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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' ANSWERING BRIEF IN OPPOSITION TO THE MAGNENTAR FUNDS' OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

Funds affiliated with Magnetar Capital Master Fund Ltd. (the "Magnetar Funds" or "Appellees/Cross-Appellants") lodged this appeal because they want a free ride. They want this Court to rule that they may enjoy the benefit of a successful appraisal proceeding without contributing their fair share to the expenses incurred in pursuing it. The Magnetar Funds would have this Court tax the costs and expenses of appraisal litigation against those who are ***not*** entitled to appraisal, contrary to the explicit mandate of the appraisal statute, case authority, and sound policy. Their appeal should be recognized for what it is – a self-serving attempt to shirk their share of the costs of litigation – and it should be rejected.

Grant & Eisenhofer P.A. ("G&E"), which served as counsel for Petitioner-Below and Appellee/Cross-Appellant Morgan Stanley Defined Contribution Master Trust ("Morgan Stanley") and as Lead Counsel for all of the appraisal claimants, litigated the underlying appraisal action for more than twenty-seven months. After extensive discovery, a four-day trial involving twelve witnesses and more than 1,200 joint exhibits, and thorough pre- and post-trial briefing, G&E obtained a ***28%*** award above the merger consideration of $13.75 offered by Dell Inc. ("Dell") following its 2013 going-private merger.

Following the trial court's valuation ruling, Morgan Stanley sought to enforce its rights under 8 *Del. C.* § 262(j) to an award of attorneys' fees and

expenses. The Magnetar Funds opposed the motion. The Magnetar Funds argued that although certain petitioners represented directly by G&E had been found by the court not to be entitled to appraisal, they should nevertheless bear the costs of the litigation. The trial court granted Morgan Stanley's motion, recognizing that G&E's efforts benefitted those petitioners that were entitled to appraisal – which consisted largely of shares owned by the Magnetar Funds – to the tune of ***$25.2 million*** and that reimbursement of its requested expenses and fees (totaling approximately $8 million) was reasonable.

The Magnetar Funds want to have the expenses apportioned against claimants that the trial court determined *were not entitled to appraisal* – and, more particularly, against ***only*** those such claimants who ***also*** retained G&E. The Magnetar Funds also want to offset against the fee award to G&E the amount of fees the Magnetar Funds voluntarily incurred in trying to oppose G&E's award of fees and expenses. The Magnetar Funds' position finds no basis in the law or in equity and should be rejected. The trial court's opinion with respect to the award of fees and expenses should be affirmed in its entirety.

SUMMARY OF ARGUMENT

1. Denied. The trial court did not commit any legal error by declining to apportion attorneys' fees and litigation expenses to Dell shares that were not entitled to an appraisal. To the contrary, the trial court appropriately ordered that reasonable attorneys' fees and expenses be "charged pro rata against the value of all shares entitled to an appraisal," in accordance with 8 *Del. C.* §262(j).

2. Denied. The trial court did not abuse its discretion in declining to provide a dollar-for-dollar offset against the attorneys' fees awarded under 8 *Del. C.* §262(j) for attorneys' fees that former Dell stockholders paid to other, additional counsel whose function was to attempt to minimize these stockholders' obligation to pay their fair share of expenses awarded under Section 262(j).

COUNTER-STATEMENT OF FACTS

The Court of Chancery correctly applied the unambiguous language of Section 262(j) and apportioned the expenses of G&E's successful appraisal action amongst those stockholders who were entitled to appraisal.

Dell went private in 2013. A number of stockholders, unhappy with the $13.75 merger consideration, sought appraisal, including the Magnetar Funds. A group of entities affiliated with T. Rowe Price & Associates, Inc. ("T. Rowe") (together, the "T. Rowe Petitioners")[1] also sought appraisal and secured representation from G&E. The retainer agreement executed between the T. Rowe Petitioners and G&E provided that the clients would reimburse G&E only if the appraisal award exceeded the merger consideration, and in such a case, G&E

[1] As used herein, "T. Rowe Petitioners" include T. Rowe Price Equity Income Fund, Inc.; T. Rowe Price Equity Series, Inc., on behalf of T. Rowe Price Equity Income Portfolio; T. Rowe Price Equity Income Trust, a sub-trust of T. Rowe Price Institutional Common Trust Fund; T. Rowe Price Institutional Equity Funds, Inc., on behalf of T. Rowe Price Institutional Large Cap Value Fund; T. Rowe Price Science and Technology Fund, Inc.; T. Rowe Price U.S. Equities Trust; The Bureau of National Affairs, Inc.; John Hancock Funds II – Equity Income Fund; John Hancock Funds II – Science & Technology Fund; John Hancock Variable Insurance Trust – Science & Technology Trust; John Hancock Variable Insurance Trust – Equity Income Trust; John Hancock Funds II – Spectrum Income Fund; Prudential Retirement Insurance and Annuity Company, on behalf of Separate Account SA-5T2; Tyco International Retirement Savings and Investment Plan Master Trust; T. Rowe Price Funds SICAV US Large Cap Value Equity Fund; Curtiss-Wright Corporation Retirement Fund; Manulife US Large Cap Value Equity Fund; The Milliken Retirement Plan; and Northwestern Mutual Series Fund, Inc., on behalf of its Equity Income Portfolio.

would receive attorneys' fees contingent upon the amount by which the award exceeded the consideration.

