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IN THE

Supreme Court of the State of Delaware

SEAN J. GRIFFITH,

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

COURT BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 2017-0354-SG

APPELLANT'S CORRECTED REPLY BRIEF

OF COUNSEL:
Raffi Melkonian (*pro hac vice*)
WRIGHT CLOSE & BARGER, LLP
One Riverway, Suite 2200
Houston, Texas 77056
Tel: (713) 572-4321

Anthony A. Rickey (Bar No. 5056)
MARGRAVE LAW LLC
3411 Silverside Road, Suite 104
Baynard Building
Wilmington, Delaware 19810
Tel: (302) 604-5190
Attorney for Sean J. Griffith, Objector Below-Appellant

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PRELIMINARY STATEMENT

The opening brief requested that the Court reverse and remand a final judgment approving an unfair settlement and an order awarding an unjustifiably diminished objector's fee. The Answering Briefs offer no reason to do otherwise.[1]

The parties' primary argument favoring their forward-looking settlement, directly forbidden by precedent, is that any future claims are "barred" by *Investors Bancorp*. That is wrong. *Investors Bancorp* affords directors the protection of business judgment review rather than entire fairness. This settlement *extinguishes* future claims—exactly what this Court teaches that ratification cannot accomplish.

The parties' attempt to escape *Prezant's* plaintiff-adequacy rule fares no better. There is no principled distinction between a derivative settlement that binds all stockholders and a class settlement, which is why both this Court and the trial court have referred to a derivative settlement "class." The importance of an adequate plaintiff—and findings that this Court can review—is identical.

As for the parties' contention that Objector provided little value, their own briefs betray them. The very cases they regard as failures prove the value that objectors provide. This Court should encourage well-reasoned objections to inadequate settlements, while the parties hope to cut them off at the knees.

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[1] The Opening Brief, Plaintiff's Answering Brief, and Defendants' Answering Brief are abbreviated as "OB," "PAB," and "DAB," respectively.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY APPROVING AN OVERBROAD RELEASE.

PHLX provides a clear rule: 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, then they cannot possibly be the basis for the underlying action. . . ." *In re Philadelphia Stock Exchange, Inc.*, 945 A.2d 1123, 1146 (Del. 2008) ("*PHLX*"), *quoting UniSuper, Ltd. v. News Corp.*, 898 A.2d 344, 347 (Del. Ch. 2006). The settlement releases claims concerning upcoming payments to unknown individuals between now and 2024. It clearly violates this principle. None of the parties' responses overcome this straightforward statement of law.

First, *PHLX* is not a balancing test, so discussion of the settlement consideration is a red herring. *See* 945 A.2d at 1146. Second, this Court has recognized no exception to *PHLX* for actions taken to execute a settlement, and if it did, such an exception is inapplicable here. Third, the Answering Briefs' arguments concerning *In re Investors Bancorp, Inc. Stockholder Litigation*, 177 A.3d 1208 (Del. 2017), ignore this Court's longstanding teaching on ratification. Finally, the parties' attempts to deny the settlements' obvious scope, encompassing claims arising from future events, lack merit.

Two preliminary points are necessary. *De novo* review is appropriate where the trial court "incorrectly applied legal precepts to the relevant facts" concerning a

settlement release. *PHLX*, 945 A.2d at 1145. The Answering Briefs rely on the same facts as the Opening Brief: mainly, the text of the complaint and the settlement. *Compare* DAB at 15–16 (quoting settlement text) *with* OB at 22–23 (same). Appellees disagree on how *PHLX* applies to those facts. That is a paradigmatic legal question. Thus, *de novo* review is appropriate.

Likewise, the settlement's text betrays the parties' description of a "narrow release." DAB at 29; *see also* PAB at 17. The parties could have restricted the release to claims involving the decision to set specific compensation levels in the 2021 stock incentive plan ("2021 SIP"). Instead, it bars potential actions which "now or hereafter, are based upon, arise out of, relate in any way to, or involve, directly or indirectly [. . .] the amount of [Goldman's] non-employee director compensation to be paid or awarded pursuant to the 2021 SIP. . . ." A497. This language targets broader claims for damages: it is difficult to imagine any lawsuit involving future non-employee director compensation that seeks damages, for any reason, without "in any way" involving the amount of future compensation.

