SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

STEPHEN BUSHANSKY, Individually and on behalf of all others similarly situated, Plaintiff, vs. ALLIANCE FIBER OPTICS PRODUCTS, INC., et al., Defendants.	Case No.: 16CV294245 **ORDER AFTER HEARING ON JANUARY 25, 2019** **Final Fairness Hearing**
BAHMAN KHAKI, Individually and on behalf of all others similarly situated, Plaintiff, vs. ALLIANCE FIBER OPTICS PRODUCTS, INC., et al., Defendants.	Case No. 16CV294833

The above-entitled matters came on regularly for hearing on Friday, January 25, 2019 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh

presiding. The Court reviewed and considered the written submission of all parties and issued a tentative ruling on January 24, 2019. No party contested the tentative ruling and no party appeared; therefore, the Court orders that the tentative ruling be adopted and incorporated herein as the Order of the Court, as follows:

These related putative shareholder class actions arise from the sale of Alliance Fiber Optic Products, Inc. ("AFOP") to Corning Incorporated and its affiliates. Before the Court is plaintiffs' renewed motion for preliminary approval of a settlement. Plaintiffs' motion is unopposed, although defendants have not joined their motion and indicate that they will oppose plaintiffs' attorney fee request at the appropriate time.

I. Factual and Procedural Background

Headquartered in Sunnyvale, California, AFOP was a Delaware corporation that produced fiber optic components and integrated modules for communications equipment. (First Amended Complaint in *Bushansky*, Case No. 16-CV-294245 ("FAC"), ¶¶ 2, 11.) On April 7, 2016, the company announced that it had entered into a merger agreement pursuant to which Corning would acquire all of the outstanding shares of its common stock for $18.50 per share, in a transaction valued at approximately $305 million. (*Id.* at ¶ 3.)

Plaintiffs allege that the transaction undervalued AFOP, with the sale price discounted nearly 14.9% from the company's 52-week high value of $22.35 per share on July 23, 2015. (FAC at ¶ 4.) They further allege that the individual defendants inappropriately agreed to "lock up" the transaction with deal protection devices, including a strict "no solicitation" provision, an "information rights" provision requiring the company to fully inform Corning of any competing offer within 48 hours, a "matching rights" provision allowing Corning four business days to match any alternative bid, a "no-waiver" provision restricting AFOP from modifying or waiving any material provision of any confidentiality or similar agreement to which it is a party, and a provision establishing a termination fee of $10.55 million. (*Id.* at ¶ 5.) Plaintiffs also allege that defendants failed to disclose material information to stockholders in the Schedule 14D-9 statement filed with the United States Securities and Exchange Commission on April 21, 2016.

(*Id.* at ¶ 6.) Specifically, the statement omits and/or misrepresents material information concerning (1) the background of the proposed transaction, (2) the data and inputs underlying the financial valuation exercises supporting the fairness opinion provided by AFOP's financial advisor, Cowen and Company, LLC, and (3) the company's financial projections, relied on by Cowen. (*Ibid.*)

According to the FAC, Corning was one of at least four parties that reached out to AFOP in late 2014 and early 2015 on an unsolicited basis; these parties also included Parties A, B, and C. (FAC, ¶ 36.) To facilitate discussions, these parties each entered into confidentiality agreements in late 2014 and early 2015. (*Id.* at ¶ 37.) The confidentiality agreement executed by Corning, and potentially the other parties, contained certain standstill provisions which would terminate upon the happening of a "Fundamental Change Event" or twelve months from the date of the agreement. (*Ibid.*)

On March 16, 2015, the board met telephonically to discuss "changing industry dynamics" and the effect of those changes on the company's viability as a standalone enterprise. (FAC, ¶ 38.) The board directed its financial advisor to contact six strategic parties that the board felt were "most likely to be interested in a transaction," including Corning and Parties A, B, and C. (*Ibid.*) However, management directed Cowen to defer contacting Party C based on a subsequent determination "that Party C was not likely to be among the more interested parties." (*Id.* at ¶ 40.)

