IN THE SUPREME COURT OF THE STATE OF DELAWARE

MOELIS & COMPANY,

Defendant-Below/
Appellant,

v.

WEST PALM BEACH FIREFIGHTERS' PENSION FUND, on behalf of itself and all other similarly-situated Class A stockholders of MOELIS & COMPANY,

Plaintiff-Below/
Appellee.

Case No. 340, 2024

Court Below:
Court of Chancery;
C.A. No. 2023-0309-JTL

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Moelis & Co. was founded as an independent investment bank by Kenneth Moelis and other veteran investment bankers in 2007. In 2014, the company announced an initial public offering of Class A common stock. Upon completion of the offering—and as disclosed in the IPO prospectus—the company entered into a Stockholders Agreement with Moelis & Company Partner Holdings LP ("Partner Holdings"), a partnership owned by the company's managing directors and controlled by Kenneth Moelis. In the years following the IPO, the company re-disclosed the Stockholders Agreement in each of its annual reports. Every investor who ever purchased shares in the company thus did so on full notice of the terms of the Stockholders Agreement.

No stockholder of Moelis ever challenged any aspect of the Stockholders Agreement, on any ground, until plaintiff brought this suit in 2023—nearly nine years after it acquired Moelis shares in 2014. Plaintiff did not allege that the Stockholders Agreement had actually constrained any Moelis director from exercising his or her fiduciary duties or that it had caused the company to take, or refrain from taking, any action in breach of any duty. Plaintiff claimed only that provisions of the Stockholders Agreement are facially invalid because they limit the managerial discretion of Moelis directors in violation of 8 *Del. C.* § 141.

On cross-motions for summary judgment, the Court of Chancery held that plaintiff's claims of statutory invalidity were timely raised and that almost of all the challenged provisions of the Stockholders Agreement facially violated § 141. The Court of Chancery awarded $6 million in fees and expenses to plaintiff's counsel.

The judgment should be reversed. Plaintiff's claims are time-barred, under well-settled principles governing the proper application of laches. Under equally well-settled principles governing a board's authority to bind the corporation in contract, the Stockholders Agreement does not facially violate § 141. And even assuming that plaintiff was entitled to judgment in its favor, the Court of Chancery improperly awarded $6 million in fees to plaintiff's counsel.

SUMMARY OF ARGUMENT

1. Plaintiff's claims that provisions of the Stockholders Agreement facially violate § 141 are time-barred because they were brought long after the three-year analogous limitations period had run. To conclude otherwise, the Court of Chancery erroneously held that the challenged provisions are void rather than voidable, precluding a laches defense. The court further erred by holding in the alternative that plaintiff's claims continually accrued as long as the Stockholders Agreement was in effect and that the prejudice element of a laches defense was unsatisfied.

2. The Court of Chancery erred in concluding that plaintiff met its burden to show, as a matter of law, that the challenged provisions of the Stockholders Agreement are facially invalid under § 141(a). The challenged provisions are valid under longstanding Delaware law recognizing a board's managerial authority to contractually bind the corporation, including in contracts with stockholders. The court disregarded this settled law and instead applied a new rule ungrounded in the relevant precedent. According to the court, § 141(a) constrains a board's authority to enter into "internal governance arrangements" but not "external commercial contracts." This rule is novel and yields unpredictable results, as illustrated by the court's mistaken conclusion that there was no commercial arrangement underlying the Stockholders Agreement. To the contrary, the agreement was integral to the

commercial bargain that transformed Moelis from a privately owned business into a public company. The court also erred by relying on hypotheticals rather than evidence to conclude that the challenged provisions always operate unlawfully.

3. The Court of Chancery abused its discretion in awarding $6 million in attorneys' fees. The court disregarded its duty to independently determine fair and reasonable fees by instead employing an improper "either-or" approach to grant plaintiff's full request. Moreover, the court enhanced the award for the improper purpose of guiding lawyers' fee submissions in future cases, handing plaintiff's counsel an undeserved windfall. Finally, the court misapplied the *Sugarland* factors by awarding fees unjustified by the at most nominal benefit achieved in this litigation.

STATEMENT OF FACTS

A. Kenneth Moelis and other veteran bankers found Moelis & Company

Moelis & Company was founded as an independent investment bank in 2007 by Kenneth Moelis, the former President of UBS Investment Bank, and other veteran investment bankers. Ex.B 15; A0430. The company was owned by Moelis & Company Holdings LP ("Old Holdings"), a Delaware limited partnership held by the business's managing directors. A0430. By 2013, Moelis & Company was generating over $400 million in annual revenue. Ex.B 15. Kenneth Moelis has served as chair of the board of directors and CEO since the company's founding. Ex.B 15; A0491.

B. Moelis & Company announces an IPO

In 2014, Moelis & Company announced an IPO of Class A common stock. Ex.B 15. In preparation for the IPO, Old Holdings transferred the company's advisory business to a new entity, Moelis & Company Group LP ("Group LP"). Ex.B 15; A0462. An LLC was formed to serve as Group LP's sole general partner. Ex.B 15. All of the equity interest in Group LP's general partner was, in turn, issued to a new entity, Moelis & Company ("Moelis"), which was incorporated in Delaware as a holding company. Ex.B 15.

Moelis was formed to be the new publicly traded entity. As part of the reorganization, it was issued partnership units representing an approximately 27%

economic interest in Group LP. Ex.B 15. The remaining economic interest was largely transferred to Moelis & Company Partner Holdings LP ("Partner Holdings"), an entity controlled by Mr. Moelis and also owned by the managing directors who had previously held the advisory business through Old Holdings. A0439, -61.

Moelis has two authorized classes of common stock. The Class A common stock—which was issued to the public through the IPO—carries one vote per share. Ex.B 16. The Class B stock carries ten votes per share if the "Class B Condition," defined in the company's charter, is satisfied, and one vote per share if it is not. Ex.B 16; A0542/Certificate of Incorporation § 2(a)(i)-(ii). In connection with its offering of Class A stock, Moelis issued to Partner Holdings Class B stock amounting to an approximately 96% voting interest so long as the Class B Condition is met. A0437.

The Class B Condition is satisfied if Mr. Moelis (1) owns at least 4,458,445 shares of Class A stock and Equivalent Class A shares, that is, securities that could be exchanged for Class A stock; (2) owns at least 5% of the Class A stock; (3) has not been convicted of a felony in violation of securities laws or involving moral turpitude; (4) is alive; and if (5) Mr. Moelis's employment agreement with the company has not been terminated because of a breach of his covenant to devote his primary business time and efforts to the business and affairs of the company or because he suffered an "[i]ncapacity." Ex.B 16; A0542/Certificate of Incorporation § 2(a)(ii).

