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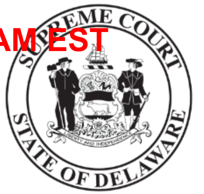

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SEAN J. GRIFFTH, Objector Below, Appellant, v. SHIVA STEIN, derivatively on behalf of The Goldman Sachs Group, Inc., and individually as a Stockholder of the Goldman Sachs Group, Inc., Plaintiff Below, Appellee, and LLOYD C. BLANKFEIN, M. MICHELE BURNS, GARY D. COHN, MARK A. FLAHERTY, WILLIAM W. GEORGE, JAMES A. JOHNSON, ELLEN J. KULLMAN, LAKSHMI N. MITTAL, ADEBAYO O. OGUNLESI, PETER OPPENHEIMER, DEBORA L. SPAR, MARK E. TUCKER, DAVID A. VINIAR, MARK O. WINKELMAN and THE GOLDMAN SACHS GROUP, INC., Defendants Below, Appellees.	No. 264, 2021 Case Below: Court of Chancery of the State of Delaware C.A. No. 2017-0354-SG

APPELLEE PLAINTIFF'S CORRECTED ANSWERING BRIEF ON APPEAL

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PRELIMINARY STATEMENT 1

This appeal stems from the Objector-Appellant's dissatisfaction with the fee that the Court of Chancery awarded to him in the underlying Action. Specifically, the Objector says he was inadequately compensated when he was awarded $100,000 by the trial court concerning a previously rejected settlement in this Action. But the Court of Chancery is afforded wide discretion in awarding fees, and his fee award was reasonable. 1

The Objector-Appellant does not appeal the Settlement consideration or Plaintiff's award of attorneys' fees. He instead proffers two makeweight arguments that have no merit. First, he takes issue with the release of certain derivative claims because he says that the Release releases future violations of fiduciary duty despite the trial court's specific finding that it did not release such future claims. And second, he argues that this Court has imposed a requirement that the Court of Chancery must make specific findings concerning a Plaintiff stockholder's adequacy in a derivative case despite his failure to identify a single decision by this Court where it has reversed a derivative settlement for failure to make such a finding. He instead analogizes this situation to class actions where this Court has said that such findings must be made because of the specific requirements of Rule 23(a). *Prezant v. De Angelis*, 636 A.2d 915, 925 (Del. 1994). But unlike class action claims, there are no specific requirements requiring a showing of adequacy in Rule 23.1. In addition, also unlike in class action claims, Plaintiff does not bear the burden of proving that she is an adequate derivative plaintiff. *Emerald Partners v. Berlin*, 564 A.2d 670, 674 (Del. Ch. 1989). And in any event, the Court of Chancery did hold in the Judgment that all Parties had been adequately represented in the Action. For these reasons, the Settlement and Judgment should be affirmed. 1

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1. Denied. The Release does not release future violations of fiduciary duty because the only available claim challenging compensation that exists going forward are waste claims since Goldman's stockholders have approved the limits on director compensation, and the trial court correctly found that the release had carved out waste claims. The Court should not reverse the Judgment on this basis. 10

2. Denied. There is no requirement under Delaware law that the trial court must make specific findings concerning the adequacy of a derivative Plaintiff during a settlement hearing, and the trial court's determination that the Settlement was fair and adequate and that all Parties had been adequately represented is more than sufficient. The Court should not reverse the Judgment on this basis. 10

3. Denied. The trial court did not abuse its discretion in awarding the Objector a $100,000 fee, which was more than 17% of the quantifiable benefit determined by the trial court. The trial court's determination to award this amount was reasonable, and the Court should not reverse this decision. 10

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In the face of this situation, the Objector concocts a host of hypotheticals about possible claims that could exist and that could be released, but none of these hypotheticals stand up to scrutiny. 27

First, the Objector argues that this Court may reverse *Investors' Bancorp* before 2024 such that the 2021 vote will no longer act as a ratification of director compensation. Obj. Br. at 24. But a settlement cannot be attacked based on hypothetical future changes to the law. *In re Resorts Int'l S'holders Litig.*, 1988 WL 92749, at *5 (Del. Ch. Sept. 7, 1988) (finding that an objection to the approval of a large termination fee failed because "[u]nder current Delaware law … the possibility that the actions of the disinterested Special Committee could be successfully challenged are doubtful."); *aff'd sub nom. In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 266-67 (Del. 1990) ("The trial court properly found that the contested transactions of the Griffin/Trump merger agreement had been approved by an independent and disinterested special committee and therefore would be accorded the presumption of the business judgment rule's application."). 27

Second, the Objector speculates that Goldman's peer group compensation could plummet in the next two years to make Goldman's director compensation "shockingly high." Obj. Br. at 24. Again, such speculation about this unlikely hypothetical should not require reversal here. But any claim that Goldman director's compensation is "shockingly" high would be a classic waste claim, which the trial court held the Release had carved out. *Grobow v. Perot*, 539 A.2d 180, 189 (Del. 1988), *overruled for other reasons by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (claim of waste was one that would "shock the conscience"); *see also Brehm*, 746 A.2d at 253 (waste claim asserted a "shocking amount of severance"). 27

Third, the Objector speculates that a hypothetical change in tax law could somehow make Goldman's director compensation "disadvantageous to stockholders." Obj. Br. at 24. But this Court has held that allegations that a board acted in a way that was disadvantageous under tax law was also a waste claim and one that would fail. *Freedman v. Adams*, 58 A.3d 414, 417 (Del. 2013) ("The decision to sacrifice some tax savings in order to retain flexibility in compensation decisions is a classic exercise of business judgment. Even if the decision was a poor one for the reasons alleged by Freedman, it was not unconscionable or irrational.") 28

Finally, the Objector speculates that "[a] foreign government [may] maintain[] that Goldman's director compensation should be cut, but the directors refuse." Obj. Br. at 24. Objector does not provide any support for the proposition that a foreign government has the ability to set limits on director compensation, let alone that a shareholder derivative action could follow such an illegal foreign order. *Beard v. Elster*, 160 A.2d 731, 735 (1960) ("The issuance of stock option plans by

Delaware corporations involves the internal affairs of a Delaware corporation and is, therefore, controlled by the laws of Delaware.") (*citing Elster v. Am. Airlines*, 100 A.2d 219, 225 (1953). Given that none of the Objector's hypotheticals would provide a cause of action other than one for waste, the Court should not reverse the Judgment based on such speculation. 28

The Objector goes on to argue that Plaintiff is taking a contrary position here to that which she took in *In re Salesforce.com, Inc. Derivative Litigation*, C.A. No. 2018-0922-AGB (Del. Ch.). Obj. Br. at 21. This is not so. In *Salesforce*, an objector represented by Mr. Rickey – Objector's counsel here – complained that 29

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Krinsky, 156 A.2d at 94 (citing *Braun v. Fleming-Hall Tobacco Co., Inc.*, 92 A.2d 302 (1952)). Here, the record shows that the trial court engaged in a significant examination of the nature of the claims and possible defenses, and further exercised its business judgment to determine that the Settlement was reasonable. The trial court found: 32

There's been no objection to the settlement itself. I note that the settlement, to my mind, implies a reduction in the amount that at least is expected to be paid at the current rates in an amount of about $4,600,000. That's discounted to present value, by my rough calculation. So this is the equivalent of a $4,600,000 reduction in 32

nonemployee director compensation. That is a benefit to the company. 32

Is it a benefit sufficient to extinguish the claims for past compensation? I've already ruled that those have gotten by a motion to dismiss. The standard is entire fairness. However, it is still a claim that has significant risk

because director compensation is a matter that obviously involves many considerations. 32

