

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MINDBODY, INC.,
STOCKHOLDER LITIGATION

CONSOLIDATED
C.A. No. 2019-0442-KSJM

**MOTION FOR (1) DISTRIBUTION OF FUNDS AND
(2) APPRAISAL SHARE ATTORNEYS' FEES**

There are two issues for the Court to resolve before closing the case: (i) the manner of distribution of the damages award of \$1 per share, plus pre- and post-judgment interest (the “Damages Award”), net of an award of attorneys’ fees (the “Net Damages Fund”), and (ii) an award of attorneys’ fees on the damages the appraisal petitioners have now opted to receive for the 8,001,902 Mindbody, Inc. shares subject to appraisal (the “Appraisal Shares”) in lieu of seeking a determination of an appraisal award (the “Appraisal Share Damages”).

Lead Plaintiffs request respectfully that the Court enter the [Proposed] Order Regarding Distribution of Damages and Appraisal Share Attorneys’ Fees (“Proposed Damages Distribution Order”). The Proposed Damages Distribution Order: (i) provides for distribution of the Damages Award consistent with the Class Distribution Order the Court entered on October 17, 2024, respecting the settlement with defendants Eric Liaw, Institutional Venture Partners XIII, L.P., and Institutional Venture Management XIII LLC (the “Liaw/IVP Settlement”) and (ii) awards attorneys’ fees of 33% of the Appraisal Share Damages consistent with the Court’s award of attorneys’ fees for the non-Appraisal Shares. In support, Lead Plaintiffs state as follows:

FACTUAL BACKGROUND

A. The Liaw/IVP Settlement Plan of Allocation Provided for *Pro Rata* Distribution of the Liaw/IVP Settlement to All Eligible Class Members

1. On June 8, 2022, the Court approved the \$27 million Liaw/IVP Settlement. In approving the Liaw/IVP Settlement, the Court appointed JND Legal Administration (“JND”) as Settlement Administrator and approved the “Plan of Allocation” set forth in the Notice of Pendency of Stockholder Class Action and Proposed Settlement with Defendants Liaw and IVP Entities, Settlement Hearing, and Right to Appear (the “Notice”).¹ The Plan of Allocation provided for distribution of the Net Settlement Fund (*i.e.*, \$27 million less attorneys’ fees and expenses) on a *pro rata* basis to “Eligible Class Members” based on the number of their “Eligible Shares.” Eligible Class Members are defined as members of the Class of:

all holders of Mindbody common stock as of the closing of the merger with affiliates of Vista on February 15, 2019 (“Closing”), whether beneficial or of record, including their legal representatives, heirs, successors in interest, transferees and assignees of all such foregoing holders, but excluding (i) defendants in this Action, (ii) any person who is, or was at the time of Closing, an officer, director, or partner of Mindbody, Vista, or the IVP Entities, (iii) the immediate family members, meaning the parents, spouse, siblings, or children, of any of the foregoing, (iv) any trusts, estates, entities, or accounts that held Mindbody shares for the benefit of any of the foregoing, and (v) the legal representatives, heirs, successors in interest, successors, transferees, and assigns of the foregoing.²

¹ Trans. ID 67349508 at 71-72.

² Stipulation of Settlement ¶ 1(b).

“Eligible Shares” are the number of shares of Mindbody common stock held by Eligible Class Members at the Closing.

2. After the Court approved the Liaw/IVP Settlement, JND identified all excluded stockholders, and Plaintiffs filed a Motion for Class Distribution Order on September 16, 2024 (the “Class Distribution Motion”).³ On October 17, 2024, the Court granted the Class Distribution Motion. The relevant portions of the Class Distribution Motion are repeated below for the Court’s benefit.

3. Pursuant to the Liaw/IVP Settlement, JND was to distribute the Net Settlement Fund to Eligible Class Members, including the appraisal petitioners (if they opted into the class), after deducting all payments previously allowed and the payment of JND’s fees and expenses requested and after deducting payment of any estimated taxes, the costs of preparing appropriate tax returns, administrative contingencies, and any escrow fees, as set forth in paragraph 11 of the Affidavit of Luiggy Segura in Support of Lead Plaintiffs’ Motion for Class Distribution Order, filed with the Court on September 16, 2024 (the “Liaw/IVP Distribution”).⁴

4. Each Eligible Class Member was allocated a *pro rata* payment from the Net Settlement Fund equal to the product of (i) the number of Eligible Shares held

³ Trans. ID 74329450.