In the prospectus for the offering, Moelis disclosed that "[u]pon completion of this offering, Mr. Moelis will control"—through his control of Partner Holdings and additional holdings of Class A stock—"approximately 96.8% of the voting interest in Moelis & Company." A0455. "As a result," the prospectus disclosed, "he will have the ability to elect all of the members of our board of directors and thereby to control our management and affairs." *Id.*

C. Moelis & Company enters into the Stockholders Agreement with Partner Holdings in connection with the IPO

In its IPO prospectus, Moelis disclosed that, "[i]n connection with the completion of [the] offering," it would "enter into a stockholders agreement with Partner Holdings." A0441; Ex.B 17. The same disclosure has appeared, in substance, in each ensuing Annual Report. *See* A0763; A0781; A0799; A0816; A0831; A0846; A0861; A0876.

In contemplation of the reorganization, through which Partner Holdings' owners contributed the operating business to the newly formed holding company, the Stockholders Agreement grants Partner Holdings various rights. Ex.B 17; A0561. These rights are contingent on the satisfaction of the Class B Condition and a "Secondary Class B Condition" defined in the agreement. Ex.B 17; A0566/Stockholders Agreement ("SA") § 1.1. The Secondary Class B Condition is identical to the Class B Condition, except that its satisfaction requires that Mr. Moelis own only 2,229,222 shares of Class A stock or its equivalent. Ex.B 17;

A0566/SA § 1.1. If the Secondary Class B condition ceases to be satisfied, the Stockholders Agreement terminates. Ex.B 17; A0571/SA § 5.1.

Approval Rights. Pursuant to § 2.1 of the Agreement, so long as the Class B Condition is satisfied, the Moelis board may not authorize certain categories of corporate action without Partner Holdings' "prior approval." A0567/SA § 2.1(a). These eighteen categories include the incurrence of debt greater than $20 million and the issuance of preferred stock, among other things. Ex.B 18-19; A0567-68/SA § 2.1(a). If only the Secondary Class B Condition is satisfied, Partner Holdings' "prior approval" is needed for just three categories of action. Ex.B 20 n.30; A0568-69/SA § 2.1(b).

Board Representation. Article IV of the Stockholders Agreement addresses Partner Holdings' representation on the company's board. A0570-71/SA §§ 4.1-4.2. Its first provision, § 4.1, provides Partner Holdings with the right to designate nominees equal to a majority of the board (or, if only the Secondary Class B Condition is satisfied, one quarter of the board), and requires the company "to use its reasonable best efforts" to cause those designees to be elected and, absent Partner Holdings' consent, to cap the total number of directors at eleven. A0570/SA § 4.1(a), (c); Ex.B 20-22. This provision also provides that the company will replace any Partner Holdings designee that leaves the board with a new designee. A0570-71/SA § 4.1(d); Ex.B 22. The second provision of Article IV, § 4.2, requires the company to "take all reasonable actions within its control" to provide Partner Holdings with proportional representation on any board committee. Ex.B 23; A0571/SA § 4.2.

Severability. The Stockholders Agreement stipulates that its provisions "shall be deemed severable," such that, "[i]f any provision of [the] Agreement, or the application thereof to any person or entity or any circumstance, is found to be invalid or unenforceable," "the remainder of [the] Agreement and the application of such provision to other Persons or circumstances shall not be affected." A0589/SA § 9.3.

The Stockholders Agreement was executed on April 15, 2014, one day before the Class A shares began trading. Ex.B 17. In addition to the company and Partner Holdings, Mr. Moelis and two entities affiliated with Mr. Moelis were signatories to the agreement. Ex.B 17. That same day, Moelis executed an employment agreement with Mr. Moelis. A1660; A0659.

D. Moelis & Company becomes a non-controlled company under NYSE rules

In February 2021, Mr. Moelis's voting power fell below 50%, causing Moelis to no longer qualify as a controlled company under NYSE rules. Ex.B 23. To ensure compliance with the rules for non-controlled companies, Partner Holdings partially waived its designation rights under § 4.1, and, since April 2021, has only designated two director nominees for election to the company's five-member board. Ex.B 23-24; A0669. Partner Holdings also waived its right to board committee representation under § 4.2; accordingly, none of its designees has served on a committee since April 2021. A0500-01.

As of April 2023, Mr. Moelis controlled a 40.4% voting interest in the company. Ex.B 24; A0538.

E. Plaintiff files suit

Plaintiff is an owner of Class A stock. Ex.B 24. Plaintiff purchased its shares on November 19, 2014, months after the company's IPO. *Id.* On March 13, 2023, plaintiff filed this action claiming that provisions of the Stockholders Agreement concerning Partner Holdings' approval rights and board representation rights violate 8 *Del. C.* § 141. *Id.*

The complaint asserts three claims alleging that § 2.1, § 4.1(a), (c), and (d), and § 4.2 of the Stockholders Agreement are facially invalid under § 141(a). A0039-42/Compl. ¶¶ 45-56. As to § 4.2, the complaint also asserts that it violates § 141(c). A0041-42/Compl. ¶¶ 53-56. The complaint requests a declaratory judgment that the challenged provisions are invalid and unenforceable. A0042/Compl. at 25.

Moelis answered the complaint, raising as affirmative defenses, among others, that plaintiff's claims are time-barred or unripe. A0079. Cross-motions for summary judgment followed. Ex.B 24.

F. The Court of Chancery rules the challenged provisions facially invalid

The Court of Chancery granted plaintiff's motion in substantial part.

The court first issued an opinion addressing what it referred to as the company's "timeliness defenses." Ex.A 40. As to Moelis's argument that plaintiff's challenge was brought long after the three-year limitations period for statutory claims expired, the court held that laches, not the statute of limitations, was the relevant inquiry, that laches could not validate a void act, and that, even if laches could apply, plaintiff's claims allege "an ongoing statutory violation" that could not go stale. Ex.A 7-20. As to ripeness, the court held that plaintiff's "facial statutory challenge" presented a "pure question of law" and was therefore ripe. Ex.A 25-30.

The court later issued a 132-page opinion on the merits. The court surveyed case law to determine whether § 141(a) restricts a company's ability to contract with a stockholder. Ex.B 26-80. While recognizing that the cases were not consistent, the court posited that they "reveal[] a clear rule." Ex.B 25, 79. The court concluded that "[a]lthough none of the cases say so expressly," they rely on a two-part test: At step one, the court conducts a seven-factor inquiry to determine whether the contract at issue is an "internal governance arrangement," and so subject to § 141(a), or "external commercial agreement," not subject to § 141(a). If the former, the court proceeds to step two and determines whether the challenged provision "tends to limit" the board's managerial freedom "in a substantial way." Ex.B 25, 80-94.

Applying this test, the court held that the Stockholders Agreement was an "internal governance arrangement" and that all of the challenged provisions violate

§ 141(a)—though, as to § 4.1, the court held the violation only extends to the requirements that the board recommend Partner Holdings' designees and replace vacancies with such designees and that it obtain Partner Holdings' consent to increase the board's size beyond eleven directors. Ex.B 95-131. The court also held that § 4.2 violates § 141(c)(2), apparently for the same reasons it violates § 141(a). Ex.B 121-24. The court accordingly substantially granted plaintiff's motion and declared § 2.1, the relevant portions of § 4.1, and § 4.2 to be facially invalid. Ex.B 132.

