

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
	)	
BW Industries Inc. <i>et al.</i> , ¹	)	Case No. 23-10844-MFW
	)	(Jointly Administered)
Debtors.	)	
	)	Objection Deadline: August 14, 2024 at 4:00 p.m. (ET)
	)	Hearing Date: August 21, 2024 at 2:00 p.m. (ET)
	)	

NOTICE OF MOTION

PLEASE TAKE NOTICE that on July 30, 2024, Jeoffrey L. Burtch, Interim Chapter 7 Trustee for the Estates of BW Industries, Inc., *et al.* (the “Trustee”) and certain proposed members of a class of former employees (together with the Trustee, the “Movants”) filed a *Joint Motion Pursuant to 11 U.S.C. § 105 and Fed. R. Bankr. P. 7023 and 9019 for: (I) Entry of Order: (A) Approving Settlement Agreement on a Preliminary Basis, (B) Certifying a Class of Employee Claimants for Settlement Purposes, (C) Appointing Class Counsel and Class Representatives, (D) Approving the Form and Manner of Notice to Class Members, and (E) Scheduling Fairness Hearing to Consider Final Approval of Settlement Agreement; (II) Entry of Order Approving the Settlement Agreement on a Final Basis; and (III) Such Further Related Relief as May Be Appropriate* (the “Motion”).

PLEASE TAKE FURTHER NOTICE that the Movants are presently only seeking preliminary approval of the Settlement Agreement (as defined in the Motion). If the Court grants preliminary approval, a final hearing will be scheduled, and a deadline for objection to final approval will be set. The failure to object to preliminary approval will not result in a waiver of any party’s right to object to approval of the Settlement Agreement on a final basis.

PLEASE TAKE FURTHER NOTICE that if you wish to file a response to the request for preliminary approval, you must do so by August 14, 2024 at 4:00 p.m. (ET) (the “Objection Deadline”) with the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same time, you must serve a copy of the objection upon Trustee’s counsel:

¹ The Debtors in these cases are the following entities (the respective case numbers for each estate follows in parentheses): BW Industries Inc. (23-10844-MFW); Bitwise Industries, Inc. (23-10845-MFW); BWRD, LLC (23-10846-MFW); Alpha Works Technologies, LLC (23-10847-MFW); Bruce’s Bagels, Beverages, and Bites, LLC (23-10848-MFW).

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PLEASE TAKE FURTHER NOTICE that, if an any objections are filed, a hearing to consider preliminary approval will be held on August 21, 2024 at 2:00 p.m. (ET) before the Honorable Mary F. Walrath at the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, 5th Floor, Courtroom No. 4, Wilmington, Delaware 19801.

PLEASE TAKE FURTHER NOTICE THAT, IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR A HEARING.

Dated: July 30, 2024

COZEN O'CONNOR

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Counsel for the Interim Chapter 7 Trustee

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

BW Industries Inc. *et al.*,¹

Debtors.

)
) Chapter 7
) Case No. 23-10844-MFW
) (Jointly Administered)
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) **Objection Deadline: August 14, 2024 at 4:00 p.m. (ET)**
) **Hearing Date: August 21, 2024 at 2:00 p.m. (ET)**
)

JOINT MOTION PURSUANT TO 11 U.S.C. § 105 AND FED. R. BANKR. P. 7023 AND 9019 FOR: (I) ENTRY OF ORDER: (A) APPROVING SETTLEMENT AGREEMENT ON A PRELIMINARY BASIS, (B) CERTIFYING A CLASS OF EMPLOYEE CLAIMANTS FOR SETTLEMENT PURPOSES, (C) APPOINTING CLASS COUNSEL AND CLASS REPRESENTATIVES, (D) APPROVING THE FORM AND MANNER OF NOTICE TO CLASS MEMBERS, AND (E) SCHEDULING FAIRNESS HEARING TO CONSIDER FINAL APPROVAL OF SETTLEMENT AGREEMENT; (II) ENTRY OF ORDER APPROVING THE SETTLEMENT AGREEMENT ON A FINAL BASIS; AND (III) SUCH FURTHER RELATED RELIEF AS MAY BE APPROPRIATE

Jeffrey L. Burtch, in his capacity as Chapter 7 Trustee in the cases of BW Industries Inc. and its affiliated Debtors (the “Trustee”), and Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez, each individually and on behalf of similarly situated former employees, file this joint motion (the “Motion”) pursuant to section 105 of title 11 of the United States Code (11 U.S.C. §101 *et seq.* (the “Bankruptcy Code”)), Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 23 of the Federal Rules of Civil Procedure (the “Civil Rules”), made applicable to the Motion by operation of Bankruptcy Rule 7023, for the entry of: (I) an order (the “Preliminary Approval Order”): (A) approving, on a preliminary basis, the Settlement Agreement and

¹ The Debtors in these cases are the following entities (the respective case numbers for each estate follows in parentheses): BW Industries Inc. (23-10844-MFW); Bitwise Industries, Inc. (23-10845-MFW); BWRD, LLC (23-10846-MFW); Alpha Works Technologies, LLC (23-10847-MFW); Bruce’s Bagels, Beverages, and Bites, LLC (23-10848-MFW).

General Release (the “Settlement Agreement”)² by and among: (1) the Trustee; (2) the Class Representatives (as defined below); (3) Ollen Douglass, Mitchell Kapor, Paula Pretlow, and Joseph Proietti (collectively, the “Non-Management Directors”); (4) Kapor Capital Management Co., LLC, Kapor Capital Partners II, L.P., Kapor Capital Partners III, L.P., and the Kapor Klein Revocable Trust (collectively, the “Kapor Entities”); (5) 906 Ventures, LLC and Nuovo Capital, LLC; (6) Motley Fool Ventures Management LLC and Motley Fool Ventures LP (together, “Motley Fool Ventures”); (7) Scottsdale Insurance Company (“Scottsdale”), Great American E&S Insurance Company (“Great American”), and The Hanover Insurance Company (“Hanover,” and, together with Scottsdale and Great American, the “Participating Insurance Carriers”); and (8) Bethany Mily (all of the foregoing shall be referred to, collectively, as the “Settling Parties”), (B) certifying a Class for settlement purposes only, (C) appointing the law firms of Raisner Roupinian LLP, Erickson Kramer Osborne, Whelan Law Group, and Bonakdar Law Firm as attorneys for the Class (“Class Counsel”) and appointing Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez as representative members of the Class (collectively, the “Class Representatives”), (D) approving the form and manner of notice to Class Members (the “Class Notice”), and (E) scheduling a fairness hearing (the “Fairness Hearing”) to consider final approval of the Settlement Agreement; and (II) after the Fairness Hearing, entering an order (the “Final Approval Order”) approving the Settlement Agreement on a final basis; and (III) granting related relief. A true and correct copy of the Settlement Agreement is attached hereto as **Exhibit 1**. In support of the Motion, the Trustee and the Class Representatives respectfully represent as follows:

² Capitalized terms not otherwise defined herein shall have the meaning assigned in the Settlement Agreement.

Jurisdiction

1. The United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”) has jurisdiction over the subject matter of this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are 11 U.S.C. § 105(a) and Rules 7023 and 9019 of the Bankruptcy Rules.

3. Pursuant to Rule 9013-l(f) of the Local Rules of Bankruptcy Practice and Procedure of this Court, the Trustee and the Class Representatives consent to the entry of a final order with respect to this Motion if it is determined that the Court lacks adjudicatory authority under Article III of the United States Constitution to enter such final order absent consent of the parties.

Procedural Background

4. On June 28, 2023 (the “Petition Date”), the Debtors filed petitions under Chapter 7 of the Bankruptcy Code, thereby commencing these cases (the “Bankruptcy Cases”).

5. On or shortly after the Petition Date, the Trustee was appointed interim trustee in the Bankruptcy Cases, and he continues to act in such capacity.

Factual Background Regarding Disputes and Settlement

6. In 2013, Irma Olguin and Jake Soberal (together, the “Co-CEOs”) started a business in Fresno, California that would grow to include Debtor BW Industries, Inc., the other Debtors, and a number of non-debtor affiliates (collectively, “Bitwise”). The Co-CEOs and the Non-Management Directors made up the Bitwise Board of Directors (the “Board”).

7. Initially, the business operated “Geekwise Academy,” a coding and tech skills “bootcamp” that offered courses to people of all ages. Over the following 10 years, Bitwise grew

to include three lines of business. While continuing to operate education and training operations, Bitwise added a software development business and a real estate investment business that purchased, renovated, and leased commercial properties.

8. In addition to adding new lines of business, Bitwise also began expanding geographically, and by mid-2023 was either in the process of beginning or had already begun operations in four cities in California (including Fresno) and cities in six other states.

9. As Bitwise expanded, its operating expenses increased dramatically. Unfortunately, revenue growth did not keep pace with expenses. By the time of its demise, Bitwise's payroll alone appears to have been in excess of \$6 million per month. It is not clear exactly what Bitwise's revenues were at any time, but there is reason to believe that total revenue for all of 2022 was between \$2 million and \$3 million, and may have been as little as \$400,000 for the first quarter of 2023.

10. While Bitwise was incurring enormous losses, the Co-CEOs were painting a very different picture for the Non-Management Directors. Profit and loss statements prepared for meetings of the Board reported nearly \$58.5 million in 2021 revenue and over \$143 million in 2022 revenue, and a loss of just under \$100,000 in 2020 and a net gain of \$16.3 million in 2022.

11. Even though it raised nearly \$140 million through a number of funding rounds starting in 2017, such investments were not sufficient to cover the massive gap between operating expenses and revenue. The cash shortfall was instead covered by large amounts of debt, the vast bulk of which was not authorized by appropriate Board action. Based on records made available to the Trustee, it appears that by June 2023, Bitwise had approximately \$73 million in private loans outstanding, and total liabilities well in excess of \$100 million.

12. While it was rapidly expanding, and as its operating losses were growing, Bitwise had developed a means by which it was able to continue operating a clearly unsustainable enterprise. When a funding round closed, Bitwise would use the proceeds to cover losses until available cash was exhausted, at which time it would start covering losses with unauthorized debt. While such debt was increasing, Bitwise would be pursuing its next funding round, and when that round closed, the unauthorized debt would be repaid, and the process would begin again.

13. By the end of May 2023, the Co-CEOs were no longer able to source loans that would fund Bitwise's ongoing losses. On May 28, 2023, the Co-CEOs informed the Non-Management Directors that the company did not have enough cash to make payroll or pay other expenses that were currently due.³ On May 29, 2023, all employees were informed that they were being furloughed effective immediately, and in a June 14, 2023 email, they were told that their jobs were being terminated permanently due to "unforeseeable business circumstances and other reasons." On June 28, 2023, the Debtors filed the petitions commencing these Bankruptcy Cases.

B. Estate Claims

14. Shortly after the Petition Date, the Trustee began investigating potential claims belonging to the Estates, including breach of fiduciary duty claims against directors and officers and other claims based on harm to the Debtors and generalized harm to creditors.

³ The Co-CEOs' alleged misconduct goes far beyond misrepresentations to the Non-Management Directors, and has resulted in a number of legal actions outside of the Bankruptcy Cases. Numerous creditors have asserted claims against the Co-CEOs based on alleged misrepresentations, the U.S. Attorney for the Eastern District of California charged the Co-CEOs with conspiracy to commit wire fraud, and the SEC commenced a civil enforcement action. The SEC's complaint alleged misrepresentation and falsification of various records associated with solicitation of approximately \$70 million from investors in 2022. Consent judgments entered in the SEC action on January 31, 2024 enjoin the Co-CEOs from engaging in various activities and reserve the issues of disgorgement and civil penalties for later determination. On July 17, 2024, the Co-CEOs pleaded guilty to felony charges of wire fraud and conspiracy to commit wire fraud.

15. The Trustee’s counsel conducted an intensive investigation that involved searching through over 1.4 million documents that were retrieved from the Debtors’ servers, computers, and other electronic devices, including key employees’ laptops and mobile phones.

16. Based on that investigation, the Trustee concluded that the Estates had viable claims against the Non-Management Directors based primarily on an alleged failure to exercise oversight in accordance with the standard set forth in *In re Caremark Int’l Inc. Deriv. Litig.*, 698 A.3d 959, 967 (Del. Ch. 1996) (the “D&O Claims”). As set forth below, the Non-Management Directors dispute the viability of the D&O Claims.

17. In general terms, it appears to be undisputed that the Co-CEOs had been falsifying financial information for years before Bitwise’s inevitable collapse. The Trustee alleges that if reasonable oversight and reporting systems had been implemented, their fraudulent – indeed, criminal – conduct would have been discovered earlier, and steps could have been taken to avoid the sort of damages that Bitwise actually suffered. The Non-Management Directors deny these allegations.

18. In addition to the D&O Claims, the Trustee has also asserted that the Estates have a viable avoidance claim against the Kapor Klein Revocable Trust based on a \$5,000,000.00 loan payment made by one or more of the Debtors on or about April 7, 2023 (the “Kapor Preference Claim”).

C. Insurance Policies

19. The Debtors maintained a Business and Management Indemnity Policy (Policy No. EKS3476591) (the “Scottsdale Policy”) issued by Scottsdale. The Scottsdale Policy has a limit of

\$5 million and provides for coverage of costs of defense within limits.⁴ In other words, covered defense fees and costs erode the \$5 million limit.

20. A number of insureds made claims under the Scottsdale Policy, and this led to considerable motion practice in these Bankruptcy Cases, including that related to:

- a. Ollen Douglass and Joseph Proietti's *Motion For Determination That The Automatic Stay Does Not Stay Commencement And Prosecution Of Litigation To Determine Use Of Insurance Proceeds Or, In The Alternative, For Stay Relief* [D.I. 26];
- b. Ollen Douglass and Joseph Proietti's *Amended Motion To Modify Automatic Stay To Permit Advancement Of Defense Fees and Costs* [D.I. 104];
- c. Bethany Mily's *Motion by For An Order Modifying The Automatic Stay To Permit Payment And/Or Advancement Of Defense Fees And Costs* [D.I. 133]; and
- d. The Co-CEO's *Motion To Modify Automatic Stay To Permit Advancement Of Defense Fees And Costs* [D.I. 147].

(collectively, the "D&O Policy Motions").

21. Given the potential for litigation in numerous venues, there was cause to believe that the value of the Policy to the Estates would be substantially compromised simply by reason of defense costs if a comprehensive resolution of all covered claims could not be reached promptly.

22. As a result, while consenting to certain conditional relief sought under the D&O Policy Motions, the Trustee also sought a voluntary stay of several actions (the "Civil Actions")⁵ against non-debtor defendants to allow for mediation of claims that might affect the Estates.

⁴ The Policy does not cover claims arising from "any dishonest, deliberately fraudulent or criminal act of an Insured," and this provision would likely bar any coverage for claims against the Co-CEOs.

⁵ The Civil Actions specifically included: *Agri Capital, Inc., et al. v. Jake Soberal; et al.*, (Case No. 23CECG02240, Sup. Ct. of Cal., County of Fresno); *Pedro Garza, et al. v. BW Industries, Inc., et al.*, (Case No. 23CECG0208, Sup. Ct. of Cal., County of Fresno); *Nunn et al. v. Bitwise Industries, Inc., et al.*, (Case No. 23-00867-ADA-SAB, E.D. Ca.); and *Nunn, et al. v. Bitwise Industries, Inc., et al.*, (Adv. Pro. No. 23-50425-MFW, Bankr. D. Del.).

23. Discussions with the various parties-in-interest resulted in entry of consensual orders on September 5, 2023 and December 18, 2023 providing, in relevant part, for the stay of the Civil Actions [D.I. 123, 196].

24. Bitwise also maintained a Technology Professional and Cyber Advantage Policy (Policy No. LHF D041495 07) (the “Hanover Policy”) issued by Hanover, which has a \$2,000,000.00 per claim limit. As with the Scottsdale Policy, defense costs erode coverage under the Hanover Policy.

25. Finally, Great American issued a Private Equity Liability Insurance Policy (Policy No. PEPE24733) (the “Great American Policy,” and, together with the Scottsdale Policy and the Hanover Policy, the “Policies”) to Kapor Capital Management Co., LLC. Coverage under the Great American Policy is limited to \$5,000,000.00 per claim.

WARN Actions

26. Among the Civil Actions are several class actions commenced by former employees.

27. On June 6, 2023, Andre Nunn, Kaila Webb, and Kasandra Jimenez (the “Nunn Class Representatives”) filed an action in the United States District Court for the Eastern District of California styled as *Nunn et al. v. Bitwise Industries, Inc., et al.*, (Case No. 23-00867-ADA-SAB, E.D. Ca.). On July 3, 2023, the Nunn Class Representatives filed an adversary proceeding in this Court styled as *Nunn, et al. v. Bitwise Industries, Inc., et al.*, (Adv. Pro. No. 23-50425-MFW, Bankr. D. Del.) (the two actions commenced by the Nunn Class Representatives will be referred to, together, as the “Nunn Actions”).

28. The Nunn Actions were filed on behalf of a nation-wide class consisting of all Bitwise employees and seek damages of 60 days’ wages and benefits and other damages under the

Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 *et seq.* (the “WARN Act”)) and the California Labor Code § 1400 *et. seq.* (“CAL-WARN Act”), and damages under the state laws of California, New Mexico, Colorado, Ohio, Illinois, New York, Wyoming, and Texas based on unpaid wages.

29. On June 7, 2023, Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, and Neptali Montez (the “Garza Class Representatives”) filed an action in the Superior Court of the State of California, Fresno County styled as *Pedro Garza, et al. v. BW Industries, Inc., et al.*, (Case No. 23CECG0208, Sup. Ct. of Cal., County of Fresno) (the “Garza Action,” and, together with the Nunn Actions, the “WARN Actions”).

30. The Garza Action was filed on behalf of a class consisting of all of Bitwise’s employees in California, and includes claims based on various theories of liability under California law, including violation of the Cal/WARN Act, violation of the California Unfair Competition Law (Cal. Bus & Prof Code §§ 17200, *et seq.*), wage theft (Cal. Penal Code §§ 487m & 496), failure to pay wages for all hours worked (Cal. Lab. Code §§ 200-204, 216, 225.5, 226, 500, 510, 558, 1197, 1198), failure to maintain accurate records (Cal. Lab. Code §§ 1174 & 1174.15), failure to furnish wage statements (Cal. Lab. Code §§ 226(e) & 226.3), failure to timely pay wages (Cal. Lab. Code §§ 201-204), failure to pay minimum wages (Cal. Lab. Code § 1194), and common law negligence.

31. In addition to the claims asserted in the Garza Action, the Garza Class Representatives have begun the process to assert claims under the California Private Attorneys General Act of 2004 (Cal. Lab. Code §§ 2699, *et seq.*), and have stated an intention to amend the complaint to include those claims (the “PAGA Claims”) in the Garza Action.

Mediation

32. From an early stage in these Bankruptcy Cases, the Trustee began coordinating with a number of parties in an effort to achieve a comprehensive resolution of the Estates' claims against the Non-Management Directors, the claims asserted in the WARN Actions, and any third party claims that might have an impact on the settlement process, including, in particular, the claims asserted in the action styled as *Agri Capital, Inc., et al. v. Jake Soberal; et al.*, (Case No. 23CECG02240, Sup. Ct. of Cal., County of Fresno) (the "Agri Capital Action").

33. Eventually, the following parties agreed to participate in mediation:

- a. The Trustee;
- b. The Non-Management Directors
- c. The Class Representatives;
- d. The Participating Insurance Carriers;
- e. The plaintiffs in the Agri Capital Action (the "Agri Capital Parties");
- f. The Kapor Entities;
- g. 906 Ventures, LLC and Nuovo Capital, LLC;
- h. Motley Fool Ventures; and
- i. Bethany Mily, one of the Debtors' former officers.

34. Following the submission of written opening and responsive statements, the above-named parties attended mediation sessions in New York on January 30 and 31, 2024.

35. The parties were unable to reach a definitive agreement on terms for the settlement of any claims by the time the January 31, 2024 mediation session concluded. With the mediator's assistance, however, negotiations continued, and by March 11, 2024, the Trustee, the Non-Management Directors, and the Class Representatives were able to agree to the major terms of a settlement of their various disputes. Over the next several months, the Settling Parties collaborated

on reducing their tentative agreement to writing, and finally agreed to the terms of the Settlement Agreement.

36. The Agri Capital Parties are not parties to the Settlement Agreement, and the Settlement Agreement includes terms, as discussed below, that would require the Trustee to assist in efforts to have the Agri Capital Action against the Non-Management Directors dismissed. The Settlement Agreement also contemplates, as discussed below, the settlement of claims against the Non-Management Directors alleging a generalized harm to creditors that rightfully belong to the Estates but that were impermissibly asserted by the Agri Capital Plaintiffs in the Agri Capital Lawsuit.

Summary of Settlement Agreement⁶

37. In addition to the conditions and other terms related to certification and treatment of the Class and Class Members, and dismissal of the WARN Actions that are pending outside of this Court, the Settlement Agreement includes the following material terms:

- a. The Settlement Agreement shall become effective on the Effective Date (as defined below) (Settlement Agreement, § 15);
- b. The Settling Parties shall be released from all of the Estates' and Class's claims upon the Effective Date and payment of the sum of Twenty Million and No/100 Dollars (\$20,000,000.00) (the "D&O Settlement Amount") to the Trustee, with such payment being due within thirty (30) days following the Effective Date (*Id.*, § 14);
- c. The order approving the Settlement Agreement shall include findings that the Trustee has sole authority to settle and release any and all claims against the Settling Parties that are based on alleged breaches of duties owed to a corporation or generalized harm to creditors (including, but not limited to, claims asserted against the Non-Management Directors in the Agri Capital Lawsuit, which include negligent supervision for an

⁶ The summary of the Settlement Agreement in this Motion is only intended to describe select material terms. To the extent of any inconsistency between the summary set forth in this Motion and the Settlement Agreement, the Settlement Agreement shall govern.

alleged breach relating to reasonable care in the management and supervision of Bitwise and its officers, and breach of duty claims for an alleged breach relating to supervision and monitoring the affairs of the corporation to the business' viability and well-being) (*Id.*, § 12(a));

- d. Within ten (10) business days after the Effective Date, the Trustee shall request that the Agri Capital Parties dismiss all pending claims against the Settling Parties, and if such request is declined, shall take such actions in the Bankruptcy Cases as may be appropriate to seek the stay or dismissal of such claims within thirty (30) days from the date on which the request is declined (*Id.*, § 20(b));
- e. Within ten (10) business days after receipt of the D&O Settlement Amount, the Trustee shall distribute the sum of Six Million and No/100 Dollars (\$6,000,000.00) to the Class (the "Initial Class Distribution") (*Id.*, § 22);
- f. As soon as practicable after the Effective Date, Class Counsel shall provide the Trustee with their calculation of the amount of the claim that they will file on behalf of the Class in the Bankruptcy Cases (the "Class Priority Claim"), and, in the absence of specific, identifiable errors in such calculation, the Trustee shall stipulate to such amount. The Class Priority Claim shall be entitled to priority pursuant to 11 U.S.C. § 507(a)(4) and shall be calculated on the basis of Class Members' actual wages, provided that the sum of the Initial Class Distribution and the Class Priority Claim shall in no event exceed the aggregate of Class Members' individual claims that would be entitled to priority under 11 U.S.C. § 507(a)(4). Subject to the Trustee's review and approval as provided herein, the Settling Parties shall stipulate and agree that the Class Priority Claim shall have priority over any of the claims of the Non-Management Directors and certain of their affiliates, and the Participating Insurance Carriers, and agree not to contest the Class Priority Claim, or the amounts thereof, in whole or in part in the Bankruptcy Cases or in any other proceeding (*Id.*, § 23).
- g. The Trustee will use best efforts to obtain a bar order from the Bankruptcy Court that will protect the Settling Parties from all outstanding and future claims involving the Debtors or the other Settling Parties, and all parties expressly agree that any such bar order is "integral" to (but not a condition of) the settlement (*Id.*, § 16(i));
- h. With limited exceptions set forth in the Settlement Agreement, mutual general releases shall be exchanged as between all parties, including, but not limited to, the Class Members, and the Settling Parties shall agree to release the Participating Insurance Carriers from any and all coverage obligations, and the Participating Insurance Carriers shall agree to release one another (*Id.*, § 30);

- i. Within ten (10) days after execution of the Settlement Agreement, the parties shall seek relief from the automatic stay solely for the purpose of allowing the Garza Plaintiffs to file an amended complaint (the “First Amended Garza Complaint”) in the Garza Class Action to add the PAGA Claims for settlement purposes only. The First Amended Garza Complaint will be subject to the Non-Management Directors’ approval as to form and content before filing (*Id.*, § 17);
- j. Class Counsel shall apply for attorneys’ fees of not more than thirty-percent (30%) of the Initial Class Distribution, and none of the Settling Parties may object to such application (*Id.*, § 25); and
- k. Class Counsel may apply for attorneys’ fees of up to one-third of the amount distributed on account of the Class Priority Claim, provided, however, that no party shall be barred from objecting to such application (*Id.*).

38. As a condition of its approval, the Settlement Agreement requires certification of the Class,⁷ which comprised of all persons who: (i) were employed by the Debtors; (ii) suffered an “employment loss” as that term is defined in 29 U.S.C. § 2101(a)(6) and 20 C.F.R. § 639.3(f), on, or within thirty (30) days of, May 29, 2023, as part of a “plant closing” or “mass layoff,” as those terms are defined in 29 U.S.C. § 2101(a)(2)-(3) and 20 C.F.R. § 639.3(b)-(c), or as the reasonably foreseeable consequence of a “plant closing” or “mass layoff” occurring on or about May 29, 2023; (iii) meet the definition of “affected employee” as set forth in 29 U.S.C. § 2101(a)(5) and 20 C.F.R. § 639.3(e); and (iv) do not file a timely request to opt out of the Class (collectively, the “Class Members”). *Id.*, § 16.

39. In the event that the number of otherwise eligible members of the Class that file a timely request to opt out of the Class is greater than ten percent (10%) of the total number of individuals who are eligible to be Class Members, any of the Settling Parties shall have the right

⁷ Such Class shall be certified for settlement purposes only pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure as made applicable to these proceedings by Rule 7023 of the Federal Rules of Bankruptcy Procedure.

to terminate the Settlement Agreement within ten (10) days after receiving notice of the number of employees exercising the right to opt out of the Class. *Id.*, § 18(c).

40. As a condition of its effectiveness, the Settlement Agreement must be approved by the Bankruptcy Court and the WARN Actions pending in other jurisdictions shall be dismissed with prejudice. The Settlement Agreement shall become effective on the date on which all required orders become “Final Orders”; and (b) the Non-Management Directors, Bethany Mily, Scottsdale, Hanover, and Debtor affiliates JITRE, Inc. and Wishon Row, LLC have executed the Scottsdale/Hanover Agreement, as defined in the Settlement Agreement (the “Effective Date”). The orders approving the Settlement Agreement or otherwise approving the dismissal of any of the WARN Actions with prejudice shall become Final Orders when the time for taking an appeal has expired or, if an appeal has been taken, on the day the relevant approval order has been affirmed with no further right of appeal. *Id.*, § 15.

41. Except as otherwise agreed by the Settling Parties, the Settlement Agreement shall become null and void if the Final Approval Order has not been entered by November 30, 2024. *Id.*, §21.

Additional Terms Relevant to Class

42. The Settlement Agreement includes the following terms regarding treatment of the Class, Class Members, the Class Representatives, and Class Counsel:

- a. **Class Payments.** The Initial Class Distribution and distributions on account of the Class Priority Claim (collectively, the “Class Payments”) shall be forwarded by the Trustee to a qualified settlement fund to be established by Class Counsel in conformity with Internal Revenue Code §468B (the “Qualified Settlement Fund”) pursuant to written instructions provided by Class Counsel. *Id.*, § 24.
- b. **Satisfaction and Expungement of Individual Claims.** The Final Approval Order shall provide that, on the Effective Date, any and all individual claims asserted by Class Members against the Estates that are

duplicative of or based on the same legal theories as any claims asserted in the WARN Actions, including, but not limited to, claims under the WARN Act or any comparable federal, state, and local laws shall be deemed satisfied and expunged. *Id.*, § 12(a), (referencing Exhibit A).

