



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

KATTEN MUCHIN ROSENMAN )  
LLP, )  
 )  
Intervenor Below/Appellant, )  
 )  
v. )  
 )  
MARTHA S. SUTHERLAND as )  
Trustee of the Martha S. Sutherland )  
Revocable Trust dated August 18, )  
1976, )  
 )  
Plaintiff Below/Appellee. )

No. 151,2016  
  
Court Below – Court of  
Chancery C.A. No. 2399-VCS  
  
PUBLIC VERSION

**OPENING BRIEF OF INTERVENOR BELOW/APPELLANT**

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## **NATURE OF PROCEEDINGS**

This appeal involves a fundamental question of Delaware law: under what circumstances may an attorney impose a charging lien to collect unpaid fees from its client? In this case, Martha S. Sutherland disputes Katten Muchin Rosenman LLP's right to impose an attorney's charging lien to recoup a portion of the \$766,166.75 in unpaid fees for work done on her behalf. In March of 2004, Ms. Sutherland engaged Katten to represent her in a demand for books and records relating to Dardanelle Timber Co. Inc., a company in which Ms. Sutherland held stock, and to Sutherland Lumber-Southwest Inc., a company from whose board of directors Ms. Sutherland had been ousted the prior year (together, the "Companies"). A0239, A0140. In August of 2004, Ms. Sutherland commenced a formal § 220 action against the directors of these companies (the "Individual Defendants"), in which action Katten served, again, as Ms. Sutherland's counsel. A0141. For the next seven years, Katten continued to represent Ms. Sutherland in various pieces of litigation relating to the Companies. A0240. During this time, Katten invoiced Ms. Sutherland on a monthly basis for legal fees and costs, and Ms. Sutherland paid these invoices on an intermit basis. A0240.

In late 2009, however, Ms. Sutherland had ceased payment of Katten's monthly invoices altogether, and, by January of 2011, she owed Katten \$766,166.75 in unpaid legal fees and expenses in connection with its work in the

actions just described. A0240-0241. In the spring of 2011, owing, largely, to this outstanding balance, Katten withdrew as Ms. Sutherland's counsel and was replaced by Kuser & Raucci Chartered (later, Kuser Law Group, Ltd.), which continued to represent her in various proceedings against the Individual Defendants. A0241. In November of 2012, following the conclusion of her derivative action against the Companies, Ms. Sutherland sought attorneys' fees and costs in excess of \$1.4 million. A0145. On July 31, 2014, the Court ruled on Ms. Sutherland's motion for attorneys' fees and costs, ultimately awarding her \$275,000 (the "Fee Award"). A0152. In order to recoup its unpaid fees and expenses, Katten intervened in the action to seek a charging lien against the Fee Award given to Ms. Sutherland. A1065.

This appeal arises from the Chancery Court's February 26, 2016 ruling denying Katten's motion for summary judgment (the "February 26, 2016 Ruling") and holding that its request for an attorney's charging lien was not consistent with the "theoretical underpinnings" of that concept. A1071. In particular, the Court held that Katten was not entitled to a charging lien because it had already been paid for the work attributable to the Fee Award, against which Katten sought to impose its lien. A1071. This determination was mistaken. Under Delaware law, attorneys are entitled to impose a lien to secure their costs and fees against a judgment entered in the suit wherein those costs and fees arose. This equitable right exists

irrespective of whether the attorneys' unpaid fees and costs can be directly linked to the judgment against which the lien is sought. By imposing this condition—conspicuously absent from Delaware precedent—the Chancery Court committed reversible error. Moreover, Katten's efforts on Ms. Sutherland's behalf indisputably *did* generate the Fee Award in this case (though Ms. Sutherland indicates that Katten has been paid for those efforts). A1003. Because there is no dispute that Katten is entitled to the fees it seeks from Ms. Sutherland, because they arose in the same case as Ms. Sutherland's Fee Award, and because Katten's efforts created the benefit (i.e., the Fee Award), Katten is entitled to impose an attorney's charging lien to recoup those fees.

## **SUMMARY OF ARGUMENT**

1. In representing Ms. Sutherland, Katten has incurred \$766,166.75 in unpaid legal fees and costs; this much is indisputable. Under Delaware law, Katten has the right to recoup these expenses from Ms. Sutherland.

