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Case No. N20C-01-259 KMM

IN THE SUPERIOR COURTS OF THE STATE OF DELAWARE

DUSTIN EVANS, Individually And On Behalf Of All Other Similarly Situated, Plaintiff, v. MOHAWK INDUSTRIES, INC., JEFFREY S. LORBERBAUM, FRANK H. BOYKIN, and WILLIAM CHRISTOPHER WELLBORN, Defendants.	)	C.A. No. N20C-01-259 KMM

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFICATION OF THE CLASS, AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND A CASE CONTRIBUTION AWARD

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I. INTRODUCTION

This is a securities class action on behalf of all those who purchased or otherwise acquired Mohawk Industries, Inc. ("Mohawk" or the "Company") common stock in the Mohawk Industries Retirement Plan 1 and Mohawk Industries Retirement Plan 2 (collectively, the "Plan") between April 27, 2017 and July 25, 2019 (the "Class Period") pursuant or traceable to Mohawk's August 11, 2016 Form S-8 registration statement (the "Registration Statement"). This action asserts claims under Sections 11 and 12(a)(2) of the Securities Act of 1933 (the "Securities Act") against Mohawk and certain current and former Mohawk officers and directors.

Plaintiff submits this Motion in support of the settlement of this litigation, as proposed in the Stipulation of Settlement ("Settlement Agreement" or "Stipulation"), attached as Exhibit A to Dkt. 22.[1] This Court previously granted preliminary approval of the proposed Settlement and ordered notice to the proposed Class to be disseminated in its November 14, 2023 Preliminary Approval Order. *See* Dkt. 32. Plaintiff now moves this Court for an Order, as described more fully below, that grants final approval of the Settlement Agreement, certifies the Class for settlement purposes, grants attorneys' fees and expenses, and a case contribution award to Plaintiff.

[1] As set forth in the Settlement Agreement, Defendants do not admit any factual allegations or any liability related to the claims asserted in this action. Defendants do not oppose the present Motion.

II. FACTS

A. Claims

Plaintiff Dustin Evans ("Plaintiff") claims that Defendants[2] are liable under Sections 11 and 12(a)(2) of the Securities Act by reason of material misrepresentations and omissions in documents incorporated by reference in the Company's Registration Statement. *See* Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Final Approval of Class Action Settlement ("McKenna Decl.") at ¶ 11. Specifically, Plaintiff alleges documents incorporated into the Registration Statement, including Mohawk's 2015 Annual Report, Form 10-Qs for Q2 and Q3 2016, Form 8-Ks filed in 2016, and the 2015 Annual Report for the Plan, failed to disclose (i) the Company purportedly engaged in deceptive and unsustainable sales practices to mask declining customer demand for its traditional product offering including ceramic, stone, laminate, carpet, wood, and vinyl flooring (the "Conventional Flooring Products"); (ii) the Company's revenue growth was allegedly not attributable to product differentiation and innovation or growing demand for Conventional Flooring Products, but rather due to unsustainable channel stuffing of Conventional Flooring Products; and (iii) the Company's increasing accounts receivable was not the result of channel mix and its increasing inventories

[2] Defendants are Jeffrey S. Lorberbaum, Frank H. Boykin, William Christopher Wellborn (the "Individual Defendants") and with Mohawk ("Defendants").

were not the result of product growth and expansion, but instead the result of the Company deliberately stuffing the channels with Conventional Flooring Products to boost sales. McKenna Decl. at ¶ 12; *see also* Dkt. 1 ("Complaint") at ¶¶ 2-12, 25-57.

B. <u>The Company's Plan</u>

Plaintiff is a beneficial owner of Mohawk company stock in the Plan accounts. A "beneficial owner" is any "person" who, directly or indirectly, has or shares (1) voting or investment power and (2) a pecuniary interest in a security. 17 C.F.R. §§ 240.16a-1(a)(1)-(2), § 240.13d-3(a)(1)-(2). Here, Plaintiff (1) has voting and investment power and (2) also has a pecuniary interest.

The Company's Plan Form S-8 Registration Statement under the Securities Act of 1933 (the "Registration Statement") states in relevant part:

> Amount to be registered consists of 175,000 shares of common stock of Mohawk Industries, Inc. (the "Company") that may be issued under the Mohawk Industries Retirement Plan 1 (the "Mohawk Retirement Plan 1"). Pursuant to Rule 416(c) under the Securities Act of 1933, as amended (the "Securities Act"), this registration statement on Form S-8 (the "Registration Statement") also covers an indeterminate amount of interests to be offered or sold pursuant to the Mohawk Retirement Plan 1.
>
> PART I INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS
>
> (a) The documents constituting Part I of this Registration Statement under the Securities Act will be sent or given to participants in the Plans as specified by Rule 428(b)(1) under the Securities Act. These documents and the documents incorporated by reference in

this Registration Statement pursuant to Item 3 of Part II of this form, taken together, constitute a prospectus that meets the requirements of Section 10(a) of the Securities Act.

