

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re: IHEARTMEDIA, INC., <i>et al.</i> , ¹ <div style="text-align: right;">Debtors.</div>	§ § § § § § §	Chapter 11 Case No. 18-31274 (MI) (Jointly Administered)
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**GAMCO ASSET MANAGEMENT, INC.’S
EMERGENCY MOTION FOR ENTRY OF AN ORDER
 (I) DIRECTING THE APPLICATION OF BANKRUPTCY
 RULES 7023 AND 7023.1, (II) CERTIFYING A CLASS, DESIGNATING A
 CLASS REPRESENTATIVE, AND APPOINTING CLASS COUNSEL FOR
 PURPOSES OF SETTLEMENT, AND (III) GRANTING RELATED RELIEF**

THIS MOTION SEEKS ENTRY OF AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

EMERGENCY RELIEF HAS BEEN REQUESTED. IF THE COURT CONSIDERS THE MOTION ON AN EMERGENCY BASIS, THEN YOU WILL HAVE LESS THAN 21 DAYS TO ANSWER. IF YOU OBJECT TO THE REQUESTED RELIEF OR IF YOU BELIEVE THAT THE EMERGENCY CONSIDERATION IS NOT WARRANTED, YOU SHOULD FILE AN IMMEDIATE RESPONSE. A HEARING WILL BE HELD ON THIS MATTER ON DECEMBER 11, 2018, AT 9:00 A.M. (CT) BEFORE THE HONORABLE MARVIN ISGUR, 515 RUSK STREET, COURTROOM 404, HOUSTON, TEXAS 77002.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEYS.

GAMCO Asset Management, Inc. (“GAMCO”) respectfully states the following in support of this emergency motion (this “Motion”).

¹ Due to the large number of Debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the Debtors and the last four digits of their tax identification, registration, or like numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ claims, noticing, and solicitation agent at <https://cases.primeclerk.com/iheartmedia>. The location of Debtor iHeartMedia, Inc.’s principal place of business and the Debtors’ service address is: 20880 Stone Oak Parkway, San Antonio, Texas 78258.

**Reservation of Rights - Settlement Remains Subject
to Agreement on Definitive Documentation and Final Approvals**

1. The Settlement (as defined herein) contemplated by the Joint Motion (as defined herein) and the documents attached thereto, remain subject to a final agreement being reached on certain of the document terms and the receipt of final approvals. Described in the Joint Motion and attached thereto are the current versions of the documents (CCOH's drafts and Debtors' drafts, where applicable), which if agreed upon, would definitively memorialize the agreement in principle that was announced at the status conference held on November 30, 2018 and set forth in the *Notice of Filing of Separation Settlement Term Sheet* that was filed on December 3, 2018 [Docket No. 2111]. As of the time of the filing of the Joint Motion, the settling parties have not reached final agreement on all of the terms of the documents, nor have all necessary final approvals been obtained. All of the settling parties' rights are reserved with respect to the description of the Settlement set forth in the Joint Motion and in the forms of the documents attached thereto. The Debtors (as defined herein) will file revised versions of the documents in advance of the hearing upon a final agreement being reached.

Relief Requested²

2. GAMCO, by and through its counsel, hereby seeks entry of an Order (the "Order") substantially in the form attached hereto as **Exhibit A**: (i) directing the application of rules 7023 and 7023.1 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and, by incorporation, rules 23 and 23.1 of the Federal Rules of Civil Procedure (the "Civil Rules");

² Capitalized terms not otherwise defined herein have the same meanings as set forth in the Plan (defined herein).

(ii) certifying a settlement class of minority shareholders of Clear Channel Outdoor Holdings, Inc.'s Class A common shares from March 14, 2015 to March 14, 2018 (collectively, the "CCOH Minority Shareholders," and together with GAMCO, the "Class Members" or "Class"), designating GAMCO as class representative ("Class Representative"), and appointing the law firm of Entwistle & Cappucci LLP as class counsel ("Class Counsel") for purposes of settlement; and

(iii) granting related relief.