The directors on the Goldman board would be entitled to show that their compensation was not excessive. It would be expensive litigation. And it seems to me this reduction is so close to the 32

maximum amount that could be recovered, even though it has some contingencies to it, that it is a reasonable and, indeed, a favorable compromise of the claims that were still at issue, which, as I've noted before, were not particularly strong. 32

So all things considered, I think the settlement is fair compensation for the claims that are being resolved. It's fair to the class. And I am 32

approving the settlement, which obviates the need to argue about Ms. Stein's fitness going forward, I think. 32

Exh. C to Obj. Br. at 44:19 – 46:1 33

The Objector argues that the trial court's finding that it was unnecessary to argue about Ms. Stein's fitness "going forward" after the trial court had approved the Settlement was insufficient because it did not include an explicit statement as to Ms. Stein's adequacy, but there is no such requirement under Delaware law. Indeed, the cases the Objector cites demonstrate this. In *In re Infinity Broad. Corp. S'holders Litig.,* 802 A.2d 285, 291 (Del. 2002), this Court held that "Rule 23.1 includes an implicit requirement that the named plaintiffs in a settlement class have adequately represented the class as a whole" and cited *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1045 (Del.1996), for this principal. *Goodrich* was not a derivative case, but instead was a common fund case where the question was raised as to what kind of determination needed to be made by a trial court when considering a request for an award of attorney's fees from a common fund. *Goodrich* stated that in such a circumstance 33

We hold that a request for an award of attorney's fees from a common fund must be subjected to the same heightened judicial scrutiny that applies to the approval of class action settlements. Consequently, we hold ***the Court of Chancery must make an independent determination of reasonableness on behalf of the common fund's beneficiaries***, before making or approving an attorney's fee award. 33

Goodrich, 681 A.2d at 1045–46. 33

Here, there is no question that the trial court made an "independent determination of reasonableness on behalf of" the beneficiary of the Settlement, which was Goldman Sachs. The trial court determined that the $4.6 million present value benefit was sufficient to extinguish the

Company's claims regarding the director's past compensation. No other finding was necessary under *Goodrich*. 34

Moreover, the trial court also held in the Judgment that the Parties – which was defined to include Plaintiff Stein in her derivative capacity on behalf of Goldman Sachs, *see* A479-A480, were adequately represented in the litigation: 34

Approval of Settlement and Entry of Final Judgment. The Settlement is found to be ***fair, reasonable, adequate, and in the best interests of GS Group*** and it is hereby approved. The Court further finds that the Settlement is the result of arms'-length negotiations between experienced counsel ***fairly and adequately representing the interests of the respective Parties***. Accordingly, this Court fully and finally approves the Settlement in all respects, the Parties are hereby authorized and directed to comply with and to consummate the Settlement in accordance with its terms, conditions, and provisions, and the Register in Chancery is directed to enter and docket this Order in the Action....................34

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PRELIMINARY STATEMENT

This appeal stems from the Objector-Appellant's dissatisfaction with the fee that the Court of Chancery awarded to him in the underlying Action. Specifically, the Objector says he was inadequately compensated when he was awarded $100,000 by the trial court concerning a previously rejected settlement in this Action. But the Court of Chancery is afforded wide discretion in awarding fees, and his fee award was reasonable.

The Objector-Appellant does not appeal the Settlement consideration or Plaintiff's award of attorneys' fees. He instead proffers two makeweight arguments that have no merit. First, he takes issue with the release of certain derivative claims because he says that the Release releases future violations of fiduciary duty despite the trial court's specific finding that it did not release such future claims. And second, he argues that this Court has imposed a requirement that the Court of Chancery must make specific findings concerning a Plaintiff stockholder's adequacy in a derivative case despite his failure to identify a single decision by this Court where it has reversed a derivative settlement for failure to make such a finding. He instead analogizes this situation to class actions where this Court has said that such findings must be made because of the specific requirements of Rule 23(a). *Prezant v. De Angelis*, 636 A.2d 915, 925 (Del. 1994). But unlike class

action claims, there are no specific requirements requiring a showing of adequacy in Rule 23.1. In addition, also unlike in class action claims, Plaintiff does not bear the burden of proving that she is an adequate derivative plaintiff. *Emerald Partners v. Berlin*, 564 A.2d 670, 674 (Del. Ch. 1989). And in any event, the Court of Chancery did hold in the Judgment that all Parties had been adequately represented in the Action. For these reasons, the Settlement and Judgment should be affirmed.

NATURE OF THE PROCEEDINGS

On May 9, 2017, Plaintiff Shiva Stein, on behalf of herself and derivatively on behalf of The Goldman Sachs Group, Inc., a Delaware corporation ("Goldman" or the "Company"), brought an action asserting claims for breach of fiduciary duty against current and former directors of Goldman. Among other things, the Complaint alleged that: (i) the annual remuneration paid to Goldman's non-employee directors in 2015, 2016, and 2017 was excessive, for a stockholder's derivative claim in Count I; (ii) Goldman's 2013 and 2015 proxy statements, which sought approval of compensation plans, omitted disclosures required by the terms of those plans, by regulations of the United States Department of the Treasury, and by regulations of the United States Securities and Exchange Commission ("SEC"), for an individual direct claim in Count II; (iii) the omission of those disclosures from the 2013 and 2015 proxy statements rendered the plans ineffective, so that the Board's authorization of the issuance of awards under those plans was a breach of fiduciary duty, for a stockholder's derivative claim in Count III; and (iv) Goldman's 2015, 2016, and 2017 proxy statements contained misleading and partial disclosures regarding the tax deductibility of cash compensation to be paid to certain executive officers under Goldman's Long-Term Inventive Plan, for an individual direct claim in Count IV. A24-48.

On July 28, 2017, Defendants moved to dismiss under Chancery Court Rule 12(b)(6), but not Chancery Court Rule 23.1. After full briefing on Defendants' motion to dismiss, but before oral argument, the Parties agreed to settle subject to the trial court's approval. As part of that settlement, Goldman's 2018 proxy statement, which sought approval of a compensation plan, the 2018 SIP, included the disclosures that the Complaint alleged were wrongfully omitted from the 2013 and 2015 proxy statements. Plaintiff contended then and continues to believe that as a result Goldman was able to correctly recognize valuable deferred tax assets immediately upon granting stock awards under the 2018 SIP.

On October 23, 2018, the trial court held that it could not approve that settlement because the Defendant directors gave up nothing, even though the settlement had caused the Company to take certain actions that may have been beneficial to Goldman. *Stein v. Blankfein*, 2018 WL 5279358, at *4 (Del. Ch. Oct. 23, 2018). The trial court added, "Those actions, largely relating to the disclosure claims, may well have merit…. However, they are unrelated to the damages/disgorgement claims for conflicted overpayment that are the heart of the derivative claims…. Therefore I cannot approve the Proposed Settlement." *Id.* at 4. The trial court also denied without prejudice Plaintiff's request for attorneys' fees. *Id*. Objector Sean Griffith had objected to this first proposed settlement, and

the court below awarded him $100,000 in attorneys' fees and expenses despite the Court stating that its conclusions and reasons for rejecting the settlement were "not entirely congruent with the Objector's." *Stein v. Blankfein*, 2019 WL 2750100, at *1 (Del. Ch. July 1, 2019). Objector immediately appealed that award to this Court on the basis that if the fee order were to stand pending the final outcome of the Action, "it will have a substantial, continuing effect on stockholders and Delaware corporation outside of this State as it will discourage objections to unfair settlements." *Griffith v. Stein on behalf of Goldman Sachs Grp., Inc.*, 214 A.3d 943 (Del. 2019). This Court disagreed, holding that this situation did not fall within the collateral order doctrine. *Id.*

On February 4, 2019, after the trial court had rejected the Parties' initial settlement, it held oral argument on Defendants' motion to dismiss. On May 31, 2019, the trial court granted in part and denied in part the motion. The trial court denied the motion to dismiss Count I, concerning the stockholder's derivative claim for excessive remuneration to the non-employee directors, but it granted the motion on laches grounds as to Count II and Count III, and on the merits as to Count IV, which were Plaintiff's direct claims. *Stein v. Blankfein*, 2019 WL 2323790, at *10-11 (Del. Ch. May 31, 2019).