(b) Upon written or oral request, the Company will provide, without charge, the documents incorporated by reference in Item 3 of Part II of this Registration Statement. The documents are incorporated by reference in the Section 10(a) prospectus. The Company will also provide, without charge, upon written or oral request, other documents required to be delivered to employees pursuant to Rule 428(b). Requests for any of the above-mentioned information should be directed to R. David Patton, Vice President-Business Strategy, General Counsel and Secretary at the address and telephone number on the cover page of this Registration Statement.

PART II INFORMATION REQUIRED IN REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The following documents filed with the Securities and Exchange Commission (the "Commission") pursuant to the Securities Exchange Act of 1934, as amended (the "Exchange Act"), are hereby incorporated by reference into this Registration Statement and deemed to be a part hereof:

(1) The Company's Annual Report on Form 10-K for the fiscal year ended December 31, 2015, filed on February 29, 2016;

(2) The Company's Quarterly Reports on Form 10-Q for the quarters ended April 2, 2016, filed on May 6, 2016, and July 2, 2016, filed on August 5, 2016;

(3) The Company's Current Reports on Form 8-K, filed on February 19, 2016, March 4, 2016, April 4, 2016, and May 20, 2016;

(4) The description of the Company's common stock contained in its Registration Statement on Form 8-A filed on January 29, 1992, including any amendment or report filed for purposes of updating such description;

(5) The Mohawk Retirement Plan 1's Annual Report on Form 11-K for the year ended December 31, 2015;

(6) The Mohawk Retirement Plan 2's Annual Report on Form 11-K for the year ended December 31, 2015; and

(7) All other documents subsequently filed by the Company or the Plans pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act prior to the filing of a post-effective amendment to this Registration Statement that indicates that all securities offered have been sold or that deregisters all securities that remain unsold (except for information furnished to the Commission that is not deemed to be "filed" for purposes of the Exchange Act).

Any statement contained in a document incorporated or deemed incorporated herein by reference shall be deemed to be modified or superseded for the purpose of this Registration Statement to the extent that a statement contained herein or in any subsequently filed document which also is, or is deemed to be, incorporated herein by reference modifies or supersedes such statement. Any such statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement. [Emphasis added].

C. Defendants' Alleged Violations of Sections 11 And 12(A)(2) of the Securities Act

The elements of a § 11 claim[3] under the Securities Act are: "(1) the registration statement contained an omission or representation, and (2) that the omission or misrepresentation was material, that is, it would have misled a reasonable investor about the nature of his or her investment." *In re Stac Elecs. Litig.*, 89 F.3d 1399,

[3] "Claims under sections 11 and 12(a)(2) are Securities Act siblings with roughly parallel elements." *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d 109, 120 (2d Cir. 2013).

1403–04 (9th Cir. 1999). Unlike under § 10(b), scienter is not an element of a § 11 claim, and thus Defendants and the Company are liable for innocent or negligent misrepresentations. *Id*. (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382, 103 S. Ct. 683, 74 L.Ed.2d 548 (1983)). Unlike common law fraud or securities fraud statutes, the plaintiff need not show that the defendant knew the information was false. *Kaplan v. Rose*, 49 F.3d 1363, 1371 (9th Cir. 1994); *see also In re MobileMedia Sec. Litig.*, 28 F.Supp.2d 901, 923 (D.N.J. 1998) ("A plaintiff need not plead fraud, reliance, motive, intent, knowledge or scienter under Section 11.").

Further, loss causation is not an element of a Section 11 claim and need not be pleaded to sufficiently state a claim. *See* 15 U.S.C. §§ 77k, 77l; *see also In re Giant Interactive Grp., Inc. Secs. Litig.*, 643 F.Supp.2d 562, 571 (S.D.N.Y. 2009) ("[L]oss causation is not an element of a claim under either Section 11 or 12.") (collecting cases); *Briarwood Invs. Inc. v. Care Inv. Trust Inc.*, No. 07 Civ. 8159, 2009 WL 536517, at *3 (S.D.N.Y. Mar. 4, 2009) ("A plaintiff is not required to plead 'loss causation' . . . to establish a prima facie claim under §§ 11 or 12(a)(2) of the Securities Act.").

Here, Plaintiff alleges that the Company made numerous false representations. Plaintiff and other employees who purchased Company stock in the Plan allege they were harmed because the price at which the Plan purchased Company stock for the

employees was artificially inflated because of the Company's material misrepresentations.

III. PROCEDURAL HISTORY

On January 30, 2020, Plaintiff, a beneficial owner of Mohawk company stock in the Plan accounts with (1) voting and investment power and (2) a pecuniary interest, filed the Complaint in the action captioned *Evans v. Mohawk Industries, Inc., et al.*, C.A. No. N20C-01-259 KMM, in this Court (the "Action"). McKenna Decl. at ¶ 10.

