



THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN E. MALORK, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

v.

ERIK ANDERSON, JENNIFER AAKER,
JANE KEARNS, PIERRE LAPEYRE,
JR., DAVID LEUSCHEN, ROBERT
TICHIO, JIM McDERMOTT, JEFFREY
TEPPER, MICHAEL WARREN,
RIVERSTONE INVESTMENT GROUP
LLC, WRG DCRB INVESTORS, LLC
and DECARBONIZATION PLUS
ACQUISITION SPONSOR, LLC,
CRAIG M. KNIGHT, and HYZON
MOTORS INC.,

Defendants.

C.A. No. 2022-0260-PAF

**NOTICE OF INTENT TO APPEAR AND OBJECTION TO SETTLEMENT
BY FEDERAL CLASS ACTION LEAD PLAINTIFF DR. ALFRED MILLER**

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Dr. Alfred Miller—the federally appointed Lead Plaintiff in the related federal litigation against Defendant Decarbonization Plus Acquisition Corporation (“DCRB”)¹ and Hyzon Motors, Inc. (“Hyzon”) (the “Federal Action”)—hereby objects to Plaintiff Malork’s motion to approve the Proposed Settlement (“Proposed Settlement”), award attorneys’ fees, and certify a non-opt out settlement class,² pursuant to Section 9 of the Notice of Pendency and Proposed Settlement of Stockholder Class Action, Settlement Hearing, and Right to Appear (“Notice”).³ Additionally, Dr. Miller notices his intent to appear (through his attorneys) at the October 3, 2025 Settlement Hearing and argue in support of his objections.

As outlined in the Notice and Plaintiff’s moving papers, the objected-to Proposed Settlement purports to create a *non-opt out* settlement class, which, as defined, heavily overlaps with, if not completely envelops, claims (i) brought against some of the *same defendants* in this case⁴ (ii) based on some of the *same facts at issue* in this case (iii) which seeks similar, if not the *same damages* sought, in the related putative federal class action over which Dr. Miller has been judicially selected to litigate. Additionally, the Proposed Settlement is conditioned on an

¹ *In re Hyzon Motors Inc. Sec. Litig.*, No. 6:21-cv-06612-MAV-MWP (W.D.N.Y.).

² Pl.’s Motion (D.I. 279) & Pl.’s Opening Brief in Support of Motion to Approve the Proposed Settlement, Certify the Class, and for an Award of Attorneys’ Fees and Expenses and Incentive Award (D.I. 280) (“Pl.’s Br.”). As used herein: D.I. ## refers to documents filed in this case, ECF No. ## refers to documents filed in the federal case, and Ex. __ refers to exhibits filed in the Melanson Affidavit, submitted herewith.

³ D.I. 269.

⁴ As used herein, “DCRB Defendants” refer to Defendants Anderson, Aaker, Kearns, Lapeyre, Leuschen, Tichio, McDermott, Tepper, and Warren—*i.e.*, the “DCRB Director Defendants”—and Defendants Riverstone, Sponsor, and WRG—*i.e.*, the “DCRB Corporate Defendants.”

extremely broad release of claims, which the settling parties concede will extinguish not just the remaining claims in this suit, but all claims that could be brought against Defendants based on the overlapping facts—including the federal class action’s Section 14 claims over which the federal courts have *exclusive jurisdiction*. The Proposed Settlement does so without any added consideration for the federal claims—which only require a showing of negligence.

In passing the Private Securities Litigation Reform Act (“PSLRA”),⁵ Congress specifically intended to supplant the race-to-the-courthouse tactics employed by settling state court parties by establishing a competitive notice-and-selection process for identifying the most adequate lead plaintiff to represent an investor class.⁶ Dr. Miller was selected to be the lead plaintiff for DCRB investors because of this process (“Lead Plaintiff”). And he has already taken proactive steps to protect the Class’s federal claims and put a stop to this settlement. In the related federal litigation, he has filed a motion to enjoin this very settlement and its release of the exclusively federal claims.⁷ He also has a pending motion for leave to amend his complaint, which cures previously perceived deficiencies with the Section 14 claims.⁸ These pending motions highlight that the federal litigation is the proper forum for these claims and demonstrate that the federal class is actively pursuing

⁵ 15 U.S.C. § 78u-4 (establishing a detailed notice-and-selection process for appointing lead plaintiffs in securities law class actions).

⁶ See *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 422 (2018) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006)).

⁷ ECF No. 110 (motion to enjoin, also filed as D.I. 276); ECF No. 122 (reply).

⁸ Ex. A, Motion for Leave to File Fourth Amended Complaint (ECF. No. 125); Ex. B, [Proposed] Fourth Amended Complaint (“4AC”) (ECF. No. 126-1).

them, despite the settling parties' attempt to circumvent that process here in state court. Nevertheless, Plaintiff Malork and the settling parties ask this Court for an end-run around the PSLRA's Congressionally-enacted regime by racing first to this courthouse with a settlement and asking this Court to approve its dubious terms. The Court should deny the motion for approval on these grounds alone.⁹

Additionally, Plaintiff has failed his burden of showing that the value of the Proposed Settlement is fair or reasonable. Specifically, he fails to explain what additional consideration he extracted from Defendants to not only resolve the claims at issue in this case, but to extinguish the potential *additional* recovery that DCRB investors could receive through the federal claims that the Proposed Settlement also seeks to release. Further, the Proposed Settlement extinguishes all claims for a fraction of what investors could get if Plaintiff Malork litigated his claims through trial. Plaintiff provides insufficient and generalized justifications for this discount.

Plaintiff Malork's claims regarding the lack of objectors to date are also flawed,¹⁰ as the Notice failed to provide information that would have been important to investors in assessing their options, in violation of Rule 23 and Due Process. For example, the Notice did not include any of the information Malork now offers in his brief about the purported adequacy of the settlement value and the total that could have been earned had he litigated further. Additionally, the Notice failed to provide any meaningful notice to the Class about the existence of the related Federal Action, much less the substantial recovery that could be achieved in the Federal Action

⁹ See, e.g., *Off v. Ross*, 2008 WL 5053448, at *10 (Del. Ch. Nov. 26, 2008).

¹⁰ See Pl.'s Br. at 1-2, 33, 43.

which the Proposed Settlement would cut off, if not objected to. By omitting this critical information, the Notice prevented Class members from making an informed decision about which of their options to exercise, which is a clear violation of their Due Process rights.¹¹ As such, the Notice is fundamentally flawed and inadequate.

