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Case No. Multi-Case

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CHENIERE ENERGY, INC. STOCKHOLDERS LITIGATION	)	CONSOLIDATED C.A. No. 9710-VCL
IN RE CHENIERE ENERGY, INC.	)	C.A. No. 9766-VCL

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT, CERTIFICATION OF THE CASE AS A CLASS AND DERIVATIVE ACTION, AND PLAINTIFFS' COUNSEL'S FEE AND EXPENSE APPLICATION

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Lead Plaintiffs, James B. Jones, Robert Maguire and Richard Shenker, and additional plaintiff Kayann Davidoff, by and through Plaintiffs' Co-Lead Counsel – Andrews & Springer LLC; Barrack, Rodos & Bacine; Bernstein Litowitz Berger & Grossmann LLP; and Grant & Eisenhofer, P.A. – and additional counsel for plaintiffs, Berger & Montague, P.C. (collectively, "Plaintiffs' Counsel"), respectfully submit this memorandum in support of the proposed Settlement in this Action and Plaintiffs' Counsel's Fee and Expense Application.

PRELIMINARY STATEMENT

If ever there was a case bearing out the Court's admonition "To prepare a good complaint requires the investment of time and resources" (*In re Del Monte Foods Co. S'holders Litig.*, C.A. No. 6027-VCL, 2010 WL 5550677, at *9 (Del. Ch. Dec. 31, 2010)), this case is it. Prior to the filing of this case, Cheniere Energy, Inc. ("Cheniere" or the "Company") – which had already provided its chief executive officer and other senior executives with hundreds of millions dollars worth of stock-based compensation in the years 2012 and 2013 – was proposing to its stockholders that they vote at its Annual Stockholder Meeting set for June 12, 2014, in favor of the board's recommendation that the Company place another 30 million shares of stock ("Amendment No. 2"), that then had a value of approximately $1.9 billion, into the Company's 2011 Incentive Plan ("2011 Plan"), so that such stock could be awarded to the Company's CEO Charif Souki

("Souki"), other senior executives and employees, board members, and a consultant within the coming few years. The April 28, 2014 Proxy Statement ("April 28, 2014 Proxy") for the Annual Stockholder Meeting further sought stockholder approval of a new 2014-2018 Long-Term Incentive Plan ("2014-2018 LTIP"). And, among other things, it represented that in a stockholder vote held on February 1, 2013 ("February 2013 Vote"), Cheniere stockholders had approved an amendment to the 2011 Plan ("Amendment No. 1") that had been proposed by the board to add 25 million shares to the 2011 Plan's share reserve.

As more fully described below and in the accompanying declaration of counsel, the investigation, filing and prosecution of this case (a) exposed that Cheniere had not, in fact, received the requisite stockholder vote in the February 2013 Vote to pass the 25 million share addition to the 2011 Plan's share reserve under the Company's bylaws in effect at that time, and (b) stopped the board's further stock-granting plan in its tracks. Further, the ultimate resolution of this case, as set forth in the Stipulation and Agreement of Compromise, Settlement and Release dated December 12, 2014 (the "Stipulation" or the "Settlement"),[1] provides enormous executive compensation savings that do not find many, if any, comparables in Delaware precedent. These extraordinary benefits to the Company

[1] All capitalized terms not otherwise defined herein have the same meanings as set forth in Paragraph 1 of the Stipulation.

and its stockholders form the basis of Lead Plaintiffs' and Plaintiffs' Counsel's requests that this Court grant final approval to the Settlement and approve the Fee and Expense Application in its entirety.

STATEMENT OF FACTS

I. The Genesis of the Case

In the early morning hours of April 29, 2014, *Bloomberg* ran an article entitled, "Cheniere CEO Compensation for 2013 Doubles to $142 Million," that reported that Cheniere – which had never posted an annual profit – had "more than doubled the compensation of its chief executive officer [Souki] to $141.9 million" in 2013, which was more than five times the compensation paid to Exxon Mobil's chief executive officer. Among other things, the article further reported that Souki's total compensation in 2013 had included stock awards valued at $132.9 million, compared to his total 2012 compensation of $57.5 million, which had included $49.2 million in stock awards, according to a filing that Cheniere had just made with the United States Securities and Exchange Commission ("SEC").[2]

After reviewing the article and recognizing the burdens imposed by Delaware law on excessive compensation claims, Co-Lead Counsel immediately commenced an investigation of the Proxy filing made by Cheniere that included

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[2] *See* Declaration of Jeffrey W. Golan in Support of Motion to Approve Settlement and Application for Fees and Expenses ("Golan Decl."), filed herewith, ¶ 2.

this information. Co-Lead Counsel sought to determine whether the stock awards to Souki, other senior executives, board members and consultants went beyond the Company's stockholder-approved plans.[3]

The investigation, which is described in detail in the Golan Decl., led to a series of important discoveries.

First, the stockholder vote taken in 2011 to establish the 2011 Plan with 10 million reserve shares passed with 23,459,610 votes "for," 7,320,515 votes "against," 209,084 "abstentions," and 19,308,606 "broker non-votes." However, the stockholders must have been asked to add shares to the 2011 Plan soon after the 2011 vote since Souki was awarded 6 million shares from the 2011 Plan, the maximum allowed in any one year, just in 2013.[4]

Second, through a Proxy issued on December 31, 2012 ("Special Meeting Proxy"), the Company had convened a special meeting specifically to address the depleted 2011 Plan share reserve, which by then was down to approximately 100,000 shares from the 10 million established in 2011. The Special Meeting Proxy asked Cheniere stockholders to more than triple the share reserve by passing

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[3] *Id*. ¶ 3. In addition to Souki, five other senior executives were paid over $129 million in compensation, primarily in stock awards, in 2012 and 2013. *See* April 28, 2014 Proxy Statement at 35.

[4] Golan Decl. ¶ 4.

Amendment No. 1 to the 2011 Plan, which would place another 25 million shares into the 2011 Plan share reserve.[5]

Third, at the special meeting convened to consider Amendment No. 1 on February 1, 2013, the vote totals on the proposal were 77,011,739 votes "for", 57,907,345 votes "against" and 36,252,581 "abstentions."[6] However, Cheniere's voting bylaw at the time of the February 2013 Vote was consistent with the Delaware default rule at 8 *Del. C.* § 216(2), under which "abstentions" should count as "no" votes unless a company's bylaws or certificate of incorporation provide a different standard. Specifically, section 2.7 of the bylaws in place at the time stated: "Except as otherwise provided by law or the Certificate of Incorporation, when a quorum is present at any meeting of Stockholders, ***the vote of the recordholders of a majority of the Shares entitled to vote thereat, present in person or by proxy, shall decide any question brought before such meeting***." (Emphasis added). Therefore, the Company had received just 45% "yes" votes in favor of the 25 million share reserve increase proposal, which was less than a majority and would mean that the proposal had not, in fact, passed.[7]

Fourth, in the April 28, 2014 Proxy, Cheniere's board had proposed for stockholder approval the placement of an additional 30 million shares into the

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[5] *Id.* ¶ 5.
[6] *Id.*
[7] *Id.* ¶¶ 6-7.

2011 Plan share reserve, as well as the 2014-2018 LTIP. With this proposed increase, from 2011 to 2014 the board had requested stockholder permission to issue ***65 million shares*** for compensation purposes under the 2011 Plan, which would have resulted in Company insiders receiving a whopping ***23.6%*** of the Company's total outstanding shares.[8]

Fifth, just weeks before the board proposed this massive increase to the 2011 Plan's share reserve, the Company's voting bylaw ***had been amended*** by Cheniere's board on April 3, 2014, so that the vote on the board's proposals seeking a 30 million share increase to the 2011 Plan share reserve and the 2014-2018 LTIP ***would have a lower standard for passage***, a "votes cast" standard, under which abstentions are not counted in the vote, rather than the prior "shares present and entitled to vote" standard, under which abstentions are counted as "no" votes.[9] Specifically, in a new lengthy, complicated and multi-tiered section 2.8 of the bylaws, the board unilaterally and without seeking stockholder approval or ratification changed the voting standard for compensation-related votes by referring to "minimum" voting rules and regulations of a stock exchange, as follows:

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[8] *Id*. ¶¶ 9-10; April 28, 2014 Proxy at 19. The 2014-2018 LTIP was to be a sub-plan under the 2011 Plan. *Id.* (April 28, 2014 Proxy) at 45.

[9] Golan Decl. ¶ 8.

> ***On any matter where a minimum or other vote of stockholders is provided by*** the Certificate of Incorporation, these Bylaws, ***the rules or regulations of any stock exchange applicable to the Corporation, or applicable law*** or pursuant to any regulation applicable to the Corporation or its securities, ***such minimum or other vote shall be the required vote on such matter (with the effect of abstentions and broker non-votes to be determined based on the vote required)***. (Emphasis added).

Sixth, the bylaw amendment, it appeared, dramatically changed the voting standard applicable to stockholder votes undertaken pursuant to a stock exchange requirement, which included votes on stock-based compensation plans or material amendments to such plans.[10] The amendment set in new section 2.8 also appeared to allow the board, on an ad hoc basis, to decide whether it would count abstentions in accordance with its own interests in any particular stockholder vote – possibly even after a vote had occurred. The new bylaw provision thus instituted a new voting standard that sought to exclude abstentions – which had been the reason, in Co-Lead Counsel's view, that the board had not obtained stockholder approval for Amendment No. 1 in the February 2013 Vote – from consideration when determining the voting results for Amendment No. 2, the additional 30 million share proposal, and the 2014-2018 LTIP, both of which were set to be vote upon at the upcoming June 12, 2014 Annual Stockholder Meeting.

