

The logo for Fiduciary Counselors features a stylized, light green graphic composed of several overlapping curved shapes that form a central, abstract figure. A dark green rectangular box with a thin white border is superimposed over the center of this graphic, containing the text "FIDUCIARY COUNSELORS" in white, uppercase, sans-serif font.

FIDUCIARY COUNSELORS

Report of the Independent Fiduciary  
for the Settlement in  
*Smith, et al. v. GreatBanc Trust Company, et al.*

July 24, 2023

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## **I. Introduction**

Fiduciary Counselors has been appointed as an independent fiduciary for the Triad Manufacturing, Inc. Employee Stock Ownership Plan (the “Plan” or the “ESOP”), in connection with the settlement (the “Settlement”) reached in *Smith, et al. v. GreatBanc Trust Company, et al.*, Case No. 1:20-cv-02350-FUV (the “Litigation” or “Action”), which was brought in the United States District Court for the Northern District of Illinois (Eastern Division) (the “Court”). Fiduciary Counselors has reviewed over 100 previous settlements involving ERISA plans.

## **II. Executive Summary of Conclusions**

After a review of key pleadings, decisions and orders, selected other materials and interviews with counsel for the parties, Fiduciary Counselors has determined that:

- In connection with preliminary approval of the Settlement, the Court has certified the Settlement Class as defined in the Settlement, and in any event, there is a genuine controversy involving the Plan.
- The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan and the amount of any attorneys’ fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan’s likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone.
- The terms and conditions of the transaction are no less favorable to the Plan than comparable arm’s-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.
- The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.
- The transaction is not described in Prohibited Transaction Exemption (“PTE”) 76-1.
- All terms of the Settlement are specifically described in the written settlement agreement.
- To the extent there is non-cash consideration, it is in the interest of the Plan’s participants and beneficiaries, and the Plan is receiving no assets other than cash in the Settlement.

Based on these determinations about the Settlement, Fiduciary Counselors hereby approves and authorizes the Settlement on behalf of the Plan in accordance with PTE 2003-39.

## **III. Procedure**

Fiduciary Counselors reviewed key documents, including the First Amended Complaint (“FAC”), the Defendants’ Motion to Compel Arbitration, the Court’s Order denying the Motion to Compel Arbitration, the Seventh Circuit Court documents, the parties’ mediation statements, the Settlement Agreement, the Notice, the Motion for Preliminary Approval and related papers,

the Court’s Order Preliminarily Approving the Settlement, the Motion and Incorporated Memorandum of Law for Attorneys’ Fees and Expense Reimbursement, Settlement Administration Expenses, and Service Awards and the Motion and Incorporated Memorandum of Law for Final Approval of Settlement. In order to help assess the strengths and weaknesses of the claims and defenses in the Litigation, as well as the process leading to the Settlement, the members of the Fiduciary Counselors Litigation Committee conducted separate telephone interviews with counsel for GreatBanc Trust Company, counsel for the Triad Defendants and Selling Shareholders (defined below) and counsel for Plaintiffs.

#### **IV. Background**

##### **A. Factual and Procedural History of Case**

###### ***Factual Background.***

On December 28, 2015, the ESOP’s trustee—GreatBanc Trust Company (“GreatBanc”)—caused the ESOP to purchase 100% of Triad Manufacturing, Inc. (“Triad” or the “Company”) from Defendants David Caito, Robert Hardie, Michael McCormick, and revocable trusts of which they or their spouses are beneficiaries (the “Selling Shareholders”) for \$106.2 million (the “Transaction”). The Transaction was financed by a \$72.8 million loan made by the Selling Shareholders that carried a 10.5% annual interest rate (the “Seller Notes”). The Seller Notes were issued with warrants that granted the Selling Shareholders the right to purchase 1,029,375 shares of Company common stock for \$2 per share (the “Warrants”).

