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Case Number 565,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELL INC.,

Respondent-Below, Appellant/
Cross-Appellee,

v.

MAGNETAR GLOBAL EVENT DRIVEN MASTER FUND LTD., MAGNETAR CAPITAL MASTER FUND LTD., GLOBAL CONTINUUM FUND, LTD., SPECTRUM OPPORTUNITIES MASTER FUND LTD., MORGAN STANLEY DEFINED CONTRIBUTION MASTER TRUST, BLACKWELL PARTNERS LLC, AAMAF, LP, WAKEFIELD PARTNERS, LP, CSS, LLC, MERLIN PARTNERS, LP, WILLIAM L. MARTIN, TERENCE LALLY, ARTHUR H. BURNET, DARSHANAND KHUSIAL, DONNA H. LINDSEY, DOUGLAS J. JOSEPH ROTH CONTRIBUTORY IRA, DOUGLAS J. JOSEPH & THUY JOSEPH, JOINT TENANTS, GEOFFREY STERN, JAMES C. ARAMAYO, THOMAS RUEGG, CAVAN PARTNERS LP, and RENE A. BAKER,

Petitioners-Below,
Appellees/Cross-Appellants.

No. 565, 2016

Court below: Court of Chancery
Consolidated C.A. No. 9322-VCL

**PETITIONERS-BELOW APPELLEES/
CROSS-APPELLANTS THE MAGNETAR FUNDS'
CORRECTED ANSWERING/OPENING BRIEF ON CROSS-APPEAL**

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NATURE OF PROCEEDINGS

This cross-appeal challenges the trial court's novel interpretation and application of 8 *Del. C.* § 262(j), the statutory provision that governs the equitable apportionment of expenses and fees among stockholders who seek judicial appraisal of their shares. In particular, this cross-appeal asks which petitioners should pay for the appraisal proceeding of Appellant Dell Inc. ("Dell"), and how much two different groups of petitioners -- entities affiliated with Magnetar Capital Master Fund Ltd. (the "Magnetar Funds"), and entities affiliated with T. Rowe Price ("T. Rowe") -- should be required to pay.

On October 5, 2015, the law firm Grant & Eisenhofer P.A. ("Lead Counsel") commenced a four-day trial as Lead Counsel with respect to more than 36 million total shares that sought an appraisal of Dell's common stock. At the time of trial, 30,730,930 of these shares (the "T. Rowe Shares") were beneficially owned by T. Rowe. Because the T. Rowe Shares voted in favor of the merger that gave rise to the Dell appraisal proceeding, those 30 million shares were later dismissed from the case for lack of standing. As a result of this ruling, at the time the final order was entered below, only 5,505,730 shares remained in the case, of which 3,865,820 were beneficially owned by the Magnetar Funds.

Lead Counsel, who was counsel of record for T. Rowe, incurred $4 million in expenses and sought $4 million in legal fees. In a post-trial Memorandum

Opinion dated October 17, 2016 (the "Expenses and Fees Decision"), the Court of Chancery ruled that the entire cost of the Dell appraisal, including expenses and attorneys' fees, should be borne exclusively by the 5.5 million shares remaining in the case, rather than being allocated *pro rata* among *all* the shares for whom Lead Counsel tried the case. This is so notwithstanding the fact that T. Rowe -- which settled its appraisal claim after the T. Rowe Shares were dismissed but before appeal -- received a greater monetary benefit from the proceedings below than did all the remaining petitioners combined. The trial court reached its result without any analysis of the language and purpose of Section 262(j), and without any consideration of the inequality resulting from its ruling.

As set forth below, this Court should reverse and remand with instructions to the Court of Chancery that Lead Counsel's litigation expenses be apportioned *pro rata* among the 36,236,660 million shares that petitioned for appraisal, proceeded with the trial below and benefitted substantially as a result. This Court should also reverse in part the Court of Chancery's award of attorneys' fees to Lead Counsel. This Court should remand to the trial court with instructions to reduce those fees in an amount equal to the fees expended by the Magnetar Funds to obtain their own counsel to protect their interests from the unique and adverse interests of T. Rowe and Lead Counsel, arising from their ever-present risk of dismissal from the appraisal case for lack of entitlement to proceed.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in concluding that Section 262(j) prevented it from apportioning any of Lead Counsel's litigation expenses to the T. Rowe Shares. The trial court misapplied the statutory language and failed to incorporate the history behind and intent of that provision. Under Section 262(j), the financial burden of a statutory appraisal action is to be shared ratably between and among all those stockholders that benefit from petitioning for appraisal, not just those shares left standing at the end of the case. By declining to apportion a single dollar of expenses to T. Rowe, and instead forcing a small fraction of the petitioning shares to shoulder all $4 million of those expenses, the trial court committed reversible legal error, abused its discretion, and saddled the Magnetar Funds with the unjust responsibility to pay T. Rowe's portion of a proceeding that benefitted T. Rowe more than the Magnetar Funds or any other non-T. Rowe petitioner. The inequity is particularly palpable here, because it was the Court of Chancery's decision to put off resolution of Dell's challenge to T. Rowe's standing until after trial of the matter that created the risk that the non-T. Rowe Petitioners, including the Magnetar Funds, would be required to bear T. Rowe's share of litigation expenses as well as their own.

2. The trial court abused its discretion by declining to grant the Magnetar Funds a dollar-for-dollar offset against Lead Counsel's attorneys' fees award. This

credit was necessitated to accommodate the legal fees incurred by the Magnetar Funds to preserve their unique legal interests, which Lead Counsel could not adequately advocate for. Because of Dell's challenge to T. Rowe's standing and entitlement to proceed, the Magnetar Funds and Lead Counsel were repeatedly placed in conflict with each other throughout the proceedings below. To look after their own interests in the face of these conflicts, the Magnetar Funds utilized separate counsel to protect themselves against a doomsday scenario -- which ultimately came to pass -- in which the non-T. Rowe shares were stuck with the entire trial tab even though T. Rowe enjoyed a vast settlement payout as a direct result of that trial. The lower court, however, failed to appreciate that it was T. Rowe's and Lead Counsel's actions that required the Magnetar Funds to hire their own counsel to account for Lead Counsel's conflict in having its largest client at risk of dismissal. The Magnetar Funds needed their own counsel to address the narrow conflict issues arising from T. Rowe's entitlement challenge. The trial court's failure to account for that need and credit the Magnetar Funds for legal fees spent exclusively on that issue was reversible error.

STATEMENT OF FACTS

Relying on an unnecessarily rigid reading of Section 262(j), the Court of Chancery (i) saddled a narrow subset of petitioners with the sole burden of reimbursing Lead Counsel for more than $4 million in expenses incurred predominantly for the benefit of the T. Rowe Shares, and (ii) refused to offset Lead Counsel's fee award for fees incurred by the Magnetar Funds to advocate for interests that Lead Counsel could not because of the threat to T. Rowe's standing. Expenses & Fees Op. 25, 40.