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[10] *Id.* A comparison of the former bylaw § 2.7 and the amended bylaw § 2.8 is attached to the Golan Decl. hereto as Exhibit 1.

Seventh, nowhere in the April 28, 2014 Proxy seeking the 30 million share increase did the Company identify that a change had been made to the Company's bylaws dealing with the way abstentions would be counted, and nowhere in the Proxy did the Company disclose that only 45% of the shares present and entitled to vote in the February 2013 Vote had voted in favor of Amendment No. 1.[11] To the contrary, the Proxy stated several times that the stockholders voted ***in favor*** of Amendment No. 1 to the 2011 Plan in the February 2013 Vote.[12] These facts suggested that the Company's board and management may have been aware that they had miscounted the February 2013 Vote and that by changing the bylaws in April 2014, they may have been seeking to (a) conceal the miscounting of the prior vote and (b) make it easier for the 30 million share reserve increase proposal to pass, given the less-than-majority support for the 25 million share reserve increase at issue in the February 2013 Vote.[13]

And ***eighth***, based on this research and analysis, it appeared that the vast bulk of the compensation provided to Souki, other senior executives, board members and consultants in 2013 had come through the issuance of stock awards that ***exceeded*** the total number of shares that could be awarded under the stockholder-approved 2011 Plan, and that the Proxy for the upcoming June 12,

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[11] *Id.* ¶ 10.
[12] *Id.*
[13] *Id.* ¶ 9.

2014 stockholder vote contained false and misleading statements that should be corrected before the Company went forward with that vote.[14]

II. The Case Filing Leads To Extraordinary Concessions

In May 2014, Co-Lead Counsel was retained by a Cheniere stockholder, James B. Jones ("Jones"), a firefighter for 23 years who had held stock in Cheniere continuously from before the time the 2011 Plan was proposed and voted on by stockholders, through the time of the December 2012 Proxy and the February 2013 Vote, and to the present.[15] On Thursday, May 29, 2014, Jones filed a complaint asserting direct claims against Cheniere, Souki, five other senior executives and the members of the Company's board, and asserting derivative claims on behalf of the Company.[16] The complaint alleged, *inter alia*, that Cheniere's management team and board breached the terms of the Company's bylaws as well as their fiduciary duties to the Company and its stockholders based on the above-identified facts. Through the complaint and accompanying motions to expedite proceedings and for injunctive relief, Jones also sought to enjoin the upcoming stockholder vote on June 12, 2014, through which the board was seeking stockholder approval for the proposed 30 million share increase for future stock awards, until Defendants made full and fair disclosures about the previous stock awards, the February 2013 Vote,

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[14] *Id.* ¶ 12.
[15] *Id.* ¶¶ 13-14.
[16] *Id.*

the then-current share reserve increase proposal, and the actions the board took in April 2014 to amend the bylaws.[17]

Among other activities then being undertaken by Jones' counsel,[18] on Friday, May 30, 2014, Jones filed a brief in support of plaintiff's motion to expedite proceedings, and plaintiff's first set of document requests.[19] The brief reflected the extensive research that had been done with respect to the actions taken by Cheniere's board, the bylaws under which the February 2013 Vote was taken (specifically, citing to the former bylaw § 2.7), the board's subsequent action to change the bylaws before the upcoming June 12, 2014 vote (specifically, citing to the new bylaw § 2.8), and the past stock awards made to the Souki, other senior executives, board members and consultants.[20]

These filings elicited a quick and extraordinary response. On Monday, June 2, 2014, before the market open, the Company filed a Form 8-K that disclosed the Company would "***postpone the 2014 Annual Meeting of Stockholders of the***

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[17] *Id.* ¶¶ 14-15; *see also* Complaint filed in C.A. No. 9710-VCL (May 29, 2014).
[18] Golan Decl. ¶ 16.
[19] *Id.* ¶ 17.
[20] *Id.* As part of this investigation, Co-Lead Counsel also discovered and asserted in the brief that the 600,000 shares of stock awarded to a Company "consultant" in 2013 were granted to Karim Souki, a brother of CEO Souki.

Company, previously scheduled to be held … on Thursday, June 12, 2014."[21] The 8-K stated this action was being taken "***in light of a complaint that has been filed in the Delaware Court of Chancery of the State of Delaware styled Jones v. Souki, et al., C.A. No. 9710-VCL (Del. Ch.) and plaintiff's request to expedite proceedings before the June 12th Annual Meeting***."[22] The Company's filing further disclosed that the 2014 Annual Meeting had been re-set for September 11, 2014.[23]

Had Co-Lead Counsel not investigated, researched, crafted and filed the *Jones* complaint and brief in support of plaintiff's motion to expedite proceedings, none of the alleged misconduct – including the granting of stock awards without appropriate stockholder approval – would have come to light.[24] Indeed, as admitted in the Company's Form 8-K filing on June 2, 2014, had the *Jones* case not been filed, the Company would not have postponed its Annual Stockholder Meeting, and instead would have presented to Cheniere stockholders the board's proposals to add another 30 million shares to the 2011 Plan's share reserve and to

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[21] *Id.* ¶ 21; *see also* June 2, 2014 Form 8-K (emphasis added), accessible at http://www.sec.gov/Archives/edgar/data/3570/000119312514220800/d737843d8k.htm..

[22] *Id.* ¶ 21; *see also* June 2, 2014 Form 8-K (emphasis added).

[23] *Id.* In view of the Form 8-K disclosures and following a telephone call between Cheniere's counsel and Jones' counsel, counsel for the parties alerted the Court that in view of the postponement of the Annual Meeting, there would be no need for the Court to rule very quickly on the motion to expedite. Golan Decl. ¶ 20.

[24] *Id.* ¶ 22.

put into place the 2014-2018 LTIP. Moreover, both of these proposals would have been determined under the new bylaw enacted by the board in early April 2014 that changed the applicable voting standard from a majority of the shares present and entitled to vote (under which abstentions should be counted as "no" votes) to a majority of the votes cast standard (under which abstentions are not counted within the vote totals except for quorum purposes).[25] The decision to postpone the stockholder vote scheduled for June 12, 2014 was, in Jones' counsel's view, an extraordinary action by the Company, and was perceived as such in many press articles and blog postings.[26]

Jones' counsel continued to work diligently on the case by preparing and serving a more comprehensive second set of document requests, a first set of

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[25] *Id.*

[26] *Id.* ¶ 23 (citing Tom Gara, *A New Twist in the Case of the $142 Million CEO*, The Wall Street Journal (June 2, 2014); Daniel Gilbert, *Cheniere Cancels Annual Meeting, Citing Suit Over Compensation*, The Wall Street Journal (June 2, 2014); *Investors Sue Cheniere, Alleging Improper Executive, Director Stock Awards*, Sean Sullivan, SNL.com (June 3, 2014); *Cheniere's Delayed Shareholder Meeting Signals 'Potential" Backlash Over Executives' Pay,* Oil and Gas Investor.com (June 4, 2014); Mike Melbinger, *Company Postpones its Annual Meeting Due to Lawsuit over Stock Plan and Disclosures*, Compensation Standards (June 4, 2014); Olivia Pulsinelli, *Shareholders Challenge Cheniere Stock Awards,* Houston Business Journal (June 4, 2014); Collin Eaton, *Suit Alleges Cheniere Execs Got Unapproved Stock Awards*, Fuel Fix.com (June 4, 2014); Conrad De Aenlle, *More Scrutiny, Still Spectacular*, The New York Times (June 7, 2014); Jill Radloff, *Shareholder Lawsuit About Compensation Plan Derails Shareholder Vote*, JDSupra.com (June 9, 2014); and Collin Eaton, *Investors Claw Back in Cheniere Compensation Fight*, The Houston Chronicle (June 15, 2014)).

interrogatories relating to any advice of counsel reliance defense that the Defendants might assert, and a series of subpoenas on three compensation consultants retained by the Company, its board or the compensation committee over the years (Deloitte Consulting LLP, Farient Advisors, and Pearl Meyer & Partners) and on two firms that provided services to the Company in connection with stockholder votes and proxies (Morrow & Co. LLC and Broadridge Financial Solutions Inc.).[27] Jones' counsel also continued to research, *inter alia*, the Company's SEC filings and incentive plans.[28]

Subsequently, other counsel filed cases and joined in the prosecution of the litigation. Cases were filed by plaintiffs Maguire, Shenker and Davidoff on June 6, 13 and 25, 2014, respectively, asserting similar claims against the same group of defendants named in the *Jones* complaint.[29]

Instead of responding directly to the stockholder complaints then on file, on June 16, 2014, Cheniere filed a Verified Application Pursuant to 8 *Del. C.* § 205 (the "Application"), and sought to stay proceedings in the consolidated stockholder action. In its filing, Cheniere took the position that the February 2013 Vote had been conducted in accordance with Delaware law, the Company's bylaws and the rules of the NYSE MKT LLC ("NYSE MKT"), the former AMEX exchange on

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[27] *Id.* ¶ 24.
[28] *Id.* ¶ 25.
[29] *Id.* ¶¶ 26, 30 & 35 n.3.

