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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE DELL TECHNOLOGIES INC. CLASS V STOCKHOLDERS LITIGATION	)	No. 349, 2023
	)	Court Below: Court of Chancery of the State of Delaware
	)	
	)	Consol. C.A. No. 2018-0816-JTL

APPELLANT'S SECOND CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

Appellant and Objector-below Pentwater Capital Management LP ("Pentwater") respectfully appeals from the Court of Chancery's award of $266,700,000.00 in fees and expenses (the "Fee Award") to counsel for Appellee and Plaintiff-below Steamfitters Local 449 Pension Plan ("Plaintiff").

The underlying litigation involved a challenge to a stock swap transaction by Dell Technologies Inc. (the "Company") that occurred in December 2018. Shortly before trial, the parties reached a settlement whereby defendants would pay $1 billion to the stockholder class (the "Settlement Fund"). Plaintiff's counsel sought a fee award of $285 million from the Settlement Fund. Because of the magnitude of the requested fee award and its disproportionate impact upon class members, Pentwater objected to the fee request and asked the Court of Chancery to exercise its discretion to grant a lesser, but still substantial, fee award.[1] (A367-81.) Pentwater specifically requested that the Court consider the enormity of the Settlement Fund, apply the declining percentage principle, and reduce the Fee Award because the benefit achieved – albeit significant – does not merit the requested fee. (*Id.*)

[1] Other stockholders, representing a total of 24.5% of the class, joined Pentwater's objection. (A440-41)

On April 4, 2023, the Court of Chancery requested additional information from Pentwater about the state of professorial scholarship on fee awards in mega-settlement cases, how privately negotiated fee agreements address mega-settlements, and whether the declining percentage method applied to the compensation of investment managers. (A450-52.) Pentwater responded to the Trial Court's request for additional information on April 11, 2023 and accepted the Court's invitation to submit information about its compensation structure *in camera*. (A458-74; A4.) That same day, several law professors moved for leave to participate as *amicus curiae* in the fee objection. (A453-55.) The Court granted the law professors' motion. (A456-57.) The law professors filed their *amicus* brief on April 12, 2023, and a corrected brief on April 13, 2023. (A4; A478-98.) On April 12, 2023, after reviewing the law professors' *amicus* brief, the Court of Chancery issued an Order Requesting Additional Information from Plaintiff's counsel. (A475-77.) Plaintiff submitted its reply in further support of the requested fee award on April 14, 2023 and provided the additional information requested by the Court of Chancery's order on April 17, 2023. (A499-544; A545-47.) The law professors responded to Plaintiff's April 17, 2023 letter on April 18, 2023. (A548-50.) The Court of Chancery held a hearing to resolve the objection and approve the settlement on April 19, 2023. (A551.) At the conclusion of the hearing, the Trial Court

approved the settlement, but took under advisement the request for an award of attorneys' fees and costs. (*Id.*)

On July 31, 2023, the Trial Court issued a Memorandum Opinion on Fee Award and Incentive Award, which the Court of Chancery subsequently revised on August 21, 2023 (the "Opinion" or "Op."). (Exhibit A.) On August 24, 2023, the Trial Court Granted the Order and Final Judgment Implementing the Court's Rulings on Attorneys' Fees, Expenses & Incentive Award and Closing the Action (the "Final Order"). (Exhibit B.) While the Trial Court reduced the requested fee slightly, Pentwater respectfully appeals from the Final Order and the reasoning set forth in the Opinion, because a $266.7 million Fee Award is excessive under the circumstances and deprives class members of a substantial portion of the recovery obtained.

The Court of Chancery erred for several reasons. First, the Trial Court misapplied applicable Supreme Court precedent by failing adequately to consider the enormity of the Settlement Fund in awarding attorneys' fees. Second, the Trial Court refused to apply the declining percentage principle regularly utilized in federal securities litigation, which recognizes that mega-settlements justify a smaller percentage of the recovered common fund to compensate class counsel fairly. Third, the Trial Court abused its discretion by considering the irrelevant facts that Pentwater is an investment fund with differently structured incentive compensation

and did not bring the underlying litigation itself. For the reasons set forth herein, this Court should reverse the Fee Award, and set a reasonable fee itself to provide the Court of Chancery with clear guidance on how to apply the *Sugarland* factors in cases resulting in large common funds and when a straight application of a "percentage of the fund" results in an unreasonable fee.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in awarding excessive attorneys' fees to Plaintiff's counsel. Specifically, the Court of Chancery failed to properly apply the standards set forth in *Americas Mining* and *Sugarland*, erred by refusing to consider the Declining Percentage Method, and improperly considered Pentwater's compensation structure.

STATEMENT OF FACTS

A. The Underlying Transaction

This appeal concerns the approval of the Fee Award to Plaintiff's Counsel, and the relevant facts arise out of the settlement process. To put the appeal in full context, Pentwater provides a brief overview of the transaction that underlies the litigation.

Beginning in 2015, Dell Technologies Inc. sought to acquire EMC Corporation ("EMC"). (Op. at 5.) The acquisition would include EMC's stake in VMware, Inc. ("VMware"). On September 6, 2016, the Company completed its acquisition of EMC. (A107.) The Company acquired EMC through a combination of cash and newly authorized shares of Class V Common Stock. (Op. at 5-6; A107.) The transaction valued EMC at $67 billion. (Op. at 6.)