For these reasons, this Court should deny the Proposed Settlement. Alternatively, it should defer ruling until after the federal court rules on the pending motions and provides further guidance on the validity of the federal putative class claims against the DCRB Defendants for the same false statements at issue here and, if the Court does not deny the settlement outright, require that the settling parties re-issue the Notice with additional information about DCRB investors' federal rights.

I. SUMMARY OF THE DUELING FEDERAL AND CHANCERY COURT CASES

A. The Federal Action's Pending Exchange Act Claims Against the DCRB Defendants for Deprivation of DCRB's Investors' Rights.

Like this case, the Federal Action concerns efforts to revive and take public a now defunct, hydrogen electric vehicle company—Hyzon—through a special merger with the blank-check, special purpose acquisition company—Defendant DCRB.¹² To persuade shareholders to approve the proposed July 2021 merger, DCRB and Hyzon emphasized in press releases, investor presentations, media appearances, and other Soliciting Materials that Hyzon had a growing backlog of

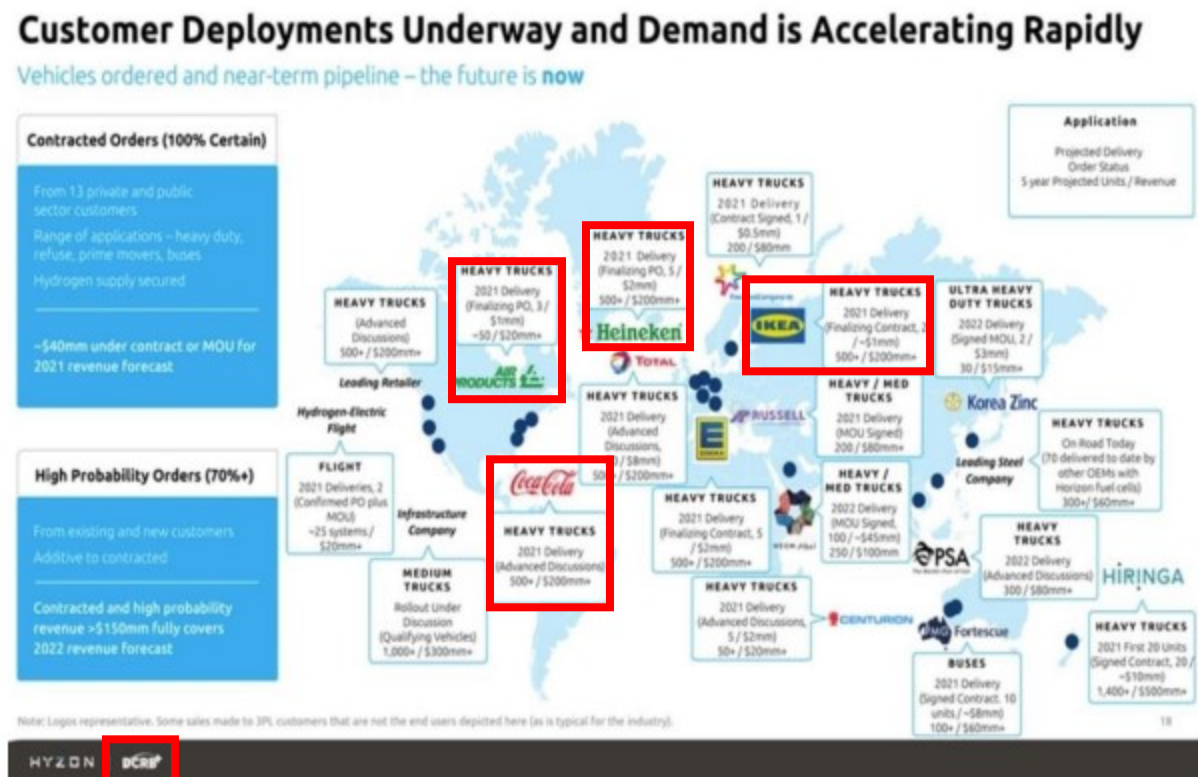
¹¹ See, e.g., *In re Lendingclub Sec. Litig.*, 282 F. Supp. 3d 1171, 1192 (N.D. Cal. 2017).

¹² 4AC ¶ 1.

deep-pocketed purchasers with revenue-generating sales and deliveries.¹³ These misrepresentations included that:

- Hyzon was in “advanced discussions” with, was “finalizing” purchase orders with blue-chip, Fortune 100 companies, including Heineken, Ikea, Coca-Cola, and Air Products; and
- “Key relationships ha[d] already been formed” with specific chassis manufacturers and vehicle customers.¹⁴

Example Slide Containing Misleading Statements and DCRB Logo from the February 9, 2021 Investor Presentation Filed by DCRB with the SEC



¹³ *Id.* ¶ 3.

¹⁴ *Id.*

To lend credit to the recommendation that shareholders vote for the proposed merger, the DCRB Defendants represented they had conducted substantial due diligence and had favored the proposed merger due in part to their review of “Hyzon’s non-binding memoranda of understanding, letters of intent and a limited number of orders with various clients, including blue-chip Fortune 100 companies.”¹⁵ The DCRB Defendants then negligently prepared, reviewed, or disseminated misleading statements about Hyzon’s then-existing relationships with these popular brands in materials bearing DCRB’s name, and filed such materials with the SEC, for all investors to read.¹⁶

These statements were material to investors, especially those evaluating whether to vote for the July 2021 de-SPAC merger, because they (i) suggested Hyzon was capable of generating revenue, despite lacking a significant sales history, because it was purportedly finalizing contract terms with well-known customers who, given their nature, could make several large orders for Hyzon vehicles (rather

¹⁵ *Id.* ¶ 100

¹⁶ *Id.* ¶ 3, 344, 578. DCRB first published these materials on February 9, 2021, and it continued to do so up through the July 2021 merger. *See id.* ¶¶ 287-372. As alleged, DCRB’s negligence was two-fold. First, DCRB negligently disseminated these statements in February despite its purported due diligence or because it otherwise failed to do reasonable diligence into statements it was disseminating for a capital raising event. *Id.* ¶ 16. Second, DCRB was negligent in future disseminations (including new investor presentations on February 10, February 12, and April 29) because DCRB failed to conduct ongoing diligence or failed to inquire as to the reason for changes to the presentations, particularly for the February 10 and 12 presentations, given the unusual timing of the changes and the sudden anonymization of potential customer identities. Defendant Tichio’s public comments about Hyzon’s customers in June 2021 also triggered duties to self-educate before speaking, as it suggested ongoing diligence. *Id.*

than one-off or trial purchases) and (ii) despite lacking a significant manufacturing history, Hyzon had established supplier relationships that would enable it to manufacture the vehicles needed to fulfill the orders purportedly being finalized.¹⁷