Defendants answered the Complaint on July 26, 2019. In the late summer and fall of 2019, Plaintiff conducted discovery on the remaining claim challenging director compensation. Among other things, Plaintiff served document requests, to which the Individual Defendants served objections, and the Parties thereafter negotiated and agreed on search terms for the review and production of certain Board materials and emails. The Individual Defendants thereafter produced documents in a rolling document production to Plaintiff.

In December 2019, Defendants contacted Plaintiff regarding the potential for a negotiated resolution of the remaining director compensation claim. Plaintiff declined to engage in settlement discussions until completion of the agreed-upon document discovery. In February 2020, the Parties then engaged in negotiations concerning this Settlement. During those negotiations, the Individual Defendants produced to Plaintiff certain additional discovery about the non-employee director compensation challenged in the Complaint.

The Settlement that resulted from this negotiation addressed the trial court's concern that Goldman's directors did not give up anything of value in the initial proposed settlement. The Settlement, as approved by the Court of Chancery, reduced the non-employee directors' compensation by $125,000 per director, per year, for the next four years with a pro rata reduction in the fifth year when the

restrictions lapse in April 2024. The total value of these reductions was reported on the Settlement Notice as $5,381,721. *See* B381-83 (Notice, Exhibit 1). The trial court later found that the present value of these reductions was approximately $4.6 million. *Stein v. Blankfein*, 2021 WL 2926169, at *2 (Del. Ch. July 12, 2021). The Settlement also granted Goldman's shareholders a vote on this reduced compensation because such amounts were to be included in and would be part of the shareholder vote for the Company's Stock Incentive Plan to be taken in 2021. (That vote has now occurred and Goldman's shareholders have approved the plan and the limits on director compensation. *See* B548 (Goldman Apr. 29, 2021 Form 8-K.) The Settlement also included several disclosure and governance requirements that were included in the initially proposed settlement and which will now continue until 2024. Despite these benefits, the Objector again objected to the Settlement.

The Objector argued that the Release in the Settlement released future violations of fiduciary duty, which was not permitted by *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1146 (Del. 2008). The Court of Chancery disagreed finding that the only fiduciary duty claim that would exist after the 2021 stockholder vote capping directors' compensation would be a waste claim, and that the Parties had imported the Delaware waste standard into the Release such that it did not release

future waste claims. *See* Exh. C to Objector-Appellant's Opening Brief ("Obj. Br.") at 43:21-44-3.

On the basis of these substantial benefits, the Court of Chancery approved the Settlement during a hearing on August 18, 2020, and rejected the Objector's arguments. Despite this rejection, the Objector continued to press for additional attorneys' fees. On July 12, 2021, the Court of Chancery refused to award the Objector additional fees because it stated that "[a] failed objection to a settlement I found to be fair does not amount to a corporate benefit for which I can award a fee…." *Stein*, 2021 WL 2926169, at *2. The trial court stated that its previous award to Objector was intended to credit the Objector for any potential benefit that might flow from the rejection of the first settlement.

The Objector does not appeal the trial court's decision denying him fees associated with the approved Settlement. Nor does Objector argue that the Settlement coin is insufficient or that Plaintiff was awarded too much in attorneys' fees.

Instead, Objector appeals the trial court's holdings that (1) the Release does not include a release of future fiduciary duty claims or torts; (2) there is no requirement to make a specific finding of the adequacy of a derivative plaintiff

during the course of a settlement; and (3) the Objector’s $100,000 award was reasonable.

SUMMARY OF THE ARGUMENT

1. **Denied.** The Release does not release future violations of fiduciary duty because the only available claim challenging compensation that exists going forward are waste claims since Goldman's stockholders have approved the limits on director compensation, and the trial court correctly found that the release had carved out waste claims. The Court should not reverse the Judgment on this basis.

2. **Denied.** There is no requirement under Delaware law that the trial court must make specific findings concerning the adequacy of a derivative Plaintiff during a settlement hearing, and the trial court's determination that the Settlement was fair and adequate and that all Parties had been adequately represented is more than sufficient. The Court should not reverse the Judgment on this basis.

3. **Denied.** The trial court did not abuse its discretion in awarding the Objector a $100,000 fee, which was more than 17% of the quantifiable benefit determined by the trial court. The trial court's determination to award this amount was reasonable, and the Court should not reverse this decision.

STATEMENT OF FACTS

Plaintiff has been a common stockholder of Goldman since June 12, 2014, and continuously to date. A26 ¶ 3. The Individual Defendants are or were members of Goldman's board. A26-27 ¶¶ 5-18. Defendant Lloyd C. Blankfein was also Goldman's chief executive officer until September 30, 2018 and the chairman of its board of directors until December 31, 2018. A26 ¶ 5. Defendant Gary D. Cohn was also Goldman's president and chief operating officer until December 31, 2016. A27 ¶ 18.

I. The Excessive Director Compensation

In January 2015, 2016, and 2017, the Goldman board of directors authorized remuneration to the non-employee directors, in cash and restricted stock units (RSUs), worth, on average, $605,000 per year. A28-32 ¶¶ 20-27. Defendants identified four U.S. peer companies in their 2015, 2016, and 2017 proxy statements. The remuneration of the non-employee directors at those U.S. peer companies was, on average, $352,000 for 2015 and $353,000 for 2016. A32 ¶ 28.

In 2015 and 2016, Goldman was much smaller in terms of revenues, income, and assets than three of its four U.S. peers and approximately the same size as the fourth. A33 ¶¶ 29-30. The Goldman non-employee directors attended fewer board and committee meetings than three of its U.S. peers in 2015 and all four of its U.S.

peers in 2016. A34 ¶ 31. The Complaint alleges that the Individual Defendants breached their fiduciary duties by awarding themselves excessive remuneration.

The discovery Plaintiff received confirmed that in these years, Goldman's directors were the highest-compensated among their peers. Indeed, from 2014-2019, Goldman's compensation consultant – F.W. Cook – found that in each year Goldman's non-employee directors received the highest compensation (both as a group and per Individual Director) when compared to both (i) the 29 other companies in the Dow Jones Industrial Average and (ii) the four U.S. financial services companies Goldman uses for executive compensation comparisons.

II. The Ineffective Stock Plans

From 2015 through 2017, the Goldman board awarded all of its equity-based compensation from the 2013 and 2015 SIPs, including the RSUs for the non-employee directors. A34-35 ¶ 32. But, as the Complaint alleged, the 2013 and 2015 SIPs were not effective because the stockholder votes that ostensibly approved them did not comply with the terms of the 2013 and 2015 SIPs that were required for approval. A35-36 ¶ 34. Article 3.15 of the 2013 and 2015 SIPs required that the plans were

> [e]xpressly conditioned on the approval of the shareholders of … [Goldman] in accordance with Treasury Regulations § 1.162-27(e)(4), Section 422 of the [Internal Revenue] Code, the rules of the New York Stock Exchange and other applicable law.

