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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

DEAN DRULIAS, on Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

1st CENTURY BANCSHARES, INC., ALAN I. ROTHENBERG, WILLIAM W. BRIEN, M.D., DAVE BROOKES, JASON P. DINAPOLI, ERIC M. GEORGE, ALAN D. LEVY, BARRY D. PRESSMAN, ROBERT A. MOORE, LEWIS N. WOLFF, NADINE WATT, and STANLEY R. ZAX,

Defendants.

CASE NO. 16CV294673

CLASS ACTION

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE JOINT MOTION BY ALL PARTIES FOR ENTRY OF AN ORDER FOR NOTICE AND SCHEDULING OF HEARING OF SETTLEMENT

DATE: October 21, 2016
TIME: 9:00 a.m.
JUDGE: Honorable Peter H. Kirwan
DEPT: 1C

Date Action Filed: May 3, 2016

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I. INTRODUCTION

Plaintiff Dean Drulias ("Plaintiff") respectfully submits this memorandum in support of the joint motion by all parties to this action (the "Action") seeking entry of the accompanying Order for Notice and Scheduling of Hearing of Settlement (the "Notice Order"), submitted herewith.

By signing the Notice Order, the Court will: (a) authorize Plaintiff to mail notice of the proposed settlement the parties have reached to the class; (b) preliminarily certify a class consisting of all persons (other than Defendants, their immediate families, heirs, assigns and related persons) who owned common stock of 1st Century Bancshares, Inc. ("1st Century" or the "Company"), either of record or beneficially, at any time from and including March 10, 2016 through and including July 1, 2016, including, to the extent acting as such, any and all of their respective successors in interest, predecessors, representatives, trustees, executors, administrators, heirs, assigns, or transferees, immediate and remote, or any person or entity acting for or on behalf of, or claiming under any of them, and each of them (the "Settlement Class") so that the Notice can be mailed to them; (c) preliminarily approve the settlement set forth in the Stipulation of Settlement dated June 10, 2016 (the "Stipulation"), which is appended as Exhibit 1 to the accompanying Declaration of Dennis Stewart (the "Stewart Decl.");[1] and (d) schedule a hearing at which, following notice and an opportunity for members of the Settlement Class (the "Class Members") to be heard, the Court will consider whether to grant final approval to the proposed settlement set forth in the Stipulation.[2]

II. FACTUAL BACKGROUND

The following facts are derived from the Stipulation and hence were stipulated to by all Parties:

On March 10, 2016, 1st Century and Midland Financial Co. ("Midland") announced that they had entered into a definitive agreement (the "Merger Agreement" or "Sale Agreement")

[1] Hereinafter, "Ex. _" is used to denote an exhibit to the Stewart Decl.

[2] While all parties are jointly moving the Court to enter the Notice Order, this Memorandum of Points and Authorities is submitted only on behalf of the Plaintiff and does not necessarily represent the views of Defendants with respect to each and every statement herein.

pursuant to which Midland would acquire all outstanding shares of 1st Century for $11.22 per share (the "Merger"). On April 8, 2016, 1st Century, in connection with a proposed special meeting of its stockholders to consider and vote upon a proposal to approve and adopt the Merger Agreement, filed a preliminary proxy statement (the "Proxy Statement") with the United States Securities and Exchange Commission ("SEC"), which indicated that 1st Century's board of directors unanimously approved the Merger Agreement. The Proxy Statement also contained a discussion of the background of the Merger Agreement and the reasons the board of directors of 1st Century recommended that stockholders vote in favor of the Merger and sought stockholder approval for the Merger.