The court entered judgment on March 4, 2024. A1762.

G. The Court of Chancery's awards plaintiff attorneys' fees

Plaintiff filed a motion requesting $6 million in fees and expenses, highlighting what it characterized as the "tectonic shift" to "corporate practice" its challenge achieved. A1763. The company opposed this motion, arguing that an appropriate fee would be between $450,000 and $600,000. A2136. The court issued a bench ruling granting plaintiff's full request. Ex.D 37-38. The court acknowledged that its initial "independent view" of an appropriate fee was "in the range of $3 million," but, because the company's request for a six-figure fee was not "even on the game board," it decided "to go with the plaintiff's request." *Id.*

ARGUMENT

I. PLAINTIFF'S CLAIMS OF FACIAL STATUTORY INVALIDITY ARE TIME-BARRED

A. Question Presented

Are plaintiff's claims, alleging that provisions of the Stockholders Agreement facially violate 8 *Del. C.* § 141, time-barred? The question was raised below (A0392-94) and considered by the Court of Chancery (Ex.A 5-25).

B. Scope of Review

The decision below was based on undisputed facts (Ex.A 4) and decided as a question of law subject to de novo review in this Court. *Levey* v. *Brownstone Asset Mgmt., LP*, 76 A.3d 764, 768 (Del. 2013).

C. Merits of Argument

Under the analysis this Court has directed for assessing the timeliness of a claim, plaintiff's claims are time-barred. The Court of Chancery, however, determined that plaintiff's claims are unencumbered by any time bars, whether imposed by law or equity, but are instead perpetually ripe. It reached that conclusion only by departing from the settled timeliness inquiry.

1. Under the analogous limitations period, plaintiff's claims of facial invalidity are untimely

All three of plaintiff's claims allege that various provisions of the Stockholders Agreement facially violate § 141 and name Moelis, the corporation, as the sole defendant. A0039-42/Compl. ¶¶ 45-56. And they all seek as a remedy a declaratory judgment of statutory invalidity. *Id.* Such claims are "legal in nature," even if the relief sought is equitable, because plaintiff "relies entirely on its statutory claim under the DGCL" to justify its entitlement to relief. *Kraft* v. *WisdomTree Invs., Inc.*, 145 A.3d 969, 984-87 (Del. Ch. 2016). The three-year limitation period set forth in 10 *Del. C.* § 8106 for actions at law "based on a statute" thus applies "by analogy" to the claims. *Id.* at 979, 988; *see Kahn* v. *Seaboard Corp.*, 625 A.2d 269, 272-73 (Del. Ch. 1993). "Absent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period." *U.S. Cellular Inv. Co. of Allentown* v. *Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996)

Plaintiff here brought its claims in 2023, long after the analogous statutory period expired. It is undisputed that Moelis disclosed in its 2014 IPO prospectus that it would enter into the Stockholders Agreement upon completion of the offering, that Moelis also disclosed the Stockholders Agreement itself, and that plaintiff bought its Moelis shares in 2014, after the offering was completed. Ex.A 17, 24; A0468-70; *see U.S. Cellular*, 677 A.2d at 504 (holding that "the undisputed facts of this case, *e.g.*, the public filings and actions of [defendant], indicate that [plaintiff] was chargeable with notice of the contractual breach" alleged).

Plaintiff neither alleged, nor argued below, that any "unusual circumstances" explained its failure to sue for nearly a decade after it acquired its Moelis shares. Where a plaintiff has not made any attempt to justify suing beyond the analogous statutory period, its claims are barred by laches. In *U.S. Cellular*, for example, this Court concluded that because the plaintiff "ha[d] offered no justification for its delay in bringing suit," it was "thus appropriate to apply the statutory period set forth in 10 *Del. C.* § 8106." 677 A.2d at 502. Similarly, the court in *Kraft* found plaintiff's claim untimely because "the statutory period expired almost twelve years before suit was filed" and the plaintiff "ha[d] not made any tolling argument." 145 A.3d at 989. Applying the same analysis, the claims here are likewise time-barred.

2. Plaintiff's claims are subject to laches because they allege voidable, not void, corporate action

The Court of Chancery concluded that plaintiff's claims are timely—indeed, forever timely—because laches could not apply to them. The court reasoned that "[i]f the Challenged Provisions violate Section 141(a), then they are void" and "[e]quitable defenses, including laches, cannot validate void act." Ex.A 7.

The court's determination that any corporate action that violates § 141(a) is necessarily void is inconsistent with "the well-established distinction between void and voidable corporate actions." *Klaassen* v. *Allegro Dev. Corp.*, 106 A.3d 1035, 1046 (Del. 2014). As this Court has explained, "void acts are *ultra vires* and generally cannot be ratified, but voidable acts are acts falling within the power of a corporation, though not properly authorized, and are subject to equitable defenses." *CompoSecure, L.L.C.* v. *CardUX, LLC*, 206 A.3d 807, 816-17 (Del. 2018); *see also Holifield* v. *XRI Inv. Holdings LLC*, 304 A.3d 896, 921-22 (Del. 2023) (same). Put another way, "[v]oid acts are not ratifiable because the corporation cannot, *in any case*, lawfully accomplish them." *Nevins* v. *Bryan*, 885 A.2d 233, 245 (Del. Ch. 2005), *aff'd*, 884 A.2d 512 (Del. 2005) (quoted in *CompoSecure*, 206 A.3d at 817 n.35). "In contrast, voidable acts are ratifiable because the corporation can lawfully accomplish them if it does so in the appropriate manner." *Id.*

As the Court of Chancery recognized, Moelis had the power to bind itself to the challenged provisions of the Stockholders Agreement if they were implemented in its charter. Ex.B 12-13. That is because § 141(a) does not limit the corporation's power, but rather addresses "the statutory allocation of power or authority" among the "stockholders, officers, and directors." 1 David A. Drexler *et al.*, Delaware Corporation Law and Practice § 11.02 (2023). In holding that the challenged provision were nevertheless a violation of § 141(a), the Court of Chancery observed that "[a]lthough some might find it bizarre that the DGCL would prohibit one means of accomplishing a goal while allowing another, that is what the doctrine of independent legal significance contemplates." Ex.B 13. Thus, even assuming that the challenged provisions violated § 141(a) because they were implemented only in the Stockholders Agreement, as the Court of Chancery held, the challenged provisions were not *ultra vires*. To the contrary, they could be "lawfully accomplish[ed]" if implemented "in the appropriate manner." *Nevins*, 885 A.2d at 245. Moelis's action in binding itself to the challenged provisions, and taking any action in compliance with them, was thus voidable, not void, corporate action. Plaintiff's claims challenging that corporate action are therefore subject to equitable defenses, including laches.