Dell issued approximately 223 million shares of Class V Common Stock and each share of EMC common stock was converted into the right to receive $24.05 per share in cash and 0.11146 Class V common shares for each share of EMC. (Op. at 6; A108.) The Class V shares were listed on the New York Stock Exchange and traded under the symbol "DVMT." (Op. at 6.)

While many predicted otherwise, DVMT traded at a discount of 30-50% to VMware's publicly traded shares. (Op. at 6.) The Company considered how to

capture the value of the DVMT discount by consolidating the Company's ownership of VMware and retained Goldman Sachs & Co. for advice. (Op. at 6.)

After reporting in January 2018 that the Company was considering an IPO of its Class C Stock, which would be viewed as a precursor to a forced conversion of the DVMT shares into Class C shares, DVMT's stock price fell 6.4%, and the DVMT discount increased to 45.6%. (Op. at 6.) After this reporting, a special committee of the Company's board of directors was formed for the purpose of negotiating a redemption of the DVMT shares (the "Special Committee"). (Op. at 7.)

The Special Committee negotiated with the Company and eventually agreed to a redemption, which valued the DVMT shares at $109 per share, representing a 32.7% discount to VMware's trading price. (Op. at 7.) After receiving objections from DVMT stockholders, the Company was concerned that it could not obtain stockholder approval for the potential transaction. (Op. at 7.)

The Company began separately negotiating with six investment funds that were DVMT stockholders and entered into nondisclosure agreements with the funds. (Op. at 7.) After months of negotiations, the Company reached an agreement whereby each DVMT stockholder could opt to receive (i) shares of newly issued Class C common stock valued at $120 per share, or (ii) $120 per share in cash, with the aggregate amount of cash capped at $14 billion. (Op. at 7.) This new proposed

agreement would value DVMT stock in the aggregate at $23.9 billion. (Op. at 7.) The Company obtained approval of the Special Committee on November 14, 2018. (Op. at 7.) After a stockholder vote, 61% of the unaffiliated holders of the issued DVMT shares approved the transaction on December 11, 2018. (Op. at 7.) The transaction closed on December 28, 2018. (Op. at 7; A122.)

B. The Litigation

Five actions were filed in the Court of Chancery to challenge the transaction on behalf of the DVMT stockholders. (Op. at 8.) Two groups of plaintiffs' counsel competed for the Trial Court's approval to lead the lawsuit. (Op. at 8.) Plaintiff and its counsel won the leadership contest and the Court of Chancery appointed Labaton Sucharow LLP and Quinn Emanuel Urquhart & Sullivan, LLP as co-lead counsel, and Robins Geller Rudman & Dowd LLP, Friedman Oster & Tejtel PLLC, and Andrews & Springer LLC as additional counsel (collectively, "Plaintiff's Counsel"). (Op. at 8.)

Plaintiff's Counsel litigated this consolidated action thoroughly and effectively. (A368 (acknowledging "the hard work and dedicated efforts of Plaintiff's Counsel in this matter.").) The litigation included four amended complaints, pleading-stage dispositive motion practice that dismissed one defendant but otherwise permitted Plaintiff's other causes of action, significant fact and expert discovery, mediation, and pre-trial practice. (*See* A10-94; Op. at 8.) The parties

reached a settlement only "nineteen calendar days before trial was scheduled to begin." (Op. at 19.)

C. The Settlement

Plaintiff sought approval of a settlement that included a $1 billion payment to the class members (the "Settlement"). (Op. at 1.) As the Court of Chancery noted, "[i]t is the largest cash recovery ever obtained by a representative plaintiff in this court." (Op. at 1.) The parties filed the Settlement stipulation and supporting materials on December 22, 2022 and a hearing to consider the Settlement and Plaintiff's application for an award of fees and expenses was noticed for April 19, 2023. (A9.) On March 20, 2023, Plaintiff's Counsel sought a fee award of $285 million.[2] (A7; A280-366.)

D. Pentwater Objects to the Fee Award Requested by Plaintiff's Counsel

While no party objected to the Settlement, Pentwater objected to the fee application made by Plaintiff's Counsel (the "Objection"). (*See* A367-84.) Pentwater owned approximately 1.6% of shares of Dell Class V common stock as of December 28, 2018. (*See* A367; A386-402.) Seven other members of the class that collectively held or beneficially owned 24.45% of the class joined the Objection. (*See* A367; A440-49.) Pentwater's Objection asserted that the requested fee amount

[2] Plaintiff filed a corrected version of its Opening Brief on March 27, 2023. (*See* A7; A280-366.)

of $285 million was "far in excess of what is appropriate in these circumstances, and would be fundamentally unfair to the Class." (A368.)

In response to the Objection, on April 4, 2023, the Court of Chancery requested additional information from the objecting parties by April 11, 2023. (A450-452.) The letter asked for three categories of information: (1) what "law professors say in favor of or against the declining percentage method"; (2) a discussion about how privately negotiated fee arrangements deal with the large recovery issue; and (3) to provide information on the objector's own compensation arrangements. (*Id*.) Pentwater timely filed a response providing the requested information. (A458-74.)

