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 REPLY BRIEF

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INTRODUCTION

Plaintiff filed this suit, asserting a facial challenge to the validity of provisions of the Stockholders Agreement under 8 *Del. C.* § 141, almost nine years after the Agreement was publicly disclosed. Plaintiff does not assert any reason, let alone a good reason, for failing to sue within the three-year analogous limitations period. Its claims are therefore barred by laches. That is the first, and simplest, reason to reverse the judgment for plaintiff. Plaintiff resists this conclusion. But its argument depends on ignoring settled law—including decisions plaintiff itself invokes—that subjects claims under § 141(a) to equitable defenses and applies laches to claims brought late with no excuse.

Plaintiff's claims also fail on the merits. In concluding that the challenged provisions of the Stockholders Agreement facially violated § 141(a), the Court of Chancery bypassed the most relevant precedents—those addressing agreements between stockholders and corporations. Instead, it extracted what it called a "clear rule" from inapposite cases—a rule that plaintiff never argued or even suggested—to sustain plaintiff's claims. That rule is grounded in neither case law nor statutory text, leads to inconsistent results, and given the "commercial arrangement" at the heart of the Stockholders Agreement, does not establish the invalidity of the provisions at issue. Instead of answering these arguments, plaintiff attacks an argument Moelis never made—that the Stockholders Agreement is valid under

§ 141(a) because § 141(a) imposes "no limits" on the constraints a stockholders agreement may impose on board authority.

Finally, plaintiff argues that a vacatur of the discretionary attorneys' fee award would be unprecedented. But the Court of Chancery's own statements showed it did not make an independent determination of the appropriate fee, but instead used an "either or," "baseball arbitration" approach to pick plaintiff's proposed fee amount after rejecting defendant's fee position. As the court noted, its approach was animated by the desire to disincentivize similar positions by defendants in future cases, rather than the particular facts of this litigation, which involved no discovery and cross-motions for summary judgment on legal issues. The result was an astonishing hourly rate of nearly $12,000, more than twice the amount this Court has suggested could be reasonable. The award should be reversed.

ARGUMENT

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

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

Plaintiff begins with the premise that corporate action that violates § 141(a) is void and therefore not subject to equitable defenses. But that idea cannot be squared with the definition of void corporate action and the restriction imposed by § 141(a). "Void acts" are those "the corporation cannot, in any case, lawfully accomplish" because they are *ultra vires*—"beyond the authority of the corporation." *CompoSecure, L.L.C.* v. *CardUX, LLC*, 206 A.3d 807, 816-17 & n.35 (Del. 2018) (quoting *Nevins* v. *Bryan*, 885 A.2d 233, 245 (Del. Ch.), *aff'd*, 884 A.2d 512 (Del. 2005)). By contrast, "voidable acts are acts falling within the power of a corporation, though not properly authorized, and are subject to equitable defenses." *Id.* at 816-17. And as the trial court recognized, § 141(a) limits only the "board's ability to authorize" corporate action, not the "corporation's exercise of its corporate power." Ex. B 82-83. A claim challenging corporate action as a violation of § 141(a) thus necessarily challenges corporate action as improperly authorized, and such action is voidable, not void.

Moelis's opening brief cited multiple decisions of this Court explicating "the well-established distinction between void and voidable corporate actions." Moelis

Br. 15-16. Plaintiff does not address those authorities, let alone explain how an alleged lack of authorization under § 141(a) could render an act void, rather than merely voidable. Instead, plaintiff invokes *Abercrombie* v. *Davies*, 123 A.2d 893 (Del. Ch. 1956). Br. 10-11. There, the plaintiffs challenged an agreement among a controlling group of stockholders and the representatives they had designated to serve as directors, claiming that it violated § 141(a). 123 A.2d at 895-96. Plaintiff contends that "[l]aches was not an issue" in *Abercrombie* because a laches defense to a § 141(a) claim is "foreclose[d]." Br. 11. But *Abercrombie* said nothing of the sort, and the decision shows just the opposite. The defendants did not raise a laches defense, and the court did not rule on one. But the court did rule on another equitable defense raised by defendants: unclean hands. *See* 123 A.2d at 896. And the court rejected that defense only because it found the elements unsatisfied, not because equitable defenses were "foreclose[d]." *See id.* (defense lacked "merit" because "the basis for the[] alleged unclean hands" was "not related to this Agreement"). *Abercrombie* thus confirms that § 141(a) claims are subject to equitable defenses.