Once the appropriate standard of review and the actual scope of the release are recognized, the Answering Briefs' defenses crumble. Approval should be reversed.

A. Arguments Concerning the Settlement Consideration Must Be Addressed in a Later Case or Another Forum.

Defendants start with a red herring: Objector does not appeal the "adequacy of the Settlement consideration." DAB at 20–23; *see also* PAB at 8. *PHLX* is not a balancing test: Delaware settlements cannot release claims based on future events whatever relief they secure. *See PHLX*, 945 A.2d at 1146. Objector did not appeal the settlement consideration or Plaintiff's $612,500 fee not because they are fair, but because establishing an abuse of discretion requires data unavailable today.

Time will tell if post-*Investors Bancorp* settlements produce their anticipated benefits. It took over a decade to recognize, after scholars "present[ed] empirical evidence," that disclosure settlements "typically provided the class with nothing of substance. . . ." *KTR Parts. LLC v. Palantir Techs., Inc.*, 203 A.3d 738, 759 n.97 (Del. 2019), *citing* Jill E. Frish, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 581–85 (2015). Post-*Investors Bancorp* settlements may also underperform.[2] But a *Riverbed*- or *Trulia*-style attack on them, or an abuse-of-discretion appeal, must await analysis impossible to complete now.

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[2] For instance, if a company goes bankrupt or is acquired before a settlement's terms expire, the anticipated benefits from reduced future compensation disappear.

Shareholders now suspicious of plaintiff-guided salary negotiations may look to the General Assembly or Congress for relief. Appeal on this basis is premature, although it bears repeating that reversal of the settlement will not lead to consideration flowing back to Defendants. *See* OB at 29–30.

B. The Release Extends Beyond Actions "Necessary to Execute the Settlement," an Exception Not Permitted by this Court.

The parties contend that Delaware law permits "settlements that release claims related to the actions necessary to execute the settlement." PAB at 23; *see also* DAB at 27–28. Of course, paying 2024 compensation is not part of settlement execution. *See* OB at 21. Even if it were, this Court has not recognized an exception to *PHLX*, and the Answering Briefs' authority suggest that the Court of Chancery does not either.

The only cited case applying *PHLX* to future events, *In re Medley Capital Corp. Shareholders Litigation* (cited DAB at 27–28), favors reversal. After the *Medley* court expressed initial misgivings, the parties agreed "to amend the release to limit its scope to claims that were or could have been asserted ***through the date of the settlement hearing***." *Medley*, C.A. No. 2019-0100-KSJM at 33:8–14 (Del. Ch. Nov. 19, 2019) (TRANSCRIPT) (DAB Ex. C) (emphasis added). *Medley*'s release extended "to all ***historical*** aspects of the amended agreement despite the fact that certain terms are unrelated to the litigated issues. . . ." *Id*. at 37:12–20 (emphasis added). It did not release claims in the far future. The *Medley* court's confidence in

this result relied on both (i) the absence of objectors and (ii) specific findings about the adequacy of the stockholder representative. *Id*. at 39:24–40:7. Neither applies here.

The remaining cases mostly involve settlements approved without considering potentially forward-looking aspects of a release. The objectors in *Marie Raymond Revocable Trust v. MAT Five LLC* challenged the release of "federal securities claims ***currently pending*** in New York." 980 A.2d 388, 406 (Del. Ch. 2008), *aff'd sub nom. Whitson v. Marie Raymond Revocable Tr.*, 976 A.2d 172 (Del. 2009) (emphasis added) (cited at PAB 23–24; DAB 28). *Marie Raymond* describes the release as "broad enough to cover all claims ***that have been asserted***" in two related actions outside Delaware. *Id*. at 397 (emphasis added). Even if *Marie Raymond*'s settlement released claims based on future events, nothing suggests the parties, the objector, the trial court, or this Court considered it.

