result, deferred lease amounts were approximately $123.6 million as of March 31, 2023. In instances where there were no substantive changes to the lease terms, i.e., modifications that resulted in total payments of the modified lease being substantially the same or less than the total payments of the existing lease, the Company elected the relief as provided by the FASB staff related to the accounting for certain lease concessions. The Company elected not to account for these concessions as a lease modification, and therefore the Company has remeasured the related lease liability and right-of-use asset but did not reassess the lease classification or change the discount rate to the current rate in effect upon the remeasurement. The deferred payment amounts have been recorded in the Company’s lease liabilities to reflect the change in the timing of payments. Those leases that did not meet the criteria for treatment under the FASB relief were evaluated as lease modifications. The deferred payment amounts included in accounts payable for contractual rent amounts due and not paid are reflected in accounts payable on the condensed consolidated balance sheets and in the

condensed consolidated statements of cash flows as part of the change in accounts payable. In addition, the Company included deferred lease payments in operating lease right-of-use assets as a result of lease remeasurements.

A summary of deferred payment amounts related to rent obligations for which payments were deferred to future periods is provided below:

| (In millions) | As of December 31, 2022 | Decrease in deferred amounts | As of March 31, 2023 |
|---|---|---|---|
| Fixed operating lease deferred amounts (1) | $ 150.3 | $ (32.5) | $ 117.8 |
| Finance lease deferred amounts | 0.9 | (0.3) | 0.6 |
| Variable lease deferred amounts | 6.0 | (0.8) | 5.2 |
| Total deferred lease amounts | $ 157.2 | $ (33.6) | $ 123.6 |

(1) During the three months ended March 31, 2023, the decrease in fixed operating lease deferred amounts includes $5.7 million of rent payments that are included in change in accounts payable and $26.8 million included in deferred rent and other non-cash rent in the condensed consolidated statement of cash flows.

The following table reflects the lease costs for the periods presented:

| | | Three Months Ended | |
|---|---|---|---|
| (In millions) | Consolidated Statements of Operations | March 31, 2023 | March 31, 2022 |
| Operating lease cost | | | |
| Theatre properties | Rent | $ 184.2 | $ 202.5 |
| Theatre properties | Operating expense | 0.3 | 1.2 |
| Equipment | Operating expense | 3.1 | 2.8 |
| Office and other | General and administrative: other | 1.3 | 1.4 |
| Finance lease cost | | | |
| Amortization of finance lease assets | Depreciation and amortization | 0.5 | 0.7 |
| Interest expense on lease liabilities | Finance lease obligations | 0.9 | 1.2 |
| Variable lease cost | | | |
| Theatre properties | Rent | 21.5 | 20.7 |
| Equipment | Operating expense | 13.3 | 12.6 |
| Total lease cost | | $ 225.1 | $ 243.1 |

Cash flow and supplemental information is presented below:

| | Three Months Ended | |
|---|---|---|
| (In millions) | March 31, 2023 | March 31, 2022 |
| Cash paid for amounts included in the measurement of lease liabilities: | | |
| Operating cash flows used in finance leases | $ (0.8) | $ (1.0) |
| Operating cash flows used in operating leases | (242.8) | (266.4) |
| Financing cash flows used in finance leases | (1.6) | (2.5) |
| | | |
| Landlord contributions: | | |
| Operating cashflows provided by operating leases | 6.4 | 0.6 |
| Supplemental disclosure of noncash leasing activities: | | |
| Right-of-use assets obtained in exchange for new operating lease liabilities (1) | 16.0 | 111.8 |

(1) Includes lease extensions and option exercises.

The following table represents the weighted-average remaining lease term and discount rate as of March 31, 2023:

| | As of March 31, 2023 | |
|---|---|---|
| Lease Term and Discount Rate | Weighted Average Remaining Lease Term (years) | Weighted Average Discount Rate |
| Operating leases | 9.2 | 10.1% |
| Finance leases | 13.6 | 6.4% |

Minimum annual payments, including deferred lease payments less contractual rent amounts due and not paid that were recorded in accounts payable, that are recorded as operating and finance lease liabilities and the net present value thereof as of March 31, 2023 are as follows:

| (In millions) | Operating Lease Payments (2) | Financing Lease Payments (2) |
|---|---|---|
| Nine months ending December 31, 2023 (1) | $ 729.6 | $ 6.8 |
| 2024 | 874.7 | 8.3 |
| 2025 | 825.6 | 7.6 |
| 2026 | 761.3 | 7.5 |
| 2027 | 697.8 | 7.5 |
| 2028 | 608.8 | 7.1 |
| Thereafter | 2,733.9 | 45.2 |
| Total lease payments | 7,231.7 | 90.0 |
| Less imputed interest | (2,513.0) | (31.5) |
| Total operating and finance lease liabilities, respectively | $ 4,718.7 | $ 58.5 |

(1) The minimum annual payments table above does not include contractual cash rent amounts that were due and not paid, which are recorded in accounts payable as shown below, including estimated repayment dates:

| (In millions) | Accounts Payable Lease Payments |
|---|---|
| Nine months ended December 31, 2023 | $ 15.4 |
| 2024 | 1.0 |
| 2025 | 0.8 |
| 2026 | 0.7 |
| 2027 | 0.3 |
| 2028 | 0.1 |
| Thereafter | 0.1 |
| Total deferred lease amounts recorded in accounts payable | $ 18.4 |

(2) The minimum annual payments table above includes deferred undiscounted cash rent amounts that were due and not paid related to operating and finance leases, as shown below:

| (In millions) | Operating Lease Payments | Financing Lease Payments |
|---|---|---|
| Nine months ended December 31, 2023 | $ 54.9 | $ 0.3 |
| 2024 | 15.8 | - |
| 2025 | 5.7 | - |
| 2026 | 4.2 | - |
| 2027 | 3.4 | - |
| 2028 | 3.2 | - |
| Thereafter | 17.7 | - |
| Total deferred lease amounts | $ 104.9 | $ 0.3 |

As of March 31, 2023, the Company had signed additional operating lease agreements for three theatres that have not yet commenced with minimum annual payments of approximately $

79.5 million, which are expected to commence between years 2023 and 2024 and carry lease terms ranging from 10 to 20 years. The timing of lease commencement is dependent on the landlord providing the Company with control and access to the related facility.

During the three months ended March 31, 2023, the Company received a $13.0 million buyout incentive from a landlord which provided the landlord the right to terminate the lease of one theatre. The incentive was treated as a reduction to rent expense in the Company's condensed consolidated statement of operations.

**NOTE 3-REVENUE RECOGNITION**

**Disaggregation of Revenue.** Revenue is disaggregated in the following tables by major revenue types and by timing of revenue recognition:

| | Three Months Ended | |
|---|---|---|
| **(In millions)** | **March 31, 2023** | **March 31, 2022** |
| **Major revenue types** | | |
| Admissions | $ 534.1 | $ 443.8 |
| Food and beverage | 328.7 | 252.5 |
| Other theatre: | | |
| Screen advertising | 30.9 | 28.9 |
| Other | 60.7 | 60.5 |
| Other theatre | 91.6 | 89.4 |
| Total revenues | $ 954.4 | $ 785.7 |

| | Three Months Ended | |
|---|---|---|
| **(In millions)** | **March 31, 2023** | **March 31, 2022** |
| **Timing of revenue recognition** | | |
| Products and services transferred at a point in time | $ 871.8 | $ 708.1 |
| Products and services transferred over time (1) | 82.6 | 77.6 |
| Total revenues | $ 954.4 | $ 785.7 |

(1) Amounts primarily include subscription and advertising revenues.

The following tables provide the balances of receivables and deferred revenue income:

| **(In millions)** | **March 31, 2023** | **December 31, 2022** |
|---|---|---|
| **Current assets** | | |
| Receivables related to contracts with customers | $ 40.6 | $ 92.3 |
| Miscellaneous receivables | 65.1 | 74.3 |
| Receivables, net | $ 105.7 | $ 166.6 |

| **(In millions)** | **March 31, 2023** | **December 31, 2022** |
|---|---|---|
| **Current liabilities** | | |
| Deferred revenue related to contracts with customers | $ 387.5 | $ 398.8 |
| Miscellaneous deferred income | 4.2 | 3.9 |
| Deferred revenue and income | $ 391.7 | $ 402.7 |

The significant changes in contract liabilities with customers included in deferred revenues and income are as follows:

| (In millions) | Deferred Revenues Related to Contracts with Customers |
|---|---|
| Balance December 31, 2022 | $ 398.8 |
| Cash received in advance(1) | 78.5 |
| Customer loyalty rewards accumulated, net of expirations: | |
| Admission revenues (2) | 3.6 |
| Food and beverage (2) | 7.5 |
| Other theatre (2) | (0.2) |
| Reclassification to revenue as the result of performance obligations satisfied: | |
| Admission revenues (3) | (68.7) |
| Food and beverage (3) | (16.3) |
| Other theatre (4) | (16.1) |
| Foreign currency translation adjustment | 0.4 |
| Balance March 31, 2023 | $ 387.5 |

(1) Includes movie tickets, food and beverage, gift cards, exchange tickets, and AMC Stubs® loyalty membership fees.

(2) Amount of rewards accumulated, net of expirations, that are attributed to AMC Stubs® and other loyalty programs.

(3) Amount of rewards redeemed that are attributed to gift cards, exchange tickets, movie tickets, AMC Stubs® loyalty programs and other loyalty programs.

(4) Amounts relate to income from non-redeemed or partially redeemed gift cards, non-redeemed exchange tickets, AMC Stubs® loyalty membership fees and other loyalty programs.

The significant changes to contract liabilities included in the exhibitor services agreement in the condensed consolidated balance sheets, are as follows:

| (In millions) | Exhibitor Services Agreement (1) |
|---|---|
| Balance December 31, 2022 | $ 505.8 |
| Reclassification, net of adjustments, for portion of the beginning balance to other theatre revenue, as the result of performance obligations satisfied | (3.3) |
| Balance March 31, 2023 | $ 502.5 |

(1) Represents the carrying amount of the National CineMedia, LLC ("NCM") common units that were previously received under the annual Common Unit Adjustment ("CUA"). The deferred revenues are being amortized to other theatre revenues over the remainder of the 30-year term of the Exhibitor Service Agreement ("ESA") ending in February 2037.

**Gift Cards and Exchange Tickets.** The total amount of non-redeemed gift cards and exchange tickets included in deferred revenues and income in the condensed consolidated balance sheet as of March 31, 2023 was $298.2 million. This will be recognized as revenues as the gift cards and exchange tickets are redeemed or as the non-redeemed gift card and exchange ticket revenues are recognized in proportion to the pattern of actual redemptions, which is estimated to occur over the next 24 months.

**Loyalty Programs.** As of March 31, 2023, the amount of deferred revenues allocated to the loyalty programs included in deferred revenues and income in the condensed consolidated balance sheet was $67.0 million. The earned points will be recognized as revenue as the points are redeemed, which is estimated to occur over the next 24 months. The AMC Stubs® annual membership fee is recognized ratably over the one-year membership period.

The Company applies the practical expedient in ASC 606-10-50-14 and does not disclose information about remaining performance obligations that have original expected durations of one year or less.

**NOTE 4-GOODWILL**

The following table summarizes the changes in goodwill by reporting unit for the three months ended March 31, 2023:

| | U.S. Markets | | | International Markets | | | Consolidated Goodwill | | |
|---|---|---|---|---|---|---|---|---|---|
| (In millions) | Gross Carrying Amount | Accumulated Impairment Losses | Net Carrying Amount | Gross Carrying Amount | Accumulated Impairment Losses | Net Carrying Amount | Gross Carrying Amount | Accumulated Impairment Losses | Net Carrying Amount |
| Balance December 31, 2022 | $3,072.6 | $ (1,276.1) | $1,796.5 | $1,521.8 | $ (976.3) | $ 545.5 | $4,594.4 | $ (2,252.4) | $2,342.0 |
| Currency translation adjustment | - | - | - | 23.1 | (22.4) | 0.7 | 23.1 | (22.4) | 0.7 |
| Balance March 31, 2023 | $3,072.6 | $ (1,276.1) | $1,796.5 | $1,544.9 | $ (998.7) | $ 546.2 | $4,617.5 | $ (2,274.8) | $2,342.7 |

**NOTE 5-INVESTMENTS**

Investments in non-consolidated affiliates and certain other investments accounted for under the equity method generally include all entities in which the Company or its subsidiaries have significant influence, but not more than 50% voting control, and are recorded in the condensed consolidated balance sheets in other long-term assets. On December 30, 2022, the Company entered into an agreement to sell its 10.0% investment in Saudi Cinema Company, LLC for SAR 112.5 million ($30.0) million, and on January 24, 2023, the Saudi Ministry of Commerce recorded the sale of equity and the Company received the proceeds on January 25, 2023. The Company recorded a gain on the sale of $15.5 million in investment income during the three months ended March 31, 2023. Investments in non-consolidated affiliates as of March 31, 2023 include interests in Digital Cinema Distribution Coalition, LLC ("DCDC") of 14.6%, AC JV, LLC ("AC JV"), owner of Fathom Events, of 32.0%, SV Holdco LLC ("SV Holdco"), owner of Screenvision, of 18.4% and Digital Cinema Media Ltd. ("DCM") of 50.0%. The Company also has partnership interests in three U.S. motion picture theatres ("Theatre Partnerships") and approximately 50.0% interests in 58 theatres in Europe. Indebtedness held by equity method investees is non-recourse to the Company. During the three months ended March 31, 2023 and March 31, 2022, the Company recorded equity in (earnings) loss of non-consolidated entities of $(1.4) million and $5.1 million, respectively.

**Related Party Transactions with Equity Method Investees.** At March 31, 2023 and December 31, 2022, the Company recorded net receivable amounts due from equity method investees of $

0.5 million and $1.7 million, respectively, primarily related to on-screen advertising revenue and other transactions. The Company recorded related party transactions with equity method investees in other revenues and film exhibition costs of $5.0 million and $3.0 million, respectively, during the three months ended March 31, 2023, and $5.5 million and $1.4 million, respectively, during the three months ended March 31, 2022.

**Investment in Hycroft**

On March 14, 2022, the Company purchased 23.4 million units of Hycroft Mining Holding Corporation (NASDAQ: HYMC) ("Hycroft"), for $27.9 million, with each unit consisting of one common share of Hycroft and one common share purchase warrant. The units were priced at $1.193 per unit. Each warrant is exercisable for one common share of Hycroft at a price of $1.068 per share over a 5-year term through March 2027. Hycroft filed a resale registration statement to register the common shares and warrant shares for sale under the Securities Act of 1933, as amended (the "Securities Act") on April 14, 2022 which became effective on June 2, 2022. The Company accounts for the common shares of Hycroft under the equity method and has elected the fair value option in accordance with ASC 825-10. The Company accounts for the warrants as derivatives in accordance with ASC 815. Accordingly, the fair value of the investments in Hycroft are remeasured at each subsequent reporting period and unrealized gains and losses are reported in investment income. The Company believes the fair value option to be the most appropriate election for this equity method investment as the Company is not entering the mining business. During the three months ended March 31, 2023 and March 31, 2022, the Company recorded unrealized (gain) loss in investment income of $4.6 million and $(63.9) million, respectively. See Note 9-Fair Value Measurements for fair value information and the asset value for investments in Hycroft measured under the fair value option as well as the total asset value for other equity method investments.

**NOTE 6-CORPORATE BORROWINGS AND FINANCE LEASE LIABILITIES**

A summary of the carrying value of corporate borrowings and finance lease liabilities is as follows:

| (In millions) | March 31, 2023 | December 31, 2022 |
|---|---|---|
| ***First Lien Secured Debt:*** | | |
| Senior Secured Credit Facility-Term Loan due 2026 (7.684% as of March 31, 2023 and 7.274% as of December 31, 2022) | $ 1,920.0 | $ 1,925.0 |
| 12.75% Odeon Senior Secured Notes due 2027 | 400.0 | 400.0 |
| 7.5% First Lien Notes due 2029 | 950.0 | 950.0 |
| ***Second Lien Secured Debt:*** | | |
| 10%/12% Cash/PIK Toggle Second Lien Subordinated Notes due 2026 | 1,190.4 | 1,389.8 |
| ***Subordinated Debt:*** | | |
| 6.375% Senior Subordinated Notes due 2024 (£4.0 million par value as of March 31, 2023) | 4.9 | 4.8 |
| 5.75% Senior Subordinated Notes due 2025 | 98.3 | 98.3 |
| 5.875% Senior Subordinated Notes due 2026 | 51.5 | 55.6 |
| 6.125% Senior Subordinated Notes due 2027 | 125.5 | 125.5 |
| Total principal amount of corporate borrowings | $ 4,740.6 | $ 4,949.0 |
| Finance lease liabilities | 58.5 | 58.8 |
| Deferred financing costs | (36.3) | (37.9) |
| Net premium (1) | 177.7 | 229.7 |
| Total carrying value of corporate borrowings and finance lease liabilities | $ 4,940.5 | $ 5,199.6 |
| Less: | | |
| Current maturities corporate borrowings | (20.0) | (20.0) |
| Current maturities finance lease obligations | (6.5) | (5.5) |
| Total noncurrent carrying value of corporate borrowings and finance lease liabilities | $ 4,914.0 | $ 5,174.1 |

(1) The following table provides the net premium (discount) amounts of corporate borrowings:

| (In millions) | March 31, 2023 | December 31, 2022 |
|---|---|---|
| 10%/12% Cash/PIK Toggle Second Lien Subordinated Notes due 2026 | $ 212.0 | $ 265.5 |
| Senior Secured Credit Facility-Term Loan due 2026 | (4.4) | (4.8) |
| 12.75% Odeon Senior Secured Notes due 2027 | (30.0) | (31.1) |
| 6.375% Senior Subordinated Notes due 2024 | 0.1 | 0.1 |
| | $ 177.7 | $ 229.7 |

The following table provides the principal payments required and maturities of corporate borrowing as of March 31, 2023:

| (In millions) | Principal Amount of Corporate Borrowings |
|---|---|
| Nine months ended December 31, 2023 | $ 15.0 |
| 2024 | 24.9 |
| 2025 | 118.3 |
| 2026 | 3,106.9 |
| 2027 | 525.5 |
| 2028 | - |
| Thereafter | 950.0 |
| Total | $ 4,740.6 |

**Debt Repurchases**

The below table summarizes the cash debt repurchase transactions during the three months ended March 31, 2023, including the related party transactions with Antara, which became a related party on February 7, 2023:

| (In millions) | Aggregate Principal Repurchased | Reacquisition Cost | Gain on Extinguishment | Accrued Interest Paid |
|---|---|---|---|---|
| Related party transactions: | | | | |
| Second Lien Notes due 2026 | $ 41.9 | $ 24.4 | $ 25.3 | $ 0.7 |
| 5.875% Senior Subordinated Notes due 2026 | 4.1 | 1.7 | 2.3 | 0.1 |
| Total related party transactions | 46.0 | 26.1 | 27.6 | 0.8 |
| Non-related party transactions: | | | | |
| Second Lien Notes due 2026 | 57.5 | 30.4 | 37.5 | 1.1 |
| Total non-related party transactions | 57.5 | 30.4 | 37.5 | 1.1 |
| Total debt repurchases | $ 103.5 | $ 56.5 | $ 65.1 | $ 1.9 |

**Financial Covenants**

The Company currently estimates that its existing cash and cash equivalents will be sufficient to comply with the minimum liquidity covenant requirement under its Senior Secured Revolving Credit Facility, currently and through the next twelve months. The Company entered the Ninth Amendment to Credit Agreement pursuant to which the requisite revolving lenders party thereto agreed to extend the fixed date for the termination of the suspension period for the financial covenant (the secured leverage ratio) applicable to the Senior Secured Revolving Credit Facility from March 31, 2021 to March 31, 2022, which was further extended by the Eleventh Amendment to Credit Agreement from March 31, 2022 to March 31, 2023 and further extended by the Twelfth Amendment to Credit Agreement from March 31, 2023 to March 31, 2024, in each case, as described, and on the terms and conditions specified, therein. The Company is currently subject to a minimum liquidity requirement of $ 100 million as a condition to the Extended Covenant Suspension Period. The current maturity date of the Senior Secured Revolving Credit Facility is April 22, 2024; since the financial covenant applicable to the Senior Secured Revolving Credit Facility is tested as of the last day of any fiscal quarter for which financial statements have been (or were required to have been) delivered, the financial covenant has been effectively suspended through maturity of the Senior Secured Revolving Credit Facility.

**NOTE 7-STOCKHOLDERS' EQUITY**

**AMC Preferred Equity Units**

On August 4, 2022, the Company announced that its Board of Directors declared a special dividend of one AMC Preferred Equity Unit for each share of Class A common stock outstanding at the close of business on August 15, 2022, the record date. The dividend was paid at the close of business on August 19, 2022 to investors who held Class A common stock as of August 22, 2022, the ex-dividend date.

Each AMC Preferred Equity Unit is a depositary share and represents an interest in one one-hundredth (1/100th) of a share of Series A Convertible Participating Preferred Stock evidenced by a depositary receipt pursuant to a deposit agreement. The Company has 50,000,000 Preferred Stock shares authorized, 10,000,000 of which have currently been allocated and 9,741,909 have been issued under the depositary agreement as Series A Convertible Participating Preferred Stock, leaving 40,000,000 unallocated Preferred Stock shares. Each AMC Preferred Equity Unit is designed to have the same economic and voting rights as a share of Class A common stock. Trading of the AMC Preferred Equity Units on the NYSE began on August 22, 2022 under the ticker symbol "APE". Due to the characteristics of the AMC Preferred Equity Units, the special dividend had the effect of a stock split pursuant to ASC 505-20-25-4. Accordingly, all references made to share, per share, or common share amounts in the accompanying consolidated financial statements and applicable disclosures include Class A common stock and AMC Preferred Equity Units and have been retroactively adjusted to reflect the effects of the special dividend as a stock split.

**Share Issuances**

On September 26, 2022, the Company entered into an equity distribution agreement (the "Equity Distribution Agreement) with Citigroup Global Markets Inc., as a sales agent ("Sales Agent"), to sell up to 425.0 million shares of the Company's AMC Preferred Equity Units, from time to time, through an "at-the-market" offering program (the "Offering"). Subject to the terms and conditions of the Equity Distribution Agreement, the Sales Agent will use reasonable efforts consistent with their normal trading and sales practices, applicable law and regulations, and the rules of the NYSE to sell the AMC Preferred Equity Units from time to time based upon the Company's instructions for the sales, including any price, time or size limits specified by the Company. The Company intends to use the net proceeds, from the sale of AMC Preferred Equity Units pursuant to the Equity Distribution Agreement to repay, refinance, redeem or repurchase the Company's existing indebtedness (including expenses, accrued interest and premium, if any) and otherwise for general corporate purposes.

On December 22, 2022, the Company entered into a forward purchase agreement (the "Forward Purchase Agreement") with Antara pursuant to which the Company agreed to (i) sell to Antara 106,595,106 AMC Preferred Equity Units for an aggregate purchase price of $75.1 million and (ii) simultaneously purchase from Antara $100.0 million aggregate principal amount of the Company's 10%/12% Cash/PIK Toggle Second Lien Notes due 2026 in exchange for 91,026,191 AMC Preferred Equity Units. On February 7, 2023, the Company issued 197,621,297 AMC Preferred Equity Units to Antara in exchange for $75.1 million in cash and $100.0 million aggregate principal amount of the Company's 10%/12% Cash/PIK Toggle Second Lien Notes due 2026. The Company recorded $193.7 million to stockholders' deficit as a result of the transaction. The Company paid $1.4 million of accrued interest in cash upon exchange of the notes.

During the three months ended March 31, 2023 the Company raised gross proceeds of approximately $80.3 million and paid fees to the Sales Agent and incurred other third-party issuance costs of approximately $2.0 million and $7.8 million, respectively, through its at-the-market offering of approximately 49.3 million shares of its AMC Preferred Equity Units. The Company paid $6.8 million of other third-party issuance costs during the three months ended March 31, 2023. See Note 13-Subsequent Events for further information regarding at-the-market offerings.

**Shareholder Litigation**

Two putative stockholder class actions have been filed that assert a breach of fiduciary duty against certain of the Company's directors and a claim for breach of 8 *Del. C.* § 220 against those directors and the Company, arising out of the Company's creation of the APEs, the Antara Transactions, and the Charter Amendment Proposals. See Note 11-Commitments and Contingencies for further information regarding the litigation.

**Stock-Based Compensation**

The following table presents the stock-based compensation expense recorded within general and administrative: other:

| | Three Months Ended | |
|---|---|---|
| (In millions) | March 31, 2023 | March 31, 2022 |
| Equity classified awards: | | |
| Special awards expense | $ 20.2 | $ - |
| Board of director stock award expense | 0.9 | 0.8 |
| Restricted stock unit expense | 3.0 | 2.8 |
| Performance stock unit expense | 1.7 | 2.9 |
| Total equity classified awards: | 25.8 | 6.5 |
| Liability classified awards: | | |
| Restricted and performance stock unit expense | 0.1 | - |
| Total liability classified awards: | 0.1 | - |
| Total stock-based compensation expense | $ 25.9 | $ 6.5 |

As of March 31, 2023, the estimated remaining unrecognized compensation cost related to stock-based compensation grants was approximately $37.2 million, which reflects assumptions related to attainment of performance targets based on the scales as described below. The weighted average period over which this remaining compensation expense is expected to be recognized is approximately 1.2 years.

***Plan Amendment due to stock split***

The 2013 Plan contemplates equitable adjustments for certain transactions such as a stock split. On August 19, 2022 the Compensation Committee approved an adjustment to the 2013 Equity Incentive Plan to entitle each participant one AMC Preferred Equity Unit and one share of Common Stock for each RSU or PSU that vests. The Company determined that this modification was a Type 1 (probable-to-probable) modification that did not increase the fair value of the award and therefore did not require additional stock-based compensation expense to be recognized. References made to share, per share, or common share amounts have been retroactively adjusted to reflect the effects of the stock split.

***Special Awards***

On February 23, 2023, AMC's Board of Directors approved special awards in lieu of vesting of the 2022 PSU awards. The special awards were accounted for as modification to the 2022 PSU awards which lowered the Adjusted EBITDA and free cash flow performance targets such that 200% vesting was achieved for both tranches. This modification resulted in the immediate additional vesting of 2,389,589 Common Stock 2022 PSUs and 2,389,589 AMC Preferred Equity Unit 2022 PSUs. This was treated as a Type 3 modification (improbable-to-probable) which requires the Company to recognize additional stock compensation expense based on the modification date fair values of the Common Stock PSUs and AMC Preferred Equity Units PSUs of $6.23 and $2.22, respectively. During the three months ended March 31, 2023, the Company recognized $20.2 million of additional stock compensation expense.

***Awards Granted in 2023***

During the three months ended March 31, 2023, AMC's Board of Directors approved awards of stock, restricted stock units ("RSUs"), and performance stock units ("PSUs") to certain of the Company's employees and directors under the 2013 Equity Incentive Plan. The grant date fair value of these equity classified awards was based on the closing price of AMC's Class A common stock and AMC Preferred Equity Units of $6.23 and $2.22, respectively.

AMC's Board of Directors also granted awards to non-section 16 officers that are expected to be settled in cash. Participants receiving cash settlement shall receive an amount of cash equal to the closing price of an AMC Preferred Equity Unit multiplied by the number of underlying cash based RSUs and PSUs awarded. These awards have been classified as liabilities and are included within accrued expenses and other liabilities in the condensed consolidated balance sheets. The vesting requirements and vesting periods are identical to the equity classified awards described below. The Company recognizes expense related to these awards based on the fair value of the AMC Preferred Equity Units, giving effect to the portion of services rendered during the requisite services period. As of March 31, 2023 there were 1,723,830 nonvested underlying AMC Preferred Equity Unit RSUs and PSUs related to awards granted to non-section 16 officers. There are 1,149,186 nonvested underlying AMC Preferred Equity Unit RSUs and PSUs (2023 Tranche Year) that are currently classified as liabilities and 574,644 nonvested underlying AMC Preferred Equity Unit PSUs (2024 & 2025 Tranche Year) which have not been granted for accounting purposes as the performance targets for the 2024 and 2025 PSU Tranche Years have yet to be established.

Each RSU and PSU held by a participant as of a dividend record date is entitled to a dividend equivalent equal to the amount paid with respect to one share of Common Stock or one AMC Preferred Equity Unit underlying the unit. Any such accrued dividend equivalents are paid to the holder only upon vesting of the units. Each unit represents the right to receive one share of Common Stock or one AMC Preferred Equity Unit at a future date.

The 2023 award agreements generally had the following features:

- **Stock Award Agreement:** During the three months ended March 31, 2023, the Company granted awards of 85,552 fully vested shares of Common Stock and 153,696 AMC Preferred Equity Units to its independent members of AMC's Board of Directors with a grant date fair value of $0.9 million.

- **Restricted Stock Unit Award Agreement:** During the three months ended March 31, 2023, the Company granted RSU awards of 2,827,979 to certain members of management with a grant date fair value of $11.6 million. The Company records stock-based compensation expense on a straight-line recognition method over the requisite vesting period. The RSUs vest over three years, with one-third vesting each year. These RSUs will be settled within 30 days of vesting.

- **Performance Stock Unit Award Agreement:** During the three months ended March 31, 2023, total PSUs of 942,613 were awarded ("2023 PSU award") to certain members of management and executive officers, with the total PSUs divided into three separate year tranches, with each tranche allocated to a fiscal year within the performance period ("Tranche Year"). The PSUs within each Tranche Year are further divided between two performance targets; the Adjusted EBITDA performance target and free cash flow performance target. The 2023 PSU awards will vest based on achieving 80% to 120% of the performance targets, with the corresponding vested unit amount ranging from 50% to 200%. If the performance targets are met at 100%, the 2023 PSU awards will vest at 942,613 units in the aggregate. No PSUs will vest for each Tranche Year if the Company does not achieve 80% of the Tranche Year's Adjusted EBITDA and free cash flow targets.

  The Compensation Committee establishes the annual performance targets at the beginning of each year. Therefore, the grant date (and fair value measurement date) for each Tranche Year is the date at the beginning of each year when a mutual understanding of the key terms and conditions are reached per ASC 718, Compensation - Stock compensation. The 2023 PSU award grant date fair value for the 2023 Tranche Year award of 942,613 units was $3.9 million, the 2022 PSU award grant date fair value for the 2023 Tranche Year award of 461,016 units was $1.9 million, and the 2021 PSU award grant date fair value for the 2023 Tranche Year Award of 1,601,522 units was $6.8 million, measured using performance targets at 100%.

The following table represents the equity classified nonvested RSU and PSU activity for the three months ended March 31, 2023:

| | Class A Common Stock RSUs and PSUs | Weighted Average Grant Date Fair Value | AMC Preferred Equity Unit RSUs and PSUs | Weighted Average Grant Date Fair Value |
|---|---|---|---|---|
| Nonvested at January 1, 2023 | 3,129,241 | $ 5.91 | 3,129,241 | $ 5.91 |
| Granted (1) | 2,790,514 | 6.23 | 3,042,616 | 2.22 |
| Granted - Special Award | 2,389,589 | 6.23 | 2,389,589 | 2.22 |
| Vested | (983,107) | 5.90 | (1,246,290) | 5.62 |
| Vested - Special Award | (1,284,818) | 6.23 | (1,294,464) | 2.22 |
| Forfeited | (29,317) | 5.94 | (29,317) | 4.11 |
| Cancelled (2) | (884,452) | 5.80 | (621,269) | 6.31 |
| Cancelled - Special Award (2) | (1,104,771) | 6.23 | (1,095,125) | 2.22 |
| Nonvested at March 31, 2023 | 4,022,879 | $ 6.16 | 4,274,981 | $ 3.32 |
| Tranche Years 2024 and 2025 awarded under the 2023 PSU award and Tranche Year 2024 awarded under the 2022 PSU award with grant date fair values to be determined in years 2024 and 2025, respectively | 1,107,804 | | 1,233,800 | |
| Total Nonvested at March 31, 2023 | 5,130,683 | | 5,508,781 | |

(1) The number of PSU shares granted under the Tranche Year 2023 assumes the Company will attain a performance target at 100% for the Adjusted EBITDA target and 100% for the free cash flow target.

(2) Represents vested RSUs and PSUs surrendered in lieu of taxes and cancelled awards returned to the 2013 Equity Incentive Plan. As a result, the Company paid taxes for restricted unit withholdings of approximately $13.1 million during the three months ended March 31, 2023.

## Condensed Consolidated Statements of Stockholders' Deficit

**For the Three Months Ended March 31, 2023**

| | Class A Voting Common Stock | | Preferred Stock | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| (In millions, except share and per share data) | Shares | Amount | Series A Convertible Participating Preferred Stock Shares | Depositary Shares of AMC Preferred Equity Units | Amount | Additional Paid-in Capital | Accumulated Other Comprehensive Loss | Accumulated Deficit | Total Stockholders' Equity (Deficit) |
| Balances December 31, 2022 | 516,838,912 | $ 5.2 | 7,245,872 | 724,587,058 | $ 0.1 | $ 5,045.1 | $ (77.3) | $ (7,597.6) | $ (2,624.5) |
| Net loss | - | - | - | - | - | - | - | (235.5) | (235.5) |
| Other comprehensive loss | - | - | - | - | - | - | (7.3) | - | (7.3) |
| AMC Preferred Equity Units issuance | - | - | 492,880 | 49,287,989 | - | 70.5 | - | - | 70.5 |
| Antara Forward Purchase Agreement (2) | - | - | 1,976,213 | 197,621,297 | - | 193.7 | - | - | 193.7 |
| Taxes paid for restricted unit withholdings | - | - | - | - | - | (13.1) | - | - | (13.1) |
| Stock-based compensation (1) | 2,353,477 | - | 26,944 | 2,694,450 | - | 25.9 | - | - | 25.9 |
| Balances March 31, 2023 | 519,192,389 | $ 5.2 | 9,741,909 | 974,190,794 | $ 0.1 | $ 5,322.1 | $ (84.6) | $ (7,833.1) | $ (2,590.3) |

(1) Includes 85,552 Class A common stock shares and 153,696 AMC Preferred Equity Units awarded to the Board of Directors, 2,267,925 vested Class A common stock RSUs and PSUs, and 2,540,754 AMC Preferred Equity Units RSUs and PSUs.

(2) Includes $75.1 million of cash proceeds and $118.6 million carrying value of the debt exchanged for AMC Preferred Equity Units.

## Condensed Consolidated Statements of Stockholders' Deficit

### For the Three Months Ended March 31, 2022

| | Class A Common Stock | | Preferred Stock | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| (In millions, except share and per share data) | Shares | Amount | Series A Convertible Participating Preferred Stock Shares | Depositary Shares of AMC Preferred Equity Units | Amount | Additional Paid-in Capital | Accumulated Other Comprehensive Income (Loss) | Accumulated Deficit | Total AMC Stockholders' Equity (Deficit) |
| Balances December 31, 2021 | 513,979,100 | $ 5.1 | 5,139,791 | 513,979,100 | $ 0.1 | $ 4,857.4 | $ (28.1) | $ (6,624.0) | $ (1,789.5) |
| Net loss | - | - | - | - | - | - | - | (337.4) | (337.4) |
| Other comprehensive loss | - | - | - | - | - | - | (5.8) | - | (5.8) |
| Taxes paid for restricted unit withholdings | - | - | - | - | - | (52.2) | - | - | (52.2) |
| Stock-based compensation (1) | 2,841,495 | 0.1 | 28,415 | 2,841,495 | - | 6.5 | - | - | 6.6 |
| Balances March 31, 2022 | 516,820,595 | $ 5.2 | 5,168,206 | 516,820,595 | $ 0.1 | $ 4,811.7 | $ (33.9) | $ (6,961.4) | $ (2,178.3) |

(1) Includes 41,650 Class A common stock shares and 41,650 AMC Preferred Equity Units awarded to Board of Directors, 2,799,845 vested Class A common stock RSUs and PSUs, and 2,799,845 vested AMC Preferred Equity Units RSUs and PSUs.

**NOTE 8-INCOME TAXES**

The Company's worldwide effective income tax rate is based on actual income (loss), statutory rates, valuation allowances against deferred tax assets and tax planning opportunities available in the various jurisdictions in which it operates. The Company is using a discrete income tax calculation for the three months ended March 31, 2023 due to the lingering effects of the COVID-19 pandemic on the industry. Historically, for interim financial reporting, the Company estimated the worldwide annual income tax rate based on projected taxable income (loss) for the full year and recorded a quarterly income tax provision or benefit in accordance with the anticipated annual rate, adjusted for discrete items, if any. The Company will return to the historic approach of computing quarterly tax expense based on an annual effective rate in the future interim period when more reliable estimates of annual income become available. The Company recognizes income tax-related interest expense and penalties as income tax expense and general and administrative expense, respectively.

The Company evaluates its deferred tax assets each period to determine if a valuation allowance is required based on whether it is "more likely than not" that some portion of the deferred tax assets would not be realized. The ultimate realization of these deferred tax assets is dependent upon the generation of sufficient taxable income during future periods on a federal, state, and foreign jurisdiction basis. The Company conducts its evaluation by considering all available positive and negative evidence, including historical operating results, forecasts of future profitability, the duration of statutory carryforward periods, and the outlooks for the U.S. motion picture and broader economy, among others.

A valuation allowance is recorded against the Company's U.S. deferred tax assets and most of the Company's international deferred tax assets as the Company has determined the realization of these assets does not meet the more likely than not criteria.

The effective tax rate for the three months ended March 31, 2023 reflects the impact of these valuation allowances against U.S. and international deferred tax assets generated during the three-month period. The actual effective rate for the three months ended March 31, 2023 was (

0.8)%. The Company's consolidated tax rate for the three months ended March 31, 2023 differs from the U.S. statutory tax rate primarily due to the valuation allowances in U.S. and foreign jurisdictions, foreign tax rate differences, federal and state tax credits, permanent differences and other discrete items. At March 31, 2023 and December 31, 2022, the Company has recorded net deferred tax liabilities of $32.7 million and $32.1 million, respectively.

Utilization of the Company's net operating loss carryforwards, disallowed business interest carryforwards and other tax attributes became subject to the Section 382 ownership change limitation due to changes in the Company's stock ownership on January 27, 2021. The Company does not believe, however, that tax attributes generated prior to this event are significantly impacted by Section 382.

**NOTE 9-FAIR VALUE MEASUREMENTS**

Fair value refers to the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants in the market in which the entity transacts business. The inputs used to develop these fair value measurements are established in a hierarchy, which ranks the quality and reliability of the information used to determine the fair values. The fair value classification is based on levels of inputs. Assets and liabilities that are carried at fair value are classified and disclosed in one of the following categories:

| | |
|---|---|
| Level 1: | Quoted market prices in active markets for identical assets or liabilities. |
| Level 2: | Observable market based inputs or unobservable inputs that are corroborated by market data. |
| Level 3: | Unobservable inputs that are not corroborated by market data. |

**Recurring Fair Value Measurements.** The following table summarizes the fair value hierarchy of the Company's financial assets and liabilities carried at fair value on a recurring basis as of March 31, 2023:

| | | Fair Value Measurements at March 31, 2023 Using | | |
|---|---|---|---|---|
| (In millions) | Total Carrying Value at March 31, 2023 | Quoted prices in active market (Level 1) | Significant other observable inputs (Level 2) | Significant unobservable inputs (Level 3) |
| ***Other long-term assets:*** | | | | |
| Investment in Hycroft Mining Holding Corporation warrants | $ 6.9 | $ - | $ - | $ 6.9 |
| Marketable equity securities: | | | | |
| Investment in Hycroft Mining Holding Corporation | 10.1 | 10.1 | - | - |
| Total assets at fair value | $ 17.0 | $ 10.1 | $ - | $ 6.9 |

*Valuation Techniques.* The equity method investment in Hycroft was measured at fair value using Hycroft's stock price at the date of measurement. To estimate the fair value of the Company's investment in Hycroft warrants, the Company valued the warrants using the Black Scholes pricing model. Such judgments and estimates included estimates of volatility of 122.2% and discount rate of 3.7%. The discount rate is based on the treasury yield that matches the term as of the measurement date. Other inputs included the term of 4.0 years, exercise price of $1.068 and Hycroft's stock price at the date of measurement. There is considerable management judgment with respect to the inputs used in determining fair value, and, accordingly, actual results could vary significantly from such estimates, which fall under Level 3 within the fair value measurement hierarchy. See Note 5-Investments for further information regarding the investments in Hycroft.

**Other Fair Value Measurement Disclosures.** The Company is required to disclose the fair value of financial instruments that are not recognized at fair value in the statement of financial position for which it is practicable to estimate that value:

| | | Fair Value Measurements at March 31, 2023 Using | | |
|---|---|---|---|---|
| (In millions) | Total Carrying Value at March 31, 2023 | Quoted prices in active market (Level 1) | Significant other observable inputs (Level 2) | Significant unobservable inputs (Level 3) |
| Current maturities of corporate borrowings | $ 20.0 | $ - | $ 14.6 | $ - |
| Corporate borrowings | 4,862.0 | - | 3,266.3 | - |

*Valuation Technique.* Quoted market prices and observable market based inputs were used to estimate fair value for Level 2 inputs. The Company valued these notes at principal value less an estimated discount reflecting a market yield to maturity. See Note 6-Corporate Borrowings and Finance Lease Liabilities for further information.

The carrying amounts of cash and cash equivalents, accounts receivable, accounts payable, and accrued liabilities approximate fair value because of the short maturity of these instruments.

**NOTE 10-OPERATING SEGMENTS**

The Company reports information about operating segments in accordance with ASC 280-10, Segment Reporting, which requires financial information to be reported based on the way management organizes segments within a company for making operating decisions and evaluating performance. The Company has identified two reportable segments and reporting units for its theatrical exhibition operations, U.S. markets and International markets. The International markets reportable segment has operations in or partial interest in theatres in the United Kingdom, Germany, Spain, Italy, Ireland, Portugal, Sweden, Finland, Norway, Denmark, and Saudi Arabia. On December 30, 2022, the Company entered into an agreement to sell its 10.0% investment Saudi Cinema Company, LLC for SAR 112.5 million $(30.0) million, subject to certain closing conditions. On January 24, 2023, the Saudi Ministry of Commerce recorded the sale of equity and the Company received the proceeds on January 25, 2023. See Note 5-Investments for further information. Each segment's revenue is derived from admissions, food and beverage sales and other ancillary revenues, primarily screen advertising, AMC Stubs® membership fees and other loyalty programs, ticket sales, gift card income and exchange ticket income. The measure of segment profit and loss the Company uses to

evaluate performance and allocate its resources is Adjusted EBITDA, as defined in the reconciliation table below. The Company does not report asset information by segment because that information is not used to evaluate the performance of or allocate resources between segments.

Below is a breakdown of select financial information by reportable operating segment:

| | Three Months Ended | |
|---|---|---|
| **Revenues (In millions)** | **March 31, 2023** | **March 31, 2022** |
| U.S. markets | $ 704.5 | $ 563.1 |
| International markets | 249.9 | 222.6 |
| Total revenues | $ 954.4 | $ 785.7 |

| | Three Months Ended | |
|---|---|---|
| **Adjusted EBITDA (In millions)** | **March 31, 2023** | **March 31, 2022** |
| U.S. markets | $ 10.9 | $ (43.4) |
| International markets | (3.8) | (18.3) |
| Total Adjusted EBITDA (1) | $ 7.1 | $ (61.7) |

(1) The Company presents Adjusted EBITDA as a supplemental measure of its performance. The Company defines Adjusted EBITDA as net earnings (loss) plus (i) income tax provision (benefit), (ii) interest expense and (iii) depreciation and amortization, as further adjusted to eliminate the impact of certain items that the Company does not consider indicative of the Company's ongoing operating performance and to include attributable EBITDA from equity investments in theatre operations in International markets and any cash distributions of earnings from its other equity method investees. The measure of segment profit and loss the Company uses to evaluate performance and allocate its resources is Adjusted EBITDA, which is broadly consistent with how Adjusted EBITDA is defined in the Company's debt indentures.

| | Three Months Ended | |
|---|---|---|
| **Capital Expenditures (In millions)** | **March 31, 2023** | **March 31, 2022** |
| U.S. markets | $ 34.6 | $ 21.1 |
| International markets | 12.8 | 13.7 |
| Total capital expenditures | $ 47.4 | $ 34.8 |

| | As of | As of |
|---|---|---|
| **Long-term assets, net (In millions)** | **March 31, 2023** | **December 31, 2022** |
| U.S. markets | $ 6,026.1 | $ 6,135.9 |
| International markets | 2,081.0 | 2,097.6 |
| Total long-term assets (1) | $ 8,107.1 | $ 8,233.5 |

(1) Long-term assets are comprised of property, net, operating lease right-of-use assets, intangible assets, goodwill, deferred tax assets, net and other long-term assets.

The following table sets forth a reconciliation of net loss to Adjusted EBITDA:

| (In millions) | Three Months Ended March 31, 2023 | Three Months Ended March 31, 2022 |
|---|---|---|
| Net loss | $ (235.5) | $ (337.4) |
| Plus: | | |
| Income tax provision | 1.9 | 0.1 |
| Interest expense | 101.1 | 92.4 |
| Depreciation and amortization | 93.6 | 98.7 |
| Certain operating expense (1) | 1.1 | 2.3 |
| Equity in (earnings) loss of non-consolidated entities | (1.4) | 5.1 |
| Cash distributions from non-consolidated entities (2) | - | 0.7 |
| Attributable EBITDA (3) | 0.5 | 0.2 |
| Investment income (4) | (13.5) | (63.4) |
| Other expense (5) | 42.8 | 139.8 |
| Other non-cash rent benefit (6) | (9.6) | (7.1) |
| General and administrative - unallocated: | | |
| Merger, acquisition and other costs (7) | 0.2 | 0.4 |
| Stock-based compensation expense (8) | 25.9 | 6.5 |
| Adjusted EBITDA | $ 7.1 | $ (61.7) |

(1) Amounts represent preopening expense related to temporarily closed screens under renovation, theatre and other closure expense for the permanent closure of screens, including the related accretion of interest, disposition of assets and other non-operating gains or losses included in operating expenses. The Company has excluded these items as they are non-cash in nature or are non-operating in nature.

(2) Includes U.S. non-theatre distributions from equity method investments and International non-theatre distributions from equity method investments to the extent received. The Company believes including cash distributions is an appropriate reflection of the contribution of these investments to the Company's operations.

