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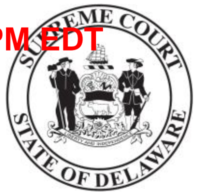

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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' REPLY BRIEF ON CROSS-APPEAL

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INTRODUCTION[1]

Having pursued appraisal of their 30 million Dell shares and been dismissed only after trial for lack of entitlement to proceed, the T. Rowe petitioners nevertheless settled their claim for $28 million, an amount greater than the $25 million appraisal award that the Magnetar Funds obtained. T. Rowe was able to negotiate this settlement because a successful appeal by T. Rowe on its 30 million shares could have cost Dell more than $200 million. Under the terms of its retainer agreement with Lead Counsel, T. Rowe was responsible to pay fees and reimburse expenses that had been advanced during the proceeding. Despite having secured a $28 million benefit for T. Rowe, Lead Counsel elected to forego its right to reimbursement under the terms of the retainer agreement and sought instead to impose all the costs incurred during the appraisal on the few remaining shareholders, including the Magnetar Funds.

By virtue of its sheer size, and because it happened to be Lead Counsel's largest client, T. Rowe directed the prosecution and management of the Dell appraisal action; controlled expert selection; determined the content and tenor of papers filed with the Court of Chancery; and took control of overall case strategy.

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[1] The Opening Brief on Cross-Appeal is referred to as "Br.," and the Answering Brief in Opposition is referred to as "Ans. Br." Capitalized terms have the meanings ascribed to them in the Opening Brief. For the Court's convenience, the Magnetar Funds address their arguments to Lead Counsel and T. Rowe, the true parties in interest here.

Notwithstanding its role in running the case and benefitting from it the most in terms of aggregate dollars recovered, the trial court excused T. Rowe from making any contribution to offset the millions of dollars in expense burden shouldered by the remaining -- and much smaller -- appraisal class. Lead Counsel was correct to frame the issue on this appeal as one involving a free rider, but it failed to correctly identify the passenger; it is T. Rowe, who has walked away with a $28 million recovery while foisting its rightful share of expenses on the remaining co-petitioners.

This result could have been avoided by applying Section 262(j)'s plain language and ordering only "a portion of" Lead Counsel's expenses to be borne by the remaining appraisal class. The decision below (at 25) acknowledges as much. Nevertheless, the trial court read Section 262(j) so narrowly as to lead to the improper result of forcing a small fraction of appraisal shares to pay full freight for other, substantially larger petitioners who settled after trial and after a valuation award. And the trial court took this position without regard to its earlier decision to sequence the entitlement decision *after* the fair value trial, thereby allowing Lead Counsel to incur $4 million of expenses before anyone knew just how many shares would ultimately remain entitled to an appraisal. In these circumstances, it is reversible error to construe the statute to require an order imposing "all" rather than just "a portion" of expenses incurred on shareholders entitled to appraisal,

allowing the T. Rowe shares to obtain a benefit while placing the entire burden on other co-petitioners. Section 262(j) was intended to apportion expenses ratably across the benefitted petitioners, not foist them on the last man standing. The Answering Brief fails to engage any of the Magnetar Funds' substantive arguments in support of that common sense conclusion.

In this *sui generis* case, the largest appraisal petitioner was jettisoned from the case *after* the fair-value trial and only after $4 million of expert fees and other expenses were spent at its direction and predominantly on its behalf. This anomalous result was a direct and foreseeable consequence of the Vice Chancellor's other exercise of discretion in reversing the typical sequence of events, to consider the entitlement challenge only after the trial was concluded and the lion's share of expenses were incurred. Having set the table in this manner, the trial court allowed T. Rowe to order from an expensive menu, enjoy a sumptuous meal, and yet exit the restaurant just before the check arrived, sticking the remaining non-T. Rowe petitioners with the bill. The inequity is plain from the sequencing, and the expenses decision should be reversed.

