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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE DELAWARE PUBLIC SCHOOLS LITIGATION	)	No. 138, 2023
	)	On appeal from C.A. No. 2018-0029-JTL (COUNTY TRACK) in the Court of Chancery of the State of Delaware

CORRECTED BRIEF OF THE DELAWARE LEAGUE OF LOCAL GOVERNMENTS AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal presents a very important issue of Delaware law with high significance to Delaware governmental entities – specifically, whether the Court of Chancery may, under the common benefit doctrine, award attorneys' fees against government entities, political subdivisions and municipalities for litigation deemed by the Court of Chancery to be of a sufficient "public benefit." The Delaware League of Local Governments ("DLLG") respectfully requests that the Delaware Supreme Court reject the Court of Chancery's novel and expansive application of the common benefit doctrine and hold that—outside the taxpayer context—attorneys' fees cannot be shifted in public interest litigation absent statutory authority granted by the General Assembly or a showing of bad faith in the litigation by the government.

While it is difficult to neatly characterize what is specifically a "public interest" lawsuit, dozens of suits which could qualify as such have been brought against governmental entities, officials and municipalities in Delaware State courts since 2020. These cases include citizen challenges to rezonings[1] and subdivision approvals,[2] challenges to allocations of funds through the community transportation

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1 *Cain v. Sussex Cty. Council*, 2020 WL 2122775, at *1 (Del. Ch. May 4, 2020).

2 *Schafer v. Kent Cty. Dep't. of Planning Services*, 2023 WL 3750390, at *1 (Del. Super. May 31, 2023).

fund,[3] challenges to validity of ordinances,[4] challenges to persons being elected to office,[5] assessment cases,[6] school funding cases,[7] medical insurance coverage challenges,[8] citizen attempts to enforce Town zoning ordinances,[9] writs of mandamus,[10] actions to produce President Biden's senatorial papers,[11] pension plan challenges,[12] election law challenges,[13] challenges to covid related restrictions,[14] challenges to the State's health care plan decisions,[15] challenges to environmental

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3 *Brandywood Civic Ass'n v. Cohan*, 2020 WL 1866871, at *1 (Del. Super. April 14, 2020); *aff'd*, 246 A.3d 556 (Table) (Del. 2021).

4 *Croda Inc. v. New Castle Cty.*, 282 A.3d 543 (Del. 2022).

5 *Capriglione v. State ex rel. Jennings*, 279 A.3d 803 (Del. 2021).

6 *Shahin v. City of Dover*, 259 A.3d 1272 (Table), 2021 WL 4099434, at *1 (Del. Sept. 8, 2021).

7 *Del. Charter Sch. Network Inc. v. Holodick*, 2023 WL 2623207, at *1 (Del. Super. Mar. 23, 2023).

8 *Sliney v. New Castle Cty.*, 2021 WL 1235204, at *1 (Del. Super. Mar. 31, 2021).

9 *Napolitano v. Town of Fenwick Island*, 2021 WL 877955, at *1 (Del. Super. Mar. 9, 2021).

10 *See, e.g., Balsamo Real Estate, LLC v. Town of Fenwick Island*, 2023 WL 2384738, at *1 (Del. Super. Mar. 7, 2023).

11 *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

12 *Giles v. Town of Elsmere*, 2022 WL 17826005, at *1 (Del. Super. Dec. 20, 2022).

13 *League of Women Voters of Del., Inc. v. State of Del. Dep't of Elections*, 250 A.3d 922 (Del. Ch. 2020); *Republican State Comm. of Del. v. State of Del. Dep't. of Elections*, 250 A.3d 911 (Del. Ch. 2020); *Albence v. Higgin*, -- A.3d --, 2022 WL 17591864, at *1 (Del. Dec. 13, 2022).

14 *In re Covid Related Restrictions on Religious Services,* 285 A.3d 1205 (Del. Ch. Nov. 21, 2022); *Facer v. Governor of Del.*, 277 A.3d 937 (Table), 2022 WL 1561444, at *1 (Del. May 17, 2022).