The Answering Briefs' other case law similarly does not engage with *PHLX* or *UniSuper*. Indeed, the parties cite several cases predating them. *See* PAB at 24, *citing In re Coleman Co. Inc. S'holders Litig.*, 750 A.2d 1202 (Del. Ch. 1999); *In re AXA Fin. Inc.*, 2002 WL 1283674 (Del. Ch. May 22, 2002); DAB at 28–29, *citing Blank v. Belzberg*, 858 A.2d 336 (Del. Ch. 2003). Of these, only *Blank v. Belzberg* considers post-settlement events. *Blank* discusses a release encompassing a securities disclosure to be filed no later than ten days following settlement approval.

See 858 A.2d at 341–42. That disclosure could, at most, include recent post-settlement events. *PHLX* casts doubt on *Blank*'s vitality, but even *Blank* never pretended to extend a release years into the future.

To the extent that the Answering Briefs' remaining citations discuss objections to settlements, none of them were based on releases covering future events. *See Coleman*, 750 A.2d at 1210–1212 (denying objection to release based on "transaction and later events" described in opinion, including claims assertable in existing Florida suit or under federal securities law); *AXA Fin.*, 2002 WL 1283674, at *5 (denying objection to release of claims under Pennsylvania statute). As for the final order in *In re Compellent Techs., Inc. S'holder Litigation*, if it purports to reach claims arising out of future events, Plaintiff offers no sign that the trial court knew this when it approved the settlement. C.A. No. 6084-VCL (Del. Ch. Sept. 16, 2011) (ORDER) (cited PAB at 24).

At best, this authority supports the proposition that the Court of Chancery (a) before *PHLX*, once approved a release of claims accruing within ten days of its order; (b) before or after *PHLX*, may have approved overbroad releases where no one raised the issue; and (c) when recently considering *PHLX*, approved a settlement only after the parties narrowed the release to claims ripe as of the settlement hearing. The parties cite no post-*PHLX* case, apart from this one, where the trial court

knowingly approved a "forward-looking release," let alone one looking years into the future. OB Ex. C at 42.

The parties could have reached a *Medley*-style settlement limited to the decision to approve the 2021 SIP's compensation levels. Instead, they drafted broader language encompassing unknowable events between now and 2024. OB at 22–25. Unless this Court corrects the error, such releases will likely become the norm.

C. The Settlement's Protection Extends Beyond *Investors Bancorp*.

The parties' alternate position—that released claims based on future events are "*already barred* by this Court's *Investors Bancorp* decision" (DAB at 23)—is betrayed by their litigation posture. Defendants bemoan the inefficiency of litigation (*id*. at 38), but know how to avoid it. After Objector protested the first settlement's release of antitrust claims—truly an unnecessary sweetener—the parties mooted the issue. DAB at 10. If the release simply replicated *Investors Bancorp*, the parties could do the same. They haven't. By digging in, they underscore that Objector is right on the law.

In fact, the parties brush aside a decade of this Court's jurisprudence limiting stockholder ratification:

> With one exception, the "cleansing" effect of such a ratifying shareholder vote is to subject the challenged director action to

> business judgment review, as opposed to "extinguishing" the claim altogether (i.e., obviating all judicial review of the challenged action).

Gantler v. Stephens, 965 A.2d 695, 713 (Del. 2009).

Read together, *PHLX* and *Gantler* limit both directors' ability to shield themselves from fiduciary duty lawsuits and stockholder plaintiffs' ability to sell "litigation insurance." Settlement releases utterly extinguish claims—but only those based on operative facts a plaintiff could include in a complaint. *PHLX*, 945 A.2d at 1146. By contrast, stockholder ratification permits directors to protect past decisions to carry out future acts with the formidable, but not impregnable, shield of business judgment review. *Investors Bancorp,* 117 A.3d at 1211; *Gantler*, 965 A.2d at 713.

The settlement upends this balance by extinguishing claims that *Investors Bancorp* does not, with significant consequences for stockholders. Defendants' observation that "the Settlement contains no 'sanctions' provision" (DAB at 26) overlooks that their bargain is a court order, not a mere contract. Ratification may result in a lawsuit being dismissed, but a stockholder defying the Second Settlement violates an injunction. OB Ex. E ¶ 7. This does, and should, have teeth. As for courts not imposing sanctions for "meritorious" lawsuits (DAB at 26), a later suit may be meritless not due to factual deficiency, but because it violates the

settlement's litigation bar. How would a court find claims meritorious if they are dismissed at the outset on pain of contempt?