In respect of attorneys' fees, Lead Counsel makes three baseless arguments. The Answering Brief, like the trial court, assumes that the Magnetar Funds seek an offset from other members of the remaining appraisal class, which would upset the *pro rata* nature of the reimbursement. This is incorrect, as the Magnetar Funds ask

only that they, and the other remaining petitioners, receive a comparable offset and pay less than the full amount of *all* fees. Second, the Answering Brief does not, because it cannot, muster a legitimate defense of the trial court's law-of-the-case analysis. That doctrine applies only where the essential facts underlying the initial ruling remain constant. Here, after Dell's successful challenge in 2016 to T. Rowe's standing, the 2014 Consolidation Order could not properly have been applied to bind the Magnetar Funds years later, when T. Rowe went from lead petitioner to non-petitioner status.

Finally, Lead Counsel suggests that Magnetar's separate counsel were not devoted to curing Lead Counsel's conflict, which had not yet been fully appreciated at the outset. But the Answering Brief reaches this conclusion only by turning a blind eye to the significant record evidence of the Magnetar Funds' repeated efforts to blunt the effects of T. Rowe's standing problem. (*E.g.*, C176-181).

ARGUMENT

I. THE COURT OF CHANCERY MISAPPLIED SECTION 262(J) BY APPORTIONING "ALL" EXPENSES, RATHER THAN "A PORTION," TO THE NON-T. ROWE SHARES.

Never before has an appraisal been litigated on behalf of a lead petitioner that is responsible for more than 80% of the value of the dissenting shares, only to see that party struck from the appraisal class *after* trial (and *after* Lead Counsel incurred all expenses). Acknowledging these unique facts, the Magnetar Funds' Opening Brief analyzed the history of the appraisal statute to explain how the Court of Chancery's expenses decision was a misconstruction of Section 262(j) that forced a small subset of petitioning shares to bear all of the costs of the appraisal. Br. 20-27. T. Rowe, meanwhile, secured a concrete monetary benefit by settling its entitlement and valuation appeals, yet others were required to pay for the substantial litigation efforts made on T. Rowe's behalf. On these facts, the error below is apparent.

Rather than engage in a statutory analysis, Lead Counsel accuses the Magnetar Funds of being freeloaders and then twists the facts and ignores well-settled law to distract attention away from the fact that the appraisal class got stuck with T. Rowe's fair share of expenses. Indeed, the central premise of Lead Counsel's argument -- that T. Rowe did not secure a benefit by petitioning for appraisal, *see* Ans. Br. 18 -- is belied by the Answering Brief itself, which strains

(unsuccessfully) to avoid admitting that T. Rowe actually secured a benefit from the Dell appraisal that others paid for.

A simple example demonstrates how illogical Lead Counsel's position is. Under its proposed rule, so long as just one petitioner is left standing after entitlement decisions are rendered, that petitioner foots the bill for "all" costs of the appraisal, regardless of the procedural history and whether other shareholders settled their claims after trial. This would be so even if the value of the shares entitled to appraisal were less than the fees and expenses incurred to secure that award. For instance, if the only petitioner entitled to proceed post-trial held 100,000 shares, its award would equate to $1.762 million based on the trial court's fair value award. If this hypothetical petitioner were the only dissenter in the case, its lawyers would never have incurred more than $8 million in fees and expenses, far out of proportion to the underlying holdings. If they did, T. Rowe would secure a $28 million settlement and pay no portion of the $8 million in fees and expenses, and the holder of 100,000 shares would lose more than $6 million. The difference between this *reductio ad absurdum* and the circumstances here is that the Magnetar Funds obtained just enough of an appraisal award to save the reimbursement request from being facially absurd. But the perverse and imbalanced nature of the expense award below is analogous.

A. The T. Rowe Shares Received an Actual, Pecuniary Benefit from Petitioning for Appraisal.

The Answering Brief proceeds from the assumption that T. Rowe "did not 'benefit,'" Ans. Br. 18, and thus T. Rowe need not reimburse its lawyers. This premise is factually wrong.

Initially, Lead Counsel admits that T. Rowe received a $28 million settlement payment that could only have been secured by releasing its claims in the appraisal petition. *See, e.g.*, Ans. Br. at 20 n.45 ("The T. Rowe Petitioners negotiated a $28 million interest payment."). Lead Counsel diminishes the value of that benefit, comparing it on a price-per-share basis to the amount secured by the Magnetar Funds, or downplaying the magnitude of that benefit when characterizing it as a hypothetical return on capital if T. Rowe had never filed a petition. *See* Ans. Br. at 18-20. However, if T. Rowe had not been satisfied with the settlement it could have pressed its arguments on appeal. Rather than test its claims and defenses on appeal -- as Magnetar has done -- T. Rowe chose to settle. Whether or not this settlement is second-guessed, there remains a tacit admission that T. Rowe's participation in the Dell appraisal generated tens of millions of dollars of value, just not as much value as T. Rowe had hoped for.