15 *RiseDelaware Inc. v. DeMatteis*, 2022 WL 11121549, at *1 (Del. Super. Oct. 19, 2022) (on appeal).

enforcement decisions,[16] challenges to variances granted for a courthouse,[17] challenges to rate setting by the Public Service Commission,[18] challenges to conditional use permits for solar farms,[19] actions seeking tax refunds pursuant to 14 *Del. C.* § 1921,[20] challenges to gun regulations,[21] challenges to sewer service decisions for the community,[22] and petitions to determine the validity of municipal resolutions.[23] The list goes on.

Under the Vice Chancellor's novel formulation of the common benefit doctrine for public interest cases, if successful, each of the individual Plaintiffs in the aforementioned cases could now be deemed to have established a common benefit by obtaining a judicial determination that forces the government to perform

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16 *Diamond Town Tire Pros & Auto Care LLC v. Del. Dep't. of Nat. Resources and Env't. Control*, 2023 WL 3959882, at *1 (Del. Super. June 9, 2023); *Keep Our Wells Clean v. Del. Dep't. of Nat. Resources and Env't. Control*, 243 A.3d 441 (Del. 2020).

17 *Lingo v. Town of Georgetown Bd. of Adj.*, 2023 WL 2906162, at *1 (Del. Super. Apr. 11, 2023).

18 *Del. Div. of the Public Advocate v. Del. Public Serv. Comm.*, 2023 WL 2641492, at *1 (Del. Super. Mar 24, 2023).

19 *Citizens Against Solar Pol. v. Kent Cty.*, 2023 WL 2199646, at *1 (Del. Ch. Feb. 24, 2023).

20 *250 Executive v. Christina Sch. Dist.*, 2023 WL 1113221, at *1 (Del. Super. Feb. 1, 2023).

21 *Del. State Sportsman Ass'n v. Garvin*, 2020 WL 6813997, at *1 (Del. Super. Nov. 18, 2020).

22 *Glen Allen Farm, LLC v. New Castle Cty.*, 2020 WL 5800714, at *1 (Del. Ch. Sept. 29, 2020).

23 *Guy v. City of Wilmington*, 2020 WL 2511122, at *1 (Del. Super. May 15, 2020).

properly and in the public interest.[24] Each of the aforementioned challengers to governmental actions could also be deemed "courageous." But that does not, and should not, establish an entitlement for a fee award.

Under the American Rule, absent statutory authorization, there should be no shifting of attorneys' fees for payment by the government in cases where the government does not win. In almost all instances, it is for the legislature, and not the Court, to determine when fees shifting is appropriate for public interest cases against the government. Indeed, if the legislature deems a particular cause appropriate for fee shifting, the legislature knows how to specifically provide a fee shifting remedy.[25]

The test is not, and should not be, that whenever there is a suit to compel compliance with the law by a municipal or governmental entity, or that the municipal or governmental entity failed to act, the government must pay (or be at risk to pay) the prevailing parties attorneys' fees under a common benefit theory. Such a result

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[24] *See* William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 Vand. L. Rev. 2129, 2142 (2004) ("commentators occasionally argue that any individual lawsuit--even one seeking nothing more than compensation for a single private citizen--benefits the public as the compensatory damages realized in such a case help deter wrongdoing by the defendant.").

[25] *See, e.g.,* 13 *Del. C.* § 1941(a) (Uniform Child Custody Jurisdiction and Enforcement Act); 10 *Del. C.* § 348(e) (disputes involving deed covenants or restrictions); 29 *Del. C.* § 10005(d) (Delaware Freedom of Information Act); 6 *Del. C.* § 2004 (claim of misappropriation); 42 U.S.C. § 1988 (fees shifting for federal constitutional violations); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 249-69 (1975) (discussing federal fee shifting statutes).

would: (1) encourage mercenary plaintiffs who would seek to parlay a perceived error or mistake by the government into a large fee award; (2) provide a disincentive for the municipality or governmental body to vindicate what it believes is the correct formulation of the law for fear that, if they are wrong, they will be hit with a large financial damage award for the opposing party's attorneys; (3) result in potentially large awards for any type of litigation which could cripple and curtail vital municipal and governmental services – especially in smaller municipalities; and (4) eviscerate the American Rule for actions against government entities because any action deemed to be in the public interest that compelled the government to change course could be deemed a common benefit.