2. Because Katten's unpaid fees were incurred in the same action as the Fee Award, and, furthermore, because the Fee award was generated by the work Katten did for Ms. Sutherland, Katten has an equitable right to assert an attorney's lien against that award. The Chancery Court's finding that, as a condition of its charging lien, Katten must first demonstrate a causal link between its *unpaid* fees and the Fee Award is a misreading of Delaware law and would result in inequity. All that is required is that an attorney be entitled to his or her fees and that the judgment be awarded in the same case that gave rise to those fees. Consequently, Katten is entitled to recoup its unpaid costs and fees by imposing a charging lien against the Fee Award in the full amount of \$275,000.

## **STATEMENT OF FACTS**

This appeal results from Katten’s attempts to recoup \$766,166.75 in unpaid legal fees and costs (the “Unpaid Fees”) from a former client, Martha S. Sutherland. Those fees have been outstanding since early 2011, when Katten terminated its representation of Ms. Sutherland. A0240-0241. The parties now disagree over Katten’s right to collect its Unpaid Fees via charging lien against a \$275,000 fee award granted to Ms. Sutherland in 2014. A0152. The Chancery Court held that Ms. Sutherland raised no questions of material fact in opposition to Katten’s motion, but the Court decided the dispositive legal issue in Ms. Sutherland’s favor, holding that Katten was required to establish a causal connection between its unpaid fees and the Fee Award. A1070-1071. Katten now appeals that decision to this Court.

### **A. Ms. Sutherland Seeks Company Books and Records**

Until 2003, Ms. Sutherland served on the board of Sutherland Lumber-Southwest, Inc. (“Southwest”),<sup>1</sup> along with her brothers, Perry and Todd, and her father. A0140. Following her father’s death in 2003, Ms. Sutherland was promptly removed from Southwest’s board by her brothers. A0140. On the day of Ms. Sutherland’s removal, Southwest and Dardanelle executed employment agreements with Perry and Todd (the “Employment Agreements”), which Martha

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<sup>1</sup> Dardanelle Timber Co., Inc. (“Dardanelle”), also relevant here, is Southwest’s sole stockholder. A0140. Together, Dardanelle and Southwest are referred to herein as the “Companies.”



believed might be harmful to the Companies. A0140. Given her concerns, in the spring of 2004, Ms. Sutherland retained Katten, through a written engagement letter,<sup>2</sup> to help her gain access to books and records from the Companies. A0239. In April 2004, the Companies provided certain books and records to Ms. Sutherland, including the Employment Agreements. A0140-0141.

In August 2004, seeking additional information from the Companies, Ms. Sutherland, through Katten, filed a books-and-records action pursuant to 8 *Del. C.* § 220 (the “§ 220 Action”). A0141. Ms. Sutherland’s case was assigned to a Court of Chancery Master, who ordered the Companies to allow Martha to inspect additional books and records, per her request. A0141; *see also Sutherland v. Dardanelle Timber Co., Inc.*, 2005 WL 3272125 (Del. Ch. Nov. 18, 2005). Katten incurred in excess of \$513,741.50 in costs and fees prosecuting Ms. Sutherland’s § 220 Action, while the Companies spend approximately \$750,000 defending it. A0141.

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<sup>2</sup> Katten no longer has a copy of the engagement letter, having transferred, in 2011, its paper and electronic files related to the case to Ms. Sutherland’s new attorneys. A0241; (*see infra* at p. 14).

**B. Ms. Sutherland Files a Derivative Action Against the Companies**

Based on the foregoing books-and-records inspection, Ms. Sutherland, again represented by Katten, filed derivative and double-derivative claims (the “Derivative Action”) against her brothers, Perry and Todd, and her cousin, Mark (another of the Companies’ directors), in September of 2006. A0141-0142. Ms. Sutherland’s Derivative Action alleged, among other things,<sup>3</sup> that the Employment Agreements were a result of self-dealing in violation of her brothers’ fiduciary duties to the Companies. A0142. In response to the Derivative Action, the Companies appointed an additional director to the board, who was given the sole duty of acting as a single-member special litigation committee (the “SLC”), tasked with investigating Ms. Sutherland’s claims. A0142. In March 2007, the SLC completed its investigation and issued a report (the “SLC Report”) outlining its findings, whose bases the Court called into question in a subsequent opinion. A0142; *see also Sutherland v. Sutherland*, 2008 WL 571253, at \*1 (Del. Ch. Feb. 14, 2008).<sup>4</sup>

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<sup>3</sup> The Derivative Action also took issue with Southwest’s 50% ownership interest in a private jet maintained for personal use and alleged that Perry, Todd, and Mark (together, the “Individual Defendants”) received improper personal tax and accounting services from a Dardanelle affiliate. A0143.