A35 ¶ 33. The 2013 and 2015 proxy statements omitted to disclose the information required by Treas. Reg. § 1.162-27(e)(4)(v), which incorporates the disclosure requirements of the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., including SEC Schedule 14A (Item 10(a)(1)), 17 C.F.R. § 240.14a-101 (Item 10(a)(1)). Those regulations require the identification of the classes of eligible participants in the proposed compensation plan, the approximate number of persons in each such class, and the basis of such participation. A35-36 ¶¶ 34-35.

In 2018, as part of the initial proposed settlement in this action, Goldman submitted a new 2018 SIP to its shareholders in a proxy statement that contained the information that the Complaint alleged was missing from the 2013 and 2015 proxy statements, identifying (a) the classes of eligible participants in the 2018 SIP, (b) the approximate number of persons in each such class, and (c) the basis of such participation. The following was included in the 2018 proxy statement at page 74:

> ***Eligibility.*** The 2018 SIP permits grants of Awards to individuals in the following classes of persons: (1) any current or prospective director of Goldman Sachs, (2) any officer or employee of Goldman Sachs, (3) any consultant or other service provider to Goldman Sachs, and (4) any former director, officer or employee of, or consultant or other service provider to, Goldman Sachs with respect to the year of their departure from, or completion of service to, the firm. As of December 31, 2017, Goldman Sachs had 11 directors, 11 officers, approximately 33,600 employees and approximately 3,000

> consultants or other service providers to Goldman Sachs who are, in each case, eligible to participate in the 2018 SIP.

See B150.

III. The Approved Settlement

The trial court-approved Settlement provides for the reduction of the remuneration for Goldman's non-employee directors' service from 2020 until the stockholders' annual meeting in April 2024, a period of four years and four months. During this time period, the non-employee directors (a) who do not serve as committee chairs shall receive a fixed compensation amount of no more than $450,000; and (b) who serve as a committee chair shall receive a fixed compensation amount of no more than $475,000. These total amounts may be paid in cash or equity, such as RSUs. A499-500 ¶ 2(a)-(b). The Settlement provided that Goldman include these restrictions in its 2021 SIP, A500 ¶ 2(c), which was approved by its stockholders at their 2021 annual meeting. *See* B548.

These changes have reduced each director's compensation by $125,000 per director, per year, until April 2024. The Notice stated that the estimated value of these reductions in Non-Employee Director compensation totaled $5,381,721, assuming that there continue to be ten non-employee directors. *See* B381-83 (Notice, Exhibit 1).

In addition, Goldman agreed to continue until 2024 the enhanced Item 10(a)(1) disclosures that it began to implement as a result of the initial proposed settlement. As a result, the 2021 proxy statement containing the 2021 SIP proposal furnished the information that had been omitted from the 2013 and 2015 proxy statements concerning the 2013 and 2015 SIPs. A502 ¶ 2(g). Accordingly, the 2021 Proxy Statement identified each class of persons who will be eligible to participate in the 2021 SIP and indicate the approximate number of persons in each of the following classes: (i) directors, (ii) officers, (iii) employees, and (iv) consultants and other service providers. B481-82.

Plaintiff submits that as a result of these disclosures, stockholder approval of the 2021 SIP is in accordance with Treas. Reg. § 1.162-27(e)(4)(v) and 17 C.F.R. § 240.14a-101 (Item 10(a)(1)), as was the case with the stockholder approval of the 2018 SIP where such disclosures were required by the initial proposed settlement. These disclosures that are required by the SEC and Treasury regulations will protect Goldman's accounting of stock-based compensation granted under the SIP. Based on Goldman's 10-K, the SIP generates approximately $420 million in deferred tax assets per year. B357 (Goldman 2019 Form 10-K at 195 shows Goldman has expensed approximately $2 billion in RSUs under the SIP from 2017-2019, which when multiplied by the 21% U.S. corporate tax rate provides for

$420 million in deferred tax assets per year). Thus, these disclosures will allow Goldman to correctly account for such deferred tax assets from 2019 through 2024, protecting approximately $2.5 billion in tax deferred assets that otherwise would be subject to question as a result of an ineffective stock compensation plan.

Such disclosures also allow SIP awards to be properly listed on the New York Stock Exchange. B551 (NYSE Listed Company Manual) § 312.03(a) (requiring shareholder approval for equity compensation plans). An additional benefit is that an effective equity-based compensation plan is required for Goldman to comply with the UK Prudential Regulation Authority and the United States Federal Reserve System. *See* B69, Tr. 45:21 – 48:14 (Perloff Transcript).

Finally, Goldman has agreed to maintain in place, for at least four years, the following specified director compensation practices: (i) annual board review of Non-Employee Director compensation; (ii) annual review of Non-Employee Director compensation by an independent compensation consultant; (iii) an annual recommendation by the board's Governance Committee to the full board on Non-Employee Director compensation; and (iv) annual disclosure in Goldman's proxy statement of its compensation process and program for Non-Employee Directors. A501-02 ¶ 2(f).

In return for these benefits to the Company and Goldman's shareholders, the Settlement provides for a narrow set of releases. Plaintiff, the Company, and the Company's stockholders, in their derivative capacities on behalf of the Company, will release all claims that were alleged in or are related to the Action.

Specifically, the releases cover the non-employee directors' remuneration for service from 2014 through 2019, the non-employee directors' remuneration during the period of its reduction, *i.e.*, 2020 through the first four months of 2024, and the disclosure claims. A502-03 ¶ 3. The Release expressly excludes the claims in *Fulton County Employees' Retirement System v. Blankfein*, No. 1:19-cv-1562 (VSB) (S.D.N.Y.), which is an ongoing case that includes certain claims regarding Goldman's non-employee director compensation, and it carves out claims that the compensation to be paid under the 2021 SIP "served no corporate purpose whatsoever," i.e. waste claims. A497-98 ¶¶1(m)3(5)(D) & (E). As part of the discovery taken in contemplation of this Settlement, Plaintiff requested and Defendants confirmed that this was the only other pending case that includes director compensation claims against Goldman's directors.

The Settlement also appropriately releases all the disclosure claims in the Complaint. It should be noted, however, that except for Count III, the disclosure claims are all individual claims, rather than stockholder derivative claims or claims

belonging to Goldman. Moreover, given that the trial court dismissed Counts II and III claims pertaining to the 2013 SIP and the 2015 SIP on the basis of laches, and Count IV on its merits, Plaintiff submits that the Settlement's release of those claims imposes no cost on the Company.

ARGUMENT

I. The Trial Court Correctly Determined that the Release Did Not Release Future Fiduciary Duty Claims

A. Question Presented Regarding the Release

Was the trial court's determination that the Release did not release future fiduciary duty claims or torts supported by the record?

B. Scope of Review

The Court reviews the trial court's determination of legal precepts *de novo*. Assuming a correct formulation by the trial court of the legal precepts, the standard of review of the court's findings of fact, in application of those precepts to its ultimate determination, is whether they are supported by the record and the product of an orderly and logical deductive process, i.e. abuse of discretion. *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1223 (Del. 1991); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1102 (Del. 1989).