A. The Initial Appraisal Class

On October 29, 2013, Dell completed the going-private merger (the "Dell Merger" or the "Merger") that is the subject of this appeal. (A2725; A2739.) Holders of more than thirty-eight million shares filed demands for appraisal. Following the closing of the merger, holders of 36,704,337 of the shares demanding appraisal filed thirteen separate appraisal petitions. (C5-8; C9-29.)

Eighty-seven percent of those 36,704,337 shares -- or 32,012,405 total shares, in dollar terms equivalent to approximately $440 million in merger consideration -- were represented directly by Lead Counsel. The vast majority of these thirty-two million shares -- 30,730,930 -- were held by petitioners affiliated with T. Rowe (the "T. Rowe Shares"). These 30 million shares constituted nearly 80% of initial appraisal class, and themselves were equivalent to more than $410

million in merger consideration. In comparison, shares held by the Magnetar Funds constituted only 10.5% of the initial appraisal class, and in dollar terms equated to approximately $53 million in merger consideration. (C5-29.) Lead Counsel highlighted the size of T. Rowe's position in moving for control of the Dell appraisal class.

Lead Counsel represented T. Rowe in the litigation on a contingency fee basis, and agreed to advance expenses on T. Rowe's behalf, with the commensurate right to reimbursement of "all out of pocket expenses." (C2.) Per the terms of Lead Counsel's engagement letter with T. Rowe, those parties agreed that T. Rowe would "owe no fees and no reimbursement of expenses" if Lead Counsel could not secure a recovery above the $13.75 Dell merger consideration. (C3.) Furthermore, those parties agreed that "[e]xpenses will be deducted from [T. Rowe's] portion of the recovery on a per share basis." (C2.)

B. The Dell Appraisal Litigation

Unlike most contemporary appraisal cases, in which a known universe of petitioning shares proceeds to a trial in the Court of Chancery on the issue of fair value, *see* 8 *Del. C.* § 262(h), issues concerning certain petitioners' compliance with the strictures of Section 262 occupied a substantial portion of the proceedings. And, the decision about whether the largest petitioner (T. Rowe) was actually

entitled to seek appraisal was put off until well after trial and post-trial proceedings.

1. Litigation Concerning Compliance with the Appraisal Statute

In a series of rulings dated June 27 and September 10, 2014 and May 13, 2015, the trial court dismissed a total of 854,656 shares from the Dell Appraisal. (C48-51; C112-121.) Lead Counsel did not represent any of the petitioners holding these shares.

On December 8, 2014, Dell moved for partial summary judgment against five stockholders represented by Lead Counsel, arguing that these five holders -- who beneficially owned their shares, but did not possess legal title to them -- failed to satisfy Section 262(a)'s continuous holder requirement. (C127.) On July 13, 2015, after briefing and oral argument, the Court of Chancery ruled that each of these petitioners had failed to comply with the continuous holder requirement and therefore "lost their appraisal rights." (C141.) This decision dismissed 1,675,666 shares from the case, on whose behalf Lead Counsel had litigated the appraisal proceeding since October 2013.

Meanwhile, in early May 2015, it was revealed that T. Rowe -- through its shares' holder of record, Cede & Co. ("Cede") -- voted those shares in favor of the

merger. (C52-111.)[1] Shortly thereafter, Dell moved for partial summary judgment against T. Rowe based on its failure to dissent (the "Failure to Dissent Motion"). Dell argued that because the T. Rowe Shares were voted in favor of the Dell Merger, those shares did not satisfy Section 262(a)'s so-called "Dissenter Requirement," which provides that a stockholder may pursue appraisal where it "neither voted in favor of the merger . . . nor consented thereto in writing." This motion immediately imperiled the appraisal rights of the 30,730,930 T. Rowe Shares (representing approximately 83% of the class at the time, and more than $420 million based on the $13.75 per share Dell Merger price). Nonetheless, faced with challenges to Lead Counsel's status as such (by virtue of the attack on T. Rowe's standing), the Court of Chancery granted T. Rowe's and Dell's request to postpone adjudication of the Failure to Dissent Motion until after trial. (C203.)

2. The Trial and Post-Trial Rulings

Because the decision on the Failure to Dissent Motion was put off until after trial, the class of petitioners entitled to appraisal was not fixed before trial, the default procedure under Section 262(h). As such, Lead Counsel litigated all other issues in the case -- including, among other things, the merger process, the buyout price, and the fair value determination -- for the benefit of approximately 36 million shares of Dell stock. This included shares held by T. Rowe, whose more

[1] T. Rowe and Lead Counsel had been aware of this fact for months. (C222-225.)

than 30 million shares remained in the case through and including trial. As the trial court found, Lead Counsel was involved in seventeen depositions; hosted nearly 500 GB of data; retained and defended three experts in depositions; and obtained discovery from two experts retained by Dell. Expenses & Fees Op. 8. Given the size of the appraisal class, Lead Counsel's extensive pretrial and trial expenditures presumed that 30 million T. Rowe shares would ultimately remain in the appraisal class to support the expense burden.

On October 5, 2015, Lead Counsel commenced trial on behalf of the then-extant appraisal class, which at that date comprised 36,236,660 shares, or more than $469 million in merger consideration. Expenses & Fees Op. 8. Trial lasted four days, and the parties presented twelve total witnesses and introduced more than 1,200 exhibits. *Id.* Many of these exhibits were critical to the Failure to Dissent Motion. (*See*, *e.g.*, C222-223 (referencing JX 838 and 843, which were emails explaining to T. Rowe how and why their shares had been voted in favor of the Dell Merger).)

The Court below held post-trial argument in March 2016. On May 11, 2016, nearly two months later, the trial court granted Dell's Failure to Dissent Motion, holding that "[b]ecause the holder of record [Cede & Co.] did not dissent as to the shares for which . . . [T. Rowe] . . . now seek[s] appraisal," and instead "voted the T. Rowe . . . shares in favor of the Merger," "the Dissenter Requirement is not met

[as to those shares]." (C203.) The trial court held that the T. Rowe Shares "do not qualify for appraisal," and that those shares "remain entitled to the merger consideration without any award of interest." (*Id.*) This decision removed all of T. Rowe's 30,730,930 shares from the case, reducing to just 5,505,730 -- or about $75.7 million in merger consideration -- the number of appraisal-eligible shares remaining. As a result of this ruling, the Magnetar Funds now constituted the largest single entitled appraisal petitioner left in the case.

On May 31, 2016, the trial court issued its opinion on the fair value of Dell's shares on a going concern basis, holding that Dell was worth $17.62 per share at the effective date of the Merger. (C270-384.) This constituted a $3.87 per-share premium over the Merger consideration, resulting in a cumulative award to the remaining petitioners of approximately $21.3 million. Had the T. Rowe Shares qualified for appraisal, that premium would have been nearly $119 million, entitling Lead Counsel to a fee of more than $20 million from T. Rowe directly, per the terms of Lead Counsel's engagement letter. (C1-4.)