This Court should reject the Court of Chancery's novel invocation of the "common benefit" doctrine for public interest suits, return the law to where it has been for decades, and reaffirm *Dover Historical Society, Inc. v. City of Dover Planning Commission*.[26] The DLLG requests that this Court also reaffirm the general rule that "apart from statute or contract, a litigant must pay his counsel fees,"[27] and hold that, absent statutory authorization, attorneys' fees may not be assessed against the government under a common benefit theory or a private attorney

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26 902 A.2d at 1084, 1090 (Del. 2006) (*Dover Historical Society*).

27 *Maurer v. Intl. Re-Insurance Corp.*, 95 A.2d 827, 830 (Del. 1953).

general theory in any non-taxpayer public interest suit that seeks to compel the government to perform properly.

STATEMENT AND IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

The DLLG proudly serves Delaware's 57 municipalities and three counties and seeks to improve everyday life for all Delawareans. It seeks to be a unified voice for Delaware's local governments (cities, towns, and counties). It strives to be a dynamic resource for local government advocacy, education, engagement, and best practices. The DLLG has as its goals to protect, preserve and advance the principles of home rule and to ensure that institutions of local democracy can respond to the needs of their constituents. As part of its policy and advocacy mission, the DLLG has previously filed *amicus curiae* briefs in Delaware in cases of importance to its municipal members. The DLLG has a significant interest in this case, which, in its view, puts all Delaware municipalities at risk for awards of attorneys' fees under the common benefit doctrine for public interest related litigation when almost any Court could deem a successful suit against a government entity is in the "public interest" and award fees.

DLLG seeks reversal of the holding of the Court of Chancery. The holding is to the detriment of DLLG members – local governments that would have to carry the burden of potentially paying attorneys' fees with taxpayer dollars in any case deemed by the Court of Chancery to be of a public benefit. The Court of Chancery's decision, if left undisturbed, would be a fiscal and policy detriment to all Delaware local governments. The DLLG believes that it can provide a state-wide perspective

regarding the issues presented and the consequences of unwarranted fee shifting whenever a municipal government defends its actions but is, in the end, determined by the Court to be incorrect. Pursuant to Supreme Court Rule 28, DLLG asks that the Court accept this brief of the *amicus curiae,* which has been authorized and approved by the DLLG executive committee.

SUMMARY OF ARGUMENT

1. This Court should reverse the decision of the Court of Chancery because the decision is an unwarranted and unwise expansion of the "common benefit" doctrine, reaffirm *Dover Historical Society*,[28] and confirm that *Korn v. New Castle County*[29] applies only to taxpayer suits *and* only if the taxpayer litigation establishes "a substantial and quantifiable monetary benefit to all taxpayers."

2. The Court of Chancery's articulation of the "common benefit" doctrine is a disguised adoption of the private attorney general doctrine. Because this Court has rejected the private attorney general doctrine, and because the General Assembly has not adopted it via statute, the Court of Chancery's holding should be reversed.

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28 902 A.2d at 1090.

29 922 A.2d 409, 413 (Del. 2007) ("*Korn I*").

STATEMENT OF FACTS

On March 28, 2022, the Court of Chancery issued its Order determining that the plaintiffs below ("Plaintiffs") are entitled to an award of attorneys' fees and expenses.[30] The Order contains no meaningful discussion of this Court's decision in *Dover Historical Society*.[31] (The case is cited only once in passing in the Order). The Order specifically holds—contrary to *Dover Historical Society*—that the common benefit doctrine can apply to public interest litigation outside of the taxpayer context, and that "[p]ublic policy supports providing an incentive for litigants like the plaintiffs who take on difficult statutory and constitutional issues like those litigated in the County Track."[32] The Vice Chancellor also concluded that the "litigation that the plaintiffs pursued is the type of socially beneficial litigation that should be rewarded."[33] On March 29, 2023, the Court of Chancery entered a fee award in the amount of $1,549,471.90 against the Counties under a common benefit theory. The Counties appeal followed, and the Counties filed their opening brief on June 30, 2023.