But at the time, information that would have been readily apparent from a reasonably diligent investigation demonstrated the Soliciting Materials were inaccurate. Although Hyzon had solicited transactions with blue-chip, Fortune 100 companies like Heineken, Ikea, Air Products, and Coca-Cola, none of these companies had indicated they would purchase vehicles from Hyzon at the time Defendants disseminated these statements.¹⁸ To the contrary, several of these purported customers had relayed that they would not be making purchases. For example, though on February 9, 2021, DCRB disseminated presentations claiming that Heineken was “finalizing [a] PO [purchase order],” Heineken had already relayed by February 4 that it could not accept an offer for any vehicle deliveries in 2021.¹⁹ And though the materials claimed “key relationships ha[d] already been formed” with two, vehicle chassis suppliers, neither had reached the point of negotiating any supply relationship with Hyzon.²⁰

Lead Plaintiff claims that, in engaging in the above-described conduct prior to the merger vote, the DCRB Defendants impeded Lead Plaintiff and the putative federal class, specifically those entitled to vote for/against the July 2021 Hyzon-

¹⁷ *Id.* ¶ 4.

¹⁸ *Id.* ¶ 5, 111-115.

¹⁹ *Id.* ¶ 112.

²⁰ *Id.* ¶ 117.

DCRB merger, from exercising their right to redeem their pro rata investment interest in the SPAC (“Redemption Rights”), in violation of Section 14 of the Exchange Act and SEC Rule 14a-9 (promulgated thereunder).²¹ Lead Plaintiff further maintains that DCRB Director Defendants Anderson and Tichio are also liable under Section 10(b) of the Exchange Act (and SEC Rule 10b-5 promulgated thereunder) for making certain false or misleading statements in the above-mentioned Soliciting Materials and for engaging in fraudulent and deceptive conduct in connection with the merger solicitation process.²²

B. This Action’s Overlapping Breach-of-Fiduciary-Duty Claims.

Like the Federal Action, Plaintiff John Malork’s complaint here asserts that the DCRB Defendants impaired the Redemption Rights of DCRB stockholders by issuing false or misleading statements in Soliciting Materials leading up to the July 2021 merger.²³ Plaintiff alleges that the DCRB Defendants’ pre-merger Soliciting Materials and investor presentations “falsely and misleadingly represented Legacy Hyzon’s value and financial prospects, including by providing unsupportable financial projections (the ‘Proxy Projections’) for vehicle sales and corresponding revenue that the Company would generate for the 2021 through 2025 fiscal years,”

²¹ *Id.* ¶¶ 16, 574-583.

²² Lead Plaintiff also alleges that certain Hyzon-affiliated defendants, including Hyzon’s CEO, Craig Knight; its Chairman, George Gu; and its CFO, Mark Gordon, acted negligently in making and/or disseminating the statements contained within the Soliciting Materials and by allowing the Soliciting Materials to be disseminated with such misleading statements to appear next to their name(s) and image(s).

²³ Verified Second Amended Class Action Compl. ¶¶ 6-13, 88-91, 93-94, 96-97, 102 (D.I. 228) (“Malork Compl.”).

and overstated the DCRB Defendants’ role in assessing the merger.²⁴ The Complaint then features images from the same Soliciting Materials that have been at issue in the Federal Action since November 2021.

Like the Federal Action, Malork also claims that the DCRB Defendants “knew—or through reasonable due diligence should have known”—at the time of publication “that Legacy Hyzon was nowhere near converting the internationally-recognized brands identified in the Investor Presentations into actual customers.”²⁵ And just like Lead Plaintiff Miller, Malork claims that “[a]s a natural and predictable consequence of the false and misleading disclosures and omissions in the Merger Proxy and Investor Presentations, Decarb stockholders voted to approve the Merger and largely chose to invest in the post-closing combined entity rather than exercise their Redemption Rights.”²⁶

Given this state law forum, Plaintiff claims only violations of state law, specifically that the DCRB Defendants breached their fiduciary duty and unjustly enriched themselves.²⁷ Plaintiff did not move to be Lead Plaintiff in the Federal Action. He instead filed his first state court complaint in March 2022 and his most recent amended complaint in July 2024.²⁸ It is unclear from the case filings what

²⁴ *Id.* ¶¶ 5-6, 9.

²⁵ *Id.* ¶ 7. Additionally, Malork alleges the Soliciting Materials “withheld critical information from Decarb’s public stockholders concerning the high degree of dilution of Decarb’s shares that would occur in connection with the Merger.” *Id.* ¶ 4.

²⁶ *Id.* ¶ 12.

²⁷ *Id.* ¶¶ 166-185.

²⁸ *See* D.I. 1 & 210-211.

financial interest Plaintiff Malork has in this litigation, or whether he even has statutory standing to assert the federal claims he now seeks to release.

C. The Proposed Settlement.

In July 2024 (two weeks after Plaintiff Malork filed his second amended complaint), he participated in a mediation with the DCRB Defendants without Lead Plaintiff's knowledge or involvement.²⁹ That day, the Malork parties purportedly reached a settlement in principle. At no point prior did he move to certify a litigation class or otherwise divulge the details of the settlement.³⁰

On June 17, 2025, almost a year later, Plaintiff Malork and the Settling Defendants filed their Proposed Settlement with the Chancery Court. “[S]ubject to the approval of the [Chancery] Court,” the Proposed Settlement purports to “completely, fully, finally, and forever compromised, settled, released, discharged, extinguished, and dismissed with prejudice and without costs (except as provided herein) and are fully, finally, and forever compromised, settled, released, discharged, extinguished, and dismissed with prejudice and without costs (except as provided herein) as to the Released Defendant Parties and the Released Plaintiff Parties, in the manner and upon the terms and conditions set forth herein.”³¹

Additionally, Plaintiff Malork asked this Court to certify a non-opt out class “consisting of all Persons who held shares of Decarb Class A common stock as of the Redemption Deadline, either of record or beneficially, and who did not redeem

²⁹ Proposed Settlement (D.I. 267).