On April 7, 2014, the T. Rowe Petitioners moved the trial court to consolidate the appraisal actions and to designate G&E as Lead Counsel. The Magnetar Funds protested that they had retained their own counsel and therefore should not have to contribute to G&E's fees. In a hearing on the T. Rowe Petitioners' motion, the trial court rejected the Magnetar Funds' position and stated that "262(j) actually addresses this issue, and it says that you can tax and allocate costs and expenses pro rata across the entire appraisal class."[2] The order granting G&E's motion provided, among other things, that as to "any arguments common to all appraisal claimants," G&E would be responsible for representing the "Appraisal Class," which would be constituted of all claimants who had not been determined to be ineligible to pursue appraisal.[3] It also provided that G&E could "seek to have its fees and expenses charged *pro rata* against the value of all the shares entitled to appraisal."[4]

As Lead Counsel, G&E secured discovery from Dell and numerous third parties, participated in more than a dozen depositions, retained three experts, and

[2] B2737.

[3] C45.

[4] C47.

successfully prosecuted a four-day trial involving seven fact witnesses, five expert witnesses, and 1,200 exhibits introduced by the parties. Following hundreds of pages of post-trial briefing, as well as post-trial argument, on May 31, 2016, the court determined that the fair value of a share of Dell stock was $17.62 (the "Fair Value Opinion"), a 28% increase over the merger consideration.[5]

Before issuing the Fair Value Opinion, the trial court addressed several motions relating to the entitlement of certain petitioners to seek appraisal, two of which are relevant to this appeal. First, by order dated July 30, 2015, the trial court disqualified certain of the T. Rowe Petitioners on the basis that they failed to satisfy Section 262's continuous ownership requirement.[6] Second, by order dated May 11, 2016, the trial court disqualified the balance of the T. Rowe Petitioners on the grounds that their shares had been voted in favor of the merger (the "Voting Opinion").[7] Ruling on the Voting Opinion had been held in abeyance until after the trial concluded. The Voting Opinion dismissed 30,730,930 shares held by the T. Rowe Price Petitioners from the appraisal class. As a result of the Voting Opinion and a series of other entitlement decisions (including entitlement decisions dismissing a variety of claimants who had never filed appraisal petitions),

[5] C271.

[6] B2768-2769.

[7] C203. Certain G&E clients remained within the appraisal class after this opinion, including Morgan Stanley.

5,505,730 shares remained eligible for appraisal, 3,865,820 of which were beneficially owned by the Magnetar Funds.[8]

Having obtained a ruling that Dell's fair value substantially exceeded the merger price, Morgan Stanley moved the Court of Chancery for an award of expenses and attorneys' fees to be apportioned *pro rata* against the shares entitled to appraisal, pursuant to Section 262(j). More specifically, it sought an award of $3,964.125.60 in attorneys' fees and reimbursement of $4,035,787.18 in expenses.[9] The fee request was based on G&E's written agreement with the T. Rowe Price Petitioners and other appraisal clients. As Morgan Stanley explained in its motion, the request to reimburse those fees and expenses was amply supported by record (including the benefit that resulted ***exclusively*** from G&E's efforts) and was substantially lower than G&E's $7.7 million lodestar.[10]

The Magnetar Funds opposed the motion[11] and sought discovery (which they received) relating to those costs and expenses. The Magnetar Funds argued that they should not be required to pay for Lead Counsel's fees and expenses

[8] C417-419.

[9] G&E subsequently revised its request to exclude those expenses that had been incurred in connection with litigating the T. Rowe Price Petitioners' entitlement to an appraisal. The revised request sought reimbursement of $4,007,462.08 in expenses. B2842.

[10] B2836.

[11] Another group of petitioners, consisting of Global Continuum Fund, Ltd. and Wakefield Partners LP, also opposed the motion. They have not lodged an appeal.

unless those of the T. Rowe Petitioners that the court ruled were ***ineligible*** for appraisal contributed to the costs of obtaining the appraisal award.