In response to the Vice Chancellor's letter, five law professors sought leave to submit an *amicus curiae* brief to provide additional information in response to the Court of Chancery's request for additional information. (A453-55.) The Trial Court approved this motion and permitted the law professors to file their requested submission, which they did on April 12, 2023.[3] (A456-57; A4.) The law professors'

[3] The Court of Chancery noted in its original opinion that "it seems likely that the objectors recruited [the law professors]." (A564.) In a letter filed shortly after the Court filed its revised opinion that described the changes made in the revised opinion, however, the Trial Court described the first substantive change as "no longer draw[ing] the inference that the objectors contacted the professors." (A644.) In the Opinion, the Court of Chancery acknowledged that "[o]ne of the professors subsequently found fault with that inference and implied that the objectors were not the link." (Op. at 12.) The article cited by the Court of Chancery stated:

submission addressed the Trial Court's question about legal scholarship concerning the declining percentage method. (A483.) At the law professors' suggestion, on April 12, 2023, the Court requested additional information from Plaintiff's Counsel regarding previous fee arrangements and whether there are any undisclosed counsel who would receive a share of any fee award. (A475-77.) Plaintiff's Counsel provided the requested information on April 17, 2023. (A3; A545-47.) The law professors responded to Plaintiff's submission on April 18, 2023. (A2; A548-50.) On April 19, 2023, the Court heard oral argument regarding the settlement and fee application. (A551.) The Court approved the settlement in an oral ruling, but took the fee application under advisement. (Op. at 12.)

> Oddly, [Vice Chancellor] Laster speculated that the law professor[s] had been "recruited" by Pentwater and the other objectors, even though he docketed a letter in April asking about legal scholarship on declining percentage fees. "If the professors were recruited by anyone, it was by the vice chancellor," said Joseph Grundfest of Stanford Law School, who was one of the amici.

See Alison Frankel, *Whopper $267 million fee award in $1 billion Dell case shows why Delaware is different*, Reuters (Aug. 1, 2023 5:10 pm), available at https://www.reuters.com/legal/transactional/column-whopper-267-million-fee-award-1-billion-dell-case-shows-why-delaware-is-2023-08-01/ (last visited Nov. 11, 2023) (cited to in Opinion at 12 n.3).

E. The Court Orders that Plaintiff's Counsel is Entitled to a Fee Award of $266.7 Million

On July 31, 2023, the Court issued its Opinion on Fee Award and Incentive Award. (A2; A552.) On August 21, 2023, the Court issued the Revised Opinion on Fee Award and Incentive Award.[4] (*See* Op. at 1.) In the Opinion, the Court reduced the amount of the fees requested from $285 million to $266.7 million, representing 26.67% of the class recovery. (Op. at 90.)

The Opinion crafted a stage-of-case analysis and then purportedly undertook a *Sugarland* analysis when considering whether to reduce the requested fee. (Op. at 4.) The Court of Chancery failed, however, to consider the magnitude of the award and refused to use the declining percentage principle. The Court of Chancery also abused its discretion by factoring into its analysis the irrelevant fact that Pentwater and the objectors are investment fund managers and receive incentive-based compensation. This is Pentwater's appeal of the Order and Final Judgment Implementing the Court's Rulings on Attorneys' Fees, Expenses & Incentive Award and Closing the Action, only as to the Fee Award of $266.7 million to Plaintiff's Counsel. (Final Award at 1.)

[4] With the revised Opinion, the Court also filed a letter explaining the differences. (A644.) The letter identified only two substantive changes, neither of which impacted the fee awarded in the original opinion. (A644.)

ARGUMENT

I. THE COURT BELOW ERRED IN AWARDING EXCESSIVE ATTORNEYS' FEES

A. Questions Presented

Did the Court of Chancery err in issuing the Fee Award that granted a percentage of the Settlement Fund without properly considering the enormity of that fund, that failed to employ the declining percentage method, that improperly considered irrelevant factors, and that disproportionately valued the work of Plaintiff's Counsel in relation to the benefit achieved for the class members? (A367-81.)

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*, 420 A.2d at 149. However, the review of the legal principles applied by the Court of Chancery in reaching that decision is de novo. *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010) ("We review [the trial court's] denial of... attorneys' fees and costs for abuse of discretion, but we review *de novo* the legal principles applied in reaching that decision."); *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006) ("Where it is in issue, we review the [trial court's] formulation of the appropriate legal standard de novo."). Further, when, as here, the fee awarded by the Court of Chancery should be reduced,

this Court may determine the appropriate fee rather than remanding for further proceedings. *Sugarland*, 420 A.2d at 151.