3. The Court of Chancery's laches analysis was erroneous

The Court of Chancery also concluded that even if plaintiffs' claims were subject to equitable defenses, the elements of laches were unsatisfied. That conclusion depended on two legal errors, both stemming from the court's failure to acknowledge the analogous statutory limitations period.

The analogous limitations period. In conducting its laches analysis, the Court of Chancery made no mention of § 8106. It is settled, however, that "[w]here the plaintiff seeks equitable relief," that court "applies the statute of limitations by analogy." *Whittington* v. *Dragon Grp. LLC*, 991 A.2d 1, 9 (Del. 2009). And "[a]bsent a tolling of the limitations period a party's failure to file within the analogous period of limitations will be given great weight in deciding whether the claims are barred by laches." *Id.* Accordingly, as noted above, "[a]bsent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period." *U.S. Cellular*, 677 A.2d at 502. A laches inquiry thus begins with a determination whether there is an analogous period of limitations, and if so, when it was. *See id.* at 503.

Plaintiff did not dispute below that § 8106 sets forth the analogous period of limitations for its claims. (Like the Court of Chancery, plaintiff did not mention § 8106 at all.) "[A] cause of action 'accrues' under Section 8106 at the time of the wrongful act." *Wal-Mart Stores, Inc.* v. *AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004). Here, the allegedly wrongful act giving rise to plaintiff's claims is the company's entry into the Stockholders Agreement in 2014. At that point, everything necessary to allege plaintiff's claims of facial statutorily invalidity, and to justify all the relief it sought, had already occurred. As plaintiff put it below, "each of the challenged provisions of the Stockholders Agreement are invalid and unenforceable under Delaware law" because the 2014 "Stockholders Agreement says what is says, and the law is what it is." A0089-90.

In the Court of Chancery's view, however, the wrongful act was not "complete at that point." Ex.A 10. Rather, it agreed with plaintiff that the wrongful act extended, or was repeated, during the term of the Stockholders Agreement because "the on-going existence of the Challenged Provisions violates Section 141(a)" and "[e]very moment that the Company's board operates under the constraints of the Challenged Provisions interferes with the directors' authority." Ex.A 10-11.

But that conclusion is contrary to long-standing law holding that a claim challenging a corporation's entry into a contract accrues at the time of entry and the subsequent performance of the contract is not a "continuing wrong" that persists for the duration of the contract. In *Kahn*, Chancellor Allen rejected the plaintiff's contention that, because the corporation allegedly entered into a contract in a breach of the directors' fiduciary duty, "the 'continuing wrong' is performance of the contract." 625 A.2d at 271. Because there was no claim that the corporation made any payments "in excess of those contemplated" when the contract was made, the only wrong was "the creation of these contract rights and liabilities." *Id.* Other decisions of the Court of Chancery have come to the same conclusion, for the same reason. For example, in *Teachers' Ret. Sys. of La.* v. *Aidinoff*, 900 A.2d 654 (Del. Ch. 2006), the court explained that the "the statute of limitations begins running at the time of the decision to contract, as the date of the key wrong" because "[p]erformance under the contract . . . is generally considered as a natural consequence flowing from the original decision by the defendant-fiduciaries to obligate the corporation to the contract." *Id.* at 666; *see also HUMC Holdco, LLC* v. *MPT of Hoboken TRS, LLC*, 2022 WL 3010640, at *13 (Del. Ch. July 29, 2022) (same).

In the decision below, the Court of Chancery dismissed these cases as inapposite because they addressed claims challenging a corporate contracting decision as a fiduciary breach, not as statutorily invalid. But nothing in the reasoning of those cases supports that distinction as reason to employ a different analysis in determining when a claim accrues. To the contrary, the court's reason for rejecting the continuing accrual doctrine—that the respective wrongs arose when the challenged contract rights were created—applies equally to plaintiff's § 141(a) claims. *See, e.g.*, *Khan*, 625 A.2d at 1036 (emphasis added). Nor is that distinction consistent with this Court's instruction that, under § 8106, a claim accrues "at the time of the wrongful *act*." *Wal-Mart*, 860 A.2d at 319 (emphasis added). The accrual inquiry under § 8106 thus focuses on the "act" allegedly giving rise to the plaintiff's claims, not the particular theory of wrongfulness or liability. *See id.* (focusing on "gravamen" of plaintiff's claims in determining the statutory limitation period). Contrary to the Court of Chancery's view, nothing in this Court's interpretation and application of § 8106 suggests that the court has discretion—based on consideration of undefined "policy interests"—to characterize "the wrongful act" allegedly giving rise to a claim as discrete or continuing. Ex.A 10.

Moreover, the Court of Chancery had already held that a claim challenging a corporate contract as statutorily invalid accrues when the contract was made. In *Kraft*, the plaintiff challenged a stock purchase agreement as a violation 8 *Del. C.* § 152 and sought as relief a declaratory judgment that the stock issued under the agreement was consequently void. 145 A.3d at 972. Chancellor Bouchard held that the claim accrued on the date of "the allegedly wrongful stock issuance giving rise to [the plaintiff]'s claim"—not that the claim was accruing as long as the allegedly illegal shares were in existence. *Id.* at 989. Similarly here, plaintiff's claims that the challenged provisions of the Stockholders Agreement violated § 141 accrued when those provisions went into effect; they did not continue to accrue as long as those provisions are in existence.

Unusual circumstances. The Court of Chancery further erred by holding that laches could not bar plaintiff's claims in any event because Moelis would not suffer any prejudice if the claims proceeded. "Absent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period." *U.S. Cellular*, 677 A.2d at 502. Here, plaintiff did not allege any reason, let alone "unusual circumstances," for its failure to sue within the analogous limitations period. The Court of Chancery should therefore have found the prejudice element satisfied. In *U.S. Cellular*, for example, the plaintiff also "offered no justification for its delay in bringing suit" after the analogous limitations period. *Id.* This Court found that it was "thus appropriate to apply the statutory period set for the in 10 *Del. C.* § 8106" without undertaking any further analysis regarding prejudice to the defendant. *Id.* at 502-04; *see also Kraft*, 145 A.3d at 979 (a court "may presume prejudice if the claim is brought after the analogous limitations period has expired").

4. The time bar against plaintiffs' claims of facial statutory invalidity does not bar ripe, as-applied challenges to the provisions of the Stockholders Agreement

The Court of Chancery's analysis of the timeliness of plaintiffs' claim appears to have been driven, at least in part, by a policy concern that if the claims were untimely, no Moelis shareholder would be able to later bring claims of statutory invalidity or fiduciary breach challenging the provisions of the Stockholders Agreement. But holding plaintiff's claims of *facial* statutory invalidity to be time-barred does not prevent Moelis stockholders from bringing *as-applied* claims against the company or its fiduciaries, based on specific circumstances that may arise in the future, challenging the enforceability of the Stockholders Agreement in those circumstances. *See Grimes* v. *Donald*, 673 A.2d 1207, 1215 n.4 (Del. 1996) ("What actually may happen in the future may or may not ever become a litigable issue that is ripe for adjudication.").