The trial court granted Morgan Stanley's motion for fees and expenses. The trial court explained that Section 262(j) "authorizes a party that has incurred expenses litigating an appraisal to have its expenses, including reasonable attorneys' fees, allocated *pro rata* among the shares comprising the appraisal class."[12] The court recognized that this provision is based on the equitable fund doctrine, which holds that "when a litigant creates or preserves a common fund for the benefit of a class, equity demands that those who share in its benefit share in the burden of the prosecution."[13]

To that end, the court ordered reimbursement of the $4,007,462.08 G&E expended in its pursuit of the appraisal award, finding that "the amount of expenses that G&E incurred is proportionate to the benefit achieved."[14] The court rejected the Magnetar Funds' attempt to burden stockholders who were not members of the appraisal class with a share of the expenses incurred in obtaining the appraisal award, noting that Section 262 "does not permit the court to allocate

[12] Oct. 17, 2016 Memorandum Opinion Regarding Fees and Expenses ("Op.") at 1.

[13] *Id.* at 14 (quoting *In re Appraisal of Shell Oil Co.*, 1992 WL 321250 (Del. Ch. Oct. 30, 1992)).

[14] *Id.* at 25.

expenses to former stockholders that were not entitled to seek appraisal and are not part of the appraisal class."[15]

As to Morgan Stanley's fee request, the trial court applied *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980). The court considered the relevant factors, including the results of G&E's efforts on behalf of the appraisal class; the time and effort expended by counsel; the relative complexity of the appraisal action; the contingency factor; and G&E's standing and abilities. The trial court emphasized that "G&E's litigation efforts generated a benefit for the appraisal class," including an award net of expenses of $21,217,683.[16] Because the award was achieved after conclusion of the appraisal trial and post-trial adjudication, the court determined that the *Sugarland* factors would support a $7,072,561 fee award – far in excess of the $3,964.125.60 plus interest that Morgan Stanley sought for G&E. The court concluded that the sum sought "easily satisfies the test of reasonableness."[17]

The court also considered the request by the Magnetar Funds to reduce their share of the fees by what they decided to pay the counsel that they had separately retained. The Magnetar Funds had argued that they required their own counsel "in

[15] *Id.* at 25.

[16] *Id.* at 17.

[17] *Id.* at 35.

large part to address the same unique entitlement issue that threatened the viability of the T. Rowe Petitioners' appraisal claim."[18] As the court recognized, however, the consolidation order already provided that Section 262 would govern. According to that order, G&E could recover fees and expenses apportioned *pro rata* for its efforts on behalf of common issues, rather than petitioner-specific entitlement issues. In addition, the trial court correctly observed that if the Magnetar Funds received an offset, the fee award would "burden other class members disproportionately by forcing them to bear the additional portion of G&E's fees and expenses that Magnetar" sought to avoid, and would thereby ***not*** be a *pro rata* award.[19] Finally, the trial court recognized that the Magnetar Funds chose to hire their own lawyers, who had not contributed to the common benefit.[20]

While the T. Rowe Petitioners were considering whether to appeal the entitlement and valuation decisions, they reached an agreement with Dell that provided for prompt payment of the merger consideration, together with a substantially reduced interest payment of $28 million, for the 31,653,905 shares

[18] Dkt. 444, at 9-10. In their Opening Brief, the Magnetar Funds make clear that any counsel fees that they incurred were not for the benefit of the appraisal participants but rather "to pursue motion practice and settlement negotiations with Lead Counsel." B2905.

[19] Op. at 37.

[20] *Id.* at 37-38.

owned by the T. Rowe Petitioners.[21] The settlement was approved by the trial court on June 29, 2016.[22] Subsequently, the trial court issued its Final Order and Judgment on November 21, 2016.[23]

[21] This worked out to approximately 2.3% interest compared to the statutory rate of over 6% that the Magnetar Funds will enjoy regardless of the outcome of the appeal by Dell of the merits of the Fair Value Opinion.

[22] C385-388.

[23] C400-422.

ARGUMENT

I. THE TRIAL COURT PROPERLY REFUSED TO ALLOCATE LITIGATION EXPENSES TO SHARES THAT WERE NOT ENTITLED TO AN APPRAISAL

A. QUESTION PRESENTED

Whether the Court of Chancery committed legal error when it apportioned the fees and expenses of the successful appraisal litigation *pro rata* among those shares that were entitled to the appraisal award, consistent with the unambiguous language of the appraisal statute.

B. STANDARD OF REVIEW

The Magnetar Funds challenge the Court of Chancery's interpretation of Section 262(j). This Court reviews the trial court's interpretation of statutes *de novo*.[24] So far as the Magnetar Funds also challenge the reasonableness of the fee award and expense reimbursement, the trial court's decision is subject to an abuse-of-discretion review.[25] The trial court abuses its discretion only if its factual

[24] *M.P.M. Enters., Inc. v. Gilbert*, 731 A.2d 790, 795 (Del. 1999).