###### ***Litigation.***

Plaintiffs James Smith and Jerry Honse (“Plaintiffs”) alleged that Defendants GreatBanc, the Board of Directors of Triad Manufacturing, Inc., David Caito, Robert Hardie, Michael McCormick, Elizabeth J. McCormick, Elizabeth J. McCormick Second Amended and Restated Revocable Living Trust, Michael K. McCormick Second Amended and Restated Revocable Living Trust, David M. Caito Revocable Trust, and First Amended and Restated Robert Hardie Revocable Trust (collectively the “Defendants” or, without GreatBanc, the “Triad Defendants”), violated ERISA in connection with the Transaction because, *inter alia*, the agreement to pay the Selling Shareholders \$106.2 million and other consideration for Triad did not account for the contraction within the market for the Company’s retail displays—brick and mortar retail stores—and improperly included a control premium even though the Selling Shareholders retained control over the Company after the Transaction. In Counts I and III of the FAC, Plaintiffs asserted that Defendant GreatBanc violated ERISA in connection with the Transaction by, *inter alia*, causing the ESOP to pay more than fair market value for Triad stock. In Count II, Plaintiffs alleged that Defendants Caito, Hardie, and McCormick (the “Board Defendants”) violated ERISA by failing to monitor GreatBanc. In Count IV, Plaintiffs asserted, pursuant to ERISA § 406(a), 29 U.S.C. § 1106(a), that the Selling Shareholders engaged in prohibited transactions. In Count V, Plaintiffs asserted, pursuant to ERISA § 405(a), 29 U.S.C. §§ 1105(a)(1) and (a)(3), that the Board Defendants are

liable as co-fiduciaries for GreatBanc's fiduciary breaches. In Count VI, Plaintiffs asserted, pursuant to ERISA § 410(a), 29 U.S.C. § 1110(a), that agreements by the Company to indemnify GreatBanc are void under ERISA. Defendants deny these allegations and deny any wrongdoing or liability.

Plaintiff James Smith filed the original Complaint on April 15, 2020. On June 1, 2020, the Board Defendants filed a motion to compel arbitration or, in the alternative, dismiss the Complaint, and on August 21, 2020, the Court denied this motion. On June 29, 2020, GreatBanc answered the Complaint. On September 3, 2020, the Triad Defendants filed a notice of appeal and a motion to stay the litigation pending appeal and, on September 21, 2020, the Court granted this motion over Plaintiff Smith's opposition. After full briefing, including several amicus briefs filed on behalf of both sides, and oral argument, the Seventh Circuit affirmed this Court's denial of the Triad Defendants' motion to compel arbitration. *Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613 (7th Cir. 2021). The Court reasoned that the Plan's arbitration provision prohibited certain plan-wide remedies available under ERISA and thus constituted an impermissible prospective waiver of a party's right to pursue statutory remedies. District and circuit courts across the country have relied upon this decision's analysis, making it a landmark arbitration decision. *See, e.g., Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090 (10th Cir. 2023); *Burnett v. Prudent Fiduciary Servs. LLC*, 2023 WL 387586 (D. Del. Jan. 25, 2023), *report & recommendation adopted* 2023 WL 2401707 (D. Del. Mar. 8, 2023), *appeal filed* No. 23-1527 (3d Cir. Apr. 3, 2023).

On October 4, 2021, the Seventh Circuit issued its mandate, and the Action returned to the District Court. Shortly thereafter, Plaintiffs propounded 79 requests for production on the Triad Defendants and GreatBanc and served 13 document subpoenas on third-parties. Plaintiffs also responded to written discovery requests from Defendants and produced documents in response to such requests. In total, Class Counsel received and reviewed 32,476 documents spanning nearly 250,000 pages, along with more than 14 hours of audio recordings. Working with a valuation expert, Class Counsel utilized the information received through discovery to obtain an analysis of potential damages, consisting of the difference between what the ESOP paid for Triad stock and the fair market value of those shares (according to Plaintiffs' expert). During discovery, Class Counsel took fact depositions and defended the depositions of both Named Plaintiffs. They engaged in numerous meet and confer conferences with Defendants and third parties to resolve discovery disputes wherein they resolved the vast majority of disputes without motions practice. However, the parties reached an impasse on post-Transaction documents, and Plaintiffs moved to compel this discovery. GreatBanc and the Triad Defendants jointly opposed the motion to compel. On May 2, 2022, Magistrate Judge Kim granted Plaintiffs' motion. Fact discovery closed on September 30, 2022 and, on January 17, 2023, Plaintiffs moved for class certification. Subsequently, the parties agreed to the primary settlement terms, and this Court stayed Plaintiffs' motion for class certification to allow the parties to seek approval of the settlement.