3. Contemporaneously herewith, GAMCO, iHeartMedia, Inc., and its debtor affiliates (collectively, the "Debtors"), and Clear Channel Outdoor Holdings, Inc. ("CCOH" and together with GAMCO and the Debtors, the "Parties") are filing the *Joint Emergency Motion for Entry of an Order (I) Directing the Application of Bankruptcy Rules 7023 and 7023.1, (II) Preliminarily Approving the Settlement, (III) Approving the Retention of Prime Clerk LLC as Notice Administrator, (IV) Approving the Form and Manner of Notice, (V) Scheduling a Fairness Hearing to Consider Final Approval of the Settlement as Part of Confirmation of the Plan, and (VI) Granting Related Relief* (the "Joint Motion").

4. GAMCO requests emergency relief as the relief requested herein is procedural and integral to the commencement of the notice process set forth in the Joint Motion. As noted in the Joint Motion, the Parties are seeking only preliminary approval of the Settlement (as defined herein) at this time, and parties in interest will have at least thirty days after receiving notice to object to the approval of the Settlement on a final basis in connection with the confirmation order. Given these circumstances, GAMCO respectfully requests that the United States Bankruptcy Court for the Southern District of Texas (the "Court") approve the relief requested in this Motion on an emergency basis.

Jurisdiction and Venue

5. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The Court has authority to apply Civil Rules 23 and 23.1 pursuant to Bankruptcy Rules 7023, 7023.1, and 9014. GAMCO confirms its consent, pursuant to Bankruptcy Rule 7008, to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the Parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

6. Venue is permissible pursuant to 28 U.S.C. §§ 1408 and 1409.

7. The bases for the relief requested herein are section 1123(b) of title 11 of the United States Code (the “Bankruptcy Code”), Bankruptcy Rules 7023, 7023.1, and 9014, and Civil Rules 23 and 23.1.

Introduction

8. As noted above, contemporaneously herewith, the Parties are filing the Joint Motion requesting preliminarily approval of the settlement and mutual release attached to the Joint Motion as Exhibit 1 to Exhibit A (the “Settlement,” and the agreement, the “Settlement Agreement”) and incorporated into the *Modified Fifth Amended Joint Chapter 11 Plan of Reorganization of iHeartMedia, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* (the “Plan”) attached thereto. The Settlement Agreement is the product of hard-fought, good-faith, arms’-length negotiations between the settling parties that settles outstanding issues related to the Plan, the Delaware Action (as defined herein), and related claims,

bringing to a close what may have otherwise turned into lengthy, expensive, and complex litigation.

9. The Settlement Agreement is fair and reasonable to the Class Members. The Class Members, as shareholders of CCOH, have a direct interest in ensuring that CCOH is adequately capitalized following the separation of CCOH from the Debtors (the “Separation”) in order to preserve their equity investment. Without the Settlement Agreement, the Class Members face uncertainty regarding the outcome of litigation regarding the Plan and the Delaware Action (and any related claims). Even assuming GAMCO were to prevail, it could take years for the Class Members to receive any relief on their claims. By way of the Settlement Agreement, the Class Members will realize an *immediate* benefit – their equity interest in CCOH will be bolstered by the consideration being provided to CCOH under the Settlement.

10. As the Parties seek to release class, direct, and derivative claims through the Settlement Agreement, it is appropriate for the Court to apply Bankruptcy Rules 7023 and 7023.1, and by incorporation, Civil Rules 23 and 23.1. Pursuant to Civil Rule 23, the Court should certify the Class, designate GAMCO as Class Representative, and appoint Entwistle & Cappucci LLP as Class Counsel. The Class meets the requirements of Civil Rules 23(a) and 23(b)(1), and Class Counsel is competent, experienced, and best positioned to protect the interests of the Class Members. Accordingly, GAMCO respectfully requests that the Court enter the Order granting the relief requested in this Motion.

Background

11. On August 27, 2018, GAMCO filed a verified class action complaint (the “Complaint,” attached hereto as **Exhibit B**) in the Delaware Court of Chancery on its own

behalf and on behalf of the CCOH Minority Shareholders. *See GAMCO Asset Mgmt. v. Hendrix, et al.*, C.A. No. 2018-0633-JRS (Del. Ch.) (the “Delaware Action”).