C. T. Rowe and Dell Settle the Entitlement and Valuation Issues

Following the decision's on fair value and Dell's Failure to Dissent Motion, on June 24, 2016, Dell, its post-Merger holding company -- Denali Holding Inc. ("Denali") -- and T. Rowe entered into a settlement agreement to fully and finally resolve T. Rowe's appraisal petition. Five days later, the trial court approved the

settlement, which negated the risk that the decision on the Failure to Dissent Motion would be reversed on appeal. (C385-388.) As explained in Denali's Form 424B3, filed publicly with the U.S. Securities and Exchange Commission ("SEC") on July 5, 2016:

> On June 29, 2016, the Company, Dell and certain investment funds affiliated with T. Rowe Price (the "Petitioners") entered into a settlement agreement **to resolve a dispute regarding the fair value and interest due** on approximately 31,653,905 Dell shares held by the Petitioners, representing the 30,730,930 shares subject to appraisal claims that were dismissed in May 2016 plus an additional 922,975 shares subject to appraisal claims that had been previously disqualified on other grounds. . . . [I]n exchange for a release and dismissal of all asserted claims, the Company will pay $13.75 per share for a total sum of $435,241,193.75, plus an additional $28,000,000 in interest.

(C392 (emphasis added).) By this filing, Denali represented that the settlement payment resolved, at least to some degree, the "fair value" issue in the appraisal case. Lead Counsel received a fee in connection with the settlement of $4.2 million, or 15% of Dell's $28 million settlement payment above and beyond the $13.75 per share merger consideration to T. Rowe. (C398.)

D. The Magnetar Funds Attempt To Resolve The Expense Allocation Issue Years Before Trial, Only To Be Rebuffed By Lead Counsel

It became apparent to the Magnetar Funds early on that adverse rulings on standing issues could negatively affect the non-T. Rowe petitioners, and the Magnetar Funds thus attempted from the earliest stages of the case to guard against

being stuck holding the bag if (indeed, when) the vast bulk of petitioning shares were deemed ineligible to proceed.

First, in March and April 2014, the Magnetar Funds, which engaged their own counsel[2] to look after their own interests at the outset of the proceeding, objected to the terms of Lead Counsel's proposed consolidation order. (C30-38; C182-193.) As the trial court explained, that order "would have granted [Lead Counsel] broad authority to litigate on behalf of the appraisal class [including the Magnetar Funds] . . . ." Expenses & Fees Op. 4. The Magnetar Funds also moved to have their own counsel appointed as co-lead counsel for the appraisal class, which motion was denied. (C30-38; C182-193.) In part as a result of the Magnetar Funds' objections, however, the trial court entered a narrower consolidation order, which provided that "[Lead Counsel] act as lead counsel wherever an issue arose that was common to the entire appraisal class." Expenses & Fees Op. 6.

Second, the Magnetar Funds attempted repeatedly to address with Lead Counsel the fact that the risk to its clients' entitlement to proceed warranted reaching an understanding on expense allocation before trial and long before more expenses were incurred. By a July 23, 2015 letter (C176-178), counsel for the

[2] The Magnetar Funds' counsel at the outset of the case was Greenberg Traurig, which was later replaced in 2015 by their current counsel of record, Heyman Enerio Gattuso & Hirzel LLP, and Lowenstein Sandler LLP.

Magnetar Funds repeated an earlier request that Lead Counsel facilitate an agreement among all petitioners reflecting a fair and reasonable allocation of costs and expenses, cautioning that if the entitlement issue were decided against T. Rowe, the Magnetar Funds might be left to bear a disproportionate share of the expenses. (C178.) The Magnetar Funds further warned that the expenses borne to date -- which as of that point in time Lead Counsel had advised were approximately $2-3 million -- might have been appropriate in magnitude relative to the 30 million shares held by the T. Rowe Petitioners. They were, however, disproportionate to the Magnetar Funds alone, which held less than 13% of that share count. Despite the Magnetar Funds having raised this issue, Lead Counsel did not address it at that time. (C178.)

The Magnetar Funds thereafter continued to raise this issue with Lead Counsel, both by telephone and in writing. By their counsel's August 10, 2015 letter (C179-181), the Magnetar Funds once again expressed their concern to Lead Counsel that each petitioner should bear its proportionate share of expenses incurred until such time as that petitioner is found ineligible to proceed. As that August 10, 2015 letter reflects, Lead Counsel had stated in an earlier telephone call that it believed the issue to be premature and declined to take it up with its clients or otherwise address the issue at that time. (C180.)

In particular, Lead Counsel represented in August 2015 that it had not yet decided how much of the expenses it would seek to allocate to other petitioners, and that it would make such a determination once it was able to gauge just how much the expenses would cost each shareholder relative to the amount of any recovery. It was for this reason that Lead Counsel stated that it believed the issue to be premature, despite the fact that all parties to the appraisal were well aware by this point by virtue of the Failure to Dissent Motion that the T. Rowe Shares were at real risk of being dismissed from the case, with a resulting 73% reduction in the pool of appraisal-eligible shares. But because of Lead Counsel's refusal to act, and decision (blessed by the trial court) to forestall the resolution of the Failure to Dissent Motion, the issue remained unresolved through trial.

E. The Court of Chancery's Expenses and Fees Decision

On June 2, 2016, Lead Counsel's last remaining client in the Dell Appraisal, Morgan Stanley Defined Contribution Benefit Trust, filed a fee and expense petition and moved on behalf of Lead Counsel to have the remaining 5.5 million shares in the case reimburse Lead Counsel's litigation expenses, as well as contribute their ratable portion of Lead Counsel's attorneys' fees. Lead Counsel originally demanded reimbursement for $4,035,787.18 in expenses, Expenses & Fees Op. 22-23, but after the Magnetar Funds challenged the amount sought that was truly attributable to the valuation case (as opposed to the entitlement issue),

Lead Counsel reduced its demand to $4,007,462.08 after purporting to remove those expenses that Lead Counsel incurred in connection with T. Rowe's entitlement. Expenses & Fees Op. 22. Of this $4 million in expenses, $3,372,878.02 were fees paid to valuation experts, while the remaining $634,584.06 were purportedly incurred in connection with issues related to fair value only. The trial court adopted Lead Counsel's representations wholesale, even though Lead Counsel failed to provide any substantiation whatsoever to justify the amount of expenses allocated to the fair value determination. Expenses & Fees Op. 23. Lead Counsel further sought an attorney's fees award of $3,964,125.60, premised on extending the formula set forth in its contingency fee agreement with T. Rowe to the other remaining petitioners. Expenses & Fees Op. 22-23.[3]

In a Memorandum Opinion dated October 17, 2016, the Court of Chancery granted Lead Counsel's fee and expense petition in full. As to expenses, the trial court determined that $4,007,462.08 was a "reasonable[]" amount of reimbursable expenses, despite the fact that those expenses were incurred at a time when the appraisal class was 86% larger (equivalent to approximately $400 million in merger consideration). The Court of Chancery was not troubled that all of those

[3] Pursuant to that agreement, if Lead Counsel secured a post-trial recovery for T. Rowe in the range of $15.76 to $17.75, Lead Counsel's fee was equivalent to 17% of that recovery. (C2.)

expenses would be levied against shares representing only a small fraction of those petitioners represented at trial. In the trial court's view, "even with the reduced number of shares, this was a case that required the highest level of investment." Expenses & Fees Op. 24. The Expenses and Fees Decision refused to allocate any expenses to the T. Rowe Shares, concluding that as a technical matter those shares could not foot any part of the bill because they had been dismissed from the action and thus were no longer "entitled to appraisal" at that particular point in time under Section 262(j). *Id.* at 25.