Plaintiff also relies on *Politan Capital Management LP* v. *Masimo Corp.*, C.A. No. 2022-0948-NAC (Del. Ch. Feb. 3, 2023) (A2801), a transcript ruling denying a motion to dismiss a claim challenging a provision of a CEO employment agreement. Br. 11-12. But contrary to plaintiff's suggestion, *Politan* nowhere held that a § 141(a) claim is not subject to equitable defenses as a matter of law. Rather, the court held that "[b]ased on the well-pleaded allegations . . . it is reasonably conceivable" that the provision "amounts to abdication, *ultra vires*, and/or some form of waste" and so the claim was not "subject to equitable defenses." *Politan* Tr. 174, 180-81; *see also id.* 175 ("Void acts include . . . waste, or *ultra vires* acts."). Nor do plaintiff's remaining authorities support its argument. Br. 11. In *Paramount Communications* v. *QVC Network*, 637 A.2d 34 (Del. 1994), this Court did not address whether the plaintiff's § 141(a) claim challenged a void, rather than voidable, agreement, or whether the claim could be subject to any equitable defenses. And *PHL Variable Insurance Co.* v. *Price Dawe 2006 Insurance Trust*, 28 A.3d 1059 (Del. 2011), did not involve a claim under § 141(a) at all, or even any challenge to corporate action as void or voidable. *See id.* at 1064-68 (in insurer's suit against policy owner, addressing circumstances in which a life insurance policy is void *ab initio*).

The trial court's conclusion that "the vast majority" of the challenged provisions of the Stockholders Agreement could have been "accomplished . . . through the Company's certificate of incorporation" further confirms that corporate action is not void, *i.e.*, *ultra vires*, simply because it violates § 141(a). Ex. B 12-13. Plaintiff balks at this implication. Br. 13. But the trial court made clear that whether the challenged provisions violated § 141(a) presented a separate issue from whether they were *ultra vires*. As the trial court explained, if the challenged provisions "appear[ed] in the [c]harter, they would comply with Section 141(a)." Ex. B. 13 n.19. But since "[e]ven a charter provision cannot override a mandatory feature of the DGCL," the challenged provisions' compliance with § 141(a) in that scenario would not insulate them from a challenge as *ultra vires*. *Id.* 13 n.19.

Plaintiff next argues that Moelis somehow "waived" the argument that the challenged provisions of the Stockholders Agreement "could have been included in its charter and were therefore merely voidable." Br. 13. But Moelis argued below that the challenged provisions could be implemented in the Stockholders Agreement without violating § 141(a)—and that of course entails the argument that they could have been implemented in the charter in equal compliance with § 141(a). A0409-10; A1644. And plaintiff does not—and could not—dispute that Moelis argued below that plaintiff's claims challenged voidable action. A1626. Plaintiff's strained "waiver" argument is thus incorrect. If any party has waived an argument, it is plaintiff—who asserted and litigated claims under § 141(a), but now asserts on appeal that its claims should be reconceived as ones challenging the provisions of the Stockholders Agreement as *ultra vires* under other provisions of the DGCL. *See* Br. 13, 43.

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

Plaintiff contends that even if its claims could be subject to a laches defense, the defense was rightly rejected below. That argument is contrary to long-standing law holding that claims challenging corporate contracts accrue when the contracts are entered into. And it ignores this Court's instruction that an analogous limitations period should be applied to bar a claim unless a plaintiff has shown "unusual circumstances" justifying otherwise.

The analogous limitations period has expired. Plaintiff contends that its claims continuously or repeatedly accrue during the term of the Stockholders Agreement because "the on-going existence of the Challenged Provisions violates Section 141(a)." Br. 14 (quoting Ex. A 10). But "a cause of action 'accrues' under Section 8106 at the time of the wrongful *act*." *Wal-Mart Stores, Inc.* v. *AIG Life Ins.*, 860 A.2d 312, 319 (Del. 2004) (emphasis added). The accrual inquiry thus focuses on the "gravamen" of the claims—the act giving rise to the claim. *Id.* at 320. Accordingly, where a claim challenges a corporate contract, "the time of the decision to contract" is "the date of the key wrong" because "[p]erformance under the contract" is "a natural consequence flowing from the original decision by the defendant-fiduciaries to obligate the corporation to the contract." *Tchrs. Ret. Sys. of La.* v. *Aidinoff*, 900 A.2d 654, 666 (Del. Ch. 2006); *see also Kahn* v. *Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993) (Allen, C.) (claim accrues at "the creation of [the challenged] contract rights and liabilities").