Unidentified members of company management met with representatives of Parties A and B, as well as Corning. (FAC, ¶ 42.) Then, on April 12, 2015, Party B informed the company it was no longer interested in a transaction, citing its view of "the future prospects of the Company." (*Id.* at ¶ 43.) On April 20, Party A informed the company that its key business unit, which initially thought the company would be a fit, was no longer interested in a combination with AFOP. (*Id.* at ¶ 44.) After Parties A and B indicated their lack of interest, Cowen held telephonic discussions with Party C on May 4. (*Id.* at ¶ 45.) Corning submitted an indication of interest three days later, and AFOP negotiated with it over the following weeks. (*Id.* at ¶ 46.) On May 19, 2015, Party C informed the company that it was no longer interested in a

transaction. (*Id.* at ¶ 47.) However, negotiations with Corning were suspended after it informed the board that based on its due diligence findings, it could not agree to a valuation in the range that AFOP had indicated. (*Id.* at ¶ 49.)

The strategic process remained suspended until, between August and December of 2015, unidentified members of AFOP management met with representatives of Party B, Party C, and Corning on numerous occasions. (FAC, ¶ 51.) On December 1, 2015, Party B informed the company it was no longer interested in a potential transaction and on January 5, 2016, Party C did the same. (*Id.* at ¶ 52.) Corning submitted a new indication of interest, and a meeting with Party D was confirmed for January 26; however, the Party D meeting was postponed due to Corning's request for exclusivity. (*Id.* at ¶¶ 53-56.) This exclusivity period expired on February 15, 2016, at which time Party D again confirmed its interest in a potential transaction and asked for a meeting on March 18. (*Id.* at ¶ 57.) The Party D meeting was scheduled but was again postponed. (*Ibid.*) The board approved the merger with Corning, including the complained-of deal protection devices, on April 7, 2016. (*Id.* at ¶ 59.) The merger agreement included a "no-waiver" provision that "restrict[ed] the Company and its subsidiaries from terminating, amending, releasing, modifying or waiving any material provision of any confidentiality or similar agreement to which Alliance or any of its subsidiaries is a party." (*Id.* at ¶ 73.)

In April 2016, plaintiffs Stephen Bushansky and Rudy Luck filed suit against AFOP; individual defendants Peter C. Chang, Gwong-Yih Lee, James C. Yeh, Richard B. Black, and Ray Sun; and Corning and its subsidiary, the Apricot Merger Company. In May 2016, plaintiff Bahman Khaki brought a complaint against the same defendants, and plaintiff Rick Doerr sued the individual defendants only. All four actions arose from the same general allegations described above and asserted claims for breach of fiduciary duty and (with respect to Corning and Apricot) aiding and abetting breach of fiduciary duty. Plaintiffs Luck and Doerr dismissed their actions in July of 2018, leaving the actions filed by Bushansky and Khaki at issue.

The parties agreed to exchange expedited discovery and reached a non-monetary settlement on May 26, 2016, which included a waiver impacting a provision in AFOP's confidentiality agreement with Party B and AFOP's agreement to provide supplemental

disclosures in connection with the sale. The following day, AFOP filed the supplemental disclosures in Amendment No. 5 to its Schedule 14D-9. The shareholders voted to approve the sale on June 3, and on June 6, 2016, the merger was completed.

As discussed further below, the Court continued for supplemental briefing and then denied without prejudice plaintiffs' original motion for preliminary approval, filed in August of 2017. Responding to the Court's order, plaintiffs now renew their motion. They seek an order preliminarily approving the settlement, provisionally certifying the settlement class and appointing the class representatives, designating class counsel, approving the form and method for providing notice to the class, and scheduling a final fairness hearing.

II. Legal Standard for Approval of a Class Action Settlement

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, ... and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, ... the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, internal citations and quotations omitted.)

The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the

product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, quoting *Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1801, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1802.) The presumption does not permit the Court to "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.)

III. The Settlement Process and the Parties' Agreement

Between May 4 and 25 of 2016, the individual defendants produced certain confidential documents in expedited discovery, including minutes of meetings of AFOP's board of directors, Cowen's engagement letters and presentations to the board, non-disclosure agreements with prospective bidders, and presentations and financial projections prepared by management. Plaintiffs' counsel retained a financial and valuation expert to evaluate these materials. On May 10, 2016, plaintiffs' counsel began settlement negotiations with a formal demand letter.

The parties reached an agreement-in-principle on May 26, 2016. The agreement provided for supplemental disclosures to the shareholders in advance of the shareholder vote on June 3, which are discussed in more detail in the Court's December 13th, 2017 order. In addition, AFOP and Corning waived the standstill provision in Party B's confidentiality agreement "to the extent that Party B was prohibited from making any confidential proposal to acquire AFOP." Plaintiffs are not aware of Party B providing any further response or confidential offer after receiving notice of the standstill waiver.