which Cheniere shares are listed and trade. Cheniere sought judgment in its favor on two grounds: (1) as a matter of law, the February 2013 Vote had been conducted in accordance with the Company's bylaws and was sufficient to pass the 25 million share proposal (Count I); and (2) pursuant to the discretion afforded by § 205, notwithstanding any defect in the issuance of the 25 million shares, whether occurring in the past or future, the Court should declare the issuance valid (Count II).[30]

One week later, on June 23, 2014, in connection with the Company's motion to stay the stockholder litigation and proceed with briefing of a motion the Company sought to file in support of Count I of the Application, the Company disclosed in a letter to the Court that it would not be submitting the proposal to place an additional 30 million shares into the 2011 Plan's share reserve or the 2014-2018 LTIP proposal at the September 11, 2014 Annual Meeting, as had been initially proposed in the April 28, 2014 Proxy.[31] The financial press reported on this filing in article published on July 1, 2014, and the Company confirmed the decision in a Definitive Proxy Statement filed with the SEC a month later, on July 25, 2014.[32]

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[30] *Id.* ¶ 33; *see also* Application.
[31] *Id.* ¶ 34.
[32] *Id.*; *see also* Daniel Gilbert, "Cheniere Energy Cancels Proposed Compensation Plan: Decision Follows Shareholder Suits Protesting Previous Stock Grants to

Thus, within a month of the filing of the *Jones* complaint and brief in support of the motion to expedite proceedings, the legal issues had been joined and the Company had taken two extraordinary actions in direct response to the filing of the lawsuit: (1) postponing the Annual Stockholder Meeting for three months; and (2) withdrawing the board's proposals to place another 30 million shares into the 2011 Plan's share reserve and to approve the 2014-2018 LTIP.[33]

III. The Continued Litigation and Settlement of the Case

As more fully detailed in the Golan Decl., the parties proceeded to brief Cheniere's motion for judgment on Count I of the Application, which included a sur-reply brief by the stockholder plaintiffs/intervenors that brought to the attention

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Employees," The Wall Street Journal (July 1, 2014) ("The company made the disclosure June 23 to a Delaware court, following shareholder lawsuits that said a previous Cheniere plan improperly awarded stock to employees last year. The plaintiffs also sought to block the company from voting on the new compensation plan at its annual meeting last month. That prompted Cheniere to postpone the vote until September."); Zain Shauk, "Cheniere Scraps Stock Awards Plan Following Lawsuit," Bloomberg News (July 1, 2014); Collin Eaton, "Cheniere Strikes LNG Deals, Backs Down On Pay: Company Won't Ask Shareholders to OK $2.2 Billion For Top Executives," The Houston Chronicle (July 1, 2014) ("Cheniere Energy, facing a shareholder lawsuit over 'excessive' executive compensation paid out last year, said in court filings last week it wouldn't seek investors' approval of another round of stock awards.").

[33] As a *Wall Street Journal* article published on May 30, 2014 noted, the 30 million additional shares that the board sought to have available to grant as stock awards to Souki, other Company executives and employees, board members, and consultants were valued, based on the stock's market price at that time, at $1.9 billion, more than all the revenue Cheniere had generated since 2008. *See* Daniel Gilbert, *Cheniere Energy Pitches Big Boost in Employee Compensation*, The Wall Street Journal (May 30, 2014).

of the Court the seminal decision issued in *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990), certain law review articles and a presentation by former Supreme Court Justice Veasey, which, in the Plaintiffs' view, provided an additional basis for denying the Company's motion and finding that the rules of the NYSE MKT could not override the voting requirement stated in the Company's bylaw at the time of the February 2013 Vote.[34] And on August 26, 2014, the parties presented argument to the Court on the motion, during which counsel for the Company and counsel for the stockholder plaintiffs/interveners presented their arguments, respectively, in favor of and against the motion, and responded to the Court's questions and observations concerning the parties' positions.[35]

Although the Court took the matter under advisement at the conclusion of the hearing, the Court's questions and observations provided the parties with a better understanding of the Court's views on the cases filed by the stockholder plaintiffs and the Application filed by the Company.[36] With those observations in mind, the parties entered into an intense period of discussions concerning a potential resolution of the action.[37] In preparation for the discussions, Plaintiffs'

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[34] *Id.* ¶¶ 36-38.
[35] *Id.* ¶ 40; *see also* Transcript of Proceedings, August 26, 2014.
[36] *Id.* ¶ 41.
[37] *Id.* ¶¶ 41-42.

Counsel conducted further analyses of the Company's proxy statements and other public information about the Company and its compensation plans.[38]

Ultimately, after extensive discussions between Co-Lead Counsel and counsel for defendants, and with the approval of Lead Plaintiffs, additional plaintiff Davidoff and her counsel, Co-Lead Counsel presented a best and final settlement demand which, after further discussions, counsel for the Company accepted on behalf of the Company and the other defendants in the consolidated stockholder actions.[39] On October 7, 2014, the parties entered into a Memorandum of Understanding ("MOU"), which set forth the parties' agreement on the terms of a potential settlement as well as the discovery that the Company would produce in advance of the parties entering into formal stipulation of settlement, if Plaintiffs and Plaintiffs' Counsel remained satisfied with the terms of the MOU after conducting the anticipated discovery.[40]

Consistent with the terms of the MOU, the Company produced, among other things: (1) charts showing stock awards (included vesting schedules) and summary compensation for all Section 16 officers, similar to the charts that had been included in the last two proxy statements for the six top executives; (2) information about the number of other employees who received stock grants from the February

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[38] *Id.* ¶ 41.
[39] *Id.* ¶ 42.
[40] *Id.* ¶ 43.

2013 Vote the total amount of those awards; and (3) other documents pertaining to (a) the 2011 Plan voting requirements, (b) the February 2013 Vote and proxy, (c) the April 2014 bylaw change, (d) the April 2014 proposals to add another 30 million shares to the 2011 Plan share reserve and the 2014-2018 LTIP, and (e) the accounting for the 2013 stock awards. In all, based on the MOU and subsequent discussions between counsel for the parties, Cheniere produced over 7,500 pages of documents, all of which Plaintiffs' Counsel reviewed and analyzed.[41]

Plaintiffs' counsel further deposed David B. Kilpatrick, a director of the Company and chairman of the board's compensation committee, and Greg W. Rayford, Senior Vice President and General Counsel.[42]

After full consideration of the discovery provided, Plaintiffs and Plaintiffs' Counsel believed that the discovery supported the settlement reached through the MOU. Accordingly, the parties went forward with finalizing the Stipulation, which was executed and submitted to the Court on December 12, 2014.[43] The Settlement provides that in consideration for the full settlement and release of all Released Plaintiffs' Claims against the Released Defendant Persons and the dismissal with prejudice of the Actions:

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[41] *Id.* ¶¶ 44-46.
[42] *Id.* ¶ 47.
[43] *Id.* ¶ 48 and Exhibits 2a-2d (Plaintiffs' declarations supporting Settlement).

A. The Parties will jointly request that the Court validate, pursuant to 8 *Del. C.* § 205, all Existing Awards (whether vested or unvested, provided however that all unvested shares shall remain subject to the terms of the award agreements) and all common stock issued or to be issued in connection with the Existing Awards, and further declare that current holders of the Existing Awards are entitled to ownership of such shares (subject to the terms and conditions of the award agreements, including any outstanding requirements for vesting) (the "Validation").[44]

B. Except with respect to the stockholder vote concerning the Available Shares set forth in paragraph F below (paragraph 1.F. of the Stipulation), Cheniere will not seek stockholder approval for stock-based compensation beyond that which was the subject of Amendment No. 1 prior to January 1, 2017.

C. Except as permitted by paragraph F (paragraph 1.F. of the Stipulation) below (and subject to the following sentence), prior to January 1, 2017, Cheniere will not award stock-based compensation to Company executives, directors or consultants other than to the extent stockholders have already approved such compensation or such compensation was subject to the Validation. Notwithstanding the foregoing, authorized stock (unissued or treasury), other than the Available Shares, may be used to compensate new employees (inclusive of individuals who had a bona fide period of non-employment with the Company) without violating the preceding sentence; and a cash pay award (bonus, incentive, etc.) tied to the

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[44] *Id.* ¶ 49; *see also* Stipulation ¶ 1 at 12-16. "Existing Awards" include the approximately 17,154,370 shares (subject to equitable adjustment in according with the terms of the 2011 Plan) that were awarded following the February 2013 Vote from the shares included in Amendment No. 1 to the 2011 Plan, which awards either had vested or were outstanding subject to vesting conditions. "Available Shares" consist of approximately 7,845,630 shares (subject to equitable adjustment in accordance with the terms of the 2011 Plan) of the 25 million shares listed with the NYSE MKT LLC and registered with the SEC subject to Amendment No. 1 that either had not been awarded or had again become available for grant following the forfeiture or lapse of awards.

performance of the Company's stock shall not constitute stock-based compensation.

D. All compensation-related matters submitted by Cheniere to a stockholder vote on or before September 17, 2022 will be subject to a "majority of the shares present and entitled to vote" standard. For the avoidance of any doubt, pursuant to this standard, abstentions will be counted as the functional equivalent of "no" votes and broker non-votes will not be considered in determining the outcome of the resolution, but will be counted for purposes of establishing a quorum. Nothing set forth herein shall be interpreted as imposing an obligation on the Company to submit any matter to a stockholder vote.