12. The Complaint names as defendants (a) members of the CCOH Board as of November 29, 2017, including Blair Hendrix, Douglas L. Jacobs, Daniel G. Jones, Paul Keglevic, Vincente Piedrahita, Robert W. Pittman, Olivia Sabine, and Dale W. Tremblay (collectively, the “Board Defendants”); (b) members of a committee of independent directors of CCOH (the “Intercompany Note Committee”) as of November 8, 2017 (the “Intercompany Note Committee Defendants”); and (c) Bain Capital, LP (“Bain”) and Thomas H. Lee Partners, L.P. (“THL,” and together with Bain, the “Sponsor Entities,” and together with the Intercompany Note Committee Defendants and the Board Defendants, the “Defendants”). *See* Complaint ¶ 30.

13. The Complaint alleges that in November 2017 the Board Defendants and the Intercompany Note Committee Defendants breached fiduciary duties owed to the Class relating to the intercompany revolving promissory note, which evidences an intercompany balance owed by iHeartCommunications, Inc. (“iHC”) to CCOH (the “Intercompany Note”). The Complaint alleged that the defendants breached a fiduciary duty to cause CCOH to demand repayment under the Intercompany Note (or allow the Intercompany Note to mature) and simultaneously declare a *pro rata* dividend to CCOH’s shareholders. *See id.* ¶¶ 19-30. The Complaint seeks declaratory relief and damages for the Class. *See id.* at 77.

Basis for Relief

I. THE COURT HAS JURISDICTION OVER THIS MATTER AND SHOULD DIRECT THE APPLICATION OF BANKRUPTCY RULES 7023 AND 7023.1 AND CIVIL RULES 23 AND 23.1.

14. The Court has jurisdiction over this matter and should direct the application of Bankruptcy Rules 7023 and 7023.1 and Civil Rules 23 and 23.1 for the reasons set forth in paragraphs 58 through 60 of the Joint Motion.

II. THE COURT SHOULD CERTIFY THE CLASS, DESIGNATE GAMCO AS CLASS REPRESENTATIVE, AND APPOINT ENTWISTLE & CAPPUCCI LLP AS CLASS COUNSEL.

A. The Court Should Certify the Class.

15. “Settlement classes are a typical feature of modern class litigation, and courts routinely certify them . . . to facilitate the voluntary resolution of legal disputes.” *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010*, 910 F. Supp. 2d 891, 913 (E.D. La. 2012), *aff’d sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014); *see also, e.g., Prezant v. De Angelis*, 636 A.2d 915, 924 (Del. 1994) (recognizing the “beneficial aspects of temporary settlement classes,” which “allow several steps of litigation to be collapsed into one”).³

16. To certify the Class for purposes of settlement, the Court must determine that the requirements of Civil Rule 23(a) as well as Civil Rule 23(b)(1), (b)(2), or (b)(3) are satisfied. *See, e.g., Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 619 (1997); *Prezant*, 636 A.2d at 924. The Court is not to adjudicate the merits of the claims at the certification stage, *see Langbecker v. Electric Data Systems Corp.*, 476 F.3d 299, 307 (5th Cir. 2007). The Court has “wide discretion”

³ The Delaware court decisions cited herein provide guidance for this Court because the Complaint pleads claims under Delaware law and “Court of Chancery Rule 23 . . . is modeled on its federal counterpart.” *See Prezant*, 636 A.2d at 920.

in making the final determination. *Ordonez Orosco v. Napolitano*, 598 F.3d 222, 225 (5th Cir. 2010). Here, certification is warranted because the requirements of Civil Rules 23(a) and 23(b)(1) are readily satisfied.

1. The Class Satisfies the Requirements of Civil Rule 23(a).

17. Civil Rule 23(a) establishes four requirements for certification: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See* Fed. R. Civ. P. 23; *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1052 (S.D. Tex. 2012). The Class meets each of these requirements.