The Answering Brief downplays Dell's public representation that T. Rowe's settlement payment resolved, in part, an outstanding "fair value" issue in the Dell appraisal. (*See* C392 (resolving dispute over "the fair value and interest due . . .

.").) According to Lead Counsel, the Court should disregard this statement because its "source" was "a Dell filing, not a T. Rowe filing." Ans. Br. at 20 n.46. But the representation is reliable precisely because Denali (Dell's successor) was required to make a truthful and accurate disclosure in its Form 424B3 filing, under penalty of regulatory scrutiny and damages for material falsehoods. Dell's characterization of the settlement is thus more likely to be believed than any self-serving description that T. Rowe might offer up in litigation filings. Indeed, despite its denials, Lead Counsel is forced to acknowledge that T. Rowe was considering whether to appeal "the entitlement *and valuation decisions,*" *see* Ans. Br. at 10 (emphasis added), a formulation that mirrors Dell's description.[2]

Consequently, the resolution represented T. Rowe's monetizing its appraisal claim, by threat of appeal, to the fair value premium awarded post-trial. Having filed an appraisal case and litigated it through trial and the entry of a valuation award, T. Rowe secured unique appeal rights, which posed sufficient risk to Dell that it paid $28 million to T. Rowe, $4.2 million of which went to Lead Counsel as fees under its retainer agreement. (C398.) Moreover, having moved not once but twice for an award of interest (first legal, then equitable) and been denied both

[2] Dell's admission that the T. Rowe settlement relates to both fair value and interest is consistent with the terms of the appraisal statute itself, which provides that a payment of interest only ever follows from an award of fair value. *See* 8 *Del. C.* § 262(h) ("interest . . . to be paid upon the amount determined to be the fair value").

times (A12), any portion of the settlement that T. Rowe seeks to characterize as "interest" would not have been due unless the entitlement ruling was reversed.[3] And $28 million is more than the zero dollars in litigation benefit that T. Rowe would have received had it been jettisoned from the case without those appeal rights and the concomitant threat of reinstating their $200 million entitlement to the appraisal award.[4]

B. Because the T. Rowe Shares Secured a Concrete Benefit, the Trial Court Could Not, Consistent with Section 262(j), Apportion "All" of T. Rowe's Rightful Expenses to Other Petitioners.

To the extent that the trial court concluded that Section 262(j) prevented it from charging only "a portion" of expenses to the remaining appraisal class, that decision was legal error. Br. 20-30. This Court's precedent establishes that when the "interpretation and application of the mandates in Section 262" is on appeal, the review is *de novo*. *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 524 (Del.

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[3] Lead Counsel's argument that the $28 million was "just a 2% return" is a distraction. *See* Ans. Br. 19. Absent the settlement and resolution of the fair value and entitlement risks, which issues were inextricably bound together, T. Rowe was entitled to 0% interest on its $13.75 per share merger consideration.

[4] Lead Counsel chastises as "facile" the Magnetar Funds' comparison of the two petitioners' relative awards (the Answering Brief admits T. Rowe's recovery was a few million dollars greater than Magnetar's). Ans. Br. 20. Notwithstanding Lead Counsel's efforts to downplay the recovery, T. Rowe undeniably made more money from the Dell appraisal case than the Magnetar Funds did, and yet it has not borne a dime of the litigation expenses.

1999).[5] And, it is well established that even where a statute governs the reimbursement of litigation expenses, as Section 262(j) does, that provision is reviewed *de novo*. *E.g.*, *Lawson v. State*, 91 A.3d 544, 548 (Del. 2014) (interpreting *de novo* 29 *Del. C.* § 9503, which governs reimbursement of expenses incurred in connection with condemnation proceedings). Moreover, and insofar as the trial court had discretion under the statute to charge "all or a portion of" Lead Counsel's $4 million in litigation expenses to the remaining appraisal class, it abused that discretion by giving T. Rowe a "free ride" and imposing its share of costs on other shareholders.