As for the Second Settlement's carve-out for payments that "serve[] no corporate purpose whatsoever" (A498), the parties purposefully avoided the word "waste." Neither Answering Brief cites authority describing this language as Delaware's *test* for waste, rather than an *example* meeting the test. They cannot: waste is a comparative, not absolute, standard. Tellingly, neither party even discusses *Feuer*, which sustained a waste claim against compensation of small, but not nonexistent, corporate purpose. *See* OB at 27, *citing Feuer ex rel. CBS Corp. v. Redstone*, 2018 WL 1870074, at *10 (Del. Ch. Apr. 19, 2018). As for the parties' reliance on judicial estoppel, how can statements made by Defendants here estop *different* litigants (e.g., unnamed future directors) simply because Goldman is a party? *See* DAB at 26; PAB at 26 n.5 (citing *Motors Liquidation Co. DIP Lenders Tr. v. Allstate Ins. Co.*, 191 A.3d 1109 (Del. 2018) (judicial estoppel applies to positions "that ***the litigant*** previously took" (emphasis added)). The parties offer no relevant authority.

D. The Release Encompasses Claims Based on Future Events.

As to examples of events between now and 2024 that may sustain claims, the Answering Briefs cannot overcome the settlement's text: it releases any claims that arise "now or hereafter" concerning payments made in the future. A497. Defendants

do not specifically address the Opening Brief's hypotheticals. DAB at 30. Their reliance on *In re Sirius XM Shareholder Litigation* simply evades the issue. *See* DAB at 27, *citing* 2013 WL 5411268, at *5 (Del. Ch. Sept. 27, 2013). Unlike *Sirius* (or *Medley*), this settlement extends to claims arising from acts in the future, not simply past decisions to approve the settlement. Meanwhile, Plaintiff's attempts to evade possible scenarios fail.

First, Plaintiff repeatedly bemoans Objector's "speculation." PAB at 27, 29; *see also* PAB at 28 ("Objector speculates. . . ."). But that is the point: settlements compliant with *PHLX* do not invite speculation because they release only claims arising from past events. Had the parties stuck to a *Medley*-style release, explicitly limited to claims ripe as of the settlement hearing, debating the likelihood of future events would be irrelevant. They chose otherwise, despite *PHLX*. One can only guess at the exact mischief this will cause between now and 2024.

Second, Plaintiff contends that "a settlement cannot be attacked based on hypothetical future changes to the law." PAB at 27. Yet Plaintiff's authority stands for the unremarkable proposition that past actions of a board are evaluated under existing law. *See In re Resorts Int'l Stockholder Litig.*, 1988 WL 92749, at *5–6 (Del. Ch. Sept. 7, 1988). The current settlement exceeds existing law, both by defying *PHLX* and by extinguishing challenges to future fiduciary malfeasance, unless they fall into a subset of waste claims. The parties cite no authority permitting

a settlement to expand the protections of Delaware law and, worse, immunize directors from any future reversal of that law.

Finally, Plaintiff unsuccessfully tries to cram all future claims for fiduciary malfeasance into a waste-shaped box. Delaware law is not so limited:

- This Court did not hold that waste is the only possible claim arising when directors accept compensation rendered excessive by a change in tax law. PAB at 28. Rather, the *Freedman* plaintiffs brought fiduciary duty and waste claims, but only appealed the latter. *See Freedman v. Adams*, 58 A.3d 414, 416 (Del. 2013); *see also Freedman v. Adams*, 2012 WL 1345638, at *1 (Del. Ch. Mar. 30, 2012).
- Were Goldman's U.S. Peer compensation to fall to levels that again render Goldman's peer compensation "shockingly" high, a waste claim might be appropriate—but Plaintiff cites no authority holding this is the *only* potential claim. *See* PAB at 27–28. In any event, the settlement would release such a waste claim, as it would be based on relatively excessive compensation, not payments that served "no corporate purpose whatsoever." A498. That is why the parties chose their language.
- Finally, Plaintiff supposes that, because a Delaware company's stock incentive plan is governed by Delaware law, no country anywhere in the world could order the clawback of director pay, even as a penalty for wrongdoing.