E. The Compensation Committee of the Cheniere Board of Directors will be comprised exclusively of independent directors defined in accordance with the rules of the NYSE MKT (or the rules of the primary exchange on which the Company common stock is listed in the future).

F. With respect to the Available Shares, the Parties will jointly request that the Court enter an order, pursuant to 8 *Del. C.* § 205, as follows (the "Available Share Order" and together with the Validation, the "Section 205 Orders"):

1. No earlier than 90 days after the Court's entry of the Judgment, the Company may hold a stockholder vote to approve or not approve the issuance of awards with respect to the Available Shares. Any such vote will be subject to a "majority of the shares present and entitled to vote" standard. For the avoidance of any doubt, pursuant to this standard, abstentions will be counted as the functional equivalent of "no" votes and broker non-votes will not be considered in determining the outcome of the resolution, but will be counted for purposes of establishing a quorum.

2. The Company will not award any of the Available Shares pending a stockholder vote pursuant to this paragraph F (including its subparts) (which, until such approving vote and permitted use thereafter or termination of the 2011 Incentive Plan, shall be evidenced by an electronic reserve of

approximately 7,845,630 shares solely for use pursuant to Amendment No. 1). If the shareholders do not approve the issuance of the awards with respect to the Available Shares, those shares shall be authorized but unissued shares and shall not be awarded under Amendment No. 1 or used for any other compensation purpose whatsoever.

3. If the Cheniere stockholders approve the issuance of the awards with respect to the Available Shares pursuant to this paragraph F (including its subparts), the Available Shares shall be valid for compensation use and may be awarded pursuant to the terms of the 2011 Plan; provided, however, that no more than 1 million of the Available Shares (subject to equitable adjustment) may be awarded to Mr. Charif Souki.

Pursuant to the Court's Order of January 5, 2015, a notice of the pendency of the Action and proposed Settlement was thereafter provided to the members of the proposed Class and current Cheniere stockholders.

ARGUMENT

I. The Settlement Should Be Approved As Fair, Reasonable And Adequate

A. The Standard for Approving the Settlement

Delaware has long favored the voluntary settlement of contested claims.[45] In reviewing the settlement of an action brought on behalf of a company and its stockholders, the Court "consider[s] the nature of the claim, the possible defenses

[45] *See, e.g., Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991); *In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 265-66 (Del. 1990); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1102 (Del. 1989); *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986).

thereto, the legal and factual circumstances of the case, and then . . . appl[ies] its own business judgment in deciding whether the settlement is reasonable in light of these factors."[46]

The Court is "not required to decide any of the issues on the merits."[47] Rather, the Court's duty is to consider the nature of the claims, the possible defenses, the legal and factual obstacles to be faced by plaintiffs at trial, and the delay, expense and complexity of litigation.[48] Of particular importance is balancing the strength of plaintiffs' claims being compromised against the benefits secured by the settlement for class members.[49] As the Delaware Supreme Court summarized in *Polk*, facts and circumstances that may be considered by courts in assessing the overall fairness of a proposed settlement include: (1) the probable validity of the claims; (2) the apparent difficulties in enforcing the claims through the courts; (3) the delay, expense and trouble of litigation; (4) the amount of the compromise as compared with the amount of any collectible judgment; and (5) the views of the parties involved.[50] When considered under these standards, the Settlement is fair, reasonable, adequate and in the best interests of all involved.

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[46] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1284 (Del. 1989) (quoting *Polk*, 507 A.2d at 535).
[47] *Polk*, 507 A.2d at 536.
[48] *See Kahn*, 594 A.2d at 58-59.
[49] *Barkan*, 567 A.2d at 1284; *Polk*, 507 A.2d at 535.
[50] *Polk*, 507 A.2d at 536.

B. Analysis of the Claims and Benefits Achieved

1. Analysis of the Claims in This Action

Franchise rights, which are at the core of all stockholder rights, have a history of enjoying particularly critical protection from the Delaware judiciary. In *EMAK Worldwide*, the Delaware Supreme Court recently re-affirmed its view that stockholder voting rights are "sacrosanct."[51]

Until April 3, 2014, Cheniere's bylaws set forth a clear voting standard to be used in all stockholder elections:

> Each Stockholder shall be entitled to one vote for each share held of record by such Stockholder. Except as otherwise provided by law or the Certificate of Incorporation, when a quorum is present at any meeting of Stockholders, ***the vote of the recordholders of a majority of the Shares entitled to vote thereat, present in person or by proxy, shall decide any question brought before such meeting***.[52]

This is equivalent to the default standard contained in the DGCL, which provides that "[i]n all matters other than the election of directors, the affirmative vote of the majority of the shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders[.]"[53]

In 2005, Vice Chancellor Noble determined that a company that had the "same standard" in its bylaws as the Delaware default standard properly counted,

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[51] *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012).
[52] Former Bylaw § 2.7 (emphasis added).
[53] 8 *Del. C.* § 216 (2).

and was required to count, abstentions as "no" votes in determining that a stockholder proposal failed to gain majority approval.[54] As determined in *Licht*, the Delaware standard in Section 216 "looks to a majority of shares (1) present or represented at the meeting and (2) entitled to vote."[55] On this basis, the *Licht* court held that bylaws with these same terms have the "same standard" and are governed by the same interpretation.[56]

On February 1, 2013, Cheniere's stockholders voted on whether to approve Amendment No. 1, which requested authorization to issue 25 million additional shares under the 2011 Plan.[57] At the Special Meeting, as to Amendment No. 1, 77,011,739 shares were voted in favor, 57,907,345 were voted against, and 36,252,581 shares abstained from voting.[58] Thus, based on Cheniere's then-current voting bylaw and consistent with the reasoning of *Licht*, Amendment No. 1 did not receive the support of a majority of the shares present and entitled to vote, and therefore did not pass under the standard contained in the bylaw.

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[54] *Licht v. Storage Tech. Corp*., C.A. No. 524-N, 2005 WL 1252355, at *2-3 (Del. Ch. May 13, 2005).
[55] *Id.* at *3.
[56] *Id.* at *2-4; *see also id*. at *5 ("If a shareholder is at a shareholders' meeting and abstains, the shares owned by that shareholder are fairly characterized as both present and entitled to vote.").
[57] Golan Decl. ¶ 5.
[58] *Id.*

This Court has made clear that bylaws are contracts that bind stockholders and directors to their terms. As then Chancellor Strine stated:

> In an unbroken line of decisions dating back several generations, our Supreme Court has made clear that the bylaws constitute a binding part of the contract between a Delaware Corporation and its stockholders.[59]

Plaintiffs instituted suit seeking to, among other things, hold Defendants accountable for breaching the Company's bylaws, roll back the awards of stock made pursuant to Amendment No. 1, and enjoin Defendants from seeking stockholder authorization to issue more shares under Amendment No. 2.

Although Plaintiffs and Plaintiffs' Counsel believe that the claims asserted have merit, the Company and other Defendants raised various defenses to the claims and further sought ratification of the awards made pursuant to Amendment No. 1, even if the Court found that the February 2013 Vote had not been sufficient to pass Amendment No. 1 under the voting bylaw in place at that time.[60] As a result, the Court could have found, among other things, that (a) the stockholder

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[59] *Boilermakers Local 154 Ret. Fund v. Chevron Corp*., 73 A.3d 934, 955 (Del. Ch. 2013) (citing *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) and *Lawson v. Household Fin. Corp.* 152 A. 723, 726 (Del. 1930)). *See also* Henry Winthrop Ballantine, *Ballantine on Corporations*, at 440 (1946) ("Directors and officers are bound by the by-laws."); 8 William Meade Fletcher, et al., *Fletcher Cyclopedia of the Law of Corporations* § 4197, at 803–04 (perm. ed., rev. vol. 2010) ("The corporation, and its directors and officers, are bound by and must comply with [the bylaws.]").

[60] Golan Decl. ¶ 33; *see also* Application.

vote taken on February 1, 2013 had approved the proposal made in Amendment No. 1 to increase the number of shares in the 2011 Plan share reserve by 25 million shares, (b) there were no misrepresentations in the December 31, 2012 proxy statement or in subsequent proxy statements concerning the voting standard for or the result of the vote taken on February 1, 2013, and/or (c) even if the Court had concluded that abstentions should have been counted as "no" votes in connection with the February 1, 2013 vote, equitable factors supported a declaration under 8 *Del. C.* § 205 that any stock issued or to be issued pursuant to Amendment No. 1 was valid, and could have thus entered judgment for Defendants dismissing Plaintiffs' claims.[61] Therefore, Plaintiffs negotiated and agreed to the Settlement in order to provide substantial immediate and long-term relief to Cheniere stockholders and to avoid the risks and expense of continued litigation.

2. The Litigation Confers Substantial Benefits on Cheniere and its Stockholders

This litigation and the Settlement unquestionably provide substantial benefits to Cheniere and its stockholders. It is critically important that a corporation and its boards of directors adhere to the corporation's governing documents, including its bylaws.[62] Under the general scheme in Delaware,

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[61] Golan Decl. ¶ 50.
[62] *See* note 59, above.

however, enforcement of bylaws typically falls to the stockholders.[63] In keeping with and in furtherance of the role that stockholders play under Delaware law, Plaintiffs and Co-Lead Counsel took action by investigating what appeared to be a violation of the Company's bylaws and filing complaints and other submissions that brought the situation at issue to light. As a direct and sole result of Plaintiffs' actions, Cheniere's improper actions with regard to the vote on Amendment No. 1 were publicly revealed to the Company's stockholders and further unauthorized dilution of their ownership stakes was prevented.