(3) Attributable EBITDA includes the EBITDA from equity investments in theatre operators in certain International markets. See below for a reconciliation of the Company's equity in loss of non-consolidated entities to attributable EBITDA. Because these equity investments are in theatre operators in regions where the Company holds a significant market share, the Company believes attributable EBITDA is more indicative of the performance of these equity investments and management uses this measure to monitor and evaluate these equity investments. The Company also provides services to these theatre operators including information technology systems, certain on-screen advertising services and the Company's gift card and package ticket program.

| (In millions) | Three Months Ended March 31, 2023 | Three Months Ended March 31, 2022 |
|---|---|---|
| Equity in (earnings) loss of non-consolidated entities | $ (1.4) | $ 5.1 |
| Less: | | |
| Equity in (earnings) loss of non-consolidated entities excluding International theatre joint ventures | (1.1) | 0.3 |
| Equity in earnings (loss) of International theatre joint ventures | 0.3 | (4.8) |
| Income tax benefit | (0.1) | - |
| Investment expense | 0.1 | - |
| Impairment of long-lived assets | - | 4.2 |
| Depreciation and amortization | 0.2 | 0.8 |
| Attributable EBITDA | $ 0.5 | $ 0.2 |

(4) Investment income during the three months ended March 31, 2023 primarily includes deterioration in estimated fair value of the Company's investment in common shares of Hycroft Mining Holding Corporation of $2.3 million, deterioration in estimated fair value of the Company's investment in warrants to purchase common shares of Hycroft Mining Holding Corporation of $2.3 million, a $(15.5) million gain on the sale of the Company's investment in Saudi Cinema Company, LLC, and interest income of $(2.3) million.

Investment income during the three months ended March 31, 2022 includes appreciation in estimated fair

value of the Company's investment in common shares of Hycroft Mining Holding Corporation of $28.8 million and appreciation in estimated fair value of the Company's investment in warrants to purchase common shares of Hycroft Mining Holding Corporation of $35.1 million.

(5) Other expense during the three months ended March 31, 2023 includes a non-cash litigation contingency reserve charge of $116.6 million, partially offset by foreign currency transaction gains of $(8.7) million and gains on debt extinguishment of $(65.1) million.

Other expense during the three months ended March 31, 2022 included loss on debt extinguishment of $135.0 million and foreign currency transaction losses of $4.8 million.

(6) Reflects amortization expense for certain intangible assets reclassified from depreciation and amortization to rent expense due to the adoption of ASC 842, Leases and deferred rent benefit related to the impairment of right-of-use operating lease assets.

(7) Merger, acquisition and other costs are excluded as they are non-operating in nature.

(8) Non-cash or non-recurring expense included in general and administrative: other.

**NOTE 11-COMMITMENTS AND CONTINGENCIES**

The Company, in the normal course of business, is a party to various ordinary course claims from vendors (including food and beverage suppliers and film distributors), landlords, competitors, and other legal proceedings. If management believes that a loss arising from these actions is probable and can reasonably be estimated, the Company records the amount of the loss or the minimum estimated liability when the loss is estimated using a range and no point is more probable than another. As additional information becomes available, any potential liability related to these actions is assessed and the estimates are revised, if necessary. Management believes that the ultimate outcome of such matters discussed below, individually and in the aggregate, will not have a material adverse effect on the Company's financial position or overall trends in results of operations. However, litigation and claims are subject to inherent uncertainties and unfavorable outcomes can occur. An unfavorable outcome might include monetary damages. If an unfavorable outcome were to occur, there exists the possibility of a material adverse impact on the results of operations in the period in which the outcome occurs or in future periods.

On January 12, 2018 and January 19, 2018, two putative federal securities class actions, captioned Hawaii Structural Ironworkers Pension Trust Fund v. AMC Entertainment Holdings, Inc., et al., Case No. 1:18-cv-00299-AJN (the "Hawaii Action"), and Nichols v. AMC Entertainment Holdings, Inc., et al., Case No. 1:18-cv-00510-AJN (the "Nichols Action," and together with the Hawaii Action, the "Actions"), respectively, were filed against the Company in the U.S. District Court for the Southern District of New York. The Actions, which named certain of the Company's officers and directors and, in the case of the Hawaii Action, the underwriters of the Company's February 8, 2017 secondary public offering, as defendants, asserted claims under Sections 11, 12(a)(2) and 15 of the Securities Act and Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") with respect to alleged material misstatements and omissions in the registration statement for the secondary public offering and in certain other public disclosures. On May 30, 2018, the court consolidated the Actions. On January 22, 2019, defendants moved to dismiss the Second Amended Class Action Complaint. On September 23, 2019, the court granted the motion to dismiss in part and denied it in part. On March 2, 2020, plaintiffs moved to certify the purported class. On March 30, 2021, the court granted the motion to certify the class. On September 2, 2021, the parties reached an agreement in principle to resolve the Actions for $18.0 million. The Company agreed to the settlement and the payment of the settlement amount to eliminate the distraction, burden, expense, and uncertainty of further litigation. The Company and the other defendants continue to expressly deny any liability or wrongdoing with respect to the matters alleged in the Actions. On November 1, 2021, the parties to the Actions signed a stipulation of settlement, which memorialized the terms of the agreement in principle, and which the plaintiffs filed with the court. Also on November 1, 2021, plaintiffs filed a motion to preliminarily approve the settlement. On November 8, 2021, the court preliminarily approved the settlement, approved the form of notice to be disseminated to class members, and scheduled a final fairness hearing on the settlement for February 10, 2022. On February 14, 2022, the court issued a final judgment approving the settlement and dismissing the action.

On May 21, 2018, a stockholder derivative complaint, captioned *Gantulga v. Aron, et al.*, Case No. 2:18-cv-02262-JAR-TJJ (the "Gantulga Action"), was filed against certain of the Company's officers and directors in the U.S. District Court for the District of Kansas. The Gantulga Action, which was filed on behalf of the Company, asserts

claims under Section 14(a) of the Exchange Act and for breaches of fiduciary duty and unjust enrichment based on allegations substantially similar to the Actions. On October 12, 2018, the parties filed a joint motion to transfer the action to the U.S. District Court for the Southern District of New York, which the court granted on October 15, 2018. When the action was transferred to the Southern District of New York, it was re-captioned *Gantulga v. Aron, et al.*, Case No. 1:18-cv-10007-AJN. The parties filed a joint stipulation to stay the action, which the court granted on December 17, 2018. The stay was lifted as of February 9, 2022.

On October 2, 2019, a stockholder derivative complaint, captioned *Kenna v. Aron*, et al., Case No. 1:19-cv-09148-AJN (the "Kenna Action"), was filed in the U.S. District Court for the Southern District of New York. The parties filed a joint stipulation to stay the action, which the court granted on October 17, 2019. On April 20, 2020, the plaintiff filed an amended complaint. The Kenna Action asserts claims under Sections 10(b), 14(a), and 21D of the Exchange Act and for breaches of fiduciary duty and unjust enrichment based on allegations substantially similar to the Actions and the Gantulga Action. The stay was lifted as of February 9, 2022.

On March 20, 2020, a stockholder derivative complaint, captioned *Manuel v. Aron, et al*., Case No. 1:20-cv-02456-AJN (the "Manuel Action"), was filed in the U.S. District Court for the Southern District of New York. The Manuel Action asserts claims under Sections 10(b), 21D, and 29(b) of the Exchange Act and for breaches of fiduciary duty based on allegations substantially similar to the Actions, the Gantulga Action, and the Kenna Action. The parties filed a joint stipulation to stay the action, which the court granted on May 18, 2020.

On April 7, 2020, a stockholder derivative complaint, captioned *Dinkevich v. Aron, et al*., Case No. 1:20-cv-02870-AJN (the "Dinkevich Action"), was filed in the U.S. District Court for the Southern District of New York. The Dinkevich Action asserts the same claims as the Manuel Action based on allegations substantially similar to the Actions, the Gantulga Action, the Kenna Action, and the Manuel Action. The parties filed a joint stipulation to stay the action, which was granted on June 25, 2020. On January 11, 2022, the court lifted the stay.

On September 23, 2021, a stockholder derivative complaint, captioned *Lyon v. Aron, et al.*, Case No. 1:21-cv-07940-AJN (the "Lyon Action"), was filed in the U.S. District Court for the Southern District of New York against certain of the Company's current and former officers and directors. The Lyon Action asserts claims for contribution and indemnification under the Exchange Act and for breaches of fiduciary duty, waste of corporate assets, and unjust enrichment/constructive trust based on allegations substantially similar to the Actions, the Gantulga Action, the Kenna Action, the Manuel Action, and the Dinkevich Action. On January 14, 2022, defendants moved to dismiss the complaint. On March 21, 2023, the court granted defendants' motion to dismiss.

On December 31, 2019, the Company received a stockholder litigation demand, requesting that the Board investigate the allegations in the Actions and pursue claims on the Company's behalf based on those allegations. On May 5, 2020, the Board determined not to pursue the claims sought in the demand at this time.

On July 15, 2020, the Company received a second stockholder litigation demand requesting substantially the same action as the stockholder demand it received on December 31, 2019. On September 23, 2020, the Board determined not to pursue the claims sought in the demand at this time.

On April 22, 2019, a putative stockholder class and derivative complaint, captioned *Lao v. Dalian Wanda Group Co., Ltd.*, et al., C.A. No. 2019-0303-JRS (the "Lao Action"), was filed against certain of the Company's directors, Wanda, two of Wanda's affiliates, Silver Lake, and one of Silver Lake's affiliates in the Delaware Court of Chancery. The Lao Action asserts claims directly, on behalf of a putative class of Company stockholders, and derivatively, on behalf of the Company, for breaches of fiduciary duty and aiding and abetting breaches of fiduciary duty with respect to transactions that the Company entered into with affiliates of Wanda and Silver Lake on September 14, 2018, and the special cash dividend of $1.55 per share of common stock that was payable on September 28, 2018 to the Company's stockholders of record as of September 25, 2018. On July 18, 2019, the Company's Board of Directors formed a Special Litigation Committee to investigate and evaluate the claims and allegations asserted in the Lao Action and make a determination as to how the Company should proceed with respect to the Lao Action. On January 8, 2021, the Special Litigation Committee filed a report with the court recommending that the court dismiss all of the claims asserted in the Lao Action, and moved to dismiss all of the claims in the Lao Action. On June 6, 2022, the parties signed a stipulation of settlement to resolve the Lao Action for $17.4 million (the "Settlement Amount"). Defendants agreed to the settlement and the payment of the Settlement Amount solely to eliminate the burden, expense, and uncertainty of further litigation, and continue to expressly deny any liability or wrongdoing with respect to the matters alleged in the Lao Action. On September 28, 2022, the court held a hearing to

consider whether to approve the proposed settlement. At the hearing, the court requested a supplemental notice to stockholders prior to approval. A second hearing regarding approval of the settlement was held on November 30, 2022. Following the hearing, also on November 30, 2022, the court issued an order and final judgment approving the settlement and dismissing the action. The order and final judgment included a fee and expense award to Plaintiff's counsel in the amount of $3.4 million to be paid out of the Settlement Amount. On January 6, 2023, the remainder of the Settlement Amount of $14.0 million was paid to the Company. The Company recorded the settlement as a gain in other income once all contingencies were resolved during the three months ended March 31, 2023.

On December 27, 2022, the Company received a letter form a purported stockholder, demanding to inspect certain of the Company's books and records pursuant to 8 *Del. C*. § 220 in order to investigate allegations concerning: (i) the proposal that was approved by the Board on January 27, 2021 to amend the Company's Certificate of Incorporation to increase the total number of shares of the Company's Common Stock; (ii) the Company's creation, distribution, and/or sale of AMC Preferred Equity Units (APE's); (iii) the transactions between the Company and Antara Capital, LP that the Company announced on December 22, 2022 (the "Antara Transactions"); (iv) the special meeting of the holders of the Company's Common Stock and APEs held March 14, 2023 for the purpose of voting on amendments to the Company's Certificate of Incorporation that, together will enable APEs to convert into shares of the Company's Common Stock: and (v) the independence of the members of the Board (the "December 27, 2022 Demand"). On January 4, 2023, the Company rejected the December 27, 2022 Demand. On February 7, 2023, without conceding the propriety of the December 27, 2022 Demand in any respect and while reserving all rights, the Company, in an effort to avoid unnecessary litigation, allowed the stockholder who made the December 27, 2022 Demand to inspect certain of the Company's books and records concerning the subject matter of December 27, 2022 Demand.

On February 6, 2023, the Company received a letter from another purported stockholder, demanding to inspect certain of the Company's books and records pursuant to 8 *Del. C*. § 220 in order to investigate allegations similar to those made in the December 27, 2022 Demand (the "February 6, 2023 Demand" and, together with the December 27, 2022 Demand, the "Books and Records Demands"). On February 13, 2023, the Company rejected the February 6, 2023 Demand. Also, on February 13, 2023, without conceding the propriety of the February 6, 2023 Demand in any respect and while reserving all rights, the Company, in an effort to avoid unnecessary litigation, allowed the stockholder who made the February 6, 2023 Demand to inspect the same books and records that it allowed the stockholder who made the December 27, 2022 Demand to inspect.

On February 20, 2023,

two putative stockholder class actions were filed in the Delaware Court of Chancery, captioned *Allegheny County Employees' Retirement System v. AMC Entertainment Holdings, Inc., et al.,* C.A No. 2023-0215-MTZ (Del. Ch.) (the "Allegheny Action"), and *Munoz v Adam M. Aron, et al.,* C.A. No. 2023-0216-MTZ (Del. Ch.) (the "Munoz Action") and which have been subsequently consolidated into *In re AMC Entertainment Holdings, Inc. Stockholder Litigation* C.A. No. 2023-0215-MTZ (Del. Ch.) (the "Shareholder Litigation"). The *Allegheny* Action asserts a claim for breach of fiduciary duty against certain of the Company's directors and a claim for breach of 8 *Del. C*. § 220 against those directors and the Company, arising out of the Company's creation of the APEs, the Antara Transactions, and the Charter Amendment Proposals. The *Munoz* Action, which was filed by the stockholders who made the Books and Records Demands, assert a claim for breach of fiduciary duty against the Company's current directors and former director Lee Wittlinger, arising out of the same conduct challenged in the *Allegheny* Action. The *Allegheny* Action seeks a declaration that the issuance of the APEs violated 8 *Del. C*. § 242(b), an order that holders of the Company's Common Stock be provided with a separate vote from the holders of the APEs on the Charter Amendment Proposals or that the APEs be enjoined from voting on the Charter Amendment Proposals, and an award of money damages. The *Munoz* Action seeks to enjoin the APEs from voting on the Charter Amendment Proposals.

On February 27, 2023, the Delaware Court of Chancery entered a status quo order that (i) allowed the March 14, 2023 vote on the Charter Amendment Proposals to proceed, but precludes the Company from implementing the Charter Amendment Proposals pending a ruling by the court on the plaintiffs' then-anticipated preliminary injunction motion, and (ii) scheduled a hearing on the plaintiffs' then-anticipated preliminary injunction motion for April 27, 2023 (the "Status Quo Order").

On April 2, 2023, the parties entered into a binding settlement term sheet to settle the Shareholder Litigation, which among other things, provided that the parties would jointly request that the Status Quo Order be lifted. Pursuant to the term sheet, the Company agreed to make a non-cash settlement payment to record holders of Common Stock as of the time (the "Settlement Class Time") at which the Reverse Stock Split is effective (and after giving effect to the Reverse Stock Split) of one share of Class A common stock for every 7.5 shares of Common Stock owned by such record holders (the "Settlement Payment"). The Company's obligation to make the Settlement Payment is contingent on

the Status Quo Order being lifted and the Company effecting the Charter Amendment Proposals. The defendants agreed to the settlement and the payment of the Settlement Payment solely to eliminate the burden, expense, and uncertainty of further litigation, and continue to expressly deny any liability or wrongdoing with respect to the matters alleged in the Shareholder Litigation. On April 3, 2023, the plaintiffs filed an unopposed motion to lift the Status Quo Order. In connection with the proposed settlement payment, the Company recorded a $126.6 million contingency reserve charge to other expense during the three months ended March 31, 2023. The contingency reserve charge is based on the estimated fair value of $116.6 million for the Settlement Payment and the expected attorneys' fees, net of probable insurance recoveries of $10.0 million. The contingent liability is included in accrued expenses in other liabilities within the condensed consolidated balance sheets.

On April 5, 2023 the court denied the motion to lift the Status Quo Order. Unless and until the court lifts the Status Quo Order, the Company cannot proceed with filing the amendment to the Company's certificate of incorporation to effect the Charter Amendment Proposals.

On April 27, 2023, the parties jointly filed a Stipulation and Agreement of Compromise, Settlement, and Release (the "Settlement Stipulation") with the court, which fully memorializes the settlement that the parties agreed to in the term sheet. The court has set a hearing to consider approval of the settlement for June 29-30, 2023. Any settlement of the Shareholder Litigation is subject to court approval.

**NOTE 12-LOSS PER SHARE**

On August 4, 2022, the Company announced that its Board of Directors declared a special dividend of one AMC Preferred Equity Unit for each share of Common Stock outstanding at the close of business on August 15, 2022, the record date. The dividend was paid at the close of business on August 19, 2022 to investors who held shares of Common Stock as of August 22, 2022, the ex-dividend date.

Each AMC Preferred Equity Unit is a depositary share and represents an interest in one one-hundredth ($1/100^{th}$) of a share of Series A Convertible Participating Preferred Stock evidenced by a depositary receipt pursuant to a deposit agreement. The Company has 50,000,000 Preferred Stock shares authorized, 10,000,000 of which have currently been allocated and 9,741,909 have been issued under depositary agreement as Series A Convertible Participating Preferred Stock, leaving 40,000,000 unallocated Preferred Stock shares. Each AMC Preferred Equity Unit is designed to have the same economic and voting rights as a share of Class A common stock. Trading of the AMC Preferred Equity Units on the NYSE began on August 22, 2022 under the ticker symbol "APE". Due to the characteristics of the AMC Preferred Equity Units, the special dividend similar to a stock split pursuant to ASC 505-20-25-4. Accordingly, all references made to share, per share, or common share amounts in the accompanying consolidated financial statements and applicable disclosures have been retroactively adjusted to reflect the effects of the special dividend as a stock split.

Basic loss per share is computed by dividing net loss by the weighted-average number of common shares outstanding. Diluted loss per share includes the effects of unvested RSUs with a service condition only and unvested contingently issuable RSUs and PSUs that have service and performance conditions, if dilutive.

The following table sets forth the computation of basic and diluted loss per common share:

| | Three Months Ended | |
|---|---|---|
| (In millions) | March 31, 2023 | March 31, 2022 |
| **Numerator:** | | |
| Net loss for basic loss per share attributable to AMC Entertainment Holdings, Inc. | $ (235.5) | $ (337.4) |
| Net loss for diluted loss per share attributable to AMC Entertainment Holdings, Inc. | $ (235.5) | $ (337.4) |
| **Denominator** (shares in thousands): | | |
| Weighted average shares for basic loss per common share | 1,373,947 | 1,031,820 |
| Weighted average shares for diluted loss per common share | 1,373,947 | 1,031,820 |
| Basic loss per common share | $ (0.17) | $ (0.33) |
| Diluted loss per common share | $ (0.17) | $ (0.33) |

Vested RSUs and PSUs have dividend rights identical to the Company's Common Stock and AMC Preferred Equity Units and are treated as outstanding shares for purposes of computing basic and diluted earnings per share. Unvested RSUs of 5,319,571 for the three months ended March 31, 2023 and unvested RSUs of 5,614,052 for the three months ended March 31, 2022 were not included in the computation of diluted loss per share because they would be anti-dilutive.

Unvested PSUs are subject to performance conditions and are included in diluted earnings per share, if dilutive, based on the number of shares, if any, that would be issuable under the terms of the Company's 2013 Equity Incentive Plan if the end of the reporting period were the end of the contingency period. Unvested PSUs of 2,978,289 at certain performance targets for the three months ended March 31, 2023 and unvested PSUs of 2,953,978 at certain performance targets for the three months ended March 31, 2022, were not included in the computation of diluted loss per share because they would not be issuable if the end of the reporting period were the end of the contingency period or they would be anti-dilutive.

## NOTE 13-SUBSEQUENT EVENTS

**Equity Distribution Agreement.** During April 2023, the Company raised gross proceeds of approximately $34.2 million through its at-the-market offering of approximately 21.2 million shares of its AMC Preferred Equity Units and paid fees to the sales agent of approximately $0.9 million. The shares were sold pursuant to the Equity Distribution Agreement described in Note 7-Stockholders' Equity. The Company no longer has any authorized AMC Preferred Equity Units available for issuance under the Equity Distribution Agreement.

**Related Party Debt Repurchase.** On April 6, 2023, the Company repurchased $9.0 million aggregate principal of the Second Lien Notes due 2026 from Antara, a related party, for $6.2 million and recorded a gain on extinguishment of $4.4 million in other expense (income). Accrued interest of $0.3 million was paid in connection with the repurchase.

**NCM Bankruptcy**. On April 11, 2023, National Cine-Media, LLC ("NCM") filed a petition under Chapter 11 of the U.S. Bankruptcy Code in the Southern District of Texas. NCM is the in-theatre advertising provider for the majority of our theatres in the United States. NCM has indicated that it plans to assume its agreements with us and we do not expect its bankruptcy to have a material impact on the Company. However, certain payments due to AMC from NCM for periods prior to the bankruptcy filing may be delayed, and NCM failed to issue the common units that were owed to AMC as part of the annual common unit adjustment on April 12, 2023. We will continue to monitor the bankruptcy proceedings and take such actions as are necessary to preserve AMC's contractual rights.

**Shareholder Litigation.** On April 2, 2023, the Company entered into a binding settlement term sheet with the named plaintiffs in the Shareholder Litigation to settle the Shareholder Litigation and to request that the status quo order (the "Status Quo Order") in the Shareholder Litigation be lifted. Pursuant to the binding settlement term sheet, the Company agreed to make a non-cash settlement payment to record holders of Common Stock as of the time (the "Settlement Class Time") at which the Reverse Stock Split is effective (and after giving effect to the Reverse Stock Split) of one share of Class A common stock for every 7.5 shares of Common Stock owned by such record holders (the

"Settlement Payment"). On April 3, 2023, the plaintiffs filed an unopposed motion to lift the Status Quo Order.

On April 5, 2023, the court denied the motion to lift the Status Quo Order. Unless and until the court lifts the Status Quo Order, the Company cannot proceed with filing the amendment to the Company's certificate of incorporation to effect the Charter Amendment Proposals. Further, any settlement of the Shareholder Litigation is subject to court approval.

On April 26, 2023, the Company and the plaintiffs jointly filed a Stipulation and Agreement of Compromise, Settlement, and Release (the "Settlement Stipulation") with the court. The terms of the Settlement Stipulation are substantially the same as the previously entered binding settlement term sheet. The court has set a hearing to consider approval of the Settlement Stipulation on June 29-30, 2023.

See Note 11-Commitments and Contingencies for further information regarding the litigation.

**Item 2. Management's Discussion and Analysis of Financial Condition and Results of Operations.**

**Forward-Looking Statements**

In addition to historical information, this Quarterly Report on Form 10-Q contains "forward-looking statements" within the meaning of the "safe harbor" provisions of the United States Private Securities Litigation Reform Act of 1995. Forward-looking statements may be identified by the use of words such as "may," "will," "forecast," "estimate," "project," "intend," "plan," "expect," "should," "believe" and other similar expressions that predict or indicate future events or trends or that are not statements of historical matters. These forward-looking statements are based only on our current beliefs, expectations and assumptions regarding the future of our business, future plans and strategies, projections, anticipated events and trends, the economy and other future conditions and speak only as of the date on which it is made. Examples of forward-looking statements include statements we make regarding the impact of COVID-19, future attendance levels and our liquidity. These forward-looking statements involve known and unknown risks, uncertainties, assumptions and other factors, including those discussed in "Risk Factors" and "Management's Discussion and Analysis of Financial Condition and Results of Operations," which may cause our actual results, performance or achievements to be materially different from any future results, performance or achievements expressed or implied by such forward-looking statements. These risks and uncertainties include, but are not limited to, the following:

- the risks and uncertainties relating to the sufficiency of our existing cash and cash equivalents and available borrowing capacity to comply with the minimum liquidity requirement under our debt covenants related to borrowings pursuant to the Senior Secured Revolving Credit Facility (as defined in Note 6-Corporate Borrowings and Finance Lease Liabilities in the Notes to the Condensed Consolidated Financial Statements under Part I, Item 1 thereof), fund operations, and satisfy obligations including cash outflows for deferred rent and planned capital expenditures currently and through the next twelve months. In order to achieve net positive operating cash flows and long-term profitability, operating revenues will need to increase significantly from current levels to levels in line with pre COVID-19 operating revenues. We believe the anticipated volume of titles available for theatrical release and the anticipated broad appeal of many of those titles will support increased operating revenues and attendance levels. However, there remain significant risks that may negatively impact operating revenues and attendance levels, including changes to movie studios release schedules and direct to streaming or other changing movie studio practices. If we are unable to achieve significantly increased levels of attendance and operating revenues, we may be required to obtain additional liquidity. If such additional liquidity is not obtained or insufficient, we likely would seek an in-court or out-of-court restructuring of our liabilities, and in the event of such future liquidation or bankruptcy proceeding, holders of our Common Stock, AMC Preferred Equity Units, and other securities would likely suffer a total loss of their investment;

- the impact of COVID-19 upon the operations of the exhibition industry; the practices of distributors; and the changing movie-going behavior of consumers;

- increased use of alternative film delivery methods including premium video on demand or other forms of entertainment;

- the risk that the North American and international box office in the near term will not recover sufficiently,

resulting in higher cash burn and the need to seek additional financing;

- risks and uncertainties relating to our significant indebtedness, including our borrowings and our ability to meet our financial maintenance and other covenants;
- shrinking exclusive theatrical release windows or release of movies to theatrical exhibition and streaming platforms on the same date, and the theatrical release of fewer movies;
- the seasonality of our revenue and working capital, which are dependent upon the timing of motion picture releases by distributor, such releases being seasonal and resulting in higher attendance and revenues generally during the summer months and holiday seasons;
- intense competition in the geographic areas in which we operate among exhibitors or from other forms of entertainment;
- certain covenants in the agreements that govern our indebtedness may limit our ability to take advantage of certain business opportunities and limit or restrict our ability to pay dividends, pre-pay debt, and also to refinance debt and to do so at favorable terms;
- risks relating to impairment losses, including with respect to goodwill and other intangibles, and theatre and other closure charges;
- risks relating to motion picture production and performance, including labor stoppages affecting the production and supply of theatrical motion picture content;
- general and international economic, political, regulatory, social and financial market conditions, including potential economic recession, inflation, the financial stability of the banking industry, and other risks that may negatively impact discretionary income and our operating revenues and attendance levels;
- our lack of control over distributors of films;
- limitations on the availability of capital or poor financial results may prevent us from deploying strategic initiatives;
- an issuance of preferred stock, including the Series A Convertible Participating Preferred Stock (represented by AMC Preferred Equity Units), could dilute the voting power of the common stockholders and adversely affect the market value of our Common Stock and AMC Preferred Equity Units;
- limitations on the authorized number of Common Stock shares prevents us from raising additional capital through Common Stock issuances;
- our ability to achieve expected synergies, benefits and performance from our strategic initiatives;
- our ability to refinance our indebtedness on terms favorable to us or at all;
- our ability to optimize our theatre circuit through new construction, the transformation of our existing theatres, and strategically closing underperforming theatres may be subject to delay and unanticipated costs;
- failures, unavailability or security breaches of our information systems;
- our ability to utilize interest expense deductions will be limited annually due to Section 163(j) of the Internal Revenue Code as amended by the Tax Cuts and Jobs Act of 2017;
- our ability to recognize interest deduction carryforwards, net operating loss carryforwards and other tax attributes to reduce our future tax liability;

- our ability to recognize certain international deferred tax assets which currently do not have a valuation allowance recorded;
- impact of the elimination of the calculation of USD LIBOR rates on our contracts indexed to USD LIBOR;
- review by antitrust authorities in connection with acquisition opportunities;
- risks relating to the incurrence of legal liability, including costs associated with the ongoing securities class action lawsuits;
- dependence on key personnel for current and future performance and our ability to attract and retain senior executives and other key personnel, including in connection with any future acquisitions;
- increased costs in order to comply or resulting from a failure to comply with governmental regulation, including the General Data Protection Regulation ("GDPR") and all other current and pending privacy and data regulations in the jurisdictions where we have operations.
- supply chain disruptions may negatively impact our operating results;
- the availability and/or cost of energy, particularly in Europe;
- the dilution caused by recent and potential future sales of our Common Stock and AMC Preferred Equity Units, including the implications of the proposed conversion of the Series A Convertible Participating Preferred Stock (which are represented by AMC Preferred Equity Units) to Common Stock, could adversely affect the market price of the Common Stock and AMC Preferred Equity Units;
- the market price and trading volume of our shares of Common Stock has been and may continue to be volatile and such volatility also applies to our AMC Preferred Equity Units, and purchasers of our securities could incur substantial losses;
- future offerings of debt, which would be senior to our Common Stock and AMC Preferred Equity Units for purposes of distributions or upon liquidation, could adversely affect the market price of our Common Stock and AMC Preferred Equity Units;
- our ability to implement the Charter Amendment Proposals due to the Shareholder Litigation (as defined herein);
- the potential for political, social, or economic unrest, terrorism, hostilities, cyber-attacks or war, including the conflict between Russia and Ukraine and that Sweden and Finland (countries where we operate approximately 100 theatres) have either signed or completed accession protocols. Their accession could cause a deterioration in the relationship each country has with Russia;
- the potential impact of financial and economic sanctions on the regional and global economy, or widespread health emergencies, such as COVID-19 or other pandemics or epidemics, causing people to avoid our theatres or other public places where large crowds are in attendance;
- anti-takeover protections in our amended and restated certificate of incorporation and our amended and restated bylaws may discourage or prevent a takeover of our Company, even if an acquisition would be beneficial to our stockholders; and
- other risks referenced from time to time in filings with the SEC.

This list of factors that may affect future performance and the accuracy of forward-looking statements is illustrative but not exhaustive. In addition, new risks and uncertainties may arise from time to time. Accordingly, all

forward-looking statements should be evaluated with an understanding of their inherent uncertainty and we caution accordingly against relying on forward-looking statements.

Readers are urged to consider these factors carefully in evaluating the forward-looking statements. For further information about these and other risks and uncertainties as well as strategic initiatives, see Item 1A. “Risk Factors” of this Form 10-Q, Item 1. “Business” in our Annual Report on Form 10-K for the year ended December 31, 2022, and our other public filings.

All subsequent written and oral forward-looking statements attributable to us or persons acting on our behalf are expressly qualified in their entirety by these cautionary statements. The forward-looking statements included herein are made only as of the date of this Quarterly Report on Form 10-Q, and we do not undertake any obligation to release publicly any revisions to such forward-looking statements to reflect events or circumstances after the date hereof or to reflect the occurrence of unanticipated events.

**Overview**

AMC is the world’s largest theatrical exhibition company and an industry leader in innovation and operational excellence. We operate theatres in 11 countries, including the U.S. and Europe.

Our theatrical exhibition revenues are generated primarily from box office admissions and theatre food and beverage sales. Our remaining revenues are generated from ancillary sources, including on-screen advertising, fees earned from our AMC Stubs® customer loyalty program, rental of theatre auditoriums, income from gift card and exchange ticket sales, and online ticketing fees. As of March 31, 2023, we owned, operated or had interests in 920 theatres and 10,264 screens.

**Box Office Admissions and Film Content**

Box office admissions are our largest source of revenue. We predominantly license theatrical films from distributors owned by major film production companies and from independent distributors on a film-by-film and theatre-by-theatre basis. Film exhibition costs are based on a share of admissions revenues and are accrued based on estimates of the final settlement pursuant to our film licenses. These licenses typically state that rental fees are based on the box office performance of each film, though in certain circumstances and less frequently, our rental fees are based on a mutually agreed settlement rate that is fixed. In some European territories, film rental fees are established on a weekly basis and some licenses use a per capita agreement instead of a revenue share, paying a flat amount per ticket.

Our revenues attributable to individual distributors may vary significantly from year to year depending upon the commercial success of each distributor’s films in any given year. Our results of operations may vary significantly from quarter to quarter and from year to year based on the timing and popularity of film releases.

**Movie Screens**

The following table provides detail with respect to digital delivery, 3D enabled projection, large screen formats, such as IMAX® and our proprietary Dolby Cinema™, other Premium Large Format (“PLF”) screens, enhanced food and beverage offerings and our premium seating as deployed throughout our circuit:

| | U.S. Markets | | International Markets | |
|---|---|---|---|---|
| Format | Number of Screens As of March 31, 2023 | Number of Screens As of March 31, 2022 | Number of Screens As of March 31, 2023 | Number of Screens As of March 31, 2022 |
| IMAX® | 186 | 185 | 32 | 37 |
| Dolby Cinema™ | 158 | 154 | 7 | 8 |
| Other Premium Large Format ("PLF") | 57 | 56 | 74 | 77 |
| Dine-In theatres | 667 | 729 | 13 | 13 |
| Premium seating | 3,518 | 3,395 | 536 | 579 |

**Seating Concepts and Amenities**

| | U.S. Markets | | International Markets | | Consolidated | |
|---|---|---|---|---|---|---|
| | Three Months Ended March 31, | | Three Months Ended March 31, | | Three Months Ended March 31, | |
| | 2023 | 2022 | 2023 | 2022 | 2023 | 2022 |
| Recliner screens operated | 3,518 | 3,395 | 536 | 579 | 4,054 | 3,974 |
| Recliner theatres operated | 364 | 351 | 83 | 90 | 447 | 441 |
| Dine-In screens operated | 667 | 729 | 13 | 13 | 680 | 742 |
| Dine-In theatres operated | 48 | 51 | 3 | 3 | 51 | 54 |
| Number of theatres offering alcohol | 358 | 350 | 236 | 241 | 594 | 591 |

**Loyalty Programs and Other Marketing**

As of March 31, 2023, we had more than 28,800,000 member households enrolled in AMC Stubs® A-List, AMC Stubs Premiere™ and AMC Stubs Insider™ programs, combined. During the three months ended March 31, 2023 our AMC Stubs® members represented approximately 43.9% of AMC U.S. markets attendance.

We currently have approximately 15,000,000 members in our various International loyalty programs.

See “Item 1. Business” in our 2022 Annual Report on Form 10-K for additional discussion and information of our screens, seating concepts, amenities, loyalty programs and other marketing initiatives.

**Holders of Shares**

As of March 31, 2023, approximately 7.9 million shares of our Class A common stock and approximately 124.7 million shares of our AMC Preferred Equity Units were directly registered with our transfer agent by 16,779 and 14,852 shareholders, respectively.

**Critical Accounting Estimates**

For a discussion of our critical accounting policies and the means by which we develop estimates therefore, see “Item 7. Management’s Discussion and Analysis of Financial Condition and Results of Operations” in our 2022 Annual Report on Form 10-K. Other than as discussed above, there have been no material changes from critical accounting estimates described in our Form 10-K.

**Significant Events**

**Saudi Cinema Company.** On December 30, 2022, we entered into an agreement to sell our 10.0% investment in Saudi Cinema Company, LLC for SAR 112.5 million ($30.0 million), subject to certain closing conditions. On January 24, 2023, the Saudi Ministry of Commerce recorded a sale of equity and we received the proceeds on January 25, 2023. We recorded a gain on the sale of $15.5 million in investment income during the three months ended March 31, 2023.

**Debt Repurchases.** The below table summarizes the cash debt repurchase transactions during the three months ended March 31, 2023, including related party transactions with Antara, which became a related party on February 7, 2023:

| (In millions) | Aggregate Principal Repurchased | Reacquisition Cost | Gain on Extinguishment | Accrued Interest Paid |
|---|---|---|---|---|
| Related party transactions: | | | | |
| Second Lien Notes due 2026 | $ 41.9 | $ 24.4 | $ 25.3 | $ 0.7 |
| 5.875% Senior Subordinated Notes due 2026 | 4.1 | 1.7 | 2.3 | 0.1 |
| Total related party transactions | 46.0 | 26.1 | 27.6 | 0.8 |
| Non-related party transactions: | | | | |
| Second Lien Notes due 2026 | 57.5 | 30.4 | 37.5 | 1.1 |
| Total non-related party transactions | 57.5 | 30.4 | 37.5 | 1.1 |
| Total debt repurchases | $ 103.5 | $ 56.5 | $ 65.1 | $ 1.9 |

**Additional Share Issuances Antara.** On December 22, 2022, we entered into a forward purchase agreement (the "Forward Purchase Agreement") with Antara pursuant to which we agreed to (i) sell to Antara 106,595,106 AMC Preferred Equity Units for an aggregate purchase price of $75.1 million and (ii) simultaneously purchase from Antara $100.0 million aggregate principal amount of the Company's 10%/12% Cash/PIK Toggle Second Lien Notes due 2026 in exchange for 91,026,191 AMC Preferred Equity Units. On February 7, 2023, the Company issued 197,621,297 AMC Preferred Equity Units to Antara in exchange for $75.1 million in cash and $100.0 million aggregate principal amount of the Company's 10%/12% Cash/PIK Toggle Second Lien Notes due 2026. The Company recorded $193.7 million to stockholders' deficit as a result of the transaction. We paid $1.4 million of accrued interest in cash upon exchange of the notes.

**Equity Distribution Agreement.** During the three months ended March 31, 2023, we raised gross proceeds of approximately $80.3 million and paid fees to the Sales Agent and incurred other third-party issuance costs of approximately $2.0 million and $7.8 million, respectively, through our at-the-market offering of approximately 49.3 million shares of our AMC Preferred Equity Units. The Company paid $6.8 million of other third-party issuance costs during the three months ended March 31, 2023. See Note 13-Subsequent Events in the Notes to the Condensed Consolidated Financial Statements under Part I, Item 1, for information about additional AMC Preferred Equity Unit issuances.

**Special Awards.** On February 23, 2023, AMC's Board of Directors approved special awards in lieu of vesting of the 2022 PSU awards. The special awards were accounted for as a modification to the 2022 PSU awards which lowered the Adjusted EBITDA and free cash flow performance targets such that 200% vesting was achieved for both tranches. This modification resulted in the immediate additional vesting of 2,389,589 Common Stock 2022 PSUs and 2,389,589 AMC Preferred Equity Unit 2022 PSUs. This was treated as a Type 3 modification (improbable-to-probable) which requires the Company to recognize additional stock compensation expense based on the modification date fair values of the Common Stock PSUs and AMC Preferred Equity Units PSUs of $6.23 and $2.22, respectively. During the three months ended March 31, 2023, we recognized $20.2 million of additional stock compensation expense.

**Operating Results**

The following table sets forth our consolidated revenues, operating costs and expenses:

| (In millions) | Three Months Ended March 31, 2023 | March 31, 2022 | % Change |
|---|---|---|---|
| **Revenues** | | | |
| Admissions | $ 534.1 | $ 443.8 | 20.3 % |
| Food and beverage | 328.7 | 252.5 | 30.2 % |
| Other theatre | 91.6 | 89.4 | 2.5 % |
| Total revenues | 954.4 | 785.7 | 21.5 % |
| **Operating Costs and Expenses** | | | |
| Film exhibition costs | 246.2 | 189.8 | 29.7 % |
| Food and beverage costs | 61.4 | 42.6 | 44.1 % |
| Operating expense, excluding depreciation and amortization below | 383.2 | 344.8 | 11.1 % |
| Rent | 205.7 | 223.2 | (7.8)% |
| General and administrative: | | | |
| Merger, acquisition and other costs | 0.2 | 0.4 | (50.0)% |
| Other, excluding depreciation and amortization below | 72.3 | 53.1 | 36.2 % |
| Depreciation and amortization | 93.6 | 98.7 | (5.2)% |
| Operating costs and expenses | 1,062.6 | 952.6 | 11.5 % |
| Operating loss | (108.2) | (166.9) | (35.2)% |
| Other expense: | | | |
| Other expense | 39.2 | 136.3 | (71.2)% |
| Interest expense: | | | |
| Corporate borrowings | 90.7 | 82.0 | 10.6 % |
| Finance lease obligations | 0.9 | 1.2 | (25.0)% |
| Non-cash NCM exhibitor service agreement | 9.5 | 9.2 | 3.3 % |
| Equity in (earnings) loss of non-consolidated entities | (1.4) | 5.1 | * % |
| Investment income | (13.5) | (63.4) | (78.7)% |
| Total other expense, net | 125.4 | 170.4 | (26.4)% |
| Net loss before income taxes | (233.6) | (337.3) | (30.7)% |
| Income tax provision | 1.9 | 0.1 | * % |
| Net loss | $ (235.5) | $ (337.4) | (30.2)% |

* Percentage change in excess of 100%

| Operating Data: | Three Months Ended March 31, 2023 | March 31, 2022 |
|---|---|---|
| Screen additions | - | 7 |
| Screen acquisitions | 2 | 30 |
| Screen dispositions | 208 | 118 |
| Construction openings (closures), net | (4) | 12 |
| Average screens (1) | 9,998 | 10,099 |
| Number of screens operated | 10,264 | 10,493 |
| Number of theatres operated | 920 | 938 |
| Screens per theatre | 11.2 | 11.2 |
| Attendance (in thousands) (1) | 47,621 | 39,075 |

(1) Includes consolidated theatres only and excludes screens offline due to construction.

**Segment Operating Results**

The following table sets forth our revenues, operating costs and expenses by reportable segment:

| | U.S. Markets | | International Markets | | Consolidated | |
|---|---|---|---|---|---|---|
| | Three Months Ended March 31, | | Three Months Ended March 31, | | Three Months Ended March 31, | |
| (In millions) | 2023 | 2022 | 2023 | 2022 | 2023 | 2022 |
| **Revenues** | | | | | | |
| Admissions | $ 384.0 | $ 310.8 | $ 150.1 | $ 133.0 | $ 534.1 | $ 443.8 |
| Food and beverage | 258.5 | 194.0 | 70.2 | 58.5 | 328.7 | 252.5 |
| Other theatre | 62.0 | 58.3 | 29.6 | 31.1 | 91.6 | 89.4 |
| Total revenues | 704.5 | 563.1 | 249.9 | 222.6 | 954.4 | 785.7 |
| **Operating Costs and Expenses** | | | | | | |
| Film exhibition costs | 188.5 | 138.7 | 57.7 | 51.1 | 246.2 | 189.8 |
| Food and beverage costs | 44.0 | 28.7 | 17.4 | 13.9 | 61.4 | 42.6 |
| Operating expense | 278.3 | 241.0 | 104.9 | 103.8 | 383.2 | 344.8 |
| Rent | 150.7 | 166.3 | 55.0 | 56.9 | 205.7 | 223.2 |
| General and administrative expense: | | | | | | |
| Merger, acquisition and other costs | 0.2 | 0.2 | - | 0.2 | 0.2 | 0.4 |
| Other, excluding depreciation and amortization below | 53.4 | 35.2 | 18.9 | 17.9 | 72.3 | 53.1 |
| Depreciation and amortization | 74.9 | 75.6 | 18.7 | 23.1 | 93.6 | 98.7 |
| Operating costs and expenses | 790.0 | 685.7 | 272.6 | 266.9 | 1,062.6 | 952.6 |
| Operating loss | (85.5) | (122.6) | (22.7) | (44.3) | (108.2) | (166.9) |
| Other expense (income): | | | | | | |
| Other expense | 47.7 | 133.7 | (8.5) | 2.6 | 39.2 | 136.3 |
| Interest expense: | | | | | | |
| Corporate borrowings | 76.1 | 63.2 | 14.6 | 18.8 | 90.7 | 82.0 |
| Finance lease obligations | 0.1 | 0.1 | 0.8 | 1.1 | 0.9 | 1.2 |
| Non-cash NCM exhibitor service agreement | 9.5 | 9.2 | - | - | 9.5 | 9.2 |
| Equity in (earnings) loss of non-consolidated entities | (0.9) | 0.3 | (0.5) | 4.8 | (1.4) | 5.1 |
| Investment expense (income) | 2.0 | (63.4) | (15.5) | - | (13.5) | (63.4) |
| Total other expense (income), net | 134.5 | 143.1 | (9.1) | 27.3 | 125.4 | 170.4 |
| Net loss before income taxes | (220.0) | (265.7) | (13.6) | (71.6) | (233.6) | (337.3) |
| Income tax provision | 0.4 | 0.1 | 1.5 | - | 1.9 | 0.1 |
| Net loss | $ (220.4) | $ (265.8) | $ (15.1) | $ (71.6) | $ (235.5) | $ (337.4) |

| | U.S. Markets | | International Markets | | Consolidated | |
|---|---|---|---|---|---|---|
| | Three Months Ended March 31, | | Three Months Ended March 31, | | Three Months Ended March 31, | |
| | 2023 | 2022 | 2023 | 2022 | 2023 | 2022 |
| **Segment Operating Data:** | | | | | | |
| Screen additions | - | - | - | 7 | - | 7 |
| Screen acquisitions | - | 30 | 2 | - | 2 | 30 |
| Screen dispositions | 116 | 88 | 92 | 30 | 208 | 118 |
| Construction openings (closures), net | (2) | 12 | (2) | - | (4) | 12 |
| Average screens (1) | 7,513 | 7,622 | 2,485 | 2,477 | 9,998 | 10,099 |
| Number of screens operated | 7,530 | 7,709 | 2,734 | 2,784 | 10,264 | 10,493 |
| Number of theatres operated | 578 | 587 | 342 | 351 | 920 | 938 |
| Screens per theatre | 13.0 | 13.1 | 8.0 | 7.9 | 11.2 | 11.2 |
| Attendance (in thousands) (1) | 32,362 | 25,792 | 15,259 | 13,283 | 47,621 | 39,075 |

(1) Includes consolidated theatres only and excludes screens offline due to construction.

**Adjusted EBITDA**

We present Adjusted EBITDA as a supplemental measure of our performance. We define Adjusted EBITDA as net earnings (loss) plus (i) income tax provision (benefit), (ii) interest expense and (iii) depreciation and amortization, as further adjusted to eliminate the impact of certain items that we do not consider indicative of our ongoing operating performance and to include attributable EBITDA from equity investments in theatre operations in International markets and any cash distributions of earnings from other equity method investees. These further adjustments are itemized below. You are encouraged to evaluate these adjustments and the reasons we consider them appropriate for supplemental analysis. In evaluating Adjusted EBITDA, you should be aware that in the future we may incur expenses that are the same as or similar to some of the adjustments in this presentation. Our presentation of Adjusted EBITDA should not be construed as an inference that our future results will be unaffected by unusual or non-recurring items. The preceding definition of and adjustments made to GAAP measures to determine Adjusted EBITDA are broadly consistent with Adjusted EBITDA as defined in the Company's debt indentures.