- c. **Allocation of Class Payments.** The Class Payments (after being reduced on account of the Class Representative Service Payments, Class Counsel's Fees and Expenses, the PAGA Settlement Amount, and the employer's share of payroll taxes (each as defined below)) shall be distributed to individual Class Members on a pro rata basis. *Id.*, §28
- d. **Disbursement of Class Payments.** American Legal Claims Services LLC, or such other entity as may be designated by Class Counsel (the "Administrator"), shall be responsible for making distributions from the Qualified Settlement Fund of any amounts required by the Settlement Agreement. The Trustee shall pay the fees and costs incurred by the Administrator in an amount not to exceed \$50,000.00. Any fees and costs in excess of that amount shall be paid out of the Qualified Settlement Fund. *Id.*, § 27.
- e. **Responsibilities of Class Counsel.** Class Counsel shall be responsible for the production and mailing of all notices required to be provided to the Class Members, including the Class Notice. Class Counsel or its designee shall mail the Class Notice within fifteen (15) days following entry of the Preliminary Approval Order. *Id.*, § 16(a), (referencing Exhibit B).
- f. **PAGA Settlement Amount.** The Garza Plaintiffs, through counsel, shall propose allocating \$75,000.00 of the Settlement Proceeds to the PAGA claims. In the event the Bankruptcy Court rejects such proposed allocation, the Garza Plaintiffs may increase the proposed PAGA allocation as necessary to secure the Court's approval (the amount so approved, the "PAGA Settlement Amount"), which shall be payable from the Qualified Settlement Fund. *Id.*, §§ 19, 28(b).
- g. **Class Representative Service Payments.** Subject to Court approval, each Class Representative shall receive \$3,000.00 in compensation for his/her service on behalf of the Class. For the avoidance of doubt, the service payments shall be in addition to Class Representatives' share of Class Payments made to Class Members generally. *Id.*, §§ 26, 28(c).
- h. **Class Counsel Fees and Expenses.** Class Counsel shall be entitled to apply for attorneys' fees ("Class Counsel's Fees") in amounts of not more than: (i) thirty percent (30%) of the Initial Class Distribution; and (ii) one-third of amounts distributed on account of the Class Priority Claim and reimbursement of its expenses ("Expenses"). Class Counsel's Fees and Expenses and the Class Representative Service

Payments, shall be paid exclusively by the Qualified Settlement Fund, and Class Counsel and the Class Representatives shall have no right to payment, either as an administrative expense, unsecured claim, or otherwise, from the Estates for any reason at any time. Class Counsel's Fees and Class Counsel's Expenses shall constitute payment in full for Class Counsel's work and expenses in connection with this matter. *Id.*, §§ 25, 28.

Relief Requested

43. By this Motion, the Trustee and the Class Representatives jointly request that the Court enter orders, substantially in the forms attached to the Settlement Agreement as **Exhibit A** and **Exhibit C**: (i) approving the Settlement Agreement on a preliminary basis; (ii) certifying the Class for settlement purposes only and appointing Class Counsel and the Class Representatives; (iii) approving the form and manner of Class Notice; (iv) scheduling a Fairness Hearing to consider final approval of the Settlement Agreement; (v) after the Fairness Hearing, approving the Settlement Agreement on a final basis; and (vi) granting such other and further related relief as may be appropriate.

Basis for Relief Requested

A. The Court Should Approve the Settlement Pursuant to Bankruptcy Rule 9019.

44. Bankruptcy courts have recognized that “to minimize litigation and expedite the administration of a bankruptcy estate ‘compromises are favored in bankruptcy.’” *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (quoting 9 Collier on Bankruptcy ¶ 9019.03[1] (15th ed. 1993)); *see also In re Culmtech, Ltd.*, 118 B.R. 237, 238 (Bankr. M.D. Pa. 1990) (“[C]ompromises are favored in bankruptcy and ... much of litigation in bankruptcy estates results in settlements”). Bankruptcy Rule 9019 authorizes a bankruptcy court to approve a compromise or settlement after notice and a hearing, FED. R. BANKR. P. 9019(a), and section 105 of the

Bankruptcy Code empowers a court to issue any order that is “necessary or appropriate to carry out the provisions of” the Bankruptcy Code. 11 U.S.C. § 105(a).

45. “[T]he authority to approve a compromise settlement is within the sound discretion of the bankruptcy court.” *In re Key3Media Group, Inc.*, 336 B.R. 87, 92 (Bankr. D. Del. 2005); *see also In re Louise’s, Inc.*, 211 B.R. 798, 801 (D. Del. 1997). When exercising such discretion, the bankruptcy court must determine whether the compromise is “fair, reasonable, and in the best interests of the estate.” *Key3Media Group*, 336 B.R. at 92; *see also Fry’s Metals, Inc. v. Gibbons (In re RFE Industries, Inc.)*, 283 F.3d 159, 165 (3d Cir. 2002); *In re Louise’s, Inc.*, 211 B.R. at 801; *In re Marvel Entertainment Group, Inc.*, 222 B.R. 243, 249 (Bankr D. Del. 1998).

46. The Bankruptcy court is not required to determine that the proposed settlement is the best possible compromise. *Key3Media Group*, 336 B.R. at 92-93 (citing *In re Coram Healthcare Corp.*, 315 B.R. 321, 329 (Bankr. D. Del. 2004)). Rather, the settlement should be approved as long as it does not fall below the lowest point in the range of reasonableness. *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir.), *cert. denied*, 464 U.S. 822 (1983). In this respect, it is unnecessary for the court to consider the information necessary to resolve the factual dispute, nor is necessary for the bankruptcy court to “conclusively determine claims subject to a compromise.” *Key3Media Group*, 336 B.R. at 92 (quoting *Martin*, 212 B.R. 316, 319 (8th Cir. B.A.P. 1997)).

1. Standard for Approval of the Settlement Agreement

47. Courts generally consider the following four factors when determining whether a settlement is in the best interests of the estate: (i) the probability of success in the litigation; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attendant thereto; and

(iv) the paramount interest of the creditors and a proper deference to their reasonable opinions. *Martin*, 91 F.3d at 393; *Aetna Casualty & Surety v. Jasmine, Ltd. (In re Jasmine, Ltd.)*, 258 B.R. 119, 123 (Bankr. D.N.J. 1999); *Key3Media Group*, 336 B.R. at 93; *Marvel*, 222 B.R. at 249; *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005) citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975).

48. In addition to these criteria, courts have also scrutinized additional factors that are relevant to the settlement of class claims, including: (i) the competency and experience of counsel who support the settlement; (ii) the relative benefits to be received by individuals or groups within the class; (iii) the nature and breadth of releases to be obtained by the parties to the settlement; and (iv) the extent to which the settlement is the product of arm's length bargaining. *See Fischer v. Pereira (In re 47-49 Charles Street, Inc.)*, 209 B.R. 618, 620 (S.D.N.Y. 1997); *In re Spielfogel*, 211 B.R. 133, 144 (Bankr. S.D.N.Y. 1997); *In re Dow Corning Corp.*, 198 B.R. 214, 223 (Bankr. E.D. Mich. 1996).

49. The compromise at issue here actually involves settlement of two distinct, but related, disputes. First, the Settlement Agreement resolves the Estates' claims against the Settling Parties (the "D&O Settlement"). Second, the Settlement Agreement provides for the allowance and treatment of the claims held by Class Members (the "Class Settlement"). Although the Settlement Agreement is only possible because it resolves all of these disputes, and must therefore be considered in its entirety, for the sake of organizational clarity, the two major compromises under the Settlement Agreement are addressed separately.

Application of the Martin Factors – D&O Settlement⁸

Probability of Success

50. While the Trustee believes that there is certainly a significant possibility of success if litigation of the D&O Claims were necessary, a successful outcome is far from certain.

51. Perhaps most important to evaluation of the settlement of the D&O Claims is the fact that the Debtor BW Industries, Inc., the parent of the other Debtors and the company on whose board the Non-Management Directors served, had a provision in its certificate of incorporation that limited directors' liability based on fiduciary duty claims to the maximum extent permitted under Delaware law.

52. As a result of the limitation on liability, the Non-Management Directors' liability under the circumstances of this case would require a determination that their failure to oversee the Debtors' finances and operations was so egregious as to amount to a breach of the duty of loyalty. *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.3d 959, 967 (Del. Ch. 1996).

53. *Caremark* claims are notoriously difficult to bring. The *Caremark* court itself described the theory on which this sort of liability may be found to be "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Id.*; *see also Teachers' Retirement System v. Aidinoff*, 900 A.2d 654 (Del. Ch. 2006) ("[T]he burden of pleading and proving [*Caremark* claims] is rightly onerous.").

⁸ The Settlement Agreement resolves all of the Estates' claims against the Settling Parties, including the D&O Claims and the Kapor Preference Claim. The Trustee has assumed that the Kapor Preference Claim is a viable claim for \$5,000,000.00, and that such claim would be fully collectible. Accordingly, the analysis herein is focused only on the D&O Claims.

54. Even in cases in which a plaintiff is able to meet the burdensome pleading requirements, and survive a motion to dismiss, proving liability is still a difficult task. The Non-Management Directors have adamantly denied any failure of oversight, and there is no dispute that they attended board meetings and communicated with management. There is no doubt that they would mount the most vigorous and thorough defense possible, and one or more of the Policies would provide millions of dollars of coverage for the costs of that defense. Furthermore, even if the litigation were not resolved by the time the limits of the Policies had been reached, it is a matter of public record that the Non-Management Directors include individuals of substantial means who would almost certainly have no difficulty personally funding ongoing defense costs.

55. Even if the Trustee were able to establish liability, there can be no certainty that the damages would be any greater than the amount that will be paid under the Settlement Agreement. There may be several theories of damages applicable to the Bitwise situation, but the one that would almost certainly result in the greatest recovery would be based on the amount of debt that was incurred as a result of a failure to take timely corrective action. This theory is generally known as “deepening insolvency,” and there is uncertainty whether it is a permissible measure of damages. *See In re Troll Commc'ns, LLC*, 385 B.R. 110, 122 (Bankr. D. Del. 2008) (“deepening insolvency has been rejected as a valid cause of action or a theory of damages under Delaware law...”); *but see Kane v. PaCap Aviation Fin., LLC*, 652 B.R. 184, 201 (D. Haw. 2023) (Interpreting Delaware law to bar deepening insolvency as a theory of liability but opining that the Chancery Court “would not reject a deepening insolvency damages theory *per se*...”).

56. If deepening insolvency were recognized as the proper measure of damages, it is possible that damages could very well exceed \$100 million. If it were not, the damages might be far less.

57. When weighed against the risks of an adverse outcome, with respect to both liability and to damages, the \$20 million that will be realized under the Settlement Agreement (inclusive of amounts attributable to the Kapor Preference Claim) is a very favorable recovery.

58. In short, the probability of success in litigation of the D&O Claims is so uncertain that the first *Martin* factor, by itself, provides a sufficient or nearly sufficient basis to establish the reasonableness of the settlement of the D&O Claims.

Difficulty in Collection

59. It is unlikely that there would be any difficulty collecting on any judgment that might potentially be entered as a result of litigation of the D&O Claims. In comparison to the other *Martin* factors, however, concerns regarding collection are of little significance.

Complexity, Expense, Inconvenience, and Delay Attendant to Litigation

60. Claims of the sort at issue here are notoriously complex. The D&O Claims would involve complicated legal and factual issues regarding alleged breaches of fiduciary duties, and it is reasonable to expect protracted litigation and appeals.

61. Any judgment in favor of the Estates would only be entered after drawn-out, expensive litigation. After surviving a motion to dismiss, completing discovery, prevailing on an all-but-certain motion for summary judgment, and winning at trial, there would inevitably be a lengthy appeals process.

62. It is likely that litigation of the D&O Claims would not be finally concluded for at least three or four years, perhaps significantly longer. Under the Settlement Agreement, on the other hand, the Estates – and ultimately creditors – will realize a substantial recovery without any undue delay.

63. The third *Martin* factor weighs heavily in favor of approval of the Settlement Agreement.

Paramount Interest of Creditors

64. The Settlement Agreement also serves the paramount interest of creditors of the Estates in that it is likely to: (1) maximize the amount available for distribution to creditors; and (2) promote the efficient administration of the Estates.

65. First, the Settlement Agreement will result in a recovery that may very well be greater than what would be realized under any alternative. It is reasonable to conclude, therefore, that the Settlement Agreement will maximize the value of the Estates, and therefore maximize creditors' recoveries.

66. Second, the Settlement Agreement undoubtedly offers the most expedient resolution of the D&O Claims (and the Kapor Preference Claim), and will best promote the prompt, economical, and efficient administration of the Estates.

67. By both maximizing and expediting creditors' recoveries, settlement of the D&O Claims best serves creditors' interests. The fourth *Martin* factor therefore weighs heavily in favor of approval of the Settlement Agreement.

Application of the Martin Factors – Class Settlement

Probability of Success

68. The Class Settlement will primarily serve the function of liquidating employees' claims under the WARN Act and similar federal, state, and local laws regarding plant closings and mass layoffs without the need for protracted litigation.

69. Under the federal WARN Act, a covered employer must provide sixty days' written notice before a "plant closing" or "mass layoff." 29 U.S.C. § 2102(a). A covered employer is one

that employs at least 100 full-time employees. 29 U.S.C. § 2101(a)(1). In relevant part, a mass layoff or plant closing is an action that affects 50 or more full-time, six-month tenured employees at a single facility.

70. When a mass layoff or plant closing is caused by “unforeseeable business circumstances,” a sudden, dramatic, and unexpected action or condition outside the employer’s control, the employer may give less than 60 days’ notice, but must give as much notice as is reasonably practicable *and* provide a statement explaining the reason why less than 60 days’ notice was given. 29 U.S.C. § 2102(b)(2)(A).

71. The WARN Act also recognizes a “faltering company defense.” For the faltering company defense to apply, the employer must have been “actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.” See 29 U.S.C. § 2102(b)(1).

72. An employer asserting either the unforeseeable business circumstance or the faltering company defense is nonetheless required to “give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.” See 29 U.S.C. § 2102(b)(1).

73. An employer that fails to comply with the WARN Act’s notice requirements may be liable to each affected employee for an amount equal to back pay and benefits for the period of the violation, up to 60 days, but no more than half the number of days the employee was employed by the employer. 29 U.S.C. § 2104(a)(1).

74. In addition to the federal statute, there are state laws that may impose liability for mass layoffs and other adverse employment actions that may have been experienced by the Debtors' former employees. The Cal/WARN Act, for example, is similar to the federal WARN Act, with certain notable differences.⁹ Among other things, the Cal/WARN Act covers a broader range of employers, as it applies to any employer that had 75 or more employees in the twelve months prior to the adverse employment action.

75. Also of relevance to the present case is the fact that there is no unforeseeable business circumstances defense under the Cal/WARN Act.

76. In addition, under the Cal/WARN Act, the faltering company defense requires a *pre-layoff* determination by the Department of Industrial Relations (the "DIR") that all the following conditions exist:

- (1) As of the time that notice would have been required, the employer was actively seeking capital or business.
- (2) The capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination.
- (3) The employer reasonably and in good faith believed that giving the notice required by subdivision (a) Section 1401 would have precluded the employer from obtaining the needed capital or business.

California Labor Code, § 1402.5.

77. There is no evidence suggesting that the request required under the Cal/WARN Act was ever submitted to the DIR. As such, there does not appear to be any viable defense to claims under the Cal/WARN Act.

⁹ While the Debtors had employees in a number of different states, by far the largest number of employees were located in California.

78. An employer may be assessed a civil penalty of \$500 a day for each day of violation under the Cal/WARN Act. In addition, employees may be awarded back pay calculated at their final rate or 3-year average rate of compensation, whichever is higher, and the cost of any medical expenses that would have been covered under an employee benefit plan. The employer is liable for the period of violation up to 60 days or one-half the number of days the employee was employed whichever period is smaller. California Labor Code § 1403.

79. The facts regarding the Debtors' sudden collapse are not in dispute, and there appears to be general agreement that employees were given no notice prior to the May 29 furlough, and were given, at most, just over two weeks' notice prior to the June 14 email advising them that their jobs were being eliminated permanently.

80. While the June 14 email stated that the job terminations were the result of "unforeseeable business circumstances and other reasons," no specific details regarding such circumstances were provided. This sort of conclusory statement is insufficient to support a defense based on unforeseeable business circumstances. *See In re Art Van Furniture, LLC*, 638 B.R. 523, 540 (Bankr. D. Del.), *aff'd in part, rev'd in part sub nom. In re Start Man Furniture, LLC*, 647 B.R. 116 (D. Del. 2022) ("Merely stating a statutory exception - - such as 'we are a faltering company' or 'termination arises from unforeseeable business circumstances' - - is not sufficient."); *In re AE Liquidation, Inc.*, 556 B.R. 609, 625 (D. Del. 2016), *aff'd*, 866 F.3d 515 (3d Cir. 2017) ("Generalized statements will not suffice; rather, the presence of 'reasonably specific facts' is required.") (citing *Alarcon v. Keller Indus.*, 27 F.3d 386, 389-90 (9th Cir.1994)).

81. In short, there appears to be no serious doubt that the Debtors' actions gave rise to liability under the WARN Act and the Cal/WARN Act, and that the large majority of – perhaps substantially all – former employees hold viable claims under those statutes.

82. Although there may be plausible defenses with respect to a relatively small number of employees' claims, litigation of those defenses likely would not be cost-effective.

83. For example, a relatively small number of employees were either working remotely at the time of the layoff or worked at facilities with fewer than 50 employees and were, therefore, arguably not subject to protection under the WARN Act. Even if this were so, however, the large majority of the Debtors' employees did in fact work at facilities with more than 50 employees, and the reduction in liability would not be of such significance as to affect the merits of the settlement.

84. Furthermore, there is authority holding that multiple sites may be combined for purposes of determination of what is and is not an "affected facility," or that employees at smaller worksites may be protected when their employment is terminated as a result of actions at a larger facility. *Campbell v. A-P-A Transport Corp. (In re A-P-A Transport Corp.)*, 2005 WL 3077916, at *3 (D.N.J. Nov.16, 2005) ("Where those employees are terminated as the consequence of layoffs at facilities with 50 or more employees, employees at the smaller facilities may be included in the plaintiff class.").

85. Another potential complication for the Class is the fact that some potential members were employed by a Debtor that, standing alone, would not be subject to the WARN Act or the Cal/WARN Act. In particular, it appears that Debtor Bruce's Bagels, Beverages, and Bites, LLC ("BBBB") had fewer than twenty employees when the mass layoff occurred.

86. The question in these sorts of cases is whether the Debtors should be treated as a "single employer." Courts considering whether a separate legal entity might be considered part of a group that is treated as a single employer look at such factors as (1) common ownership, (2) common directors and/or officers, (3) de facto exercise of control, (4) unity of personnel policies emanating from a common source, and (5) dependency of operations. *In re APA Transp. Corp.*

Consol. Litig., 541 F.3d 233, 243 (3d Cir. 2008), as amended (Oct. 27, 2008) (*citing, inter alia*, 20 C.F.R. § 639.3(a)(2)).

87. The single employer inquiry is fact-sensitive, and there can be no certainty how it would be resolved in the present case. Based on the Trustee's and Class Counsel's investigation to date, however, it does appear that there is evidence that would support the inclusion of all of the Debtors' employees in a single class. Even if the BBBB employees were excluded from the Class, however, the net effect on the Estates would be negligible in light of the costs of litigation and the relatively small part of the Class's claim that is attributable to those employees.

88. There is a chance that the Trustee might be able to reduce the Class's total claim, but the potential savings that might result from litigating certain employees' rights under the WARN Act are not substantial. Because the claim that will be allowed under the Settlement Agreement is approximately what the Class would be entitled to after litigation, the first *Martin* factor weighs in favor of approval.

Difficulty in Collection

89. With respect to the Class Settlement, the Settlement Agreement resolves claims against the Estates, and this *Martin* factor is not relevant.

Complexity, Expense, Inconvenience, and Delay Attendant to Litigation

90. There are, as previously noted, potential arguments against WARN Act coverage for a small subgroup of the Debtors' employees. Also as noted above, however, the potential savings that might theoretically be realized by successfully litigating these issues is insignificant in comparison to the costs of doing so.

91. Solely in terms of fees and costs, it is doubtful that there is any scenario in which the Estates would benefit from litigation of the total WARN Act liability.

92. On balance, the third *Martin* factor weighs in favor of approval of the Class Settlement.

Paramount Interests of Creditors

93. It is the final *Martin* factor, consideration of the paramount interests of creditors, that is most important to evaluation of the Settlement Agreement.

94. As discussed above, there are clearly compelling grounds for approval of the D&O Settlement. The D&O Settlement, however, is only possible because it is part of a significantly broader settlement of claims against the Non-Management Directors.

95. The Non-Management Directors have been named as defendants in all of the WARN Actions, and they have made the D&O Settlement conditional on settlement of the WARN Actions and a release of substantially all claims that could be asserted by the Estates and the Debtors' former employees.

96. Based on all of the foregoing, the Trustee is faced with a choice between settlement of the Class Members' claims on the terms set forth in the Settlement Agreement and recovery of \$20 million for the benefit of the Estates, on one hand, and costly, time-consuming, and highly uncertain litigation of the D&O Claims and either litigation or piecemeal settlement of the Class Members' claims, on the other.

97. Considering the strengths and weaknesses of the Estates' claims and defenses, there can be no doubt that the Trustee's determination that the Settlement Agreement is in the best interests of the Estates and creditors is eminently reasonable.

B. The Court Should Certify the Class and Appoint Class Counsel and Class Representatives Pursuant to Civil Rule 23

98. Where, as in this case, a class has not already been certified, before approving a class settlement pursuant to Civil Rule 23, the Court must determine whether the proposed

settlement class satisfies the certification requirements of Civil Rule 23. *See Amchem v. Windsor*, 521 U.S. 591, 620 (1997); *In re Community Bank of Northern Virginia*, 418 F.3d 277, 300 (3d Cir. 2005).

99. “[A]ll Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes.” *Amchem*, 521 U.S. at 618; *accord Community Bank*, 418 F.3d at 299. “The settlement class action device offers defendants the opportunity to engage in settlement negotiations without conceding any of the arguments they may have against class certification.” *Community Bank*, 418 F.3d at 299; *see General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 786 (3d Cir. 1995) (“By specifying certification for settlement purposes only ... the court preserves the defendant’s ability to contest certification should the settlement fall apart.”).

100. Subdivisions (a) and (b) of Civil Rule 23 “focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives.” *Amchem*, 521 U.S. at 621.

1. The Court Should Certify the Settlement Class

101. To be certified, a class must satisfy the four requirements of Civil Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. P. 23; *see Community Bank*, 418 F.3d at 302. In addition, the class must satisfy the requirements of Civil Rule 23(b)(1), (2), or (3). In this case, the Settling Parties have agreed to request certification under Civil Rule 23(b)(3), “the customary vehicle for damage actions.” *Id.* In order to certify a class under Civil Rule 23(b)(3), the court must also find predominance and superiority. That is, “[i]ssues common to the class must predominate over individual issues, and the class device must be superior to other means of handling the litigation.” *Gates v. Rohm & Hass Co.*, 248 F.R.D.

434, 442-43 (E.D. Pa. 2008). The Class, as proposed in this Motion, meets each of the foregoing elements.

A. The Rule 23(a) Criteria are Satisfied¹⁰

102. Numerosity requires a finding that the putative class is “so numerous that joinder of all members is impracticable.” *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182 (3d Cir. 2001). There is no set number of members that a proposed class must have, but “the Third Circuit generally has approved classes of forty or more.” *Behrend v. Comcast Corp.*, 245 F.R.D. 195, 202 (E.D. Pa. 1989) (citing *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001)).

103. The proposed class is believed to include over 700 potential Class Members, and is sufficiently large so as to make joinder of all Class Members impractical. Accordingly, the Court should find that the numerosity requirement has been met.

104. The commonality requirement requires existence of at least one question of law or fact common to the Class. FED. R. CIV. P. 23(a)(2); *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 184 (3d Cir. 2001). The commonality threshold is low and does not require “an identity of claims or facts among class members.” *Behrend*, 245 F.R.D. at 202. Further, the existence of individual facts and circumstances will not defeat commonality so long as the Class Members allege harm under the same legal theory.

¹⁰ The positions expressed in this section are those of the Class Representatives only and not of the Trustee. The Trustee does not dispute these positions solely for purposes of this Motion.

105. Here, fundamental issues of law and fact regarding notice of termination, potential defenses, measure of damages, priority of claims, and attorneys' fees are common to all Class Members.¹¹

106. Typicality requires that the “named plaintiffs’ claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class.” *Beck v. Maximus, Inc.*, 457 F.3d 291, 295-296 (3d Cir. 2006) (quoting *Baby Neal*, 43 F.3d at 55); see Fed. R. Civ. P. 23(a)(3). “[F]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.” *Beck*, 457 F.3d at 295-96 (quoting *Baby Neal*, 43 F.3d at 55).

107. The Class Representatives do not allege that they were singled out for treatment different from that affecting the Debtors’ employees generally; instead, they allege that they suffered harm as a result of precisely the same conduct that allegedly injured all other Class Members -- that they were terminated by the Debtors on either May 29, 2023 or June 14, 2023, or as the reasonably foreseeable result of the layoffs ordered on or about that date, without receiving sixty (60) days’ advance written notice. Accordingly, the Court should find that the typicality requirement is met.

108. With respect to adequacy, class representatives must “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4); *Gates*, 248 F.R.D. at 441. The adequacy inquiry “assures that the named plaintiffs’ claims are not antagonistic to the class and that the attorneys

¹¹ Class Counsel recognizes that the amount of damages may be particular to each Class Member. However, individualized damage calculations do not defeat commonality, “so long as the plaintiffs allege harm under the same legal theory.” *Baby Neal v. Casey*, 43 F.3d 48, 56-58 (3d Cir. 1994).

for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class.” *Beck*, 457 F.3d at 296. Thus, the court must determine “whether the representatives’ interests conflict with those of the class and whether the class attorney is capable of representing the class.” *Johnston*, 265 F.3d at 185.

109. The Court should find that the Class Representatives and Class Counsel adequately represent the interests of the Class Members. As demonstrated by the Declaration of René S. Roupinian attached hereto as Exhibit 2, Class Counsel are well qualified and sufficiently experienced to represent the Class Members. Raisner Roupinian LLP, Erickson Kramer Osborne, Whelan Law Group, and Bonakdar Law Firm have served as lead counsel in numerous employment law class action lawsuits, including, WARN class actions.

B. The Rule 23(b)(3) Criteria are Met¹²

110. Common questions of law and fact predominate over the individual issues (which appear to be limited to each Class Member’s pay and benefits).¹³ Predominance tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation. *Amchem*, 521 U.S. at 623-24; *Community Bank*, 418 F.3d at 308-09. The proper predominance inquiry “trains on the legal and factual questions that qualify each member’s case as a genuine controversy, questions that preexist any settlement.” *Amchem*, 521 U.S. at 623. “In this vein a predominance analysis is similar to the requirement of Rule 23(a)(3) that claims or defenses of the named

¹² The positions expressed in this section are those of the Class Representatives only and not of the Trustee. The Trustee does not dispute these positions solely for purposes this Motion.