<sup>4</sup> For example, the Court noted that “[the SLC Report] summarizes the investigation done and factual conclusions reached by the SLC in a format that entirely omits any record citation, either

Following completion of the SLC's investigation, Ms. Sutherland sought, and was granted, discovery relating to the SLC's Report, over the Individual Defendants' objection. A0142. In particular, the Court permitted, in July 2007, several broad categories of discovery, while sustaining the Individual Defendants' objections to certain specific document requests and interrogatories. A0142-0143; *see also Sutherland v. Sutherland*, 2007 WL 1954444, at \*3-4 (Del. Ch. July 2, 2007). Soon afterward, based on the SLC's recommendations, the Companies agreed to amend the Employment Agreements to address certain concerns raised by Ms. Sutherland. A0143. These amendments modified the Employment Agreements by, among other things, limiting the amount of personal tax and accounting services the Individual Defendants could receive at the Companies' expense, limiting their use of a recreation center at the Companies' expense, and eliminating provisions that would have granted Perry and Todd two years of full compensation if they were terminated for cause. A0143. Despite these benefits to the Companies (as they were characterized by the Chancery Court (*see* February 26, 2016 Ruling)), the amendments also increased Perry's and Todd's salaries and

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to documentary evidence or to the witness summaries the SLC's counsel prepared in the course of its investigation. The Report does not contain an appendix but it is limited to certain analyses of one particular aspect of the complaint. None of the source documents or testimonial evidence is found therein." *Id.*

continued to permit personal use of the Companies' jet, about which Ms. Sutherland had previously expressed concern. (*See supra* at 6 n.3); *Sutherland v. Sutherland*, 2010 WL 1838968, at \*16-17 (Del. Ch. May 3, 2010).

In May 2008, the Chancery Court denied the Individual Defendants' motion to dismiss the Derivative Action after taking issue with several aspects of the SLC's investigation. *Sutherland v. Sutherland*, 2008 WL 1932374, at \*5-7 (Del. Ch. May 5, 2008). In addition to noting the shortcomings of the SLC's investigation, the Court also pointed out that the SLC failed to include documentation to support its findings, which suggested that "the SLC [did] not take[ ] its obligation seriously and [did not act] in good faith." *Id.* at \*7 n.34.

The next step in the proceedings came as an amended complaint, which Ms. Sutherland filed in the Chancery Court. A0067. Discovery followed, after which the defendants prevailed, in part, on a motion for summary judgment. A0144. The only remaining claim—that Dardanelle improperly paid for personal tax and accounting services provided to Perry and Todd—proceeded to trial. *See Sutherland*, 2010 WL 1838968, at \*6, \*17.

### **C. Katten Withdraws as Ms. Sutherland's Counsel**

By this stage of the litigation, Katten had incurred substantial costs and fees representing Ms. Sutherland, \$766,166.75 of which were now outstanding. A0241. In light of these Unpaid Fees, Katten withdrew as Ms. Sutherland's counsel in

April of 2011 and was replaced by Kusper & Raucci Chartered. A0241.<sup>5</sup> Kusper & Raucci represented Ms. Sutherland for the remainder of the litigation and trial.