The Opening Brief explained in detail that the purpose behind Section 262(j) is to eliminate "free riders" and spread the costs of an appraisal proceeding equitably among all the shares that receive a benefit by petitioning. Br. 22-23. There is no basis to use that Section as the trial court did below, to tax only those last shares standing, especially where -- as here -- the expenses were incurred by a larger co-petitioner that ended up outside the appraisal class. That decision, when taken together with the trial court's decision to sequence the fair value

[5] Citing to, inter alia, *Rapid-American Corp. v. Harris*, 603 A.2d 796, 804 (Del. 1992), Dell argues in its Reply Brief on Appeal in connection with trial court's valuation ruling that this same standard of review applies to the interpretation and application of fair value under Section 262(h). It would be anomalous to apply a *de novo* standard of review to the construction of one provision of Section 262 while applying a different standard to another provision *in the course of the same appellate proceeding*.

determination prior to its entitlement ruling, created the "free ride" problem that Section 262(j) is meant to avoid. None of the arguments Lead Counsel advances in the Answering Brief redresses that mistake.

The net result of the trial court's ruling is that the Magnetar Funds, for reasons entirely beyond their control, were compelled to foot the bill for an appraisal litigated predominantly on behalf of another, significantly larger petitioner, which earned $28 million from the appraisal and then got off scot free without paying *any* expenses. The Magnetar Funds and the rest of the non-T. Rowe petitioners were put in this position only because the Court of Chancery, at the behest of T. Rowe, delayed the entitlement ruling until after trial (and after all expenses were incurred). (C203.) This is the case, presumably, because T. Rowe believed (correctly, as it turns out) that taking a $400 million appraisal claim to trial with the entitlement decision outstanding would create the opportunity for, and leverage to extract, significant value regardless of the decision on its standing. Forcing the Magnetar Funds -- who had no hand in or control over (and in fact objected to) the sequencing of the litigation -- to pay for the entirety of such a lawsuit is an inequitable result that neither the court below nor Lead Counsel address head on.

To forestall this outcome, the trial court should have adhered to the purpose behind Section 262(j) but did not. *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del.

2000) (construction must "ascertain and give effect to" General Assembly's intent). The trial court committed legal error by not doing so. If it had done so, the Court of Chancery would have uncovered that the only sensible analysis of the modern version of Section 262(j) suggests that the General Assembly intended for Section 262(j) to allow for the *pro rata* apportionment of expenses "against all of the shares for which appraisal was demanded," not just the ultimate appraisal class. Br. 22-23. By charging only a "portion" -- as opposed to "all" -- of expenses to the Magnetar Funds and the rest of the appraisal class, the trial court would have comfortably satisfied this statutory goal, applied the plain language of the statue, and avoided the evident injustice below.[6]

The Answering Brief fails to counter this analysis of the legislative history, refuses to offer competing authority, and instead crafts a straw-man argument, suggesting that the question on appeal is whether a "stockholder [can] foist its fair share of the costs of obtaining an appraisal award on those who are not entitled to

[6] The Answering Brief suggests that if the Magnetar Funds succeed, petitioners that are dismissed or settle before final judgment will be billed for benefits "they did not enjoy." Ans. Br. 23. This is nonsense, and the Magnetar Funds have already acknowledged that it would be inequitable to functionally charge expenses to those shares that depart the appraisal case before trial. Br. 23 n.5. T. Rowe, which hired the experts and directed Lead Counsel throughout the trial, only to be dismissed subsequently for lack of standing, is different. The inequities that resulted here could have been easily avoided had the trial court simply directed that only a portion of Lead Counsel's expenses be charged against the remaining petitioners, excluding from its assessment those expenses that would have been borne by T. Rowe had it remained in the case. *See* Br. 35-36

partake in that award." Ans. Br. 16. This is a determined attempt to pivot from *Balotti & Finkelstein* and *Folk*, which detail how Section 262(j) was enacted to equitably apportion the costs of an appraisal across the shares that benefitted from petitioning. *See* Br. 23. And, this proceeding has nothing to do with the Magnetar Funds trying to stick other petitioners with the tab. Instead, it concerns how a court of equity should allocate "all" or "a portion" of the expenses of an appraisal proceeding among the petitioners benefitted by it. On that question, *Balotti & Finkelstein* and *Folk* are authoritative and consistent: Section 262(j) contemplates sharing the burden among more than just those co-petitioners left to pick up the check. *E.g.*, *Balotti & Finkelstein*, § 253(d) ("all of the stockholders would share the expenses of the . . . experts who have achieved a benefit for them").