[25] *See Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 675 (Del. 2013) (reviewing fee award for abuse-of-discretion while interpreting contractual fee-shifting provision under *de novo* standard); *Lawson v. State*, 91 A.3d 544, 549 (Del. 2014) (expense reimbursement order reviewed for abuse of discretion); *Sugarland*, 420 A.2d at 149 ("The standard of review of an award of attorney fees in Chancery is well settled under Delaware case law: the test is abuse of discretion.").

findings do not have support in the record or are not "the product of an orderly and logical deductive process."[26]

C. MERITS OF THE ARGUMENT

1. The Chancery Court Properly Applied Section 262(j) In Declining To Apportion Expenses To The T. Rowe Price Shares

The Chancery Court properly applied Section 262(j) in apportioning expenses only among those shares entitled to an appraisal. The Magnetar Funds' arguments to the contrary are baseless.

(a) Section 262(j)'s Mandate That Costs Must Be Borne By Those "Entitled To Appraisal" Is Unambiguous

At its core, this appeal is an expression of the Magnetar Funds' dissatisfaction with the appraisal statute. Section 262(j) provides:

> Upon 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). The Chancery Court applied the unambiguous language of the appraisal statute when it determined that litigation expenses, including attorney fees, should be charged *pro rata* against the value of all the shares entitled to appraisal – and ***only*** against those shares. Recognizing

[26] *Sternberg v. O'Neill*, 550 A.2d 1105, 1126 (Del. 1988).

that "the appraisal statute does not permit the court to allocate expenses to former stockholders that were not entitled to seek appraisal and are not part of the appraisal class," the court rejected the Magnetar Funds' efforts to burden the T. Rowe Petitioners with such costs when they were not entitled to any part of the appraisal award.[27] Because the language of the statute was clear and unambiguous,[28] the trial court was right to reject the Magnetar Funds' invitation that it engage in judicial contortionism to find some other, unwritten meaning.[29]

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[27] Op. at 25. The Magnetar Funds fault the court for its "exclusive focus" on the final clause of Section 262(j), which addresses the *pro rata* apportionment of expenses, without acknowledging that it could order that only a "portion" of expenses be reimbursed. B2885. In reality, the trial court *did* consider reimbursing G&E only a portion of the expenses incurred. It rejected this proposition because it determined that the expenses sought were reasonable (Op. at 22), that a reduction in the expenses awarded to G&E was "unwarranted" (Op. at 25-26), that the fee award was "materially below what this court might award independently as a reasonable fee" (Op. at 35), and that no offset was appropriate (Op. at 38). For all of these reasons, the court determined that an award of "all" of the expenses and fees sought was appropriate.

[28] The Magnetar Funds ask this Court to ignore the words of the statute and to instead focus on the General Assembly. B2886-2894. But when the words of the statute have a plain meaning, the Court's inquiry is at an end. *CLM V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011). Moreover, the Magnetar Funds offer no evidence of the General Assembly's intent.

[29] *See LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932-33 (Del. 2007) ("An unambiguous statute precludes the need for judicial interpretation, and 'the plain meaning of the statutory language controls.'") (quotation omitted).

(b) Neither Case Precedent Nor Legislative History Supports The Magnetar Funds' Position

The Magnetar Funds argue that when the legislature wrote "pro rata against the value of all the shares entitled to an appraisal,"[30] what it really meant was "all shares that received a benefit from petitioning."[31] The Magnetar Funds are simply making this up. The relevant statutory language has been in place since 1976. The Magnetar Funds have failed to point to ***a single case*** from the past 41 years that supports its interpretation of Section 262(j). The Magnetar Funds' insistence that what the legislature wrote is not what the legislature actually intended must be rejected.[32]

It is telling that none of the authority the Magnetar Funds cite supports their position. First, in reciting Section 262's history, the Magnetar Funds recognized – as they must – that the statute was amended to address the "free rider" problem wherein stockholders who had not expended any money to retain their own counsel nonetheless benefited from the fees incurred by those who "pulled the laboring

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[30] 8 *Del. C.* § 262(j).

[31] B2889.

[32] *See In re Adoption of Swanson*, 623 A.2d 1095, 1096-97 (Del. 1993) ("If the statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the words used, the court's role is limited to an application of the literal meaning of those words.") (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985)).

oar" in pursuing the appraisal litigation.[33] As amended, the statute provided that every stockholder who was entitled to appraisal would be responsible for contributing to the expenses.

The Magnetar Funds cited two treatises that make general references to the fact that the statute was amended so that stockholders would contribute to the costs of the appraisal litigation when they have benefitted from it.[34] But neither of those texts even addresses the question before this Court, *i.e.*, whether it would be permissible for a stockholder to foist its fair share of the costs of obtaining an appraisal award on those who are not entitled to partake in that award.

The case law the Magnetar Funds relied on actually ***rejects*** the Magnetar Funds' position. In *Tannetics, Inc. v. A.J. Industries, Inc.*, 1980 WL 268103 (Del. Ch. Dec. 16, 1980), the court made clear that, following the 1976 amendment, "all dissident stockholders … who have participated in this proceeding ***to the extent of being entitled to an appraisal of their shares*** must bear pro rata the expenses of … the only dissident stockholder participating actively in this merger proceeding."[35] Even in the nascent years of the provision's application, the court recognized that

[33] B2887 (quoting *Levin v. Midland-Ross Corp.*, 194 A.2d 853, 854 (Del. Ch. 1963) (applying prior version of the appraisal statute)).