¹³ If litigation of the Class Members’ claims were necessary, there would likely be significant differences between the claims of different groups of employees. Specifically, there would be questions of fact and law that would be specific to employees that worked for a Debtor that had fewer than 75 employees, and, perhaps, those that worked at a smaller facility. Inclusion of all of the Debtors’ employees, and stipulation to the full amount of their aggregate claim, however, obviates any concerns related to the differences between employees, as no Class Member’s recovery will be affected by the inclusion of any other employee in the Class.

representatives must be typical of the claims or defenses of the classes.” *Community Bank*, 418 F.3d at 309.

111. Just as typicality exists, predominance also exists. All of the claims arise from an alleged violation of the WARN Act resulting from the Debtors’ ceasing operations and terminating all employment relationships on either May 29, 2023 or, at the latest, June 14, 2023. Accordingly, the Court should find that the predominance requirement is met.

112. Civil Rule 23(b)(3) also requires a determination that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3); *Gates*, 248 F.R.D. at 443. In effect, “[t]he superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.” *Krell v. Prudential Inc. Co. (In re Prudential Inc. Co.)*, 148 F.3d at 283, 316 (3d Cir. 1998).

113. Civil Rule 23 sets forth several factors relevant to the superiority inquiry: “(A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of claims in the particular forum; and (D) the likely difficulties in managing a class action.” Fed. R. Civ. P. 23(b)(3); *Gates*, 248 F.R.D. at 443. However, when class certification is being considered for settlement purposes only, the difficulties in managing a class action are not considered. *Gates*, 248 F.R.D. at 443.

114. Here, a class action is superior to individual actions. The WARN Act itself expressly contemplates class treatment for WARN Act Litigation. *See* 29 U.S.C. § 2104(a)(5) (WARN Act claimant “may sue either for such person or for other persons similarly situated.”).

The nature of the WARN Act makes it perfectly suited to class treatment in many cases, such as this one, as liability depends on issues of law and fact that necessarily affect an entire large group of employees in the same way. Additionally, the Class Members' individual claims are in amounts that make anything other than class treatment impractical from an economic perspective. Individually, there is little incentive in controlling the prosecution of separate actions. *See Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (internal quotation and citation omitted). It is therefore appropriate for all of the claims asserted in the WARN Actions to be resolved together, and the Court should find that the superiority element is met.

115. Based on the foregoing, the Court should certify the Class for Settlement purposes, appoint Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez as the Class Representatives and the law firms of Raisner Roupinian LLP, Erickson Kramer Osborne, Whelan Law Group, and Bonakdar Law Firm as Class Counsel.

C. The Court Should Preliminarily Approve the Settlement Agreement Pursuant to Civil Rule 23

116. After class certification, approval of a class settlement generally requires two hearings: one preliminary approval hearing and one final "fairness" hearing. *Gates*, 248 F.R.D. at 442-43; MANUAL FOR COMPLEX LITIGATION § 30.632 (2004). Once a settlement is approved on a preliminary basis, notice of the proposed settlement and of the fairness hearing is provided to prospective class members. Because the Settlement Agreement in this case will be preliminarily

approved pursuant to this Joint Motion, notice of the conditional class certification and proposed settlement can be combined in one notice. *Gates*, 248 F.R.D. at 445; *Collier v. Montgomery County Housing Authority*, 192 F.R.D. 176, 186 (E.D. Pa. 2000) (citing MANUAL FOR COMPLEX LITIGATION § 30.212 (2004)). At the subsequent fairness hearing, former employees may formally object to the proposed settlement. *Gates*, 248 F.R.D. at 439.

117. “The preliminary approval decision is not a commitment [to] approve the final settlement; rather, it is a determination that ‘there are no obvious deficiencies and the settlement falls within the range of reason.’” *Id.*, at 438 (quoting *Smith v. Professional Billing & Management Services, Inc.*, 2007 WL 4191749, at *1 (D. N.J. 2007)). The preliminary approval determination requires the Court to consider whether “(1) the negotiations occurred at arm’s length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.” *In re General Motors Corp. Pick Up Fuel Tank Products Liability Litigation*, 55 F.3d 768, 785-86 (3d Cir. 1995); *Gates*, 248 F.R.D. at 444. When class certification is sought in conjunction with preliminary approval, class member objections are not relevant. *Gates*, 248 F.R.D. at 444.

118. The Settlement Agreement has no obvious deficiencies and, as demonstrated above, falls well within the range of reason. Further, each of the above-cited factors weighs in favor of preliminary approval of the Settlement Agreement.

119. First, the Settlement is the result of good faith, arm’s-length negotiations between and among capable adversaries. The Settling Parties have been in discussions with respect to the WARN Actions since soon after they were filed, and the Class is represented by counsel with extensive experience and expertise in matters of this sort.

120. Second, the Settling Parties had access to a substantial volume of documents prior to mediation and subsequent negotiations. Class Counsel had access to substantially all available documents that might have been important to any analysis of the Class's claims and any potential defenses. The Settling Parties thereafter participated in mediation, and extensive post-mediation negotiations with the assistance of an experienced mediator.

121. Third, according to the Declaration of René S. Roupinian, Class Counsel has been appointed as class counsel or been appointed jointly with co-counsel in over one hundred and fifty (150) employment class actions, many of which involved WARN Act or Cal/WARN Act claims similar to those asserted herein. The Class Representatives believe that Class Counsel had the experience and skill to both vigorously litigate the claims asserted in the WARN Actions and to determine when and to what extent settlement is appropriate. They have exercised that judgment in this case with respect to the Settlement Agreement.

122. Based on the foregoing, the Court should approve the Settlement Agreement on a preliminary basis.

D. The Court Should Approve the Form and Manner of the Proposed Notice of the Settlement

123. Civil Rule 23(c)(2)(B) provides:

For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;

- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

124. In addition, Rule 23(e) requires that all members of the class be notified of the terms of any proposed settlement. Fed. R. Civ. P. 23(e). The Rule 23(e) requirement is “designed to summarize the litigation and the settlement and to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation.” *Krell v. Prudential Ins. Co. of America (In re Prudential)*, 148 F.3d 283, 326-27 (3d Cir. 1998).

125. The Class Notice, which also includes the Opt-Out Notice Form, substantially in the form attached to the Settlement Agreement as **Exhibit B** will be served by Class Counsel upon each individual who is eligible to be a Class Member. Class Counsel proposes that within fifteen (15) days following entry of the order certifying the Class for settlement purposes and preliminarily approving the Settlement Agreement, Class Counsel will serve the Class Notice and Opt-Out Notice Form upon each Class Member at the last known address of each Class Member according to the Debtors’ books and records (or as updated by Class Counsel’s searches for current addresses or as may otherwise be determined by the parties). *Cf. id.*, at 327 (holding that mailings to last known addresses of class members is sufficient to provide notice to large, multi-state class).

126. The Class Notice includes all of the information required by Civil Rule 23(c)(2)(B). The Class Notice also outlines the terms of the Settlement Agreement, including the fees proposed to be paid to Class Counsel, and describes how each Class Member may obtain a copy of the pleadings in the WARN Actions and a copy of the Settlement Agreement. The Class Notice also states the date, time, location, and purpose of the Fairness Hearing, informs the Class Members of their right to appear at the Fairness Hearing, and describes the procedure for opting out of the Class or objecting to the Settlement Agreement. Accordingly, the proposed form and method of service of the Class Notice should be approved.

127. In addition to the notice provided to individuals eligible to be Class Members, notice, in the form attached hereto as Exhibit 3 (the “General Notice”), shall be mailed to all creditors who are not Class Members within fifteen (15) days following entry of the order certifying the Class for settlement purposes and preliminarily approving the Settlement Agreement.

E. The Court Should Finally Approve the Settlement at the Fairness Hearing Pursuant to Civil Rule 23

128. At the conclusion of the Fairness Hearing, the Court should enter the Final Approval Order.

129. Civil Rule 23 provides that “[t]he claims, issues, or defenses of a certified class – or a class proposed to be certified for purposes of settlement – may be settled, voluntarily dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P. 23(e). Final approval of a settlement pursuant to Civil Rule 23(e) turns on whether the settlement is “fair, reasonable and adequate.” Fed. R. Civ. P. 23(e)(2). “Rule 23(e) imposes on the trial judge the duty of protecting absentees, which is executed by the court’s assuring that the settlement represents

adequate compensation for the release of the class claims.” *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995) (citation omitted).

130. The Third Circuit recognizes a non-exclusive list of nine factors that might be relevant in determining whether a proposed class settlement is fair, reasonable, and adequate:

(1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Halley v. Honeywell Int’l, Inc., 861 F.3d 481, 488 (3d Cir. 2017) (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975).

131. The following *Girsh* factors strongly support approval of the Settlement Agreement (and not one of the factors support denial of approval).

- As discussed, litigation of the WARN Actions would be complicated, protracted, and expensive, and the recovery under the Settlement Agreement (funded in large part by the D&O Settlement) is almost certainly substantially greater than the recovery in any alternative scenario.
- The Class Representatives support the Settlement Agreement and Class Counsel believes that the bulk of the other Class Members will have a favorable reaction to the Settlement Agreement and will not object to it.
- The Settlement Agreement was reached after the essential facts had been thoroughly investigated by Class Counsel through an investigation that was reasonable and sufficient under the circumstances, and the Settling Parties participated in mediation followed by extensive settlement negotiations.
- When considered in light of the best possible recovery and the attendant risks, the settlement falls well within the range of reasonableness. The settlement provides for payment of an amount that is projected to be near the best reasonable estimate of WARN damages of the Class.

132. Based on the foregoing, the Court should approve the Settlement Agreement on a final basis pursuant to Civil Rule 23 and Bankruptcy Rule 7023.

Notice

133. Substantially contemporaneously with the filing of this Motion, the Trustee is serving a copy of the same on: (a) the Office of the United States Trustee; (b) counsel for Debtors; (c) counsel for the Settling Parties; (d) the California Labor and Workforce Development Agency; (e) the United States Department of Justice; (f) the United States Department of Labor; (g) the United State Securities Exchange Commission; and (h) all parties in interest who requested notice pursuant to Bankruptcy Rule 2002.

134. Within fifteen (15) days following entry of the order certifying the Class for settlement purposes and preliminarily approving the Settlement Agreement:

- a. The Class Notice shall be mailed to all Class Members; and
- b. The General Notice shall be mailed to all creditors who are not Class Members.

No Prior Request

135. No previous motion for the relief sought herein has been made to this or any other Court.

Conclusion

WHEREFORE, the Trustee and the Class Representatives respectfully request that the Court enter orders, substantially in the proposed forms annexed to the Settlement Agreement as **Exhibit A** and **Exhibit C**: (i) granting the Motion; (ii) approving the Settlement Agreement on a preliminary basis; (iii) certifying the Class for settlement purposes only; (iv) appointing Class Counsel and the Class Representatives and preliminarily approving the Settlement; (v) approving the form and manner of Class Notice; (vi) scheduling a Fairness Hearing; (vii) approving the Settlement Agreement on a final basis; and (viii) granting such other and further relief as may be just and equitable.

Date: July 30, 2024

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EXHIBIT 1

(Settlement Agreement and General Release)

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (“**Settlement Agreement**” or “**Agreement**”) is entered into by, between, and among the following (each a “**Settling Party**” and collectively referred to as the “**Settling Parties**”):

(a) Geoffrey Burtch (the “**Trustee**”), solely in his capacity as the Trustee in the Chapter 7 bankruptcy cases filed by BW Industries, Inc., a Delaware corporation (“**BWI**”), and its affiliated debtors, Bitwise Industries, Inc., a California corporation (“**Bitwise**”), BWRD, LLC, a California Limited Liability Company (“**BWRD**”), Alpha Works Technologies, LLC, a California Limited Liability Company (“**Alpha Works**”), and Bruce’s Bagels, Beverages, and Bites, LLC, a California Limited Liability Company (“**BBBB**”) (collectively, the “**Debtors**”),

(b) Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, and Neptali Montez (collectively, the “**Garza Plaintiffs**”), and Andre Nunn, Kaila Webb, and Kasandra Jimenez (collectively, the “**Nunn Plaintiffs**,” and, together with the Garza Plaintiffs, the “**Class Representatives**”), individually and on behalf of the Class (as defined below),

(c) Ollen Douglass (“**Douglass**”), Mitchell Kapor (“**Kapor**”), Paula Pretlow (“**Pretlow**”), and Joseph T. Proietti (“**Proietti**”), individually, and collectively as the “**Former Directors**”,

(d) Kapor Capital Management Co., LLC, Kapor Capital Partners II, L.P., Kapor Capital Partners III, L.P., and the Kapor Klein Revocable Trust (together, the “**Kapor-related Entities**”),

(e) 906 Ventures, LLC and Nuovo Capital, LLC (together, the “**Proietti-related Entities**”),

(f) Motley Fool Ventures Management LLC and Motley Fool Ventures LP (collectively, “**Motley Fool Ventures**”),

(g) The “**Participating Insurance Carriers**” which shall mean Scottsdale Insurance Company (“**Scottsdale**”), Great American E&S Insurance Company (“**Great American**”) and The Hanover Insurance Company (“**Hanover**”), and

(h) Bethany Mily (“**Mily**”).

I. RECITALS

1. WHEREAS, BWI is the sole stockholder of Bitwise. Bitwise was founded in 2013 by Jake Soberal (“**Soberal**”) and Irma Olguin, Jr. (“**Olguin, Jr.**”) in Fresno, California. Bitwise focused on computer programming instruction, technology sales, and real estate operations.

2. WHEREAS, BWI is the sole Member and Manager of Alpha Works Technologies, BWRD, and BBBB, its directly wholly owned subsidiaries.

3. WHEREAS, at all relevant times, the Debtors were operated and managed by co-CEO’s Soberal and Olguin, Jr. (together, the “**Former CEOs**”). The Former Directors served as members of BWI’s board of directors.

4. WHEREAS, during, or around, Memorial Day weekend of 2023, the Former Directors were made aware by the Former CEOs that the Debtors would not be able to meet current payroll obligations. Upon investigation by the Former Directors, it was discovered that the Former CEOs had, for a period of months if not years, misrepresented the Debtors’ financial condition and profitability.

5. WHEREAS, shortly after the events of Memorial Day weekend of 2023, the Former Directors voted to terminate the Former CEOs and other members of the Debtors’ management. For a period of three to four weeks thereafter, the Former Directors continued their investigation into the true status of the Debtors. Due to the nature and extent of the Former CEOs’ misfeasance and malfeasance, it was determined that the Debtors could not continue as going concerns and would file petitions for relief under Chapter 7 of the Bankruptcy Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**”).

6. WHEREAS, numerous civil lawsuits were filed as a result of and/or related to the Debtors’ demise:

(a) On June 7, 2023, the Garza Plaintiffs individually, as representatives of the Private Attorney General Act (“**PAGA**”) statutory group of former employees, and on behalf of similarly situated members of a putative class (the “**Garza Class**”) filed a complaint in the Fresno County Superior Court for the State of California against BWI, Bitwise, Alpha Works, the Former CEOs, the Former Directors, and DOES 1 through 100. The lawsuit, styled *Garza et al. v. BW Industries, Inc. et al.*, No. 23CECG02098 (the “**Garza Class Action**”), alleges: (1) Violation of the California WARN Act; (2) Violation of California Unfair Business Practices law; (3) Violation of California

Penal Code § 496; (4) Failure to pay wages; (5) Failure to maintain accurate records; (6) Failure to furnish wage statements; (7) Failure to timely pay wages; (8) Failure to pay minimum wages; and (8) Negligence. The complaint expresses the Garza Plaintiffs’ intent to add claims pursuant to PAGA (the “**PAGA Claims**”), and the Garza Plaintiffs filed a notice of such claims—the first step in bringing those claims—with the California Labor and Workforce Development Agency (“**LWDA**”). Pursuant to the automatic stay and an order [Dkt. 123] issued by the Bankruptcy Court, the Garza Class Action is stayed.

(b) On June 6, 2023, the Nunn Plaintiffs, individually and on behalf of similarly situated members of a putative class (the “**Nunn Class**”) filed a complaint (subsequently amended) in the United States District Court for the Eastern District of California against Bitwise, Alpha Works, certain of the Kapor-related Entities, the Proietti-related Entities, Motley Fool Ventures Management LLC, Soberal, Olguin, Jr., Kapor, Proietti, and Douglass. The lawsuit, styled *Andre Nunn, et al. v. Bitwise Industries, Inc. et al.*, Case 1:23-cv-00867-ADA-SAB (the “**Original Nunn Class Action**”), alleges: (1) Violation of the California WARN Act; (2) Violation of the Federal WARN Act; and (3) State Wage Law Claims. The Nunn Plaintiffs also expressed an intent to add claims pursuant to PAGA to the class action lawsuit by sending a notice to the California Labor and Workforce Development Agency. The Nunn Plaintiffs agree that any PAGA Claims they intended to and intend to file on behalf of any former employee group would be and will be encompassed by the LWDA notice and claims to be filed by the Garza Plaintiffs. Pursuant the automatic stay and an order [Dkt. 123] issued by the Bankruptcy Court, the Original Nunn Class Action is stayed.

(c) On June 9, 2023, Plaintiffs Agri Capital, Inc. and CA AG, LLC (the “**Agri Capital Plaintiffs**”) filed a complaint (subsequently amended) in the Superior Court of California, Fresno County against the Former CEOs, former Bitwise President Mily, the Former Directors, BWI, Bitwise, BBBB, and DOES 1 through 100 (collectively, the “**Agri Capital Defendants**”). The lawsuit, styled *Agri Capital, Inc. et al. v. Soberal, et al.*, Case No. 23CECG02240 (the “**Agri Capital Lawsuit**”), asserts claims for fraud, negligent misrepresentation, violation of California Penal Code § 496, breach of contract, breach of covenant of good faith and fair dealing, negligent supervision, breach of duty of care, and negligence related to unauthorized loan solicitations by Soberal, Olguin, and Mily. The Agri Capital Lawsuit was stayed pursuant to the automatic stay and an order [Dkt. 123] issued by the Bankruptcy Court. The Agri Capital Plaintiffs have taken

the position that the stay of actions against parties other than the Debtors terminated after the January 30-31, 2024 Global Mediation, referenced in ¶ 10, *infra*. Nonetheless, the Agri Capital Plaintiffs agreed to extend the Agri Capital Defendants' deadline to respond to the First Amended Complaint.

(d) On September 11, 2023, Douglass and Proietti filed a lawsuit in Fresno County Superior Court against Soberal, Olguin, Jr., Mily, and Scottsdale. The lawsuit, styled *Proietti et al. v. Soberal et al.*, No. 23CECG03741 (the “**Scottsdale Lawsuit**”) asserts claims for Declaratory Judgment related to insurance coverage on policies issued by Scottsdale. Pursuant to an order [Dkt. 123] issued by the Bankruptcy Court, the Scottsdale Lawsuit is stayed; and

(e) Additional lawsuits were filed against the Debtors, Former Directors, and Former CEOs, including but not limited to *Catalyst Communications, Inc. v. Jake Soberal, et al.*, Case No. 23CECG02145, Superior Court of the State of California, Fresno County; *Central Valley Community Foundation v. BW Capital Fund I, LP, et. al*, Case No. 24CECG00377, Superior Court of the State of California, Fresno County; *Chase Carter, et al. v. BW Industries, Inc., et al.*, Case No. 23CECG00649, Superior Court of the State of California, Fresno County; *Robert Ellis v. Jake A. Soberal, et al.*, Case No. 23CECG04476, Superior Court of California, Fresno County; *NICbyte, LLC, et al. v. Wishon Row, LLC, et al.*, Case No. 23CECG01990, Superior Court of the State of California, Fresno County; and *NICbyte, LLC, et al. v. StarTop Investments, LLC, et al.*, C.A. No. 2023-0637-NAC, Court of Chancery, State of Delaware (the “**Additional Lawsuits**”).

7. WHEREAS, on June 28, 2023 (the “**Petition Date**”), the Debtors filed their voluntary petitions with the Bankruptcy Court, thereby commencing the Chapter 7 case styled *In re BW Industries, Inc.*, Case, No. 23-10844-MFW), *In re Bitwise Industries, Inc.*, Case No. 23-10845-MFW, *In re BWRD, LLC*, Case No. 23-10846-MFW, *In re Alpha Works Technologies, LLC*, Case No. 23-10847-MFW, and *In re Bruce's Bagels, Beverages, and Bites, LLC*, Case No. 23-10848-MFW (the “**Bankruptcy Cases**”). The Bankruptcy Cases are being jointly administered under Case No. 23-10844-MFW. On June 30, 2023, the Trustee was appointed as the interim chapter 7 trustee in the Bankruptcy Cases.

8. WHEREAS, on July 3, 2023, the Nunn Plaintiffs filed an adversary proceeding in the Bankruptcy Court styled as *Nunn, et al. v. Bitwise Industries, Inc., et al.*, (Adv. Pro. No. 23-50425-MFW, Bankr. D. Del.) (the “**Nunn Adversary**” and, with the Original Nunn Class Action, the

“Nunn Class Actions”), in which they assert claims substantially similar to those asserted in the Original Nunn Class Action.

9. WHEREAS, on July 20, 2023, Proietti and Douglass filed a Motion for Determination that the Automatic Stay Does Not Stay Commencement and Prosecution of Litigation to Determine Use of Insurance Proceeds or, in the alternative, for Stay Relief [Dkt. 26] (the **“Use of Insurance Proceeds Motion”**). On August 18, 2023, attorneys for Bitwise, BWI, BBBB, and non-debtor wholly-owned subsidiary Wishon Row, LLC, Kapor, Pretlow, Proietti and Douglass filed a Motion to Modify Automatic Stay to Permit Advancement of Defense Fees and Costs [Dkt. 99, as amended Dkt. 104] (the **“Advancement Motion”**). In an attempt to resolve the Use of Insurance Proceeds Motion and the Advancement Motion and resolve the civil actions referenced above in the most economical and efficient manner, the Trustee, the Former Directors, the Agri Capital Plaintiffs, the Nunn Plaintiffs and the Garza Plaintiffs, through counsel, negotiated a Consent Order [Dkt. 123] (the **“Consent Order”**) which resolved the motions, and stayed the civil actions, originally for 120 days and subsequently through a period until 20 days after completion of the mediation process that began on January 30, 2024, during which time the parties agreed to mediate the claims of the plaintiffs in the civil actions as well as claims by the Trustee on behalf of the Debtors against the Former Directors (the **“Trustee’s Claims”**).

10. WHEREAS, on January 30th and 31st of 2024, in an attempt to agree to a global resolution of the above-referenced lawsuits and other disputes (or as many as possible), existing or potential, related to the demise of Bitwise and the Debtors’ bankruptcies, a mediation was held in New York, New York (the **“Global Mediation”**). The parties to the Global Mediation, through their respective counsel, included, among others: the Trustee, the Garza Plaintiffs, the Nunn Plaintiffs, Scottsdale, Hanover, Great American, Kapor and the Kapor-related entities, Proietti and the Proietti-related entities, Pretlow, Douglass, and Motley Fool Ventures. The Settling Parties agreed to continue the Global Mediation beyond January 31, 2024, in order to negotiate a potential settlement.

11. WHEREAS, the Settling Parties through counsel, have (i) extensively examined the allegations and defenses relating to the Bankruptcy Cases (including proofs of claims and priority claims against the Debtors’ estates), the Nunn Class Actions, the Garza Class Action, the Agri Capital Lawsuit, the Scottsdale Lawsuit, and the Trustee’s Claims, (ii) carefully considered the position statements and responses submitted in advance of the Global Mediation, and (iii) engaged

in extensive post-mediation discussion and negotiation. In light of the foregoing, the Settling Parties, without admitting liability, now desire to avoid the cost and uncertainty of further litigation and therefore agree to resolve their disputes as follows and pursuant to the terms stated herein.

NOW, THEREFORE, in consideration of the foregoing and the covenants, stipulations, promises, and representations herein, including but not limited to the releases granted herein, and other valuable consideration the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the Settling Parties hereby agree as follows:

II. DEFINITIONS

12. As used herein (and not defined elsewhere in this Agreement), the following terms shall have the meanings set forth below:

(a) **“Final Approval Order”** means the Bankruptcy Court’s order substantially in the form attached hereto as Exhibit A approving this Settlement Agreement on a final basis, which Final Approval Order shall include a finding that the Trustee, acting on behalf of the Debtors’ estates, has the full and sole authority to settle and release the Debtors and the Debtors’ estates’ claims, including all claims alleging a generalized harm to creditors asserted against the Former Directors (including, but not limited to such claims asserted against the Former Directors in the Agri Capital Lawsuit) and that by approving this Settlement Agreement that the Bankruptcy Court is authorizing the Trustee to fully release any and all claims of the Debtors and the Debtors’ estates as set forth in this Settlement Agreement.

(b) The **“Funding Parties”** includes, and is limited to, (i) Great American, (ii) Hanover, (iii) Scottsdale, (iv) Motley Fool Ventures, and (v) Kapor and/or Kapor-related Entities.

(c) The **“Great American Policy”** means Private Equity Liability Insurance Policy No. PEPE247333 issued by Great American to Kapor Capital Management Co., LLC, which was in effect from July 30, 2022 to July 30, 2023 with a per Claim limit of \$5,000,000.00.

(d) The **“Hanover TPL Policy”** means Technology Professional and Cyber Advantage Policy No. LHF D041495 07 issued by Hanover to BWI, which was in effect from September 2, 2022 to September 2, 2023 with a \$2,000,000.00 per Claim limit and a \$10,000.00 per Claim self-insured retention, which has been satisfied.

(e) **“Kapor Preference Claim”** means the claim informally asserted by the Trustee against the Kapor Klein Revocable Trust seeking recovery under Section 547 of the Bankruptcy Code with respect to loan payments made by the Debtors.

(f) “**PAGA Members**” means former employees of the Debtors employed at any time during the one-year preceding the Garza Plaintiffs’ PAGA notice filing with the LWDA.

(g) “**Scottsdale/Hanover Agreement**” means the insurance settlement and release agreement entered into between and among Scottsdale, Hanover, and certain insureds and other parties.

(h) The “**Scottsdale Policy**” means Business and Management Indemnity Policy No. EKS3476591 issued by Scottsdale to “Bitwise Industries dba Listing Agent,” subsequently modified by endorsement to identify the Named Insured as “BW Industries, Inc. DBA Bitwise Industries,” which was in effect from April 30, 2023 to April 30 2024 with a \$5,000,000.00 aggregate limit and \$25,000.00 per Claim retentions applicable to each Claim under Insuring Clauses 2 and 3, which such retentions, to the extent applicable, have been satisfied.

(i) “**Settled Matters**” means the Nunn Class Actions, the Garza Class Action and PAGA Claims, the Scottsdale Lawsuit, and the Trustee’s Claims.

III. TERMS OF SETTLEMENT

13. In exchange for, and as consideration for, the covenants, stipulations, promises, and representations herein, including but not limited to the releases granted herein, the Settling Parties agree that the Settled Matters are resolved for a total monetary consideration of \$20,000,000.00 (the “**Settlement Proceeds**”) payable in U.S. dollars to the Trustee pursuant to the terms and conditions set forth below.

Funding of the Settlement Proceeds.

14. Funding of the Settlement Proceeds. The Settlement Proceeds shall be funded as follows: (a) \$2,000,000.00 in insurance proceeds from the Hanover TPL Policy; (b) All remaining insurance proceeds from the Scottsdale Policy, estimated to be approximately \$4,500,000.00; (c) \$5,000,000.00 in insurance proceeds from the Great American Policy; (d) \$5,000,000.00 from Kapor as satisfaction of the Kapor Preference Claim; (e) \$75,000.00 from Motley Fool Ventures; and (f) the difference between \$20,000,000.00 and the aggregate total of 14(a) through 14(e), estimated to be approximately \$3,425,000.00, from Kapor and/or Kapor-related Entities. The Funding Parties will pay the Settlement Proceeds to the Trustee within thirty (30) days following the Effective Date (as defined below), provided that at least ten (10) days prior to such funding each of the Funding Parties is provided with a completed Form W-9 and all necessary payment instructions to complete payment by check or wire.