As to the fee award, the trial court rejected the Magnetar Funds' request that Lead Counsel's fee be offset to account for the separate legal fees that the Magnetar Funds incurred in hiring counsel to advocate for them in those circumstances where Lead Counsel -- whose interests were adverse to the Magnetar Funds' by virtue of Dell's challenge to T. Rowe's standing -- could not. *See* Expenses & Fees Op. 36-37. At the direction of the trial court, the parties submitted a form of final order that implemented the court's rulings, which the Court of Chancery entered without revision. (C400-422.)

The Magnetar Funds thereafter filed a timely notice of appeal from the trial court's decision and order. (C423-429.)

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY FAILING TO ALLOCATE LITIGATION EXPENSES PRO RATA AMONG ALL STOCKHOLDERS WHO SOUGHT APPRAISAL AND WERE BENEFITTED THEREBY

A. Question Presented

Whether the Court of Chancery misapplied Section 262(j) by refusing to allocate any valuation allocation expenses to the T. Rowe Shares, which pursued appraisal through trial and received a substantial monetary benefit as a direct result of the proceeding, and instead apportioning all of those expenses to a mere fraction of the appraisal shares.

B. Standard of Review

This Court reviews *de novo* decisions that "implicate[] the statutory construction of § 262." *M.P.M. Enters., Inc. v. Gilbert*, 731 A.2d 790, 795 (Del. 1999). The Court of Chancery's factual findings should be reversed where "they are clearly wrong and the doing of justice requires their overturn." *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005). This Court may also reject the trial court's factual findings where they are not "sufficiently supported by the record" or are not "the product of an orderly and logical deductive process . . . ." *Sternberg v. O'Neil*, 550 A.2d 1105, 1126 (Del. 1988).

C. Merits of the Argument

The decision below was premised on an erroneous interpretation and application of Section 262(j), which provides that

> [u]pon application of a stockholder, the Court *may* order *all or a portion* of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to appraisal.

8 *Del. C.* § 262(j) (emphasis added). Attempting to apply this language, the trial court declined to allocate any part of Lead Counsel's more than $4 million in expenses to the T. Rowe Shares, which had been dismissed from the case after trial, instead of by way of pretrial proceedings as envisioned by Section 262(h) and as is typical in appraisal proceedings. The Court of Chancery concluded that because the T. Rowe Shares failed to comply with the strictures of Section 262, the appraisal statute did not permit it to allocate any expenses to them -- and required the non-T. Rowe Shares to bear them all -- even though it cannot be disputed that those expenses were incurred largely for the T. Rowe Shares' benefit. *See* Expenses & Fees Op. 25.

This decision was incorrect, and is in conflict with the legislative history of, commentary explaining, and case law applying, Section 262(j). The fact that the T. Rowe Shares actually received a greater aggregate monetary benefit from the

Dell appraisal than the Magnetar Funds did, yet were excused from paying any of the litigation expenses whatsoever, makes this a particularly inequitable result. The trial court's exclusive focus on only the final clause of the statute -- charging only those shares which as of the day of judgment were "the shares entitled to appraisal" -- caused it to disregard the earlier language highlighted above providing that the trial court was fully capable of awarding only "a portion" of the claimed expenses and was not required to assess "all" such expenses against the remaining non-lead shares. This decision was reversible legal error, an inequitable abuse of discretion, and justice requires that it be overturned.

Moreover, the appraisal itself is generally conducted only "[a]fter the Court determines the stockholders entitled to an appraisal . . . ." 8 *Del. C.* § 262(h). Here, however, the trial court "in its discretion[]" and at the request of T. Rowe and Dell "proceed[ed] to trial upon the appraisal prior to the final determination of the stockholders entitled to an appraisal." *Id.* This exercise of discretion by the trial court effectively gave T. Rowe a risk-free ability to participate in the trial, while continuing to direct the strategic and budgetary decisions of Lead Counsel, all without fear of having to bear any of the costs of the proceeding in the event that T. Rowe was not entitled to appraisal after all. It was therefore unjust that the Expenses and Fees Decision saddled the remaining minority of petitioners with what should have been T. Rowe's share of expenses all as a consequence of the

trial court's earlier exercise of discretion in sequencing the entitlement issue to be decided only *after* the valuation trial.

1. The Court of Chancery Misapplied Section 262(j) by Failing to Apportion any Expenses to the T. Rowe Shares, Even Though the Vast Majority of Those Expenses Were Incurred to Benefit the T. Rowe Shares.

a. Section 262(j) Was Enacted To Ensure That The Fees And Expenses Of An Appraisal Proceeding Are Fairly Apportioned Between And Among All Petitioners Who Benefit From Dissenting.

Today's version of Section 262(j) was introduced on July 1, 1976, as part of the Legislature's overhaul of the procedures governing statutory appraisals.[4] Prior to 1976, the appraisal statute provided no means by which counsel fees or expert costs could be allocated among all appraisal petitioners. Rather, Section 262(h), which then governed fee shifting, provided as follows:

> [t]he cost of any such appraisal, including a reasonable fee to and the reasonable expenses of the appraiser, ***but exclusive of fees of counsel or of experts retained by any party***, may on application of any party in interest be determined by the Court and taxed upon the parties to such appraisal or any of them as appears to be equitable . . . .

Levin v. Midland-Ross Corp., 194 A.2d 853, 854 (Del. Ch. 1963) (quoting 8 *Del. C.* 262(h) (1976)) (emphasis added). This led, predictably, to the unfair result of

[4] Among other things, the 1976 amendments to the appraisal statute did away with the court-appointed appraiser, and provided that the appraisal proceeding would be heard by the Court of Chancery in the first instance. *See* 60 Del. Laws, ch. 371 (1976).

counseled appraisal petitioners footing the bill for those members of the appraisal class who elected not to take an active part in the proceeding (or whose financial stake was too small to justify participating actively), but reaped the benefits of the appraisal proceeding nonetheless.