Adjusted EBITDA is a non-GAAP financial measure commonly used in our industry and should not be construed as an alternative to net earnings (loss) as an indicator of operating performance (as determined in accordance with U.S. GAAP). Adjusted EBITDA may not be comparable to similarly titled measures reported by other companies. We have included Adjusted EBITDA because we believe it provides management and investors with additional information to measure our performance and estimate our value.

Adjusted EBITDA has important limitations as an analytical tool, and you should not consider it in isolation, or as a substitute for analysis of our results as reported under U.S. GAAP. For example, Adjusted EBITDA:

- does not reflect our capital expenditures, future requirements for capital expenditures or contractual commitments;
- does not reflect changes in, or cash requirements for, our working capital needs;
- does not reflect the significant interest expenses, or the cash requirements necessary to service interest or principal payments on our debt;
- excludes income tax payments that represent a reduction in cash available to us; and
- does not reflect any cash requirements for the assets being depreciated and amortized that may have to be replaced in the future.

During the three months ended March 31, 2023, Adjusted EBITDA in the U.S. markets was $10.9 million compared to $(43.4) million during the three months ended March 31, 2022. The year-over-year improvement was primarily due to the decreased net loss driven by an increase in attendance as a result of the popularity of new film releases compared to the prior year and decreases in rent expense, partially offset by increases in operating costs due to the increase in attendance. During the three months ended March 31, 2023, Adjusted EBITDA in the International markets was $(3.8) million compared to $(18.3) million during the three months ended March 31, 2022. The year-over-year improvement was primarily due to the decreased net loss driven by the increase in attendance as a result of the popularity of new film releases compared to the prior year and decreases in foreign currency translation rates, partially offset by increases in operating costs due to the increase in attendance and decreases in government assistance. During the three months ended March 31, 2023, Adjusted EBITDA in the U.S. markets and International markets was $7.1 million compared to $(61.7) million during the three months ended March 31, 2022, driven by the aforementioned factors impacting Adjusted EBITDA.

The following tables set forth our Adjusted EBITDA by reportable operating segment and our reconciliation of Adjusted EBITDA:

| | Three Months Ended | |
|---|---|---|
| **Adjusted EBITDA (In millions)** | **March 31, 2023** | **March 31, 2022** |
| U.S. markets | $ 10.9 | $ (43.4) |
| International markets | (3.8) | (18.3) |
| Total Adjusted EBITDA | $ 7.1 | $ (61.7) |

| (In millions) | Three Months Ended March 31, 2023 | March 31, 2022 |
|---|---|---|
| Net loss | $ (235.5) | $ (337.4) |
| Plus: | | |
| Income tax provision | 1.9 | 0.1 |
| Interest expense | 101.1 | 92.4 |
| Depreciation and amortization | 93.6 | 98.7 |
| Certain operating expense (1) | 1.1 | 2.3 |
| Equity in (earnings) loss of non-consolidated entities | (1.4) | 5.1 |
| Cash distributions from non-consolidated entities (2) | - | 0.7 |
| Attributable EBITDA (3) | 0.5 | 0.2 |
| Investment income (4) | (13.5) | (63.4) |
| Other expense (5) | 42.8 | 139.8 |
| Other non-cash rent benefit (6) | (9.6) | (7.1) |
| General and administrative - unallocated: | | |
| Merger, acquisition and other costs (7) | 0.2 | 0.4 |
| Stock-based compensation expense (8) | 25.9 | 6.5 |
| Adjusted EBITDA | $ 7.1 | $ (61.7) |

(1) Amounts represent preopening expense related to temporarily closed screens under renovation, theatre and other closure expense for the permanent closure of screens, including the related accretion of interest, disposition of assets and other non-operating gains or losses included in operating expenses. We have excluded these items as they are non-cash in nature or are non-operating in nature.

(2) Includes U.S. non-theatre distributions from equity method investments and International non-theatre distributions from equity method investments to the extent received. We believe including cash distributions is an appropriate reflection of the contribution of these investments to our operations.

(3) Attributable EBITDA includes the EBITDA from equity investments in theatre operators in certain International markets. See below for a reconciliation of our equity in loss of non-consolidated entities to attributable EBITDA. Because these equity investments are in theatre operators in regions where we hold a significant market share, we believe attributable EBITDA is more indicative of the performance of these equity investments and management uses this measure to monitor and evaluate these equity investments. We also provide services to these theatre operators including information technology systems, certain on-screen advertising services and our gift card and package ticket program.

| (In millions) | Three Months Ended March 31, 2023 | March 31, 2022 |
|---|---|---|
| Equity in (earnings) loss of non-consolidated entities | $ (1.4) | $ 5.1 |
| Less: | | |
| Equity in (earnings) loss of non-consolidated entities excluding International theatre joint ventures | (1.1) | 0.3 |
| Equity in earnings (loss) of International theatre joint ventures | 0.3 | (4.8) |
| Income tax benefit | (0.1) | - |
| Investment expense | 0.1 | - |
| Impairment of long-lived assets | - | 4.2 |
| Depreciation and amortization | 0.2 | 0.8 |
| Attributable EBITDA | $ 0.5 | $ 0.2 |

(4) Investment income during the three months ended March 31, 2023 primarily includes deterioration in estimated fair value of the Company's investment in common shares of Hycroft Mining Holding Corporation of $2.3 million, deterioration in estimated fair value of the Company's investment in warrants to purchase common shares of Hycroft Mining Holding Corporation of $2.3 million, a $(15.5) million gain on the sale of the Company's investment in Saudi Cinema Company, LLC, and interest income of $(2.3) million.

Investment income during the three months ended March 31, 2022 includes appreciation in estimated fair value of the Company's investment in common shares of Hycroft Mining Holding Corporation of $28.8 million and appreciation in estimated fair value of the Company's investment in warrants to purchase

common shares of Hycroft Mining Holding Corporation of $35.1 million.

(5) Other expense during the three months ended March 31, 2023 includes a non-cash litigation contingency reserve charge of $116.6 million, partially offset by income related to foreign currency transaction gains of $(8.7) million and gains on debt extinguishment of $(65.1) million.

Other expense during the three months ended March 31, 2022 included loss on debt extinguishment of $135.0 million, partially offset by foreign currency transaction losses of $4.8 million.

(6) Reflects amortization expense for certain intangible assets reclassified from depreciation and amortization to rent expense due to the adoption of ASC 842, Leases and deferred rent benefit related to the impairment of right-of-use operating lease assets.

(7) Merger, acquisition and other costs are excluded as they are non-operating in nature.

(8) Non-cash expense included in general and administrative: other.

**Segment Information**

Our historical results of operations for the three months ended March 31, 2023 and March 31, 2022 reflect the results of operations for our two theatrical exhibition reportable segments, U.S. markets and International markets.

**Results of Operations- For the Three Months ended March 31, 2023 Compared to the Three Months ended March 31, 2022**

**Condensed Consolidated Results of Operations**

**Revenues.** Total revenues increased $168.7 million or 21.5%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022. Admissions revenues increased $90.3 million or 20.3%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to an increase in attendance of 21.9% from 39.1 million patrons to 47.6 million patrons partially offset by a 1.2% decrease in average ticket price. The increase in attendance was primarily due to the popularity of film product compared to the prior year. The decrease in average ticket price was primarily due to higher frequency on our A-List subscription program, a higher amount of discount-day ticket attendance, increased discount ticket attendance for non-adult tickets, which are typically discounted, and a decrease in foreign currency translation rates, partially offset by increased attendance for 3D content.

Food and beverage revenues increased $76.2 million 30.2%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to the increase in attendance and an increase in food and beverage per patron. Food and beverage per patron increased 6.8% from $6.46 to $6.90 due primarily to an increase in average prices and units purchased per transaction and the lifting of COVID-19 restrictions on the sale of food and beverage, partially offset by higher frequency from our AMC Stubs loyalty members and a decrease in foreign currency translation rates.

Total other theatre revenues increased $2.2 million or 2.5%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to increases in ticket fees and screen and other advertising due to the increase in attendance, partially offset by lower income from gift cards and package tickets and the decrease in foreign currency translation rates.

**Operating costs and expenses.** Operating costs and expenses increased $110.0 million or 11.5%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022. Film exhibition costs increased $56.4 million or 29.7%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to the increase in attendance. As a percentage of admissions revenues, film exhibition costs were 46.1% for the three months ended March 31, 2023, compared to 42.8% for the three months ended March 31, 2022. The increase in film exhibition cost percentage is primarily due to the concentration of box office revenues in higher grossing films in the current year, which typically results in higher film exhibition costs.

Food and beverage costs increased $18.8 million or 44.1%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022. The increase in food and beverage costs was primarily due to the

increase in food and beverage revenues and increases in product costs and obsolescence. As a percentage of food and beverage revenues, food and beverage costs were 18.7% for the three months ended March 31, 2023 and 16.9% for the three months ended March 31, 2022.

As a percentage of revenues, operating expense was 40.2% for the three months ended March 31, 2023, and 43.9% for the three months ended March 31, 2022. Rent expense decreased 7.8%, or $17.5 million, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, due primarily to the early termination of one theatre lease for a benefit of $16.7 million, which included an early termination payment from the landlord for $13.0 million and the decrease in foreign currency translation rates. See Note 2-Leases in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for further information on the impact of COVID-19 on leases and rent obligations of approximately $123.6 million that have been deferred to future years as of March 31, 2023.

**Merger, acquisition, and other costs.** Merger, acquisition, and other costs were $0.2 million during the three months ended March 31, 2023, compared to $0.4 million during the three months ended March 31, 2022.

**Other.** Other general and administrative expense increased 36.2%, or $19.2 million, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022 due primarily to stock-based compensation expense of $20.2 million related to a February 23, 2023 special award grant accounted for as a modification to the 2022 PSU awards which lowered the Adjusted EBITDA and free cash flow performance targets such that 200% vesting was achieved for both tranches. This modification resulted in the immediate additional vesting of 2,389,589 Class A Common Stock PSU's and 2,389,589 Preferred Equity Unit PSU's. The modification was treated as a Type 3 modification (improbable to probable) which required us to recognize additional stock compensation expense based on the modification date fair values of the Class A Common Stock PSU's and AMC Preferred Equity Unit PSU's of $6.23 per unit and $2.22 per unit, respectively during the three months ended March 31, 2023. See Note 7-Stockholders' Equity in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for additional information about stock-based compensation expense.

**Depreciation and amortization.** Depreciation and amortization decreased $5.1 million or 5.2%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to lower depreciation expense on theatres impaired during years ended December 31, 2021 and December 31, 2022 and the decrease in foreign currency translation rates, partially offset by accelerated depreciation related to the replacement of digital projectors.

**Other expense.** Other expense of $39.2 million during the three months ended March 31, 2023 was primarily due to $126.6 million of expense related to a proposed settlement of the Shareholder Litigation comprised of $10 million of estimated legal fees and $116.6 million of non-cash expense for the estimated fair value as of March 31, 2023 of settlement shares proposed to be issued to holders of AMC Class A Common Stock, partially offset by a gain on extinguishment of debt of $62.8 million related to the redemption of $99.4 million aggregate principal amount of the Second Lien Notes due 2026, a gain on extinguishment of debt of $2.3 million related to the redemption of $4.1 million aggregate principal amount of our Senior Subordinated Notes due 2026, a receipt of $14.0 million in settlement of the Lao Action and $8.7 million in foreign currency transaction gains. Other expense of $136.3 million during the three months ended March 31, 2022 was primarily due to a loss on extinguishment of debt of $135.0 million related to the full redemption of the $500 million aggregate principal amount of the First Lien Notes due 2025, the $300 million aggregate principal amount of the First Lien Notes due 2026, and the $73.5 million aggregate principal amount of the First Lien Toggle Notes due 2026. See Note 1-Basis of Presentation in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for additional information about the components of other expense (income).

**Interest expense.** Interest expense increased $8.7 million to $101.1 million for the three months ended March 31, 2023 compared to $92.4 million during the three months ended March 31, 2022 primarily due to:

- the issuance of $950.0 million of 7.5% First Lien Senior Secured Notes due 2029 on February 14, 2022;
- the issuance of $400.0 million 12.75% Odeon Senior Secured Notes due 2027 on October 20, 2022; and
- the increase in interest rates on the Senior Secured Credit Facility Term Loan due 2026,

partially offset by:

- the extinguishment of $317.6 million of 10%/12% Cash/PIK/Toggle Second Lien Notes due 2026 from May 2022 to March 2023;
- the extinguishment of $500.0 million of 10.5% First Lien Notes due 2025 on February 14, 2022;
- the extinguishment of $300.0 million of 10.5% First Lien Notes due 2026 on February 14, 2022;
- the extinguishment of $73.5 million of 15%/17% Cash/PIK/Toggle Second Lien Notes due 2026 on February 14, 2022;
- the extinguishment of £147.6 million and €312.2 million ($476.6 million) 10.75%/11.25% Cash/PIK Term Loans due 2023 on October 20, 2022; and
- the decline in foreign currency translation rates.

**Equity in (earnings) loss of non-consolidated entities.** Equity in earnings of non-consolidated entities was ($1.4) million for the three months ended March 31, 2023, compared to a loss of $5.1 million for the three months ended March 31, 2022. The decrease in equity losses from the prior year is primarily related to our 10.0% interest in Saudi Cinema Company, LLC that was sold on January 24, 2023.

**Investment income.** Investment income was $13.5 million for the three months ended March 31, 2023, compared to $63.4 million for the three months ended March 31, 2022. Investment income in the current year includes a gain on sale of our 10.0% interest in Saudi Cinema Company, LLC of $15.5 million and interest income of $2.3 million, partially offset by $2.3 million of decline in estimated fair value of our investment in common shares of Hycroft Mining Holding Corporation and $2.3 million of decline in estimated fair value of our investment in warrants to purchase common shares of Hycroft Mining Holding Corporation. Investment income of $63.4 million in the prior year includes $28.8 million of appreciation in estimated fair value of our investment in common shares of Hycroft Mining Holding Corporation and $35.1 million of appreciation in estimated fair value of our investment in warrants to purchase common shares of Hycroft Mining Holding Corporation.

**Income tax provision.** The income tax provision was $1.9 million and $0.1 million for the three months ended March 31, 2023 and March 31, 2022, respectively. See Note 8-Income Taxes in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for further information.

**Net loss.** Net loss was $235.5 million and $337.4 million during the three months ended March 31, 2023 and March 31, 2022, respectively. Net loss during the three months ended March 31, 2023 compared to net loss for the three months ended March 31, 2022 was positively impacted by the increase in attendance as a result of the popularity of new film releases compared to the prior year, decreases in rent expense, decreases in depreciation and amortization expense, decreases in other expense, decreases in equity in losses and decreases in foreign currency translation rates, partially offset by increases in general and administrative expenses, increases in interest expense, decreases in investment income and an increase in income tax provision.

**Theatrical Exhibition-U.S. Markets**

**Revenues.** Total revenues increased $141.4 million or 25.1%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022. Admissions revenues increased $73.2 million or 23.6%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to an increase in attendance of 25.5% from 25.8 million patrons to 32.4 million patrons partially offset by a 1.5% decrease in average ticket price. The increase in attendance was primarily due to the popularity of film product compared to the prior year. The decrease in average ticket price was primarily due to higher frequency on our A-List subscription program, a higher amount of discount-day ticket attendance, and increased attendance for non-adult tickets, which are typically discounted, partially offset by increased attendance for 3D content.

Food and beverage revenues increased $64.5 million or 33.2%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to the increase in attendance and an increase in food and beverage per patron. Food and beverage per patron increased 6.3% from $7.52 to $7.99 due primarily to an increase in average prices and units purchased per transaction, partially offset by higher frequency from our AMC Stubs loyalty members.

Total other theatre revenues increased $3.7 million or 6.3%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to increases in ticket fees and screen and other

advertising due to the increase in attendance, partially offset by lower income from gift cards and package tickets.

**Operating costs and expenses.** Operating costs and expenses increased $104.3 million or 15.2%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022. Film exhibition costs increased $49.8 million or 35.9%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to the increase in attendance. As a percentage of admissions revenues, film exhibition costs were 49.1% for the three months ended March 31, 2023, compared to 44.6% for the three months ended March 31, 2022. The increase in film exhibition cost percentage is primarily due to the concentration of box office revenues in higher grossing films in the current year, which typically results in higher film exhibition costs.

Food and beverage costs increased $15.3 million or 53.3%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022. The increase in food and beverage costs was primarily due to the increase in food and beverage revenues and increases in product costs and obsolescence. As a percentage of food and beverage revenues, food and beverage costs were 17.0% for the three months ended March 31, 2023 and 14.8% for the three months ended March 31, 2022.

As a percentage of revenues, operating expense was 39.5% for the three months ended March 31, 2023, and 42.8% for the three months ended March 31, 2022. Rent expense decreased 9.4%, or $15.6 million, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, due primarily to the early termination of one theatre lease for a benefit of $16.7 million, which included an early termination payment from the landlord for $13.0 million. See Note 2-Leases in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for further information on the impact of COVID-19 on leases and rent obligations of approximately $106.1 million that have been deferred to future years as of March 31, 2023.

**Merger, acquisition, and other costs.** Merger, acquisition, and other costs were $0.2 million during the three months ended March 31, 2023, compared to $0.2 million during the three months ended March 31, 2022.

**Other.** Other general and administrative expense increased 51.7%, or $18.2 million, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022 due primarily to stock-based compensation expense of $18.1 million related to the February 23, 2023 special award grant accounted for as a modification to the 2022 PSU awards discussed further in Condensed Consolidated Results of Operations. See Note 7-Stockholders' Equity in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for additional information about stock-based compensation expense.

**Depreciation and amortization.** Depreciation and amortization decreased $0.7 million or 0.9%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to lower depreciation expense on theatres impaired during years ended December 31, 2021 and December 31, 2022, partially offset by accelerated depreciation related to the replacement of digital projectors.

**Other expense.** Other expense of $47.7 million during the three months ended March 31, 2023 was primarily due to $126.6 million of expense related to a proposed settlement of the Shareholder Litigation comprised of $10 million of estimated legal fees and $116.6 million of non-cash expense for the estimated fair value as of March 31, 2023 of settlement shares proposed to be issued to holders of AMC Class A Common Stock, partially offset by a gain on extinguishment of debt of $62.8 million related to the redemption of $99.4 million aggregate principal amount of the Second Lien Notes due 2026, a gain on extinguishment of debt of $2.3 million related to the redemption of $4.1 million aggregate principal amount of our Senior Subordinated Notes due 2026 and a receipt of $14.0 million in settlement of the Lao Action. Other expense of $133.7 million during the three months ended March 31, 2022 was primarily due to a loss on extinguishment of debt of $135.0 million related to the full redemption of the $500 million aggregate principal amount of the First Lien Notes due 2025, the $300 million aggregate principal amount of the First Lien Notes due 2026, and the $73.5 million aggregate principal amount of the First Lien Toggle Notes due 2026. See Note 1-Basis of Presentation in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for additional information about the components of other expense (income) and Note 11-Commitments and Contingencies for additional information about our legal contingencies and settlements.

**Interest expense.** Interest expense increased $13.2 million to $85.7 million for the three months ended March 31, 2023 compared to $72.5 million during the three months ended March 31, 2022, primarily due to:

- the issuance of $950.0 million of 7.5% First Lien Senior Secured Notes due 2029 on February 14, 2022; and

- the increase in interest rates on the Senior Secured Credit Facility Term Loan due 2026,

partially offset by:

- the extinguishment of $317.6 million of 10%/12% Cash/PIK/Toggle Second Lien Notes due 2026 from May 2022 to March 2023;
- the extinguishment of $500.0 million of 10.5% First Lien Notes due 2025 on February 14, 2022;
- the extinguishment of $300.0 million of 10.5% First Lien Notes due 2026 on February 14, 2022; and
- the extinguishment of $73.5 million of 15%/17% Cash/PIK/Toggle Second Lien Notes due 2026 on February 14, 2022.

**Equity in (earnings) loss of non-consolidated entities.** Equity in earnings of non-consolidated entities was $(0.9) million for the three months ended March 31, 2023, compared to a loss of $0.3 million for the three months ended March 31, 2022.

**Investment (income) expense.** Investment expense was $2.0 million for the three months ended March 31, 2023, compared to $63.4 million for the three months ended March 31, 2022. Investment expense in the current year includes $2.3 million of decline in estimated fair value of our investment in common shares of Hycroft Mining Holding Corporation and $2.3 million of decline in estimated fair value of our investment in warrants to purchase common shares of Hycroft Mining Holding Corporation, partially offset by $2.3 million of interest income. Investment income of ($63.4) million in the prior year includes ($28.8) million of appreciation in estimated fair value of our investment in common shares of Hycroft Mining Holding Corporation and ($35.1) million of appreciation in estimated fair value of our investment in warrants to purchase common shares of Hycroft Mining Holding Corporation.

**Income tax provision.** The income tax provision was $0.4 million and $0.1 million for the three months ended March 31, 2023 and March 31, 2022, respectively. See Note 8-Income Taxes in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for further information.

**Net loss.** Net loss was $220.4 million and $265.8 million during the three months ended March 31, 2023 and March 31, 2022, respectively. Net loss during the three months ended March 31, 2023 compared to net loss for the three months ended March 31, 2022 was positively impacted by the increase in attendance as a result of the popularity of new film releases compared to the prior year, decreases in rent expense, decreases in depreciation and amortization expense, decreases in other expense and decreases in equity in losses, partially offset by increases in general and administrative expenses, increases in interest expense, decreases in investment income and an increase in income tax provision.

**Theatrical Exhibition - International Markets**

**Revenues.** Total revenues increased $27.3 million or 12.3%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022. Admissions revenues increased $17.1 million or 12.9%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to an increase in attendance of 14.9% from 13.3 million patrons to 15.3 million patrons partially offset by a 1.7% decrease in average ticket price. The increase in attendance was primarily due to the popularity of film product compared to the prior year. The decrease in average ticket price was primarily due to a decrease in foreign currency translation rates, partially offset by strategic pricing initiatives put in place over the prior year.

Food and beverage revenues increased $11.7 million or 20.0%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to the increase in attendance and an increase in food and beverage per patron. Food and beverage per patron increased 4.5% from $4.40 to $4.60 due primarily to the lifting of COVID-19 restrictions on the sale of food and beverage and strategic pricing initiatives put in place over the prior year, partially offset by a decrease in foreign currency translation rates.

Total other theatre revenues decreased $1.5 million or 4.8%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to the decrease in foreign currency translation rates and the decline of theatre rentals as traditional attendance increased.

**Operating costs and expenses.** Operating costs and expenses increased $5.7 million or 2.1%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022. Film exhibition costs increased $6.6 million or 12.9%, during the three months ended March 31, 2023, compared to the three months ended March 31,

2022, primarily due to the increase in attendance, partially offset by the decrease in foreign currency translation rates. As a percentage of admissions revenues, film exhibition costs were 38.4% for the three months ended March 31, 2023 and March 31, 2022.

Food and beverage costs increased $3.5 million or 25.2%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022. The increase in food and beverage costs was primarily due to the increase in food and beverage revenues. As a percentage of food and beverage revenues, food and beverage costs were 24.8% for the three months ended March 31, 2023 and 23.8% for the three months ended March 31, 2022.

As a percentage of revenues, operating expense was 42.0% for the three months ended March 31, 2023, and 46.6% for the three months ended March 31, 2022. Rent expense decreased 3.3%, or $1.9 million, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to the decrease in foreign currency translation rates. See Note 2-Leases in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for further information on the impact of COVID-19 on leases and rent obligations of approximately $17.5 million that have been deferred to future years as of March 31, 2023.

**Merger, acquisition, and other costs.** Merger, acquisition, and other costs were $0.0 million during the three months ended March 31, 2023, compared to $0.2 million during the three months ended March 31, 2022.

**Other.** Other general and administrative expense increased 5.6%, or $1.0 million, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022 due primarily to stock-based compensation expense of $2.1 million related to the February 23, 2023 special award grant accounted for as a modification to the 2022 PSU awards discussed further in Condensed Consolidated Results of Operations and partially offset by the decline in foreign currency translation rates. See Note 7-Stockholders' Equity in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for additional information about stock-based compensation expense.

**Depreciation and amortization.** Depreciation and amortization decreased $4.4 million or 19.0%, during the three months ended March 31, 2023, compared to the three months ended March 31, 2022, primarily due to lower depreciation expense on theatres impaired during years ended December 31, 2021 and December 31, 2022 and the decrease in foreign currency translation rates.

**Other (income) expense.** Other income of $(8.5) million during the three months ended March 31, 2023 was primarily due to ($8.7) million in foreign currency transaction gains. Other expense was $2.6 million during the three months ended March 31, 2022. See Note 1-Basis of Presentation in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for additional information about the components of other expense (income) and Note 11-Commitments and Contingencies for additional information about our legal contingencies and settlements.

**Interest expense.** Interest expense decreased $4.5 million to $15.4 million for the three months ended March 31, 2023 compared to $19.9 million during the three months ended March 31, 2022, primarily due to:

- the extinguishment of £147.6 million and €312.2 million ($476.6 million) 10.75%/11.25% Cash/PIK Term Loans due 2023 on October 20, 2022; and
- the decline in foreign currency translation rates,

partially offset by:

- the issuance of $400.0 million 12.75% Odeon Senior Secured Notes due 2027 on October 20, 2022.

**Equity in (earnings) loss of non-consolidated entities.** Equity in earnings of non-consolidated entities was ($0.5) million for the three months ended March 31, 2023, compared to a loss of $4.8 million for the three months ended March 31, 2022. The decrease in equity losses from the prior year is primarily related to our 10.0% interest in Saudi Cinema Company, LLC that was sold on January 24, 2023.

**Investment income**. Investment income was $15.5 million for the three months ended March 31, 2023, compared to $0.0 million for the three months ended March 31, 2022. Investment income in the current year includes a gain on sale of our 10.0% interest in Saudi Cinema Company, LLC of $15.5 million.

**Income tax provision.** The income tax provision was $1.5 million and $0.0 million for the three months ended

March 31, 2023 and March 31, 2022, respectively. See Note 8-Income Taxes in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for further information.

**Net loss.** Net loss was $15.1 million and $71.6 million during the three months ended March 31, 2023 and March 31, 2022, respectively. Net loss during the three months ended March 31, 2023 compared to net loss for the three months ended March 31, 2022 was positively impacted by the increase in attendance as a result of the popularity of new film releases compared to the prior year, decreases in rent expense, decreases in depreciation and amortization expense, decreases in other expense, decreases in interest expense, increases in investment income, decreases in equity in losses and decreases in foreign currency translation rates, partially offset by increases in general and administrative expenses and an increase in income tax provision.

**LIQUIDITY AND CAPITAL RESOURCES**

Our consolidated revenues are primarily collected in cash, principally through admissions and food and beverage sales. We have an operating "float" which partially finances our operations and which generally permits us to maintain a smaller amount of working capital capacity. This float exists because admissions revenues are received in cash, while exhibition costs (primarily film rentals) are ordinarily paid to distributors 20 to 45 days following receipt of admissions revenues. Film distributors generally release the films which they anticipate will be the most successful during the summer and year-end holiday seasons. Consequently, we typically generate higher revenues during such periods and experience higher working capital requirements following such periods.

We had working capital surplus (deficit) (excluding restricted cash) as of March 31, 2023 and December 31, 2022 of $(994.9) million and $(811.1) million, respectively. As of March 31, 2023 and December 31, 2022, working capital included operating lease liabilities of $546.5 million and $567.3 million, respectively, and deferred revenues of $391.7 million and $402.7 million, respectively. As of March 31, 2023, we had $208.1 million unused borrowing capacity, net of letters of credit, under our $225.0 million Senior Secured Revolving Credit Facility. As of December 31, 2022, we had $211.2 million unused borrowing capacity, net of letters of credit, under our $225.0 million Senior Secured Revolving Credit Facility. See Note 6-Corporate Borrowings and Finance Lease Liabilities in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for a further discussion of our Financial Covenants.

As of March 31, 2023, we had cash and cash equivalents of $495.6 million.

Additionally, we continued to lower our future interest expense in the first quarter of 2023 through purchases of debt below par value and debt exchanges for equity and enhanced liquidity through equity issuances. See Note 6-Corporate Borrowings and Finance Lease Liabilities, Note 7-Stockholders' Equity and Note 13-Subsequent Events in the Notes to the Condensed Consolidated Financial Statements under Item 1 of Part I of this Form 10-Q for further information.

We believe our existing cash and cash equivalents, together with cash generated from operations, will be sufficient to fund our operations, satisfy our obligations, and comply with the minimum liquidity covenant requirement under our Senior Secured Revolving Credit Facility for at least the next twelve months. Pursuant to the Twelfth Amendment to Credit Agreement, the requisite revolving lenders party thereto agreed to extend the suspension period for the financial covenant applicable to the Senior Secured Revolving Credit Facility under the Credit Agreement through March 31, 2024. The current maturity date of the Senior Secured Revolving Credit Facility is April 22, 2024; since the financial covenant applicable to the Senior Secured Revolving Credit Facility is tested as of the last day of any fiscal quarter for which financial statements have been (or were required to have been) delivered, the financial covenant has been effectively suspended through maturity of the Senior Secured Revolving Credit Facility. As of March 31, 2023, we were subject to a minimum liquidity requirement of $100 million as a condition to the financial covenant suspension period under the Credit Agreement.

Our current cash burn rates are not sustainable long-term. In order to achieve net positive operating cash flows and long-term profitability, we believe that operating revenues will need to increase significantly to levels in line with pre-COVID-19 operating revenues. Until such time as we are able to achieve positive operating cash flow, it is difficult to estimate our liquidity requirements, future cash burn rates, future operating revenues and attendance levels. Depending on our assumptions regarding the timing and ability to achieve significantly increased levels of operating revenue, the estimates of amounts of required liquidity vary significantly.

There can be no assurance that the operating revenues, attendance levels and other assumptions used to estimate our liquidity requirements and future cash burn rates will be correct, and our ability to be predictive is uncertain due to limited ability to predict studio film release dates, the overall production and theatrical release levels and success of individual titles. Further, there can be no assurances that we will be successful in generating the additional liquidity necessary to meet our obligations beyond twelve months from the issuance of these financial statements on terms acceptable to us or at all.

**Cash Flows from Operating Activities**

Cash flows used in operating activities, as reflected in the condensed consolidated statements of cash flows, were $189.9 million and $295.0 million during the three months ended March 31, 2023 and March 31, 2022, respectively. The improvement in cash flows used in operating activities was primarily due to the increase in attendance and decrease in net loss, decreases in working capital used, increased lease incentive receipts, and reductions in rent repayments for rent that was deferred during the COVID-19 pandemic, partially offset by increases in cash interest paid during the three months ended March 31, 2023 compared to the three months ended March 31, 2022. See Note 2-Leases in the Notes to the Condensed Consolidated Financial Statements in Item 1 of Part I in this Form 10-Q for a summary of the estimated future repayment terms for the remaining $123.6 million of rentals that were deferred during the COVID-19 pandemic.

**Cash Flows from Investing Activities**

Cash flows used in investing activities, as reflected in the condensed consolidated statements of cash flows, were $16.6 million and $54.9 million during the three months ended March 31, 2023 and March 31, 2022, respectively. Cash outflows from investing activities include capital expenditures of $47.4 million and $34.8 million during the three months ended March 31, 2023 and March 31, 2022, respectively. During the three months ended March 31, 2023, cash flows used in investing activities also included proceeds from the sale of our investment in Saudi Cinema Company, LLC of $30.0 million and proceeds from the disposition of long-term assets of $0.8 million.

During the three months ended March 31, 2022, cash flows used in investing activities included investment in Hycroft common stock for $25.0 million, investment in Hycroft warrants for $2.9 million, and proceeds from the disposition of long-term assets of $7.2 million related to one property and other assets.

We fund the costs of constructing, maintaining, and remodeling our theatres through existing cash balances, cash generated from operations, landlord contributions, or borrowed funds, as necessary. We generally lease our theatres pursuant to long-term non-cancelable operating leases, which may require the developer, who owns the property, to reimburse us for the construction costs. We estimate that our capital expenditures, net of landlord contributions, will be approximately $150 million to $200 million for year ended December 31, 2023 to maintain and enhance operations.

**Cash Flows from Financing Activities**

Cash flows provided by (used in) financing activities, as reflected in the condensed consolidated statements of cash flows, were $68.9 million and $(76.3) million during the three months ended March 31, 2023 and March 31, 2022, respectively. Cash flows from financing activities during the three months ended March 31, 2023 were primarily due to AMC Preferred Equity Unit issuances of $146.6 million, net of issuance costs, partially offset by the repurchase of Second Lien Notes due 2026 for $54.8 million, and taxes paid for restricted unit withholdings of $13.1 million. See Note 6-Corporate Borrowings and Finance Lease Liabilities and Note 7 - Stockholders' Equity in the Notes to the Condensed Consolidated Financial Statements in Item 1 of Part I of this Form 10-Q for further information, including a summary of principal payments required and maturities of corporate borrowings as of March 31, 2023.

We or our affiliates actively seek and expect, at any time and from time to time, to continue to seek to retire or purchase our outstanding debt through cash purchases and/or exchanges for equity (including AMC Preferred Equity Units) or debt, in open-market purchases, privately negotiated transactions or otherwise. Such repurchases or exchanges, if any will be upon such terms and at such prices as we may determine, and will depend on prevailing market conditions, our liquidity requirements, contractual restrictions and other factors. The amounts involved may be material and to the extent equity is used, dilutive.

Cash flows provided by financing activities during the three months ended March 31, 2022 was primarily due to principal and premium payments under the First Lien Notes due 2025 of $534.5 million, principal and premium payments under the First Lien Notes due 2026 of $325.6 million, principal and premium payments under the First Lien Toggle Notes due 2026 of $88.1 million, taxes paid for restricted unit withholdings of $52.2 million, and cash used to pay for deferred financing costs of $17.7 million, partially offset by the issuance of the First Lien Notes due 2029 of $950.0 million.

**Item 3. Quantitative and Qualitative Disclosures about Market Risk**

In the ordinary course of business, our financial results are exposed to fluctuations in interest rates and foreign currency exchange rates. In accordance with applicable guidance, we presented a sensitivity analysis showing the potential impact to net income of changes in interest rates and foreign currency exchange rates. For the three months ended March 31, 2023 and March 31, 2022, our analysis utilized a hypothetical 100 basis-point increase or decrease to the average interest rate on our variable rate debt instruments to illustrate the potential impact to interest expense of changes in interest rates and a hypothetical 100 basis-point increase or decrease to market interest rates on our fixed rate debt instruments to illustrate the potential impact to fair value of changes in interest rates.

Similarly, for the same period, our analysis used a uniform and hypothetical 10% strengthening of the U.S. dollar versus the average exchange rates of applicable currencies to depict the potential impact to net income of changes in foreign exchange rates. These market risk instruments and the potential impacts to the condensed consolidated statements of operations are presented below.

**Market risk on variable-rate financial instruments.** At March 31, 2023 and March 31, 2022, we maintained Senior Secured Credit Facilities comprised of a $225.0 million revolving credit facility and $1,920.0 million of Term Loan due 2026. The Credit Agreement (which governs the Senior Secured Credit Facilities) provides for borrowings at a rate per annum equal to, at our option, either (1) a base rate determined by reference to the highest of (a) 0.50% per annum plus the Federal Funds Effective Rate, and (b) the prime rate announced by the Administrative Agent or (2) LIBOR plus (x) in the case of the Senior Secured Term Loans, 2.0% for base rate loans or 3.0% for LIBOR loans or (y) in the case of the Senior Secured Revolving Credit Facility, an applicable margin based on the Secured Leverage Ratio (defined in the Credit Agreement). The rate in effect for the outstanding Senior Secured Term Loan due 2026 was 7.684% per annum at March 31, 2023 and 3.352% per annum at March 31, 2022.

Increases in market interest rates would cause interest expense to increase and earnings before income taxes to decrease. The change in interest expense and earnings before income taxes would be dependent upon the weighted average outstanding borrowings during the reporting period following an increase in market interest rates. At March 31, 2023, we had no variable-rate borrowings outstanding under our revolving credit facilities and had an aggregate principal balance of $1,920.0 million outstanding under the Term Loan due 2026. A 100-basis point change in market interest rates would have increased or decreased interest expense on the Senior Secured Credit Facilities by $4.8 million during the three months ended March 31, 2023.

At March 31, 2022, we had no variable-rate borrowings outstanding under our revolving credit facilities and had an aggregate principal balance of $1,940.0 million outstanding under the Term Loan due 2026. A 100-basis point change in market interest rates would have increased or decreased interest expense on our Senior Secured Term Loan due 2026 by $4.9 million during the three months ended March 31, 2022.

**Market risk on fixed-rate financial instruments.** Included in long-term corporate borrowings at March 31, 2023 were principal amounts of $950.0 million of our First Lien Notes due 2029, $1,190.4 million of our Second Lien Notes due 2026, $400.0 million of our Odeon Notes due 2027, $98.3 million of our Notes due 2025, $51.5 million of our Notes due 2026, $125.5 million of our Notes due 2027, and £4.0 million ($4.9 million) of our Sterling Notes due 2024. A 100-basis point change in market interest rates would have caused an increase or (decrease) in the fair value of our fixed rate financial instruments of approximately $61.9 million and $(59.3) million, respectively, as of March 31, 2023.

Included in long-term corporate borrowings at March 31, 2022 were principal amounts of $950.0 million of our First Lien Notes due 2029, $1,508.0 million of our Second Lien Notes due 2026, $542.3 million (£147.6 million and €312.2 million) of our Odeon Term Loan due 2023, $98.3 million of our Notes due 2025, $55.6 million of our Notes due 2026, $130.7 million of our Notes due 2027, and £4.0 million ($5.2 million) of our Sterling Notes due 2024.

A 100-basis point change in market interest rates would have caused an increase or (decrease) in the fair value of our fixed rate financial instruments of approximately $109.5 million and $(104.1) million, respectively, as of March 31, 2022.

**Foreign currency exchange rate risk.** We are also exposed to market risk arising from changes in foreign currency exchange rates arising from our International markets operations. International markets revenues and operating expenses are transacted in British Pounds, Euros, Swedish Krona, and Norwegian Krone. U.S. GAAP requires that our subsidiaries use the currency of the primary economic environment in which they operate as their functional currency. If any international subsidiary was to operate in a highly inflationary economy, U.S. GAAP would require that the U.S. dollar be used as the functional currency. Currency fluctuations in the countries in which we operate result in us reporting exchange gains (losses) or foreign currency translation adjustments. Based upon the functional currencies in the International markets as of March 31, 2023, holding everything else constant, a hypothetical 10% strengthening of the U.S. dollar versus the average exchange rates of applicable currencies to depict the potential impact to net loss of changes in foreign exchange rates would decrease the aggregate net loss of our International theatres for the three months ended March 31, 2023 by approximately $1.5 million. Based upon the functional currencies in the International markets as of March 31, 2022, holding everything else constant, a hypothetical 10% strengthening of the U.S. dollar versus the average exchange rates of applicable currencies to depict the potential impact to net loss of changes in foreign exchange rates would decrease the aggregate net loss of our International theatres for the three months ended March 31, 2022 by approximately $7.1 million.

Our foreign currency translation rates decreased by approximately 7.3% for the three months ended March 31, 2023 compared to the three months ended March 31, 2022.

**Item 4. Controls and Procedures.**

(a) Evaluation of disclosure controls and procedures.

The Company maintains a set of disclosure controls and procedures designed to ensure that material information required to be disclosed in its filings under the Securities Exchange Act of 1934 is recorded, processed, summarized and reported within the time periods specified in the Securities and Exchange Commission's rules and forms and that material information is accumulated and communicated to the Company's management, including its Chief Executive Officer and Chief Financial Officer, as appropriate, to allow timely decisions regarding required disclosure. The Company's Chief Executive Officer and Chief Financial Officer have evaluated these disclosure controls and procedures as of the end of the period covered by this Quarterly Report on Form 10-Q and have determined that such disclosure controls and procedures were effective.

(b) Changes in internal control.

There has been no change in our internal control over financial reporting during our most recent calendar quarter that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

**PART II-OTHER INFORMATION**

**Item 1. Legal Proceedings**

Reference is made to Note 11-Commitments and Contingencies of the Notes to the Company's Condensed Consolidated Financial Statements in Item 1 of Part I of this Form 10-Q for information on certain litigation to which we are a party.

**Item 1A. Risk Factors**

Reference is made to Part I Item 1A. Risk Factors in our Annual Report on Form 10-K for the year ended December 31, 2022, which sets forth information relating to important risks and uncertainties that could materially

adversely affect our business, financial condition or operating results. Except as set forth below and the updates to liquidity provided herein, there have been no material changes to the risk factors contained in our Annual Report on Form 10-K for the year ended December 31, 2022.

***There has been significant recent dilution and there may continue to be additional future dilution of our Common Stock and AMC Preferred Equity Units, which could adversely affect the market price of shares of our Common Stock and AMC Preferred Equity Units. The risks of future dilution must also be weighed against the risks of failing to increase our authorized shares of Common Stock, each of which could adversely affect the market price of shares of our Common Stock and AMC Preferred Equity Units.***

From January 1, 2020 through May 4, 2023, the outstanding shares of our Common Stock have increased by 467,112,312 shares in a combination of at-the-market sales, conversion of Class B common stock, conversion of notes, exchanges of notes, transaction fee payments, and equity grant vesting. On August 19, 2022, the Company issued a dividend of one AMC Preferred Equity Unit for each share of Common Stock outstanding at the close of business on August 15, 2022, which resulted in the issuance of 516,820,595 AMC Preferred Equity Units. From August 19, 2022 through May 4, 2023, we issued 478,585,818 AMC Preferred Equity Units in combination of at-the-market sales, exchanges of debt, private placement transactions, and equity grant vesting. As of May 4, 2023, there were 519,192,389 shares of Common Stock and 995,406,413 AMC Preferred Equity Units issued and outstanding. Pursuant to our strategy to enhance our liquidity, we intend to issue preferred equity securities or securities convertible into, or exchangeable for, or that represent the right to receive, shares of Common Stock. We may continue to issue additional AMC preferred Equity Units, or subject to effectiveness of the Charter Amendment Proposals, we may issue additional shares of Common Stock, in each case, to raise cash to bolster our liquidity, to refinance indebtedness, for working capital, to finance strategic initiatives and future acquisitions or for other purposes. We may also acquire interests in other companies, or other assets by using a combination of cash and shares of Common Stock or AMC Preferred Equity Units, or just shares of Common Stock. Additionally, vesting under our equity compensation programs results in the issuance of new shares of Common Stock and AMC Preferred Equity Units and shares withheld to cover tax withholding obligations upon vesting remain available for future grants. Furthermore, the Settlement Payment (as defined below) may result in the issuance of 6,922,566 shares of Common Stock (on a post Reverse Stock Split basis) to settle the Shareholder Litigation. Any of these events may dilute the ownership interests of current stockholders, reduce our earnings per share or have an adverse effect on the price of our shares of Common Stock and AMC Preferred Equity Units.

To provide for the authorization of a sufficient number of authorized and unissued and unreserved shares of the Common Stock into which the Series A Convertible Participating Preferred Stock (and, by virtue of such conversion, AMC Preferred Equity Units) can convert in full, the Company held a special meeting of the Company's stockholders on March 14, 2023 (the "Special Meeting") and obtained the requisite stockholder approval of the Charter Amendment Proposals. We are precluded from implementing the Charter Amendment Proposals until the resolution of the Shareholder Litigation. If the Charter Amendment Proposals are implemented, we will have additional authorized but unissued Common Stock that may be used in the future for at-the-market sales, exchanges of notes, private placement transactions, equity grant vesting and other dilutive issuances. These future issuances may be dilutive and result in a decline in the market price of our Common Stock.

If we are unable to effectuate the Charter Amendment Proposals, this will create substantial risks, which could have an adverse effect on the price of our shares of Common Stock and AMC Preferred Equity Units, including:

- we will be limited in our ability to issue equity to bolster our liquidity and respond to future challenges, including if operating revenues and attendance levels do not return to the levels assumed;
- for future financing, we may be required to issue additional debt, which may be unavailable on favorable terms or at all, which would exacerbate the challenges created by our high leverage;
- we may be unable to issue equity in deleveraging transactions, including exchanges, redemptions or buy-backs of debt, which will limit our flexibility to deliver; and
- we may be unable to issue equity as currency in strategic transactions, including acquisitions, joint ventures or in connection with landlord negotiations, which may prevent us from entering into transactions that could increase shareholder value.

***The Charter Amendment Proposals and the outcome of the Shareholder Litigation could cause extreme volatility in our Common Stock and AMC Preferred Equity Units and may adversely affect the market price of our Common Stock and/or AMC Preferred Equity Units.***

At the Special Meeting, holders of our shares of Common Stock and holders of shares of Series A Convertible Participating Preferred Stock (which are represented by AMC Preferred Equity Units) on the books of Computershare Trust Company, N.A. as of the record date for the Special Meeting approved the Charter Amendment Proposals. However, as described below, the Company is currently precluded from implementing the Charter Amendment Proposals until the resolution of the Shareholder Litigation. Upon the effectiveness of the Charter Amendment Proposals, the AMC Preferred Equity Units will be automatically converted into shares of our Common Stock and the AMC Preferred Equity Units will cease trading and be delisted from the NYSE. The effect of the Charter Amendment Proposals, including the Reverse Split Proposal (as defined in Note 16-Subsequent Events in the Notes to the Consolidated Financial Statements under Part II, Item 8 thereof), upon the market price of our Common Stock cannot be predicted with certainty. Given the current disparity in the trading prices of the AMC Preferred Equity Units and the Common Stock, the conversion of AMC Preferred Equity Units into Common Stock could adversely affect the market price of the Common Stock. Conversely, if the Charter Amendment Proposals are precluded from being implemented due to the Shareholder Litigation or otherwise, the AMC Preferred Equity Units will not convert into shares of Common Stock, which could also adversely affect the market price of the AMC Preferred Equity Units, cause extreme volatility, make it difficult to raise additional equity without causing significant economic dilution to the Common Stock, which could also adversely affect the market price of the Common Stock. If the Company is precluded from effectuating the Charter Amendment Proposals, the Company may not make another proposal with respect to converting the AMC Preferred Equity Units into Common Stock, or it may be some time before any such proposal is made, although such determination will be made by the Company's Board at its sole discretion.