15. Conditions Precedent to Funding of the Settlement Proceeds. This Settlement Agreement shall become effective on the “**Effective Date**,” and the Funding Parties’ obligations to submit their respective contributions to the Settlement Proceeds are expressly conditioned on the occurrence of the Effective Date. For purposes of this Settlement Agreement the Effective Date shall be the date on which all of the following have occurred: (a) the Final Approval Order and such orders as are necessary for the dismissal of the Nunn Class Actions and the Garza Class Action, if any, have all become “Final Orders”; and (b) the Former Directors, Mily, JITRE, Inc., Wishon Row, LLC, Scottsdale, and Hanover have executed the Scottsdale/Hanover Agreement. The orders shall become Final Orders when the time for taking an appeal has expired or, if an appeal has been taken, on the day the relevant approval order has been affirmed with no further right of appeal.

16. Bankruptcy Court Approval. Within ten (10) days after this Settlement Agreement has been executed by all parties, the Trustee and the Class Representatives will file a joint motion (the “**Rule 9019 Motion**”) with the Bankruptcy Court requesting:

- a. Entry of an order substantially in the form attached hereto as Exhibit B approving the Settlement Agreement on a preliminary basis (the “**Preliminary Order**”);
- b. Solely for purposes of approval of the Settlement Agreement, certification of a class comprised of all persons who: (i) were employed by the Debtors; (ii) suffered an “employment loss” as that term is defined in 29 U.S.C. § 2101(a)(6) and 20 C.F.R. § 639.3(f), on, or within thirty (30) days of, May 29, 2023, as part of a “plant closing” or “mass layoff,” as those terms are defined in 29 U.S.C. § 2101(a)(2)-(3) and 20 C.F.R. § 639.3(b)-(c), or as the reasonably foreseeable consequence of a “plant closing” or “mass layoff” occurring on or about May 29, 2023; (iii) meet the definition of “affected employee” as set forth in 29 U.S.C. § 2101(a)(5) and 20 C.F.R. § 639.3(e); and (iv) do not file a timely request to opt out of the class (each a “**Class Member**” and, collectively, the “**Class**”);
- c. The appointment of the Class Representatives;
- d. The Appointment of Raisner Roupinian LLP, Erickson Kramer Osborne, Whelan Law Group and Bonakdar Law Firm as counsel for the Class (“**Class Counsel**”);

- e. Approval of the notice, substantially in the form attached hereto as Exhibit C (the **“Class Notice”**) to be provided to individuals who are eligible to be Class Members, and the manner of service of the Class Notice;
 - g. Scheduling a hearing (the **“Fairness Hearing”**) to consider approval of the Settlement Agreement on a final basis; and
 - h. Following the Fairness Hearing, entry of the Final Approval Order.
 - i. The Trustee shall use his best efforts to obtain Bankruptcy Court approval of a bar order in the Final Approval Order that will prohibit and enjoin any person from asserting against the Settling Parties any and all outstanding and future claims arising from or relating to the Settled Matters, the Released Matters, the Debtors, the Former Directors, or the Settling Parties. The Settling Parties expressly agree that Trustee’s best efforts to obtain such bar order is integral to the resolution of the Settled Matters as set forth in this Settlement Agreement, including the granting of the mutual release by the Settling Parties and the payment of the Settlement Proceeds by the Funding Parties.
17. Within ten (10) days after this Settlement Agreement has been executed by all parties, the parties shall seek relief from the automatic stay in the Bankruptcy Court solely for the purpose of allowing the Garza Plaintiffs to file an amended complaint (the **“First Amended Garza Complaint”**) in the Garza Class Action to add the PAGA Claims for settlement purposes only. The First Amended Garza Complaint will be subject to the Former Directors’ approval as to form and content before filing.
18. Prior to the Fairness Hearing, and as otherwise provided in the Preliminary Approval Order:
- a. Class Counsel shall send the Class Notice to all individuals who are eligible to be Class Members as provided in the Preliminary Approval Order.
 - b. Within ten (10) days after the Opt-Out Deadline and PAGA Members’ Objection Deadline (each as defined in the Class Notice), Class Counsel shall provide written notice to the other Settling Parties of the total number of Class Members and the number and percentage of Class Members who have exercised their right to opt out or object.
 - c. In the event that the percentage of individuals who are eligible to be Class Members who elected to exercise their right to opt out of the Class is greater than ten percent (10%) of the total number of eligible Class Members, any of the Settling Parties shall have the

right to terminate the Settlement Agreement by notice to the other Settling Parties within ten (10) days after delivery of the notice required under paragraph 18.b, whereupon the Trustee and the Class Representatives shall withdraw the 9019 Motion and cancel the Fairness Hearing, and this Settlement Agreement shall be null and void.

19. Dismissal of Original Nunn Class Action and Garza Class Action. Upon entry of the Final Approval Order, the Nunn Plaintiffs, the Garza Plaintiffs, and the defendants in the relevant actions shall stipulate to dismissal, with prejudice, of their respective lawsuits pending in California. The Garza Plaintiffs, through counsel, shall propose allocating \$75,000.00 of the Settlement Proceeds to the PAGA Claims. In the event the Bankruptcy Court rejects such proposed allocation, the Garza Plaintiffs may increase the proposed PAGA allocation as necessary to secure the court's approval.

20. Post-Effective Date Obligations. Within ten (10) business days after the Effective Date:

a. The Nunn Plaintiffs shall file a notice of dismissal of the Nunn Adversary with prejudice.

b. The Trustee shall request dismissal of the Agri Capital Lawsuit as against all Former Directors and Mily. If the Trustee's request is denied, the Trustee shall, within thirty (30) days after such denial, in consultation with the Former Directors, take such actions in the Bankruptcy Court as may be reasonably necessary or appropriate to seek dismissal of the Agri Capital Lawsuit.

b. Proietti and Douglass shall file a Request for Dismissal of the Scottsdale Lawsuit on California Judicial Council Form CIV-110, with each party to bear its own attorney's fees and costs.

21. Termination. Except as otherwise agreed in writing by all Settling Parties in accordance with Section 56 of this Settlement Agreement, in the event that the Final Approval Order has not been entered by November 30, 2024, the Settlement Agreement shall become null and void and of no further force and effect and the Settling Parties shall be restored to their litigation position existing before the execution of this Settlement Agreement.

Distribution of Settlement Proceeds.

22. Initial Class Distribution. Within ten (10) business days after receipt of the Settlement Proceeds, the Trustee shall distribute Six Million and No/100 Dollars (\$6,000,000.00) out of the Settlement Proceeds to the Class (the "**Initial Class Distribution**").

23. Class Priority Claim. As soon as practicable after the Effective Date, Class Counsel shall provide the Trustee with their calculation of the amount of the claim that they will file on behalf of the Class in the Bankruptcy Cases (the “**Class Priority Claim**”), and, in the absence of specific, identifiable errors in such calculation, the Trustee shall stipulate to such amount. The Class Priority Claim shall be entitled to priority pursuant to 11 U.S.C. § 507(a)(4), and shall be calculated on the basis of Class Members’ actual wages, provided that the sum of the Initial Class Distribution and the Class Priority Claim shall in no event exceed the aggregate amount of the Class Members’ individual claims that would be entitled to priority under 11 U.S.C. § 507(a)(4). Subject to the Trustee’s review and approval as provided in this paragraph, the Settling Parties further stipulate and agree that the Class Priority Claim shall have priority in right of payment to any of the claims of the Former Directors, Kapor-related Entities, Proietti-related Entities, Motley Fool Ventures, and the Participating Insurance Carriers with respect to any distributions made by the Trustee in the Bankruptcy Cases, and agree not to contest the Class Priority Claim, or the amounts and priority thereof, in whole or in part in the Bankruptcy Cases or in any other proceeding.

24. Qualified Settlement Fund. The Initial Class Distribution and distributions on account of the Class Priority Claim (collectively, the “**Class Payments**”) shall be transferred by the Trustee to a qualified settlement fund to be established by Class Counsel in conformity with Internal Revenue Code §468B (the “**Qualified Settlement Fund**”) pursuant to written instructions provided by Class Counsel.

Class Counsel Fees and Expenses

25. Bankruptcy Court Fee Approval. Class Counsel shall seek Bankruptcy Court approval of Class Counsel’s fees and expenses. The Settling Parties agree that they shall not object to the allowance of fees payable out of the Initial Class Distribution, provided that such fees do not exceed thirty percent (30%) of the amount of the Initial Class Distribution plus reasonable expenses. Class Counsel may seek allowance of up to one-third of the amount to be distributed on account of the Class Priority Claim as its fees and expenses, provided that the Settling Parties reserve the right to object to fees with respect to distributions on account of the Class Priority Claim. Any of Class Counsel’s fees and expenses allowed by the Bankruptcy Court shall be referred to as the “**Attorneys’ Fee Award.**” The Attorneys’ Fee Award shall be paid solely out of the Qualified Settlement Fund, and Class Counsel shall have no right to payment, either as an administrative expense, unsecured claim, or otherwise, from the Estates for any reason at any time.

Class Counsel's Fees and Class Counsel's Expenses shall constitute payment in full for Class Counsel's work and expenses in connection with this Settlement Agreement or the claims that are the subject matter hereof.

Class Representative Service Payments

26. A one-time payment, subject to Bankruptcy Court Approval, shall be made in the Initial Class Distribution from the Qualified Settlement Fund in the amount of \$3,000.00 for each of the Class Representatives and distributed to them as compensation for their services to the Class ("**Service Payments**"). Any awarded Service Payments shall be characterized as non-employee compensation to the Class Representatives and shall be reported to the Taxing Authorities on behalf of each Class Representative on an IRS Form 1099.

Administration of Qualified Settlement Fund

27. For the sole purpose of implementing this Settlement Agreement and effectuating the Settlement, Class Counsel shall designate and appoint American Legal Claims Services LLC as independent fund administrator (the "**Settlement Administrator**"). In addition to the Class Payments, the Trustee shall pay the invoiced fees and costs incurred by the Settlement Administrator in the administration of the Qualified Settlement Fund in an amount not to exceed \$50,000.00. Any fees and costs in excess of \$50,000.00 shall be paid solely from the Qualified Settlement Fund and shall be paid prior to any distributions to the Class Members.

28. Participating Class Members shall receive a pro rata portion of the Qualified Settlement Fund determined as follows:

- a. The Qualified Settlement Fund shall first be reduced by the amounts paid to the Settlement Administrator and Class Counsel as their Attorney's Fee Award, the Service Payments, and the employers' share of payroll taxes payable with respect to distributions to Class Members.
- b. The Qualified Settlement Fund shall thereafter be reduced by \$75,000 or such other amount as may be allocated to PAGA penalties (the "**PAGA Settlement Amount**"). 75% of the PAGA Settlement Amount shall be distributed to the State of California Labor and Workforce Development Agency and 25% of the PAGA Settlement Amount shall be distributed equally (per capita) among the PAGA Members.
- c. The balance remaining in the Qualified Settlement Fund, after the reductions provided by paragraph 28.a through 28.b shall be divided on a pro rata basis among all the

members of the Class; provided that no Class Member shall receive payments from the Qualified Settlement Fund in an aggregate amount in excess of the applicable limit under 11 U.S.C. § 507(a)(4), except to the extent that such excess is solely attributable to Service Payments. The number of Class Members for purposes of this distribution shall be determined from the Debtors' books and records.

d. Settlement Administrator shall be responsible for the mailing of the Initial Class Distribution checks, Class Priority Claim checks, and Service Payment checks to the Class Representatives and Class Members. Class Counsel's (or designees') and Settlement Administrator's addresses will be used as the return address for the Class Notices and for checks mailed to the Class Members, respectively, so that any returned Class Notices or checks will be returned to the sender who shall undertake to determine a current address and remail the Class Notice or check promptly. Any Class Notices or checks that are returned after three unsuccessful mailing attempts shall be deemed undeliverable. Any undeliverable check amounts from the Initial Class Distribution shall be added to the Qualified Settlement Fund and remitted to members of the Class at such time that the Class Priority Claims payment is distributed to members. Any settlement checks from the Class Priority Claim distribution remaining un-cashed for more than one hundred and eighty (180) calendar days after issuance shall be automatically cancelled, at which time the participating Class Member's and/or PAGA Member's claim shall be deemed null and void and of no further force and effect, although the individual shall remain a Class Member and/or PAGA Member bound by this Settlement Agreement and the Final Approval Order. After 180 calendar days, the aggregate dollar amount of the uncashed checks, plus any interest that has accrued thereon and has not otherwise been distributed, shall be tendered to any Class Member to correct any non-payment due to error, and the remainder remitted to a non-profit entity whose mission is concordant with that of the Class Members in this matter.

e. All payments will be made to Class Members and PAGA Members as promptly as possible after any Class Payment is received by the Qualified Settlement Fund.

f. Payments made to PAGA Members will be treated as 1099 PAGA statutory penalty payments, not wage earnings, for which a 1099-MISC will be issued.

Taxation

29. Any employee payroll tax withholdings required by federal, state, or local law (“**Employee Taxes**”) shall be withheld by the Settlement Administrator from the Qualified Settlement Fund and each Class Member shall be issued a Form W-2 reflecting such withholdings. The employer portion of all applicable federal, state, and local taxes, including without limitation, Federal Insurance Contribution Act (“**FICA**”) taxes, as well as any other taxes and unemployment compensation contributions, shall also be withheld by the Settlement Administrator and paid solely from the Qualified Settlement Fund (the “**Employers’ Taxes**” and together with the “**Employee Taxes**,” the “**Payroll Taxes**”). All such Payroll Taxes shall be paid promptly to the appropriate taxing authorities. The Settlement Administrator shall be responsible for the reporting of the Payroll Taxes to the appropriate taxing authorities, as well as the provision of Forms W-2 and other required tax reporting forms (including any Form 1099 issued).

Release of Claims

30. Except for obligations under this Settlement Agreement, as of the Effective Date, the Settling Parties, on behalf of themselves and (as applicable) their current and former officers, directors, managers, members, shareholders, general partners, limited partners, employees, advisors, agents, professionals, affiliates, subsidiaries, parents, guarantors, and controlling persons (each in their respective capacities as such), and, in the case of the Class Representatives, on behalf of the Class and all Class Members, and, in the case of the Trustee, on behalf of the Debtors’ estates, together with the predecessors, successors and/or assignees of each of the foregoing (“**Releasor**,” or collectively, “**Releasors**”), shall and hereby do release, acquit, and forever discharge each other and every other Settling Party and Releasor from any and all claims, actions, causes of action, rights, demands, suits, debts, liens, contracts, agreements, offsets or liabilities, with respect to any conduct, acts, omissions, facts, matters, transactions, oral or written statements, or occurrences arising from or relating in any way to the Debtors’ bankruptcies or any of the Debtors or their bankruptcy estates. This general and mutual release (the “**Release**” or “**Releases**”) expressly includes, but is not limited to, the following:

- a. All claims and causes of action alleged or threatened in the Nunn Class Actions, the Garza Class Action, and the Scottsdale Lawsuit;
- b. The Trustee’s Claims;

c. All tort claims, negligence claims, claims for breach of contract, breach of the duty of good faith and fair dealing, breach of statutory duties, actual or constructive fraud, unfair business or trade practices, false advertising, restitution, rescission, unjust enrichment, compensatory and punitive damages, injunctive or declaratory relief, attorney's fees, interests, costs, penalties and any other claims), whether known or unknown, alleged or not alleged, foreseen or unforeseen, suspected or unsuspected, contingent or matured, liquidated or unliquidated, under federal, state or local law, whether by statute, contract, common law or equity, which any Settling Party or Releasor had or now has with respect to any conduct, acts, omissions, facts, matters, transactions or oral or written statements or occurrences arising from or relating in any way to the Debtors' bankruptcies or any of the Debtors or their bankruptcy estates, including but not limited to the Agri Capital Lawsuit and the Additional Lawsuits;

d. Any and all coverage obligations under or related to the Hanover TPL Policy, the Great American Policy, and the Scottsdale Policy; and

e. All claims that might otherwise be asserted by or against any Releasor in the Bankruptcy Cases, including claims under Chapter 5 of the Bankruptcy Code.

Collectively, a. through e. are referred to as the "**Released Matters.**" Notwithstanding the foregoing: (i) the Released Matters do not include, and this Settlement Agreement has no effect on, Claim No. 257, filed by The Mitchell Kapor Foundation (the "**Kapor Foundation**"), a 501(c)(3) charitable organization; and (ii) the Class Members' release shall be limited to (a) claims and causes of action alleged in, arising from, or relating to the Nunn Class Actions, the Garza Class Action, and the PAGA Claims, and (b) all rights to any insurance policy issued by the Participating Insurance Carriers at any time.

31. Release of Attorneys' Fees. Except as set forth above with respect to Attorneys' Fee Award, the Releases cover any and all claims for attorneys' fees, costs or disbursements incurred by any Settling Party or counsel representing any Settling Party in connection with or related in any manner to the Settled Matters or Released Matters.

32. Enforcement of Settlement Agreement. Nothing herein shall preclude any action to enforce the terms of this Settlement Agreement, including participation in any of the processes detailed herein.

33. Scope of Release, California Civil Code §1542. With respect to any and all claims released hereby, each of the Settling Parties stipulates and agrees that, upon the date the Releases provided herein become effective, the Settling Parties shall be deemed to have expressly waived and relinquished, to the fullest extent permitted by law, any and all provisions, rights, and benefits conferred by law or statute, whether federal, state, municipal, local, tribal, foreign or other, or principle of common law, which are similar, comparable, or equivalent to California Civil Code §1542 (including California Civil Code §1542 itself), which provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

It is the intention of the Settling Parties providing the Releases that, notwithstanding the provisions of California Civil Code § 1542 or any similar provisions, rights and benefits conferred by law, and notwithstanding the possibility that the Settling Parties providing the Releases or their counsel may discover or gain a more complete understanding of the facts, events, or law that, if presently known or fully understood, would have affected the decision to enter into this Settlement Agreement, any and all releases of claims, including unknown claims, shall be fully, finally, and forever settled. Each of the Settling Parties acknowledges that the inclusion of unknown claims herein was separately bargained for and was a key and material element of this Settlement Agreement.

34. Covenant Not to Sue. Following the occurrence of the Effective Date and payment of the Settlement Proceeds, the Settling Parties, including, without limitation, the Trustee and the bankruptcy estates, hereby promise, covenant and agree not to continue, pursue, commence, initiate, file, institute, assert, aid, prosecute, encourage, support, induce, participate in or assist, directly or indirectly, any lawsuit, action, claim or other proceeding of any kind, at any time, against any other Settling Party or Releasor, in any court or administrative proceeding, in any venue, based upon, arising out of, or relating in any way to the Settled Matters and the Released Matters.

General Terms and Conditions

35. Court Approval. This Settlement Agreement is subject in all respects to the Bankruptcy Court's entry of the Final Approval Order.

36. Recitals. The above Recitals and the definitions contained therein are incorporated by reference and shall be deemed substantive parts of this Settlement Agreement.

37. Press Statement. Upon filing of the Rule 9019 Motion, any Settling Party may issue its own public statement regarding this Settlement Agreement. After entry of the Preliminary Approval Order, any of the Settling Parties shall be entitled to issue or cause the publication of the joint press statement attached as Exhibit D to this Settlement Agreement.

38. Entirety. Except as set forth in the Scottsdale/Hanover Agreement, this Settlement Agreement contains the entire agreement between the Settling Parties. It supersedes any and all prior agreements, arrangements, or understandings between the Settling Parties on all subjects in any way related to the subject matters of this Settlement Agreement. No oral understandings, statements, promises, or inducements contrary to or inconsistent with the terms of this Settlement Agreement exist.

39. Sophisticated Parties. The Settling Parties represent and warrant that they are sophisticated and represented by counsel in negotiating this Agreement, are specifically resolving existing disputes, and intend to include “disclaimer of reliance” language necessary to satisfy the requirements for barring fraudulent inducement or misrepresentation claims. Accordingly, THE PARTIES HEREBY SPECIFICALLY DISCLAIM RELIANCE ON ANY STATEMENTS, REPRESENTATIONS, OR PROMISES MADE BY ANY OF THE PARTIES PRIOR TO THE EXECUTION OF THIS AGREEMENT, except as expressly set forth in this Agreement.

40. Collectively Drafted. All terms contained herein are contractual. For the purpose of construing or interpreting this Settlement Agreement, the Settling Parties agree that the Settlement Agreement is to be deemed to have been drafted equally by all Settling Parties hereto and shall not be construed strictly for or against any Settling Party, and the Settling Parties further agree that any prior drafts may not be used to construe or interpret this Settlement Agreement.

41. Voluntary Agreement. This Settlement Agreement is executed voluntarily and without duress or undue influence on the part of or on behalf of any Settling Party, or of any other person, firm, or entity. Each Party has made such investigation of the facts pertaining to this Settlement Agreement and of all other matters pertaining hereto as he, she, or it deems necessary.

42. Separate Investigation. The Settling Parties acknowledge that they have made their own investigation of the matters covered by this Settlement Agreement to the extent they have deemed it necessary to do so. Therefore, the Settling Parties agree that they will not seek to set aside any

part of the Settlement Agreement on the grounds of mistake. Moreover, the Settling Parties understand, agree, and expressly assume the risk that any fact not recited, contained, or embodied in the Settlement Agreement may turn out hereinafter to be other than, different from, or contrary to the facts now known to them or believed by them to be true, and further agree that the Settlement Agreement shall be effective in all respects notwithstanding and shall not be subject to termination, modification or recession by reason of any such difference in facts.

43. Inurement. The terms are and shall be binding upon each of the Settling Parties, their administrators, estates, agents, assigns, attorneys, executors, heirs, partners, representatives, predecessors-in-interest, and successors, as well as upon all other persons claiming any interest in the subject matter of this Settlement Agreement through any of the Settling Parties, including any Releaser or Class Members. This Settlement Agreement shall remain binding notwithstanding any dismissal or conversion of the Bankruptcy Cases.

44. Savings. If any provision of this Settlement Agreement is held to be illegal, invalid, or unenforceable, under any present or future laws, such provision shall be fully severable and this Settlement Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision never comprised a part hereof; and the remaining provisions hereof shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision.

45. Authority. Each of the Settling Parties, and each of the persons signing the Settlement Agreement on behalf of such Settling Party, represents that he, she, or it is fully competent and has the authority necessary to settle all claims released herein and to execute this Settlement Agreement on behalf of the Settling Party for whom he, she, or it signs.

46. No Waiver. The waiver by one Settling Party of any breach of this Settlement Agreement by any other Settling Party shall not be deemed a waiver by the waiving Settling Party of any other prior or subsequent breach of this Settlement Agreement or a waiver by any other Settling Party of any breach of the Settlement Agreement.

47. No Admission. This Settlement Agreement is intended to be and is a settlement and compromise of a dispute between the Settling Parties, and neither this Settlement Agreement, nor any acts or omissions related thereto, shall constitute an admission or disclaimer of the existence of liability of any kind (other than the liability created by this Settlement Agreement). The Settling Parties agree that nothing in this Settlement Agreement shall constitute or be introduced, treated,

deemed, or otherwise interpreted or construed as evidence in any judicial or arbitration proceedings except proceedings to enforce or defend the terms hereof.

48. No Assignment. Each of the Settling Parties represents and warrants that such Settling Party is the owner of the claims that it releases in this Settlement Agreement, and has not assigned or otherwise transferred, pledged, or hypothecated such claims or any portion thereof to any third party.

49. Jurisdiction. Any dispute regarding the interpretation or validity or otherwise arising out of this Settlement Agreement and all orders and judgments entered in connection therewith, or relating to the Settled Matters or the Released Matters, shall be subject to the exclusive jurisdiction of the Bankruptcy Court, and the Settling Parties, Class Members, and PAGA Members all agree to submit to the personal and exclusive jurisdiction of the Bankruptcy Court for the purpose of resolving any such dispute. Following the Effective Date, the Bankruptcy Court shall retain jurisdiction solely with respect to the interpretation, implementation, and enforcement of the terms of this Agreement and all orders and judgments entered in connection therewith, and the Parties and their counsel submit to the jurisdiction of the Bankruptcy Court for purposes of interpreting, implementing, and enforcing the Settlement embodied in this Agreement and all orders and judgments entered in connection therewith.

50. Headings. Headings in this Settlement Agreement are for convenience only and do not constitute a part of this Agreement.

51. Choice of Law. The construction, interpretation, operation, effect and validity of this Settlement Agreement, and all documents necessary to effectuate it, shall be governed by the laws of the State of Delaware without regard to conflicts of law, except to the extent that federal law requires that federal law govern.

52. Cooperation. The Settling Parties agree to cooperate fully with one another in seeking Bankruptcy Court approval of this Settlement Agreement, and to use best efforts to promptly agree upon and execute all such other documentation as may be reasonably required to obtain final approval by the Bankruptcy Court of this Settlement Agreement.

53. No Oral Modification. This Settlement Agreement may be amended or modified only by a written instrument signed by all signatories hereto (or their successors-in-interest) or their counsel, and a Settling Party shall not be deemed to have waived any provision except by a writing signed by that Settling Party (or its successor-in-interest) or its counsel. Amendments and modifications

may be made without notice to the Class unless such notice is required by law or by the Bankruptcy Court.

54. Agreement Constitutes a Complete Defense. To the extent permitted by law, this Settlement Agreement may be pleaded as a full and complete defense to any action, suit, or other proceeding that may be instituted, prosecuted, or attempted in breach of or contrary to this Settlement Agreement.

55. Signatures. Signatures by facsimile or in Portable Document Format (PDF), such as through DocuSign, or by other electronic means, shall have the same force and effect as original signatures.

56. Execution Date and Execution in Counterparts. This Settlement Agreement shall be deemed executed upon the last date of signature of all of the undersigned. The Settling Parties may execute this Settlement Agreement in counterparts, each of which shall constitute an original, but all of which together shall constitute one and the same instrument having the same force and effect as if all Settling Parties had signed the same instrument.

57. Notice. Any notice, demand, or communication required or permitted to be given by any provision of this Agreement shall be in writing and sent by Certified Mail, Return Receipt Requested and email, addressed to each respective Party's counsel, as follows:

Jeffrey Burtch, the Trustee:

Jeffrey L. Burtch
P.O. Box 549
Wilmington, DE 19899
jburtch@burtchtrustee.com

-and-

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Gregory F. Fischer
Eric D. Freed
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San Francisco, CA 94105
elizabeth@eko.law
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Ollen Douglass:

Paul Lackey
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2200 Ross Avenue, Suite 2900
Dallas, TX 75201
paul.lackey@stinson.com

-and-

Anthony Cali
Clarissa Brady
STINSON LLP
1850 N. Central Avenue, Suite 2100
Phoenix, AZ 85004
anthony.cali@stinson.com
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-and-

John D. Demmy
SAUL EWING LLP
1201 North Market Street, Suite 2300
P.O. Box 1266
Wilmington, DE 19899
john.demmy@saul.com

Motley Fool Ventures LP and Motley Fool Ventures Management LLC:

Christian D. H. Schultz
ARNOLD & PORTER KAYE SCHOLER
LLP
601 Massachusetts Avenue NW
Washington, DC 20001-3743
christian.schultz@arnoldporter.com

-and-

David J. Reis
Matthew R. Diton
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San Francisco, CA 94111-4024
david.reis@arnoldporter.com
matthew.diton@arnoldporter.com

Joseph T. Proietti, Nuovo Capital, LLC, and 906 Ventures, LLC:

Paul Lackey
STINSON LLP
2200 Ross Avenue, Suite 2900
Dallas, TX 75201
paul.lackey@stinson.com

-and-

Anthony Cali
Clarissa Brady
STINSON LLP
1850 N. Central Avenue, Suite 2100
Phoenix, AZ 85004
anthony.cali@stinson.com
clarissa.brady@stinson.com

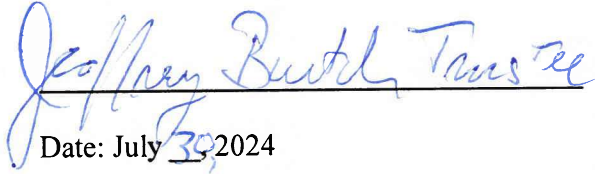
-and-

John D. Demmy
SAUL EWING LLP
1201 North Market Street, Suite 2300
P.O. Box 1266
Wilmington, DE 19899
john.demmy@saul.com

Signature pages to follow

IN WITNESS WHEREOF, the Settling Parties have executed this Settlement Agreement and General Release as of the dates indicated below.