³⁰ *Id.* at 7.

³¹ *Id.* at 10.

all of their shares”³²—a class definition that overlaps with, if not completely envelops, the federal putative class members with Section 14 federal claims.³³ And for this Proposed Settlement class, the Stipulation includes an extremely broad release encompassing “any and all manner of claims, ... of any kind, nature, or description whatsoever, whether known or unknown, disclosed or undisclosed, ... whether based on state, local, federal, foreign, statutory, regulatory, or common law or equity or otherwise, that (a) Plaintiff or any other member of the Class individually or on behalf of the Class: (i) alleged, asserted, set forth, or claimed against the Released Defendant Parties in the Action or in any other action in any other court, tribunal, proceeding, or other forum, or (ii) could have alleged, asserted, set forth, or claimed against the Released Defendant Parties in the Action or in any other action in any other court, tribunal, proceeding, or other forum; and (b) that are based upon, arise out of, or relate in any way to the impairment of the redemption rights of any Decarb Class A stockholder.”³⁴ Thus, the Malork parties seek to extinguish class members’ federal claims on a non-opt-out basis, effectively stripping class members of their fundamental right to pursue those claims without their express consent.

³² *Id.* at 11.

³³ As defined in 4AC ¶ 539, the putative federal class consists of “all those who (a) purchased Hyzon Motors Inc. f/k/a Decarbonization Plus Acquisition Corporation’s (‘Hyzon’ or the ‘Company’) securities during the period from February 9, 2021 to August 17, 2022, inclusive (‘Class Period’) and/or (b) are former shareholders of DCRB who held DCRB securities as of June 1, 2021 and were entitled to vote with respect to the Merger, and (c) were damaged thereby.”

³⁴ D.I. 267, at 17-18.

The day after the Proposed Settlement was filed, Lead Plaintiff Miller (through his attorneys) requested an immediate meeting with the settling parties to discuss the scope of the proposed release.³⁵ The parties promptly met. But the settling parties refused to modify their proposed release to exempt the federal putative class’s Section 14 claims or otherwise stay proceedings pending rulings from the federal court on the viability of those claims.

II. DR. MILLER’S STANDING TO OBJECT TO THE PROPOSED SETTLEMENT

As an initial matter, Dr. Miller has standing to object to the Settlement as both an investor in DCRB and as the federally appointed Lead Plaintiff in the putative federal class action.

As an investor, his injury is clear: As of the July 15, 2021—the date of the SPAC Merger, Dr. Miller held nearly 160,000 shares of DCRB, plus over 800,000 warrants (costing him, in total, nearly \$7 million).³⁶ To date, Plaintiff Malork’s papers have been silent as to his DCRB transactions, making comparison to his potentially *de minimis* shares of DCRB securities impossible at this juncture.

Additionally, the PSLRA imbues Dr. Miller, as the federal Lead Plaintiff, with a uniquely federal right to represent DCRB investors’ interests.³⁷ Under federal law,

³⁵ Ex. C, Ltr. from Lucas E. Gilmore, Lead Counsel for Dr. Miller and the putative federal class, to Erik W. Luedeke, counsel for Plaintiff Malork, *et al.* (June 18, 2025).

³⁶ Ex. D (detailing Dr. Miller’s trades in DCRB common stock and warrants).

³⁷ *See In re BankAmerica Corp. Sec. Litig.*, 95 F. Supp. 2d 1044 (E.D. Mo. 2000) (finding that the PSLRA vested several rights in the investors found to be “the most adequate plaintiff,” including “the right to be appointed lead plaintiffs, to control the course of the class action litigation, and to select class counsel of their choice,” which would be

the lead plaintiff is a key player in a securities class action who is charged by the Courts to act as a fiduciary on behalf of a putative investor class. To further that goal, the Lead Plaintiff is responsible for selecting lead counsel, signing off on litigation strategy and tactics, approving proposed settlements, and negotiating attorneys' fees.³⁸

The PSLRA's lead plaintiff process is paramount to the orderly prosecution of securities laws and to ensuring investors get a fair recovery for their losses. Prior to the PSLRA's enactment, judges often assigned the role of lead plaintiff to the first party to file a complaint.³⁹ This created a perceived "race to the courthouse," in which specialized attorneys filed complaints soon after stock drops, sometimes relying on a stable of clients with small stock holdings in many publicly traded companies.⁴⁰ These practices caused Congress to become concerned that too many shareholder lawsuits were lawyer driven, since plaintiffs' attorneys usually had far larger stakes in the outcome than the small investors who often brought the lawsuits.⁴¹

Accordingly, "Congress passed the [PSLRA] principally to stem 'perceived abuses of the class-action vehicle in litigation involving nationally traded

"frustrated if [the court] fail[ed] to enjoin" a motion to approve a class action settlement filed in state court which sought to release pending federal claims).

³⁸ *Id.*

³⁹ See H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess., at 32-35 (1995) (describing Congress's concerns about the method by which class representatives and class counsel were selected).

⁴⁰ *Id.*

⁴¹ *Id.*

securities.”⁴² To remove any advantage for early filers, the PSLRA sets forth a detailed notice-and-selection process for appointing a lead plaintiff. At the end of this process, the federal courts “shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members.”⁴³ In doing so, the PSLRA’s notice-and-selection process confers a uniquely federal right on lead plaintiffs appointed through the PSLRA’s provisions,⁴⁴ which cannot be given their intended meaning or scope if a plaintiff in an overlapping state court proceeding can usurp the putative federal class’s claims, without the federal lead plaintiff’s consent or involvement.⁴⁵

Here, Dr. Miller was appointed by the District Court for the Western District of New York to serve as Lead Plaintiff and represent all DCRB investors relating to the false statements at issue in this case and the Federal Action. The original *Hyzon*

⁴² *Cyan, Inc.*, 583 U.S. at 422 (quoting *Merrill Lynch*, 547 U.S. at 81).

⁴³ 15 U.S. Code § 78u-4(a)(1)(3)(i).