In addition, the results of reverse stock splits by companies in the past have been varied. There can be no assurance that the total market capitalization of our Common Stock after the Reverse Split Proposal (if implemented) (the "Reverse Stock Split") will be equal to or greater than the total market capitalization before the Reverse Stock Split or that the per share market price of our Common Stock following the Reverse Stock Split will increase in proportion to the reduction in the number of shares of Common Stock outstanding before the Reverse Stock Split. Further, the market price and trading volume of our shares of Common Stock has been subject to extreme volatility and implementation of the Charter Amendment Proposals, including the Reverse Stock Split, may increase such volatility, with a decline in the market price of our Common Stock after the Reverse Stock Split resulting in a greater percentage decline than would occur in the absence of a Reverse Stock Split.

On February 20, 2023, two putative stockholder class actions were filed in the Delaware Court of Chancery, captioned *Allegheny County Employees' Retirement System v. AMC Entertainment Holdings, Inc., et al.*, C.A. No. 2023-0215-MTZ (Del. Ch.), and *Munoz v. Adam M. Aron, et al.*, C.A. No. 2023-0216-MTZ (Del. Ch.) and which have been subsequently consolidated into *In re AMC Entertainment Holdings, Inc. Stockholder Litigation* C.A. No. 2023-0215-MTZ (Del. Ch.) (the "Shareholder Litigation"). See Note 11-Commitments and Contingencies for additional information about the Shareholder Litigation. On April 2, 2023, the parties entered into a binding settlement term sheet to settle the Shareholder Litigation, which, among other things, provided that the parties would jointly request that the status quo order (the "Status Quo Order") in the Shareholder Litigation be lifted. Pursuant to the term sheet, the Company agreed to make a settlement payment to record holders of Common Stock as of the time (the "Settlement Class Time") at which the Reverse Stock Split is effective (and after giving effect to the Reverse Stock Split) of one share of Class A common stock for every 7.5 shares of Common Stock owned by such record holders (the "Settlement Payment"). The Company's obligation to make the Settlement Payment is contingent on the Status Quo Order being lifted and the Company effecting the Charter Amendment Proposals. The defendants agreed to the settlement and the payment of the Settlement Payment solely to eliminate the burden, expense, and uncertainty of further litigation, and continue to expressly deny any liability or wrongdoing with respect to the matters alleged in the Shareholder Litigation. On April 3, 2023, the plaintiffs filed an unopposed motion to lift the Status Quo Order. On April 5, 2023, the court denied the motion to lift the Status Quo Order. On April 27, 2023, the parties jointly filed the Settlement Stipulation which fully memorializes the settlement that the parties agreed to in the term sheet with the court. The court has set a hearing to consider approval of the settlement for June 29-30, 2023. Unless and until the court lifts the Status Quo Order, the Company cannot proceed with filing the amendment to the Company's certificate of incorporation to effect the Charter Amendment Proposals. Further, any settlement of the Shareholder Litigation is subject to court approval, which may substantially delay or prevent the conversion of AMC Preferred Equity Units into Common Stock. If the court does not approve a settlement of the Shareholder Litigation or if the plaintiffs are successful in obtaining relief restraining, delaying, enjoining or otherwise prohibiting the Charter Amendment Proposals from going into effect, this would likely adversely affect the market price

of the AMC Preferred Equity Units, cause extreme volatility, make it difficult to raise additional equity without causing significant economic dilution to both the AMC Preferred Equity Units and the Common Stock, which could also adversely affect the market price of the Common Stock. Although the parties have agreed to a settlement of the Shareholder Litigation, any settlement of the Shareholder Litigation is subject to court approval, and accordingly the outcome of the Shareholder Litigation and any other similar future lawsuits, is uncertain.

***The market prices and trading volumes of our shares of Common Stock and AMC Preferred Equity Units have experienced, and may continue to experience, extreme volatility, which could cause purchasers of our Common Stock and AMC Preferred Equity Units to incur substantial losses.***

The market prices and trading volume of our shares of Common Stock and AMC Preferred Equity Units have been and may continue to be subject to wide fluctuations in response to numerous factors, many of which are beyond our control. Because each AMC Preferred Equity Unit initially represents the right to receive one (1) share of our Common Stock, and subject to effectiveness of the Reverse Split Proposal, the right to receive one-tenth (1/10) of one share of our Common Stock, and is otherwise designed to bear equivalent economic and voting rights as described herein, the market price of the AMC Preferred Equity Units may be correlated with the market price of our Common Stock. The market prices and trading volume of our shares of Common Stock have experienced, and may continue to experience extreme volatility, which could cause purchasers of our Common Stock and AMC Preferred Equity Units to incur substantial losses. For example, during 2022 and through May 3, 2023, the market price of our Common Stock has fluctuated from an intra-day low of $3.77 per share on January 6, 2023 to an intra-day high on the NYSE of $17.17 on March 29, 2022. The market price of our AMC Preferred Equity Units has fluctuated from an intra-day low of $0.65 on December 19, 2022 to an intra-day high of $10.50 on August 22, 2022. The reported sale price of our Common Stock and AMC Preferred Equity Units on the NYSE on May 3, 2023, was $5.74 per share and $1.52 per share, respectively. During 2022 and through May 3, 2023, daily trading volume ranged from approximately 8,287,600 to 226,704,100 shares and the AMC Preferred Equity Units ranged from approximately 5,858,000 to 180,271,200.

We believe that the recent volatility and our current market prices reflect market and trading dynamics unrelated to our underlying business, or macro or industry fundamentals, and we do not know how long these dynamics will last. Under the circumstances, we caution you against investing in our Common Stock and AMC Preferred Equity Units, unless you are prepared to incur the risk of losing all or a substantial portion of your investment.

Extreme fluctuations in the market price of our Common Stock and AMC Preferred Equity Units have been accompanied by reports of strong and atypical retail investor interest, including on social media and online forums. The market volatility and trading patterns we have experienced create several risks for investors, including the following:

- the market prices of our Common Stock and AMC Preferred Equity Units have experienced and may continue to experience rapid and substantial increases or decreases unrelated to our operating performance or prospects, or macro or industry fundamentals, and substantial increases may be significantly inconsistent with the risks and uncertainties that we continue to face;
- factors in the public trading market for our Common Stock and AMC Preferred Equity Units may include the sentiment of retail investors (including as may be expressed on financial trading and other social media sites and online forums), the direct access by retail investors to broadly available trading platforms, the amount and status of short interest in our securities, access to margin debt, trading in options and other derivatives on our Common Stock and AMC Preferred Equity Units and any related hedging and other trading factors;
- our market capitalization, as implied by various trading prices, currently reflects valuations that are significantly higher than our market capitalization immediately prior to the COVID-19 pandemic, and to the extent, these valuations reflect trading dynamics unrelated to our financial performance or prospects, purchasers of our Common Stock and AMC Preferred Equity Units could incur substantial losses if there are declines in market prices driven by a return to earlier valuations;
- to the extent volatility in our Common Stock and AMC Preferred Equity Units is caused, or may from time to time be caused, as has widely been reported, by a “short squeeze” in which coordinated trading activity causes a spike in the market price of our Common Stock and AMC Preferred Equity Units as traders with a short position make market purchases to avoid or to mitigate potential losses, investors purchase at inflated prices unrelated to our financial performance or prospects, and may thereafter suffer substantial losses as prices decline once the level of short-covering purchases has abated;

- if the market price of our Common Stock and/or AMC Preferred Equity Units declines, you may be unable to resell your shares of Common Stock or AMC Preferred Equity Units at or above the price at which you acquired them. We cannot assure you that the equity issuance of our Common Stock and AMC Preferred Equity Units will not fluctuate or decline significantly in the future, in which case you could incur substantial losses; and
- the Company paid approximately $13.1 million in cash to cover tax withholding liabilities upon vesting of awards under our Equity Incentive Plan in the first quarter of 2023. The Company withheld shares based upon elections by participants under the terms of the plan. The shares withheld had an equivalent value to the cash tax requirements for national, federal, state and local withholdings. Withheld shares were returned to the Equity Incentive Plan reserve.

We may continue to incur rapid and substantial increases or decreases in the market prices of our Common Stock and AMC Preferred Equity Units in the foreseeable future that may not coincide in timing with the disclosure of news or developments by or affecting us. Accordingly, the market price of our shares of Common Stock and AMC Preferred Equity Units may fluctuate dramatically and may decline rapidly, regardless of any developments in our business. Overall, there are various factors, many of which are beyond our control, that could negatively affect the market price of our Common Stock and AMC Preferred Equity Units or result in fluctuations in the price or trading volume of our Common Stock and AMC Preferred Equity Units, including:

- the ongoing impacts relating to the COVID-19 pandemic on our industry;
- actual or anticipated variations in our annual or quarterly results of operations, including our earnings estimates and whether we meet market expectations with regard to our earnings;
- our current inability to pay dividends or other distributions;
- publication of research reports by analysts or others about us or the motion picture exhibition industry, which may be unfavorable, inaccurate, inconsistent or not disseminated on a regular basis;
- changes in market interest rates that may cause purchasers of our shares to demand a different yield;
- changes in market valuations of similar companies;
- market reaction to any additional equity, debt or other securities that we may issue in the future, and which may or may not dilute the holdings of our existing stockholders;
- additions or departures of key personnel;
- actions by institutional or significant stockholders;
- short interest in our securities and the market response to such short interest;
- dramatic increase or decrease in the number of individual holders of our Common Stock and AMC Preferred Equity Units and their participation in social media platforms targeted at speculative investing;
- speculation in the press or investment community about our company or industry;
- strategic actions by us or our competitors, such as acquisitions or other investments;
- legislative, administrative, regulatory or other actions affecting our business, our industry, including positions taken by the Internal Revenue Service (“IRS”);
- investigations, proceedings, or litigation that involve or affect us;
- the outcome of the Shareholder Litigation;
- strategic actions taken by motion picture studios, such as the shuffling of film release dates;
- the occurrence of any of the other risk factors included or incorporated by reference in this Annual Report on Form 10-K; and
- general market and economic conditions.

***Anti-takeover protections in our amended and restated certificate of incorporation and our amended and restated bylaws may discourage or prevent a takeover of our Company, even if an acquisition would be beneficial to our stockholders.***

Provisions contained in our amended and restated certificate of incorporation and amended and restated bylaws, as amended, as well as provisions of the Delaware General Corporation Law delay or make it more difficult to remove incumbent directors or for a third-party to acquire us, even if a takeover would benefit our stockholders. These provisions include:

- a classified board of directors;
- the sole power of a majority of the board of directors to fix the number of directors;
- limitations on the removal of directors;
- the sole power of the board of directors to fill any vacancy on the board of directors, whether such vacancy occurs as a result of an increase in the number of directors or otherwise;
- the ability of our board of directors to designate one or more series of preferred stock and issue shares of preferred stock without stockholder approval; and
- the inability of stockholders to call special meetings.

Our issuance of shares of preferred stock could delay or prevent a change of control of our company. Our board of directors has the authority to cause us to issue, without any further vote or action by the stockholders, up to 50,000,000 shares of preferred stock, par value $0.01 per share, in one or more series, to designate the number of shares constituting any series, and to fix the rights, preferences, privileges and restrictions thereof, including dividend rights, voting rights, rights and terms of redemption, redemption price or prices and liquidation preferences of such series. The issuance of shares of preferred stock may have the effect of delaying, deferring or preventing a change in control of our company without further action by the stockholders, even where stockholders are offered a premium for their shares. As of March 31, 2023 there were 10,000,000 Series A Convertible Participating Preferred Stock shares authorized and 9,741,909 Series A Convertible Participating Preferred Stock shares issued and outstanding, 40,000,000 preferred stock shares remain available for issuance and 258,091 Series A Convertible Participating Preferred Stock shares remain available for issuance.

Our incorporation under Delaware law, the ability of our board of directors to create and issue a new series of preferred stock or a stockholder rights plan and certain other provisions of our amended and restated certificate of incorporation and amended and restated bylaws, as amended, could impede a merger, takeover or other business combination involving our company or the replacement of our management or discourage a potential investor from making a tender offer for our Common Stock and AMC Preferred Equity Units, which, under certain circumstances, could reduce the market value of our Common Stock and AMC Preferred Equity Units.

***Our business depends on motion picture production and performance and is subject to intense competition, including increases in alternative film delivery methods or other forms of entertainment.***

Our ability to operate successfully depends upon the availability, diversity and appeal of motion pictures, our ability to license motion pictures and the performance of such motion pictures in our markets. The most attended films are usually released during the summer and the calendar year-end holidays, making our business seasonal. We license first-run motion pictures, the success of which has increasingly depended on the marketing efforts of the major motion picture studios and the duration of the exclusive theatrical release windows. Poor performance of, or any disruption in the production of these motion pictures (including by reason of a strike or lack of adequate financing), a reduction in the marketing efforts of the major motion picture studios, the choice by distributors to release fewer feature-length movies theatrically, or the choice to release feature-length movies directly to video streaming or PVOD platforms, either in lieu of or on the same date as a theatrical release, could hurt our business and results of operations. Conversely, the successful performance of these motion pictures, particularly the sustained success of any one motion picture, or an increase in effective marketing efforts of the major motion picture studios and extension of the exclusive theatrical release windows, may generate positive results for our business and operations in a specific fiscal quarter or year that may not necessarily be indicative of, or comparable to, future results of operations. As movie studios rely on a smaller number of higher grossing “tent pole” films there may be increased pressure for higher film licensing fees. Our loyalty program and certain promotional pricing also may affect performance and increase the cost to license motion pictures relative to revenue for admission. In addition, a change in the type and breadth of movies offered by motion picture studios and the theatrical

exclusive release window may adversely affect the demographic base of movie-goers.

Motion picture production is highly dependent on labor that is subject to various collective bargaining agreements. The Writers Guild of America strike that began on May 2, 2023, has halted production, and may delay or otherwise affect the supply, of certain motion pictures. Studios are party to collective bargaining agreements with a number of other labor unions, and failure to reach timely agreements or renewals of existing agreements may further affect the production and supply of theatrical motion picture content.

Our theatres are subject to varying degrees of competition in the geographic areas in which we operate. Competitors may be multi-national circuits, national circuits, regional circuits or smaller independent exhibitors. Competition among theatre exhibition companies is often intense with respect to attracting patrons, terms for licensing of motion pictures and availability and securing and maintaining desirable locations.

We also compete with other film delivery methods, including video streaming, network, syndicated cable and satellite television, as well as video-on-demand, pay-per-view services, and subscription streaming services. We also compete for the public's leisure time and disposable income with other forms of entertainment, including sporting events, amusement parks, live music concerts, live theatre, and restaurants. An increase in the popularity of these alternative film delivery methods and other forms of entertainment could reduce attendance at our theatres, limit the prices we can charge for admission and materially adversely affect our business and results of operations.

**Item 2. Unregistered Sales of Equity Securities and Use of Proceeds**

On February 7, 2023, in connection with the consummation of the Forward Purchase Agreement, the Company issued to Antara 106,595,106 AMC Preferred Equity Units for an aggregate purchase price of $75.1 million (the "Forward Purchase APEs") and simultaneously purchased from Antara, on a private basis, $100 million aggregate principal amount of our 10%/12% Cash/PIK Toggle Second Lien Notes due 2026 (the "Exchange Notes") in exchange for 91,026,191 AMC Preferred Equity Units (together with the Forward Purchase APEs, the "Private Placement APEs") and cash equal to the accrued and unpaid interest on the Exchange Notes. The Company used the net proceeds from the sale of the Private Placement APEs to further deleverage and bolster liquidity.

The issuance of the Private Placement APEs was made in reliance on the exemption from registration provided by Section 4(a)(2) of the Securities Act.

**Item 3. Defaults Upon Senior Securities**

None.

**Item 4. Mine Safety Disclosures**

None.

**Item 5. Other Information**

**Compensatory Arrangements of Certain Officers**

On May 3, 2023, the Compensation Committee of AMC's Board of Directors, pursuant to its authority under the AMC Entertainment Holdings, Inc. 2013 Equity Incentive Plan (the "EIP") and in consultation with the Company's independent compensation consultant, adopted a Change in Control Policy (the "Policy") applicable to awards granted under the EIP. Adoption of the Policy impacts the rights of named executive officers ("NEOs") and other senior officers under outstanding and future EIP awards. Pursuant to the Policy, upon a Change in Control (as defined in the Policy), the vesting of all outstanding equity awards will be accelerated to occur immediately prior to the effectiveness of such Change in Control event. For the purpose of such accelerated vesting upon a Chang in Control, outstanding awards subject to performance-based conditions will be deemed to have attained the applicable performance goals at the higher of (a) target, or (b) actual attainment at the time of the triggering event.

For purposes of the Policy, a Change in Control is defined as:

(a) A person or coordinated group acquires more than 35% (by voting power) of the outstanding securities of

the Company;

(b) The election of the lesser of (i) three directors or (ii) 35% of the board of directors, in either case, who (x) are not nominees approved by a majority of the incumbent board or (y) are elected in connection with a proxy contest on behalf of a third-party; or

(c) A business combination transaction unless (i) the Company's stockholders own more than 50% of the voting power in the surviving entity, (ii) no third-party acquires more than 35% (by voting power) in the surviving entity, and (iii) at least 65% of the governing body of the surviving entity consists of directors of the Company.

The Compensation Committee adopted the Policy in connection with a review of the overall severance benefits provided to executives under its compensation programs in the event of a Change in Control and determined that adoption of the Policy would minimize the risk of turnover in key positions during the pendency of a Change in Control transaction or in response to rumors of possible Change in Control events. No elements of executive compensation are impacted by the Policy other than awards under the EIP.

**Item 6. Exhibits.**

**EXHIBIT INDEX**

| EXHIBIT NUMBER | DESCRIPTION |
|---|---|
| 4.1 | Twelfth Amendment to Credit Agreement, dated as of January 25, 2023, by and among AMC Entertainment Holdings, Inc., as borrower, the other loan parties party thereto, the lenders party thereto and Wilmington Savings Fund Society, FSB, as administrative agent (incorporated by reference from Exhibit 10.1 to AMC's Current Report on Form 8-K (File No. 1-33892) filed on January 25, 2023). |
| *10.1 | 2013 Equity Incentive Plan Change in Control Policy |
| 10.2 | Forward Purchase Agreement, dated as of December 22, 2022, by and between AMC Entertainment Holdings, Inc. and Antara Capital LP (incorporated by reference from Exhibit 10.1 to AMC's Current Report on Form 8-K (File No. 1-33892) filed on December 22, 2022). |
| *31.1 | Certification of Chief Executive Officer pursuant to Section 302 of the Sarbanes-Oxley Acts of 2002. |
| *31.2 | Certification of Chief Financial Officer pursuant to Section 302 of the Sarbanes-Oxley Acts of 2002. |
| *32.1 | Section 906 Certifications of Adam M. Aron (Chief Executive Officer) and Sean D. Goodman (Chief Financial Officer) furnished in accordance with Securities Act Release 33-8212. |
| **101.INS | Inline XBRL Instance Document |
| **101.SCH | Inline XBRL Taxonomy Extension Schema Document |
| **101.CAL | Inline XBRL Taxonomy Extension Calculation Linkbase Document |
| **101.DEF | Inline XBRL Taxonomy Extension Definition Linkbase Document |
| **101.LAB | Inline XBRL Taxonomy Extension Label Linkbase Document |
| **101.PRE | Inline XBRL Taxonomy Extension Presentation Linkbase Document |
| **104 | Cover Page Interactive Data File (formatted as inline XBRL and contained as Exhibit 101) |

* Filed herewith.
** Submitted electronically with this Report.

**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

**AMC ENTERTAINMENT HOLDINGS, INC.**

Date: May 5, 2023

/s/ ADAM M. ARON

Adam M. Aron

*Chairman of the Board, Chief Executive Officer and President*

Date: May 5, 2023

/s/ SEAN D. GOODMAN

Sean D. Goodman

*Executive Vice President, International Operations, Chief Financial Officer and Treasurer*

# EXHIBIT AF

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE PROTECTION ONE, INC., SHAREHOLDERS LITIGATION ) Consolidated C.A. No. 5468-VCS

- - -

Chancery Courtroom No. 12A
New Castle County Courthouse
Wilmington, Delaware
Wednesday, October 6, 2010
10:02 a.m.

- - -

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

- - -

# SETTLEMENT HEARING

- - -

APPEARANCES:

MICHAEL HANRAHAN, ESQ.
PAUL A. FIORAVANTI, JR., ESQ.
KEVIN H. DAVENPORT, ESQ.
Prickett, Jones & Elliott, P.A.
-and-
MICHAEL C. WAGNER, ESQ.
of the Pennsylvania Bar
Barroway Topaz Kessler Meltzer & Check, LLP
for the Plaintiffs

EDWARD B. MICHELETTI, ESQ.
STEPHEN D. DARGITZ, ESQ.
CLIFF C. GARDNER, ESQ.
Skadden, Arps, Slate, Meagher & Flom LLP
for Defendants GTCR Golder Rauner II, L.L.C., Protection Holdings, LLC and Protection Acquisition Sub, Inc.

RAYMOND J. DiCAMILLO, ESQ
Richards, Layton & Finger, P.A.
for Defendatns Protection One, Inc., Raymond C. Kubacki, Richard Ginsburg, Thomas J. Russo, Arlene M. Yocum and Robert J. McGuire

MARTIN S. LESSNER, ESQ.
JAMES M. YOCH, JR., ESQ.
Young Conaway Stargatt & Taylor LLP
-and-
KATHERINE SWAN, ESQ.
of the New York Bar
Davis, Polk & Wardwell LLP
for Defendants Quadrangle Group LLC, POI Acquisition, L.L.C., Peter Ezersky, Alex Hocherman and Edward Sippel

SUSAN WOOD WAESCO, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
for Defendants Monarch Alternative Capital LP and Michael Weinstock

APPEARANCES: (Continued)

STEPHANIE S. HABELOW, ESQ.
Smith, Katzenstein & Furlow LLP
-and-
XIMENA R. SKOVRON, ESQ.
of the New York Bar
Abraham, Fruchter & Twersky, LLP
for Objectors Glazer Capital LLC, on its behalf, and on behalf of Glazer Capital Management, LP, Glazer Qualified Partners, LP, Glazer Offshore, Ltd., HFR MA Select Opportunity Master Trust and Gottex Solutions Service Sarl

- - -

MS. HABELOW: Good morning, Your Honor. Stephanie Habelow, Smith, Katzenstein & Furlow, on behalf of objector, Glazer Capital. I would like to introduce my cocounsel. Ximena Skovron, of Abraham, Fruchter & Twersky. With the Court's permission, she will be making the argument. Also present is Mr. Mark Ort, a representative of Glazer Capital. Thank you.

MR. HANRAHAN: I think, Your Honor probably knows everyone at our table, including Mr. Wagner of the Barroway firm, who has been here many times before.

This is the settlement hearing in the Protection One Shareholders Litigation. There are three, or perhaps four, issues before the Court: Class certification, the reasonableness of the settlement, the request for attorneys' fees. And we have an objection from only one stockholder, or at least -- or an investor, I guess they refer to themselves as.

With respect to the class certification, we think that the -- as we set forth in our brief, the requirements for class certification have been met. And so we would ask that the Court

certify the class for purposes of the settlement.

The settlement itself, we think there is no question that it is fair, reasonable and adequate. The principal benefit of the settlement is $3.25 million in cash, to be paid exclusively to the former holders of the approximately 7.7 million public minority shares. I note that the attorneys' fee that we are applying for is not to be deducted from that amount. That is paid separately and was negotiated after we had negotiated the amount for the class.

THE COURT: The fee -- there is two fees, though. Right? There is a load here, and then there is a load in Kansas?

MR. HANRAHAN: Your Honor, that is correct. Mr. Brualdi is not applying for a fee in this case, did not want to come to Delaware. He was not working with us, nor we with him. And we did not have any involvement with respect to any negotiations of any fee with respect to Mr. Brualdi.

THE COURT: What is the total amount sought for fees?

MR. HANRAHAN: Your Honor, the total amount that we were seeking is $1.4 million. And that's the application that is before the Court.

THE COURT: Mr. Brualdi is what? Seeking what?

MR. HANRAHAN: I may have to be refreshed. I think it's 900-something thousand.

MR. MICHELETTI: We have agreed not to oppose up to 900,000.

Ed Micheletti, by the way, on behalf of Protection One and GTCR.

MR. HANRAHAN: The settlement amount translates into roughly 40 cents per share. This monetary recovery is unusual in several respects.

First, the acquiror was a third party, not the controlling stockholders. It is rare for there to be a monetary recovery in a third-party transaction. Indeed, as I was reminded yesterday, it's hard to get any relief in a transaction involving a third party.

Second, the transaction was the result of an active bidding process and arm's-length negotiation. Again, it's unusual to achieve a monetary recovery in such a transaction.

And third, Your Honor, as a result of the settlement, the minority stockholders will actually receive more for their shares than the

controlling stockholders did. The controlling stockholders owned 70 percent of the company. That certainly doesn't happen very often. So we think that we have achieved a significant monetary benefit in circumstances where that is not usually the case. The disclosure benefits here were extensive and included changes to the offer to purchase, the 14D-9, and the notice of merger. We have detailed those disclosures in our brief. And Exhibits 1, 4, 5 and 6 to the affidavit that I submitted yesterday show that these improved disclosures were the direct result of the Delaware litigation.

Disclosure-based settlements seem to have been somewhat in disfavor recently, but here there are other benefits, including a monetary recovery. And this is not a run-of-the-mill disclosure settlement. The disclosures are quantitatively and qualitatively far more significant than the marginal disclosures that sometimes serve as settlement consideration in the routine case. The settlement also included an amendment to the merger agreement, to extend the period for demanding appraisal from 20 to 30 days, to provide that the top-up option, top-up shares and note would not be

considered in an appraisal, and to change the interest term of the note.

THE COURT: Well, what was the most important disclosure, in your view?

MR. HANRAHAN: I think perhaps, Your Honor, the unlevered free cash flows. That is certainly one that the Court has in the past indicated --

THE COURT: There were no cash flows disclosed originally?

MR. HANRAHAN: We had the cash flows disclosed in a table, and that had not been disclosed before.

THE COURT: None of the cash flows had been?

MR. HANRAHAN: I don't believe so, Your Honor. And, Your Honor, I can, if the Court wishes, go through the various disclosures, or maybe identify them in our brief. But as the Court will see, they were numerous, and they were about things that are important. It would include, Your Honor, the disclosure of the median levered beta, the identity of the selected public companies that were used to determine that beta in Lazard's analysis. The summary

of the precedent transactions analysis was supplemented to include all precedent transactions that were actually considered in rendering a fairness opinion. The precedent transactions analysis was also supplemented to include information respecting the last-12-month multiple in the Brinks Home Security transaction. As I mentioned, the unlevered free cash flows that were considered by Lazard were disclosed. The share price data for the 52-week period ending January 19, 2010 was corrected. The -- there was a disclosure that Lazard did not take the top-up option, top-up shares and promissory note into consideration in its analysis.

With respect to the top-up option, there was disclosure of the number of shares that could potentially be issued under the top-up option, as well as the potential impact the top-up option, top-up shares and promissory notes could have in an appraisal proceeding, although as I mentioned, there was also an agreement that as part of the settlement -- and we ask the Court to approve -- that those would not be considered in an appraisal.

There was disclosure about the merger process and J.P. Morgan's role. Those were detailed

at page 20 of our brief. There were various disclosures regarding --

THE COURT: What is the concern about these top-up options in appraisal. I'm not sure I get it. The price of the option is set as part of the transaction that gives rise to the appraisal proceeding. So the theory is that the appraisal petitioner gets harmed how?

MR. HANRAHAN: Well, Your Honor, I think the question is whether the transaction -- the top-up transaction would actually be completed prior to the consummation of the merger. Fair value is measured in appraisal as of the time of the merger. So the question would become, given the Delaware case law -- Cede, etc. -- which says that anything that is part of the operative reality of the company prior to the merger is to be -- is considered in an appraisal action. Of course, the statute says all relevant factors. We can -- we can -- I have heard both sides of the debate on it. But certainly --

THE COURT: The reason why people get top-up options is to complete sweeping out everybody.

MR. HANRAHAN: That is the reason, although yesterday's Cogent opinion suggests that even

when the top-up option is exercisable in a situation where it would not get you to 90 percent, that that may still be okay. You know, if it's sort of ally-ally in free on top-up options, I think we will have some interesting developments --

THE COURT: I have no idea what that even means.

MR. HANRAHAN: If a top-up option could be for all available authorized shares that are available for issuance, with consideration for a note that is going to disappear in the transaction, and never be repaid, if it's exercisable in whole or in part on multiple occasions and there aren't -- you -- I know the rationale, as Your Honor says: Oh, it allows for a short-form merger.

THE COURT: I mean, the reality of why it's called a top-up option was that was really what it was. It was typically done to do -- was to top somebody up to where they could do the 253 back end, and do it all. I just don't understand how it becomes part going concern value of the company. And if in the appraisal, then -- it's either not part of the going concern, the company -- because this is all essentially part and parcel of the transaction that

gave rise to appraisal in the first instance. I admit, frankly, Cede is just filled with bizarre things. I mean, it's just -- it's a 20-year -- it's a generation of incredibly goofy things it gives to the law. I have no problem saying that. I mean, it takes deeper minds -- maybe Kant could come back to life and explain some of the logic in it.

But the point is you are supposed to value the company as it was, setting aside the merger. If the top-up merger -- if the top-up option is designed essentially to effectuate the completion of the transaction, I understand it has multiple steps. But the point is, the price is set in the merger. If you are actually proving, for example, in the appraisal that the fair value of the company was less than the deal, then you can make, also, the argument that you have to value that as a derivative claim. If you want to take another theory, you have to value as a derivative claim in the merger. You prove the fair value of the company -- right? -- is 80 rather than 69. The deal was 69. The top-up option is at 69. Then you just proved that there was a derivative claim worth 11 bucks per share. You add that to the value, and you are right where you were before.

MR. HANRAHAN: Well, Your Honor, of course, you would have a question of whether you would have a derivative claim there, but you would also have the question of the -- the assumptions seem to be that the consideration was going to be worth the amount of the deal price. But when it's an unsecured note --

THE COURT: Yeah. See that is the other thing. The unsecured note that is supposed to hang out there for a millisecond, or something like that?

MR. HANRAHAN: Well, Your Honor, that is one of the questions about whether this is a -- but that is not why we are here today. I'm happy to talk to Your Honor about --

THE COURT: The problem is: How much benefit do I put on this? I understand, you know -- lawyers are among my favorite group of people, and it gets you all to think about these fascinating hypotheticals, but that's what they seem like.

MR. HANRAHAN: Well, Your Honor, the -- you know, the top-up option here was very real. You had the front end of the transaction locked up, because you had support agreements with stockholders who owned 70 percent.

THE COURT: No. No. No.

MR. HANRAHAN: You had the top-up on the back end. Where does that leave a stockholder? It's basically, "You are gone. You are history. You get no vote."

THE COURT: That's what I'm saying. What I don't understand is -- it's either -- I just really don't get the gap. You know, if you look at the spirit of Cede -- I'm not going to talk about the logic of it, because I don't believe there is any real logic to it. But if you talk about the spirit of Cede on the second-step thing, it was "nail the acquiror." You had this situation. You got the benefit from a genuine third-party acquiror's business plan during the period, because they didn't effectuate the second-step merger. Also, during that case, there was a period of months in which the argument became that the acquiror's business plan, which -- Perelman's business plan, as I remember it -- that that became the operative reality of the company, and you were subjected to it as a stockholder.

In the context of a top-up option, as here, the idea is get the top-up option, do your merger, you would be done, and people get appraisal.

It's not clear what any new business plan is. The only distorting effect is going to be arguing, "We have to look at the capitalization of the company, and now includes these shares at that price." Right? And then we have to say, "Oh, it's a separate transaction," even though it's in a contract. Right? Isn't it in the merger agreement?

MR. HANRAHAN: The top-up option?

THE COURT: Yeah.

MR. HANRAHAN: Yes, Your Honor. Yes. Just as any option would be reflected in an agreement or an instrument.

THE COURT: I agree.

MR. HANRAHAN: That would be part of --

THE COURT: It's like the silliness if somebody tried to argue that you couldn't litigate your case, or something, that your only remedy was a 253 remedy in a situation like this. I think the Court would have problems with that, because it's all under one merger agreement, essentially. Right?

MR. HANRAHAN: Yes, Your Honor. But it's basically a -- I mean, the fact that, for example, if you had an asset sale -- there are cases

beyond Cede that have dealt with -- I think we have cited some of them in our brief, where there was an asset sale that was part of -- under the merger agreement, but it occurred prior to the merger. The Court said, "Well, that was the operative reality on the date of the merger."

Now, it may be that Your Honor would disagree with that or the Supreme Court would disagree with that. Don't know. But there is that case law out there. You have a statute that says all relevant factors, and you have this option.

THE COURT: Is one relevant factor common sense?

MR. HANRAHAN: Excuse me? Well, Your Honor, that, you know --

THE COURT: I would never think in -- in the wildest dreams that you would hit an appraisal petitioner -- you would reduce the value of any award to an appraisal petitioner because of a top-up option included in a -- in the merger agreement that gave rise to the appraisal triggering event.

MR. HANRAHAN: Well, Your Honor, you know, if there are provisions in the merger agreement for the cash-out of other options, are those part of

the operative reality? Or is that not part of the operative reality because that is a transaction that is pursuant to the merger agreement; that is, where they take options that aren't vested and --

THE COURT: The issue there -- the reason why, as a practical matter, you are probably going to have to deal with them in an appraisal is because under the existing contracts, they would have a right to merger consideration, and they would -- the delta would be whatever it was under their exercise price and acceleration. There might be things like that. You know? There might be some issues if you started including people who weren't otherwise entitled to have their options turned into cash. I suppose that could be a litigable issue in an appraisal.

A 253 merger -- calling it independent, when it is the logically intended consequence of the specific terms of the 251 merger agreement, just seems a bit odd to me. And I don't really get the fear. If anybody should fear appraisal, it tends to be respondents. You know, you get these things where, pretty much, jump balls go to the petitioners. You have the theoretical ability to

take a control premium when you are a controller in Delaware, but the appraisal standard takes that away. You have got the Cede thing, which I get you, how it supports you in a sort of nominal way, but really what it says is even in a situation where there was really no expectancy of the business plan, you get the upside.

Here, I don't know. I would put on a lot of padding if I issued a ruling nailing an appraisal petitioner over a top-up option, because the ball would bounce off Dover so quickly, that opinion, and could come back and hit me. I would want to be well padded, because the impact would be dangerous to my person. I really have no doubt it would be a really rapid remand.

MR. HANRAHAN: Perhaps, Your Honor. We will see what -- maybe we will see, some day, what Dover has to say about the top-up options. But in any event, Your Honor, the bottom line is we can debate over the merits of the claim. The fact of the matter is we obtained relief with respect to it, and including a guarantee. You say, well, the respondents are really the one that has the risk, but the top-up option is not a risk to the respondent, because the

impact is likely to be, particularly if you have a promissory note as the consideration -- it's going to be the deal price or less. It's not going to be more. So it doesn't impact them. It would potentially impact someone seeking appraisal. And while we -- Your Honor may have a view that, "Oh, the risk is slight," from the standpoint of a stockholder evaluating appraisal, with all its other downsides, the delay, the cost, and what have you. Then you throw in one more element of uncertainty, and it really just adds to: "This is not a workable remedy for the stockholders."

We address that with our claims. Maybe we did the right thing, then. If Your Honor thinks so little of the top-up claims, well, we got money instead. That was our primary focus. Certainly, that is a benefit.

THE COURT: That is obviously the thing that is obviously most impressive.

MR. HANRAHAN: I mean, the defendants here agreed to expedited proceedings. They pushed settlement negotiations. They agreed to pay more money, make extensive disclosures, and to amend the merger agreement. We think that is certainly a

package of benefits that makes the settlement fair, reasonable and adequate.

And, Your Honor, the only objector that we have actually, I think, is a further recommendation for the settlement, because they are not here to protest the settlement. They are just here to claim that they should get some of the proceeds for shares that they apparently bought on the morning of June 4 or did not have in their brokerage account at the close of business on June 3rd.

So, Your Honor, we would ask that the Court approve the settlement.

THE COURT: On the -- do you want to hear from the objector first, before you respond?

MR. HANRAHAN: Your Honor, I'm happy to address the objection now, if the Court would like.

THE COURT: Sure.

MR. HANRAHAN: The objection is from an entity that has not shown it was even a stockholder at the time this suit was commenced or when the MOU was entered into. It appears, basically, Glazer Capital attempted to buy into our settlement. Now it suggests that I and members of my firm were professionally discourteous and incompetent. I think

that comes with a little ill grace. We worked hard to frame strong claims, we litigated vigorously, and we obtained a good settlement, apparently before Protection One was even a gleam in the eye of Glazer Capital. The party objection is meritless and it's cynical, Your Honor.

At the Court's request, we have pointed out, and defendants have pointed out, in written submissions numerous grounds for denial of the objection. It's late. It's speculative. But I would like to take a few moments to highlight a number of things.

First, they submit, yesterday, a letter from UBS that says that with respect to 2002, 899 shares, they were tendered into the tender offer. And presumably, UBS will pay Glazer Capital the settlement consideration with respect to those shares.

THE COURT: Was this letter delivered to chambers?

MR. HANRAHAN: It was an attachment to the motion for leave to file affidavits that the objectors filed yesterday, Exhibit B to that.

THE COURT: Is there a cover letter that indicates that it came to me?

MR. HANRAHAN: Your Honor, I don't have that in my binder, but I do not know how it came in, or whatever. We received it the end of the day yesterday. It has these proposed affidavits, one of which is largely hearsay, from supposed conversations with UBS. But they attach this letter.

It says, well, certain shares were tendered. So you assume that UBS is going to hand over whatever settlement consideration they receive to Glazer Capital. But that is a matter that is between Glazer Capital and its broker.

THE COURT: What they fault is the original notice. They say -- the original public disclosure of the settlement, it said what?

MR. HANRAHAN: What they are saying is that the MOU said "holders," instead of "record holders." Now --

THE COURT: What is a beneficial holder? Never heard of that.

MR. HANRAHAN: Your Honor, that is part of the issue.

THE COURT: You hold -- in some metaphorical --

MR. HANRAHAN: In their objection,

they conveniently go from the term "holders" to "beneficial owners." And they obviously, from the objection, Your Honor -- they don't understand what a record holder is, because they say --

THE COURT: The original MOU said --

MR. HANRAHAN: Holders.

THE COURT: Holders as of what date?

MR. HANRAHAN: As of the close of business on the day before the tender offer was to close. That is where the June 3 -- close of business on June 3rd came from, because the tender offer was then going to close.

THE COURT: What you are saying is folks who wanted to play the market by buying into the stock should have been following the deal attentively if they wished to know when the tender offer was going to exactly close? They should have made sure they were a holder of record, or that they bought from somebody, a broker, and said, "You better make sure we get the proceeds"?

MR. HANRAHAN: Yeah. Your Honor, that is basically it. And that's what we explained to Glazer Capital when they called our firm three times during the summer. We patiently explained to them why

the June 3rd date had been selected. It was not arbitrary at all. It was basically the close of business on the last date before the tender offer was going to close. And what they say is: "Well, if you purchased on June 1, 2010 or June 2, 2010, you, quote, do not technically become a record holder until days later, after June 3rd, 2010." They obviously don't understand what a record holder is, because an investor like Glazer Capital, who purchases shares through a broker, is never going to become a record holder. Their complaint about it going to record holders doesn't make any sense, because they wouldn't be a record holder, anyway.

You know, they -- they are obviously referring to the three-day rule for settlement of trades. Well, we just don't think the Court can get into refereeing.

THE COURT: What you are saying is there also has to be an end at some point in time?

MR. HANRAHAN: Yeah.

THE COURT: It's not set up, really, for -- there is a benefit to being an arb, which is -- the argument is that you would be buying from people who aren't even focused on the settlement, but you

have to do it smartly.

MR. HANRAHAN: There is nothing that they submitted that says they couldn't have bought the shares sooner. Basically, they wanted us to redo the settlement so that they could get every last dime out of their arbitrage scheme. They do it, Your Honor, based strictly on speculation. They say if the settlement distribution is made to record holders, theoretically, an investor selling shares on June 1, 2010 could receive both the benefit of the higher trading price occasioned by the settlement, as well as the settlement proceeds itself."

You go through their objection, it's just one thing after another: "Well, if this, then this could happen." They are talking about not only some theoretical possibility as to what some unidentified other investor might get -- and then it's all based on their incorrect understanding of record ownership. There is just nothing to this. And then they say, Your Honor, they want clarification that the settlement funds be distributed equitably to the investors and shareholders who held the economic interest in Protection One as of the date of tender or the cash-out date. They don't say how Your Honor

would ever do that.

I mean, this is a class action that was brought on behalf of stockholders with respect to their stock. They say they want the proceeds equitably distributed. They don't say what that means. They say the settlement should go to both investors, who apparently are something different than shareholders. Well, this suit was about shareholders. They are apparently saying that they were an investor, that they may not have owned the shares. And then they want the -- who held the economic interest in Protection One, to try to get the Court down into the gears of that, with some depository and broker and other relationships, and nominees and so on, it would be a nightmare. You have got short sales. We cite the Digex case, where I was retained to come in and ask the Court that a -- someone who had engaged in short sales should be entitled to participate in the settlement proceeds. And Chancellor Chandler basically told me what I thought he would tell me: "Sounds like a problem between your client and a broker." That's what we have here.

So there certainly was, Your Honor, no discourtesy or refusal to help by my firm at all. We

went patiently through why the June 3rd date, how the thing operated. The problem is they just didn't like the answer. Yes, we did tell them, "If you don't like the answer, your recourse could be to object," and they have done that. Unfortunately for them, Your Honor, their objection is without merit and ought to be denied. Let me --

If Your Honor will turn to attorneys' fees?

THE COURT: Yeah. Tell me. Here is my only -- I will be candid -- my only real concern. I do -- you shouldn't have any doubt I'm going to -- there is really no doubt in my mind that there are benefits to the settlement, that I'm going to approve the settlement, that I place the highest value on the cash part of it. It's refreshing to see a cash component to a settlement. I don't place -- I just don't -- I mean, reasonable minds may differ, Mr. Hanrahan. I just -- this top-up thing, it just really doesn't move me. But I give credit, if none of the projections were -- if this essentially was what justified the only disclosure of projections, I give credit to that. I give lesser credit to some of the other tweaking around banker's, you know, multiples

and stuff.

I really wouldn't even blanch in a second if I were just approving your fee, honestly. What I'm looking at, though, is a total fee of 2.3 million on a benefit -- you know, the most tangible monetary benefit to the class is the 3.25 million. Even if I were to say, "Value the rest at another million," which I have got to say is fairly -- you know, arguably generous. I will give myself some leeway. I know you may feel differently. Even if I were to move it to two and you were at 5.25 million, you would be talking about a total requested award -- this is what I want you to talk to me about, is the relationship between this and Kansas, and what my job is today -- of, you know, 2.3 million, you know, upwards of 40 percent of the value of the benefit in fees. And you know, who did what between you and the Kansas folks? How do I take that into account?

I also understand the defendants' dynamic. You guys put it sort of elegantly, that the pendency of the Kansas case complicated the negotiations. Sort of, what went on? Who did what?

MR. HANRAHAN: The first thing I would

note is because the fees are paid separately --

THE COURT: I get that.

MR. HANRAHAN: I think you would have to -- in assessing any percentage of the benefit, if you would, you would have to add in the amount of attorneys' fees before you did the percentage. I mean, that is if it was coming out of the fund itself --

THE COURT: No. You have got to be careful adding it in. Then people would just pay 10 million in attorneys' fees, three to the class so the total benefit would be 13 million. That is the role of the Court in the site of litigation. It's not our favorite role. It's probably one of our least favorite roles. We do have to act as a superintendent of the representative litigation process, which is a very important one, to make sure, frankly, it's working as intended. Although it is good that it doesn't come out of the benefit, the reality is it arguably could have been part of the benefit.

MR. HANRAHAN: Well, Your Honor --

THE COURT: I'm not saying that you -- I trust, entirely -- I'm not implying in the least that the negotiation of the fee did not follow the

thing. You get my point. From the defendants' perspective, money is money. And money that will resolve a matter, you know -- any part of this fee could have been part -- put into what was given to the stockholders and just deducted from the fee. The total load would have been fine.

What I'm saying is I have got a situation here where, honestly, I have been -- I have been pretty consistent that with respect to, for example, very big achievements by plaintiff's lawyers -- I don't do a declining percentage. I have never gotten that. I have understood that there are federal judges who say, "If you take it all the way to trial and get $250,000,000, we ought to cut your percentage, because you have got $250 million, and you took 35 depositions." That has always been to me where, frankly, you would do the highest possible percentage of the recovery, because the person took the most risk. They clearly justified it.

So when I -- I'm glad to see a monetary benefit, but honestly, when I'm looking at a fee -- a total fee load that appears to be 40-some percent of the benefit, I just am asking about that and about who did what, because it does trouble me.

As I said, if it was just you for the 1.4, which is obviously more than 33 percent of the monetary benefit, but with the settlement and all, I wouldn't have any trouble. But when I get to 2.3 million, I'm being very candid with you. I don't place as much benefit on therapeutic things. A lot of the disclosure stuff wasn't that central. I'm giving you credit, a lot of credit, for the disclosure of the projections, but we are still at a fairly -- frankly, it's 2.3 million in fees compared to 3.25 million in tangible benefits, and then the rest.

MR. HANRAHAN: Your Honor has given me much to address.

THE COURT: Right.

MR. HANRAHAN: Let me try to do it, if I can. It may not be in the right order, or whatever.

THE COURT: Take your time.

MR. HANRAHAN: I will try to address --

THE COURT: I wanted to give you what was on my mind.

MR. HANRAHAN: First of all, in terms of the percentage, my point is you can say our fee is 1.4 million of 3.25 million, but in fact, it's not

coming out of that. I don't think we should be penalized both ways. We did, in fact -- and there is a record, if you look at the documents attached to my affidavit. This is why I put them in. I thank Your Honor for having given us an alert to say, "You ought to be prepared to explain this," because I wanted it to be clear to Your Honor how this settlement got negotiated. You can track it through the documents. We suggested that there were things that the controlling stockholders were getting that ought to be given back, and that that money ought to go to the minority stockholders. They didn't like that idea.