A contrary result creates substantial tension with the legislative history as well as with the plain language of the appraisal statute itself, in particular between Section 262(j) and Section 262(h), which governs, among other things, the sequencing of events in an appraisal proceeding. *See Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 540 (Del. 2011) (explaining that a statute should be interpreted "to produce a harmonious whole"). Under Section 262(h), "the Court may, in its discretion, proceed to trial upon the appraisal prior to the final determination of the stockholders entitled to an appraisal." 8 *Del. C.* § 262(h). This is the language the trial court seized upon to put off the entitlement ruling

until after trial. Notwithstanding this provision, "[a]ny stockholder" who has taken steps to perfect its appraisal petition may still "participate fully . . . until it is finally determined that such stockholder is not entitled to appraisal rights." *Id.*

In other words, even those stockholders who are eventually found not entitled to seek appraisal are participants on equal footing with all other dissenting shareholders in the appraisal class. Given this pronouncement, it cannot be the case that if those same stockholders are later deemed to lack standing, some other petitioner should pay for the part of the proceeding they were directed by statute to "participate fully in[.]" But that is precisely the rule the trial court and Lead Counsel apply. And this rule is nonsensical here, where the shareholder who "participated fully" in the Dell appraisal pending a determination on entitlement was, in the words of the Answering Brief, "***eight times***" bigger than the Magnetar Funds. Ans. Br. 20. Had the General Assembly sought to grant stockholders of questionable entitlement the right to "participate fully in all proceedings *for free,*" it surely would have said so. But the trial court's decision creates just such a situation and incentivizes large holders with questionable standing to delay entitlement questions for as long as possible, litigating the appraisal case with the comfort of knowing someone else will pick up the tab if they are excused. A ruling charging only a "portion" of those expenses as expressly provided in Section 262(j) avoids any such problems.

The Answering Brief cites no law to the contrary. *In re Appraisal of Shell Oil Co.*, 1992 WL 321250 (Del Ch. Oct. 30, 1992), dealt only with "the law governing an award of attorneys' fees in appraisal actions," *id.* at *3, and did not analyze Section 262(j) in any other meaningful way. *In re Orchard Enterprises, Inc. Shareholder Litigation*, 2014 WL 418912 (Del. Ch. Aug. 22, 2014), is similarly inapposite. When the *Orchard* Court explained that an appraisal proceeding does not benefit "stockholders more broadly," it was referring to stockholders who did not file appraisal petitions, not those -- like T. Rowe -- who not only petitioned but directed the trial and secured a $28 million post-trial settlement. *See id.* at *10 (referencing "shareholders dissenting from a merger" (quoting *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1186 (Del. 1988))).

Meanwhile, *Pinson v. Campbell-Taggart, Inc.*, 1989 WL 17438, at *7 (Del. Ch. Feb. 28, 1989), rejected a stockholder's attempt to recoup expenses from the surviving corporation, not other co-petitioners. Such an analysis would have been impossible in that case, because the moving petitioners owned "all but two" of the dissenting shares. *Id.* at *7 n.9 The shares for whom an appraisal were "being sought" in that case were the same as those "entitled" to an appraisal. Similarly, the reference in *Tannetics, Inc. v. A.J. Industries, Inc.* to "entitled" is of little value. *See* Ans. Br. 16 (quoting 1980 WL 268103, at *4 (Del. Ch. Dec. 17, 1980)). The petitioners that "sought an appraisal of . . . their shares" in that case were the same

as those "entitled" to an appraisal. Under the literal terms of *Tannetics*, a petitioner such as T. Rowe that "sought" appraisal is responsible for its share of expenses. Moreover, the analysis applied in *Tannetics* is precisely what the Magnetar Funds advocate here: those "dissidents" who "reap the benefits of" an appraisal, or their counsel, should take some "responsibility for the expenses of such proceeding." *See* 1980 WL 268103, *at 4.