> *See* PAB at 28–29. The issue is not whether a foreign government can limit pay under the internal affairs doctrine. It is whether, were a government to order such a clawback and the directors refused, any subsequent derivative lawsuit would "involve" the "amount . . . to be paid or awarded pursuant to the 2021 SIP. . . ." A497. It clearly would.

Unsurprisingly, the release defies the boundaries of acceptability. Stein's first bargain reprised her dozens of zero-dollar M&A settlements for the compensation context. Her second attempt provides a roadmap for plaintiffs to convert lawsuits alleging past overcompensation into insurance against future fiduciary duty actions. Unless corrected, the Court may expect this tactic to become "market," both in non-employee director cases and others.

Instead, the Court should reaffirm the teachings of *PHLX*, *Gantler*, and *Investors Bancorp*, and reemphasize the distinction between settlement releases and ratification. Settlements containing forward-looking releases contradict Delaware law, and the judgment below should be reversed.

II. THE COURT OF CHANCERY ERRED BY APPROVING THE SETTLEMENT WITHOUT FINDINGS CONCERNING PLAINTIFF'S ADEQUACY.

No Party cites a single finding concerning Stein's adequacy as a plaintiff. Instead, they insist that the trial court satisfied Rule 23.1's implicit requirements by finding that the settlement was generally fair and concluding that counsel adequately represented the parties in negotiating the settlement. PAB at 33–34; DAB at 31–33. This conflates two distinct inquiries required by this Court: adequacy of a plaintiff (which Objector challenged) and adequacy of counsel (which he did not). *PHLX*, 945 A.2d at 1143–45 (considering both arguments separately).

The general elements of adequacy of representation are the same under Rule 23 and Rule 23.1. *South v. Baker*, 62 A.3d 1, 21 (Del. Ch. 2012). *Infinity Broadcasting* should have clarified that explicit findings were required in this action, which was both a derivative action and a class action in all but name. OB at 32–33, *discussing In re Infinity Broadcasting Corp. S'holders Litigation*, 802 A.2d 285 (Del. 2002). But even were the Court to apply a standard less rigorous than *de novo* review, it would not matter: there are simply no relevant findings to test for being "supported by the record and . . . the product of an orderly and logical reasoning process." *PHLX*, 945 A.2d at 1143.

A. A Stockholder Plaintiff's Adequacy is an Essential Component of the Settlement Approval Process.

The Answering Briefs argue that judicial findings concerning adequacy are unnecessary in derivative actions. *See* PAB at 35–37; DAB at 33–35. But *Infinity Broadcasting*'s description of Rule 23.1's "implicit requirement that the named plaintiffs in a ***settlement class*** have adequately represented ***the class*** as a whole" was no slip of the tongue.[3] *Infinity Broadcasting*, 802 A.2d at 290–91 n.13 (emphasis added). Formally, derivative settlements do not produce a "settlement class." Practically, there is no difference. As the Court of Chancery has stated, derivative suits "should be seen for what they are, a form of class action." *Parfi Holding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 940 (Del. Ch. 2008).

The parties' attempts to ground *Prezant*'s reasoning solely in Rule 23(a) have no merit. *See* PAB at 35–36 (discussing *Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994)); DAB at 33–34 (same). Certainly, the prerequisites for derivative and class actions are not identical. For instance, numerosity "is irrelevant in the derivative context." *In re Wal-Mart Stores, Inc. Del. Deriv. Litig.*, 167 A.3d 513, 526 (Del. Ch. 2017), *rejected on other grounds sub nom. Cal. State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824 (Del. 2018) ("*Alvarez*"). However, both forms of representative action require adequacy of representation as a matter of due process.

[3] The trial court likewise described the settlement's reduced compensation as "fair to the class." OB Ex. C at 45:22.

Compare Prezant, 636 A.2d at 923 (adequacy "has a constitutional dimension" based in the Due Process Clause) *with Alvarez*, 179 A.3d at 850–52 (discussing due process requirements of adequacy in derivative suits). *Prezant*'s rule for settlements shields the same interests in class and derivative lawsuits, which provide similar protections to stockholders—notice and court approval. *Compare* Rule 23(e) *with* Rule 23.1(c); *cf. Wal-Mart*, 167 A.3d at 526 (noting similarity between analogous Fed. R. Civ. P. 23(e) and 23.1(c)).