Moreover, through the Settlement, Plaintiffs secured enormously significant quantifiable and unquantifiable benefits for Cheniere and its stockholders, including:

- A restriction on issuing, for compensation purposes, 7.845 million of the shares covered by Amendment No. 1 – which the Company had heretofore claimed had been validly set aside for compensation purposes – unless and until the stockholders approve such issuance in accordance with the "present and entitled to vote" standard;

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[63] *See, e.g.*, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 956 (Del. Ch. 2013), *judgment entered sub nom. Boilermakers Local 154 Ret. Fund & Key W. Police & Fire Pension Fund v. Chevron Corp.* Nos. 7220-CS, 7238-CS, 2013 WL 3810127 (Del. Ch. June 22, 2013) ("even though a board may…be granted authority to adopt bylaws, stockholders can check that authority by repealing board-adopted bylaws"); *Klaassen v. Allegro Dev. Corp. et al.*, C.A. No. 8626-VCL, 2013 WL 5739680, at *19 (Del. Ch. Oct. 11, 2013) ("It is the general rule that the stockholders, through bylaws, may dictate the process that directors use to manage the corporation …. [T]raditionally, when a board took action in contravention of a mandatory bylaw, the board action was treated as void.") (citations omitted).

- An agreement not to award more than 1 million of those 7.845 million shares to Souki, even if Cheniere stockholders approve the issuance of those shares for compensation purposes;

- An agreement not to seek stockholder approval for any further stock based compensation until 2017;

- An agreement to apply the "present and entitled to vote" standard to any future compensation-related stockholder vote for another seven and a half years, until September 17, 2022; and

- An agreement that the compensation committee of the board shall be comprised exclusively of independent directors as defined by the NYSE MKT or the rule of the primary exchange on which the Company's stock may be listed in the future.[64]

These are incredibly significant benefits for Cheniere and its stockholders. While not all of these benefits are quantifiable, certain portions of the Settlement are.

To value the provision in the Settlement requiring the Company to undertake a re-vote of the 7.845 million shares in order to utilize those shares for any compensation purpose (which vote must be undertaken based on a majority of the shares present and entitled to vote standard), Plaintiffs' Counsel retained Gregory P. Taxin, a co-founder of the Glass-Lewis proxy advisory firm and a principal of a series of other money management, investment and consulting firms.[65] A copy of Mr. Taxin's report, which includes an extensive description of his background and

[64] Golan Decl. ¶¶ 49, 51; *see also* Stipulation ¶ 1 at 12-16.
[65] Golan Decl. ¶ 53.

expertise, and that includes as an exhibit his curriculum vitae, is attached to the Golan Decl. as Exhibit 3. As demonstrated in Mr. Taxin's report, the value of this provision of the Settlement is $565 million. *See* Report of Gregory P. Taxin, at 8-11.[66]

Plaintiffs also engaged Steven C. Root ("Root"), of Steven Hall & Partners ("Steven Hall"), to undertake an economic analysis of the Company's agreement not to request authorization to issue any more shares for compensation purposes until 2017.[67] Steven Hall is an independent compensation consulting firm that specializes in the area of executive compensation, board remuneration, and related corporate governance issues. Mr. Root, a founding partner and managing director of Steven Hall, leads Steven Hall's technical consulting services with respect to the legal, accounting, and tax aspects of board and executive compensation programs.[68]

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[66] As explained in Mr. Taxin's report, the approximately 7.845 million shares have effectively been placed under the control of Cheniere stockholders to determine whether to allow Cheniere's board to distribute those shares as compensation to Company insiders. The value of those shares – which the Company had set aside for use as compensation under the 2011 Plan, but that must now be approved by Cheniere stockholders under the "present and entitled to vote" standard to be utilized for compensation purposes – is $565 million, and it is highly unlikely that Cheniere stockholders will approve them for compensation purposes. *Id.*

[67] Golan Decl. ¶ 54. A copy of Mr. Root's report, which includes as an exhibit his curriculum vitae, is attached to the Golan Decl. as Exhibit 4.

[68] *See* Root report, at ¶¶ 1-4.

In performing his analysis, Mr. Root considered and analyzed the Company's historical compensation practices, as well as the 2014-2018 LTIP Plan and Amendment No. 2, for which the Company was seeking approval at the 2014 Annual Meeting.[69] Mr. Root conducted burn rate models under various scenarios, and also performed a Monte Carlo simulation on the proposed 2014-2018 LTIP.[70] Mr. Root utilized two methodologies to value this provision of the Settlement, a burn rate analysis and a Monte Carlo simulation. As demonstrated in Mr. Root's report, the savings during 2014, 2015 and 2016, based on a Monte Carlo simulation, were $1.159 billion, and based on the burn rate analysis was between $1.263 billion and $1.752 billion, depending on whether stockholders approve use of the Available Shares for compensation purposes.[71] Indeed, under both analyses, the value of this provision of the Settlement in 2014 ***alone*** was approximately $600 million.[72] Whatever valuation is utilized, these are very large sums that, absent this litigation and Settlement, would have been diverted from Cheniere stockholders to Company insiders.

In addition to the quantifiable benefits stemming from the prosecution and settlement of this case, there are further unquantifiable benefits in the Settlement.

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[69] *Id.* ¶¶ 9-10 *et seq*.
[70] *Id.* ¶¶ 13-14, 17-19, 20-26.
[71] *Id.* ¶¶ 10, *et seq*.
[72] *Id.* ¶¶ 19, 25.

Such benefits include the requirements that: (i) Cheniere conduct all compensation related votes under the voting standard under a "present and entitled to vote" standard until September 17, 2022; (ii) only independent directors sit on the board's compensation committee; and (iii) if Cheniere's stockholders approve the issuance of the 7.8 million shares, the board cannot award more than 1 million of those shares to Souki. Each of these also provides significant value to Cheniere stockholders.[73]

First, the application of the "present and entitled to vote" standard, rather than a "votes cast" standard, increases stockholder power to reject board and management proffered compensation plans. This gives the stockholders greater control over future dilution of their ownership in Cheniere through compensation awards, and serves to reinforce the mandate in Delaware law that corporate boards and management must strictly abide by a company's bylaws.[74]

Second, limiting the composition of the compensation committee solely to independent directors provides a greater likelihood that the Company's future compensation plans will not be tainted by management's influence.

Third, limiting the number of shares Souki can receive even if Cheniere stockholders approve the issuance of the 7.845 million shares places a strict limit

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[73] *See generally* Golan Decl. ¶ 55 & Ex. 3 (Taxin Report), at 12.
[74] *See* note 59, above.

on the amount of stock the board can allocate to Souki, who was the highest paid chief executive of a public company in the country in 2013. The significance of this limitation is borne out by comparing the limit achieved in the Settlement (no more than 1 million of the 7.845 million shares, if approved by the Company's stockholders, which is 12% of the total) with the number of shares that were granted to Souki by the board from Amendment No. 1 in December 2012 (6 million of the 25 million available shares, or 34%).

3. The Benefits of the Settlement Compare Favorably with the Risks of Continued Litigation

If the parties had not agreed to the Settlement, this Court, in response to the § 205 Application, would have determined the future of the litigation. Although Plaintiffs and their counsel believe that the Company's arguments were unavailing, the Court may have ruled in favor of Cheniere by validating the shares awarded pursuant to Amendment No. 1 and the February 2013 Vote, which could have effectively ended the litigation. Of course, it is impossible to predict how the Court would have ruled, but it is fair to say that a ruling in favor of the Company on its Application would have led to a far different result from the negotiated Settlement, and thereby would have deprived Cheniere stockholders of the enormous benefits achieved through the Settlement.

Moreover, even if the Court had ruled in favor of the Plaintiffs in the § 205 Application, that may only have allowed Plaintiffs to pursue their litigation of the

consolidated plenary action. Presumably, Defendants would have continued vigorously to pursue adjudication in their favor in the consolidated stockholder action, citing the many arguments they had made about management's and the board's alleged good faith in presenting Amendments Nos. 1 and 2 to Cheniere's stockholders, in changing the voting bylaw, and in issuing shares pursuant to the February 2013 Vote. Although Plaintiffs believe they would have ultimately prevailed, they would have still faced a lengthy and unpredictable litigation before they could have obtained any relief. At bottom, there was no certainty that Plaintiffs would have prevailed.

By agreeing to the Settlement, Plaintiffs have obtained significant relief that addresses the key claims in the case. It forces the Company to undertake a re-vote on more than 30% of the shares at issue in the February 2013 Vote in order to use those shares for any compensation purpose. It bars the Company from going forward either with the proposal to add another 30 million shares to the 2011 Plan's share reserve (Amendment No. 2) or any other stock-based compensation plan until 2017. And, among other things, the Settlement provides greater leverage to the Company's stockholders in compensation-related votes from now until September 17, 2022, by requiring compensation proposals to be approved by stockholders using a "present and entitled to vote" standard rather than a "votes cast" standard.

In agreeing to the Settlement terms, as described above, Plaintiffs have provided a quantifiable benefit of over $1.7 billion as well as the unquantifiable benefits described above. In addition, by agreeing to the Settlement, Plaintiffs and Plaintiffs' Counsel spared the Company and its stockholders, other parties to the case, and this Court the expense and delay of continued proceedings necessary to pursue the claims asserted through trial, as well as the uncertainty of appeals, while providing relief that Plaintiffs may not have been able to be achieve through further judicial proceedings. All of these factors favor approval of the Settlement.