Lead Counsel has not identified any case that supports its reading of the statute, where dissenters who led the appraisal case through trial are later dismissed from the proceedings but then settle their appraisal claims for $28 million. The circumstances here are unique. There is no precedent to guide the fair apportionment of expenses when the party for whom those expenses were predominantly incurred settles its claim only after losing a disputed entitlement claim and after its litigation costs on the valuation proceeding are spent. Faced with novel facts, the Court of Chancery should have acted in accord with the meaning and purpose of Section 262(j) to craft an appropriate solution, which happens to be baked into the statute itself -- *i.e.*, the charging of "a portion" as opposed to "all" expenses. What the trial court could not do, however, was inequitably apply that provision to saddle 15% of the dissenting shares with 100% of Lead Counsel's expenses and absolve T. Rowe -- which secured a $28 million benefit by petitioning for appraisal -- from sharing any of those costs.

Moreover, the trial court erred by conflating the reasonableness and proportionality of the *amount* of Lead Counsel's expenses with the *allocation* of those expenses among the petitioners, *i.e.*, whether "all" or only "a portion" of those expenses should be charged to non-T. Rowe petitioners. *See* Br. 30. Lead Counsel suggests that the trial court was free to make an expenses decision without considering who should shoulder the burden of those expenses. Ans. Br. 25. This contention is more convenient than convincing, because earlier in its brief Lead Counsel highlights that Section 262(j) embodies common fund doctrine principles, by which "equity demands that those who share in [a benefit created by a litigant] share in the burden of the prosecution." Ans. Br. 8 (quoting *Shell*, 1992 WL 321250). In this circumstance, burden and benefit are two sides of the same coin and must be -- but were not -- considered together. And, it is undeniable here that the burden of the Dell appraisal was incurred when T. Rowe was still in the case.

Lead Counsel highlights the fact that the entitlement issue was decided on summary judgment and not in the post-trial opinion. Ans. Br. 25. But the fact that the decision dismissing the T. Rowe Shares was couched as a "summary judgment" is irrelevant. It is the timing of that decision -- following full discovery, and trial -- that matters. This appeal would have been unnecessary had the trial court determined the entitlement issue at the start of the case, as is typical, before substantial expenses were incurred and before the parties litigated over fair value.

This act of discretion cannot be separated from the discretion the trial court abused by shouldering the non-T. Rowe shares with "all" of T. Rowe's expenses. Moreover, Lead Counsel can protest all it wants that the trial had nothing to do with entitlement. Ans. Br. 26. But it is undeniable that the trial court's entitlement decision relied on exhibits introduced in the trial record (C222-223), and that the post-trial fair value award is what made possible T. Rowe's settlement with Dell, which monetized its appeal threat. (C392.)

Lead Counsel disputes in a footnote that the trial court rewrote its retainer agreement with T. Rowe to the benefit of the parties to that contract and to the detriment of the Magnetar Funds and the appraisal class. Here again, Lead Counsel ignores the record. T. Rowe's retainer agreement plainly states that Lead Counsel will be reimbursed "all out-of-pocket expenses." (C2.) While expense reimbursement and payment of fees was not required if there was no recovery above merger price, fees and expenses were due on any "net . . . settlement." That is precisely what happened here when T. Rowe secured a $28 million settlement and attorneys' fees were required to be paid (and they in fact were paid), and expenses were required to be reimbursed (although they were not). (C3.) If Lead Counsel wanted to forfeit its right to reimbursement of expenses due on a "net . . . settlement," it was not fair for the trial court to make the appraisal class bear the

cost of that choice and impose all expenses incurred by T. Rowe against the remaining petitioners.