Applying that principle, multiple Chancery decisions have held that claims of supposed "ongoing" wrongfulness due to the continued existence of "contract rights and liabilities" accrue when the contract is made. *See, e.g.*, *Kahn*, 625 A.2d at 271; *see also* Moelis Br. 19. Plaintiff dismisses these decisions on the ground that they addressed claims of fiduciary breach, not statutory invalidity. Br. 14-15. But as Moelis pointed out in its opening brief, that distinction has no grounding in either the reasoning of those decisions or the text of § 8106, which focuses on the "wrongful act" giving rise to a claim, not the particular theory of wrongfulness. Moelis Br. 19-20. In response to this, plaintiff says nothing. Moreover, the Chancery decisions applying this principle include ones addressing claims of statutory invalidity—*Kraft* v. *WisdomTree Investments, Inc.*, 145 A.3d 969 (Del. Ch. 2016), for example. Unable to distinguish *Kraft*, plaintiff asserts that *Kraft* "erroneously relied on cases involving voidable acts." Br. 15. But that criticism suggests no error in *Kraft*'s accrual analysis, since laches can apply only to claims alleging voidable acts.

The only decision plaintiff identifies as a precedent for its accrual approach is *Politan*. Br. 14. But there the court simply found it reasonably conceivable that the analogous limitations period had not expired because the allegedly invalid contract had been amended the year before and the board had allegedly breached its fiduciary duties by declining to disable the provision in connection with an upcoming director election. *Politan* Tr. 173, 188. Both *Politan*'s posture and alleged facts make it an inapt comparison here, where plaintiff alleged neither a contractual amendment nor a fiduciary breach within the analogous limitations period.

No unusual circumstances justified filing after the analogous limitations period. Plaintiff contends that even if the analogous limitations period has expired, a laches defense is "precluded" because both in this Court and "[b]elow, Moelis failed to even attempt to identify any cognizable prejudice." Br. 16. But Moelis argued below that laches bars a claim brought after the analogous limitations period "absent tolling or extraordinary circumstances." A0392 (quoting *Kraft*, 145 A.3d at 983); *see also Kraft*, 145 A.3d at 979 (court "may presume prejudice" when claim is brought past the analogous limitations period). Plaintiff neither contested that principle nor attempted to show tolling or other extenuating circumstances that justified filing suit nearly nine years after the Stockholders Agreement was publicly disclosed. *See* A1131-37. And plaintiff's brief below did not even mention the word "prejudice." *See id.* Now, on appeal, plaintiff argues for the first time that laches cannot apply unless Moelis has proved prejudice, citing *Fike* v. *Ruger*, 752 A.2d 112 (Del. 2000). Br. 16. But *Fike* merely affirms a laches finding where the defendants showed prejudice. Nothing in *Fike* contradicts this Court's instruction that "[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 Inv. Co. of Allentown* v. *Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996). As in *U.S. Cellular*, laches applies because the plaintiff "has offered no justification for its delay in bringing suit." *Id.* Plaintiff does not address *U.S. Cellular*, let alone refute the application of its reasoning here. Moreover, the prejudice here is evident, given that Moelis, Kenneth Moelis and all the managing directors who own Partner Holdings, and every investor who ever bought or sold Moelis stock have acted in reliance on a decade-old contract that plaintiff would now have the courts rip up seven years after the expiry of the limitations period.

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

Plaintiff also contends that a time-bar against its claims should not be enforced because "as-applied fiduciary suits are no substitute" for a facial challenge of statutory invalidity. Br. 16. Plaintiff appears to assume that a future as-applied suit would be restricted to claims of fiduciary breach, foreclosing future as-applied claims of statutory invalidity. But there is no reason that would be so. Holding that plaintiff's *facial* claims are time-barred would not prevent a plaintiff from asserting an *as-applied* claim challenging the operation or enforcement of the Stockholders Agreement—whether as a statutory violation or a fiduciary breach—in particular circumstances that have actually arisen. There is no good reason to think that the continued prospect of as-applied claims is inadequate to ensure a remedy for any unlawful or inequitable operation of the Stockholders Agreement. Indeed, as-applied challenges are favored precisely because the court can tailor the relief to the specific harm threatened or established. *See Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 450 (2008). And by parity of reasoning, "[f]acial challenges are disfavored" precisely because (as here) they "often rest on speculation" and so "risk . . . premature interpretation . . . on the basis of factually barebones records." *Id.*