⁴ In calculating the distribution of the Net Settlement Fund under the terms of the Court-approved Plan of Allocation, JND relied on Merger Records, the DTCC Allocation Report, and information provided by Defense Counsel. In June 2024, JND was advised by Lead Counsel of Mindbody’s publicly filed SEC Form 8-K/A dated February 21, 2019 indicating the existence of 43,642,996 Eligible Shares on January 18, 2019, prior to the merger Closing Date. JND will do the same respecting the Net Damages Fund.

by the Eligible Class Member and (ii) the “Per-Share Recovery” for the Liaw/IVP Settlement, which was determined by dividing the total amount of the Net Settlement Fund by the total number of Eligible Shares. (Segura Affidavit ¶ 11(a)).

5. Payments from the Net Settlement Fund to Eligible Class Members will be made in the same manner in which Eligible Class Members received the consideration from the merger (the “Merger Consideration”) or in the case of the appraisal petitioners, who did not receive the Merger Consideration at the same time of the Closing, into accounts designated by the appraisal petitioners. (Segura Affidavit ¶ 11(b)). Accordingly, if an Eligible Class Member’s shares of Mindbody common stock were held in “street name” and the Merger Consideration was deposited into that Eligible Class Member’s brokerage account, that Eligible Class Member’s broker will be responsible for depositing that Eligible Class Member’s damages payment into that same brokerage account.

6. Respecting the Mindbody common stock held of record at the closing of the merger (the “Closing”) by the Depository Trust & Clearing Corporation, including its subsidiary the Depository Trust Company (collectively, “DTCC”), through its nominee Cede & Co., Inc. (“Cede”), JND will cause that portion of the Net Damages Fund to be allocated to Eligible Class Members who held their shares through DTCC Participants to be paid to DTCC. DTCC shall then distribute that portion of the Net Settlement Fund among the DTCC Participants by paying each the Per-Share

Recovery times its respective Closing Security Position,⁵ using the same mechanism that DTCC used to distribute the Merger Consideration and subject to payment suppression instructions with respect to excluded shares and any other shares ineligible for recovery from the Net Damages Fund. (Segura Affidavit ¶ 11(c)). The DTCC Participants and their respective customers, including any intermediaries, shall then ensure *pro rata* payment to each Eligible Class Member based on the number of Eligible Shares beneficially owned by such Eligible Class Member. (*Id.*)

7. Respecting the Mindbody common stock held of record as of the Closing other than by Cede, as nominee for DTCC (a “Closing Non-Cede Record Position”), JND will make payment from the Net Settlement Fund directly to the record owner of each such Closing Non-Cede Record Position in an amount equal to the Per-Share Recovery times the number of Eligible Shares comprising such Closing Non-Cede Record Position. (Segura Affidavit ¶ 11(d)).

8. To the extent that any record owner, any DTCC Participants, or their respective customers, including any intermediaries, took or permitted actions that had the effect of increasing the number of shares of Mindbody common stock entitled to payment of the Merger Consideration, whether through permitting naked short-selling or the cash settlement of short positions or through any other means (“Increased Merger Consideration Entitlements”), such record owner, DTCC Participants, or their respective customers (including intermediaries) shall be

⁵ For each DTCC Participant, the “Closing Security Position” is the number of shares of Mindbody common stock reflected on the DTCC Allocation Report used by DTCC to distribute the Merger Consideration. See Notice at footnote 5.

responsible for paying to the ultimate beneficial owners of such Increased Merger Consideration Entitlements an amount equal to the Per-Share Recovery times the number of the Increased Merger Consideration Entitlements. Whether DTCC, any DTCC Participant, or DTCC Participants' customers are entitled to receive such funds from any such short-seller is not before this Court. (Segura Affidavit ¶ 11(e)).