18. *Numerosity*. Civil Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable.” *See* Fed. R. Civ. P. 23(a)(1). A showing that the class consists of more than forty members “should raise a presumption that joinder is impracticable.” *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (quoting 1 NEWBERG ON CLASS ACTIONS § 3.05, at 3–25 (3d ed. 1992)); *In re Talbert*, 347 B.R. 804, 808- 809 (E.D. La. 2005) (finding numerosity requirement met when class potentially consisted of 88 members, while noting that classes consisting of as few as 25 or 30 members are certifiable). Courts may also consider additional factors, including “(i) the interest of judicial economy, (ii) whether the class involves small individual claims, (iii) the geographical dispersion of the class, and (iv) the ease with which class members may be identified.” *In re Rodriguez*, 432 B.R. 671, 692 (Bankr. S.D. Tex. 2010). But Civil Rule 23(a)(1) does not require a movant to show that every factor points toward numerosity for a court to find that numerosity exists. *See Mullen*, 186 F.3d at 624–25; *see also Reyes v. Julia Place Condominiums Homeowners Ass’n, Inc.*, No. CIV.A. 12-2043, 2014 WL 7330602, at *3 (E.D. La. Dec. 18, 2014) (“[a] common sense approach” is appropriate).

19. Here, the Class easily meets the numerosity requirement. “As of November 8, 2017, more than 36.1 million [CCOH] Class A common shares were outstanding and held by individuals and entities unaffiliated with Defendants, and members of the class are believed to exceed 100 and be spread across the U.S.” Complaint at ¶ 191. Pursuant to publicly available filings, GAMCO is one of the largest minority shareholders of CCOH but GAMCO holds only approximately 1.5 percent of the more than 50.4 million outstanding Class A common shares as of November 5, 2018. *See* Clear Channel Outdoor Holdings, Inc., Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-Q) (November 8, 2018); Clear Channel Outdoor Holdings, Inc., Proxy Statements Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Schedule 14A) (May 17, 2018); *see also* Clear Channel Outdoor Holdings, Inc., Statement of Acquisition of Beneficial Ownership by Individuals (Schedule 13G) (Jan. 18, 2018). Accordingly, the Class is so numerous that joinder is impracticable. *See Mullen*, 186 F.3d at 624 (“the size of the class in this case – 100 to 150 members – is within the range that generally satisfies the numerosity requirement”).

20. *Commonality*. Civil Rule 23(a)(2) requires that “there are questions of law or fact common to the class.” *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 368 (2011) (*citing* Fed. R. Civ. P. 23). “The principal requirement of [*Dukes*] is merely a single common contention that enables the class action ‘to generate common *answers* apt to drive the resolution of the litigation.’” *In re Deepwater Horizon*, 739 F.3d at 811 (*citing M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012)). “These ‘common answers’ may indeed relate to the injurious effects experienced by the class members, but they may also relate to the defendant’s injurious conduct.” *Id.* Regardless, “a *single* common question will do.” *Id.* (*emphasis added*); *see* 1 NEWBERG ON

CLASS ACTIONS § 3:21 (5th ed.) (“It is well settled that the requirement of ‘common questions of law or fact’ in Rule 23(a) is disjunctive; that is, *either* a question of law *or* a question of fact will suffice.”).

21. Where a practice has allegedly caused class-wide harm, the commonality requirement is easily met. *See Rodriguez*, 432 B.R. at 695; *see also* 1 NEWBERG ON CLASS ACTIONS § 3:20 (“When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.”).

22. Courts have routinely found that the commonality requirement is met in class actions involving an alleged breach of fiduciary duty owed to all class members alike. *See In re Enron Corp.*, MDL No. 1446, 2006 WL 1662596, at *9-10 (S.D. Tex. June 7, 2006) (collecting cases); *see also, e.g., In re Riverbed Tech., Inc. Stockholders Litig.*, C.A. No. 10484-VCG, 2015 WL 5458041, at *2 (Del. Ch. Sept. 17, 2015) (“This is a stockholder class action that alleges breaches of fiduciaries duties, raising identical issues with respect to each member of the very numerous Class.”).