C. Merits of Argument

1. The Trial Court Properly Interpreted This Court's Precedent

In approving the Release, the trial court analyzed this Court's holding in *In re Phila. Stock Exch.*, 945 A.2d at 1146, which stated that a release may not be "based on a set of operative facts that will occur in the future." This Court

explained immediately after this quote that a release *can* be based on conduct "not specifically asserted in the settled action, but only if those claims are 'based on the "same identical factual predicate" or the "same set of operative facts" as the underlying action."' *Id.* at 1146 & n.48. Here, the released claims for future excessive non-employee director remuneration are based on the same set of operative facts that the Complaint here challenges. By contrast, the Court explained, a settlement cannot release claims if they are based on "tangential facts, as opposed to operative or core facts." *Id.* at 1146 n.50 (citing *UniSuper Ltd. v. News Corp.*, 898 A.2d 344, 347 (Del. Ch. 2006)).

In *UniSuper Ltd.*, 898 A.2d at 347, which the Objectors says is "directly on point," Obj. Br. at 20, the Court of Chancery held the same:

> A settlement can release claims that were not specifically asserted in an action, but can only release claims that are based on the "same identical factual predicate" or the "same set of operative facts" as the underlying action. Thus, it follows that a release is overly broad if it releases claims based on a set of operative facts that will occur in the future. ***If the facts have not yet occurred***,[1] then they cannot possibly be the basis for the underlying action.

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[1] Emphasis added throughout unless otherwise specified.

Here, the facts as to the limit of director compensation from 2020-2024 have already occurred.[2] The decision has been made as part of this Settlement to pay directors no more than $450,000 - $475,000 over the next five years. Any shareholder who wished to challenge such compensation could have done so by objecting to this Settlement. But no shareholder, including the Objector, has objected to this term of the Settlement. The fact that directors have yet not "received" such compensation is immaterial. Indeed, Goldman has a requirement that all equity compensation granted to non-employee directors must be held by them until they retire.

UniSuper cited two cases for its statement about "future claims": *Green v. Phillips*, 2000 WL 33521109, at *1 (Del. Ch. June 28, 2000); and *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 578 (E.D. Pa. 2001). *Green* was concerned with whether the release was so broad that it might release

[2] In *UniSuper*, by comparison, the proposed settlement released all "claims relating to the adoption of the October 2006 Rights Plan[, which was to] be adopted, pursuant to a shareholder vote, at the October 2006 shareholders meeting." 898 A.2d at 348. This type of broad release of future conduct is prohibited because it is impossible to know what kind of claims may result from the adoption of a plan in the future. Here, there is no question as to the maximum amount of compensation that Defendants may be awarded as a result of the Settlement, and the trial court specifically analyzed the type of claims that could be alleged stemming from such compensation as discussed *infra*.

claims even if the defendants "fail to perform the contract as modified by the settlement, and as a result the corporation fails to receive much or all of the consideration it bargained for." 2000 WL 33521109, at *1. This is not a concern here where the Release does not include claims to enforce the Stipulation. A498 ¶1(m)(5).

Schwartz said that future claims based on the same conduct as described in the complaint could be released, whereas future claims regarding unlitigated future conduct could not be included in the release:

> For example, ***while the release properly bars future claims regarding the bundling of NFL games on satellite television, which forms the basis of this litigation***, it also bars future claims for conduct such as the future bundling of games on cable television and the Internet. As discussed above, the legality of these practices under the antitrust laws was not litigated in the present suit…. [G]iven that under the proposed release class members would be releasing unlitigated future claims, the releases are too broad.

157 F. Supp. 2d at 578 (emphasis added). Here, the Complaint challenged Goldman's non-executive directors' compensation, and that is precisely what the relief achieved through the Settlement entails.

At the settlement hearing, the trial court analyzed the above case law and concluded that it did not prohibit all forward-looking releases, only those which release future torts and future breaches of fiduciary duty:

> This settlement attempts to address allegations of past overpayments by limiting future nonemployee director compensation. And that raises the question of the scope of a permissible release. It seems to me there has to be a forward-looking release of some kind if such a settlement will work because the purpose of a settlement is to provide peace for the issues that are raised in the litigation. On the other hand, a settlement cannot release future torts and future breaches of fiduciary duty. If it attempts to do that it's against public policy.

Exh. C to Obj. Br. at 42:2-13.

2. The Trial Court Did Not Abuse Its Discretion Concerning Its Findings of Fact with Regard to the Release

Having determined that a future release based on executing the terms of the Settlement was permissible so long as there was not a release of future torts or breaches of fiduciary duty, the trial court then determined that the release did not release any such future claims. First, the trial court noted that as part of the Settlement, the release on director compensation claims would only extend until the required stockholder vote in 2021, which was a necessary requirement of executing the Settlement, and that if the vote was in the negative there would not be a release of any future compensation claims. Exh. C to Obj. Br. at 42:20-43:1.[3] In this regard, the Court of Chancery often approves settlements that release claims related to the actions necessary to execute the settlement. *See Marie Raymond Revocable Tr. v. MAT Five LLC*, 980 A.2d 388, 406-07 (Del. Ch. 2008), *aff'd sub*

[3] That vote approving the compensation limits occurred on April 29, 2021, well before the Judgment was entered that finally approved the release.

nom. *Whitson v. Marie Raymond Revocable Tr.*, 976 A.2d 172 (Del. 2009) & *Marie Raymond Revocable Tr. v. MAT Five LLC*, 2008 WL 7961438 (Del.Ch.) (Stipulation of Settlement) ¶¶ 13(o), 15, 18, 19 (approving release of all claims regarding an amended exchange offer that was ongoing at the time of the settlement); *In re Coleman Co. Inc. S'holders Litig.*, 750 A.2d 1202, 1210-12 (Del. Ch. 1999) (approving "universal release of all claims relating to the transaction and later events" including claims challenging allegedly coercive settlement); *In re AXA Fin., Inc.*, 2002 WL 1283674, at *3, *5 (Del. Ch. May 22, 2002) (approving settlement releasing all claims by class members under federal or state law "'relating to the Proposed Transaction, the Revised Transaction, the discussions and negotiations pertaining thereto, the actions of the Special Committee, the tender offer and subsequent merger and any public filings or statements' made in connection therewith"); Ex. A (*In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL, ¶ 5 (Del. Ch. Sept. 16, 2011) (ORDER) (approving settlement releasing all claims relating to the challenged merger and agreed-upon merger agreement amendments implemented pursuant to the settlement MOU)).

The trial court then noted that by requiring the stockholder approval of the compensation plan in order for the release to continue after 2021, which would "cap[] [director compensation] at an amount substantially below current

compensation," the Settlement had incorporated the requirements of *In re Investors' Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1221 (Del. 2017),[4] and would allow for the directors to assert a stockholder ratification defense going forward. Exh. C to Obj. Br. at 43:7-13. As a result of this ratification defense, the only remaining fiduciary claim that could attack the compensation at issue would be a claim for waste. *See Invs. Bancorp.*, 177 A.3d at 1220 ("directors' post-approval compensation decisions [within specific limits approved by the stockholders] were subject to the business judgment rule standard of review, requiring … waste"). The trial court therefore determined that the release would only violate *In re Phila. Stock Exch.* if it released waste claims. Exh. C to Obj. Br. at 43:14-20.