[34] B3093-3095; B3096-3098.

[35] *Tannetics*, 1980 WL 268103 at *4 (emphasis added).

any *pro rata* allocation of costs should only be among those "entitled to an appraisal of their shares."

In a footnote in its brief, the Magnetar Funds attempt to characterize the "entitled to an appraisal" language from *Tannetics* as "dicta."[36] By "dicta," the Magnetar Funds apparently mean language they simply do not like. The "dicta" they reference is straight from Section 262, the statute the *Tannetics* court quoted immediately before the alleged "dicta."[37]

Tannetics is not the only case to make clear that expenses should be allocated *pro rata* amongst those entitled to appraisal. In *In re Appraisal of Shell Oil*, the court indicated that Section 262(j) "allows a stockholder who brings an appraisal action to obtain costs from all the stockholders who benefit ***from the appraisal award***."[38] In *Pinson*, the court recognized that, by the terms of the appraisal statute, litigation "expenses are recoverable only by a *pro rata* apportionment against the value of the ***shares entitled to an appraisal***."[39] Recently, the court ruled that "the statute acknowledges that counsel who leads the effort on behalf of the 'appraisal class' should be compensated ***by the 'entire***

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[36] B2890

[37] *Tannetics*, 1980 WL 268103 at *4 (quoting 8 *Del. C.* § 262(h) (1976)).

[38] *Shell*, 1992 WL 136416, at *4 (emphasis added).

[39] *Pinson v. Campbell-Taggart, Inc.*, 1989 WL 17438, at *7 (Del. Ch. Feb. 28, 1989).

appraisal class.'"[40] In *Orchard Enterprises*, the court noted that this Court's precedent "recognizes that an appraisal proceeding benefits only those stockholders who perfect their appraisal rights, not the stockholders more broadly. … By statute, only the stockholders who perfected their appraisal rights receive the appraisal award."[41] Thus, "fees and costs incurred by one appraisal claimant to litigate the proceeding can be allocated *pro rata* among all the stockholders ***who perfected their appraisal rights***."[42]

Quite clearly, the weight of authority supports the trial court's decision.

(c) The T. Rowe Price Petitioners Did Not "Benefit" From The Appraisal Litigation

Even if the statute did permit the court to apportion fees based on some undefined "benefit" resulting from the fact of litigation, the premise underlying this argument is entirely wrong. The T. Rowe Petitioners did not "benefit" from the appraisal litigation.

The T. Rowe Petitioners – believing that they had perfected their rights to appraisal and properly dissented from the merger – did not seek or accept the merger consideration at the time the merger concluded. As a result, during the

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[40] *Sunrise Partners Ltd. P'ship v. Rouse Props., Inc.*, 216 WL 7188104, at *4 (Del. Ch. Dec. 8, 2016) (emphasis added).

[41] *In re Orchard Enters., Inc. S'holder Litig.*, 2014 WL 4181912, at *10 (Del. Ch. Aug. 22, 2014).

[42] *Id.* at *11.

pendency of the litigation, the T. Rowe Petitioners effectively provided Dell with a $435 million interest-free loan. Had the T. Rowe Petitioners invested this amount during the pendency of the action and received just a 2% return on that investment, they would have earned $25,231,120.42.[43] Given the trial court's entitlement rulings, the appraisal litigation could hardly be said to have "benefited" the T. Rowe Petitioners.

Not only would the T. Rowe Petitioners have been better off if, with perfect foresight, they had invested the merger consideration, they would have been better off if they had been able to remain in the appraisal class, as the Magnetar Funds did. Had the statutory interest rate applied, and had the T. Rowe shares been included in the appraisal class, they would have received $72 million in interest alone. The $28 million that they received in their settlement with Dell pales in comparison.

The Magnetar Funds contend that the T. Rowe Petitioners "received a greater monetary benefit from the proceedings below than did all of the remaining petitioners combined."[44] They repeatedly compare the appraisal award they

[43] A 3% return would have earned the T. Rowe Petitioners $38,340,238.79 – a more than 125% increase over the interest payment they received from Dell as part of the negotiated settlement (N.B.: these figures, and those in the text above, assume quarterly compounding).