Indeed, that is precisely the conclusion of *Ebix* and *Politan*, both discussed by the Court of Chancery. Ex.A 18-19. In *Ebix*, the court held that a challenge to the adoption of the corporate contract was untimely, but permitted plaintiff to pursue a fiduciary claim for "improperly maintain[ing] [the agreement] as an unreasonable anti-takeover device." *In re Ebix, Inc. S'holder Litig.*, 2014 WL 3696655, at *12 (Del. Ch. July 24, 2014). So, too, in *Politan*, the Court of Chancery declined to find untimely a claim that the directors had breached their fiduciary duties by failing to disable an allegedly invalid provision of the CEO's employment agreement that allegedly operated as a coercive dead-hand pill "in connection with [the company's] upcoming director elections." *Politan Cap. Mgmt. LP* v. *Masimo Corp.*, C.A. No. 2022-0948-NAC, at 168, 173, 188 (Del. Ch. Feb. 3, 2023) (TRANSCRIPT) (A2968, -73, -88).

Given that the Stockholders Agreement was fully disclosed a decade ago, allowing Moelis stockholders to now challenge that agreement only through an as-applied challenge serves the measured evolution of common-law decisionmaking. As Chancellor Allen observed, "to the extent that the judicial branch contributes to law creation in our legal system, it legitimately does so interstitially and because it is required to do so by reason of specific facts that necessitate a judicial judgment." *Schick Inc.* v. *Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987). And so, he explained, "[t]o address a matter before the facts surrounding the dispute are fully developed necessarily not only increases the risk of an incorrect judgment in the particular case, but risks, as well, an inappropriate or unnecessary step in the incremental law building process itself." *Id.* The court below thus erred in concluding that plaintiff's claims of facial invalidity should be considered not only timely but also ripe. *See XL Specialty Ins. Co.* v. *WMI Liquidating Tr.*, 93 A.3d 1208, 1217-18 (Del. 2014).

II. THE CHALLENGED PROVISIONS OF THE STOCKHOLDERS AGREEMENT ARE FACIALLY VALID UNDER 8 *DEL. C.* § 141(A)

A. Question Presented

Are the challenged provisions of the Stockholders Agreement facially invalid under § 141(a)? The question was raised below (A0395-419) and considered by the Court of Chancery (Ex.B 1-132).

B. Scope of Review

The decision below was based on undisputed facts (Ex.B 15) and decided as a question of law subject to *de novo* review. *Salzberg* v. *Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020).

C. Merits of Argument

Plaintiff failed to meet the exacting standard for establishing the facial invalidity of the challenged provisions of the Stockholders Agreement. To conclude otherwise, the Court of Chancery applied a novel test for claims under § 141(a) that has no footing in the relevant precedents and arbitrarily limits a board's exercise of its managerial authority to approve corporate contracts.

1. Under longstanding precedent, the Stockholders Agreement is a permissible exercise of the board's managerial authority to contractually bind the corporation

Section 141(a) provides: "The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." This Court has long recognized that "business decisions"—and entering into a contract is a quintessential business decision—"are not an abdication of directorial authority merely because they limit a board's freedom of future action." *Grimes*, 673 A.2d at 1214. "[I]nevitabl[y]," a "decision to do one thing will commit a board to a certain course of action and make it costly and difficult (indeed, sometimes impossible) to change course and do another." *Id.* at 1214-15. As *Grimes* explained, merely establishing that a board has approved agreements limiting its freedom of future action—even regarding matters of fundamental importance to the corporation—is insufficient to show a violation of § 141(a). More is required—a showing that the challenged agreement "ha[s] the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters." *Id.* at 1214 (quoting *Abercrombie* v. *Davies*, 123 A.2d 893, 899 (Del. Ch. 1956)).

Plaintiff has not shown, as a matter of law, that the aspects of the Stockholders Agreement it challenges—stockholder rights of approval over corporation action and of board representation—have that prohibited effect "under any circumstance." *Kellner* v. *AIM ImmunoTech Inc.*, 320 A.3d 239, 263 (Del. 2024). Indeed, until the decision below, no Delaware court had held that such rights, contained in an agreement between a stockholder and the corporation, violated § 141(a).

To the contrary, the Court of Chancery has held—consistent with *Abercrombie* and *Grimes*—that rights conferred in an agreement between a stockholder and the corporation are facially valid under § 141(a). In *Sample* v. *Morgan*, 914 A.2d 647 (Del. Ch. 2007), the plaintiff claimed that a contractual provision giving a stockholder approval rights over new stock issuances "constitute[d] an abdication of the board's governance authority under 8 *Del. C.* § 141(a)." *Id.* at 671. Echoing *Grimes*, the Court reasoned that when a board enters into a contract that "limit[s] . . . future range of action," it is "exercis[ing] its authority" under § 141(a) to manage the business and affairs of a corporation—not abdicating it. *Id.* at 671-72 & n.76. "Although . . . authority to issue equity is an important, statutorily-authorized power," the court explained, "that does not mean that a board cannot, for proper business reasons, enter into contracts limiting its ability to exercise that power." *Id.* at 671. For example, a board "might use a contractual limitation on additional issuances in order to obtain a higher price from buyers to the net benefit of the corporation." *Id.* at 672. The Court accordingly rejected the plaintiff's request for "a bright-line ruling" that the contractual provision was "per se invalid." *Id.* at 673. The Court recognized, however, that a court could make a "fact-intensive" determination that the contract is "unenforceable on equitable grounds" under "principles of fiduciary duty." *Id.* at 672-73; *see UniSuper Ltd.* v. *News Corp.*, 2006 WL 207505, at *2 (Del. Ch. Jan. 20, 2006) ("[A] board's power to bind itself through contract is limited by the board's fiduciary duties . . . but strictly speaking not by section 141(a) itself.").