On May 3, 2016, Dean Drulias ("Plaintiff") commenced this action by filing a complaint (the "Complaint"), on behalf of a putative class of all holders of 1st Century's common stock, other than Defendants and their affiliates. The Complaint sought relief against 1st Century and the following individuals (the "Board"): Alan I. Rothenberg, William W. Brien, M.D., Dave Brooks, Jason P. DiNapoli, Eric M. George, Alan D. Levy, Barry D. Pressman, Robert A. Moore, Lewis N. Wolff, Nadine Watt and Stanley R. Zax (the "Individual Defendants" and with 1st Century, the "Defendants"). The Complaint challenged, *inter alia*, the Merger and the Merger Agreement, including, but not limited to, the Company's disclosures in the Proxy Statement and the terms of the Merger Agreement, and alleged that the Board had breached its fiduciary duties in connection therewith. The Complaint further alleged, *inter alia*, that by reason of Defendants' actions, Plaintiff and the class members had suffered and would suffer irreparable harm for which they had no adequate remedy at law, and requested that the Court grant appropriate relief for such alleged harm.

On or about May 18, 2016, 1st Century, in connection with seeking 1st Century's shareholders' vote on the Merger Agreement, filed a definitive proxy statement (the "Definitive Proxy Statement") with the SEC and mailed the same to its shareholders on or about May 20, 2016. Plaintiff contended that certain material information related to, *inter alia*, the conflicts of interest of members of the Board and the Company's investment banker, was not included in the Definitive Proxy Statement.

During the week of May 16, 2016, the Parties engaged in discussions regarding expedited

discovery and on or about May 25, 2016, Defendants provided certain documents to Plaintiff including certain minutes of meetings of 1st Century's Board and the special committee thereof formed to evaluate strategic alternatives for the Company (the "Special Committee"); Sandler O'Neill presentations to the Board, including the fairness opinion presentation; Sandler O'Neill's fairness opinion; Sandler O'Neill's engagement letter; and the various indications of interest received from Midland.

On or about May 25, 2016, Plaintiff filed an application for a temporary restraining order (the "Injunction Motion"), which was set for a hearing on June 17, 2016. On June 6, 2016, Defendants filed their Opposition to the Injunction Motion.

Between May 16, 2016 and June 10, 2016, counsel for the Defendants and counsel for Plaintiff engaged in good faith discussions which resulted in a settlement, contingent on the subsequently completed depositions of both Eric George, a director of 1st Century who served as the Chairman of the Special Transaction Committee of 1st Century's Board formed to evaluate and oversee negotiations with Midland and other parties, and Peter Buck, a managing director in the investment banking group at Sandler O'Neill, who advised 1st Century on the Merger Agreement and the process leading thereto.

III. TERMS OF THE SETTLEMENT

In consideration for the Settlement, on June 10, 2016 Defendants caused a Form 8-K, which contained substantially all of the information sought by Plaintiff (the "Challenged Information"), to be filed with the SEC and made available through such filing with the SEC to 1st Century's shareholders in connection with seeking shareholders' vote on the Merger Agreement (the "Supplemental Disclosures"). The Supplemental Disclosures included the following material information:[3]

[3] Plaintiff cites to Delaware law below for the proposition that the specific information disclosed in the Supplemental Disclosures is plainly material and important to stockholders. In this regard, since 1st Century was incorporated in Delaware, it is Delaware substantive law which governs Plaintiff's claims. *See* Cal. Corp. Code § 2116 ("The directors of a foreign corporation transacting intrastate business are liable to the corporation, its shareholders . . . according to any applicable laws of the state or place of incorporation . . . Such liability may be enforced in the courts of this state."). *See also Villari v. Mozilo*, 208 Cal. App. 4th 1470, 1478, n.8 (2012) (noting that the internal affairs doctrine requires application of Delaware law to disputes between stockholders and entities incorporated under Delaware law.)

(1) Information regarding the potential conflicts of interest of certain 1st Century insiders including (a) the point during sale negotiations when Midland indicated that Midland would require 1st Century's Chairman of the Board and CEO, Alan I. Rothenberg, and 1st Century President and director, Jason P. DiNapoli, to enter into post-merger employment agreements with Midland as a condition to the Merger, (b) that following the closing of the Merger Agreement, and pursuant to their respective employment agreement with Midland, Mr. Rothenberg would be employed as Chairman of 1st Century, a division of MidFirst and Mr. DiNapoli would be employed as an Executive Vice President of MidFirst and also hold the title of President and Chief Executive Officer of 1st Century, a division of MidFirst, (c) that at a January 7, 2016 meeting of the 1st Century Board, the Board authorized the payment of fees for Messrs. Rothenberg and DiNapoli to retain separate counsel in connection with the negotiation of employment-related agreements to the extent entry into such agreements by Messrs. Rothenberg and DiNapoli was required by Midland as a condition to the merger, and (d) the amount of money that each non-employee director of 1st Century was anticipated to receive for their restricted shares of 1st Century stock in connection with the Merger.[4]