[44] B2868.

received to the interest agreement that the T. Rowe Petitioners negotiated[45] in what amounts to a facile attempt to suggest that there must be some injustice because the T. Rowe Petitioners received more. This is ***not*** inequity: it is math. The T. Rowe Petitioners altogether consisted of 31,653,905 shares, ***eight times*** as many shares as the Magnetar Funds. To the extent any comparison is useful, it should be in terms of sums per share: in all, the T. Rowe petitioners who were found to not be entitled to appraisal received $0.8846 in interest in addition to the merger consideration; the Magnetar Funds were awarded $7.21 per share above the merger consideration as a result of G&E's efforts, and their right to recover interest continues to compound. It is undeniable that the T. Rowe Petitioners did ***not*** receive a "greater monetary benefit from the proceedings" than the appraisal class members. In fact they received no benefit from the appraisal proceedings, just a below-market interest payment in return for not appealing the entitlement ruling.[46]

The present appeal demonstrates this point. While the Magnetar Funds are benefitting from G&E's efforts to defend the valuation decision against Dell's

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[45] The Magnetar Funds were awarded $14,960,723.40 in value above the merger consideration, plus $9,913,168.95 in interest. In total, the Magnetar Funds are to receive $24,873.892.35. The T. Rowe Petitioners negotiated a $28 million interest payment.

[46] The Magnetar Funds claim that the T. Rowe Petitioners admitted that they received a $28 million interest payment to "resolve a dispute regarding the fair value and interest due" on the T. Rowe Petitioners' shares. B2877, B2939. But the source for this characterization is a Dell filing, not a T. Rowe filing.

appeal, the T. Rowe Petitioners receive ***no benefit*** from this undertaking. Indeed, the Magnetar Funds stand to benefit the most from G&E's efforts in this appeal. The irony of the Magnetar Funds' efforts to avoid their *pro rata* share of expenses, therefore, is not lost on G&E.

(d) There Is No Equitable Exception To Section 262(j) That Permits Shifting Costs To Stockholders Whose Appraisal Claims Were Dismissed

Unable to deny that the statute as written mandates that the Magnetar Funds pay their proper share, they argue instead that the Chancery Court should have ignored the actual language of the statute and instead focused on the "injustice" of its application.

This argument fails for several reasons. First, as the Chancery Court ruled several times in the underlying proceeding, the statute is meant to be read strictly. Second, as discussed above, the language of Section 262(j) is unambiguous and so must be applied as written. Finally, an order that the Magnetar Funds should shoulder their fair portion of the benefit received ***is*** equitable.

In several rulings below, the trial court recognized that Section 262 should be read strictly. First, in its opinion ruling that certain petitioners represented by G&E were not entitled to appraisal because their share certificates had been retitled, the Chancery Court noted that "[t]he Delaware Supreme Court has

endorsed a principle of strict construction" of the appraisal statute.[47] As a consequence of this strict construction of the statute, the court dismissed these petitioners from the appraisal class. The court took a similar approach when it rejected an equitable award of interest sought by the T. Rowe Petitioners.[48] This is consistent with other precedent addressing the construction of Section 262(j).[49]

Even if the court were to disregard the plain language of the statute and instead attempt to fashion a "just" allocation, the result would be no different. Charging the Magnetar Funds – and other members of the appraisal class – a *pro rata* portion of the expenses and fees incurred in this action is fair. Regardless of the fate of the T. Rowe Petitioners' claims, G&E obtained a significant benefit for the entire appraisal class, securing a 28% bump over the merger price, exclusive of interest. The Magnetar Funds enjoy the benefit of G&E's diligence and skill; as

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[47] B2785 (citing *Alabama By-Prods Corp. v. Cede & Co..*, 657 A.2d 254, 263 (Del. 1995)).

[48] B3100.

[49] *See Pinson*, 1989 WL 17438, at *7 (noting that "[t]he appraisal remedy is a creature of statute" and "[b]y its own terms . . . [litigation] expenses are recoverable only by a *pro rata* apportionment against the value of the shares entitled to an appraisal"); *Levin*, 194 A.2d at 854-55 (noting the unfairness of allowing some appraisal claimants a free ride, but concluding that the clear language of the prior version of the appraisal statute provided the court with "no alternative"). It is also consistent with the position the Magnetar Funds have taken with respect to other provisions of Section 262. *See* B3105 ("Delaware courts have required the parties to strictly comply with all formalities" and so "the plain language" of the statute "must control.").

they share in the benefit, so should they share in the cost. The T. Rowe Petitioners' exclusion from the appraisal class and subsequent negotiation of a settlement bear no relevance to the amount of that benefit obtained by the appraisal class and the amount of the costs incurred.

Should the Magnetar Funds' position be applied to all stockholders and all appraisals, stockholders who are dismissed or who reach settlements before judgment is entered will later receive a bill for costs incurred securing a benefit they did not enjoy. The Magnetar Funds cannot protest that this circumstance is unique or that their position should only apply to the T. Rowe Petitioners, for there is no principle that makes this an equitable result only when applied to clients of lead counsel or to petitioners who settle after trial. The legislature, in its wisdom, determined that a fair result is the equal apportionment of expenses among those who are entitled to the appraisal award. That is precisely the result that should inure here.

(e) The Magnetar Funds Were Not Prejudiced By Delayed Consideration Of Dell's Entitlement Motion

The Magnetar Funds also appear to take issue with the trial court's decision to hold the entitlement decision in abeyance until after the trial.[50] The Magnetar Funds fail to offer any coherent explanation of how this decision prejudiced them.

