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Case No. 2022-0584-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PETER J. KREHER, on behalf of himself and all others similarly situated, Plaintiff, v. ADVANT-E CORPORATION, JASON WADZINSKI, and JASON BOONE, Defendants.	)	C.A. No. 2022-0584-SG

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF MOTION FOR (I) APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION, (II) CERTIFICATION OF THE SETTLEMENT CLASS, AND (III) AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND A SERVICE AWARD TO PLAINTIFF

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I. INTRODUCTION

In December 2021, Advant-e Corporation effected a 1 for 20,000 reverse stock split, and paid stockholders $5.25 per share (on a pre-split basis) for any fractional shares of Advant-e common stock that resulted from the reverse split (the "2021 Reverse Stock Split").[1] Plaintiff Peter J. Kreher filed this class action on behalf of himself and other stockholders who received cash for fractional shares alleging, among other things, that (a) the 2021 Reverse Stock Split was subject to entire fairness review, (b) Defendant Advant-e violated 8 *Del. C.* § 155 ("Section 155") by paying less than fair value for fractional shares that resulted from the 2021 Reverse Stock Split, and (c) Defendants Jason Wadzinski and Jason Boone breached their fiduciary duties by approving and carrying out the 2021 Reverse Stock Split at an unfair price and through an unfair process.

Plaintiff respectfully requests that the Court approve the Settlement of this action for a total of $896,973 in cash for the benefit of a Settlement Class of "the non-opt-out class of record holders and beneficial owners of Advant-e common stock who were paid cash for fractional shares of Advant-e common stock as a result of the 2021 Reverse Stock Split."[2]

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[1] Unless otherwise defined, all capitalized terms have the meaning ascribed to them in the Scheduling Order, dated July 20, 2023 (Trans. ID 70439072), or the Stipulation, dated July 6, 2023 (Trans. ID 70317071).

[2] Stipulation ¶ 1.56. Excluded from the Settlement Class are "(i) Defendants; (ii) current and former employees, executives, and directors of Advant-e ('Excluded D&Os'), except

The Settlement Fund of $896,973, or $1.75 per cashed share owned by Settlement Class Members and cashed out in the 2021 Reverse Stock Split, is equal to a 33% increase in the consideration received by Settlement Class Members for the fractional shares that resulted from the 2021 Reverse Stock Split ($1.75 / $5.25). Plaintiff respectfully submits that this is an excellent result, and that the Settlement should be approved by the Court.

Further, all requirements of Delaware Court of Chancery Rule 23 are met, and Plaintiff respectfully requests that the Court finally certify the Settlement Class in connection with approval of the Settlement.

Finally, Plaintiff and Plaintiff's Counsel respectfully request that the Court approve a Fee and Expense Award composed of (a) an award of attorneys' fees equal to 15% of the Settlement Fund, or $134,545, and (b) reimbursement of litigation costs and expenses of $19,922.64. These amounts are reasonable in light of the results achieved by Plaintiff's Counsel in the litigation, and in line with fee and expense awards granted by the Court of Chancery in similar cases. Plaintiff's

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for one Advant-e employee who Defendants represent is a programmer and had no involvement in the reverse stock split (the 'Included Employee'); and (iii) members of Defendants' and the Excluded D&Os' immediate families, legal representatives, heirs, successors or assigns and any entity in which Defendants or the Excluded D&Os have or had a controlling interest (each person or entity listed by romanette in this paragraph except for the Included Employee, an 'Excluded Person'). For the avoidance of doubt, the Included Employee is a member of the Settlement Class and is not an Excluded D&O or Excluded Person." *Id.*

Counsel also seek approval of a $1,000 Service Award to be paid to Plaintiff from the Fee and Expense Award granted to Plaintiff's Counsel. The Service Award will compensate the Plaintiff for the time he spent on the Action, including consulting with Plaintiff's Counsel concerning the underlying claims of the litigation, potential damages, settlement discussions, and strategy.

The deadline for Settlement Class members to object to the Settlement, the requested Fee and Expense Award, and/or the Service Award is October 25, 2023.[3] To date, no objections have been received by counsel or filed with the Court.[4]

II. STATEMENT OF FACTS AND SUMMARY OF LITIGATION

A. Background.

1. The Parties.

Plaintiff Peter Kreher was a stockholder of Advant-e, and had all of his shares of Advant-e common stock cashed out in the 2021 Reverse Stock Split at the price of $5.25 per share.[5]

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[3] Objections must be served "not later than 14 calendar days before the Settlement Hearing" (Scheduling Order ¶ 17), which is scheduled for November 8, 2023.

[4] Affidavit of Joshua W. Ruthizer, Esq., in Support of Motion for (I) Approval of Settlement and Plan of Allocation, (II) Certification of the Settlement Class, and (III) An Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and a Service Award to Plaintiff ("Ruthizer Aff."), dated October 10, 2023, and filed herewith, ¶ 3; Affidavit of Lance Cavallo Regarding (A) Mailing of the Postcard Notice; (B) Publication of the Summary Notice; (C) Establishment of the Telephone Hotline; and (D) Establishment of the Settlement Website ("Cavallo Aff."), dated October 6, 2023, and filed herewith, ¶ 14.

[5] Verified Class Action Complaint ("Complaint" or "Compl."), filed with the Court on July 1, 2022, Trans. ID 67785091, ¶ 5.

Advant-e is a Delaware corporation. Advant-e "develops, markets, resells, and hosts software and provides services that enable its customers to send and receive business documents electronically in standard and proprietary formats, specializing in providing hosted Electronic Data Interchange (EDI) solutions utilizing the Internet as the primary communications method."[6]

At all relevant times, Defendants Jason Wadzinski and Jason Boone were the only two members of the Board of Directors of Advant-e.[7] Wadzinski was the Chairman of the Board, President, CEO, and controlling majority stockholder of Advant-e, owning more than 50% of the outstanding shares of Advant-e common stock.[8] Boone was a director and the CFO of Advant-e.[9]

2. Advant-E Refuses to File Public Financial Statements and De-Lists its Common Stock.

Prior to May 2013, Advant-e's common stock was listed and traded on the OTC Markets OTCQB under the symbol "ADVC."[10] On May 2, 2013, Advant-e filed a Form 15 with the SEC, terminating registration of Advant-e's common stock

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[6] Compl. ¶ 19; Answer to Verified Class Action Complaint ("Answer" or "Ans."), filed with the Court September 6, 2022, Trans. ID 68044864, ¶ 19.

[7] Compl. ¶ 18.

[8] Ans. ¶ 13; Compl. ¶¶ 3, 15, 42-43, 71-72, 75.

[9] Ans. ¶ 16.

[10] *Id.* ¶ 32.

and suspending reporting requirements under the Securities Exchange Act of 1934.[11] At the time, Advant-e told investors that its Board made "the decision to voluntarily suspend its public reporting obligations due to many factors, including the Company's size and the lack of sufficient liquidity in the market for its common stock, but also the high cost of complying with SEC rules, regulations and procedures and eliminating the requirement to disclose certain competitive business information."[12] From May 2, 2013 through September 2021, Advant-e common stock was listed and traded on the OTC Pink Market under the symbol "ADVC."[13]

In a letter dated December 15, 2021 (the "December 15 Letter") and purportedly sent to all Advant-e stockholders, the defendants stated that a recent amendment to SEC Rule 15c2-11 "required [Advant-e] to make its financials publicly available for continued quotation on the OTC Pink Market," and that Defendants "made the decision not to make [Advant-e's] financial statements available" in response to the amended rule "for the same reasons we suspended the SEC reporting requirements after our 2012 financial statements were filed."[14] Because Wadzinski was the majority controlling stockholder of Advant-e and owned more than 50% of the outstanding common stock of Advant-e, he had the ability to

[11] Compl. ¶ 40; Ans. ¶ 40.

[12] Compl. ¶ 38.

[13] Ans. ¶ 41.

[14] Compl. ¶¶ 63-64.

act alone to refuse to comply with the amended Rule 15c2-11 and remove Advant-e common stock from public listing.[15]

3. The 2021 Reverse Stock Split.

The December 15 Letter also stated that on November 1, 2021, stockholders of Advant-e, acting by written consent in lieu of a special meeting of stockholders, had approved the 2021 Reverse Stock Split. The 2021 Reverse Stock Split was effective December 15, 2021.[16] Because Wadzinski was the controlling majority stockholder of Advant-e and owned more than 50% of the outstanding common stock of Advant-e, he had the ability to, and did, act alone to approve the 2021 Reverse Stock Split by written consent.[17]

Pursuant to the 2021 Reverse Stock Split, every 20,000 shares of Advant-e common stock were exchanged for one share of common stock, and "[a]ny fractional shares resulting from the reverse stock split [resulted] in a cash payment in lieu of fractional shares at the rate of $5.25 per share on a pre-split basis."[18] The December 15, 2021 letter claimed that the $5.25 per share cash-out price was "a 4.58% premium over the per share value determined by an independent third-party

[15] *Id.* ¶¶ 71-72.