In any event, the lack of a "substitute" for a time-barred claim is not a ground to disregard an otherwise applicable time-bar. Contrary to plaintiff's assertion, there is nothing "radical" in enforcing a time-bar, Br. 10, against a party, like plaintiff here, who has zero excuse for failing to timely bring its claim. Tellingly, plaintiff's amici do not argue that enforcing a time-bar against plaintiff would broadly impair stockholder plaintiffs' ability to bring facial challenges. To the contrary, consistently enforcing settled time-bar doctrine would encourage "early challenges to nascent market practices" and serve the interests of "predictability and certainty" in the application of corporate law. Pl.'s Amici Br. (Dkt. 23) 22-23. It is plaintiff's position that disserves those interests, by creating a reverse "Goldilocks" problem in which facial claims of statutory violation can never be too early and never too late.

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

A. Under long-standing precedent, the Stockholders Agreement is a permissible exercise of the board's managerial authority to contractually bind the corporation

Under long-standing precedent, the Stockholders Agreement is a permissible exercise of the board's authority to contractually bind the corporation. Moelis Br. 24-29, 32-33. Plaintiff asserts that Moelis wrongly "argues Section 141(a) imposes no limits on the extent to which board power may be constrained through a corporate contract with a favored insider." Br. 24. But Moelis made no such argument—which is why plaintiff's assertion lacks a citation of Moelis's brief. Plaintiff fails to refute the argument Moelis actually made: that the challenged provisions of the Stockholders Agreement do not violate § 141(a), as interpreted by multiple decisions of this Court and the Court of Chancery.

Chancery decisions specifically addressing stockholder agreements have upheld them against challenges under § 141(a). Moelis Br. 25-28. *Sample* v. *Morgan*, 914 A.2d 647 (Del. Ch. 2007), did so in a thoughtful opinion that applied the principles of *Grimes* v. *Donald*, 673 A.2d 1207 (Del. 1996). And *In re InfoUSA, Inc. Shareholders Litigation*, 953 A.2d 963 (Del. Ch. 2007), came to the same conclusion. Although these decisions are considered and directly on point here, plaintiff is unable to reconcile them with its claim that the Stockholders Agreement violated § 141(a). Instead, it simply dismisses them as "fundamentally at odds with the weight of Delaware law applying Section 141(a)." Br. 30; *see id.* 28 n.14.

The Legislature amended the General Corporation Law many times following those decisions, but never sought to undo their holdings. Moelis Br. 28. The Legislature's acceptance of these decisions thus has "significant force" in interpreting § 141(a) as it applied to the Stockholders Agreement. *Allen* v. *Prime Comput., Inc.*, 540 A.2d 417, 420 (Del. 1988). Plaintiff spends pages arguing that the most recent amendment to the General Corporation Law shows that the decision below "got it right." Br. 32. But it offers no answer to the settled principle, recognized in *Allen*, that a judicial interpretation of a statute left legislatively undisturbed is a persuasive indication of the proper application of the statute.

B. 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 trial court found the challenged provisions of the Stockholders Agreement facially invalid by applying what it viewed as a "clear rule": "Internal corporate governance arrangements"—but not "external commercial contracts"—violate § 141(a) if they "do not appear in the charter and deprive boards of a significant portion of their authority." Ex. B 2, 25. As Moelis argued in its opening brief, the "clear rule" is neither grounded in precedent nor compelled by statutory text. Moelis Br. 29-31. And most troubling, it lacks any persuasive rationale for its regulation of only "internal" contracts that allegedly abdicate directors' duties, leaving "external" contracts that do so immune from challenge. *Id.* Plaintiff fails to refute any of these arguments.

Plaintiff asserts that the "clear rule" identified in the decision below was drawn from "clear teachings" revealed by a "survey[] . . . of Section 141(a) case law." Br. 31. But as Moelis argued in its opening brief, that survey included cases that did not even mention § 141(a) and consisted almost entirely of cases that did not involve agreements between stockholders and a corporation. Moelis Br. 29. Plaintiff offers nothing to show that Moelis's description of that "survey" is incorrect.