23. Here, common questions of law and fact permeate all of the claims brought on behalf of all of the Class Members. Such questions include, among others:

- Whether the Intercompany Note Committee Defendants breached a fiduciary duty owed to the Class in November 2017 by failing to demand repayment on the Intercompany Note balance and declare a *pro rata* dividend to CCOH Class A shareholders based on the repayment.
- Whether the Board Defendants breached a fiduciary duty owed to the Class in November 2017 by failing to permit the Intercompany Note to mature and declare a *pro rata* dividend to CCOH Class A shareholders based on the repayment.

- Whether the Board Defendants breached a fiduciary duty owed to the Class in November 2017 by failing to demand repayment on the Intercompany Note balance and declare a *pro rata* dividend to CCOH Class A shareholders based on the repayment.
- Whether the Sponsor Entities breached a fiduciary duty owed to the Class in November 2017 by failing to direct the Board Defendants to let the Intercompany Note mature and declare a *pro rata* dividend to CCOH Class A shareholders based on the repayment.
- Whether the Sponsor Entities aided and abetted an alleged breach of fiduciary duty owed to the Class Members by the Board Defendants by failing to direct the Board Defendants to let the Intercompany Note mature and declare a *pro rata* dividend to CCOH Class A shareholders based on the repayment.

See Complaint ¶¶ 192, 212-223. If litigated, these common questions would generate common answers that would drive resolution of these claims. See *In re Deepwater Horizon*, 739 F.3d at 811. Accordingly, the Class satisfies the commonality requirement. See *id.*; see also *Riverbed Tech.*, 2015 WL 5458041, at *2.

24. *Typicality.* Civil Rule 23(a)(3) requires that the “claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The “test for typicality is not demanding.” *James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001), *abrogated on other grounds by M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012). “[T]he critical inquiry is whether the class representative’s claims have the same essential characteristics of those of the putative class.” *Id.*; see also 1 NEWBERG ON CLASS ACTIONS § 3:29 (“A plaintiff with typical claims will pursue his or her own self-interest in the litigation and, in so doing, will advance the interests of the class members, which are aligned with those of the representative.”). In other words, the test is whether the representative plaintiff’s claims “arise

from the same common nucleus of facts as the claims of absent class members.” *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 281 (W.D. Tex. 2007).

25. Here, the claims of GAMCO as Class Representative and the claims of the CCOH Minority Shareholders share the same essential characteristics and arise from a common nucleus of facts. Specifically, all of the claims on behalf of all of the Class Members focus on the following conduct as alleged in the Complaint:

- The Intercompany Note Committee Defendants’ failure in November 2017 to demand repayment on the Intercompany Note balance and declare a *pro rata* dividend of the proceeds to CCOH shareholders.
- The decision not to let the Intercompany Note expire by its own terms on December 15, 2017, at which time the outstanding balance and all interest accrued and unpaid would have become due and payable without any additional action by CCOH, and declare a *pro rata* dividend of the proceeds to CCOH shareholders.
- The Board Defendants’ failure between November 2017 and the Petition Date to demand repayment on the Intercompany Note and declare a *pro rata* dividend of the proceeds to CCOH shareholders.
- The Sponsor Entities’ failure to direct the Board Defendants to permit the Intercompany Note to expire and to declare a *pro rata* dividend of the proceeds to CCOH shareholders.

See Complaint ¶¶ 196-223. GAMCO does not allege that it was singled out in any respect; instead, GAMCO alleges that it and the CCOH Minority Shareholders suffered the same harm as a result of the same course of events. Accordingly, the Class satisfies the typicality requirement.

26. *Adequacy*. Civil Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This involves examination of both the representative’s counsel and the representative itself. See *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 294 (5th Cir. 2017), *cert. denied sub nom. Almond v.*

Singing River Health Sys., 138 S. Ct. 1000 (2018); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982). More specifically, “[t]he adequacy requirement mandates an inquiry into the zeal and competence of the representative’s counsel and into the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees.” *Id.* “The adequacy inquiry also ‘serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent.’” *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 479–80 (5th Cir. 2001) (quoting *Amchem*, 521 U.S. at 625). Minor conflicts of interest will not defeat certification, however; “the conflict must be a ‘fundamental’ one going to the specific issues in controversy.” *In re Deepwater Horizon*, 739 F.3d at 813 n. 99 (quoting *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003)).