⁴⁴ *See, e.g., In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1020 (N.D. Cal. 1999); *see also Cohen v. U.S. Dist. Ct. for N. Dist. of Cal.*, 586 F.3d 703, 709 (9th Cir. 2009) (“The [PSLRA] expressly provides that lead plaintiff has the power to select lead counsel, suggesting that the identity of the party selecting lead counsel was of substantial importance to Congress.”); *In re Cendant Corp.*, 260 F.3d 183, 197 (3d Cir. 2001) (“Congress’ clear intent in enacting the PSLRA was to transfer control of securities class actions from the attorneys to the class members (through a properly selected lead plaintiff).”); *In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117, 123 (S.D.N.Y. 2002) (finding the “responsibility explicitly given to lead plaintiffs by the PSLRA is the power to select and direct class counsel.”); *In re Baan Co. Sec. Litig.*, 271 F. Supp. 2d 3, 11 (D.D.C. 2002) (“[T]he legislative history makes clear that the lead plaintiff must do two things—select the lead counsel and control the litigation.”).

⁴⁵ *See In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 801 (8th Cir. 2001).

Motors Inc. securities class action lawsuit was filed on September 30, 2021.⁴⁶ On November 29, 2021, Dr. Miller and three other movants timely moved to be appointed lead plaintiff.⁴⁷ On December 14, 2021, the Court entered an Order finding that Dr. Miller was “the most adequate plaintiff because he has the largest loss and financial interest among the other lead plaintiff movants.”⁴⁸ In turn, the Court appointed Dr. Miller Lead Plaintiff.⁴⁹ The Court also approved Dr. Miller’s selection of Hagens Berman as Lead Counsel, granting the firm exclusive authority to manage all aspects of the litigation, including pretrial and trial procedures, settlement negotiations, and coordinating all activities and filings for Plaintiffs, ensuring efficient prosecution and avoiding duplication.⁵⁰

Since then, Lead Plaintiff Miller has zealously prosecuted claims on behalf of himself and the federal class. On March 21, 2022, he filed his first class action complaint (building off the November 2021 federal complaints by the first federal filers). Thereafter, he amended his complaint to include any new information revealed by Hyzon’s subsequent corrective disclosures—just like Plaintiff Malork in this case. The only difference is that, unlike this Court, the federal court took much longer to resolve the DCRB Defendants’ motion to dismiss. In May 2025—after defendants’ motion had been fully briefed for nearly 1.5 years and the federal case was reassigned to a new judge—the federal court entered its first, substantive

⁴⁶ ECF No. 1.

⁴⁷ *See* ECF No. 10.

⁴⁸ ECF No. 22 at 2.

⁴⁹ *Id.*

⁵⁰ *Id.*

motion-to-dismiss order.⁵¹ This order sustained in part Lead Plaintiff Miller's federal securities law claims, without ruling on false statements describing Hyzon's relationships with customers made in DCRB's Soliciting Materials. Additionally, the order gave Dr. Miller leave to move to amend so that allegations raised in the SEC's lawsuit against Hyzon could be deemed properly before the court for consideration. As discussed below, these new allegations plead actionable federal claims against the DCRB Defendants which the Proposed Settlement seeks to release.

Dr. Miller has already taken proactive steps to protect the Class's federal claims. In the Federal Action, he has filed a pending motion to enjoin this very settlement's release of the putative federal class's Section 14 claims.⁵² He also has a pending motion for leave to amend his complaint, which cures previously perceived deficiencies with the Section 14 claims.⁵³ These pending motions highlight that the federal litigation is the proper forum for these claims and demonstrate that the federal class is actively pursuing them, despite the settling parties' attempt to circumvent that process here in state court.

III. APPLICABLE LEGAL STANDARD

Under Court of Chancery Rules 23(e) and 23.1, class actions may not be dismissed or compromised without the approval of the Court. "Rules 23 and 23.1 are intended to guard against surreptitious buyouts of representative plaintiffs,

⁵¹ ECF No. 119.

⁵² ECF No. 110 (motion to enjoin, also filed as D.I. 276); ECF No. 122 (reply).

⁵³ Exs. A, B.

leaving other class members without recourse.”⁵⁴ Thus, the Court has a duty to protect the interests of absent class members who will be barred from future litigation of claims released by a proposed settlement.⁵⁵

The Court “must carefully scrutinize a settlement that has the effect of barring claims of at least arguable merit that were never asserted in Delaware but were asserted in a suit elsewhere, especially if the settlement has little or no value to the class.”⁵⁶ And the proponents of a proposed settlement bear the burden of proving that the settlement for which they seek approval is both fair and reasonable.⁵⁷ On this front, Plaintiff Malork’s showings fall short.

IV. ARGUMENT

A. The Proposed Settlement Releases Viable Federal Claims.

Plaintiff Malork has failed his burden of showing that the Proposed Settlement constitutes a fair and reasonable resolution given the cost to absent DCRB stockholders, particularly those with potential Exchange Act claims alleged against DCRB in the active federal putative securities class action pending in the district court for the Western District of New York.

⁵⁴ *Wied v. Valhi, Inc.*, 466 A.2d 9, 15 (Del. 1983) (citations omitted); *see also OptimisCorp v. Atkins*, 2023 WL 3745306, at *13, n.5 (Del. Ch. June 1, 2023).

⁵⁵ *See In re Celera Corp. S’holder Litig.*, 59 A.3d 418, 434 (Del. 2012); *In re Coleman Co. Inc. S’holders Litig.*, 750 A.2d 1202, 1204 (Del. Ch. 1999), as revised (Nov. 22, 1999).

⁵⁶ *In re MCA, Inc.*, 598 A.2d 687, 695 (Del. Ch. 1991).

⁵⁷ *See, e.g., Re: Smollar v. Potarazu*, 2016 WL 206288, at *3 n.12 (Del. Ch. Jan. 14, 2016).