**D. Ms. Sutherland Obtains a Fee Award and Katten Intervenes**

The trial was held in November of 2012, and the defendants were ultimately successful in defeating Ms. Sutherland’s remaining claim. *See Sutherland v. Sutherland*, 2013 WL 2362263 (Del. Ch. May 30, 2013). Regardless, in November of 2013, Ms. Sutherland again invoked the Court’s assistance, this time to recoup her attorneys’ fees and costs, accumulated during the protracted litigation. A0100-0101. In particular, Ms. Sutherland sought fees associated with her Derivative Action, including \$25,000 incurred defending against the defendants’ summary judgment efforts. A0145. All told, Ms. Sutherland maintained that she was entitled to approximately \$1.4 million in attorneys’ fees and costs, all of which she and her counsel vigorously argued were reasonable and necessary given the length and complexity of the underlying litigation. A0103-0104. The defendants countered that Ms. Sutherland’s efforts achieved only minimal, therapeutic benefits and that she was only entitled to reimbursement for \$25,000 of her fees and costs. A0145. Ms. Sutherland was ultimately awarded \$275,000 in fees, and, in order to secure its

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<sup>5</sup> Ms. Sutherland alternatively claims that she “terminated” Katten in March of 2011 and admits that Katten withdrew of its own volition. A0202. Ultimately, however, this dispute is unimportant to the present appeal.

own interests, Katten moved to intervene on August 28, 2014. A0153. On June 26, 2015, Katten moved for summary judgment on its petition for a charging lien, the Chancery Court's denial of which effectively disposed of Katten's petition and has led to this appeal. A1071.

Since it first undertook representation of Ms. Sutherland in 2004, Katten has incurred a total of \$3,347,874.30 in legal fees and another \$201,285.87 in associated expenses. A0240. Additionally, Katten provided Ms. Sutherland with billing discounts approaching \$400,000 throughout the course of its representation. A0240. Of the total amount of Katten's fees and expenses, \$718,912.99 and \$47,253.76, respectively, remain unpaid. A0240-0241; A0914. This amount exceeds Ms. Sutherland's Fee Award by \$491,166.75. A0152. Katten seeks to recoup its outstanding fees and expenses by placing a charging lien on Ms. Sutherland's Fee Award for the full amount of \$275,000.

## ARGUMENT

### **I. THE CHANCERY COURT ERRED IN DENYING KATTEN'S MOTION FOR SUMMARY JUDGMENT SEEKING TO IMPOSE AN ATTORNEY'S CHARGING LIEN AGAINST THE FEE AWARD**

**A. Question Presented:** Does Katten have the right to recoup its unpaid fees and expenses by imposing an attorney's charging lien against Ms. Sutherland's Fee Award in the amount of \$275,000? This question was preserved in Katten's summary judgment briefing and at oral argument. A0226; A1059-1060.

#### **B. Scope of Review**

This Court reviews summary judgment determinations made by a trial court *de novo*. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011). General legal precepts, such as those originating from common law, are reviewed under the same standard. *See Volair Contractors, Inc. v. AmQuip Corp.*, 829 A.2d 130, 133 (Del. 2003).

#### **C. Merits of Argument**

This Court recently confirmed that the conceptual origins of the attorney's charging lien are deeply rooted in common law:

An attorney has a lien on the money recovered by his client for his bill of costs; if the money come to his hands, he may retain to the amount of the bill. He may stop it *in transitu* if he can lay hold of it. *If he apply to the court, they will prevent its being paid over till his demand is satisfied.*

*Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 340 (Del. 2012) (quoting *Welsh v. Hole*, 1 Doug. (Eng.) 238, 99 Eng. Rep. 155) (emphasis added). *Doroshow* also observed the concept's breadth: "[c]ourts both of law and equity have now carried it so far, that [an attorney can] stop his client from receiving money recovered in a suit *in which he has been employed for him*, till his bill is paid." *Id.* (quoting *Wilkins v. Carmichael*, 1 Doug. (Engl.) 101, 105) (emphasis added).

In *Doroshow*, this Court upheld a law firm's charging lien (reversing the decision of the Superior Court) and recognized that "[b]oth *Welsh* and *Wilkins* have been cited in Delaware cases and incorporated into our common law." *Doroshow*, 36 A.3d at 340. Thus, "[b]ecause Delaware courts have chosen to follow the attorney's charging lien established in English common law," this Court reaffirmed an attorney's right to assert a charging lien to recover outstanding fees and costs. *Id.* at 342.