C. The Experience and Opinion of Plaintiffs' Counsel Favors Approving the Settlement

The opinion of experienced counsel is entitled to weight in determining the fairness of a settlement.[75] Here, Plaintiffs' Counsel are experienced and skilled stockholder advocates who negotiated the terms of the Stipulation on behalf of Plaintiffs, and concluded that the Settlement is fair, reasonable, adequate, and in the best interests of the Company and the Class. Moreover, Plaintiffs' Counsel made this final determination only after engaging in intense, arms-length settlement negotiations with opposing counsel and conducting post-MOU discovery. The discovery included a review and analysis of over 7,500 pages of documents produced by the Company and conducting two depositions. The

[75] *See generally Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964).

reports submitted by two experts further demonstrate the extraordinary benefits that were achieved through the Settlement. Accordingly, Plaintiffs' Counsel's opinion is informed and this factor, like each of the other factors cited above, supports approving the Settlement.[76]

II. Final Approval of the Settlement Class Is Appropriate and the Consolidated Stockholders Litigation Should Be Certified as a Class and Derivative Action

Delaware courts liberally interpret Chancery Court Rule 23's requirements to favor class certification.[77] This is especially so in stockholder litigation. As this Court explained in *Shapiro*, "class certification . . . serves judicial efficiency since it allows a single court to determine claims involving one set of actions by defendants that have a uniform effect upon a class of identically situated shareholders."[78]

On January 5, 2015, the Court preliminarily certified the Class to include all record an beneficial owners of common stock of Cheniere, together with their successors, predecessors, representatives, trustees, executors, administrators, heirs, assigns or transferees, immediate and remote, and any person or entity acting for or

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[76] *See Neponsit Inv. Co. v. Abramson*, 405 A.2d 97 (Del. 1979) (approving settlement based, in part, on plaintiff's counsel's conclusion, reached after conducting pretrial discovery, that the settlement was fair and in the best interest of the class).

[77] *See Parker v. Univ. of Del.*, 75 A.2d 225, 227 (Del. 1950).

[78] *Shapiro v. Nu-West Indus., Inc.*, C.A. No. 15442-CC, 2000 WL 1478536, at *4 (Del. Ch. Sept. 29, 2000).

on behalf of any of them, who held shares of Cheniere common stock at any time between and including March 2, 2011 and the Effective Date (as defined in the Stipulation). Excluded from the class are Defendants and their immediate family members, any entity controlled by any of the Defendants and any successors in interest thereto (the "Class").

Chancery Court Rule 23(a) sets forth the threshold requirements that must be met for a class to be certified: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the class's interests."[79] As shown below, because Plaintiffs have met these requirements, as well as the requirements of Rule 23(b), the preliminarily certified Class should receive final approval for settlement purposes.

First, as of October 16, 2014, Cheniere had 236,846,177 shares of common stock outstanding.

Second, the commonality requirement is met "where the question of law linking the class members is substantially related to the resolution of the litigation

[79] Ch. Ct. R. 23(a)

even though the individuals are not identically situated."[80] Delaware Courts consistently find that complaints asserting breaches of fiduciary duties by corporate officers and/or directors present sufficiently common questions of law and fact to warrant class certification.[81] Here, questions of law or fact common to all plaintiffs and other members in the Class include, *inter alia*:

- Whether Cheniere's management team and board breached their fiduciary duties to and contract (via the bylaws) with Plaintiffs and the Class in connection with the February 2013 Vote, the issuance of shares under the 2011 Plan, the April 2014 bylaw amendment, and the April 28, 2014 Proxy for the 2014 Annual Stockholder Meeting;

- Whether the February 2013 Vote was conducted in accordance with the Company's then existing bylaws;

- Whether the shares issued pursuant to Amendment No. 1 should be ratified pursuant to Section 205; and

- Whether the Class was harmed by the alleged breaches of duty.

Third, typicality exists where "all Class members face the same injury flowing from the defendants' conduct."[82] Here, if the Defendants breached their duties and improperly issued shares for compensation purposes, all Cheniere stockholders, including Plaintiffs, are harmed in the same way — by diluting and

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[80] *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1225 (Del. 1991) (internal quotations omitted).
[81] *See, e.g., Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989); *Zirn v. VLI Corp.*, C.A. No. 9488-VCH, 1991 WL 20378 (Del. Ch. Feb. 15, 1991).
[82] *In re Talley Indus., Inc. S'holder Litig.*, C.A. No. 15961-VCL, 1998 WL 191939, at *9 (Del. Ch. Apr. 13, 1998).

devaluing their ownership in the Company, and through the Defendants' breaches of contract and fiduciary duties stemming from their failure to act in accordance with the Company's bylaws.

Fourth, the adequacy element requires that "a representative plaintiff must not hold interests antagonistic to the class, retain competent and experienced counsel to act on behalf of the class and, finally, possess a basic familiarity with the facts and issues involved in the lawsuit."[83] Plaintiffs' adequacy here is demonstrated by, among other things, their commencement and prosecution of this case, the Settlement achieved, and the declarations Plaintiffs have submitted.[84] Moreover, given the adequacy of the Plaintiffs with respect to the claims asserted on behalf of the Class of Cheniere stockholders, there should be no question about the Plaintiffs' adequacy with respect to the derivative claims asserted in this Action on behalf of the Company, especially given that the derivative claims were asserted based on express actions taken by the entire board in alleged contravention of the Company's bylaws and allegedly for the direct benefit of the board members and the Company's senior executives.

Finally, the action must also satisfy at least one of Rule 23(b)'s three subsections before this Court will certify a class. Actions challenging the exercise

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[83] *Oliver v. Boston University*, C.A. No. 16570-VCN, 2002 WL 385553, at *7 (Del. Ch. Feb. 28, 2002). (internal quotations omitted).
[84] *See* Golan Decl., Exhibits 2a-2d.

of fiduciary responsibilities in corporate transactions are routinely certified under Chancery Court Rules 23(b)(1) and (b)(2).[85] "Subdivision (b)(1) applies to class actions that are necessary to protect the party opposing the class or the members of the class from inconsistent adjudications in separate actions. Subdivision (b)(2) applies to class actions for class-wide injunctive or declaratory relief."[86] This Action readily satisfies these elements and, thus, certification of the proposed Class is proper under Chancery Court Rules 23(b)(1) and (b)(2), and the Action should also be certified as a proper derivative action.

III. The Requested Fee and Expense Award is Fair and Reasonable

For prosecuting this litigation on a fully contingent basis and obtaining significant benefits for the Company and the Class despite Defendants' zealous and aggressive defense, Plaintiffs' Counsel request that they be awarded attorneys' fees (inclusive of expenses) in the amount of $43.1 million. Plaintiffs' Counsel respectfully submit that the request is eminently fair and reasonable under the precedents of this Court and in light of the significant benefits, both quantifiable and unquantifiable, that were obtained as a result of the prosecution and resolution of this case.

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[85] *See Nottingham*, 564 A.2d at 1094-97.
[86] *Id*. at 1095 (internal quotations omitted).

Plaintiffs' Counsel seek the fee and expense award under the corporate benefit doctrine. Under the corporate benefit doctrine, a litigant who confers a benefit upon a class "is entitled to an award of counsel fees and expenses for its efforts in creating the benefit."[87] The "benefit need not be measurable in economic terms. Changes in corporate policy or . . . a heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees."[88]

Under the corporate benefit doctrine, the amount of the fee and expense award is committed to the sound discretion of the Court.[89] In exercising its discretion, this Court considers (1) the benefits achieved in the action, (2) the efforts of counsel and the time spent in connection with the case, (3) the contingent nature of the fee, (4) the difficulty of the litigation, and (5) the standing and ability

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[87] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).
[88] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989).
[89] *In re Abercrombie & Fitch Co. S'holders Derivative Litig.*, 886 A.2d 1271, 1273 (Del. 2005); *Tandycrafts*, 562 A.2d at 1165-66. *See also Ryan v. Gifford*, C.A. No. 2213-CC, 2009 WL 18143, at *13 (Del. Ch. Jan. 2, 2009) ("Such non-monetary recovery is properly considered by the Court in determining a fee award and in the past has served as the sole basis for a fee award.")

of counsel.[90] These so-called *Sugarland* factors fully support the present fee and expense application.

Additionally, under Delaware law, the Court will presume that Plaintiffs' lawsuit caused the Company to take whatever curative measures the board may dictate, and that any resulting benefit was the result of that lawsuit.[91] "This rebuttable presumption exists because it is the 'defendant, and not the plaintiff, who is in a position to know the reasons, events and decisions leading up to the defendant's action.'"[92] In other words, to avoid crediting Plaintiffs with the benefits received by stockholders, Defendants must establish that Plaintiffs' suit "did not in any way cause [their] actions."[93] "[T]he presumption of causation is a heavy one and it is to be expected that [the] defendant will not often be able to satisfy it.'"[94]

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[90] *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980); *In re Plains Res. Inc. S'holders Litig.*, C.A. No. 071-N, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005).

[91] *See Grimes v. Donald*, 791 A.2d 818 (Del. Ch. 2000) (defendants bear the burden of persuasion to show that no causal connection existed between the initiation of the lawsuit and any later benefit to the stockholders).