**JEFFREY BURTCH, IN HIS
CAPACITY AS CHAPTER 7 TRUSTEE**


Date: July 30, 2024

**RAISNER ROUPINIAN LLP, ON
BEHALF OF THE NUNN PLAINTIFFS**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**WHELAN LAW GROUP, ON BEHALF
OF THE GARZA PLAINTIFFS**

**BONAKDAR LAW FIRM, ON BEHALF
OF THE GARZA PLAINTIFFS**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**ERICKSON KRAMER OSBORNE, ON
BEHALF OF THE GARZA PLAINTIFFS**

**MOTLEY FOOL VENTURES
MANAGEMENT LLC**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

MOTLEY FOOL VENTURES LP

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

906 VENTURES, LLC

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

OLLEN DOUGLASS

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

MITCHELL KAPOR

Date: July __, 2024

Date: July __, 2024

IN WITNESS WHEREOF, the Settling Parties have executed this Settlement Agreement and General Release as of the dates indicated below.

**JEFFREY BURTCH, IN HIS
CAPACITY AS CHAPTER 7 TRUSTEE**

**RAISNER ROUPINIAN LLP, ON
BEHALF OF THE NUNN PLAINTIFFS**

Date: July __, 2024

By: _____

Print Name: _____

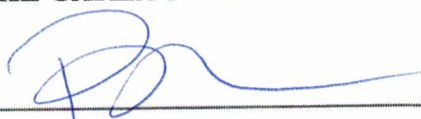
Title: _____

Date: July __, 2024

**WHELAN LAW GROUP, ON BEHALF
OF THE GARZA PLAINTIFFS**

**BONAKDAR LAW FIRM, ON BEHALF
OF THE GARZA PLAINTIFFS**

By:  _____

By:  _____

Print Name: Brian Whelan

Print Name: Rogers Bonakdar

Title: Attorney

Title: Attorney

Date: July 18, 2024

Date: July 19, 2024

**ERICKSON KRAMER OSBORNE, ON
BEHALF OF THE GARZA PLAINTIFFS**

**MOTLEY FOOL VENTURES
MANAGEMENT LLC**

By:  _____

By: _____

Print Name: Elizabeth A. Kramer

Print Name: _____

Title: Partner, Counsel for Garza Plaintiffs

Title: _____

Date: July 18, 2024

Date: July __, 2024

MOTLEY FOOL VENTURES LP

906 VENTURES, LLC

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Date: July __, 2024

Date: July __, 2024

OLLEN DOUGLASS

MITCHELL KAPOR

Date: July __, 2024

Date: July __, 2024

IN WITNESS WHEREOF, the Settling Parties have executed this Settlement Agreement and General Release as of the dates indicated below.

**JEFFREY BURTCH, IN HIS
CAPACITY AS CHAPTER 7 TRUSTEE**

**RAISNER ROUPINIAN LLP, ON
BEHALF OF THE NUNN PLAINTIFFS**

Date: July __, 2024

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

**WHELAN LAW GROUP, ON BEHALF
OF THE GARZA PLAINTIFFS**

**BONAKDAR LAW FIRM, ON BEHALF
OF THE GARZA PLAINTIFFS**

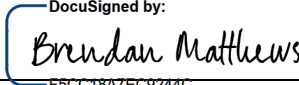
By: _____
Print Name: _____
Title: _____
Date: July __, 2024

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

**ERICKSON KRAMER OSBORNE, ON
BEHALF OF THE GARZA PLAINTIFFS**

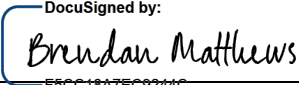
**MOTLEY FOOL VENTURES
MANAGEMENT LLC**

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

DocuSigned by:
By: 
F5CC18A7EC9244C...
Print Name: Brendan Matthews
Title: Director
Date: July 17, 2024

MOTLEY FOOL VENTURES LP

906 VENTURES, LLC

DocuSigned by:
By: 
F5CC18A7EC9244C...
Print Name: Brendan Matthews
Title: Director
Date: July 17, 2024

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

OLLEN DOUGLASS

MITCHELL KAPOR

Date: July __, 2024

Date: July __, 2024

IN WITNESS WHEREOF, the Settling Parties have executed this Settlement Agreement and General Release as of the dates indicated below.

**JEFFREY BURTCH, IN HIS
CAPACITY AS CHAPTER 7 TRUSTEE**

Date: July __, 2024

**RAISNER ROUPINIAN LLP, ON
BEHALF OF THE NUNN PLAINTIFFS**

By: 
Print Name: Rene S. Roupinian
Title: Partner
Date: July 18, 2024

**WHELAN LAW GROUP, ON BEHALF
OF THE GARZA PLAINTIFFS**

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

**BONAKDAR LAW FIRM, ON BEHALF
OF THE GARZA PLAINTIFFS**

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

**ERICKSON KRAMER OSBORNE, ON
BEHALF OF THE GARZA PLAINTIFFS**

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

**MOTLEY FOOL VENTURES
MANAGEMENT LLC**

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

MOTLEY FOOL VENTURES LP

906 VENTURES, LLC

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

OLLEN DOUGLASS

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

MITCHELL KAPOR

Date: July __, 2024

Date: July __, 2024

IN WITNESS WHEREOF, the Settling Parties have executed this Settlement Agreement and General Release as of the dates indicated below.

**JEFFREY BURTCH, IN HIS
CAPACITY AS CHAPTER 7 TRUSTEE**

**RAISNER ROUPINIAN LLP, ON
BEHALF OF THE NUNN PLAINTIFFS**

Date: July __, 2024

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

**WHELAN LAW GROUP, ON BEHALF
OF THE GARZA PLAINTIFFS**

**BONAKDAR LAW FIRM, ON BEHALF
OF THE GARZA PLAINTIFFS**

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

**ERICKSON KRAMER OSBORNE, ON
BEHALF OF THE GARZA PLAINTIFFS**

**MOTLEY FOOL VENTURES
MANAGEMENT LLC**

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

MOTLEY FOOL VENTURES LP

906 VENTURES, LLC

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

OLLEN DOUGLASS

MITCHELL KAPOR

Date: July __, 2024

DocuSigned by:

2E4050350E0E46C...

Date: July²⁹ __, 2024

IN WITNESS WHEREOF, the Settling Parties have executed this Settlement Agreement and General Release as of the dates indicated below.

**JEFFREY BURTCH, IN HIS
CAPACITY AS CHAPTER 7 TRUSTEE**

**RAISNER ROUPINIAN LLP, ON
BEHALF OF THE NUNN PLAINTIFFS**

Date: July __, 2024

By: _____
Print Name: _____
Title: _____

Date: July __, 2024

**WHELAN LAW GROUP, ON BEHALF
OF THE GARZA PLAINTIFFS**

**BONAKDAR LAW FIRM, ON BEHALF
OF THE GARZA PLAINTIFFS**

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

**ERICKSON KRAMER OSBORNE, ON
BEHALF OF THE GARZA PLAINTIFFS**

**MOTLEY FOOL VENTURES
MANAGEMENT LLC**

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

MOTLEY FOOL VENTURES LP

906 VENTURES, LLC

By: _____
Print Name: _____
Title: _____
Date: July __, 2024

DocuSigned by:
By: Joseph Proietti
16832C38BF834AB
Print Name: Joseph Proietti
Title: Manager
Date: July ²³ __, 2024

OLLEN DOUGLASS

MITCHELL KAPOR

DocuSigned by:
Allen Douglass
92F84CBF735F4A9...
Date: July ²³ __, 2024

Date: July __, 2024

JOSEPH T. PROIETTI

PAULA PRETLOW

Date: July __, 2024

BETHANY MILY

Date: July __, 2024

KAPOR CAPITAL PARTNERS II, L.P.

Date: July __, 2024

**KAPOR CAPITAL MANAGEMENT
CO., LLC**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

KAPOR KLEIN REVOCABLE TRUST

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

NUOVO CAPITAL, LLC

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**GREAT AMERICAN E & S INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**SCOTTSDALE INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**THE HANOVER INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

DocuSigned by:

By: _____
8C5EA69073E94BF...

Print Name: Philip Pancoast

Title: Director - Major Case Unit East

Date: July 23, 2024

JOSEPH T. PROIETTI

PAULA PRETLOW

Date: July __, 2024

BETHANY MILY

Date: July __, 2024

KAPOR CAPITAL PARTNERS II, L.P.

Date: July __, 2024

**KAPOR CAPITAL MANAGEMENT
CO., LLC**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

KAPOR KLEIN REVOCABLE TRUST

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

NUOVO CAPITAL, LLC

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**GREAT AMERICAN E & S INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**SCOTTSDALE INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**THE HANOVER INSURANCE
COMPANY**

By: _____

Print Name: ARON KLAS

Title: Senior Claims Specialist

Date: July 25, 2024

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

JOSEPH T. PROIETTI

PAULA PRETLOW

Date: July __, 2024

BETHANY MILY

Date: July __, 2024

KAPOR CAPITAL PARTNERS II, L.P.

Date: July __, 2024

**KAPOR CAPITAL MANAGEMENT
CO., LLC**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

KAPOR KLEIN REVOCABLE TRUST

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

NUOVO CAPITAL, LLC

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**GREAT AMERICAN E & S INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**SCOTTSDALE INSURANCE
COMPANY**

By: Cindy Braun

Print Name: Cindy Braun

Title: Divisional Assistant Vice President

Date: July 29, 2024

**THE HANOVER INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

JOSEPH T. PROIETTI

Date: July __, 2024

BETHANY MILY

Date: July __, 2024

**KAPOR CAPITAL MANAGEMENT
CO., LLC**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

NUOVO CAPITAL, LLC

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**SCOTTSDALE INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

PAULA PRETLOW

DocuSigned by:
Paula B. Pretlow
6344BC71B39B410

Date: July ^{Date} __, 2024

KAPOR CAPITAL PARTNERS II, L.P.

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

KAPOR KLEIN REVOCABLE TRUST

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**GREAT AMERICAN E & S INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**THE HANOVER INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

JOSEPH T. PROIETTI

PAULA PRETLOW

Date: July __, 2024

BETHANY MILY

Date: July __, 2024

**KAPOR CAPITAL MANAGEMENT
CO., LLC**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

NUOVO CAPITAL, LLC

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**SCOTTSDALE INSURANCE
COMPANY**

By: _____

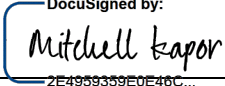
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Title: _____

Date: July __, 2024

Date: July __, 2024

KAPOR CAPITAL PARTNERS II, L.P.

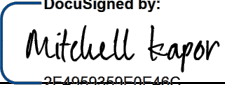
DocuSigned by:
By: 
2E49593359E0E48C...

Print Name: Mitchell Kapor

Title: President

Date: July ²⁹, 2024

KAPOR KLEIN REVOCABLE TRUST

DocuSigned by:
By: 
2E49593359E0E48C...

Print Name: Mitchell Kapor

Title: President

Date: July ²⁹, 2024

**GREAT AMERICAN E & S INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**THE HANOVER INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

JOSEPH T. PROIETTI

DocuSigned by:
Joseph Proietti
16832C38BF834AB...

Date: July 23, 2024

BETHANY MILY

Date: July __, 2024

**KAPOR CAPITAL MANAGEMENT
CO., LLC**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

NUOVO CAPITAL, LLC

DocuSigned by:
By: Joseph Proietti
16832C38BF834AB...

Print Name: Joseph Proietti

Title: Manager

Date: July 23, 2024

**SCOTTSDALE INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

PAULA PRETLOW

Date: July __, 2024

KAPOR CAPITAL PARTNERS II, L.P.

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

KAPOR KLEIN REVOCABLE TRUST

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**GREAT AMERICAN E & S INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**THE HANOVER INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

JOSEPH T. PROIETTI

PAULA PRETLOW

Date: July __, 2024

BETHANY MILY

Date: July __, 2024

KAPOR CAPITAL PARTNERS II, L.P.

Date: July __, 2024

**KAPOR CAPITAL MANAGEMENT
CO., LLC**

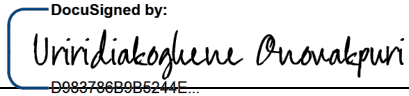
By: _____

Print Name: _____

Title: _____

Date: July __, 2024

KAPOR KLEIN REVOCABLE TRUST

By: 
D083786B0B5244E...
Uriridiakoghene Onovakpuri
Print Name: _____
Title: Managing Partner

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

Date: July __, 2024

NUOVO CAPITAL, LLC

**GREAT AMERICAN E & S INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**SCOTTSDALE INSURANCE
COMPANY**

**THE HANOVER INSURANCE
COMPANY**

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

JOSEPH T. PROIETTI

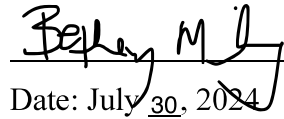
PAULA PRETLOW

Date: July __, 2024

Date: July __, 2024

BETHANY MILY

KAPOR CAPITAL PARTNERS II, L.P.



Date: July 30, 2024

By: _____

Print Name: _____

Title: _____

Date: July __, 2024

**KAPOR CAPITAL MANAGEMENT
CO., LLC**

KAPOR KLEIN REVOCABLE TRUST

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Date: July __, 2024

Date: July __, 2024

NUOVO CAPITAL, LLC

**GREAT AMERICAN E & S INSURANCE
COMPANY**

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Date: July __, 2024

Date: July __, 2024

**SCOTTSDALE INSURANCE
COMPANY**

**THE HANOVER INSURANCE
COMPANY**

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Date: July __, 2024

Date: July __, 2024

KAPOR CAPITAL PARTNERS III, L.P.

DocuSigned by:
By: Uriridiakoghene Onovakpuri
D903706B9B5244E...
Print Name: Uriridiakoghene Onovakpuri
Title: Managing Partner
Date: July 30, 2024

Exhibit A - Final Approval Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
	)	
BW Industries Inc. <i>et al.</i> , ¹	)	Case No. 23-10844-MFW
	)	
Debtors.	)	(Jointly Administered)

**FINAL ORDER APPROVING
SETTLEMENT AGREEMENT AND GRANTING RELATED RELIEF**

The Court has considered the joint motion of Jeoffrey L. Burtch, in his capacity as Chapter 7 Trustee in the cases of BW Enterprises, Inc. and its affiliated Debtors (the “Trustee”), Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez (the “Class Representatives”), on behalf of themselves and on behalf of similarly situated class members (together with the Class Representatives, and excluding eligible members who timely elected to not be included, the “Class Members” or “Class”) for an order approving the proposed Settlement Agreement and General Release among: (1) the Trustee; (2) the Class Representatives; (3) Ollen Douglass, Mitchell Kapor, Paula Pretlow, and Joseph Proietti (collectively, the “Non-Management Directors”); (4) Kapor Capital Management Co. LLC, Kapor Capital Partners II, L.P., Kapor Capital Partners III, L.P., and the Kapor Klein Revocable Trust; (5) 906 Ventures, LLC and Nuovo Capital, LLC; (6) Motley Fool Ventures Management LLC and Motley Fool Ventures LP; (7) Scottsdale Insurance Company, Great American E&S Insurance Company, and The Hanover Insurance Company (collectively, the “Participating Insurance Carriers”); and (8) Bethany Mily (all of the foregoing shall be referred to,

¹ The Debtors in these cases are the following entities (the respective case numbers for each estate follows in parentheses): BW Industries Inc. (23-10844-MFW); Bitwise Industries, Inc. (23-10845-MFW); BWRD, LLC (23-10846-MFW); Alpha Works Technologies, LLC (23-10847-MFW); Bruce’s Bagels, Beverages, and Bites, LLC (23-10848-MFW).

collectively, as the “Settling Parties”) (the “Settlement Agreement”).² A true and correct copy of the Settlement Agreement is attached hereto as **Exhibit A**.

The Court finds:

A. The Class Representatives filed the following actions asserting claims under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 *et seq.* (the “WARN Act”) and various state laws:

1. The federal civil action styled as *Nunn et al. v. Bitwise Industries, Inc., et al.*, Case No. 23-00867-ADA-SAB, E.D. Ca.), which remains pending in the United States District Court for the Eastern District of California;
2. The state civil action styled as *Pedro Garza, et al. v. BW Industries, Inc., et al.*, (Case No. 23CECG0208, Sup. Ct. of Cal., County of Fresno), which remains pending in the Superior Court of the State of California, Fresno County; and
3. The adversary proceeding styled as *Nunn, et al. v. Bitwise Industries, Inc., et al.*, (Adv. Pro. No. 23-50425-MFW, Bankr. D. Del.), which remains pending in this Court.

(collectively, the “WARN Actions”).

B. The Court entered an Order on [_____, 2024], certifying the Class, approving the Settlement Agreement on a preliminary basis, and approving the form and manner of notice of Class certification and the Settlement Agreement and the deadline for opting out of the Class and filing objections to the Settlement Agreement to be given to all individuals eligible to be members of the Class.

C. Due notice of the Settlement Agreement has been given to all creditors and all individuals eligible to be members of the Class of the right to opt-out of the Class or object to the

² Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Settlement Agreement.

proposed Settlement Agreement and the right to appear in person or by counsel at the Fairness Hearing; and no other or further notice is required and such notice is deemed proper and sufficient under the circumstances.

D. All Class Members who did not exercise the right to opt-out of the Class are bound by this Order and the terms of the Settlement Agreement.

E. The terms of the Settlement Agreement are fair, reasonable, and adequate under Federal Rule of Civil Procedure 23 incorporated by Rule 7023 of the Federal Rules of Bankruptcy Procedure. The Court finds that: (i) the recovery that the Estates will realize on account of the Settled Matters and Released Matters are within the range of reasonably foreseeable recoveries in the event of litigation of such claims; (ii) recoveries for the Class are at the high end of the range of reasonably foreseeable recoveries in the event of litigation of such claims and in the absence of the settlement of the Settled Matters and Released Matters; and (iii) the costs of litigation would be high because fact issues predominate and the matters resolved through the Settlement Agreement would not likely be resolved early through motions to dismiss.

F. There are no valid, enforceable, duly perfected security interests or liens of any type that would encumber any of the Estates' claims against the Settling Parties, and the Court finds and concludes that all amounts paid to the Trustee pursuant to the Settlement Agreement shall become property of the Estates, free and clear of any liens or other interests.

G. All of the Settled Matters and any other claims based on harm to the Debtors or generalized harm of the sort that could be asserted by any creditor (including, but not limited to, claims asserted against the Non-Management Directors in the Agri Capital Lawsuit) are property of the Estates, and the Trustee has sole and exclusive authority to settle such claims.

H. The terms of the Settlement Agreement, including those related to the settlement of the Settled Matters and Released Matters, the settlement of the Trustee and the Estates' claims, and the mutual releases, are fair and reasonable, and in the best interests of the Estates and creditors.

I. The terms of the Settlement Agreement as it relates to the Class Members' claims are also appropriate and in the best interests of the Estates, Class Members, and creditors generally under Bankruptcy Rule 9019.

J. The Settlement Agreement was negotiated at arm's-length and in good faith, and is fair, equitable, and in the best interest of the Estates.

K. Good and sufficient cause exists for granting the relief requested in the Joint Motion.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Settlement Agreement is APPROVED.
2. The Trustee is authorized to settle and fully release any and all claims of the Debtors and the Debtors' Estates as set forth in the Settlement Agreement.
3. Upon the Effective Date of the Settlement Agreement, the Settling Parties are authorized and directed to implement the terms of the Settlement Agreement, make the payments required thereunder, and otherwise perform in accordance with the Settlement Agreement.
4. Upon the Effective Date of the Settlement Agreement, except for the rights arising out of, provided for, or reserved in the Settlement Agreement, the Settling Parties, on behalf of themselves and (as applicable) their current and former officers, directors, managers, members, shareholders, general partners, limited partners, employees, advisors, agents, professionals, affiliates, subsidiaries, parents, guarantors, and controlling persons (each in their respective

capacities as such), and, in the case of the Class Representatives, on behalf of the Class and all Class Members, and, in the case of the Trustee, on behalf of the Debtors and the Estates, together with the predecessors, successors, and/or assignees of each of the foregoing (each, a “Releasor,” and, collectively, the “Releasors”) shall be conclusively deemed to have fully and forever released, acquitted, and forever discharged each other and every other Party and Releasor from the Settled Matters and the Released Matters as set forth in the Settlement Agreement, and their respective current and former shareholders and investors, subsidiaries and affiliated entities, any potential “single employer” under the WARN Act, and their respective officers, directors, shareholders, agents, employees, partners, members, accountants, attorneys, representatives, and other agents, and all of their respective predecessors, successors, and assigns, of and from any and all claims, demands, debts, liabilities, obligations, liens, actions and causes of action, costs, expenses, attorneys’ fees, and damages of whatever kind or nature, at law, in equity and otherwise, whether known or unknown, anticipated, suspected, or disclosed, that any Party may now have or hereafter may have against any other Party, including, but not limited to, those related to or are based on back or severance pay or benefits under any federal, state, or local law or regulation arising out of the termination of the Class Members’ employment by the Debtors, including, but not limited to: (i) all claims asserted or that could have been asserted in the WARN Actions; and (ii) any other claims for back or severance pay or benefits based on or arising out of any federal, state, or local statute, ordinance or regulation; *provided, however*, that the following claims and/or rights shall not be released: (a) any claims for continuation of health or medical coverage, at the Class Member’s expense, or at the expense of a beneficiary or dependent of a Class Member, to the extent allegedly required by the relevant provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985; (b) any prepetition claims arising out of obligations of the Debtor

unrelated to the WARN Act, or back or severance pay or benefits; and (c) rights, if any, unrelated to Class Members' claims under the WARN Act, under the Debtors' 401(k) plans. The claims released above are referred to as the "Released Claims."

5. As of the Effective Date of the Settlement Agreement, any claims that have been filed by the Class Representatives or the Class Members, on account of any alleged violation of the WARN Act or for severance pay or benefits under any federal, state, or local law or regulation, are disallowed in their entirety and shall be deemed expunged from the claims register. In addition, each Party shall be deemed as of the Effective Date to have released the Class Representatives from any and all claims whether liquidated or unliquidated, contingent or non-contingent, asserted or unasserted, fixed or not, matured or unmatured, disputed or undisputed, legal or equitable, known or unknown that he or she may have against the Class Representatives, any successors or assignees to their legal interests, or any of their present or former agents, attorneys, or consultants arising out of any Released Claim or the terms of the Settlement Agreement.

6. Stipulations for dismissal with prejudice of the WARN Actions shall be executed in forms agreeable to the Settling Parties and filed within fourteen (14) days following the Effective Date, or such other date as may be ordered by any court with jurisdiction over the relevant WARN Action.

7. All amounts paid to a Class Member pursuant to the terms of the Settlement Agreement shall be deemed a recovery by such Class Member under 11 U.S.C. § 507(a)(4). In no event shall any Class Member receive aggregate distributions under or by reason of the Settlement Agreement in an amount that is greater than the priority amount allowable under 11 U.S.C. § 507(a)(4), except to the extent of any recovery on account of a general unsecured, non-priority claim, or, in the case of the Class Representatives, Service Payments.

8. Within 30 days after the close of each calendar quarter, Class Counsel shall provide the other Settling Parties with a report of distributions made to the Class Members. Following the occurrence of the Effective Date, the Settling Parties and the Releasors, including, without limitation, the Trustee and the Estates, shall not, and are prohibited and enjoined from, continuing, pursuing, commencing, initiating, filing, instituting, asserting, aiding, prosecuting, encouraging, supporting, inducing, participating in or assisting, directly or indirectly, any lawsuit, action, claim or other proceeding of any kind, at any time, against any other Party or Releasor, in any court or administrative proceeding, in any venue, based upon, arising out of, or relating in any way to the Settled Matters and the Released Matters.

9. All persons or entities who hold or assert, or may in the future hold or assert, any claim against any insured party arising in connection with any activities covered or potentially covered by any of the policies identified and defined in the Settlement Agreement, specifically (i) the Great American Policy, (ii) the Hanover TPL Policy, and (iii) the Scottsdale Policy (each, a “Policy,” collectively the “Policies”), or in connection with any insured party’s activities giving rise to the claims made or to be made under any of the Policies, and any other person or entity who may claim to be an insured, additional insured, or otherwise entitled to any benefit or recovery, directly or indirectly, from or under any of the Policies, are permanently stayed, restrained, and enjoined from asserting any such claim, right or entitlement, commencing a proceeding, or taking any other action against any of the Participating Insurance Carriers for the purpose of obtaining any recovery under any of the Policies.

10. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of the Settlement Agreement and this Order, except to the extent that

approval of the Settlement Agreement is required by the other courts with jurisdiction over the WARN Actions.

So ordered: _____, 2024

MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

Exhibit B – Preliminary Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
	)	
BW Industries Inc. <i>et al.</i> , ¹	)	Case No. 23-10844-MFW
	)	
Debtors.	)	(Jointly Administered)

ORDER PURSUANT TO 11 U.S.C. § 105 AND FED. R. BANK. P. 7023 AND 9019: (I) PRELIMINARILY APPROVING SETTLEMENT AGREEMENT; (II) CERTIFYING A CLASS OF WARN ACT CLAIMANTS FOR SETTLEMENT PURPOSES ONLY; (III) APPOINTING CLASS COUNSEL AND CLASS REPRESENTATIVES; (IV) APPROVING THE FORM AND MANNER OF NOTICE TO CLASS MEMBERS OF THE CLASS CERTIFICATION AND SETTLEMENT; (V) SCHEDULING A FAIRNESS HEARING TO CONSIDER FINAL APPROVAL OF THE SETTLEMENT AGREEMENT; AND (VI) GRANTING RELATED RELIEF

The Court has considered the joint motion of Jeoffrey L. Burtch, in his capacity as Chapter 7 Trustee in the cases of BW Enterprises, Inc. and its affiliated Debtors (the “Trustee”), Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez (the “Class Representatives”), on behalf of themselves and on behalf of similarly situated class members (together with the Class Representatives, and excluding eligible members who timely elect to not be included as provided herein, the “Class Members” or “Class”) for the entry of orders: (a) approving the Settlement Agreement and General Release (the “Settlement Agreement”)² among: (1) the Trustee; (2) the Class Representatives; (3) Ollen Douglass, Mitchell Kapor, Paula Pretlow, and Joseph Proietti (collectively, the “Non-Management Directors”); (4) Kapor Capital

¹ The Debtors in these cases are the following entities (the respective case numbers for each estate follows in parentheses): BW Industries Inc. (23-10844-MFW); Bitwise Industries, Inc. (23-10845-MFW); BWRD, LLC (23-10846-MFW); Alpha Works Technologies, LLC (23-10847-MFW); Bruce’s Bagels, Beverages, and Bites, LLC (23-10848-MFW).

² Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Settlement Agreement.