Exercising its business judgment, the Court assesses the reasonableness of the benefits that a class or corporation receives from a settlement (the “get”) against the value of what a plaintiff seeks to trade away (the “give”).⁵⁸ The scope of any release must be factually circumscribed to relinquish only causes of action arising from the core operative facts at issue in the action.⁵⁹ “[T]he scope of a release of claims cannot be limitless, if only because of substantive due process concerns.”⁶⁰

As discussed above, the federal action alleges that: Between February 9, 2021 and the July 16, 2021 merger, the DCRB Defendants negligently disseminated a series of investor presentations—filed as Soliciting Materials with the SEC pursuant to SEC Rule 14a-12—which falsely repeated that Hyzon was “finalizing purchase orders” from, or were engaged in “advanced discussions” with, certain household brands including Heineken, Coca-Cola, and Ikea.⁶¹ But, in reality, none of these blue-chip brands had expressed an intent to order Hyzon hydrogen vehicles, and several had expressly rejected or terminated discussions with Hyzon prior to DCRB disseminating the false and misleading statements.⁶²

“As with the underlying Delaware claims, this Court’s role in viewing the [Proposed] Settlement is not to determine the merits of the [related federal action], but to evaluate the credibility of the claims in that action and the effect of the proposed release on those claims in relation to the benefits of the Settlement to the

⁵⁸ *In re Activision Blizzard, Inc. S’holder Litig.*, 124 A.3d 1025, 1043 (Del. Ch. 2015).

⁵⁹ *Nottingham Partners v. Dana*, 564 A.2d 1089, 1105-07 (Del. 1989).

⁶⁰ *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1145 (Del. 2008).

⁶¹ *See, e.g.*, 4AC ¶¶ 16, 111-115,

⁶² *Id.*

stockholders and to the protection of absent stockholders' interests.”⁶³ In doing so, the Court should consider whether the parties moving for settlement have shown that “that the claims in the different actions are sufficiently segregable that the proposed release in the Settlement would not materially undermine and complicate the ability of the class to pursue their claims in the [federal action].”⁶⁴ Additionally, the Court should balance any dismissal of federal claims against the additional benefits, if any, the settling party has extracted for the benefit of the Class to settle claims in another action. “If the court finds that the stockholder class would receive small or inadequate consideration in exchange for surrendering a facially credible claim, it may reject the proposed settlement.”⁶⁵

The Chancery Court’s decision in *Off v. Ross* is instructive to how to view cases like this. There, a shareholder had brought a breach-of-fiduciary-duty lawsuit in Chancery Court against an asset management company to stop a contentious stock transaction, and after reaching a tentative agreement with the company, notified the court. Two weeks later, a second shareholder filed its own complaint in federal court challenging not only the contentious stock transaction, but also related decisions to transform the nature of the asset management business. Knowing this, the first shareholder and the company entered into a stipulation of settlement which broadly released all claims that could have been brought against the defendants that related to the contentious stock transaction, whether derivative, class action, or individual.

⁶³ *Off v. Ross*, 2008 WL 5053448, at *10.

⁶⁴ *Id.* at *13.

⁶⁵ *Id.* at *10.

The Chancery Court parties then moved for approval of the proposed settlement. And though, thereafter, they amended the stipulation of settlement to narrow the scope of release to allow the federal action “to proceed on a host of other claims and theories,” the release still precluded claims related to the contentious stock transaction, which were a focus of the federal suit.⁶⁶ The second investor thus objected.

On review, the Chancery Court evaluated the adequacy of the proposed settlement’s value in comparison to its effect on the proposed release of the federal claims. The court found that the contentious stock transaction “reasonably c[ould] be viewed as integral parts” to the uniquely federal claim theories.⁶⁷ It thus found that “the release of claims arising out of or related to [contentious transactions] ha[d] the potential of substantially weakening the consolidated class action brought [in federal court], in which the plaintiffs seek a more comprehensive remedy.”⁶⁸ Balancing this harm against the value of the settlement, the court concluded that the plaintiff had “not met her burden of demonstrating that the Settlement constitutes a fair and reasonable resolution of this controversy in light of the cost to the absent stockholders.”⁶⁹ It thus declined to approve the settlement.

This Court should take a similar tact. Here, the Proposed Settlement unfairly seeks to extinguish Dr. Miller’s and the putative class’s Section 14 claims regarding

⁶⁶ *Id.* at *5.

⁶⁷ *Id.* at *12.

⁶⁸ *Id.* at *13.

⁶⁹ *Id.*

the false and misleading investor presentation statements about Hyzon’s customer relationships. *See also* Part I.A, *supra* (describing claims). These are not meritless claims. They concern the same misleading materials at issue in this case, which this Court upheld in its order denying Defendants’ motion to dismiss. These very materials were also the subject of the SEC’s complaint against (and consent judgment with) Hyzon.⁷⁰ And unlike other false statements struck down by the federal district court,⁷¹ Defendants’ misstatements about the then-present status of Hyzon’s relationships with its customers conveyed concrete, present facts about the status of Hyzon’s business relationships, not merely aspirations or projections, and thus were not forward-looking statements protected by federal or common law.⁷²

⁷⁰ *See In re Dell Techs. Inc. Class V S’holders Litig.*, 300 A.3d 679, 709 (Del. Ch. 2023), as revised (Aug. 21, 2023) (noting that “[a]lthough half of all securities actions are dismissed at the pleading stage, that statistic plummets for cases where there are strong initial indicia of wrongdoing. Only 9.1% of cases are dismissed where there is a parallel SEC investigation, only 13.9% where there is another government investigation, only 25.9% where there is an officer termination, and only 9.6% where there is a restatement.”), *aff’d*, 326 A.3d 686 (Del. 2024). All four factors are present here.

⁷¹ *See* Decision and Order on Defs.’ Motions to Dismiss at 54-55 (ECF No. 119). In particular, the federal district court’s motion-to-dismiss order focused on misstatements about Hyzon’s projected deliveries and revenue for 2021 from contracts and nonbinding memoranda of understanding. In doing so, the Court found that these statements were forward looking because they “project[ed] results in the future”—*i.e.*, 85 deliveries and \$37 million in revenue by the year’s end. *Id.* at 55. But it did not address the false statements about the then-present status of Hyzon’s relationships with name brand customers and suppliers, and instead reserved ruling on that theory until the SEC allegations were properly before the Court.

⁷² *See generally* Ex. A, Motion for Leave to File Fourth Amended Complaint at 13-15 (collecting case law); *see also*, e.g., *In re Dentsply Sirona, Inc. Sec. Litig.*, 665 F. Supp. 3d 255, 284 (E.D.N.Y. 2023) (finding that statements describing relationships with distributors were actionable because they were made shortly after a distributor announced it would not renew its exclusive deal, and the statements were allegedly intended to soften the financial impact of the distributorship changes).