Plaintiff also insists that there is "nothing novel" about the trial court's "clear rule" for assessing validity of a corporate contract under § 141(a). Br. 25. But plaintiff does not identify any court or litigant that ever previously ascertained this "clear rule." Nothing in plaintiff's briefs below even hinted at the existence of such a "clear rule." And plaintiff does not contest Moelis's argument that the "clear rule" has no footing in the text of § 141(a).

Most important, plaintiff does not even attempt to identify a compelling reason for the fundamental distinction the trial court's "clear rule" attempts to draw between "internal corporate governance arrangements" and "external commercial contracts." If § 141(a) prohibits a board from abdicating its managerial authority, it should not matter if that authority is ceded to an "external" rather than "internal" contractual counterparty. The decision on appeal nowhere explained why it should matter. Plaintiff attempts no answer either. The rule announced below constrains, without statutory warrant or principled reason, the Moelis board's authority to make contracting decisions it believes to be in the best interests of the corporation.

Nor does plaintiff show that the Stockholders Agreement is an "internal corporate governance arrangement" for the purposes of the "clear rule." The trial court classified the Stockholders Agreement that way because, in its view, the Agreement reflected "no underlying commercial arrangement." Ex. B 97. But as Moelis explained in its opening brief, the Stockholders Agreement was an essential part of the commercial bargain that transformed Moelis into a public company. Moelis Br. 31-33. Moelis was founded as a private company, owned by its managing directors. *Id.* 32. When they contributed the business they built to a holding company in anticipation of an initial public offering, they received in exchange, via Partner Holdings, significant stock in the public company and the accompanying rights set forth in the Stockholders Agreement. *Id.*; s*ee OptimisCorp* v. *Waite*, 137 A.3d 970, 2016 WL 2585871, at *3 (Del. Apr. 25, 2016) (TABLE) (recognizing that stockholder agreements are "important to the willingness of people to commit capital to corporations"). That contribution of capital was at the heart of the company's

IPO, which is why the Stockholders Agreement was entered in connection with the IPO and disclosed before a single share of Moelis stock was ever publicly traded.

Plaintiff contends that it "makes no difference" that the Stockholders Agreement was supported by consideration and that Moelis did not rely on this consideration below. Br. 27. But Moelis's argument is not that the Stockholders Agreement complies with § 141(a) because it was supported by consideration (though it amply was). Moelis's argument is that even under the test applied by the trial court, the Stockholders Agreement complies with § 141(a) because it reflects a "commercial" arrangement. Moelis of course had no reason or opportunity to make the argument below, since the test the trial court applied was not one plaintiff or anyone else had ever previously identified. And to this argument, plaintiff again offers no response.

C. The Court of Chancery misapplied the standard governing 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* v. *AIM ImmunoTech Inc.*, 320 A.3d 239, 263 (Del. 2024). Plaintiff contends that the trial court relied on only "common sense" to find the provisions of the Stockholders Agreement facially invalid. Br. 36. But the decision below relied on both hypotheticals and speculation to reach that conclusion.

For example, to show that the challenged provisions of the Stockholders Agreement impose a "detrimental effect" in all possible scenarios, the trial court posited "a hypothetical scenario in which a controller holds contracts rights paralleling the Pre-Approval Requirements" in the Stockholders Agreement "and wants the bound corporation to hire one of his children as a C-suite officer." Ex. B 105-06 & n.300. Speculating about the conduct of the Moelis directors in this and other hypothetical scenarios, the trial court opined that "the Pre-Approval Requirements shape . . . what the [Moelis] directors pursue," and that the Moelis directors can be "expected to take a stand" only "on a major issue that threaten[s] [their] reputations, livelihoods, or wealth" and will otherwise take "the easier course" of "accommodation." *Id*. 106. Based on this thought experiment—plaintiff offered no evidence on this or any other point in its motion for summary judgment—the court found that these directors are "chill[ed]" from exercising their fiduciary duties, contrary to the business judgment presumption. *Id.* But in the "absence of a genuine controversy with concrete facts," what-if scenarios cannot sustain a facial challenge. *Boilermakers Loc. 154 Ret. Fund* v. *Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013).

Plaintiff also contends that it must prevail because Moelis "cannot identify any situation" in which the challenged provisions "would operate validly." Br. 37. That argument gets the facial validity test backward. "[T]he burden is on the party asserting invalidity"—plaintiff in this case—"to demonstrate that" each challenged provision "cannot be valid under any circumstance." *Kellner*, 320 A.3d at 263.