9. Any person who purchased shares of Mindbody common stock on or before the Closing on February 15, 2019 but had not settled those shares at the Merger's Closing ("Non-Settled Shares") shall be treated as an Eligible Class Member (and their shares treated as Eligible Shares) with respect to those Non-Settled Shares, and a person who sold those Non-Settled Shares on or before the Closing on February 15, 2019 shall not be treated as an Eligible Class Member with respect to those Non-Settled Shares. (Segura Affidavit ¶ 11(f)).

10. In the event that any payment from the Net Settlement Fund is undeliverable or in the event a check is not cashed by the stale date (i.e., more than six months from the check's issue date), the DTCC Participants or the holder of a Closing Non-Cede Record Position shall follow their respective policies with respect to further attempted distribution or escheatment. (Segura Affidavit ¶ 11(g)).

11. Following the distribution of the Net Settlement Fund to DTCC Participants, inquiries by Eligible Class Members regarding payment of the Net Damages Fund should be made directly to DTCC Participants, such as banks or brokerage firms, through which they beneficially owned Eligible Shares. (Segura Affidavit ¶ 11(h)).

12. In order to encourage Eligible Class Members to cash their checks promptly, and to avoid or reduce future expenses relating to unpaid checks, all distribution checks will bear the following notation: “CASH PROMPTLY, VOID AND SUBJECT TO REDISTRIBUTION IF NOT CASHED BY [6 MONTHS AFTER ISSUE DATE].” (Segura Affidavit ¶ 11(i)).

13. All undeliverable or uncashed payments returned to JND by DTCC Participants or the holder of a Closing Non-Cede Record Position will be available for further distribution provided that such distribution is economically feasible. At such time as Co-Lead Counsel, in consultation with JND, determines that further distribution of the funds remaining in the Net Settlement Fund is not cost-effective, the remaining balance of the Net Settlement Fund, after payment of any unpaid fees or expenses incurred in connection with administering the Net Settlement Fund and after the payment of any estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees, will be contributed to the Combined Campaign for Justice (the “CCJ”). (Segura Affidavit ¶ 11(j)).

14. JND will be paid its fees and expenses incurred in connection with the administration of the Net Settlement Fund and estimated to be incurred in connection with the distribution of the Net Settlement Fund as set forth in Exhibit A to the Segura Affidavit, and Co-Lead Counsel may direct payment out of the Net Settlement Fund to JND in payment of any such outstanding fees and expenses.

B. The Court Awarded 33% of the Damages Fund as to the Non-Appraisal Shares

15. On November 27, 2023, the Court entered its Final Order and Judgment.⁶ The Final Order and Judgment awarded attorneys' fees as to the non-Appraisal Shares as follows:

For the results obtained on behalf of the 35,564,444 Non-Appraisal Shares in the Class Action, Co-Lead Counsel are awarded fees and expenses, payable out of the common fund, in the amount of 33% of (i) the \$1 per share Class damages as to the 35,564,444 Non-Appraisal Shares and (ii) pre- and post-judgment interest thereon.⁷

The Final Order and Judgment did not address attorneys' fees as to the 8,001,902 Appraisal Shares.⁸

ARGUMENT

A. The Court Should Approve Distribution of the Net Damages Fund Consistent with the Plan of Allocation in the Liaw/IVP Settlement

16. Plaintiffs submit that the Court should direct the distribution of the Net Damages Fund consistent with the distribution of the Net Settlement Fund.

17. On October 17, the Court granted the Class Distribution Motion, which provided for the distribution of the Net Settlement Fund pursuant to the Liaw/IVP Settlement Plan of Allocation.

⁶ Trans. ID 71485231.

⁷ *Id.* ¶ 5.

⁸ *Id.* at 2.

18. The Net Settlement Fund was set to be distributed in early December of 2024, but counsel held off on distributing the Net Settlement Fund after the Supreme Court's December 2 decision.

19. The former Mindbody stockholders eligible to receive their *pro rata* share of the Net Settlement Fund are the same Mindbody stockholders eligible to receive their *pro rata* share of the Net Damages Fund. Thus, Plaintiffs respectfully submit that the Net Damages Fund can and should be combined with the Net Settlement Fund and distributed to Eligible Class Members in a single distribution. *See* Supplemental Affidavit of Luiggy Segura in Support of Lead Plaintiffs' Motion for Distribution of Funds (setting out same Plan of Allocation as in the Affidavit of Luiggy Segura in Support of Lead Plaintiffs' Motion for Class Distribution Order, but updated to reflect the (i) Net Damages Fund and (ii) Appraisal Shares having elected into the Class).