That the Court of Chancery, at the merits stage, allocates defendants the burden of proving a plaintiff inadequate holds little practical consequence. *See* PAB at 36–37; DAB at 34. This Court has never adopted the rule (*see South*, 62 A.3d at 21), but if it did, it is unclear that defendants' merits-stage burden should apply to nonparties—with limited due process rights or entitlement to discovery—drawn into court by non-adversarial settling parties.

At the settlement stage, the same due process concerns and policy implications underlie class and derivative actions. To the extent that *Infinity Broadcasting* did not incorporate *Prezant*'s requirements concerning adequacy into derivative settlements, this case offers the opportunity to do so. *Prezant*'s rationale has no less force here. By protecting settlements from collateral attack, affirmative findings will "help insure that the final release sought by defendants in settlements is indeed final." *Prezant*, 636 A.2d at 926. And where, as here, a plaintiff's

adequacy is challenged, a court's findings of fact and supporting reasoning will "facilitate possible appellate review." *Id*. at 925. Had the trial court made such findings, they could be reviewed for abuse of discretion. *Id*. It did not.

B. Stein is an Inadequate Plaintiff.

Had the Court of Chancery evaluated Stein's adequacy, it would have been required to reject the settlement. Plaintiff's response to the Opening Brief simply ignores her record. Her litigation strategy revealed a "serious conflict" (PAB at 39)—indeed, an obvious conflict—between her and other stockholders.

Stein claimed to represent Goldman stockholders, rather than just herself, in contesting purportedly excessive compensation that twelve named Goldman directors awarded themselves between 2015 and 2017. A29–31. Any reasonable stockholder crediting Stein's allegations would also believe that recovering excessive compensation would offer Goldman ***some*** value. Not Stein: she insisted that disgorgement "would not be of any measurable benefit to the company itself." A215. To her, the only reasonable fixes were either to "reduce the compensation going forward"—*i.e.*, including directors never accused of wrongdoing—or "fix[] something else that's wrong. . . ." A218. This was at best idiosyncratic, and at worst self-serving. The conflict exists not because Stein failed to "secure disgorgement" (PAB at 40), but because she did not seek, and in fact disavowed, this obvious remedy in pursuit of an unfair settlement.

This highlights the importance of adequacy being considered independently from the sufficiency of the settlement consideration. An adequate plaintiff, weighing the value of reduced future compensation against disgorgement, might find the former more appealing or achievable. But what rational stockholder would choose representation by a plaintiff convinced that compensation from wrongdoers for alleged wrongdoing has ***no monetary value whatsoever***? *See Prezant*, 636 A.2d at 924 ("[u]nless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize the plaintiffs as representative, and a violation of due process" to bind absent stockholders (quotation omitted)).

Stein took this position while advocating for an unfair, zero-dollar settlement—for which Defendants agreed to cause Goldman to pay $575,000 to her counsel. A70. That bargain was consistent with her legion of non-monetary settlements. OB at 35–37. Had the trial court found this conduct adequate, it would warrant reversal as an abuse of discretion. But the trial court did *not* exercise its discretion. It made no relevant findings, and reversal and remand is necessary so that it may do so to protect the interests of Goldman and its stockholders.

III. THE COURT OF CHANCERY ERRED BY REDUCING AN OBJECTOR'S FEE BASED BECAUSE IT REACHED THE SAME CONCLUSION.

This Appeal asks the Court to adopt a narrow rule, based on precedent from outside Delaware, cabining a single aspect of the trial court's considerable discretion. A trial court should not deny full credit for the benefit created by a successful objection because it might have reached the same conclusion independently. Such a rule is necessary because stockholders must respond to a settlement notice without knowing if the trial court already shares their concerns. If a trial court may then cut an objector's fee, even when it rejects a settlement based upon arguments only raised by an objector, stockholders will find it difficult or impossible to retain counsel.

In response, the Answering Briefs misconstrue the opinion below, miscast the record, and mistakenly fail to cite controlling authority from other courts. Placed in context, these arguments—made by the same parties that earlier advocated for a demonstrably unfair settlement—do not withstand scrutiny.