Although plaintiff proffered no evidence that Partner Holdings has ever enforced its veto rights under the Stockholder Agreement, the trial court speculated that Partner Holdings would do so in a dispute with Moelis. Ex. B 109. But, as Moelis argued in its opening brief, it is at best unclear whether Partner Holdings could obtain an order of specific performance. Plaintiff contends that uncertainty does not prevent it from meeting the facial challenge standard. Br. 37. But if in a dispute, Partner Holdings cannot compel performance of the Stockholders Agreement, then the Stockholders Agreement has not constrained Moelis. *See* Moelis Br. 34-35 (citing cases).

Moelis also showed that the Court of Chancery erroneously declared the challenged provisions facially invalid given the Stockholders Agreement's inclusion of a severability clause and the court's equitable authority to decline to enforce a provision as applied to a specific case. Moelis Br. 34-36. Plaintiff asserts that Moelis failed to preserve an argument based on the severability clause. Br. 37-38. But Moelis invoked the clause below to argue, as it does here, that "the right to bring a proper as-applied challenge sufficiently protects the interests of plaintiff and the other Moelis stockholders," making facial invalidation inappropriate. A0407. The express terms of the clause confirm that the parties intended to make severable particular "*application[s]*" of the agreement's provisions found to be invalid or unenforceable, to ensure that "the remainder" of the Agreement and its applications would "not be affected" to the greatest extent possible. A0589/SA § 9.3.

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

In granting plaintiff's counsel's fee request for $6 million, the trial court failed to satisfy its obligation to "make an independent determination of reasonableness." Moelis Br. 38-39 (quoting *In re Dell Techs. Inc. Class V S'holders Litig.*, 2024 WL 3811075, at *7 (Del. Aug. 14, 2024)). Instead, the trial court abused its discretion by using an "either or" approach to adopt plaintiff's fee position and reject defendant's. And it did so for an improper motive unrelated to appropriate compensation for plaintiff's counsel in this case: to deter defendants in future cases from taking similar fee positions.

Plaintiff does not contend that an "either or" approach to setting a fee award is permissible. Instead, it denies that the court used that approach. Br. 39-40. But that argument cannot be squared with the court's ruling. The court began its fee ruling by stating that it was "going to go with the plaintiff's request," even though it was "on the high end," because Moelis's position was not "in the right ballpark" or "on the game board." Ex. D 37-38. And the court concluded its ruling by again stating that it was "going to go with the plaintiff's ask," which was "at the upper end," rather than Moelis's "much smaller" number—even though Moelis's submission was closer to the court's preliminary independent figure. Ex. D 61. Plaintiff does not address these statements, let alone show how they could be consistent with an independent analysis of the appropriate fee award.

Plaintiff also disregards Moelis's argument that the Court of Chancery improperly awarded fees for the purpose of disincentivizing so-called bracketing. Moelis Br. 39-40. The court said it was awarding plaintiff's full request because it wanted to "hopefully disincentivize bracketing in the future." Ex. D 61. That purpose is not germane to the *Sugarland* factors and resulted in an undeserved windfall to plaintiff's counsel. Moelis Br. 40-41. Plaintiff neither disputes the impropriety of using a fee award to "disincentivize bracketing" nor contests that the trial court expressly did so.

Moreover, and contrary to *Sugarland*, the trial court awarded a fee that implied an unusually high hourly rate, unjustified by the results achieved in this litigation. Moelis Br. 41-43. With no evidentiary or expert support, plaintiff argues that the fee here is within the range of awards of $5 to $10 million for counsel "who achieve substantial corporate governance benefits implicating 'control' of a corporation in a manner beneficial to public stockholders." Br. 40. But those awards were made for litigation that achieved concrete control-related benefits for public stockholders, such as a quantifiable "reduction in insiders' voting power" or the "imposition of independent approval requirements for [squeeze-out] transactions." Br. 40 n.25 (citing cases). By contrast, the litigation here obtained no reduction in Partner Holdings' significant "voting power." Ex. D 40. Moreover, plaintiff does not dispute the court's finding that the board could have accomplished "the vast majority" of the challenged provisions' effects through the company's charter or a golden share, Ex. B 12, undercutting the purported benefit of the litigation.