By its plain terms, the Proposed Settlement broadly releases viable claims built on these misleading statements of present fact without extracting a single penny more to DCRB investors for the loss of their potential federal claims (claims which require a showing of mere negligence).⁷³ As DCRB has admitted in the Federal Action, this Settlement “would release the precise claims asserted against the DCRB Defendants relating to ‘the impairment of the redemption rights’” in the federal action.⁷⁴ And in doing so, the Proposed Settlement would strip the federal court from considering federal claims that lie exclusively within its purview to decide.⁷⁵

Neither Plaintiff Malork nor his attorneys have offered any explanation for this in their moving papers, despite knowing that Dr. Miller’s objection was imminent. Nor has he explained why the Proposed Settlement cannot proceed without releasing potentially viable federal claims. On balance, this Court should therefore decline to approve the Proposed Settlement so long as it purports to extinguish exclusively federal claims.

B. Plaintiff Has Failed to Show That the Strength of the Claims Compromised Far Outweighs the Benefits Received.

Plaintiff Malork claims that the Proposed Settlement amount of \$8.8 million—*i.e.*, approximately \$0.43 per share—is fair and within the range of

⁷³ D.I. 267, at 17-18. In his brief, Mr. Malork makes the *pro forma* claim the Proposed Settlement’s release “is narrower than the settlement release approved” in other cases. Pl.’s Br. at 42. But beyond quoting language, he never explains how the release is less encompassing, for example, by identifying types of claims that would be allowed to live on.

⁷⁴ Defs.’ Opp. to Mot. to Enjoin at 1-2 (ECF No. 120) (internal citation omitted).

⁷⁵ See 15 U.S.C. § 78aa (“The district courts of the United States *shall have exclusive jurisdiction* of violations of” the Exchange Act. (emphasis added)).

reasonableness. But it is admittedly a fraction of the up to \$2.72 per share that absent class members could potentially recover if litigated through trial.⁷⁶ Plaintiff does not contend Defendants lack the ability to pay. Rather, to justify this discount, he offers several flawed merits risks.

First, Plaintiff notes that, in its July 17, 2023 ruling on the motion to dismiss in this case, this Court found that claims based on Hyzon’s dealings with blue-chip customers was a “very close call,” as there were no pled facts showing that Hyzon lacked such relationships, and that “discovery may very well show that the difference in the slides was merely an effort to anonymize customers and nothing more.”⁷⁷ But this story was incomplete.

What Plaintiff failed to note is that, just three months after the motion-to-dismiss ruling, the SEC filed a complaint showing that the opposite was true. As revealed by the SEC, “[a]lthough Hyzon had solicited transactions with these companies, none had indicated they would purchase [hydrogen vehicles] from Hyzon,” and some had specifically told Hyzon that they would not be making purchases.⁷⁸ Additionally, the SEC confirmed that, though Hyzon “replaced the names and logos with generic descriptions of each company” in its presentations,

⁷⁶ Mr. Malork also compares his extracted settlement amount to potential nominal damages. Pl.’s Br. at 5, 37. This comparison is a red herring, as nominal damages are not awarded in federal securities lawsuits. As such, if a jury found in the federal class’s favor, they would be entitled to full damages. So long as the Proposed Settlement seeks to release federal claims, full damages should be the only bar for comparison.

⁷⁷ Pl.’s Br. at 38 (quoting D.I. 112, at 38:20-39:5).

⁷⁸ Ex. E, SEC Compl. ¶¶ 19, 22.

“false and misleading statements about the status of Hyzon’s customer relationships remained in subsequent versions of the investor presentations.”⁷⁹

Though Dr. Miller has no access to discovered material, there is good reason to suspect that, if Plaintiffs’ counsel were diligent, they should have received the same discovery material received by the SEC in its pre-suit investigation. Plaintiff concedes as much in his Second Amended Complaint in stating that “[i]nitial discovery has confirmed that the Decarb Defendants knew—or through reasonable due diligence should have known—that Legacy Hyzon was nowhere near converting the internationally-recognized brands identified in the Investor Presentations into actual customers.”⁸⁰

Second, Plaintiff notes that, in discovery, it became apparent that Hyzon supplied the misleading information that went into the investor presentations.⁸¹ Yet in the very next sentence, he reaffirms his allegations that “the Settling Defendants knew or should have known, through reasonable due diligence, about the inaccuracies associated with the information.”⁸² At the very least, it was negligent for DCRB to continue to publish statements about Hyzon’s business or to speak publicly about Hyzon without conducting some ongoing due diligence to confirm

⁷⁹ *Id.* ¶¶ 20-21.

⁸⁰ Malork Compl. ¶ 7; *see also id.* ¶ 11 (confirming the existence of “a series of emails immediately after the February Investor Presentation and before the April Investor Presentation between defendant Knight and several of Legacy Hyzon’s purported ‘customers’ demonstrate that defendant Knight knew that these purported ‘customers’ were not Legacy Hyzon customers at all and had not signed contracts”).

⁸¹ Pl.’s Br. at 39.

⁸² *Id.*

that there had been no material changes in Hyzon's customer relationships since DCRB completed its purportedly extensive due diligence investigation on February 8, 2021.⁸³ This is the core theory of liability, at least in the putative federal class action's Section 14 claims against DCRB. And the risk that this Court or a jury would not always enter a plaintiffs' verdict is the risk carried in every lawsuit that gets past a motion to dismiss.

Accordingly, Plaintiff has failed to justify the settlement amount.

C. The Proposed Settlement Class Is Improper, As Is, as Plaintiff Has Failed to Make Any Effort to Show His Typicality or Adequacy.

Plaintiff's briefing for approval of a settlement class treats this Court's review of Rule 23's factors like a rubber-stamp process.⁸⁴

His brief offers no affirmative evidence or proffer of evidence showing that his claims are typical. The assertions offered are nothing more than conclusory repetitions of the applicable legal standard. Plaintiff also says nothing about himself. For example, he has never revealed the extent of his potentially minimal financial interest in this lawsuit. And because he has chosen to settle early in the litigation, before moving for class certification, there is no way of testing whether he is subject

⁸³ See, e.g., *In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 757 F. Supp. 2d 260, 288 (S.D.N.Y. 2010) (false proxy statements concerning business relationships violate Section 14(a) claim, even if the information was uniquely within the knowledge of the transaction's counterparty).