Management Co., LLC, Kapor Capital Partners II, L.P., Kapor Capital Partners III, L.P., and the Kapor Klein Revocable Trust; (5) 906 Ventures, LLC and Nuovo Capital, LLC; (6) Motley Fool Ventures Management LLC and Motley Fool Ventures LP; (7) Scottsdale Insurance Company, Great American E&S Insurance Company, and The Hanover Insurance Company (collectively, the “Participating Insurance Carriers”); and (8) Bethany Mily (all of the foregoing shall be referred to, collectively, as the “Settling Parties”), pursuant to Bankruptcy Rule 9019, (b) certifying the Class for settlement purposes only, appointing the law firms of Raisner Roupinian LLP, Erickson Kramer Osborne, Whelan Law Group and Bonakdar Law Firm as class counsel (“Class Counsel”), appointing Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez as Class Representatives and preliminarily approving the Settlement Agreement pursuant to Civil Rule 23 and Bankruptcy Rule 7023, (c) approving the form and manner of notice to Class Members of the conditional class certification and settlement, (d) scheduling a fairness hearing (the “Fairness Hearing”) to consider final approval of the Settlement Agreement pursuant to Civil Rule 23 and Bankruptcy Rule 7023, (e) after the Fairness Hearing, finally approving the Settlement Agreement pursuant to Civil Rule 23 and Bankruptcy Rule 7023, and (f) granting related relief (the “Joint Motion”). A true and correct copy of the Settlement Agreement is attached hereto as **Exhibit A**.

The Court finds that:

A. The Class Representatives filed the following actions asserting claims under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 *et seq.* (the “WARN Act”) and various state laws:

1. The federal civil action styled as *Nunn et al. v. Bitwise Industries, Inc., et al.*, Case No. 23-00867-ADA-SAB, E.D. Ca.), which remains pending in the United States District Court for the Eastern District of California;

2. The state civil action styled as *Pedro Garza, et al. v. BW Industries, Inc., et al.*, (Case No. 23CECG0208, Sup. Ct. of Cal., County of Fresno), which remains pending in the Superior Court of the State of California, Fresno County; and
3. The adversary proceeding styled as *Nunn, et al. v. Bitwise Industries, Inc., et al.*, (Adv. Pro. No. 23-50425-MFW, Bankr. D. Del.), which remains pending in this Court.

(collectively, the “WARN Actions”).

B. On [_____, 2024], the notice of the Joint Motion (“Notice”) was served by first class mail on the parties listed on the proof of service of the Notice filed with the Court.

C. The Notice given constituted the best notice practicable under the circumstances and is adequate, and no other notice need be given.

D. An adequate opportunity has been offered to the parties-in-interest to participate in the hearing on the Joint Motion.

E. For purposes of the Settlement Agreement and related matters raised in the Joint Motion: (a) Class Counsel has had extensive experience handling class action WARN litigation and has been appointed class counsel in over one hundred and fifty (150) employment law class action cases, including many class actions asserting claims under the WARN Act; and (b) the Class Representatives do not have interests that are materially adverse to those of the Class.

F. For the purposes of the Settlement Agreement and related matters raised in the Joint Motion: (a) the Class, consisting of over 700 potential Class Members, is so numerous that joinder of all Class Members is impracticable; (b) there are questions of law or fact common to the Class; (c) the claims of the Class Representatives are typical of Class Members generally; (d) Class Counsel has fairly and adequately protected the interests of the Class; (e) questions of law or fact common to the Class Members predominate over any questions affecting only the individual Class Members; and (f) the class settlement mechanism is superior to other available methods of

resolving the claims released in the Settlement Agreement. Therefore, pursuant to Civil Rules 23(a) and (b)(3) and Bankruptcy Rule 7023, the Class should be certified for settlement purposes only.

G. The Class shall consist of all persons who: (a) were employed by the Debtors; (b) suffered an “employment loss,” as that term is defined in 29 U.S.C. § 2101(a)(6) and 20 C.F.R. § 639.3(f), on, or within thirty (30) days of, May 29, 2023, as part of a “plant closing” or “mass layoff,” as those terms are defined in 29 U.S.C. § 2101(a)(2)-(3) and 20 C.F.R. § 639.3(b)-(c), as the reasonably foreseeable consequence of a “plant closing” or “mass layoff” occurring on or about May 29, 2023; (c) meet the definition of “affected employee” as set forth in 29 U.S.C. § 2101(a)(5) and 20 C.F.R. § 639.3(e); and (d) do not file a timely request to opt out of the Class.

H. Notice should be given to all of the eligible Class Members, affording them the opportunity to opt-out of the Class or object to approval of the Settlement Agreement.

I. Based on the range of possible outcomes and the cost, delay, and uncertainty associated with further litigation, the Settlement Agreement is reasonable and cost-effective, and preliminary approval of the Settlement Agreement is warranted.

J. The Settlement Agreement should be approved on a preliminary basis.

K. Notice to all individuals by first class mail, postage prepaid, at their last known address as indicated in the records of the Debtor (and as updated by Class Counsel’s searches for current addresses or as may otherwise be reasonably determined) is reasonable and the best notice practicable under the circumstances and such mailing shall be made by Class Counsel within fifteen (15) days following the entry of this Order.

L. Notice to all creditors who are not Class Members in the form attached to the Joint Motion as Exhibit 3 (the “General Notice”) by first class mail, postage prepaid, at their last known

address as indicated in the records of the Debtor or proofs of claim or other documents filed with this Court (and as may be updated by searches by the Trustee and Class Counsel for current addresses or as may otherwise be reasonably determined) is reasonable and the best notice practicable under the circumstances and such mailing shall be made by the Trustee within fifteen (15) days following the entry of this Order.

M. The contents of the Class Notice (the “Class Notice”) form annexed to the Settlement Agreement as Exhibit B meet the requirements of Fed. R. Civ. P. 23(c)(2)(B). The Class Notice states the nature of the WARN Actions, and the issues and potential defenses relevant to such actions. The Class Notice also states that the Settlement Agreement, if approved, will be binding on all Class Members. The Class Notice summarizes the terms of the Settlement Agreement, the right of each eligible Class Member to opt-out of the Class or object to the Settlement Agreement, the right of each eligible Class Member to appear either *pro se* or by counsel at the Fairness Hearing, and the fact that more information is available from Class Counsel upon request. Further, the Class Notice informs the eligible Class Members that the Settlement Agreement provides for the release of the Released Matters (as that term is defined in the Settlement Agreement) and the payment of Class Counsel’s attorneys’ fees and expenses. *See* FED. R. CIV. P. 23(h).

N. The Fairness Hearing should be held no sooner than sixty (60) days after service of the Class Notice, so that eligible Class Members will have sufficient time from the mailing of the Class Notice to secure further information regarding the relief sought by the Joint Motion, to decide whether to opt out of the Class, or to object to approval of the Settlement Agreement should they choose to do so, and to engage counsel to appear at the Fairness Hearing.

O. Other good and sufficient cause exists for granting the relief requested in the Joint Motion.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Joint Motion is GRANTED to the extent set forth herein.
2. The Settlement Agreement is hereby approved on a preliminary basis.
3. The Class comprised of all persons who:
 - a. were employed by the Debtors in the United States;
 - b. suffered an “employment loss,” as that term is defined in 29 U.S.C. § 2101(a)(6) and 20 C.F.R. § 639.3(f), on, or within thirty (30) days of, May 29, 2023, as part of a “plant closing” or “mass layoff,” as those terms are defined in 29 U.S.C. § 2101(a)(2)-(3) and 20 C.F.R. § 639.3(b)-(c), as the reasonably foreseeable consequence of a “plant closing” or “mass layoff” occurring on or about May 29, 2023;
 - c. meet the definition of “affected employee” as set forth in 29 U.S.C. § 2101(a)(5) and 20 C.F.R. § 639.3(e); and
 - d. do not file a timely request to opt out of the Class,

is hereby certified for settlement purposes only, pursuant to Civil Rules 23(a) and (b)(3), made applicable to the Joint Motion by operation of Bankruptcy Rule 7023, with respect to all claims released pursuant to the Settlement Agreement.

4. Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez are hereby appointed Class Representatives.

5. The law firms of Raisner Roupinian LLP, Erickson Kramer Osborne, Whelan Law Group, and Bonakdar Law Firm are hereby appointed as Class Counsel.

6. The form of the Class Notice and the service of the Class Notice by Class Counsel by first class mail, postage prepaid, to each individual identified at his or her last known address

contained in the Debtor's records (as updated by the Trustee and Class Counsel's searches for current addresses or as may otherwise be reasonably determined) is hereby approved.

7. The form of the General Notice and the service of the General Notice by the Trustee by first class mail, postage prepaid, to all creditors who do not receive the Class Notice at his or her last known address as indicated in the records of the Debtors or proofs of claim or other documents filed with this Court (and as updated by the Trustee and Class Counsel's searches for current addresses or as may otherwise be reasonably determined) is hereby approved.

8. Objections or other responses to final approval of the Settlement Agreement are to be filed with the Clerk of the Court and mailed to the parties listed in the Class Notice and the General Notice, so that they are filed and received by no later than **[November 15, 2024]**. Objections or other responses must be in writing and must set forth the basis for any such objection or other response to the Settlement Agreement.

9. Should a Class Member choose not to be bound by the Settlement, his or her completed and executed Opt-Out Notice Form (substantially in the form incorporated in the Class Notice) must be mailed to Class Counsel as provided in the Class Notice. The Opt-Out Notice Form must be postmarked by no later than **[November 8, 2024]**. Opt-Out Notice Forms postmarked after that date will not be effective.

10. The Court shall conduct the Fairness Hearing on **[November 20, 2024 at 2:00 p.m.]** The Court may adjourn the Fairness Hearing without further notice of any kind other than an announcement of such adjournment in open court at the Fairness Hearing or any adjournment thereof.

11. This Court retains jurisdiction to construe, interpret, enforce, and implement the Settlement Agreement and this Order.

Dated: _____, 2024

MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

Exhibit C – Class Notice

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
	)	
BW Industries Inc. <i>et al.</i> , ¹	)	Case No. 23-10844-MFW
	)	
Debtors.	)	(Jointly Administered)

**NOTICE OF PROPOSED OF CLASS SETTLEMENT,
DATE AND TIME OF FINAL FAIRNESS HEARING, AND
RIGHT TO OBJECT TO THE PROPOSED SETTLEMENT**

PLEASE READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR RIGHTS.

TO: The former employees of any one or more of the following: BW Industries Inc.; Bitwise Industries, Inc.; BWRD, LLC; Alpha Works Technologies, LLC; and Bruce’s Bagels, Beverages, and Bites, LLC (collectively, the “**Debtors**”), who were involuntarily terminated without cause on or about May 29, 2023 or June 14, 2023 and who did not receive at least 60 days’ written notice in advance of their permanent terminations.

SUBJECT: On June 28, 2023 (the “**Petition Date**”), the Debtors filed petitions commencing cases (the “**Bankruptcy Cases**”) under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**”). Following negotiations among a number of parties representing various interests, including those of former employees of the Debtors, the Trustee appointed in the Bankruptcy Cases (the “**Trustee**”) and the Class Representatives (as identified below) have filed a motion for approval of their settlement of claims under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* (the “**WARN Act**”) and similar federal, state, and local laws.

**FORMER EMPLOYEES WHO ARE ELIGIBLE TO BE MEMBERS OF
THE CLASS WISHING TO PARTICIPATE IN THE SETTLEMENT AND
POTENTIALLY RECEIVE MONEY, DO NOT NEED TO DO ANYTHING**

Introduction

The following class actions have been filed on behalf of proposed classes made up of some or all of the Debtors’ former employees:

1. The federal civil action styled as *Nunn et al. v. Bitwise Industries, Inc., et al.*, Case No. 23-00867-ADA-SAB, E.D. Ca.), which remains

¹ The Debtors in these cases are the following entities (the respective case numbers for each estate follows in parentheses): BW Industries Inc. (23-10844-MFW); Bitwise Industries, Inc. (23-10845-MFW); BWRD, LLC (23-10846-MFW); Alpha Works Technologies, LLC (23-10847-MFW); Bruce’s Bagels, Beverages, and Bites, LLC (23-10848-MFW).

pending in the United States District Court for the Eastern District of California;

2. The state civil action styled as *Pedro Garza, et al. v. BW Industries, Inc., et al.*, (Case No. 23CECG0208, Sup. Ct. of Cal., County of Fresno), which remains pending in the Superior Court of the State of California, Fresno County; and
3. The adversary proceeding styled as *Nunn, et al. v. Bitwise Industries, Inc., et al.*, (Adv. Pro. No. 23-50425-MFW, Bankr. D. Del.), which remains pending in the Bankruptcy Court.

(all of these lawsuits will be referred to as the “**WARN Actions**,” and the proposed classes of employees in each will be referred to as the “**Class**”). The parties to the **WARN Actions** have reached an agreement on terms of a proposed settlement, which are set forth in a settlement agreement (the “**Settlement Agreement**”), under which, among other things, the Class Representatives, Class Members, and Class Counsel (each as defined below) would receive payments.

The Bankruptcy Court has preliminarily approved the Settlement Agreement and ordered that this Notice be sent to all individuals whose rights may be affected by the Settlement Agreement before the Court grants final approval.

You are receiving this Notice because you have been identified as a potential member of the Class. This Notice informs you of the developments in the **WARN Actions**; explains what a class action is and who is eligible to be a member of the Class in this case; summarizes the principal terms of the settlement; and explains your rights with respect to certification of the Class certification (including your right to opt out of the Class) and the Settlement Agreement (including your right to file objections to it).

The WARN Actions

Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez (together the “**Class Representatives**”), individually and on behalf of other similarly situated former employees of the Debtors, filed the **WARN Actions** to assert that they were terminated without cause due to mass layoffs and/or permanent plant closings carried out on or about May 29, 2023. The Class Representatives claim that, under the **WARN Act**, they were entitled to receive written notice sixty (60) days in advance of the termination of their employment. The Class Representatives contend that employees did not receive proper notice and that they are therefore entitled to an award of sixty (60) days’ wages and benefits, and the Debtors’ bankruptcy estates (the “**Estates**”), and certain others, are therefore, liable for the damages alleged in the **WARN Actions**. Among the other parties who were named as defendants in the **WARN Actions** are certain individuals who served as directors of the Debtors (the “**Non-Management Directors**”).

Negotiations and Disputed Issues

Since the filing of the Bankruptcy Cases, the Trustee, the Class Representatives, the Non-Management Directors, and others parties to the Settlement Agreement (collectively, the “**Parties**”) have conducted a substantial investigation of the facts and documents concerning the events preceding the shut-down of Debtors’ business operations. Following a reasonable period of time for investigation, the Parties participated in mediation to attempt to resolve a wide range of claims, including the claims asserted in the WARN Actions and claims that the Trustee might assert against the Non-Management Directors on behalf of the Estates.

The Non-Management Directors have argued, in part, that there are no grounds on which they can be held personally liable for claims of the type asserted in the WARN Actions. The Trustee and others have argued that certain exceptions to the WARN Act protected the Estates from liability, including, but not limited to, the “unforeseeable business circumstances” exception, and on grounds a number of courts to consider whether employees working at sites with less than fifty (50) employees are entitled to WARN Act damages, have held that such employees are not covered by the WARN Act. The Class Representatives have argued that those do not constitute valid defenses under the circumstances of the Debtors’ operations and closure and have further argued that the Estates (among others) also have liability under a number of state laws that do not contemplate or provide for defenses that might be available for claims under the WARN Act.

What is a Class Action and Who Is Involved?

In a class action lawsuit, one or more individual representatives sue on behalf of themselves and other people who have similar claims. The representative(s) and those who have similar claims are called a “class” or “class members.” The companies and individuals that are sued are called the defendant(s). One court resolves the issues for everyone in the class in a single lawsuit. The class members’ claims are legally and factually similar, and, as such, resolving those claims through a class action can be more efficient than having many individual lawsuits.

Who is a Class Member?

On [_____, 2024], the Court certified a class (the “**Class**”) in this case for settlement purposes only. That means that the Parties have agreed that a Class exists so they can settle various disputes, including those at issue in the WARN Actions. If the settlement does not become final for any reason, however, the Class Representatives may have to prove that one or more classes should be recognized, and the Trustee or others may argue that such class(es) should not be recognized. Additionally, the Class Representatives must still demonstrate that the Class meets all of the requirements for a class under federal law.

For these purposes, the Bankruptcy Court has decided that the Class includes the Class Representatives and any other former employee of the Debtor who was terminated on May 29, 2023, or shortly thereafter (with the exception of those who opt out (as discussed below), such former employees shall be called the “**Class Members**”).

No Admission of Liability

The Trustee on behalf of the Estates and the other Parties have agreed to the proposed Class solely for settlement purposes. This Notice shall not be read or interpreted as an admission of liability by the Trustee, the Debtors, the Non-Management Directors, or any other Party. To the contrary, all Parties have preserved all of their defenses in the WARN Actions.

Class Counsel

The Class Representatives and the Class are represented by Jack Raisner and René Roupinian of the law firms of Raisner Roupinian LLP, Kevin Osborne and Elizabeth Kramer of the law firm of Erickson Kramer Osborne, Brian Whelan of Whelan Law Group and Roger Bonakdar of Bonakdar Law Firm (**“Class Counsel”**).

The Settlement and the Final Fairness Hearing

The Parties recently agreed to the terms of the Settlement Agreement that, with the Bankruptcy Court’s final approval would resolve and finally settle all claims asserted in the WARN Actions, claims that the Estates have against the Non-Management Directors, and other related claims and rights.

You may request a copy of the Settlement Agreement by contacting Class Counsel, through the contact information provided below. The information below explains the principal terms of the Settlement Agreement. This Notice, however, only includes a summary, and the terms as set forth in the Settlement Agreement control if there is any inconsistency.

Under the Settlement Agreement:

- Certain parties will pay the amount of \$20 million in exchange for a release of: (a) all of the Estates’ claims against the Settling Parties (as defined in the Settlement Agreement), including, without limitation, breach of fiduciary duty claims; and (b) all claims asserted in the WARN Actions and any similar or related claims.
- The Parties agree to seek certification of Class.
- All of the individual employees who were employed by the Debtors as of May 29, 2023, shall be classified as the **“Class.”** The Class will be entitled to receive an immediate payment in the amount of \$6 million (the **“Initial Class Distribution”**), and also to an allowed priority claim in an amount to be determined by Class Counsel, and subject to review by the Trustee, in the Bankruptcy Cases (the **“Class Priority Claim,”** and, with the Initial Class Distribution, the **“Class Settlement Amount”**).
- The Class Settlement Amount shall be paid into to a qualified settlement fund to be established by Class Counsel in conformity with Internal Revenue Code §468B (the **“Common Fund”**).

- The Class Priority Claim will be entitled to priority under Section 507(a)(4) of the Bankruptcy Code. The claim's priority status means that it has to be paid in full before any claims that do not have higher priority receive anything. The Trustee believes that the only claims that will have higher priority than the Class Priority Claim are administrative expense claims, which are claims that arise during the course of a bankruptcy case, such as the fees of the Trustees' attorneys and the expenses associated with mediation of the claims that would be resolved under the Settlement Agreement.
- Amounts paid for the benefit of the Class shall be distributed as provided below. All amounts paid to a Class Member from the Class Settlement Amount shall be deemed a recovery under Section 507(a)(4) of the Bankruptcy Code, the priority statute discussed above. The amount of any claim that is entitled to priority treatment under Section 507(a)(4) is \$15,150. In no event shall any Class Member receive more than \$15,150 from the Class Settlement Amount.
- The Class Members will be deemed to have agreed to release the other Settling Parties from any and all claims asserted in the WARN Actions and any similar or related claims.
- American Legal Claims Services LLC as independent fund administrator shall have responsibility for administering the payments for the benefit of all Class Members. None of the other Parties shall have any responsibility or obligation with respect to the apportionment and allocation of payments among the Class Members.
- Class Counsel will file a motion seeking Court approval for attorneys' fees of up to 30% of the Initial Class Distribution and up to one-third of amounts distributed on account of the Class Priority Claim. All other Parties have agreed that they will not oppose Class Counsel's request for a fee from the Initial Class Distribution, but all Parties have the right to object to fees that would be paid from the Class Priority Claim.
- The settlement is contingent on the total number of the former employees exercising their right to opt-out of the settlement being less than ten percent (10%) of the number of people eligible to be members of the Class. If ten percent (10%) or more of the eligible members opt-out, the Parties will have the option to terminate the Settlement Agreement.
- The Settlement Agreement will become effective only after: (1) the Bankruptcy Court and the other courts with jurisdiction over the WARN Actions enter orders finally approving the Settlement Agreement or otherwise dismissing the WARN Actions with prejudice; and (2) each of the approval orders is either affirmed on appeal, the last remaining appeal challenging it is dismissed with prejudice, or, if no appeal is filed, the time for filing an appeal has expired.

- If the Settlement Agreement is not approved, the Parties expressly reserve all defenses, privileges, counterclaims, and other rights in and related to the WARN Actions and other claims that would be settled under the Settlement Agreement.
- Deductions from the Common Fund: Prior to distributions to the respective Class Members, the amounts listed below will be deducted from the Common Fund. Because there may be multiple distributions, some of the deductions will be on a percentage basis of each distribution (i.e., attorney's fees) while others will be on an actual cost basis (i.e., cost of a third-party administration).
 - (a) Service payments of \$3,000 to each of the Class Representatives (the "**Class Representative Fees**").
 - (b) Up to 30% of the amount of the Initial Class Distribution and up to one-third of the amount distributed on account of the Class Priority Claim for Class Counsel's fees, plus reimbursement of expenses.
 - (c) The PAGA Settlement Amount, as defined in the Settlement Agreement, and the proposed amount of which is \$75,000.
 - (d) The employers' share of payroll taxes payable with respect to distributions to Class Members.
 - (e) The costs of administration of the Common Fund and distribution of the Class Settlement Amount to the extent such costs exceed \$50,000.

The Bankruptcy Court has preliminarily approved the Settlement Agreement for the purposes of notifying all Class Members, but the Settlement Agreement will not take final effect unless and until the Bankruptcy Court decides, at a Final Fairness Hearing, that it is a fair and reasonable, and the other courts with jurisdiction over the WARN Actions have entered approval orders as provided above. The Bankruptcy Court will conduct the Final Fairness Hearing on **[November 20, 2024 at 2:00 p.m.]** in the U.S. Bankruptcy Court, District of Delaware, 824 North Market Street, 5th Floor, Courtroom No. 4, Wilmington, Delaware 19801. If the Bankruptcy Court decides not to approve the Settlement Agreement at the Final Fairness Hearing, or any other required order is not entered, nothing in the Settlement Agreement will be considered to be an admission of liability or a waiver of rights.

How Do I Participate In The Settlement?

IN ORDER FOR YOU TO PARTICIPATE IN THE SETTLEMENT AND RECEIVE YOUR DISTRIBUTION, YOU DO NOT NEED TO DO ANYTHING

Your Right to be Excluded from the Class

If you wish to be excluded from the Class, called "opting out" of the Class, you will not get any money or benefits from amounts paid under the Settlement Agreement. Likewise, if the Court does not approve the Settlement Agreement and the litigation continues, you will not be entitled to any money or benefits that Class Members receive later. If you opt out, however, you will have the

right to bring a claim on your own, with or without an attorney of your own choosing. If you opt out, you will not be legally bound by the Court's approval of the Settlement Agreement.

If you want to opt out of the Class, you must sign and mail the attached Exclusion Form by certified mail, return receipt requested, to Raisner Roupinian LLP, 270 Madison Ave, Suite 1801, New York, New York 10016, ATTN: René S. Roupinian. The Exclusion Form must be postmarked by no later than **[November 8, 2024]**. Exclusion Forms postmarked after that date will not be effective, and any person who sends a late Exclusion Form will nevertheless be a Class Member and will be bound in the same way and to the same extent as all other Class Members, provided that he or she otherwise qualifies as a Class Member. If you choose to remain a Class Member, you will NOT waive your right to recover any proof of claim you filed seeking recovery of any claims that are **not** of the type asserted in the WARN Actions.

Objections

If you want to remain a member of the Class, you must next decide whether you approve of the Settlement Agreement. If you do, and do not wish to object to it, you do not need to do anything at this time. However, if you believe that the settlement is unfair, unreasonable, or should not be approved for any other reason, including because of the amount of attorneys' fees, you must make a formal objection to it. To object, you must state, in writing: (1) the name and case number of this case as it appears on the first page of this document; (2) your name, address, and telephone number; (3) your specific objection(s) to the Settlement Agreement, providing detailed reason(s) why you believe that the Settlement Agreement is improper; and (4) whether you intend to appear either on your own behalf or through an attorney of your choosing to make the objection at the Final Fairness Hearing.

All objections must be mailed to the Clerk of Court for the U.S. Bankruptcy Court, District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801. Additionally, copies of each objection must be mailed to: (1) Class Counsel, Raisner Roupinian LLP, 270 Madison Ave, Suite 1801, New York, NY 10016 (rsr@raisnerroupinian.com); (2) Counsel for the Trustee, Cozen O'Connor, Attn. Mark E. Felger, 1201 N. Market Street, Suite 1001, Wilmington, DE 19801 (mfelger@cozen.com); (3) Counsel for Non-Management Directors Mitchell Kapor and Paula Pretlow, Morrison & Foerster LLP, Attn. Andrew L. Perito, 425 Market Street, San Francisco, CA 94105-2482 (aperito@mofo.com); and (4) Counsel for Non-Management Directors Ollen Douglass and Joseph Proietti, Stinson LLP, Attn. Paul Lackey, 2200 Ross Avenue, Suite 2900, Dallas, TX 75201 (paul.lackey@stinson.com). All objections must be received by both the Clerk and the above-identified counsel no later than **[November 15, 2024]**. As noted above, if you choose to make an objection, you have the right to appear either on your own behalf or through an attorney of your choosing to be heard at and participate in the Final Fairness Hearing. You are not required to make your objection either in person or through an attorney.

Right to Appear by Counsel

In addition to the right to hire an attorney of your choosing to file objections, you also have the right to be represented by an attorney of your choosing in all other stages of this case. If you elect to hire an attorney, you may be responsible for paying any fees and costs that the attorney charges.

The Bankruptcy Court Has No Position on the Merits

Although it has approved the Settlement Agreement on a preliminary basis, the Bankruptcy Court has taken no position on the merits of claims asserted in the WARN Actions or the Settlement Agreement.

Additional Information

If you wish to receive any additional information, or to receive full copies of the Motion (which includes a copy of the Settlement Agreement), or if you have questions, please contact René S. Roupinian by emailing rrlp@raisnerroupinian.com or by calling 212 221-1747. *Please do not call or contact the Court or counsel for any of the other Parties for information about this case.*

EXCLUSION FORM

Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez, individually and on behalf of all other similarly situated former employees of BW Industries Inc.; Bitwise Industries, Inc.; BWRD, LLC; Alpha Works Technologies, LLC; and Bruce's Bagels, Beverages, and Bites, LLC

U.S. Bankruptcy Court, District of Delaware
824 North Market Street, 3rd Floor
Wilmington, Delaware 19801

I, the undersigned, have read the foregoing Notice of Proposed Class Settlement, Date and Time of Final Fairness Hearing, and Right to Object to the Proposed Settlement.

I DO NOT want to participate in the above Class Action and **DO NOT** wish to be bound by the outcome of the Class Action or receive any potential benefits of the Class Action.

Signature

Address

Name (print or type)

Telephone

Date

Send completed form to:

Raisner Roupinian LLP
270 Madison Ave, Suite 1801
New York, New York 10016
ATTN: René S. Roupinian

EXHIBIT 2

(Declaration of René S. Roupinian)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

BW Industries Inc. *et al.*,¹

Debtors.