Plaintiff also argues that the litigation achieved the benefit of removing the "substantial deterrent effect" of the challenged provisions on the directors. Br. 41. But the supposed deterrent effect of those provisions is pure speculation: there is no evidence that any director has ever been chilled from suggesting a course of action for fear that Partner Holdings would exercise its veto rights. Moelis Br. 33-34. Plaintiff protests that it need "not identify or challenge any specific enforcement of the provisions." Br. 41. But it "bears the burden of establishing the value of any benefit conferred," and that value "must be immediately discernible rather than speculative in character." *Garfield* v. *Boxed, Inc.*, 2022 WL 17959766, at *10 (Del. Ch. Dec. 27, 2022). Plaintiff's deterrence theory fails that test.

The recent DGCL amendments confirm that the company obtained no valuable benefit from invalidation of the challenged provisions, as they make clear that there is no public policy against Moelis's use of the Stockholders Agreement. Moelis Br. 42-43. Plaintiff responds that Delaware courts have awarded substantial fees in successful challenges to stock reclassifications even though there is no public policy against dual-class stock. Br. 41. But the examples plaintiff cites involved stipulated fees, which have limited persuasive value. *See In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1137 (Del. Ch. 2011) (explaining reasons for limited "precedential value of uncontested fee awards"). Moreover, plaintiff's own description of those cases demonstrates that the benefits achieved for minority stockholders followed from the "withdrawal of stock reclassification plan[s] designed to preserve controller's control." Br. 41 n.26. No similar reduced-control benefit was achieved here.

Finally, plaintiff argues that the implied hourly rate of nearly $12,000 in this case, while concededly a "big number," is "within a range previously approved, particularly in novel or consequential cases." Br. 42 & n.27. But the three awards on which plaintiff relies all pre-date this Court's observation that a fee with a $5,000 implied hourly rate is at "the high end" of awards—even when counsel obtains an "extraordinary" $1 billion settlement for shareholders. *Dell*, 2024 WL 3811075, at *4, *14. Plaintiff does not even mention *Dell*, let alone offer any explanation of how a fee award implying an hourly rate well north of $10,000 could be reasonable in a case that, unlike *Dell*, required zero discovery and achieved zero monetary benefit for stockholders.

Even setting aside *Dell*, the awards on which plaintiff relies are poor support for the fee award here. Two of the awards were made to plaintiffs' counsel who obtained substantial monetary benefits for stockholders. *Ams. Mining Corp.* v. *Theriault*, 51 A.3d 1213, 1255 (Del. 2012) ($2 billion damages award was an "extraordinary benefit" that "merit[ed] [the] very substantial award of attorneys' fees"); *In re Versum Materials, Inc. S'holder Litig.*, C.A. 2019-0206-JTL, at 46-47, 73, 75-80 (Del. Ch. July 16, 2020) (TRANSCRIPT) (litigation achieved "a really rare result in Delaware corporate litigation," the revocation of a poison pill, and the fee was priced in relation to the value of a successful topping bid), *aff'd*, 248 A.3d 105 (Del. 2021) (TABLE). But the purported benefit here, to the extent it exists, is abstract and non-monetary: the invalidation of provisions of a stockholder agreement not alleged to have ever caused Moelis stockholders any financial harm.

The benefit justifying the third award on which plaintiff relies is also nothing like the benefit supposedly achieved here. In *Garfield*, the court awarded an $850,000 fee—well below the $6 million fee here—for achieving relief that ensured the compliance of stockholder votes with statutory requirements. 2022 WL 17959766, at *12. The fee was justified in part by the concrete benefit of preventing "a pending merger conditioned on stockholder approval" from standing "on shaky ground" due to a statutory violation. *Id.* at *11, *12. But plaintiff here never alleged, let alone proved, that Moelis was at risk of entering into a significant transaction in violation of statutory requirements if the challenged provisions of the Stockholders Agreement were not declared invalid. Indeed, *Garfield* recognized that an even lower fee would have been warranted if the claimed statutory violation "was not in conjunction with a stock issuance or pending transaction." *Id.* at *12. Far from supporting plaintiff's $6 million fee request, *Garfield* is further confirmation that, as

Moelis argued below, a fee of no more than six figures is appropriate on the facts of this case.

CONCLUSION

Judgment should be entered for the company. Alternatively, the fee award should be vacated and the case remanded for reconsideration of plaintiff's counsel's fee application.

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