The settlement contemplates that plaintiffs will petition the Court for an award of attorney fees and expenses not to exceed $2 million. It includes a broad release of all claims by plaintiffs in their capacities as AFOP stockholders "that arise out of any of the allegations, facts, practices, matters, [etc.] ... that are related, directly or indirectly, to the Actions, or the subject matter thereof ...."

The settlement was subject to additional confirmatory discovery, including depositions of defendant and AFOP board member Richard B. Black and of the company's principal financial advisor at Cowen, Setch Subudhayangkul. These depositions were completed in February 2017 and December 2016, respectively. Plaintiffs' counsel has now concluded that the settlement is in the best interests of the putative class.

IV. The Court's Prior Order

On December 13, 2017, the Court denied plaintiffs' original motion for preliminary approval of the settlement without prejudice. Applying *In re Trulia, Inc. Stockholder Litigation* (Del. Ch. 2016) 129 A.3d 884 ("*Trulia*"), and reserving judgment on the disclosure relating to the Party B standstill waiver, the Court found that the remaining supplemental disclosures were not plainly material as would support approval of the settlement. Consistent with the Court's order, plaintiffs' renewed motion for preliminary approval no longer relies on these disclosures.

The Court's December 13th order also addressed the standstill waiver and related disclosure. Supplemental briefing submitted by AFOP explained that in addition to the standstill provisions included in the confidentiality agreements of other bidders like Corning, a "Don't Ask/Don't Waive" ("DADW") provision was contained in Party B's confidentiality agreement dated October 15, 2014 and amended in September 9, 2015. The company did not enter into an agreement containing such a DADW provision with any of the other interested parties, which explains why the waiver provided by the settlement was as to Party B only.[1]

[1] In their present motion, plaintiffs still do not explain *why* only Party B was subject to this provision, other than to report defendants' representation that Party B was not required to agree to it.

AFOP explained generally that standstill provisions are employed to maximize shareholder value by obtaining bidders' best and final offers at a set time, to avoid lowball bids. Used in connection with standstill provisions, "DADW provisions prohibit a party from even making a confidential request to waive the standstill. This is to avoid a situation where a bidder makes a confidential request to make a topping bid, knowing that the target's board will feel obliged to grant the waiver in order to obtain higher value for its shareholder, effectively vitiating" the standstill provision. (AFOP's Supp. Br. at p. 4.)

As discussed in the Court's order, several unpublished Delaware Court of Chancery decisions support the proposition that DADW standstill waivers like the one at issue here can support approval of a settlement. However, those opinions do not suggest that any and all such waivers would provide material value to shareholders; rather, they analyzed the waivers before them in the context of the particular transaction at issue. As summarized by the Court,

> [*In re Celera Corp. Shareholder Litigation* (Del. Ch., Mar. 23, 2012, No. CIV.A. 6304-VCP) 2012 WL 1020471, *aff'd in part, rev'd in part on another ground* (Del. 2012) 59 A.3d 418] involved a non-monetary settlement of claims related to a tender offer, which included "therapeutic benefits" like standstill waivers as well as supplemental disclosures. In *Celera*, a settlement was reached on April 18, 2011 that provided for: "(1) reduction of the Termination Fee from $23.45 million to $15.6 million; (2) modification of the No Solicitation Provision to invite competing offers from the potential bidders subject to the Don't–Ask–Don't–Waive Standstills; [and] (3) extension of the tender offer for seven days, from April 25 to no earlier than May 2, 2011...." (At *6-7.) In analyzing the settlement, the court considered how all of these concessions worked together, in light of the overall landscape of deal protection devices in that case, to create real value for shareholders. (At *20-22; see also *In re Compellent Technologies, Inc. Shareholder Litigation* (Del. Ch., Dec. 9, 2011, No. CIV.A. 6084-VCL) 2011 WL 6382523 [awarding fees in case where "the settlement shifted the agreement's protective array from the aggressive end of the spectrum towards the middle"; discussing expert declaration, published studies, and several deal protection concessions in addition to a standstill waiver]; *In re Del Monte Foods Co. Shareholders Litigation* (Del. Ch., June 27, 2011, No. CIV.A. 6027-VCL) 2011 WL 2535256, at *14 [discussing empirical data yet denying without prejudice interim fee application where plaintiffs "obtained a limited injunction barring the defendants from proceeding with the stockholder vote on the Merger for a period of 20 days and, in the interim, from enforcing the no-shop, match right, and termination fee provisions in the Merger Agreement"].) A similar analysis is called for here.