27. Here, there is no potential for intraclass conflicts because GAMCO’s interests and those of the CCOH Minority Shareholders are fully aligned. As one of the largest minority shareholders, GAMCO stands to benefit as the Settlement provides substantial benefits for CCOH and all minority shareholders of CCOH. *Cf.* 1 NEWBERG ON CLASS ACTIONS § 3:57 (5th ed.) (“Logically, the adequacy of the class representative prong of Rule 23(a)(4) tends to merge with the requirement that the class representative’s claims be typical of the class.”). Additionally, as demonstrated by the *Declaration of Andrew J. Entwistle* (the “Entwistle Declaration”), annexed hereto as **Exhibit 1** to **Exhibit A**, and as evidenced by the substantial benefit that would accrue to the Class Members from the Settlement, GAMCO’s chosen counsel is qualified, experienced, and best positioned to continue to represent the interests of all of the Class Members.

2. The Class Satisfies the Requirements of Civil Rule 23(b)(1).

28. Civil Rule 23(b)(1) provides for class certification where prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1).

29. To certify a class under Civil Rule 23(b)(1), it is only necessary to conclude that either subsection (b)(1)(A) or (b)(1)(B) is applicable. *See, e.g., In re Enron Corp.*, 2006 WL 1662596, at *13; *In re Ebix, Inc. Stockholder Litig.*, C.A. No. 8526, 2018 WL 3570126, at *4-5 (Del. Ch. July 17, 2018); *see also* 2 NEWBERG ON CLASS ACTIONS § 4:2 (5th ed.) (“The two parts of 23(b)(1) consider similar situations from opposite perspectives. The situation is that of multiple suits arising out of the same subject matter.”). Where, as here, a class seeks to litigate claims for breach of fiduciary duty, courts have routinely concluded that certification is proper under both (b)(1)(A) and (b)(1)(B). *See, e.g., In re Enron Corp.*, 2006 WL 1662596, at *13-15; *In re Merck & Co., Inc. Securities, Derivative & ERISA Litigation*, MDL No. 1658, 2009 WL 331426, *10-12 (D.N.J. 2009); *see also, e.g., Ebix*, 2018 WL 3570126, at *4-5; *Noerr v. Greenwood*, C.A. No. 14320, 2002 WL 31720734, at *5 (Del. Ch. Nov. 22, 2002); *Turner v. Bernstein*, 768 A.2d 24, 30-

31 (Del. Ch. 2000); *In re Mobile Communications Corp. Consolidated Litigation*, C.A. Nos. 10627, 10638, 10644, 10656, 10697, 1991 WL 1392, at *15 (Del. Ch. Jan. 7, 1991).

30. In *Ebix*, for example, the court certified a proposed class of shareholders under subsection (b)(1)(A) of Civil Rule 23 because “[t]he prosecution of separate actions by individual members of the class would create a risk of inconsistent and varying adjudications with respect to individual members of the class – for example, determinations with regard to whether [d]efendants breached their fiduciary duty.” 2018 WL 3570126, at *4. At the same time, the court recognized that certification was also proper under subsection (b)(1)(B) of Civil Rule 23 because “adjudications with respect to individual members of the class, as a practical matter, would either be dispositive of the interests of the other members of the class who are not parties to the adjudications, or substantially impair or impede their ability to protect their interests.” *Id.*; *cf. In re Enron Corp.*, 2006 WL 1662596, at *15 (“For all these reasons, the Court finds that certification under both [Civil] Rule 23(b)(1)(A) and (b) is appropriate here.”); *Turner*, 768 A.2d at 35 (“Rule 23(b)(1)(A) is satisfied in cases such as this one. Certification under Rule 23(b)(1)(B) is equally appropriate.”).