(2) Information about the potential conflict of interests of Sandler O'Neill including (a) that, in the two years prior to rendering its fairness opinion on the sale of 1st Century to Midland, Sandler O'Neill had provided certain investment banking services to Midland in connection with Midland's acquisition of Steele Street Bank & Trust, for which services Sandler received $500,000.00 in fees, and (b) that while Midland was not then the issuer of any debt or equity securities, were Midland to issue any such securities in the future, Sandler O'Neill could actively trade the equity and debt securities of Midland or its affiliates for Sandler's own account and for the accounts of Sandler customers.[5]

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[4] In this regard, the case law is clear that the conflicts of interest of insiders are plainly material because "a reasonable stockholder would want to know [the] economic motivation[s] of [those who negotiate the merger] . . . when that motivation could rationally lead [those] negotiator[s] to favor a deal at a less than optimal price, because the procession of a deal was more important to [them], given [their] overall economic interest . . . ." *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114 (Del. Ch. 2007). *See also In re Atheros Comm. Inc., S'holder Litig.,* 2011 Del. Ch. LEXIS 36, at *41-*42 (March 4, 2011) ("Knowledge that, even though specific terms were not elicited until later in the process, [an insider] was aware that he would receive an offer of employment from [a specific buyer] at the same time he was negotiating . . . would be important to a reasonable shareholder's decision regarding the Transaction"); *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 73-74 (Del. Ch. 2007) (holding that a proxy statement should have disclosed that the buyer's bid for the Company was premised on its ability to retain management); *In re Wheelabrator Technologies Shareholders Litig.*, 663 A.2d 1194, 1205, n.8 (Del. Ch. 1995) (noting the conflict of interest created by accelerated stock options and the prospect for future employment).

[5] In this regard, the case law is clear that "[b]ecause of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives . . . full disclosure of investment banker compensation and potential conflicts" is both plainly material and required. *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011). *See also In re Atheros Comm. Inc., S'holder Litig.,* 2011 Del. Ch. LEXIS 36, at *27-*28 (March 4, 2011) (finding that the specific amount of a financial advisor's contingent fee was likely material and granting preliminary injunction prohibiting stockholder vote and closing of transaction until that information was disclosed); *La. Mun. Police Emples. Ret. Sys. v. Crawford*, 918 A.2d 1172,

(3) Information regarding "don't ask, don't waive" ("DADW") conditions to the confidentiality agreements entered into with potential parties to an agreement including that (a) each of the seven confidentiality agreements entered into with the seven companies that expressed interest in potential transaction with 1st Century included a one year standstill provision pursuant to which the applicable counterparty was prohibited from taking certain actions with respect to 1st Century during such period, including requesting that 1st Century waive the standstill (subject to certain exceptions in the case of the confidentiality agreement with Midland permitting non-public requests for a waiver and providing that the standstill will fall-away upon 1st Century entering into or failing to reject certain alternative transactions), and (b) no non-public requests for waiver of standstill provisions were made.[6]

In return, and consistent with California case law, Defendants are to receive a release of all claims (with certain exceptions) that relate to the Action and the Merger Agreement. *See Villacres v. ABM Indus., Inc.*, 189 Cal. App. 4th 562, 588 (2010) (collecting cases and noting that "a general release – covering 'all claims' that were or could have been raised in the suit – is not uncommon in class action settlements"); *In re Dynamic Random Access Memory Antitrust Litig.*, 2013 U.S. Dist. LEXIS 188116, at *260 & n. 161 (N.D. Cal. Jan. 8, 2013) ("An important use of class certification in the settlement context . . . is to effectuate a global release of all claims that are based on a common nucleus of fact . . . "a settlement is ordinarily impractical unless it covers all claims, actual and potential, state and federal, arising out of the transaction or conduct at issue") (quoting McLaughlin, *McLaughlin on Class Actions* § 6.28 at 141 (5th ed. 2009)).