Another Delaware Court recently based its opinion on these same principles. In *Zutrau v. Jansing*, 2014 WL 7013578, at \*1 (Del. Ch. Dec. 8, 2014), the Chancery Court approved an attorney's lien request, noting that "[an attorney's charging lien] is an equitable right to have costs advanced and attorney's fees secured by the judgment entered *in the suit wherein the costs were advanced and the fee earned.*" (Quoting 7A C.J.S. *Attorney & Client* § 446 (West 2014))



(emphasis added). In this case, the Chancery Court granted Katten’s motion to intervene in pursuit of its Unpaid Fees, confirming that “Delaware precedent recognizes an attorney’s right to a charging lien at law and equity. An agreement governing fees does not preclude the assertion [of such a lien].” A0180 (citing *Doroshov* and *Zutrau*).

**1. Katten Is Legally Entitled to Recoup Its Unpaid Fees and Costs**

There is no genuine issue of material fact regarding Katten’s right to an attorney’s charging lien. First, there is no doubt that Katten performed the work for which it billed Ms. Sutherland, nor that \$766,166.75 of these bills remains unpaid. A0240-0241. When Ms. Sutherland retained Katten in 2004, she agreed to pay—and for the next several years did, in fact, pay—Katten’s monthly invoices, though often in a sporadic fashion. A0240. However, Ms. Sutherland stopped paying these invoices in late 2009, and she has made no payment to Katten since that time. A0914. Ms. Sutherland has made no attempt to refute these facts in the proceedings below, nor, indeed, could she.

While Ms. Sutherland maintains that Katten’s files, which were transferred to her attorney in 2011 after Katten withdrew its representation, did not contain a copy of her engagement letter, there is no question that the parties operated under a valid fee arrangement. A0181. Indeed, there is no evidence to dispute the fact that the parties’ fee arrangement required *full payment* of Katten’s legal fees and

expenses. A0239. Nor is there any question that Katten's Unpaid Fees arose in the same litigation that produced Ms. Sutherland's Fee Award, or that Katten achieved for Ms. Sutherland the benefit that is embodied in that award. A1064, A1070; *see Zutrau*, 2014 WL 7013578, at \*1. Consequently, the lien Katten seeks to impose is precisely the type contemplated at common law and adopted by Delaware courts. *See Doroshov*, 36 A.3d at 340; *see also Zutrau*, 2014 WL 7013578, at \*2 (noting that, in light of the client's obligation to pay her attorney's hourly rates, the fact that "the cost of prosecution conceivably could exceed the recovery" [against which a lien is sought] did not excuse [the client] from paying those fees). In short, Katten has an equitable right to an attorney's charging lien against Ms. Sutherland's Fee Award in order to recoup \$275,000 of its Unpaid Fees (which amount, as already noted, falls well short of the total sum that Ms. Sutherland owes Katten). (*See* discussion, *supra*, at 9-10).

**2. There Is No Basis for Ms. Sutherland's Proposed Rule that Katten Must Connect Its Outstanding Fees to the Fee Award**

Nevertheless, in the proceedings below, Ms. Sutherland argued that Katten's attorney's lien would be improper because the work for which Katten seeks to be paid is not the work that resulted in her Fee Award—Katten has already been paid for that work. A1002-1003. According to Ms. Sutherland, Delaware law allows for an attorney's charging lien against a particular judgment *only* when the attorney's unpaid services directly resulted in that judgment. A1002-1003. Therefore, Ms.

Sutherland argues, because she has paid Katten’s pre-2009 invoices—those that generated the benefits identified by the Chancery Court and, thus, the Fee Award—Katten is not entitled to impose a charging lien for *post*-2009 invoices (which are the only unpaid bills remaining). (*Id.*). As explained below, this argument is based on a misreading of Delaware law and would produce absurd results.

In short, Ms. Sutherland’s argument seeks to impose an additional burden on attorneys wishing to establish a valid charging lien: that they demonstrate a causal relationship between their unpaid work and the judgment against which the lien is sought. But there is no basis in the law for this requirement. Indeed, relying on English precedent to establish an attorney’s lien rights, this Court has followed Lord Mansfield’s simple maxim: “[a]n attorney has a lien on the money recovered by his client *for his bill of costs.*” *Doroshov*, 36 A.3d at 340 (emphasis added). No requirement of a causal nexus between the attorney’s bill and client’s recovery is mentioned. *Zutrau* also spoke of an attorney’s lien rights in broad terms: “[an attorney’s charging lien] is an equitable right to have costs advanced and attorney’s fees secured by the judgment entered *in the suit wherein the costs were advanced and the fee earned.*” *Zutrau*, 2014 WL 7013578, at \*1 (citation omitted) (emphasis added). The only requirement mentioned in *Zutrau*—that the judgment arise in the same suit as the unpaid costs and fees—is consistent with the cases already cited