The trial court then determined that because the release carved out any claims alleging that the directors' compensation "served no corporate purpose whatsoever," the Parties had carved out waste claims. The trial court determined that this language, in addition to the representations made by the Parties that this was their intent, led to him to conclude that waste claims were carved out of the release:

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[4] "[A]fter *Seinfeld*, directors could retain the discretion to make awards after stockholder plan approval, but the plan had to contain meaningful limits on the awards the directors could make to themselves before ratification could be successfully asserted." *Investors' Bancorp, Inc.*, 177 A.3d at 1221.

> [T]he parties to this agreement have made it clear to me that what they're attempting to do is to import the Delaware waste standard into their release. And I have accepted that, and I am relying on that in approving this settlement.
>
> And so a judicial estoppel arises. And should some case come up in which a plaintiff is attempting to bring a waste claim against the directors for a ratified stock plan consistent with the settlement here, and if that litigation involves a claim of waste that is within Delaware law but without the limitations of the settlement, I think a judicial estoppel would arise, and I think that the defendants would not be able to impose the settlement standard to the extent it is higher than the actual waste standard.

Exh. C to Obj. Br. at 43:22-44:14.[5]

Having determined that the only remaining claims after stockholder approval of the meaningful limits in the plan would be waste claims, and having determined that such waste claims had been carved out of the release, the trial court approved the Release and then signed the judgment on July 23, 2021 after the 2021 shareholder vote approving the compensation plan that contained meaningful limits on director compensation. Exh. E to Obj. Br. Plaintiff submits this was not error.

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[5] The Objector suggests that the trial court's position that Defendants are judicially estopped from arguing that waste claims are part of release going forward was "legally dubious," but the only case the Objector cites on this point supports that this is exactly the type of situation in which judicial estoppel applies. *See* Obj. at 28 (quoting *Motors Liquidation Co. DIP Lenders Tr. v. Allstate Ins. Co.*, 191 A.3d 1109 (Del. 2018) ("Judicial estoppel applies when a litigant's position contradicts another position that the litigant previously took and that the Court was successfully induced to adopt in a judicial ruling.")

In the face of this situation, the Objector concocts a host of hypotheticals about possible claims that could exist and that could be released, but none of these hypotheticals stand up to scrutiny.

First, the Objector argues that this Court may reverse *Investors' Bancorp* before 2024 such that the 2021 vote will no longer act as a ratification of director compensation. Obj. Br. at 24. But a settlement cannot be attacked based on hypothetical future changes to the law. *In re Resorts Int'l S'holders Litig.*, 1988 WL 92749, at *5 (Del. Ch. Sept. 7, 1988) (finding that an objection to the approval of a large termination fee failed because "[u]nder current Delaware law … the possibility that the actions of the disinterested Special Committee could be successfully challenged are doubtful."); *aff'd sub nom. In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 266-67 (Del. 1990) ("The trial court properly found that the contested transactions of the Griffin/Trump merger agreement had been approved by an independent and disinterested special committee and therefore would be accorded the presumption of the business judgment rule's application.").

Second, the Objector speculates that Goldman's peer group compensation could plummet in the next two years to make Goldman's director compensation "shockingly high." Obj. Br. at 24. Again, such speculation about this unlikely hypothetical should not require reversal here. But any claim that Goldman

director's compensation is "shockingly" high would be a classic waste claim, which the trial court held the Release had carved out. *Grobow v. Perot*, 539 A.2d 180, 189 (Del. 1988), *overruled for other reasons by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (claim of waste was one that would "shock the conscience"); *see also Brehm*, 746 A.2d at 253 (waste claim asserted a "shocking amount of severance").

Third, the Objector speculates that a hypothetical change in tax law could somehow make Goldman's director compensation "disadvantageous to stockholders." Obj. Br. at 24. But this Court has held that allegations that a board acted in a way that was disadvantageous under tax law was also a waste claim and one that would fail. *Freedman v. Adams*, 58 A.3d 414, 417 (Del. 2013) ("The decision to sacrifice some tax savings in order to retain flexibility in compensation decisions is a classic exercise of business judgment. Even if the decision was a poor one for the reasons alleged by Freedman, it was not unconscionable or irrational.")

Finally, the Objector speculates that "[a] foreign government [may] maintain[] that Goldman's director compensation should be cut, but the directors refuse." Obj. Br. at 24. Objector does not provide any support for the proposition that a foreign government has the ability to set limits on director compensation, let

alone that a shareholder derivative action could follow such an illegal foreign order. *Beard v. Elster*, 160 A.2d 731, 735 (1960) ("The issuance of stock option plans by Delaware corporations involves the internal affairs of a Delaware corporation and is, therefore, controlled by the laws of Delaware.") (*citing Elster v. Am. Airlines*, 100 A.2d 219, 225 (1953). Given that none of the Objector's hypotheticals would provide a cause of action other than one for waste, the Court should not reverse the Judgment based on such speculation.

The Objector goes on to argue that Plaintiff is taking a contrary position here to that which she took in *In re Salesforce.com, Inc. Derivative Litigation*, C.A. No. 2018-0922-AGB (Del. Ch.). Obj. Br. at 21. This is not so. In *Salesforce*, an objector represented by Mr. Rickey – Objector's counsel here – complained that

> the release is underinclusive because it does not buy peace for the Company. Nothing in the proposed Settlement establishes that compensation awarded according to its formula is, in fact, fair. Salesforce stockholders will have no means of ratifying the proposed formula, because the Settlement does not require a stockholder vote. Absent ratification, future stockholder plaintiffs may emerge to file new lawsuits and extract further fees.[6]

B335 (*Salesforce* Objection at 28).

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[6] By comparison, the Settlement here *required* a stockholder ratification vote on the non-employee director compensation amount. This vote, which was absent from the settlement in *Salesforce*, provided further justification for this Court finding that the proposed Settlement is fair and adequate, and that the Release is not overly broad.

In response to a different objector's argument (represented by Objector's counsel here) that the *Salesforce* settlement should "buy peace for the Company," the *Salesforce* plaintiffs asserted that the release was not capable of granting total peace because the plaintiffs had "carved out the ability for stockholders to enforce ***future fiduciary malfeasance***, should it occur," which "preserve[d] an asset of Salesforce …." B289 (*Salesforce* Brief in Further Support at 20) (citing *UniSuper*, 898 A.2d at 347) (emphasis added). This does not mean that a release cannot extend to the contractual requirements of the Settlement. In addition, as the trial court held, there is no "future fiduciary malfeasance" at issue here that the Release forgives.

In sum, the Release is circumscribed to the case at hand and not overbroad. The Court should not reverse the trial court's approval of it.

II. Delaware Law Does Not Require a Specific Finding of the Adequacy of a Derivative Plaintiff in Connection with a Settlement

A. Question Presented Regarding Derivative Plaintiff's Adequacy

When presenting a settlement of derivative claims, does Delaware law require the trial court to make a specific finding of a plaintiff's adequacy despite long-standing Delaware precedent stating that it is not a derivative plaintiff's burden to demonstrate her adequacy?

B. Scope of Review

The Court reviews the approval of a settlement of a derivative action by determining whether or not under all the facts and circumstances the trial court abused its discretion in approving the settlement. *Krinsky v. Helfand*, 156 A.2d 90, 94 (1959).

C. Merits of Argument

1. The Court Properly Approved the Derivative Settlement

The trial court properly applied Delaware law when approving the Settlement of Plaintiff's derivative claims.

> In determining whether or not to approve a proposed settlement of a derivative stockholders' action, it is not necessary for the court to try the issues of the case for the reason that any such requirement would defeat the purpose of settlement, itself. The court is called upon to consider and weigh the nature of the claim, the possible defenses, and to exercise business judgment in determining whether or not the proposed settlement is reasonable.