1191 (Del. Ch. 2007) ("[W]here a significant portion of bankers' fees rests upon initial approval of a particular transaction, that condition must be specifically disclosed to the shareholder. Knowledge of such financial incentives on the part of the bankers is material to shareholder deliberations"); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 Del Ch LEXIS 174, at *55-*56 (October 2, 2009) ("It is imperative that stockholders be able to decide for themselves what weight to place on a conflict faced by the financial advisor."); *David P. Simonetti Rollover IRA v Margolis*, C.A. No. 3694-VCN, 2008 Del Ch LEXIS 78, at *26 (June 27, 2008) ("[a] financial advisor's own proprietary financial interest in a proposed transaction must be carefully considered in assessing how much credence to give its analysis. For that reason, the peculiar benefits of the Merger to UBS . . . must also be disclosed"); *In re Rural Metro Corp. Stockholders Litig*., 88 A.3d 54, 105 (Del. Ch. 2014) ("Information that bears on whether an investment bank faces conflicts of interest is material to stockholders when deciding how to vote on a merger").

[6] In this regard, the case law is clear that disclosure regarding DADWs is plainly material and important because otherwise shareholders would be operating under a "false impression that any of the folks who signed the standstill could have made a superior proposal. That's not true. They could only make it by breaching the standstill." *In re: Ancestry.com, Inc. S'holder Litig.*, C.A. No. 7988-CS,Transcript at 228:20-24, (Del. Ch. Dec. 17, 2012).

Plaintiff believes that by agreeing to make the Supplemental Disclosures, the Defendants agreed to provide the material information sought in the Action to 1st Century's shareholders, and thus allowed the decision faced by shareholders on whether to vote in favor of the adoption of the Merger Agreement to be based on complete information about the conflicts of the Company's directors and financial advisors, and enabled shareholders to engage in their own meaningful valuation of the Merger Agreement.

As discussed *infra*, and as will be briefed in greater detail prior to the final approval hearing, obtaining such disclosures was a particularly appropriate method of settling this case not only because it provided Plaintiff with a large part of the relief sought in its complaint, but because it allowed shareholders to make a decision on whether to vote in favor of the Merger Agreement with the benefit of disclosure of all relevant facts. In this regard, the Delaware courts have consistently recognized that it is a fundamental tenet of Delaware corporate law that shareholders are entitled to be fully informed of all material facts concerning transactions requiring their approval. *See, e.g., In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 199 (Del. Ch. 2007) ("Directors of Delaware corporations must disclose fully and fairly all material information within the board's control when they seek shareholder action.") (internal citation omitted); *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 858 (Del. 2015) ("Corporate fiduciaries can breach their duty of disclosure under Delaware law by making a materially false statement, by omitting a material fact, or by making a partial disclosure that is materially misleading.") (internal citations and quotations omitted).

Moreover, while the Action also sought to preclude Defendants from consummating the Merger Agreement without making further efforts to obtain a higher price, this claim would have been significantly more difficult for Plaintiff to prove than the failure to disclose claim. In this regard, Defendants could have been expected to argue that the "business judgment rule," which generally provides that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company," provided them with a substantial defense to Plaintiff's claim. *See Omnicare v. NCS Healthcare*, 818 A.2d 914, 927 (Del. 2003). Further, Plaintiff's ability to obtain monetary

damages following the consummation of the Merger would have been significantly curtailed by an exculpatory provision in 1st Century's certification of incorporation which shields its Board from liability for monetary damages for breaches of the duty of care. *See In re Bioclinica, S'holder Litig., Inc.,* 2013 Del. Ch. LEXIS 250, at *13 (Oct. 16, 2013) ("Pursuant to 8 Del. C. § 102(b)(7), the exculpation provision in BioClinica's certificate of incorporation absolves its directors from monetary damages arising out of breaches of the duty of care.").