On March 3, 2020, by mutual agreement, the Action was stayed through the earlier of (1) the close of fact discovery in a related securities class action pending in the federal District Court for the Northern District of Georgia captioned *Public Employees' Retirement System of Mississippi v. Mohawk Industries, Inc.*, No. 4:20-cv-00005-VMC (the "NDGA Class Action") or (2) the deadline for appealing a dismissal of the NDGA Class Action with prejudice. The Parties' stipulation to stay the proceedings was granted by this Court on March 27, 2020. McKenna Decl. at ¶ 13; *see also* Dkt. 6.

In an effort to conserve judicial resources and attempt to settle the Action, the Parties attended mediation over the course of two (2) days with former federal Judge Layn R. Phillips of Phillips ADR Enterprises where the Parties engaged in arms-length settlement negotiations. McKenna Decl. at ¶ 14.

On June 9, 2022, the Parties reached an agreement in principle to settle the Action, subject to the negotiation of the Settlement Agreement and approval by the Court. The Settlement Agreement (together with the exhibits thereto) reflects the final and binding agreement between the Parties. McKenna Decl. at ¶ 15.

On November 14, 2023, this Court granted preliminary approval of the Settlement, class certification for settlement purposes, the form and manner of the class notice, and the plan of allocation and further set a date for the Final Approval Hearing. McKenna Decl. at ¶ 17; *see also* Dkt. 32.

IV. ARGUMENT

A. The Court Should Certify the Settlement Class

Certification of a class action requires a two-step analysis. *Crowhorn v. Nationwide Mut. Ins. Co.*, 836 A.2d 558, 561–62 (Del. Super. 2003). The first step requires that the action satisfy all four prerequisites mandated by Rule 23(a).[4] *Id.* "The prerequisites are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." *Id.* If all of the prerequisites are satisfied, then the Court moves to the second step, which is to determine if the requirements of Rule 23(b) are satisfied. *Id*.

In this Court's November 14, 2023 Preliminary Approval Order at ¶ 2(a)-(d), the Court preliminarily found that the Settlement Class satisfied the four

[4] All references to "Rule 23" and its subparts refers to Super. Ct. Civ. R. 23.

requirements of Rule 23(a). The Court further found that for settlement purposes, "the Class is so numerous that joinder of all members is impractical," "there are one or more questions of law and/or fact common to the class," "the claims of the Plaintiff are typical of the claims of the Class," and "Plaintiff will fairly and adequately protect the interests of the Class in that: (i) the interests of the Plaintiff and the nature of the alleged claims are consistent with those of the Class Members; and (ii) there appear to be no conflicts between or among the Plaintiff and the Class." *See* Dkt. 32.

The Court further found in its Preliminary Approval Order (Dkt. 32) that "the prosecution of separate actions by or against individual members of the class would create a risk of: (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[,]" thus satisfying Rule 23(b)(1). Preliminary Approval Order at ¶ 2(e).

To date, there is no party or class member who has come forward to oppose the Settlement, nor has anyone alleged that the requirements of Rule 23 have not been met. Thus, Plaintiff requests that this Court conclude that the requirements of

Rule 23 continue to be met and thus certify the Settlement Class. To review, Plaintiff addresses the elements of Rule 23 below:

(1) Rule 23(a) is Satisfied

(a) Numerosity

First, a class must be "so numerous that joinder of all members is impracticable" in order to meet the numerosity requirement. Del. Super. Ct. Civ. Rule 23(a). "Although there is no numerical cutoff under the numerosity requirement, numbers in the proposed class in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement." *Smith v. Hercules, Inc*., 2003 Del. Super. LEXIS 38, at *13 (Del. Super. Jan. 31, 2003). "Courts look to the "litigational inconvenience" of bringing separate actions versus a class action to assess impracticability. *Id.*

Here, Plan 1 has an estimated number of 20,479 Class Members and Plan 2 has an estimated number of 11,831 Class Members. McKenna Decl. at ¶ 26 Accordingly, Rule 23(a)'s numerosity requirement is easily satisfied. *See, e.g., Leon N. Weiner & Assocs. v. Krapf,* 584 A.2d 1220, 1225 (Del. Sup. 1991) (citations omitted); *accord Dubroff v. Wren Holdings, LLC*, 2010 Del. Ch. LEXIS 178, at *15 (Del. Ch. Aug. 20, 2010) ("Numbers in a proposed class in excess of forty have sustained the numerosity requirement, and classes with as few as twenty-three members have been upheld.") (citations omitted).

(b) Commonality

The second requirement, commonality, will be met "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Leon*, 584 A.2d at 1224. Commonality is satisfied where common questions are capable of generating common answers apt to drive the resolution of the litigation. *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Thus, if Plaintiff shares at least one question of law or fact with the grievances of the prospective class this requirement will be met. *Smith*, 2003 Del. Super. LEXIS 38, at *27-28.

There are common questions of law and fact in this action which can be certified and resolved on behalf of the class. In particular, Plaintiff asserts that Defendants' conduct presents numerous common questions which could be resolved on a class-wide basis.