The Court found that, despite being provided with an opportunity to submit supplemental briefing on this issue, plaintiffs failed to analyze how the standstill waiver achieved by the settlement provided real value to shareholders. In particular, the Court noted that the timing of the standstill waiver provided Party B with only eight days to submit a topping bid, while plaintiffs provided little discussion of the likelihood it would do so:

> [T]he parties have failed to provide the Court with context such as the full content of the confidentiality agreement with Party B; an explanation of why Party B but no other interested party was required to agree to a DADW provision; a discussion of the actual likelihood that Party B would submit a topping bid in eight days considering the history of its interactions with AFOP, its apparent ability to submit a public bid even before the waiver, and any due diligence it had conducted; an update on whether Party B actually learned of the standstill waiver considering the other deal protection devices that remained in place and whether any response or confidential offer was received from Party B; and an overview of how the standstill waiver altered the overall landscape of deal protection devices in this case.

The Court concluded that, "[h]aving received more information about the proposed settlement through the parties' supplemental briefing, the Court agrees with AFOP that the heart of the matter is the standstill waiver and associated disclosure of Party B's confidentiality agreement." It denied preliminary approval without prejudice, noting that it "remain[ed] open to the prospect that this aspect of the settlement provided real value to shareholders." It directed that

> [a]ny future motion for preliminary approval should address the specific concerns raised by the Court in this order, and should focus on the value of the standstill waiver and associated disclosures given the particular circumstances in this case, as opposed to relying on general or hypothetical arguments. In particular, a future motion for preliminary approval must address the value of the standstill waiver in light of the deal size, the statistical probability of a topping bid, the number of parties that conducted due diligence, and the statistical likelihood of the percentage increase in price if a topping bid occurs.

V. Fairness of the Settlement

Plaintiffs' renewed motion for preliminary approval addresses some, but by no means all, of the issues raised by the Court. Plaintiffs submit Party B's confidentiality agreement for the Court's review, which clarifies that Party B had been prohibited from making either a public or private bid to acquire AFOP before the waiver permitted it to make a confidential proposal. They confirm that Party B was informed of the standstill waiver by letter on May 26, 2016, and note that AFOP had not gone back to Party B and the other bidders prior to executing the merger agreement with Corning, three months after preliminary discussions with the bidders had ceased. They also submit rulings in unpublished Delaware Chancery cases that standstill waivers implemented in similar proximity to the expiration of the pending offer provided adequate value to shareholders to support approval of a settlement and release.

With regard to the practical likelihood that Party B would submit a topping bid, plaintiffs provide additional detail regarding the history of the discussions between AFOP and Party B, a globally recognized provider of electronic solutions across industries and another potential strategic acquirer. While these details provide support for plaintiffs' prior representation that Party B and AFOP had engaged in serious discussions, they do not address whether Party B had performed due diligence that would enable it to submit a topping bid in an eight-day timeframe. Plaintiffs' narrative does indicate that Party B first disengaged with AFOP due to the run-up in its stock price in 2015. This suggests that it could have been interested in topping Corning's bid, which was discounted almost fifteen percent from the company's 52-week high value, even accounting for the roughly three percent termination fee. Still, the likelihood that Party B might have submitted a topping bid remains uncertain based on the record before the Court.

Plaintiffs also submit a valuation of the standstill waiver based on methodology used by Vice Chancellor Laster in *In re Compellent Techs., Inc. S'holders Litig.*, C.A. No 6084-VCL and *In re Complete Genomics S'holder Litig.*, C.A. No. 7888-VCL. This analysis is helpful, although—as noted by Vice Chancellor Parsons in another Delaware Chancery case—by no means scientific. (See Decl. of Evan J. Smith ISO Renewed Mot., Ex. H, Settlement Hearing and Rulings of the Court, *In re MModal Inc. S'holder Litig.*, C.A. No 7675-VCP, pp. 20-21.) In

the Court's view, the 4.6 percent likelihood of a topping bid assumed by plaintiffs is probably too high given that the standstill waiver here impacted a single party. Still, plaintiffs' analysis and citations support the conclusion that the standstill waiver provided some value to shareholders.