### *Settlement and Preliminary Approval.*

The parties first engaged in mediation in the fall of 2020 through the Seventh Circuit mandatory mediation program, which was unsuccessful. After the case returned to district court and fact discovery was completed, the parties engaged in a full day of mediation with JAMS mediator Michael Young on December 8, 2022. The parties made considerable progress but were not able to resolve the case that day. From December 9, 2022 until February 8, 2023, the parties continued to exchange settlement offers with the assistance of JAMS mediator Michael Young. The parties then continued negotiating until April 11, 2023 when they reached agreed to the terms of the Settlement Agreement. Plaintiffs filed a motion seeking preliminary approval of the Settlement on April 20, 2023. The Court granted Plaintiffs' motion on June 7, 2023. The Court's Order: (1) certified the Settlement Class as defined in the Settlement; (2) approved the form and method of class notice; (3) set August 1, 2023 as the deadline for objections; and (4) set August 22, 2023 as the date for a Fairness Hearing.

### *Objections.*

August 1, 2023 is the deadline for Class Members to file objections to the Settlement. As of the date of this report, no Class Members have filed any objections.

## **V. Settlement**

### **A. Settlement Consideration**

Prior to entering into the Settlement, Plaintiffs' counsel consulted with a valuation expert to help them value the economic value of the Settlement to the Plan and its participants. Plaintiffs' valuation expert advised that the total economic value of the Settlement to the Plan and its participants is at least \$14,800,000.<sup>1</sup> The Settlement provides most of this economic value to the ESOP by increasing the value of the ESOP's Triad stock – and thereby the value of Class Members' individual accounts in the ESOP. The Settlement provides this economic value through five different components.

First, the Selling Shareholders will forfeit \$15 million of interest (debt) that Triad owes them from the ESOP Transaction. Without this concession, Triad would be obligated to pay the Selling Shareholders this \$15 million. Stout Risus Ross, LLC (“Stout”) —the financial adviser who provides annual valuation services for the ESOP—quantified the economic impact of the Selling Shareholders forfeiting \$15 million of interest they accrued through the Transaction. Under Stout's valuation methodology, the \$15 million reduction of accrued interest will increase Triad's equity value by \$5.32 per share or \$9,735,600.<sup>2</sup>

<sup>1</sup> ECF No. 145-1, Declaration of Daniel Feinberg in Support of Plaintiffs' Unopposed Motion and Incorporated Memorandum of Law for Preliminary Approval of Settlement and Certification of Settlement Class, ¶ 34.

<sup>2</sup> ECF No. 145-1 ¶ 35. Stout's analysis, which was filed under seal was attached as Exhibit B to ECF No. 145-1. In Section 11 of the Settlement, Defendants represent and warrant that the Stout analysis accurately states the updated conclusion of value for the 12/31/2022 annual ESOP valuation. Defendants further represent and warrant that the calculated equity value impact of the \$15 million accrued interest reduction to be \$5.32 per share as of 12/31/2022.

Second, the Selling Shareholders will forfeit 150,000 Warrants they received as part of the Transaction, and Defendants have agreed that no new warrants will be issued within twenty-four months of Final Approval of the Settlement. ECF 145-1 ¶ 36 states: “As of December 31, 2022, the Selling Shareholder’s warrants reduce Triad’s equity value by \$18,530,000. Eliminating 150,000 warrants increases Triad’s equity value by at least \$1.28 per share or \$2,340,000.” Class Counsel have informed us that \$2,340,000 is Plaintiffs’ expert’s conservative estimate of the warrant reduction value using Black Scholes. They have noted, and we agree, that this approach is more conservative than using a per share value derived by dividing the total value attributed to all warrants in the Stout valuation by the 1,029,375 total warrants outstanding absent the Settlement, then multiplying that per share value by 150,000, which would yield a value of approximately \$2.7 million for the warrant reduction. Because Triad’s stock is the sole asset that Class Members have in their ESOP accounts, this Settlement will cause the value of their retirement accounts to increase by a commensurate amount.

Third, some Class Members have terminated employment and sold their shares of Triad during the Class Period. To ensure these Class Members also receive an economic benefit from the Settlement, Defendants will pay Class Members \$8.20 per share cashed out during the Class Period which is more than double what they previously received for their ESOP stock. From December 28, 2015 to December 31, 2022, Class members sold 32,166.93 shares of Triad from their ESOP accounts back to the Company. In total, Defendants will pay \$263,769 to these Class Members.<sup>3</sup>

Fourth, the Settlement ensures that the Selling Shareholders do not benefit from the increase in Triad’s stock price. Without this term, the remaining Warrants owned by the Selling Shareholders would increase from the increased Triad stock price resulting from the forfeiture of debt. To prevent any “windfall,” the Settlement provides that the strike price on the Selling Shareholders’ remaining Warrants will substantially increase from \$2.00 to \$9.45. The Stout analysis, which valued the Warrants using Black-Scholes, confirmed that the adjustment of the strike price would avoid an increase in the value of the Warrants resulting from the forfeiture of debt.