We then said, "We want a 4 million-dollar payment to the minority shareholders." Now, maybe somebody would say, "You should have asked for eight." These are the judgments you make in a situation as to what is realistic, where the company -- there had been a bidding process and what have you. And so that's what the -- the offer we made. That got negotiated to 3.25 million. There was not any discussion whatsoever about attorneys' fees, as to whether we were getting one or what it was going to be, much less what was going to happen in Kansas.

THE COURT: Who negotiated that? You?

MR. HANRAHAN: Yes, Your Honor. Largely with Mr. Welsh.

THE COURT: What was the role of Kansas guys?

MR. HANRAHAN: I'm not aware of any role. The defendants can speak to that. I can say we weren't in touch with Mr. Brualdi at all. We were litigating our claims.

THE COURT: The MOU just -- so when you reached agreement on the 3.25 million, and then the disclosures --

MR. HANRAHAN: And the same thing with the disclosures. That is why I put this information in. Your Honor will see. First of all, a lot of the disclosures, they are items that were specifically raised in our complaint. And then there is a settlement proposal that I made in writing that identified the areas of the disclosures. And those got negotiated over. We had phone calls where we were told we couldn't get any monetary recovery. We stuck to our guns, and we got something, and we got the disclosures. They are also reflected where the defendants' drafted up a 14D-9. There is an exhibit that shows my handwritten changes, and the changes

that I gathered from my cocounsel, that ended up in the 14D-9. We did similarly with the notice of merger. We are the ones who raised disclosure in that, as well.

A lot of the disclosure claims related to things like the top-up option that weren't raised in Kansas. A lot of the relief addressed things that were not raised in Kansas. That is the point of my affidavit. That's what we are here for, is for an attorneys' fee based on the benefits that we conferred in this litigation. I'm not here to carry water for Mr. Brualdi. Nor do I think we should be penalized for having brought the action in Delaware.

THE COURT: No. No. That's what I said. I wanted to get a sense. For example, when the MOU was entered, was Mr. Brualdi part of the conversations that gave rise to the MOU?

MR. HANRAHAN: There were conversations between defendants and him, because they wanted to round him up. That is just the unfortunate reality today, is that in virtually every case, now, there are firms who will file cases on behalf of stockholders of Delaware corporations in any forum other than Delaware. That seems to be a continuing

trend. And frankly, given some recent decisions, it may be a continuing trend further on. And that is the situation we find ourselves in. But when firms do file in Delaware and you achieve a substantial result, if you are then penalized with respect to the fee award because some other firm filed somewhere else and the defendants -- you know, I understand their position.

THE COURT: What you are saying is sufficient unto the day is the evil thereof, and my judicial colleague in Kansas ought to be assessing what benefit, if anything, that action created. What you are saying to me, though, in an appropriately modest way, is from your perception, you guys were doing all the heavy lifting?

MR. HANRAHAN: Yeah. He -- there was an order in Kansas saying he could participate in our discovery. He was entitled to half the time in our depositions. Of course, we had no say in that. But we weren't litigating the case with Mr. Brualdi. I'm not going to comment on his thing, because what is in front of Your Honor --

THE COURT: Was there a motion to expedite in this case?

MR. HANRAHAN: Yes, there was, but the -- we did not have to litigate.

THE COURT: The defendants agreed?

MR. HANRAHAN: The defendants agreed to expedition, and there was expedited litigation. There was 66,000 pages of documents that were produced. There were depositions that were taken. We were juggling around depositions as we were --

THE COURT: Did you take the depositions with Mr. Brualdi?

MR. HANRAHAN: Did they show up?

MR. WAGNER: Your Honor, they were there, but they did not take the depositions, I don't believe.

THE COURT: They didn't ask any questions?

MR. WAGNER: That is my recollection, Your Honor.

MR. HANRAHAN: Your Honor, we are here for a settlement of this Delaware litigation, and with a fee request for the benefits that were conferred in this litigation. I think that is what is really in front of Your Honor. I think Your Honor has acknowledged that the benefits that we have conferred

do justify a $1.4 million fee. So we would ask that the Court grant that fee.

Thank you, Your Honor.

THE COURT: Why don't I hear from the objector, and then, Mr. Micheletti, if you and Mr. Hanrahan have anything to say in response to the objection, do that.

MS. SKOVRON: Good morning, Your Honor.

THE COURT: Good morning.

MS. SKOVRON: Ximena Skovron, for Glazer Capital LLC.

Your Honor, the motion for leave to file the affidavits of Paul Glazer and Mark Ort should have been delivered to your chambers this morning. It was filed late yesterday evening -- or afternoon, I should say -- as a result of our rather, I should say, Herculean efforts to reach out to UBS, and obtain an affidavit from them supporting their representation to us that they actually had not received notice of this settlement.

Your Honor, I have the motion here, along with the affidavits.

THE COURT: You know, I will trust

you, that that's what it says. So you are saying that UBS wasn't on the mailing list?

MS. SKOVRON: Your Honor, I'm not sure exactly what happened. I actually just want to make clear that I'm not -- our client -- my client is not disputing that due process was not -- due process procedures were not followed here.

THE COURT: You were in your original objection. Are you withdrawing that?

MS. SKOVRON: We are not withdrawing that, but we are stating that we did not receive notice.

THE COURT: Why would you have received notice?

MS. SKOVRON: From UBS. Because UBS itself did not receive notice. UBS was a record holder.

THE COURT: I get that. I'm sure UBS was a record holder.

MS. SKOVRON: Yes, Your Honor.

THE COURT: Are they on the list of record holders? Does anybody have the list?

MR. MICHELETTI: Your Honor, we don't have the list with us presently, but we do have an

affidavit from our mailing agent that said that the mailing -- the notice was mailed to all record owners as of --

THE COURT: Why isn't UBS here making the objection?

MS. SKOVRON: Your Honor, I have no idea.

THE COURT: UBS is pretty big. Ever consider the possibility they didn't take it seriously, or they lost it, or that it's somewhere in their -- what is their big building in Connecticut? It's somewhere on an elevator, riding up and down in the corner, because it dropped off a mail cart?

MS. SKOVRON: Absolutely, Your Honor.

THE COURT: How is the world supposed to work for clients like yours. Life is -- America is full of ingenious ways to make money without creating absolute -- without creating any societal value. And people make products. What is the value of a Chia Pet? Who knows? I guess it's amusing.

But your client is here. They were not the object of this lawsuit. Nobody in the world invented corporate lawsuits for after-arriving people who arbitrage settlements and buy -- I guess buy stock

on the basis that maybe other people don't know that there is a cash -- essentially, kind of a dividend coming. Right? That's what your client did. Right?

MS. SKOVRON: Your Honor, my client -- yes.

THE COURT: Your client could not have filed this lawsuit. Right?

MS. SKOVRON: Your Honor, my --

THE COURT: When this -- when the MOU was entered, your client had no standing to be a plaintiff?

MS. SKOVRON: I believe that we -- my client purchased approximately 200,000 shares prior to the June 1st dates. I'm not exactly sure what the precise date is, but it was in May. In addition, Your Honor, if I may point out, the memorandum of understanding, that was the only document available to the public concerning the terms of the settlement and was filed on May 21st. That document does not state --

THE COURT: That's what I said.

MS. SKOVRON: -- holders of record.

THE COURT: Your client filed -- your client bought a beneficial interest in shares on

June 1st?

MS. SKOVRON: Yes. That's correct.

THE COURT: Okay. I just asked you a question. Your client could not have even been a plaintiff in the lawsuit as of the time the MOU was entered. Right?

MS. SKOVRON: Your Honor, the honest answer to that question is I don't know. Here is why. There are two blocks of stock. One block of stock is not at issue here. My client purchased that back in May. Another block of stock --

THE COURT: Back in May. When was the MOU announced?

MS. SKOVRON: The 21st, I believe.

THE COURT: Was it before or after the MOU was announced?

MS. SKOVRON: My client has a representative here, Mark Ort.

THE COURT: If you don't know your case well enough, it's not the time to have someone who is not a lawyer stand up. But the point is: At the wrongs that were challenged in the complaint, your client wasn't a beneficial owner at the time the complaint was filed, right, or any of the expedited

discovery was going on?

MS. SKOVRON: With respect to the shares purchased on June 1st and 2nd, you are correct, Your Honor. He was not a beneficial owner.

THE COURT: When was the case filed?

MR. HANRAHAN: May 6th, Your Honor.

THE COURT: May 6th. There is a possibility that your client bought in May 5th, or May 4th or May 3rd or May 2nd or May 1st?

MS. SKOVRON: Yes, Your Honor. I apologize I don't have this. The partner on this case, Jeff Abraham, is --

THE COURT: What is a beneficial holder?

MS. SKOVRON: Your Honor, that is an excellent question. I'm not sure myself. I will tell you this. In the MOU that was filed on May 21st, holders of record are not actually referenced. It's, rather, holders as of a particular date. A term "holders of record" was not used.

THE COURT: What is a beneficial holder?

MS. SKOVRON: Your Honor, I don't know. I know --

THE COURT: What would holder -- what do you hold -- in what way, shape or form does it lead you to believe that the payment under the settlement would not be made to the holder of the stock?

MS. SKOVRON: Your Honor, it is our understanding from UBS that UBS does not consider our client to be a beneficial owner until the trade settles, which in this case did not occur until June 4th and June 7th.

THE COURT: That is between you and UBS.

MS. SKOVRON: Your Honor, we respectfully disagree. We understand that the case law here in the Chancery Court of Delaware --

THE COURT: How many brokers -- that is a UBS role? That is a UBS rule?

MS. SKOVRON: It seems to be a rather widespread rule in the industry, yes, Your Honor.

THE COURT: Your clients would not be aware of any such rule, right, because they are arbs? They have no idea, right, when their broker considers a trade be settled?

MS. SKOVRON: Your Honor, I believe that they were acting on the language of the MOU,

which, if I may read to you, does not speak in terms of holders of record.

THE COURT: I'm going to ask you one last time. You tell me. Right? You filed all these late -- you filed a late objection when your client clearly knew about the settlement, clearly has been monitoring it, and when you are, frankly, horsing everybody around by saying you didn't get mail notice -- no. Listen. This is the Delaware Court of Chancery. This is not the People's Court. It's not a made up court on television. It's not a prekindergarten. It's the big leagues.

There is a lot of people who have put a lot of time and attention into this, and this process is taken seriously. I'm not being discourteous to you, but when someone horses around when they are arbing a case, when they have got the MOU, when they have spoken to counsel, and then they claim they can file a late objection because they didn't get mail notice, when they never were a record holder -- that is a word that starts with an F. In the law, it is still an F word. That is called frivolous.

So you are lucky that you are here,

but don't try my patience when you have already wasted the time and money of other people. So I'm indulging because I have a role in this process. I'm indulging your merits argument. But don't tell me there was any excuse for the late filings, that there is any excuse for your clients not dealing with UBS before today, that you couldn't have delivered an affidavit, frankly, to my chambers in a timely manner.

So "holder" -- this is the question. This is the last question I ask you if you don't give me a real answer. What did you think it means? And when you answer, don't make stuff up. Tell me a rational reading of the law or any situation whereby the term "holder" misled your client.

MS. SKOVRON: Your Honor, when the decision was made to purchase the stock -- if I may actually address --

THE COURT: No.

MS. SKOVRON: -- the Court's concern?

THE COURT: You can address "holder." The idea is that it was somehow misleading because it didn't say "record holder," and that the people at Glazer Capital, who go around making these kind of opportunistic buys, were mizzled, and they were

confused, and so they went out and made a transaction in which they would not, by any dint of any meaning on the part of anybody in this room who has ever done corporate or securities law, think they became a holder. They somehow did. You are the lawyer standing before me. I guess you have been moved pro hac vice. Right?

MS. SKOVRON: Yes, Your Honor.

THE COURT: So you are going to tell me a reasoned legal and factual argument why that was misleading, because that is what you have us all here today engaged in. That's what we are waiting to hear.

MS. SKOVRON: Your Honor, when my client made the decision to purchase the stock, he believed he acquired an economic interest in the stock as of the date of the purchase.

THE COURT: Okay. And that's what I'm asking you: How did that make him, or it, or the seven different funds it is -- I mean, by the way, you didn't follow the rules, as you know. You didn't make an objection on behalf of the specific people you even claim to be the beneficial owner, and identify them by fund, and do all the things that the notice clearly said, which should have been, frankly, gate-kept by

Delaware counsel, although the first one I guess was just filed by Mr. Glazer, or something like that, with the request for his attorneys' fees.

What you just said doesn't answer my question. Holder. How would it make them a holder?

MS. SKOVRON: Your Honor, as of the date that my client made the decision to purchase the stock, he acquired -- he believed he had acquired an economic interest. And besides --

THE COURT: He did acquire an interest.

MS. SKOVRON: The 200,000 other shares in that period.

THE COURT: He did acquire an economic interest.

MS. SKOVRON: And we believe --

THE COURT: How -- no. This is a very precise question. You have alleged that the public notice that was given, by leaving out the word "record," put your clients off their game. And so what I'm asking is: Is that real, or are your clients just upset because they made a really bad business decision at the end, and they didn't deal with the broker right, and now they are hassling with UBS, and

they want to hold up a settlement and hope somebody throws some money their way, just to go away?

MS. SKOVRON: Your Honor, that is a completely valid question, and I understand the Court's concerns. Besides the language in the MOU, there are other bases for the objection. The MOU was not the crux of our argument. And in fact, my client owns approximately five percent of the minority shareholders' interest in this company. And additional --

THE COURT: Five percent of the company after the settlement?

MS. SKOVRON: Yes, Your Honor. In addition, 200,000 other shares were being traded on the same dates that my client traded. Now, if it is unclear whether these people are included in the class --

THE COURT: It's not unclear. If they are not record holders -- there is no lack of clarity. The only issue -- I'm going to conclude that there was no basis, legal or factual, for your client to conclude that it was becoming a holder.

MS. SKOVRON: Okay, Your Honor.

THE COURT: Right?

MS. SKOVRON: I am willing to agree with you on this point, but I want --

THE COURT: You don't have to agree with me on any point. We have been sitting here for about ten minutes when there has been a single question pending to you, which you have done everything other than answer, because -- may I suggest because you know that you cannot answer it in any way that is plausible, because there is no such thing as a concept that anybody has ever heard of, of a beneficial holder.

MS. SKOVRON: Your Honor, I think you misunderstand, with all due respect, the basis of our objection. I would like to -- if nothing else, I would like to emphasize to the Court that this objection was absolutely not made in bad faith. The circumstances of the objection are as follows:

THE COURT: Wait a minute. I'm just -- just so the record is clear --

MS. SKOVRON: If you wish to stay --

THE COURT: No. Wait a minute. If you wish to withdraw your argument -- I mean, you are standing here. I assume the objection before me is the one filed by Mr. Glazer. Right?

MS. SKOVRON: By Mr. Glazer, yes.

THE COURT: Bottom of page two.

MS. SKOVRON: Yes.

THE COURT: "The MOU states that holders" -- quote/unquote, holders -- "would receive a pro rata distribution of settlement proceeds rather than the pro rata distribution being restricted, as now appears to be the case, to holders of record."

So I'm not making this up. This was your argument. Okay? And when I asked you why the term "holders" is misleading, and you cannot answer it or will not answer it, you know, to then -- if you are changing the argument, tell everybody. That can be another late objection.

MS. SKOVRON: Your Honor, with all due respect, again, because of the speed and the -- with which we had to act on this matter -- because again, I have to emphasize my client did not receive notice of this settlement in any form. He did -- of the objection date. He did speak to --

THE COURT: Your client --

MS. SKOVRON: -- counsel for plaintiff, and he was given a Crash Course 101 in settlement proceedings. But he was not -- he was not

advised of the objection date.

THE COURT: Did he ask --

MS. SKOVRON: He did not receive notice until September 27th, Your Honor. September 27th. UBS --

THE COURT: Did he ask?

MS. SKOVRON: Your Honor, my client is not an attorney. He didn't know that there is such thing as a notice of pendency.

If I might say, it seems inequitable to me that everybody here is saying that the primary focus of this lawsuit is the money, and yet nobody cares where it ends up, including in the pockets of people, 400,000 shares -- that is 200,000 over and above my clients -- are not going to receive the monetary benefits of the settlement, even though they were actually purchasers. They purchased before June -- the June 3rd cutoff date. It seems inequitable to me, and it seems that this Court, acting in equity, has the obligation, or at least the discretion, to include those shareholders who rightfully belong in the class within -- within the group that will be receiving the monetary payment.

My client is a merger arbitrageur. I

admit that. I find nothing wrong with that, Your Honor. Provides valuable liquidity to the market.

THE COURT: Who said there is anything wrong with it?

MS. SKOVRON: Seems to be --

THE COURT: Wait a minute. You are saying things -- honestly, you are saying things which are utterly implausible. Is the Mr. Glazer here?

MS. SKOVRON: Mr. Glazer is not here.

THE COURT: Oh, no. It would be interesting to see whether Mr. Glazer would actually take an oath and swear that he bought five percent of a public company's stock on the basis that a settlement was coming, which means he is making decisions, he is arbing -- don't interrupt me. He is arbing legal proceedings, reads an MOU, which is the basis for his thing. Right? We don't have his testimony about his view of a holder, as opposed to a beneficial holder. But he has no idea that there will be a settlement notice. He never checks into the settlement proceeding. He calls the attorneys, but he never asks, because he is a lawyer -- he is not a lawyer. He sits around and he waits until September 27th, and then he finds out, and all of a

sudden, it's a rush, and he never knew any of it. He wasn't monitoring.

I mean, that is fine. That is the kind of stuff -- before I believe something like that, I either turn into a character played by Jim Nabors, or I see somebody survive cross-examination on that after full discovery, because right now, that makes absolutely no sense.

MS. SKOVRON: Your Honor, as to the motivations and the business decisions that my client makes, you are right. I absolutely can't speak to that. It would be for Mr. Glazer. And in fact, it was -- Mr. Ort was the one who placed those trades. I don't know if I will offer him up for testimony, but his affidavit is before the Court, in which he obtained the letter from UBS.

Again, I would like to say that this issue does affect a number of shareholders, and it would seem to me that the actual distribution of moneys in this case to these persons should be an issue that the Court and, indeed, the litigants are concerned with. Here is why. Those people who purchased on June 1st and June 2nd, are they releasing the claims in this lawsuit or not? I think not,

because they cannot release without receiving consideration. And if so, then what is this -- are we going to be facing challenges to this rather good settlement, that we would agree is --

THE COURT: Thank you. Thank you. Do you have a citation for that, for your now -- your cosmic challenge to the settlement process in the world? You do understand -- I mean, really, you have cited no law.

MS. SKOVRON: Your Honor, I have law. I would be happy to send it to the Court. I was trying to answer the Court's question. I am endeavoring to answer the Court's question. If you will excuse me, I received this case two days ago. The partner in this case is having his first child this week and was unable to attend, Mr. Abraham, but he would have liked to have been here.

THE COURT: I'm going to say something to both of the lawyers involved here, you and your Delaware counsel. Let's just consider this a law school -- like a continuation of law school. I have heard enough. This is not the way things should happen here, not at all.

I expect Delaware counsel, however new

to the bar, to consult with senior members of the firm. I believe probably both of you have been put in a very bad position by more senior members of the bar. You are saying astonishing things. They are astonishingly at odds with the settled legal authority. To tell me you are now going to hand me up precedent, when I required the lawyers, on short notice, to object to -- to respond in writing to your late objection, is disrespectful to them; it's disrespectful to this Court.

I read my mail. I am prepared for this hearing. I didn't have a chance to read your late flurry of stuff yesterday. Absent some new decision that you have, indicating that settlements have to deal with every beneficial holder in the world -- you got one from yesterday?

MS. SKOVRON: No, Your Honor.

THE COURT: Okay. Then this is nothing new. And it would not -- you would not be able to settle federal securities cases, you would not be able to settle anything, if folks like your clients were going to get to come in and talk all about the 17 people they dealt with.

You want to talk about equity? Your

clients were buying, probably, largely on the assumption that there were people miscalculating the benefits of the settlement. I'm not faulting them. They don't have any obligation. But you are coming in here with -- and suggesting some sort of cosmic unfairness by following regular orders when the marketplace got the information, when your clients acted on it, using the fact that they monitor information more closely than other people. They made trades, but they didn't do their job. I don't want to hear --

I have heard you out. I want to hear from Mr. Micheletti and Mr. Hanrahan. What I would say is late-filed notices, with implausible excuses, no update -- you are withdrawing an argument, not really replacing it with another argument, not answering my question, not delivering something even to me yesterday -- perhaps it's downstairs for me before this hearing. I have no idea. I don't know that we got a call this morning to indicate it was coming.

Frankly, the lawyers in the room shouldn't have had to be worried about after-hours deliveries last night in this case, when they might

have even -- they might even have a family life or a moment off, or they may have already prepared for the hearing. So let me hear from Mr. Micheletti and Mr. Hanrahan.

Thank you.

MS. SKOVRON: Your Honor, if I may just add one more thing?

THE COURT: I have heard more than I ever typically hear on late objections.

MR. MICHELETTI: Your Honor, Ed Micheletti, of Skadden Arps, on behalf of Protection One and GTCR. We submitted a brief in opposition to the objection. We are happy and content to rest on the arguments in that brief.

THE COURT: Do you know -- you don't know anything about this UBS thing?

MR. MICHELETTI: Well, I'm not aware of any affidavit submitted by UBS to the Court. What I am --

THE COURT: You didn't receive it, either?

MR. MICHELETTI: I didn't receive an affidavit from UBS. That's correct. What I did receive was an affidavit -- or a motion for leave to

file affidavits from Glazer Capital, one of which was an affidavit of an individual named Mark Ort, who apparently had a conversation with somebody in the prime brokerage unit of UBS; reports on that conversation; and then purports to attach a letter from UBS to Mr. Ort that said that UBS did not send -- did not send Glazer a copy of the notice.

THE COURT: It says UBS did not send. Does it say they did not receive?

MR. MICHELETTI: It does not say that. The letter from UBS does not say that. That's correct.

THE COURT: Okay. Thank you. Mr. Hanrahan?

MR. HANRAHAN: Unless Your Honor has questions, I don't have anything further.

THE COURT: I will deal with the objection first. It's late, inexcusably late. I don't even know, frankly -- it doesn't -- for something that is late, you would think it was late and it would otherwise meet the requirements for an objection. It does not. If you want to operate through multiple entities, which apparently Mr. Glazer does, then there should be proof that each of the

entities that is objecting is a stockholder. There is not.

It would probably be better, I guess, to add the word "record." We don't have it in the musical context as much, so it has a quaint thing. So we will put "record holder." A member of the bar came here prepared for an argument and was asked about the principal objection made by Mr. Glazer. Could not answer. I don't fault her. It's because there is no plausible argument.

The fact that the word "record" was not in there and it simply said "holder" does not mislead anyone at all. To be a holder you have got to be -- they talk about beneficial owners. You are not a holder. You don't have a certificate. Entities like Glazer ought to -- they play this game. And there is nothing in any of the responses to the objections or anything the Court says -- I want to be clear about this -- that implies there is something wrong with what Glazer does. But Glazer is arbing the market. Frankly, it is trying to make opportunistic profits off of its perceived knowledge of the settlement, which it believes it has got a better knowledge than the people who are selling.

Well, when you are going to play that game, you need to actually understand the rules. There is nothing new under the sun about the fact that record holders are who are defined as the class. It is, frankly, insulting to the Court and disrespectful to all counsel involved, including the plaintiff's counsel, who worked hard to get a good result in this case, to suggest that somebody is turning their back on their duty to the stockholders by not rooting -- by not representing Glazer Capital in its battle with the record holder or its broker. If Glazer wants to sue UBS, it knows where UBS is. It has buildings. It has UBS right on the side of all its buildings. That's what it should do. But to imply that what the Court or the plaintiffs in the case are supposed to do is to go out and deal with everybody who made trades during the class period and do a summing up is just nuts.

This case is about stockholders, as Mr. Hanrahan says. Glazer Capital didn't even have standing to bring this suit. At best, it might have bought something before the settlement, but it doesn't even know. This suit is about protecting the stockholders of Protection One. Glazer came in. It is entitled to do whatever it does from the record

holder. The settlement is actually clear. I have no doubt that Glazer Capital pulled the actual settlement agreement when it became available. And it says in there beneficial -- "the record holders are responsible for dealing with beneficial holders with respect to the proceeds."

Glazer may still get paid. But the point is the settlement proceeds will be paid to the class. The class has been clearly defined. There was some temporal ambiguity about when the tender offer would close, but that is not even what Glazer is talking about. The reality is the initial publication of the MOU put everyone on notice that they had be careful. The law particularly does not exist for people who want to buy in at the last nanosecond of a class period and then come and make sure they get their harvest.

You will read every corporate law treatise that is ever written, and you will find not any dilation of that -- on that principal concern, that the late-arising arb, who can't get its game together professionally, should be the object of special protection. I actually think if society thought about it, people would probably be more

interested in exploring whether there were people who sold to Glazer Capital in ignorance of the settlement. But the law doesn't put on Glazer Capital the responsibility to be forthright with the people from whom it buys. It doesn't. They don't have to say anything. They can buy on markets. That is cool.

MS. SKOVRON: Your Honor --

THE COURT: Do not interrupt my ruling. But what Glazer -- when Glazer Capital comes into this court and suggests that everyone needs to protect it from its own ignorance and its own failure of diligence, that is what Emeril Lagasse would say is one-sided cooking, one-sided-tasting food. Glazer gets to buy. It's not an issue. It doesn't have to tell people, "By the way, there is a dividend coming. By the way, if you calculate this right, you probably want to hold." No. It goes out on the market, buys five percent of a public company, but then because -- society should temper harshness. Right? We have a free lunch program. We have Head Start. We have other sorts of things. What we should do is make sure there is a subsidy for Glazer Capital at the end, so to the extent it makes mistakes by not reading documents, by not actually securing record status, by

not acting sufficiently in advance of the tender offer closing to make sure that if it wanted to be a record holder, it would become a record holder, there should be a subsidy, and we should have investigation costs, and everybody should go after UBS and hold up a class action. That is crazy.

The law is settled. You are allowed to base a settlement on record holders. That is what we look at. When you deal -- when you are a beneficial owner and you deal with a broker, you are at your own risk. If you want to get notice of a settlement, you become a record holder.

Here, I have every reason to believe Glazer had full knowledge of what was going on. If it failed to read documents or to ask for them when it spoke to counsel, that is on it. This is a frivolous, late objection. And I hope to never receive another one of its kind.

With respect to the settlement, I'm happy to approve the settlement. There are multiple benefits; principally, the monetary relief, which is substantial in light of the case. There is a lot of enhanced disclosure. I give the heaviest weight to the cash flow projections. As I said, I'm not -- I

haven't caught the top-up wave, Mr. Hanrahan, but I acknowledge it's there.

With respect to the fee -- I'm obviously going to certify the class as a quintessentially appropriate situation, to certify the class.

With respect to the fee, I will acknowledge I am troubled. And I guess I won't ask Mr. Micheletti to comment, because he has got a duty not to object. My perception from Mr. Hanrahan, and from my own perception of the case, is that the firms here in Delaware did all the heavy lifting, for the most part, and that the fee that they are requesting is entirely reasonable in light of the substantial benefits they achieved.

I am concerned about the $900,000, but I think Mr. Hanrahan -- there is much to what he says about the fact that he and his colleagues here from the Barroway firm should not be penalized by the fact that someone else brought litigation. Really, the appropriate thing is for the judge in Kansas to exercise her independent discretion. And if she believes that an award of the full $900,000 to the Brualdi firm, in light of the total benefits and in

light of the record before her, including the fact that it seems that the Delaware lawsuit really drove the results, and the efforts of the Delaware lawyers is what brought about the benefit, then -- it's really up to her to exercise her independent judicial discretion and to address that fee.

I'm not going to reduce the fee sought by the Delaware plaintiffs. I'm confident that it -- looked at in comparison to the benefits that were achieved, and the fact that they -- and I give credit that an actual monetary result was obtained. I'm going to award the full amount requested by the Delaware plaintiffs.

If Mr. Hanrahan has an implementing order, I will be happy to sign it.

MR. HANRAHAN: Your Honor, the order and final judgment does not reference the objection, but I think Your Honor has already ruled on that on the record.

THE COURT: Yes. When was the scheduling order entered?

MR. HANRAHAN: August 9, 2010.

THE COURT: That goes on the first blank. Right?

MR. HANRAHAN: That's correct, Your Honor.

THE COURT: You guys decided you wanted to have as authentic an order as you could, with my indecipherable handwriting, and -- it's 1.4 inclusive of expenses? Is that right?

MR. HANRAHAN: That's correct, Your Honor.

THE COURT: If the order is in two different colored inks, make nothing of it other than that the one that was blue ceased to write in the middle of me doing it. It has no -- it's no comment on the subject matter. So you will be able to get that order.

Thank you, counsel, and everybody have a good day.

(Recess at 11:25 a.m.)

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CERTIFICATE

I, WILLIAM J. DAWSON, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 66 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 7th day of October, 2010.

/s/William J. Dawson
Official Court Reporter
of the Chancery Court
State of Delaware

# EXHIBIT AG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| IN RE COLUMBIA PIPELINE GROUP, INC. MERGER LITIGATION | : | CONSOLIDATED<br>Civil Action<br>No. 2018-0484-JTL |

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Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, June 1, 2022
9:14 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

SETTLEMENT HEARING AND RULINGS OF THE COURT

- - -

CHANCERY COURT REPORTERS
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THE COURT: Welcome, everyone. Thank you for being here.

I'm happy to start with introductions. It probably would make sense to do so from the defense side, but given how long we've been together, I'm also happy just to get straight to it.

Mr. Lafferty, why don't you go ahead.

ATTORNEY LAFFERTY: Good morning, Your Honor. I'm here on behalf of Mr. Skaggs and Mr. Smith, and with me at counsel table are Mr. Savitt and Mr. Yavitz from Wachtell Lipton, my partner Ryan Stottmann as well.

In the back we have my partner, Lauren Neal, and a summer associate, Apoorva Gokare, who I believe saw you speak at the University of Iowa. This is her first time in a courthouse today.

THE COURT: Oh, great. Well, thank you all for being here, and particularly Ms. Gokare.

ATTORNEY LESSNER: Good morning, Your Honor. Marty Lessner from Young Conaway on behalf of TransCanada. With me at counsel table is Brian Massengill from Mayer Brown, my partner James Yoch, and Kevin Rickert.

THE COURT: Great. Thank you all for

being here as well.

ATTORNEY WEINBERGER: Good morning, Your Honor. Ned Weinberger from Labaton Sucharow on behalf of the plaintiffs. With me at counsel table: Jeroen van Kwawegen from Bernstein Litowitz Berger & Grossman; Gregory Varallo as well.

At rear counsel table, Brendan Sullivan from Labaton Sucharow and Marie Degnan from Ashby & Geddes. I believe Steve Jenkins is in the back. I can't quite see him.

ATTORNEY JENKINS: Good morning, Your Honor.

ATTORNEY WEINBERGER: Just briefly, Your Honor. I discussed with Mr. --

THE COURT: I want to say thank you to you all for being here as well. I appreciate it.

Please go ahead.

ATTORNEY WEINBERGER: I discussed order of presentation with Mr. Lessner. What we discussed was that, with the Court's permission, Mr. van Kwawegen would present the settlement, I would then follow him, present the motion for class certification, and Mr. Lessner would then respond to both of those motions.

Of course, if the Court has a different preference, happy to go in a different order.

THE COURT: Yes, I want to go in a different order.

I want to do the motion for class certification first.

ATTORNEY WEINBERGER: Certainly, Your Honor.

Again, for the record, Ned Weinberger from Labaton Sucharow on behalf of plaintiffs. I'll try to be relatively brief on this motion. I'll start with our affirmative motion then turn to TransCanada's opposition. I know the Court is very familiar with the standards on a motion for class certification. The case needs to have met the four Rule 23(a) factors: numerosity, commonality, typicality, and adequacy. The case also needs to satisfy at least one Rule 23(b) condition.

And just very briefly, let me tick through the Rule 23(a) factors.

Numerosity, hundreds of millions of shares in the proposed class. That element should be easily satisfied.

In terms of commonality, every member of class was owed the same duty of loyalty and care. Every member of the class received the same 25.50 per share in the merger consideration.

In terms of typicality, we are not asserting any -- plaintiffs are not asserting any claims that are unique to them nor are plaintiffs subject to any unique defenses. Plaintiffs are passive institutions that have held stock at close and are actively seeking to recover for themselves and other former public stockholders of Columbia.

In terms of adequacy, plaintiffs retained competent counsel. I don't think that's in dispute. Plaintiffs have no conflicts. And we would submit, as we do in our papers, that the partial settlement that Mr. van Kwawegen will present is really objective evidence that Mississippi and Detroit are advancing in protecting the interests of Columbia's former stockholders.

THE COURT: That's all correct. And what you're saying is consistent with how we've been doing these things for decades. But the defendants have chosen to advance some novel arguments. They've drawn on a lot of different sort of a hodgepodge of

case law, a grab bag: if you could find a class certification decision from any context whatsoever, they've cited it. And they've done so to advance to really one major theory, which is this cross-ownership concept.

Why don't you engage with that because, as you suggested, what you've just said is pretty much straight down the middle in terms of how we've been doing these things for decades.

ATTORNEY WEINBERGER: Sure, Your Honor. I think that's an accurate characterization of their opposition. It is a bit of a grab bag.

I'm going to address these points. I think what I would first say -- a small point, but I think an important one -- sort of what I've just laid out on 23(a) -- I didn't get into 23(b) -- but with what's laid out in our papers, we would submit we easily have made a *prima facie* case under 23(a) and 23(b), such that we've met our burden.

As a result, the burden then shifts to my friends to establish -- to come forward with some legal argument, something so unusual about the facts of this case that it would compel the Court to take

the unusual step of denying certification.

And on this first argument, the cross-holdings argument, it's answered by *Urdan*. It is answered by the Delaware Supreme Court's decision in *Urdan*, *Urdan v. WR Capital Partners*, which is a decision that's not even cited in their opposition to the motion for class certification. And the reason it's not cited, as we point out in our brief, they effectively -- I don't know a better way of putting it -- copied it, cribbed, lifted, a scorched-earth grab bag opposition that Mr. van Kwawegen and I faced in *Straight Path*. Doesn't address the controlling, binding Delaware Supreme Court precedent confirming that these are claims that inhere with the shares, such that the characteristics of who, in fact, held those shares is largely irrelevant, absent some unusual or unique circumstances that just simply are not present here.

And, you know, Your Honor will note, you know, we cite all the -- we cite the orders. We cite the precedent in our brief. My friends have not been able to point to a single decision of this court -- transcript order, opinion -- where the court so much as contemplated excluding cross-holders from

the class.

And there are many reasons. The most fundamental reason is, as *Urdan* explains, this concept of claims traveling with the shares, inhering in the shares. Had my friends read our reply in *Straight Path*, they would have seen we laid out these arguments very plainly, cited the relevant authorities.

If my friends had looked at the transcript from the class certification hearing in *Straight Path*, they would have seen Vice Chancellor Glasscock giving the shortest, the absolute shortest of shrift, to the cross-holdings argument that Mr. Lessner is advancing here.

They advanced in *Straight Path* the same ascertainability argument that my friends are advancing here. We actually have to go into the class, remove all the stockholders who actually -- who, in fact, held shares of TransCanada stock. Vice Chancellor Glasscock responded to that argument at the hearing on the class certification in *Straight Path*.

So it doesn't make any difference -- quote, from page 133 of his transcript, "it doesn't

make any difference because the claim inheres to the stock, and the fact there was other stock owned by someone that may have benefited from the faithless act but [who] didn't participate in it [it's] immaterial".

There's no allegation of TransCanada or -- not TransCanada, of Detroit or of Mississippi having participated in any of the wrongdoing. My friends advance this argument on the objection to the settlement that Detroit should be excluded and holders of TransCanada stock should be excluded for the same reason that we've stipulated to excluding defendants Skaggs and Smith from the settlement. They're obviously being excluded for very different reasons. They acted disloyally. They were active participants in the wrongdoing. That's not the case with Detroit and Mississippi.

And the other showcase argument about excluding the members of the appraisal class, that's answered by *Urdan* as well. The class claims the equitable claims inhere in the shares that were held by each of the appraisal petitioners at the close of the merger. Those claims haven't been adjudicated, as Your Honor noted, or has noted multiple times previously in this case. Nor did any of the appraisal

petitioners release any equitable claims during the pendency of the appraisal litigation or at any other time.

In fact, if Your Honor recalls, back in 2018, TransCanada had the option of stipulating to consolidation of the two cases having these issues decided at one trial. They opposed it. They said the fiduciary duty claims can wait; they said that they wanted a trial on solely the statutory claim, and that's what they got. So this is really a situation of TransCanada's own making.

THE COURT: Let me push you on one thing on the appraisal action aspect.

As to the appraisal claimants, they were parties to a case where factual findings were made. So it is true that I held in the dismissal ruling that the legal issues were different, and therefore it didn't necessarily follow that a ruling in the appraisal case translated into an outcome for this case. And obviously, they're attempting to relitigate that with the formula argument that they make.

But setting that aside, why isn't there a valid point that as to a factual finding that

someone actually litigated and obtained in the appraisal case, that factual finding would be binding on that appraisal litigant?

ATTORNEY WEINBERGER: Well, Your Honor -- and I'm going to directly address this question. The first response is the Court didn't make findings under what will be the essential questions at the trial scheduled to commence next month. So under enhanced scrutiny, whether fiduciary duties were, in fact, breached, whether there are damages. Your Honor has posited a scenario where -- I believe the scenario Your Honor is positing is there is some finding in --

THE COURT: Let's make it simple to the point of trivial. Let's assume that there was a question as to whether an event happened on the 1st of June versus the 10th of June, and that might have different implications legally, depending on what the issues are, but it's a fact question as to whether the event happened on June 1 or June 10. In the appraisal case, there's actually a finding made that it happened on June 1.

Why isn't that factual finding binding as a matter of collateral estoppel, even if it wouldn't be binding as to the legal implications?

ATTORNEY WEINBERGER: Well, Your Honor, I think we would concede that that binding -- or that that finding, that factual finding, may very well apply to the appraisal petitioners who are part of the class.

THE COURT: Yes, that would make sense to me too. And so, as I spin this out, sitting here today, we don't know whether it's an issue or not, because we could get to trial in the follow-on case and I could hold that it actually did happen on June 1, and it wouldn't be a problem.

Or, because discovery has unfolded differently in this case and there's different evidence, I could hold, wow, I now can see that this actually occurred on June 10, and things were backdated to make it look like June 1 and you pulled one over on me on the last one, but so be it, or I was mistaken, whatever the answer is.

And then the question would be, does that have any legal implication, right?

But, I mean, you could, in theory, it seems to me, at the end of this rainbow, get to a situation where you had a subset of folks consisting of the people who actually litigated the appraisal

case who would be bound by June 1 and whatever flows from that, and a different set of people that could seek and obtain the finding that it was actually June 10.

Does that make sense to you or do you disagree with that? As I was trying to think through these things, it seemed to me like that was a potential possibility, but you've been spending a lot more time with this stuff than I have, so feel free to explain to me where I am going off the rails.

ATTORNEY WEINBERGER: Certainly, Your Honor. So what I would say is a few things.

One, standing here right now, I cannot conceive of a factual determination the Court would make at trial that would be undermined by any of the findings that the Court made in the appraisal trial, to the extent those are -- those findings would be binding on the appraisal petitioner. But to more directly --

THE COURT: Let's set that aside because we're all human and we have difficulty conceiving of things, particularly when they're things that we don't want to have happen.

ATTORNEY WEINBERGER: Sure. So the

second scenario where the Court made a June 1 finding, but based on, hypothetically, discovery misconduct, documents were not produced that should have been produced, evidence was not proffered that should have been proffered, I think that is a -- the argument that those findings would be binding on the appraisal petitioners I think is weaker, and we certainly have, you know, various mechanisms that can be employed to deal with that, including potentially reopening the judgment in the prior decision based on findings the Court makes --

THE COURT: That's all true and well and good, but I still want to push, like, the absolutely clean-focused question of the collateral estoppel effect of someone who actually litigated to judgment in the appraisal case versus other class members who did not.

Again, let's make it even cleaner, and we can insert sort of the black box of the jury in terms of fact-finding or something like that.

But imagine that you're simply confronted with case 2 in which the outcome comes out as June 10th, and case 1 in which the earlier court, in a case that was litigated by certain members of the

class but not others, reached a finding that it was June 1.

Absent Rule 60 or some way to set aside the validity of that first judgment, are those folks who actually litigated bound by the June 1 finding or is there some reason why you think they wouldn't be bound by the June 1 finding?

ATTORNEY WEINBERGER: I think it's quite possible they would be bound by the June 1 finding.

And to hypothesize some scenario where the Court made some finding inconsistent with the finding in the appraisal action that it turned out was essential to some type of recovery or judgment, would obviously be the most extreme scenario. To me, that is something that the Court can deal with post-trial.

But it's certainly not an issue, we would submit, that needs to be addressed now, before trial, before the Court has made additional findings. But the scenario you hypothesize, Your Honor, it's certainly possible, yes.

THE COURT: So then, again, if we're in the world of possibility, it sounds to me like you're suggesting that this is a problem that we deal

with down the road if it happens, if, in fact, there is a different factual finding, and if, in fact, there's a conclusion that the different factual finding has some legal significance such that the appraisal petitioners would face a different outcome because of the earlier factual finding.

ATTORNEY WEINBERGER: Yes, Your Honor. And I think we addressed this in a footnote. I think the Court has a number of mechanisms, including, I think, Rule 23 even expressly says that the Court can at any time, including post-trial, modify an order certifying the class.

THE COURT: So your view is that we would deal with that down the road.

All right. Now, let me ask you a couple other things that I think are curiosities.

To the length of the class definition -- and I want to distinguish between the length of the class definition for the litigation and the potential length for the class definition for the settlement.

I mean, this is a dialogue that I've had with folks over the years about why the class definition starts typically at the beginning of the

time period for exploring strategic alternatives and ends on the closing date. I mean, that's like the standard definition --

ATTORNEY WEINBERGER: Right.

THE COURT: -- people use.

So from time to time, I'll ask people in settlement hearing colloquies, because that's usually when it comes up, why are we doing this? The claims travel with the shares. It's going to be the people who end up with the claims as of the closing date anyway, why are we doing this?

And the answer is always what you-all alluded to and what Mr. Lafferty more thoroughly presented, which is, look, we're getting a release, the release is covering a lot of different claims, there's potential federal claims out there, there's maybe common law fraud claims. We don't think they're worth anything, but we're bargaining for this release, so we want the broad temporal period to sweep this in, and so that's why we agree to the broad class definition. Your Honor can weigh whether or not those claims are worth anything. Nobody's coming in and saying they are. On we go, and, historically, on we've gone. And that completely makes sense to me in

the settlement context, right. I buy that.

Now let's pivot to the class that I'm being asked to certify for you for litigation purposes and let's distinguish between what you would think a defendant wants and what sort of legal theory would say. All right.

So what you think a defendant would want would be the same broad class definition, because they want *res judicata* effect one way or the other as to the full scope of the class, right, so if they win, they want everybody bound; and even if they lose, yes, that's a bad day at the office, but you still want everybody bound so you don't have to do this thing all over again.

So, again, we can see what TransCanada's doing in terms of acting counterintuitively by coming in and saying, no, no, no, we want the narrowest possible class definition. We do not want the broad thing that would protect us with *res judicata*. We want actually a narrow one. Let's set that aside.

Let's just think about, in the abstract, what the Delaware definition should be. And in a world where all of the Delaware claims that

you're litigating travel with the shares, why isn't the answer just the universe of holders at the time of closing? Because everyone up to that point who was a holder during the class period sold, claims traveled with the shares, and so really, in terms of what I would be doing in any type of liability ruling, right, your best day at trial, any type of liability ruling, I'm going to be making a determination that's going to go out to whoever it was that held those shares at the effective time.

So for the litigation definition, as opposed to the settlement definition, and setting aside that I think, other than somebody trying to throw sand in the gears, which is what we've got, no defendant would ever argue this, because they benefit from the broader definition.

So this is like one of these issues that really shouldn't be coming up as a practical matter if people are actually not just being obstreperous.

But why, from like a purist standpoint, isn't the answer that it ought to be shares as held at closing?

ATTORNEY WEINBERGER: So, Your Honor,

I will make a concession, somewhat of a concession. The answer to your question is, I think, usually, usually, ordinarily, the litigation class period for a Delaware claim challenging a merger, it makes sense. It's close. Claims travel with the shares. Anybody who sold before, they've disassociated themselves with the shares such that they've relinquished the claim.

Ordinarily, that probably should be the definition. I think if you look at the majority of the stipulated class certification orders outside of settlement context we've entered into over the last four or five years, my firm and Mr. van Kwawegen, Mr. Varallo's firms, it is generally just a one-day class period, close.

I think here -- so Your Honor was not asking about precedent. Your Honor was just -- wanted to discuss what should the rule be, so I will leave aside the precedent that -- you know, class definition looks a lot like -- even the class that was permanently certified in *Rural/Metro*, in *Dole*, *Haverhill v. Kerley*, which Your Honor approved.

THE COURT: It's because no one's fighting these things, right. The broad class definition is something where, for a corporate case,

people's interests are aligned in terms of the class framing. I mean, you'll have to refresh my recollection. I just don't know. Were any of those contested definitions where somebody came in and made the argument? I mean, the only person who actually would have a rational interest in contesting the size of the class would be a competing plaintiff who, for example, was asserting federal securities claims and didn't want to get carved out. It's just counterintuitive for the parties actually before the court in the case to do this.

So were any of those contested?

ATTORNEY WEINBERGER: I don't believe any of those were contested, Your Honor. I mean, I do place significance on the fact that I think the Court has an independent obligation in connection with --

THE COURT: Look, I think about this stuff and I try to -- it's a fair point you make. I interrupted you because my sense was that those were going to be not contested. You were winding up to say what you thought the approach really ought to be.

ATTORNEY WEINBERGER: I've conceded somewhat, Your Honor, that I do think, ordinarily, the one-day class period does make sense for Delaware law

claims.

When I look at this case, and in terms of even sort of leaving aside, how do you get comfortable by representing a class knowing that many members in that class likely sold their shares, gave up, essentially, their right to recover on a Delaware law claim. I consider that this is a six-year-old transaction. The tires on this transaction have been kicked by plaintiffs and plaintiffs' counsel about as hard as one could possibly kick the tires.

THE COURT: You guys are inside the engine. You guys didn't just kick the tires. You took it to the mechanic and had the mechanic go over it, and we're still in that process, right. We're still in the process of we're all under the hood at this point.