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30 Exhibit A (the "Order").
31 902 A.2d at 1090.
32 Order ¶13.
33 Order ¶15.

ARGUMENT

I. THE ORDER BELOW IMPROPERLY EXPANDED THE COMMON BENEFIT DOCTRINE AND SHOULD BE REVERSED

A. *Dover Historical Society* Governs Fee Shifting In Non-Taxpayer Cases

"The general rule is that . . . a court may not order the payment of attorney's fees by the losing party unless the payment of such fees is authorized by some statutory or contractual provision."[34] Delaware Courts move with "great caution" in approving exceptions to the American Rule.[35] Here, the Court below was not cautious, and it improperly created a newfound common law exception to the American Rule by allowing fee shifting (to the tune of $1.5 million) for "public benefit" litigation. The DLLG submits that that this Court's precedent is clear – fee shifting under the common benefit doctrine is not permitted in suits (such as this) where Plaintiffs succeeded only in requiring the government to "do its job" and "perform properly."

The Court of Chancery's failure to meaningfully discuss or address this Court's decision in *Dover Historical Society*[36] in its Order is telling. In *Dover Historical Society,* this Court rejected a fee application in a similar case where the

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34 *Conventional Builders v. Bethany, Inc.,* 1994 WL 45431, at *1 (Del. Super. Jan. 10, 1994) (citing *Great Am. Indem. Co. v. State to Use of Mills*, 88 A.2d 426 (Del. 1952); *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 370 (Del. Super. 1982)).

35 *Id.*; *Walsh v. Hotel Corp. of Am.*, 231 A.2d 458, 462 (Del. 1967).

36 902 A.2d at 1090.

plaintiffs "caused a government agency . . . to do its job properly."[37] This Court recognized that "[i]n the public interest litigation context, absent legislative authorization, fee-shifting applications are disfavored."[38] This Court recognized that, in such public interest litigation, if the government is compelled to perform properly, a social benefit is created.[39] But this Court held that such a social benefit "is not of the kind that justifies creating a new *judge*-made exception to the American Rule."[40]

Here, admittedly, Plaintiffs were successful in causing the Counties to reassess pursuant to Article VIII, Section 1 of the Delaware Constitution ("Uniformity Clause") and 9 *Del. C.* § 8036(a) ("True Value Statute"). While the Vice Chancellor held that "applying the common benefit doctrine is warranted" and "[p]ublic policy supports an incentive for litigants" in public interest cases, the Vice Chancellor's reasoning in support of a fee award cannot be squared with this Court's holding in *Dover Historical Society*. This is so because: (1) a mere social benefit does not create an exception to the American Rule; and (2) it is for the legislature, and not the Courts, to determine whether fee shifting is appropriate in public interest litigation.

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37 *Id.* at 1091.
38 *Id.*
39 *Id.*
40 *Id.*

The DLLG asks this Court to reject the Order's new judge-made exception to the American Rule for public interest litigation; reaffirm the rule set forth in *Dover Historical Society*, and hold that there is no fee shifting permitted under the American Rule for non-taxpayer public interest litigation. Cases, such as this one, whereby the Plaintiff is successful in causing the government to "do its job" and "perform properly" should not result in fee shifting unless the General Assembly provides for fee shifting by statute.

B. The Court of Chancery Misapplied *Korn I*

In *Korn I*, this Court slightly expanded the common benefit doctrine for a limited class of suits – specifically taxpayer suits.[41] This Court held that when a social benefit is created *and* when the "litigation also created a substantial and quantifiable monetary benefit to *all taxpayers*," fee shifting may be permitted under a common benefit theory.[42]

As the Counties' opening brief demonstrates, this case is not a taxpayer suit and does not qualify under this Court's narrowly tailored expansion of the common benefit doctrine to taxpayer suits.[43] Despite this, the Court of Chancery used the *Korn I* rationale (and Chancellor Chandler's remand opinion in *Korn*[44]) to justify an

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41 922 A.2d at 413.