[50] *See*, *e.g.*, B2885-2886, B2893.

The argument appears to be that had the T. Rowe Petitioners been dismissed in May 2015, G&E would have spent less money at, and after, the October 2015 trial. The Magnetar Funds concede they have no evidence for this,[51] and they certainly provided no evidence for the trial court to evaluate. All they have is supposition based on the faulty premise that G&E – which served as a fiduciary for the entire appraisal class, not just the T. Rowe Petitioners or the Magnetar Funds[52] – would have litigated less vigorously if it directly represented fewer shares. Such a course of action was never a consideration for G&E, which takes its fiduciary responsibilities seriously. Moreover, most of the expense of the trial resulted from the use of the already-retained experts. The Magnetar Funds do not explain whether they envision that G&E would have dismissed one or more of the experts before trial simply to save money if the T. Rowe Petitioners had been excluded. Ironically, although this appears to be what the Magnetar Funds now wish G&E had done, they previously sought to usurp G&E's role as lead counsel on the stated basis that they feared G&E would not prosecute the matter vigorously enough.[53]

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[51] B2893.

[52] As well as serving as Lead Counsel, G&E also directly represented certain appraisal claimants who remained members of the Appraisal Class at the time of the judgment, including Morgan Stanley.

[53] B3121 (indicating that "G&E takes direction from the G&E Claimants, whose appetite for litigation may well have changed" since Dell challenged the T. Rowe Petitioners' entitlement).

2. The Chancery Court Did Not Abuse Its Discretion By Awarding All Of The Expenses For Which Morgan Stanley Sought Reimbursement

Following a careful review of the expenses for which Morgan Stanley sought reimbursement,[54] the Chancery Court determined that such expenses were "reasonable and proportionate to the outcome achieved for the appraisal class." Op. at 26. Accordingly, the Chancery Court awarded reimbursement of these expenses in full. This decision was amply supported and was not an abuse of discretion.

The Magentar Funds interpose three arguments against this ruling. Each is baseless. First, the Magnetar Funds assert that the Chancery Court abused its discretion because it failed to "take into account the burden that should be shouldered by dissenting stockholders" "who participated in the appraisal proceedings through the full trial and post-trial arguments."[55] The Magnetar Petitioners cite no authority for this argument. Nor could they because, as noted

[54] *See generally* Op. at 17-26.

[55] B2897.

above, there is no authority for charging expenses against any stockholders[56] other than those who were entitled to an appraisal.

Second, the Magnetar Funds assert that the trial court "failed to appreciate that the trial proceedings below resolved issues of fair value as well as T. Rowe's standing."[57] This is nonsense. The trial was solely on the issue of valuation. The entitlement issue was determined on summary judgment. Moreover, G&E carefully reviewed the expenses for which reimbursement was sought and removed all expenses incurred in connection with the entitlement issue. The Magnetar Funds offered no evidence to the contrary. The trial court awarded reimbursement only for those expenses incurred litigating the fair value of Dell.[58]

Third, the Magnetar Funds criticize the Chancery Court's failure to "appreciate" its efforts to force G&E to strike a deal with them on expenses.[59] The

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[56] The Magnetar Petitioners' assertion that the trial court "effectively rewrote Lead Counsel's contingency fee agreement with T. Rowe" by "shift[ing] the contractual risk of non-payment from Lead Counsel to the non-T. Rowe Petitioners" is demonstrably false. B2897. The T. Rowe Petitioners were not "excused" from making any expense contribution. B2898. Rather, under the terms of G&E's retainer, the T. Rowe Price Petitioners would be obligated to pay expenses if – but only if – they obtained a recovery in the appraisal action. Because the T. Rowe Price Petitioners did not obtain a recovery in the appraisal action, G&E's retainer does not permit it to charge appraisal action expenses to the T. Rowe Price Petitioners.

[57] B2899.

[58] Op. at 20-23.

[59] B2900-2901.

Chancery Court was not required to consider this. Section 262(j) permits expenses to be charged *pro rata* against the value of all shares entitled to an appraisal. The trial court committed no error in declining to give the Magnetar Funds the better deal that they were not able to negotiate for themselves.

The trial court reviewed the expenses incurred in litigating the fair value of Dell and found that such expenses were reasonable. Nothing more was required to support an award of reimbursement of these expenses in full.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO PROVIDE AN OFFSET AGAINST ATTORNEYS' FEES AWARDED PURSUANT TO SECTION 262(j) FOR FEES PAID TO OTHER ATTORNEYS WHOSE SOLE FUNCTION WAS TO ATTEMPT TO MINIMIZE FORMER DELL STOCKHOLDERS' LIABILITY FOR EXPENSES AWARDED UNDER SECTION 262(j)

A. QUESTION PRESENTED

Whether the trial court abused its discretion in refusing to afford the Magnetar Funds an offset against the attorneys' fees awarded to G&E for the expenses the Magnetar Funds voluntarily chose to incur in retaining additional counsel who provided no benefit to the appraisal petitioners.