Finally, Defendants will deposit \$2.5 million (the “Cash Payment Amount”) into the Settlement Fund for the payment of any court-awarded attorneys’ fees and expenses, class representative service awards, and settlement administration expenses. Any amount not awarded by the Court for fees, expenses, or service awards will be paid to the Class rather than revert to Defendants. Neither Triad nor the ESOP will pay the Cash Payment Amount or indemnify or reimburse Defendants for any portion of the Cash Payment Amount or payments to terminated participants.

These components in the aggregate provide approximately \$14.8 million of economic value to the ESOP and its participants.

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<sup>3</sup> ECF 145-1 ¶ 37.

### **Class and Class Period**

The Settlement defines the Settlement Class as follows:

All participants in the Triad ESOP from December 17, 2015 through December 31, 2022 who vested under the terms of the Plan, and those participants' beneficiaries, excluding the Excluded Persons defined below.

Excluded Persons means the following persons who are excluded from the Class: (a) the individual Defendants (David Caito, Robert Hardie, Michael McCormick, and Elizabeth McCormick), and (b) legal representatives, successors, heirs, and assigns of any such excluded persons.

In connection with preliminary approval of the Settlement, the Court has certified the Settlement Class as defined in the Settlement.

### **B. The Release**

The Settlement defines Released Claims as follows:

all claims Plaintiffs and the Class, their representatives, spouses, heirs, beneficiaries, dependents, and/or assigns currently have or may have, of any nature whatsoever, known or unknown, at law in equity, or otherwise, relating to or arising out of the Litigation, the Complaint or based upon the same factual predicate alleged in the Complaint, including but not limited to any claims for attorneys' fees, costs, expenses or sanctions, whether the Claim arises under ERISA or any federal law, state law, foreign law, common law doctrine, rule, regulation, or otherwise.

Plaintiffs and the Class are not releasing (a) any claims to enforce the Settlement Agreement, including the express warranties and covenants in the Settlement Agreement; and (b) individual claims for benefits pursuant to the ESOP Plan documents.

The terms of the release, including the provision for the Independent Fiduciary to provide a release of claims by the Plan, are reasonable.

### **C. The Plan of Allocation**

The Settlement Agreement does not include a traditional Plan of Allocation. The Settlement Agreement provides that (1) Class Members that still hold Triad stock in their retirement account will automatically receive the Settlement benefits through an increase in the value of their Triad stock, which they will monetize when they leave Triad or retire, and (2) Class Members who have already sold their Triad stock will receive a cash payment of \$8.20 per share. No claim forms are required.



Defendants will pay a total of \$2,500,000 into the Settlement Fund to cover payment of court-awarded attorneys' fees, expenses, settlement administration costs, and service awards. Class Members will not have to pay for any potential awards of attorneys' fees, expense reimbursements, or service awards, which will come from the \$2.5 million fund created by Defendants. However, any amount left in that fund after the distribution of court awarded amounts and settlement administration expenses will be deposited into the ESOP and distributed to ESOP participants with active accounts on a *pro rata* basis (based on the proportional number of shares they have compared to all allocated shares).

The provisions are cost-effective and fair to Class Members in terms of both calculation and distribution.

#### **D. Attorneys' Fees, Litigation Expenses and Service Awards**

Class Counsel seek an award of attorneys' fees in the amount of \$2,279,105, which represents 15% of the Settlement value of \$14,800,000. Class Counsel's lodestar to date was \$3,029,591, which would produce a lodestar multiplier of 0.75 if the requested \$2,279,105 were awarded.

In our experience, the percentage requested and the lodestar multiplier are well within the range of attorney fee awards for similar ERISA cases. Class Counsel also are highly qualified and highly experienced ERISA litigators and have obtained a favorable settlement for the Settlement Class. In light of the work performed, the result achieved, the litigation risk assumed by Class Counsel, and the combination of the percentage and the lodestar multiplier, Fiduciary Counselors finds the requested attorneys' fees to be reasonable. In reaching this conclusion, we took into account the fact that most of the settlement consideration is not in the form of cash payments, but instead is through changes that will increase the value of the Triad stock in participants' accounts. We believe that the \$14,800,000 total value attributed to the Settlement consideration is reasonable and that, even if the total value were substantially lower, and therefore the requested award represented a higher percentage of the total consideration, the requested fees would be reasonable.