and yields only one possible reading: if an attorney's bills have not been paid, he or she may seek a lien against a recovery obtained *in that case*, regardless of whether the client has paid for previous work deemed to have produced the recovery. There is no factual dispute that Katten's present circumstances meet this requirement. (*See* discussion, *supra*, at 11-12; Opp. at ¶¶ 1-4). Thus, the Chancery Court erred when it denied Katten's motion for summary judgment. A1071.

Moreover, Katten's efforts in the Derivative action *did* yield the \$275,000 Fee Award; this is not a case where an attorney seeks to lay claim to a judgment to which her work did not contribute. Indeed, the only dispute here stems from Ms. Sutherland's belief that *only* Katten's pre-2009 fees contributed to the Fee Award and that Katten's Unpaid Fees—which postdate 2009—therefore cannot form the basis for a lien against that award. But the law makes no such distinction. Rather, as discussed above, all that the law requires is a beneficial result, unpaid fees and costs, and that the result, together with the unpaid fees and costs, arise in the same case. (*See* discussion, *supra*, at 14-15).

In addition to being legally unsound, Ms. Sutherland's additional lien requirement, if adopted by this Court, would have pernicious effects well beyond the confines of the present dispute. Under the reading espoused by Ms. Sutherland, any litigant owing fees to an attorney could legally avoid a charging lien by simply choosing to pay *only* for the services directly related (a term that is itself

problematic, as discussed below) to the litigation's beneficial results. This would be true even where, as here, an otherwise valid fee arrangement exists between the parties. Such an outcome would be absurd and cannot be what the common law envisioned or what this Court meant when it described a lien as "equitable in nature and based on general principles of justice." *Doroshov*, 36 A.3d at 340. Rather, the law intended to provide attorneys with a broad equitable tool to recoup their costs and expenses from a judgment rendered in the same case. *See Wilkins*, 1 Doug. (Engl.) at 105.

Moreover, Ms. Sutherland's desired result suffers from another practical flaw: while the link between Katten's services and the Fee Award might be easily determined in this case,<sup>6</sup> clear-cut causal connections are unlikely to be the norm. Indeed, in many cases, an attorney's beneficial services will be combined in a single invoice with those that did not, strictly speaking, contribute to a particular benefit. Such cases, under Ms. Sutherland's theory, would require courts and litigants to parse attorneys' invoices in an effort to determine which individual time entries contributed to a particular recovery and which did not. Even if theoretically possible, such a task would be unduly burdensome, particularly given

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<sup>6</sup> Here, the litigation can be fairly cleanly divided into two phases: one that the Chancery Court held produced certain benefits (the § 220 action and the SLC investigation), and one that did not (the summary judgment and discovery portions).

the prolonged, complex nature of cases in which fee disputes often arise. This Court should be wary of any ruling likely to engender such wide-ranging and negative consequences.

Finally, the Chancery Court's observation that Katten can pursue Ms. Sutherland personally for its Unpaid Fees (outside the context of a charging lien) is insufficient (*see* A1071, n22): the right to bring a collection action against a former client exists in every charging-lien case. An attorney's lien, on the other hand, offers a litany of benefits not available in a typical fee action: often, it gives precedence to the attorney's debt; it can be brought before the same judge who oversaw, and is familiar with, the underlying litigation; and it offers a concrete fund from which the debt can be recovered. Consequently, Katten seeks to avail itself of its rightful equitable remedy under Delaware law.

For all these reasons, this Court should refrain from transmuting Ms. Sutherland's argument into settled law, both because it is based on a misreading of Delaware law and because it would establish an ill-advised precedent whose effects would be pernicious and far-reaching.

### **CONCLUSION AND RELIEF SOUGHT**

The Chancery Court's judgment should be reversed. On remand, the Chancery Court should be instructed to place an attorney's charging lien against the Fee Award in the amount of \$275,000.

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