⁸⁴ See Pl.'s Br. at 30-31.

to any unique circumstances or defenses that make him “markedly different from that of the members of the class.”⁸⁵

These problems are compounded by his flawed assertion that he has “fairly and adequately protect[ed] the interests of the class” and that “there is no divergence between [his interests] and absent Class Members.”⁸⁶ As discussed above, the Proposed Settlement seeks to extinguish a potential source of additional recovery for absent class members from their federal class action claims. Plaintiff and his counsel did not involve Lead Plaintiff Miller—the representative of the putative federal class—in any settlement discussions or deliberations. He did not communicate the existence of a potential settlement to the federal class until he notified this Court nearly a year after reaching an agreement with Defendants.⁸⁷ And, to date, he has not shown how the amount to be distributed to DCRB investors under the proposed settlement in any way compensates investors for any additional recovery they could receive in the Federal Action.

D. The Notice Failed to Provide Absent Class Members with Information About their Potential to Recover in the Federal Action and Thus Deprived Them of Essential Information to Make an Informed Objection.

As a general matter, class notices serve as absent class members’ “primary, if not exclusive, source of information for deciding how to exercise their rights under

⁸⁵ *Leon N. Weiner & Assocs., Inc.*, 584 A.2d 1220, 1225-26 (Del. 1991) (citations and internal quotation marks omitted).

⁸⁶ Pl.’s Br. at 31.

⁸⁷ D.I. 267; *See also In re TD Banknorth*, 938 A.2d 654, 670 (Del. Ch. 2007) (“[K]eeping class members informed of the potential outcome of the case directly implicates the plaintiffs’ fiduciary obligations in conducting the litigation.”).

rule 23.”⁸⁸ To comply with Due Process, a settlement notice must “fairly apprise[] the prospective members of the class of the terms of the proposed settlement and of the options that [are] open to them in connection with the proceedings.”⁸⁹ “Keeping class members informed of the potential outcome of the case directly implicates the plaintiffs’ fiduciary obligations in conducting the litigation.”⁹⁰

Here, however, the Notice was deficient on several fronts. First, it contained none of the information contained in Plaintiff’s moving papers explaining why in his view, the settlement amount is reasonable. Second, the Notice makes no mention of the Federal Action, let alone how the Proposed Settlement’s release will affect overlapping class members’ rights in the Federal Action, such that absent class members would know they have realistic options to obtain recovery beyond agreeing to the Proposed Settlement or finding a lawyer to litigate their claims themselves. Third, the Notice fails to inform investors that the potential recovery in the Federal Action could be substantially greater than the \$7.0 million amount (for investors) agreed to by the settling parties. Without such information, shareholders cannot be expected to make fully informed decisions, including whether to object to the Proposed Settlement.

Such deficient notices have concerned courts in other cases. *In LendingClub*, for example, a federal district court that was asked to enjoin a state court from certifying a litigation class in a related state court securities case noted that it had

⁸⁸ *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104 (5th Cir. 1977).

⁸⁹ *See Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 95 (2d Cir. 2019); *accord In re Philadelphia Stock Exch., Inc.*, 945 A.2d at 1135.

⁹⁰ *In re TD Banknorth*, 938 A.2d at 670.

great concerns “regarding the ... form of state plaintiffs’ class notice.”⁹¹ This state court notice “fail[ed] to notify class members of the parallel federal action,” as well as a pending Supreme Court case that had the potential to revoke the state court’s jurisdiction over the securities claims at issue.⁹² To address those concerns, the federal court ordered the state court plaintiffs to reform “their class notices to inform class members of the parallel actions, the important differences between those actions, and their right to opt out of either, both, or neither action.”⁹³

Yet, when Lead Plaintiff put the settling parties on notice that they should follow a similar tact here, they made no efforts to modify the Notice.

E. The Prudent Course of Action Would Be To Stay All Decisions on the Proposed Settlement Until After the Federal District Court Rules on Plaintiffs’ Fourth Amended Complaint.

In defending the Proposed Settlement, the settling parties may try to attack the viability of the Federal Action’s Section 14 claims. This would be foolhardy for Plaintiff, given that he asserts nearly the exact same theories in this forum. Regardless, given the procedural history of the Federal Action, this Court need not tread on the federal court’s exclusive jurisdiction by gauging the viability of Dr. Miller’s Section 14 claims. Rather, the prudent course of action would be to reserve any ruling until the federal district court has a chance to decide that matter for itself.

⁹¹ 282 F. Supp. 3d at 1191-1192.

⁹² *Id.*

⁹³ *Id.* (detailing further what the notices had to disclose).

As discussed above, upon having the federal class action reassigned to her court, the federal district judge, the Honorable Meredith A. Vacca, has moved expeditiously in getting up to speed and issuing timely rulings. Upon learning of the Proposed Settlement here, Judge Vacca quickly held oral argument on and ruled on Defendants' motions to dismiss.⁹⁴ In the same order, Judge Vacca established quick deadlines for Dr. Miller to amend his complaint to include the material revealed by the SEC about Defendants' misleading statements about the then-present status of Hyzon's customers relationships.⁹⁵ That amended complaint (and the issue of whether the federal putative class's re-invigorated Section 14 claims are frivolous under a Rule 12(b)(6) standard) is now pending before the federal district court.⁹⁶

Judge Vacca's actions to date show that she is actively managing the federal docket so that the parties, this Court, and Hyzon/DCRB investors at-large can more accurately assess where things stand in this four-year-old case. If Judge Vacca strikes the federal putative class's Section 14 claims against DCRB, then the bulk of the objections presented herein may become moot. But if the Section 14 claims are sustained, Dr. Miller intends to proceed expeditiously towards a resolution that will maximize the recovery for all DCRB investors.

⁹⁴ ECF No. 119.

⁹⁵ *See also* Text Scheduling Order (ECF No. 124) (noting "[t]he Court is cognizant of the hearing scheduled for October 3, 2025 in the Malork action" and setting briefing deadlines as account of the scheduled hearing).

⁹⁶ *See* ECF No. 125, 127, & 129.

Because there are no downsides to waiting for the district court's imminent ruling, this Court should decline to approve the Proposed Settlement until at least that time.

V. CONCLUSION

For these reasons, the Court should decline to approve the Proposed Settlement or, as a matter of prudence, stay its decision until after the federal district court rules on the sufficiency of Dr. Miller's recently bolstered Section 14 claims. Additionally, the Court should consider ordering Plaintiff to reissue notices to the class that fully inform them of their options for recovery in this and the Federal Action.

Respectfully,

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