Class Counsel also request reimbursement of \$180,395.00 in litigation costs, including experts (\$91,901.50), court reporter and transcripts (\$31,153.30), database hosting and processing/vendor costs (\$16,935.21), mediation (\$20,456), online research (\$7,661.30), travel (\$7,189.77) and process server (\$2,595). Class Counsel also requests reimbursement of \$15,500 for Settlement administration. Fiduciary Counselors finds the request for expenses to be reasonable.

Class Counsel seek service awards for the Named Plaintiffs in the amounts of \$12,500 to each Named Plaintiff James Smith and Jerry Honse for a total of \$25,000. The Named Plaintiffs communicated with Class Counsel throughout the litigation, including responding to questions, reviewing the pleadings, preparing for depositions, and assessing the settlement. Both Named Plaintiffs also sat for their depositions and responded to written discovery requests, including interrogatories and requests for the

production of documents. Fiduciary Counselors finds the requested service awards to be reasonable.

In sum, although the Court ultimately will decide what fees, expenses and service awards to approve, we find that the requested amounts are reasonable under ERISA.

## VI. PTE 2003-39 Determination

As required by PTE 2003-39, Fiduciary Counselors has determined that:

- In connection with preliminary approval of the Settlement, the Court has certified the Settlement Class.** Thus, the requirement of a determination by counsel regarding the existence of a genuine controversy does not apply. Nevertheless, we have determined that there is a genuine controversy involving the Plan. Based on the documents we reviewed and our calls with counsel, we find that there is a genuine controversy involving the Plan within the meaning of the Department of Labor Class Exemption, which the Settlement will resolve.
- The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan, and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone.** The Litigation asserted that Defendants violated ERISA in connection with the ESOP's purchase of Triad stock in 2015 for approximately \$106 million. Plaintiffs allege that the ESOP paid more than fair market value for Triad stock. Specifically, the Lawsuit alleges that some of the Defendants were ESOP fiduciaries who violated their duties under ERISA § 404, 29 U.S.C. § 1104, ERISA § 405, 29 U.S.C. § 1105 ERISA § 406, 29 U.S.C. § 1106, and ERISA § 410, 29 U.S.C. § 1110 in connection with the ESOP purchase of Triad stock. The Litigation also asserted claims against various Selling Shareholders for participating in the ERISA violations when they sold their Triad stock to the ESOP. The Defendants denied all the allegations in the Action, deny any wrongdoing regarding the ESOP Transaction, and have vigorously defended the Litigation.

In ERISA cases challenging an ESOP's purchase of privately held stock, the measure of loss is the difference between what the ESOP paid for the stock and the stock's true fair market value. Applying this, Plaintiffs' valuation expert estimated that the ESOP's overpayment ranged between \$3 million to \$35 million. The value of the settlement consideration is approximately \$14.8 million. Although much of this Settlement consideration is not cash, the economic value gained by Class Members is similar. This Settlement causes the value of Class Members' retirement accounts to increase. When they retire or leave Triad, they will convert this value into cash. This result is similar to cash payments to the plan made in other ERISA settlements involving retirement plans. In many ERISA class action settlements, cash is transferred into the 401(k) plan accounts of class members and invested in the investments available within the plan, which increases the value of class members' 401(k) accounts, but which is not realized until they retire or leave the plan. Unlike cash, the non-cash consideration in the Settlement

needs to be valued, but it provides a real increase in the value of participants' accounts, and we have found the valuation to be reasonable. Further, Department of Labor settlements of ESOP cases, similar to this one, often involve non-cash relief such as loan reductions and elimination of warrants or other forms of synthetic equity.