But, anyway, your point is a valid one.

ATTORNEY WEINBERGER: And we appreciate that, Your Honor. Yes, so I sort of look at the history of this transaction, what is the extent of the litigation, six years of litigation, appraisal claims litigated through trial, full record there, developing different record here.

And we also know that folks have tried to assert federal --

THE COURT: I mean, what flows from that is, therefore, those claims for other people in the class period aren't really worth that much; isn't that the answer?

ATTORNEY WEINBERGER: Yes.

THE COURT: Sort of the next step.

Again, that strikes me as an eminently fair point on the settlement. Eminently fair. But for purposes of the class that you get to represent going to a judgment, why does that matter? In other words, yes, somebody might have a Delaware law common law fraud claim, or who knows what might have survived under the federal securities laws or something like that. Why do they get swept along with you when you are pushing Delaware law claims in terms of getting to a judgment, separate from what you could settle? I'm not questioning what you can settle. I'm questioning for purposes of the Delaware claims that we're going to litigate.

ATTORNEY WEINBERGER: And my response would be, again -- and leaving aside the settlement -- ordinarily, ordinarily, I don't think those folks

should necessarily be swept along.

Here, where -- we basically had, you know, over half a decade to evaluate every conceivable claim that could be brought on behalf of former stockholders of Columbia Pipeline, who -- certainly, Mississippi and Detroit have a relationship to everyone in the class in that they were all -- we all held stock at some point -- Mississippi, Detroit, every member of the class all held stock at some point -- had a duty, we allege, breach at some point in the -- this was a yearlong sale process.

So hopefully that answer is not unsatisfying to Your Honor, but, again --

THE COURT: What implications does it have? I mean, really what I'm wondering is, look, why on this one doesn't TransCanada get what it wants? In other words, these guys have come in and said, no, no, we don't want the broad class that could protect us on *res judicata* grounds. We just don't want that. We actually just want a one-day class for litigation purposes as to going to judgment. And, again, it doesn't have to be the same as the settlement class. You can settle a broader group of claims. So why don't, for the settlement, I give you the class that

you-all bargained for.

But for the litigation class, why isn't the answer, you know what, TransCanada, you're right, this is a theoretically, doctrinally correct point that you are making, you should not get broader *res judicata* protection from this than you deserve. That is a fantastic point. We'll just make it class as of closing.

Why isn't that the answer?

ATTORNEY WEINBERGER: I tend to agree with Your Honor. As we lay out in our papers, there is no requirement that the settlement class and the litigation class be identical or be the same thing. It doesn't create any issue that we can conceive of. It doesn't create any issue -- doesn't create any issue.

So, yeah, to the extent the Court were inclined to certify a settlement class consistent with the class negotiated for by defendants Skaggs and Smith, certify a different class for purposes of a judgment or later settlement in this case, I don't think Detroit or Mississippi would have any objection to that, Your Honor.

THE COURT: Yes. And to be fair, all

I would be doing on the class certification motion is the class that you guys would be litigating potentially to judgment if -- my hopes of broader settlement have dimmed, but it wouldn't impede people from getting a broader class along the lines of what Mr. Lafferty and his co-counsel negotiated in the context of a settlement.

Again, doctrinally, this is one where the point lies oddly in TransCanada's mouth, but it's a point that seems well-taken in terms of the doctrinal step. It's just something no defendant usually asks for.

ATTORNEY WEINBERGER: We would agree with Your Honor, and that's certainly within the Court's discretion. And if that's how the Court wants to deal with this class issue, like I said, Mississippi and Detroit have no objection to the Court certifying two separate classes.

THE COURT: Anything else you want to tell me?

I'll tell you the other thing that I was curious about. And it's not front and center in TransCanada's briefs, but they put it out there. And, again, it's one of these things that would have

colossally borderline nuclear consequences for how we've been doing things for decades.

But their view is that once you're in the damages context for disclosure claims, reliance, in particular, becomes a sufficiently particularized issue that you can't certify under (b)(1), (b)(2), and, indeed, under (b)(3), you can't certify at all. And that would be big because that would mean that, really, you couldn't do disclosure class actions, period or I guess you'd have -- that's probably an overstatement. But the way we've been doing them for decades we would have suddenly discovered was wrong.

But setting aside the innovative nature of the argument, what's the conceptual response? Because it is true under the federal securities laws, which is one of the sources for the potpourri of citations, although a lot of them are antitrust, a lot of them are consumer injury cases, it's all over the map. There is this concept that reliance can be individualized.

What is your pushback to the reenvisioning of how disclosure class actions work?

ATTORNEY WEINBERGER: Well, Your Honor, I think the place I would start is the

Court's decision denying summary judgment in *Orchard*, where I think you talk about the availability of a post-close class disclosure claim and that the element of reliance, I believe Your Honor said -- been a while since I've read that decision -- we presume reliance based on a proxy's been issued, we presume reliance.

And one of the reasons why the Court might presume reliance for purposes of maintaining a class mechanism, I think the policy in Delaware is in favor of certifying classes allowing rationally apathetic stockholders who have been aggrieved by faithless fiduciaries, whether in the disclosure context or otherwise, to assert class claims.

And as I understand the law, historically -- I'm blanking on some of these case names right now -- I believe there is case law saying that where stockholder action is not sought, maintaining a class action is going to be more difficult. Maybe -- it may just not be possible, given particular individualized issues of reliance, where you can't presume it. No stockholder action is actually being sought.

But I think -- the law on this is fairly well-settled, and I think in part it's sort of

a function of the policy in Delaware, which is in favor as opposed to allowing class claims to go forward.

THE COURT: Interesting. Look, I think the nonstockholder action context, the *Malone* claim. And *Malone* says it can be brought either on a class basis or a derivative basis.

So what I'm hearing you say, it sounds like, is that we ought to have separate -- the question is not just is disclosure being sought for injunctive relief or damages. The question is still, is it stockholder action or nonstockholder action, and within the context of stockholder action, we can presume reliance because the board is actually putting out this information to solicit stockholder action and, therefore, that, at a minimum, gets you enough to be able to certify a class, absent some evidence from the other side that would cause some different reliance calculus.

ATTORNEY WEINBERGER: Yes, Your Honor. And, I mean, consider the alternative. This is a class of hundreds of millions of shares within it, you know, and this is a starkly misleading proxy. I know the Court -- that's our allegation. We intend to

prove that at trial. I think it's already, in part, been proven, but not to the degree to which we'll be able to prove it at trial in July.

But the alternative, if you don't -- if you make reliance an individualized issue such as you can't certify a class, you just lie to your stockholders, lie to your stockholders.

THE COURT: It wouldn't be that far, but, I mean, this certainly is sort of the person who only works the defense side of the street, it's like their dream, right, because you would be able to pursue these claims in the injunction phase, where reliance doesn't come into play, but once you got post-close, this would be the silver bullet. You couldn't certify a disclosure-based, post-close stockholder action because of the individualized element.

So it wouldn't be that there would be no remedy; that I think would be an overstatement. It would be that it would be massively circumscribed compared to what has been the practice.

I don't want to dismiss your point, which, I think, is, look, this would be a massive discovery to realize that we had been doing this wrong

for so long, but it wouldn't let you just lie with impunity. It would simply narrow the window to injunctive relief.

ATTORNEY WEINBERGER: Certainly. A claim for damages would be largely unavailable.

And I just note, Your Honor, Your Honor was noting how strange it is for TransCanada to be in this courtroom, you know, asking for a shorter as opposed to a longer class period. I think the 23(b)(3) argument is just as strange. I can't recall, other than in *Straight Path*, a defendant advocating for stockholder right of opt out. Truly odd.

THE COURT: Yes. I'll push back on you a little bit only because I do think that the folks who mainly litigate in federal court and are immersed in the *Wal-Mart v. Dukes* line of case law, for them, the idea that a damages class has to be a (b)(3) class, it's almost like an article of faith.

And so it is not infrequent that I'll get arguments driven by folks from that world who want to port that framework into the Delaware law idea. That's why it keeps getting rejected. You guys cited all the cases. Chancellor Allen rejected it in 1991.

It seems every five or six years, we have to come back and say this again.

I can understand if what you are in the business of doing is fighting (b)(3) classes, and you often can blow up classes by pointing at (b)(3) factors, it's not crazy that you'd say, oh, well, I want to take this technology to Delaware, fight the (b)(3) battle in Delaware, blow up whatever classes I can under (b)(3) in Delaware, I don't want to face the (b)(1), (b)(2) class.

That to me is somewhat rational in the long, but I do hear you in saying what is bizarre is a (b)(3) class where suddenly people could opt out and these people would have to litigate claims both individually and class, like they do under the federal regime.

ATTORNEY WEINBERGER: Any other questions I can answer for Your Honor? If not, I'm happy to cede the floor to my colleague, Mr. van Kwawegen.

THE COURT: That would be helpful. Again, since I don't see full overlap between these things -- and, in fact, I wholeheartedly agree with you that I'm not really sure TransCanada even has

standing to speak on the second issue -- I was planning to hear this one, where I think TransCanada does have standing to oppose, and see what they have to say on this before we turn to the second point.

ATTORNEY WEINBERGER: Any other questions I can answer for Your Honor? If not, I'll let Mr. Lessner come to the podium. Thank you, Your Honor.

ATTORNEY LESSNER: Thank you, Your Honor. Good morning.

Your Honor, let's focus on the main issue here on why we believe that the class -- the proposed class is overbroad. We believe it's overbroad because it includes stockholders who -- the dual stockholders who are not injured, and it includes the petitioners from the appraisal, who are precluded from bringing those claims.

So I'll focus first on the dual stockholder issue. And the reason this comes up, of course, is because we're in a class action context. Detroit, I mean, it's undisputed -- there's a couple of things that are undisputed, the federal law on the subject and that Detroit is a -- owns a predominant amount of shares in TransCanada.

So the issue is whether the Court looks at this particular transaction, the merger transaction, and finds that people were injured or not injured at all differently, depending on their cross-holdings. That issue has never been litigated, as far as we know, in Delaware.

And so the precise issue before the Court in the class certification context is when looking at the hundreds of thousands of stockholders who own 400 million shares and certifying a class, does the Court include in those class stockholders, like Detroit, who have not been injured?

And we take that from -- so it is an issue that has not been decided before in Delaware. I have not seen it in the context of federal cases either.

So, as Your Honor rightly notes, we have analogous cases where the Court's determined that there hasn't been injury to certain people in the class based on antitrust violations or others.

So we start with the Supreme Court of Delaware in the *Wit* case, where the Court says, "The parties also agree that [] failure to show that some fact of injury exists can defeat class certification

while issues going only to [] measure[s] of damages cannot."

So we don't contend that because stockholder A owns X amount of shares and stockholder B owns Y amount of shares, you wouldn't be able to calculate, ultimately, damages.

What our argument is, in this particular transaction, which is a merger between two very large, publicly traded companies where there is some amount of cross-ownership, witness Detroit, which they claim they're typical of the stockholders and they have a predominant amount, were they or were they not injured in the transaction.

So the Court, having not dealt with it, but the Court does look at the stockholdings of a stockholder in particular transactions. The undisputed holdings of *Urdan* simply says the cause of action goes to people who hold those shares, but the cause of action that they have is for breach of fiduciary duty, in that TransCanada did not pay as much as they said should have been paid in the transaction.

So the breach of fiduciary duty is a duty that's owed not to pieces of paper. The breach

of fiduciary duty is owed to the stockholders, and that is, you know, *Revlon*, every other case. It's the duty to the stockholders as a corporation. This is not an *in rem* proceeding that says that you owe some sort of duty to -- you know, to the piece of paper. And, as a matter of fact, we cited a case where you cannot have an *in rem* fiduciary duty proceeding.

So now the issue is, is this the type of transaction where the Court will look at the transaction as a whole, sort of like knotting a step transaction, where the Court looks at the transaction as a whole, a spinoff and then a merger, and looks ultimately to the transaction to see what stockholders have been damaged.

And the concept that dual stockholders have not been damaged, I'm going to say it's not new, it's not novel. The Court considers the dual stockholdings in other contexts of our corporate law, particularly in determining whether a stockholder is disinterested or not.

So a Court will consider the dual stockholdings of a stockholder for purposes of determining a disinterestedness for *Corwin*, disinterested for a majority of the minority

provisions. Disinterested is written into our statute in 203. The Court will consider the stockholdings in all of these issues in deciding what rights attach to the shares in those case -- you know, the right to vote or the right to -- I was going to say a poison pill or the right to be considered disinterested for purposes of the transaction.

It's novel only in that the issue is coming up now in the context of class certification, and it usually -- the best I can presume it hasn't come up before is because most class certifications are unopposed or most class certifications, certainly in the settlement context, are unopposed, so the issue just has not come up.

It was argued just recently by the plaintiffs in the recent *Tesla* case, as Vice Chancellor Slights noted, that the argument was that dual stockholders of Tesla and SolarCity should not be considered disinterested stockholders.

So our point is that there's certain members who have not been determined of the class, who were not injured in the transaction, and, therefore, should not be considered part of -- they should not be considered part of the class.

And I'm going to say it's real money because in this case, it's not a derivative case, it's not a common fund case. It's a case where the damages are -- the damages will be calculated on a per-share basis.

And so with 400 million shares at play, the class makes a big difference. And as we cited in the federal case of *Kohen*, the battle was done because that's where the money is, and the battle over the size of the class is because plaintiffs, naturally, want as big a class as possible. And as the Court said for the *in terrorem* effect that even a weak claim on a very large amount of shares has great settlement value.

So we are here because it is in our clients' best interests that the settlement class -- or, I'm sorry, that the class, okay, is as limited to only people who allegedly, arguably would have been interested -- or, I'm sorry, would have been injured in the transaction.

And as the Supreme Court said in the *Wit* case, the issue then comes down to there has to be a fact of injury exists. And in *Wit*, the Supreme Court reversed the trial court, where the

trial court had certified subclasses, which included people who the court said had not been injured. And in *Wit*, it had been people who were owed IPO shares. The obligation of the company was to give them IPO shares. So their claim of damages was they did not get the IPO shares that they should have gotten.

The Supreme Court said, well, you can't certify a class that broadly because "class members who might have sold at [a] loss had they been allocated the IPO shares were not injured in fact by any alleged denial of an allocation of [those] shares."

So what the Court recognized was in the class context that there's people who are injured and people who were not. If we just take the issue of Detroit, Detroit claims to be representative or typical of the class. Detroit has a preponderance of TransCanada stock. And if Detroit was to bring that claim as solely Detroit, there would be a valid defense that they suffered no damages, and the Court would have to decide that issue, and, as far as I know, the Court has not decided the issue of -- in a merger like this between two public companies. The Court has simply not decided that issue. But the

Court is now confronted with that issue on class certification.

Everything else flows from that as far as the issues on a certification under 23(a) and 23(b) and (b)(1), (b)(2), (b)(3).

So if there are people out there who own shares who weren't damaged, that means under (b)(1) that it's not the same, all the stockholders are not entitled to the same, which is (b)(1), they all suffer -- they all have the same liability and damages.

It's not (b)(2) because this is not an injunction or declaration case. It's (b)(3), which is people have different amount of damages. And then the question is predominance, is the issue predominant between the dual stockholders and none.

And so I would suggest to Your Honor that this is, in fact -- assuming Your Honor does not rule, as a matter of law, that these stock -- that the Detroits of the class simply do not suffer -- or did suffer damages or did not -- rejects as a matter of law that in this type of transaction, you will look at the dual holdings.

Assuming that that is a viable claim

that the Court is not deciding, then we have the issues of ascertainability, and that is -- we're not here to blow up the class action regime in Delaware. In fact, we believe we're just -- we're applying the class action regime in Delaware.

Class actions, obviously beneficial that people can aggregate small claims into big classes, but they can't overaggregate.

So when -- you have the issue here of ascertainability. So on one hand, if you say it's too difficult to ascertain who actually was dual stockholders, then you can't certify a class because it's unascertainable.

On the other hand, if at the same time you are ascertaining the stockholders who are actually injured, so the stockholders who received a merger -- who were stockholders as of July 1st, at the same time, through the same process, you're ascertaining what their stockholding was in Columbia, you would use the same process to ascertain what their stockholdings were in TransCanada. And that is assumed by the court in some of the cases. I will say -- I will call that, for shorthand, the *PLX* method: you go through DTC and through the DTC participants. There's also, I guess,

the original *Dole* method, where the stockholders actually have to say that they own the shares.

And that was the assumption in the *Kohen* case that we cite throughout the brief in which the Court said, well, people who weren't injured, they'll have to produce their sales records to show whether they were actually injured or not, and that way you'll determine who was injured or not.

So what we've suggested also is that Your Honor -- and the plaintiffs say that this is a conditional certification, because the plaintiffs have not put forth the facts that would allow the Court, at the end of the day, if there is a judgment at the end of the day, for the Court to determine who was actually damaged. Their expert didn't do it. Their expert just took a figure of total outstanding, plus, I guess, options or whatever, and that would have been cash, subtracted off Smith and Skaggs, and said, that's the class, multiply it by damages.

But at the end of the day, that will not be the measure of damages. It'll be only the measure of damages of those people who were in the class.

And it's the plaintiffs' burden, I

presume, assume, to prove who are the dual stockholders and who are not for purposes of the award of -- any potential award of damages.

So in sum, Your Honor, we're not trying to blow up any settlement regime. We're operating within the settlement regime. We are asking for a -- the class, as proposed, is overly broad because it includes people who were not injured or were precluded, and in that is a decision to be made now in class -- at class certification time in the context of class certification and the logical conclusion of the arguments on (b)(3) and certification under (b)(1), (b)(2), (b)(3).

The arguments logically flow that if you have people in the class who were damaged in different ways, or not at all, it has to be under (b)(3).

Let me present for a minute why the stockholders who were appraisal petitioners --

THE COURT: Before you move on to that, let me just ask a couple things.

You've said today and you've said in your briefs that you don't view this as a common fund case.

Can you elaborate on that?

ATTORNEY LESSNER: Sure. The settlement is a common fund case. It's different than the class. The class is -- whatever damages are in the class are based on if Your Honor were to decide that there was some incremental amount above 25.50 that was owed to the stockholders, say it was 15 cents, they owe 15 cents more, okay, it would be 15 cents times the eligible share for the stockholders who were entitled to it.

So it's not -- it's different than the settlement where the settlement is simply a lump -- is a lump sum to be decided who is to allocate, and I'll talk about that when we're arguing the settlement part --

THE COURT: The math is going the other way. I guess part of why that seemed incongruous to me is because certainly whenever there is a fee petition in that setting, the plaintiff says, I created a common fund, and the common fund is equal to value times number of shares participating.

So it sounds like you're focused on the directionality of the math in terms of the per-share, starting with the per-share number and

ending up with an aggregate rather than going the other direction.

ATTORNEY LESSNER: So it's different, Your Honor, in the -- I'll call it the litigation class versus the settlement class.

The settlement class is a common -- is a common fund. The settlement was, here's $79 million, we want our releases, rightfully, and you can distribute it because we don't have an interest anymore in how it's distributed.

TransCanada has an interest in how it's distributed, but I'll discuss that when we're talking about the settlement.

But it's different for the litigation class because the measure of damages as their own expert, Mr. Minehart, calculated, it's simply how much more per share the plaintiffs claim that TransCanada should have paid times the amount of the eligible shares.

THE COURT: How would you feel if, instead of viewing it that way, it was presented, essentially, as an enterprise value calculation for the company or an equity valuation for the company, because that's really what the per-share number is a

proxy for. There's no magic to 25.50. It's 25.50 because that works out to an aggregate price that someone's willing to pay.

ATTORNEY LESSNER: No, I would disagree with that proposition because their cause of action is a fiduciary duty breach that's owed to the stockholders. The stockholders were paid 25.50. The claim is they should have been paid some amount more than 25.50. It's not an appraisal where the measure of damages is you're entitled to the enterprise value at some proportion. This claim is on behalf of the stockholders that, whoever the eligible stockholders are, that they were damaged because they only got -- they got 25.50 and something less. It's not --

THE COURT: Think back to your framing of the core claim as whether the defendant fiduciaries achieved the best price in a sale of the company. The issue is whether they could have held their fiduciary duties in selling the company for which they got an aggregate price.

ATTORNEY LESSNER: Your Honor, I would say that the case law is, in terms of *Revlon*, it's whether they got the -- they attempted, the directors who owe the fiduciary duty to stockholders, attempted

to get the best price reasonably available for the stockholders. It's not in an aggregate level where they attempted to sell the company. It's what they did to get the best price for the stockholders. There could be other constituents here in a merger. There could be bondholders, debtholders. There could be other kinds of constituents. The *Revlon* duties are owed to the stockholders.

THE COURT: It seems to me there's a circularity problem in terms of excluding the Detroits of the world from the class in terms of an actual liability setting. And what I mean by that is, imagine a situation where TransCanada does have to pay a judgment. That judgment transfers over to the plaintiffs' side, the plaintiff class side of the ledger.

The Detroits of the world, who own more shares in TransCanada, indirectly bear the cost of that judgment, but they get none of the benefit of that judgment.

So effectively, as a result of TransCanada having to pay the judgment, they get harmed by the litigation, but they've been excluded from the class, and so, therefore, don't get whatever

the true-up would be.

Why isn't that a problem for your approach?

ATTORNEY LESSNER: Because it really just goes to who suffered the harm.

Now, we are not -- we're very narrowly focused on this, and that is who were the dual stockholders at the time of the transaction. So we're not asking to look and see what their future holdings was of TransCanada. We're focused very much on the transaction, and so if Detroit was not harmed by the transaction because they were a net benefit, then they have no entitlement to a judgment in the first place.

THE COURT: Look, I understand that step in the argument. And I'm asking you to take the next step and think about the position Detroit is in, in a world where TransCanada has to pay the judgment.

Your premise that Detroit has benefited from the transaction, the math isn't necessarily going to work anymore, because TransCanada has now had to pay something that you have to subtract from whatever Detroit's share of the benefit was.

ATTORNEY LESSNER: I don't think -- when you say "Detroit's share of the" --

THE COURT: Using Detroit as a proxy for someone you're excluding from the claims.

At the end of this, imagine a world where TransCanada only has a hundred shares, TransCanada has to pay a judgment equal to $100. Your world is one where I look through TransCanada to the stockholders. So each one of those stockholders now is attributed $1 less value because TransCanada has had to pay the judgment.

Why doesn't that potentially upset the calculations that we used to figure out whether they would be excluded from the class in the first place?

ATTORNEY LESSNER: I think what Your Honor is saying is that the premise of that is that TransCanada is paying some lump sum.

THE COURT: Yes.

ATTORNEY LESSNER: And sort of what the settlement is. Okay.

THE COURT: No. The premise is that we actually get to the end of the day and somebody's going to win, somebody's going to lose. And the hypothetical where you guys win, we don't have this problem. In the hypothetical where the plaintiffs win, your guy has to write a check.

And what I am interrogating or trying to interrogate is how your model works from the stockholders you have excluded from the class in a situation where TransCanada has to write a check.

ATTORNEY LESSNER: Yes. So I guess the easiest thing would be that there is no final judgment until there is a determination, a factual determination, of which stockholders were injured or not.

THE COURT: Why is that the easiest thing? What I'm suggesting to you is there's a circularity problem because the judgment itself is going to affect the relevant allocation of injury.

ATTORNEY LESSNER: Correct. So what the Court -- if there was a finding, okay, the --

THE COURT: That's the only situation where this matters. That's why we're talking about it.

ATTORNEY LESSNER: Okay. The Court's judgment would be, I assume, similar to what happened in *Rural/Metro*, where it was a marginal increase in price times the eligible shares.

The only problem I see is if the Court were to say that at that time that the Detroits of the

world are eligible shares and hence they're entitled to the dollars. It's not a problem -- that's an ascertainability problem. If I understand your hypothetical, and I may not be --

THE COURT: Yes, let me try again.

What you're envisioning, as I understand it, is a world where, at the deal price, somebody is a net gainer because their TransCanada stake exceeds the value of their Columbia stake.

Fair so far?

ATTORNEY LESSNER: That is -- in the transaction itself, yes.

THE COURT: To calculate whether someone is a net gainer, you're going to use the transaction price.

Fair so far?

ATTORNEY LESSNER: What the stockholder was paid in the transaction, yes.

THE COURT: In a world where your client has to write a check, the transaction price effectively changes because TransCanada is making a payment over to the plaintiff class.

Again, with me so far?

ATTORNEY LESSNER: At -- oh, I see

what you're saying. I think I see what you're saying, Your Honor.

THE COURT: So that should change the math as to who's in, who's out, and at a minimum, if I have excluded people based on the math at the transaction price, those excluded people, they're now bearing the cost of the judgment without the offsetting value that they would get if they were part of the class.

ATTORNEY LESSNER: I think what Your Honor is saying is at the time of the transaction, whether dual stockholders should be paid or not, and we're not arguing that. We're not arguing that all the stockholders weren't entitled to 25.50.

So at the time of the transaction, the stockholders received the money -- the stockholders received the merger consideration, and we're not arguing that -- from -- that merger transaction itself, it should have excluded dual stockholders.

THE COURT: I'm not positing that.

ATTORNEY LESSNER: So we're not -- Your Honor, as far as the time difference, where we're saying just look at the people at the time of the transaction and not six years later, like right now,

you're saying --

THE COURT: I get that too. We're freezing the universe of stockholders as of the time of the judgment.

ATTORNEY LESSNER: The judgment, yes.

THE COURT: I'm sorry, as of the time of the transaction.

ATTORNEY LESSNER: The transaction. Okay.

THE COURT: All right. Look, we'll move on. I'm not successfully communicating my point, which may be likely due to my own inability to communicate.

ATTORNEY LESSNER: I'm sure it's mine, Your Honor.

THE COURT: No, no.

You were going to shift on to the individual appraisal claimants.

ATTORNEY LESSNER: Yes. Yes.

So, Your Honor, there's no question that the 19 stockholders who owned the close to 9 million shares, who were actual petitioners in the appraisal case, they are bound by the rulings of the appraisal case.

So the question is -- and then -- again, we're just focusing on those particular stockholders because Your Honor has already held at the motion to dismiss stage that stockholders who are not part of the appraisal are not bound, and so therefore focusing solely on the appraisal petitioner stockholders.

So I don't think there's any question that the appraisal petitioner stockholders are bound by the rulings -- by the rulings in the appraisal.

The same way Your Honor has ruled on the partial summary judgment motion that TransCanada is bound by the law and facts as found in the appraisal, but Smith and Skaggs were not.

Now, so -- and in the partial summary judgment ruling, Your Honor found, in the context of the appraisal decision, where the argument was made, that the Court can give credence to the 25.50 because it was approved by an overwhelming amount of Columbia stockholders, and the Court rejected that as an indicia of fair value because the Court ruled that there were fiduciary duties of disclosure violations and therefore the Court could not rely on that.

The same way -- so our argument is,

the same way the Court held that it had found a breach of fiduciary duty violation in the appraisal, in that context, and that the parties to it are bound by that ruling, the same way the petitioners in the appraisal case are bound by the Court's holdings that the sales process was sufficient to rely 100 percent on the appraisal price.

And we are aware of no cases where a sales process that was the subject of a breach of fiduciary duty would -- could be relied upon for a hundred percent. It would be what we could say is a tier 1 or tier 2 process.

Therefore, you could not have -- the necessary holding of the appraisal case was that there was the sales process, which is relied upon a hundred percent, could not be the product of a breach of fiduciary duty. And the only duty in that case is the sales process, so it was your *Revlon* duties, the duty to attempt to get the best price reasonably available, and that that process had to be within a range of reasonableness.

And so the Court, having relied on the sales process a hundred percent for the sales price -- I'm sorry, for the 25.50 fairness is a necessary

implication that the stockholders who were the petitioners in the appraisal case are bound by that ruling. That is the premise on this motion for class action certification, that those stockholders should not be included.

THE COURT: And, again, I take your point that the appraisal petitioners would be bound by the factual findings in the appraisal determination.

But how is your argument that the factual findings in the appraisal decision foreclose any breach of fiduciary duty claim different from the argument I addressed at the motion to dismiss stage?

ATTORNEY LESSNER: It's a different context, Your Honor. And the motion --

THE COURT: How is the argument different? I get that it would have a different implication in that, at the motion to dismiss stage, it would have resulted in the dismissal of the whole case, whereas at this stage, it would only result in the exclusion of the appraisal claimants from the class, but how is the argument different?

ATTORNEY LESSNER: The argument is different in that in the motion to dismiss, it was an argument based on preclusion, that the stockholders

were not bound, all stockholders were not bound, and that Your Honor rejected that and said that they are not precluded from that finding.

The next day, in the summary judgment, the Court did find that there was -- that the appraisal case had found a breach of fiduciary duty and that the -- TransCanada, as a party to the appraisal, was bound by that ruling of a finding of a breach of fiduciary duty coming out of the appraisal action.

So in the class context, what the Court, at least the way I've read it, the Court has held that it made a finding of a breach of fiduciary duty in the appraisal action and that those parties were bound to it.

And in -- the necessary implication is the Court found in the appraisal action that there was not a breach of fiduciary duty because --

THE COURT: That's what I want you to focus on. The first part that you talked about is what I'm not fighting you on and what I said I take your point on.

I want you to focus on the second part --

ATTORNEY LESSNER: Yes.

THE COURT: -- which was also raised at the dismissal ruling, which was the idea that those findings meant there could not be a breach of duty. Why isn't that the same argument that you're making now?

ATTORNEY LESSNER: So, one -- and I'll go -- one, because it applies only to the petitioners; and two, as we put in our brief, Your Honor, the issue was fully litigated by the petitioners. They took discovery on it. All the stuff we said in our brief, they fully litigated that issue and it was necessary --

THE COURT: The issue that I'm trying to get you to focus on is the assertion that the fair value finding in the appraisal case was the legal equivalency of a no-breach finding under enhanced scrutiny.

Why isn't that the same argument that you made at the motion to dismiss stage and that I already ruled on?

ATTORNEY LESSNER: Okay. That ruling, to the extent Your Honor ruled that the class -- that the members who are not appraisal petitioners are --

that the Court did not find -- the Court did not go into the issue of fiduciary duty. Okay. That is, I guess -- you say -- that is not being made in the context of the class certification and --

THE COURT: Let me just read some text to you. This is from page 2 of the dismissal decision.

"The Appraisal Decision held that [a] sale process was sufficiently reliable that the deal price provided a sound indication of the Company's standalone value. The Appraisal Decision did not determine whether Skaggs and Smith breached their fiduciary duties, nor did it address the claim that the Company could have obtained a higher deal price from TransCanada or from a competing bidder if Skaggs and Smith had not acted as they did."

I also said the Court had characterized the appraisal decision as addressing, and here again I'm quoting, "a narrow question: The fair value of [Columbia] as a standalone entity operating as a going concern."

Look, I understand you disagree with those rulings. I understand you think they're wrong. But why isn't that the exact same issue and the exact

same argument you're making now? It's just instead of saying that it is a clean winner under either preclusion or, remember, you also argued *stare decisis*, and this would be the *stare decisis* version, most plainly, why isn't that the exact same argument that you're now making as a basis to exclude the appraisal claimants from the class?

ATTORNEY LESSNER: It is, Your Honor.

THE COURT: So why do you get to do that?

ATTORNEY LESSNER: It is the same argument. It's in a different context and it's with -- it's not on a motion to dismiss.

THE COURT: Is it law of the case?

ATTORNEY LESSNER: I don't believe it's law of the case, Your Honor.

THE COURT: Why don't you believe it's law of the case, Mr. Lessner?

ATTORNEY LESSNER: Because the law of the case deals with an issue that was decided -- as an issue that was decided as a matter of law in the context of what it was argued.

THE COURT: Under your view of law of the case, why would there ever be law of the case or

fact, because it's a different motion? It's a different motion. It wasn't a motion to dismiss. It's a motion for summary judgment. It wasn't decided under the summary judgment standard. It was decided under the Rule 12(b)(6) standard.

ATTORNEY LESSNER: Even if it was law of the case, Your Honor, we cited law that says that Your Honor can revisit issues prior to a final judgment.

THE COURT: At least we got to the point where -- keep going.

ATTORNEY LESSNER: In that ...

Just one last point on that so I don't let it stew, and I brought it up before.

In the context of the motion to dismiss, it was argued on behalf of different -- I would say different elements on behalf of the appraisal petitioners. In this case we put in front of Your Honor -- on this procedural posture, we put in front of Your Honor all of the facts that -- they argued the same issue -- and that they argued the same issue and the Court ruled on the issue in the same way the Court may reconsider or consider the class action motion in light of the -- in light of what the

arguments were in the appraisal case by the petitioners.

And other than that -- and if it is the law of the case, it's an issue that can be revisited in the context of the class certification or it can be revisited at any time before the end of the trial.

Okay. And that, Your Honor, was really -- talk about the issues as far as the broad class, but I think Your Honor takes our point that the class is overbroad because of the dual stockholders, the appraisal stockholders. And once the Court were to reach the conclusion that it has to look at the -- it has to look at these things in determining who the class is, everything else flows through the 23(a) elements and the 23(b)(3) elements and is simply an application of standard law.

THE COURT: Thank you.

ATTORNEY LESSNER: Thank you, Your Honor.

THE COURT: Do we have a quick reply on this?

ATTORNEY WEINBERGER: Yes, Your Honor. Thank you. I'll be very brief.

I will note that a number of the arguments I heard are straight out of the objection to the settlement as opposed to the opposition to class certification, and Mr. Lessner was -- Your Honor had asked a question also about TransCanada's assertion that this is not a common fund case or a common fund settlement.

The objection to the settlement says, explicitly, "this is not a derivative case or 'common fund' settlement." So that -- they have, in fact, made that obviously erroneous assertion.

Again, just very briefly on the dual holdings, again, all answered by *Urdan*. Mr. Lessner mentioned *Wit*. *Wit* is a case involving personal claims, breach of contract, breach of a brokerage agreement, not stockholder claims associated with the property. This notion of looking to other contexts where the court assesses an individual or entity's financial interest, such as in a board vote or a stockholder vote, completely different context.

There, the court is trying to determine whether or not to defer to a board decision or to a stockholder decision. Perhaps the Court's considering whether or not an officer or director's

conduct has been called into question by some interest they may have that's not the same as the interests of other stockholders.

I made the point before about burden. TransCanada, Mr. Lessner, they haven't identified the individuals in the class who actually have these supposed cross-holdings.

In *Straight Path*, at least, defendants -- and we undermined this -- Mr. van Kwawegen deposed the expert there. They at least came forward with data, with information purporting to show that there was substantial overlap among the classes.

THE COURT: Look, it's got to be; right? This is part of the reason why, even though there's the professed view that this wouldn't change anything, I mean, these are two widely held companies. We know about the levels of cross-ownership in the market. I mean, there's got to be a lot of cross-ownership. That's why this would essentially be a recurring issue.

What also no one has shown me is why there's anything unique about TransCanada and Columbia that would not make this something that would be a far

more wide-reaching precedent.

What's your take on that? You don't think that there's not cross-holdings, do you?

ATTORNEY WEINBERGER: No, I would presume there are cross-holdings. I mean, we know the data generally with diversified investors and the way mutual funds and other institutional investors invest, if the rules they are advocating are to be the rules in Delaware, we are likely done with the class action mechanism, which becomes so cumbersome that it's almost unmanageable. At a minimum, we revert back to the claims process that --

THE COURT: Yes. Again, it certainly becomes massively cumbersome. Essentially, what you have to do is you have to do a mid-case claims process to figure out who's going to be in the class. So think how expensive an end-of-case claims process is or a settlement claims process is and all that that requires.

I mean, one can say with a straight face that class actions wouldn't be gone, but I guess what I don't want to do is have you say to me, oh, they haven't come forward with evidence that there's cross-ownership and create the impression that the

reason why it would be okay in this case is because there's not likely to be some cross-ownership.

I think that would be closing our eyes to the fact that, as you also point out, there's got to be substantial cross-ownership. I mean, I don't know what the level is, but there's got to be some.

ATTORNEY WEINBERGER: And there's nothing unique about this case. In that regard, this is a garden-variety merger, and strategic mergers happen all the time. Folks in the same industry buy one another.

THE COURT: Anyway, I interrupted you because I just didn't want to go down the road where we were presuming to engage on a basis where we were pretending that there really wasn't likely to be cross-ownership because nobody had come forward with plain evidence of the magnitude of cross-ownership, but I don't want to throw you off in terms of whatever else you wanted to say in your reply.

ATTORNEY WEINBERGER: Well, I'll only make one more point on the cross-ownership, and that is with respect to Detroit specifically, because I did not address -- I addressed our affirmative points on adequacy when I stood up at the podium before, but the

notion that having a nominally larger dollar stake in an acquirer that is three times the size of the company being acquired, that that somehow creates a conflict or whatever, create any type of right of offset, we just fundamentally disagree with that.

And, certainly, in terms of, you know, adequacy in this case, again, Your Honor, I'd say the best objective evidence here is, you know, what have these stockholders done today. Is there any suggestion, as TransCanada says in its papers, that Detroit is adverse, is somehow adverse to the members of the class or has acted adversely at any time? To the contrary, basically all the history shows advancing the interests of the stockholder class.

One last point, Your Honor, I just want to make on this. The notion of the impact of the appraisal decision on factual findings made in the appraisal trial with respect to appraisal petitioners who may be members of the class, you know, in thinking about it more, I mean, as I understand *Cede v. Technicolor*, the stockholders have a right to elect their remedies following a trial, a trial of all claims.

There has not been a trial of all

claims here, and as I mentioned before, there's not been a trial of all claims because TransCanada opposed a trial of all claims.

So I want to somewhat walk back what I said before, having considered it more under what I understand to still be binding precedent in Delaware, that that is an appraisal petitioner's right to elect whether or not, following a trial, that stockholder wants to have some other remedy.

And I think that's sort of consistent with *Orchard*, where there was a trial, and the appraisal petitioners who were included later in the settlement class were effectively topped up to receive the remedy that the fiduciary plaintiffs had secured in the class action case.

Unless Your Honor has any questions, that's all I have.

THE COURT: All right. Thank you.

We've been going for 90 minutes. I appreciate everyone's presentations and patience on this issue. Let's take a 15-minute break.

And when we come back, I think I'm going to go ahead and give you an answer on this motion, and then we'll move on to the settlement

approval motion.

Thank you, everyone. We stand in recess until 11:00.

(Recess taken from 10:45 a.m. to 11:00 a.m.)

THE COURT: Welcome back, everyone. I appreciate your time and your presentations this morning, and your briefing.

We have two matters to address this morning. First is the motion for class certification. The second is the approval of the settlement.

I'm going to go ahead and address the first question now, and that's the motion to certify class that would be used to litigate this case going forward. It's not a class for all time. It can be modified for good cause shown. Absent modification, it's the class that will be used to litigate this case to judgment.

In terms of the factual background, I'm not going to spend time on that. I would refer people to a decision dated March 1, 2021, which I think of as the dismissal decision, that denied a Rule 12(b)(6) motion to dismiss. There's also background in a decision issued August 12th, 2019, which I think of as the appraisal decision, which was

a post-trial decision in the appraisal action.

I'm also not going to go through chapter and verse on the language of Rule 23(a) and (b) and what they say. I'll let you-all, in the interests of time, look up those things on your own if anybody wants to examine the actual text.

So what I'm asked to certify today is a class that is defined as "all public stockholders of [Columbia] at any time from July 6, 2015 through and including July 1, 2016 ..., including any and all of their respective successors-in-interest, successors, predecessors-in-interest, predecessors, assigns, and transferees ...," and then there are exclusions for the defendants, parties associated with TransCanada and their affiliates.

This is a standard class definition for an M&A case. One could find literally thousands of settlements agreeing to a definition like this. One could find, I suspect -- I don't know what the order of magnitude is, but I would bet it's north of a hundred, certainly high double figures using these types of definitions for litigation classes. So I start from that premise that there is nothing exceptional in any way about the proposed definition.

TransCanada has objected to the definition. The opposition struck me as a little bit like coleslaw: They chopped up a lot of cases on class actions from a lot of different contexts and pulled in quotations, then threw it all together into one somewhat slimy bowl of stuff. I think their arguments rest on very basic misunderstandings about how a corporate class action works and how this court has adjudicated and certified classes for quite some time.

TransCanada's objections can largely be divided into three categories.

The first is problems with the class definition as to its breadth.

The second is with problems under Rule 23(a).

And then the third is problems under Rule 23(b) and the appropriate mechanism for certification.

One of the principal themes throughout TransCanada's opposition is this concept of cross-ownership. TransCanada starts from the plaintiffs' premise that TransCanada aided and abetted a breach of fiduciary duty by Smith and Skaggs that

resulted in TransCanada paying too little to acquire Columbia. It then says, well, that necessarily must mean that TransCanada's stockholders benefited from that outcome. TransCanada then envisions a world in which the Court looks through TransCanada, effectively piercing the veil of TransCanada, to determine how much TransCanada stock each investor in Columbia owned.

The Court then nets out the alleged benefit, and if the investor owned more TransCanada stock such that it was a net benefiter rather than a net loser, then those stockholders are excluded from the class. Essentially, TransCanada maintains that the class can only include net losers.

I think this notion of certifying a class based on net losers and net gainers is conceptually wrong in many ways. There's nothing unique to this case that would warrant it. There is no material difference that would distinguish this case from the other cases in which this court regularly certifies classes of the type proposed and does so under (b)(1) and (b)(2).

As I noted, the premise requires looking through TransCanada to assess its individual

stockholders. It also treats the benefit as something that those stockholders would be entitled to receive, when in a situation where the net loser/net gainer concept becomes pertinent, what there would be is an adjudicated fiduciary wrong.

Most importantly, I think it ignores the distinction between personal claims, which individuals hold, versus claims associated with a property right. So, in other words, claims that persons hold in their capacities as stockholders.

(b)(3) classes are associated with the former. (b)(1) and (b)(2) classes are associated with the latter. The TransCanada approach is a (b)(3) individualized injury approach that looks at the individual. One needn't stop at cross-ownership. One could look at the individual in all respects, as one does in other settings, to see if they were harmed or helped, rather than simply looking at that person in their capacity as a holder of shares, which is what Delaware law does.

So let's start with the objections to the class definition. As I noted at the outset, it's a standard class definition. TransCanada objects that the class is overbroad because it includes all public

stockholders from July 6, 2015, through and including July 1, 2016. TransCanada professes not to understand why that definition would be appropriate. It is customary to start with the beginning of the time period that's potentially covered by the sale process and end with the closing of the merger.

Now, I'll say that's not required, and it's not required for Delaware law purposes, because, as we know from the Delaware Supreme Court's decision in *Urdan*, the claims that are being litigated in this case, and which are generally litigated under Delaware law, travel with the shares. So folks who were owners at the start of that class period but not at the end of the class period because they sold, gave up their shares and sold them to the new owner. The right to bring and benefit from these claims traveled with that transaction.

Likewise, somebody who dipped in and dipped out of the stock during the class period. That person acquired their shares, would be entitled to be a member of a class asserting the Delaware claim as of the time they were an owner, and then dropped out again when they sold their shares.

What this means is that the Delaware

law claims for breach of fiduciary duty, whether they be the sale process claims or the disclosure claims, ultimately end up being held by the owners of the shares at the effective time. The class period only needs to cover the shares at the effective time.

A temporally broad class definition in a Delaware case only benefits the defendants. It doesn't change the *quantum* of damages because of this factor of claims passing with the shares. What it does is it gives broad *res judicata* effect to the judgment, such that if the defendants prevail, great, a large class, a temporally broad class is bound.

If the defendants don't prevail and they have to pay some money, okay, but at least a temporally broad class is bound. So it is counterintuitive for the defendants to come in and say, no, no, we want a shorter class period. This isn't something that affects the count of shares in the class, which is something that the net loser/net gainer concept addresses.

The time period is something that, again, I don't see any basis for it to benefit TransCanada, but I think what TransCanada is here to do is make whatever arguments it can, and this is an

argument that it had, and so it made it.

So I am going to acknowledge that TransCanada has a valid point. The only stockholders that need to be in the class for purposes of the claims that will be litigated to judgment are those stockholders at the effective time. So I am going to modify the class definition to refer to the public stockholders of Columbia as of the effective time on July 1, 2016, subject to the exceptions that were in the original definition.

The next argument that TransCanada makes is that the class impermissibly includes 19 Columbia stockholders who were parties to the appraisal action and are bound by the appraisal decision. One consequence of the Delaware Supreme Court's ruling in *Cede v. Technicolor* is that a stockholder can pursue an appraisal and a breach of fiduciary duty claim. The only limitation is that the stockholder can't recover duplicative remedies.

In *Technicolor*, the Delaware Supreme Court recommended deciding the breach of fiduciary duty case first because that remedy is likely to be broader and could moot the appraisal case. At a minimum, the two are usually tried

together.

Here, that's what the plaintiffs sought to do. TransCanada resisted that approach and obtained a ruling from me saying that they did not have to try the fiduciary duty class with the appraisal claim. So we did the appraisal claim first.

There's nothing wrong with including the appraisal petitioners in the class. The plaintiffs have cited the *Orchard Enterprise* cases, which I think are on point.

What I do think is a fair point for TransCanada to raise is that it is likely true that as to factual findings made in the appraisal case, those factual findings are binding on the parties that actually litigated that case. Thus, the 19 Columbia stockholders who actually litigated that case to judgment, I think it is true, as a matter of issue preclusion, are bound by factual findings in that case.

Now, TransCanada takes the next step and asserts that those appraisal members can't be part of the class because their claims for breach of fiduciary duty arising from the sale process, their *Revlon* claims, are barred based on the findings that

were made in the appraisal case. This is the same argument that was made as to all plaintiffs at the motion to dismiss stage. It was advanced as a matter of issue preclusion. It was also advanced as a theory of *stare decisis*. The Court rejected that argument.

I quoted earlier from pages 1 and 2 of the dismissal decision, which summarized the Court rejecting that argument. That's law of the case. I understand that the defendants disagree with it. That's their right. They sought interlocutory appeal on that point, so there's no question that they disagree with that outcome. But for purposes of this proceeding, that's a ruling that I have made.

Now, the narrower point, though, that factual findings could be binding on the appraisal petitioners, is a meaningful one. So the question is how to proceed.

It may not make any difference. I may make the same factual findings that I made in the appraisal case. Or there might be factual findings that differ but which lack any legal significance. So my view is that the best course is to try this case. After I've issued a post-trial decision, there can be an opportunity for the parties to address whether the

Court has made factual findings that, A, differ from the appraisal action and, B, have legal significance as to the outcome. If there are such factual findings, then I would have the ability to create a subclass consisting of the appraisal claimants. I don't have to do that now. I can do that once we know whether that's a real problem or just a hypothetical problem.