Based on the principles articulated in *Grimes* and applied in decisions such as *Sample*, Delaware courts and corporations have long understood that "a board is empowered to make agreements with other actors in commerce, including its own shareholders." *In re InfoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 999 (Del. Ch. 2007). Many cases refer to and address stockholder agreements with corporations that contain stockholder approval rights over corporate action without ever suggesting that such rights are *per se* invalid. *See, e.g.*, *Voigt* v. *Metcalf*, 2020 WL 614999, at *1, *3, *19 (Del. Ch. Feb. 10, 2020) ("contractual veto rights" over "a wide range of significant corporate and finance matters" that "the Board could otherwise take unilaterally"); *Firefighters' Pension Sys. of City of Kansas City Tr.* v. *Presidio, Inc.*, 251 A.3d 212, 234, 258 (Del. Ch. 2021) ("contractual veto right over any change in the CEO"). Cases also regularly consider director designation rights in stockholder agreements—and assume their enforceability—in determining the extent of control the stockholder with those rights can exercise over the company. *See e.g.*, *Reith* v. *Lichtenstein*, 2019 WL 2714065, at *2, *8, and *9 (Del. Ch. June 28, 2019) (proxy settlement agreement allowing stockholder to appoint two directors); *Sciabacucchi* v. *Liberty Broadband Corp.*, 2017 WL 2352152, at *7, *17 (Del. Ch. May 31, 2017) (stockholders agreement allowing stockholder to designate directors). And publicly filed stockholder agreements with Delaware corporations confirm that companies frequently exchange rights like those in this case for contractual benefits. A0879; A0881-83 (2022 agreements); A0885-88 (2014 agreements). The law firms that advised Moelis and its lead underwriter in connection with the IPO understandably relied on this settled market practice in employing the Stockholders Agreement.

In the years since decisions such as *Grimes*, *Sample*, and *InfoUSA*, the Legislature has amended the General Corporation Law numerous times—but never to reject those decisions. Given the "cardinal principle" that the Legislature "is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," the Legislature's acceptance of these decisions has "significant force." *Allen* v. *Prime Computer, Inc.*, 540 A.2d 417, 420 (Del. 1988). By contrast, the Legislature acted swiftly to amend the General Corporation Law in response to the decision below, confirming that a corporation is empowered to make contracts with stockholders in which it agrees to restrict itself from taking, or obtain stockholder approval before taking, specified actions. 8 *Del. C.* § 122(18); *see* Del. S.B. 313 Synopsis, 152d Gen. Assem. (May 23, 2024) (citing *InfoUSA*, 953 A.2d 963, as in "[a]ccord" with § 122(18)) (A3088); Del. S.B. Debate Hr'g, 152d Gen. Assem. (June 13, 2024) at https://sg001-harmony.sliq.net/00329/Harmony/en/PowerBrowser/PowerBrowserV2/20240109/-1/4296 (Corporation Law Council chair testimony that the proposed amendment would codify an "interpretation . . . based on existing case law, including . . . the *Sample* v. *Morgan* case") (A3030 (unofficial transcript at 33)).

2. The test applied by the Court of Chancery to review contracts under § 141(a) constrains boards from entering into business arrangements they judge beneficial for the corporation

The Court of Chancery opined that a "surve[y]" of "the Section 141(a) precedents . . . reveals a clear rule": "Internal corporate governance arrangements that do not appear in the charter and deprive boards of a significant portion of their authority contravene Section 141(a)." Ex.B 2, 25. Based on that perceived "clear rule," the Court of Chancery held that the Stockholders Agreement facially violated § 141(a).

That "clear rule" is contrary to decisions such as *Sample* and *InfoUSA*, which directly addressed the application of § 141(a) to agreements between stockholders and the corporation. The Court of Chancery dismissed those decisions as contrary to "[t]he overwhelming weight of authority." Ex.B 27, 45 n.102. But the authority from which it extracted its "clear rule" consists almost entirely of cases that did not involve agreements between stockholders and a corporation. *See* Ex.B 30-80. And some did not even mention § 141, let alone address a claim of invalidity under § 141(a). *See, e.g.*, *Marmon* v. *Arbinet-Thexchange, Inc.*, 2004 WL 936512 (Del. Ch. Apr. 28, 2004). Contrary to the Court of Chancery's view, the rule it formulated is not grounded in precedent.

And the rule is anything but clear. As articulated by the Court of Chancery, § 141(a) regulates a board's authority to enter into "internal governance arrangements," not "external commercial contracts." Ex.B 7. According to the court below, one can tell the difference between these two categories of agreements because the former "have salient features"—seven, to be precise. Ex.B 86-89. These features "facilitate categorization," but do not determine it, since they "[a]ll are matters of degree" and "[n]one are essential." Ex.B 86. While the decision on appeal finds this rule "clear," the rule has not previously been ascertained by other experienced judges of the Court of Chancery, including those who decided *Sample* and *InfoUSA*. Nor have counsel in any preceding case (or this one) articulated and advocated it—or even referred to it.

The rule's biggest flaw, however, is not its novelty or complexity. Rather, in the name of protecting the board's managerial authority, the rule instead unpredictably constrains it. The rule constrains a board from limiting its future freedom of action by entering into one type of contract—an "internal corporate governance arrangement"—but allows a board to limit its future freedom of action *in precisely the same way* by entering into another type of contract—an "external commercial contract."[1] If the basic claim of a § 141(a) violation is that the board

[1] Standard negative covenants in credit agreements include prohibitions, absent the lender's consent, on the incurrence of debt; investments exceeding a

has abdicated its managerial authority, it should not matter to whom the board has ceded its managerial authority. The Court of Chancery never explained the basis for a rule that operates in this inconsistent way.

These considerations suggest that the rule proposed below is inadvisable. The rule is inconsistent with the business judgment presumption. A board can conclude—and many have concluded—that entering into an agreement with a stockholder would benefit the corporation, just as entering into a "commercial" agreement would benefit the corporation. And that decision is accorded a presumption of regularity, of propriety. A rule that constrains the board's managerial authority to enter into contracts it believes beneficial for the corporation, based on the counterparty's status as "internal" or "external," is not compelled by the text of § 141(a). And it limits, without statutory warrant, a board's authority to take actions it believes to be in the best interests of the corporation.

The rule's shortcomings are exemplified in its application to the Stockholders Agreement here. The court concluded that the Stockholders Agreement was subject to § 141(a) because it reflected "no underlying commercial arrangement." Ex.B 97.

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specified amount; entry into new lines of business; payments of dividends; mergers, consolidations, liquidations and other fundamental changes; and changes to the company's fiscal year. *See* Michael Belluci & Jerome McCluskey, *The LSTA's Complete Credit Agreement Guide* 370, 376, 382, 386, 402 (2d ed. 2017). All of these standard creditor approval rights appear in § 2.1(a) of the Stockholders Agreement.

But the Stockholders Agreement was integral to the commercial bargain that transformed Moelis into a public company. The company was initially founded as a private financial advisory firm in 2007; it was owned not just by Kenneth Moelis, but by all managing directors through a limited partnership. Ex.B 15; A0430. In preparation for the company's IPO in 2014, the advisory business was transferred to a new entity, with the managing directors retaining, via Partner Holdings, a majority economic interest in the entity's LP units and all Class B stock in the public holding company. Ex.B 15; A0439, 0461-62. The remaining economic interest in the new entity's LP units was held by the public holding company, which issued Class A common stock in the offering. Ex.B 15. To ensure that the company's most important human capital remained after the IPO, the managing directors were subject to years-long lock-ups of their stock, which could be extended if they quit. A0441, 0466-67.