[92] *United Vanguard*, 693 A.2d at 1080 (quoting *Allied Artists Pictures Corp.*, 413 A.2d 876, 880 (Del. 1980)).

[93] *Cal-Maine Foods, Inc. v. Pyles*, 858 A.2d 927, 929 (Del. 2004).

[94] *San Antonio Fire & Police Pension Fund v. Bradbury*, C.A. No. 4446-VCN, 2010 WL 4273171, at *11 (Del. Ch. Oct. 28, 2010) (quoting *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 363 (Del. Ch. 1999)).

A. The Benefits Achieved

The benefits achieved through litigation are accorded the greatest weight in determining an appropriate fee award.[95] Even where no common fund is created, this Court has acknowledged that attorneys' fees can be based on results that provide real and tangible (even if difficult to quantify) benefits to stockholders. Indeed, while a non-quantifiable recovery can be the sole basis for a fee award,[96] the benefits achieved in this case include over $1.7 billion worth of quantifiable benefits as well as unquantifiable benefits.

By commencing and prosecuting this action, Plaintiffs' Counsel achieved clear and significant benefits for Cheniere and its stockholders, even outside the context of the Settlement.[97] After Jones's counsel filed the first complaint in this

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[95] *See Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000) ("Sugarland's first factor is indeed its most important – the results accomplished for the benefit of the shareholders.").

[96] *See, e.g., Tandycrafts*, 562 A.2d at 1165; *State of Wisconsin Inv. Bd. v. Bartlett*, C. A. No. 17727, 2002 WL 568417, at *5 (Del. Ch. April 9, 2002) (finding that a therapeutic benefit was caused by supplemental disclosures, and determining what was a reasonable fee for that benefit).

[97] *See, e.g., In re Del Monte Foods Co. S'holders Litig.*, C.A. No. 6027-VCL, 2011 WL 2535256, at *13 (Del. Ch. June 27, 2011) ("This was not cookie-cutter deal litigation in which Lead Counsel advanced routine process and disclosure arguments, then accepted a standard package of board minutes and bankers' books before agreeing to a disclosure-only settlement. … Lead Counsel had to develop, assemble, and advance persuasive legal arguments. The relative complexity of the litigation supports an award at the higher end of the range.")

action and a brief in support of an accompanying motion to expedite, the Company immediately postponed the 2014 Annual Meeting from June 12, 2014 to September 11, 2014. This was an extraordinary reaction of the Company and was widely recognized as such.[98]

For this meeting, Cheniere's board had recommended for stockholder approval the 2014-2018 LTIP and Amendment No. 2, which would have authorized the issuance of an additional ***30 million*** shares in the 2011 Plan's share reserve. Furthermore, on June 23, 2014, in the context of this litigation, Cheniere disclosed in a letter to the Court that it would no longer seek stockholder approval for Amendment No. 2 and 2014-2018 LTIP, a decision that was reported in the press on July 1, 2014, and only thereafter disclosed by the Company in its filing of a Definitive Proxy Statement on July 25, 2014.[99] Absent the actions of Plaintiffs and Plaintiffs' Counsel, there can be no doubt that Cheniere would have held the 2014 Annual Stockholder Meeting on June 12, 2014 and, considering that the voting standard had by then been changed by the board to a standard under which abstentions would not be counted as "no" votes, may have obtained approval to place the 30 million additional shares into the 2011 Plan's share reserve. However, after the filing of this Action and the public disclosures that were made through

[98] *See* Golan Decl. ¶ 23 and note 26, above.
[99] Golan Decl. ¶ 34.

Plaintiffs' filings, the Company simply could not go forward with those votes. Based on the $65.68 closing price of Cheniere stock on June 12, 2014, this by itself could be seen as resulting in over $1.97 billion in savings for the Company and its stockholders.

Cheniere stockholders will also have full information concerning the Company's compensation practices as a result of the actions of Plaintiff's Counsel. The Company's faulty description concerning the claimed "approval" of Amendment No. 1 has been corrected through this lawsuit, and can no longer be asserted in any future compensation votes. Thus, thanks to the Plaintiff's Counsel, Cheniere will be required to hold fully informed stockholder votes.[100]

Moreover, in negotiating and obtaining the Settlement, Plaintiff's Counsel secured other significant quantifiable, as well as unquantifiable, benefits for Cheniere and its stockholders, including:

- A restriction on issuing, for compensation purposes, 7.845 million of the 25 million shares covered by Amendment No. 1, unless and until the stockholders approve such issuance under a "present and entitled to vote" standard;

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[100] As noted in the cases cited above, it is critical that companies and their corporate boards adhere to their governing corporate documents, including their bylaws. In Delaware, it typically falls to stockholders and their counsel to enforce a company's bylaws when they are violated. By bringing this action, Plaintiffs' Counsel have helped uphold the integrity of the Delaware corporate law scheme and put corporate boards on notice that they may not flout their company's bylaws with impunity. This is also the type of vigilance and action the courts ought to encourage through fee awards.

- An agreement not to award more than 1 million of the 7.845 million shares to Souki, even if Cheniere stockholders approve the issuance of those shares;

- An agreement not to seek stockholder approval for any further stock based compensation until 2017;

- An agreement to apply the "present and entitled to vote" standard to any future compensation related stockholder vote for another seven and a half years, until September 17, 2022; and

- An agreement that the compensation committee of the board shall be comprised exclusively of independent directors as defined by the NYSE MKT or the rule of the primary exchange on which the Company's stock may be listed in the future.

As more fully described above, these are very significant benefits. Plaintiffs' expert, Mr. Taxin, has valued the Settlement provision involving the 7.845 million shares re-vote at $565 million. Plaintiffs' expert, Mr. Root, has valued the Settlement provision barring the Company from seeking stockholder approval to issue, for compensation purposes, any additional shares until 2017 at a minimum of $1.159 billion. These are enormous quantifiable benefits that certainly support Plaintiffs' Counsel's fee request.

Further unquantifiable benefits flow from the Settlement requirements that: (i) Cheniere conduct all compensation related votes under the "present and entitled to vote" standard (the standard under former bylaw § 2.7), rather than the "votes cast" standard that is contained in the current bylaw § 2.8, until September 17, 2022; (ii) the board's compensation committee consist solely of independent

directors; and (iii) even if Cheniere's stockholders approve the issuance of the 7.8 million shares, the board cannot award more than 1 million of those shares to Souki. As the Court stated in *Ryan v. Gifford*, such non-quantifiable benefits can readily support a settlement and fee request.[101] Accordingly, each of these is valuable to Cheniere stockholders, and collectively they give much greater control over Cheniere's future compensation practices to the stockholders.

For these reasons alone, the Court should grant in full Plaintiffs' Counsel's fee and expense request.

B. The Efforts of Experienced Counsel Resolved Complex Issues

The difficulty and complexity of the claims are also considered in determining an appropriate fee to award.[102] Here, the issues were complex and the course of the litigation was certainly novel.

While Plaintiffs contended that former bylaw § 2.7 was clear and left little, if any, room for interpretation, Defendants made arguments that the Company

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[101] *See Ryan*, 2009 WL 18143, at *10 ("As part of the Settlement, Maxim will also receive the benefit of substantial corporate governance changes designed to address the problems that led to the backdating of options. These changes are designed to assure that Maxim's options grant process is transparent and properly monitored, while still providing Maxim with the flexibility to use options to incentivize its employees. It is difficult to place a value on such non-pecuniary benefits; however, such governance reforms can provide substantial benefits and are appropriately considered by the Court when evaluating a proposed settlement.").

[102] *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1256 (Del. 2012).

conducted the Special Meeting and the vote on Amendment No. 1 properly. Much of the briefing involved analyzing the intricate interplays between Delaware law, Cheniere's bylaws, stock exchange rules, and general corporate practice. Thus, a favorable result in the litigation could not be predicted with any certainty.

Moreover, the procedural posture of this case was unique. Although the case commenced in standard fashion with the filing of several plenary complaints, the consolidation of those complaints, and the appointment of lead counsel, events quickly took a dramatic turn. Instead of seeking to defend themselves in the plenary actions, the Company filed a petition with the Court under Section 205 of the DGCL and sought a declaration asserting the validity of the 25 million shares covered by Amendment No. 1. Section 205 is a new statute that became effective on April 1, 2014, less than two months before the filing of the first complaint in this Action. It appears that no one, not even the Court, had experience litigating such a contested petition. The procedural setting was further complicated because stockholder complaints had earlier been filed, specifically asserting that Cheniere's actions had violated the Company's bylaws, were *ultra vires*, and should have been voided.

Finally, achieving a resolution of this case – especially one that provides such extensive benefits to the Company and its stockholders – will allow the Company to formulate business and compensation plans going forward, without

the cloud and uncertainties that the filing of the stockholder cases had raised for the Company's earlier stock-based awards and the proposals that had been presented for stockholder approval at the 2014 Annual Meeting. These factors, in addition to the complex issues raised in this litigation and the novel procedural devices employed, further support the requested attorneys' fee and expense award.