[16] *Id.* ¶¶ 73-74.

[17] *Id.* ¶¶ 75, 81-82, 87-88.

[18] *Id.* ¶¶ 73-74.

valuation."[19] However, the valuation, and the name of the third-party, was never disclosed to the Settlement Class.[20]

The 2021 Reverse Stock Split was not subject to, from the outset or at any time, negotiation and approval by a special committee of independent directors or a vote of a majority of Advant-e minority stockholders.[21] Minority stockholders were not given the opportunity to vote on the transaction, and purportedly only learned about the transaction by the December 15 Letter, which was dated the same date the 2021 Reverse Stock Split was effective.[22]

As a result of the 2021 Reverse Stock Split, 512,556 shares of Advant-e common stock owned by the Settlement Class were cashed out at $5.25 per share on a pre-split basis, for a total of $2,690,919.[23]

B. Procedural History.

1. The Complaint.

On July 1, 2022, Plaintiff filed the Complaint on behalf of himself and a class of "all minority stockholders of Advant-e who were paid cash for fractional shares

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[19] *Id.*

[20] *Id*. ¶ 76.

[21] Ans. ¶¶ 83, 89.

[22] Compl. ¶¶ 83, 90.

[23] Cavallo Aff. Ex. B (Longform Notice) at pp. 3-4.

of Advant-e common stock as a result of the 2021 Reverse Stock Split and were harmed by the Defendants' actions."[24]

The Complaint alleges that the 2021 Reverse Stock Split is subject to entire fairness review because it was effected through approval of the controlling majority stockholder of Advant-e (Wadzinski), and was not subject from the outset to approval by an independent special committee or a fully informed vote of the minority stockholders.[25]

The Complaint alleges that the $5.25 per share price (on a pre-split basis) paid for fractional shares was not fair value/was unfair because, among other reasons, in the months leading up to the September 27, 2021 de-listing of Advant-e common stock, almost all transactions in Advant-e common stock were at prices above $5.52 per share (a 5% premium to the $5.25 per share price), and at prices as high as $6.95 per share (a 32% premium to the $5.25 per share price).[26]

The Complaint also alleges that the 2021 Reverse Stock Split was executed through an unfair process because, among other reasons, (a) minority stockholders were not given the ability to vote on the reverse split, (b) there was no independent special committee that approved the reverse split, (c) the valuation was not disclosed

[24] Compl. ¶ 21.

[25] *Id*. ¶¶ 81-86.

[26] *Id*. ¶¶ 109-124.

to class members, and (d) class members learned of the reverse stock split by a letter dated the same date the reverse split was effective.

The Complaint alleges three causes of action. Count I alleges that Advant-e violated Section 155, which requires that if a corporation "does not issue fractions of a share, it shall…***pay in cash the fair value of fractions of a share*** as of the time when those entitled to receive such fractions are determined,"[27] and that the $5.25 per share cash paid for fractional shares as part of the 2021 Reverse Stock Split was not fair value.[28] Count II alleges that Wadzinski and Boone breached their fiduciary duties to the minority stockholders of Advant-e by approving and carrying out the 2021 Reverse Stock Split through an unfair process and at an unfair price.[29] Count III alleges that Wadzinski, as the controlling majority stockholder of Advant-e who had the ability to, and did, approve the 2021 Reverse Stock Split through the written consent of his majority ownership of Advant-e common stock, breached his fiduciary duties to the minority stockholders by approving and carrying out the 2021 Reverse Stock Split at an unfair price and through an unfair process.[30]

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[27] *Id*. ¶¶ 109, 126 (emphasis added).

[28] *Id*. ¶¶ 109-114, 125-130.

[29] *Id*. ¶¶ 131-142.

[30] *Id*. ¶¶ 143-152.

2. Discovery and Settlement Negotiations.

Defendants filed an Answer on September 6, 2022. On September 19, 2022, Plaintiff and Defendants entered into a Confidentiality Stipulation, which was entered by the Court the same day. After entry of the Confidentiality Order, Defendants produced to Plaintiff the non-public valuation report prepared in connection with the 2021 Reverse Stock Split.[31]

After receiving and reviewing the valuation report, Plaintiff's Counsel requested 16 additional categories of documents from Defendants, and Defendants produced the responsive documents on October 10, 2022, comprising approximately 500 pages of mostly non-public documents, including financial documents, documents related to the 2021 Reverse Stock Split, drafts of the valuation report, and other relevant documents.[32]

Plaintiff's Counsel reviewed the documents produced by Defendants and other publicly available information concerning Advant-e.[33] Plaintiff's Counsel also consulted with a valuation expert concerning the fair value of Advant-e and the cashed-out minority stock at the time of the 2021 Reverse Stock Split Effective Date, and potential damages to the Settlement Class.[34]

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[31] Stipulation at p. 4.

[32] *Id.*

[33] Ruthizer Aff. ¶ 5.

[34] *Id.* ¶¶ 5-6.

Plaintiff and Defendants, through their respective counsel, then engaged in arm's-length negotiations in an attempt to resolve the Action, culminating in the agreement on the terms of the proposed Settlement.

3. <u>The Settlement and the Stipulation.</u>

The Parties have agreed to settle the Litigation on the terms set forth in the Stipulation. Pursuant to the terms of the Stipulation, Defendants have paid into the Escrow Account the Settlement Amount of $896,973 for the benefit of the Settlement Class. Defendants produced information to evidence that the Settlement Class owned, collectively, 512,556 shares of Advant-e common stock that were cashed out in the 2021 Reverse Stock Split. The Settlement Amount represents $1.75 per share for each Advant-e share, on a pre-split basis, owned by a Settlement Class Member and cashed-out as part of the 2021 Reverse Stock Split.[35]

In exchange for the payment of the Settlement Amount, and subject to final approval of the Settlement and certification of the Settlement Class by the Court, as well as the Effective Date of the Settlement, the Released Plaintiff Persons (Plaintiff, the Settlement Class Members, and their heirs, estates, executors, trustees, successors, and assigns) will release the Released Plaintiff Claims:

> all Claims that were alleged, asserted, set forth, or claimed in the Complaint or could have been alleged, asserted, set forth, or claimed in the Complaint or in any other court, tribunal, or proceeding by Plaintiff or any other member of the Settlement Class, individually, or as a

[35] Stipulation at pp. 4-5.

> member of the Settlement Class directly in their capacities as current or former Advant-e stockholders, against Defendants, in each case arising out of, based on, or relating to the allegations, transactions, facts, events, matters, occurrences, representations, or omissions involved, set forth, or referred to in the Complaint, including without limitation all such claims relating to (i) the 2021 Reverse Stock Split and the process of effecting the 2021 Reverse Stock Split; (ii) the consideration received by Plaintiff and/or the Settlement Class in connection with the 2021 Reverse Stock Split; and (iii) any fiduciary obligations of Defendants relating to the 2021 Reverse Stock Split, the process of deliberation leading to the 2021 Reverse Stock Split, the disclosures respecting the 2021 Reverse Stock Split, or the consideration received by Plaintiff and/or the Settlement Class in connection with the 2021 Reverse Stock Split, provided, however, that the Released Plaintiff Claims shall not include claims to enforce the Settlement.[36]

Following the Effective Date of the Settlement, the Net Settlement Fund will be disbursed by the Settlement Administrator according to the Plan of Allocation to the Settlement Class.[37] The Net Settlement Fund is the Settlement Amount plus interest, minus (i) any Taxes and Tax Expenses; (ii) any Notice and Administration Costs; (iii) any Fee and Expense Award (including any Service Award) awarded by the Court; and (iv) any other costs or fees approved by the Court.[38]

Pursuant to the Plan of Allocation and the Stipulation, the Net Settlement Fund will be distributed to Settlement Class Members on a *pro rata* basis, based upon the number of shares each Settlement Class Member had cashed out in the 2021

[36] *Id.* ¶¶ 1.47, 6.

[37] *Id.* ¶ 29.

[38] *Id.* ¶ 1.34.