C. Merits of Argument

1. The Court Erred in Awarding Excessive Attorneys' Fees Based on Awarding a Percentage of the Settlement Fund, Without Considering of The Enormity of That Fund

Delaware law is clear that the amount of attorneys' fee awards in representative litigation must be reasonable. *See Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1046 (Del. 1996) (holding that the trial court must independently determine the reasonableness of fee awards). A reasonable fee award will strike a balance between encouraging plaintiffs' attorneys to bring meritorious claims and avoiding "socially unwholesome" windfalls. *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). The Court of Chancery's Fee Award grants Plaintiff's Counsel a windfall and should be reversed.

a. The Court of Chancery Ignored *Americas Mining*

The $1 billion Settlement Fund is impressive by any standard. But it does not justify a $266.7 million attorneys' fee award. In setting the Fee Award, the Court of Chancery claimed to employ the stage-of-case method analysis used in *Americas Mining Corporation v. Theriault*, 51 A.3d 1213 (Del. 2012) and then looked to the *Sugarland* factors to determine whether to reduce an excessive fee. (Op. at 4.) In

reality, the Court of Chancery ignored *Americas Mining* and mechanically applied the exemplary percentages identified in that opinion to this "late-stage settlement" where "plaintiff's counsel made it through approximately one-third of the late-stage tasks." (Op. at 25, 26.) The Court of Chancery's approach directly conflicts with *Americas Mining* and should be reversed.

In *Americas Mining*, this Court observed that "33% is the very top range of the percentages . . . [but,] the Court of Chancery has a history of awarding lower percentages of the benefits where cases have settled before trial." 51 A.3d at 1259-1260 ("When a case settles early, the Court of Chancery tends to award 10-15% of the monetary benefit conferred. When a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically including multiple depositions and some level of motion practice, fee awards in the Court of Chancery range from 15-25% of the monetary benefits conferred…Higher percentages are warranted when cases progress to a post-trial adjudication."). Relying on the Supreme Court's observation and a review of several trial court fee award decisions, the Court of Chancery identified four classes of settlements: early-stage, mid-stage,[5] late-stage settlements, and fully-litigated judgments, and attempted to assign formulaic percentage ranges for each of them. (Op. at 25 ("[T]he percentage awarded in a case that stops short

[5] The Court of Chancery interpreted the Supreme Court's description of cases that settle after "meaningful litigation efforts" and that justify fee awards of 15-25% as "mid-stage" settlements. (Op. at 18.)

of a fully litigated judgment should top out at 30%, leaving a range of 25%-30% for a late-stage settlement.").)

Applying this logic and noting that Plaintiff's Counsel made it through "approximately one-third of the late-stage tasks," the Court awarded a baseline percentage, which it did not adjust, of 26.67% of the Settlement Fund, "one-third of the way between 25% and 30%." (Op. at 26.) The Court of Chancery's mechanical approach and use of standard percentage ranges to award attorneys' fees flies in the face of *Americas Mining* and should be reversed. 51 A.3d at 1254 ("[T]his Court rejected any mechanical approach to determining common fund fee awards."); *id.* at 1261 ("[W]e decline to impose either a cap or the mandatory use of any particular range of percentages for determining attorneys' fees in megafund cases."). Tellingly, the Trial Court's decision is out of step with the substantive holding of *Americas Mining*, which approved a post-trial fee award of 15% of the common fund. *Id.* at 1262-63. Under the Court of Chancery's formulaic logic, the post-trial *Americas Mining* fee award should have accounted for 30-33% of the settlement fund, or $600-660 million, more than double the $304 million fee this Court approved as reasonable.[6] The Trial Court's starting point for calculating the Fee Award is fundamentally flawed, contrary to *Americas Mining*, and should be reversed.

[6] As discussed in greater detail below, the Trial Court's decision refusing to apply a declining percentage to the Fee Award similarly misapplies *Americas Mining*, which affirmed in part because the award was reduced from "the 22.5% requested by the

b. The Court of Chancery's Application of the *Sugarland Factors* is Also Flawed

Instead of starting with a mechanically induced, formulaic percentage and refusing to adjust it, the Court of Chancery should have applied the *Sugarland* factors to determine an appropriate Fee Award. The *Sugarland* factors require consideration of the "1) the results achieved; 2) the time and effort of counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved." *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980). While Pentwater takes no issue with the Court of Chancery's application of the third, fourth, and fifth factors, Pentwater respectfully submits that the Court of Chancery erred in its application of the first two *Sugarland* factors.

1. *Sugarland* Factor 1: The Results Achieved

The first *Sugarland* factor considers the benefits achieved in the litigation. As Pentwater's Objection explains, when assessing the "benefit achieved" the value of the settlement to the class members should be considered on a net basis.[7] (A380); *Anthony v. Yahoo!, Inc.*, 376 Fed. Appx. 775 (9th Cir. 2010) (holding that district

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Plaintiff to 15% based, at least in part, on its consideration of the Defendants' argument that the percentage should be smaller in light of the size of the judgment." 51 A.3d at 1259-1260. The Trial Court's refusal to adjust the Fee Award based on a declining percentage conflicts with *Americas Mining* and necessitates reversal.

[7] Courts differ in their definitions of net settlements, which can exclude costs, fees or both.

court properly exercised its discretion by requiring fee award to be calculated based on the net recovery); *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000) (holding, "it is impossible to conclude that the district court abused its discretion in using net recovery as a basis for awarding attorneys' fees."); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *3 (S.D.N.Y. Nov. 29, 2018) (applying fee percentage to net fund); *see also In re Jefferies Grp., Inc. S'holders Litig.*, 2015 WL 3540662, at *2 & n.5 (Del. Ch. June 5, 2015) ("In a settlement structured based on an agreed-upon net payment to stockholders (or the corporation in a derivative case) without an agreement on the amount of the maximum fee award that defendants will not oppose, as occurred here, defendants have an incentive to oppose fee requests viewed as unreasonable to manage their expected gross financial exposure. By contrast, defendants are usually indifferent as to what percentage of a gross settlement is awarded to plaintiffs' counsel because their exposure is capped at the gross amount. From a policy perspective, it would be beneficial in my view for fee applications to be subject to adversarial inquiry to provide the Court with a better record with which to evaluate the *Sugarland* factors, in particular the quality of the benefit achieved in the proposed settlement and the relative complexity of the case."). With the Fee Award deducted from the Settlement Fund, the true amount of the "benefit achieved" for the class is $733.33 million, not $1 billion.