42 *Id.* (emphasis supplied).

43 OB 7-8.

44 *Korn v. New Castle Cty.*, 2007 WL 2981939 (Del. Ch. Oct. 3, 2007) (hereinafter "*Korn II*").

award of fees in a non-taxpayer suit for purported public benefit litigation. Contrary to the Court of Chancery's rationale, *Korn I* does not overrule or impact this Court's decision in *Dover Historical Society*, and *Korn* is not an "open sesame" which allows the Court to award fees in a case where there is a perceived public benefit.

Taxpayer suits are a narrow class of suits. Taxpayer suits are limited to those situations where a taxpayer challenges how public funds are spent, or the manner in which public lands are used.[45] Where a citizen files suit to compel government action in compliance with statutory provisions— as was the case herein— taxpayer suit status does not follow.[46]

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[45] *See O'Neill v. Town of Middletown*, 2006 WL 205071, at * 19 (Del. Ch. Jan. 18, 2006) ("In Delaware...taxpayer standing is reserved for a narrow set of claims involving challenges either to expenditure of public funds or use of public lands."); *see also Lechliter v. Del. Dep't. of Nat. Resources and Env't. Control*, 2015 WL 7720277, at *7 (Del. Ch. Nov. 30, 2015) ("[Taxpayer standing] is focused on whether use of public funds or property itself is illegal, not merely on the process by which decisions regarding such use are made–otherwise, the breadth of taxpayer standing would be near-limitless.").

[46] *See Reader v. Wagner*, 974 A.2d 858 (Table), 2009 WL 1525945, at *2 (Del. Jun. 2, 2009) ("...plaintiffs were not seeking to enjoin the misuse of public money or lands...they were seeking an advisory opinion...and to compel [the auditor] to perform his discretionary audit functions in a particular way...To allow plaintiffs to pursue their claims, which do not fall within the scope of recognized taxpayer standing cases, would 'impermissibly expand the scope of claims recognized under [the] taxpayer standing doctrine in Delaware (thereby not only eviscerating traditional notions of standing analysis where challenges to governmental conduct are concerned, but also undermining certain principles of separation of powers, as well.)'") (citations and quotations omitted).

The Court of Chancery consequently erred in holding that the "form of the suit is not a deciding factor; rather, the question to be determined is whether a plaintiff...has conferred a benefit on others."[47] In point of fact, this Court's holdings establish that the form of suit is determinative as to whether fee shifting is appropriate in public interest litigation. Under *Dover Historical Society*, if the suit is successful in compelling the government and confers a social benefit, fees cannot be shifted under a common benefit theory. If, however, the suit falls within the narrow band of suits that qualify as a taxpayer suit, *and* if the plaintiff obtains a "substantial and quantifiable monetary benefit to all taxpayers," fee shifting is permitted under the common benefit doctrine. *Korn I* **does not** authorize fee shifting under a common benefit theory outside of a taxpayer suit that creates quantifiable monetary benefits for all taxpayers.

The Vice Chancellor's formulation of this Court's limited holding in *Korn I* allows any public interest plaintiff to obtain fees *for any case* where there is a perceived public benefit. The Order, therefore, implicitly and impermissibly contravenes *Dover Historical Society*. Moreover, such a formulation is, for reasons outlined above, financially and practically detrimental to all Delaware governments

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47 Order ¶9.

and municipalities.[48] This attempted reformulation of Delaware law should be rejected.

C. The Court Below Also Misapplied The *Korn II* Remand Decision

The Court of Chancery below draws upon Chancellor Chandler's 2007 statement in *Korn II* cautioning that "local governments face a new financial risk because plaintiff's attorneys are now incentivized to bring public interest lawsuits" to draw the conclusion that "[t]he court would not have expressed a broader concern about public interest litigation unless *Korn II* applied more broadly than just taxpayer suits that generate monetary benefits for other taxpayers."[49] This conclusion is in error.