Reverse Stock Split for $5.25 per share. There is no "claim form" for Settlement Class Members to submit in order to be entitled to payment under the Plan of Allocation. Rather, payment will be made to Settlement Class Members directly by the Settlement Administrator and in the same manner in which Settlement Class Members received their 2021 Reverse Stock Split Cash Payment based on the information provided by Defendants, their agents, and the Depository Trust Company ("DTC").[39]

4. The Notice Program.

Pursuant to the Stipulation, and the Scheduling Order entered by the Court on July 20, 2023, on August 4, 2023, the Settlement Administrator launched the Settlement Website, www.AdvantEStockholderSettlement.com, which contains information about the Settlement, including but not limited to the Settlement Amount, the Settlement Class, the Fee and Expense Application, the date of the Settlement Hearing, and the deadline and procedure for Settlement Class Members to make objections to the Settlement or the Fee and Expense Application, and downloadable copies of the Long-Form Notice, the Stipulation, the Complaint, the Scheduling Order, and other documents and information related to the Litigation and the Settlement.[40]

[39] *Id.* ¶¶ 29-34; Cavallo Aff. Ex. B (Long-Form Notice) at pp. 3-4.

[40] Cavallo Aff. ¶ 13.

On August 4, 2023, the Settlement Administrator mailed the Postcard Notice by first class mail to potential Settlement Class Members and brokers and nominees that may have held Advant-e common stock in street name for their customers.[41] The mailing was conducted based on information provided to Plaintiff's Counsel and the Settlement Administrator by Defendants' Counsel. On August 11, 2023, the Settlement Administrator caused a copy of the Summary Notice to be published on *PR Newswire*, a national wire service.[42] In addition to providing potential Settlement Class Members with information about the Settlement, the Settlement Hearing, and the deadline for Settlement Class Members to object to the Settlement, the Postcard Notice and the Summary Notice directed potential Settlement Class Members to the Settlement Website for further information and a copy of the Long-Form Notice.[43]

In total, the Settlement Administrator has mailed or distributed a total of 194 Postcard Notices.[44] Through October 6, 2023 the Settlement Website has been visited 331 times by 221 unique visitors, and the Long-Form Notice has been downloaded 29 times.[45]

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[41] *Id.* ¶¶ 4-6.

[42] *Id.* ¶ 11.

[43] *See Id.* Exs. A (Postcard Notice) and C (Summary Notice).

[44] *Id.* ¶ 9.

[45] *Id.* ¶ 13.

III. ARGUMENT

A. The Proposed Settlement Is Fair, Reasonable, and Adequate and Should Be Approved.

1. Delaware Law Strongly Favors Settlement.

Delaware law strongly favors the voluntary settlement of claims, particularly in representative actions like this one.[46] In reviewing a proposed settlement, the Court is "not required to decide any of the issues on the merits,"[47] but instead "consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then to apply its own business judgment in deciding whether the settlement is reasonable in light of these factors."[48] The relevant "facts and circumstances" include: (a) the strength of the claims; (b) difficulties in enforcing the claims through the courts; (c) the delay, expense, and trouble of litigation; (d) the amount of the compromise as compared with the amount of any collectible judgment; and (e) the views of the parties involved.[49]

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[46] *See, e.g.*, *Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991); *In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 265-66 (Del. 1990); *Nottingham P'rs v. Dana*, 564 A.2d 1089, 1102 (Del. 1989).

[47] *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986).

[48] *Polk*, 507 A.2d at 535; *see Forsythe v. ESC Fund Mgmt. Co.*, C.A. No. 1091–VCL, 2012 WL 1655538, at *3 (Del. Ch. May 9, 2012) (the Court need not perform a "definitive evaluation of the case on its merits" as doing so "would defeat the basic purpose of the settlement of litigation").

[49] *Polk*, 507 A.2d at 535-36 (citing *Rome v. Archer*, 197 A.2d 49, 53-54 (Del. 1964)).

In deciding whether to approve a settlement, the Court's critical inquiry is the balance between the value of the benefits achieved for class members and the strength of the claims being released.[50] This inquiry involves "assessing the reasonableness of the 'give' and the 'get....'"[51] Here, a comparison of the narrowly tailored releases provided to Defendants in the Stipulation, which relate only to the 2021 Reverse Stock Split (the "give"), to the $896,973 Settlement Amount for the Settlement Class (the "get"), weighs heavily in favor of approving the Settlement.

2. The Settlement Confers a Substantial Financial Benefit and a 33% Increase in the 2021 Reverse Stock Split Consideration for the Settlement Class.

The "get" here is significant and straightforward: a $896,973 cash payment for the benefit of the Settlement Class, or $1.75 per share owned by the Settlement Class and cashed out as part of the 2021 Reverse Stock Split. The "get" represents a 33% increase in the $5.25 per share cash payment to Settlement Class Members as part of the 2021 Reverse Stock Split – an excellent result. This Court has recognized that increased deal price ranges similar to that at issue here represent a strong recovery.[52]

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[50] *Barkan v. Amsted Indus., Inc*., 567 A.2d 1279, 1284 (Del. 1989); *Polk*, 507 A.2d at 535.

[51] *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1043 (Del. Ch. 2015).

[52] *See*, *e.g.*, *In re HomeFed Corp. S'holder Litig.*, C.A. No. 2019-0592-LWW, at 26 (Del. Ch. Feb. 15, 2022) (TRANSCRIPT) ("[T]he recovery is about 9.4 % of the total price. In my view, that's a good result for the class, and it's certainly within the range of reasonableness and in line with other similar settlements that have been recently approved."); *id.* at 31 (stating that the settlement was a "fantastic result for the class"); *See*

3. The Proposed Settlement Is Highly Favorable to the Settlement Class, Particularly in Light of the Risks, Costs, and Uncertainties of Continued Litigation.

The Proposed Settlement is particularly fair, adequate, and reasonable when weighed against the risks, costs, and uncertainties of continued litigation. As explained below, Plaintiff faced significant risks related to the ability to prove liability and achieve a judgment in favor of the Settlement Class. Further, had litigation continued, costs and expenses (including discovery and expert costs) would have significantly increased, without any guarantee of a higher recovery by the Class.

a) Defendants May Have Convinced the Court that Enhanced Scrutiny or Business Judgement Review, and Not Entire Fairness, Applies to the 2021 Reverse Stock Split.

In Plaintiff's view, this case was plainly subject to entire fairness review: the 2021 Reverse Stock Split was approved by the written consent of Advant-e's

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also In re AVX Corp. S'holders Litig., Consol. C.A. No. 2020-1046- SG (Del. Ch. Dec. 27, 2022) (ORDER) (approving $49.9 million settlement, representing approximate 5% premium to total transaction size); *In re Pivotal Software, Inc. S'holders' Litig.*, 2022 WL 5185565 (Del. Ch. Oct. 4, 2022) (approving $42.5 million settlement, representing approximately 3% of total deal price); *In re Saba Software, Inc. S'holder Litig.*, 2018 WL 4620107 (Del. Ch. Sept. 26, 2018) (approving $19.5 million settlement, representing 4.9% of total transaction size); *In re Mavenir Sys., Inc. S'holder Litig.*, C.A. No. 10757-VCMR (Del. Ch. Oct. 12, 2016) (ORDER) (approving $3 million settlement, representing 0.5% of total transaction size of $560 million); *In re TIBCO Software Inc. S'holder Litig.*, C.A. No. 10319-CB (Del. Ch. Sept. 7, 2016) (ORDER) (approving $30.4 million settlement, representing 7.2% of total transaction size of $4.2 billion); *In re Arthrocare Corp. S'holder Litig.*, C.A. No. 9313-VCL (Del. Ch. Nov. 6, 2014) (ORDER) (approving $12 million settlement, representing 0.87% of total transaction size).

majority controlling stockholder, Defendant Wadzinski.[53] The 2021 Reverse Stock Split was not subject to, from the outset, approval by an independent special committee and a fully informed vote of Advant-e's minority stockholders, all of whom were subject to having shares cashed out in the 2021 Reverse Stock Split.[54] As stated by Vice Chancellor Laster:

> When a controlling stockholder uses a reverse split to freeze out minority stockholders without any procedural protections, the transaction will be reviewed for entire fairness with the burden of proof on the defendant fiduciaries. A reverse split under those circumstances is the 'functional equivalent' of a cash-out merger. If the controlling stockholder permits the board to form a duly empowered and properly functioning special committee, or if the transaction is conditioned on a correctly formulated majority-of-the-minority vote, then the burden could shift to the plaintiff to prove that the transaction was unfair.[55]

Although Plaintiff has a compelling argument as to why entire fairness would apply, there is a considerable risk that the Court could disagree. In their Answer, Defendants denied that entire fairness applied.[56] Plaintiff anticipates that the Defendants would have argued strenuously at trial that entire fairness was not the appropriate standard of review for the 2021 Reverse Stock Split. For example, Plaintiff anticipates that Defendants would argue that Wadzinski received the same

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[53] Compl. ¶ 82.

[54] Ans. ¶ 83.

[55] *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 460 (Del. Ch. 2011) (citations omitted).