Additionally, had Plaintiff not persuaded the Defendants to make the Supplemental Disclosures as part of the settlement, Plaintiff would have had to persuade the Court to enter a preliminary injunction in order for any relief to be meaningful, as absent such an injunction the Merger Agreement would undoubtedly have been consummated prior to any trial on the merits. Moreover, had Plaintiff been successful in persuading the Court to issue such an injunction, Defendants would undoubtedly have argued that Plaintiff must post a bond of many millions of dollars to secure the injunction, a bond which, depending on its size, Plaintiff may have been unable to arrange. As a result of the settlement, each of these potentially difficult obstacles was overcome by Defendants' agreement, pursuant to the settlement of the Action, to make the Supplemental Disclosures.

Finally, because Plaintiff's Counsel created a benefit for Settlement Class Members as a result of this litigation, they became entitled to an attorneys' fee under the common benefit doctrine. *See Serrano v. Priest*, 20 Cal. 3d 25, 38 (1977) (noting that it is "well established" at California law that "when [a] litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a 'substantial benefit' of a pecuniary or nonpecuniary nature . . . . the court, in the exercise of its equitable discretion, thereupon may decree that under dictates of justice those receiving the benefit should contribute to the costs of its production"). However, rather than continuing to litigate this issue, the parties to this Settlement (after negotiating the substantive terms of the Settlement) agreed that, subject to approval of the Court, Defendants will cause to be paid to Plaintiffs' Counsel the sum of $400,000 in full settlement of this claim for attorneys' fees and expenses. A detailed briefing of the appropriateness of these fees will be submitted by Plaintiff's counsel prior to the Court's consideration of whether to grant final

approval.[7]

IV. THE NOTICE ORDER SHOULD BE ENTERED, PRELIMINARY APPROVAL SHOULD BE GRANTED, AND A SETTLEMENT HEARING SHOULD BE SCHEDULED

California has a strong policy favoring compromises of litigation, particularly class action litigation. *See 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("Voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation"); *Bell v. Am. Title Ins. Co.*, 226 Cal. App. 3d 1589, 1607 (1991) (noting "the strong public policy in favor of settlement of class actions.").

California Rule of Court 3.769 requires the Court to approve all settlements of a class action and sets forth the procedure to do so. The first step is to obtain preliminary approval of the settlement, followed by notice to the class and a final approval hearing. S*ee Luckey v. Superior Court*, 228 Cal. App. 4th 81, 93 (2014).

"At the preliminary stage, the court considers general settlement terms. It reviews information on the arms-length nature of the negotiation, any obvious signs of collusion, presence or absence of conflicts within the class, and possible preferential treatment within the class. The court also determines whether the settlement is likely to be approved at the hearing to be

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[7] In this regard, while there do not appear to be any published California appellate cases considering fees in similar settlements, California Courts, including this Court, have previously approved fees of similar or higher amounts in settlements where similar disclosures were obtained. *See In re Supertex, Inc. S'holder Litig.*, Case No. 1-14-CV-261747 (Santa Clara Super. Ct. Sept. 23, 2014) (approving fees of $550,000 where disclosures, similar to those obtained here, regarding, *inter alia*, the conflicts of interest of members of the board and the Company's financial advisor were made) (Ex. 6)*; Fundamental Partners v. Berg*, Case No. 112CV237054 (Santa Clara Super. Ct. Oct. 25, 2013) (approving fees of $500,000 where disclosures, similar to those obtained here, regarding, *inter alia*, the conflicts of interest of members of the board and the Company's financial advisor were made) (Ex. 7).

Delaware courts are in accord and have found fees of a similar or greater amount to be appropriate in similar cases. *See Continuum Capital v. Nolan*, Case No. 5687-VCL, Hearing Transcript at 100:14-101:3 (Del. Ch. Feb. 3, 2011) ("I start from the premise that a disclosure case is worth 400 to 500,000. . . . I think the plaintiffs got two [banker oriented] conflict-oriented disclosures . . . I think conflict-oriented disclosures are important. So having gotten those, I would dial up, and I would dial up in the amount of 200,000, which gets me to an aggregate of 700,000."), Ex. 5; *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1136 (Del. Ch. 2011) (noting that a fee range of $400,000 to $500,000 is standard for "one or two meaningful disclosures, such as . . . undisclosed conflicts faced by fiduciaries or their advisors").

scheduled after notice." Cohelan on California Class Actions (2015-2016 ed.) § 9:10.