Even if the Trial Court properly considered the gross benefit to the class, the results achieved by Plaintiff's Counsel do not justify the Fee Award. The Court of Chancery's opinion focuses on the overall size of the Settlement Fund, without considering how the result compared to what the Court could have awarded. (Op. at 62; *see also* Op. at 18-20.) Instead, the Court should have considered how the result achieved compared to what Plaintiff's Counsel could otherwise have obtained. *Nottingham P'rs v. Dana*, 564 A.2d 1089, 1103 (Del. 1989) (observing that the settlement "value and its worth must be viewed in light of the strength of the claim that is being foregone in order to settle it.") (citation omitted). That analysis should have compelled a lesser Fee Award.

The Court of Chancery's opinion criticizes Pentwater for ignoring the enormity of the Settlement Fund. But that criticism lacks necessary context. The damages theory proffered by Plaintiff's Counsel in its Pre-Trial Brief—the difference in value between what Dell received in the underlying transaction ($31.5 billion), and what Dell gave up ($20.8 billion) would have resulted in an award of $10.7 billion in damages to the class.[8] (A250-54.) Such a recovery would equate to a $54 per share premium to the actual deal price for the class—from $104 to

[8] Even comparing the $400 million to $3.1 billion range of "alternative remedies" proposed by Plaintiff's Counsel shows that the Settlement Fund is significantly less than the results that could have been achieved given the size of the transaction and the application of entire fairness review to Defendants' conflicted conduct.

approximately $158—an approximately 52% increase. Viewed against what Plaintiff's counsel sought at trial, the Settlement equates to 9.3% of the class's total potential recovery (as proffered by Plaintiff's Counsel). The Court of Chancery's own analysis confirms that the benefit achieved here is at the lower end of the precedential cases it considered, even without adjusting for the substantially greater size of the transaction challenged here. (Op. at 69 (noting that this Settlement would rank eleventh of fifteen precedents comparing the settlement achieved as a percentage of equity value).) But notwithstanding the contextual analysis of the results, the Court of Chancery declined to move from its formulaic percentage allocation based on the results obtained.

Nor should the Trial Court's (or Plaintiff's Counsel's) overemphasis of the risks of proceeding to trial or defending a successful judgment on appeal in the face of a large settlement disproportionately inform the *Sugarland* analysis. While there is undoubtedly risk in every case, Plaintiff's likelihood of success increased dramatically the further the case proceeded. The "phalanx of high-powered attorneys" representing Defendants would not have entered into the largest settlement in Delaware history, after refusing even to engage in mediation until after the close of fact and expert discovery, if Defendants did not face significant risk at trial. (Op. at 74.) Overplaying the risk of recovery, while downplaying the damages theories that would have yielded a substantially higher recovery ignores important

context and the Court of Chancery's failure to properly assess the true benefit conferred on the class is an abuse of discretion. This Court should reverse the Court of Chancery and Award attorneys' fees more reflective of the benefit obtained.

2. *Sugarland* Factor 2: The Time and Effort of Counsel

Though the time and effort expended by counsel is used as a cross-check to guard against windfalls, the Court of Chancery did not properly cross-check its mechanical decision to approve a pre-set percentage award based primarily on the stage of the litigation the Settlement was reached. *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1136 (Del. Ch. 2011). Plaintiff's Counsel asserted that they spent more than 53,000 hours litigating this case, which includes time of contract review attorneys engaged to review Defendants' document production. (A360.) The Trial Court found that the 26.67% Fee Award translates to approximately $5,000 per hour and seven times the value of the time incurred at Plaintiff's Counsel's customary rates. (Op. at 74.) Without analysis or explanation, the Court of Chancery concluded that neither is excessive.

While Plaintiff's Counsel thoroughly and effectively litigated this case nearly to trial, an implied hourly rate of $5,000 and a 7x multiplier are both at the high end of Delaware fee awards and should have signified to the Court of Chancery that the Fee Award risked a windfall for Plaintiff's Counsel. *See Seinfeld v. Coker*, 847 A.2d 330, 338 (Del. Ch. 2000) ("In cases such as this one, however, where the percentage