[56] Ans. ¶ 85.

consideration for fractional shares he received as part of the 2021 Reverse Stock Split as did the other (minority) stockholders of Advant-e, and that Wadzinski did not receive any material "not-ratable benefit" pursuant to the 2021 Reverse Stock Split,[57] distinguishing the 2021 Reverse Stock Split from classic squeeze-outs where the controller is economically incentivized to pay minority stockholders as little as possible. It is also not apparent that Wadzinski engaged in self-dealing, which would support application of the entire fairness standard.[58]

Had Plaintiff been unable to prove that the entire fairness standard of review applied, then the Court could have applied either the enhanced scrutiny[59] or business judgment standards of review. In the context of a Section 155 proceeding, under enhanced scrutiny, "a stockholder who seeks to challenge the board's decision [on a fair value for fractional shares] must plead and subsequently prove that the board

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[57] *See, e.g., In re Viacom Inc. Stockholders Litig.*, Consol. C.A. No. 2019-0948-JRS, 2020 WL 7711128, at *16 (Del. Ch. Dec. 29, 2020) ("A non-ratable benefit exists when the controller receives a 'unique benefit by extracting something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders.'").

[58] *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (finding that entire fairness will be applied only when the fiduciary duty is accompanied by self-dealing, the situation when a controller is on both sides of a transaction).

[59] "A reverse split in which stockholders receive cash in lieu of fractional interests is an end stage transaction for those stockholders being cashed out of the enterprise. A disinterested and independent board's decision to pay cash in lieu of fractional shares therefore should be subject to enhanced scrutiny." *Reis*, 28 A.3d at 459.

acted wrongfully."[60] Under enhanced scrutiny, "the defendant fiduciaries bear the burden of persuasion to show that their motivations were proper and not selfish" and that "their actions were reasonable in relation to their legitimate objective."[61] Plaintiff respectfully submits that under enhanced scrutiny, the Defendants could make a strong argument that the 2021 Reverse Stock Split was reasonable in relation to a legitimate corporate purpose. For example, in the December 15 Letter, the Defendants stated that the Board determined the 2021 Reverse Stock Split was necessary:

> due to numerous shareholders, many left from the original [] reverse merger, no longer having valid contact information and the associated cost of reporting dividends with these shareholders to unclaimed funds in every state of their last known address.[62]

Under the business judgment rule, Plaintiff "must rebut the presumption that the Board's business decision was 'rational in the sense of being one logical approach to advancing the corporation's objectives.'"[63] "'[W]here the business judgment [rule] presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational purpose.'"[64] Plaintiff respectfully

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[60] *Reis*, 28 A.3d at 456-57.

[61] *Reis*, 28 A.3d at 457.

[62] Compl. ¶ 78.

[63] *Samuels v. CCUR Holdings, Inc.,* C.A. No. 2021-0358-PAF, 2022 WL 1744438, at *8 (Del. Ch. May 31, 2022).

[64] *Reis*, 28 A.3d at 457 (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 74 (Del. 2006) (internal quotation marks omitted)).

submits that had the business judgment rule been applied in this case, Advant-e's stated reasoning for the 2021 Reverse Stock Split would likely have been found to be a rational corporate purpose, and Defendants likely would have been successful at trial or on summary judgment.

b) Defendants May Have Proven That the 2021 Reverse Stock Split Was Entirely Fair.

In their Answer, Defendants asserted an affirmative defense that "[t]o the extent the Court finds that entire fairness applies, the challenged transaction and any actions taken by the Individual Defendants in connection therewith were entirely fair."[65] While entire fairness is the most "onerous standard" of review Delaware Courts apply to corporate transactions,[66] a plaintiff victory is not guaranteed. In fact, the Chancery Court has recently found in favor of defendants when evaluating challenged transactions under entire fairness, and the Delaware Supreme Court agreed.[67]

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[65] Fifth Affirmative Defense, Ans. at p. 54.

[66] *Reis*, 28 A.3d at 459 (Del. Ch. 2011).

[67] *See In re Tesla Motors Stockholder Litig.*, 298 A.3d 667 (Del. 2023) (affirming the trial court's decision that the acquisition was entirely fair and the determination that the directors of the acquiring company, following a rigorous negotiation process, were not dominated or controlled by the company's CEO and largest stockholder when they voted to approve the acquisition); *In re BGC Partners, Inc. Derivative Litig.*, No. 359, 2022, 2023 WL 5127340 (Del. Aug. 10, 2023) (en banc) (affirming that the acquisition was entirely fair and there was no breach of fiduciary duties because despite the controlling stockholder's involvement in selecting the chairs and advisors of the corporation's special committee and one of the chair's interactions with the controlling stockholder, which were withheld from the other special committee members—the transaction was fair in all

(1) Defendants May Have Proven That $5.25 Per Share (on a Pre-Split Basis) was Fair Value or Fair Price.

Section 155 requires a corporation to "pay in cash ***the fair value*** of the factions of a share as of the time when those entitled to receive such fractions are determined." When the reverse stock split is evaluated under the entire fairness standard, "fair value" is equivalent to "fair price" in the entire fairness standard of review.[68]

Advant-e's common stock was delisted from the OTC Markets on or about September 27, 2021. As such, "[t]he court cannot defer to market price as a measure of fair value if the stock has not been traded actively in a liquid market."[69] Valuations can vary widely depending on the methods of valuation used (comparable companies, discounted cash flow, precedent transactions), and the various factors and inputs used in each valuation method (specific comparable companies or precedent transactions, multiples, risk premiums, and discounts).

While Plaintiff is confident that he could have presented evidence that the fair price of Advant-e was common stock at the time of the 2021 Reverse Stock Split was greater than $5.25 per share (on a pre-split basis), he anticipates that Defendants

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respects to the corporation and its minority stockholders and resulted in a deal with a favorable structure and a fair price).

[68] *See Reis*, 28 A.3d at 461-64.

[69] *Applebaum v. Avaya, Inc.*, 812 A.2d 880, 890 (Del. 2002).

would have presented expert testimony that the $5.25 per share price was more than fair. There is no guarantee that the Court would have accepted Plaintiff's expert's arguments, or arrived at a fair value in excess of $5.25 per share, or in excess of $7.00 per share, the total value that Settlement Class Members will receive, before attorneys' fees, costs, and expenses, for their cashed out shares of Advant-e common stock if the Settlement is approved.

(2) Defendants May Have Proven That the 2021 Reverse Stock Split Process Was Entirely Fair.

Plaintiff would have also argued at trial that the 2021 Reverse Stock Split was conducted through an unfair process. For example, the 2021 Reverse Stock Split was approved through the written consent of Wadzinski, the majority controlling stockholder, President, CEO, and Chairman of Advant-e, and without approval by an independent special committee. Minority stockholders were not given the opportunity to vote to approve the 2021 Reverse Stock Split, and only learned of the 2021 Reverse Stock Split through the December 15 Letter, dated the same day that the 2021 Reverse Stock Split was effective. Further, Plaintiff, and likely other Settlement Class members, never received the letter at the time of the 2021 Reverse Stock Split.

While Plaintiff believes that he could have proved an unfair process, that alone may not have been enough to warrant an award of damages after trial. Further, in

their Answer, Defendants asserted affirmative defenses that "[a]t all relevant times, Defendants acted in good faith and with justification" and

> [p]ursuant to Section 141(e) of the Delaware General Corporation Law, Plaintiffs' putative claims are barred, in whole or in part, by the Individual Defendants' good faith reliance on records, officers, and/or employees of Advant-e, as well as their good faith reliance on information, opinions, reports, or statements presented by advisors, who were selected with reasonable care, on matters within their professional or expert competence…[70]

Plaintiff anticipates that Defendants would have presented evidence to support, and argued strenuously that, the 2021 Reverse Stock Split was entirely fair and Defendants had no liability.[71]

c) <u>At the Time the Complaint Was Filed, it Was Unclear Whether a Standalone Right of Action for Violations of Section 155 Existed.</u>

Count I of the Complaint alleges a separate cause of action for a violation of Section 155. However, at the time the Complaint was filed, there was a pending motion to the Supreme Court to determine whether a standalone claim for a violation of Section 155 existed.

In *CCUR Holdings*, the defendant company argued that a stockholder could not bring a standalone claim asserting a violation of Section 155, as opposed to as

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[70] Fourth and Sixth Affirmative Defenses, Ans. at pp. 54-55.

[71] As stated above in Section III.A.3.a), if enhanced scrutiny applied, Plaintiff would have to prove that Defendants' acted wrongly. Under enhanced scrutiny, had Defendants proved that the process was fair, then they likely would have succeeded at trial or at summary judgment.

part of a breach of fiduciary duty claim. On May 31, 2022, Vice Chancellor Fioravanti issued a decision rejecting this argument and denying the defendant company's motion to dismiss the claim for violations of Section 155. The defendant asked Vice Chancellor Fioravanti to certify an interlocutory appeal to the Delaware Supreme Court on this issue, arguing that "the Opinion decided a substantial issue of material importance—namely, whether a stockholder may maintain a 'standalone statutory claim' against a corporation under Section 155(2) for the corporation's alleged failure to pay fair value for fractional interests."[72] Vice Chancellor Fioravanti denied this application on June 21, 2022, but the defendant then sought interlocutory review from the Delaware Supreme Court. The Supreme Court denied interlocutory review by an order dated July 22, 2022.