Thus, in *Levin*, for instance, then-Vice Chancellor Marvel was asked to decide whether stockholders who had "not . . . taken an active part in the actual [appraisal] proceedings may be required to contribute proportionately to defraying the cost of counsel and expert witness fees incurred by those stockholders who through their attorneys and others have pulled the laboring oar . . . ." *See* 194 A.2d at 854. Vice Chancellor Marvel recognized that "there is an element of inequity in having dissident shareholders 'go along for the ride', . . . while other stockholders incur the expense of engaging the services of counsel or of an expert or both often with results . . . beneficial to all dissenting stockholders." *See id.* "[D]espite the seeming unfairness of the results permitted by the language of the statute in its present form," however, the Vice Chancellor found "no alternative" but to reject the stockholders' request to have the burden of the proceedings shouldered proportionately amongst all shares benefitted by it. *Id.* at 854-55.

The 1976 amendments to Section 262 addressed this inequity head on, removing the exclusions for expenses and attorneys' fees. *See* 60 Del Laws, ch. 371. The commentary to the amendment acknowledged that under pre-amendment

practice, "each stockholder bears his own expenses in the appraisal so that if one stockholder hires an attorney and expert witness, he must bear all of the expenses while all of the other stockholders receive the benefit of the attorney's representation and the testimony of the expert witnesses." R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations*, § 253(d) (3rd ed. 2017) [hereinafter "Balotti & Finkelstein"]. The proposed revisions were intended "to provide more equitable means of sharing the cost of an appraisal." *Id.* Under those revisions, "all of the stockholders would share the expenses of the attorneys and experts who have achieved a benefit for them." *Id.*

Folk's commentary on the 1976 amendment is consistent. *See* Edward P. Welch et al., *Folk on the Delaware General Corporation Law* § 262.12 (6th ed. 2017) [hereinafter "Folk"]. According to Folk, the statute was amended because "it was unfair to the 'stockholder who has neither the money nor a sufficient stock interest in the corporation to hire attorneys and experts.'" *Id.* (quoting H. 916, 128th Gen. Assembly, 2d Sess., 10-11, 60 Del. Laws, c. 371, §§3-12 (1976)).

> [A] more equitable result was achieved by providing for the pro rata distribution of the litigation expenses. The statute now provides that all of the participating stockholders' reasonable expenses may be apportioned, including attorneys' fee and expert witness fees.
> . . .

> The dissident stockholder may petition the court to order that all or a portion of its expenses be charged pro rata against all of the shares for which appraisal was demanded. . . .

See id. (quoting *In re Appraisal of Shell Oil Co.*, 1992 WL 136416, at *4 (Del. Ch. June 16, 1992) (footnotes and other citations omitted)). As Folk and Balotti & Finkelstein consistently observed, it is apparent that Section 262(j) was enacted to spread the costs of the entire appraisal proceeding equitably across all shares that received a benefit from petitioning.[5] It was not, however, intended to be used as a vehicle to tax only the last shares standing, which was how the Court of Chancery applied the statute here.

The one Delaware decision to apply the modern version of Section 262(j), *Tannetics, Inc. v. A.J. Industries, Inc.*, 1980 WL 268103 (Del. Ch. Dec. 16, 1980), does not refute this legislative history and intent. In *Tannetics*, Chancellor Marvel addressed, *inter alia*, the lead petitioners' request for "a pro rata assessment of the substantial expenses which it has incurred in this case among the other dissenting

[5] Indeed, this language could be read to support the view that "all of the shares for which appraisal was demanded" should share in the ultimate bill. *See* Folk, at § 262.12. The Magnetar Funds do not advocate for such a reading here. It seems inequitable to force shares that are dismissed before trial to shoulder the trial and expert costs. But that logic does not apply to the T. Rowe Shares, which constituted the biggest stake in this case by several orders of magnitude, delayed resolution of the Failure to Dissent Motion until after trial, were only dismissed following trial and after nearly all of the litigation expenses were incurred, and reaped a significant financial benefit through their settlement with Dell.

stockholders who sought an appraisal of the intrinsic value of their shares." *Id.* at *1. Applying the new version of Section 262(j) (which at that time was Section 262(h)), the court distinguished "the pre-amendment case of *Levin*[,]" which as the court explained "allowed [non-active dissidents] to reap the benefits of a merger appraisal action without . . . taking responsibility for the expenses of such proceeding." *Id.* at *4 (citing 194 A.2d 853). The *Tannetics* Court then held that all expenses should be prorated.[6]

The court below failed to cite or discuss any of this authority.[7] Rather, the trial court stopped its analysis at Section 262(j)'s use of the word "entitled," and

[6] Because the gating question in the *Tannetics* decision was whether to prorate expenses "among the other dissenting stockholders who sought an appraisal", *see* 1980 WL 268103, at *1, the Chancellor's statement that non-participating stockholders would share in expenses "to the extent of being entitled to appraisal," *see id.* at *4, is dicta. Were it otherwise, there would have been no need for the *Tannetics* Court to distinguish *Levin* on the grounds that the non-active stockholders there "were allowed to reap the benefits of a[n] . . . appraisal action" without shouldering some expenses. *See id.* at *4. In other words, the give and get in that case -- a prorated share of expenses to pay for securing a benefit by petitioning for appraisal -- is the same *quid pro quo* the Magnetar Funds seek here. And, in all events, there were no active-participant stockholders dismissed from the *Tannetics* action ***following*** the appraisal trial and ***after*** all expenses were incurred, as was the case here.

[7] The trial court did cite to *In re Appraisal of Shell Oil Co.*, 1992 WL 321250 (Del. Ch. Oct. 30, 1992), for "the principles to be used when awarding fees and expenses under the second sentence of Section 262(j)." *See* Expenses & Fees Op. 13. This is a curious case for purposes of analyzing a demand for expenses, however, because *Shell* dealt exclusively with "the law governing an award of attorneys' fees in appraisal actions," 1992 WL 321250, at *3, and was not otherwise relevant. In addition, *Shell* dealt with the legally and factually inapposite question of how to

held that because the T. Rowe Shares were dismissed from the Dell Appraisal, they were not "entitled" to an appraisal and hence fell "outside the Scope of 262(j)." *See* Expenses and Fees Op. 25. Because the goal of all statutory construction is to "ascertain and give effect to the intent of the legislature," *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000) (quotation omitted), this analysis was inadequate. This is especially so because the Court of Chancery's reading would lead to the "unreasonable" and "absurd" result of forcing approximately 15% of the dissenting shares brought to trial to bear all expenses incurred in prosecuting the case up to and including that trial. *See Dir. of Revenue v. CNA Hldgs., Inc.*, 818 A.2d 953, 957 (Del. 2003) (explaining that in such a circumstance "judicial interpretation" is necessary). The trial court's failure to engage in any analysis of Section 262(j) is reason enough to reverse its decision here.