The factual and legal issues in this case are common for all members of the proposed Class. Among others, the issues include (i) whether Defendants violated the Securities Act; (ii) whether Defendants omitted and/or misrepresented material facts; (iii) whether Defendants' statements omitted material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; (iv) whether the Individual Defendants are liable for the alleged misrepresentations and omissions described herein; (v) whether Defendants

knew or recklessly disregarded that their statements and/or omissions were false and misleading; (vi) whether Defendants' conduct impacted the price of Mohawk common stock; (vii) whether Defendants' conduct caused the members of the Class to sustain damages; and (viii) the extent of damage sustained by Class members and the appropriate measure of damages. McKenna Decl. at ¶ 29; *see also* Dkt. 1 at ¶ 60.

(c) Typicality

The "typicality" requirement is satisfied if the representative's interests are consistent with those of the Class members. *Leon*, 584 A.2d at 1225-26. Typicality will be found despite factual differences if a representative's claim "'arises from the same event or course of conduct that gives rise to the claims . . . of other class members and is based on the same legal theory.'" *Id.* at 1226 (quoting *Zeffiro v. First Pa. Banking & Trust Co*., 96 F.R.D. 567, 569 (E.D. Pa. 1983)). The claims of the proposed Class Representative are typical of the claims of the Class, as each Class member, like the proposed Class Representative, was a current or former employee of Mohawk and participated in the Plan by purchasing Mohawk stock. McKenna Decl. at ¶ 31.

(d) Adequacy of Representation

The fourth prerequisite determines whether the proposed Class Representative is competent to represent the entire class. *Smith*, 2003 Del. Super. LEXIS 38, at *33. This requirement is comprised of two elements: "(a) that the interests of the

representative party must coincide with those of the class; and (b) that the representative party and his attorney can be expected to prosecute the action vigorously." *Id.*

In determining whether the interests of a representative coincide with those of the class, the Court looks to see if any conflict exists between named parties and the class they seek to represent. *Id.*, at *9. "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Id.* The proposed Class Representative has no conflicts with other Class members. As set forth above, his interests as a former employee of Mohawk and participant in the Plan are typical and coincide with the interests of the Class. Further, Plaintiff's counsel are experienced in class actions and other complex litigation, and have been diligently working on this case for several years. Plaintiff's counsel has adequately represented the interests of the Class. McKenna Decl. at ¶¶ 33-35.

(2) Rule 23(b) is Satisfied

Once the prerequisites of Rule 23(a) are satisfied, a class action may be certified if any of Rule 23(b) conditions are met. This Action challenges the conduct of certain officers of the Company in connection with the Company's allegedly false and misleading Registration Statement and, therefore, is properly certifiable under Rule 23(b)(1).

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

Rule 23(b)(1) provides for class certification where:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
>
> (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; […][5]

This Court preliminarily found in its November 14, 2023 Preliminary Approval Order at ¶ 2(e), for purposes of settlement only, that certification under Rule 23(b)(1) was appropriate. *See* Dkt. 32. Rule 23(b)(1) "clearly embraces cases in which the party is obliged by law to treat the class members alike[.]" *Turner v. Bernstein*, 768 A.2d 24, 32 (Del. Ch. 2000). Furthermore, certification is appropriate under Rule 23(b)(1) because "any damages to which class members would be entitled would be based solely upon the number of [shares of Mohawk stock] that they own." *Allen v. El Paso Pipeline GP Co., L.L.C.*, 90 A.3d 1097, 2014 WL 2086371, at *2 (Del. Ch. 2014) (citing *Noerr v. Greenwood*, 2002 WL 31720734, at *6 (Del. Ch. Nov. 22, 2002)).

[5] Del. Super. Ct. Civ. R. 23(b)(1).

Such is the case here where Defendants' contractual relationship was the same with all Mohawk employee stockholders in the Plan and, thus, members of the proposed Class. Therefore, Defendants were obliged by law to treat them alike. Certification under Rule 23(b)(1) is appropriate because Plaintiff challenges a course of conduct that affected all Mohawk employee stockholders in the Plan in the same manner. There is no legitimate basis on which Defendants might be found liable to some members of the Class and not others.

Further, Rule 23(b)(1)(A) and (B) are satisfied because if separate actions were commenced by members of the Class, Defendants and Mohawk employee stockholders in the Plan 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 Class members. Thus, Rule 23(b)(1) certification is appropriate because multiple lawsuits could follow if certification were denied, which would be prejudicial to non-parties and inefficient. *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1095 (Del. Ch. 2001). Certification pursuant to Rule 23(b)(1) is, therefore, appropriate. *See Allen*, 90 A.3d at 1111-12 (certifying a class of common unitholders under Rule 23(b)(1) and (b)(2)).

B. The Settlement is Fair, Reasonable, and Adequate and Warrants Final Approval

With Class Certification established, and pursuant to Superior Court Rule 23, the Court engages in a two-step process when determining whether to approve a class action settlement. *Doe v. Bradley*, 64 A.3d 379, 394 (Del. Super. 2012) (citing *Crowhorn*, 836 A.2d at 562). First, the Court conducts a preliminary review of the proposed settlement to determine if there are patent grounds to question the fairness of the settlement. If not, the Court will preliminarily approve the settlement and schedule a so-called "fairness hearing." *Id.* This first step is complete. The Court found in its November 14, 2023 Preliminary Approval Order that the Settlement resulted from arm's-length negotiations through mediation and direct discussion, and in authorizing class notice, that the Court would likely be able to approve the Settlement under Rule 23. *See* Dkt. 32.