The Complaint was filed on July 1, 2022, when the Supreme Court was deciding whether to take the interlocutory appeal in *CCUR Holdings* to determine whether there was a standalone action for a violation of Section 155. Therefore, Plaintiff' ability to assert a standalone claim for a violation of Section 155 separate and apart from his claims for breach of fiduciary duty was at risk at the outset of the litigation. In addition, there was the possibility that, during the litigation of this

[72] *CCUR Holdings, Inc. v. Samuels*, No. 216, 2022, 2022 WL 2902826, at *1 (Del. July 22, 2022).

Action, the Defendants would raise this point on a motion for summary judgment or the issue would be raised again at the Supreme Court.

4. <u>The Settlement Was Reached Through Arm's-Length Negotiations.</u>

In assessing the fairness of a proposed settlement, Delaware courts place considerable weight on whether the settlement was reached through adversarial, arm's-length negotiations between informed counsel.[73]

Here, the Settlement is the product of non-collusive negotiations between Plaintiff's Counsel and Defendants' Counsel. At the time of the negotiations, Plaintiff had received discovery, including the third-party valuation of Advant-e conducted in connection with the 2021 Reverse Stock Split, drafts of that valuation, and financial and other documents produced by the Defendants.[74] Plaintiff's Counsel also consulted with a valuation expert concerning the valuation performed by Defendants in connection with the 2021 Reverse Stock Split and the fair value of Advant-e at the time of the 2021 Reverse Stock Split.[75] As such, Plaintiff and Plaintiff's Counsel had a thorough understanding of the strengths and weaknesses of the legal, valuation, and factual issues in the case, including the risks and costs

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[73] *See, e.g.*, *Ryan v. Gifford*, Civil Action No. 2213–CC, 2009 WL 18143, at *5 (Del. Ch. Jan. 2, 2009) ("The diligence with which plaintiffs' counsel pursued the claims and the hard-fought negotiation process weigh in favor of approval of the Settlement.").

[74] Ruthizer Aff. ¶ 5.

[75] *Id.* ¶¶ 5-6.

associated with continued litigation. There were numerous settlement communications between the Parties that eventually led to the Settlement.

5. The Experience and Opinion of Counsel—and the Absence of Any Objection—Favor Approving the Proposed Settlement.

Delaware courts also consider the opinion of experienced counsel in determining the fairness of a settlement.[76] Here, the Parties' counsel are experienced stockholder advocates who are known to the Court. Through their experience, counsel understood the strengths and weaknesses of the claims when negotiating the Proposed Settlement. Counsel's view that the Proposed Settlement serves the best interests of the Class supports approval.[77]

Additionally, to date, no objections to the Proposed Settlement have been received, further supporting approval.[78]

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

[77] Plaintiff is also an attorney with experience in class action litigation, and Plaintiff views the Settlement as serving the best interests of the Settlement Class. Affidavit of Peter J. Kreher in Support of Motion for (I) Approval of Settlement and Plan of Allocation, (II) Certification of the Settlement Class, and (III) An Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and a Service Award to Plaintiff ("Kreher Aff."), dated October 10, 2023 and filed herewith, ¶¶ 2, 3, 6.

[78] Ruthizer Aff. ¶ 3; Cavallo Aff. ¶ 14; *Spen v. Andrews Grp., Inc*., Civ. A. Nos. 11400, 11612, 1992 WL 127512, at *1 (Del. Ch. June 5, 1992) ("In this case, no shareholders have objected to the proposed settlement. That fact obviously weighs heavily in the Court's analysis."); *Crowhorn v. Nationwide Mut. Ins. Co*., 836 A.2d 558, 563 (Del. Super. 2003).

6. The Plan of Allocation Is Fair, Reasonable, and Adequate.

"An allocation plan must be fair, reasonable, and adequate."[79] In deciding whether a proposed plan of allocation is fair, reasonable, and adequate, the Court gives great weight to counsel's opinion.[80]

As set forth in the Stipulation and Long-Form Notice, the Settlement Administrator will allocate payment according to the Plan of Allocation, which provides that the Net Settlement Amount be distributed among Eligible Class Members on a *pro rata*, per-share basis,[81] and requires Defendants and their counsel to cooperate to ensure that no payments are made to any Excluded Person.[82] The Plan of Allocation avoids the potentially high administrative costs of a claims process by providing for a direct payment by the Settlement Administrator to registered stockholders and DTC participants (for transmittal and distribution to beneficial holders) through information obtained from DTC,[83] a method this court

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[79] *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009), overruled on other grounds by *Urdan v. WR Cap. P'rs, LLC*, 244 A.3d 668 (Del. 2020).

[80] *See, e.g., CME Grp., Inc. v. Chi. Bd. Options Exch., Inc.*, C.A. No. 2369-VCN, 2009 WL 1547510, at *10 (Del. Ch. June 3, 2009) ("Class counsel, in the Court's judgment, came to a fair and reasonable balancing of the various interests of all class members.").

[81] Stipulation ¶ 29.

[82] *Id.* ¶ 33.

[83] *Id.* ¶¶ 29-34; Cavallo Aff. Ex. B (Long-Form Notice) at pp. 3-4.

has endorsed.[84] This Court has approved substantially similar plans of allocation in other actions.[85]

B. The Settlement Class Should Be Certified.

"Certification of a class under Court of Chancery Rule 23 is a two-step process, which requires the purported class meet all four criteria within Court of Chancery Rule 23(a) and at least one of the criteria within Court of Chancery Rule 23(b)."[86] In a Settlement, the requirements of Court of Chancery Rule 23(e) must also be satisfied.

On July 20, 2023, this Court issued the Scheduling Order and conditionally certified the non-opt out Settlement Class. Final certification of the Settlement Class is appropriate because this action satisfies Rule 23(a) and Rule 23(b).

1. The Settlement Class Satisfies the Requirements of Rule 23(a).

a) Numerosity Is Satisfied.

Court of Chancery Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable...."[87] The test for numerosity is "not

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[84] *See, e.g., In re Dole Food Co., Inc. S'holder Litig.*, C.A. No. 8703–VCL, 2017 WL 624843 (Del. Ch. Feb. 15, 2017).

[85] *See, e.g.*, *City of Daytona Beach Police & Fire Pension Fund v. Examworks Grp., Inc.*, C.A. No. 12481-VCL (Del. Ch. Sept. 12, 2017) (ORDER) (approving nearly identical plan of allocation).

[86] *In re Ebix, Inc. S'holder Litig.*, Consol. C.A. No. 8526-VCS, 2018 WL 3570126, at *1 (Del. Ch. July 17, 2018).

[87] Ct. Ch. R. 23(a)(1).

impossibility of joinder, but practicality.... Numbers in the proposed class in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement."[88]

Based on information produced by the Defendants, there are 34 unique stockholders of record of Advant-e common stock, including Cede & Co., and not including Wadzinski. There are also 22 DTC participants for which Cede & Co. is the stockholder of record.[89] Each DTC participant likely holds shares for multiple beneficial owners of Advant-e common stock. Therefore, there are at least 55 (not including Cede & Co), and likely more than 100, Settlement Class Members. Numerosity is satisfied.

b) <u>Commonality Is Satisfied.</u>

Rule 23(a)(2) requires that there be "at least one question of law or fact common to the members of the class."[90] This requirement is satisfied "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated."[91]

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[88] *Leon N. Weiner & Associates v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991).

[89] Cavallo Aff. ¶¶ 4, 6.

[90] *Emerald Partners v. Berlin*, Civ. A. No. 9700, 1991 WL 244230, at *3 (Del. Ch. Nov. 15, 1991).

[91] *Weiner*, 584 A.2d at 1225 (citations omitted).

The factual and legal issues in this case are common for all members of the Settlement Class. They include, among other matters, whether: (a) the Individual Defendants breached any of their fiduciary duties to Plaintiff and the other members of the Settlement Class in connection with the 2021 Reverse Stock Split, including the duties of loyalty and due care; (b) Advant-e violated Section 155 by failing to pay members of the Settlement Class fair value for their fractional shares of Advant-e common stock that resulted from the 2021 Reverse Stock Split; (c) entire fairness applies; (d) the 2021 Reverse Stock Split was entirely fair to the minority stockholders of Advant-e who were paid cash for fractional shares that resulted from the 2021 Reverse Stock Split; and (e) the members of the Settlement Class have sustained damages, and if so, what is the proper measure of damages.[92] Commonality is therefore satisfied.

c) Plaintiff's Claims Are Typical of the Settlement Class's Claims.