Krinsky, 156 A.2d at 94 (citing *Braun v. Fleming-Hall Tobacco Co., Inc.*, 92 A.2d 302 (1952)). Here, the record shows that the trial court engaged in a significant examination of the nature of the claims and possible defenses, and further exercised its business judgment to determine that the Settlement was reasonable. The trial court found:

> There's been no objection to the settlement itself. I note that the settlement, to my mind, implies a reduction in the amount that at least is expected to be paid at the current rates in an amount of about $4,600,000. That's discounted to present value, by my rough calculation. So this is the equivalent of a $4,600,000 reduction in nonemployee director compensation. That is a benefit to the company.
>
> Is it a benefit sufficient to extinguish the claims for past compensation? I've already ruled that those have gotten by a motion to dismiss. The standard is entire fairness. However, it is still a claim that has significant risk because director compensation is a matter that obviously involves many considerations.
>
> The directors on the Goldman board would be entitled to show that their compensation was not excessive. It would be expensive litigation. And it seems to me this reduction is so close to the maximum amount that could be recovered, even though it has some contingencies to it, that it is a reasonable and, indeed, a favorable compromise of the claims that were still at issue, which, as I've noted before, were not particularly strong.
>
> So all things considered, I think the settlement is fair compensation for the claims that are being resolved. It's fair to the class. And I am approving the settlement, which obviates the need to argue about Ms. Stein's fitness going forward, I think.

Exh. C to Obj. Br. at 44:19 – 46:1.

The Objector argues that the trial court's finding that it was unnecessary to argue about Ms. Stein's fitness "going forward" after the trial court had approved the Settlement was insufficient because it did not include an explicit statement as to Ms. Stein's adequacy, but there is no such requirement under Delaware law. Indeed, the cases the Objector cites demonstrate this. In *In re Infinity Broad. Corp. S'holders Litig.,* 802 A.2d 285, 291 (Del. 2002), this Court held that "Rule 23.1 includes an implicit requirement that the named plaintiffs in a settlement class have adequately represented the class as a whole" and cited *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1045 (Del.1996), for this principal. *Goodrich* was not a derivative case, but instead was a common fund case where the question was raised as to what kind of determination needed to be made by a trial court when considering a request for an award of attorney's fees from a common fund. *Goodrich* stated that in such a circumstance

> We hold that a request for an award of attorney's fees from a common fund must be subjected to the same heightened judicial scrutiny that applies to the approval of class action settlements. Consequently, we hold ***the Court of Chancery must make an independent determination of reasonableness on behalf of the common fund's beneficiaries***, before making or approving an attorney's fee award.

Goodrich, 681 A.2d at 1045–46.

Here, there is no question that the trial court made an "independent determination of reasonableness on behalf of" the beneficiary of the Settlement, which was Goldman Sachs. The trial court determined that the $4.6 million present value benefit was sufficient to extinguish the Company's claims regarding the director's past compensation. No other finding was necessary under *Goodrich*.

Moreover, the trial court also held in the Judgment that the Parties – which was defined to include Plaintiff Stein in her derivative capacity on behalf of Goldman Sachs, *see* A479-A480, were adequately represented in the litigation:

> Approval of Settlement and Entry of Final Judgment. The Settlement is found to be ***fair, reasonable, adequate, and in the best interests of GS Group*** and it is hereby approved. The Court further finds that the Settlement is the result of arms'-length negotiations between experienced counsel ***fairly and adequately representing the interests of the respective Parties***. Accordingly, this Court fully and finally approves the Settlement in all respects, the Parties are hereby authorized and directed to comply with and to consummate the Settlement in accordance with its terms, conditions, and provisions, and the Register in Chancery is directed to enter and docket this Order in the Action

Exh. E to Obj. Br. at 4.

For these reasons, this Court should not disturb the trial court's well-founded decision as to the adequacy of the Settlement and representation of the Parties.

2. There Is No Requirement that a Derivative Plaintiff Affirmatively Demonstrate Her Adequacy When Proposing a Settlement of Derivative Claims

Objector argues that there exists in Delaware law a specific requirement that the trial court must make a finding of a plaintiff's adequacy when approving a derivative settlement. Such an explicit requirement does not exist, however, and the Objector does not provide a single derivative settlement where a lack of such a finding caused this Court to reverse the settlement.

This Court has declared that a requirement exists in ***class action settlements*** since 1994 given the explicit requirements of Rule 23: "[W]e hold that, in every class action settlement, the Court of Chancery is required to make an explicit determination on the record of the propriety of the class action according to the requisites of Rule 23(a) and (b)." *Prezant*, 636 A.2d at 925. In *Prezant*, the Court held that it could not presume the adequacy of a class representative since Rule 23 contained explicit requirements:

> There are at least two problems with [implying adequacy in class actions]. First, as the United States Supreme Court has held, "actual, not presumed, conformance with Rule 23(a) [is] indispensable." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982). *See Malchman v. Davis*, 2d Cir., 706 F.2d 426, 433 (1983), cert. denied, 475 U.S. 1143, 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986) ("There is no doubt that the district court must make an independent evaluation of whether the named plaintiffs were adequate representatives of the class...."). Moreover, the plain language of 23(c)(1) clearly contemplates an

> explicit finding that the action satisfies the Rule 23 criteria and is thus properly maintainable as a class action ("the Court shall determine by order whether it is to be so maintained.").

Prezant, 636 A.2d at 924.

Here, there is no explicit requirement for a finding of adequacy in Rule 23.1. Instead, Rule 23.1(b) and (c) require that the representative plaintiff file an affidavit attesting to her refusal to be compensated in connection with the settlement unless such compensation is expressly approved by the trial court. Plaintiff complied with this requirement and filed such an affidavit. A521-23. Nothing more is required by Rule 23.1.

In addition, with regard to Rule 23, "[t]he burden rests upon the plaintiff to show he meets the requirements of Rule 23 for class certification." *Tuckman v. Aerosonic Corp.*, 1980 WL 272833, at *1 (Del. Ch. Sept. 8, 1980). But with regard to Rule 23.1, no affirmative showing is required by the plaintiff because,

> A defendant has the burden of proof in a motion to disqualify a derivative plaintiff and he must show that a serious conflict exists, by virtue of one factor or a combination of factors, and that the plaintiff cannot be expected to act in the interests of the others because doing so would harm his other interests. In effect, the defendant must show a substantial likelihood that the derivative action is not being maintained for the benefit of the shareholders.

Emerald Partners, 564 A.2d at 674 (citations omitted).[7] Here, since there was no explicit requirement for a finding of the adequacy of the derivative Plaintiff, and the burden rested on the Objector ***to prove*** "that a serious conflict exists, by virtue of one factor or a combination of factors, and that the plaintiff cannot be expected to act in the interests of the others because doing so would harm his other interests," it was not necessary for the trial court to explicitly state that Ms. Stein adequately represented the Company. Instead, the trial court's determination that the Parties had been adequately represented and the Settlement was fair and reasonable was more than what was required for the trial court to approve the Settlement.