Second, to make the "fairness" determination, the Court should consider several factors, including, *inter alia:* (1) the advantages of the proposed settlement versus the probable outcome of a trial on the merits; (2) the probable duration and cost (here both financial and emotional) of a trial; (3) the extent of participation in the settlement negotiations by class representatives and by a judge or special master (including a retired judge); (4) the number and force of the objections by Class members; (5) the effect of the settlement on other pending (or future) actions; (6) the fairness and reasonableness of the claims administration process for individual

claims; (7) the apparent intrinsic fairness of the settlement terms; and (8) the extent to which only the class representatives are to receive monetary relief." *Id.*

In addition, "[t]here is a presumption in favor of the settlement when there has been arms-length bargaining among the parties" after adequate development of the factual record and legal theories." *Id.* (citing *Wellman v. Dickinson*, 497 F. Supp. 824, 830 (S.D.N.Y. 1980); *Prezant v. DeAngelis*, 636 A.2d 915, 921 (Del. 1994) ("As a general proposition, Delaware law favors settlements.")).

(1) The Advantages of the Settlement and Probable Duration of Litigation

The Settlement would "mark an end to the civil litigation" arising from the Defendants' alleged wrongdoing and would provide guaranteed substantial monetary benefits for the Class. *See Bradley*, 64 A.3d, at 395. Plaintiff has evaluated, *inter alia*: (1) the prospect of continuing litigation on issues including certification, jurisdiction, and liability; (2) litigation that would be extraordinarily expensive and continue for many years; (3) the likelihood and uncertainty of appeals of legal and other issues by Defendants; (4) the unpredictability of success on any of the issues that would be litigated, including, *inter alia*, questions of whether Defendants violated federal securities laws; (5) the delays that would necessarily be encountered throughout many years of litigation versus the benefit of compensation to Class Members at this time; (6) the additional expense that would be incurred in the litigation process; (7) the absence of insurance coverage available for recovery;

and (8) the development of the factual record, legal theories, and extent of discovery conducted.

As reflected in the Stipulation, Defendants continue to deny, *inter alia*, all charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts, or omissions alleged, or that could have been alleged, in this Action. Defendants also have denied and continue to deny, *inter alia*, the allegations that Plaintiff or members of the Class have suffered damage or were otherwise harmed by the conduct alleged in this Action. Stipulation at 4. Accordingly, there are "real risks to the [C]lass posed by continued litigation" and the Settlement thus "presents a significantly superior means by which to resolve the [C]lass claims." *Id.*

Moreover, any continued litigation would come with significant costs. Since the filing of the Complaint (Dkt. 1), there has been careful investigation and an exchange of information for mediation but limited substantive litigation. Continued litigation would require discovery to take place which would be "costly, intrusive, and time consuming," as well as the probable filing of an amended complaint, dispositive motion practice, and lengthy and complex trial practice, as well as any possible appeals which would have added time to this litigation and burden upon the Parties and the Court. Instead, "[t]his [S]ettlement allows the [P]arties to avoid lengthy […] and costly litigation in favor of a fair and final resolution now." *Bradley*, 64 A.3d, at 395.

Thus, Plaintiff and Defendants believe that Settlement of this Action, which has already been pending for a number of years, provides guaranteed benefits to the Class and is a fair, reasonable, and adequate resolution of the Action.

(2) The Participation of Representatives and Neutrals

The Class Representative has been active in this litigation having spent significant time and effort representing the Class to date, including, *inter alia*, time assisting counsel, providing information regarding the Plan, reviewing and approving the complaint before filing, and consulting with counsel during the litigation and extensive mediation and settlement negotiations. The Class Representative has been informed of and supports the terms of the Settlement Agreement. McKenna Decl. at ¶ 49.

Additionally, the Parties were aided in reaching a resolution of this matter by the assistance of an experienced and skilled mediator: Judge Layn R. Phillips of Phillips ADR Enterprises. The Parties engaged in arms-length negotiations across two days of mediation and reached an agreement in principle to settle the Action on June 9, 2022, subject to the negotiation of a Stipulation of Settlement and approval by the Court. McKenna Decl. at ¶ 50. Accordingly, the active participation of Plaintiff and the use of the "experienced and respected mediator, Judge Layn Phillips (Ret.) supports a finding that the Settlement is fair, reasonable, and adequate. *Forsythe v. Esc Fund Mgmt. Co. (U.S.)*, 2012 Del. Ch. LEXIS 98, at *9 (Del. Ch.