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class[.]"[93] The typicality requirement requires that "the legal and factual position of the class representative must not be markedly different from that of the members of the class."[94] "A representative's

[92] Compl. ¶ 24.

[93] Ct. Ch. R. 23(a)(3).

[94] *Weiner*, 584 A.2d at 1225-26 (citations omitted).

claim or defense will suffice if it 'arises from the same event or course of conduct that gives rise to the claims [or defenses] of other class members and is based on the same legal theory.'"[95]

Here, Plaintiff's claims are identical to the claims of the Settlement Class, and arise out of the same events and conduct. Plaintiff's and the Settlement Class's claims arise from Advant-e's alleged failure to pay fair value for fractional shares that resulted from the 2021 Reverse Stock Split, and the Individual Defendants' alleged breaches of fiduciary duty in connection with effecting the 2021 Reverse Stock Split through an unfair price and unfair process. All members of the Settlement Class have the same interest in establishing the unfairness of the 2021 Reverse Stock Split, a violation of Section 155, and resulting damages. All Settlement Class Members, "as stockholders, face[] the same alleged injury from the same alleged conduct, and the plaintiffs would be affected in the same way as the rest of the class."[96] Typicality is therefore satisfied.

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[95] *Weiner,* 584 A.2d at 1226 (citation omitted) (alteration in original); *see also Regal Ent. Grp. v. Amaranth LLC*, 894 A.2d 1104, 1112 n.12 (Del. Ch. 2006) (noting that the test for typicality is "relatively non-stringent," that "courts have set a 'low threshold' for satisfying typicality") (citations omitted); *In re Ebix, Inc. S'holder Litig.*, Consol. C.A. No. 8526-VCS, 2018 WL 3478863, at *2 (Del. Ch. July 17, 2018) (typicality requirement met where plaintiffs' claims "rely on the same legal theories as those of the other class members," including "breaches of fiduciary duties").

[96] *See In re HomeFed Corp. S'holder Litig.*, Tr. at 22 (cited in footnote 52, above).

d) Plaintiff Has Fairly and Adequately Protected the Interests of the Settlement Class.

Rule 23(a)(4) requires the class representative to "fairly and adequately protect the interests of the class."[97] Class representatives are generally adequate if (i) there is no "economic antagonism[] between the representative and the class," and (ii) the class representative is represented by "qualified, experienced, and competent" counsel capable of prosecuting the litigation.[98]

Here, there is no antagonism between Plaintiff and the members of the Settlement Class. Moreover, Plaintiff's Counsel is well-known to this Court, experienced, and capable of prosecuting this action. Adequacy is therefore satisfied.

2. The Settlement Class Satisfies the Requirements of Rule 23(b).

The Court should certify the Settlement Class under Rules 23(b)(1) and (b)(2). This action challenges the exercise of fiduciary responsibility in connection with the 2021 Reverse Stock Split.[99] Therefore, this action is properly certifiable under both Rule 23(b)(1) and (b)(2).[100]

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[97] *Nottingham Partners*, 564 A.2d at 1094-95.

[98] *N.J. Carpenters Pension Fund v. Infogroup, Inc.*, C.A. No. 5334-VCN, 2013 WL 610143, at *3 (Del. Ch. Feb. 13, 2013).

[99] *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 432-33 (Del. 2012) (quoting *In re Cox Radio, Inc. S'holders Litig.*, Consol. Civil Action No. 4461-VCP, 2010 WL 1806616, at *8 (Del. Ch. May 6, 2010) (citations omitted)).

[100] *See Hynson v. Drummond Coal Co.*, 601 A.2d 570, 579 (Del. Ch. 1991).

a) Certification Under Rule 23(b)(1) Is Appropriate.

Certification under Rule 23(b)(1) is appropriate here because if separate actions were commenced by members of the Settlement Class, Defendants and Settlement Class Members would be subject to the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct and would, as a practical matter, be dispositive of the interests of other Settlement Class members.[101]

b) Certification Under Rule 23(b)(2) Is Appropriate.

Certification pursuant to Rule 23(b)(2) is also appropriate. Rule 23(b)(2) provides for certification where the party opposing the class has acted or refused to act on grounds generally applicable to the class, "so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole."[102]

This action concerns whether the $5.25 per share price paid for fractional shares as part of the 2021 Reverse Stock Split was fair value and/or whether the 2021 Reverse Stock Split was entirely fair to the Settlement Class. The particular facts related to any stockholder will not have any bearing on the appropriate remedy. Defendants acted on grounds generally applicable to the Settlement Class as a whole.

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[101] *See In re Ebix*, 2018 WL 3570126, at *5 ("[C]lass certifications under Rules 23(b)(1) and (2) permit damages recoveries as long as adjudication is uniform").

[102] Ct. Ch. R. 23(b)(2) .

Further, Plaintiff seeks monetary relief for the unfairness of the 2021 Reverse Stock Split consideration received by Settlement Class Members, and other declaratory and/or equitable relief applicable to all members of the Settlement Class. Accordingly, certification under Rule 23(b)(2) is appropriate here.[103]

3. The Requirements of Rule 23(f) Were Satisfied.

a) Plaintiff Has Submitted the Required Affidavit.

Plaintiff submits herewith the affidavit required by Delaware Chancery Court Rules 23(f)(2)(A) and 23(aa)(2),[104] stating that Plaintiff has not received, been promised or been offered, and will not accept any form of compensation, directly or indirectly, for serving as a representative party in this Litigation except for (i) any damages or other relief as the Court may award Plaintiff as a Settlement Class Member, (ii) any fees, costs or other payments that the Court expressly approves to be paid to or on behalf of Plaintiff, including any Plaintiff Service Award, or (iii) reimbursement, paid by Plaintiff's attorneys, of actual and reasonable out-of-pocket expenditures incurred in prosecuting the action.[105]

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[103] *See In re Starz S'holder Litig.*, No. 12584-VCG, 2018 WL 4111944, at *1 (Del. Ch. Aug. 28, 2018); *Nottingham*, 564 A.2d at 1096-97; *In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d at 269-70.

[104] A copy of the Stipulation was also filed with the Court on July 6, 2023, in compliance with Chancery Court Rule 23(f)(2)(C).

[105] Kreher Aff. ¶ 11.

b) Notice Was Disseminated to Settlement Class Members in Accordance with the Requirements of the Scheduling Order and Court of Chancery Rule 23(c)(2).

The Scheduling Order required that on or before September 8, 2023 (60 days before the November 8, 2023 Settlement Hearing), Plaintiff mail the Postcard Notice, publish the Summary Notice, and publish the Settlement Website.[106] Plaintiff has complied with all of these requirements.

The Postcard Notice was mailed to former Advant-e common stockholders on August 4, 2023.[107] The Summary Notice was published on *PR Newswire*, a national wire service, on August 11, 2023.[108] On August 4, 2023, the Settlement Website, www.AdvantEStockholderSettlement.com, was launched, which included information about the Litigation, the Settlement, and downloadable copies of the Complaint, the Stipulation, the Long-Form Notice.[109] As of October 6, 2023, 194 Postcard Notices have been mailed or distributed to brokers or other nominees for mailing to potential class members, the Settlement Website has been visited 331 times by 221 unique visitors, and the Long-Form Notice has been downloaded 29 times.[110]

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[106] Scheduling Order ¶ 9(b).

[107] Cavallo Aff. ¶¶ 4-6.

[108] *Id.* ¶ 11.

[109] *Id.* ¶ 13.

[110] *Id.* ¶¶ 9, 13.

Plaintiff respectfully submits that the form and manner of notice complies with Delaware Law and the requirements of due process.

To date, although the objection deadline has not passed, no objections have been received by Plaintiff's Counsel or filed with the Court.[111]

4. Wolf Popper and Cooch and Taylor Should Be Appointed Class Counsel.

Delaware Chancery Court Rule 23(d)(3) requires that "the Court must appoint class counsel when certifying a class." Plaintiff respectfully request that the Court appoint Wolf Popper and Cooch and Taylor as Class Counsel when certifying the Settlement Class.

Wolf Popper and Cooch and Taylor are experienced stockholder advocates who repeatedly appear before the Court of Chancery.[112]

Plaintiff respectfully submits that Wolf Popper and Cooch and Taylor have fairly and adequately represented the Settlement Class in terms of litigating the Action, negotiating the Settlement, and for purposes of entering into and implementing the Settlement. It is through their actions that the Settlement was reached and the Settlement Class will, if the Court approves the Settlement, receive

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[111] Cavallo Aff. ¶ 14; Ruthizer Aff. ¶ 3.