Moreover, there was simply no need to read the statute in such an inflexible manner, especially in light of the express discretion Section 262(j) grants trial courts. Delaware courts often decline to read the appraisal statute literally where such a reading would work injustice upon appraisal petitioners. For example (and as the trial court itself acknowledged in its Dissenter Opinion (C228)), Section

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measure the value of the benefit conferred upon shareholders in related litigations by the efforts expended by the attorneys in the Shell appraisal action. *See id.* at *4, *6. The answer to that question has no bearing on how *expenses* incurred in a single appraisal action should be apportioned.

262(a) imposes upon petitioners "all-or-nothing propositions that require a stockholder to act uniformly as to all of its shares. For the Dissenter Requirement [in particular], this would mean that a stockholder would be foreclosed from seeking appraisal if it voted a single share in favor of the merger." (C229.)

But this cannot be the law. And indeed, numerous decisions, including this Court's rulings in *Olivetti Underwood Corp. v. Jacques Coe & Co.*, 217 A.2d 683 (Del. 1966), and *Reynolds Metals Co. v. Colonial Realty Corp.*, 190 A.2d 752 (Del. 1963), softened Section 262's edges in a manner inconsistent with its actual terms. Now, instead of applying Section 262(a) to bar from appraisal any beneficial owner who votes at least one share in favor of a merger, *see Union Illinois. 1995 Investment Ltd. Partnership v. Union Financial Group Ltd.*, 847 A.2d 340, 365 (Del. Ch. 2004) (Strine, V.C.), the Dissenter Requirement is understood to mean that "the stockholder has not voted in favor of the merger or consented to it ***with respect to the shares it seeks to have appraised***." *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 67586, at *3 n.23 (Del. Ch. Jan. 5, 2015) (emphasis added). In other words, Delaware courts reject "hyper-literal" readings of the appraisal statute's provisions where such interpretations impose unjust and absurd results (such as the affirmative vote of a single share barring an entire claim).

Here too, it cannot be the law that the Magnetar Funds, for reasons entirely beyond their control, are forced to pick up the tab for an appraisal litigated in the

main on behalf of another exponentially larger petitioner. Parties besides the Magnetar Funds, namely, T. Rowe, Dell and Lead Counsel -- with the Chancery Court's blessing -- purposefully delayed resolution of the Failure to Dissent Motion until after trial. (C194-199.) This means that the appraisal class for whom Lead Counsel tried the case represented nearly $500 million in merger consideration (as opposed to the approximately $75 million represented by the petitioners who were ultimately ordered to bear the full expense load). Had the T. Rowe Shares not been dismissed post-trial, the award premium in this case would have been nearly $120 million, before interest (as opposed to the approximately $21 million actually awarded below). (C400-422.) Given the dollars originally at stake, it is impossible to know whether Lead Counsel would have incurred more than $4 million in expert witness fees if the case litigated and tried had been one-sixth the size. But it is fundamentally unfair to force the Magnetar Funds to bear the costs of this uncertainty while effectively giving T. Rowe and Lead Counsel a free pass on their risky decision to "kick the can down the road" on the entitlement issue.

In sum, the Court of Chancery erred by declining to consider the purpose and meaning of Section 262(j), opting instead for a reading that worked a substantial injustice on the Magnetar Funds. Given the legislative intent behind Section 262(j) -- to alleviate the unfairness that results from making a limited

number of appraisal petitioners pay for the efforts that benefit other petitioners -- this constitutes reversible error.

b. Without Sharing in the Litigation Expenses, T. Rowe Earned A Concrete Monetary Benefit from the Dell Appraisal That Was in Fact Greater Than the Amount Awarded to the Magnetar Funds.

The trial court also ignored that the T. Rowe Shares fall squarely within the ambit of Section 262(j) because they received a concrete and substantial benefit from the Dell appraisal proceeding, including from the work put towards a determination of Dell's fair value. It is therefore appropriate to allocate to them their fair share of the expenses incurred in prosecuting the case.

As a result of the Court of Chancery's post-trial determination that the T. Rowe Shares were not entitled to appraisal, the T. Rowe Shares were slated to receive only the $13.75 merger consideration without an award of interest. (C200-269.) Plainly -- given the sheer size of their potential claim -- T. Rowe was poised to appeal the entitlement ruling after the trial court entered a final order below. A favorable ruling on that appeal and would have entitled the T. Rowe Shares to the trial court's fair value determination would have cost Dell approximately $119 million even before interest were applied. This gave the T. Rowe Shares leverage in advance of any potential appeal, which they would not have had absent the Court of Chancery's favorable ruling on fair value and decision to defer consideration of the Failure to Dissent Motion until after trial.

In exchange for eliminating that appeal risk, Dell paid T. Rowe $13.75 per share plus $28 million in aggregate interest, to "resolve a dispute regarding ***the fair value*** and interest due" on the T. Rowe Shares. (C392 (emphasis added).) From T. Rowe's perspective, the settlement was compensation to forego the possibility that the T. Rowe Shares would be permitted to the significant fair value uplift above the merger price plus statutory interest thereon. Such a settlement would not have been otherwise available to the T. Rowe Shares had they not petitioned for statutory appraisal and benefited from the efforts expended in the litigation. In other words, T. Rowe took full advantage of the effort expended in litigating the issue of fair value -- which resulted in a $3.87 premium -- and obtained a settlement payment whose value can never be fully divorced from the valuation ruling, as Denali itself represented publicly.

Because the trial court refused to allocate any expenses to the T. Rowe Shares at all, however, T. Rowe received this benefit for free, at least from the perspective of expenses. This is not a proper application of Section 262(j), which was enacted precisely to avoid the "free rider" problem inherent in the pre-1976 version of the statute. *See Levin*, 194 A.2d at 854-855. The trial court's application is particularly inequitable because the $28 million settlement payment to T. Rowe exceeds the $25.23 million aggregate award to the non-T. Rowe shares -- *i.e.*, the $17.62 fair value award plus interest as of September 30, 2016 -- that the

trial court relied on in to justify burdening the Magnetar Funds and the other surviving petitioners with the full weight of Lead Counsel's $4 million in expenses. *See* Expenses & Fees Op. 17, 26.

If the purpose of Section 262(j) is the equitable allocation of benefits and burdens, *see* Balotti & Finkelstein, § 253(d), it constitutes reversible error to use that provision to prevent the party that gained the most from the appraisal from sharing in its most significant burden.

2. The Court of Chancery Abused its Discretion by Ordering That "All," as Opposed to A "Portion" of, the Expenses be Charged Against the Magnetar Funds.

Section 262(j) expressly empowers the Court of Chancery to charge either "all" or "a portion of the expenses incurred . . . in a connection with the appraisal proceeding" against the value of the shares in the appraisal class. On the facts presented here, and notwithstanding the trial court's legal error, it was an abuse of discretion to reject the Magnetar Funds' request that only "a portion" of expenses -- as opposed to "all" of them -- be charged against the Funds.