May 9, 2012) ("Several significant factors support the reasonableness of the settlement and weigh in favor of approval. The Parties negotiated at arm's-length with the benefit of an experienced and respected mediator. […]"); *Bodnar v. Bank of Am., N.A.*, 2016 U.S. Dist. LEXIS 121506, at *11 (E.D. Pa. 2016) (noting that Judge Layn Phillips is an "experienced and respected mediator" when discussing reasonableness of a settlement).

(3) Number and Force of Objections

There are over 31,000 Class Members across the two Plans and zero objections have been raised to date regarding the Settlement. McKenna Decl. at ¶ 52. There is a presumption in favor of the settlement when, among other criteria, "only a few members of the class object and their relative interest is small." *Crowhorn*, 836 A.2d at 563 (citing *Wellman*, 497 F.Supp. 824 at *830. Accordingly, this presumption applies here as there have been no objections to date, thus further supporting the reasonableness of the Settlement.

(4) The Effect of the Settlement on Other Actions

There are no other pending actions against Defendants for the same or similar underlying claims as alleged in the Action. McKenna Decl. at ¶ 54. If the Settlement is approved, there will be no future actions either. As a result, this Settlement provides Defendants "complete peace that would include a release to the broadest extent possible." *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1137 (Del. 2008).

(5) The Fairness of the Allocation Process

Plaintiff's Counsel represents that the Plan of Allocation attached as Exhibit C to the Stipulation, contemplates a fair process for allocation of the proceeds of this Settlement. The relief will be administered through a comprehensive claims process to "share the fruits of the efforts with all class members after evaluating each class members' damages." *See Cuppels v. Mountaire Corp.*, 2021 Del. Super. LEXIS 292, at *21 (Del. Super. Apr. 12, 2021). Indeed, the Plan of Allocation provides consideration to the compensable elements of each Class Members' claims and a right to appeal to the Claims Administrator if a claimant is dissatisfied with their allocation amount. This settlement will provide substantial monetary relief to all participating Class Members.

Accordingly, in evaluating the advantages of the Settlement, the likely cost and duration of continued litigation, the participation of Plaintiff, a mediator, and the existence of arm's-length negotiations, the fairness of the allocation process, the intrinsic fairness of the terms of the Settlement, the monetary relief available to Class Members, the Settlement is clearly fair, reasonable, and adequate. *See Bradley*, 64 A.3d at 394.

(6) The Apparent Intrinsic Fairness of the Settlement

"This is not a class action settlement where class members will receive nebulous forms of non-monetary compensation. The monetary compensation

proposed here, […], is real, substantial money that can do much good" for the Class. *Id.* at 400. As discussed, *supra*, there are a number of challenges that would arise with continued litigation, such as establishing liability and the level of damages, among other things. This Settlement eliminates those uncertainties and provides real, tangible, and guaranteed benefits to the Class and is therefore fair, adequate, and reasonable.

(7) Extent to Which Only the Class Will Receive Monetary Relief

As clearly set out in the Stipulation, only the members of the Class shall receive the Settlement Fund. Stipulation at 19–20. Aside from the Court-ordered attorneys' fees and expenses and Plaintiff's case contribution award, the Net Settlement Fund will be distributed to all eligible Class Members until exhausted. No funds shall revert back to Defendants. Accordingly, the Settlement is fair, adequate, and reasonable. *See Bradley*, 64 A.3d at 400 (finding a settlement fair, adequate, and reasonable where only the members of the class receive the settlement funds).

C. Award of Attorneys' Fees to Class Counsel

It is well-settled in Delaware that an attorney who prosecutes a lawsuit that results in the creation of a common fund or benefit may be awarded fees. Indeed, the common fund doctrine permits a successful plaintiff's attorney to request an award of attorneys' fees from the common fund. *Crowhorn*, 836 A.2d at 564. "The

Supreme Court has stated, 'Class action suits which result in the recovery of money exemplify the class creation of a common fund." *Id.* at 564 (citing *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996). "In the class action context, the cost of litigation, including counsel fees, are paid out of the common fund, in this case, the settlement fund." *Bradley*, 64 A.2d at 402.

Class counsel seeks an award using the percentage approach plus expenses, which is the method Delaware courts apply for an award of attorneys' fees. *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1259 (Del. 2012) (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142 (Del. 1980)). Delaware courts generally follow a multiple factor approach to determine attorneys' fee awards in class actions, in order for a Court to reach "an equitable award of attorneys' fees." *Crowhorn*, 836 A.2d at 565 (citing *Sugarland*, 420 A.2d 142). "In Delaware, the courts are not bound by a particular methodology in determining appropriate counsel fees under the common fund doctrine." *Bradley*, 64 A.2d at 401. Here, Class Counsel requests one-third of the common fund, or $333,333.33, an amount that is reasonable, compensates Class Counsel for their time and effort in litigating the Action, and is similar to other awards in Delaware. *See S'holder Representative Servs. LLC v. Shire US Holdings, Inc.*, C.A. No. 2017-0863-KSJM, 2021 Del. Ch. LEXIS 81, at *2 (Del. Ch. 2021) ("A one-third contingent fee arrangement is quite typical and commercially reasonable.").