31. Here, as in *Ebix* and the other cases cited above, the only substantive issues are whether the Defendants breached fiduciary duties (or aided and abetted breaches of fiduciaries duties) owed to the Class as a whole. Regardless of liability, the Defendants’ conduct affected the Class Members the same way. There is no reason to favor piecemeal, serial adjudication of the same substantive issues arising out of the same events. Such a scenario would create a palpable risk of inconsistent adjudications and prejudice both the Class Members and the Defendants—precisely the result Civil Rule 23(b)(1) exists to avoid. *See Fed. R. Civ. P. 23 advisory*

comm. notes (explaining that Civil Rule 23(b)(1) was designed to accommodate, for example, “actions by shareholders” and “action[s] which charge[] a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries”); *cf.* 2 NEWBERG ON CLASS ACTIONS § 4:2 (5th ed.) (“The 23(b)(1) class action is the most organic form of aggregate litigation because when 23(b)(1) circumstances are present, unitary adjudication is perceived as not only preferable but essential as well.”).

32. Certification under Civil Rule 23(b)(1) is also appropriate here because the Class seeks primarily declaratory relief, with any damages “flowing directly from liability to the class as a whole on the claims forming the basis of the . . . declaratory relief.” *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998). Although in other contexts class actions for damages can be certified under Civil Rule 23(b)(3), certification under Civil Rule 23(b)(1) is the proper approach where, as here, a damages award would be only “incidental” to a declaration of liability and calculated on a uniform, per-share basis. *See Id.*; *see also In re Enron Corp.*, 2006 WL 1662596, at *18-19 (“[W]hen the choice exists between (b)(1) and (b)(3) certification, generally it is proper to proceed under (b)(1) exclusively in order to avoid inconsistent adjudication or a compromise of class interests.”) (internal quotation marks omitted); *Ebix*, 2018 WL 3570126, at *4-5 (“[23(b)(1)] permit[s] damages recoveries as long as adjudication is uniform”); *Noerr*, 2002 WL 31720734, at *5 (“the primary substantive issue is whether the directors breached their fiduciary duty,” and “the damages awarded to each class member would depend solely on the number of shares that each class members owns”); *Turner*, 768 A.2d at 31 (“the defendant-directors either did or did not breach their fiduciary duty . . . to all or none of the [] stockholders in the Proposed Class,” and “any monetary remedy due to the Proposed Class will be calculated

on a per share, rather than per shareholder, basis”); *Mobile Communications*, 1991 WL 1392, at *15-16 (same).

B. The Court Should Designate GAMCO as Class Representative and Appoint Entwistle & Cappucci LLP as Class Counsel.

33. Pursuant to Civil Rules 23(c)(1)(B) and 23(g), the Court should designate GAMCO as Class Representative and appoint the law firm of Entwistle & Cappucci LLP as Class Counsel. As explained above, GAMCO’s interests and those of the Class Members are fully aligned. GAMCO is one of the largest minority shareholders of CCOH and stands to benefit from the Settlement as the Settlement benefits all minority shareholders of CCOH. Entwistle & Cappucci LLP has devoted considerable resources to identifying and investigating the claims underlying the Complaint, and it remains fully committed to devoting its resources on behalf of the Class Members going forward. Additionally, as demonstrated by the Entwistle Declaration, Entwistle & Cappucci LLP is well qualified and experienced when it comes to prosecuting complex litigation on behalf of shareholders such as the Class Members and Entwistle & Cappucci LLP is best positioned to represent the Class.

WHEREFORE, for the reasons stated above, GAMCO respectfully requests entry of an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and granting such other relief as is just and proper.

Houston, Texas
December 8, 2018

/s/ Andrew J. Entwistle

Andrew J. Entwistle (TX Bar No. 24038131)

Entwistle & Cappucci, LLP

299 Park Avenue, 20th Floor

New York, NY 10171

Telephone: (212) 894-7200

Facsimile: (212) 894-7272

Email: aentwistle@entwistle-law.com

Counsel to GAMCO and the Proposed Class