Thus, preliminary approval does not require the trial court to answer the ultimate question – whether a proposed settlement is fair, reasonable, and adequate. Rather, that determination is made only *after* notice of the settlement has been given to the members of the settlement class and *after* they have been given the opportunity to comment on the settlement. *See* 5 James Wm. Moore, *Moore's Federal Practice* § 23.83[1], at 23-336.2 to 23-339 (3d ed. 2002) (same).

The attorneys for the parties here have agreed to the settlement of this Action based upon a comparison of "'the terms of the compromise with the likely rewards of litigation.'" *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)) (superseded by statute on other grounds). Many courts recognize that the opinion of experienced counsel supporting the settlement is entitled to considerable weight. For example, in *Miller v. CEVA Logistics USA, Inc*., 2015 U.S. Dist. LEXIS 104704, 15-16 (E.D. Cal. Aug. 7, 2015), the Court noted as follows:

> Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation. This is because parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation.

(internal citation omitted).

The parties' decision regarding the respective merits of their positions has an important bearing on this case. Here, Plaintiff and his counsel are satisfied because the settlement gives Plaintiff a substantial portion of the relief sought in Plaintiff's complaint. Further, the settlement was reached only after counsel for Plaintiff had reviewed certain confidential documents regarding, *inter alia*, the Merger Agreement and the process leading thereto, produced by Defendants. Additionally, the fairness of the Settlement was confirmed through the confirmatory deposition of Eric George, the Chairman of the Special Committee of 1st Century's Board formed to evaluate the Merger Agreement and alternatives thereto and the deposition of Peter Buck, a senior banker at Sandler O'Neill who advised 1st Century on the Merger Agreement and the process leading thereto. Further, counsel for all parties believe this settlement is advisable to put

the claims asserted in this action to rest. This conclusion should be afforded considerable weight by the Court.

In sum, the proposed settlement meets the applicable criteria for preliminary approval. Therefore, entry of the Notice Order is appropriate.

V. PRELIMINARY CLASS CERTIFICATION FOR PURPOSES OF SETTLEMENT IS PROPER

California Code of Civil Procedure § 382 provides that "when the question is one of common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." The public policy of California favors the use of class actions and so Courts have adopted rules that favor certification. *See Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 473 (1981) ("Since this state has a public policy which encourages the use of the class action device, rules promulgated by this court should reflect that policy."). Thus, case law interpreting § 382 has established the following prerequisites to class certification: "(1) a sufficiently numerous, ascertainable class, (2) a well-defined community of interest, and (3) substantial benefits to litigants and the courts." *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007). The analysis turns simply on the existence of these factors, and not on the merits of the plaintiff's claim. *See Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 326 (2004) ("The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious.") (internal quotation marks and citation omitted).

As demonstrated below, Plaintiff properly satisfies all of the prerequisites of § 382, and the relevant case law. Class certification is therefore appropriate, and the parties' motion should be granted.

A. An Ascertainable Class Exists and Is so Numerous that Joinder Is Impracticable

The numerosity requirement is met if the class is so large that joinder of all members would be impracticable. *See Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470 (1981). As of May, 2016, 1st Century had over 10 million shares of common stock outstanding, held by

approximately 273 holders of record and hundreds of beneficial holders. Ex. 2. It clearly would not be practical to join all potential plaintiffs before this Court. *See Collins v. Cargill Meat Solutions Corp*., 274 F.R.D. 294, 300 (E.D. Cal. 2011) ("Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members.").[8] *See also Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1531 (Cal. App. 2d Dist. 2008) (concluding that a class of 190 would satisfy this requirement.)