Delaware law requires the review of a fee application based on five factors often called the "Sugarland" factors: (i) the benefits achieved; (ii) the time and effort of counsel; (iii) the relative complexities of the litigation; (iv) any contingency factor; and (v) the standing and ability of counsel involved. An analysis of the Sugarland factors here concludes that Class Counsel's fee request is appropriate, well-reasoned, and results in an equitable award. *See In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, 1273 (Del. 2005).

(1) The Benefits Achieved

The benefit achieved is the "most important of the Sugarland factors." *Theriault*, 51 A.3d at 1255. The measure of the benefit achieved includes both considerations of ultimate recovery and the value added by class counsel. *Sugarland*, 420 A.2d at 151. If the benefit achieved is quantifiable, then it is typical for Delaware courts to apply a "percentage-of-the-benefit approach" to reach an equitable fee award. *Bradley*, 64 A.3d at 401.

Here, the Settlement will provide the Class Members with real and certain recovery for the damages that they have sustained. Indeed, the achievement of a $1,000,000 common fund which will be distributed according to each Class Members' proportionate loss is an excellent result for the Class which was achieved through the efforts of Class Counsel. As discussed, *supra*, "[t]his is not a class action settlement where class members will receive nebulous forms of non-monetary

compensation. The monetary compensation proposed here, […], is real, substantial money that can do much good" for the Class. *Bradley*, 64 A.2d at 400. Furthermore, Class Counsel informed the Class Members in the Notice of their intent to apply for an award of attorneys' fees not exceeding one-third which received no objections to date from the Class, thus supporting this factor.

Accordingly, the creation of the common fund here is an excellent resolution which will provide great benefits to the harmed Mohawk shareholders and, in light of these benefits, Class Counsel's request for just $333,333.33 is reasonable.

(2) The Time and Effort of Class Counsel

As of February 12, 2024, Class Counsel has spent a collective 325.8 hours on litigating this Action. McKenna Decl. at ¶ 73. While "the hourly rate represented by a fee award is a secondary consideration, the first issue being the size of the benefit created," *In re AXA Fin., Inc., S'holders Litig*., 2002 WL 1283674, at *7 (Del. Ch. May 22, 2002), Delaware courts look to attorney lodestar as a "backstop check" when assessing reasonableness. *In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, at *1274. Here, the requested fee is entirely reasonable in light of the hours Class Counsel has devoted to the matter and their resulting lodestar amount.

Class Counsel has spent a collective 325.8 hours for a lodestar of $263,261, resulting in a multiplier of 1.27 which is within the range of approval in Delaware

and thus supports the reasonableness of Class Counsel's requested fee award. *See Sciabacucchi v. Howley*, 2023 Del. Ch. LEXIS 164, at *13 (Del. Ch. Jul. 3, 2023) (awarding fees of approximately 1.65x the lodestar for a case that settled "right out of the gate"); *Williams Cos. v. Energy Transfer LP*, 2022 Del. Ch. LEXIS 207, at *11 (Del. Ch. Aug. 25, 2022) (finding a 1.7x lodestar multiple as well within the range of reasonableness).

Moreover, during the 325.8 hours of litigating this Action, spanning several years, Class Counsel have devoted substantial time, effort, and resources to this matter, beginning with their initial investigation of Plaintiffs' allegations, continuing through mediation and settlement negotiations that resulted in a non-reversionary settlement fund for the benefit of the Settlement Class, while taking into account the strengths and weaknesses of the case. McKenna Decl. at ¶ 75. Accordingly, Class Counsel have spent a significant amount of time and effort on this Action and will continue to spend time on finalizing and filing motion papers in support of final approval of the proposed Settlement, attending the Fairness Hearing, and overseeing the future the distribution of the Settlement Fund, thus supporting their fee request. McKenna Decl. at ¶ 76.

(3) The Complexities of the Litigation

"One of the secondary Sugarland factors is the complexity of the litigation. All else equal, litigation that is challenging and complex supports a higher fee

award." *In re Activision Blizzard, Inc. S'holder Litig*., 124 A.3d 1025, 1072 (Del. Ch. 2015).

The issues involved in this Action were complicated and vigorously contested. Initially, the case presented a question that required a detailed understanding of federal securities laws. *See Sciabacucchi*, 2019 Del. Ch. LEXIS 250, at *23-24 (finding a case that required a detailed understanding of federal securities law to be relatively complex). Further, the case required an understanding of the factual issues unique to this litigation, namely whether the Company engaged in deceptive and unsustainable sales practices to mask declining customer demand for its traditional product offering including ceramic, stone, laminate, carpet, wood, and vinyl flooring (the "Conventional Flooring Products"). Taking this required knowledge into consideration, it is submitted that the Action was relatively complex which supports Class Counsel's requested fee award.