Chancellor Chandler's comment in *Korn II* was directly related to the Supreme Court's limited expansion of the common benefit doctrine to taxpayer suits.[50] This Court expressly limited that expansion to a very narrow class of suits - "taxpayer suits that result in a quantifiable monetary benefit for all taxpayers."[51]

The DLLG avers that the *Korn II* Court could not, and did not, intend to expand this Court's narrow exception to also include the award of attorney's fees for non-taxpayer, public interest litigation. If that were the intent, this Court would have

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48 *See supra* p. 5-6.
49 Order ¶11 (citing *Korn II*, 2007 WL 2981939 at *2).
50 *Korn II*, 2007 WL 2981939, at *2.
51 *Korn I*, 922 A.2d at 410.

expressly overruled *Dover Historical Society* via *Korn I* – but that was not done. Rather, Chancellor Chandler's comment in *Korn II* was reflective of his concern that local governments would face more suits and/or more requests for attorney's fees as a result of the judge-made expansion to the common benefit exception *for taxpayer suits*.[52] Chancellor Chandler's comment could not, and did not overrule, the pronouncements of this Court in *Dover Historical Society*. As such, the Court of Chancery's reliance on *Korn II* to expand the common benefit doctrine and award fees for a non-taxpayer public benefit suits was misplaced and should be rejected.

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[52] Certainly, that prophecy will come to fruition if the broad-based invocation of the common benefit doctrine set forth by the Court of Chancery in this case is permitted to stand.

II. THE BACK DOOR INVOCATION OF THE PRIVATE ATTORNEY GENERAL EXCEPTION TO THE AMERICAN RULE SHOULD BE REJECTED

The DLLG agrees with the Counties that the methodology employed by the Vice Chancellor in the Order is an undeclared invocation of the "private attorney general" doctrine[53] – a doctrine which has been rejected by this Court in *Dover Historical Society*,[54] the United States Supreme Court,[55] and virtually all courts that have considered the doctrine.[56]

Here, it is clear that the Court of Chancery viewed the case as a public interest litigation, that there was a purported societal benefit, and that (the Court believed) public policy supports an award for litigants who take on difficult and statutory constitutional issues. However, the United States Supreme Court, in rejecting the "private attorney general" doctrine, foreclosed fee awards based on the same proffered justifications.[57] The Supreme Court in *Alyeska Pipeline* held, upon review of several statutes which give courts discretion in specific cases to award fees, that it was for Congress, and not the judiciary, to fashion exceptions to the American Rule. *Alyeska Pipeline* pertinently holds:

> [C]ourts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party ... or to pick and

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53 OB 35-42.
54 902 A.2d at 1091 n.16.
55 *Alyeska Pipeline,* 421 U.S. at 269.
56 OB 39, n. 111.
57 *Id.* at 249-69.

> choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases.[58]

The holding of *Alyeska Pipeline* applies with equal force here to the Court of Chancery's justification and reasoning in favor of the fee award.

Whether there was a societal benefit created by the Plaintiffs bringing public interest litigation, whether Plaintiffs were "courageous," and even if the Court of Chancery believes public policy supports an award, the Courts should not "pick and choose" and "award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."[59] These decisions should be left to the General Assembly. The DLLG believes that a back door incorporation of the private attorney general doctrine into Delaware law (as was done here) should be rejected – and the Order should be reversed under the reasoning of *Alyeska Pipeline.* Indeed, as this Court has made clear, "[i]n the public interest litigation context, absent legislative authorization, fee-shifting applications are [and should continue to be] disfavored."[60]

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58 *Id.* at 269.

59 *Id.*

60 *Dover Historical Soc'y.*, 902 A.2d at 1091.

CONCLUSION

The DLLG requests that the novel and expansive articulation of the common benefit doctrine adopted by the Court of Chancery below be rejected, that *Dover Historical Society* remain the law of the State, that exceptions to the American Rule (if any) be established by the General Assembly, and that the Court of Chancery's Order be reversed.

Respectfully submitted,

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