All right. So those are my rulings on the class definition. I'm now going to use that definition to analyze Rule 23(a) and (b).

For purposes of Rule 23(a)(1), numerosity is plainly satisfied. There were over 400 million shares of Columbia common stock outstanding and entitled to vote as of the record date. It's reasonable to infer that that same amount of shares was outstanding at the effective time. That is a quite-large number, sufficient to satisfy Rule 23(a)(1), particularly when the record reflects that those shares were held by approximately 22,000 holders of record.

The next question is whether there are common questions of law or fact under 23(a)(2). This element is satisfied where the questions of law or

fact linking the class members are substantially related to the resolution of the litigation. That's from the Delaware Supreme Court's decision in the *Leon Weiner* case from 1991.

In the *Marie Raymond Revocable Trust* decision from 2008, this court held that the commonality requirement was met when the plaintiff alleged injuries to all investors stemming from a common course of action by defendants, including an alleged breach of the defendants' fiduciary duties owed to the class in connection with the transaction at issue in that case, which was an exchange offer.

It's true that there can be some cases where common questions of fact sufficient to certify a class do not exist. This is not one of them. This is a standard M&A deal case. From a class certification standpoint, there's nothing different. There's nothing unique. The defendants took action that affected the stockholders proportionally based on their ownership of Columbia stock. All of the legal issues in the case are common across the holders of the common stock. Those questions include whether Skaggs and Smith breached their fiduciary duties in connection with the merger, whether TransCanada aided

and abetted Skaggs and Smith's breaches of fiduciary duties, and whether the sell-side stockholders are entitled to damages.

Now, this is one of the main places where TransCanada trots out its net losers/net gainers theory. TransCanada asserts that the class would need to be significantly pared back to exclude net gainers. I think that this argument treats the class as if this was going to be a 23(b)(3) class comprised of individuals like mass tort victims or antitrust plaintiffs, where we'd have to work through each person individually to assess the degree of harm. That's not how these claims work.

As I've already stated, under *Urdan*, the rights being asserted travel with the security. They exist because of the person's capacity as a holder of the shares. One doesn't look to the person as an individual. One doesn't consider, for example, as one would do if one were a trustee considering the interests of one's beneficiaries, whether that person needed money because of their age or sickness or financial situation or children or employment status or any of these things attendant as to that person's individual capacity.

One might, indeed, if one were a trustee, take into account someone's other investments when making a decision as to what to do in the best interests of that beneficiary.

That's not how corporate fiduciary duties work. Fiduciary duties are owed to the corporation and its stockholders, and what that means is people in their capacity as owners of the shares. We don't ask whether those people needed money because they lost their jobs. We don't ask whether those people might benefit from a longer holding period because they're really wealthy and don't need the cash right now. We don't ask whether those people might really need to sell because they actually had some medical tragedy and need the money. What our cases say is that the directors have a fiduciary duty to strive to maximize the value of the equity.

There's actually a pretty humorous law review article on this. I think it's humorous. It's by a fellow named Daniel Greenwood. And it's from 1996, and it's in the Southern California Law Review. It's called "Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited."

He goes through this analysis from the

point of view of satire to try to say that it's silly for corporate law not to think about the individual interests of persons in the way that I've just articulated, but sometimes satire can be insightful. Think about Jonathan Swift. What he actually shows is that this is really how we think about these things.

So one of the things that we don't do, is we don't look through to individualize damages based on buy-side holdings which would require ignoring the corporate separateness of the acquirer and looking through to the effect at the time of the deal on the individual stockholders.

Now, that doesn't mean that we have to blind ourselves to cross-holdings in other contexts. And I'm going to get to 23(a)(4) in this case. Cross-holdings can create incentives, and so in a setting where incentives are important for decision-making, one can consider the decision-makers' incentives. That's why, as counsel points out, we have considered cross-holdings when we think about things like whether individual directors are disinterested and independent or who should be included in the definition of disinterested and independent shares. We think about these things in

those contexts because of their implications for approval and what the approval decision means.

We don't -- at least we never have, and I don't think we should -- do that same type of look-through for purposes of a damages analysis in a corporate case involving a (b)(1) or (b)(2) class where the claims arise and are attached to and travel with the shares and are therefore reflective of harm to the person in their capacity as a holder of the shares, not harm to the person in their capacity as the holder of inalienable rights to life, liberty, and the pursuit of happiness.

Here, liability can be determined on a class-wide basis. The issues can be determined on a class-wide basis. If there is a remedy, it will run against TransCanada, not against its stockholders. As I tried to inquire, but I think I did so inaptly and ineffectively, is how the fact that TransCanada pays the judgment -- if, indeed, there is a judgment, because that's the only setting that really matters and would work through indirectly to the cross-owning stockholders and effectively inflict harm on them. That is a factor that doesn't seem to me to be taken into account in the objection that TransCanada has

raised.

So I do hold, to be clear, and I think there was an invitation to be clear on this, I do think, as a matter of law, this is not something we do. I'm not making this finding based on the idea that there isn't cross-ownership. I think that would be a counterfactual assumption. I think there likely is cross-ownership. I think there likely is cross-ownership in virtually every deal case involving two publicly traded companies, and so I think that this is an issue where a change would have quite significant policy ramifications.

All right. Now, let's talk about Rules 23(a)(3) and (a)(4). Rule (a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. For all the reasons I've now explained, the lead plaintiffs' claims and injuries are typical. They are viewed for purposes of this action as sell-side stockholders. It is not a unique defense or disproportionate defense for them to have a potential buy-side interest, or in the case of Detroit, to have an actual buy-side interest. So typicality is satisfied.

Now let's talk about Rule 23(a)(4). Rule 23(a)(4) asks whether the representative parties will fairly and adequately protect the interests of the class. This is an inquiry into decision-making. This is an inquiry into whether the class representatives can fulfill their fiduciary duties. It therefore is, in my view, analogous to those settings where we have considered cross-ownership to determine whether directors have a conflict or whether stockholders can be validly included in the definition of the disinterested shares.

I do think that it is fair to take into account levels of ownership, and, indeed, cross-ownership, when evaluating whether the representative parties will fairly and adequately protect the interests of the class.

TransCanada argues here that Detroit can't meet this standard because Detroit is a dual stockholder that owned a substantially greater equity interest in TransCanada than in Columbia. TransCanada argues that Detroit's interest was seven times its interest in Columbia, that it therefore should be excluded from the class and can't be an adequate or typical class representative.

I've already explained why I don't think Detroit has to be excluded from the class. I have considered whether this level of interest should be a problem for (a)(4), and I am not at all convinced that it is.

Would I take it into account at some level? Yes, I would. Would I take it into account potentially when I was assessing a leadership structure and choosing between competing counsel? I might think about it there too.

I don't think this is irrelevant, but I don't think it is a factor in this case that warrants making a finding of inadequacy under Rule 23(a)(4). I think the plaintiffs and their counsel have proven quite graphically that they are diligent litigators who are pursuing the best interests of the class. They've been doing so for quite some time against significant odds, and they have obtained in this case a settlement, which I haven't yet approved, but which is indicative of their ability to act on behalf of and in the best interests of the class.

So having taken into account the allegations about cross-holdings, I do find that

Rule 23(a)(4) is satisfied.

TransCanada has further argued that Detroit can't serve as a representative plaintiff because its Rule 30(b)(6) representative was unprepared to answer basic questions regarding noticed topics. I didn't like the quality of the testimony that the 30(b)(6) witness gave. He should have been better prepared. He should have known more. But I don't think the answer is to disqualify Detroit or plaintiffs' counsel or hold that 23(a)(4) isn't met.

I think that when I take into account what I have seen, and particularly witnessed in terms of the litigation conduct and the vigorous efforts that the plaintiffs have put in, 23(a)(4) is met.

I'm also not moved by the argument that neither Detroit nor Mississippi could adequately represent the class because they failed to give informed consent to continue being represented by Bernstein Litowitz based on the order issued by the District Judge in California. I think that's, in the first instance, a question for Detroit and Mississippi.

It's not clear to me why TransCanada has the ability or should be able to argue that

Detroit and Mississippi needed to be protected from their own decision-making in this regard.

Now, what I do think about is whether this could evidence some type of compromised decision by Detroit or Mississippi and therefore an inability to oversee counsel that would lead to counsel not doing an effective job. And just as I've already said, I think that when viewed in the totality of the circumstances, that's not a point that moves me. So from my standpoint, all of the Rule 23(a) factors are satisfied.

The next question I have to deal with is certification under Rule 23(b). There are three options: (b)(1), (b)(2), and (b)(3). TransCanada argues that if the class can be certified at all, it has to be certified under Rule 23(b)(3). That is contrary to our law and a number of well-reasoned decisions by distinguished members of this court.

Chancellor Allen addressed the issue at length in 1991 in the *Hynson* case. He also talked about it in the *Mobile Communications* case.

Chief Justice Strine, when he was a member of this court, addressed it in the *Turner v. Bernstein* case. The defendants have cited a

decision by then-Vice Chancellor Steele in *Dieter v. Prime* that took a different approach. That decision predated *Turner*, and I don't think is persuasive.

I think if there was any doubt about the availability of 23(b)(1) and (b)(2) certification from the decisions of this court, we have a statement from the Delaware Supreme Court in 2012. I'm going to read it to you, "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). The availability of potential damages alone does not automatically require certification under Rule 23(b)(3)." That's from the *Celera* case.

Certification under this Court's precedents is plainly warranted here. A class is properly certified under Rule 23(b)(1) where the case involves "one set of actions by [the] defendants creating a uniform type of impact upon the class of stockholders." That's a cleaned-up version of a quotation from the *Turner* decision by then-Vice Chancellor Strine. That's exactly what we have here.

What our cases normally do is certify under 23(b)(1) and also say that 23(b)(2) is another vehicle. That's what I think as well. The plaintiffs seek class-wide declaratory relief. That can be a vehicle for 23(b)(2) certification under our precedents, so I can certify under both 23(b)(1) and 23(b)(2)

So the bottom line is I'm certifying the class. The one modification I'm making is that I'm certifying the class comprising the stockholders as of July 1, 2016 at the effective time, and I am acknowledging the possibility that it may be necessary at a later time to think about the appraisal claimants once we know whether that issue matters or not.

I appreciate you-all bearing with me.

Any questions on that before we turn to the settlement? It's technically the plaintiffs' motion, so I'll start with you.

ATTORNEY WEINBERGER: No, Your Honor. No questions. Thank you.

THE COURT: Defendants?

ATTORNEY LESSNER: No questions, Your Honor.

THE COURT: Great. Thank you so much.

All right.

ATTORNEY van KWAWEGEN: Good morning, Your Honor. Jeroen van Kwawegen from Bernstein Litowitz on behalf of the plaintiffs.

Your Honor, I'm proud to stand here, very proud of this settlement. The question before the Court is whether the settlement, plan of allocation, and the fee are fair and reasonable, and we respectfully submit that they are.

Your Honor saw from the papers that over 100,000 Columbia -- the pipeline stockholders, former stockholders, received notice, and we know that they paid attention because when there was an error in the signing -- in the sending of the notice, they started calling us, and we corrected that mislabeling of the notice.

So it is not the case that this notice just went into the garbage and nobody paid attention. People were actually paying attention. And after they paid attention, no former stockholder came forward and said, we object to the settlement, we object to the plan of allocation, we object to the fee. And we respectfully submit that there's no reason to do so.

When you think about the settlement,

it's a $79 million settlement, one of the largest settlements against individual defendants with respect to *Revlon* claims. One of the largest partial settlements that I think has ever been presented in this court.

And, as Your Honor saw from the papers, clearly the result of hard-fought litigation against well-skilled adversaries and the result of hard-fought negotiations. I have deepest respect for the Wachtell firm, Mr. Savitt, Mr. Yavitz. These were not easy negotiations, I can assure Your Honor.

So respectfully, we honestly believe this is one of the best settlements we could have achieved at this point in time. We are very proud of it.

When you think about the plan of allocation, plan of allocation has been consistently applied like this since *Dole* and *PLX* and *Starz*, and it has been consistently used in this court since those cases.

And in the past, there have been objections to that kind of plan of allocation from former stockholders. I remember vividly an objection to the allocation in *Starz* from a former stockholder

who said, you know, this system where you have direct deposits don't make sense, and Vice Chancellor Glasscock overruled that objection. And the reason I think, fundamentally, is the acknowledgment that no plan of allocation is perfect.

When the choices are between a claims-made process and a direct deposit, there is no perfect answer. The claims-made process has significant flaws. I do securities litigation in addition to litigation in this court, and Your Honor earlier today alluded to the cost of administering those plans, but in addition to that, many small stockholders never get paid. They don't fill out the form because their holdings are too small or because of some other reason that I don't know.

Whereas here, in this court, the plan of allocation ensures that all stockholders, as of the effective date, or virtually all of them, will get paid, which I submit, respectfully, is a significant benefit of the system that this court has created.

Now, again, no former Columbia stockholder has objected to this plan of allocation after the Court-approved notice went out, which, of course, describes this plan of allocation in detail.

And then finally, the request for fees has also not been opposed by any stockholder. And Your Honor saw from the papers, we respectfully request payment of 23 percent of the settlement, which amounts to an hourly rate of less than $1400 an hour, which is far below the rates that this Court has approved in the past.

So normally I would have stopped there, but, of course, we know that TransCanada lodged an objection, so let me just quickly turn to that.

Your Honor, there are three fundamental problems with TransCanada's objection.

The first one is standing.

The second one is the assumption that the settlement class must be identical to the litigation class.

And the third one is that TransCanada has some right of setoff as opposed to a right to a judgment reduction in case the requirements are met.

Those are the three fatal flaws, Your Honor.

With respect to standing, TransCanada is not a party to the settlement, not making any payments, not releasing any claims. They have no

interest in this settlement that needs to be protected.

And they could have protected those interests if they had any, because we know that TransCanada's counsel reviewed both the term sheet and the settlement stipulation before Mr. Skaggs and Mr. Smith entered into those agreements. That, I think, could end the inquiry, Your Honor. They have no standing to raise any objections.

But let's assume for a fact that we're going to entertain those objections. Well, the second fatal flaw is this assumption that the settlement class must be the litigation class, and Your Honor touched on that a little bit during the discussion with my friend, Mr. Lessner.

There's no legal support that those two classes must be identical, and there's a good reason for that. They serve different purposes. When you think about the settlement class, they are the product of a negotiation, and I can tell you, Your Honor, this was a vigorous negotiation between us, on the one hand, and the Wachtell firm on the other, because the settlement class, and the size of the settlement class, ties directly into the release

that the defendants are getting, and they are very interested in getting that release. And it's not just them. It's also the insurance carriers that pay for a settlement. And so there's a multi-level negotiation going on at any given time.

At this point, I think it's important for me to call out one of my colleagues, his name is John Mills, and he is the person at my firm in our settlement department who is involved in every settlement that is presented to this court where my firm is involved.

There's a practice now that whenever we have a settlement in this court, my firm, including Mr. Mills, take the laboring or -- on documenting the settlement for the plaintiffs and negotiating the class releases.

And so here, what happened was, there was a hard-fought negotiation with Mr. Mills and me on one hand and Mr. Yavitz and Mr. Savitt on the other hand about that particular issue. And, of course, the defendants are interested in getting as broad a release as possible, but we, as shareholder lawyers, take it very seriously that the release should not be too broad and that it should be narrowed and tied to

the actual conduct or the merger or the claims alleged, all subject to court approval.

That, Your Honor, is a fundamentally different proposition than what Your Honor is determining, like Your Honor just did, whether or not a class should be certified for legal purposes.

And we respectfully submit under the authorities submitted by us and also by the supplemental letter that was submitted by Mr. Lafferty that the authorities fully support this practice and that when you look at the release here and the claim definition -- the class definition here, they are consistent with many, many, many, many settlements that have been approved by this court.

The final fatal flaw, I think, in TransCanada's objection is this notion that they have a right of setoff and that somehow, if there's a distribution that is being paid to the class, that that could impact the rights of TransCanada. It doesn't.

There's no scenario under which passive class members receive payment of this partial settlement and would have to give it back. There's no scenario in which TransCanada could have some kind of

claim against the passive class members who have received settlement.

What there is, is a possibility that following a judgment -- and assuming that there is a judgment in favor of the plaintiffs -- that TransCanada can make a showing that it is entitled to judgment reduction under DUCATA, and that was included in the settlement and it is the law of this court.

But that judgment reduction will never result in passive class members having to repay anything or a new allocation of this particular settlement to the passive class members, and that's partially so because TransCanada is not a class member.

Your Honor, that's all I wanted to say, unless Your Honor has any questions about this.

THE COURT: Thank you.

ATTORNEY LESSNER: Your Honor, we don't oppose the settlement. We don't -- our opposition was based on that the plan of allocation should match the litigation class, and we've already made that argument.

Other than that, we have no objections to the settlement.

THE COURT: Translate that for me into smaller words that I'll be able to comprehend better.

In terms of the plan of allocation, just spell that out for me a little bit more.

ATTORNEY LESSNER: Our concern was that if the plan -- if the plan of allocation allocated -- gave money to stockholders who the court did not consider to be members of the class when the time came, if the time ever came, for setoff or reduction, that there could be an argument that we were not entitled to the amount that was allocated to people who were not damaged or who otherwise weren't members of the class.

Here, I hear plaintiffs' counsel saying that the time comes that TransCanada, if it ever comes to that, would be entitled to the entire setoff of $79 million, that there's not an argument that would be made that if the classes were different that there would not be a reduction or credit for people who were in the settlement class but who were not part of the litigation class.

THE COURT: Spin out for me a little bit more the argument that you're making about the allocation problem. I honestly didn't follow it in

your papers, and so I need you to help me with it a little bit more as to what you thought could transpire and how you thought it would happen.

ATTORNEY LESSNER: I'll try to rephrase what I just said, Your Honor, but the concern was that in a settlement, that, at the end of the day, under *Rural/Metro*, if there was a judgment, that TransCanada would get an offset for the amounts that were paid.

If the amounts were paid under the plan of allocation to persons who were not part of the litigation class, then there would be an argument that we were not entitled to that offset.

THE COURT: Yes. And spin that one out for me. What would be the argument there?

ATTORNEY LESSNER: Well, there might not be an argument, but I could envision the argument that -- envision the argument that if you pay -- say the class was half different, say it was half the people -- it was only 200 million for the litigation class but 400 million for the settlement class. I could see an argument -- which apparently is not going to be made -- that the settlement paid 20 cents a share and -- but the ultimate judgment in the

litigation class was 40 cents a share, and so, therefore, you are not -- that you are only entitled to an offset of 20 cents a share, not the entire 79 million. That's the argument I can envision. It apparently is not going to be made. And --

THE COURT: And in the actual issue, the actual class definitions that were being proffered here, that potential risk would exist how under the original class definitions?

ATTORNEY LESSNER: The risk, as we saw it, was that ultimate damages were going to be awarded on a per-share basis. And so if you have the -- and so the settlement is a common fund, so it's 79 million among roughly 400 -- $79 million among roughly 400 million shares, and roughly 20 cents a share. Okay.

So the risk was that the litigation class was smaller, was different, was smaller. Say it was 200 million. Okay. Then the only credit or setoff or reduction or whatever we're talking about would be 20 cents a share and not -- would be the 20 cents a share from the settlement and not the entire -- the Court wouldn't -- or there would be an argument that that's all we were entitled to instead

of entitled to the full 79.

THE COURT: And the potential distinction between the two classes was because TransCanada was arguing that the litigation class should be smaller; right?

ATTORNEY LESSNER: Yes. And our understanding is that the litigation class should be the same -- the same factors as in the litigation class are the same factors --

THE COURT: For your concern, what you were envisioning was a litigation class that was smaller than the settlement class.

ATTORNEY LESSNER: Our concern was a litigation class, a settlement class that was greater than the --

THE COURT: So I view those two things as reciprocal. If the litigation class is smaller than the settlement class, it strikes me that the settlement class is greater than the litigation class.

Are you with me on that or do you have a different view?

ATTORNEY LESSNER: Of course.

THE COURT: Since you made the point of clarifying it, I thought that there might be a

divergence that you had picked up that I wasn't following you on, and I wanted to make sure that I wasn't missing a point that you were making.

We're on the same page?

ATTORNEY LESSNER: Yes, of course.

THE COURT: So why, if you-all argued for a smaller class and you win that and get the smaller class, would you still get the reduction for the full settlement? Why wouldn't it naturally follow that you would only get the lesser reduction?

ATTORNEY LESSNER: Well, Your Honor, I'm not saying that that's a winning argument. I'm saying that that's a risk -- I'm saying that that was a risk that we would face that argument at some time.

THE COURT: Right. But what you wanted to be able to do is to say we got this smaller class. We only have to pay the smaller judgment, but we should still get the offset based on the much-larger class that the settlement went out to.

ATTORNEY LESSNER: Well, not necessarily a class, Your Honor. It's the allocation. So it's our understanding the allocation should be tied to the class, that the people who were getting allocated the money for the settlement should be the

same people who are members of the class.

And so, therefore, if the plan of allocation gives people money, gives people the $79 million who were ultimately found not to be part of the litigation class, there could be an argument -- not that we think it's a valid argument -- but there could be an argument that TransCanada was not entitled to the entire offset, but only to the offset of the people who were paid pursuant to the class.

THE COURT: Yes, I guess I'm trying to understand why you would think you have a claim to the full boat. We've got two types of people in the settlement class, ins and outs, and the outs are the people who aren't in the class that you wanted to achieve, which was the much-smaller class, right. So 79 million goes to everybody in the settlement class.

What I understood you to be saying is, hey, we, TransCanada, we're going to successfully argue for a much-smaller class, we're only going to owe money to this smaller class and therefore pay a smaller aggregate damage award, and yet we want the full offset from the larger. We want the full 79 million. We just don't want whatever was allocated the ins.

Why would you get that?

ATTORNEY LESSNER: Well, Your Honor, that was why -- that was our position of why the allocation coming out of the settlement should only be to those people who -- the allocation -- the class definition is derived or is -- I'm going to say it's set aside. The real point here is the plan of allocation because, even under their plan of allocation, they were going to be allocating to what we believed was a broader group of stockholders than we had argued for, for the class certification. Which is why our understanding is that the litigation class should be the same as the allocation class because, ultimately, at the end of the day, we did not want to face the argument that Your Honor poses, and that is that the plan of allocation paid stockholders -- paid stockholders who were not part of the litigation class, and we wanted to avoid that argument, which is why we argued that the plan of allocation and the eligible stockholders and the -- should match with the litigation class.

THE COURT: All right. Thank you.

ATTORNEY van KWAWEGEN: Nothing further from me, Your Honor, unless you have

questions.

THE COURT: I want to know if Mr. Lafferty or his colleagues want to add anything. They did put in a response. I appreciate it. It was very helpful. I don't want to cut you-all off if you have anything to add.

ATTORNEY LAFFERTY: We have nothing further to add at this point, Your Honor.

ATTORNEY van KWAWEGEN: I apologize, Your Honor, but I also have nothing to add unless Your Honor has any questions.

THE COURT: All right. Great.

Well, I appreciate everyone's presentations. I'm going to go ahead and rule on the settlement now.

No one actually opposes the settlement. No one actually filed an opposition to the settlement. What TransCanada filed was a strange brief that said that TransCanada does not oppose the proposed partial settlement, *per se* but, nevertheless, raised an objection to the class definition.

I don't think TransCanada has standing to object. It's not a party to the settlement. It's not a member of the class. It's expressly excluded

from the definition. There is an exception, admittedly, where the nonsettling defendant can demonstrate they will suffer some formal legal prejudice as a result of the partial settlement. I don't see any basis for any claim of prejudice. To the extent that there is some form of liability imposed on TransCanada after trial, TransCanada will have its rights under the Delaware Uniform Contribution Against Tortfeasors Act. That's what TransCanada gets.

What TransCanada doesn't get is the opportunity to insert itself in an otherwise arm's-length bargain between two parties to restrict what they can agree to in terms of their releases and the class that they can propose.

Now, there might be some contractual basis for that. I don't know if TransCanada had a consent right. There's been the representation made that TransCanada reviewed the settlement terms when they were being negotiated. But in terms of this motion, I don't think that TransCanada had standing to object.

The parties had separately briefed the motion for class certification. The plaintiff didn't

re-engage on the class definition when it moved for approval of the settlement. TransCanada filed a brief that was in every respect a surreply on the motion for class certification.

I don't get it. We had this issue once in the case before. I think Mr. Yoch remembers this issue. I actually think Mr. Massengill was on the phone. I think Mr. Lessner was on the phone because he tried to speak up on it. I addressed this specifically.

I don't know why you-all are having so much trouble following the rules. I don't know what I can do to try to get you to follow the rules. The Court isn't used to having lawyers, particularly Delaware lawyers, have so much trouble following the rules.

I thought about striking this. I thought about imposing some additional sanction along the lines of the fee that I asked Mr. Yoch to pay, and which he responsibly did pay, and I appreciate his doing that.

I want to say again, I don't know what you-all are doing, and I don't understand it as a matter of judgment either. The key claim in this

case, or one of the key claims in this case, is that your client doesn't follow the rules. One of the key claims in this case, at least as it's shaping up, is that there was a "don't ask, don't waive" standstill that your client allegedly, with the help of its legal counsel, blew through.

And what you-all come in here and do is you keep demonstrating that same behavior. It's evidence of conduct, and there's reasons why and times when we can consider it. Intent is one. And what I've got is a party that is just repeatedly not following the rules, and I do not understand it.

I tried to be clear when I put Mr. Yoch on the spot the last time around as to what I expected. I wanted to put it behind us. I wanted a clean slate. I didn't want anybody to mention again. I suspect it was embarrassing for Mr. Yoch. It wasn't pleasant for me. I have a lot of respect for Mr. Yoch. Everyone on the Court does. And I thought we were going to be done with it. Yet here we are again. So I'd just ask you-all to think about it.

All right. My first task is class certification. I am not using the same definition for the litigation class that I certified. I'm going to

use the definition that is actually in the settlement papers. For all the reasons I discussed in my ruling for class certification, and which were ably presented by the plaintiffs and by Mr. Lafferty in his response, that type of definition is both customary and appropriate in a settlement context because one of the sets of claims that the plaintiffs also have the ability to release are the claims of claimants under other types of law, such as the federal securities laws or common law. We know that from *Matsushita* case, which was a decision related to the *MCA* litigation in this court.

So I have no problem certifying the class. I think it's clear that it doesn't have to be the same class that is used for the litigation. I see zero risk of prejudice to TransCanada.

In terms of the procedural requirements, the affidavits that were required under the rules have been filed both for purposes of Rule 23(aa) and Rule 23(e).

I have reviewed the steps that were taken to distribute notice of the settlement. The form of the notice was adequate. It was admittedly cursory. I had a discussion with my clerks, as I

often do, when they look at these notices and come talk to me about them and they say, this is really all it has to say? And I say, yes, that's really all it has to say. It adequately described the lawsuit. It adequately described the settlement consideration. It stated the location, date, and time of this settlement hearing, and it explained how the class members could obtain additional information by contacting plaintiffs' counsel.

The record reflects that it was adequately distributed. We have the affidavit of Eric J. Miller found at Docket Item No. 389 that attests to that effort. I appreciated the disclosure of the data error and the steps that were taken to remedy it. That's the type of candor that the Court is grateful for, and I commend A.B. Data for agreeing to pay for the updated notice. That strikes me as appropriate, and it is appreciated.

In terms of the merits of the settlement, the question is whether the terms of the proposed settlement are fair and reasonable, recognizing that this court generally favors settlement of complicated litigation. I, nevertheless, have to be involved because of the

fiduciary nature of the class action, which requires that the Court participate to determine the extent of the settlement's fairness. The core question is whether the settlement falls within a range of reasonableness that parties could accept. Those are paraphrases of *Gatz v. Ponsoldt*, the *Philadelphia Stock Exchange* case, *Polk v. Good*, and other decisions.

In terms of the settlement here, it is a settlement that I have no problem approving. The plaintiffs asserted claims that Skaggs and Smith breached their fiduciary duties during the sale process. The plaintiffs had established a meaningful evidentiary record supporting their claims that Skaggs and Smith had breached their fiduciary duties. That evidentiary record differed in material ways from the record that had been developed in the appraisal action because of differences in how discovery in this case unfolded. That doesn't mean that the plaintiffs were going to win. It's always difficult to prove a breach of fiduciary duty, so there was certainly risk.

The parties reached a settlement after negotiating at arm's length. The settlement consideration is $79 million, less the award of fees

and expenses. The settlement doesn't release claims against TransCanada, and the plaintiffs will be able to continue to seek an additional monetary recovery from TransCanada.

The plaintiffs have pointed out that in absolute terms, the settlement is one of the largest involving individual fiduciary defendants that have presented to this court. I've taken that into account. I've also taken into account the size of the settlement relative to the size of the transaction and the potential damages and those sorts of things.

Based on my consideration of the record and what has been presented, I think that the settlement falls within the range of reasonableness, and I am happy to approve it.

I would also like to express the Court's appreciation to Judge Layn Phillips, who assisted in the mediation and helped get this settlement to a conclusion. The involvement of a skilled mediator like Judge Phillips is always a positive factor that gives the Court comfort.

So having approved the settlement, the next question is counsel's request for an award of attorneys' fees. They've requested an all-in award of

$18,170,000, representing 23 percent of the settlement consideration. That award is supported by Delaware law, and I will approve it.

In brief, Delaware's policy is to ensure that "even without a favorable adjudication, counsel will be compensated for beneficial results [that] they produced, provided that [the claim] was meritorious and had a causal connection [with a] conferred benefit." That's from the *Allied Artists* case. The *Sugarland* factors are the criteria that we apply. The most important is the size of the benefit. Here, we have a self-pricing benefit in the form of $79 million in cash.

The Court also considers the stage at which the litigation has settled. The goal there is to avoid creating an incentive or to mitigate any incentive that the plaintiffs might have to settle early for a bird in the hand rather than attempting to get fair value for the case.

To assess that factor, the Court considers the stage of the case and evaluates the type of percentage that the plaintiffs have requested. The percentage of the recovery here is right in line with at least my personal views as to what is an

appropriate percentage. Those percentages are drawn from the *Americas Mining* case from the Delaware Supreme Court.

The other factors to me don't warrant a major upward or downward adjustment. The case was certainly difficult and complex enough to warrant this type of recovery. As I suggested, this has been a tough slog for the plaintiffs. There is already an appraisal decision that made findings that were, I would say, mixed in terms of their outcome. Some favored the plaintiffs, but some certainly were beneficial to the defendants. The plaintiffs faced a hurdle in terms of that, in addition to all of the other hurdles that normally arise in these types of litigation. So that factor supports the fee award.

The plaintiffs litigated on a contingent basis, which is also a factor that this Court considers, and the plaintiffs' standing and ability supports the size of the award.

I've also considered the time that the plaintiffs expended as a cross-check and the implied hourly rate. The implied hourly rate is not excessive. It's actually relatively conservative relative to some of the awards that this Court has

approved.

So for all of these reasons, I'm approving the fee that was requested.

So at this point I usually look to see if there's any type of updated form of order that people would like to have me enter. If not, I'm happy to go down and do something through LexisNexis. What's your preference?

ATTORNEY WEINBERGER: Whatever the Court's preference is. I have a copy of the final order here (handing).

THE COURT: All right. It's a sad day for the Court. This is Vice Chancellor Slights' official day of retirement. As I wrote the date, that fact jumped out in my mind.

He's going to be around. I don't think he's disappearing. He's been a fantastic colleague. He is a great friend. We're all going to miss him. So having written the date that I know to be his last official day in the order, I wanted to acknowledge that.

I'm grateful for everyone's time today. I'm going to hand the signed order to the clerk so that she can enter it on the docket.

I appreciate everyone's time and consideration.

We stand in recess.

(Proceedings concluded at 12:12 p.m.)

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CERTIFICATE

I, DOUGLAS J. ZWEIZIG, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 119 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 2nd day of June, 2022.

/s/ Douglas J. Zweizig
---
Douglas J. Zweizig
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter

# EXHIBIT AH

EFiled: Mar 02 2022 02:51PM EST
Transaction ID 67347742
Case No. 2018-0484-JTL

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

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|---|---|
| IN RE COLUMBIA PIPELINE GROUP, INC. MERGER LITIGATION | Consol. C.A. No. 2018-0484-JTL |

**STIPULATION AND AGREEMENT OF COMPROMISE AND SETTLEMENT BETWEEN PLAINTIFFS AND THE SETTLING DEFENDANTS**

This Stipulation and Agreement of Compromise and Settlement between Plaintiffs and the Settling Defendants (the "Stipulation") is made and entered into as of March 2, 2022.[1] The parties to this Stipulation (each a "Settling Party" and, collectively, the "Settling Parties"), by and through their undersigned attorneys, have reached an agreement for the settlement of the claims asserted against Robert C. Skaggs, Jr. and Stephen P. Smith (the "Settling Defendants") in the above-captioned matter styled *In re Columbia Pipeline Group, Inc. Merger Litigation*, filed in the Court of Chancery of the State of Delaware (the "Court"), C.A. No. 2018-0484-JTL (the "Action") on the terms set forth below (the "Settlement") and subject to Court approval pursuant to Court of Chancery Rule 23. This Stipulation is intended to fully, finally, and forever resolve, discharge, and settle (i) all Released Plaintiffs' Claims against the Settling Defendants and the other Released Settling Defendants' Persons and (ii) all Released Settling Defendants' Claims against Plaintiffs and the

[1] All terms in this Stipulation with initial capitalization shall, unless defined elsewhere in this Stipulation, have the meanings ascribed to them in Section 1 of this Stipulation.

other Released Plaintiffs' Persons. The Settling Parties are: (i) co-lead plaintiffs Public Employees' Retirement System of Mississippi and Police & Fire Retirement System of the City of Detroit ("Plaintiffs"), on behalf of themselves and the Class; and (ii) defendants Robert C. Skaggs, Jr. and Stephen P. Smith (the "Settling Defendants"). This Stipulation does not release, resolve, compromise, settle, or discharge any claims brought, or that could have been brought, by Plaintiffs against non-settling defendant TC Energy Corp. (together with its parents, affiliates, subsidiaries, officers (except for the Settling Defendants), directors, predecessors, successors, and assigns, "TCE" or "Non-Settling Defendant") (TCE and the Settling Defendants, together, "Defendants"), including, but not limited to, any claims against TCE for aiding-and-abetting the Settling Defendants' alleged breaches of fiduciary duty, any claims against TCE for unjust enrichment, or any claims against TCE relating to (i) the Merger or any element, term, condition, or circumstance of the Merger or the sale process leading up to the Merger; (ii) any actions, deliberations, negotiations, discussions, offers, inquiries, solicitations of interest, indications of interest, bids, due diligence, or any act or omission in connection with the review of strategic alternatives available to CPG or the Merger, including the process of deliberation or negotiation concerning the Merger; (iii) the consideration received by Plaintiffs and the Class in connection with the Merger; or (iv) any fiduciary obligations of the Settling Defendants (as directors or officers) relating to

the Merger, the process of deliberation or negotiation leading to the Merger, or the disclosures respecting the Merger.

**WHEREAS,**

**Summary of the Action**

A. On September 28, 2014, NiSource, Inc. announced a plan to spin off its Columbia Pipeline Group division into a separate publicly traded company.

B. On June 17, 2015, Columbia Pipeline Group Inc. ("CPG") common stock began trading on a limited market, commonly known as a "when-issued" trading market, in advance of the distribution date and its spin-off from NiSource, Inc.

C. On July 1, 2015, CPG shares began trading publicly when the company was spun off from NiSource, Inc. At the time of that spin-off, Robert C. Skaggs, Jr. served as CPG's chief executive officer and the chairman of its board, and Stephen P. Smith served as CPG's chief financial officer.

D. On March 17, 2016, CPG and TransCanada Corporation ("TC," now known as TC Energy Corp.) announced that they had entered into an agreement and plan of merger pursuant to which CPG would merge with a TC subsidiary and become an indirect wholly owned subsidiary of TC in an all-cash deal under which CPG shareholders would receive $25.50 per common share in consideration.

E. On April 8, 2016, CPG filed its preliminary proxy regarding the

Merger, and on May 17, 2016, CPG filed its definitive proxy (the "Proxy"). The Proxy included a detailed account of the sale process.

F. On June 22, 2016, the Merger received approval from CPG stockholders, with support from ninety five percent of voting shares and seventy four percent of shares outstanding.

G. On July 1, 2016, the Merger closed, and on July 5, 2016 TC terminated the Settling Defendants' employment, triggering change-in-control agreements between the Settling Defendants and CPG.

H. On July 3, 2018, Plaintiffs commenced the Action. As subsequently amended on February 24, 2020, the Verified Amended Stockholder Class Action Complaint (the "Complaint") names the Settling Defendants and TC as defendants. The Complaint alleges, among other things, that the Settling Defendants breached their fiduciary duties by causing CPG to issue a misleading Proxy and by impairing the sale process. Plaintiffs further claim that TC aided and abetted those breaches, and was unjustly enriched by the Merger.

I. On June 12, 2020, Defendants moved to dismiss the Complaint. On March 1, 2021, the Court dismissed Plaintiffs' unjust enrichment claim but otherwise denied the motion to dismiss, holding that Plaintiffs had pleaded enough to support a rational inference that the Settling Defendants breached their duties of care and loyalty with respect to the sale process and the disclosure. The Court also

sustained Plaintiffs' claim that TC aided and abetted those alleged breaches.

J. Between April and December 2021, Plaintiffs and Defendants engaged in discovery, including preparing, serving, and responding to requests for production of documents and interrogatories, serving subpoenas on various third parties, engaging in various written and oral communications concerning the scope of document production, and noticing and taking depositions. Plaintiffs have obtained and reviewed over 1,450,000 pages of documents from the Defendants and third parties.

K. Following the Court's decision, while discovery was proceeding, Plaintiffs and the Settling Defendants engaged in arm's-length negotiations, including participation in mediation, in an attempt to resolve the Action.

L. On October 28, 2021, Plaintiffs and Defendants participated in a mediation before former United States District Court Judge Layn R. Phillips. However, the parties were unable to agree to settlement terms that day.

M. Following the mediation, extensive settlement talks continued between Plaintiffs and the Settling Defendants, culminating in an agreement on the terms of a proposed settlement between Plaintiffs and the Settling Defendants.

N. On January 11, 2022, Plaintiffs and the Settling Defendants executed a term sheet memorializing the terms of their agreement (the "Term Sheet"). The Term Sheet set forth, among other things, the Settling Parties' agreement to settle

and release all claims against the Settling Defendants in return for a cash payment on behalf of the Settling Defendants of $79,000,000 for the benefit of the Class, subject to certain terms and conditions and the execution of a customary "long form" stipulation and agreement of settlement and related papers.

O. This Stipulation (together with the Exhibits hereto) reflects the final and binding agreement between the Settling Parties and supersedes the Term Sheet.

P. On January 22, 2022, the Court entered an order granting Plaintiffs' motion to sever Plaintiffs' claims against the Settling Defendants from their claims against the Non-Settling Defendant and staying Plaintiffs' claims against the Settling Defendants pending the Court's consideration of the proposed Settlement ("Order Granting Plaintiffs' Motion to Sever and Stay").

**Plaintiffs' Claims and the Benefits of the Settlement**

Q. Plaintiffs believe that the claims asserted in the Action have merit, but also believe that the Settlement set forth below provides substantial and immediate benefits for the Class. In addition to these substantial benefits, Plaintiffs and Plaintiffs' Lead Counsel (defined below) have considered: (i) the attendant risks of continued litigation and the uncertainty of the outcome of the Action; (ii) the probability of success on the merits; (iii) the inherent problems of proof associated with, and possible defenses to, the claims asserted in the Action; (iv) the desirability of permitting the Settlement to be consummated according to its terms; (v) the

expense and length of continued proceedings necessary to prosecute the Action against the Settling Defendants through trial and appeals; and (vi) the conclusion of Plaintiffs and Plaintiffs' Lead Counsel that the terms and conditions of the Stipulation are fair, reasonable, and adequate, and that it is in the best interests of the Class to settle the claims asserted against the Settling Defendants in the Action on the terms set forth herein.

R. Based on Plaintiffs' Lead Counsel's thorough review and analysis of the relevant facts, allegations, defenses, and controlling legal principles, Plaintiffs' Lead Counsel believe that the settlement set forth in this Stipulation is fair, reasonable, and adequate, and confers substantial benefits upon the Class. Based upon Plaintiffs' Lead Counsel's evaluation as well as their own evaluations, Plaintiffs have determined that the Settlement is in the best interests of the Class and have agreed to the terms and conditions set forth herein.

**Settling Defendants' Denial of Wrongdoing and Liability**

S. The Settling Defendants deny any and all allegations of wrongdoing, liability, violations of law or damages arising out of or related to any of the conduct, statements, acts, or omissions alleged in the Action, and maintain that their conduct was at all times proper, in the best interests of CPG and its stockholders, and in compliance with applicable law. The Settling Defendants further deny any breach of fiduciary duties. The Settling Defendants further deny that TC was unjustly

enriched by the Merger. The Settling Defendants affirmatively assert that the Merger was the best available transaction for CPG and its stockholders, was entirely fair to CPG and its stockholders, and has provided CPG and its stockholders with substantial benefits. The Settling Defendants also deny that CPG or its stockholders were harmed by any conduct of the Settling Defendants alleged in the Action or that could have been alleged therein. Each of the Settling Defendants asserts that, at all relevant times, he acted in good faith and in a manner he reasonably believed to be in the best interests of CPG and all of its stockholders. Nevertheless, the Settling Defendants wish to eliminate the uncertainty, risk, burden, and expense of further litigation. The Settling Defendants have therefore determined to settle the claims asserted against them in the Action on the terms and conditions set forth in this Stipulation solely to put the Released Plaintiffs' Claims (as defined below) to rest, finally and forever, without in any way acknowledging any wrongdoing, fault, liability, or damages.

T. Nothing in this Stipulation shall be construed as any admission by the Settling Defendants of wrongdoing, fault, liability, or damages whatsoever.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, BY AND AMONG THE PARTIES TO THIS STIPULATION, subject to the approval of the Court pursuant to Court of Chancery Rule 23, that the Action against the Settling Defendants shall be fully and finally compromised and settled, and the

Released Plaintiffs' Claims shall be fully and finally compromised, settled, released, discharged, and dismissed with prejudice as against the Released Settling Defendants' Persons, and that the Released Settling Defendants' Claims shall be finally and fully compromised, settled, released, discharged and dismissed with prejudice as against the Released Plaintiffs' Persons, upon and subject to the following terms and conditions of the Settlement, as follows:

## I. DEFINITIONS

All terms in this Stipulation with initial capitalization shall, unless defined elsewhere in this Stipulation, have the meanings ascribed to them below.

1.1 "Class" means the non-opt-out class of all public stockholders of CPG at any time from July 6, 2015 through and including July 1, 2016 (the "Class Period"), including any and all of their respective successors-in-interest, successors, predecessors-in-interest, predecessors, assigns, and transferees, but excluding (i) Defendants; (ii) the directors, officers, or partners of TCE during the Class Period; (iii) the members of the Immediate Families of the Settling Defendants or of any person who was a director, officer, or partner of TCE during the Class Period; (iv) the parents, subsidiaries, and affiliates of TCE; (v) any entity in which any Defendant or any other excluded party has, or had during the Class Period, a controlling interest; and (vi) the legal representatives, heirs, successors, or assigns of any such excluded person or entity. Attached hereto as Exhibit E is a schedule of

all persons and entities related to the Settling Defendants that the Settling Defendants have identified to be excluded from the Class by definition.

1.2 "Class Member" means a member of the Class.

1.3 "Closing" means the closing of the Merger on July 1, 2016.

1.4 "Court" means the Court of Chancery of the State of Delaware.

1.5 "Effective Date" means the first date by which all of the events and conditions specified in Paragraph 7.1 of this Stipulation have been met and have occurred or have been waived in writing.

1.6 "Escrow Account" means the bank account that is maintained by Plaintiffs' Lead Counsel and into which the Settlement Amount will be deposited and wherein the Settlement Fund will be held.

1.7 "Escrow Agent" means the agent or agents who shall be chosen by Plaintiffs' Lead Counsel to administer the Escrow Account.

1.8 "Fee and Expense Award" means an award to Plaintiffs' Lead Counsel of fees and expenses to be paid from the Settlement Fund, approved by the Court and in full satisfaction of any and all claims for attorneys' fees that have been, could be, or could have been, asserted by Plaintiffs' Lead Counsel or any other counsel or any Class Member against the Settling Defendants with respect to Action or the Settlement. For the avoidance of doubt, the Fee and Expense Award contemplated herein is not intended to satisfy in whole or in part any fee and expense award that

may be sought in connection with Plaintiffs' claims against the Non-Settling Defendant.

1.9 "Final" means, with respect to any judgment or order, that (i) if no appeal is filed, the expiration date of the time for filing or noticing of any appeal of the judgment or order; or (ii) if there is an appeal from the judgment or order, the date of (a) final dismissal of all such appeals, or the final dismissal of any proceeding on certiorari or otherwise to review the judgment or order, or (b) the date the judgment or order is finally affirmed on an appeal, the expiration of the time to file a petition for a writ of certiorari or other form of review, or the denial of a writ of certiorari or other form of review of the judgment or order, and, if certiorari or other form of review is granted, the date of final affirmance of the judgment or order following review pursuant to that grant. However, any appeal or proceeding seeking subsequent judicial review pertaining solely to an order issued with respect to attorneys' fees or expenses or any plan of allocation in this Action shall not in any way delay or preclude the Judgment from becoming Final.

1.10 "Immediate Family" means children, stepchildren, parents, stepparents, spouses, siblings. As used in this Paragraph, "spouse" shall mean a husband, a wife, or a partner in a state-recognized domestic relationship or civil union.

1.11 "Judgment" means the Order and Final Judgment to be entered by the Court, substantially in the form attached hereto as Exhibit D.

1.12 "Merger" means the July 1, 2016 merger of CPG with Taurus Merger Sub Inc., a wholly owned subsidiary of TC, with CPG surviving as an indirect wholly owned subsidiary of TC.

1.13 "Merger Consideration" means the cash consideration of $25.50 per common share paid in connection with the Merger.

1.14 "Net Settlement Fund" means the Settlement Fund less: (i) any Taxes and Tax Expenses; (ii) any Notice and Administration Costs; (iii) any Fee and Expense Award awarded by the Court; and (iv) any other costs or fees approved by the Court.