(4) Contingency Factor

Another secondary Sugarland factor is the degree of contingency risk that counsel undertook. Some contingency risk is a prerequisite for a risk-based award. *In re Activision*, 124 A.3d at 1073. "[J]ust because a lawyer works on contingency does not automatically warrant a significant award. "Not all contingent cases involve the same level of contingency risk."" *Sciabacucchi*, 2019 Del. Ch. LEXIS 250, at *22 (quoting *In re Activision*, 124 A.3d at 1073). Here, Class Counsel faced

legitimate contingency risk. Counsel did not enter the case with a ready-made exit or settlement opportunity and they faced significant adversaries who believed in the validity of the Company's defenses. *See Sciabacucchi*, 2019 Del. Ch. LEXIS 250, at *22.

Class Counsel took on this Action on a wholly contingent basis and advanced all out-of-pocket expenses without any guarantee of recovery. At the time of taking on this case, Class Counsel knew that securities class actions are inherently uncertain and could fail at any stage, including on a motion to dismiss, class certification, trial, or at any subsequent appeal. Despite this, Class Counsel continued to pursue this case over multiple years to achieve the Settlement for the benefit of the Class.

(5) The Standing and Ability of Class Counsel

"Law firms establish a track record over time, and they build (and sometimes burn) reputational capital." *In re Del Monte Foods Co. S'holders Litig.*, 2010 Del. Ch. LEXIS 255, at *27 (Del. Ch. Dec. 31, 2010) (quoting *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 956 (Del. Ch. 2010)).

It is respectfully suggested that this Court is familiar with Class Counsel through their efforts here and in prior cases, and otherwise is aware of the attributes of counsel. Class Counsel in this case is Thomas J. McKenna and Gregory M. Egleston of Gainey McKenna & Egleston with Liaison Counsel Ryan M. Ernst of Bielli & Klauder, LLC. Class Counsel and Liaison Counsel each have a breadth of

experience with class action and shareholder litigation both in Delaware and across the United States, as demonstrated by their firm résumés, attached as Exhibits A and B to the McKenna Decl.

These lawyers were supported by a team of associates, paralegals, assistants, and consultants with experience litigating complex and difficult cases. The results in this case illustrate the standing and ability of counsel and thus speak for themselves.

D. Reimbursement of Expenses

Class Counsel requests the reimbursement of reasonably incurred litigation expenses in the amount of $6,123.19. These expenses include, among other things, the costs of an expert, travel, and necessary administrative expenses such as filing fees and conference calls. McKenna Decl. at ¶¶ 90-93. Class Counsel submits that these expenses represent a mere 0.61% of the common fund and are therefore reasonable, fair, and appropriate, and warrant reimbursement. *See In re Appraisal of Dell, Inc.*, 2016 Del. Ch. LEXIS 160, at *35 (Del. Ch. 2016) (finding that reimbursable expenses amounting to 15.89% of the benefit is reasonable). Further supporting this, Class Members were informed in the notice that Class Counsel would seek reimbursement of litigation-related expenses of not more than $8,000. The Class did not object, and the requested reimbursement here is 23.46% lower than the $8,000. McKenna Decl. at ¶ 95.

E. Case Contribution Award

The Delaware Supreme Court has recognized that a class representative can receive an incentive fee based on (i) the time, effort and expertise expended by the class representative, and (ii) the benefit to the class. *Raider v. Sunderland*, 2006 WL 75310, at *1 (Del. Ch. Jan. 4, 2006), *cited in Isaacson v. Niedermayer*, 200 A.3d 1205, 1205 n.1 (Del. 2018).

Serving as class representative is not an easy task. "In the current litigation environment, a stockholder who files plenary litigation faces the very real possibility of having their computer and other electronic devices imaged and searched, sitting for a deposition—perhaps more than one if they also institute [Section] 220 litigation—and then perhaps testify at trial." *In re Dell Technologies Inc. Class V S'holders Litig.*, 300 A.3d 685, 733 (Del. Ch. Jul. 31, 2023) (internal citations omitted). Further, a named plaintiff accepts reputational risk. *See In re Dell*, 300 A.3d at 733-734 (detailing the risks for a named plaintiff and the "fate of Herb Chen, the named plaintiff in *Chen v. Howard-Anderson*, 2017 Del. Ch. LEXIS 734 (Del. Ch. Jun. 30, 2017)").

Paying an incentive award to a Named Plaintiff is customary and recognizes that without a successful recovery, the Named Plaintiff is not entitled to an award, just as plaintiff's counsel is not entitled to a fee. *In re Dell*, 300 A.3d at 735. Accordingly, Class Counsel therefore requests an incentive fee in the amount of

$10,000 for Plaintiff to compensate him for his extensive efforts in achieving the substantial and meaningful result on behalf of all Class Members despite the risks facing him in vigorously prosecuting this Action. McKenna Decl. ¶ 100.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that the Court should (i) grant final approval of the class action settlement; (ii) certify the class for settlement purposes; (iii) grant an award of attorneys' fees in the amount of $333,333.33; (iv) grant the reimbursement of Class Counsel's litigation expenses in the amount of $6,123.19; and (v) grant a case contribution award to Plaintiff in the amount of $10,000.

Dated: February 15, 2024

Respectfully submitted,

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