)
) Chapter 7
) Case No. 23-10844-MFW
) (Jointly Administered)
)
)
)
)

**DECLARATION OF RENÉ S. ROUPINIAN IN SUPPORT OF JOINT MOTION
PURSUANT TO 11 U.S.C. § 105 AND FED. R. BANKR. P. 7023 AND 9019 FOR: (I)
ENTRY OF ORDER: (A) APPROVING SETTLEMENT AGREEMENT ON A
PRELIMINARY BASIS, (B) CERTIFYING A CLASS OF EMPLOYEE CLAIMANTS
FOR SETTLEMENT PURPOSES, (C) APPOINTING CLASS COUNSEL AND CLASS
REPRESENTATIVES, (D) APPROVING THE FORM AND MANNER OF NOTICE TO
CLASS MEMBERS, AND (E) SCHEDULING FAIRNESS HEARING TO CONSIDER
FINAL APPROVAL OF SETTLEMENT AGREEMENT; (II) ENTRY OF ORDER
APPROVING THE SETTLEMENT AGREEMENT ON A FINAL BASIS; AND (III)
SUCH FURTHER RELATED RELIEF AS MAY BE APPROPRIATE**

René S. Roupinian hereby declares the following under penalty of perjury:

1. I am a partner of Raisner Roupinian LLP, representing Andre Nunn, Kaila Webb and Kasandra Jiminez (the “Nunn Plaintiffs”) in the above-captioned action. I am an attorney in good standing admitted to practice in the State of Michigan and New York and admitted *pro hac vice* before this Court. I make this Declaration in support of the Joint Motion (the “Motion”) pursuant to section 105 of title 11 of the United States Code (11 U.S.C. §101 *et seq.* (the “Bankruptcy Code”)), Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 23 of the Federal Rules of Civil Procedure (the “Civil Rules”), made applicable to the Motion by operation of Bankruptcy Rule 7023, for the entry of: (I) an order (the “Preliminary Approval Order”): (A) approving, on a preliminary basis, the Settlement

¹ The Debtors in these cases are the following entities (the respective case numbers for each estate follows in parentheses): BW Industries Inc. (23-10844-MFW); Bitwise Industries, Inc. (23-10845-MFW); BWRD, LLC (23-10846-MFW); Alpha Works Technologies, LLC (23-10847-MFW); Bruce’s Bagels, Beverages, and Bites, LLC (23-10848-MFW).

Agreement and General Release (the “Settlement Agreement”)² by and among: (1) the Trustee; (2) the Class Representatives (as defined below); (3) Ollen Douglass, Mitchell Kapor, Paula Pretlow, and Joseph Proietti (collectively, the “Non-Management Directors”); (4) Kapor Capital Management Co., LLC, Kapor Capital Partners III, L.P. and the Kapor Klein Revocable Trust (collectively, the “Kapor Entities”); (5) 906 Ventures, LLC and Nuovo Capital, LLC; (6) Motley Fool Ventures Management LLC and Motley Fool Ventures LP (together, “Motley Fool Ventures”); (7) Scottsdale Insurance Company (“Scottsdale”), Great American E&S Insurance Company (“Great American”), and The Hanover Insurance Company (“Hanover,” and, together with Scottsdale and Great American, the “Participating Insurance Carriers”); and (8) Bethany Mily (all of the foregoing shall be referred to, collectively, as the “Settling Parties”), (B) certifying a Class for settlement purposes only, (C) appointing the firms of Raisner Roupinian LLP, Erickson Kramer Osborne LLP, Whelan Law Group and Bonakdar Law Firm as attorneys for the Class (“Class Counsel”) and appointing Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez as representative members of the Class (collectively, the “Class Representatives”), (D) approving the form and manner of notice to Class Members (the “Class Notice”), and (E) scheduling a fairness hearing (the “Fairness Hearing”) to consider final approval of the Settlement Agreement; and (II) after the Fairness Hearing, entering an order (the “Final Approval Order”) approving the Settlement Agreement on a final basis; and (III) granting related relief.

2. As set forth in the Joint Motion, the proposed settlement class comprises all persons who: (i) were employed by the Debtors; (ii) suffered an “employment loss” as that term is defined

² Capitalized terms not otherwise defined herein shall have the meaning assigned in the Settlement Agreement.

in 29 U.S.C. § 2101(a)(6) and 20 C.F.R. § 639.3(f), on, or within thirty (30) days of, May 29, 2023, as part of a “plant closing” or “mass layoff,” as those terms are defined in 29 U.S.C. § 2101(a)(2)-(3) and 20 C.F.R. § 639.3(b)-(c), or as the reasonably foreseeable consequence of a “plant closing” or “mass layoff” occurring on or about May 29, 2023; (iii) meet the definition of “affected employee” as set forth in 29 U.S.C. § 2101(a)(5) and 20 C.F.R. § 639.3(e)); and (iv) do not file a timely request to opt out of the Class (collectively, the “Class Members”).

3. In addition to certification of the class for settlement purposes only, the Parties seek appointment of Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez as the Class Representatives and the law firms of Raisner Roupinian LLP, Erickson Kramer Osborne LLP, Whelan Law Group and Bonakdar Law Firm as Class Counsel.

4. Plaintiffs incorporate by reference the Nunn *Plaintiffs’ Motion for Class Certification and Related Relief* and the Declarations submitted in support thereto. (Adv. D.I. 6,7).

5. The qualifications of proposed Class Counsel are summarized as follows:

Raisner Roupinian LLP

6. Jack A. Raisner and I are the founders of Raisner Roupinian LLP, which is solely dedicated to representing employees affected by mass layoffs and shutdowns. Prior to forming Raisner Roupinian LLP, Mr. Raisner and I were co-chairs of the WARN Act Practice Group at a prominent national employee rights law firm, where we spent over a decade litigating WARN Act cases throughout the country. We are joined by Gail C. Lin, who is Of Counsel, to our firm, and has more than 15 years’ experience litigating WARN Act claims in state, district, and bankruptcy courts throughout the country, and Isaac Raisner, our associate, who, prior to joining our firm,

litigated employee rights claims on behalf of migrant and domestic farmworkers at Georgia Legal Services and, other employee right's claims at a prominent firm in Georgia.

7. In 2017, Jack Raisner and I, along with our WARN team, obtained a notable United States Supreme Court decision that restored mandatory priority treatment for employee wage claims under the U.S. Bankruptcy Code. It reversed a decision of the U.S. Court of Appeals for the Third Circuit that approved the devaluation of the WARN Class's \$10 million judgment by accepting a popular device that avoided the priority scheme. In a 6-2 decision, the Court rejected the Bankruptcy Code deviation, because the WARN Act Class had not consented to it. *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017). Further protecting the priority rule, after a two-day trial, we won priority treatment for WARN claims that accrued more than 180 days prior to the petition filing – under the rarely-litigated “cessation of business” provision of the Bankruptcy Code. *In re FAH Liquidating Corp.*, 13-13087-KG, 2019 WL 8269114 (Bankr. D. Del. Dec. 27, 2019).

8. We have testified at the request of lawmakers on Capitol Hill and in state legislatures to strengthen the notice law for employees facing mass layoffs and shutdowns.

9. In 2019, Mr. Raisner and I had instrumental roles in the drafting and passage of the New Jersey “Toys R’ Us” law which expanded the protections of the New Jersey WARN Act workers, by increasing the notice requirement from 60 to 90 days, extending coverage to small sites, and adding an extra amount of severance-type pay for violations, which makes it unique.

10. Our WARN practice has helped give WARN Act claims its foothold in the bankruptcy process. We have obtained decisions approving the use of adversary proceedings in many jurisdictions, including Delaware and New York bankruptcy courts. *See In re Dewey &*

LeBoeuf LLP, 487 B.R. 169 (Bankr. S.D. NY 2013); *In re TSC Glob., LLC*, No. 12-10505-G, 2013 WL 6502168 (Bankr. D. Del. June 26, 2013) (Chapter 7).

11. On the appellate level, in *In re TWL Corp.*, 712 F.3d 886 (5th Cir. 2013), we obtained a reversal from the U.S. Court of Appeals for the Fifth Circuit, of a Bankruptcy Court's denied of class certification. On remand the Bankruptcy Court certified the class. The *TWL* case recognizes the availability of WARN Act adversary proceedings and class actions.

12. In addition, Mr. Raisner and I obtained a reversal from the U.S. Court of Appeals for the Second Circuit in a Chapter 7 WARN Act case. *See, Guippone v. BH S & B Holdings LLC*, 737 F.3d 221 (2d Cir. 2013) (vacating summary judgment awarded to single employer parent).

13. We have been Plaintiffs' counsel in over 150 active or settled, certified or putative WARN class actions, including the following in Bankruptcy Court for the District of Delaware: *Zeeshan, et al. v. Polished.com, et al.*: 24-50040-TMH; *Rivera v. Yellow Corporation, et al.*, 23-80456-CTG; *Grandfield v. Pear Therapeutics (US)*, Adv. Proc. No. 23-50334-TMH (settled); *Gass v. Boxed, LLC*, Adv. Proc. No. 23-10397-BLS; *Hansen v. PGX Holdings, Inc., et al.*, Adv. Proc. No. 23-50396-CTG (settled); *Boyko v. Virgin Orbit, LLC*, Adv. Proc. No. 23-50324-KBO(settled); *Hoover v. Drivetrain LLC*, Adv. Proc. No. 20-50966-CTG; *Johnson, et al. v. RAC Investment; Holdings, LLC, et al.*, Adv. Proc. No. 23-10316-BLS; *Buckley, et al. v. First Guaranty Mortgage Corp.*, Adv. Proc. No. 22-50387-CTG (settled); *Thomay v. Klausner Lumber One, LLC*, Adv. Proc. No. 20-50602-KBO (settled); *In re Klausner Lumber Two LLC*, Case No. 20-11518-KBO (settled); *Karaniowsky et al v. US Investigations Services, LLC*, Adv. Proc. No. 15-50204-KBO (settled); *Etzelsberger, et al. v. Fisker Automotive Holdings, Inc.*, Case No. 13-13087- KG (settled); *Wilrich v. Charming Charlie Holdings, Inc., at al.*, 19-50276-CSS (settled); *Miller v. Columbus Steel Castings Company, et al.*, Adv. Proc. No. 16-50997-CSS (settled); *Rasheed v.*

American Home Mortgage Corp., Case No. 07-51688 (settled); *Mekonnen, et al. v. HomeBanc Mortgage Corporation*, Case No. 07-51695 (settled); *Aguilar v. Quaker Fabric Corporation*, Case No. 07-51716-KG (settled); *Jones v. Alliance Bancorp.*, Case No. 07-51799-CSS (settled); *Bressmer v. Delta Financial Corporation*, Case No. 07-51808-CSS (settled); *Czyzewski, et al. v. Jevic Transportation, Inc.*, Case No. 08-50662-BLS; *Austen. v. Archway Cookies*, Case No. 08-12323-CSS (settled); *Jackson v. Qimonda NA*, Case No. 09-50192-MFW (settled); *Willock v. Pemco World Air Services, Inc.*, Case No. 12-50799-MFW (settled); *Folk, et al. v. Monaco Coach Corporation*, Case No. 09-50402-KJC (settled); *Decuir v. WL Homes LLC*, Case No. 09-52270-BLS (settled); and *Kohlstadt v. Solyndra LLC*, Case No. 11-53155-MFW (settled).

14. We have been appointed as class counsel or been appointed jointly with co-counsel in at least fifty (50) employment class actions which involved California WARN Act claims similar to those asserted herein, including the following cases: *Boyko v. Virgin Orbit, LLC*, Case No. 23-50324-KBO (Bank. D.Del.)(settled); *Miranda v. DC Solar Solutions, Inc.*, 19-5002-gs (Bankr. D. Nev.) (settled); *Martz-Gomez v. Anna's Linen's, Inc.*, Adv. Proc. No. 8:15-bk-13008-TA (Bankr. C.D. Cal.) (settled); *Philips v. Munchery, Inc.*, 19-0469-JSC (N.D. Cal.) (settled); *Vance v. Zacky & Sons Poultry, LLC*, 18-01375-RK (Bankr. E.D. Cal.)(settled); *Wojciechowski v. ClearEdge Power, Inc.*, Case No. 14-4152-CN (Bankr. N.D. Cal.) (settled); *Barcelo v. Rhythm and Hues, Inc.*, Case No. 13-01206-NB (Bankr. C.D. Cal.) (settled).

15. Additionally, we have or currently represent plaintiffs in WARN class actions in courts outside of Delaware: *Belendez-Desha v. JAF Communications, Inc.*, 1:24-cv-00741-MMG (S.D. NY); *Bishop v. StratFS, LLC et al.*, 1:24-cv-01796-ER (S.D.N.Y.); *Ramirez v. KDI Cheese Co., LLC*, 2:24-cv-02041-DDC-ADM (D. Kan.); *Sanford v. Hey Favor, Inc., et al.* Case No. 23-4038-elm (Bank. N.D. Tex.); *Fetto v. Tuesday Morning Corporation*, Case No. 23-09005-elm

(Bankr. S.D. Tex.); *Garrett v. Santa Cruz Valley Regional Hospital*, Case No. 22-99908-RCC (D. Az.); *Walker v. Product Quest Manufacturing, LLC*, Adv. Proc. No. 18-06028-LMJ (Bankr. M.D. N.C.) (settled); *Kinney v. Public Consulting Group, et al.*, Case No. 22-02458-ER (S.D. NY), *Coleman, et al. v. Optum Inc., et al.*, Case No. 22-05664-JLR (S.D.N.Y.); *Castillero, et al. v. Xtend Healthcare, LLC*, Case No. NO. 3:22-cv-02099-GC-DEA (D. N.J.); *Federman, et al. v. ITT Educational Services, Inc.*, Adv. Proc. No. 16-50296 (Bankr. S.D. Ind.) (settled); *Bergeron v. DGI Services, LLC*, 11-2712-GMB (D. N.J.)(settled); *Piron, et al v. General Dynamics Information Technology, Inc.*, Case No. 19-709-REP (E.D. Va.) (settled); *Ien v. Transcare Corporation, et al.*, Case No. 16-1033-DSJ (Bankr. S.D.N.Y) (partially settled); *Kennedy v. Colortree Group, Inc.*, 3:19-cv-00424-KLP (E.D. Va.) (settled); *Primavera v. Crowne Architectural Systems, Inc.*, Case No. 17-01272-SLM (Bankr. D. N.J.) (settled); *Chism v. Lamar Construction Company*, Case No. 14-80170-jwb (W.D. Mich.) (settled); *Pocrass v. Gymboree Group, Inc., et al.*, 19-03010-KLP (Bankr. E.D. Va.) (settled); *Grimes v. Evergreen Recreational Vehicles, LLC*, 16-00472-MGG (N.D. Ind.) (settled); *Singleton v. Alevo Manufacturing, Inc.*, Case No. 17-06024-CLA (Bankr. M.D.N.C.) (settled); *Chenault v. CS Mining, LLC*, Case No. 16-02095-WTT (Bankr. D. Utah) (settled); *May v. Blackhawk Mining, LLC*, Case No. 15–cv–377–JMH (E.D. Ky.) (settled); *Bent v. ABMD, Limited*, 09-3367-LSW (Bankr. S.D. Ohio) (settled); *Murphy v. LenderLive Network, Inc.*, Case No. Case No. 13-3135- RBJ (D. Colo.) (settled); *Mofield v. FNX Mining Company USA Inc.*, Case No. 08-00105-JEG (M.D. Tenn.) (settled); *Schuman v. The Connaught Group. Ltd.*, Case No. 12-10512-SMB (Bankr. S.D.N.Y.) (settled); *Callahan v. Taylor Bean & Whitaker Mortgage Corp.*, Case No. 09-00439-JAF (Bankr. M.D. Fla.) (settled); *Mochnal v. EOS Airlines, Inc.*, Case No. 08-08279-RDD (Bankr. S.D.N.Y.) (settled); *Binford v. First Magnus Capital, Inc.*, Case No. 08-01494-GBN (Bankr. D. Az.)(settled); *Bridges v. ContinentalAFA Dispensing Co.*, Case No.

08-45921-KAS (Bankr. E.D. Mo.) (settled); *Johnson v. First NLC Financial Services, LLC*, Case No. 08-01130-PGH (Bankr. S.D. Fla.) (settled); *Clayton v. Continental Promotion Group Inc.*, Case No. 08-18112-CPM (Bankr. M.D. Fla.) (settled); *Iannacone v. Fortunoff Holdings Inc.*, 09-22581-ASH (Bankr. S.D.N.Y.) (settled); *Curry v. Caritas Health Care Inc.*, Case No. 09-40901-CEC (Bankr. E.D. N.M.) (settled); *Thielmann, et al., v. MF Global Holdings Ltd., et al.*, Case No. 11-02880-MG (Bankr. S.D.N.Y.) (settled); *Conn et al. v. Dewey & LeBoeuf LLP*, Case No. 12-01672-MG (Bankr. S.D.N.Y.) (settled); *Matzen v. Corwood Laboratories, Inc.*, Case No. 10-08003-AST (Bankr. E.D.N.Y.) (settled); *Decker v. Data Listing Services, LLC*, Case No. 11-06373-FPG (W.D.N.Y.) (settled).

Jack A. Raisner

16. Jack A. Raisner is a founding partner at Raisner Roupinian LLP. Prior to forming Raisner Roupinian LLP, Mr. Raisner spent over a decade as the co-chair of the WARN practice group at an employee rights firm in New York City.

17. In addition to practicing law, Mr. Raisner is Professor of Law at Tobin College of Business, St. John's University. He is the author of *Pregnancy Discrimination and Parental Leave* (Aspen 2000), update editor of the two-volume treatise, *Representing Plaintiffs in Title VII Actions* (Aspen 2006), and numerous articles and legal texts encompassing an extensive range of issues. He is a contributing author of chapters in leading legal treatises, including *Employee Rights Litigation*, *Disability Discrimination in the Workplace*, *New York Employment Law*, *Employment Litigation in New York*, *West's General Practice in New York*, and *International Labor and Employment Laws*. He has been a member of the American Bar Association, Section of Labor and Employment Law, Fair Labor Standards subcommittee where, starting in 2006, he delivered the annual conference presentation concerning attorneys' ethics in wage and hour class actions. His

articles have appeared in various legal journals and publications, including the New York Law Journal and the New York State Bar Association Labor and Employment Newsletter. Mr. Raisner received his B.S. degree from Boston University in 1978 and his J.D. from Benjamin N. Cardozo School of Law in 1983. He is admitted to the New York bar. He is also admitted to practice in several federal district courts, four U.S. Court of Appeals Circuits, and the U.S. Supreme Court.

18. In May 2008, Mr. Raisner submitted testimony from the litigator's perspective on the need for WARN Act reform at the invitation of Senator Edward Kennedy, Chairman of the Senate Health Education Labor and Pensions (HELP) Committee of the U.S. Senate upon the occasion of the Committee's hearing on the 20th Anniversary of the WARN Act, at which his client testified regarding his class action against Quaker Fabrics, which resulted in a \$1 million settlement in the U.S. Bankruptcy Court, District of Delaware.

René S. Roupinian

19. I am a founding partner of Raisner Roupinian LLP. I have litigated cases on behalf of employees under the WARN Act for nearly two decades. Prior to forming Raisner Roupinian LLP, I spent over a decade as the co-chair of the WARN practice group at an employee rights firm in New York City. I have served as counsel in more than 150 WARN class actions, representing tens of thousands of employees. Those cases, in addition to the ones mentioned in paragraphs 11 – 13 above, include: *Ballentine v. Triad International Maintenance Corporation*, Case No. 01-10357 (E.D. Mich.); *Scott v. Greenwood Mills, Inc.*, Case No. 02-00221 (D.S.C.); *Andrews v. Pliant Systems Inc.*, Case No. 01-00065 (Bankr. E.D.N.C.); *Law v. American Capital Strategies Ltd.*, Case No. 05-00836 (M.D. Tenn.); *Bandel v. L.F. Brands Marketing, Inc.*, Case No. 04-CV-01672 (S.D.N.Y.); *Walsh v. Consolidated Freightways Corporation*, Case No. 03-01074 MG (Bankr. C.D. Cal.); *Gardner v. Pillowtex Corporation*, Case No. 03-60213 (Bankr. D. Del.); *Baker*

v. National Machinery Company, Case No. 02-07444 (N.D. Ohio); *Ruggieri v. Teligent, Inc.*, 03-04871 (S.D.N.Y.); *Trout v. Transcom USA, Inc.*, 03-00537 (S.D. Ind.); *Barajas v. Gonzalez Inc.*, Case No. 02-15508 (Bankr. D. Ariz.); *D'Andreis v. Thomaston Mills, Inc.*, Case No. 01-05142 (Bankr. M.D. Ga.); and *Michael Cain v. Inacom Corp.*, 00-01724 (Bankr. D. Del.).

20. I have written numerous articles and lectured on WARN class action litigation. I have spoken on federal and state WARN rights and the litigation of WARN class claims before the American Bar Association, the New York State Bar Association, the National Employment Lawyers Association, the Midwest Regional Bankruptcy Seminar and other organizations, including presenting at the National Conference of Bankruptcy Judges on *Jevic – The Insider Story and the Impact on Future Chapter 11s*. Following is a list of my WARN presentations and publications:

Presentations:

2022

Speaker: “*Reevaluating and Revisiting Class Claims*,” American Bankruptcy Institute Annual Spring Meeting, Washington, D.C.

2020

Speaker: “*What Every Employment Attorney Needs to Know About Bankruptcy, But is Afraid to Ask*,” National Employment Lawyers Association New York Fall Conference

2019

Speaker: – Class Action and Bankruptcy Convergence; American Bankruptcy Institute Southeast Workshop

2017

Speaker: *Jevic – The Insider Story and the Impact on Future Chapter 11s*; National Conference of Bankruptcy Judges

Speaker: How will *Jevic* Change Chapter 11 Practice? ABI’s Midwest Regional Bankruptcy Seminar

2016

Speaker: “*WARN Act Issues in Bankruptcy*,” 36th Annual ABI Midwestern Bankruptcy Institute

Speaker: “*WARN Act Update: What Labor and Employment Lawyers Need to Know*,” 53rd Annual Midwest Labor & Employment Law Seminar

2014

Speaker: “*Seeking Your Recovery: Pre-Judgment Attachment and Bankruptcy*,” National Employment Lawyers Association New York Affiliate

2010

Speaker: “*The Financial Crisis: Impact on WARN Act Cases*,” ABA Federal Labor Standards Legislation Committee Midwinter Meeting

Speaker: “*The Financial Crisis: Impact on WARN Act Cases*,” New York County Lawyers’ Association

Speaker: “*Economy in Peril (Part 1): The Legal Landscape for Addressing Reductions in Force*,” American Bar Association teleconference

Speaker: “*WARN Act Specialist Offers Advice About Layoffs Amidst Tough Economic Times*,” Employment & Labor LAWCal.ST

Speaker: “*Layoff Law*,” Fairfield County Bar Association

Speaker: “*New Causes of Action: WARN Act and ERISA*,” National Employment Lawyers Association New York Affiliate

Speaker: “*Reductions in Force in Both a Union and Non-Union Setting*,” New York State Bar Association

Speaker: “*Attacking Mass Layoffs*,” National Employment Lawyers Association National Convention

Speaker: “*Analyzing Employee Issues in Chapter 11*,” Midwest Regional Bankruptcy Seminar

Speaker: “*The Last Resort: What Labor & Employment Lawyers Need to Know About Bankruptcy*,” American Bar Association

2008

Speaker: “Grasping the WARN Act through an interactive discussion addressing all the ins and outs,” Tonkins Employment Law: Termination

Publications:

2010 Co-Author with Jack A. Raisner and Michael Scimone: “*Fair Warning for Workers*,” Trial Magazine, August 2010

2008 Author: “*A Practitioner’s Overview of the Deficiencies of the Worker Adjustment and Retraining Notification Act Twenty Years Following its Enactment*,” The New York Employee Advocate, Volume 14, No. 5, June 2008

21. I have been quoted on WARN law rights and the firm’s cases have been cited in such publications as the Wall Street Journal, the New York Times, American Lawyer, Associated Press, USA Today, Forbes, Newsday, Times-Gazette, The Herald News, and others.

22. In May 2008, together with Jack A. Raisner and our client, Joe Aguiar, I submitted testimony to the Senate Health Education Labor and Pensions (HELP) Committee of the U.S. Senate upon invitation from the Committee’s Chair, Senator Edward Kennedy on the 20th Anniversary of the WARN Act. My testimony highlighted from a litigator’s perspective the deficiencies in the Act and its need for reform.

23. I received my BA from the University of Michigan and my JD from Michigan State University College of Law. I am a member of the bars of New York and Michigan. I am also admitted to practice in six federal district courts and the U.S. Supreme Court.

Erickson Kramer Osborne

24. Erickson Kramer Osborne LLP (“EKO”) is a class action law firm based in San Francisco, California. The firm focuses on class and collective actions involving workers’ rights, financial fraud, consumer protection, sexual abuse, and privacy.

25. EKO’s cases have been spotlighted in the Wall Street Journal, Barron’s, Bloomberg, the Los Angeles Times, the New York Times, the Washington Post, and NPR’s Marketplace.

26. EKO’s attorneys have represented plaintiffs in some of the most notable class action settlements in recent history, including *In re USC Student Health Center Sexual Abuse Litigation*, No. 2:18-cv-04258 (C.D. Cal.) (\$215 million) and *A.B. v. Regents of University of*

California, No. 2:20-cv-09555 (C.D. Cal.) (\$73 million settlement). They have also represented plaintiffs and parties in some of the most complex multi-district litigation and consolidated actions in recent years, including *In re: MOVEit Customer Data Breach Litigation*, No. MDL 3083 (D. Mass.); *In Re: Generic Pharms. Pricing Antitrust Case*, No. MDL 2724 (E.D. Penn.); and *In Re Ghost Ship Fire Litigation*, No. RG16843631 (Alameda County Superior Court).

27. In the field of workers' rights, EKO attorneys have litigated dozens of individual and class action cases in state and federal courts. They won and defended class certification before the California Supreme Court in *Minix v. Sutter Health*, No. RG20061295 (Alameda County Superior Court), represented gig economy workers' against a technology startup employer in *Camp v. Instacart*, No. BC652216 (Los Angeles County Superior Court), represented employees working in conditions the Seattle Times referred to as "Kafkaesque" in *Torres v. North Pacific Seafoods, Inc.*, No. 2:20-cv-01545 (W.D. Wa.), tried workers' cases to multi-million dollar verdicts in *Matias v. Star-J Trucking*, No. (Alameda County Superior Court) and *Frias v. California Materials*, No. (San Joaquin County Superior Court), and litigated against the country's largest employers in *Rittmann v. Amazon.com Inc.*, No. 2:16-cv-01554 (W.D. Wa.) and *Zamudio v. Home Depot USA, Inc.*, No. 05-446984 (San Francisco Superior Court).