A. The Trial Court Improperly Credited Objector with Half the Value of Avoiding the $575,000 Fee.

Defendants first attempt to deny the problem, insisting that the opinion below "determined that any benefit created by Objector was at most half of the avoided fee request." DAB at 37. But the record is indisputable: the trial court rejected the first settlement and the ***entire*** $575,000 payment that Defendants agreed to cause

Goldman to pay. A289. If Objector created only half that benefit, where did the other half come from? Not Plaintiff or Defendants, who delayed the settlement hearing, filed three briefs, and argued extensively in favor of their bargain (and, in Plaintiff's case, the $575,000 fee). A6, A8, A161–67, A159–276.

The answer lies in the trial court's conclusion that Objector's efforts were "not crucial" to its decision. OB Ex. D at 7. But neither Answering Brief points to a single conclusion reached in the opinion rejecting the unfair bargain that was not advanced by Objector and *only* the Objector. *See* OB at 40–42. If his participation was not "crucial," it must be because the first settlement was so flawed that the trial court did not believe an objection necessary. But Objector could not know that: once the trial court approved the notice, he had to assume that even a manifestly unfair deal might prevail. After all, the trial court could have rejected the settlement before sending notice.

Thus the need for the rule advanced here. If the opinion below stands, stockholder objectors will be unable to retain adequate counsel. Perversely, the worse the settlement, the less likely that a stockholder will be able to find contingency attorneys. The resulting policy will not "encourage wholesome levels of litigation" advancing stockholder interests. *In re Xoom Corp. S'holder Litig.*, 2016 WL 4146425, at *5 (Del. Ch. Aug. 4, 2016).

B. Defendants Misstate the Record and Case Law to Denigrate Stockholder Objections.

Plaintiff does not address policy arguments favoring stockholder objections. *See* PAB at 44. Defendants respond by blaming Objector for Plaintiff's $612,500 fee (DAB at 39), which only exists because, after Objector opposed the first settlement, the parties reached a more valuable (if still inequitable) deal. Worse, Defendants denigrate Objector's efforts by truncating legal citations and misrepresenting the record. Placed in context, Defendants' facts reveal the inequity that would be corrected by an appropriate rule.

1. Defendants Omit Authority to Understate the Value of Stockholder Objections.

Defendants describe *Delman v. Quality Distribution, Inc.* as "approving [a] merger over Griffith's objection. . . ." DAB at 9, *citing* 2017 WL 2694490, at *1 (Fla. Cir. Ct. June 21, 2017) (ORDER). They omit Objector's successful appeal of *Delman*, which led to *Trulia* becoming good law in Florida and the reversal of the trial court's denial of an objector's fee. *Griffith v. Quality Distrib.*, 307 So.3d 791, 800 (Fla. 2DCA 2018). The *Delman* parties then reached a $3.25 million settlement, with a hearing scheduled in January 2022.[4] *See* Order, *Delman v. Quality Dist.*, No. 15-CA-005553, at 11 (Fla. Cir. Ct. Sept. 24, 2021) (Ex. A); *see also* QDI

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[4] This Court may take judicial notice of these documents as court-approved sources "whose accuracy cannot reasonably be questioned." D.R.E. 201(c)(1).

Shareholder Litigation Settlement, *Important Documents*, *available at* https://qdisettlementlitigation.com/Home/Documents (updated 11/09/2021) (providing court-approved notice and preliminary approval order). Proper citation would have highlighted the importance of the rule proposed here. This is not Griffith's first case in which the plaintiff and defendants both insisted that their zero-dollar settlement gave away claims of minimal value, only to reach a monetary deal after a successful objection.

Even Defendants' litany of unsuccessful cases, placed in context, prove the benefit of objections. True, Griffith's California appeal was unsuccessful. *See Evangelista v. Duggan*, 2020 WL 780961, at *4 (Cal. Ct. App. Feb. 14, 2020) (cited DAB at 9). But a funny thing happened: after the California trial court denied Griffith's objection, it began to apply *Trulia*, *sua sponte*, in California disclosure settlements. *Compare id.* at **6–7 (noting settlement approval in July 2016) *with* Pierluigi Matera & Ferruccio M. Sbarbaro, *From* Trulia *to* Akorn: *A Ride on the Roller Coaster of M&A Litigation*, 44 DEL. J. CORP. L. 61, 79 n.69 (2020) (describing rejection of disclosure settlements in Nov. 2016 and Apr. 2017). And of course, the *Riverbed* case (DAB at 9) served as prelude to *Trulia* itself.[5] *In re Trulia Inc. S'holder Litig.*, 129 A.3d 884, 895–96 n.36 (Del. Ch. 2016).