The Court of Chancery erred by relying solely on its conclusion that the "amount of [Lead Counsel's] expenses is reasonable and proportionate to the outcome achieved" to support its holding that all of those expenses necessarily had to be borne by the members of the appraisal class remaining after the post-trial consideration of entitlement for the T. Rowe shares. Expenses & Fees Op. 26.

This reasoning was legally unsupported and unsound. For purposes of Section 262(j), it is not enough to look exclusively to the benefit achieved for the dissenting shares to apportion expenses. The allocation also must take into account the burden that should be shouldered by dissenting stockholders -- like T. Rowe -- who participated in the appraisal proceeding through the full trial and post-trial arguments. It was wrong for the trial court to foist without justification the entirety of that burden on the appraisal class that remained.

First, by shifting T. Rowe's expenses to the Magnetar Funds, the trial court effectively rewrote Lead Counsel's contingency fee agreement with T. Rowe. This was an improper exercise of discretion, and inconsistent with the trial court's heavy reliance on the terms of that engagement letter to, among other things, set the amount of attorney's fees awarded to Lead Counsel. Expenses & Fees Op. 9. But under *Sugarland*, courts are explicitly encouraged to consider contingency fee agreements as part of their fee analysis. *See generally Sugarland Indus. Inc. v. Thomas*, 420 A.2d 142 (Del. 1980). Section 262(j) is not similarly accommodating when it comes to expenses.

Under its fee agreement, Lead Counsel had the right to reimbursement of "all out of pocket expenses" from T. Rowe, but took the risk that if it could not secure a recovery above the $13.75 Dell merger consideration, those expenses could not be recovered. (C2.) By ordering the remaining appraisal petitioners to

pay those expenses, however, the trial court shifted the contractual risk of non-payment from Lead Counsel to the non-T. Rowe petitioners, who were thus forced to guarantee the expense contribution that T. Rowe was effectively excused from making. Nothing in Section 262(j) guarantees lead counsel in an appraisal action full reimbursement of monies advanced if lead counsel elects to forego enforcement of the terms of its engagement with a particular client. But that is effectively what the trial court accomplished below by placing the burden of "all" the expenses on the non-T. Rowe Shares.

Justifying this anomalous result, the trial court surmised that an order awarding to Lead Counsel less than its requested expenses would "force [Lead Counsel] to bear those expenses in the first instance and likely seek reimbursement from T. Rowe." Expenses & Fees Op. 26. This explanation does not withstand scrutiny. Whatever T. Rowe's contract rights were with respect to Lead Counsel was a matter for the parties to that contract to decide. It is not, however, a legitimate reason to improve Lead Counsel's bargain with T. Rowe by requiring the Magnetar Funds to shoulder "all" of Lead Counsel's expenses, forcing them to pay Lead Counsel for expenditures it was not entitled to receive from its own client or excusing T. Rowe from its obligation to pay those expenses if in fact they were due and owing.

In other words, as a result of the $28 million settlement payment, either T. Rowe's contractual obligation to reimburse Lead Counsel's expenses was triggered -- in which case T. Rowe should have been required to pay them to Lead Counsel -- or T. Rowe's contractual obligation to pay its share of expenses was not triggered, in which case Lead Counsel's risk of non-payment materialized, and no other parties, including the Magnetar Funds, should have been required to indemnify Lead Counsel for expenses that it was simply not entitled to recover.

Second, the Court of Chancery failed to appreciate that the trial proceedings below resolved issues of fair value as well as T. Rowe's standing. This was an error because the trial court's own decision on Dell's Failure to Dissent Motion expressly relied on exhibits introduced by the parties into the trial record. (C222-223.) The Expenses and Fees Decision, however, was premised on the critical (and erroneous) assumption that the Dell appraisal proceeded on two separate and independent tracks -- valuation and entitlement -- which could be easily parsed for purposes of demarcating the respective litigation efforts and expenses. *See* Expense & Fee Op. 7, 24-25. But such a clean delineation was impossible here, and Dell itself acknowledged as much in describing its settlement payout as resulting from considerations of fair value as well as interest. It was error for the Court of Chancery to assume that the trial was devoted exclusively to valuation or that the T. Rowe settlement was made in a vacuum devoid of any valuation issues,

and thus wrongly forced the Magnetar Funds to pay for 100% of Lead Counsel's requested expenses. That may have been the case if the entitlement determination had been made prior to the commencement of discovery and trial, but it cannot be the case here.

Third, the trial court inequitably failed to appreciate the efforts made by the Magnetar Funds to fairly and equitably allocate expenses long prior to the decision on T. Rowe's standing. *See supra* pp. 11-14. In light of these efforts, the trial court's suggestion that the Magnetar Funds' displeasure with its share of the expenses boils down to sticker shock rings hollow. *See* Expenses & Fees Op. 26. The Magnetar Funds recognized long before trial that an adverse ruling on the standing issue could have costs that would be disproportionately borne by them. (C179-181.) Lead Counsel rebuffed these overtures, and the Court of Chancery also rejected the Magnetar Funds' requests to have their own counsel installed as co-lead counsel to avoid precisely the problem the Magnetar Funds find themselves in now, being left stuck holding the bag after T. Rowe's departure.

Presumably, Lead Counsel refused to work with the Magnetar Funds in the apparent hopes that a favorable outcome on the standing issue would moot the problem. Banking on this good result, Lead Counsel incurred expenses that even the it very well might not have had the appraisal class at the commencement of the trial been one-sixth the size. The trial court's expense ruling forced the Magnetar

Funds to pay for Lead Counsel's losing bet and makes for bad policy by incentivizing parties to avoid early resolution of entitlement challenges even where substantial dollars are at stake. Just as the Chancery Court exercised its discretion in putting off the standing issues until after trial, *see* 8 *Del. C.* § 262(h), the Chancery Court should likewise have exercised its discretion to avoid the unfair result of burdening the relatively few remaining post-trial shares with the high cost of the trial that the at-risk stockholders controlled and ultimately benefitted from.

Accordingly, it was an abuse of discretion for the trial court to require the remaining 15% minority of petitioners, including the Magnetar Funds to take responsibility for "all" of Lead Counsel's expenses, as opposed to just a "portion" of them, as is permitted by Section 262(j).

3. The Proper Means By Which to Apportion Expenses

As set forth above, Section 262(j) properly applied requires that Lead Counsel's expenses be charged ratably to all of the petitioners for whom Lead Counsel tried the Dell appraisal. Those parties should share equitably in the financial burden of the efforts from which they all benefitted. The Court can effect this result by applying the following formula (per specific petitioner):

$$\frac{\text{(Number of shares held by each specific petitioner as of October 5, 2015 start of trial)}}{\text{(total shares as of October 5, 2015 start of trial)}} \times \text{\$4,007,462.08 (expenses incurred independent of discrete standing issues)}$$

The Court should therefore reverse and remand to the trial court to apply this formula in the first instance and equitably apportion the expenses incurred in the Dell appraisal proceeding. For the avoidance of doubt, it is irrelevant for purposes of this appeal whether T. Rowe eventually has to reimburse Lead Counsel -- which can waive any right to reimbursement by its own client -- or not. It does, however, do violence to the letter and spirit of Section 262(j) to foist upon non-T. Rowe petitioners the burden of expenses that should ratably accrue to T. Rowe.