Mr. Moelis and the other managing directors thus contributed to the public company the advisory business they had spent years building, as well as their commitment to grow that business as part of the public company. Companies often enter into agreements giving "large stockholders" a say in how a business is run in exchange for their "invest[ment] in [the] corporation, either through monetary or human capital." *OptimisCorp* v. *Waite*, 137 A.3d 970, 2016 WL 2585871, at *3 (Del. Apr. 25, 2016) (TABLE). Indeed, the Court of Chancery acknowledged in a subsequent decision that a "capital-raising transaction" can be "viewed as a commercial agreement" under the framework of the decision below. *Seavitt* v. *N-Able, Inc.*, 321 A.3d 516, 540 (Del. Ch. 2024). And such a transaction was at the heart of the company's IPO and the Stockholders Agreement. The interrelated transactions and agreements undertaken in preparation for the company's IPO, including the Stockholders Agreement, resulted in Partner Holdings receiving rights from the company in exchange for valuable contributions going to the foundation of the company's business.

All of this indicates that the distinction the Court of Chancery sought to draw between "internal" and "external" agreements, between "governance" and "commercial" contracts, is far less stable than it suggested. More important, the distinction does not reliably identify contracts that "have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters." *Grimes*, 673 A.2d at 1214 (quoting *Abercrombie*, 123 A.2d at 899).

3. The Court of Chancery misapplied the standard governing facial challenges

Finally, the Court of Chancery misapplied the standard for facial challenges. In assessing facial validity, "the court should not consider hypotheticals or speculate whether" the challenged provision "might be invalid under certain circumstances." *Kellner*, 320 A.3d at 263. But that is precisely what the Court did here. It concluded that the Challenged Provisions cannot operate lawfully on the basis of a theoretical "deterrent" effect on the board: "[i]f the directors anticipate that Moelis will not pre-approve a course of action, then they may never suggest it in the first place." Ex.B 106-07. But that is pure speculation: there is no evidence (or even an allegation) that any director has ever taken "the easier course" in this fashion. Ex.B 106. The Court continued to speculate when it characterized the Company's representation that Partner Holdings has never exercised its approval rights as "powerful evidence that [they] have a chilling effect," dismissing the possibility that Partner Holdings and the board simply had not disagreed on the Company's best interests. Ex.B 106-07.

The Court also relied on hypotheticals to reject the argument that "the provisions do not formally constrain the Board as long as Moelis and the directors agree." Ex.B 109. Despite the lack of any evidence that Partner Holdings had ever enforced its rights under the Stockholders Agreement, the Court hypothesized that Partner Holdings would do so "*if* the Board was committed to taking action that Moelis rejected." *Id.* (emphasis added). But there are at least two flaws in this reasoning. First, even were Partner Holdings to seek to enforce its rights, the availability of specific performance depends on "the balance of equities" under the circumstances. *Osborn* v. *Kemp*, 991 A.2d 1153, 1161 (Del. 2010). Thus, irrespective of the facial validity of the challenged provisions, a court will decline to enforce them to override the board at the shareholders' expense. *Wu* v. *White*, C.A. No. 20180427-JMS, at 45 (Del. Ch. Aug. 14, 2018) (TRANSCRIPT) (A2797) ("If the facts as developed in discovery reflect that [enforcing the stockholder's director designation or pre-approval rights] would be inequitable, would cause more harm than good, then the Court has the discretion to decline to award specific performance."); *see also Grimes*, 673 A.2d at 1214 (rejecting claim that an agreement "constitute[d] a *de facto* abdication" where the claim depended on "speculation" about the relief that would be granted against the company).

Second, the Stockholders Agreement's severability clause specifically provides that if any "application" of the Agreement "is found to be invalid or unenforceable," that application should be severed such that "the remainder of [the] Agreement and the application of such provision to other Persons or circumstances shall not be affected." A0589/SA § 9.3. Accordingly, even if the enforcement of the Stockholders Agreement would amount to a § 141 violation in those circumstances where the board and Partner Holdings disagreed, the appropriate response would be to decline to enforce the challenged provisions in such applications, not to facially invalidate the provisions on the whole. To hold otherwise would be to ignore those circumstances in which the challenged provisions serve only to ensure Partner Holdings' participation in and consultation on major decisions—giving rise to no § 141(a) violation, even under the novel framework adopted by the court below. *See Wagner* v. *BRP Grp., Inc.*, 316 A.3d 826, 881-82 (Del. Ch. 2024) (stockholders agreement functioned as a valid "procedural limitation[]" where it required stockholder's pre-approval for major decision but—as modified by subsequent agreement—would not be enforced when the board deemed it not "in the best interests of [the Company] and its stockholders"). Thus, the Court erred by relying on "hypothetical scenarios" to invalidate the challenged provisions on their face while ignoring those circumstances in which the challenged provisions serve a valid—and enforceable—procedural function. *Kellner*, 320 A.3d at 262.[2]

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[2] Neither case cited by the Court supports its facial validity analysis. Ex.B 107-10. In *Abercrombie*, the directors faced the real consequence of removal under the relevant agreement if they voted contrary to the stockholders, 123 A.2d at 609-10, not the hypothetical chilling posited here. And in *CA* this Court *rejected* a facial challenge under § 141(a) to a proposed bylaw. *CA, Inc.* v. *AFSCME Emps. Pension Plan*, 953 A.2d 227, 234 n.14, 238 (Del. 2008).

III. THE COURT OF CHANCERY ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES

A. Question Presented

Was the award of $6 million in attorney's fees to plaintiff's counsel proper? The question was raised below (A2134-47) and considered by the Court of Chancery (Ex.D 36-61).

B. Scope of Review

This Court reviews the award of attorney's fees for abuse of discretion, while reviewing *de novo* "the legal principles applied in reaching that decision." *Alaska Elec. Pension Fund* v. *Brown*, 989 A.2d 412, 417 (Del. 2010).

C. Merits of Argument

The Court of Chancery made multiple errors in considering plaintiff's fee application. First, the court adopted a *post hoc* "either-or" approach in granting plaintiff's $6 million fee request, and thus failed to independently determine fair and reasonable fees. Second, the court granted plaintiff's full fee request for the purpose of discouraging so-called "bracketing" in future cases. Finally, the court misapplied the *Sugarland* factors. Whether considered individually or in combination, these errors constitute an abuse of discretion.

1. The Court of Chancery employed a legally flawed "either-or" approach in determining the fee award

A litigant may "recover fees and expenses from a corporation where the litigation has conferred some . . . (non-monetary) valuable benefit upon the corporate enterprise or its shareholders." *Dover Historical Soc'y, Inc.* v. *City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006). The fees awarded must be "fair and reasonable." *In re Dell Techs. Inc. Class V S'holders Litig.*, --- A.3d ---, 2024 WL 3811075, at *7 (Del. Aug. 14, 2024). The court must apply "heightened judicial scrutiny" to a fee request. *Dell*, 2024 WL 3811075, at *7. After the requisite "intensive review" of the request, the court must "make an independent determination of reasonableness" of fees. *Id.* at *7 & n.75. Thus, as in the analogous appraisal context, the court's "selection or rejection" of a party's request "should not spring from an 'all or nothing' mind-set." *Gonsalves* v. *Straight Arrow Pubs., Inc.*, 701 A.2d 357, 362 (Del. 1997).