28. EKO attorneys have litigated several class actions against technology-sector defendants like Bitwise, including *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726 (N.D. Cal.); *Mehta v. Robinhood Financial LLC*, No. 5:21-cv-01013 (N.D. Cal.); *In re HP Printer Firmware Update Consumer Fraud Litigation*, No. 5:16-cv-05820 (N.D. Cal.); *In re Lenovo Adware Consumer Fraud Litigation*, No. 4:15-md-02624 (N.D. Cal.); *Ward v. Prime Trust*, No. 2:22-cv-02034 (D. Nev.); *Pearl v. Coinbase, Inc.*, No. 3:22-cv-03561 (N.D. Cal.); *Donovan v. Coinbase, Inc.*, No. 4:22-cv-02826 (N.D. Cal.); *Nguyen v. Okcoin*, No. 4:22-cv-06022 (N.D. Cal.);

Debono v. Cerebral Inc., No. 3:22-cv-03378 (N.D. Cal.); *Valenti, et al. v. DFINITY USA Research LLC*, No. 3:21-cv-06118 (N.D. Cal.); and *Bow v. Suddenlink*, No. TCU21-7785 (Nevada County Superior Court). They have also litigated numerous class actions against corporate and banking defendants, including *In re Oppenheimer Rochester Funds Securities Litigation (CA Fund)*, No. 09-md-02063 (D. Colo.) and *Carducci v. Wachovia Bank, NA*, No. 4:11-cv-00181 (N.D. Cal.);

29. Over the last decade, EKO founding partner Julie Erickson has litigated and tried cases in state and federal court, argued in the Ninth Circuit Court of Appeals, and been named Outstanding New Lawyer of the Year by the San Francisco Trial Lawyers Association. She is a graduate of Santa Clara University and University of San Francisco School of Law. In addition to her work with EKO, Julie is an adjunct professor at the University of San Francisco School of Law, teaching a course on class actions in the “gig economy,” and is a member of the San Francisco Trial Lawyers Women’s Caucus Committee.

30. In the last 5 years, EKO founding partner Elizabeth Kramer has been a central figure in some of the largest sexual abuse class actions ever, including serving as lead counsel in litigation against USC (\$215 million settlement) and against UCLA (\$73 million settlement). The Daily Journal described her role as “a very active and important voice in the settlement process.” Jason Ingber’s Outside the Courtroom podcast referred to her as “the Queen of Class Actions.” She is also a leader in the field of FinTech litigation, as the primary attorney in cases against Robinhood and Coinbase and has been interviewed by the Wall Street Journal regarding the rise of cryptocurrency litigation. She is a graduate of University of California, Santa Cruz and University of San Francisco School of Law and is a on the Board of Directors of La Raza Centro Legal, a community based legal services non-profit that assists in workers’ rights litigation in San Francisco.

31. EKO founding partner Kevin Osborne has tried dozens of civil and criminal cases to verdict in jury trials, arbitrations, administrative hearings, and criminal proceedings on behalf of the Department of Justice. He has over a decade of experience in workers' rights litigation, having litigated more than 20 workers' right cases in four states (California, Washington, Nevada, and Idaho) and is admitted to practice in the federal courts of six states (California, Washington, Nevada, Michigan, Massachusetts, and New York) and the Ninth Circuit Court of Appeals. Kevin has been interviewed by NPR's Marketplace, Out of the Courtroom, Bloomberg, and various other media outlets on issues including workers' right to labor unionization efforts. He has published workers rights' articles in Forum Magazine, Plaintiff's Magazine, and other journals and periodicals. He is a graduate of Western New England University and Santa Clara Law and is on the Board of the Alexander Community Law Center at Santa Clara Law.

Whelan Law Group

32. Whelan Law Group is a Central California trial firm that specializes in complex business and employment litigation in California. Whelan Law Group is a Martindale-Hubbell AV® Pre-Eminent Peer Review Rated law firm founded by Walter William Whelan III who is a member of the American Board of Trial Advocates (ABOTA). Brian Whelan is a partner in the firm.

33. Brian Whelan, of the Whelan Law Group, chairs the firm's class action litigation department, and was the firm's sole attorney involved with this action. Brian has extensive experience both defending and prosecuting Class Action and Private Attorney General Act ("PAGA") claims in the context of California's Labor and Employment Laws across the State of California. Brian not only represents aggrieved employees in the context of employment Class Action and PAGA claims, but is frequently and currently retained by both national, international

and foreign-based employers to defend employment class action and PAGA lawsuits.

34. In sixteen years of practice, Brian Whelan has tried or co-tried over nineteen trials to a verdict or judgment – many of which resulted in multi-million-dollar judgments for his clients in the employment litigation context. In 2017, a Sacramento jury awarded Brian’s client over \$24 million. The employment-related verdict was California’s largest defamation verdict in 2017, and one of the 100 largest verdicts in the United States in 2017 (*King v. U.S. Bank Nat’l Ass’n*, 53 Cal.App.5th 675 (2020)). Brian has achieved other multi-million-dollar jury verdicts for his clients when representing plaintiffs. Brian has repeatedly been named to the California Super Lawyer’s list and was nominated by the Consumer Attorneys of California as a CAOC Street Fighter of the Year. Brian has been quoted on the law and the firm’s cases in such publications as the Associated Press, Fresno Bee, Sacramento Bee, San Francisco Chronicle, GV Wire, SJV Sun, Los Angeles Times, USA Today, and many others local and national publications.

Brian Whelan graduated from the University of California, Berkeley, with honors in 2005, and graduated from Rutgers School of Law in 2008. Brian has served on statewide bar committees on access to justice. In 2012 and 2013, Brian served as California’s alternate delegate to the American Bar Association for California. Brian is a member of many professional associations, including the association of Business Trial Lawyers-San Joaquin Chapter and is frequently sought after by news outlets and other attorneys in Central California to provide legal opinions on labor and employment matters. Brian is admitted to practice in California, federal district courts located in California and the U.S. Supreme Court.

Bonakdar Law Firm

35. The Bonakdar Law Firm is a Fresno, California-based firm specializing in business and civil litigation. The firm’s founder, Roger Bonakdar was a member of two prominent Central

Valley law firms—one specializing in civil litigation, and the other specializing in criminal defense—prior to starting the Bonakdar Law Firm twelve years ago. Mr. Bonakdar has a history of success representing San Joaquin Valley consumers in business-related litigation matters. Before starting his practice, Mr. Bonakdar also worked with the California Department of Justice, Office of the Attorney General.

36. Mr. Bonakdar earned his bachelor’s degree from the University of California, San Diego and his Juris Doctor from Santa Clara University, School of Law. Mr. Roger Bonakdar has many academic achievements, including Witkin Awards in several areas such as Civil Procedure, Contracts and Consumer Law. Mr. Bonakdar was also recognized by Santa Clara University, School of Law as a “Scholar of Public Interest & Social Justice Law,” with emphasis in Consumer Law.

37. Mr. Bonakdar is a San Joaquin Valley native who has dedicated his practice to achieving justice for his community. He is currently a candidate for District 6 of the Fresno City Council.

Reasonableness of the Settlement

38. Class Counsel and the Class Representatives believe the settlement is fair and reasonable under the circumstances. Upon Court approval, the settlement provides for a prompt distribution by the Trustee of \$6 million to the 750 or so Class members (the “Initial Class Distribution”). This equates to approximately \$8,000 per class member - a meaningful recovery for abruptly terminated employees, many of whom were not paid their final wages and are still struggling to find employment. An additional significant payment is also called-for at the conclusion of these Chapter 7 cases. It also will receive priority treatment up to the employee cap of \$15,150 per individual under 11 U.S.C. § 507(a)(4). (the “Class Priority Claim”). This means

Class members may each receive the full priority amount of their wage and WARN damages up to that cap – a positive outcome that certainly is in the best interests of the Class.

39. Class Counsel submits the settlement is also in the best interests of all creditors. It will resolve the employees' claims under the WARN Act and similar federal, state, and local laws without the need for protracted litigation regarding Defendants' affirmative defenses, as well as any D&O litigation that may be brought by the Trustee against the Debtors' former officers and directors.

40. Class Counsel further submits that the settlement fairly and reasonably resolves Class Members' claims under California's Private Attorneys General Act (Cal. Lab. Code §§ 2699 *et seq.*) (the "PAGA Claims"). These claims give rise to statutory penalties for, among other things, unpaid wages. Per the PAGA statute, settlement funds from such claims are divided between the California Labor & Workforce Development Agency and aggrieved employees. The settlement allocates the reasonable sum of \$75,000 to resolve the claims of Class Members who qualify for PAGA payments, 25% of which will be allocated to the qualifying Class Members and 75% of which will be allocated to the state agency.

41. Although the Defendants may have plausible defenses with respect to a relatively small number of employees' claims, litigation of those defenses would not be cost-effective in the context of a Chapter 7 bankruptcy.

42. The Class Representatives support the Settlement Agreement and Class Counsel believes that most if not all the Class Members will have a favorable reaction to the settlement and will not object to it.

43. The settlement was reached following Class Counsel's investigation of the essential facts through public records and intake, informal exchange of information with the Trustee and

counsel for Defendants, review of payroll records, and after a two day in-person mediation in New York City, followed by extensive settlement negotiations over the subsequent months.

44. In view of the foregoing and the Motion and exhibits thereto, on behalf of Class Counsel and the Class Representative, I request the Court to grant preliminary and final approval of the Settlement.

Dated: July 30, 2024

RAISNER ROUPINIAN LLP

/s/ *René S. Roupinian*
René S. Roupinian

EXHIBIT 3

(General Notice)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
	)	
BW Industries Inc. <i>et al.</i> , ¹	)	Case No. 23-10844-MFW
	)	
Debtors.	)	(Jointly Administered)

**NOTICE OF JOINT MOTION FOR APPROVAL OF SETTLEMENT PURSUANT TO
FED. R. BANKR. P. 9019 AND RELATED RELIEF**

Jeoffrey L. Burtch, in his capacity as Chapter 7 Trustee for the bankruptcy estates (the “Estates”) of BW Industries Inc. and its affiliated Debtors (the “Trustee”), and Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez (together, the “Class Representatives”), individually and on behalf of similarly situated former employees and class members, have filed a motion (the “Motion”) seeking approval of a settlement of: (a) the Estates’ claims against certain of the Debtors’ former directors (the “Non-Management Directors”), including, but not limited to, claims based on alleged breaches of fiduciary duty and claims for avoidance of certain transfers; and (b) former employees’ claims against the Estates and the Debtors’ officers and directors under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* (the “WARN Act”) and any other federal, state, and local laws. A summary of the material terms of the proposed settlement is attached to this notice, and a full copy of the Motion will be produced upon request to the undersigned counsel. **Your rights may be affected.** You should read these papers carefully and discuss them with your attorney. If you do not have an attorney, you may wish to consult one.

If you do not want the Court to approve the settlement or you otherwise wish to be heard on any matter related to the settlement, you or your attorney must file a written response with the Bankruptcy Clerk **so that it is received on or before [November 15, 2024]** at the following address: Bankruptcy Clerk, United States Bankruptcy Court for District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801. Your response must include the case name and number, and state the legal and factual grounds for the objection or response.

If you file a response, you must also mail a copy of the response to the following at the same time as it is filed to: (1) Class Counsel, Raisner Roupinian LLP, Attn. René S. Roupinian, 270 Madison Ave, Suite 1801, New York, NY 10016 (rsr@raisnerroupinian.com); (2) Counsel for the Trustee, Cozen O’Connor, Attn. Mark E. Felger, 1201 N. Market Street, Suite 1001, Wilmington, DE 19801 (mfelger@cozen.com); (3) Counsel for Non-Management Directors Mitchell Kapor and Paula Pretlow, Morrison & Foerster LLP, Attn. Andrew L. Perito, 425

¹ The Debtors in these cases are the following entities (the respective case numbers for each estate follows in parentheses): BW Industries Inc. (23-10844-MFW); Bitwise Industries, Inc. (23-10845-MFW); BWRD, LLC (23-10846-MFW); Alpha Works Technologies, LLC (23-10847-MFW); Bruce’s Bagels, Beverages, and Bites, LLC (23-10848-MFW).

Market Street, San Francisco, CA 94105-2482 (aperito@mofo.com); and (4) Counsel for Non-Management Directors Ollen Douglass and Joseph Proietti, Stinson LLP, Attn. Paul Lackey, 2200 Ross Avenue, Suite 2900, Dallas, TX 75201 (paul.lackey@stinson.com).

A hearing on the motion has been scheduled for **[November 20, 2024, at 2:00 p.m.]**, at the U.S. Bankruptcy Court, District of Delaware, 824 North Market Street, 5^h Floor, Courtroom No. 4, Wilmington, Delaware 19801

SUMMARY OF SETTLEMENT²

The Trustee and the Class Representatives have filed a motion (the “Motion”) with the United States Bankruptcy Court for the District of Delaware seeking approval of a Settlement Agreement and General Release (the “Settlement Agreement”), providing for the final settlement and resolution of: (a) The Trustee’s claims against the Non-Management Directors, including, but not limited to, claims based on alleged breaches of fiduciary duties (the “D&O Claims”) and claims for the avoidance of transfers under chapter 5 of the Bankruptcy Code; and (b) Class Members’ claims against the Estates and the Non-Management Directors under the WARN Act and similar federal, state, and local laws. The essential terms of the Settlement Agreement are as follows:

- a. The Settlement Agreement shall become effective only on the date on which certain enumerated events have occurred, include the Bankruptcy Court’s order approving the Settlement Agreement and orders dismissing all pending actions involving the Class Members’ claims have been entered and the time for taking an appeal has expired or, if an appeal has been taken, on the day the relevant approval order has been affirmed with no further right of appeal (the “Effective Date”).
- b. The Settling Parties shall be released from all of the Estates’ and Class’s claims upon the Effective Date and payment of the sum of Twenty Million and No/100 Dollars (\$20,000,000.00) (the “D&O Settlement Amount”) to the Trustee, with such payment being due within thirty (30) days following the Effective Date.
- c. The order approving the Settlement Agreement shall include findings that the Trustee has sole authority to settle and release any and all claims against the Non-Management Directors that are based on alleged breaches of duties owed to a corporation or generalized harm to creditors.
- d. Within ten (10) business days after the Effective Date, the Trustee shall request dismissal of certain actions against the Non-Management Directors and one of the Debtors’ former officers that are pending in different courts, and if such request is declined, shall take such actions in the Bankruptcy Cases as may be appropriate to seek the stay or dismissal of such claims within thirty (30) days from the date on which the request is declined.

² The summary in not intended to be an exhaustive or complete description of the terms of the Settlement Agreement, and in the event of any inconsistency, the terms of the Settlement Agreement shall control over the summary. Capitalized terms not otherwise defined herein shall have the meanings assigned in the Motion. A complete copy of the Motion will be provided via email or U.S. Mail upon request to the Trustee’s counsel.

- e. Within ten (10) business days after receipt of the D&O Settlement Amount, the Trustee shall distribute the sum of Six Million and No/100 Dollars (\$6,000,000.00) to the Class (the “Initial Class Distribution”).
- f. As soon as practicable after the Effective Date, Class Counsel shall provide the Trustee with their calculation of the amount of the claim that they will file on behalf of the Class in the Bankruptcy Cases (the “Class Priority Claim”), and, in the absence of specific, identifiable errors in such calculation, the Trustee shall stipulate to such amount. The Class Priority Claim shall be entitled to priority pursuant to 11 U.S.C. § 507(a)(4) and shall be calculated on the basis of Class Members’ actual wages, provided that the sum of the Initial Class Distribution and the Class Priority Claim shall in no event exceed the aggregate of Class Members’ individual claims that would be entitled to priority under 11 U.S.C. § 507(a)(4). Subject to the Trustee’s review and approval as provided herein, the Settling Parties shall stipulate and agree that the Class Priority Claim shall have priority over any of the claims of the Non-Management Directors and certain of their affiliates, and the Participating Insurance Carriers, and agree not to contest the Class Priority Claim, or the amounts thereof, in whole or in part in the Bankruptcy Cases or in any other proceeding.
- g. The Trustee will use best efforts to obtain a bar order from the Bankruptcy Court that will protect the Settling Parties and the Participating Insurance Carriers from all outstanding and future claims involving the Debtors or the Non-Management Directors, and all parties expressly agree that any such bar order is integral to the settlement.
- h. With limited exceptions set forth in the Settlement Agreement, mutual general releases of all claims related to or arising out of the Debtors or the Bankruptcy cases shall be exchanged as between Settling Parties, including, but not limited to, the Class Members and the Trustee, acting on behalf of the Estates, and all Settling Parties shall agree to release the Participating Insurance Carriers from any and all coverage obligations, and the Participating Insurance Carriers shall agree to release one another.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
	)	
BW Industries Inc. <i>et al.</i> , ¹	)	Case No. 23-10844-MFW
	)	
Debtors.	)	(Jointly Administered)
	)	RE: Docket No.

ORDER PURSUANT TO 11 U.S.C. § 105 AND FED. R. BANK. P. 7023 AND 9019: (I) PRELIMINARILY APPROVING SETTLEMENT AGREEMENT; (II) CERTIFYING A CLASS OF WARN ACT CLAIMANTS FOR SETTLEMENT PURPOSES ONLY; (III) APPOINTING CLASS COUNSEL AND CLASS REPRESENTATIVES; (IV) APPROVING THE FORM AND MANNER OF NOTICE TO CLASS MEMBERS OF THE CLASS CERTIFICATION AND SETTLEMENT; (V) SCHEDULING A FAIRNESS HEARING TO CONSIDER FINAL APPROVAL OF THE SETTLEMENT AGREEMENT; AND (VI) GRANTING RELATED RELIEF

The Court has considered the joint motion of Jeoffrey L. Burtch, in his capacity as Chapter 7 Trustee in the cases of BW Enterprises, Inc. and its affiliated Debtors (the “Trustee”), Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez (the “Class Representatives”), on behalf of themselves and on behalf of similarly situated class members (together with the Class Representatives, and excluding eligible members who timely elect to not be included as provided herein, the “Class Members” or “Class”) for the entry of orders: (a) approving the Settlement Agreement and General Release (the “Settlement Agreement”)² among: (1) the Trustee; (2) the Class Representatives; (3) Ollen Douglass, Mitchell Kapor, Paula Pretlow, and Joseph Proietti (collectively, the “Non-Management Directors”); (4) Kapor Capital Management Co., LLC, Kapor Capital Partners II, L.P., Kapor Capital Partners III, L.P., and the

¹ The Debtors in these cases are the following entities (the respective case numbers for each estate follows in parentheses): BW Industries Inc. (23-10844-MFW); Bitwise Industries, Inc. (23-10845-MFW); BWRD, LLC (23-10846-MFW); Alpha Works Technologies, LLC (23-10847-MFW); Bruce’s Bagels, Beverages, and Bites, LLC (23-10848-MFW).

² Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Settlement Agreement.

Kapor Klein Revocable Trust; (5) 906 Ventures, LLC and Nuovo Capital, LLC; (6) Motley Fool Ventures Management LLC and Motley Fool Ventures LP; (7) Scottsdale Insurance Company, Great American E&S Insurance Company, and The Hanover Insurance Company (collectively, the “Participating Insurance Carriers”); and (8) Bethany Mily (all of the foregoing shall be referred to, collectively, as the “Settling Parties”), pursuant to Bankruptcy Rule 9019, (b) certifying the Class for settlement purposes only, appointing the law firms of Raisner Roupinian LLP, Erickson Kramer Osborne, Whelan Law Group and Bonakdar Law Firm as class counsel (“Class Counsel”), appointing Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez as Class Representatives and preliminarily approving the Settlement Agreement pursuant to Civil Rule 23 and Bankruptcy Rule 7023, (c) approving the form and manner of notice to Class Members of the conditional class certification and settlement, (d) scheduling a fairness hearing (the “Fairness Hearing”) to consider final approval of the Settlement Agreement pursuant to Civil Rule 23 and Bankruptcy Rule 7023, (e) after the Fairness Hearing, finally approving the Settlement Agreement pursuant to Civil Rule 23 and Bankruptcy Rule 7023, and (f) granting related relief (the “Joint Motion”). A true and correct copy of the Settlement Agreement is attached hereto as **Exhibit A**.

The Court finds that:

A. The Class Representatives filed the following actions asserting claims under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 *et seq.* (the “WARN Act”) and various state laws:

1. The federal civil action styled as *Nunn et al. v. Bitwise Industries, Inc., et al.*, Case No. 23-00867-ADA-SAB, E.D. Ca.), which remains pending in the United States District Court for the Eastern District of California;
2. The state civil action styled as *Pedro Garza, et al. v. BW Industries, Inc., et al.*, (Case No. 23CECG0208, Sup. Ct. of Cal., County of Fresno),

which remains pending in the Superior Court of the State of California, Fresno County; and

3. The adversary proceeding styled as *Nunn, et al. v. Bitwise Industries, Inc., et al.*, (Adv. Pro. No. 23-50425-MFW, Bankr. D. Del.), which remains pending in this Court.

(collectively, the “WARN Actions”).

B. On July 30, 2024, the notice of the Joint Motion (“Notice”) was served by first class mail on the parties listed on the proof of service of the Notice filed with the Court.

C. The Notice given constituted the best notice practicable under the circumstances and is adequate, and no other notice need be given.

D. An adequate opportunity has been offered to the parties-in-interest to participate in the hearing on the Joint Motion.

E. For purposes of the Settlement Agreement and related matters raised in the Joint Motion: (a) Class Counsel has had extensive experience handling class action WARN litigation and has been appointed class counsel in over one hundred and fifty (150) employment law class action cases, including many class actions asserting claims under the WARN Act; and (b) the Class Representatives do not have interests that are materially adverse to those of the Class.

F. For the purposes of the Settlement Agreement and related matters raised in the Joint Motion: (a) the Class, consisting of over 700 potential Class Members, is so numerous that joinder of all Class Members is impracticable; (b) there are questions of law or fact common to the Class; (c) the claims of the Class Representatives are typical of Class Members generally; (d) Class Counsel has fairly and adequately protected the interests of the Class; (e) questions of law or fact common to the Class Members predominate over any questions affecting only the individual Class Members; and (f) the class settlement mechanism is superior to other available methods of resolving the claims released in the Settlement Agreement. Therefore, pursuant to Civil Rules

23(a) and (b)(3) and Bankruptcy Rule 7023, the Class should be certified for settlement purposes only.

G. The Class shall consist of all persons who: (a) were employed by the Debtors; (b) suffered an “employment loss,” as that term is defined in 29 U.S.C. § 2101(a)(6) and 20 C.F.R. § 639.3(f), on, or within thirty (30) days of, May 29, 2023, as part of a “plant closing” or “mass layoff,” as those terms are defined in 29 U.S.C. § 2101(a)(2)-(3) and 20 C.F.R. § 639.3(b)-(c), as the reasonably foreseeable consequence of a “plant closing” or “mass layoff” occurring on or about May 29, 2023; (c) meet the definition of “affected employee” as set forth in 29 U.S.C. § 2101(a)(5) and 20 C.F.R. § 639.3(e); and (d) do not file a timely request to opt out of the Class.

H. Notice should be given to all of the eligible Class Members, affording them the opportunity to opt-out of the Class or object to approval of the Settlement Agreement.

I. Based on the range of possible outcomes and the cost, delay, and uncertainty associated with further litigation, the Settlement Agreement is reasonable and cost-effective, and preliminary approval of the Settlement Agreement is warranted.

J. The Settlement Agreement should be approved on a preliminary basis.

K. Notice to all individuals by first class mail, postage prepaid, at their last known address as indicated in the records of the Debtor (and as updated by Class Counsel’s searches for current addresses or as may otherwise be reasonably determined) is reasonable and the best notice practicable under the circumstances and such mailing shall be made by Class Counsel within fifteen (15) days following the entry of this Order.

L. Notice to all creditors who are not Class Members in the form attached to the Joint Motion as Exhibit 3 (the “General Notice”) by first class mail, postage prepaid, at their last known address as indicated in the records of the Debtor or proofs of claim or other documents filed with

this Court (and as may be updated by searches by the Trustee and Class Counsel for current addresses or as may otherwise be reasonably determined) is reasonable and the best notice practicable under the circumstances and such mailing shall be made by the Trustee within fifteen (15) days following the entry of this Order.

M. The contents of the Class Notice (the “Class Notice”) form annexed to the Settlement Agreement as Exhibit B meet the requirements of Fed. R. Civ. P. 23(c)(2)(B). The Class Notice states the nature of the WARN Actions, and the issues and potential defenses relevant to such actions. The Class Notice also states that the Settlement Agreement, if approved, will be binding on all Class Members. The Class Notice summarizes the terms of the Settlement Agreement, the right of each eligible Class Member to opt-out of the Class or object to the Settlement Agreement, the right of each eligible Class Member to appear either *pro se* or by counsel at the Fairness Hearing, and the fact that more information is available from Class Counsel upon request. Further, the Class Notice informs the eligible Class Members that the Settlement Agreement provides for the release of the Released Matters (as that term is defined in the Settlement Agreement) and the payment of Class Counsel’s attorneys’ fees and expenses. *See* FED. R. CIV. P. 23(h).

N. The Fairness Hearing should be held no sooner than sixty (60) days after service of the Class Notice, so that eligible Class Members will have sufficient time from the mailing of the Class Notice to secure further information regarding the relief sought by the Joint Motion, to decide whether to opt out of the Class, or to object to approval of the Settlement Agreement should they choose to do so, and to engage counsel to appear at the Fairness Hearing.

O. Other good and sufficient cause exists for granting the relief requested in the Joint Motion.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Joint Motion is GRANTED to the extent set forth herein.
2. The Settlement Agreement is hereby approved on a preliminary basis.
3. The Class comprised of all persons who:
 - a. were employed by the Debtors in the United States;
 - b. suffered an “employment loss,” as that term is defined in 29 U.S.C. § 2101(a)(6) and 20 C.F.R. § 639.3(f), on, or within thirty (30) days of, May 29, 2023, as part of a “plant closing” or “mass layoff,” as those terms are defined in 29 U.S.C. § 2101(a)(2)-(3) and 20 C.F.R. § 639.3(b)-(c), as the reasonably foreseeable consequence of a “plant closing” or “mass layoff” occurring on or about May 29, 2023;
 - c. meet the definition of “affected employee” as set forth in 29 U.S.C. § 2101(a)(5) and 20 C.F.R. § 639.3(e); and
 - d. do not file a timely request to opt out of the Class,

is hereby certified for settlement purposes only, pursuant to Civil Rules 23(a) and (b)(3), made applicable to the Joint Motion by operation of Bankruptcy Rule 7023, with respect to all claims released pursuant to the Settlement Agreement.

4. Pedro Garza, Rosa Saldana Lemus, Trenton Lively, Victor Carranza, Yaritza Bejarano, Mayra Silva, Jessica Daniels, Neptali Montez, Andre Nunn, Kaila Webb, and Kasandra Jimenez are hereby appointed Class Representatives.

5. The law firms of Raisner Roupinian LLP, Erickson Kramer Osborne, Whelan Law Group, and Bonakdar Law Firm are hereby appointed as Class Counsel.

6. The form of the Class Notice and the service of the Class Notice by Class Counsel by first class mail, postage prepaid, to each individual identified at his or her last known address contained in the Debtor’s records (as updated by the Trustee and Class Counsel’s searches for current addresses or as may otherwise be reasonably determined) is hereby approved.

7. The form of the General Notice and the service of the General Notice by the Trustee by first class mail, postage prepaid, to all creditors who do not receive the Class Notice at his or her last known address as indicated in the records of the Debtors or proofs of claim or other documents filed with this Court (and as updated by the Trustee and Class Counsel's searches for current addresses or as may otherwise be reasonably determined) is hereby approved.

8. Objections or other responses to final approval of the Settlement Agreement are to be filed with the Clerk of the Court and mailed to the parties listed in the Class Notice and the General Notice, so that they are filed and received by no later than **[November 15, 2024]**. Objections or other responses must be in writing and must set forth the basis for any such objection or other response to the Settlement Agreement.

9. Should a Class Member choose not to be bound by the Settlement, his or her completed and executed Opt-Out Notice Form (substantially in the form incorporated in the Class Notice) must be mailed to Class Counsel as provided in the Class Notice. The Opt-Out Notice Form must be postmarked by no later than **[November 8, 2024]**. Opt-Out Notice Forms postmarked after that date will not be effective.

10. The Court shall conduct the Fairness Hearing on **[November 20, 2024 at 2:00 p.m.]** The Court may adjourn the Fairness Hearing without further notice of any kind other than an announcement of such adjournment in open court at the Fairness Hearing or any adjournment thereof.

11. This Court retains jurisdiction to construe, interpret, enforce, and implement the Settlement Agreement and this Order.