In addition, plaintiffs urge that disclosing the existence of the DADW provision in Party B's confidentiality agreement provided material value to shareholders. Upon further reflection and having reviewed the additional Delaware authorities submitted by plaintiffs,[2] the Court agrees. Given the challenges to achieving a financial recovery in this action, which are described in plaintiffs' motion, and the impossibility of rewriting the history of the negotiations leading up to Corning's offer, ensuring that the shareholder vote on the merger was fully informed was probably the most important outcome this action could achieve. The Court accordingly finds that this disclosure was material under the standard announced by *Trulia*.

As previously noted by the Court, the release in this action is not "narrow" under *Trulia*, which stated that a release associated with disclosure settlements should encompass only "disclosure claims and fiduciary duty claims concerning the decision to enter the merger." (*Trulia, supra,* 129 A.3d at p. 907, fn. 89.) Here, like the one criticized by *Trulia*, the release encompasses all claims related "in any conceivable way to the transaction." (*Id.* at pp. 889, 890.) Still, for purposes of preliminary approval, the Court finds that plaintiffs' investigation in this action was adequate to enable them to determine that shareholders do not likely possess any meritorious claims connected to the transaction, other those addressed by the settlement. Significantly, the fact that no additional lawsuits have been filed since this case was settled over two years ago bolsters this conclusion, and distinguishes the circumstances here from those present in the typical disclosure settlement. As directed by the Court, plaintiffs' counsel filed a supplemental declaration confirming that the parties are unaware of any other lawsuits having been filed in connection with the merger. The supplemental declaration provides additional detail regarding the unlikelihood of any such claims emerging at this juncture.

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[2] Again, the Court reminds plaintiffs that they must submit all unpublished Delaware authorities upon which they rely for the Court's review, whether or not those authorities are available on LexisNexis. To be clear, the Court does not have access to LexisNexis.

The Court accordingly finds that the settlement is fair and reasonable to the class for purposes of preliminary approval, based primarily on the disclosure of the DADW provision in Party B's confidentiality agreement. However, the Court retains an independent right and responsibility to review the requested attorney fees and award only so much as it determines to be reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) In a shareholder action,

> an agreement to pay fees will have a direct pecuniary impact on the shareholders, or the corporation, or both, as the negotiated fee can or might ... be paid out of the corporation's assets, or where covered by insurance, result in increased premiums or difficulty in obtaining insurance in the future. The court therefore must consider whether the negotiated fee will result in unwarranted harm to the corporation and the shareholders, such as would be the situation if the cost of the settlement to the corporation far exceeded its value to the corporation and shareholders.

(*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 449-450.) Here, these concerns may have been mitigated or mooted by the merger, an issue which plaintiffs should address at final approval.

In the Court's view, the showing made by plaintiffs to this point does not support an award of $2 million in fees and expenses as provided by the settlement agreement. However, it appears that plaintiffs have reduced their fee and expense request to $500,000 (with $1,000 incentive awards to the named plaintiffs to be paid from the fee award), which is the amount stated in the Declaration of Evan J. Smith supporting the instant motion and in the proposed notice to the class attached to that declaration as Exhibit B-1. This more reasonable request is in line with the typical fee award for a disclosure settlement, although the notice indicates that defendants will oppose it. The Court will address the arguments raised by defendants in opposition to the fee request at the appropriate time, but the reduced request is appropriate for purposes of preliminary approval. Whether or not defendants ultimately oppose their fee request, counsel shall submit lodestar information prior to final approval so the Court can compare the lodestar information with the requested fees. (See *Laffitte v. Robert Half Intern.*

Inc. (2016) 1 Cal.5th 480, 504 [trial courts have discretion to double-check the reasonableness of a fee award through a lodestar calculation].)

VI. Proposed Settlement Class

Plaintiffs request that the following settlement class be provisionally certified:

> Persons who were record or beneficial holders of the common stock of AFOP at any time during the period beginning on and including April 7, 2016 (the date the Acquisition was publicly announced), through and including June 3, 2016 (the effective date of consummation of the Acquisition), including any and all of their respective legal representatives, heirs, successors, successors in interest, predecessors, predecessors in interest, trustees, executors, administrators, transferees, and assigns, and any person or entity acting for or on behalf of, or claiming under, any such foregoing holders, immediate and remote, except for the Defendants.

A. Legal Standard for Certifying a Class for Settlement Purposes

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court ...." As interpreted by the California Supreme Court, Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court (Rocher)* (2004) 34 Cal.4th 319, 326, 332.)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class. (*Ibid.*) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield

"substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court (Botney)* (1976) 18 Cal.3d 381, 385.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court (Cotton On USA, Inc.)* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93-94.) However, considerations designed to protect absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

B. Ascertainable Class

"The trial court must determine whether the class is ascertainable by examining (1) the class definition, (2) the size of the class and (3) the means of identifying class members." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) "Class members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932.)