In the absence of a specific requirement that the trial court find the adequacy of a derivative plaintiff as part of the settlement process, the Objector complains that the Plaintiff here should have brought her direct claims (both of which were dismissed by the trial court) as class claims. Obj. Br. at 33. But there is a long and respected history of non-class cases that provide common fund benefits, and the

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[7] The Objector ignores this distinction and instead inappropriately misquotes *Infinity Broadcasting*. Objector states that that case stated: "A determination of Stein's adequacy was "an 'essential component' of the settlement approval process. . . ." *Infinity Broadcasting*, 802 A.2d at 290–91." Obj. Br. at 32. But the full quote is "We have held that the Court of Chancery's determination of the ***adequacy of a class representative*** is an 'essential component' of the settlement approval process." *Infinity Broadcasting*, 802 A.2d at 291.

Objector has not provided support for his assertion that this Court should question the propriety of bringing such claims:

> That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion. Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But ***when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation***. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility. In the actual exercise of the power to award costs 'as between solicitor and client' all sorts of practical distinctions have been taken in distributing the costs of the burden of the litigation.

Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166–67 (1939) (footnotes omitted); *see also Goodrich*, 681 A.2d at 1044 (collecting common fund cases). This Court should not discourage such cases by requiring all of the formalities of class action certification in cases that do not purport to be class actions.

3. Ms. Stein Is an Adequate Derivative Plaintiff

In any event, the Objector's arguments concerning Ms. Stein fail to meet the "serious conflict" standard enumerated in *Emerald Partners*. *See also In re S. Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 766 n.5 (Del. Ch. 2011), *aff'd sub nom. Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012) ("[O]ur Supreme Court has made clear that this is a very difficult burden unless the plaintiff has an actual economic conflict of interest or has counsel who is incompetent and suffers from such a conflict.")

The Objector argues that Plaintiff's history of successfully challenging the disclosure of corporate compensation plans in connection with stockholder votes means that her presence here, where she has successfully remediated the disclosures concerning a compensation plan, makes her an inadequate derivative plaintiff. Obj. Br. at 34-38. The Objector does not provide any legal support for this theory. Indeed, the few cases he does cite suggest that his argument is wrong.

In *In re Infinity Broad. Corp.*, 802 A.2d at 291, which the Objector cites, this Court stated that the challenged plaintiffs were adequate representatives and held that the standard for an adequate representative plaintiff is "that a representative be generally familiar with the litigation." Here, Objector advances no evidence to the contrary.

The Objector also argues that because Plaintiff did not secure disgorgement as part of this Settlement, the relief acquired in this Settlement could not "be thought to be what would be desired by the other members of the class…." Obj. Br. at 35 (quoting *Prezant*, 636 A.2d at 924). But Objector did not contest the relief in the Settlement. And for over half a century, Delaware courts have held that a reduction of future compensation is a benefit sufficient to warrant approval of a settlement in cases challenging past compensation. *Goodman v. Futrovsky*, 213 A.2d 899, 903 (Del. 1965) ("that the savings to Giant made by the restrictions on [its vendor] Shapiro's profit amounts to $100,000 annually, the total saving to Giant over the ten-year life of the contract is $1,000,000.").

Moreover, compared to other settlements of director compensation cases, this Settlement's reduction in compensation is significant. *See* Exh. B, Tr. 35:10 – 36:3 (*Steinberg v. Casey*, C.A. No. 10190-CB (Del. Ch. Dec. 31, 2015) (settlement approved reducing director equity compensation by $225,000 compared to historical compensation for two years with no cap on cash compensation and an exception for changes in Company financial performance or structure)); Ex. C, Tr. 19:12 –20:17 (*Espinoza v. Zuckerberg*, C.A. No. 9745-CB (Del. Ch. Apr. 26, 2016) (settlement approved providing for two shareholder votes on director compensation without a reduction in compensation); Ex. C, Tr. 10:8 –

11:4 (*Seinfeld v. Slager*, C.A. No. 6462-VCG (Del. Ch. Feb. 19, 2014) (settlement approved capping equity compensation at amounts that had been granted previously)). In sum, the trial court's approval of the Settlement should be affirmed.

III. The Trial Court Did Not Abuse Its Discretion In Awarding the Objector $100,000

A. Question Presented Regarding the Objector's Fee

Did the trial court abuse its discretion when it awarded the Objector $100,000 when the trial court rejected the original settlement for reasons that were "were not entirely congruent with the Objector's"?

B. Scope of Review

"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." *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980).

C. Merits of Argument

Objector misstates the present situation in his Question Presented. His Question Presented asks, "Whether this Court should… disallow fee penalties to objectors because a reviewing court might have independently reached the same result?" Obj. Br. at 39. But the trial court did not penalize the Objector here; it awarded him $100,000 after applying the *Sugarland* factors.

In determining Objector's award in connection with his objection to the earlier proposed settlement, the Court of Chancery carefully followed the "factors pertinent to setting [] a fee" set forth by this Court in *Sugarland*, 420 A.2d 142. *See Stein*, 2019 WL 2750100, at *1. As part of the weighing of those factors, the

Court of Chancery considered "several benefits" to which Objector "contributed," including avoidance of the $575,000 fee request sought by Plaintiff. *Id.* at *2. The court observed that the "outer limit" of an "equitable fee" would be one-third of that amount ($195,000). *Id.* "Delaware case law supports a wide range of reasonable percentages for attorneys' fees, but 33% is 'the very top of the range of percentages.'" *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1259 (Del. 2012) (citing *Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *13 (Del.Ch. Aug. 30, 2007)). Having established that "outer limit," the trial court then determined that if it "credit[ed]" Objector with "half of that fee avoidance" and weighted other possible benefits, an award of $100,000 would be "equitable." *Stein*, 2019 WL 2750100, at *2. The trial court stated in a subsequent decision: "I intended the initial award of fees in the amount of $100,000 to be ***in full compensation for the benefit created***." *See Stein*, 2021 WL 2926169, at *2. This award is certainly adequate given that the court found that "Objector's participation" was "not crucial" to the trial court's denial of approval for the initial settlement. *Stein*, 2021 WL 2926169, at *2; *see also Stein*, 2019 WL 2750100, at *1 ("[M]y conclusions were not entirely congruent with the Objector's.").

As the Objector concedes, fee awards are a matter of "considerable discretion." Obj. Br. at 39. Despite this concession, he attempts to invoke *de novo*

review by quoting *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010), which held, “We review ***a denial of an application for attorneys' fees*** and costs for abuse of discretion, but we review de novo the legal principles applied in reaching that decision.” But fees were not denied here. They were awarded in an amount that the Objector believes was insufficient. The Court of Chancery did not abuse its discretion when it declined to agree to the Objector’s demand for a fee award in excess of $100,000. Rather than too low, Objector’s $100,000 fee award exceeds many awards granted to objectors by other Delaware courts. *See In re Riverbed Tech., Inc. S’holders Litig.*, 2015 WL 7769861, at *3 (Del. Ch. Dec. 2, 2015) (objector awarded $10,000 plus expenses); *Brinckerhoff* v. *Tex. E. Prod. Pipeline Co., LLC*, 986 A.2d 370, 397 (Del. Ch. 2010) (objector fee of $80,000 constituting 0.08% of a $100 million benefit to which objector and plaintiffs both contributed).

Finally, Objector opines at length on policy reasons why objectors supposedly should be compensated for providing their “adversarial” input. Obj. Br. at 42-47. As the Court of Chancery recognized, however, the benefit conferred is the “paramount” factor when determining a “proper fee award.” *In re Cox Radio, Inc. S’holders Litig.*, 2010 WL 1806616, at *20 (Del. Ch. May 6, 2010), *aff’d*, 9 A. 3d 475 (Del. 2010).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that the Court should affirm the Settlement and Judgment.

Dated: November 10, 2021

Respectfully submitted,

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