The Court of Chancery did not hew to these principles here. Instead, it used an impermissible "either-or" approach to grant plaintiff's $6 million fee request. Before receiving the parties' submissions, the court formed an initial "independent view" that a reasonable fee was "in the range of $3 million." Ex.D 37; *see also* Ex.D 60 ("I was sitting in the plus or minus $3 million range"). The court described plaintiff's $6 million request as being "at the upper end" of "the range" it had in mind, or "on the high end of what [it] think[s] is warranted," while criticizing defendant's position that the fee should be between $450,000 and $600,000: "I don't view [it] as even being in the right ballpark" or "even on the game board." Ex.D 37, 61.

Despite the fact that defendant's position was rooted in the court's precedents (A2139-41) and half a million dollars closer to the court's preliminary independent figure than plaintiff's request was, the court granted plaintiff's full request because it viewed defendant's position as too low: "I've got one proposal that I don't think is even on the game board and another proposal that's on the high end of what I think is warranted, I'm going to go with the plaintiff's request." Ex.D 37-38; *see also* Ex.D 61 ("I'm going to go with the plaintiff's ask"). The court thus failed to fulfill its obligation to "make an independent determination of reasonableness." *Dell*, 2024 WL 3811075, at *7; *cf. Gonsalves*, 701 A.2d at 362.

2. The Court of Chancery granted plaintiff's full fee request for the improper purpose of deterring so-called "bracketing"

The Court of Chancery further erred by awarding fees to "hopefully disincentivize bracketing in the future." Ex.D 61. The court's use of the term "bracketing" referred to situations in which "the parties bracket[]" a relevant precedential fee award with "a lower bid and a higher ask." *Olson* v. *EV3, Inc.*, 2011 WL 704409, at *16 (Del. Ch. Feb. 21, 2011). In *Olson*, for example, the court granted the plaintiff's full request to discourage "similar bracketing," while acknowledging that "if the defendants had pegged their proposed award at the [lower, precedential] figure, [it] likely would have awarded that amount." *Id.* As in *Olson*, the court here granted plaintiff's full request to "disincentivize bracketing in the future," while acknowledging that it likely would not have awarded "that big an amount if the defendants had come in with a more reasonable ask." Ex.D 37, 61.

The error was particularly problematic here, where no common fund was created and the record reflected no evidence to support the court's conclusion that a benefit worth more than $100 million was achieved. Defendant's fee bracket was consistent with the court's previous rulings assessing therapeutic benefits achieved in cases where the underlying corporate defect was curable (as here). A2139-41.

Moreover, discouraging "bracketing" is irrelevant under the *Sugarland* factors: it bears no relation to the results achieved, the time and effort or standing and ability of counsel, the complexity of the litigation, or any contingency-fee arrangement. The *Sugarland* factors are meant to measure the corporate benefits "causally related to" counsel's litigation efforts. *In re Infinity Broadcasting Corp. S'holders Litig.*, 802 A.2d 285, 293 (Del. 2002). Whether future litigants engage in "bracketing" in connection with future fee requests has nothing to do with any benefit to the Company created by plaintiff's counsel in this case. *Sugarland*, 420 A.2d at 150-51 (rejecting fees for benefits that counsel "neither caused nor influenced”). Reliance on this consideration to inform the fee request thus constitutes a departure from the command of *Sugarland*.

The Court of Chancery’s decision to award a fee higher than it otherwise thought was necessary, and for the purpose of discouraging bracketing, resulted in an improper windfall to plaintiff’s counsel. Attorney’s fees appropriately motivate counsel to pursue meritorious litigation, but awarding “anything above th[e] point” at which these incentives are produced “is a windfall” that “serv[es] no other purpose than to siphon money away from stockholders.” *Dell*, 2024 WL 3811075, at *12. Courts accordingly must consider the “policy concern of preventing windfalls to counsel” in calculating “reasonable” attorney’s fees. *Id.* at *11.

3. The Court of Chancery misapplied the *Sugarland* factors

The Court of Chancery also abused its discretion in the application of two *Sugarland* factors: the results achieved and counsel’s time and effort. As the court acknowledged, because plaintiff’s counsel “did not put in a lot of hours” in this litigation, the $6 million fee implied a “big” hourly rate. Ex.D 59-60. The fee implied an hourly rate of $11,950.14 and a multiple of 15.2 times the lodestar amount (A1774), figures that more than double the $5,000 hourly rate and 7x multiplier that this Court called “the high end” of permissible awards. *Dell*, 2024 WL 3811075, at *14. While this Court affirmed the fee award in *Dell*, the result achieved in that case—a $1 billion settlement—was truly “extraordinary.” *Id.* at *4.

In contrast, this litigation achieved nothing justifying a fee with an unusually high implied hourly rate and lodestar multiplier. The Court of Chancery identified a single "benefit" achieved by the lawsuit: "dramatically affect[ing] the governance structure of the company" by invalidating the challenged Stockholders Agreement provisions. Ex.D 39-40, 52-53. On that basis, the court likened this case to others in which counsel achieved "the benefit of control." Ex.D 55. But as the court acknowledged, the board "could implement many of the Challenged Provisions" of the Stockholders Agreement through other means. Ex.B 12. Moreover, plaintiff never identified a single disagreement between the board and Partner Holdings on a matter governed by the Stockholders Agreement—let alone one that caused the board to do anything contrary to the best interests of the Company or its public stockholders. Plaintiff did not allege, let alone prove, that Partner Holdings' veto right has ever been used, threatened to be used, or even raised at a board meeting (except in discussing this litigation). And in the court's view, Partner Holdings could exercise control of the company, notwithstanding the invalidation of the challenged provisions, through its significant "voting power." Ex.D 40. The notion that this litigation achieved substantial benefits of control for the company's public stockholders is not supported by the record.

Furthermore, the recent amendments to the General Corporation Law make clear that there is no public policy against using stockholder agreements in the manner that the company and Partner Holdings did here. Invalidating the challenged provisions of the Stockholders Agreement therefore cannot be counted as a "valuable benefit" to the company. *Dover*, 902 A.2d at 1090.

CONCLUSION

For the foregoing reasons, judgment should be entered for the company. In the alternative, the fee award should be vacated and the case remanded for reconsideration of plaintiff's counsel's fee application.

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2024, the foregoing *Appellant's Opening Brief* was caused to be served upon the following counsel of record via File and Serve*Xpress*:

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