Furthermore, the numerosity requirement for class actions is generally assumed to be met when the suits involve stocks which are traded on national securities markets like the New York Stock Exchange (as 1st Century's stock was during the class period). *See In re Sadia*, 269 F.R.D. 298, 309 (S.D.N.Y. 2010) (finding that plaintiffs met the numerosity requirement where the company's shares "were actively traded on the NYSE, an open, well-developed and efficient market"); *In re IMAX Sec. Litig.*, 272 F.R.D. 138, 146 (S.D.N.Y. 2010) (finding that "[i]n securities fraud class actions relating to publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period") (internal citation omitted).

The class is also easily ascertainable by reference to 1st Century's shareholder records. *See Aguiar v. Cintas Corp. No. 2*, 144 Cal. App. 4th 121, 135 (2006) ("Class members are ascertainable where they may be readily identified . . . by reference to official records.") (internal quotation marks and citation omitted); *Marler v. E.M. Johansing, LLC*, 199 Cal. App. 4th 1450, 1461 (2011) (same).

Thus, the numerosity requirement has been satisfied here.

B. The Class Involves a Well-Defined Community of Interest

In evaluating whether a well-defined community of interest exists, courts look to the following three factors: (1) whether there are predominant common questions of law or fact, (2) whether the class representative's claims or defenses are typical of the class, and (3) whether the

[8] California courts look to federal law, specifically Rule 23 of the Federal Rules of Civil Procedure, for guidance in class certification decisions. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 318 (2009) ("[W]e look [to federal law] when seeking guidance on issues of class action procedure. . . . [Rule 23(a)] requirements are analogous to the requirements for class certification under [§ 382].").

class representative can adequately represent the class. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 313 (2009).

1. There Are Predominant Common Questions of Law or Fact

Common issues predominate when they would be "the principal issues in any individual action, both in terms of time to be expended in their proof and of their importance." *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 810 (1971). Common questions need only be "sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits." *Id*. In the present case, the primary issue in the Action is whether Defendants breached their fiduciary duties to the members of the class in connection with the sale of 1st Century and in particular their duties to disclose all material information in the Proxy Statement, and those claims are identical for each Class Member. Accordingly, the requirement that there are predominant common questions of law or fact is satisfied here as well.

2. Plaintiff's Claims Are Typical of the Class's Claims

Typicality requires only that the named plaintiff's interests in the action be similar to those of other class members. *See Medrazo v. Honda of N. Hollywood*, 166 Cal. App. 4th 89, 99 (2008) (finding plaintiff's claim to be typical where she alleged that "she was subjected to the same alleged wrong, by the same defendant, as the other members of the putative class"). When the same underlying conduct affects the named plaintiff and the class sought to be represented, the typicality requirement is met irrespective of any varying fact patterns that may underlie individual claims. *See Daniels v. Centennial Group, Inc.*, 16 Cal. App. 4th 467, 473 (1993) (named plaintiff's interests must only be similar to other class members).

Notably, the Court of Appeals has noted that:

> "[I]t has never been the law in California that the class representative must have *identical* interests with the class members. The only requirements are that common questions of law and fact *predominate* and that the class representative be similarly situated."

B.W.I. Custom Kitchen v. Owens-Illinois, Inc., 191 Cal. App. 3d 1341, 1347 (1987).

The typicality requirement is satisfied here. Plaintiff's claims arise from the same events and practices and are based on the same legal theories as the claims of absent members of the

class. Plaintiff's claims, *inter alia*, are that Defendants breached their fiduciary duties by causing 1st Century to enter into the Merger Agreement and that 1st Century's directors failed to disclose material information in the Proxy Statement they circulated to 1st Century's shareholders in connection with recommending that shareholders vote in favor of the proposed Merger. *See Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1090-92 (2007) (finding this factor satisfied where the plaintiff, "like other members of the putative class, was subjected to the same alleged wrong").

3. Plaintiff Adequately Represents the Proposed Class

The adequacy prong involves an analysis of whether there are conflicts of interest between the named parties and the proposed class members that they seek to represent. *See Johnson v. GlaxoSmithKline, Inc.*, 166 Cal. App. 4th 1497, 1509 (2008).