C. The Contingent Nature of the Fee and Standing of Counsel

Delaware courts recognize that counsel is typically "entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis."[103] Counsel here chose to litigate this matter on a fully contingent basis, investing time and money with no guarantee of any recovery. Delaware has a public policy to "reward this sort of risk taking in determining the amount of a fee award."[104]

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[103] *Ryan*, 2009 WL 18143 at *13; *see also Franklin Balance Sheet Invs. Fund v. Crowley*, C.A. No. 888-VCP, 2007 WL 2495018 at *12 (Del. Ch. Aug. 30, 2007) ("Fee awards should encourage future meritorious lawsuits by compensating the plaintiffs' attorneys for their lost opportunity costs (typically their hourly rate), the risks associated with the litigation, and a premium."); *In re Plains Res. Inc.*, 2005 WL 332811, at *6 (finding that plaintiffs' counsel were all retained on a contingent fee basis, and stood to gain nothing unless the litigation was successful).

[104] *First Interstate Bancorp*, 756 A.2d at 365; *see also Chrysler Corp. v. Dann*, 223 A.2d 384, 389 (Del. 1966) (awarding greater fees considering the contingent nature of the action).

In addition, the Court must consider the "standing and ability of Plaintiffs' counsel."[105] Here, Plaintiffs' Counsel are well-known to this Court for their skill and expertise in representing stockholders in complex litigation. They include firms that are among the preeminent corporate governance litigation firms in the country. In addition to their well-documented successes in previous litigation before this Court, their skill and experience is further evidenced by their ability to obtain the benefits conferred by the Settlement efficiently and with minimal Court intervention, and in the face of defenses raised by highly-respected counsel for Defendants. As such, this factor further supports the award of the requested fee.

D. Reasonableness of the Fee Sought

Considering both the quantifiable and unquantifiable benefits that this litigation has provided to the Class, Plaintiffs' Counsel's fee and expense request of $43.1 million is fair and reasonable. On a percentage basis, the requested fee (2.5% of the minimum aggregate value) is significantly lower that what this Court's precedents support in relation to the benefits conferred. The Delaware Supreme Court's decision in *Americas Mining Corp.* is highly instructive:

> Delaware case law supports a wide range of reasonable percentages for attorneys' fees, but 33% is "the very top of the range of percentages." The Court of Chancery has a history of awarding lower percentages of the benefit where cases have settled before trial. When a case settles early, the Court of Chancery tends to award 10–15% of

[105] *San Antonio Fire & Police Pension Fund*, 2010 WL 4273171, at *13.

> the monetary benefit conferred. When a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically including multiple depositions and some level of motion practice, fee awards in the Court of Chancery range from 15–25% of the monetary benefits conferred. "A study of recent Delaware fee awards finds that the average amount of fees awarded when derivative and class actions settle for both monetary and therapeutic consideration is approximately 23% of the monetary benefit conferred; the median is 25%." Higher percentages are warranted when cases progress to a post-trial adjudication
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> The question presented in this case is how to properly determine a reasonable percentage for a fee award in a megafund case. A recent study by the economic consulting firm National Economic Research Associates ("NERA") demonstrates that overall as the settlement values increase, the amount of fee percentages and expenses decrease. The study reports that median attorneys' fees awarded from settlements in securities class actions are generally in the range of 22% to 30% of the recovery until the recovery approaches approximately $500 million. Once in the vicinity of over $500 million, the median attorneys' fees falls to 11%.[106]

Despite acknowledging the existence of a "megafund" rule in other jurisdictions, the Delaware Supreme Court declined "to impose either a cap or the mandatory use of any particular range of percentages for determining attorneys' fees in mega-fund cases."[107] The Supreme Court decided that a 15% fee (*i.e.*, $300 million) on a result valued at $2 billion was not excessive. Further, the Court was unconcerned that it was awarding $35,000 per hour because "this Court expressly rejected the use of time expended as the principal basis for determining fees

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[106] *Ams. Mining Corp.*, 51 A.3d at 1259-60 (footnotes & citations omitted).
[107] *Id.* at 1261.

awarded to plaintiff's counsel. Instead, we held that the *benefit achieved* by the litigation is the 'common yardstick by which a plaintiff's counsel is compensated in a successful derivative action.'"[108]

This Court reiterated this yardstick in a recent decision, explaining that extraordinary attorneys' fees derive from extraordinary recoveries and not from anything particular to the litigation itself:

> The reward for an exceptional result comes not from a special appeal for case-specific largesse, but rather from the percentage calculation itself. A percentage of a low or ordinary recovery will produce a low or ordinary fee; the same percentage of an exceptional recovery will produce an exceptional fee. *See Ams. Mining Corp.*, 51 A.3d at 1259 (explaining that the "common fund is itself the measure of success"). The wealth proposition for plaintiffs' counsel is simple: If you want more for yourself, get more for those whom you represent.[109]

Clearly, the fee request here – which constitutes just 2.5% of the minimum aggregate value of the provisions that allow a re-vote of the 7.845 million shares remaining unallocated from Amendment No. 1 and that bars Cheniere from seeking any other stock-based compensation until January 1, 2017 – is fair and reasonable based on the benefits conferred, even taking into account the stage of the litigation at which the case settled. Fee awards in other cases bear this out.

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[108] *Id.* at 1257-58 (emphasis in original) (citation omitted).

[109] *In re Orchard Enters., Inc. Stockholder Litig.*, C.A. No. 7840-VCL, 2014 WL 4181912, at *8 (Del. Ch. Aug. 22, 2014), judgment entered sub nom. *In re Orchard Enters., Inc. Stockholders Litig.*, 2014 WL 4248096 (Del. Ch. Aug. 27, 2014).

Delaware courts have awarded as much as 33% of the benefit conferred to the corporation as attorney's fees,[110] and fee awards of 10% to 15% (and even higher) have been awarded in cases that were resolved at relatively early stages of the cases.[111]

Finally, although Delaware courts have traditionally also looked to the time and expenses incurred by plaintiffs' counsel as a "backstop check" when assessing reasonableness,[112] the Supreme Court's decision in *Americas Mining Corp.* and this Court's decision in *Orchard Enterprises* make clear that the *benefit achieved* is to be given primacy in setting an appropriate fee.[113] But even should this Court wish to consider Plaintiffs' Counsel's time and expenses, the fee request is still reasonable. Here, Plaintiffs' Counsel devoted over 3,000 hours in the pursuit of

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[110] *See, e.g., Goodrich v. E.F. Hutton Group*, 681 A.2d 1039, 1050 (Del. 1996) (33%).

[111] *Korn v. New Castle Cty.*, C.A. No. 767-CC, 2007 WL 2981939 (Del. Ch. Oct. 3, 2007) (awarding 10% when "there was limited discovery, no briefing, and no oral argument"); *Seinfeld*, 847 A.2d 330 (awarding 10% when case settled after limited document discovery and no motion practice); *In re The Coleman Co. S'holders Litig.*, 750 A.2d 1202 (Del. Ch.1999) (awarding 10% where counsel did not take a deposition or file or defend a pretrial motion); *see also In re Josephson Int'l, Inc.*, C.A. No. 9546, 1988 WL 112909 (Del. Ch. Oct. 19, 1988) (awarding 18% when case settled after ten days of document discovery); *Schreiber v. Hadson Petroleum Corp.*, C.A. No. 12169, 1986 WL 12169 (Del. Ch. Oct. 29, 1986) (awarding 16% when case settled "[s]hortly after suit was filed"); *In re Cablevision/Rainbow Media Group Tracking Stock Litig.*, C.A. No. 19819-VCN, 2009 WL 1514925 (Del. Ch. May 22, 2009) (awarding 22.5% where case settled at an early stage).

[112] *Abercrombie & Fitch*, 886 A.2d at 1274.

[113] *See* text at 49-51 & notes 106-109, above.

this case and incurred over $200,000 in expenses.[114] While the resulting hourly rate is admittedly high, it is far less than the effective hourly rate approved by the Supreme Court in *Americas Mining Corp*.[115] The fee request is also far less than the effective lodestar multiple of the fee approved in *Americas Mining Corp*.[116]

Moreover, as noted above, but for Plaintiffs' Counsel's efforts in identifying, investigating, researching, commencing, prosecuting and resolving this case, none of the benefits described above would exist, and the Company and its stockholders would be much the poorer for it.

CONCLUSION

For all of the foregoing reasons, Plaintiffs and Plaintiffs' Counsel respectfully submit that the Settlement should be approved, the consolidated stockholder litigation should be finally certified as a class and derivative action,

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[114] *See* Golan Decl. ¶ 64 and Exhibits 5 and 5a-5e thereto.

[115] *Ams. Mining Corp.*, 51 A.2d at 1252, 1257 (fee award represented a $35,000 hourly rate); *see also In re Genentech, Inc. S'holders Litig.*, C.A. No. 3911-VCS, Tr. at 6, 8, 56 (Del. Ch. July 9, 2009) (awarding $24.5 million fee that represented a $5,400 hourly rate); *In re Digex, Inc. S'holders Litig.*, C.A. No. 18336-CC, Tr. at 141, 147 (Del. Ch. Apr. 6, 2011) (7.5% fee award represented a $2,963.86 hourly rate in case for which plaintiffs' counsel were found to be only partially responsible for the benefit achieved).

[116] *Ams. Mining Corp.*, 51 A.2d at 1257-59 (fee award represented a 66x lodestar multiple); *see also In re Genentech, supra*, Tr. at 7, 56 (fee award represented an 11.3x lodestar multiple); *In re Digex, supra*, Tr. at 141, 147 (fee award represented an 8.8 lodestar multiple).

and the Court should approve Plaintiffs' Counsel's fee and expense request in its entirety.

Respectfully submitted,

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