of the fund corresponds to more than $2,500 per hour, this failure may result in a windfall."); *see also Sciabacucchi v. Howley*, 2023 WL 4345406, at *5 (Del. Ch. July 3, 2023) (observing that "[a]n hourly rate of $3,838.77 would overcompensate counsel . . . [and] a multiplier of 4.6x has been deemed reasonable for cases in an advanced stage"); *S'holder Representative Servs. LLC v. Shire US Hldgs., Inc.*, 2021 WL 1627166, at *3 n.14 (Del. Ch. Apr. 27, 2021) (observing that a 2.5x fee award was in line with fee awards deemed reasonable in the post-trial or advanced-stage litigation context) *citing Ams. Mining*, 51 A.3d at 1252, 1262–63 (affirming attorney fee award of "66 times the value of [the attorneys'] time and expenses" for post-trial victory); *In re El Paso Corp. S'holder Litig.*, C.A. No. 6949-CS, at 40 (Del. Ch. Dec. 3, 2012) (TRANSCRIPT) (awarding a fee resulting in a multiplier of approximately 4.9x the lodestar pursuant to a settlement reached after substantial motion practice and an unsuccessful preliminary injunction hearing), and *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, C.A. No. 2635-CC, at 17 (Del. Ch. June 8, 2007) (TRANSCRIPT) (awarding a fee resulting in a multiplier of approximately 6.5x the lodestar pursuant to a settlement reached after substantial motion practice and a successful preliminary injunction hearing); *In re AXA Fin., Inc.*, 2002 WL 1283674, at *7 (Del. Ch. May 22, 2002) (recognizing that an implied hourly rate of more than $2,630 is high, but not out of line, for a significant benefit with modest litigation efforts).

And although *Americas Mining* is a significant outlier on the implied hourly rate and multiplier analyses, the *Americas Mining* Court still reduced the percentage to reflect the extraordinary size of the common fund created. 51 A.3d at 1258-1259 ("[T]he record reflects that the Court of Chancery did reduce the percentage it awarded due to the large amount of the judgment."). The Court of Chancery's decision to dispense with the cross-check required by *Sugarland*, coupled with the Court's refusal to apply the declining percentage to the Fee Award constitute reversible error.

2. The Court Below Erred in Failing to Use the Declining Percentage Method

As set forth above, the proper application of the *Sugarland* factors and a more faithful application of *Americas Mining*, rather than the mechanical adoption of a fixed percentage fee based on the stage where litigation settled, compels a lower Fee Award – even without a declining percentage adjustment for mega-fund cases. The Court of Chancery also erred by refusing to apply the declining percentage method to the Settlement Fund in this case. This Court should reverse the Court of Chancery's Fee Award and recognize the appropriate application of the declining percentage method in mega-fund cases.

The Court of Chancery suggested that the declining percentage method conflicts with *Americas Mining*, "which calls for an increasing percentage as the plaintiff pushes deeper into the case." (Op. at 27.) Doubling down, the Trial Court

held that "[u]nder *Americas Mining* and *Sugarland*, a Court does not make a downward adjustment to the indicative percentage based on the size of the fund." (Op. at 34.) But *Americas Mining* expressly recognized the propriety of applying the declining percentage method. 51 A.3d at 1259 (observing that trial court reduced the fee percentage awarded because of the size of the judgment and criticizing appellants for arguing that "the Fee Award percentage did not 'decline' enough."). While *Americas Mining* confirmed that "the use of a declining percentage . . . is a matter of discretion and is not required *per se*," the declining method percentage is endorsed by and does not conflict with *Americas Mining*. The Court of Chancery's misapplication of this legal principle, which this Court reviews *de novo*, warrants reversal. *Alaska Elec. Pension Fund*, 988 A.2d at 417; *Dover Historical Soc'y, Inc.*, 902 A.2d at 1089.

The declining percentage method seeks to avoid windfall compensation to Plaintiff's Counsel by reducing the percentage paid to counsel as the size of the common fund increases. (A371-77; A484-492.) The principle recognizes that attorneys' fee awards are meant to incentivize attorneys to bring meritorious cases, and the amount of work, time, effort, and risk does not increase proportionately with the transaction size—it is not 100 times more difficult (or risky) to litigate a $10 billion case than it is to litigate a $100 million case. *Goldberger v. Integrated Res.*, 209 F.3d 43, 52 (2d Cir. 2000) ("Obviously, it is not ten times as difficult to prepare,

and try or settle a 10 million dollar case as it is to try a 1 million dollar case.") (citation omitted). Consequently, the fees earned by Plaintiff's Counsel should not increase proportionally with transaction size.

Scant Delaware precedent addresses mega-fund settlements and the only other mega-fund case in Delaware embraces the application of declining percentage principles. (Op. at 63 (identifying this case and *Americas Mining* as the only Delaware cases with common funds in excess of $1 billion).) Particularly concerning is the Court of Chancery's suggestion that the declining percentage method is "a departure" from *Americas Mining*. (Op. at 51.) In fact, *Americas Mining* confirms that consideration of the declining percentage method is appropriate, albeit not required, notwithstanding that the only mega fund case before the Supreme Court applied the declining percentage method. *Ams. Mining*, 51 A.3d at 1254. And as the only earlier Delaware precedent with a common fund in excess of $1 billion,[9] *Americas Mining* condoned the reduction of the percentage awarded "in light of the size of the judgment." *Ams. Mining*, 51 A.3d at 1258-59. The

[9] Of the eight late-stage settlement cases the Trial Court cites, *Activision's* $275 million settlement one month before trial – representing a 13.75% to 27.5% recovery (a greater percentage of recovery than here) – is the largest. *See In re Activision Blizzard*, C.A. No. 8885-VCL, at 17- 18 (Del. Ch. Mar. 4, 2015) (TRANSCRIPT). Rather than inform its analysis using *Activision's* 22.7% to 24.5% percentage range, the Court of Chancery disregards this precedent, describing it as a "curiosity." *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025, 1075 (Del. Ch. 2015); (Op. at 24.)

declining percentage principle does not conflict with *Americas Mining* and the Court of Chancery should have considered it as part of its *Sugarland* analysis.