Here, no conflicts, disabling or otherwise, exist between Plaintiff and Class Members. As a 1st Century shareholder, Plaintiff stood in the same shoes as the members of the Settlement Class. Further, as set forth in their respective firm biographies, attached as Exs. 3 and 4, Plaintiff's counsel are experienced class action attorneys, who have been previously appointed together as class counsel by other California Courts in similar actions. *See Fundamental Partners v. Berg*, Case No. 112CV237054 (Santa Clara Super. Ct. Oct. 25, 2013) (Ex.6); *In re Supertex, Inc. S'holder Litig.*, Case No. 1-14-CV-261747 (Santa Clara Super. Ct. Sept. 23, 2014) (Ex. 7);

C. Certification of the Class Provides Substantial Benefits to Litigants and the Court

Concluding that "certification will provide substantial benefits to litigants and the courts" requires a determination that "proceeding as a class is superior to other methods." *In re Tobacco II Cases*, 46 Cal. 4th 298, 313 (Cal. 2009). In this regard, individually, each class member's claim is a "negative value" claim. That is, the value of each individual class member's claim is very small compared to the costs of litigating that claim. When the claims are negative value claims, the superiority requirement is met because the class action mechanism is not merely a superior method for adjudicating this controversy, it is the only method. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996) ("A class action is the superior method for

managing litigation if no realistic alternative exists."). *See also Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286, 1308 (2010) ("In light of the numerous common issues of fact and law that predominate in this lawsuit, we conclude that proceeding by way of class action is the superior method of adjudication. Doing so would further judicial economy by avoiding repetitious suits, [and] would unify what would otherwise be a series of small claims so as to enhance the class members' access to redress . . . .").

In sum, the Settlement Class meets all criteria for certification and should be certified for purposes of effectuating this settlement.

VI. THE PROPOSED NOTICE TO SETTLEMENT CLASS MEMBERS IS ADEQUATE

The individualized mailing of notice to Class Members the Parties propose here will be the "best notice practicable under the circumstances." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (finding the individual mailing of notice to class members was the "best notice practicable"). Further, the Notice fulfills the applicable criteria of Cal. Rules of Court, Rule 3.766 (d) and Cal. Rules of Court, Rule 3.769 (f). In this regard, the Notice states, in plain and easily understandable language, the following: (i) the nature of the action; (ii) the definition of the class to be certified; (iii) the terms of the proposed Settlement; (iv) the class claims, issues and defenses; (v) that class member may request to be excluded from the Settlement Class and information on the procedure to do so; (vi) that a Class Member may enter an appearance through counsel if the member so desires; and (vii) the binding effect of a class judgment on Class Members. *See Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010) (affirming approval of notice which "fairly apprise[d] the prospective members of the class of the terms of the proposed settlement and of the options that [were] open to them in connection with the proceedings."). In addition, it also includes forms for objectors and those who wish to be excluded from the Class to complete and submit to Plaintiffs' Counsel. As such, the notice fulfills the requirements of California law and due process, and all parties ask the Court to approve it.

VII. PROPOSED SCHEDULE OF EVENTS

In connection with preliminary approval of the settlement, the parties are requesting the Court to establish dates by which notice of the settlement will be sent to potential Class Members, and to set the final approval hearing date. The following is a proposed schedule of events leading to the final approval hearing.

Notice mailed to class members	Fourteen (14) calendar days after entry of the Notice Order ("Notice Date")
Last day for class members to object to settlement	Fourteen (14) calendar days before final approval hearing
Last day for class members to request exclusion from the settlement.	Fourteen (14) calendar days before final approval hearing
Date by which to file papers in support of the settlement	Seven (7) calendar days prior to final approval hearing
Final approval hearing	Eight weeks after entry of the Notice Order or at the Court's earliest convenience thereafter.

This schedule is similar to those used in numerous class action settlements and provides due process to Class Members with respect to their rights concerning the settlement.

VIII. CONCLUSION

The proposed settlement is a fair compromise of the issues in dispute in light of the circumstances of the case. After weighing the benefits of this settlement against the uncertainty and risks of continued litigation, and following substantial document and deposition discovery, Plaintiff's counsel believe that the proposed settlement is fair, reasonable and adequate and warrants entry of the Notice Order. All Parties respectfully request that the Court enter the Notice Order.

DATED: August 18, 2016

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