20. The Court will retain jurisdiction to consider any further applications concerning the administration of the Net Damages Fund, and such other and further relief as the Court deems appropriate.

B. An Award of 33% of the Recovery on the Appraisal Shares is Appropriate

21. Co-Lead Counsel respectfully submit that an award of attorneys' fees equal to 33% of the Appraisal Share Damages is appropriate.

22. Now that the Appraisal Shares have opted into the Damages Award, Co-Lead Counsel seek the same award of attorneys' fees that the Court granted as to the

non-Appraisal Shares, *i.e.*, 33% of (i) the \$1 per share in damages and (ii) pre- and post-judgment interest thereon.

23. The same reasoning and conclusion the Court employed in awarding 33% for the damages on the non-Appraisal Shares applies with equal or greater force to the Appraisal Share Damages. The *Sugarland* factors are largely unchanged from when the Court granted the requested fee as to the non-Appraisal Shares, except that Co-Lead Counsel has expended more time and effort defending the Court's judgment on appeal and the aggregate fee award would be higher because the aggregate damages award is higher with the inclusion of the Appraisal Share Damages.

24. On December 11, 2024, \$67,719,937.28 was wired to an account designated by Co-Lead Counsel in satisfaction of the Damage Award.⁹ Under the Court's November 27, 2023, Final Order and Judgment, Co-Lead Counsel was awarded \$18,244,910.22 in attorneys' fees for the damage award on the non-Appraisal Shares. If the Court grants Co-Lead Counsels' request for the same percentage of attorneys' fees as to the Appraisal Share Damages, total attorneys' fees on the damages award would increase by approximately \$4 million for a total of \$22,347,579.30.

25. Awarding 33% in attorneys' fees on the Appraisal Share Damages is reasonable and would not create a windfall. At the time Co-Lead Counsel requested a fee award on the non-Appraisal Shares, counsel had dedicated 18,129.2 attorney hours to prosecution of this action. Without accounting for the hours dedicated to

⁹ See Trans ID 75293295.

defending the judgment on appeal, and including all attorneys' fee awards in the case, the implied hourly rate of the requested fee would be \$1,667.89 per attorney hour.¹⁰

26. This rate is reasonable in comparison to the non-contingent hourly rates of experienced and qualified counsel who practice before this Court¹¹ and is significantly lower than the effective hourly rates approved by this Court in comparable cases,¹² including the implied hourly rate that was recently affirmed by the Supreme Court in *In re Dell Technologies Inc. Class V Stockholders Litigation*, -- A.3d --, 2024 WL 3811075, at *14 (Del. Aug. 14, 2024) (affirming fee award that implied an hourly rate of approximately \$5,000).

¹⁰ This number of \$1,667.89 per attorney hour is derived by summing the previously awarded attorneys' fee for the partial settlement (\$7.89 million) and the total requested fee in connection with the judgment (*i.e.*, 33% of \$67,719,937.28, or \$22,347,579.30) and dividing that sum of \$30,237,579.30 by 18,129.2 attorney hours of Co-Lead Counsel.

¹¹ See generally Mimi Lamarre and Andrew Maloney, *Senior Partners Approach \$3,000 an Hour, As More Billing Rate Hikes Expected in 2025*, American Lawyer (Sept. 24, 2024), <https://www.law.com/americanlawyer/2024/09/24/senior-partners-approach-3000-an-hour-as-more-billing-rate-hikes-expected-in-2025/>.

¹² See, e.g., *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1257 (Del. 2012) (affirming fee award that implied "approximately \$35,000 an hour, if you look at it that way"); *In re Versum Materials, Inc. S'holder Litig.*, C.A. No. 2019-0206-JTL (Del. Ch. July 16, 2020) (TRANSCRIPT) (awarding fee that represented \$10,667 per hour), *aff'd*, 248 A.3d 105 (Del. 2021).

CONCLUSION

For the foregoing reasons, Plaintiffs seek entry of the [Proposed] Order Regarding Appraisal Share Attorneys' Fees and Distribution of Damages.

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