[112] *Id.* Ex. A (Wolf Popper Resume); Affidavit of Carmella P. Keener, Esquire Filed on Behalf of Cooch and Taylor, P.A. in Support of Application for an Award of Attorneys' Fees and Reimbursement of Expenses ("Keener Aff.") Ex. 1 (Cooch and Taylor Resume).

a 33% increase in the consideration paid for fractional shares in the 2021 Reverse Stock Split.

C. The Fee and Expense Award Should Be Granted.

Plaintiff's Counsel requests attorneys' fees of $134,545, representing 15% of the Settlement Fund, and reimbursement of litigation costs and expenses of $19,922.64. Plaintiff's Counsel submit that the Fee and Expense Award is reasonable and merited under the circumstances. Plaintiff's Counsel also requests that the Court award Plaintiff a Service Award of $1,000, to be paid from Plaintiff's Counsel's Fee and Expense Award.

1. The Applicable Standard for Attorneys' Fees and Expenses.

The Court may award attorneys' fees and expenses to counsel whose efforts have created a common fund.[113] "The percentage awarded as attorneys' fees from a [cash settlement fund] is committed to the sound discretion of the Court of Chancery."[114] In exercising its discretion, the Court is guided by the factors set out in *Sugarland Industries, Inc. v. Thomas*:[115] "(1) the benefit achieved; (2) the time and effort of counsel; (3) the standing and ability of counsel; (4) the relative complexities of the litigation; (5) the stage at which the litigation ended; and (6) any

[113] *See Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1255 (Del. 2012).

[114] *See Ams. Mining Corp.*, 51 A.3d at 1261.

[115] 420 A.2d 142, 147-50 (Del. 1980).

contingency factor." Of the *Sugarland* factors, Delaware courts assign the greatest weight to the benefit achieved in the litigation.[116]

Plaintiff's Counsel submit the benefit achieved—*i.e.*, the $896,973 Settlement Fund, amounting to $1.75 per share and a 33% increase in the consideration received by Settlement Class Members for their shares that were cashed out as part of the 2021 Reverse Stock Split—and other *Sugarland* factors support the Fee and Expense Award.

2. The $896,973 Settlement Fund Confers a Substantial Benefit.

This Court recognizes that "the dollar amount of the [payment] created" is at the "heart of the *Sugarland* analysis."[117] As detailed herein, the $896,973 Settlement Fund for the benefit of Settlement Class Members represents a 33% increase in the transaction price. This benefit is concrete and substantial, and an excellent result in light of the challenges faced by Plaintiff.

Plaintiff's Counsel submit that the requested Fee and Expense Award is consistent with this Court's precedent in cases involving comparable settlements and litigation activity:

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[116] *See Ams. Mining Corp.*, 51 A.3d at 1255 ("[T]he first and most important of the *Sugarland* factors [is] the benefit achieved.").

[117] *Seinfeld v. Coker*, 847 A.2d 330, 336-37 (Del. Ch. 2000).

Case Name	Settlement Amount	Awarded Fee Percentage	Stage of Litigation
Vero Beach Police Officers' Ret. Fund v. Bettino, et al., C.A. No. 2017-0264-JRS (Del. Ch. Dec. 3, 2018)	$17,950,000	19.8% (all-in)	Filed complaint incorporating 220 production and participated in mediation
In re Symantec Corporation Stockholder Derivative Litigation, C. A. No. 2019-0224-JTL (Del. Ch. May 4, 2023)	$12,000,000	10% (all-in)	Filed complaint; no motion practice; no discovery; participated in mediation
Nicholas Ponzio and Wolcot Capital, Inc. V. John Michael Preston, et al., C.A. No. 8672-VCG (Del. Ch. June 22, 2015)	$3,850,000	25% (all-in)	Filed complaint; discovery; took 2 depositions; mediation
Matthew Steve v. Patrick F. Williams, et al., C.A. No. 2017-0563-AGB (Del. Ch. Jan. 15, 2019)	$410,000	20% (plus reimbursement for expenses)	Filed complaint; reviewed approximately 20,000 documents; took 2 depositions

Plaintiff's Counsel submit that their efforts here compare favorably to those reflected in the chart above, and support the request for an award of attorneys' fees of 15% of the Settlement Fund, or $134,545, plus reimbursement of litigation costs and expenses in the amount of $19,922.64.

3. The Contingent Nature of The Litigation Supports the Requested Fee And Expense Award.

The contingent nature of the representation is the "second most important factor considered by this Court" in awarding attorneys' fees.[118] It is the "public policy of Delaware to reward this risk-taking in the interests of shareholders."[119]

The Court assesses litigation contingency risk as of the outset of the litigation. Plaintiff's Counsel litigated this Action and negotiated a settlement against a premier defense firm well known to this Court. Plaintiff's Counsel conducted this work on an entirely contingent basis,[120] undertaking considerable contingency risk given the obstacles discussed to prevailing at trial, in Section III.A.3 above, and the time and resources dedicated to the Action. Counsel has not been paid for their work or reimbursed for any of their costs or expenses. This factor weighs in favor of approving the requested Fee and Expense Award.

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[118] *Dow Jones & Co. v. Shields*, No. 184,1991, 1992 WL 44907, at *2 (Del. Ch. Jan. 10, 1992).

[119] *In re Plains Res. Inc. S'holders Litig.*, No. Civ.A. 071-N, 2005 WL 332811, at *6 (Del. Ch. Feb. 4, 2005); *see also Ryan v. Gifford*, Civil Action No. 2213–CC, 2009 WL 18143, at *13 (Del. Ch. Jan. 2, 2009) (noting that Delaware courts have consistently "recognized that an attorney may be entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis").

[120] Ruthizer Aff. ¶ 4; Keener Aff. ¶ 3.

4. Counsel's Significant Efforts Support the Requested Fee and Expense Award.

"The time and effort expended by counsel serves [as] a cross-check on the reasonableness of a fee award."[121]

During the pendency of the Litigation, Plaintiff's Counsel (a) thoroughly investigated the 2021 Reverse Stock Split based on publicly available information; (b) filed a 41-page complaint; (c) obtained and reviewed approximately 500 pages of mostly non-public documents, including financial documents, documents related to the 2021 Reverse Stock Split, drafts of the valuation report, and other relevant documents; (d) consulted with a valuation expert concerning potential damages and the fair value of Advant-e at the time of the 2021 Reverse Stock Split; (e) engaged in settlement negotiations with Defendants' counsel, that eventually resulted in the Settlement; and (f) drafted and negotiated the Stipulation and all related documents.[122]

Plaintiff's Counsel devoted a total of 287.4 hours to litigating this Action (258.8 hours by Wolf Popper LLP and 28.6 hours by Cooch and Taylor, P.A.) from inception to July 6, 2023, the date the Stipulation was executed and filed with this Court, with a total lodestar of $185,892.50 ($168,732.50 by Wolf Popper and

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[121] *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1138 (Del. Ch. 2011) (citation omitted).

[122] *See* Ruthizer Aff. ¶ 5.

$17,160.00 by Cooch and Taylor) at Plaintiff's Counsel's currently applicable hourly rates.[123] Time expended in preparing the request for a Fee and Expense Award also has not been included in this lodestar figure. The attorneys' fee requested represents an effective hourly rate of $646.81 per hour and a *negative* lodestar multiplier of 0.72x ($135,545 / $185,892.50).[124] Plaintiff's Counsel submit that this rate is reasonable in comparison to the non-contingent hourly rates of experienced and qualified counsel who practice before this Court, and is significantly lower than the effective hourly rates approved by this Court in comparable cases.[125]

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[123] Keener Aff. ¶ 4; Ruthizer Aff. ¶¶ 8-12. Reductions were made to Plaintiff's Counsel's time calculations in the exercise of billing judgment. Plaintiff's Counsel removed from the lodestar calculation any time expended by law school interns and summer associates for legal research (notwithstanding that they were paid and that the work performed contributed to the successful prosecution of this action) and time spent by individuals who worked less than then (10) hours on the matter. *Id.* ¶ 11.

[124] Effective Hourly Rate = (Total Requested Fee & Expense Award – Expenses) / Total Hours.