Finally, Lead Counsel downplays the Magnetar Funds' repeated attempts to timely address the risks that T. Rowe's standing problems posed to the remainder of the appraisal class and negotiate up front a fair allocation of expenses, only to be rebuffed by Lead Counsel and the trial court. (C30-38; C176-193.) Whether or not the trial court was "required" to consider these good faith efforts is beside the point. The trial court exercised its discretion to permit T. Rowe's and Lead Counsel's strategy to "kick the can down the road" on entitlement and put off the expense allocation question until it was too late to do so fairly. It constituted an abuse of that same discretion to later prejudice the one party in the appraisal proceeding who predicted the perverse consequences of the entitlement ruling on the non-T. Rowe shares and actively tried to prevent them. (C176-181 (letters to Lead Counsel).) This is not the "orderly and logical deductive process" upon which proper judicial discretion is based.

II. THE MAGNETAR FUNDS ARE ENTITLED TO AN OFFSET AGAINST LEAD COUNSEL'S FEE AWARD.

The Opening Brief explained that the trial court's denial of the Magnetar Fund's requested offset for their own legal fees was grounded on a misapplication of the law-of-the-case doctrine and a misunderstanding of the purpose behind the Magnetar Funds' request. *See* Br. 38. Lead Counsel does not advance a meritorious argument to the contrary.

First, the Magnetar Funds are not asking for other members of the appraisal class to pay for their offset, no matter what the Answering Brief says. The Magnetar Funds engaged separate counsel to protect their (and other non-T. Rowe shares') interests in a way that Lead Counsel could not, by virtue of the pending Failure to Dissent Motion and the risk to the Magnetar Funds (and all non-T. Rowe shares) that this motion posed to T. Rowe's standing. *See* Br. 38-39. The requested offset for Magnetar's legal fees should come only from Lead Counsel (on behalf of T. Rowe), and would have zero effect on the other petitioners entitled to an appraisal award.

This same factual error spoils Lead Counsel's law of the case argument, which wrongly assumes that "[i]f [Lead Counsel] cannot charge the fees and expenses it incurred litigating individual issues of standing to the appraisal class, there is no reason why" the Magnetar Funds should be able to. Ans. Br. 30. Moreover, the Answering Brief does not cite any authority to explain how law of

the case could apply in these circumstances, where the very foundations of the 2014 Consolidation Order -- that T. Rowe was the largest petitioner and thus got to call the shots in the litigation -- were removed after the Order was entered. That is presumably because this Court's case law says precisely the opposite. *See Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990) ("law of the case" only applies where the facts and premises "remain constant throughout the subsequent course of the same litigation").

Finally, the Answering Brief incorrectly argues that the Magnetar Funds did not actually engage separate counsel to protect their interests from the threat implied by T. Rowe's standing challenge, highlighting as support that the Magnetar Funds obtained separate counsel before the entitlement issue emerged. Ans. Br. 30. Lead Counsel does not explain why the Magnetar Funds could not both hire separate counsel early on and also engage that counsel (or subsequent counsel) to advocate their interests against Lead Counsel and T. Rowe. The argument also ignores the robust record on appeal (C30-38; C176-193) that reveals the substantial effort undertaken on behalf of the Magnetar Funds to (i) avoid the deleterious effect to the non-T. Rowe shares caused by T. Rowe's lack of standing -- though the Answering Brief elsewhere (at 26) acknowledges the effort -- and (ii) actively participate in the prosecution and management of the litigation. To the contrary, the Magnetar Funds provided, *inter alia*, meaningful strategic direction

and assistance in respect of the tax issues that ultimately proved to be a substantial component of the valuation uplift.

Nor does the Answering Brief address the conflict that arose between Lead Counsel and the non-T. Rowe petitioners after T. Rowe's standing was attacked. *See* Br. 34. With more than 80% of the appraisal class (and nearly all of Lead Counsel's clients) imperiled, the non-T. Rowe petitioners had legitimate questions about Lead Counsel's appetite to litigate on their behalf. (C176-193.) Furthermore, Lead Counsel had every incentive to put off the entitlement issue as long as possible, either to secure a settlement during that time or -- if T. Rowe were dismissed -- then try to seek full reimbursement from the remaining fraction of the appraisal class. This is a situation that would compel the next-largest petitioner in this matter to utilize separate counsel to guard against just such an outcome. An offset for Magnetar's fees from Lead Counsel's fee award is therefore appropriate, and the trial court abused its discretion by rejecting the Magnetar Funds' request for one.

CONCLUSION

The trial court's apportionment of expenses and award of fees pursuant to 8 *Del. C.* § 262(j) should be reversed.

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