1.15 "Notice" means the Notice of Pendency of Stockholder Class Action and Proposed Settlement, Settlement Hearing, and Right to Appear, substantially in the form attached hereto as Exhibit B.

1.16 "Notice and Administration Costs" means the costs, fees, and expenses that are incurred by the Settlement Administrator and/or Plaintiffs' Lead Counsel in connection with: (i) providing notice to the Class; and (ii) administering the Settlement, including without limitation the costs, fees, and expenses incurred in connection with the Escrow Account. Such costs and expenses shall include, without limitation, the actual costs of printing and mailing the Notice, publishing the Summary Notice, reimbursements to nominee owners for forwarding the Notice to their beneficial owners, the administrative expenses incurred and fees charged by

the Settlement Administrator in connection with providing notice and administering the Settlement, and the fees, if any, of the Escrow Agent.

1.17 "Person" means a natural person, individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, association, joint venture, joint stock company, estate, legal representative, trust, unincorporated association, government, or any political subdivision or agency thereof, or any other business or legal entity.

1.18 "Plaintiffs' Counsel" means Plaintiffs' Lead Counsel and Ashby & Geddes, P.A.

1.19 "Plaintiffs' Lead Counsel" means Bernstein Litowitz Berger & Grossmann LLP and Labaton Sucharow LLP.

1.20 "Plan of Allocation" means the proposed plan of allocation of the Net Settlement Fund set forth in the Notice.

1.21 "Released Claims" means Released Plaintiffs' Claims and Released Settling Defendants' Claims.

1.22 "Released Persons" means Released Settling Defendants' Persons and Released Plaintiffs' Persons.

1.23 "Released Plaintiffs' Claims" means all claims and causes of action, including Unknown Claims, that (a) were alleged, asserted, set forth, or claimed in the Complaint against the Settling Defendants or (b) could have been alleged,

asserted, set forth, or claimed in the Complaint or in any other court, tribunal, or proceeding by Plaintiffs or any other member of the Class, individually, or as a member of the Class directly in their capacities as current or former CPG stockholders, against the Settling Defendants arising out of or relating to the allegations, transactions, facts, matters, representations, or omissions involved, set forth, or referred to in the Complaint, including without limitation all such claims relating to (i) the Merger or any element, term, condition, or circumstance of the Merger or the sale process leading up to the Merger; (ii) any actions, deliberations, negotiations, discussions, offers, inquiries, solicitations of interest, indications of interest, bids, due diligence, or any act or omission in connection with the review of strategic alternatives available to CPG or the Merger, including the process of deliberation or negotiation concerning the Merger; (iii) the consideration received by Plaintiffs and the Class in connection with the Merger; and (iv) any fiduciary obligations of the Settling Defendants (as directors or officers) relating to the Merger, the process of deliberation or negotiation leading to the Merger, or the disclosures respecting the Merger. For the avoidance of doubt, the Released Plaintiffs' Claims do not include (a) any claims against TCE, including, but not limited to, any claims against TCE for aiding-and-abetting the Settling Defendants' alleged breaches of fiduciary duty, any claims against TCE for unjust enrichment, or any claims against TCE relating to (i) the Merger or any element, term, condition,

or circumstance of the Merger or the sale process leading up to the Merger; (ii) any actions, deliberations, negotiations, discussions, offers, inquiries, solicitations of interest, indications of interest, bids, due diligence, or any act or omission in connection with the review of strategic alternatives available to CPG or the Merger, including the process of deliberation or negotiation concerning the Merger; (iii) the consideration received by Plaintiffs and the Class in connection with the Merger; or (iv) any fiduciary obligations of the Settling Defendants (as directors or officers) relating to the Merger, the process of deliberation or negotiation leading to the Merger, or the disclosures respecting the Merger; or (b) any claims based on conduct after the Effective Date ("Excluded Plaintiffs' Claims").

1.24 "Released Plaintiffs' Persons" means (i) Plaintiffs, all other Class Members, and Plaintiffs' Counsel, and (ii) their legal representatives, heirs, executors, administrators, trusts, trustees, parents, affiliates, subsidiaries, officers, directors, partnerships, partners, agents, employees, Immediate Family Members, insurers, reinsurers, predecessors, successors, predecessors-in-interest, successors-in-interest, and assigns of any of the foregoing.

1.25 "Released Settling Defendants' Claims" means all claims and causes of action, including Unknown Claims, arising out of or relating to the Action other than claims relating to the enforcement of the Settlement, including without limitation, all actions taken by Plaintiffs in connection with the initiation, prosecution, and

settlement of the Action. For the avoidance of doubt, the Released Settling Defendants' Claims do not include claims based on conduct after the Effective Date.

1.26 "Released Settling Defendants' Persons" means (i) the Settling Defendants; and (ii) their legal representatives, heirs, executors, administrators, trusts, trustees, Immediate Family Members, insurers, reinsurers, predecessors, successors, predecessors-in-interest, successors-in-interest, and assigns of any of the foregoing. For the avoidance of doubt, the Non-Settling Defendant is not a Released Settling Defendants' Person.

1.27 "Releases" means the releases set forth in Paragraphs 3.2 and 3.3 of this Stipulation.

1.28 "Scheduling Order" means an order scheduling a hearing on the proposed Settlement and approving the form of and method of giving notice of the Settlement, substantially in the form attached hereto as Exhibit A.

1.29 "Settlement" means the settlement contemplated by this Stipulation and the Exhibits.

1.30 "Settlement Administrator" means the firm selected by Plaintiffs, subject to the approval of the Court, to administer the Settlement and provide notice to the Class.

1.31 "Settling Defendants' Counsel" means Wachtell, Lipton, Rosen & Katz and Morris, Nichols, Arsht, & Tunnell LLP.

1.32 "Settlement Fund" means the Settlement Amount, plus any and all interest earned thereon, held in the Escrow Account.

1.33 "Settlement Hearing" means the hearing (or hearings) to be held by the Court to determine, among other things, whether: (i) Plaintiffs and Plaintiffs' Lead Counsel have adequately represented the interests of the Class; (ii) the proposed Settlement should be approved by the Court as fair, reasonable, adequate, and in the best interests of the Class; (iii) the Action should be dismissed with prejudice as against the Settling Defendants and all of the Released Claims against the Released Persons should be fully, finally, and forever released, settled, and discharged; (iv) whether and in what amount any Fee and Expense Award should be paid to Plaintiffs' Counsel out of the Settlement Fund; and (v) the Judgment approving the Settlement of the Action should be entered in accordance with the terms of this Stipulation.

1.34 "Summary Notice" means the Summary Notice of Pendency of Stockholder Class Action and Proposed Settlement, Settlement Hearing, and Right to Appear, substantially in the form attached hereto as Exhibit C, to be published as set forth in the Scheduling Order.

1.35 "Taxes" means any taxes (including any estimated taxes, interest, penalties, or additional amounts) arising with respect to income earned by the Settlement Fund, including with respect to (i) any income earned by the Settlement

Fund for any period during which the Settlement Fund on deposit in the Escrow Account is not treated, or does not qualify, as a "qualified settlement fund" for federal or state income tax purposes, and (ii) the payment or reimbursement by the Settlement Fund of any amounts described in clause (i).

1.36 "Tax Expenses" means expenses and costs incurred in connection with determining the amount of, and paying, any Taxes owed by the Settlement Fund (including, without limitation, expenses of tax attorneys and/or accountants and mailing and distribution costs and expenses relating to filing (or failing to file) any tax returns).

1.37 "Unknown Claims" means, as appropriate, (i) any Released Plaintiffs' Claims that any Plaintiff or any other Class Member does not know or suspect to exist in his, her, or its favor at the time of the release of the Released Settling Defendants' Persons, or (ii) any Released Settling Defendants' Claims that any Settling Defendant does not know or suspect to exist in his favor at the time of the release of the Released Plaintiffs' Persons, which, if known by him, her, or it, might have affected his, her, or its decision(s) with respect to the Settlement. With respect to any and all Released Plaintiffs' Claims and Released Settling Defendants' Claims, the Settling Parties stipulate and agree that Plaintiffs and the Settling Defendants shall expressly waive, and each of the other Class Members by operation of law shall be deemed to have waived, any and all provisions, rights, and benefits conferred by

any law of any state or territory of the United States or other jurisdiction, or principle of common law or foreign law, which is similar, comparable, or equivalent to Cal. Civ. Code § 1542, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Plaintiffs and the Settling Defendants acknowledge, and each of the other Class Members by operation of law are deemed to acknowledge, that they may discover facts in addition to or different from those now known or believed to be true with respect to the Released Plaintiffs' Claims and the Released Settling Defendants' Claims, but that it is the intention of Plaintiffs and the Settling Defendants, and by operation of law the other Class Members, to completely, fully, finally, and forever extinguish any and all Released Plaintiffs' Claims and Released Settling Defendants' Claims, known or unknown, suspected or unsuspected, which now exist, or heretofore existed, or may hereafter exist, and without regard to the subsequent discovery of additional or different facts. Plaintiffs and the Settling Defendants also acknowledge, and each of the other Class Members by operation of law are deemed to acknowledge, that the inclusion of "Unknown Claims" in the definition of Released Plaintiffs' Claims and Released Settling Defendants' Claims is separately bargained for and is a key element of the Settlement.

## II. SETTLEMENT CONSIDERATION

2.1 In connection with the Settlement and in consideration of the Releases set forth herein, the Settling Defendants shall cause to be paid into the Escrow Account the total sum of seventy-nine million U.S. dollars ($79,000,000.00) (the "Settlement Amount") by the insurance carriers who have committed to fund the Settlement Amount solely from the proceeds of their policies (the "Insurance Carriers"). The Settlement Amount shall be paid within thirty (30) calendar days after the later of (a) the entry of the Scheduling Order by the Court or (b) Plaintiffs' Lead Counsel's delivery to Settling Defendants' Counsel of payment information to effectuate a transfer of funds to the Escrow Account, including wiring instructions that include the bank name and ABA routing number, account name and number, a contact for verbal confirmation of same, the name and address of the payee, and a signed W-9 reflecting a valid taxpayer identification number for the qualified settlement fund in which the Settlement Amount is to be deposited. Within two (2) business days of receipt of the payment details, Settling Defendants' Counsel shall provide Plaintiffs' Lead Counsel with contact information to coordinate oral confirmation of the payment information.

2.2 The Released Settling Defendants' Persons shall not be responsible for the payment of any amounts in connection with the Settlement other than the Settlement Amount. The Released Settling Defendants' Persons (except the

Insurance Carriers) shall bear no personal responsibility for any payment in connection with this Stipulation or the Settlement.

2.3 If Settling Defendants fail to cause the full payment of the Settlement Amount in a timely manner, Plaintiffs may exercise their right under Paragraph 11.1 of this Stipulation to terminate the Settlement.

## III. SCOPE OF THE SETTLEMENT

3.1 Upon entry of the Judgment, the Action against the Settling Defendants shall be dismissed with prejudice. Plaintiffs and the Settling Defendants shall each bear his, her, or its own fees, costs, and expenses, except as expressly provided in this Stipulation, provided that nothing herein shall affect the Settling Defendants' claims for advancement or indemnity of their legal fees, costs, and expenses incurred in connection with the Action and this Settlement, or any claims that any Settling Defendant may have against any of their respective insurers, co-insurers, or reinsurers.

3.2 Upon the Effective Date, Plaintiffs and each and every other member of the Class, on behalf of themselves and any and all of their respective successors-in-interest, successors, predecessors-in-interest, predecessors, representatives, trustees, executors, administrators, estates, heirs, assigns and transferees, immediate and remote, and any Person acting for or on behalf of, or claiming under, any of them, and each of them, together with their predecessors-in-interest, predecessors,

successors-in-interest, successors, and assigns, each of the foregoing in their capacities as such only, shall have fully, finally, and forever released, settled, and discharged the Released Settling Defendants' Persons from and with respect to every one of the Released Plaintiffs' Claims, and shall thereupon be forever barred and enjoined from commencing, instituting, prosecuting, or continuing to prosecute any Released Plaintiffs' Claims against any of the Released Settling Defendants' Persons. This Release shall not apply to any of the Excluded Plaintiffs' Claims.

3.3 Upon the Effective Date, the Settling Defendants, on behalf of themselves and any and all of their respective successors-in-interest, successors, predecessors-in-interest, predecessors, representatives, trustees, executors, administrators, estates, heirs, assigns and transferees, immediate and remote, and any Person acting for or on behalf of, or claiming under, any of them, and each of them, together with their predecessors-in-interest, predecessors, successors-in-interest, successors, and assigns, each of the foregoing in their capacities as such only, shall have fully, finally, and forever released, settled, and discharged the Released Plaintiffs' Persons from and with respect to every one of the Released Settling Defendants' Claims, and shall thereupon be forever barred and enjoined from commencing, instituting, prosecuting, or continuing to prosecute any Released Settling Defendants' Claims against any of the Released Plaintiffs' Persons.

3.4 The foregoing releases are executed in accordance with the provisions of 10 *Del. C.* § 6301, *et seq.*, of the Uniform Contribution Among Tortfeasors Act. Accordingly, Plaintiffs agree, and all other Class Members shall be deemed by operation of law to agree, pursuant to 10 *Del. C.* § 6304, that any damages recoverable against any other alleged tortfeasor, including the Non-Settling Defendant, will be reduced by the greater of (a) the Settlement Amount, and (b) the *pro rata* share of the responsibility or liability for such damages, if any, of the Settling Defendants, should it be determined that any of the Settling Defendants are joint tortfeasors. This language is intended to comply with 10 *Del. C.* § 6304 so as to preclude any liability of the Settling Defendants to any joint tortfeasors for contribution or any other claim in which the alleged injury arises out of or relates to the claims asserted in, or arises out of or relates to the subject matter of, the Action, including any Excluded Plaintiffs' Claims. Notwithstanding the foregoing, nothing in this Stipulation shall preclude Plaintiffs from asserting any of the Excluded Plaintiffs' Claims.

3.5 As a condition of the Settlement, the Settling Parties shall obtain as part of the Judgment a bar order ("Bar Order") in a form substantially similar to the following:

> Upon the Effective Date, any claims (i) against the Released Settling Defendants' Persons, or (ii) by the Released Settling Defendants' Persons against any other Person, in which the injury claimed is the claimant's actual

or threatened liability to Plaintiffs or any other Class Member, arising out of or relating to the subject matter of the Action, including without limitation any third party claims for contribution in accordance with 10 *Del. C.* § 6304 and any similar laws and statutes, are hereby barred; *provided, however*, that any contractual claims by a Settling Defendant for indemnification of legal fees and other litigation costs and expenses arising out of the Action shall not be barred.

## IV. CLASS CERTIFICATION

4.1 Solely for purposes of the Settlement and for no other purpose, Settling Defendants stipulate and agree to: (a) certification of the Action as a non-opt out class action pursuant to Delaware Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2) on behalf of the Class; (b) appointment of Plaintiffs as Class Representative for the Class; and (c) appointment of Plaintiffs' Lead Counsel as Class Counsel for the Class.

4.2 The certification of the Class shall be binding only with respect to this Stipulation. In the event that this Stipulation is terminated pursuant to its terms or the Effective Date otherwise fails to occur, the certification of the Class shall be deemed vacated and the Action shall proceed as though the Class had never been certified.

## V. PROCEDURE FOR APPROVAL

5.1 As soon as practicable after execution of this Stipulation, the Settling Parties shall jointly submit this Stipulation, together with the Exhibits, to the Court

and shall jointly apply to the Court for entry of the Scheduling Order, substantially in the form attached hereto as Exhibit A.

5.2 In accordance with the Scheduling Order, the Settlement Administrator shall mail, or cause to be mailed, by first class U.S. mail or other mail service if mailed outside the U.S., postage prepaid, the Notice, substantially in the form attached hereto as Exhibit B, to each Class Member at their last known address appearing in the stock transfer records maintained by or on behalf of CPG ("Stock Transfer Records"). Prior to execution of this Stipulation, Settling Defendants' Counsel provided Plaintiffs' Lead Counsel with the Stock Transfer Records containing the names and last known addresses for all record holders of CPG common stock during the Class Period. All stockholders of record who held CPG common stock on behalf of beneficial owners and who receive the Notice shall be directed to forward the Notice promptly to such beneficial owners. Plaintiffs' Lead Counsel shall use reasonable efforts to provide notice to such beneficial owners by making additional copies of the Notice available to any record holder who, prior to the Settlement Hearing, requests the same for distribution to beneficial owners. In accordance with the Scheduling Order, Plaintiffs' Lead Counsel shall also cause the Summary Notice to be published in the *Investor's Business Daily*. Any and all costs and expenses related to providing Notice shall be paid from the Settlement Fund, regardless of the form or manner of notice approved or directed by the Court and

regardless of whether the Court declines to approve the Settlement or the Effective Date otherwise fails to occur. In no event shall the Plaintiffs, the Released Settling Defendants' Persons, or any of their attorneys have any liability or responsibility for the costs and expenses associated with providing the Notice.

5.3 The Settling Parties and their attorneys agree to use their individual and collective best efforts to obtain Court approval of the Settlement. The Settling Parties and their attorneys further agree to use their individual and collective best efforts to effect, take, or cause to be taken all actions, and to do, or cause to be done, all things reasonably necessary, proper, or advisable under applicable laws, regulations, and agreements to consummate and make effective, as promptly as practicable, the Settlement provided for hereunder and the dismissal of the Action with prejudice as against the Settling Defendants. The Settling Parties and their attorneys agree to cooperate fully with one another in seeking the Court's approval of this Stipulation and to use their best efforts to effect consummation of the Settlement.

5.4 If the Settlement embodied in this Stipulation is approved by the Court, the Settling Parties shall request that the Court enter the Judgment, substantially in the form attached hereto as Exhibit D.

## VI. STAY PENDING COURT APPROVAL

6.1 Pursuant to the Court's Order Granting Plaintiffs' Motion to Sever and Stay, Plaintiffs' claims against the Individual Defendants are stayed pending the Court's consideration of the proposed Settlement. In accordance with the Order Granting Plaintiffs' Motion to Sever and Stay, Plaintiffs agree not to initiate any other proceedings against the Settling Defendants asserting any Released Plaintiffs' Claims pending the occurrence of the Effective Date. The Settling Parties also agree to use their best efforts to seek the stay and dismissal of, and to oppose entry of any interim or final relief in favor of any Class Member in, any other proceedings against any of the Settling Defendants or the other Released Settling Defendants' Persons that challenge the Settlement or otherwise assert or involve, directly or indirectly, a Released Plaintiffs' Claim against the Released Settling Defendants' Persons.

6.2 Notwithstanding Paragraph 6.1 above, nothing herein shall in any way impair or restrict the rights of any Settling Party to defend this Stipulation or to otherwise respond in the event any Person objects to the Stipulation, the proposed Judgment to be entered, the Fee and Expense Award, or the Plan of Allocation.

6.3 Notwithstanding Paragraph 6.1 above, the Settling Defendants agree that they will continue to participate in the document discovery and depositions as if they were named parties. The Settling Defendants also agree that, at the request of Plaintiffs or TCE, they will participate as witnesses in any trial in this Action and

will not use the terms of this Stipulation as a basis to avoid their participation as witnesses at any trial in this Action.

## VII. CONDITIONS OF SETTLEMENT

7.1 The Effective Date of the Settlement shall be deemed to occur on the occurrence or written waiver of all of the following events, which events the Settling Parties shall use their best efforts to achieve:

(a) the payment of the full Settlement Amount into the Escrow Account in accordance with Paragraph 2.1 above;

(b) the Court's certification of the Class as a non-opt-out class;

(c) the Court's entry of the Judgment substantially in the form attached hereto as Exhibit D, including Releases substantially in the form set out herein and the dismissal with prejudice of the Action as to the Settling Defendants without the award of any damages, costs, or fees, except as provided for in this Stipulation; and

(d) the Judgment becoming Final.

7.2 Upon the occurrence of the Effective Date, any and all remaining interest or right of the Settling Defendants or the Insurance Carriers in or to the Settlement Fund, if any, shall be absolutely and forever extinguished and the Releases herein shall be effective.

## VIII. ATTORNEYS' FEES AND EXPENSES

8.1 Plaintiffs' Lead Counsel intend to petition the Court for a Fee and Expense Award, which application will be wholly inclusive of any request for attorneys' fees and expenses on behalf of any Class Member or his, her, or its counsel in connection with the Settlement. The Settling Parties acknowledge and agree that any Fee and Expense Award in connection with the Settlement shall be paid from the Settlement Fund and shall reduce the Settlement consideration paid to the Class accordingly. Plaintiffs' Lead Counsel's application for a Fee and Expense Award is not the subject of any agreement among Plaintiffs and Settling Defendants other than what is set forth in this Stipulation.

8.2 The Fee and Expense Award shall be paid from the Settlement Fund to Plaintiffs' Lead Counsel immediately upon award by the Court, notwithstanding the existence of any timely filed objections to the Fee and Expense Award or any appeal or potential for appeal therefrom, or collateral attack on the Fee and Expense Award, the Settlement, or any part thereof, subject to Plaintiffs' Lead Counsel's obligation to make refunds or repayments to the Settlement Fund, plus accrued interest at the same net rate as is earned by the Settlement Fund, if the Settlement is terminated pursuant to the terms of this Stipulation or if, as a result of any appeal or further proceedings on remand, or successful collateral attack, the Fee and Expense Award is reduced or reversed and such order reducing or reversing the award has become

Final. Plaintiffs' Lead Counsel shall make the appropriate refund or repayment in full no later than thirty (30) calendar days after: (a) receiving from Settling Defendants' Counsel notice of the termination of the Settlement; or (b) any order disapproving, reducing, reversing, or otherwise modifying the Fee and Expense Award has become Final.

8.3 Plaintiffs' Lead Counsel, in their sole discretion, shall allocate the Fee and Expense Award amongst Plaintiffs' Counsel in a manner which they, in good faith, believe reflects the contributions of such counsel to the institution, prosecution, and settlement of the Action. The Released Settling Defendants' Persons shall have no responsibility for or liability whatsoever with respect to the allocation or award of any Fee and Expense Award to or among Plaintiffs' Counsel. The Fee and Expense Award shall be payable solely from the Settlement Fund.

8.4 This Stipulation, the Settlement, the Judgment, and whether the Judgment becomes Final, are not conditioned upon the approval of an award of attorneys' fees, costs, or expenses, either at all or in any particular amount, by the Court. The Fee and Expense Award may be considered separately from the proposed Settlement. Any disapproval or modification of the Fee and Expense Award by the Court or on appeal shall not affect or delay the enforceability of this Stipulation or the Settlement; provide any of the Settling Parties with the right to terminate the

Settlement; affect or delay the binding effect or finality of the Judgment and the release of the Released Claims; or prevent the occurrence of the Effective Date.

8.5 Plaintiffs' Lead Counsel warrants that no portion of any such award of attorneys' fees or expenses shall be paid to Plaintiffs, except as may be approved by the Court.

## IX. THE SETTLEMENT FUND

9.1 The Settlement Fund shall be used to pay: (a) any Taxes and Tax Expenses; (b) any Notice and Administration Costs; (c) any Fee and Expense Award awarded by the Court; and (d) any other costs or fees approved by the Court. The balance remaining in the Settlement Fund (the "Net Settlement Fund") shall be distributed pursuant to the proposed Plan of Allocation or such other plan of allocation approved by the Court.

9.2 Except as provided herein or pursuant to orders of the Court, the Net Settlement Fund shall remain in the Escrow Account prior to the Effective Date. All funds held by the Escrow Agent shall be deemed to be in the custody of the Court and shall remain subject to the jurisdiction of the Court until such time as the funds shall be distributed or returned pursuant to the terms of this Stipulation and/or further order of the Court.

9.3 The Escrow Agent shall invest any funds in the Escrow Account exclusively in United States Treasury Bills (or a mutual fund invested solely in such

instruments) and shall collect and reinvest all interest accrued thereon, except that any residual cash balances up to the amount that is insured by the Federal Deposit Insurance Corporation ("FDIC") may be deposited in any account that is fully insured by the FDIC. In the event that the yield on United States Treasury Bills is negative, in lieu of purchasing such Treasury Bills, all or any portion of the funds held by the Escrow Agent may be deposited in any account that is fully insured by the FDIC or backed by the full faith and credit of the United States. Additionally, if short-term placement of the funds is necessary, all or any portion of the funds held by the Escrow Agent may be deposited in any account that is fully insured by the FDIC or backed by the full faith and credit of the United States.

9.4 The Settlement Fund is intended to be a "qualified settlement fund" within the meaning of Treasury Regulation § 1.468B-1, and Plaintiffs' Lead Counsel, as administrators of the Settlement Fund within the meaning of Treasury Regulation § 1.468B-2(k)(3), shall be solely responsible for timely and properly filing or causing to be filed all informational and other tax returns as may be necessary or appropriate (including, without limitation, the returns described in Treasury Regulation § 1.468B-2(k)) for the Settlement Fund. Plaintiffs' Lead Counsel shall also be responsible for causing payment to be made from the Settlement Fund of any Taxes owed with respect to the Settlement Fund. Upon written request, Settling Defendants shall cause the Insurance Carriers to provide to

Plaintiffs' Lead Counsel the statement described in Treasury Regulation § 1.468B-3(e). Plaintiffs' Lead Counsel, as administrators of the Settlement Fund within the meaning of Treasury Regulation § 1.468B-2(k)(3), shall timely make such elections as are necessary or advisable to carry out this Paragraph, including, as necessary, making a "relation back election," as described in Treasury Regulation § 1.468B-1(j), to cause the qualified settlement fund to come into existence at the earliest allowable date, and shall take or cause to be taken all actions as may be necessary or appropriate in connection therewith.

9.5 All Taxes and Tax Expenses shall be paid out of the Settlement Fund, and shall be timely paid, or caused to be paid, by Plaintiffs' Lead Counsel and without further order of the Court. Any tax returns prepared for the Settlement Fund (as well as the election set forth therein) shall be consistent with the previous Paragraph and in all events shall reflect that all Taxes on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided herein. The Released Settling Defendants' Persons shall have no responsibility or liability for any such Taxes or Tax Expenses or the acts or omissions of Plaintiffs' Lead Counsel or its agents with respect to the payment of Taxes, as described herein.

9.6 The Settlement is not a claims-made settlement. Upon the occurrence of the Effective Date, no Settling Defendant, Released Settling Defendants' Person, or any Person who or which paid any portion of the Settlement Amount shall have

any right to the return of the Settlement Fund or any portion thereof for any reason whatsoever.

9.7 Notwithstanding the fact that the Effective Date of the Settlement has not yet occurred, Plaintiffs' Lead Counsel may pay from the Settlement Fund, without further approval from the Settling Defendants or further order of the Court, all Notice and Administration Costs actually incurred and paid or payable. Such costs and expenses shall include, without limitation, the actual costs of printing and mailing the Notice, publishing the Summary Notice, reimbursements to nominee owners for forwarding the Notice to their beneficial owners, the administrative expenses incurred and fees charged by the Settlement Administrator in connection with providing notice and administering the Settlement, and the fees, if any, of the Escrow Agent. In the event that the Settlement is terminated pursuant to the terms of this Stipulation, all Notice and Administration Costs, Taxes, or Tax Expenses paid or incurred, including any related fees, shall not be returned or repaid to the Settling Defendants, their Insurance Carriers, or any of the other Released Settling Defendants' Persons, or any Person who or which paid any portion of the Settlement Amount.

## X. SETTLEMENT ADMINISTRATION

10.1 Plaintiffs shall retain a Settlement Administrator to provide notice of the Settlement and for the disbursement of the Net Settlement Fund to eligible Class

Members. The Released Settling Defendants' Persons shall not have any involvement in or any responsibility, authority, or liability whatsoever for the selection of the Settlement Administrator.

10.2 Settling Defendants shall cooperate with Plaintiffs in providing notice of the Settlement and administering the Settlement, which cooperation shall include, but not be limited to, the Settling Defendants causing TC Energy Corp. to provide the Merger Records in accordance with Paragraph 10.3 below and the Settling Defendants making reasonable efforts to identify all Excluded Stockholders (defined below) that do not relate to either of the Settling Defendants.

10.3 For purposes of distributing the Net Settlement Fund to eligible Class Members, within five (5) business days after the Court's entry of the Judgment, the Settling Defendants, at no cost to the Settlement Fund, Plaintiffs' Counsel, or the Settlement Administrator, shall make reasonable efforts to cause TC Energy Corp. to provide to Plaintiffs' Lead Counsel or the Settlement Administrator in an electronically-searchable form, such as Excel, the following information (the "Merger Records"):

(a) the names, mailing addresses and, if available, email addresses of all registered holders of CPG common stock listed on CPG's stockholder register ("Registered Holders") who held shares of CPG common stock at the Closing and therefore received or were entitled to receive the Merger Consideration, other than

the Excluded Stockholders ("Merger Record Holders") and the number of shares of CPG common stock held by the Merger Record Holders at the Closing and for which the Merger Record Holders received or were entitled to receive the Merger Consideration;

(b) For each of the persons and entities listed on Exhibit E hereto and any additional Persons that are identified to be excluded from the Class by definition ("Excluded Stockholders"), the following information: (i) the name of the Excluded Stockholder; (ii) an indication of whether the Excluded Stockholder was, at the Closing, either (a) a Registered Holder of CPG common stock listed or (b) a beneficial holder of CPG common stock whose shares were held via a financial institution on behalf of the Excluded Stockholder ("Beneficial Holder"); (iii) the number of shares of CPG common stock beneficially owned by the Excluded Stockholder at the Closing and for which the Excluded Stockholder received or were entitled to receive the Merger consideration ("Excluded Shares"); and (iv) for each Excluded Stockholder that is a Beneficial Holder, (a) the name and DTCC number of the financial institution where his, her, or its Excluded Shares were held and (b) the account number(s) where his, her, or its Excluded Shares were held; and

(c) the allocation or "chill" report generated by the Depository Trust & Clearing Corporation, including its subsidiary the Depository Trust Company ("DTCC"), in anticipation of the Merger to facilitate the allocation of the Merger

Consideration to CPG stockholders (the "DTCC Allocation Report"), which shall include, for each DTCC participant to which DTCC distributed the Merger Consideration (a "DTCC Participant"), the DTCC Participant's DTCC number and the number of shares of CPG common stock reflected on the DTCC Allocation Report used by DTCC to distribute the Merger Consideration.

10.4 In addition to the information to be provided under Paragraph 10.3 above, the Settling Defendants, at the request of Plaintiffs, and at no cost to the Settlement Fund, Plaintiffs, Plaintiffs' Counsel, or the Settlement Administrator, shall make reasonable efforts to provide such additional information or to cause TC Energy Corp. to provide such additional information as may be required to distribute the Net Settlement Fund to eligible Class Members and to ensure that the Net Settlement Fund is paid only to eligible Class Members and not to Excluded Stockholders. Furthermore, to facilitate the distribution of the Net Settlement Fund to eligible Settlement Class Members, the information to be provided to DTCC may include, without limitation, "suppression letters" from DTCC Participants concerning any Excluded Shares, instructing DTCC to withhold payment on those Excluded Shares and containing other terms as DTCC may reasonably require.

10.5 The Settling Defendants and other Excluded Stockholders shall not have any right to receive any part of the Settlement Fund for his, her, or its own account(s) (*i.e.*, accounts in which he, she or it holds a proprietary interest), or any

additional amount based on any claim relating to the fact that Settlement proceeds are being received by any other stockholder, in each case under any theory, including but not limited to contract, application of statutory or judicial law, or equity.

10.6 The Net Settlement Fund shall be distributed to eligible Class Members in the accordance with the proposed Plan of Allocation set forth in the Notice or such other plan of allocation as may be approved by the Court. Notwithstanding anything to the contrary in this Stipulation, the Plan of Allocation proposed in the Notice is not a necessary term of the Settlement or of this Stipulation and it is not a condition of the Settlement or of this Stipulation that any particular plan of allocation be approved by the Court. Plaintiffs and Plaintiffs' Lead Counsel may not cancel or terminate the Settlement (or this Stipulation) based on this Court's or any appellate court's ruling with respect to the Plan of Allocation or any other plan of allocation in this Action. The Settling Defendants shall not object in any way to the Plan of Allocation or any other plan of allocation in this Action and shall not have any involvement with the application of the Court-approved plan of allocation.

10.7 The Net Settlement Fund shall be distributed to eligible Class Members only after the Effective Date of the Settlement and after: (a) all Notice and Administration Costs, all Taxes, and any Fee and Expense Award have been paid from the Settlement Fund or reserved; and (b) the Court has entered an order authorizing the specific distribution of the Net Settlement Fund (the "Class

Distribution Order"). At such time that Plaintiffs' Lead Counsel, in their sole discretion, deems it appropriate to move forward with the distribution of the Net Settlement Fund to the Class, Plaintiffs' Lead Counsel will apply to the Court, on notice to Settling Defendants' Counsel, for the Class Distribution Order.

10.8 Payment pursuant to the Class Distribution Order shall be final and conclusive against all Class Members. Plaintiffs, Settling Defendants, and the other Released Settling Defendants' Persons and their respective counsel, shall have no liability whatsoever for the investment or distribution of the Settlement Fund or the Net Settlement Fund, the determination, administration, or calculation of any payment from the Net Settlement Fund, the nonperformance of the Settlement Administrator or a nominee holding shares on behalf of a Class Member, the payment or withholding of Taxes (including interest and penalties) owed by the Settlement Fund, or any losses incurred in connection therewith.

10.9 All proceedings with respect to the administration of the Settlement and distribution pursuant to the Class Distribution Order shall be subject to the exclusive jurisdiction of the Court.

## XI. EFFECT OF DISAPPROVAL, CANCELLATION, OR TERMINATION

11.1 Plaintiffs and the Settling Defendants shall each have the right to terminate the Settlement and this Stipulation by providing written notice of their election to do so ("Termination Notice") to the other parties to this Stipulation within

thirty (30) calendar days of: (a) the Court's refusal to approve this Stipulation or any part of it that materially affects any Settling Party's rights or obligations hereunder; (b) the Court's declining to enter the Judgment in any material respect, including if the Court does not enter a Bar Order as part of final approval of the Settlement consistent with Paragraph 3.5 above; or (c) the date upon which the Judgment is modified or reversed in any material respect by an appellate court. In addition to the foregoing, Plaintiffs shall have the unilateral right to terminate the Settlement and this Stipulation, by providing written notice of their election to do so to Settling Defendants within thirty (30) calendar days of any failure of Settling Defendants to cause the full payment of the Settlement Amount into the Escrow Account in a timely manner in accordance with Paragraph 2.1 of this Stipulation. Neither a modification nor a reversal on appeal of the amount of fees, costs, and expenses awarded by the Court to Plaintiffs' Counsel nor any order modifying or rejecting the Plan of Allocation shall be deemed a material modification of the Judgment or this Stipulation.

11.2 In the event that the Settlement is terminated pursuant to the terms of Paragraph 11.1 of this Stipulation or the Effective Date otherwise fails to occur for any other reason, then (i) the Settlement and this Stipulation (other than this Paragraph 11.2 and Paragraphs 4.2, 5.2, 8.2, 9.2, 9.3, 9.5, 9.6, 10.8, 12.1, 13.1, 13.2, 13.13, 13.4, 13.5, 13.6, 13.7, 13.9, 13.10, 13.11, 13.12, 13.13, 13.14, 13.15, and

13.14 of this Stipulation) shall be canceled and terminated; (ii) any judgment entered in the Action and any related orders entered by the Court shall in all events be treated as vacated, nunc pro tunc; (iii) the Releases provided under the Settlement shall be null and void; (iv) the fact of the Settlement shall not be admissible in any proceeding before any court or tribunal; (v) all proceedings in the Action shall revert to their status as of immediately prior to the execution of the Term Sheet on January 11, 2022, and no materials created by or received from another Settling Party that were used in, obtained during, or related to settlement discussions shall be admissible for any purpose in any court or tribunal, or used, absent consent from the disclosing party, for any other purpose or in any other capacity, except to the extent that such materials are otherwise required to be produced during discovery in the Action or in any other litigation; (vi) the Settling Parties shall jointly petition the Court for a revised schedule for trial; (vii) the Settling Parties shall proceed in all respects as if the Settlement and this Stipulation (other than this Paragraph) had not been entered into by the Settling Parties; and (viii) within thirty (30) calendar days after joint written notification of termination is sent by Settling Defendants' Counsel and Plaintiffs' Lead Counsel to the Escrow Agent, the Settlement Fund (including accrued interest thereon, and change in value as a result of the investment of the Settlement Fund, and any funds received by Plaintiffs' Counsel consistent with Paragraph 8.2 of this Stipulation), less any Notice and Administration Costs actually

incurred, paid, or payable and less any Taxes and Tax Expenses paid, due, or owing shall be refunded by the Escrow Agent directly to the Persons who made payments pursuant to Paragraph 2.1 above in such amounts as directed by the Settling Defendants. In the event that the funds received by Plaintiffs' Lead Counsel consistent with Paragraph 8.2 of this Stipulation above have not been refunded to the Settlement Fund within the thirty (30) calendar days specified in this Paragraph, those funds shall be refunded by the Escrow Agent immediately upon their deposit into the Escrow Account directly to the Persons who made payment pursuant to Paragraph 2.1 above in such amounts as directed by the Settling Defendants.

## XII. NO ADMISSION OF LIABILITY

12.1 It is expressly understood and agreed that neither the Settlement nor any act or omission in connection therewith is intended or shall be deemed or argued to be evidence of or to constitute an admission or concession by: (a) Settling Defendants as to (i) the truth of any fact alleged by Plaintiffs; (ii) the validity of any claims or other issues raised, or which might be or might have been raised, in the Action or in any other litigation; (iii) the deficiency of any defense that has been or could have been asserted in the Action or in any litigation; or (iv) any wrongdoing, fault, or liability of any kind by any of them, which each of them expressly denies; or (b) Plaintiffs that any of their claims are without merit, that any of the Settling

Defendants had meritorious defenses, or that damages recoverable from the Settling Defendants under the Complaint would not have exceeded the Settlement Amount.

12.2 The Settling Defendants and the Released Persons may file this Stipulation and/or the Judgment in any action that has been or may be brought against them in order to support a claim or defense based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim or in connection with any insurance litigation.

## XIII. MISCELLANEOUS

13.1 Each of the Settling Defendants warrants that, as to the payments made or to be made on behalf of him, at the time of entering into this Stipulation and at the time of such payment he, or to the best of his knowledge any Persons contributing to the payment of the Settlement Amount, were not insolvent, nor will the payment required to be made on behalf of them render them insolvent, within the meaning of and/or for the purposes of the United States Bankruptcy Code, including §§ 101 and 547 thereof. This representation is made by each of the Settling Defendants and not by their counsel.

13.2 In the event of the entry of a Final order of a court of competent jurisdiction determining the transfer of money to the Settlement Fund or any portion thereof on behalf of Settling Defendants to be a preference, voidable transfer,

fraudulent transfer, or similar transaction and any portion thereof is required to be returned, and such amount is not promptly deposited into the Settlement Fund by others, then, at the election of Plaintiffs, Plaintiffs and Settling Defendants shall jointly move the Court to vacate and set aside the Releases given and the Judgment entered in favor of Settling Defendants and the other Released Persons pursuant to this Stipulation, in which event (i) the Releases and Judgment shall be null and void; (ii) Plaintiffs and Settling Defendants shall be restored to their respective positions in the litigation as provided in Paragraph 11.2 of this Stipulation; (iii) Plaintiffs' Lead Counsel shall refund the Fee and Expense Award consistent with Paragraph 8.2 of this Stipulation; and (iv) any cash amounts in the Settlement Fund (less any Taxes paid, due, or owing with respect to the Settlement Fund and less any Notice and Administration Costs actually incurred, paid, or payable) shall be returned as provided in Paragraph 11.2 of this Stipulation.

13.3 This Stipulation shall be deemed to have been mutually prepared by the Settling Parties and shall not be construed against any of them by reason of authorship.

13.4 The Settling Parties agree that in the event of any breach of this Stipulation, all of the Settling Parties' rights and remedies at law, equity, or otherwise, are expressly reserved.

13.5 This Stipulation may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same document. Any signature to the Stipulation by means of facsimile or electronic scanning shall be treated in all manner and respects as an original signature and shall be considered to have the same binding legal effect as if it were the original signed version thereof and without any necessity for delivery of the originally signed signature pages in order for this to constitute a binding agreement.

13.6 The headings herein are used for the purpose of convenience only and are not meant to have legal effect.

13.7 Each counsel or other person executing this Stipulation on behalf of any Settling Party warrants that he or she has the full authority to bind his or her principal to this Stipulation.

13.8 Plaintiffs and Plaintiffs' Lead Counsel represent and warrant that none of Plaintiffs' Released Plaintiffs' Claims have been assigned, encumbered, or in any manner transferred in whole or in part.

13.9 This Stipulation shall not be modified or amended, nor shall any provision of this Stipulation be deemed waived, unless such modification, amendment, or waiver is in writing and executed by or on behalf of the Settling Party or Settling Parties against whom such modification, amendment, or waiver is sought to be enforced.

13.10 Any failure by any Settling Party to insist upon the strict performance by any other Settling Party of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof, and such Settling Party, notwithstanding such failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Stipulation to be performed by such other Settling Party. Waiver by any Settling Party of any breach of this Stipulation by any other Settling Party shall not be deemed a waiver of any other prior or subsequent breach of this Stipulation, and failure by any Settling Party to assert any claim for breach of this Stipulation shall not be deemed to be a waiver as to that or any other breach and will not preclude any Settling Party from seeking to remedy a breach and enforce the terms of this Stipulation. Each of the Settling Defendants' respective obligations hereunder are several and not joint, and the breach or default by one Settling Defendant shall not be imputed to, nor shall any Settling Defendant have any liability or responsibility for, the obligations of any other Settling Defendant herein.

13.11 This Stipulation is and shall be binding upon, and shall inure to the benefit of, the Settling Parties (and, in the case of the Releases, all Released Persons as third-party beneficiaries) and their respective legal representatives, heirs, executors, administrators, predecessors, successors, predecessors-in-interest, successors-in-interest and assigns of any of the foregoing, including without

limitation any corporation or other entity with which any party hereto may merge, reorganize, or otherwise consolidate.

13.12 Notwithstanding the entry of the Judgment, the Court shall retain jurisdiction with respect to the implementation, enforcement, and interpretation of the terms of the Stipulation, and all Settling Parties submit to the jurisdiction of the Court for all matters relating to the administration, enforcement, and consummation of the Settlement and the implementation, enforcement, and interpretation of the Stipulation, including, without limitation, any matters relating to awards of attorneys' fees and expenses. Each Settling Party (i) consents to personal jurisdiction in any such action (but no other action) brought in the Court; (ii) consents to service of process by registered mail upon such Settling Party or such Settling Party's agent; and (iii) waives any objection to venue in the Court and any claim that Delaware or the Court is an inconvenient forum.

13.13 The construction and interpretation of this Stipulation shall be governed by and construed in accordance with the laws of the State of Delaware and without regard to the laws that might otherwise govern under principles of conflicts of law applicable hereto.

13.14 Without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

13.15 Whether or not the Stipulation is approved by the Court and whether or not the Stipulation is consummated, or the Effective Date occurs, the Settling Parties and their counsel shall use their best efforts to keep all negotiations, discussions, acts performed, agreements, drafts, documents signed, and proceedings in connection with the Stipulation confidential.

13.16 All agreements made and orders entered during the course of this Action relating to the confidentiality of information shall survive this Settlement.

13.17 This Stipulation and the following exhibits ("Exhibits") constitute the entire agreement among the Settling Parties with respect to the subject matter hereof:

(a) Exhibit A: Scheduling Order With Respect to Notice and Settlement Hearing;

(b) Exhibit B: Notice of Pendency and Proposed Settlement of Stockholder Class Action, Settlement Hearing, and Right to Appear;

(c) Exhibit C: Summary Notice of Pendency and Proposed Settlement of Stockholder Class Action, Settlement Hearing, and Right to Appear;

(d) Exhibit D: Final Order and Judgment;

(e) Exhibit E: Schedule of Excluded Stockholders Related to The Settling Defendants.

These Exhibits are incorporated by reference as if set forth herein verbatim, and the terms of all Exhibits are expressly made part of this Stipulation. No representations, warranties, or inducements have been made to or relied upon by any Settling Party concerning this Stipulation or its Exhibits, other than the representations, warranties, and covenants expressly set forth in such documents.

13.18 The Settling Parties intend this Stipulation and the Settlement to be a final and complete resolution of all disputes asserted or which could be asserted by Plaintiffs and any other Class Members against Settling Defendants with respect to the Released Plaintiffs' Claims. Accordingly, Plaintiffs and their counsel and Settling Defendants and their counsel agree not to assert in any forum that this Action was brought by Plaintiffs or defended by Settling Defendants in bad faith or without a reasonable basis. Plaintiffs and the Settling Defendants represent and agree that the terms of the Settlement reached between Plaintiffs and the Settling Defendants were negotiated at arm's-length and in good faith by Plaintiffs and the Settling Defendants, and reflect a settlement that was reached voluntarily based upon adequate information and sufficient discovery and after consultation with experienced legal counsel.

13.19 While retaining their right to deny that the claims asserted in the Action were meritorious, Settling Defendants and their counsel, in any statement made to any media representative (whether or not for attribution) will not assert that the

Action was commenced or prosecuted in bad faith, nor will they deny that the Action was commenced and prosecuted in good faith and is being settled voluntarily after consultation with competent legal counsel. In all events, Plaintiffs and their counsel and Settling Defendants and their counsel shall not make any accusations of wrongful or actionable conduct by any Settling Party concerning the prosecution, defense, and resolution of the Action, and shall not otherwise suggest that the Settlement constitutes an admission of any claim or defense alleged.

13.20 No opinion or advice concerning the tax consequences of the proposed Settlement to individual Class Members is being given or will be given by the Settling Parties or their counsel; nor is any representation or warranty in this regard made by virtue of this Stipulation. Each Class Member's tax obligations, and the determination thereof, are the sole responsibility of the Class Member, and it is understood that the tax consequences may vary depending on the particular circumstances of each individual Class Member

**IN WITNESS WHEREOF, IT IS HEREBY AGREED** by the undersigned as of the date noted above.

LABATON SUCHAROW LLP

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Dated: March 2, 2022

## CERTIFICATE OF SERVICE

I, Ned Weinberger, hereby certify that, on March 2, 2022, I caused a true and correct copy of the foregoing to be served on the following counsel of record by File and ServeXpress:

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