In the absence of well-developed Delaware authority,[10] Pentwater (and the law professors) pointed the Court of Chancery to the significant precedent found in federal securities class actions, which more frequently address mega-fund settlements, and justify the application of the declining percentage method here. (A373; A484-92.) Empirical studies demonstrate that as the size of federal securities class action settlements increase, the attorneys' fees awarded, as a percentage of the settlement, correspondingly decrease. A 2022 report released by National Economic Research Consulting ("NERA") found that within the prior ten years, in all securities class action cases that settled for more than $1 billion, attorneys' fees and expenses

[10] Likewise, Pentwater does not misread *Goodrich v. E.F. Hutton*, 681 A.2d 1039 (Del. 1996). There, the Supreme Court observed that "the Court of Chancery rightly acknowledged the merit of the emerging judicial consensus that the percentage of recovery awarded should 'decrease as the size of the [common] fund increases.'" *Ams. Mining*, 51 A.3d at 1258 *quoting Goodrich*, 681 A.2d at 1048 (quotations and modifications in original). Neither *Goodrich* nor *Americas Mining* reflects hostility towards the declining percentage method. Instead, this Court cautioned against the "adoption of a mandatory methodology or particular mathematical model for determining attorney's fees in common fund cases. *Goodrich,* 681. A.2d at 1050. But rather than considering whether a reduction to the Fee Award was justified by the overall size of the Settlement Fund, a mandatory, mechanical methodology based on the stage of the settlement is exactly what the Court of Chancery did, and why it erred, below.

averaged only **10.5%** of the settlement recovery.[11] (A404-436.) Pentwater also submitted a chart based on data collected by Stanford Law School in collaboration with Cornerstone Research on the top 10 largest federal securities class action settlements, which showed that as settlement amounts rise, the percentages awarded in attorneys' fees falls. (A438-39.)

Despite recognizing (i) that Pentwater and the law professors "have shown that when awarding fees for settlements of $1 billion or more, federal courts award approximately 10% of the common fund," (ii) "a number of surface-level similarities between federal securities cases and Chancery M&A litigation,"[12] (iii) that "[l]arger cases are thus more profitable, even with lower percentage-based awards," and (iv) that "the declining-percentage method does not create a disincentive for lawyers to litigate larger securities cases," the Court of Chancery refused even to consider the declining percentage method. (Op. at 34-37.) Focusing primarily on "the ability of plaintiff's counsel to identify high quality cases" (Op. at 45); and "the relative

[11] Importantly, studies performed by NERA have previously been relied on by this Court, including in *Americas Mining*. 51 A.3d at 1260.

[12] The Trial Court attempts to distinguish federal securities actions from Chancery M&A actions based on the "sheer volume" of federal securities litigation. (Op at 41-43.) Comparing a nationwide federal system to the caseload of a single state court – even one as busy as the Court of Chancery – is not apt. Undoubtedly the 94 federal judicial districts will process more cases than the seven members of the Court of Chancery. But this is not a basis to jettison the declining percentage method entirely.

risk that plaintiff's counsel undertakes after a case survives a motion to dismiss" in federal securities cases (Op. at 45), the Court of Chancery rejected the federal paradigm as "unpersuasive." (Op. at 45.) But both of these observations apply with equal force to Chancery M&A litigation – plaintiffs' counsel have no trouble identifying meritorious claims and the chances of success indisputably increase after surviving a motion to dismiss.

It is not uncommon for Delaware courts to look to federal decisions for guidance. *See, e.g.*, *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993); *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 496 (Del. 2000); *In re Straight Path Commc'ns Inc. Consol. S'holders Litig.*, 2022 WL 2236192 *11 fn83 (Del. Ch. June 14, 2022). While not binding on the trial court, the federal precedent provided by Pentwater offered useful guidance to the Court of Chancery, which rarely deals with mega-fund settlements in excess of $1 billion. Despite having these informative data points, the Court of Chancery disregarded federal precedent in granting the Fee Award. This Court should find that the Court of Chancery's refusal to employ the declining percentage method constitutes reversible error.

Nor does the Court of Chancery's analysis of the public policy considerations underlying the application of the declining percentage method justify its wholesale refusal even to contemplate its application within the *Sugarland* framework.

Notably, the Court of Chancery does not question that a smaller percentage of an exceptionally large common fund would adequately incentivize or compensate plaintiff's counsel. The federal guidance is instructive. The Second Circuit addressed the public policy concerns of the declining percentage principle in affirming a District Court's decision to reduce an attorneys' fee award from 18% to 6.5% of a multi-billion dollar settlement fund:

> We need not dispute whether the sliding scale approach is economically rational in the context of ensuring competent and committed counsel. Public policy concerns oftentimes redefine the focus of the court. ... [T]he district court's decision in favor of protecting the instant class from an excessive fee award militates against awarding attorneys' fees based purely on economic incentives. Satisfied that its ruling would not deter plaintiffs' attorneys from pursuing similar claims, the district court remarked, "If [this fee award] amounts to punishment, I am confident there will be many attempts to self-inflict similar punishment in future cases." We agree.