[125] *In re MSG Networks, Inc. Stockholder Class Action Litig.*, Case No. 2021-0575-LWW (Del. Ch. 2023) (TRANSCRIPT) (awarding an effective hourly rate of $692.22 and a negative lodestar multiplier (0.87x)); *In re AmTrust Fin. Servs. Inc. S'holder Litig.*, C.A. No. 2018-0396-LWW, at 45 (Del. Ch. Nov. 22, 2021) (TRANSCRIPT) (awarding an effective hourly rate of $1,128.31 noting that "[t]he implied hourly rate [] $1,128.31, [] is well within the range of implied hourly rates routinely approved by this Court" and noting that a 1.94 lodestar multiplier was not "wildly out of line with fees awarded by this court at this stage in the litigation" where settlement occurred before depositions); *In re Cornerstone Therapeutics Inc. S'holder Litig.*, Consol. C.A. No. 8922-VCG (Jan. 26, 2017) (ORDER) (awarding an effective hourly rate of $1,435); *In re Saba Software, Inc. S'holder Litig.*, 2018 WL 4620107 (Del. Ch. Sept. 26, 2018) (awarding an effective hourly rate of $1,860.93 and a 3x lodestar multiplier); *In re AVX Corp. S'holders Litig.*, Consol. C.A. No. 2020-1046-SG (Del. Ch. Dec. 27, 2022) (ORDER) (awarding an effective hourly rate of $1,256.97 and a 2.61x lodestar multiplier); *In re Del Monte Foods Co. S'holder Litig.*,

Plaintiff's Counsel incurred total expenses of $19,922.64 ($18,356.32 by Wolf Popper and $1,566.32 by Cooch and Taylor), the majority of which related to expert fees ($13,132.50).[126] All of these expenses were reasonably incurred in connection with the successful prosecution of this Action, and are of the type typically billed to clients when an attorney works on a non-contingent basis.

Plaintiff's Counsel submit that the Fee and Expense Award falls comfortably within the range of reasonableness and would not generate a windfall.

Consol. C.A. No. 6027-VCL (Del. Ch. Dec. 1, 2011) (ORDER) (awarding an effective hourly rate of $2,503.27 and a 4.61x lodestar multiplier); *Chester Cty. Emps.' Ret. Fund v. KCG Holdings, Inc*., 2020 WL 1652519 (Del. Ch. Apr. 2, 2020) (ORDER) (awarding an effective hourly rate of $1,162.04 and a 1.93x lodestar multiplier); *Vero Beach Police Officers' Ret. Fund v. Bettino*, 2018 WL 6330140 (Del. Ch. Dec. 3, 2018) (awarding an effective hourly rate of $3,165 and a 5.1x lodestar multiplier); *see also In re Pilgrim's Pride Corp. Deriv. Litig.*, 2020 WL 474676 (Del. Ch. Jan. 28, 2020) (awarding an effective hourly rate of $4,511.09 and a 7.0x lodestar multiplier); *Carr v. New Enter. Assoc. Inc.*, 2019 WL 1491579 (Del. Ch. Apr. 4, 2019) (awarding an effective hourly rate of $1,030 and a 7.2x lodestar multiplier); *In re Activision Blizzard Inc. S'holder Litig.*, C.A. No. 8885-VCL (Del. Ch. May 20, 2015) (ORDER) (awarding an effective hourly rate of $9,685); *In re Gardner Denver, Inc. S'holder Litig.*, 2014 WL 4373669 (Del. Ch. Sept. 3, 2014) (awarding an effective hourly rate of $4,480); *Berger v. Pubco Corp.*, Civil Action No. 3414-CC, 2010 WL 2573881, at *1 (Del. Ch. June 23, 2010) (noting that "the hourly rate to which the fee translates (approximately $3,450 per hour) is nestled within the range of hourly rates found among Court of Chancery monetary-benefit cases.").

[126] Ruthizer Aff. ¶ 14; Keener Aff. ¶ 6. Included in the request for reimbursement of costs and expenses is an estimate for the cost to file this motion and any Settlement Hearing related documents, copy charges for copies of documents for the Court, hearing fees, and travel expenses related to the Settlement Hearing. *Id.* ¶ 6 n.1.

5. The Complexity of the Litigation Supports the Requested Fee and Expense Award.

"All else equal, litigation that is challenging and complex supports a higher fee award."[127] Courts generally recognize that representative stockholder class actions are both complex and difficult. This factor supports Plaintiff's requested Fee and Expense Award, or at worst is a neutral factor due to the fact that the Litigation settled at an early stage.

6. Counsel's Standing and Ability Supports the Fee and Expense Award.

The Court also considers the "standing and ability of plaintiff[']s[] counsel."[128] Here, Plaintiffs' Counsel are experienced class action and securities litigators with track records of prevailing in high-stakes cases, including before this Court.[129]

The standing of opposing counsel may also be considered in determining an award of attorneys' fees.[130] Plaintiff litigated against attorneys from Potter Anderson & Corroon LLP, a leading Delaware firm well known to this Court.

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[127] *In re Activision*, 124 A.3d at 1072.

[128] *In re Sauer-Danfoss Inc.*, 65 A.3d at 1140.

[129] Ruthizer Aff. Ex. A (Wolf Popper Resume); Keener Aff. Ex. 1 (Cooch and Taylor Resume).

[130] *See Joseph v. Shell Oil Co.*, CIVIL ACTION Nos. 7450, 7699, 1985 WL 150466, at *5 (Del Ch. Apr. 22, 1985) (noting the "diligence and zealousness of the defense" and "the experience of all of the lawyers representing the parties on both sides").

Plaintiff's counsel successfully litigated and negotiated against this defense counsel and secured a settlement that provides a substantial benefit to the Settlement Class.

7. <u>The Service Award Is Reasonable.</u>

Plaintiff's Counsel also requests that the Court grant Plaintiff a Service Award of $1,000—to be paid out of any Fee and Expense Award granted to Plaintiff's Counsel—for Plaintiff's service and efforts. The Court has broad discretion in deciding "whether to grant an incentive award to a named plaintiff" following the "conclusion of the litigation."[131] "Compensating the lead plaintiff for efforts expended is not only a rescissory measure returning certain lead plaintiffs to their position before the case was initiated, but an incentive to proceed with costly litigation (especially costly for an actively participating plaintiff) with uncertain outcomes."[132] Thus, public policy favors the awarding of reasonable incentive fees in representative litigation.[133]

In determining the appropriateness of an incentive fee, the Court considers the time and effort expended by the class representative or lead plaintiff, and "[the]

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[131] *Chen v. Howard-Anderson*, C.A. No. 5878-VCL, 2017 WL 2842185, at *3 (Del. Ch. June 30, 2017) (ORDER).

[132] *Raider v. Sunderland*, No. Civ. A. 19357 NC, 2006 WL 75310, at *1 (Del. Ch. Jan. 4, 2006).

[133] *See In re Dunkin' Donuts S'holder Litig.*, Civ. A. No. 10825, 1990 WL 189120, at *10 (Del. Ch. Nov. 27, 1990).

significant benefit to the class."[134] Those factors warrant the modest Service Award requested here.

First, Plaintiff expended time and effort over the course of the Litigation. Plaintiff monitored the work of counsel and regularly communicated with counsel regarding the Complaint, litigation strategy, potential settlement, valuation of Advant-e, settlement negotiations strategy, and the Stipulation. Plaintiff also reviewed and discussed with Plaintiff's Counsel the Complaint, the Stipulation, and this Motion. Plaintiff also reviewed the request for additional documents prepared by Plaintiff's Counsel, and reviewed documents produced by Defendants, including the valuation report prepared for Defendants in connection with the 2021 Reverse Stock Split.[135]

Second, the Court has approved similar awards under circumstances, as here, where a plaintiff contributed meaningfully to the litigation.[136] *Third*, in accordance with this Court's practice, the Notice disclosed the Service Award, and the Service Award is sufficiently modest as to raise no specter of a conflict of interest. *Fourth*,

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[134] *Raider*, 2006 WL 75310, at *1.

[135] *See* Kreher Aff. ¶¶ 4-5.

[136] *See e.g., Lewis v. Aimco Props., L.P.*, Case No. 9934-VCMR, 2017 Del. Ch. LEXIS 751 (Del. Ch., Jul 14, 2017); *Tcmp 3 v. Hauser*, 2007 Del. Ch. LEXIS 524 (Del. Ch., Aug 10, 2007); *Matthew Steve v. Patrick F. Williams, et al.*, C.A. No. 2017-0563-AGB (Del. Ch. Jan. 15, 2019).

the "[t]he amounts are reasonable and will be paid out of [counsel's] fee, so they do not harm the class."[137]

Plaintiff respectfully Requests that the Service Award is reasonable and should be granted.

IV. CONCLUSION

Plaintiff respectfully requests the Court approve the Proposed Settlement, finally certify the Settlement Class, award the Fee and Expense Award of $134,545 plus reimbursement of $19,922.64 in expenses, and award Plaintiff a $1,000 Service Award to be paid from the Fee and Expense Award.

Dated: October 11, 2023

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[137] *In re Orchard Enterprises, Inc. Stockholder Litig.*, C.A. No. 7840–VCL, 2014 WL 4181912, at *13 n.8 (Del. Ch. Aug. 22, 2014).