Here, plaintiffs indicate that there were 15,803,585 outstanding shares in AFOP at the time the merger was announced. They estimate that there are hundreds if not thousands of shareholders. While not addressed by plaintiffs' moving papers, the proposed notice to shareholders reflects that class members will be identified through their nominees, which is typical in shareholder class actions. The Court accordingly finds that the class is numerous and ascertainable.

C. Community of Interest

With respect to the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad*

Home Corp. (2001) 89 Cal.App.4th 908, 916.) The court must also give due weight to any evidence of a conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court (Heliotrope General, Inc.)* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants. (*Lockheed Martin Corp. v. Superior Court, supra,* 29 Cal.4th at pp. 1104-1105.) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks v. Kaufman & Broad Home Corp., supra,* 89 Cal.App.4th at p. 916.)

Here, common legal and factual issues predominate. Plaintiffs' claims all arise from defendants' actions in connection with the merger.

As to the second factor,

> The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those she purports to represent that denial of class certification is appropriate. But even then, the court should determine if it would be feasible to divide the class into subclasses to eliminate the conflict and allow the class action to be maintained.

(*Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations, brackets, and quotation marks omitted.)

Like other members of the class, plaintiffs were AFOP shareholders during the relevant period and allege breaches of fiduciary duty in connection with the merger. The anticipated defenses are not unique to plaintiffs, and there is no indication that plaintiffs' interests are otherwise in conflict with those of the class.

Finally, adequacy of representation "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the

interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The class representative does not necessarily have to incur all of the damages suffered by each different class member in order to provide adequate representation to the class. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.) "Differences in individual class members' proof of damages [are] not fatal to class certification. Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid.*, internal citations and quotation marks omitted.)

Plaintiffs have the same interest in maintaining this action as any class member would have. Further, they have hired experienced counsel. Plaintiffs have sufficiently demonstrated adequacy of representation.

D. Substantial Benefits of Class Certification

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.*) "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Id.* at pp. 120-121, internal quotation marks omitted.)

Here, it would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

VII. Notice

The content of a class notice is subject to court approval. (Cal. Rules of Court, rule 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures

for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (*Ibid.*) In determining the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

As directed by the Court, plaintiffs submitted a modified form of notice with their supplemental filings on January 8, 2019. The notice describes the lawsuit, explains the settlement, and informs class members that they may opt out of the settlement or object to the settlement or attorney fee award. Class members are instructed that they may appear at the final fairness hearing to make an oral objection without submitting a written objection and may opt-out of the class by mailing a written request no later than 14 days before the hearing. The release language is provided. The modified notice is appropriate and is approved. Plaintiffs have also submitted an appropriate summary notice, which is approved.

In their supplemental filings, plaintiffs have also proposed a more robust and detailed notice procedure than the one they described in their moving papers. No later than 60 days before the final fairness hearing, the notice administrator will mail the notice to all record holders of AFOP stock and class members who can be identified with reasonable effort. Nominees who held AFOP stock for the benefit of another will be instructed to forward the notice to all beneficial owners or send their contact information to the notice administrator for forwarding. The administrator will also post the notice on the Legal Notice System of the Depository Trust Company and on a dedicated web site hosted by the administrator at least 60 days before the final fairness hearing. The parties will publish the summary notice on a national newswire service such as PR Newswire, a national print publication such as Investor's Business Daily, and on plaintiffs' counsel's own web sites. These notice procedures are appropriate and are approved.

VIII. Conclusion and Order

Plaintiffs' motion for preliminary approval is GRANTED. The final approval hearing shall take place on **April 26, 2019** at 9:00 a.m. in Dept. 1. The following class is provisionally certified for settlement purposes:

> Persons who were record or beneficial holders of the common stock of AFOP at any time during the period beginning on and including April 7, 2016 (the date the Acquisition was publicly announced), through and including June 3, 2016 (the effective date of consummation of the Acquisition), including any and all of their respective legal representatives, heirs, successors, successors in interest, predecessors, predecessors in interest, trustees, executors, administrators, transferees, and assigns, and any person or entity acting for or on behalf of, or claiming under, any such foregoing holders, immediate and remote, except for the Defendants.

IT IS SO ORDERED.

Dated: 1-28-19

Honorable Brian C. Walsh
Judge of the Superior Court