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 123 (2d Cir. 2005) (antitrust context).[13] The Court of Chancery erred by failing to consider how the declining percentage principle would impact the Fee Award.

[13] Nor has the use of the "declining percentage principle" in the largest securities class action settlements slowed the filing of securities class action suits or impeded the vindication of stockholder rights. (*See, e.g.*, A407 (presenting numbers of federal securities class action filings from 1996 (131) through 2021 (205)).)

3. The Court Erred by Considering Pentwater's Compensation Structure

An abuse of discretion can occur in "three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." *Homestore Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005) (internal quotations omitted). Here, the Court of Chancery gave significant weight to the irrelevant fact that Pentwater and the other objectors are investment managers.[14] (Op. at 58.) The Court of Chancery devotes nearly 4 pages of its Opinion to this issue, observing that "[t]here is [] a particular irony in *who* is arguing for [the declining percentage method]." (Op. at 58.) But who is objecting to the Fee Award and how they might get compensated for non-litigation services has no bearing on the appropriate Fee Award here.

Any reduction in the Fee Award will increase the recovery to the entire class – not just Pentwater. With a diverse class of public stockholders of all stripes, justifying an excessive Fee Award on the irrelevant compensation structure of a class member with the resources to pursue an objection ignores the mandate of the

[14] Even at the outset, instead of describing the objectors as class members or former stockholders, the Court of Chancery described the objectors as "[a] group of eight investment funds…" (Op. at 3.)

Sugarland analysis: to balance any fee award against the benefit obtained to ensure adequate compensation for class counsel without providing a windfall. Pentwater's compensation structure, for investment management services, cannot inform the market for compensating class counsel for a successful recovery. Nor does the fact that Pentwater did not litigate this case, when it actively engages in litigation, justify an excessive Fee Award. Here, five actions were filed in the Court of Chancery challenging the deal and a leadership dispute among several well-qualified plaintiff firms followed leaving little reason for Pentwater to jump into the fray. (Op. at 8.) With no evidence of Pentwater's interest or willingness to litigate this case, the Court's irrelevant speculation constitutes an abuse of discretion.[15]

The comparison "between the fees investment advisors charge and the appropriate contingency fees awarded to plaintiffs' counsel by courts in mega-settlements is inapt for several reasons." (A470.) First, "investment managers disclose and/or negotiate their fees up-front in a highly competitive marketplace for advisory services and investors' capital." (A470; *see also* A494-95.) Second, certain characteristics of fund managers' compensation are "not comparable to the proposed straight-percentage fee sought by Plaintiff's Counsel" and "render them poor candidates for comparison with contingency fee awards." (A495-96.)

[15] Pentwater's pursuit of its objection below and this appeal also runs counter to the Court of Chancery's free rider theory.

Pentwater's highly negotiated *ex-ante* compensation arrangements cannot inform the propriety of the Fee Award and the Trial Court's consideration of these irrelevant facts is an abuse of discretion.

The Court's focus on Pentwater, which improperly influenced its application of the *Sugarland* factors, is clear from the following passage:

> The objectors are thus not well positioned to insist on a declining-percentage method given that they do not use it in their own risk-based businesses. The objectors are also not well positioned to object to the fee application because the objectors could have stepped up and chose not to. All are sophisticated funds. All are highly litigious. Any of them could have hired counsel, negotiated a fee arrangement, and pursued this case. None did. They decided to free ride, then only roused themselves after the $1 billion settlement had been achieved. At that point, they did not object to the settlement itself, nor did they offer to take over the case on the theory that they and their own handpicked counsel could do better. They were content to snipe at the fee.

(Op. at 61.) But even if Pentwater employed a declining fee percentage in its negotiated fee arrangements, the Court of Chancery would undoubtedly distinguish it, as it distinguished the use of the declining fee percentage in federal securities cases as inapposite to Chancery M&A litigation. If litigation in Delaware is so different that analogous management of mega-fund settlements in federal cases cannot inform the propriety of the Fee Award here, it is difficult to see how differently negotiated compensation arrangements from different professionals in a different industry could carry meaningful weight. Such analysis is not an application

of the *Sugarland* factors, but instead reflects the Trial Court's application of "its own world views on incentives, bankers' compensation, and envy." *Am. Mining Corp.*, 51 A.3d at 1263 (Berger, J., dissenting). The Court of Chancery abused its discretion by giving these irrelevant and improper facts significant weight in its analysis.

CONCLUSION

The Supreme Court should reverse the Fee Award because the Court of Chancery misapplied *Americas Mining,* rejected the *Sugarland* analysis in favor of a mechanical structured percentage based primarily on the stage of the case at Settlement, and abused its discretion by ignoring declining percentage principles in favor of irrelevant facts about Pentwater's compensation structure and litigation motives. Pentwater respectfully requests that this Court reverse the decision below on attorneys' fees and award a reasonable fee that is fair and reasonable to the stockholder class.

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