B. STANDARD OF REVIEW

The trial court's award of fees and expenses under Section 262(j) is reviewed for abuse of discretion.[60] The trial court abuses its discretion only if its factual findings do not have support in the record or are not "the product of an orderly and logical deductive process."[61]

[60] *See Scion*, 68 A.3d at 675 (reviewing fee award for abuse-of-discretion); *Lawson*, 91 A.3d at 549 (expense reimbursement order reviewed for abuse of discretion); *Sugarland*, 420 A.2d at 149 ("The standard of review of an award of attorney fees in Chancery is well settled under Delaware case law: the test is abuse of discretion.").

[61] *Sternberg*, 550 A.2d at 1126.

C. MERITS OF THE ARGUMENT

The trial court did not abuse its discretion in refusing to provide the Magentar Funds with an offset against the fees awarded under Section 262(j) for the fees that the Magnetar Funds paid to other counsel that they ***chose to retain*** in connection with the appraisal action, who provided no benefit to the appraisal petitioners.

First, Section 262(j) does not even contemplate – let alone require – such an offset. In fact, were such an offset granted, the fees awarded under Section 262(j) would not be *pro rata* but, rather, would "burden other class members disproportionately by forcing them to bear the additional portion of G&E's fees and expenses that [the Magentar Funds] would avoid."[62] The trial court cannot possibly have abused its discretion in declining to grant a remedy that the statute does not contemplate.

Second, as the trial court noted, awarding the requested offset would violate the law-of-the-case doctrine.[63] The Consolidation Order provided that G&E could recover for fees and expenses incurred in connection with litigating common

[62] Op. at 37.

[63] Op. at 36-37. Notably, the Magnetar Funds do not cite any authority in support of their assertion that the trial court's prior ruling is somehow no longer "law of the case" in the wake of the T. Rowe Price Petitioners' dismissal from this action. B2905-2906. This argument is baseless, because (among other reasons) the trial court reviewed – and rejected – the Magnetar Funds' motion to be appointed co-lead counsel due to these changed circumstances.

issues, but not individual ones. If G&E cannot charge the fees and expenses it incurred litigating individual issues of standing to the appraisal class, there is no reason why the Magentar Funds' additional counsel should be able to (which is precisely what would result were the requested dollar-for-dollar offset granted).

Finally, the notion that the Magnetar Funds were "required" to hire their own counsel to "protect[] their own interests" is nonsense.[64] The Magnetar Funds' claim that they retained additional counsel to protect their interests in the wake of the discovery that the T. Rowe Price Petitioners might not have standing to pursue an appraisal is a bogus post hoc justification. The Magnetar Funds retained their own counsel at the outset of the litigation, long before there was ever any question about the T. Rowe Price Petitioners' entitlement to seek an appraisal.[65] Although the Magnetar Funds subsequently chose to replace Greenberg Traurig (which was to be paid on an hourly basis) with Lowenstein Sandler (which was to be paid on a contingency basis), the fact remains that these Funds hired additional counsel because they wanted to, not because some unique interests or alleged conflict on G&E's part "required" them to do so.

Moreover, the Magnetar Funds admit that Lowenstein Sandler was hired solely to protect against the risk that it would be "saddle[d]" with a

[64] B2903.

[65] *See* B3124-3132.

"disproportionate share" of the appraisal litigation expenses.[66] In other words, the Magnetar Funds do not argue (nor can they) that their counsel provided any benefit to the appraisal class, or played any role in securing the 28% premium to the deal price reflected in the appraisal award. Instead, against their *pro rata* fair share of the (heavily discounted)[67] fees awarded to G&E for obtaining the appraisal award, they want to offset the fees to Lowenstein Sandler that the Magnetar Funds voluntarily incurred in seeking to avoid that statutory liability. It would be Kafkaseque to now force the T. Rowe Price Petitioners to pay Lowenstein Sandler for that role – yet this is ***precisely*** what the Magnetar Funds ask.[68]

There is simply no basis, either in law or in fact, for the offset the Magnetar Funds have requested.

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[66] B2904.

[67] *See* B2836 (noting that G&E's lodestar was in excess of $7.7 million); Op. at 30 ("The amount that G&E seeks is just over half its lodestar."); Op. at 35 ("Having considered the *Sugarland* factors, the fee award that G&E has requested is materially below what this court might award independently as a reasonable fee.").

[68] B2906 (arguing that "the offset should be borne by Lead Counsel and T. Rowe only").

III. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's award of $8,075,865.94 (plus interest at the statutory rate from and including November 1, 2016 until the date of payment) in attorneys' fees and expenses to be charged *pro rata* against the value of all shares entitled to an appraisal.

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Respectfully submitted,

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