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[5] Defendants do not explain the relevance of a law review article authored by Griffith and his counsel. DAB at 9. There is nothing invidious about the piece,

Defendants' cases show that risky, good-faith objections to riskless sue-and-settle litigation, even when unsuccessful, benefit the law and other stockholders. Given that objectors' counsel receive no compensation for those victories, appropriate fees in successful cases become even more important. (Neither party mentions that *Riverbed*'s $10,000 fee was awarded for an unsuccessful effort. *See* PAB at 44 (*citing In re Riverbed Tech., Inc. S'holders Litig.*, 2015 WL 7769861, at *3 (Del. Ch. Dec. 2, 2015)); DAB at 36 (same).)

2. Defendants Misstate the Record on Objector's Fee Application.

Defendants string together snippets of the record to tell a misleading story: that Objector took credit for between $288,000 and $2.3 million of benefit for prompting the removal of antitrust and "unknown" claims from the first settlement. DAB at 10. Defendants' appendix shows the opposite. Objector suggested that the narrowed release, on its own, merited $72,000 (implying a benefit of $288,000), based on a recent award in Connecticut. *See* B237-38; *see also* AR3. He estimated that rejecting the first settlement, as the trial court did, would preserve claims worth $2.3 million. B237–38, B243. Defendants derided this as "funny math," but after securing the $100,000 fee, they reversed course and offered consideration worth somewhere between $4.6 million and $5,381,721. A419; OB Ex.at 44; DAB at 14.

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which has been cited by the Court of Chancery. *See Continental Invs. Fund LLC v. Tradingscreen, Inc.*, 2021 WL 3120860, at *22 n.25 (Del. Ch. July 23, 2021).

Forthright citation would have revealed that what Defendants describe as a "generous" fee for a successful objection barely exceeds the $72,000 approved for an unsuccessful effort. *Compare* DAB at 37 *with* AR3; *see also Bushansky v. Phoenix Cos., Inc.*, 2017 WL 1194768, at **6–7 (Conn. Super. Ct. Feb. 23, 2017) (approving settlement while noting objection led to narrowed release). A single error—crediting Objector with only half the benefit achieved—led to a below-lodestar, under-market result that will discourage future meritorious objections.

Given the discretion allowed by *Sugarland*, appeals to fee awards should be exceptional.[6] But this is an exceptional case: it addresses a narrow, specific, and yet recurring structural problem. If trial courts deny objectors full credit for the benefits that result when settlements fail based on arguments offered only by objectors, fewer stockholders will secure adequate counsel. As a result, when parties like Plaintiff and Defendants present their next unfair settlement, their joint motions will be met with silence.

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[6] Both parties question Objector's previous appeal. *See* PAB at 5; DAB at 39. Objector, like the trial court, believed that the fee opinion might be a collateral final order, although this Court disagreed. *See* OB Ex. D at 2. Given the uncertainty, the earlier appeal eliminated any argument that later review would prove untimely. This legal question is now settled and similar appeals will be unnecessary in future cases.

CONCLUSION

For these reasons, and those in the Opening Brief, both the Court of Chancery's order approving the settlement and the order awarding Objector's fee should be reversed and remanded. Objector respectfully requests oral argument.

MARGRAVE LAW LLC

By: /s/ *Anthony A. Rickey*
Anthony A. Rickey (Bar No. 5056)
3411 Silverside Road
Baynard Building, Suite 104
Wilmington, Delaware 19810
Tel: (302) 604-5190
Fax: (302) 258-0995

Attorney for Sean J. Griffith
Objector Below-Appellant

OF COUNSEL:

Raffi Melkonian (pro hac vice)
WRIGHT, CLOSE & BARGER LLP
1 Riverway, Suite 2200
Houston, TX 77005
Tel: (713) 572-4321
Fax: (713) 572-4320

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