Defendants vigorously denied all of Plaintiffs' allegations, asserted affirmative defenses, and otherwise defended their actions with respect to the Transaction. Plaintiffs contended that GreatBanc failed to act prudently when entering into the ESOP Transaction, resulting in a payment of more than adequate consideration by the ESOP. GreatBanc would have likely argued that it not only engaged in a thorough, prudent process when evaluating the ESOP Transaction, but also that GreatBanc's process resulted in an ESOP Transaction where adequate consideration was paid, with additional benefit to the ESOP by securing a number of downside protection. GreatBanc could point to the fact that it negotiated the Clawback—a crucial downside protection that was independent from the negotiations over the Company's valuation, board composition, and Sellers' compensation. The effect of the Clawback was to shift some of the projection risk to the Sellers in the event the Company deviated materially from its past performance and future projections through either decreased sales or the loss of a major customer. Ultimately, the Clawback resulted in a \$13.8 million loan reduction before the Action was filed, affecting both liability arguments and potential damages. Triad and the Selling Shareholders would have argued that they did not commit any wrongdoing with regard to the Transaction. At trial, they would have argued that: (1) the purchase price for the Transaction was what a willing buyer would have paid a willing seller in an arm's length transaction and constituted fair market value for purposes of ERISA § 408; (2) the Board of Directors satisfied their limited duty to monitor GreatBanc; and (3) the Selling Shareholders were not fiduciaries for the 2015 Transaction and did not have actual or constructive knowledge of circumstances that rendered the 2015 Transaction unlawful.

Absent settlement, the parties would likely have incurred greater expenses as both sides would need to complete costly expert discovery and, given the factual issues, likely proceed to trial. Any monetary recovery would be uncertain (especially given the \$13.8 million Clawback) and would require a battle of experts. Regardless of the outcome, there likely would have been appeals that followed, further delaying resolution and causing more expense. A settlement avoids the risks and delays attendant with continued litigation and ensures that the estimated 450 Class Members will each receive a substantial increase in retirement savings while curtailing the Selling Shareholders' profits from the Transaction.

Given the substantial expense and risk involved in further litigation, the difficulty in prevailing on the merits and establishing damages, and the delay that would have resulted in providing any relief to the Class if the matter had been prolonged through trial and appeal, the amount of the Settlement is reasonable.

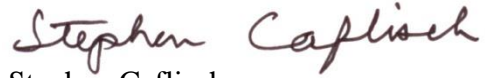
Fiduciary Counselors also finds the other terms of the Settlement to be reasonable, including the scope of the release, attorneys' fees and expenses, the service awards to the

Class Representatives and the manner in which the Plaintiffs intend to distribute the funds in the Settlement Agreement.

- **The terms and conditions of the transaction are no less favorable to the Plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.** As indicated in the finding above, Fiduciary Counselors determined that Class Counsel obtained a favorable agreement from Defendants in light of the challenges in proving the underlying claims. The agreement also was reached after arm's-length negotiations supervised by mediator Michael Young.
- **The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.** Fiduciary Counselors found no indication the Settlement is part of any broader agreement between Defendants and the Plan.
- **The transaction is not described in PTE 76-1.** The Settlement did not relate to delinquent employer contributions to multiple employer plans and multiple employer collectively bargained plans, the subject of PTE 76-1.
- **All terms of the Settlement are specifically described in the written settlement agreement and the plan of allocation.**
- **To the extent there is non-cash consideration, it is in the interest of the Plan's participants and beneficiaries, and the Plan is receiving no assets other than cash in the Settlement.** In addition to paying the \$2.5 million Cash Payment into the Settlement Fund and \$263,769 in cash to Class Members whose shares were repurchased on or before December 31, 2022, Defendants have agreed to additional provisions valued at approximately \$9,735,600 for the elimination of \$15 million in accrued interest and \$2,340,000 for the elimination of 150,000 Warrants, as described in Section V.A. above and as specifically described in the Settlement. The total value to participants is well in excess of what could have been recovered in an all-cash settlement, and including the non-cash consideration is in the interest of Plan's participants and beneficiaries. The non-cash consideration does not include non-cash assets, so the requirements related to non-cash assets do not apply.
- **Acknowledgement of fiduciary status.** Fiduciary Counselors has acknowledged in its engagement that it is a fiduciary with respect to the settlement of the Litigation on behalf of the Plan.
- **Recordkeeping.** Fiduciary Counselors will keep records related to this decision and make them available for inspection by the Plan's participants and beneficiaries as required by PTE 2003-39.
- **Fiduciary Counselors' independence.** Fiduciary Counselors has no relationship to, or interest in, any of the parties involved in the litigation, other than the Plan, that might affect the exercise of our best judgment as a fiduciary.

Based on these determinations about the Settlement, Fiduciary Counselors (i) authorizes the Settlement in accordance with PTE 2003-39; and (ii) gives a release in its capacity as a fiduciary of the Plan, for and on behalf of the Plan. Fiduciary Counselors also has determined not to object to any aspect of the Settlement.

Sincerely,



Stephen Caflisch

Senior Vice President & General Counsel