II. THE COURT OF CHANCERY ABUSED ITS DISCRETION BY DECLINING TO OFFSET LEAD COUNSEL'S FEE AWARD TO ACCOMMODATE FEES PAID BY THE MAGNETAR FUNDS TO THEIR OWN COUNSEL FOR PROTECTION FROM THE CONFLICT CAUSE BY LEAD COUNSEL'S OTHER CLIENTS

A. Question Presented

Did the trial court abuse its discretion by failing to credit the Magnetar Funds with an offset against Lead Counsel's fees to accommodate the legal fees that the Magnetar Funds were forced to incur for protecting their own interests from the consequence of decisions made by Lead Counsel and its clients at risk of losing the entitlement issue.

B. Standard of Review

Decisions awarding or denying attorneys' fees are reviewed for abuse of discretion. *Montgomery Cellular*, 880 A.2d at 227. The trial court abuses its discretion "when either its factual findings do not have record support" or its decision "is not the result of an orderly and logical deductive process." *M.G. Bancorp., Inc. v. Le Beau*, 737 A.2d 513, 526 (Del. 1999). In addition, the Court of Chancery should be reversed when its fees decision was "capricious or arbitrary." *Dover Historical Soc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006) (quoting *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968)).

C. Merits of the Argument

The Magnetar Funds do not dispute the reasonableness of Lead Counsel's requested fee award, or the trial court's application of the *Sugarland* factors. *See*

Expense & Fee Op. 26-35 (applying *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142 (Del. 1980)). The Court of Chancery, however, abused its discretion by declining to credit the Magnetar Funds for fees incurred to protect them from the deleterious effects of decisions made by Lead Counsel's clients, including T. Rowe, and the conflicted position these decisions put Lead Counsel in.

The trial court's denial of the Magnetar Funds' requested offset was improperly grounded on (i) an incorrect application of the law of the case doctrine, to apply the terms of the Consolidation Order to the Magnetar Funds' separate counsel, Expenses & Fees Op. 36; and (ii) an incorrect understanding of the purpose behind and effect of the Magnetar Funds' requested offset, *id.* at 36-37. In these circumstances, a reversal to remedy this clear abuse of discretion is warranted. *See Montgomery Cellular*, 880 A.2d at 227-29 (granting cross-appeal, reversing trial court and awarding minority shareholders fees and expenses).

1. The Magnetar Funds Obtained Separate Counsel Specifically to Advocate Interests that Lead Counsel Could Not, By Virtue of the Failure to Dissent Motion.

The trial court faulted the Magnetar Funds for seeking an offset against Lead Counsel's fees "to protect their own interests." Expenses & Fees Br. 35. But the pending Failure to Dissent Motion posed the obvious risk -- which materialized -- that T. Rowe's dismissal from the case would saddle all remaining petitioners with a disproportionate share of the significant expenses, even though such expenses

were incurred predominantly on behalf of the T. Rowe Shares. To guard against that risk threating all like-situated non-T. Rowe Shares, the Magnetar Funds engaged their own counsel to pursue motion practice and settlement negotiations with Lead Counsel to try and prevent this very real risk from materializing. (C182-193; *see also supra* pp. 11-14.)

2. The Trial Court Misapplied the Law of the Case Doctrine on These Facts.

It was also error for the trial court to invoke law of the case to reject the Magnetar Funds requested offset. *See* Expenses & Fees Op. 36. The law of the case doctrine stands for the general proposition that "matters previously ruled upon by the same court be put to rest." *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 718-19 (Del. 1983). Law of the case is not inflexible, however, and "applies only to those matters necessary to a given decision and those matters which were decided on the basis of a fully developed record." *Zirn v. VLI Corp.*, 681 A.2d 1050, 1062 n.7 (Del. 1996).

The Court of Chancery's law of the case analysis was incompatible with this well-settled law. Citing paragraph 6 of its 2014 consolidation order (C39-47), the trial court denied the Magnetar Funds' request because the court concluded that it had already decided "not to permit departures [from Section 262(j)] for particular claimants." Expenses & Fees Op. 36. The trial court deemed this order "law of the case" notwithstanding the seismic shift in share count that occurred after the

court found that the T. Rowe Shares were not entitled to appraisal. Whatever "law of the case" that may have been decided in April 2014 could not possibly still be applied to tie the Magnetar Funds' hands in October 2016, long after Lead Counsel's largest client was dismissed from the appraisal case, a fact not in issue at the time the April 2014 consolidation order had been entered. Indeed, the April 2014 consolidation order was entered over a year before Dell filed its Failure to Dissent Motion and well before the Court of Chancery allowed T. Rowe to defer resolution of that Motion until after trial. Naturally the record on entitlement was not "fully developed," or even developed at all for that matter, as of April 2014. *See Zirn*, 681 A.2d at 1062 n.7. It was therefore impossible for the trial court to issue any legal ruling in 2014 as to how fees would be ultimately be apportioned or not in the event that T. Rowe were found not entitled to proceed.

3. The Proposed Offset Would Impact Only Lead Counsel, not the other Remaining Appraisal Petitioners

The trial court further erred by concluding that the requested offset would disproportionately burden the remainder of the appraisal class. Expenses & Fees Op. 37 & n.8. But nowhere did the Magnetar Funds suggest that their offset should come out of the pockets of the rest of the appraisal class. Rather, because the offset is intended to compensate for costs incurred to protect against problems caused by T. Rowe -- and conflicts between the Magnetar Funds and Lead Counsel which those problems created -- the offset should be borne by Lead Counsel and T.

Rowe only, not other members of the appraisal class. Given T. Rowe's substantial $28 million recovery, which resulted in a $4.2 million fee payment to Lead Counsel (C398), T. Rowe should appropriately be included among those petitioners who can be expected to contribute to Lead Counsel's fees.

Accordingly, the trial court's failure to grant the Magnetar Funds an offset against Lead Counsel's fee award constituted reversible abuse of discretion. That decision rested on a misunderstanding of the essential facts and a misapplication of governing law. It should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the Magnetar Funds respectfully request that this Court reverse the Court of Chancery's Expenses and Fees decision, and remand for an appropriate apportionment of expenses pursuant to 8 *Del. C.* § 262(j). In addition, the Magnetar Funds respectfully request that this Court reverse and grant the Magnetar Funds an appropriate offset of Lead Counsel's fee award, and instruct the trial court to conduct a hearing to determine the amount of that offset.

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